

Utah Bar JOURNAL

A scenic photograph of a river flowing over mossy rocks in a forest with autumn foliage. The water is blurred, creating a sense of motion. The rocks are covered in green and brown moss. The background is filled with trees with yellow and orange leaves.

Volume 35 No. 6
Nov/Dec 2022



Shorter Name. Same Great Results.

The Firm has changed its name to Cutt, Kendell & Olson ("CKO"). But the results have never been better. CKO is pleased to announce that 2022 has been its most successful year since the firm started handling catastrophic injury cases over 22 years ago. CKO's 2022 results (thus far) include:

~~\$92 MILLION~~

RECOVERED

~~59~~

CASES CLOSED

~~\$7.05 MILLION~~

JURY VERDICT

\$100.3 MILLION recovered on 67 cases closed.

CKO works with other lawyers, accepting referrals and co-counsel arrangements, in tort, insurance and professional malpractice cases. Due to CKO's reputations and track record, the vast majority of cases handled by CKO are referred or co-counseled.

**CUTT
& KENDELL
OLSON**

Contact us if you'd like to discuss a case.

215 State St Suite 900, Salt Lake City, UT 84111 | 801-901-3470
WWW.CKOLAW.COM

The Utah Bar Journal

Published by the Utah State Bar | 645 South 200 East, Salt Lake City, Utah 84111 | 801-531-9077 | www.utahbar.org

BAR JOURNAL EDITORIAL BOARD

Editor-in-Chief

Alisha Giles

Utah Law Developments Editor

Victoria Carlton

Southern Utah Correspondent

Stephen Dent

Paralegal Representative

Greg Wayment

Managing Editor

Andrea Valenti Arthur

Utah Bar Developments Editor

Scotti Hill

Editors Emeritus

William D. Holyoak

Judge Catherine E. Roberts (Ret.)

Bar Staff Liaison

Christine Critchley

Articles Editors

Victoria Luman

Jacqueline Carlton

LaShel Shaw

Jessame Jensen

Erin Burke

Judicial Advisor

Judge Gregory K. Orme

Editor at Large

Todd Zagorec

Advertising/Design Manager

Laniece Roberts

Departments Editor

Ryan Beckstrom

Copy Editors

Hal Armstrong

Paul Justensen

Nicole Lagemann

Young Lawyer Representative

Ashley Biehl

MISSION & VISION OF THE BAR:

The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.

We envision a just legal system that is understood, valued, and accessible to all.

Cover Photo

Golden Hour Big Cottonwood Creek by Utah State Bar member Kathryn Tunacik Smith.

KATHRYN TUNACIK SMITH is a partner at Strong and Hanni law firm in Salt Lake City. She has a litigation practice with an emphasis on transportation and insurance defense. Regarding her photo, Kathryn said "I stood with my tripod in Big Cottonwood Creek to capture this scene. I was captivated by the way the colors of the leaves are repeated on the mossy rocks. Landscape photography is how I relax and recharge after days spent litigating and raising three active little girls. I find it very rewarding to have this creative outlet."



HOW TO SUBMIT A POTENTIAL COVER PHOTO

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs by e-mail .jpg attachment to barjournal@utahbar.org, along with a description of where the photographs were taken. Photo prints or photos on compact disk can be sent to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.



Like the Utah Bar Journal on Facebook at www.facebook.com/UtahBarJournal.

Table of Contents

President's Message Returning to In-Person by Kristin K. Woods	9
Views from the Bench Embracing Online Jury Selection by The Honorable Matthew Bates	10
Commentary Evolving Innovation in the Law by Deno Himonas, Victoria B. Finlinson, and Taymour B. Semnani	14
Commentary The Sandbox by Jeffrey D. Eisenberg	17
Article In Defense of the Imperial System of Measurement in Law by Steven Rinehart	29
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth	35
Lawyer Well-Being Overcoming Imposter Syndrome: What it is, What it isn't, and What You Can Do About It by Martha Knudson	39
Article Resolving The <i>Dahl</i> Conundrum: The Public Policy Conflict Between Asset Protection Trusts and The Equitable Division of Marital Assets by Alexander Chang and Bart J. Johnsen	44
Article When NFTs and Intellectual Property Collide by Alexis Nelson	50
Book Review The Dictionary Wars by Peter Martin Reviewed by The Honorable Michael Leavitt	53
Focus on Ethics & Civility Lessons From <i>Alex Jones</i> : The Rules Governing Inadvertently Produced Documents by Keith A. Call	55
State Bar News	58
Young Lawyers Division New Opportunities by Cedar Cosner	66
Paralegal Division Message From the Chair by Katie Lawyer	67
CLE Calendar	68
Classified Ads	69

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: \$30; single copies, \$5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Statements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. Publication of advertisements is not to be considered an endorsement of the product or service advertised.

Copyright © 2022 by the Utah State Bar. All rights reserved.



DEWSNUP • KING • OLSEN • WOREL
HAVAS • MORTENSEN • MILNE

ATTORNEYS AT LAW

Est. 1990

Experience and Energy



**With more than three decades of
complex injury litigation, we are ready
to take your case to the next level.**

**Catastrophic Injury • Medical Malpractice • Product Liability • Aviation Disasters • Personal Injury
Oil, Gas, Mining and Construction Accidents • Wrongful Death • Trucking Accidents**

dkowlaw.com

801.533.0400 • 800.404.8520

Interested in writing an article or book review for the *Utah Bar Journal*?

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 e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Articles that are 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 e-mail to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail 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 an author is in doubt about the suitability of an article they are 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. Authors are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

PUBLICATION: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which 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. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

RESPONSIVE. ACCOMMODATING. UNDERSTANDING.

“ALPS is a fantastic company and one that I very much appreciate our relationship. They are responsive and accommodating and truly understand the meaning of customer service. I would Highly recommend them to any one!”

► Strong & Hanni Law Firm, A Professional Corporation, Salt Lake City, UT

Utah law firms can connect directly with ALPS Insurance Specialist, Larry Vaculik, at lvaculik@alpsinsurance.com or by calling (800) 367-2577.

Learn more about how ALPS can benefit your firm at

www.alpsinsurance.com/utah



4.8 / 5

Endorsed by



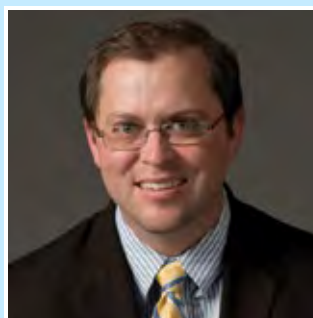
THE NATION'S LARGEST DIRECT WRITER OF LAWYERS' MALPRACTICE INSURANCE



Medical Malpractice Co-Counsel You Can Count On



- Experienced
- Creative
- Knowledgeable
- Respected



RECENT CASE RESOLUTIONS:

\$8.5M: Severe brain injury

\$5M: Wrongful death from undiagnosed heart issue

\$4M: Ruptured appendix nerve injury

\$3M: Wrongful death from delayed treatment of heart issue

\$2.8M: Brain injury from bariatric surgery

\$1M Policy: Leg amputation from blood clot

\$1M Policy: Delayed breast cancer diagnosis

\$1M Policy: Gynecological surgery scarring

**Give us a call to discuss
how we can help you
with your complex
medical malpractice case!**


G. ERIC NIELSON
AND ASSOCIATES
— A MEDICAL MALPRACTICE LAW FIRM —

4790 Holladay Blvd. • Salt Lake City

801-424-9088 • www.ericnielson.com

Returning to In-Person

by Kristin K. Woods

As I was summoned to court, in-person, for the first time in three years, I begrudgingly dragged out, and put on, my suit pants. Remember the good ol' "business on the top, party on the bottom" Webex days of yore? As our courts have started the process to bring us back to in-person hearings, I know many of you share my disappointment. Yes, I'm biased. I'm a family law attorney who doesn't do jury trials. My hearings are often brief, and the trip to court (and through security) oftentimes is longer than my actual business in the courtroom. In my practice, it has been such a benefit to my clients to tell them that they can just step out of work briefly to appear remotely rather than taking the day off or that my disabled adult wards in guardianship matters do not need to make the hard journey away from home to complete their matter. It was also a boon to my business, as I was able to appear statewide, for less money charged to the client, and to share my expertise in guardianship law with clients

across the state. If I were a criminal law practitioner, I'm sure I would be speaking about the boon that appearing remotely was to clients seeking access to justice and due process. I was hoping that the court would decide to leave certain hearings routinely on Webex, and other, more complicated matters could be moved to in-person. However, so far, that doesn't seem to be the case.

Yes, I'm biased. I am not a judge. I know it has been difficult for judges to manage the technological ineptitude that parties, attorneys, and kitty cat filter users around the country have brought to their bench. We have all been present at virtual hearings wherein the judge has had to take time to repeatedly ask people to "mute themselves," "speak up, we can't hear you," or "turn the camera on by pushing the little button that looks like a camera." That's annoying, no doubt. And just as my millennial brain doesn't understand why Snapchat is appealing, I'm sure some judges just don't understand the appeal of allowing technology to dominate the courtroom.

All of these complexities have led us to a debate, that will hopefully be ongoing, about the place that technology and virtual appearances have in the courtroom process. The overwhelming feedback that we have received from attorneys across the state is that virtual appearances, in non-complex hearings, are both desirable and more affordable for the client. I am an attorney who falls squarely into that camp. I would be the first to encourage our courts to consider making virtual appearances the default, investing in technological solutions and employees to make the technological process easier to manage for our judges, and focusing the courts' efforts on

innovation into improving the courthouse experience to make our clients' access to justice easier and more accessible.

