

# Utah Bar JOURNAL



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Jan/Feb 2023



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# The Utah Bar Journal

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*GEORGE SUTTON recently retired after a forty-five year career that included being Utah Commissioner of Financial Institutions and a shareholder at Jones Waldo. Asked about his cover photo, George said, "A few times each winter the inversion causes a fog blanket that sits close to the valley floor, letting buildings poke through into clear air. This is the view of one of those mornings from the avenues."*



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The Editors of the *Utah Bar Journal* want 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 emailing [barjournal@utahbar.org](mailto:barjournal@utahbar.org).

### GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys, paralegals, and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Articles germane to the goal of improving the quality and availability of legal services in Utah will be included in the *Bar Journal*. 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 email to [barjournal@utahbar.org](mailto:barjournal@utahbar.org), with the article attached in Microsoft Word or WordPerfect. The subject line of the email 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 in doubt about the suitability of an article, an author is invited to submit it for consideration.

**NEUTRAL LANGUAGE:** Modern legal writing has embraced neutral language for many years. *Utah Bar Journal* authors should consider

using neutral language where possible, such as plural nouns or articles “they,” “them,” “lawyers,” “clients,” “judges,” etc. The following is an example of neutral language: “A non-prevailing party who is not satisfied with the court’s decision can appeal.” Neutral language is not about a particular group or topic. Rather, neutral language acknowledges diversity, conveys respect to all people, is sensitive to differences, and promotes equal opportunity in age, disability, economic status, ethnicity, gender, geographic region, national origin, sexual orientation, practice setting and area, race, or religion. The language and content of a *Utah Bar Journal* article should make no assumptions about the beliefs or commitments of any reader.

**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.

**AUTHOR(S):** Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. Author(s) are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via email, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

**PUBLICATION:** Author(s) will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

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2. Letters shall not exceed 500 words in length.
3. No one person shall have more than one letter to the editor published every six months.
4. Letters shall be published in the order 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. If and when a letter is rejected, the author will be promptly notified.

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## Letter to the Editor

November 23, 2022, the Supreme Court sent an email to the Bar membership about the “Sandbox” or Innovation Office, apparently in response to Mr. Eisenberg’s article in the November issue of the *Bar Journal*. In the email, the Supreme Court wrote that it had not directed the Bar to fund the Sandbox but had asked the Bar “to study whether the Bar is the appropriate location to house the Innovation Office and to offer recommendation on how it should be structured and funded.” The Minutes from the September 16, 2022 meeting of the Bar Commission seem to say something different: “The ask is not necessarily about what the entity itself is doing, but about this being a request amounting to 10% of the Bar’s budget. So the discussion can be framed in terms of what programs the Bar has to give up. Ms. Crismon said that the Supreme Court is looking at partial funding and then using the bar’s captured savings from COVID as a stop gap.” Unfortunately the materials posted by the Bar Commission for the September meeting do not include documents about the Innovation Office or the actual “ask” (nor do the August, October, or November materials).

The November 23 email also states that the Innovation Office “employs a robust data collection system paired with the solicitation of consumer complaints.” The solicitation of consumer complaints appears to be that it is possible to file complaints – there is a link on a website. I am doubtful that constitutes “solicitation of consumer complaints.” Permitting is not same as soliciting. And if risk of harm is what the Office is trying to measure, surely surveys of consumers using the Sandbox services would be better.

John Bogart

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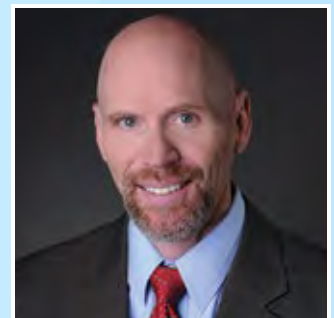
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# Utah State Bar Commission Passes Historic Funding for Attorney Wellness

by Kristin K. Woods

As the iconic Tom Haverford from Parks and Recreation once said, "This morning I saw a YouTube video with a puppy riding a motorcycle. So my bar for 'stunning' is pretty high." As is mine! My bar for being stunned, excited, happy as a clam, and all the other happy adjectives is pretty high, considering my tolerance for reality television (and for reality family law situations).

But, today, I stand before you stunned, delighted, and otherwise exhilarated to announce that your Bar Commission has voted to support the funding of the most robust, comprehensive, and valuable wellness program that has ever existed in the history of our Bar! I'm told that this investment has also made the Utah State Bar the preeminent and leading bar in the nation when it comes to investing in attorney wellness. Yay! Sorry. Too many exclamation points this early in the message. I just can't help it. I'm excited!

In the coming months you will be inundated with email announcements, information, and educational opportunities to learn about what your bar dues get you in the form of wellness services, including a plethora of free counseling sessions for both you and your dependents, and access to an internationally renowned wellness app called Unmind, where you can take part in wellness programs including meditation, fitness, education, and self-assessment tools to assist you in navigating your stressful life and career. I've tried it. It's better than your other apps.



The Bar Commission has spent the better part of this year considering how to bolster our attorney wellness programs. We all know that there is a need in our industry for wellness resources and opportunities for therapy. The question is how to

deliver it to our attorneys in the way that they will be able to utilize it simply and without added hassle to an already busy day. We have started a new partnership with a company called Tava, which provides access to therapists across the state and boasts a great online platform on which you can schedule your therapy sessions with ease. If you're anything like me, if I can do it online rather than make a phone call, I'm in. And the Unmind app is a resource that can be utilized on your phone or on any internet browser, where you will have a stunning array of tools to assist you in crafting whatever wellness looks like for you. There is no one-size-fits-all when it comes to wellness, so I very much like the flexibility that these new tools give me to create the program that caters to my needs.



If I accomplish nothing else in my presidency this year, I will be happy leaving a legacy (along with my Bar Commission) that prioritized and invested in attorney wellness to the extent that we are now leaders in the nation. I am proud to be a Utah attorney, and I am proud to know that I am working shoulder to shoulder with fellow bar servants who value quality of life and health for our attorneys. Beginning on February 1st, your new benefits will begin. Stay tuned, and watch for those emails. I hope you enjoy the benefits as much as I do.



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# Legislative Update or “Big Changes are a Comin’”

by Frank Pignanelli, Stephen Foxley, and Stephen Styler

The 2023 Utah legislative session, which commences January 17, promises to be significant for Utah’s legal community. Since the adjournment of the last session, lawyer legislators from both parties have been actively developing proposals that increase access to justice, remove complications in the judicial process, and otherwise make thoughtful improvements.

### Business and Chancery Court

Representative Brady Brammer is leading the effort to establish a new “Business and Chancery Court.” An experienced litigator, Representative Brammer developed a work group that toiled throughout the summer to construct the details for this new judicial arena. Attorney Wade Budge, of Snell & Wilmer, developed a white paper that served as a comprehensive guide for these deliberations, especially in examining and analyzing such courts in other jurisdictions.<sup>1</sup>

The details and advantages of the Business and Chancery Court include the following:

- Judges will be appointed in a manner similar to District Court judges, but through a designated committee;
- Venue will be statewide;
- A case will be eligible for the court if it meets a list of criteria including:
  - internal affairs of business organization;
  - claims between or among owners of the same business organization;
  - arises out of claims among owners;
  - sell/merger/dissolution of a business organization; and
  - matters relating to intellectual property, derivative actions, commercial real estate transactions, franchise disputes, securities fraud allegations, anti-trust allegations, Uniform Commercial Code transactions, or any other such business-related disputes;

- Any request for monetary damages must be more than \$300,000;
- Evictions, condemnations, civil rights, personal injury disputes, administrative appeals, domestic relations, employment termination, and other such matters are excluded from jurisdiction of the Business and Chancery Court. Further, if a party requests a jury trial the matter will be reassigned to District Court; and
- Of importance, all final rulings and orders on motions and cases will be published and reported publicly. The court will provide a tentative ruling on each motion to the parties at least forty-eight hours before oral argument.

This court will provide experienced and educated judicial determination of complex business issues. Furthermore, the public relations benefit is important in that it will further solidify Utah as the place to do business.

Representative Brammer encourages input from his colleagues and others, as well as responses to his legislation as it progresses through the legislative process. Feel free to reach out to him directly: [bbrammer@le.utah.gov](mailto:bbrammer@le.utah.gov).

### New Statewide Division Court

In 2018, the Supreme Court Advisory Committee expressed interest in exploring procedural reforms for cases initiated in the Justice Courts. It concluded that small claims procedures could benefit from streamlining and refinement. In response, the Justice Court Reform Task Force published the following recommendations in August 2021:

*FRANK PIGNANELLI, STEPHEN FOXLEY, and STEVEN STYLER are licensed attorneys and lobbyists for the Utah State Bar.*



- Eliminating de novo appeals without requiring a constitutional amendment;
- Creating a new division of the District Court (Magistrate Division) where all misdemeanor and small claims cases would be heard on-the-record by full-time judges who are members of the Bar; and
- Increasing judicial independence by eliminating conflicts of interest, setting fixed judicial salaries, and standardizing practices.

To implement these recommendations, Senator Kirk Cullimore, also an experienced litigator, will be proposing legislation to advance Justice Court reform through a new statewide Division Court. Expected actions include:

- Legislation to recognize Justice Courts as part of the state judiciary subject to authority of the Utah Supreme Court and Judicial Council;
- Eliminating geographic restrictions for Justice Court judge applicants;
- Requiring all new judges to have law degrees;
- Recognizing magistrate-like judges for certain case types; and
- Establishing a legislative task force to further develop statutory parameters for a Magistrate Level Court.

Senator Cullimore encourages input from his colleagues regarding this proposal.

### Judiciary Interim Committee Highlights

The Judiciary Interim Committee, chaired by Senator and attorney Todd Weiler, studied a wide array of issues during the 2022 interim, and several study items culminated in bills the committee favorably recommended for passage in the 2023 legislative session. Below is a brief description of each committee bill:

- **Criminal Financial Obligation Amendments** – This bill amends provisions regarding financial obligations owed by a defendant as a result of a criminal sentence. The bill was partly a response to *Diderickson v. State*, 2022 UT 2, 506 P.3d 519, in which the Utah Supreme Court invited the legislature to clarify the impact that a settlement agreement has on restitution. *Id.* ¶¶ 40, 54.
- **Administrative Appeals Amendments** – This bill enables parties in administrative proceedings to file cross-petitions, which was a statutory change that the Utah Court of Appeals asked the legislature to consider in *C.R. England v. Labor Commission*, 2021 UT App 108, 501 P.3d 109.
- **Waiver of Punitive Damages Amendments** – In response to the Utah Supreme Court’s call for legislative action in *doTERRA International, LLC v. Kruger*, 2021 UT 24, 491 P.3d 939, this bill prohibits courts from enforcing agreements to waive or limit liability for punitive damages in contracts.
- **Juvenile Record Modifications** – This bill allows for a petition for expungement of certain juvenile records and allows for the automatic expungement of a successful nonjudicial adjustment completed on or after October 1, 2023.

One significant area of study that did not result in a committee bill is preliminary hearing reform. Senator Weiler organized a diverse group of stakeholders to explore possible reforms to preliminary hearings. These stakeholders considered several options, including expanding preliminary hearings to include a discovery function and allowing a defendant to depose a witness in a criminal prosecution, but they did not arrive at a consensus proposal. Consequently, preliminary hearings may be the subject of further legislative study and action.

### Guilty and Mentally Ill Definition

Representative Nelson Abbott is sponsoring legislation to change the statute referred to as guilty and mentally ill. His bill would give judges more discretion while sentencing someone who commits a crime and has a mental illness. Specifically, the judge will be allowed to look at the results of the mental health treatment and determine if that treatment makes the defendant safe to live in the community, rather than in jail. This proposal intends to protect the public by helping those with mental health issues get treatment and thereby decrease the likelihood of committing another crime.

### Bar Interactions with the Legislature and How You Can Participate

Adjacent to this article is a list of the lawyer legislators serving in the 2023 session. This is a remarkable group of individuals who champion the interest of our profession and access to justice for all citizens. Not only are they open to discussions with the Bar, they welcome communications from colleagues regarding legislation. We encourage Utah State Bar practitioners to interact with their local lawmakers, with attention to the conditions provided below.

Please remember that the Utah State Bar's legislative activities are limited by design and follow United States Supreme Court precedent outlined in *Keller v. State Bar of California*, 496 U.S. 1 (1990). When the Utah Supreme Court adopted rules that directed the Utah State Bar to engage in legislative activities, it identified specific guardrails to align with the limitations expressed in *Keller*. These defined areas of the Bar's involvement in legislative activities include matters concerning the courts, rules of evidence and procedure, the administration of justice, the practice of law, and access to the legal system. Public policy positions are determined by the Bar commissioners after receiving input from the Governmental Relations Committee (GRC).

The GRC is led by Jaqualin Peterson and Sara Bouley, and each section of the Bar has a designated representative. The GRC meets weekly during the legislative session, with meetings conducted online again this year as a virtual setting provides greater accessibility to participate in these discussions. The Bar posts its legislative positions to the public on its website so practitioners may have transparency and clarity into this process. Please contact your section leaders if you are interested in pursuing involvement with the committee or would like the Bar to take a position on a particular bill.

In the past, the Bar granted sections the authority to advocate a position on their behalf if there was a matter where the section had a particular interest or expertise. In *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), a case involving the Texas State Bar introduced additional persuasive guidance and nuance to that practice, which the Utah State Bar has taken into account. Sections may no longer take official positions on legislation but may still do legislative work with safeguards, including using boilerplate language outlined below.

If a section promotes legislation (including legislation based on appellate guidance), it must use boilerplate language in substantially this form when communicating with a legislator:

The following bill is a product of [section name].  
The [section] is self-funded and voluntary, and this bill has not been approved by the Utah State Bar.  
The Bar has not taken, nor will it take, a position on the bill except to the extent that it addresses access to justice, the regulation of the practice of law, the administration of justice, or improving the quality of legal services for the public.

Sections may take a vote on proposed legislation that has originated within or outside of the section. But in communicating with legislators, the section must clarify that the vote was designed to get a feel for how practitioners felt about the policy, and the vote is not its official position. Practitioners presenting to the Utah Legislature must make clear that they are not representing the Bar – unless specifically authorized to do so – and that they are appearing in a personal capacity. If a practitioner expresses views at variance with a Bar policy or official position, the practitioner must clearly identify the variance as the practitioner's personal views only.

Utah State Bar licensees play a critical role in the legislative process. Practitioners with experience offer perspectives desired by lawmakers and their staff. Thus, we strongly encourage participation under the parameters outlined above. If you have any questions about how we can help, please feel free to reach out to the Bar or your lobbyists.

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# 2023 Utah State Lawyer Legislative Directory

## THE UTAH STATE HOUSE OF REPRESENTATIVES



**Nelson Abbott (R)** – District 60  
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**Education:** B.A., Brigham Young University; J.D. and M.B.A., Brigham Young University

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**Practice Areas:** General Counsel



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# Cryptocurrency – Cryptoscam – Why Regulation, Deposit Insurance, and Stability Matter

by George Sutton

Cryptocurrency has stirred more than its fair share of controversy and confusion. It starts with calling it “cryptocurrency,” which really means “cryptomoney.” Both terms are misleading because it isn’t money except as used by some criminals to conceal their identity and prevent tracking their money. Some advisors have stopped using the term “crypto” and “currency” and now call these things a “digital asset.” But cryptomoney isn’t an asset as that term is commonly understood. It is bits of otherwise worthless software called “tokens” that generate no income of their own and have no real purpose other than being traded by investors in the hope that they become a fad.

The lack of regulation allows promoters to attract investors with a lot of ridiculous hype and misinformation. Trading has thus far produced some big short-term profits for promoters and early investors, but it is usually followed by big losses that lately have increased into what is called “crypto winter.” Some losses resulted from the failure of several poorly or dishonestly run exchanges and businesses that held the tokens or served the market in other ways. Selling these tokens is often called a Ponzi or pyramid scheme because new investors are the only source of new money to bid up prices and earn profits for the promoters. How this can be happening baffles most traditional investors.

## The Rhetoric

Many prominent financial experts haven’t held back in their criticisms. Warren Buffett, Berkshire Hathaway chairman, recently called Bitcoin, the leading cryptomoney token, “rat poison squared.”<sup>1</sup> Charlie Munger, Berkshire Hathaway’s vice chairman, said Bitcoin is “stupid and evil” and has compared it to a venereal disease.<sup>2</sup> Bill Gates describes cryptomoney as “an asset class that’s 100% based on some sort of Greater Fool Theory.”<sup>3</sup> While testifying before Congress in September, Jamie Dimon, the CEO of JPMorgan Chase, called cryptomoney “decentralized Ponzi schemes, and the notion that it’s good for anybody is unbelievable.”<sup>4</sup> In July 2022, Paul Krugman, a *New*

*York Times* columnist and Nobel Prize winning economist, said Bitcoin is “a postmodern pyramid scheme” and “[t]he [crypto investment] industry lure[s] investors in with a combination of technobabble and libertarian derp.”<sup>5</sup>

On June 3, 2022, the Federal Trade Commission reported a crime wave infesting cryptomoney markets, stating:

Since the start of 2021, more than 46,000 people have reported losing over \$1 billion in crypto to scams – that’s about one out of every four dollars reported lost, more than any other payment method . . . \$575 million of all crypto fraud losses reported to the FTC were about bogus investment opportunities, far more than any other fraud type.<sup>6</sup>

Additional fraud losses have been reported in several crypto companies with recent reports finding total worldwide crypto fraud losses during the first half of 2022 are nearly \$1.9 billion.<sup>7</sup> Krugman points out that the fraud losses only cover criminal acts and don’t include the many investments in worthless tokens and companies.<sup>8</sup> An example is the crypto “bank,” Celsius Networks, which recently filed for bankruptcy owing 1.7 million customers \$4.7 billion.<sup>9</sup> In August, the Treasury Department sanctioned Tornado Cash – a system that conceals the identity of parties in cryptomoney transactions – for laundering \$7 billion, including money stolen by North Korean hackers to help fund North Korea’s nuclear program.<sup>10</sup>

*GEORGE SUTTON recently retired after a forty-five year career that included being Utah Commissioner of Financial Institutions and a shareholder at Jones Waldo.*



Promoters insist tokens are not securities, but Gary Gensler, the chairman of the U.S. Securities and Exchange Commission (SEC), stated:

most crypto tokens involve a group of entrepreneurs raising money from the public in anticipation of profits – the hallmark of an investment contract or a security under our jurisdiction. Some, probably only a few, are like digital gold; they may not be securities. Even fewer, if any, are actually operating like money.<sup>11</sup>

If a court ever agreed that tokens are securities, the current markets could be largely wiped out overnight for failing to register and provide required disclosures.

The U.S. Labor Department, which oversees management of retirement accounts, said it has “grave concerns” about investing retirement funds in anything crypto and warned administrators about the risk of breach of fiduciary duty if they do.<sup>12</sup>

A surprisingly large number of investors disagree or ignore these warnings.

Libertarian ideologues and anarchists are among cryptomoney’s biggest promoters. They say it is created only by those who use it, and only they control it, which to them is freedom. Peter Thiel, PayPal co-founder, billionaire fintech investor, and self-described libertarian, has promoted cryptomoney since the 1990s. Thiel predicts cryptomoney will inevitably replace government issued money, which is commonly referred to as “fiat” money. Thiel also describes Bitcoin as “like bars of gold in a vault that never move, and it’s a sort of hedge ... against the whole world ... falling apart.”<sup>13</sup> Thiel sees Bitcoin’s rise in value as an indication that the central banks such as the Federal Reserve are bankrupt, and “we’re at the end of the fiat money regime.”<sup>14</sup> Thiel has stated that cryptomoney will become “something where you have a choice between different currencies, and the choice is not left to the sovereign but to the individual, and in a sense, the individual becomes sovereign and is able to make choices regarding which currency they want to take.”<sup>15</sup>

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Nick Black, an alternative asset specialist blogging at Money Morning, is another cryptomoney evangelist who is part of the movement to privatize all finance. Black responded to critics like Krugman by saying they don't understand that:

a good chunk of the population is *completely* mistrustful of the system of fat cats and plutocrats who, since forever, have been telling us where, how, and in what form we get to hold value . . . . I certainly don't trust unelected government "economists" to manage the value of the "currency units" in *my* bank account . . . . The big, central proposition — the bet — with Bitcoin and cryptocurrency as a whole is [that] the algorithmic integrity it provides us with is worth more than the lack of integrity of government policymakers. That's a bet I'll take all day, every day.<sup>16</sup>

These libertarian fiscal ideologues are a fringe group. If it was just them, crypto tokens would barely exist. The broader crypto market, which is surprisingly large, mostly consists of investors hoping to profit as the price of tokens are bid up by new investors. Many hear the hype that Bitcoin and other coins are the money of the future, and some may believe it, but most don't much care. They invest for fun and profit and the geeks among them get to do lots of computer stuff like mining for Bitcoins. A virtual world, metaverse, video game vibe is unmistakable in this part of the market.

## The Reality — Cryptomoney is Not Money

Bitcoin was first introduced in 2009, but it has not even started to catch on as money anywhere except in ransomware extortion. There is a growing realization it is all hype and no currency. Black acknowledged:

Bitcoin isn't the money of the future because Bitcoin isn't money . . . . If you look at the structure of Bitcoin, it becomes pretty clear that it's just not cut out to be a currency. "*But Nick,*" I hear you say, "*it's a currency, and it says that right on the box: cryptocurrency.*" True enough, but on the street, the word doesn't quite match the reality.<sup>17</sup>

Instead, Black describes it as "the most successful asset of all time in terms of appreciation." That may or may not be true, but Bitcoin could also be described as one of the riskiest investments. Just ask anyone who bought Bitcoin in November 2021 and watched the price drop by 70% over the next eight months. Bank of America recently found that the drop in Bitcoin's market value is the fifth largest in history.<sup>18</sup>

Black is correct that the difference between money and an investment is the key to understanding cryptomoney. Sound money requires stable values while speculative investments need prices to fluctuate, and prices of cryptomoney tokens fluctuate more than just about all other traded assets. Dramatic price increases have been the key to cryptomoney's current success. If they became mainstream money, this volatility would wreck the economy.

Real money in a modern economy is a transferable store of value and a standard to measure the value of other things, supported by a broad social contract and government backing. It is also the foundation of a national economy that has developed beyond bartering. The only social contract involving cryptomoney is among the traders and investors who want prices to fluctuate, and criminals who only want to conceal their identity and prevent law enforcement from tracing their money. That is why neither Bitcoin nor any other kind of private money have developed into real money, and for the reasons described below, it never will, at least on a scale envisioned by some promoters such as Facebook's abandoned cryptocurrency project called Libra.

The only potential legitimate use of cryptomoney as money may be as part of new payment systems using blockchain technology. Some developers are exploring payment systems that would use

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a form of cryptomoney in a limited way, such as sending money internationally more efficiently and cheaply than current systems. These systems are in an early stage of development and nothing noteworthy has emerged thus far, at least in financial services. For now, most banks avoid dealing in cryptomoney because that market is infested with fraud and crime and promoting tokens likely qualifies as illegal Ponzi schemes.

Token sellers are essentially saying, “I am offering this cool thing that has no value, what will you pay for it?” – hence Gates’ reference to the greater fool theory. It turns out there are a lot of greater fools. According to the Pew Research Center, forty million Americans – 16% of American adults and 43% of men aged eighteen to twenty-nine – have invested in crypto tokens.<sup>19</sup> At its height, investments in tokens rose in value to \$3 trillion, but have recently declined to less than \$1 trillion. The Pew Research Center also notes that most of the investors in this market are younger people, mostly men. They are attracted to the fads, not metrics. Some also enjoy playing with the technology, which is fairly sophisticated.

For many investors the big draw isn’t just profits, it is fun. The array of tokens has grown exponentially. Hundreds of different kinds of cryptomoney now trade along with new kinds of tokens that do not claim to be money but are just clever absurdities like the Bored Ape Yacht Club and other “non fungible tokens” that may contain something such as a work of art that only exists in a virtual world.

A good example of how frivolous this market can become is Dogecoin, which started as a joke to spoof token trading but to the surprise of the creators inspired a whole internet community trading “meme” coins. Doge is a meme featuring the Shiba Inu dog. In 2021, the value of Dogecoins reached a market cap over \$85 billion.

A lot of grifters and scammers are drawn to crypto tokens because they are unregulated and it is easier to manipulate prices when tokens have no other value that can affect pricing. Many have set up shop as specialized crypto investment banks, trading platforms, venture capital funds, and uninsured depository banks. It is easier to attract new investors when the hucksters are free to spread hype rather than provide full and honest disclosures about the nature and risks of a token. Thus far, they have gotten away with ridiculous claims that cryptomoney will create a financial revolution and replace the dollar, and it works better and is safer than dollars. Many

promoters acknowledge that full disclosure of the nature and risks of investing in a token would kill their business. It is a tacit admission of how much they depend on the hype and lies. Therein lies a huge legal risk few investors realize is growing.

Insisting that tokens are not securities is mostly intended to avoid registration, disclosure requirements, and potential liability under securities laws, but that doesn’t insulate a seller from liability for common fraud if they misrepresent what they are selling. And there is a growing trend to classify at least some tokens as securities. The SEC recently classified some individual tokens as securities when the promoters committed to directly support the tokens’ value in promotional materials. Gary Gensler, the chairman of the SEC, has now gone further and said the “vast majority” of the nearly 10,000 crypto tokens currently traded qualify as securities because investors are “expecting profits derived from the efforts of others in a common enterprise.”<sup>20</sup>

For now, tokens exist in a gray area in terms of what they are and what regulatory requirements apply. Until this muddle is resolved by the courts or new laws, the legal risk for investors is huge. If a court rules that certain tokens are unregistered securities, trading of those securities would stop immediately and without trading a token becomes worthless.

Another legal issue is that cryptomoney tokens are arguably illegal Ponzi or pyramid schemes. In Utah, the most commonly cited definition of a Ponzi scheme is “an investment scheme in

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which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments.” *In re Independent Clearing House Co.*, 41 B.R. 985 (Bankr. D. Utah 1984), *rev’d in part*, 60 B.R. 985 (Bankr. D. Utah 1986). Tokens fit neatly in this definition. One difference is that most Ponzi schemes also misrepresent that they hold assets when they are shells. Token investors actually buy tokens. The fraud is misrepresenting that they are money.

A pyramid scheme is prohibited in Utah Code Sections 13-11-4(2)(a) and (n) and sections 76-6a-3 and -4. The definition of a “pyramid scheme” in Utah Code Section 76-6a-2(4) is:

any sales device or plan under which a person gives consideration to another person in exchange for compensation or the right to receive compensation which is derived primarily from the introduction of other persons into the sales device or plan rather than from the sale of goods, services, or other property.

This section was obviously designed to cover multi-level marketing schemes, but it could apply to cryptomoney promotions if a court found the tokens did not qualify as “goods ... or other property” because they are intrinsically worthless, a fraud in themselves.

The problem in a Ponzi or pyramid scheme is that you may win if you invest early enough, but if you don’t you are sure to lose. Relying on new investors for all new money means the crypto market is a closed system in which all profits depend on equivalent losses by later investors. There are always losers, and they are usually misled about the real nature of the scheme.

In addition to trading losses and hacking thefts, a large number of non-trading losses have occurred when several organizations in the market failed, often after their principals looted them. Three Arrows Capital is a good example. It was a leveraged crypto hedge fund based in Singapore and incorporated in the British Virgin Islands that at one time managed \$10 billion in assets but closed in July 2022 owing \$3.5 billion to creditors. Like most grifters, the principals lived large then vanished leaving an unlocked office and the furniture. Another example is Celsius Networks. It filed bankruptcy in August 2022 after its CEO, an Israeli citizen, withdrew millions for himself.

In November, the third largest crypto exchange, FTX, suspended withdrawals and filed Chapter 11 bankruptcy. The first CEO of

FTX resigned after the bankruptcy filing and was replaced by a restructuring specialist that previously liquidated Enron. Shortly after taking over, the new CEO said, “Never in my career have I seen such a complete failure of corporate controls and such a complete absence of trustworthy financial information as occurred here.”<sup>21</sup> Reports say the collapse was caused in part by an illegal transfer of customer money to a related investment company that in turn made a \$1 billion personal loan to the former CEO and large loans to other executives. After filing bankruptcy and resigning, the former CEO showed he remained an unrepentant libertarian by tweeting that he still opposed regulation because “regulators, they make everything worse.”<sup>22</sup>

Customers and investors in those cases can only file claims with the bankruptcy court. Another unpleasant surprise for people who deposited tokens in Celsius is that they are general creditors and have no priority. It turns out investors have priority, which is the inverse of depositor priority when an FDIC-insured bank fails.

In addition to the courts, Congress and state legislatures are considering enacting new laws to address these problems, a process that has only just begun. Current discussions about possible new laws include regulating the reserves backing stablecoins after the backing for some coins were found to be nonexistent, inadequate, or useless. Other laws would expressly classify tokens as securities or at least require the same inclusive and accurate disclosures as a security. The United Kingdom just passed a law imposing regulation on crypto firms and requiring broad disclosures for tokens. China has banned crypto altogether.

Financial measures in the U.S. comes in many forms, each with its own laws, regulations, and regulators. Cryptomoney could fall into one of three major areas, commodities, securities, or the banking system. For now, the big issue is whether tokens are commodities or securities and whether gaps need to be filled. The biggest controversy beyond that has been efforts of some cryptomoney promoters to get into the banking system through laws in states like Wyoming and Utah.

Real money is regulated primarily through the banking system by a separate group of bank, credit union, and monetary regulators with the goal of ensuring trust and stability in the system, the dollar, and the economy. Unlike securities, disclosure is not a primary goal of these regulators. They rely on comprehensive oversight of banking and other key financial

systems by examiners and economists. Regulators require well developed and viable business plans with a strong emphasis on identifying and controlling risks. They also examine the banks to ensure their records are complete and accurate. Finally, regulators do not allow real banks to support Ponzi schemes, make false claims, or ignore risks. That kind of oversight is prudent whenever a company is entrusted with the care and safekeeping of other peoples' money under any scheme. Fraud and grift will almost always happen otherwise.

Currently, many of the companies in the crypto markets are not regulated unless their stock trades on U.S. exchanges, and then only their stock is regulated. Celsius Networks promoted itself as a cryptomoney bank, but no outside auditor or regulator reviewed what it told customers and the public, examined its books, evaluated its business plan and risk controls, or did anything else to verify its honesty and viability as a business. It is getting that kind of attention now that it filed bankruptcy and, like FTX, the emerging story shows the company failed owing billions of dollars to millions of customers due to pervasive

dishonesty and incompetence. Our regulatory system has not worked perfectly, but it usually works well enough for the real banks to prevent disasters like Celsius and FTX.

### Cryptomoney Cannot Develop into Real Money

Some cryptomoney advocates predict the current problems will subside as the tokens become more widely accepted as money, but that cannot happen for several reasons.

The only transactions that can happen in an economy with volatile money are current purchases of consumable goods like food and clothing. Savings don't work if the purchasing power of the money drops by huge amounts in a short period. Valuing assets is fundamental to risk analysis and financial planning and that is not possible if the measure of value changes constantly. Credit cannot be extended if the lender doesn't know the value of the money used to repay the loan or assets securing it.

The impact volatility would have on credit is especially important because credit drives the U.S. economy today. Make

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credit impossible to reliably underwrite, and the U.S. economy would contract to a small fraction of its current size resulting in catastrophic economic harm.

The hype increases when promoters say Bitcoin is designed to avoid volatility by limiting its quantity. The limits don't work because the value of nothing is nothing, regardless of the quantity, and it has had no apparent effect on Bitcoin prices. It is nonsensical besides because Bitcoin tokens represent fractional interests in a coin and there is no limit on how much a single Bitcoin can be divided. The number of Bitcoin tokens is actually unlimited.

Stablecoins are supposed to address the volatility problem by backing them with collateral, but many of those have proven as unstable as other tokens. Some reserves turned out to be nonexistent or misrepresented. Some purported stablecoins utilize algorithms that have turned out to be ineffective. Recently a token named Luna was touted as one of the leading stablecoins and supposedly provided a floor value for another coin named TerraUSD. Luna collapsed in value along with the TerraUSD coin from \$106 per token in March 2022 to about two cents in

May, setting off a chain reaction of failures among companies that held the LUNA and TerraUSD coins.

In addition to not being stable, stablecoins make no practical sense, especially if the collateral is dollars or government securities. Why layer a cryptomoney on those assets instead of just using the dollars? And why not own the collateral directly instead of trusting an unregulated company to hold it and give you a token in return? Promoters have tried to work around this by offering interest at rates like 18% and 20%, but that usually indicates a Ponzi scheme.

Another reason cryptomoney cannot work better than dollars and maintain comparable stability is the lack of security and a safety net such as deposit insurance. Cryptomoney will never be federally insured, and the paramount importance of safety and unrestricted access to deposits will never change. Everyone who understands the risks and worries about protecting their money will almost always deposit it in a federally insured bank or credit union or buy government securities.

The importance of deposit insurance for the stability of the economy and the protection of peoples' money cannot be overstated. Creating the Federal Deposit Insurance Corporation (FDIC) was needed to end a national economic paralysis during the worst part of the Great Depression. Bank runs sparked by a nationwide panic forced President Roosevelt to order all banks to temporarily close. This happened in his second day in office. Congress passed the Federal Deposit Insurance Act creating the FDIC as part of a broader banking bill a short time later. Insuring deposits stopped the runs and made it possible for payments to flow again. It marked the turning point to recovery. Since then, federal deposit insurance programs have paid billions to people who otherwise would have lost that money when their bank or credit union or savings and loan failed.

The importance of this insurance was demonstrated again in Utah in the late 1980s when I was the state's regulator of financial institutions. Up to that time, many Utah credit unions operated as a closed, state-regulated group with private deposit insurance. An increase in credit union failures depleted the insurer's reserves, and it became insolvent. The risk of that triggering a run on the credit unions it insured meant regulators had to prepare to freeze all the accounts depositors thought were insured but no longer were, which would have included one third of all the consumer checking accounts in the state. The accounts would have remained frozen until each credit union obtained federal insurance or was closed and liquidated.

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The impact on those people and the state economy would have been disastrous. This was avoided when a federal agency that insured credit union deposits agreed to do an overnight conversion of all those accounts to the federal insurance. No depositor lost money or access to their accounts, and the credit unions themselves survived, which most would not if accounts had been frozen. It turned out to be a non-event, just as regulation is supposed to work.

Private deposit insurance is not an option. Private deposit insurers used to operate in many states but all of them failed in the 1980s and 1990s, and many of the banks and credit unions they insured also failed after they were not able to qualify for federal insurance. Some depositors lost access to their money for a time and a portion of their deposits. These private insurers all failed because it isn't feasible to hold reserves large enough to cover problems affecting the whole industry without government backing.

Another reason cryptomoney will not work as money is that the nation's economic stability depends on managing the nation's money supply and only the government can do that, and then

only if it creates the money. A thriving economy depends on a healthy balance between the amount of money available to pay for the goods and services the economy can supply. Government plays a vital role in maintaining that balance. Too little money in the economy idles farms and businesses, raises unemployment and causes a recession or depression. Too much demand bids up prices and causes inflation. It isn't possible to regulate the money supply if there is no means to quickly respond to cycles by injecting new money in a downturn and reducing spending and raising interest rates and taxes when the economy heats up too much.

Creating dollars only requires Congress passing an appropriations bill or the Federal Reserve buying assets in the market. In contrast, most kinds of cryptomoney are created in ways that have no connection to economic conditions. Private money is created by entities with no obligation or ability to monitor nationwide economic conditions and adjust money flows for maximum economic stability. Nor is there a mechanism to inject cryptomoney into the economy when conditions such as the quarantine imposed by the COVID pandemic cause a sudden disruption in employment and

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spending. The federal government can quickly inject money into the economy through programs such as unemployment compensation and ramping up infrastructure construction programs. New Bitcoins go only to the miners.

Mining Bitcoin is also unworkable because of the enormous amounts of electrical power it requires. Some estimates say Bitcoin mining currently uses as much electricity as entire nations (Pakistan, Venezuela, and Finland have all been mentioned, as have all the homes in Houston, Texas).

Cryptomoney that can be created without restriction relies on trust that unregulated money creators will resist the temptation to flood markets for quick profits.

Use by criminals for untraceable payments is another major problem. Cryptomoney promoters frequently mention that private money is exchanged without banking and government authorities monitoring deposits and payments. Only criminals and privacy zealots care about that. Following the money is a critical law enforcement tool to identify and stem criminal activity. It also enables the government to sanction other governments by restricting their ability to engage in commerce through the banking system. Allowing Bitcoin or other cryptomoney to operate as money at its current minimal level has already resulted in increased criminal activity, while eliminating cryptomoney would probably limit or even eliminate ransomware attacks and some, and perhaps a lot of money laundering.

## The Future?

Instability in the crypto markets is growing at a remarkable rate and there may be no bottom short of complete collapse. That is because the whole market is a virtual construct with no real substance. Look through the façade, and there are just grifters and geeks having a party. It seems most likely that cryptomoney will continue to exist for a time as investments, but fads come and go and court decisions or new laws could cause sudden and catastrophic changes at any time. How long will the investment fad last? No one can really be sure. Whether it can develop into some kind of limited use money is yet to be seen. In the meantime, for those enjoying the fads, keep having fun and don't invest money you can't afford to lose. For those investing for other reasons, caveat emptor.

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## Abortion, Actual Innocence, and Much More: Cases and Issues in the Pipeline at the Utah Supreme Court

by Carol Funk

Much of the time, the Utah Supreme Court's docket attracts little attention. Parties to pending cases, and lawyers with a specific interest in the subject matter, may watch for the release of an opinion of significance to them. But most members of the Bar, the press, and the public are generally unaware of cases and issues on the court's docket, at least until the Utah Supreme Court hears oral argument or issues its decision.

This year is different. Recent changes in the makeup of the five-member court, as well as substantial, highly publicized opinions of the United States Supreme Court, have generated significant interest in the Utah Supreme Court's proceedings and the questions of state law the court may address. The Bar, the press, and the public are now paying more attention to the Utah Supreme Court and the matters heading toward adjudication therein.

But when it comes to the practice of law, interest in and awareness of Utah Supreme Court proceedings should not depend on whether high-profile matters are pending or on whether the court's membership has changed. It is always useful for members of the Bar to be informed of cases and issues under review in the Utah Supreme Court. Attorneys can more effectively raise and preserve errors if they are aware that governing authority is being challenged in the state's highest court. Understanding soon-to-be-adjudicated issues is also critical when navigating proceedings, crafting arguments, assessing the strength or weakness of a claim or charge, or determining the settlement value of litigation.

### PROVIDING VISIBILITY INTO THE CASES, ISSUES, AND ARGUMENTS IN THE UTAH SUPREME COURT

This article thus provides visibility into the cases and issues currently in the pipeline at the Utah Supreme Court. The article is divided into two parts. First, the article covers relevant background, including recent changes in the justices serving on the Utah Supreme Court and general information regarding the court's docket. Second, the article outlines specific issues that

have been or are likely to be raised in many of the most significant cases on the Utah Supreme Court's docket. The article highlights more criminal than civil proceedings because of the wide applicability of the issues raised in many criminal proceedings on the court's docket.

The article is compiled based on matters listed as pending in the Utah Supreme Court in late October 2022. It should therefore capture the cases and issues that will be addressed in opinions issued by the Utah Supreme Court in 2023 and into 2024. But while the article highlights many cases and issues likely to be addressed in that period, it does not provide information on all fifty-plus matters now pending in the Utah Supreme Court.

That information is, however, important. And for those interested in accessing it, a list of all matters pending in the Utah Supreme Court as of late October 2022 is provided at <https://rqn.com/appellate-practice/utsupct-open-cases>. (Judicial and attorney discipline proceedings are not included.) The cases are identified by title, case number, and subject matter (e.g., civil, criminal, capital felony, etc.).

There are also links provided to *at least one substantive document* filed in each case. Accordingly, the petition, retention request, briefing, and/or other substantive document(s) filed in each case, *including the petition and answer filed in State v. Planned Parenthood Association of Utah, in which the state asks the Utah Supreme Court to permit enforcement of the state's*

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*“trigger law,”* may be found at the above-noted address. A review of those documents will provide insight into the issues and arguments that have been or are likely to be raised in each proceeding.

This information may also be accessed via this QR code:



## UTAH SUPREME COURT 2023: AN OVERVIEW

Last year, two justices retired from the Utah Supreme Court: Constandinos “Deno” Himonas and Thomas R. Lee. The Governor appointed, and the senate confirmed, Diana Hagen and Jill M. Pohlman to fill the two vacancies. Both were serving as judges on the Utah Court of Appeals at the time of their appointments.

Only five women have been appointed to the Utah Supreme Court in its 125-year history. Three of those women now serve on the court together, comprising its first female majority: Justice Hagen, Justice Pohlman, and Justice Paige Petersen, who was appointed in 2017. They serve alongside Chief Justice Matthew B. Durrant, who was appointed to the court in 2000, and Associate Chief Justice John A. Pearce, who was appointed in 2015.