Don't get me wrong. In-person is great in so many ways, but forcing the client to pay their lawyer for a two-hour experience rather than a

fifteen-minute one is not one of them. In a time where debate rages on about how much money to invest in unique and esoteric national innovation, why not slow down, look around, and invest in the local innovation that the pandemic forced us into and showed us is possible.

And, speaking of in-person, please consider attending the Fall Forum on November 4th in Salt Lake City – the first in-person Fall Forum event since the pandemic began – where we have a stellar group of presenters, including Governor Cox, the Utah Supreme Court (presenting on the Office of Legal Services Innovation sandbox), and state legislators (presenting on the effort to create a Chancery Court in Utah).

Innovation in Utah surges forward, but let's make sure not to leave our clients behind.

"Innovation in Utah surges forward, but let's make sure not to leave our clients behind."



Embracing Online Jury Selection

by The Honorable Matthew Bates

In March 2020, the world descended into darkness. A global pandemic shuttered businesses, schools, and government offices. General hysteria prevailed. Feral dogs roamed the streets, and toilet paper disappeared from store shelves. It was a bleak and difficult time. Utah courts stopped holding in-person hearings, including jury trials. In hindsight, that was wise, because there was no toilet paper to stock the public restrooms.

As time passed and scientists learned more about the virus, people put on masks and slowly returned to work and school. And the country rebuilt its strategic reserves of toilet paper. But courtrooms remained closed to the public. The judiciary understood that it was in “the unique position of having authority to compel individuals to attend court proceedings in person,” and judges were reluctant to force the public to appear at what could become a judicial superspreader event. This was especially true of jury selection.¹

Jury selection before the pandemic was no model of good public health. Jury clerks summoned a crowd of random strangers and jammed them shoulder to shoulder into a courtroom with an HVAC system built by the lowest bidder. There they sat breathing on each other for four to five hours while lawyers peppered them with questions like, “Does the fact that your mother-in-law’s second cousin’s dentist was once sued for malpractice cause you to have strong feelings about residential boundary disputes?” It was inconvenient for the public, it took a long time, and even before the pandemic it probably resulted in spreading endemic illnesses. But we did it that way because our forebears had done it that way, and their forebears had done it that way, and their forebears’ forebears had done it that way clear back to the Magna Carta.

So jury trials were suspended, and judges and staff watched helplessly as cases backed up. Then some brilliant court staffer had the idea to try picking a jury using written questionnaires

and a short video conference selection process. I do not know where the idea came from, but I like to imagine that a trio of deceased Supreme Court justices revealed it to one of the jury clerks in a dream.

I must admit, at first I was skeptical, and I assumed the bar would protest. Was not part of jury selection watching how the potential jurors behaved? Seeing how they interacted with each other? Observing how often they scratched their noses? Noticing who fell asleep and who talked too much? I figured online jury selection would be something that we tried once or twice and then discarded as a miserable failure.

Of course, I was wrong. Between January 2021 and February 2022, the Third District Court conducted 115 virtual jury selections. And we discovered that online jury selection had many benefits. It took less time than in-person jury selection. It allowed jurors to stay busy doing other things when they were not being directly questioned by the court or attorneys. And it halved the juror non-appearance rate. Judges loved it. Attorneys loved it. Potential jurors loved it. But most importantly, I loved it. And I hope it becomes a permanent part of our judicial system.

With that short, questionably-accurate account of the origin of online jury selection, let me offer some pointers to make online jury selection go smoothly. These tips come from my experience in the cradle of civilization, the Third District. Those practicing in other districts might want to check with their local bench.

JUDGE MATTHEW BATES was appointed to the Utah Third District Court by Governor Gary R. Herbert in July 2016. He serves Salt Lake, Summit, and Tooele counties.



How to use the Questionnaire.

By far the most efficient and important change to jury selection is the use of a written questionnaire. Upon being summoned for jury duty, each juror receives a postcard with an invitation to fill out a questionnaire online. The questionnaire contains most of the stock voir dire questions that judges and attorneys have been asking for years, along with additional questions that are commonly asked in civil and criminal cases.

If you have not yet seen the questionnaire, you should ask the Third District jury team for a blank copy to help you prepare your voir dire strategy for your next trial. The questionnaire has about forty-six questions that should give you most of what you need to exercise for-cause and peremptory challenges. But you may have additional case-specific voir dire questions that you want to ask. And in complex matters, the court may want briefing and a hearing on your proposed voir dire questions. Getting a copy of the questionnaire in advance will save you from proposing voir dire questions that are already in the questionnaire.

If you propose more than ten additional voir dire questions, you might want to ask the court to create a custom questionnaire for your case. Custom questionnaires are labor-intensive for court staff and should only be requested when the nature of the case demands substantial modifications to the standard questionnaire. But in a complex case, a carefully crafted custom questionnaire could save the parties and the court hours of questioning at jury selection.

Find yourself a good PDF reader. The juror questionnaires are lengthy – a venire of fifty potential jurors results in a questionnaire of about eighty pages – but they are also true PDFs, which means that you can highlight and search text. A good PDF reader will let you highlight and annotate the questionnaire and also search individual jurors and their answers on the fly in jury selection. I use Goodreader on my iPad. If you are an attorney or judge who still boasts of being “old school” and insists on everything being printed on paper (shame on you, you tree-killing troglodyte), you are going to waste the court and the venire’s time rifling through your three-inch binder looking for juror number twenty-three’s answer to question forty-two. It is time to join the rest of the PDF-reading world. Online jury selection moves fast (if you are doing it right), and a good PDF reader will help you keep up.

Cross-index your highlights and annotations in the questionnaire with the juror list. I have a law clerk review the questionnaire before trial and highlight answers that suggest bias, inability to serve, hardships, and other potential for-cause challenges. The clerk then notes the question number of each highlighted question on the juror list. That gives me an easy-to-use list of jurors with the corresponding question numbers next to their name. Practitioners might also note on that list those question numbers with answers that inform their peremptory strikes.

Once you have a good PDF editor and have carefully annotated the questionnaire and cross-indexed it with your juror list, plan a jury questionnaire conference with opposing counsel. At the


GreenbergTraurig

GT.LAW.COM



Local Roots. Global Reach.

Our Salt Lake City attorneys understand the dynamic nature of Utah and offer our local, regional and national clients a wealth of experience backed by GT's global platform and network.


Greenberg Traurig, LLP


GT_Law


GreenbergTraurigLLP


GT_Law

GREENBERG TRAURIG, LLP | ATTORNEYS AT LAW | 2500 ATTORNEYS | 43 LOCATIONS WORLDWIDE®

Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2022 Greenberg Traurig, LLP. Attorneys at Law. All rights reserved. Attorney Advertising. Contact: Peggy Hunt or Annette Jarvis in Utah at 801.478.6900. *These numbers are subject to fluctuation. 37063

conference, you and opposing counsel should discuss which jurors can be stricken or passed for cause based solely on the questionnaire. Many judges will order a jury questionnaire conference at the final pretrial. If your judge does not, plan the conference anyway and impress him or her with your foresight and efficiency. It is every judge's dream to have counsel show up to jury selection with a stipulated set of strikes for cause, or, even better, a stipulated set of jurors passed for cause. I have had trials in which attorneys have agreed on as many as fifteen or twenty strikes at the start of jury selection. And I have heard stories of attorneys who have shown up to trial with an agreed upon jury based solely on the questionnaires. A little work up front will save time in court and make for a happy judge and venire.

Welcome to the Internet.

If you have resisted embracing online court, or the internet in general, it is time to put your luddite morals aside and upgrade your office. Online jury selection means that in most cases the attorneys and parties will also appear by video. This will be the first time the jury sees you and your client, and you want to make a good impression. Nobody wants to see laggy, stop-motion video that looks like you are logging in from the year 2003. Get the fastest internet connection available in your area.

You should also think about your equipment and office space. Most phones and tablets will run Webex just fine, but for jury selection, you will want multiple screens. I use two: one to run Webex and another to view juror questionnaires, case files, and rules and statutes. And take time to review your video camera and microphone. The built-in camera and microphone on a laptop or monitor are often not great and may leave you looking and sounding a little fuzzy, especially on older or less-expensive models. You can significantly upgrade your camera and microphone for a few hundred dollars. Some people prefer to use a headset with an attached microphone, which works great but can sometimes look unprofessional. Whenever I see an attorney with a headset on, I mistakenly assume that he was playing Call of Duty right before the hearing started.

Lastly, avoid video conferencing systems unless you are expert at controlling them. Video conferencing systems integrate multiple cameras, microphones, and speakers into a room. But too often, attorneys using video conferencing systems are unable to work the sound properly or cannot get the camera to focus on the right person. In my experience, simpler is better. A single Logitech C920 webcam attached to one of your monitors will give you great video and sound and let you focus all your attention on the hearing.

Some of this may seem like an excessive expense just to select a jury once or twice a year. But these upgrades will improve your appearance in any video hearing, not just jury selection. Sure, a judge at a pretrial may be more forgiving than a jury about technical glitches or poor camera quality. But why risk looking unprepared? Moreover, video court is here to stay. Almost every attorney and judge that I have talked to wants to continue using Webex for scheduling conferences, pretrials, and motion hearings. So an investment now will pay dividends for years.

Dos and Don'ts During Online Jury Selection.

When you log in, make sure that Webex displays both your first and last name. The judge should know who you are, but he probably knows you as "Mr. Gardner," rather than "Jimbo." Also, the jury clerk and venire members likely do not know you, so you should include the word "Attorney" in your display name. One of the jobs of jury clerks is to move the judge and attorneys between virtual rooms to speak with different panels of jurors. Adding the word "Attorney" to your display name will allow the jury clerk to easily identify you.

Each time that you log into a hearing, ensure that your display name is correct, especially if children or prankster law partners have access to your computer or tablet. More than once, I have joined a virtual meeting only to discover that somebody changed my display name to "Batman" or "Stinkbreath." And avoid nicknames, handles, and avatars. You may be a "Superlawyer," "Grillmaster," or "Ultimate Ute Fan," but in court and in front of a jury you should just be "John Smith – Attorney."

Observe the normal courtesies of an online video conference. Keep yourself muted when you are not speaking. Make sure that your environment is free from visual distractions, such as clutter, inappropriate artwork, or activities in your background, or audio distractions, such as children, pets, and talkative law partners. The judge may ask you to introduce yourself, co-counsel, and your client to the venire. Be ready to showcase those around you by reorienting your video camera or trading places if the camera is fixed in place.

Be courteous to the jury clerk team. The Third District has a team of dedicated jury clerks who set up jury selection hearings, orient jurors, troubleshoot technical issues with jurors and attorneys, and manage the various virtual rooms for jury selection. Their job can be stressful. A kind word of encouragement or appreciation to a clerk will ensure they respond with a smile when it is your turn to have technical difficulties.²

Ask the judge at the pretrial about how he or she runs jury selection. Every judge does things a little differently, so do not assume that Judge A will run selection exactly the same as Judge B. And if a judge does something that you really like, let him or her know, and suggest it to the next judge. We are all trying to figure this out as we go, and there is no magic handbook for online jury selection.

A Word About Jurors Who Do Not Have Internet Access.

As much as I love online jury selection, there is one drawback. Participation in online jury selection necessarily requires that potential jurors be “online.” There is still a swath of our community that does not have reliable internet access – some by choice and some because it is unaffordable or it is not available where they live.

The Sixth Amendment right to a fair trial by an impartial jury includes the right to a jury that represents a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). And jury service is an important opportunity and obligation in which we expect all Utahns to participate. *See Utah Code Ann. § 78B-1-103*. We do not know for certain how excluding people with no or unreliable internet service will impact the makeup of our juries. But the excluded citizens will likely be people who can’t afford internet access or people who do not have a reliable local broadband internet provider – in other words, low-income households and rural

households – two groups that traditionally have struggled to access our justice system.

The current policy in the Third District states that jurors who do not have internet access will be excused from jury service for one year. This was an essential stopgap ordered in the haste to start a workable online selection system. As we move forward and work to improve our online jury selection process, I believe we will see this change (it might even change before this article is published). Many courthouses now have Webex enabled public computers that potential jurors can use. And judges who are adept multitaskers may allow some jurors to be in the courtroom in a hybrid online/in-person selection process.

Despite my concerns about the makeup of jury pools, I remain an enthusiastic proponent of online jury selection. It was engineered under duress and out of desperation. But it has proven to be more efficient than in-person selection and equally fair. I expect that with time and technological advances that the practice will flourish and become a bedrock component of our judicial system.

1. Administrative Order for Court Operations During Pandemic (Apr. 11, 2020), available at <https://www.utcourts.gov/alerts/docs/20220411%20-%20Pandemic%20Administrative%20Order.pdf>.
2. The Third District jury team in fact deserves much of the credit for the success of our online jury selection process. They are essential to its operation and have worked tirelessly to improve it. If you are ever blessed to meet one of these web-warriors, it would not be out of order to kneel and offer homage.

AMY M. ZHENG, M.D., M.PHIL, CHSE

Experienced Emergency and Urgent Care Expert Witness

- + Board certified in emergency medicine, in active practice
- + Experienced national lecturer and professor
- + Published VA Inspector General reports, resulted in \$53 million for veterans
- + Explains complicated medical concepts in easy to understand terms
- + Winner of the American College of Emergency Physicians teaching award



CONTACT

C: 858-299-5266 | E: amyzhengconsulting@gmail.com | W: amyzhengconsulting.com



Evolving Innovation in the Law

by Deno Himonas, Victoria B. Finlinson, and Taymour B. Semnani

The COVID-19 pandemic caused much human suffering. But it also taught us that our lifestyles, families, communities, and businesses can be improved through a reexamination of our practices and the implementation of new processes and activities. This is not a case of “out with the old and in with new;” but, rather, “out with what doesn’t work and in with what does.”

Our court system was not immune from the reexamination. Forced to reevaluate the delivery of access to our justice system, courtrooms across the United States relied heavily on technology and other innovations to adapt to the crisis.

During the pandemic (in August 2020), the Utah Supreme Court established the Utah Office of Legal Services Innovation, commonly known as the “Sandbox,” to encourage innovation with respect to the delivery of legal services. While the Sandbox fostered controversy among Bar members, we believe its advocates and critics share important goals of utilizing technology to enhance access to and efficiency within the judicial system.

On February 9, 2022, justices from the Montana, Utah, and Washington Supreme Courts participated in a panel for the CLE “Law Tech Part 1: Using Technology to Increase Access to Justice.” During this discussion, Utah was hailed an “ecosystem of innovation.” Panelists considered the Sandbox as a formidable

laboratory to develop tools to increase access to justice. Indeed, the Washington State Bar has reached out to the Office of Legal Services Innovation for assistance in developing a blueprint for their own Sandbox.

To date, the Utah Supreme Court has considered and authorized forty-three applicants in the Sandbox who have provided more than 23,000 legal services. In doing so, it has stimulated a culture of developing technologies and advancing innovations, both inside and outside of the Sandbox, aimed at giving underrepresented, lay populations the ability to make informed legal decisions and intuitive ways to engage with the otherwise-nuanced legal process. A couple of case studies serve as good examples.

Thousands of Utahns are penalized because of unintended consequences inside the court system. The debt collection docket is the largest single docket by case volume. While it also has one of the fastest throughputs, averaging less than eleven months from filing to judgment, its clearance rate is a delusion. And this throughput is owed exclusively to the highest default rate across all dockets, at 73% of debt collection cases against unrepresented parties. *Report on Debt Collection and Utah’s Courts*, UTAH BAR FOUNDATION 13 (April 2022). This can be credited to the docket with, by far, the most pro se defendants, making up 96% of all claims brought. *Id.* Moreover, according



DENO HIMONAS is a partner with the law firm of Wilson Sonsini Goodrich & Rosati. He joined the firm’s litigation and appellate practices upon his retirement from the Utah Supreme Court in March of this year. Prior to stepping off the Utah Supreme Court, where he served for seven years, Deno was a trial court judge for over ten

years. Throughout his legal career, Deno has concerned himself with issues relating to the access and affordability of civil justice in the U.S. court system.

VICTORIA B. FINLINSON is a shareholder with Clyde Snow Attorneys at Law where she practices in Labor & Employment and Civil Litigation.



TAYMOUR B. SEMNANI is a litigation attorney with Clyde Snow Attorneys at Law. His practice focuses on business matters involving partnerships, torts, real estate, and legal technology.



to the Utah Bar Foundation's recent Report on Debt Collection and Utah's Courts, less than 50% of default judgments result in successful wage garnishments. *Id.* at 32 (Apr. 2022). In other words, courts are being flooded with cases while defendants are incurring default judgments that are devastating to their personal financial condition. Yet, creditors are not collecting. The debt collection docket is characterized by extremes, and everybody loses.

One organization that is offering various alternatives to debtors and defendants – through the Sandbox – to resolve their collection issues, as well as to provide opportunities for lawyers, judges, and elected officials to learn how best to adjust the judicial system to benefit all participants, is Innovation for Justice (i4J). i4J (a social justice innovation lab that designs, builds, and tests disruptive solutions to the justice gap) studied medical debt collection issues in Utah. Medical debt represents the the most significant portion of past due bills, at 14%. *Id.* at 6. i4J has received Sandbox approval for two projects serving low-income community members experiencing medical debt in Utah:

(1) A court-sanctioned medical debt diversion program with legal advocates providing advice and assistance to defendants. i4J partnered with AAA Fair Credit to train debt relief counselors to provide free legal advice and assistance to consumers experiencing medical debt. Medical debt advocacy will be offered to defendants when they receive a ten-day summons, with the goal of resolving medical debt out of court and reducing the downstream harms of debt collection judgments.

(2) Leveraging an existing network of community health care workers and training them to augment their services by empowering them to also act as medical debt legal advocates. i4J partnered with Holy Cross Ministries, a nonprofit, ecumenical community organization, to train its community healthcare workers to offer free medical debt legal advice and assistance to their clients. As an organization embedded in the community and connected with a trusted religious institution, its providers are assisting people in identifying their legal rights as related to medical debt and assisting them in getting to resolution, perhaps before the issue erupts into court.

Rule408.com, which was developed by a Utah company, is another example of successful innovation. Rule408.com is aimed at allowing the parties to engage in a negotiation process that serves the legal objectives of two parties in dispute, while giving pro se defendants an intuitive avenue to engage with the legal

process. It catalyzes settlement negotiations by fielding confidential settlement offers. Neither party can see whether an offer was made, or the amount of the offer, unless and until the offers meet or overlap. This provides pro se defendants a way to engage in dispute resolution without needing to understand highly specialized litigation principles and also empowers the parties to negotiate in earnest without compromising the posture of their cases.

Rule408.com did not utilize the structure of the Sandbox program, as it does not provide legal representation, but it was fostered by the environment of encouraging innovation surrounding the Sandbox. In short, the Sandbox's impacts go beyond the rigid statistics of how many entities it authorizes. And thousands of Utahns will be the beneficiaries.

Consumers are looking online for simpler, more accessible, and more affordable legal assistance. Law firms and lawyers are participating in the Sandbox to innovate in this space and attract these clients through innovative service methods. Those who can afford access to competent legal representation have always, and will continue, to receive legal advice tailored to their particularized legal issues. Now for those who cannot afford that same access to justice, the Sandbox provides the ecosystem for a multitude of particularized and intuitive tools for pro se litigants' toolboxes. The Sandbox's successes are measured by both the innovations it facilitates in Utah, and the model it serves as for other states.