The Utah Supreme Court’s term is not official or formal. But, as a matter of practice, it generally runs from September through August, and the court endeavors to issue opinions in the same term in which matters are argued. In other words, if a matter is argued between September and May (the court generally does not hear argument in July or August and often does not hear argument in June), the court will endeavor to issue its decision by the following September – or close in time thereafter. But there are usually some holdover cases, as the back-and-forth on matters with concurring or dissenting opinions, or a post-argument request for supplemental briefing, can lengthen the time needed to issue a decision.

In the most recent term, the departures of Justices Himonas and Lee increased the importance of the court’s docket-clearing practice. The Utah Supreme Court was clearly focused on issuing opinions in all cases in which the two justices had participated in oral argument and on ensuring that any matters ripe for adjudication from a prior term were not held over to the court’s next term.

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In this effort, the court was quite successful. By late October 2022, only a handful of matters ripe for decision from the prior term had not yet been adjudicated – i.e., only a few cases fully briefed and argued prior to June 2022 were still awaiting a decision. None of those matters had been in that posture for an excessively long time; each had been argued within the last six to eight months. Thus, as of late October 2022, the Utah Supreme Court was fairly up to date on its caseload.

Looking at the court’s docket more broadly, in addition to the few matters argued prior to June 2022 that are still awaiting a decision, there are forty-five to fifty additional cases currently pending. Some have been argued in the court’s new term, i.e., in the fall of 2022. But most matters on the court’s docket are not yet ripe for decision, either because they have not yet been fully briefed, have not yet been argued, are awaiting supplemental briefing, or have been stayed, etc. But as these cases move through the pipeline and are eventually submitted for adjudication, the court will be ready to address them.

## UTAH SUPREME COURT 2023: SPECIFIC ISSUES

Following is a summary of several significant cases and issues currently on the Utah Supreme Court’s docket, as well as information regarding the status of each case. Matters fully briefed by spring 2023 are most likely to be decided this term. But the later a matter is briefed and argued, the greater the likelihood it will not be decided until the following term.

### Administrative Proceedings

**Crediting Customer-Generated Solar Power.** *Vote Solar v. Public Service Commission*, No. 20210041, on Review of Administrative Decision.

The Utah Supreme Court retained jurisdiction over this proceeding, which challenges the rate used by Rocky Mountain Power when crediting its customers for the solar energy they generate. In the petitioner’s view, that rate is unreasonably low.

The petitioner challenges a Public Service Commission (Commission) order addressing the rate at issue. The petitioner argues that the Commission improperly set the rate without undertaking a cost-benefit analysis as to whether the credit rate should be based on the market rate for electricity. The petitioner raises other challenges as well, including a claim that the Commission erroneously set the credit rate without considering the societal and environmental benefits of customer-generated solar power. The Utah Supreme Court’s jurisdiction to hear these challenges is also at issue; the

question is whether the order on which the petitioner has sought review constitutes final agency action on these matters.

This case was argued before the Utah Supreme Court in September 2022. By late November 2022, when this article was submitted for publication, the Utah Supreme Court had not yet issued its decision.

**Taxation of Airline Property.** *Salt Lake County v. Utah State Tax Commission*, No. 20210938, on Review of Administrative Decision.

The Utah Supreme Court agreed to retain jurisdiction over this proceeding, in which Salt Lake County challenges the Utah State Tax Commission’s application of Utah Code Section 59-2-201(4) when assessing the property of Delta Airlines, Inc.

According to Salt Lake County, section 201(4) provides a discount when valuing airline property, and imposes a relatively high evidentiary standard for assessing the property’s value, creating an assessment process that is more favorable to the airline industry than applies to other industries and taxpayers. Salt Lake County asserts that this difference in treatment renders section 201(4) unconstitutional. Article XIII, section 2 of the Utah Constitution provides that “all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be . . . assessed at a uniform and equal rate in proportion to its fair market value . . . and . . . taxed at a uniform and equal rate.”

The briefing in this matter is likely to be completed early in 2023.

**Effect of the COVID-19 Pandemic on Property Taxes.** *Larry H. Miller Theaters, Inc. v. Utah State Tax Commission*, No. 20220345, on Review of Administrative Proceeding.

The Utah Supreme Court retained jurisdiction over this proceeding, in which Larry H. Miller Theaters, Inc., along with several other entities, contests a decision of the Utah State Tax Commission construing Utah Code Section 59-2-1004.6.

The petitioners challenge the Tax Commission’s construction of section 59-2-1004.6, which addresses “tax relief for decrease in fair market value due to access interruption.” The petitioners claim that the COVID-19 pandemic created “access interruption” to their properties for purposes of section 1004.6. The Tax Commission disagreed, construing “access interruption” to include only situations in which physical access to taxpayer property is impeded. Petitioners are thus asking the Utah Supreme

Court to hold that the COVID-19 pandemic resulted in “access interruption” to their properties for purposes of section 1004.6.

The briefing in this matter is likely to be completed early in 2023.

### Criminal Proceedings

**Enforcement of Legislation Prohibiting Abortion Except in Limited Circumstances.** *State v. Planned Parenthood Association of Utah*, No. 20220696, on Interlocutory Appeal.

This appeal centers on Utah Code Sections 76-7a-101 to -301, which comprise Utah’s “trigger law.” These provisions prohibit abortion except under limited circumstances.

The trigger law’s effective date was contingent on a change in United States Supreme Court case law. After the Supreme Court issued its decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), Utah’s legislative general counsel certified that the requisite change in law had occurred – i.e., that a binding court ruling had been issued providing that a state may prohibit abortion consistent with the trigger law’s provisions – and the law went into effect.

Immediately thereafter, Planned Parenthood Association of Utah (PPAU) filed a complaint challenging the trigger law as unconstitutional under several provisions of the Utah Constitution. The district court granted a preliminary injunction, which bars enforcement of the legislation pending resolution of the litigation.

The State petitioned the Utah Supreme Court for relief, requesting: (1) permission to immediately appeal the preliminary injunction, and (2) a stay of the preliminary injunction pending resolution of the appeal. The Utah Supreme Court granted permission to immediately appeal the injunction but denied the motion to stay, allowing the injunction to remain in place while the appeal is adjudicated.

The State’s petition for relief outlined the arguments it will likely make on appeal. Those arguments include a jurisdictional challenge, alleging PPAU lacks standing to bring this litigation. The State also plans to assert that the Utah Constitution does not contain a right to abortion and there was no showing of harm sufficient to warrant entry of a preliminary injunction.

The briefing in this matter is likely to be completed early in 2023.

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**Constitutionality of the Plea Withdrawal Statute.** *State v. Rippey*, No. 20200917, on Direct Appeal.

The Utah Supreme Court recalled this appeal from the Utah Court of Appeals. The appeal presents a challenge to the constitutionality of Utah Code Section 77-13-6 (the Plea Withdrawal Statute).

The defendant argues the Plea Withdrawal Statute is facially unconstitutional and unconstitutional as applied to him. The defendant asserts the Plea Withdrawal Statute, in conjunction with the Post-Conviction Remedies Act, Utah Code Sections 78B-9-101 to -503, requires criminal defendants who plead guilty, and who do not raise all challenges available to them in a motion to withdraw the plea prior to sentencing, to pursue review of their challenges through the postconviction process. Under this statutory framework, a defendant who pleads guilty cannot raise his or her claims through the traditional appellate review process.

The defendant thus argues that the Plea Withdrawal Statute violates the right to appeal with the effective assistance of counsel. The defendant also asserts that the Plea Withdrawal Statute is an unconstitutional legislative exercise of the Utah Supreme Court's rulemaking authority. An amicus brief has been filed in support of the appeal by the Utah Indigent Appellate Defense Division.

The briefing in this matter is likely to be completed early in 2023.

**Constitutionality of Life Without Parole for a Juvenile Offender.** *State v. Mullins*, No. 2020149, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this appeal, which contests the constitutionality of a sentence of life without the possibility of parole when the underlying offense was committed by an intellectually disabled teenager.

The appellant was sentenced to life without the possibility of parole before the United States Supreme Court issued its decision in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the Court held that the Eighth Amendment's prohibition on cruel and unusual punishment precludes a mandatory sentence of life without parole for those under the age of 18 at the time of the offense. *Id.* at 465. The Court also indicated that it will be the uncommon case in which such a severe sentence would be appropriate. *Id.* at 479.

Following *Miller*, the appellant moved under Utah Rule of Criminal

Procedure 22(e) to withdraw his guilty plea and/or correct an illegal sentence, arguing in part that the district court had not taken into account the circumstances pertaining to his life, age, and possibility for rehabilitation. The motion was denied.

On appeal, the appellant argues his sentence is unconstitutional and should be corrected under Rule 22(e). The appellant raises challenges under the Sixth and Eighth Amendments of the federal constitution, but also argues his sentence violates article I, section 9, of the Utah Constitution. The appellant also asserts, among other things, that Utah Code Section 76-3-207 is unconstitutionally vague for lack of guidance on when a sentence of life without parole is "appropriate." Under section 207, "[t]he penalty of life in prison without parole shall only be imposed if the jury determines that the sentence of life in prison without parole is appropriate." Utah Code § 76-3-207(5)(c).

The briefing in this matter is likely to be completed early in 2023.

**Refusal to Provide Phone Passcode to Law Enforcement Officers.** *State v. Valdez*, No. 20210175, on Certiorari.

This proceeding raises several questions regarding a defendant's refusal to provide the passcode to his phone to law enforcement officers. The Utah Supreme Court granted certiorari to address "[w]hether the court of appeals erred in concluding that [the State's] elicitation and use of testimony about [the defendant's] refusal to provide a code for his phone constituted an impermissible commentary on an exercise of a decision to remain silent."

On certiorari, the parties focused their briefing on whether the defendant had a Fifth Amendment right to refuse to provide the passcode to his phone. But the Utah Supreme Court had granted certiorari to address, not whether such a right exists, but whether the State was permitted to comment on the refusal at trial. The court thus called for supplemental briefing. The parties were instructed to address the question on which certiorari was granted. The parties were also asked to address how the analysis is affected, if at all, by the defendant's presentation of evidence at trial about text messages that may have been located on his phone.

An amicus brief was filed by the American Civil Liberties Union, the American Civil Liberties Union of Utah, and the Electronic Frontier Foundation in support of the defendant. An amicus brief was also filed by the National Association of Criminal Defense Lawyers, asserting that the Fifth Amendment prohibits the State from using the defendant's refusal to provide his passcode as evidence of guilt.

The supplemental briefing in this matter is scheduled to be completed early in 2023.

**Availability of Bail for Defendants Charged with Felony Offenses.** *State v. Barnett*, No. 20220636, on Interlocutory Appeal.

The Utah Court of Appeals granted the State’s petition for permission to appeal from an interlocutory order and then certified the matter to the Utah Supreme Court for original appellate review.

In its appeal, the State cites Article I, Section 8, of the Utah Constitution, which provides that “all persons charged with a crime shall be bailable except . . . persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge . . . .” The State argues that, under this provision, a court has no discretion to grant bail in the specified circumstances – when a person is charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, and when there is substantial evidence to support the new felony charge.

The State argues that the district court erroneously granted bail to the defendant under these circumstances. The State also claims that this instance of granting bail despite the constitutional language is not unique. According to the State, some district court judges view the constitutional language as granting discretion to grant bail in felony-on-felony cases, while others have construed the language as prohibiting a grant of bail in the specified circumstances.

The briefing in this matter is likely to be completed early in 2023.

**Jury Unanimity/Access to Therapy Records.** *State v. Chadwick*, No. 20190818, on Direct Appeal.

The Utah Court of Appeals certified this appeal to the Utah Supreme Court for original appellate review. On appeal, the defendant challenges his conviction for sexual abuse of a child, raising two overarching issues.

The first issue centers on the confidential therapy records of the person who testified that, as a child, she was sexually abused by the defendant. During the proceeding below, the district court reviewed the therapy records in camera and determined what information, if any, would be released to the defendant. On appeal, the defendant argues he must have access to the complete record, including the currently sealed therapy records. The

defendant also argues that, if he is not given such access and the Utah Supreme Court conducts its own in camera review, the court should determine that the district court erred in failing to provide him with evidence in the therapy records to which he was constitutionally entitled, and the error warrants reversal of his conviction.

The second issue involves the requirement of jury unanimity. The defendant was charged with four identical counts of sexual abuse of a child, distinct in their nature and time of occurrence. But the jury was not instructed that their verdict on each count must be unanimous or that they must agree on the conduct that constituted the offense in each count. The defendant argues that, to the contrary, the jury instructions suggested otherwise. The jury returned a guilty verdict on one count and acquitted the defendant on the remaining three counts. The defendant thus argues that his right to a unanimous verdict was denied.

The docket indicates that briefing in this matter was stayed in October 2022. The briefing may have been stayed pending release of the Utah Supreme Court’s decision in *State v. Paule*, No. 20220039, which also addresses the issue of jury unanimity. The briefing in *Paule* is scheduled to be completed early in 2023.

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Yet another matter raising the issue of jury unanimity is *State v. Baugh*, No. 20220272, in which the Utah Supreme Court granted the State's petition for a writ of certiorari. The briefing in *Baugh* is likely to be completed in late spring or summer 2023.

### **Access to Video Recordings During Jury Deliberations.**

*State v. Centeno*, No. 20200875, on Direct Appeal.

The Utah Supreme Court agreed to retain jurisdiction over this direct appeal in which the defendant challenges his convictions. The defendant raises three primary claims.

First, the defendant argues the jury should not have been given access, during deliberations, to a video recording of the defendant being interviewed by law enforcement officers. The defendant asserts the video is a testimonial exhibit and should only have been viewed in open court. Allowing the jury to view the video during deliberations, he argues, violated his constitutional right to be present at trial.

Second, the defendant argues his counsel was constitutionally deficient. The defendant points to counsel's failure to object when an additional video recording was given to the jury for use during deliberations. The video contained an interview of the person who testified that the offense was committed against her, which interview had not been played for the jury during the trial.

Finally, the defendant argues the district court should have declared a mistrial after a witness answered a few questions but then became emotionally unable to continue. The witness was dismissed and did not return. Given the defendant's inability to cross-examine the witness, he requested a mistrial, but his motion was denied.

The briefing in this matter is likely to be completed early in 2023.

**Substantial Step/Entrapment in Attempt Offenses.** *State v. Smith*, No. 20220768, on Certiorari.

The Utah Supreme Court granted the defendant's petition for a writ of certiorari, which asserts that his convictions for attempt crimes involving a minor should be overturned.

The defendant was on a dating application when he encountered a profile of someone who appeared to be an adult woman. But the profile was a pretense, in use by a law enforcement officer. The defendant engaged in a chat with the officer, in which the officer stated that he was a minor, talked about engaging in sexual activity with the defendant, and arranged to meet the defendant. When the defendant arrived at the specified location, he was arrested.

The defendant was subsequently convicted of attempted child kidnapping and other offenses involving attempted sexual activity with a minor. The Utah Court of Appeals affirmed.

In his petition seeking certiorari, the defendant argued that arriving at the specified locale did not constitute a "substantial step" for purposes of the attempt offenses. According to the defendant, physical proximity, coupled with solicitation, is insufficient. The defendant also challenged the Court of Appeals' application of Utah Code Section 76-2-303, which addresses the defense of entrapment. The defendant argues that the Court of Appeals should have concluded, under section 303, that he was manipulated into the activity at issue by the law enforcement officer.

The briefing in this matter is likely to be completed in late spring or summer 2023.

**Restrictions on Defense Decisions in Capital Felony Proceedings.** *State v. Lovell*, No. 20150632, on Direct Appeal.

In this appeal, which falls within the Utah Supreme Court's exclusive jurisdiction, the defendant raises several challenges to his conviction for aggravated murder, a capital offense.

First, the defendant argues the district court improperly allowed Weber County to interfere in decisions regarding the funding of his defense. The defendant focuses on Weber County's cap on the funds available for a mitigation investigation, which the defendant claims is a small fraction of the funds typically spent by Utah counties on mitigation investigations in capital cases. The defendant also asserts, among other challenges, that his counsel was ineffective and that statements from his prior sentencing proceeding should not have been introduced at trial.

The briefing in this matter is likely to be completed early in 2023.

### **Postconviction Proceedings**

**Establishing Actual Innocence.** *Ashby v. State*, No. 20210330, on Direct Appeal.

The petitioner was convicted of multiple counts of aggravated sexual abuse of a child. A few years later, the child who had testified of the abuse (Child) recanted the allegations. Child sent a letter to the Utah Board of Pardons and Parole stating that the petitioner was innocent of the crimes for which she had been convicted.

The petitioner sought a postconviction determination of her factual innocence under Utah Code Section 78B-9-402 and Utah Rule of Civil Procedure 65C. The district court held a hearing, in which Child (who had recently reached the age of adulthood) testified consistent with the statements in his letter to the parole

board. The district court denied the petition, reasoning that Child’s testimony did not provide clear and convincing evidence of factual innocence because of Child’s history of speaking falsely.

The petitioner appealed, and the Utah Supreme Court retained jurisdiction over the matter. The petitioner argues the district court erred in concluding that a witness who lied in the past cannot or did not provide clear and convincing evidence of factual innocence. The State argues recantation evidence should be viewed with skepticism and is inherently unreliable, and the district court properly concluded Child’s testimony was insufficient to establish factual innocence by clear and convincing evidence.

The briefing in this matter was scheduled to be completed in late 2022.

### **Constitutionality of the Post-Conviction Remedies Act.** *Kell v. Benzon*, No. 20180788, on Direct Appeal.

The Utah Supreme Court has exclusive jurisdiction over this appeal, which involves a challenge to the legality of a death sentence. The petitioner argues that his petition for postconviction relief was wrongly dismissed.

The district court dismissed the petition on procedural grounds. On appeal, the petitioner requested that his procedural noncompliance be excused under an “egregious injustice” exception to the Post-Conviction Remedies Act (PCRA). He also asked that the court exercise its traditional authority over collateral proceedings to grant the relief he sought.

But while the appeal was pending, the Utah Supreme Court issued its decision in *Patterson v. State*, 2021 UT 52, 504 P.3d 92. In *Patterson*, the court explained that it has not included an egregious injustice exception in its rules governing the exercise of the court’s writ power; and as a result, the court may only hear a case otherwise barred by the PCRA when failure to do so would violate the petitioner’s constitutional rights. *Id.* ¶¶ 170–94.

The court thus asked the parties to provide supplemental briefing addressing whether violation of constitutional rights is at issue here. The parties were asked to address: (1) whether the procedural bar at issue in this proceeding is unconstitutional under the Utah Constitution and, if so, whether that challenge was preserved; and (2) whether the timing of the petition (which was not filed until several years after the petitioner discovered the facts upon which it is based) adversely affects the petitioner’s ability to obtain relief under the court’s constitutional writ power.

The supplemental briefing was scheduled to be completed in December 2022.

### **Civil Proceedings**

#### **Constitutional Easement for Enjoyment of Public Waters.** *Utah Stream Access Coalition v. VR Acquisitions, LLC*, No. 20151048, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this appeal, in which the appellant claims a constitutional right to incidentally touch privately owned beds of state waters as reasonably

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necessary to exercise public recreation rights in those waters.

The issue on appeal is whether the historical record supports the appellant's constitutional claim. The district court concluded it did not. In its summary judgment ruling, the district court held that the historical record did not demonstrate a public easement to touch private land while engaged in the recreational use of public waters, based on the law of easements as it existed at the time of the framing of the Utah Constitution.

This appeal followed, challenging the district court's conclusion. The Utah Alliance to Protect Property Rights filed an amicus brief in support of the appellee.

The briefing in this matter was scheduled to be completed in late 2022.

**Parental Decisions Regarding Religious Upbringing.** *Kingston v. Kingston*, No. 20200350, on Direct Appeal.

The Utah Court of Appeals certified this appeal to the Utah Supreme Court for original appellate review. At issue is a provision in a divorce decree, which bars Mother and Father from encouraging their children "to adopt the teachings of any religion or be baptized into any religion without the consent of the legal guardian." Mother is the children's legal guardian. Father thus brought this appeal.

Mother and Father were raised in the Kingston Group, married at ages sixteen and twenty-one, respectively, and have four children. Father remains an adherent of the Kingston Group's beliefs and practices. Mother does not share Father's beliefs and does not wish their children to be exposed to the Kingston Group's beliefs and practices.