ANNE CAMERON MEDIATION

ATTORNEY | MEDIATOR | COLLABORATIVE PROFESSIONAL



VIRTUAL AND IN PERSON
MEETINGS AND MEDIATIONS

PARK CITY, SALT LAKE CITY
AND ZOOM LOCATIONS

FOCUSING ON FAMILY LAW

DOCUMENT DRAFTING FOR
PRO SE DIVORCE, CUSTODY,
AND FAMILY LAW

1526 UTE BLVD., SUITE 206, PARK CITY, UT 84098
5200 S. HIGHLAND DR. STE. 303, SLC, UT 84117

435-640-2158 | 435-659-8732

ANNE@AACLAWUTAH.COM

WWW.AACLAWUTAH.ORG

WWW.UTAHCOLLABDIVORCE.COM

Staying Competitive in an Evolving Market

Foley's Health Care & Life Sciences Sector team provides strategic advice in a space where new challenges emerge daily. We offer tailored solutions across the full scope of legal services to empower your business model.

For more information, please contact:
David R. Wright | Managing Partner | Salt Lake City
801.401.8910 | dwright@foley.com

FOLEY.COM



AUSTIN | BOSTON | BRUSSELS | CHICAGO | DALLAS | DENVER | DETROIT | HOUSTON | JACKSONVILLE
LOS ANGELES | MADISON | MEXICO CITY | MIAMI | MILWAUKEE | NEW YORK | ORLANDO | SACRAMENTO
SALT LAKE CITY | SAN DIEGO | SAN FRANCISCO | SILICON VALLEY | TALLAHASSEE | TAMPA | TOKYO | WASHINGTON, D.C.

FOLEY
FOLEY & LARDNER LLP

The Sandbox

by Jeffrey D. Eisenberg

Introduction

In January, the Utah Association of Justice asked me to chair a committee to investigate the “Sandbox” experiment and evaluate whether suggestions should be made for it that would benefit consumers. I have studied information about the Sandbox project available online, and literature concerning the United Kingdom’s legal deregulation project. I’ve met with former Utah Supreme Court Justice Constandinos Himonas, John Lund, the Office for Legal Services Innovation (OLSI)’s Chairman of the Board, and Sue Crismon, OLSI’s Executive Director. I’ve talked to numerous present and former Bar Commissioners and Officers.

The purpose of this article is to inform the Bar of developments related to the Sandbox, to raise concerns about aspects of the project, and to offer ideas about how the Bar and supreme court can better work together.

What is the Sandbox?

Article VIII, Section 4 of the Utah Constitution provides: “The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” I’ve learned that the Utah Supreme Court and some in the Utah Legislature disagree about the extent to which the court can or should expand its regulatory power to cover businesses controlled by non-lawyers. The creation of the Sandbox indicates that the court assumes it has plenary authority to do so.

In August 2018, the Utah Supreme Court established a Work Group on Regulatory Reform (the Work Group). In August 2019, the Work Group submitted a report, *NARROWING THE ACCESS TO JUSTICE GAP BY REIMAGINING REGULATION*. In August 2020, under Order 15, the court established a new program, the “Sandbox” to test new models of legal service delivery in the hopes of making legal services more accessible and more affordable to underserved populations and in under resourced practice areas. Sandbox experiments include non-lawyer controlled and managed entities. Utah Supreme Court Standing

Order No. 15, August 14, 2020, <https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf>. The court also created the Utah Office of Legal Services Innovation (OLSI) to evaluate, recommend, and regulate businesses providing “nontraditional” legal services (Sandbox entities) and to design and implement systems to test whether these services were harming consumers. The OLSI was also given responsibility to report empirical data to the court about whether Sandbox provider services were harming consumers. The original project was authorized for two years; last year, the court extended it for an additional five years. Utah Supreme Court Press Notifications, *Utah Supreme Court to Extend Regulatory Sandbox to Seven Years* (May 3, 2021).

Standing Order 15 begins with: “The access-to-justice crisis across the globe, the United States, and Utah has reached the breaking point. . . . The overarching goal of this reform is to improve access to justice.” Standing Order No. 15, 1, 7. In this and other communications issued by the court, the Work Group, and OLSI, it has been stressed that most citizens are currently unrepresented by a lawyer in areas such as: debt collection enforcement, divorce and domestic law, landlord-tenant proceedings, and misdemeanor criminal cases.

The regulatory requirements of Sandbox entities differ from those of bar licensed attorneys in several critical ways. First, non-lawyers who own manage or work for Sandbox entities are exempt from compliance with the Utah Rules of Professional Conduct and are not subject to discipline for violations of those

JEFFREY D. EISENBERG is a practicing trial lawyer with more than thirty years’ experience representing consumers in product liability, professional malpractice, insurance bad faith, civil rights, sexual abuse, catastrophic injury and wrongful death cases. He now practices at Eisenberg, Lowrance, Lundell, Lofgren.



duties. See Office of Legal Services Innovation, *Interested Applicants: Eligibility* (6), <https://utahinnovationoffice.org/sandbox/interested/> (last accessed Oct. 14, 2022). Second, Sandbox entities can, in some cases, share legal fees with non-lawyers, including investors. *Id.*, *Frequently Asked Questions*, <https://utahinnovationoffice.org/sandbox/frequently-asked-questions/>. Third, persons in the Sandbox who are not lawyers or paralegals can provide legal services under certain circumstances and not all Sandbox projects are lawyer led or involve lawyers as some part of the business model. Office of Legal Services Innovation Letter to Utah State Bar Regulatory Reform Committee 4 (Feb. 23, 2021), [http://utahinnovationoffice.org/knowledge-center/Resources/Press Releases/Letter to Bar Committee -February 2021.pdf](http://utahinnovationoffice.org/knowledge-center/Resources/Press%20Releases/Letter%20to%20Bar%20Committee%20-%20February%202021.pdf). Last, I can find no indication that the court is requiring all Sandbox entities, or non lawyer personnel that own, control, or manage such entities, to act as fiduciaries.

What does OLSI data show?

OLSI's August 2022 Sandbox Activity Report provides some insight into the programs approved in the Sandbox and the types of legal services being provided. Of the forty-seven approved Alternative Service Providers (ASP), twenty-six are reporting data to OLSI. OLSI reports that over 27,000 legal services have been provided to over 20,000 unduplicated clients. Over 3,300 legal services were delivered by non-lawyers. There have only been three "audits" completed of sandbox entities, and one in progress. OLSI and the court have not released information about the audit process to allow the bar or public to evaluate the rigor or efficacy of any audits.

Although the Work Group and court identified consumer credit, marriage/family law, and misdemeanor criminal cases as the main areas where there is an "access to justice" gap, to date these represent only 7% of the legal matters provided by ASPs in the Sandbox. Of the remaining 93% of legal matters handled so far by Sandbox entities, the vast majority have been in the areas of business law, military and veteran's benefits, accident/injury claims, and trusts and estates.

I've spoken to many lawyers who misunderstand several aspects of the Sandbox project. First, many lawyers have assumed that businesses can only operate in the Sandbox if lawyers own the majority interest in the business. In fact, some approved Sandbox entities are majority owned by non-lawyers.

Second, many lawyers assume that the court is only approving

Sandbox projects in areas of law which have been underserved by Bar licensed lawyers and law firms. In fact, many Sandbox entities and projects are delivering services in areas where lawyers are plentiful, even ubiquitous, including, personal injury, estate planning, business and corporate legal advice and entity formation.

Third, some lawyers assume that to have their projects approved, Sandbox applicants must promise to deliver services to low-income consumers in need of legal help. But some approved applicants have not made that commitment, and it is not required to enter the Sandbox. Office of Legal Services Innovation Letter to Utah State Bar Regulatory Reform Committee 2–3 (Feb. 23, 2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Open-Letter-to-Bar-Committee-Feb-2021.pdf>.

Where is the Sandbox Headed?

In Order 15, the court stated, "we will never volunteer ourselves across the access-to-justice divide and what is needed is market-based, far-reaching reform focused on opening the legal market to new providers, business models, and service options." Utah Supreme Court Standing Order No. 15, 2 (Aug. 14, 2020), <https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf>. The court has increasingly made clear that the goal is to make all legal services more affordable by opening competition between traditional law firms and providers that partner with non-lawyers or are owned by corporate interests.

Recent evidence indicates the court's working hypothesis is that deregulation of legal services should continue to expand and will be beneficial for consumers. In its recent grant application to the Stand Together Foundation, the court wrote,

Lawyers themselves, who have a monopoly on legal-service delivery, face numerous capital restrictions, advertising, and marketing restrictions, expensive training requirements, and other rules that keep them from testing innovations that might provide significant access-to-justice benefits. Beyond this restrictiveness, the current regulatory approach imagines hypothetical harms to consumers that have not been empirically verified.

(Emphasis added.)

There are additional clues that more expansive deregulation

proposals will be presented by OLSI as the Sandbox moves forward. In September 2022, scholars from Stanford Law school published an “early assessment” of regulatory reform in the Utah Sandbox and Arizona. One of the principal authors is Lucy Ricca, OLSI’s founding Executive Director and a member of its Executive Committee. The report concludes, “[I]t is still early days of this brave new world of regulatory reform,” but “the legal innovation that is emerging in Utah, which appears more multi-faceted and diverse than in Arizona, might be even more so if the [S]andbox reforms were framed as **permanent** regulatory changes.”

David Freeman Engstrom, Lucy Ricca, et al., *LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE*, 47 (Sept. 2022), <https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf>.

It is not clear how much “deregulation” the court will approve. However, the benefits of deregulation need to be carefully considered against the risks posed to consumers. Those risks, described by the court as “imagine[d] hypothetical harms” are being ignored or dismissed too lightly.

Expanding Court Powers?

It now appears the court is seeking to exercise its broad powers by asking that lawyers licensed by the Utah Bar pay the costs of the operating the Sandbox. The court recently asked the Bar to take over funding operations of OLSI. If the Bar won’t do so, it has been advised that the court will consider divesting the Bar of its regulatory powers and taking over regulation directly. If this happens, will the court do what the Bar would not – require lawyers to fund the Sandbox experiment out of Bar members’ mandatory licensing fees?

Instead of the court’s proposal to tax members of the Bar twice – first to regulate themselves, and second, to regulate non-lawyer practices in the Sandbox – why shouldn’t the court make the for-profit businesses approved in the Sandbox pay fees to operate its regulatory arm?

Whose Deregulation is it Anyway?

In the court’s recent grant application to the “Stand Together Foundation,” a nonprofit founded by libertarian entrepreneur Charles Koch, which seeks nearly a half million dollars, it states:

Davis County’s Premier Litigation Law Firm

Welcomes New Attorneys



**Experienced
Litigators**

801-872-2222
HepworthLegal.com



Jacque M. Ramos | Michael W. Combs | Christian D. Austin

Thank you for all the referrals! – Michael K. Hepworth

One driving force behind the access-to-justice crisis is how states currently regulate the practice of law. **Outmoded regulations severely constrain courts, nonprofits, and for-profit organizations from innovating** in ways that would significantly increase both the availability and affordability of legal services and reduce demands on the courts.

(Emphasis added).

Could fiduciary duty and Utah's Rules of Professional Conduct be the "outmoded regulations" being dispensed of? The court does not require most Sandbox entities to act as fiduciaries nor are they required to comply with the Rules of Professional Conduct. And Sandbox entities can do what bar licensed lawyers and firms cannot – share fees with non-lawyers.

While lawyers employed by Sandbox entities must still comply with their ethical responsibilities, the business has a duty only to its shareholders. Will non-lawyer owners and/or investors adopt a "hands off" approach to the management and delivery of legal services, allowing the non-attorney employees it hires to provide services without direction? As anyone who has worked for a for-profit business knows, the people signing the paychecks have great say in making the rules. How will the Sandbox regulators ever know when a lawyer's independence is compromised? It's concerning that currently, the approach of the court and OLSI is (paraphrasing) "we will look at results, not the details of how each Sandbox business operates." Office of Legal Services

Innovation Letter to Utah State Bar Regulatory Reform Committee 3 (Feb. 23, 2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Open-Letter-to-Bar-Committee-Feb-2021.pdf>.

If the court permits non-lawyers to operate legal service businesses, unencumbered by the licensure, fiduciary, ethical and regulatory enforcement requirements that attorneys must adhere to, does the court believe that the fiduciary duties and ethical requirements now imposed on lawyers are unnecessary?

At present, with different rules for lawyers and non-legal providers, the playing field appears stacked against members of the Bar. And the protection provided to consumers by fiduciary responsibilities, ethical rules, continuous legal education for legal providers, and an office that can investigate, adjudicate and punish those who take advantage of legal clients seems to be receding, if not going away entirely. The court needs to clarify whether its goal is to significantly deregulate the practice

of law and allow non lawyer businesses in all facets of law to compete with lawyers and firms. If that's the plan, to date the court and OLSI have not been clear about it. And the court needs to also tell the Bar how it will regulate non lawyer entities to keep the consumer safe.

Is Deregulation a good thing for Consumers?

The court's hypothesis appears to be that deregulation is good for consumers. But there is little data to support the claimed benefits of a deregulated legal system and potential for harms in a



ATTORNEYS AT LAW

Clyde Snow Welcomes Two Associates to its Salt Lake City Office.



Robert W. DeBirk -
 Mr. DeBirk's practice includes water, natural resources and environmental law. Mr. DeBirk assisted the Department of Public Utilities with water law and water quality matters. Mr. DeBirk also assisted Salt Lake City in land use and planning items ranging from updating groundwater source and watershed protective ordinances to creating assistance programs for low-income residents.



Landon S. Troester -
 Mr. Troester's practice focuses on Business Transactions, Securities, Trust & Estate Planning, and Bankruptcy matters. As a law student, Mr. Troester was a Fellow for the Pro Bono Initiative at the S.J. Quinney College of Law, and assisted in the creation of several reports on the demand for legal services for low- and middle-income Utahns. He also co-authored a report on prisoners' civil legal needs in the Utah prison system.



ATTORNEYS AT LAW
 CLYDE SNOW & SESSIONS
 A PROFESSIONAL CORPORATION

ONE UTAH CENTER
 801 SOUTH MAIN, SUITE 2100
 SALT LAKE CITY, UTAH 84111
 TEL 801-578-9519
 WWW.CLYDESNOW.COM

BANKRUPTCY & CREDITORS' RIGHTS / BANKING / SECURITIES / BUSINESS & TRANSACTIONS / FAMILY LAW / WHITE COLLAR
 CRIMINAL / APPEALS & INVESTIGATION / LABOR & EMPLOYMENT / LAW / COMPLEX LITIGATION / WATER & NATURAL RESOURCES /
 TRUSTS & ESTATES

loosely regulated system. As a plaintiff's lawyer I have represented ordinary consumers for more than thirty years. For the past sixteen years, I have been a Board Member of the Public Justice Foundation, a national public interest law firm dedicated to helping consumers. Experience tells me that fiduciary laws, ethical rules, and enforcement for wrongdoers are critical to protect consumers who do not understand the complexities of the law and the legal process and must therefore place great trust in their providers.

Non-fiduciary business owners and their non-lawyer personnel have no obligation to put a client's interests on equal footing with the interests of the business and its investors. A business operating in a deregulated market has incentives to employ time tested business practices to increase profits. Most businesses focus on aggressively reducing expenses. Legal services are not products. In a service market like law, many nonfiduciary businesses will be motivated to hire less experienced, less skilled, and less trained staff and/or to replace staff with software and algorithmic decision making. Therefore, the real or imagined benefits of opening legal practice to non-fiduciary businesses in a deregulated market may come at a high cost to consumers. That's especially true if there is no specific training requirement for the non-lawyer investors, owners, managers, or staff of managed entities operating in the Sandbox.

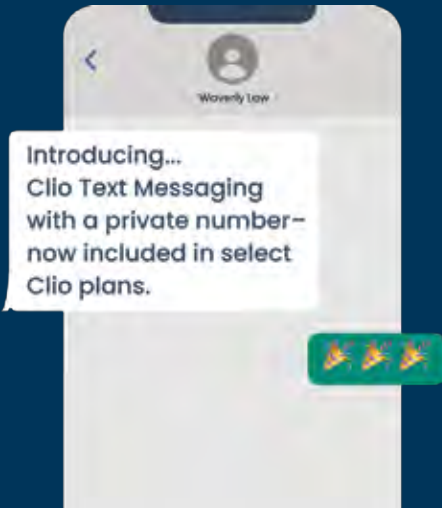
In many areas of law such as personal injury, property loss, estate planning and probate, family law, criminal law, and legal

services for businesses large and small, a lawyer's skill and judgement that comes with experience and training are critical. Legal consumers whose legal services are pushed down to less skilled or trained employees, or to an automated process, could suffer severe or even catastrophic life consequences. Starting in law school and in yearly CLE, lawyers are taught about their fiduciary duties and what is required when representing clients. A violation of these duties can result in the lawyer's license being suspended or revoked, which most lawyers take very seriously. Private investors and non-lawyer managers have not received that training and do not face the same severe consequences for breaching their duties.


Should ordinary consumers who need legal services be forced to settle for "caveat emptor"? The consumer risks of a caveat emptor market may be acceptable when buying a toaster. But when a client has sustained, for example, a life changing commercial or personal injury, a serious family law problem or when a small business is faced with a game changing legal challenge, "caveat emptor" does not seem to be an appropriate model.


Those in charge of OLSI, have said that there is "no empirical data" validating the benefits of fiduciary duties for legal providers. I believe the question should be reversed: Does the OLSI have robust and valid data to demonstrate that eliminating or reducing regulation of legal services won't harm legal services consumers? If so, this needs to be shared.

Convenient Built-In Texting





Introducing...
Clio Text Messaging
with a private number—
now included in select
Clio plans.



 **SCAN ME**

Visit clio.com/utbar or
scan the code to find
out why Utah State bar
members love Clio!

We need only look at deregulation of the real estate and banking sector leading up to the Great Recession of 2008, the loose regulation of the stock market prior to the Crash of 1929 or here in Utah, to the poorly regulated penny stock market prior to the 1990s to see that deregulation in areas where the consumer must trust service professionals carries big risks. In 2022, trillions have been lost – many by small investors – due to speculation in largely unregulated cryptocurrency market. I am skeptical about what deregulation will bring for the consumer.

Does deregulation increase access to justice?

Sandbox proponents and the court have cited to the United Kingdom's Legal Service Act (LSA) as a deregulation success story. The LSA, passed in 2007, was intended to introduce more competition into the UK legal market by creating alternative business structures (ABS), subject to streamlined and less restrictive regulatory constraints, to compete with traditional lawyer owned firms. ABS allow solicitors to form partnerships with non-lawyers, accept outside investment, and operate under external ownership.

Reports on the LSA results have been mixed, but recent analysis after fifteen years of program operation, suggest that the program has been less than a smashing success. In fact, a recent report authored by U.K. Legal Services Board has found that as of 2020, stakeholders felt that the scale of the legal access challenge “is at least as great today, if not greater” than when the LSA was put into place. Legal Services Board, *THE STATE OF LEGAL SERVICES 2020: A REFLECTION OF TEN YEARS OF REGULATION* 22.