On appeal, Father argues that the prohibition in the divorce decree violates his fundamental rights as a parent as well as his free speech and free exercise rights. Father does not appear to be raising challenges based on provisions of the Utah Constitution; he seems to be grounding his arguments in federal constitutional law.

This matter was argued before the Utah Supreme Court in April 2022. By late November 2022, when this article was submitted for publication, the Utah Supreme Court had not yet issued its decision.

**Reformulation of *Respondeat Superior* Liability.** *Burton v. Chen*, No. 20210873, on Interlocutory Appeal.

The Utah Supreme Court retained jurisdiction over this matter and granted the petition for interlocutory appeal, which raises

questions regarding liability for employee misconduct.

The doctrine of *respondeat superior* is an agency-based theory of liability under which responsibility for the torts of an agent may be imposed on the principal. A few years ago, the Utah Supreme Court characterized its approach to this doctrine as a bit outdated. *M.J. v. Wisan*, 2016 UT 13, ¶ 55, 371 P.3d 21. The court suggested the possibility of revising its approach in a future case. *Id.* ¶ 66. The appellant in this case thus asks the court to adopt an alternative approach, i.e., a foreseeability test, when determining *respondeat superior* liability.

The appellant also asserts, among other things, that liability exists under the Utah Physician Assistant Act (UPAA), Utah Code Sections 58-70a-101 to -507. According to the appellant, the UPAA imposes statutory responsibility upon a supervising physician for the professional practice and conduct of the physician assistant (PA) he supervises. And if the supervising physician does not define the scope of the PA's authority, in a written agreement, the physician cannot later claim that the PA's misconduct is outside the scope of that authority.

Briefing in this matter was completed in November 2022.

**Apparent Authority/Partnership by Estoppel.** *Wittingham, LLC v. TNE Ltd. P'ship*, No. 20210677, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this matter, which raises questions regarding apparent authority and partnership by estoppel.

A partnership obtained a loan from the defendant. It was later discovered that, before the loan was made, the partnership had been administratively dissolved. A member of the partnership then sued to, among other things, void the trust deed that secured the loan. The district court ruled in the partnership's favor, allowing it to void the trust deed. The defendant appealed, raising three challenges.

First, the defendant argues the general partner who entered into the transaction on behalf of the partnership had apparent authority to do so. Second, the defendant argues the partnership is estopped from challenging the validity of the trust deed, having represented that the general partner had authority to enter into the transaction. Third, the defendant argues that even if the trust deed were voidable at the election of the injured party, the partnership was not harmed by the transaction and had no standing to void it.

The briefing in this matter was scheduled to be completed in December 2022.

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## Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth

**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 COURT OF APPEALS

#### ***Jordan Credit Union v. Sullivan*** **2022 UT App 120 (Oct. 27, 2022)**

**The Utah Court of Appeals reversed the district court's denial of the defendant's motion to set aside a default judgment entered against him, holding that the district court lacked personal jurisdiction over the defendant because he was not properly served.** The defendant had been personally served by a Utah County deputy constable while he was incarcerated in the Utah County Jail. Rule 4(d)(1)(D), however, requires service of a person incarcerated to be made "by delivering a copy of the summons and complaint to the person who has the care, custody, or control of the individual," who must then "promptly deliver[ the summons and complaint] to the individual." Because the defendant was not served in this manner, the district court lacked personal jurisdiction. In a concurring opinion, Judge Orme suggests the Utah Supreme amend Rule 4(d)(1)(D) to include the prescribed method applies only "if personal service cannot be effected on such individual."

#### ***State v. Hintze*** **2022 UT App 117 (Oct. 14, 2022)**

The court of appeals held that **the State violated the defendant's right to a speedy trial under the Sixth Amendment**, reversed his conviction, and remanded with instructions to dismiss one count of violation by a sex offender of a protected area. In doing so, the majority rejected an argument that an invocation of the speedy trial right must

specifically reference trial to put the State on notice, and it clarified the framework for assessing prejudice for the purposes of a speedy trial analysis.

#### ***Wallace v. Niels Fugal Sons Co.*** **2022 UT App 111 (Sept. 22, 2022)**

An attorney for the plaintiff moved to withdraw before a pretrial disclosure deadline but the motion was not granted until after the deadline passed. The plaintiff's pretrial disclosures were not filed until one week after the deadline when new counsel entered an appearance. The trial court granted the defendant's motion to exclude all of the plaintiff's untimely disclosed witnesses and evidence and dismissed the case. The court of appeals affirmed the dismissal, reasoning that the plaintiff could not show good cause to excuse the late disclosures because she was represented at the time the deadline passed. **The appellate court emphasized that an attorney seeking to withdraw as counsel under Utah R. Civ. P. 74(a) once a trial date is set is not excused from representation of the client until the trial court grants the motion to withdraw.**

### 10TH CIRCUIT

#### ***Hennessey v. University of Kansas Hospital*** **53 F.4th 517 (Nov. 9, 2022)**

In this appeal, **the Tenth Circuit joined the other circuits that have addressed the issue in holding that an entity asserting it is an arm of the state for purposes of sovereign immunity has the burden on this issue.** The defendant did not carry this burden in its motion to dismiss, having failed to identify the four factors considered at the first step of the analysis, *Steadfast Ins. Co. v. Agricultural Ins. Co.*, 507 F.3d 1250 (10th Cir. 2007), and provided no evidence or

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

analysis relevant to those factors. While a district court can raise and resolve the issue of sovereign immunity *sua sponte* “where judicially noticeable evidence clearly resolves an entity’s arm-of-the-state status and entitlement to sovereign immunity,” that was not the case here. The Tenth Circuit vacated the district court’s order granting the defendant’s motion to dismiss and remanded so that the district court could receive evidence from the defendant on remand and reevaluate whether it is an arm of the state.

***United States v. Herrera***  
**51 F.4th 1226 (Oct. 27, 2022)**

Joining the First, Second, Sixth, and D.C. Circuits, the Tenth Circuit held that **a facial challenge to the constitutionality of a criminal statute does not implicate the district court’s subject-matter jurisdiction and therefore may be waived if not raised in a pretrial motion under Fed. R. Civ. P. 12(b).**

***Vincent v. Nelson***  
**51 F.4th 1200 (Oct. 27, 2022)**

This personal injury lawsuit arose from a collision between two coal-mining trucks as they were passing each other. After the

plaintiff lost at trial, he filed several post-trial motions, including a motion for new trial. His primary argument was that the trial court erred by allowing the defendants’ non-retained experts to point out the location of the accident on an aerial photograph of the mine which the experts had not discussed in their Rule 26 designations or their depositions. **The Tenth Circuit affirmed the trial court’s denial of the plaintiff’s post-trial motions, holding that the experts’ testimony about the photograph and location of the accident was lay opinion testimony that did not have to be disclosed under Rule 26; that the testimony was within the scope of the experts’ designations; and that even if it wasn’t, the trial court did not abuse its discretion in permitting the testimony to be admitted under the framework established in *Smith v. Ford Motor Co.***

***Energy West Mining Co. v. Dir., Office of Workers’ Comp. Programs***  
**49 F.4th 1362 (Sept. 27, 2022)**


The claimant in the underlying administrative action had smoked for 40 years but worked in coal mines for 6½ years. He developed pneumoconiosis, which the administrative law judge found to be legal pneumoconiosis under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45. Energy West appealed arguing the ALJ applied the wrong causation standard. As a matter of first impression, **the Tenth Circuit affirmed and joined the Sixth, Seventh, and Eleventh Circuits in holding that under the Act, in order for a claimant to receive compensation, “the work in the coal mines had to bear a significant or substantial relation to at least part of the reason for [the claimant]’s [chronic obstructive pulmonary disease].”**

***United States v. Williams***  
**48 F.4th 1125 (Sept. 8, 2022)**

As a matter of first impression, the Tenth Circuit held **a state conviction would not categorically qualify as a “serious drug offense” under the Armed Career Criminal Act (ACCA) if the state sentence included substances that were not federally controlled at the time of the federal offense.** The court rejected the government’s contention that the appropriate point of comparison for the purposes of the ACCA was federal law in effect at the time of the prior state offenses.

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# UMBA Scholarship & Awards Banquet

The Utah Minority Bar Association ("UMBA") recently held its annual Scholarship and Awards Banquet ("Banquet") on November 10th. UMBA had the privilege of honoring attorneys, judges, firms, and community leaders for their contributions to the legal community and awarding scholarships to diverse law students at the S.J. Quinney College of Law and J. Reuben Clark Law School. UMBA was pleased to honor the following individuals:

- 1) Distinguished Lawyer of the Year: Andrea T. Martinez, Executive Assistant U.S. Attorney
- 2) Jimi Mitsunaga Excellence in the Law Award: Nubia Peña
- 3) Pete Suazo Community Service Award: Representative Sandra Hollins
- 4) UMBA Ally Award: Judge Su J. Chon
- 5) Law Firm of the Year: Parsons Behle & Latimer

UMBA would also like to recognize Judge Dianna Gibson for her excellent work as our master of ceremonies. The agenda ran smoothly with her at the helm, and we are grateful for her generosity and willingness to serve.

Lastly, this year's Banquet would not have been possible without the generous support of our sponsors. UMBA would like to extend its sincere gratitude and appreciation to the firms, organizations, and individuals that made this year's Banquet a reality:

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## In Defense of Imitation

by John J. Nielsen

Oscar Wilde once said that imitation “is the sincerest form of flattery that mediocrity can pay to greatness.” Quite the backhanded compliment to the imitator. Or maybe he was trying to comfort those who had to endure cheap imitations of their greatness. Either way, if he meant that the great never imitate, I think he was wrong. In fact, there’s really no other way to become great at anything.

This dawned on me a few years ago when I read Scott Newstok’s *How to Think Like Shakespeare: Lessons from a Renaissance*

*Education*. Newstok extracts elements of a sixteenth century English education and presents ways that they can help our thinking today. In one chapter, “Of Imitation,” he gives several examples of great writers who found their voice by copying those they admired as closely as they could manage. For example, Robert Louis Stevenson said that when he read something he liked, he “set [him]self to ape that quality,” and that doing so was the only “way to learn to write.” Scott Newstok, *How to Think Like Shakespeare: Lessons from a Renaissance Education* 78 (2020) (citation and internal quotation marks omitted). “Before he can tell what cadences he truly prefers, the student should have tried all that are possible; before he can choose and preserve a fitting key of words, he should long have practised the literary scales . . . .” *Id.* (citation and internal quotation marks omitted). And after a time of such creative imitation, the writer would one day find his own voice.

That this same idea applied to legal writing came to me while reading Ross Guberman’s work. I started with his POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES. In it, he illustrates principles of good legal writing with examples from

leading practitioners. I loved the examples but didn’t realize quite how to extract ideas from them myself until I read a series of “how to write” posts on his blog, [legalwritingpro.com](http://legalwritingpro.com). In “Five Ways to Write Like John Roberts,” or “Five Ways to Write Like Justice Kagan,” for example, he would take snippets he found particularly effective and then articulate exactly what they were doing. Things like: “let your facts show, not tell;” “add speed through short and varied transitions;” and use “light, varied, and logically interesting transitions.”

*“[I]f you can repeat a point or a phrase while changing it up a bit, it becomes memorable and sticks in your reader’s/hearer’s mind.”*

Carl Jung believed that it was the work of a lifetime to make the unconscious conscious. I think that’s how good writers approach improvement – they articulate the implicit in good writing, extract and distill it, and then try to use it themselves.

Once I realized this, I decided to try my hand at it, creating a series of posts on the legal writing styles of several current SCOTUS justices for the Appellate Advocacy Blog, [https://lawprofessors.typepad.com/appellate\\_advocacy/](https://lawprofessors.typepad.com/appellate_advocacy/). It’s an ongoing project, but I hope that it illustrates to law students and practitioners alike how to think about writing in a way that will make them more effective at getting their points across. You may not be able to write like John Roberts or Elena Kagan, but you can find out what

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elements make their writing effective and use those same tools in your own style.

I don't think that the principle is limited to echoing just good legal writing either – good writing is good writing, and if you can echo good literature or poetry, so much the better. This also includes good rhetoric, which I learned from Ward Farnsworth's *Classical English* trilogy (Rhetoric, Metaphor, and Style). Repetition, for example, is one of the oldest tools of persuasion, but not all use it to equal effect. For example, any parent of a young child over the past few years will know the words to Baby Shark (dodo-do-do-do-do). But as that song incessantly bears witness, bare repetition is grating and usually unhelpful. But if you can repeat a point or a phrase while changing it up a bit, it becomes memorable and sticks in your reader's/hearer's mind. Abraham Lincoln used a rhetorical device called epistrophe – repetition at the end of a phrase – in

his most famous address “of the people, by the people, for the people.” Elegant repetition, using the same ending phrase but with a different beginning (there, simple prepositions), leaves a point ringing in the listener's mind. And if your point is sticking in your audiences' minds, you're more likely to win them over. Again, you may not have Lincoln's gifts, but neither did he, at first. And you can use the same principles he employed to get your point across.

We live in a world that often celebrates – and rightly so – those who innovate and create new things. But that celebration shouldn't put us off from encouraging creative imitation. If it was good enough for Shakespeare and Lincoln, it's good enough for you. Find good writing and think about what makes it good. Once you do, try your hand at doing the same thing. You'll be surprised at how fast your writing improves. And you may just have some fun while doing it.

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## US Intelligence Laws & EU Data-Transfer Requirements: Tools for Assessing US Law & Implementing Supplementary Measures to Meet EU Protection Levels

by Ryan Beckstrom and Kyle Petersen

As companies become more data driven and the global economy becomes increasingly interconnected, US-based companies that process data of European Union (EU) data subjects must carefully evaluate whether the mechanism of their transfer of that data to the US adequately protects it. This is because there is now greater emphasis under EU law on ensuring the protections available to personal data within the EU travel with the data wherever it goes.

Companies transferring data from the EU to another country must evaluate the laws and practices of that country to determine if they provide an “essentially equivalent” level of protection to that provided by EU law. If they do not, the company must implement additional safeguards to fill the gaps in the protection left or created by the country’s laws and elevate it to the level required by EU law. This article provides background and context on the genesis of these requirements, tools for completing an assessment of US laws that may threaten the level of protection for EU personal data, and an overview of the process for identifying and implementing additional safeguards for that data.

### BACKGROUND AND CONTEXT

In 2011, an Austrian college student named Max Schrems initiated a series of court cases before the Court of Justice of the European Union (CJEU) that would eventually upend existing mechanisms

for data transfers between the United States and the EU. When Facebook’s lawyer, Ed Palmieri, spoke to Schrems’s college class at Santa Clara University, Schrems was appalled at Palmieri’s lack of knowledge about European data protection laws. Kashmir Hill, *Max Schrems: The Austrian Thorn in Facebook’s Side*, FORBES (Feb. 7, 2012), <https://www.forbes.com/sites/kashmirhill/2012/02/07/the-austrian-thorn-in-facebooks-side>. Schrems determined to write a paper about Facebook’s ignorance of European law and as part of his research requested Facebook’s records on him. *Id.* In response, Facebook provided over a thousand pages of documents about him – all his past messages and chats, every “poke” he ever received, every event he attended – including many that he believed had been deleted. *Id.*

Schrems filed complaints with the Irish Data Protection Agency that resulted in a sequence of cases and opinions from the CJEU. In the most recent decision, *Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems (Schrems II)*, the CJEU expressed particular concern about US surveillance laws and modified two important mechanisms for transfers of data from the EU to the US – (1) invalidating the EU-US Privacy Shield and (2) imposing enhanced restrictions on the use of the EU Standard Contractual Clauses (SCCs) for transfers to the US. *See generally* Case No. 311-18, EU:C:2020:559 (July 16, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0311&from=en>. Now, companies transferring

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data from the EU to the US pursuant to SCCs must verify, on a case-by-case basis, whether the law of the United States ensures an adequate level of protection for the data and impose additional safeguards where it does not.

The European Data Protection Board (EDPB) has adopted post-*Schrems II* recommendations for undertaking this evaluation, including a blueprint for assessing transfers and implementing, where necessary, additional safeguards to protect personal data. The heart of this blueprint is what's commonly called a Transfer Impact Assessment (TIA), which for US-based companies involves an examination of national security and intelligence laws – including particularly Section 702 of the Foreign Intelligence Surveillance Act (FISA) and Executive Order 12333 – and their effect on the data of EU data subjects. Once a TIA has been completed, companies must decide whether to implement additional safeguards, called supplementary measures, to ensure that EU-level protections accompany the data to the US. The following sections provide an overview of the key US laws that should be considered and evaluated when performing a TIA, as well as a roadmap for considering and implementing supplementary measures.

### EXAMINING US NATIONAL SECURITY AND INTELLIGENCE LAWS THROUGH A TRANSFER IMPACT ASSESSMENT

A TIA focuses primarily on the laws of the destination country – in this case the US – but also the practices of the country's government in applying those laws in the context of the specific transfer. This appraisal of US law is highly dependent on the circumstances of the transfer in question, including the purpose of the transfer and processing, the types of entities and industries involved, the categories of data to be processed, and the format and storage of the data. The purpose of this exercise is to determine whether anything in the law or practices of the destination country impinge on the effectiveness of the SCCs, i.e., does US law allow the government to access data in a way that undermines the protections afforded by the SCCs.

*Schrems II* expressly raised concerns about and discussed two US laws – Section 702 of FISA and Executive Order 12333 – rendering them central to any TIA analysis for transfers from the EU to the US. In short, the CJEU in *Schrems II* found that under these laws (i) US surveillance is not limited to what is strictly necessary and proportional, and therefore does not meet the requirements of Article 52 of the EU Charter on Fundamental Rights; and (ii) with respect to surveillance carried out under US law, EU data subjects do not have effective administrative and judicial

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redress as required by Article 47 of the Charter on Fundamental Rights. *See generally Schrems II*, ¶¶ 109, 179, 180.

## FISA 702

FISA regulates the United States government's collection of foreign intelligence and authorizes the government to conduct various surveillance activities, including electronic surveillance and physical searches. Section 702 of FISA (FISA 702) authorizes surveillance of non-US persons located outside of the US with the compelled assistance of certain US companies.

The two known surveillance programs conducted under FISA 702 are PRISM and Upstream. To carry out surveillance activities under FISA 702, the US Attorney General and Director of National Intelligence must submit to the Foreign Intelligence Surveillance Court (FISC) a written certification attesting that certain criteria are met, including that (i) a significant purpose of the surveillance is to obtain foreign intelligence information; and (ii) the surveillance involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider. 50 U.S.C. § 1881a(h)(1), (2).

The term “electronic communication service provider” is defined broadly to include, among other things,

1. Any provider of telecommunications services offered directly to the public for a fee (telecommunications carrier);
2. Any provider that offers to users the ability to send or receive wire or electronic communications (electronic communication service);
3. Any provider of computer storage or processing services by means of an electronic communications system (a provider of a remote computing service);
4. Any other communication service provider who has access to wire or electronic communications as they are transmitted or stored; or
5. Any officer, employee, or agent of any entity described above.

*See* 50 U.S.C. § 1881(b)(4).

Electronic communication service providers typically (and most obviously) include cloud storage providers, telephone companies, and email and text messaging service providers. However, other companies must also grapple with the definition of an electronic communication service provider, which US courts and the US

Department of Justice have suggested may include any company that provides electronic communications to its employees, regardless of the primary purpose of the business. *Cf., e.g., United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114–15 (3d Cir. 2004).

With regards to FISA 702, *Schrems II* provides:

[T]he FISC does not authorise individual surveillance measures; rather, it authorises surveillance programs (like PRISM, UPSTREAM) on the basis of annual certifications prepared by the Attorney General and the Director of National Intelligence. As is clear from that recital, the supervisory role of the FISC is thus designed to verify whether those surveillance programmes relate to the objective of acquiring foreign intelligence information, but it does not cover the issue of whether “individuals are properly targeted to acquire foreign intelligence information.” ... It is thus apparent that Section 702 of the FISA does not indicate any limitations on the power it confers to implement surveillance programmes for the purposes of foreign intelligence or the existence of guarantees for non-US persons potentially targeted by those programmes .... In those circumstances ... [FISA 702] cannot ensure a level of protection essentially equivalent to that guaranteed by the [EU Charter on Fundamental Rights].

*Schrems II*, ¶¶ 109, 179, 180.