Some analysts believe that deregulation may merely increase the number of providers without improving access or reducing cost, and they attribute this to the fact that a shortage of legal providers is not the primary reason consumers don't connect with lawyers to solve their legal problems.

In August 2022, two professors from George Mason's and Texas A&M's law schools published an analysis of deregulation of legal services. “The [deregulation] competition paradigm is theoretically flawed because it fails to fully account for market failures Merely increasing the number and types of legal services providers cannot make legal markets more efficient. . . . Deregulation alone is insufficient and may in fact exacerbate existing market failures.”

Nuno Garoupa & Milan Markovic, *Deregulation and the Lawyers' Cartel*, U. PA. J. INT'L LAW, Vol 43:4, 935–936, 2022.

They then state:

Well-meaning observers often speak and write as though access to justice is only an issue for the poor “and assume that poor people desire lawyers' services but cannot obtain them because those services are so very expensive. . . . [T]he picture is much more complex. . . . [C]oncerns about cost play only a small role in people's decisions not to turn to lawyers or to courts.” . . . Deregulation alone fails to confront the market failures that are endemic in the consumer segment.

Id. at 986, 989 (quoting Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117 (2013) (first alteration in original)).

The recently published Stanford Study, mentioned above, reports that the evidence that the LSA is increasing consumer access is weak:

[T]he evidence is ambiguous as to whether and how [the LSA's] innovation is increasing access and/or benefiting consumers The impact of the [LSA's] reforms on access to justice for low-income people is unclear. . . . there exists little rigorous research exploring the impact of the reforms on access to justice among indigent and low-income persons. . . . [T]he simple fact is that significant unmet legal needs persist even after a decade of [the LSA's] implementation.

David Freeman Engstrom, Lucy Ricca, et al., *LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE*, 20–21 (Sept. 2022), <https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf>.

Given the above, the assumption that deregulation will solve the “access to justice gap” should not be taken as a given. The court should incorporate lessons learned from similar projects, encourage debate, and open access to all points of view to study the problem and its solutions.

Given its limited financial assets, the Utah Supreme Court should take a hard look at focusing the Sandbox project to the areas where legal experiments are clearly intended ease the access to justice gap rather than pursue a broad deregulation agenda with all its attendant risks. The Bar and the court could also pursue

other solutions to improve legal access, such as simplifying litigation of smaller claims through streamlined low cost arbitration and mediation, strengthening consumer protection laws, and expanding small claims court and better informing the public of how to use it.

Will the Court have Valid Metrics to Determine Whether Sandbox entities Are Providing Competent, High-Quality Results for Consumers?

OLSI contends it has or will soon have metrics to accurately determine whether Sandbox services are causing consumers harm. The Stanford analysis strongly suggests that those metrics will also be used to answer the larger question of whether deregulation will put legal consumers at higher risk or degrade the results they receive from their provider.

But there's a major flaw in the metrics. The Sandbox's primary metric measures one thing only – the rate of called-in consumer complaints. If the number of called-in complaints is not deemed excessive by OLSI, the conclusion reported out is that the provider has done “no harm.” But this assumes that data on consumer

reported “complaints” then can be causally connected to measure results and ignores the question of whether the legal service resolved the claim for “fair value” or provided correct legal advice. For consumers, that's what matters. Relying on a “complaint rate” to determine harm vs. success is based on the premise that consumers can accurately assess a successful resolution of their claim or service; but can the average consumer accurately assess this?

Legal services are dissimilar to consumer products. Amazon and a local shoe store have different methods of operation, but they sell many of the same products. And the quality of products can be easily assessed by the ordinary consumer. In contrast, determining what is a successful result in many areas of law is not easily assessed by the ordinary consumer, and the consequences of poorly executed legal services are much more severe than the blisters caused by a pair of knock-off sneakers. What is the value of a given legal claim and what affects that value? This is the exact question that a consumer has hired a legal expert to answer, and it depends on many variables. The value of a claim or the quality of legal advice cannot be plugged into a computer algorithm to assess quality, at least in complex matters. I can't

Picking up the scent.

White collar crime is pervasive and persistent— leaving many businesses to struggle with the impact. Our **forensic and investigative accounting** teams help your clients to discover and **mitigate** the source of **fraud and theft**.

Bankruptcy | Restructuring
Forensic Accounting | Due Diligence
Economic Damages | Receiverships
Turnaround | Workout
Business Valuation | IP Valuation

Rocky Mountain **RMA**
ADVISORY

801.428.1600 rockymountainadvisory.com



CERTIFIED PUBLIC ACCOUNTANTS
FORENSIC & FINANCIAL CONSULTANTS

envision an algorithm capable of factoring in the skills and commitment of the advocate, the presentation and preparation of witnesses, or whether the critical facts have been unearthed or the legal theories applied correctly. And these are only a few of the non-quantitative factors that greatly affect claim values and results. Any trial judge or risk manager will tell you these are all critical to assess who wins, and how much a claim is worth.

Does this mean that all Sandbox projects can't be measured through complaint rate analysis? Probably not. But complaint rates cannot be used to measure whether Sandbox providers are benefitting consumers in making or defending legal claims or providing accurate legal advice, except for legal matters that are quite simple.

It is also fair to question the idea that valid complaints, standing alone, measure anything useful. Whether a complaint is filed or not depends, among other things, on the personality and assertiveness of the client, whether they have objectively reasonable expectations of a fair result, and factors of the client's personality. The correlation of complaints to bad legal representation is weak.

OLSI has reported twelve complaints to date. It seems highly unlikely that out of 27,000 legal services provided, consumers were only unhappy or felt harmed twelve times. OLSI's complaint rate may be impacted because many Sandbox consumers may not understand the benefits of reporting. Or it may mean that the OLSI lacks regulatory personnel equivalent to the Bar to investigate, provide a remedy, or sanction the wrongdoer.

Per OLSI public reports, many Sandbox providers are not even reporting complaint data in a complete and timely fashion. Standing Order 15 contemplates controls beyond complaint-rates such as case audits of the legal services provided by Sandbox entities, and customer surveys. Utah Supreme Court Standing Order No. 15, 15 (Aug. 14, 2020), <https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf>. There is no indication that consumers are being proactively surveyed, and of the more than thirty providers, only four have been audited. As of May 2002, OLSI confirmed that there had been thousands of personal injury clients served by Sandbox legal providers, but there have been no audits of those cases.

Without a careful and robust auditing process, OLSI and the court can't accurately judge whether a client is benefitting from or being harmed by a Sandbox provider. Auditing is only valuable if the auditor is given enough time to accurately determine the

quality of services and has the right training. And where will the funds come from to pay for skilled auditors? Effective regulation of any industry or profession requires money. The Sandbox is understaffed and underfunded. OLSI has only three employees. It has only one data analyst and one "Director of Data," who is serving in a part-time or consulting basis. Given such limited resources, can the OLSI effectively design, collect, and analyze the quality of Sandbox services? Inaccurate or incomplete data puts legal consumers at risk that in the attempt to provide more legal services, we've sacrificed quality.

In response, one Sandbox proponent pointed out "we don't audit lawyers for quality now." But don't audits need to be more thorough for non-legal entities, who are not fiduciaries? If the court believes that Bar enforced regulation is not effective, those regulations should be buttressed to be made effective, not abandoned in a "reformed" legal market.

Can't we all play in the sandbox?

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . ."

Justice Oliver Wendell Holmes Jr., dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (emphasis added).

The Sandbox is an ambitious social experiment, which the Bar is now being asked to support and pay for. Social policy made and implemented without the free exchange of ideas risks harm to legal consumers and more unintended consequences. Hearing only the voices of a project's supporters is how autocrats make policy, not democratic leaders.

To this end I suggest first that the court appoint an independent task force or advisory committee to study the Sandbox and report to the court and the public. The committee should include the operators of Sandbox legal businesses, Sandbox regulators, academics for and against deregulation, consumers, and leading members of the Bar. OLSI should be required to openly share information with the committee. The committee can then share its findings and recommendations. This process will provide more information and more balanced information to the court and make it more likely that "confirmation bias" is neutralized when the court makes future decisions about the project. Creation of a diverse and multi-disciplinary advisory committee will also dispel the tension that now exists between OLSI, the court, and the Bar. An advisory committee may bring fresh ideas to improve the Sandbox.

Second, all Sandbox participants should be required to act as fiduciaries and be subject to the Rules of Professional Conduct. To make this meaningful, the court should equip the Sandbox or the Bar with equivalent authority and resources to investigate and discipline violators. It is unjust for the court to require members of the Bar and Sandbox entities to work under differing sets of fiduciary and ethical rules. And consumers with legal problems must trust their legal providers to act in their best interest, whether they possess law degrees or not. Before the court even contemplates that these protections be eliminated for legal consumers, more robust metrics must be developed, a control group established, and the results subject to independent analysis.

Third, the court must clarify the scope of the Sandbox and its goals, and provide the Bar and public with more robust information about the operations of OLSI, the type and quality of data the Sandbox is evaluating, and what the perceived benefits are of each approved project. How will each project narrow the “access to justice gap”? It is hard to expect the Bar and its members to pay for or support the Sandbox when this information is not shared.