## Executive Order 12333

Executive Order 12333 (EO 12333) is a general directive that serves as the authority for US intelligence agencies (like the National Security Agency) to collect, retain, and analyze foreign signals intelligence information from data accessible by radio, wire, and other electronic methods. There are two significant distinctions between EO 12333 and FISA 702. First, while FISA 702 permits surveillance activities in the US, EO 12333 permits US intelligence agencies to conduct surveillance activities outside of the US. Second, EO 12333 does not rely on the compelled assistance of electronic communication service providers to conduct surveillance activities. Instead, surveillance activities conducted under EO 12333 appear to rely on exploiting vulnerabilities in telecommunications infrastructure, e.g., US intelligence agencies gaining access to internet data in transit to the US. Consequently, a company is unlikely to even know whether US intelligence

agencies have sought access to its data unilaterally under EO 12333. U.S. Dep't of Comm. et al., *Information on U.S. Privacy Safeguards Relevant to SCCs and Other EU Legal Bases for EU-U.S. Data Transfers after Schrems II*, at 1–2 (Sept. 2020), <https://www.commerce.gov/sites/default/files/2020-09/SCCsWhitePaperFORMATTEDFINAL508COMPLIANT.PDF>.

Concerning EO 12333, *Schrems II* provides:

[W]hile individuals, including EU data subjects ... have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, it is equally clear that at least some legal bases that U.S. intelligence authorities may use (e.g., E.O. 12333) are not covered. Thus, as regards E.O. 12333, the [European Commission] emphasized ... the lack of any redress mechanism. In accordance with the case-law ... the existence of such a lacuna in judicial protection in respect of interferences with intelligence programmes based on that presidential decree makes it impossible to conclude, as the [European Commission] did in the Privacy Shield Decision, that United States law ensures a level of protection essentially equivalent to that guaranteed by Article 47 of the [EU Charter on Fundamental Rights].

*Schrems II*, ¶ 191.

## Helpful Considerations Regarding Application of FISA 702 and EO 12333

In determining whether FISA 702 or EO 12333 impinge on the effectiveness of the SCCs, companies may consider the likelihood of such laws being applied in practice to their transferred data, as well as their practical experience (or the practical experience of the data recipient) with prior instances of access requests received from public authorities in the US. Any such consideration must be documented and should account for the experience of other businesses operating in the same industry, including with similar types of data transfers. *See* EDPB, RECOMMENDATIONS 01/2020 ON MEASURES THAT SUPPLEMENT TRANSFER TOOLS TO ENSURE COMPLIANCE WITH THE EU LEVEL OF PROTECTION OF PERSONAL DATA 17–19 (2020), [https://edpb.europa.eu/system/files/2021-06/edpb\\_recommendations\\_202001vo.2.0\\_supplementary\\_measurestransferstools\\_en.pdf](https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementary_measurestransferstools_en.pdf) (EDPB Recommendations).

When considering the likelihood of FISA 702 and EO 12333 being applied in practice to a transfer, it is helpful to understand that most companies that sell ordinary products or services – and whose data transfers involve ordinary commercial information like employee, customer, or sales records – generally have no grounds to believe that such data is of any interest to US intelligence agencies, or that US intelligence agencies would attempt to access that data. U.S. Dep't of Comm. et al., *Information on U.S. Privacy Safeguards Relevant to SCCs and Other EU Legal Bases for EU-U.S. Data Transfers after Schrems II*, pp. 1–2 (Sept. 2020), <https://www.commerce.gov/sites/default/files/2020-09/SCCsWhitePaperFORMATTEDFINAL-508COMPLIANT.PDF>. (“Most U.S. companies do not deal in data that is of any interest to U.S. intelligence agencies.”)

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## IMPLEMENTING ADDITIONAL SAFEGUARDS THROUGH SUPPLEMENTARY MEASURES

Depending on the outcome of its TIA, a company may determine to take one of several steps: (1) suspend the transfer; (2) implement adequate supplementary measures to allow the transfer; or (3) proceed with the transfer without implementing supplementary measures, if the company can demonstrate that it has no reason to believe that problematic legislation will be applied in practice to the transfer in question. *See* EDPB Recommendations, at 17–18.

In *Schrems II*, the CJEU indicated that where a TIA suggests the destination country does not have adequate protections, the companies involved must either not transfer personal data or implement effective supplementary measures that guarantee a level of protection “essentially equivalent” to that guaranteed within the EU. There is no one-size-fits-all approach to supplementary measures; some supplementary measures that are effective in the context of one transfer will not necessarily be effective for a different transfer. And, if at any time the parties to the transfer determine that the proposed measures will not effectively guarantee adequate protection, they must suspend the transfer to avoid compromising the data.

The EDPB has provided a list of factors for determining which supplemental measures will be most effective in protecting data from problematic legislation and public authorities acting under that legislation:

1. Format of the data to be transferred, i.e., plain text, pseudonymized, encrypted;
2. Nature of the data, e.g., a higher level of protection is afforded to certain categories, such as sexual orientation and health data;
3. Length and complexity of data processing workflow, number of actors involved, and the relationship between them, e.g., do the transfers involve multiple parties and intermediaries;
4. Technique or parameters of practical application of the US law concluded in the TIA; and
5. Possibility that the data may be subject to onward transfers, within the same country or even to other countries, e.g., through the involvement of subcontractors of the receiving party.

*See* EDPB Recommendations, at 22.

After evaluating these factors and determining that additional safeguards are necessary, supplementary measures are then

chosen and adopted by the parties to the transfer. They generally come in three categories that complement one another and should be considered and adopted together. First, “organizational measures” are internal policies and methods that are designed to protect data, such as employee training on data privacy and security, policies and procedures for handling data and data-subject requests, and regular audits of data-handling procedures. As it relates to FISA 702, organizational measures may include practices and procedures for handling government requests for data. Second, “contractual measures” are bilateral commitments between parties for the protection of data, such as those already contained in the SCCs and mutual contractual assurances regarding implementation of other supplementary measures. And finally, “technical measures” aim to prevent the authorities, in the event they attempt to access the data unilaterally under EO 12333 or other laws, from collecting identifying information about the data subjects. Technical measures may include state-of-the-art encryption and key management, anonymization or pseudonymization of data, and routine tests designed to identify system vulnerabilities and backdoors.

Once appropriate and effective supplementary measures are adopted, they are combined with the SCCs to afford the data a level of protection that meets the level of protection guaranteed within the EU. Only then may the parties proceed with the transfer of data in compliance with the General Data Protection Regulation (GDPR) and *Schrems II*.

## CONCLUSION

There has never been a more important time to ensure that data transfers are being conducted in compliance with GDPR. While public authorities in the EU have the power to monitor compliance with and enforce GDPR through fines and legal actions – which they have done in several high-profile cases in 2021 – a company’s good-faith efforts to protect data will likely be a mitigating factor for authorities evaluating the severity of corrective actions. Therefore, regardless of the outcome of a company’s TIA and chosen supplementary measures, its evaluations, conclusions, and implementation of supplementary measures should be thoroughly documented. Additionally, companies should revisit their TIAs and supplementary measures at appropriate intervals to ensure that the data remains protected, that no new laws or practices threaten it, and that technological developments do not require changes to the chosen supplementary measures.

# Transferring UK Personal Data to the US using the UK International Data Transfer Agreement or the International Data Transfer Addendum to the European Commission's Standard Contractual Clauses

by Rachel Naegeli

This article is an update to an article previously published in the *Utah Bar Journal* that my colleague, Robert Snyder, and I authored in 2021. Rachel Naegeli and Robert Snyder, *Navigating Changes to European Union Data Privacy*, 34 UTAH B.J., 33, Nov/Dec 2021.

In “Navigating Changes to European Union Data Privacy,” we explained how to use the European Union’s updated Standard Contractual Clauses (New EU SCCs) to transfer “EU Personal Data,” the personal data of individuals in the European Economic Area (EEA) – which includes the twenty-seven European Union (EU) countries plus Norway, Iceland, and Liechtenstein – to the United States. To quickly recap, an approved transfer mechanism like the Standard Contractual Clauses is necessary because the United States has been deemed not to have adequate privacy laws by the EU and the UK, among others. Thus, personal data transfers from those jurisdictions to the US are considered restricted transfers. Under the EU General Data Protection Regulation (2016/679) (GDPR), appropriate safeguards, including an approved transfer mechanism, are required in order for restricted transfers to be lawful.

The New EU SCCs were adopted by the European Commission in June 2021, providing one possible mechanism for EU Personal Data to be lawfully transferred to the US.<sup>1</sup> At the time of our article’s publication, one question that remained unanswered was how the United Kingdom would handle transfers of UK residents’ personal data to the US in light of its exit from the European Union. Following Brexit, the UK adopted a piece of data privacy legislation almost identical to the EU GDPR. The UK version (the UK GDPR) contains an equivalent provision regarding restricted transfers in its Article 46, which also calls for appropriate safeguards for international transfers to countries that have not received an adequacy decision. Initially, the UK Information Commissioners Office (ICO) allowed transfers to

continue on the basis of the “old” EU SCCs, which had been drafted to meet the requirements of the pre-GDPR EU Data Protection Directive, while the UK developed its own international data transfer mechanism. The big question was whether the UK would adopt standard contractual clauses that were nearly identical to the New EU SCCs or adopt something different.

In February 2022, the UK Government answered this question when Parliament was presented with a new UK International Data Transfer Agreement (IDTA), a stand-alone document equivalent but not identical to the New EU SCCs, and a data transfer addendum, an add-on to the New EU SCCs (the UK Addendum). The IDTA and the UK Addendum came into force on March 21, 2022. Organizations can now use the IDTA or the UK Addendum as a mechanism to comply with UK GDPR’s requirement under Article 46, to take appropriate safeguards when making restricted transfers.

At the same time, the UK also adopted transition provisions which allowed continued use of the Old EU SCCs, provided that the contract was entered into before September 21, 2022. Since this window has closed, the transition provisions will not be discussed herein, though it is worth noting that if your client put the old EU SCCs in place for UK transfers prior to the September 21, 2022, cutoff date, they remain valid until March 21, 2024, so long as

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the processing described in the agreement remains unchanged.

This article introduces the IDTA and the UK Addendum and explains how your Utah-based clients can use the IDTA and the UK Addendum to transfer UK Personal Data to the US. For most Utah-based companies, compliance efforts will hinge on their implementation of the New EU SCCs. Organizations that do not already use or do not plan to concurrently implement the New EU SCCs will need to implement the IDTA.

Both the IDTA and the UK Addendum have been made available on the ICO website. The remainder of this article will discuss these documents; thus, you might find it useful to have them open for your reference.

**IDTA:** <https://ico.org.uk/media/for-organisations/documents/4019538/international-data-transfer-agreement.pdf>.

**UK Addendum:** <https://ico.org.uk/media/for-organisations/documents/4019539/international-data-transfer-addendum.pdf>.

### For organizations that do not use the New EU SCCs

Organizations that do not transfer personal data from the EEA and only need to provide a mechanism for transferring UK personal data should use the IDTA for UK to US personal data transfers.

The IDTA is comprised of contractual clauses addressing data protection and privacy that satisfy the UK GDPR's requirement to provide appropriate safeguards when transferring UK Personal Data to countries that have not received an adequacy decision.

Using a preapproved contractual mechanism to protect personal data is a familiar concept to lawyers that have been following data privacy laws in Europe. As noted above, the IDTA fills a similar role for transferring UK Personal Data as the New EU SCCs do for EU Personal Data. At this point in your read, I suggest you open the IDTA online. You will note that the IDTA is presented in a friendly, fill-in-the-field format. The process of completing the IDTA is relatively straightforward. That said, there are a few important details to keep in mind.

First, unlike the New EU SCCs, the IDTA does not take a modular approach. Instead of selecting a version of New EU SCCs Module 2 or 3, you will identify the roles of the parties vis-à-vis the data – as either the data importer or data exporter – and the roles of the parties relative to one another – as either controller, processor, sub-processor – in IDTA Table 2, Transfer Details.

Second, unlike the New EU SCCs, the IDTA does not meet the requirements of an Article 28 data processing agreement (DPA). While the New EU SCCs can be used without an accompanying DPA,

the IDTA requires a DPA in what it calls a “linked agreement.” To reiterate, the IDTA cannot merely be attached to a master services agreement unless that agreement itself contains all the Article 28 elements. Instead, you should be aware that when assisting your clients with compliance with UK data privacy obligations, you may need to draft an addendum to the master services agreement that incorporates the linked agreement and the IDTA.

Finally, the IDTA requires that organizations conduct a Transfer Risk Assessment to ensure that the safeguards provided by the IDTA do not conflict with legislation in the country to which the UK Personal Data will be transferred and that a sufficient level of data protection is achieved. The ICO published a draft TRA Tool in August 2022, which will help you guide your clients through their UK data protection efforts. <https://ico.org.uk/media/about-the-ico/consultations/2620397/intl-transfer-risk-assessment-tool-20210804.pdf>.

### For organizations that use EU SCCs

The majority of organizations transferring data across the Atlantic to the US do not limit their data to that of UK data subjects. Thus, most of your clients have likely already incorporated the New EU SCCs into their existing agreements. By way of a reminder, organizations transferring EU Personal Data to the US had until September 27, 2021, to begin using the New EU SCCs in new agreements. For existing agreements, at the time of this writing, organizations are still within a grace period that ends on December 27, 2022, during which they can revise previously concluded agreements to implement the New EU SCCs. Thus, if your client transfers data out of the EEA, chances are good that it is already using the New EU SCCs. In such cases, the UK Addendum can be used. The remainder of this article will provide some tips on how to use the UK Addendum along with the New EU SCCs for UK data transfers.

Like the IDTA, the UK Addendum is laid out in tabular fashion. The various tables are comprised of fillable blanks where organizations can include their contact details and information on the version of the New EU SCCs the Addendum modifies. The New EU SCCs are modular, requiring parties only to implement the modules that apply to the international data transfer described in the underlying agreement. Recall that the New EU SCCs include Module 1, which govern transfers between controller to controller, Module 2, which governs transfers from controller to processor, Module 3, which governs processor to processor transfers, and Module 4, which governs transfers from processors to controllers. Table 2 of the UK Addendum requires the parties to indicate which Modules are in operation. Within the New EU SCCs are embedded optional clauses, which must also be identified in Table 2 of the UK Addendum. Specifically, parties need to identify whether their personalized New EU SCCs opts to allow utilization of the

Clause 7 Docking Clause, the optional language under Clause 11, whether general or specific authorization is required for the addition of sub-processors under Clause 9a, and the time period for notification of new sub-processors under Clause 9a. Finally, parties are required to indicate whether personal data received from the data importer will be combined with personal data collected by the data exporter. The applicability and availability of the various options depends on the Modules selected.

Table 3 of the UK Addendum requires the parties to include the information that must be provided for the selected modules in the Appendix of the New EU SCCs including: Annex 1A, List of Parties; Annex 1B Description of Transfer; Annex II, Technical and Organizational Measures; and Annex III, list of sub-processors. Again, the information required may depend on the modules used. For example, Annex III only needs to be completed if Modules 2 or 3 have been selected.

One aspect of the UK Addendum that may cause confusion is how it integrates into the New EU SCCs. Table 2 of the UK Addendum provides two options. The option that is most appropriate for your client depends on how the New EU SCCs themselves were incorporated into the underlying agreement. Remember, the New EU SCCs can be attached in their entirety to an agreement, exactly as they were approved by the European Commission, with instructions on which modules and options apply to be included in the agreement. We can call this Option A. The other option, which we will call Option B, is to attach only the relevant module(s) of the New EU SCCs to the agreement, customizing these modules to only include the applicable optional language and to identify the clauses that were inoperative.

If Option A was the approach that was used initially, then when your client adds the UK Addendum, you need to select the second check box, which reads, “the Approved EU SCCs, including the Appendix Information and with only the following modules, clauses or optional provisions of the Approved EU SCCs brought into effect for the purposes of this Addendum:” and then fill in the boxes that appear below it to identify the modules and options that have been selected. If, on the other hand, Option B was the approach that was used to incorporate the New EU SCCs, then you can select the first check box in Table 2, which reads, “The version of the Approved EU SCCs which this Addendum is appended to, detailed below, including the Appendix Information” and then simply include the signature date of the New EU SCCs. These two approaches are both valid and are technically equivalent.

If you are putting the New EU SCCs in place concurrent with the UK Addendum – e.g., for a new agreement – the choice of which approach to use is yours. It is worth highlighting that Option B

(the first check box approach) may minimize confusion for the parties by removing the modules and options that do not apply. In addition, since extraneous material is excised, this approach is more concise. The choice ultimately turns on personal preference, but brevity and clarity favor the more tailored approach of Option B.

The remaining selections available in the UK Addendum should be relatively easy to walk through with your client. The ICO has published additional guidance on how to use the UK Addendum on its website for further information.<sup>2</sup>

## CONCLUSION

In conclusion, U.S. companies that process UK Personal Data now have a new path to UK data privacy compliance post-Brexit. For most U.S.-based companies, compliance efforts will hinge on adding a UK data transfer addendum to the New EU SCCs that were adopted by the European Commission in June 2021. Others will implement the UK’s standalone IDTA. We trust the tips and suggestions included in this article will assist you as you lead your clients’ efforts to implement the new UK data transfer mechanisms into their data transfer agreements and comply with the latest guidance on data transfers.

1. To access the Standard Contractual Clauses, please visit the following website: European Comm’n, Standard Contractual Clauses (SCC): *Standard Contractual Clauses for Data Transfers Between EU and Non-EU Countries*, [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en). (Last visited Dec. 20, 2022.)
2. To access the ICO guidance, please visit the following website: *International Transfer Agreement and Guidance*, Int’l Comm’n Office, <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-data-transfer-agreement-and-guidance/>. (Last visited Dec. 20, 2022.)

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# Lawyering Through the Stigma of Addiction

by Kent B. Scott

**M**y name is Kent, and I am an alcoholic and addict with thirty-five years of recovery. Would it surprise you to know that my recovery was fueled by the Utah Bar and Bench? Most notably, I am grateful to my family and the two law firms I worked for. I am now looking back on thirty-five years of recovery and can say without a doubt there is so much good in this Bar. There is hope for the future. There is recovery on the horizon, but we need to change who we are and what we are doing. More specifically, how can we better relate to one another in the fight against addiction?

### Where are we now and where are we going?

Unfortunately, my challenges are far from unique in the legal profession. Too many of us struggle with some sort of well-being and health-related concerns. Fortunately, our profession is beginning to pay attention.

In 2019, the Utah Bar hired researchers from the University of Utah to conduct a study identifying the state of lawyer well-being and the existence and impact of depression, stress, and substance abuse. The goal of this research is to understand where we currently stand and to identify any potential risk and protective factors that can guide our efforts toward effective improvement. In other words, the Utah Bar wants to understand *what* is happening, *why* it is happening, and *how* we can make a positive difference in the battle to prevent and manage addiction.

Preliminary study results are now in that suggest that the health and well-being of Utah lawyers are at risk. These concerns include:

- 44.4% of responding lawyers reporting feelings of depression
- 10.5% reporting prior drug abuse
- 48.7% reporting some level of burnout
- Lawyers responding to the survey are 8.5 times more likely to report thoughts of being “better off dead or hurting themselves” as compared to the general working population.

Matthew S. Thiese, *The Utah Lawyer Well-Being Study: Preliminary Results Show Utah Lawyers at Risk*, 33 UTAH B.J. 29, 30 (Mar./Apr. 2020) (internal quotation marks omitted).

These findings threaten the existence of a viable legal system. The findings in the survey also challenge the access to justice, and the practice of the rule of law.

### What you can do to erase the stigma of being an addict or alcoholic?

Utah Bar, you have pulled me out of the depths of hell and allowed me to walk into the light of sobriety.

There are many lawyers out there who need the same level of care and concern as was given me. If you see or are made aware of, and you will be, lawyers who are experiencing addictive behaviors, care for them enough to stand up to their behaviors. Please know that they do not have a moral problem, they have a medical condition, which has caused them to lose control of addictive behaviors. Alcoholic and addictive behaviors are diseases, not a moral failure of who one is.

- They need to know that they need to change.
- They need to know that they are responsible for the consequences of their decisions.
- And they need to be held accountable even at the risk of impending Bar sanctions.
- They need to know that they need treatment.

### Suspension

While I was in suspension, I had the opportunity to do many things other than being a lawyer. It was my decision to go back into the law because I felt that's where I belonged. This notion finally led me to conclude that I wanted to be the best lawyer I

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could be by hanging around the best lawyers. And where I found those lawyers was in court, in negotiations, in arbitrations, and in mediations. I would volunteer and work through the chairs in the Litigation Section. I also helped create the Dispute Resolution Section and the Construction Law Section. It was fun. It was meaningful. Most of all, it resulted in a lot of wellness. The only bar I now attend is the Utah State Bar.

### What the addictive lawyer and you can do to bring others back into the practice of the law:

- Be a mentor.
- Show up to Bar sponsored activities.
- Attend, in person, CLE programs, and get to know members of the Bar.
- Mediate and negotiate with other members of the Bar as the opportunity for work presents itself.
- Get involved with Lawyers Helping Lawyers by calling either me or any of the committee members.
- Go to lunch and talk with another lawyer.
- Get and stay connected.

### What members of the Bar did for me to erase the stigma of being addicted:

- Helped me arrange my financial affairs.
- Went to the Deseret Gym with me.
- Let me serve as a member of the Litigation Section.

- Encouraged me to speak at CLE events.
- Treated me as a person rather than a project.
- Gave me encouragement and hope.
- Did not enable my addictive behaviors.

### Lawyers Helping Lawyers Committee and Lawyers Wellness Committee

The Lawyers Helping Lawyers Committee continues to grow under the direction of Danielle Hawkes and S. Brook Millard.

The Well-Being Committee for the Legal Profession (WCLP), co-chaired by Justice Paige Petersen and attorney Cara Tangaro and managed by Executive Director Martha Knudson, is a significant step forward in acknowledging that our well-being is vital to our being at our best personally and professionally.

The WCLP has also launched a website with resources designed to help all of us learn how to best care for each other. It can be found at <http://wellbeing.utahbar.org>. Use it. If you do not like it, we will refund your misery.

### Conclusion

Lawyers and judges, keep giving your best and the best will come back to you as together we trudge down the road of happy destiny. As you do, I think you will find that there is no greater joy in watching someone walk out of the darkness of addiction and into the light of recovery.

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# Business and Commercial Litigation in Federal Courts, Fifth Edition

by Robert L. Haig

Reviewed by Matthew Lalli

Years ago, I went to a firm retreat and one of the speakers on the agenda was a history professor who had written a book about a landmark water law case from the middle of the 20th century. One of the founders of my firm had won that case. That win not only put my firm on the map but provided water rights to the now thriving metropolis of Phoenix, Arizona. Without it, Phoenix might be little more than a truck stop between California and the Midwest.

As the roughly 400 lawyers exited the room after the speaker was finished, we each were handed a hardbound copy of his book. I accepted my copy but knew immediately I never would read it.

I stashed it in my briefcase thinking I could put it on the bookshelf in my office. But on the flight home I found myself with nothing to read, so I pulled the book out of my briefcase and gave it a try. I read the entire flight, paused to drive from the airport home, and then finished the book a few hours later that same night. It was a gem. I found so much more in the book than I ever could have grasped from a one-hour lecture. I suppose it proves the adage of not judging a book by its cover.

The Fifth Edition of *Business and Commercial Litigation in Federal Courts* is just that kind of gem. One might initially assume it is just another academic treatise, but if you open the first chapter – or even the table of contents – and start reading you will immediately recognize it is much more than that. The word pragmatic leaps to mind. But not pragmatic as in just a good summary of basic points of law. Rather, it is pragmatic as in mining the world of law to unearth every conceivable legal problem and then providing answers, analysis, and strategy to solve those problems.

While the Fourth Edition was comprehensive, the Fifth Edition adds twenty-six new chapters, now totaling 180 chapters. Like its predecessor, the Fifth Edition contains the procedural basics of subject matter and personal jurisdiction, removal, joinder and consolidation, multidistrict litigation, provisional remedies and class actions, and many more. There are also a handful of chapters comparing litigation in the United States and Canada or Mexico, or explaining the differences and similarities of litigation in New York courts or Delaware courts. There are updated chapters on the evolving nature of discovery, trial techniques, and even jury consultants. There are numerous chapters teaching lawyers not only the law, but how to expedite and streamline litigation, how to budget and manage fees, how to market, and how to practice as an ethical and civil lawyer.

For me, the most impressive aspect of the treatise is in the esoteric. There are entire chapters devoted to topics that never would have occurred to me: fashion and retail; art law; space law; animal law; climate change; and ecommerce. My oldest son is a professional artist, so I took a turn through the art law chapter. This chapter, like most chapters, starts broadly by stating the scope of the chapter and addressing preliminary

*Business and Commercial Litigation  
in Federal Courts, Fifth Edition*

by Robert L. Haig

Thomson West (2021)

23,254 pages

Available in hardbound format only.

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considerations such as nuances in the art market and the types of disputes that are likely to arise. It addresses jurisdictional issues, veers into discussions of disputes, stolen artwork, and potential claims. There is a useful section on art contracts and another on auction-house contracts, and still others on copyrights, licensing, and trademarks. I even learned that there is a Visual Artists Rights Act and a fair amount of caselaw under it. Who knew?

Perhaps most importantly, this treatise does not simply reflect the analysis and thinking of merely a handful of legal scholars. Instead, each chapter is written by experts in the area, so the Fifth Edition really does provide the best insights from the best lawyers and thinkers in each of the respective fields. The volumes are heavily annotated with references to cases and secondary

authorities that back up virtually every point the authors make. But this treatise goes even one step further – it provides actual forms one can use to draft virtually any document a lawyer would ever need to file in federal court, whether they be discovery, motions, stipulations, orders, jury instructions, or special verdict forms. These forms are not mere templates but examples of actual forms that have been or could be filed in federal court with only adaptations to the specific facts of each case.

I am not going to hand you a hard copy of this treatise as you walk out of a conference room – indeed, one version of the Fifth Edition is fully electronic and searchable, which is a must for those of us who have given up on paper – but I am confident that both believers and skeptics will not put this book down once they pick it up.

## Utah State Bar Licensee Benefits Put Law Practice Tools at Your Fingertips

Your Utah State Bar license comes with a wide range of special offers and discounts on products and services that make running your law practice easier, more efficient, and affordable. Our benefit partners include:



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To access your Utah State Bar Benefits, visit:  
**[utahbar.org/business-partners](http://utahbar.org/business-partners)**

# An Apology for Lawyers and the Utah State Bar

by Mark O. Morris

In the late 1500s, an English soldier and writer by the name of Sir Philip Sidney wrote a treatise called *An Apology for Poetry* (also called *The Defense of Poesy*). In it he defends “poetry” (or what we regard more now as “literature”) as a better vehicle to rouse people to virtuous conduct than two other disciplines of the time, either history or philosophy. Very simply, he pointed out that history often taught that bad behavior and bad people too often prevailed, while philosophy was just too confusing to allow practical application to everyday life. Better, he thought, to tell fictional stories about virtuous people embodying positive philosophies to endure and sometimes overcome challenges and hardships, if you truly want to inspire readers to be better people.

A couple of things, one not so recent and the other very recent, inspired me to put some thoughts to pen to . . . well . . . apologize for, or defend Utah lawyers and the organization to which we all belong if we want to practice law here, the integrated Utah State Bar. First, I don’t think lawyers, generically, need an apology for who they are, what they do, or how the legal system works. But for a couple of years now I’ve been ruminating on how I see the practice of law here. My first inspiration to write comes primarily from some not so subtle criticisms that have been heaped on the Utah State Bar and lawyers generally as a predicate for suggesting that the practice of law in Utah needs to be modernized, revolutionized, disrupted, and in some extreme cases, replaced.

Let me be clear here. I do not intend here to criticize the idea of regulatory reform of the practice of law, the Office of Legal Innovation, or the “Sandbox.” A controlled, experimental environment like the Sandbox is a fantastic idea so long as there is mandatory transparency about all aspects of the people playing in it. And exploring ways to make legal advice and legal services more available is an aspiration no one can argue with. I’ll touch on those in a bit. But while I am not at all critical of the idea of making some legal services more available to people at a lower expense, I reject out of hand and resent the premise I hear most often for these suggested changes. I’ve been hearing that the Utah State Bar, lawyers, and the courts have “failed,” because there are unmet legal needs in our society, and because lawyers

are perceived as too expensive. I’ve also heard that lawyers and the Utah State Bar are “obstructionist,” “protectionist,” and “self-serving.” As if “justice” were something being hoarded by a few, and dispensed only at extortionate prices. I could not disagree more.

I’ve been a lawyer and member of Utah’s Bar for thirty-seven years. I do not consider myself a Bar “junkie.” My desire to become a Bar Commissioner arose when I had lunch with a colleague in the profession many years ago who confessed to me he hated his job. That was horrible to hear, and I wanted to see if I could make a difference in helping to make practicing law better for those who struggle to enjoy and find satisfaction in it. I’ve been a Bar Commissioner for the Third Division for five years. I chaired the Construction Section for some time before that, and I co-chaired the Annual Meeting in Sun Valley ten years ago. That’s my Bar resume. My proposition here is that merely because there is always room for improvement, “failure” and the purported need for drastic reform should not necessarily be inferred. And certainly not in the case of the Utah State Bar. I don’t think anyone has a problem with the idea that some legal services could be offered, and some legal needs met, more efficiently and economically. But Utah lawyers, Utah courts, and the Bar have not failed, in my opinion, to deliver what each is charged to deliver. The fact that there is room for improvement does not equate to failure, malfeasance, or even misfeasance, and should not take away from what Utah has achieved where so many other states have failed.

In June of 2020 the Utah State Bar Committee on Regulatory Reform studied the April 24, 2020 Utah Supreme Court Standing

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Order No. 15 and Associated Proposed Changes to the Rules of Professional Conduct (collectively Proposal). I was, and I suppose I still am, a member of that Committee. Many of my observations here are the same that I had over two years ago, at the beginning of regulatory reform. That Proposal concluded that courts and lawyers have purportedly failed to provide meaningful access to justice for all of Utah's citizens. Yet I am not persuaded that Utah citizens stand in constant, ongoing need of "justice," at least as I understand that term.

"Meaningful" of course is a normative term that is typically left to policy makers to determine. And I reject the notion that there is "fault" with the courts, or with lawyers, in their motivation or desires to increase access to justice. There is no dispute within the legal community and the Bar that courts and lawyers share a strong interest in meeting the unmet needs of the indigent and unrepresented in Utah's courts. Indeed, the extraordinary pro bono and volunteer efforts in which lawyers regularly and voluntarily engage, the court-initiated moves to systematize court-approved forms and make them easily accessible online, the establishment of a new legal profession in Licensed Paralegal Practitioners, and the piloting of an online dispute resolution model for small claims court where lawyers are not even necessary, are all examples of the myriad of efforts and the genuine motivations of lawyers and judges to serve Utah citizens. *All of these occurred and are occurring without "regulatory reform."* These efforts do not "fail" merely because everyone in Utah does not have and perhaps cannot afford legal advice on every legal issue they confront. They are not "failures" merely because the Bar's volunteer

efforts are not unlimited. Rather, they *succeed*. Because without them, there are thousands in Utah that would not have had an opportunity to improve their lives by putting the rule of law to work for them. Making these advantages universally available and contributing the financial resources to do so is not, however, the job of lawyers or of judges.

The predicate statistic upon which regulatory reform was based two years ago was that supposedly 93% of defendants in filed cases are unrepresented. That astounded me when I heard it, because in thirty-five years of practice I'd probably dealt with unrepresented people on fewer than five occasions, in matters involving hundreds or maybe a few thousand dollars. In drilling down, I learned that that statistic reflected primarily domestic, consumer credit, and landlord-tenant cases. And, as much as I may not personally care for what some perceive as the predatory practices of some landlord and credit card collection lawyers dealing with unrepresented debtors and tenants, the vast majority of those cases involve contracts that people voluntarily signed, benefitted from, and they are now in breach of obligations to pay or repay. Do I personally think \$3,000 in legal fees should be tacked on to an uncontested \$300 credit card bill? No. But paying fees as a consequence to not repaying money that a company advanced on a debtor's behalf is a legal consequence those people *agreed* to. Otherwise, don't take the money, buy the goods, or rent the apartment. Do I wish people wouldn't borrow more than they can repay? Of course. Do I wish all people earned enough to pay for reasonable living accommodations, or if they do earn enough that they would wisely devote



## CUTT & KENDELL OLSON

ATTORNEYS AT LAW

Cutt Kendell & Olson is pleased to announce our newest partner,

*Lena Daggs*

Lena graduated from the S.J. Quinney College of Law in 2011 and within a few years discovered her passion for complex personal injury work. Lena has been a member of the firm since 2018.

She tirelessly represents victims in wrongful death, medical malpractice, catastrophic auto and trucking accidents, sexual assault, and premises liability cases.

their income to necessities first, like rent? Who doesn't. And would people fare better getting legal advice before entering into those relationships, and then again when they are asked to answer for their voluntary obligations? Undoubtedly. In the cases where I have represented people in those situations, the debt has rarely been in dispute, yet I feel I've served those people well by securing payment terms that don't involve exorbitant legal fees. It's not loan forgiveness. It's debt management on hopefully achievable terms. But is that a matter for lawyers in general, or for the Utah State Bar, to administer and fund as some sort of access to justice issue? In my opinion, yes and no. Lawyers in Utah devote thousands of unpaid, volunteer hours to those endeavors. Is that enough to cover everyone? No. But should lawyers be required to dig deeper, volunteer more, and simply write checks to make up the difference? Again, no. Even unrepresented people in those cases have "access to justice" in at least one sense, because they are in court, where a judge will be asked to ensure justice is meted out to them fairly.

The other inspiration for my expressing my thoughts here comes from my recently attending the admissions ceremony for new lawyers at the State Capitol Rotunda on October 18, 2022. There, Chief Judge Robert Shelby and Magistrate Judge Paul Kohler of the U.S. District Court for the District of Utah gave advice to the newest crop of lawyers being admitted to the Bar. Their words and advice were inspiring and reminded me again that we as lawyers and our integrated Bar are engaged in a great endeavor to make peoples' lives in Utah better. And that endeavor has blessed my life, too. I have a consistent feeling of gratitude in my heart for a career where I never dread going to work and where every single day is different from another. That variety, alone, keeps it interesting and enjoyable. My job (and our profession) is, simply, to help people navigate an environment that is bounded by some rules, including adhering to duties that are inherent in some cases and voluntarily assumed in others. At times we help keep people out of trouble and, if they're in trouble, get them out. It's been deeply satisfying, and I expect it will continue to be for a good, long time. The Utah State Bar has facilitated and continues to facilitate the collegiality, civility, and education that makes justice in Utah accessible and even pleasant. I deliver better results to my clients because in almost all cases, I know and get along with the lawyers on the other side.

So what did Judges Shelby and Kohler say that I found worth mentioning here? First, Judge Kohler mentioned the very famous phrase in Shakespeare's *King Henry VI*, "[L]et's kill all the lawyers." William Shakespeare, *King Henry VI*, part 2 act IV, sc. 2. In fact this suggestion was spoken by Dick the Butcher, a follower of

anarchist Jack Cade, whom Shakespeare depicts as "the head of an army of rabble and a demagogue pandering to the ignorant," who sought to overthrow the government. Judge Kohler rightly pointed out Shakespeare's acknowledgment that the first thing any potential tyrant must do to eliminate freedom is to "kill all the lawyers." That phrase is a well-deserved compliment to lawyers in general, and to law as a profession. I submit, too, that killing the integrated Bar in Utah would be a helpful step to turn the delivery of legal services into the Hobbesian and mechanical experience I have observed in the less civil legal arenas of other states.

Judge Shelby offered inspiring reminders too. He said lawyers have an obligation to zealously guard our noble profession. A license to practice law allows us as lawyers to help others in ways we could not without it. He reminded us that practicing law is a *privilege*. We take an oath. We pledge fealty to two constitutions, to rules, to civility, and to professionalism. What other profession does all this, and backs it up with continuing education requirements and discipline for departures from those commitments? We are not mere licensees, practicing a trade.

But Judge Shelby mentioned also that the legal system fails to meet all needs, and that is likely right, and true of any system, whether political, business, and even religion. So what yardstick should we put up against the legal system here, and how can we improve it without feeling we must, at the same time, castigate lawyers and judges? Well, we can all help. The collective wisdom and thoughts of thousands of men and women who have sworn an oath to serve and protect the public in connection with being admitted to practice law in this state should neither be rejected nor discounted by the mostly mistaken assumption that lawyers see proposed "reforms" as threats to their livelihoods. Increasing access to justice and the courts for the indigent and unrepresented people in Utah is an important part of the goals and missions of the Utah State Bar. But again, I categorically reject the suggestion that any criticisms and concerns respecting the proposed regulatory changes (importantly not the aspirations) are primarily, substantially, or even moderately motivated by lawyers' self-interest.

Judges and the legislature are in the best position, and certainly better than the Utah Bar, to say that exorbitant fees for debts in the hundreds of dollars aren't reasonable. And if the legislature feels like I do that those people would benefit from legal advice to negotiate undisputed debts down to reasonable payment terms, it remains a legislative, normative policy issue to provide funding for that. And of course the *reasonableness* of attorneys' fee awards lies and has always lied within the sound discretion of judges.

Certainly obtaining good results for clients is one of our roles as lawyers. We try to get justice for some, and prevent injustice for others. But it is not always as grave as all that when legal issues arise. Importantly, allow me to posit here that access to *justice* is very different from access to *legal advice*, or *legal services*. Someone who wants a will, or to buy a home isn't looking for "justice." Yet they are very important services lawyers offer, and in many circumstances can be accomplished without great legal expense. While I agree that lawyers, the Bar, and the courts each have their role, I think a straw man has been set up for regulatory reform advocates to knock down, all in the name of denigrating lawyers and the Bar in the name of increasing "access to justice" when, in truth, the impetus is really just to suggest lawyers might be replaced by mechanical, generic, digital, and more affordable contrivances. It's not always necessary to knock down in order to build. I think access to justice in Utah is as good or better than it has ever been. It is not getting worse, or going in the wrong direction. It is constantly improving here.

The word "justice" in the Bar's vision and mission statements implies someone is in the dock – that someone is a victim, and thus "justice" is required. Not having enough money to pay a lawyer for a range of traditional legal services, however, does not necessarily imply injustices are being perpetrated. The Utah and United States Constitutions guarantee a lawyer to help prevent injustices that come in the criminal arena. The idea of a free lawyer in criminal contexts is, however, ultimately a *legislative* imperative. But free or discounted legal services (whether by lawyers or algorithms) in commercial contexts hasn't yet become a priority that taxpayers, or lawyers for that matter, should fund. Ultimately, even constitutional guarantees are *legislative* prerogatives are they not, to be enforced by the courts and advocated by lawyers? And the Utah Legislature has not seen fit, so far, to provide "access to justice" in the guise of free or discounted lawyers or legal advice of another ilk for commercial, domestic, and other non-criminal situations. If the public were to embrace that idea, then legislators should run on that platform and effect those policy choices.

If the reason for regulatory reform is to get a lawyer for everyone who is in court for any non-criminal reason, then that is a public burden and imperative solely in the hands of the legislature. If the public were to embrace that idea, then legislators should run on that platform and effect those policy choices.

Defenders of regulatory reform and the "Sandbox" claim that entrants into it must be given a chance to prove themselves. No argument here. But at whose expense? By and large, people

getting into the Sandbox are in it to make money, ironically from people who purportedly cannot afford a lawyer. If someone has a business model to serve unmet legal needs in a way that can turn a profit for them, then they should have that opportunity if they are willing to fund that risk, and at the same time risk failure along with any other new business enterprise. But if the idea is that the Utah State Bar, or lawyers, or courts, should bear the expense of devising ways to obviate the need for them – then that is an odd proposition seeking a very normative, public policy endeavor without any weigh-in from the legislative or executive branches.

The Bar serves a salutary and important service – to foster civility, collegiality, and continuing and constant education, all of which greases the grooves to more efficient dispute resolution, facilitating commerce, and saving people money. Having a mandatory Bar maintains that order. And in court, it makes "justice" much more, and more quickly obtainable. Our Bar succeeds in this where so many other Bars fail, and it's due in no small part to our supreme court's mandate for civility and professionalism. Just ask anyone who's worked with litigators from other states where large metropolitan concentrations of lawyers provide for relative anonymity, and insulation from accountability for unprofessional, sharp, and outright unethical behavior.

We play by a different set of rules here, and it's a good thing. Lawyers can and do help, and the Utah State Bar absolutely does not prevent people from getting legal help. It seeks to facilitate it. The Utah State Bar is not *the* problem, or even *a* problem here. Lawyers are not the problem. Courts are not the problem. Suggesting that they are the problems is not how to solve what I think all lawyers agree is an area for improvement. If there truly is a *public* interest in making legal services more affordable than market forces are currently dictating, then a legislative response to allocate public resources to augment what the market is doing seems to be the best means of achieving those ends. Finally, I don't know how good a writer, or soldier, Sir Philip was. But his apology for poetry had and has great merit. I know the environment we as lawyers (including importantly the lawyers on past and present Utah Supreme Courts) have created to help Utah citizens have better lives also has great merit. I don't know whether my words here accomplish anything other than some personal catharsis. And I sincerely hope my lawyer friend from lunch a few years ago turned things around and enjoys his profession and professional endeavors as much as I am blessed to do. Being a lawyer in Utah is more than a job, or a trade. And that is my pair of pennies.