Fourth, the court should make its intentions known about the

extent of its intended regulatory reform and include more voices. Is it moving to largely deregulate legal services? If not, what is the goal? And if the court is contemplating deregulation, large or small, it should encourage an open and vigorous debate about deregulation’s risks and benefits and share information about Sandbox successes and its failures. The court should consider the recently published Stanford review and assessment. There is useful information about a number of promising projects, but nothing about lessons to be learned from projects that have not been successful. There was also no mention of the fact that most of the services provided in the sandbox to date have not been in the areas identified by the Work Group in 2019 as legally underserved. The fact that one of the two principal authors was OLSI’s first executive director and is on its Executive Committee suggests the serious problem of “confirmation bias.” Those who have created the Sandbox are invested in its success, and they created or approved its methodology. Confirmation bias is not always conscious bias, but independent review is essential to address its distortions. There should be no doubt about the genuine commitment to social change and dedicated hard work demonstrated by those who have created and promoted the Sandbox. But they want to emphasize the positives to keep the



DORSEY
always ahead

seize the deal

WHEN IT COMES TO COMPLEX TRANSACTIONS, DORSEY APPLIES IN-DEPTH EXPERIENCE WITH GROUNDED COUNSEL TO HELP OUR CLIENTS ACCOMPLISH THEIR GOALS.

Maybe that’s why Dorsey’s M&A and Capital Markets practices in Utah were recognized by International Financial Law Review in its 2022 global rankings.

111 South Main Street | Suite 2100 | Salt Lake City, UT 84111-2176 dorsey.com

work going and to encourage funding. It should be the job of independent assessors and voices to provide another view of what's working, what isn't, and what should be improved, developed, or placed on hold.

Last, I believe the court should confine the Sandbox for the time being to projects that are clearly addressed at improving access to legal services in areas where they are lacking. Projects that are merely testing the broad premise of whether deregulation of legal services will “do no harm” should be put on hold, at least for now. There is insufficient evidence that deregulation will narrow the access to justice gap or that abandoning the consumer protections of current bar regulations and requirements will create a safe legal market for consumers. OLSI has neither the manpower, the financial resources, the sufficient metrics, or the regulatory structure to oversee a widely expanded legal service industry and monitor non fiduciary investors, owners, managers, and their staff. Training processes, licensure, and enforcement are behind the developmental curve. And the metric being used to determine “harm” for many services as complex civil litigation, and business advice, is not likely capable of accurately measuring results.

Conclusion

The access to justice gap is a problem of insufficient resources and information. A Sandbox that focuses on projects that have clear focus on underserved areas may prove to produce modest benefits to consumers who are in need of legal help but cannot obtain it at reasonable cost. But expecting for profit companies or innovative technology to solve the problem is unrealistic, as the experiment in the U.K seems to have demonstrated.

Many consumers have serious legal problems but no money to pay professionals. Simplifying the legal process for consumer claims, expanding small claims processes, and strengthening consumer rights laws would all help those in need of legal help to better access to justice. The Utah Supreme Court, the Bar, and the Utah Legislature should try harder to find common ground. I believe we all want to achieve a common goal – to make legal services more accessible without compromising quality or exposing consumers to harm.

Capitalism and free markets are important tools that can maximize efficiency and innovation in theoretically perfect economic systems. But caveat emptor and broad deregulation carries great risks in markets with asymmetric information access, like legal markets. The Bar and the court should be mindful of those risks.

A Note on Transparency

In Order 15, the Court underscored the importance of transparency in creating effective regulatory reform for legal services. Transparency requires robust, inclusive communication and dissemination of complete information. OLSI and the court need much improvement in this domain.

I've reviewed publicly available communications from OLSI and the court. This documentation is so general in nature that an outside observer cannot possibly determine how OLSI is doing its work or how robustly. Nor can one tell what access to justice benefits each project is promising. No details are available describing what data is being reported by OLSI or what access to justice benefits projects are delivering. OLSI has not posted, nor shared the audits of any Sandbox entities. Nothing is available to inform us of what the court considers or discusses when evaluating applicants recommended by OLSI. Thus, we are left only clues about where regulatory reform was being practiced in its execution or how the project is evolving. Since OLSI's inception, the Bar and other organizations have submitted similar questions and concerns about the Sandbox, which largely remain unanswered.

In discussions with me, several leaders of the Sandbox entities have stated that the Bar acts as a “guild” to restrict fair competition for legal services. This furthers the impression that OLSI, the court, and the Sandbox proponents assume Bar and lawyer input is not valuable because lawyers in the Bar will reflexively oppose all efforts at reform out of perceived self-interest. In a democracy, inclusiveness and transparency are important to establish good social policy, then test and refine it as it is implemented it. The Sandbox is a major social policy experiment, and its proponents have ambition to change the model of how legal service are practiced in Utah and throughout America. Policy making requires vigorous, and open debate. The court's values this principle so highly that it publishes its opinions, including dissents. Buy-in from all stakeholders is required for social change and is best accomplished when all stakeholders have a voice. What could we accomplish if OLSI saw the bar as partners in innovation, rather than a hinderance to it.

In assessing the project, policy makers must account for the tendency of a program's advocates to interpret and report information consistent with their existing beliefs and goals while discounting what is contrary to them. Without more inclusion and transparency, and more voices, our court will not have the best tools at its disposal to “narrow the access to justice gap.”

We handle clients with CARE!



At Eisenberg, Lowrance, Lundell, Lofgren, we know that every injury case is high stakes for the client. From soft-tissue injuries to life altering brain trauma, we spend the extra time it takes to help our clients regain their confidence, and get back on track with their lives.

REAL CARE GETS REAL RESULTS.

Our lawyers have handled thousands of injury cases, including more than 150 cases where we've recovered more than \$1,000,000 for our clients. But regardless of the size of the recovery, we measure our success by how our clients feel about our work when their cases are completed. So we're proud to have a 4.9/5 overall rating from online client reviews.

We're excited to announce two lawyers have joined our team!

JEFFREY EISENBERG arrives after 21 years as founding partner of Eisenberg, Cutt, Kendell & Olson. Jeff specializes in high stakes litigation. He's lead counseled some of Utah's largest tort cases. Jeff represents clients in product liability, insurance bad faith, medical and legal malpractice, sexual abuse, catastrophic injury and wrongful death cases.

PETER SUMMERILL comes to our firm from Dewsnap King & Olson. An attorney for 24 years, Pete's tried dozens of injury cases to verdict. Pete represents clients in severe injury, wrongful death, product liability and medical malpractice cases.

JOHN LOWRANCE and **RICK LUNDELL** bring more than 40 years experience helping clients in all types of injury cases.



3law.com
(801) 446-6464

If you are looking to refer an injury case or need experienced co-counsel, we're here to help.

LAWPAY[®]

AN AFFINIPAY SOLUTION

+

Utah State Bar

Proud Member Benefit Provider

“I love LawPay! I'm not sure why I waited so long to get it set up.

– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.



22% increase in cash flow with online payments



Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA



62% of bills sent online are paid in 24 hours

YOUR FIRM LOGO HERE

**Trust Payment
IOLTA Deposit**

New Case Reference

**** * 9995

TOTAL: \$1,500.00

VISA



POWERED BY
LAWPAY

eCheck

DISCOVER

PAY ATTORNEY

**PAYMENT
RECEIVED**



Get started at
lawpay.com/utahbar
866-730-4140

Data based on an average of firm accounts
receivables increases using online billing solutions.

LawPay is a registered agent of Synovus Bank, Columbus,
GA., and Fifth Third Bank, N.A., Cincinnati, OH.

In Defense of the Imperial System of Measurement in Law

by Steven Rinehart

In 1975, the United States enacted the Metric Conversion Act, amended by the Omnibus Trade Act of 1988, attempting to compel American citizenry to adopt the modern metric system as their official system of measurement (i.e., the International System of Units). The United States later directed all U.S. agencies to “take all appropriate measures within their authority” to convert to the metric system. Exec. Order No. 12770, 56 FR 35801, at 393 (July 29, 1991). Less than fifty years earlier, the consensus view of the U.S. Congress had been that “the metric system is inferior to the English.” *Congressional Hearing Relative to the Compulsory Introduction of the Metric System, on H.R. 10*, Cong. 237 (1926) (statement of Samuel S. Dale to the Committee on Coinage, Weights and Measures).

Questions about whether weights and measures should be expressed in the imperial system or the metric system in evidence, statutes, and case law have never been fully resolved. In many states, legislation arbitrarily reverts from the imperial system to metric system within subsections of the same statute. *See, e.g.*, Utah Code Ann. § 58-37c-19 (outlawing distribution and possession of methamphetamines in ounces); *id.* § 58-37c-20.5 (outlawing purchase of pseudoephedrine in grams); *see also, e.g.*, 18 V.S.A. § 4231(a)(3), (outlawing possession of cocaine measured in ounces); 18 V.S.A. § 4231(a)(2) (outlawing possession of cocaine measured in grams). The Supreme Court also appears to have vacillated about how best to express weights and measures. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016) (expressing distance in miles using the imperial system); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (converting evidence presented in the imperial system to metric system units). And although the U.S. Patent and Trademark Office (USPTO) technically requires applicants to use the metric system, it does not enforce this requirement.

Academics have long advocated for adoption of the metric system as a way of resolving this conflict, while blue-collar American works have resisted the same. Emerging evidence further discussed below appears supportive of the blue-collar workers’ reluctance.

Historical Controversy

Pressure from continental Europe to adopt the metric system began when the metric system was invented in 1791 during the French Revolution by Pierre-Simon Laplace. Thomas Jefferson rejected European pressure to convert, predicting the metric system would fail. U.S. DEP. OF COMM., *A History of the Metric System Controversy in the United States*, NAT’L BUR. STAND. SPEC. PUBL. 345–10. John Quincy Adams was forced to write a 117-page report in 1821 on weights and measures, concluding that the metric system was unnaturally contrived. He said, “[o]f all the nations of European origin, ours is that which least requires any change in the system of their weights and measures.” John Quincy Adams, *Report Upon Weights and Measures*, p. 93: U.S. Senate (1821). Even Napoleon himself ridiculed the metric system and prohibited its use in the First French Empire, which had created it. “Napoleon didn’t personally admire the metric system that Laplace invented, saying, ‘I can understand the twelfth part of an inch, but not the thousandth part of a metre.’” Andrew Roberts, *Napoleon: A Life* (Viking 2014).