# Need Ethics Help?



The Utah State Bar General Counsel's Office can help you identify applicable disciplinary rules, provide relevant formal ethics opinions and other resource material, and offer you guidance about your ethics question.

Utah attorneys and LPPs with questions regarding their professional responsibilities can contact the Utah State Bar General Counsel's office for informal guidance during any business day by sending inquiries to [ethicshotline@utahbar.org](mailto:ethicshotline@utahbar.org).

The Ethics Hotline advises only on the inquiring lawyer's or LPP's own prospective conduct and cannot address issues of law, past conduct, or advice about the conduct of anyone other than the inquiring lawyer or LPP. The Ethics Hotline cannot convey advice through a paralegal or other assistant. No attorney-client relationship is established between lawyers or LPPs seeking ethics advice and the lawyers employed by the Utah State Bar.



[ethicshotline@utahbar.org](mailto:ethicshotline@utahbar.org)

# Unauthorized Disclosure of Documents

by LaShel Shaw and Keith A. Call

In the last issue of the *Bar Journal*, we discussed the ethical implications of receiving confidential or privileged documents that appear to have been inadvertently produced. This includes, pursuant to Rule 4.4 of the Utah Rules of Professional Conduct, an obligation to notify the opposing party or their counsel of the inadvertent disclosure. See Keith A. Call, *Lessons from Alex Jones: The Rules Governing Inadvertently Produced Documents*, 35 UTAH B.J. 55 (Nov/Dec 2022). But what if someone surprises you by intentionally giving you documents helpful to your case that they did not have authority to give you?

For instance, a third-party witness and former employee of an opposing party might give you confidential company documents that she kept after the termination of her employment. See *Arnold v. Cargill Inc.*, No. 01-2086, 2004 WL 2203410 (D. Minn. Sept. 24, 2004). Or a client might ask a friend, currently working for the opposing party, to surreptitiously obtain company information that might be useful in the litigation. See *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273 (D. Utah 2016), *aff'd*, *Xyngular v. Schenkel*, 890 F.3d 868 (10th Cir. 2018). In some cases, parties have had documents mysteriously sent to them from an anonymous source. See *Burt Hill, Inc. v. Hassan*, No. Civ. A. 09-1285, 2010 WL 419433 (W.D. Penn. Jan. 29, 2010). Under such circumstances, do you still have an obligation to tell the other side that the documents have come into your possession?

The ABA issued a pair of formal ethics opinions in the early 1990s, one addressing inadvertent disclosure and one addressing

unauthorized disclosure. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-368 (1992) (inadvertent disclosure); ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-382 (1994) (unauthorized disclosure). Those decisions determined that although the two scenarios are different, the same procedure should be followed in each case: the receiving lawyer had an ethical obligation to notify the opposing party and abide by the opposing lawyer's instructions. While you could debate whether or not this is the best procedure, it provided relatively clear guidance to attorneys.

But in 2002, the ABA adopted Model Rule 4.4(b) and withdrew both of these earlier formal opinions. Rule 4.4(b) of the Utah Rules of Professional Conduct, like the ABA model rule counterpart, provides, "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

This rule expressly applies only to documents that were "inadvertently sent." It does not apply when the disclosure was intentional, even if that intentional disclosure was unauthorized. Indeed, a comment to Rule 4.4(b) expressly clarifies that this rule does not apply to the receipt of documents that were "inappropriately obtained," but merely addresses those instances where documents are produced by mistake. Utah R. Pro. Cond. 4.4, cmt. 2.

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The ABA has further emphasized this point in another pair of formal ethics opinions issued after the adoption of Model Rule 4.4. Formal Opinion 06-440 provides that Model Rule 4.4(b) does not apply to unauthorized disclosure and suggests that the model rules do not address this situation, although “other law” may prevent a receiving attorney from retaining or using the materials. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-440 (2006). The committee reiterated this position in Formal Opinion 11-460, where it stated that a lawyer has no duty under the model rules to notify opposing counsel when dealing with an unauthorized disclosure, but must act carefully in such circumstances so as not to violate other legal and ethical duties. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011). These decisions suggest there is no ethical requirement in the Rules of Professional Conduct for an attorney to notify the opposing party after receiving an opposing party’s documents that appear to have been leaked or taken without authorization.

There are other ethical considerations to consider in this scenario, focused on Rule 1.6 and your client’s informed instructions. *See id.* (absent controlling law to the contrary, decision of whether to give notice must be made by client). Rule 1.6 prohibits a lawyer from revealing “information relating to the representation of a client unless the client gives informed consent,” with some exceptions. Utah R. Pro. Conduct 1.6(a). Because the existence of the unauthorized disclosure is generally “information relating to the representation” of the client, the attorney should ordinarily not disclose the unauthorized disclosure to opposing counsel without the client’s consent. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011).

Keeping the documents’ existence a secret is not always the best decision, especially if you hope to use those documents or the information they contain. *Id.* For example, in the *Burt Hill* case, some of the plaintiff’s confidential documents were contained in an unmarked manila envelope that appeared on the doorstep of the defendants before litigation commenced. After being sued, the defendants sought to obtain the same information from the plaintiff through discovery, but the documents were not produced

and the fact that they were already in defense counsel’s possession came to light during meet-and-confer efforts. The court was “deeply troubled” that the defendants had concealed the disclosure of the documents and entered sanctions prohibiting the use of the information in the documents by defendants in the litigation. *See Burt Hill*, 2010 WL 419433, at \*1, \*7–9.

In other cases, however, the circumstances under which the documents were obtained can negatively implicate the client, even if the opposing party is notified of the unauthorized disclosure. In 2016, Judge Robert J. Shelby imposed terminating sanctions in a case where the plaintiff had requested and obtained confidential documents from an employee of the defendant who did not have authority to give such documents to third parties. *See Xyngular Corp.*, 200 F. Supp. 3d at 1273. Although the plaintiff claimed to

*“[I]t appears there is no ethical requirement...to disclose to your opposing counsel...that you received an unauthorized disclosure of the opposing party’s documents.”*

have asked for the documents for purposes of whistleblowing, not for litigation – and openly disclosed his possession of the documents to the other side, including by attaching some of them to his complaint – the court found that the plaintiff had acted in bad faith by seeking access to documents to which he was not entitled and dismissed his claims

with prejudice as a result. *Id.* Indeed, depending on how the documents came into the attorney’s possession and the client’s role in this process, it could even be advisable to consult with a criminal defense attorney before reaching a decision about whether or not to notify opposing counsel.

In summary, it appears there is no ethical requirement under the Utah Rules of Professional Conduct for you to disclose to your opposing counsel the fact that you received an unauthorized disclosure of the opposing party’s documents. But you do have an ethical responsibility to carefully discuss the potential impacts of the disclosure – positive and negative – with your client and to obtain your client’s instructions on how to proceed.

*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.*

## Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the November 18, 2022 meeting held at the Utah Law and Justice Center in Salt Lake City.

- The Commission approved the annual financial audit, which was clean.
- The Commission approved donating \$10,000 to Utah's Judicial Internship Opportunity Program.
- The Commission approved J. Brett Chambers to fill Marty Moore's unexpired Commission term in the First Division.
- The Commission approved purchasing the Unmind well-being app, which will be provided free of charge to all lawyers, LPPs, and law students in the state.
- The Commission approved Monica Maio, Trent Seegmiller, and Erin Strahm as its recommended candidates for a position on the Commission on Criminal and Juvenile Justice. The position is for an attorney who primarily represents juveniles in delinquency matters

The minute text of this and other meetings of the Bar Commission are available on the Bar's website.

## Notice of Bar Commission Election

### FIRST AND THIRD DIVISIONS

Nominations to the office of Bar Commissioner are hereby solicited for:

- one member from the First Division (Box Elder, Cache, and Rich Counties), and
- three members from the Third Division (Salt Lake, Summit, and Tooele Counties).

Bar Commissioners serve a three-year term. Terms will begin in July 2023.

To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at <https://www.utahbar.org/bar-operations/election-information/>. Completed petitions must be submitted to Christy Abad ([cabad@utahbar.org](mailto:cabad@utahbar.org)), Executive Assistant, no later than February 1, 2023, by 5:00 p.m.

## 2023 Spring Convention Awards



The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2023 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2023 Spring Convention Award no later than Friday, January 20, 2023. Use the Award

Form located at <https://www.utahbar.org/awards/> to propose your candidate in the following categories:

1. **Dorathy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

The Utah State Bar strives to recognize those who have had singular impact on the profession and the public. We appreciate your thoughtful nominations.

## Utah State Bar Launching New Pro Bono Opportunity Portal

The Utah State Bar's Access to Justice Office (ATJ Office) has the mission to advance equity in the legal system and expand access to justice at all levels for people with lower-incomes or who are facing disadvantages. This only happens through the service of dedicated staff, volunteers, and community partners. Together, they fulfill this mission by creating a culture of service and respect in Utah where pro bono and reduced rate services help people, families, and communities in need.

### Administration and direct legal services

The ATJ Office directs all access to justice programs, "signature pro bono programs," and reduced rate services. They staff and implement the initiatives of the Pro Bono Commission, the Access to Justice Commission, and pro bono activities in each of the eight Judicial Districts. The ATJ Office fields all public requests to the Utah State Bar for information about pro bono and reduced rate legal services. The ATJ Office is staffed by one attorney-director, a staff attorney, and one office coordinator. Examples of programming by the ATJ Office include directing, recruiting, training, advertising, and administration. Thus, the ATJ Office offers a unique mix of

direct and indirect civil legal services to Utahns while working systemically to drive change in the pursuit of equal justice.

### Launching the Utah Pro Bono Opportunity Portal

Since the creation of the ATJ Office, there has been recognition that a centralized database of serving opportunities for volunteers would improve engagement through pro bono service. This fall, the Utah State Bar partnered with Paladin to offer a real-time portal that shows pro bono opportunities throughout Utah. These include ATJ Office program listings and those from approved community partners. There are options for brief advice, limited scope representation, and full representation pro bono cases.

This system streamlines the process and helps legal professionals, retired lawyers, and law students find ways to serve our communities. The Utah Pro Bono Portal is a one-stop shop where you can filter by your interests, practice areas, types of service, and availability. Just click on the opportunity to "express interest." You can view the portal by visiting <https://app.joinpaladin.com/utahprobono>.

### Committed volunteers make it happen.

Having the portal accessible makes finding pro bono opportunities simple. Yet the key is having volunteers available and willing to provide the needed legal services.

Serving our communities allows volunteers to make new friends, gain relevant work experience, expand their professional network, grow and develop new skills, and even redefine priorities and perspectives. Rule 6.1 of the Utah Rules of Professional Conduct states, "A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year, except that a licensed paralegal practitioner should aspire to render thirty hours of pro bono publico services per year."

Most importantly, volunteers have the power to make a real difference in the lives of Utahns. For example, on a recent pro se immediate occupancy calendar, a family was able to get rental assistance and be retained instead of evicted after a volunteer connected them with Utah Community Action and negotiated with the plaintiff. Ultimately, people who come looking for help are often experiencing some of the scariest, most intimidating, and challenging moments of their lives. By offering clear explanations and evaluating the situation, volunteers can ease the stress and help people get better outcomes.

## Utah State Bar Announces New Member Benefit with Tava Health

The Utah State Bar is expanding mental health and well-being services for its members through a new partnership with Tava Health. Tava Health is a unique, proactive mental health benefit platform providing education, training and resources, and clinically proven mental health therapy all delivered through its platform at [tavahealth.com](https://tavahealth.com). These benefits will be available to members and their dependents beginning on February 1, 2023.


A key benefit of Tava is the convenience of its service and quick access to quality therapy. Through its platform, members can access Tava to select a licensed, professional mental health counselor and schedule counseling sessions. Tava counselors are masters- and doctorate-level mental health providers trained to provide assistance with a wide range of issues, including stress, work pressure, relationship issues, trauma, addiction, anxiety, depression, family issues, grief and loss, LGBTQ issues, postpartum issues, PTSD, and eating disorders. As more scholarship emerges about the prevalence of stress and mental health struggles within our society at large, the impact such forces have had within the legal profession is coming into sharper focus. Depression, anxiety, and burnout are a significant cause of incivility within the legal profession and can negatively impact the condition of a lawyer's ethical competency and business. According to a recent ABA report on wellbeing, 40–70% of malpractice claims against attorneys involve substance abuse. Having affordable, easy access to support can help mitigate these issues.

In addition to providing access to high quality counselors, Tava's platform makes it much easier for members to access services quickly. Appointments will typically be available within five business days of member request.

Members of the Utah State Bar and their dependents have access to six complimentary sessions per person each year. Additional sessions beyond the six will be available at a rate of \$110 per session. Tava counselors are also on network with many common health care insurance plans in Utah. The six complimentary sessions reset at the beginning of each year, running from February 1 to January 31.

Just like the robustness of client confidentiality under Rule 1.6 of the Utah Rules of Professional Conduct, Tava's service is completely confidential and no information about individual clients will ever be shared with The Utah State Bar

In sum, Tava's service exceeds the overall price of your yearly Bar dues, creating a safe, confidential, and invaluable resource for you and your dependents. A 2019 London School of Economics study showed employees with strong well-being programs were 20% more productive and 16% more profitable than those who did not have access to these resources. Consider taking advantage of this new offering as you navigate the stressful ebbs and flows of this most rewarding, yet intense profession.





### Announcing No-Cost Therapy for Utah Bar Members

The Utah Bar has partnered with Tava Health to offer all licensees no-cost therapy through Tava's intuitive online platform.

#### How it works

- Sign up and match with a licensed, high-quality therapist.
- Attend sessions through convenient and confidential online video.
- Pay nothing—the cost of your first 6 sessions is completely covered.
- Available to all licensees, including
  - Attorneys
  - Licensed Paralegal Practitioners
  - Paralegals
  - and their dependents



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Learn more at  
[care.tavahealth.com](https://care.tavahealth.com)

# IN MEMORIAM

*This "In Memoriam" listing contains the names of former and current members of the Utah State Bar, as well as paralegals, judges, and other members of the Utah legal community whose deaths occurred over the past year, as reported to the Utah State Bar. To report the recent death of a former or current Bar member, paralegal, or judge please email [BarJournal@utahbar.org](mailto:BarJournal@utahbar.org).*



## JUDGES

Raymond M. Harding  
Clint S. Judkins  
Susan Weidauer

## ATTORNEYS

Benjamin R. Allen  
John B. Anderson  
Robert M. Anderson  
Jenaveve Arnoldus  
Robert L. Backman  
Rachael Parkes Beckstrom  
Joseph N. Beecroft  
Wallace T. Boyack  
Carl B. Boyd Jr.  
Kenneth H. Brendel  
Calvin E. Clark  
Michael Chidester  
Aldine Jacob Coffman Jr.  
Gordon C. Coffman  
Matthew J. Costinett  
William J. M. Dalgliesh

Wayne T. Dance  
Earl Dorius  
Howard Lee Edwards  
Lynda P. Faldmo  
Anthony J. Famulary  
Amy Fiene  
L. Raymond Gardiner Jr.  
David L. Gillette  
Mary Lou Godbe  
Thomas R. Grisley  
Paul M. Halliday  
Doris M. Harker  
Robert L. Harrington  
Orrin G. Hatch  
David G. Hermann  
Ray Phillips Ivie  
R. Craig Johnson  
Kevin J. Kurumada  
D. Scott Little  
Robert L. Lord  
Thomas E. Lowe  
Reed L. Martineau

Jimi Mitsunaga  
Matthew L. Nebeker  
Kellie K. Nielsen  
Parker M. Nielsen  
Margaret C. Osswald  
William G. Pope  
Hal J. Pos  
Waldemar E. Rasmussen  
Randall L. Romrell  
C. Keith Rooker  
Carey A. Seager  
David M. Seeley  
Roger T. Sharp  
Robert LeGrande Stott  
Michael V. Stuhff  
Brooks M. Taylor  
Verl R. Topham  
Gerald Lewis Turner  
Rebecca Van Uitert  
Ann L. Wasserman  
David L. Wilkinson  
Leland K. Wimmer

# Remembering Randy Romrell

1944–2022



Randy Romrell was a long-time, respected editor of the *Utah Bar Journal*. He was a principal member of the task force that created the publication in 1973. His service continued on the editorial board in roles as varied as Principal Articles Editor, Associate Editor, and – until his retirement in 2013 – as the Art/Design Editor. For many years it was Randy who personally selected the photographs that were featured on *Utah Bar Journal* covers. His commitment and service to the *Journal* can not be overstated.

As we learned of Randy's passing earlier this year, a few long-time *Bar Journal* editors shared the following memories of working with Randy.

I'm not sure where Randy came by his technical skill concerning photography or his discerning eye for a great photo. But during the many years that he was in charge of our cover photos, he was quite adamant that we never deviate from featuring some aspect of Utah's scenic beauty on the cover. On the rare occasion when some of us thought our cover should feature something else, like a portrait of a deceased legal luminary or something apropos a special issue on, say, professionalism or lawyers helping lawyers, Randy was a formidable opponent – even when in a minority of one. We managed to work in only a couple of exceptions to the Randy Rule per decade.

My favorite memory of Randy is when, in his uniquely kind way, he rejected the only photo I ever submitted for consideration as a *Bar Journal* cover. It was a beautiful vista in Arches National Park. Randy complimented me on the subject and composition, but gently shared some concerns he had about aperture, ASA, f-stop and such, in encouraging me to try again. It all went over my head, but I think it was his way of saying, "Photos taken with a point-and-shoot camera just won't cut it." I'm sure he was absolutely right about that.

**Judge Gregory Orme, *Utah Bar Journal* Judicial Advisor**

I met Randy when I started as an article editor on the Bar Journal Committee. Randy was a genuine and kind individual. He was dedicated to the *Bar Journal* and spent many years selecting the cover photos for the *Bar Journal*. Randy was a perfectionist and made sure that the *Bar Journal* always had a beautiful cover. The Bar Journal Committee continues to strive to live up to the high standard that he set for us, and his presence on the committee is missed.

**Alisha Giles, *Utah Bar Journal* Editor-in-Chief**

Randy was a true gentleman – thoughtful and friendly. I met him years ago on the Bar Journal Committee, when he was responsible for selection of our cover photos. I had taken a job at a company where Randy had worked previously, and we knew a lot of the same people. He often asked about them, and had nothing but fond recollections and complimentary things to say. I never saw Randy in a cross mood and never heard him say an unkind word about anyone. Randy cared about people. Lawyers are at their best when solving problems rather than creating them. I can't imagine Randy ever being the cause of a problem, other than that the world is now a slightly less gentle and courteous place without him.

**Todd Zagorec, *Utah Bar Journal* Editor at Large**

Utah State Bar.

# Spring Convention in St. George



**March 16–19**

**Dixie Center at St. George**

1835 Convention Center Drive | St. George, Utah

*Make your plans  
to attend today!*

# 2023 “Spring Convention in St. George” Accommodations

Room blocks at the following hotels have been reserved. You must indicate that you are with the Utah State Bar to receive the Bar rate. After “release date” room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does NOT include tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
<b>Clarion Suites</b> (435) 673-7000	\$139	10–2Q 10–K	2/16/23	1
<b>Comfort Inn at Convention Center</b> (435) 628-8544	\$189		2/16/23	0.5
<b>Courtyard by Marriott</b> (435) 986-0555	\$259	15–Q&K	1/30/23	3.5
<b>Fairfield Inn</b> (435) 673-6066	\$199 \$179	5–2Q 10–K	2/14/23	0.3
<b>Hampton Inn</b> (435) 652-1200	\$229	15–2Q 10–K	2/16/23	4
<b>Hilton Garden Inn</b> (435) 634-4100	\$199 \$179	5–2Q 10–2K	2/14/23	0.3
<b>Holiday Inn Express &amp; Suites, St. George North</b> (435) 986-1313 x10	\$85	10–2Q 10–K	1/16/23	12
<b>Holiday Inn St. George Conv. Center</b> (435) 628-8007	\$199–2Q \$179–K	10–2Q 20–K	2/14/23	0.5
<b>Hyatt Place</b> (435) 656-8686	\$199 \$189	10–2Q 10–K	2/14/23	0.5
<b>Red Lion Conference Center</b> (435) 628-4235	\$159		2/16/23	1.5
<b>St. George Inn &amp; Suites</b> (435) 673-6661	\$179	8–2Q 7–K	2/16/23	1
<b>TownePlace Suites</b> (435) 986-0555	\$259	10–K	1/30/23	3.5
<b>Staybridge Suites</b> (435) 688-8900 ext 2	20% off room rate email: mindyh@inntrusted.com to reserve		2/16/23	.75
<b>Tru by Hilton</b> (435) 634-7768	\$185 \$169	5–2Q 10–K	2/16/23	.75
<b>My Place Hotel</b> (435) 674-4997	\$180 \$170	10–2Q 10–Q	2/01/23	6

Visit [utahbar.org/springconvention](http://utahbar.org/springconvention)  
to book your reservation today!

# 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 recent free legal clinic. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

## Private Guardian ad Litem

Jessica Couser  
Delavan Dickson  
Laura Hansen  
Chase Kimball  
Allison Librett  
Celia Ockey  
Lilian Reedy  
Samuel Sorensen  
Virginia Sudbury

## Pro Bono Appointments

Jared Allebest  
Russell Yaune

## Pro Se Debt Collection Calendar

Hilary Adkins  
Miriam Allred  
Greg Anjeweirden  
Mark Baer  
Tom Barton  
Pamela Beatse  
Keenan Carroll  
David Cox  
Ted Cundick  
Marcus Degen  
Mary Essuman  
Blake Faulkner  
Leslie Francis  
Greg Gunn  
Scotti Hill  
Mindy Kidd  
Andrew Lajoie  
Amy McDonald  
Vaughn Pederson  
Cami Schiel  
Taylor Smith  
Theo Smith

George Sutton  
Rheane Swenson  
Mark Thornton  
Joseph Watkins  
Austin Westerberg

\*With special thanks to  
Kirtan McConkie and  
Parsons Behle & Latimer for  
their pro bono efforts on  
this calendar.

## Pro Se Immediate Occupancy Calendar

Mark Baer  
Alex Baker  
Joel Ban  
Pamela Beatse  
Keenan Carroll  
David Cox  
Marcus Degen  
Lauren DiFrancesco  
Kit Erickson  
Anikka Hoidal  
Matt Nepute  
Nancy Sylvester  
Mark Thornton  
Glen Thurston

\*With special thanks to  
Greenberg Traurig for their  
pro bono efforts on this  
calendar.

## SUBA Talk to a Lawyer Legal Clinic

Braden Bangerter  
Travis Christiansen  
Adrienne Ence  
Bill Frazier  
Lewis Reece  
Liz Tyler

## Family Justice Center

Rob Allen  
Steve Averett  
Kelly Baldwin  
Kenny Baldwin  
Pamela Beatse  
Brett Boulton  
Lindsey Brandt  
Camille Buhman  
Jeff Buhman  
Chuck Carlston  
Keenan Carroll  
Tatiana Christensen  
Elaine Cochran  
Danielle Dallas  
Tiffany De Gala  
Erin Dickerson  
Dave Duncan  
Kit Erickson  
Scott Goodwin  
Chase Hansen  
Gage Hart Zobell  
Tana Horton  
Erin Jones  
Joni McDougal  
Brandon Merrill  
Robert Merrill  
Sandi Ness  
Dani Palmer  
Nicholle Pitt White  
Bonnie Rivera  
Richard Sheffield  
Babata Sonnenberg  
Catherine Sundwall  
Marshall Thompson  
Nancy Van Slooten  
Paul Waldren  
Amy Waldron

## Utah Bar's Virtual Legal Clinic

Ryan Anderson  
Josh Bates  
Jonathan Bench  
Jonathan Benson  
Dan Black  
Mike Black  
Douglas Cannon  
Anna Christiansen  
Adam Clark  
Jill Coil  
Kimberly Coleman  
John Cooper  
Robert Coursey  
Jessica Couser  
Jeff Daybell  
Hayden Earl  
Matthew Earl  
Craig Ebert  
Jonathan Ence  
Rebecca Evans  
Thom Gover  
Sierra Hansen  
Robert Harrison  
Aaron Hart  
Rosemary Hollinger  
Tyson Horrocks  
Robert Hughes  
Michael Hutchings  
Gabrielle Jones  
Justin Jones  
Ian Kinghorn  
Suzanne Marelius  
Travis Marker

Greg Marsh  
 Gabriela Mena  
 Tyler Needham  
 Nathan Nielson  
 Sterling Olander  
 Aaron Olsen  
 Jacob Ong  
 Ellen Ostrow  
 McKay Ozuna  
 Steven Park  
 Clifford Parkinson  
 Alex Paschal  
 Katherine Pepin  
 Leonor Perretta  
 Cecilee Price-Huish  
 Stanford Purser  
 Jessica Read  
 Brian Rothschild  
 Chris Sanders  
 Alison Satterlee  
 Thomas Seiler  
 Luke Shaw  
 Kimberly Sherwin  
 Angela Shewan  
 Peter Shiozawa  
 Emily Sopp  
 Farrah Spencer  
 Liana Spendlove  
 Brandon Stone  
 Charles Stormont  
 Mike Studebaker  
 George Sutton  
 Jeannine Timothy  
 Jeff Tuttle  
 Christian Vanderhooft  
 Alex Vandiver  
 Jason Velez  
 Kregg Wallace  
 Joseph West

### Utah Legal Services Pro Bono Case

Geena Arata  
 Jenny Arganbright  
 Melissa Bean  
 Christopher Beus  
 Lindsey Brandt  
 Michael Branum  
 Brent Brindley  
 Lorraine Brown  
 Adam Buck  
 Cleve Burns  
 Justin Caplin  
 G. Scott Dorland  
 Donna Drown  
 Carolina Duvanced  
 Angela Elmore  
 Aaron Garrett  
 Jonathan Good  
 Curtis Grow  
 Sierra Hansen  
 Lani Silva Harris  
 Tre Harris  
 Aaron Hart  
 Rori Hendrix  
 Tana Horton  
 Ryan James  
 Heather Jemmett  
 Jenny Jones  
 Aaron Kinkini  
 Linzi Labrum  
 Gail Laser  
 Erin Locke  
 Orlando Luna  
 Liane Monroe  
 Andres Morelli  
 Keil Myers  
 Jacob Ong  
 RobRoy Platt  
 Emily Rains  
 Lillian Reedy  
 Ryan Simpson

Shawn Smith  
 Matthew Snarr  
 Megan Sybor  
 Ivy Telles  
 Jordan Westgate  
 Rachel Whipple  
 Colburn Winsor  
 Robert Winterton  
 Russell Yaune

### Wills for Heroes

Alandra Adams  
 Vanessa Andelin  
 Scott Anderson  
 Kimberly Baum  
 Steven Black  
 Heather Burton  
 Andra Edmund  
 Kaylen Fetherston  
 Christopher Fournier  
 Cate Grantham  
 Calindy Green  
 Blaine Hansen  
 Karen Kreeck  
 Katie Lawyer  
 Stefanie Ray  
 Brady Snyder  
 Nancy Sylvester  
 Mindy Talbot  
 Daniel Vincent  
 David Ward  
 Candace Waters

### Pro Bono Initiative

Susan Astle  
 Jonathan Benson  
 Corttany Brooks  
 Brent Chipman  
 Dan Crook  
 Mary Anne Davies  
 Marcus Degen  
 Dave Duncan

Annie Edwards  
 Ana Flores  
 Sara French  
 Jeff Gittins  
 Samantha Hawe  
 David Head  
 April Hollingsworth  
 Beth Jennings  
 Jeremy Jones  
 Ezzy Khoasanga  
 Adam Long  
 John Macfarlane  
 Kenneth McCabe  
 Grant Miller  
 Keil Myers  
 Leonor Perretta  
 Cameron Platt  
 Clayton Preece  
 Stewart Ralphs  
 Lauren Scholnick  
 Jeremy Sink  
 Ethan Smith  
 Charles Stormont  
 Michael Thornock  
 Tracey Watson  
 Nicholle Pitt White  
 Leilani Whitmer  
 Katy Wilhelm  
 Mark Williams

### Timpanogos Legal Center

MacKenzie Armstrong  
 Amirali Barker  
 Sol M Huamain  
 Keil Meyers  
 Amy Sauni  
 Babata Sonnenberg  
 Alexandra Thomas-Vakauta  
 Nancy Van Slooten

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# Attorney Discipline

Visit [opcutah.org](http://opcutah.org) for information about the OPC, the disciplinary system, and links to court rules governing attorneys and licensed paralegal practitioners in Utah. You will also find information about how to file a complaint with the OPC, the forms necessary to obtain your discipline history records, or to request an OPC attorney presenter at your next CLE event. **Contact us – Phone: 801-531-9110 | Fax: 801-531-9912 | Email: [opc@opcutah.org](mailto:opc@opcutah.org)**

Please note, the disciplinary report summaries are provided to fulfill the OPC's obligation to disseminate disciplinary outcomes pursuant to Rule 11-521(a)(11) of the Rules of Discipline Disability and Sanctions. Information contained herein is not intended to be a complete recitation of the facts or procedure in each case. Furthermore, the information is not intended to be used in other proceedings.

## PUBLIC REPRIMAND

On October 19, 2022, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Margaret S. Edwards for violating Rules 8.4(b) (Misconduct) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

A prosecutor was assigned to prosecute a defendant for three domestic violence felonies. The prosecutor and the defendant's attorney negotiated a plea agreement where the defendant would plead guilty to two third degree felonies and two misdemeanors. As the prosecutor was in the courtroom waiting for the judge to take the bench, Ms. Edwards approached the prosecutor and asked to speak with him about the case. Ms. Edwards informed the prosecutor that she represented third-parties who had an interest in the defendant's cases. Ms. Edwards represented that her clients were friends of the defendant who had served with him multiple tours of duty during his extensive time in the military. Ms. Edwards represented that these friends were taking a special interest in the case and they were concerned that the defendant would be pleading guilty to felony-level offenses.

The prosecutor said he could not discuss the case with Ms. Edwards. However, she made statements to him to the effect that "he could be a hero" if he were to reduce the charges, and that she had "looked [him] up on line." Ms. Edwards made additional statements including that: "he was a smart person who could be counted on to the right thing," that the defendant's friends were "dangerous people," and that he would potentially "make enemies" if the plea were to be entered as planned. The prosecutor felt Ms. Edwards was threatening him and was also concerned for the victim.

Ms. Edwards was charged with one count of Threats to Influence Official Action in violation of Utah Code Section 76-8-104.

### *Aggravating Factor:*

Ms. Edwards was criminally charged and entered into a diversion agreement on an issue that affects public trust.

## SUSPENSION

On April 7, 2022, the Honorable Matthew Bates, Third Judicial District, entered an Order of Suspension against Joshua Paul Eldredge, suspending his license to practice law for a period of two years. The court determined that Mr. Eldredge violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 8.1(b) (Bar Admission and Disciplinary Matters), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

This case involves two client matters. In the first matter, a man filed a petition for divorce and a few months later retained Mr. Eldredge to represent him in the matter. Initially, Mr. Eldredge filed documents in the case that contained errors. The client told Mr. Eldredge he had not been able to spend time with his daughter. Mr. Eldredge stated he would see what he could do but failed to pursue visitation rights on behalf of his client. Throughout the litigation, the client attempted to contact Mr.

## Adam C. Bevis Memorial Ethics School

**6 hrs. CLE Credit, including at least 5 hrs. Ethics**

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**March 15, 2023 or September 20, 2023**

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Eldredge for updates and left messages. Mr. Eldredge failed to respond to the requests for information.

The court scheduled an evidentiary hearing in the matter but neither Mr. Eldredge nor the client appeared for the hearing. The client contacted Mr. Eldredge's previous firm after the hearing and asked why he was not notified of the hearing. Eventually the court scheduled and held a pretrial conference after an unsuccessful mediation. The client continued to attempt to contact Mr. Eldredge to obtain information about the status of his case and the next steps in the matter. The court gave notice that due to inactivity, the case would be dismissed. Mr. Eldredge failed to address the court's notice and failed to appear at the order to show cause hearing and the case was dismissed. The client continued to contact Mr. Eldredge after the case was dismissed. The OPC sent a Notice requesting Mr. Eldredge's response. Mr. Eldredge did not timely respond to the Notice.

In the second matter, a client retained Mr. Eldredge to represent her in her divorce matter, paying a fee for his services. The client sent Mr. Eldredge the necessary paperwork to draft the petition for divorce. Mr. Eldredge stated that he would provide a draft copy to the client. Several months passed while the client attempted to contact Mr. Eldredge to obtain status updates or a copy of the draft petition. Meanwhile, the client's husband filed his own petition for divorce and a motion for temporary orders. The client contacted Mr. Eldredge indicating her husband gave her documents, including one that awarded him custody of their children and she didn't know what to do with them and asked that he contact her as soon as possible. Mr. Eldredge stated that he filed the client's petition for divorce and that it was out for service, neither of which was true. The client continued to attempt to contact Mr. Eldredge until he recommended that she retain another attorney for representation. The client requested a refund to hire another attorney to represent her.



The Disciplinary Process Information Office is available to all attorneys who find themselves the subject of a Bar complaint, and Jeannine Timothy is the person to contact. Jeannine will answer all your questions about the disciplinary process, reinstatement, and relicensure. Jeannine is happy to be of service to you.

**801-257-5518 • [DisciplineInfo@UtahBar.org](mailto:DisciplineInfo@UtahBar.org)**

Mr. Eldredge was charged with DUI and other violations. Mr. Eldredge was sentenced to thirty days in jail for impaired driving. The total time was suspended, and a fine was imposed.

## RESIGNATION WITH DISCIPLINE PENDING

On September 7, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of James J. Packer for violation of Rules 8.4(b) (Misconduct) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

Mr. Packer entered a plea of no contest to one count of Communications Fraud, a second-degree felony in violation of Utah Code Section 76-10-1801(1)(d).

Mr. Packer was working as general counsel for a company and met with a man interested in investing funds in a company on behalf of Chinese citizens trying to obtain visas through investment properties. When the company failed to meet the statutory requirements to obtain the visas, Mr. Packer advised the man to invest in a different company. Mr. Packer was the owner of the second company but this was not disclosed to the man. Mr. Packer created documents and made statements that made the business venture look promising and to make it seem like a profitable investment. Mr. Packer pretended to invest money of his own presenting the man with a withdrawal slip from one bank account and then a subsequent deposit slip to into the company's account.

The man invested money in the scheme and later discovered that Mr. Packer had taken some of the money intended for the company and deposited it into his personal account. The remaining funds were used by Mr. Packer to pay off loans.

## RESIGNATION WITH DISCIPLINE PENDING

On September 27, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Jeffery Price for violation of Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), and Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

### *In summary:*

Jeffery Price was the personal and business attorney for a client for many years. The client's company (Company) entered into a purchase agreement with a construction company for equipment built by the Company. The terms of the purchase agreement required the construction company to deliver a portion of the purchase price into Mr. Price's attorney trust account with subsequent payments to be made into the trust account as terms of the agreement were fulfilled. The money was then to be wired to the Company's designated account at different stages of the manufacturing and shipping process. Mr. Price received the

funds for the initial payment and subsequent payments and transferred them to the Company. Mr. Price received the final payment from the Company. Four days later the client provided Mr. Price with bills of lading for delivery of the equipment and requested that Mr. Price make the final wire transfer to the Company. Over the next several days, the client sent follow-up texts and emails to Mr. Price because he had not received the wire transfer. Mr. Price admitted to the client that he had used the remaining funds for his own personal use.

## DELICENSURE

On October 24, 2022, the Honorable Kent Holmberg, Third Judicial District, entered an Order of Delicensure/Disbarment against David M. Rees, delicensing him from the practice of law. The court determined that Mr. Rees violated Rules 8.4(b) (Misconduct) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

Mr. Rees was subject to an indictment and charged with twenty-seven offenses. Based upon the indictment, Mr. Rees accepted a plea agreement, charging him with conspiracy, a class D felony in violation of 18 U.S.C. § 371.

Mr. Rees met a man (co-defendant) and started obtaining hard-money loans from him to fund his own business ventures. Mr. Rees never acted as co-defendant's attorney, never provided legal advice or billed for legal services. Mr. Rees was aware that co-defendant used various illegal practices to increase his stock holdings and proceeds and assisted co-defendant with some of those practices. Mr. Rees knew that co-defendant routinely used "straw" owners or nominees to open accounts, hold shares of stock, and incorporate entities. Co-defendant also instructed Mr. Rees to facilitate the sale of stocks using the nominees. Whenever co-defendant used a nominee, he continued to exercise control over the asset.

Mr. Rees participated in establishing nominees for co-defendant including nominees for transactions that co-defendant did not want to perform under his name in the United States. Mr. Rees' law firm received proceeds from the sale of stock and Mr. Rees arranged for those proceeds to be forwarded from the firm's IOLTA account to co-defendant's account. Mr. Rees assisted in diverting funds that were for international nominee transactions, instead the funds were divided among Mr. Rees, his assistant and others. Mr. Rees also participated in the publication of misleading promotional materials to increase liquidity of stock.



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## LPPs: Providing Important Access to Justice

by Lindsey K. Brandt, LPP

I always appreciate hearing a good quote from Martin Luther King Jr. It's often a gentle reminder that the work I do for others is only a small fraction of something much larger. My favorite quote reads, "Injustice anywhere is a threat to justice everywhere." When LPPs provide lower-cost access to justice, they are not only providing legal advice and assistance to individuals that cannot afford an attorney, but they are also serving their community and helping others fight against discrimination, violence, injustice, corruption, and personal trauma.

We have all seen or heard stories about horrible things happening to some of the best people. Life happens, and as we all try to navigate it the best way that we can, we realize that none of us are immune from experiencing all of what life has to offer, be it love, happiness, grief, pain, trauma, or a simple injustice of some sort.

As an LPP who practices family law, every day I work with individuals who have experienced something on this spectrum; I get a front-row seat to real-life trauma as it plays out, affecting children, grandparents, and families. It never matters what side of the fence people land on in life, whether they have wealth or they are living in poverty. Litigation is always stressful; there is no way around that.

Some people have a spouse who has left them alone with a child or children while others have ended marriages or relationships that didn't work, became dangerous, or were simply "easier" to walk away from. In some cases, there are those who simply cannot find a way through their current life situation, and they find themselves in a position in which they need court intervention for the adoption of one or all of their children.

While faced with these life-changing decisions, there is little time for those involved to face the reality of the perpetual cycle of trauma to which they have been exposed. Their jarring, new reality alone can be enough to send the healthiest people into an abyss of emotions. These types of situations leave behind children and families to face food insecurity, lack of transportation, fear of deportation, fear of homelessness, depression, suicide, and sometimes continued physical and emotional violence in the home, alongside financial instability through their retirement years.

We often go about our daily lives not thinking about litigation and how it affects those going through it. That doesn't mean litigation doesn't exist all around us, though. It is real, and it can feel very harsh. Families and individuals with limited means, in particular, are in need of access to justice at lower costs or sometimes at no cost at all.

The court can be an equalizer in family law, but all too often, there isn't enough money to go around for the court to be able to do so, and one party may be left with a ruling that is unconscionable due in part to the fact that one party simply could not afford an attorney.

The role of an LPP is to provide a service to those who need access to justice. Costs should not be a barrier to those in need when it comes to fighting for basic access to food, shelter, and safety for individuals, unborn children, and their families. The law is complex and nuanced, and no one understands everything about every area. It is unrealistic to expect those going through an unforeseen circumstance to be able to get caught up on the law to the point where they can fight the opposing party in a court pro se. The reality of these situations is that some individuals who are pro se are up late at night at the library after work because they don't have access to the internet or a computer to be able to fill out basic court forms. This divide creates a lack of equity and an inequality in the justice system and places a heavy burden on judges and commissioners who cannot give legal advice to parties. Resources are already limited, so LPPs play a part in lessening the burden when it comes to limited resources and underpaid attorneys who cannot afford to take on clients who cannot pay.

I am thankful that I get to serve my community through volunteering as an LPP at the Timpanogos Legal Center and at Tycksen and Shattuck. I am lucky to have found a home for my practice where I get to work with some of the best family law attorneys and where the partners have become my mentors, continually challenging me to grow as a professional. I am encouraged by the growth of the LPP program, excited to see where it will go, and pleased by the diverse cases that I see my colleagues taking on as they fight for access to justice for their clients. I also stand in amazement as I watch my clients walk away with a renewed sense of hope that they have the legal advice and encouragement they need, regardless of what the outcome of their case will be; what matters is that they are heard and have access to the support they need no matter what happens once litigation has commenced.

*LINDSEY K. BRANDT Practices Family Law as an LPP at Tycksen and Shattuck LLC and is also the owner of Brandt Law PC.*



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