Following enactment of the Metric Conversion Act in the United States in 1975, the USPTO issued a directive requiring that weights and measures submitted in U.S. Patent applications be presented in the metric system and codified this directive in the Manual of Patent Examining Procedure § 608.01. As a result of these laws and regulations intended to “metricate” the American people, nothing changed. Patent attorneys simply ignored § 608.01 and courts in our system of jurisprudence have largely done the same.

STEVEN RINEHART is a patent attorney employed by the firm Vested Law LLP. He regularly deals with questions of weights and measures in preparing patent applications.



Laymen across the country have resisted pressure to adopt the metric system whenever it is applied. The National Cowboy Hall of Fame director sued the National Bureau of Standards in 1981 for spending \$2.5 million per year to promote the metric system but had certiorari denied by the U.S. Supreme Court when he lost the case on standing. *The Supreme Court Today Rejected an Effort by Two Champions*, U. PRESS INT'L (Nov. 30, 1981), [available at https://www.upi.com/Archives/1981/11/30/The-Supreme-Court-today-rejected-an-effort-by-two/8345375944400/](https://www.upi.com/Archives/1981/11/30/The-Supreme-Court-today-rejected-an-effort-by-two/8345375944400/) (commenting on case No. 81-780). The Ford Motor Company refused to switch to the metric system and authorized articles critical of the metric system. Henry Ford, *Moving Forward* (1931). Francis Dugan, representing the U.S. construction industry on the U.S. Metric Board, promised that U.S. construction would “be the very last sector [in the U.S.] to implement conversion to metric measurement – if at all.” U.S. Metric Board, *Summary Report* (Jul. 1982).

To counter the popular resistance to the metrification of the United States, the National Institute for Standards and Technology established the U.S. Metric Program and the U.S. Metric Board

for metricating America in the 1970s. The U.S. Metric Board was disbanded by Ronald Reagan in 1982 while the U.S. Metric Program employed one person from 1982 until 2013. In 2013, when the sole employee of the U.S. Metric Program retired and was asked why nothing had been accomplished in thirty years, he blamed the failure of the U.S. to convert to the metric system on incorrigible semi-truck drivers whom he alleged were incapable of understanding overpass heights and prone to ramming their trailers into overpasses across the country. Carrie Swiggum, *Meet the Sole Employee of the U.S. Metric Program*, MENTAL FLOSS (Mar. 20, 2013), <https://www.mentalfloss.com/article/50160/years-ken-butcher-was-sole-employee-us-metric-program>.

While singling out truck drivers for ridicule, actual confusion was taking its toll among America’s more educated demographics. NASA’s Mars Climate Orbiter was lost in 1999 because NASA scientists misconverted feet to meters. An Air Canada plane crashed in 1983 after its pilots misconverted pounds to kilograms, and a patient died in 1999 when given 0.5 grams of Phenobarbital instead of 0.5 grains.

Helping attorneys and their clients...for almost four decades.

- A real estate broker who understands all the aspects of an estate sale, from working with court appointed representatives to the myriad of heirs of the deceased. One third of my business is estate sales. Divorce cases don't scare me and I'm able to get the property sold following court orders and if necessary, testifying before the judge.
- I have the complete team of estate liquidators, from appraisers, cleaners, contractors, and movers for the smallest to the largest homes or condominiums.
- Referrals available of other attorneys that I have worked with in Utah. I own my own firm and am reasonably priced with no hidden transaction fees to your clients. 38 years full time experience and in the top 5% of sales agents in the Salt Lake Board of REALTORS. Also member of the Washington County and Park City Boards of REALTORS.



Babs De Lay, Principal Broker
Urban Utah Homes & Estates

babs@urbanutah.com | 801.201.8824



Modern Chaos

Progressive thinkers continue to demand that the U.S. convert. Hollywood's Cate Blanchet asked on Jimmy Kimmel live in 2018, "Explain to me how the country that can send a man to the moon is still in gallons and inches?" Jimmy Kimmel Live, *Cate Blanchett Thinks Americans Should Use the Metric System*, YouTube (Sept. 14, 2018), <https://www.youtube.com/watch?v=f1FBYgk3svU>.

In spite of the Metric Conversion Act and a directive in 1984 from the Department of Transportation that the Federal Aviation Administration (FAA) switch to the metric system, the FAA largely failed to transition, insisting pilots could estimate runway lengths and approach speeds better in customary imperial units. The National Transportation Safety Board switched to the metric system in the 1980s, then abruptly switched back – actually printing interstate speed limit signs in the metric system for several months. The FAA's refusal to switch Federal Aviation Regulations, airworthiness directives, and traffic control practices to the metric system forced the rest of the world to switch their avionics and traffic control systems back to the imperial system and continue calculating altitude in feet, speed

in knots, and distance in miles and knots, rather than in kilometers. To the chagrin of its detractors, the imperial system is adopted by every country in the world for aviation-related functions as a result of U.S. dominance. Additionally, U.S. dominance in aviation resulted in the worldwide adaption of English as the exclusive language of communication between pilots and air traffic control towers.

Is the Imperial System Illogical?

What are we to make of this chaos? Is the United States acting illogically in resisting metrification that reformists insist is inevitable? The imperial system bases its units of measurement on organically evolved common artefacts thought to be common to human observation and intuitively understood, whereas the derived units of metric system are defined as arbitrary fractions of scientific constants. For instance, a foot in the imperial system is about the length of a human foot. The meter, on the other hand, is defined as being 1/299,792,458 of the distance light travels in a second. In the imperial system, a cup is about a cup. The volume of a barrel of oil is, it turns out, about a barrel. An acre is about the amount of land a farmer can till in a day

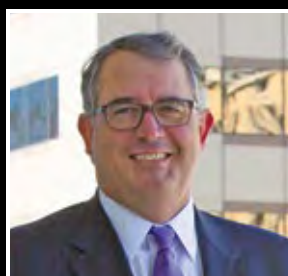
After 30 years of representing health care providers, Terry Rooney of Gross & Rooney is now accepting the representation of Plaintiffs in medical malpractice claims. Referrals and consultations are welcome.



TERRY ROONEY

**GROSS &
ROONEY**

www.grossrooney.com
136 E. South Temple, 1500
801-935-4611



JEFFERSON GROSS



ADAM SORENSON

using an ox. A mile is 2,000 paces (i.e., 1,000 left and right steps). An inch is the width of a human thumb. The same intuitive observations underlie the units of teaspoons, tablespoons, bushels, grains, lightyears, and candlepower. Even the Fahrenheit temperature scale of the imperial system was created roughly to define zero degrees as the freezing point of seawater and 100 degrees as body temperature (while Kelvin defines zero as the temperature at which molecular motion ceases for any adiabatic process). We must ask ourselves whether it is easier to understand the power of your car in horsepower or in kilogram force in meters per second.

Scientists say that the metric system has more “coherence” than the imperial system because the derived units of the metric system are directly related to the base units without the need for intermediate conversion factors. In layman’s terms, scientists say the metric units makes more sense because you simply multiply everything by ten. They do not think anyone can remember there are sixteen ounces in a pound or twelve inches in a foot. But if you times nonsense by ten, don’t you simply end up with ten times as much nonsense? Do we not use the imperial system of weights and measures for the same reason we speak an organically derived language? Despite its irregular verb conjugations

and spelling, most of the world would consider English to be preferable to contrived languages such as Esperanto. Why are some units of measurement, common to both the imperial system and the metric system, indivisibly correlated to human observation – for instance measuring time using twelve months to a year and thirty days to a month, corresponding to the phases of the moon and seasons?

Evidence Supportive of American Claims

Preliminary results of studies being done for the first time only in 2022 seem to confirm that because the base units in the imperial system are intuitively derived, those who use the imperial system are better able to estimate distance, temperature, speed, volume, and weight than those who use the metric system. This finding holds true for layman and scientists alike. According to one study, even among those with degrees in hard sciences, baccalaurei educated using the imperial system were better able to estimate distance in feet than their counterparts educated using the metric system could in meters – by nearly an entire standard deviation. *See* Steven Rinehart, *Cross-Sectional Study on the Ability of Those Educated Using the Imperial System of Measurement to Estimate Weights and Measures Relative to those Educations Using the Metric System*, AUCTORES (Aug. 10, 2022), <https://www.auctoresonline.org/article/cross-sectional-study-of-the-ability-of-those-educated-using-the-imperial-system-of-measurement-to-estimate-weights-and-measures-relative-to-those-educated-using-the-metric-system>. Study participants were also better able to estimate temperature and speed in the imperial system. With the exception of physicians’ ability to estimate small units of volume, every demographic estimated weights and measures more accurately in the imperial system than the metric system. *See id.* This is of consequence in the law where juries are tasked with interpreting and understanding evidentiary data presented to them. It is also important where witnesses, such as law enforcement officers, are regularly tasked with estimating distance, speed, and other measurements in the courts of the land.

Metrification Justification

The two justifications perpetually advanced for 250 years for converting to the metric system have always been: (1) that because Europe, as the center of scientific and economic power in the Western world, uses it, the U.S. must also use it or fall behind economically and scientifically; and, (2) that the metric system is easier to understand for the unlearned masses because it defines every unit as consisting of exactly ten of the units smaller than it.

Auctioneers & Appraisers

Erkelens & Olson Auctioneers has been the standing court appointed auction company for over 35 years. Our attention to detail and quality is unparalleled. We respond to all situations in a timely and efficient manner, preserving assets for creditors and trustees.

Utah’s Leading Auction & Appraisal Service



**Erkelens
& Olson**
Auctioneers
& Appraisers

3 Generations Strong!

Rob, Robert & David Olson
Auctioneers, CAGA Appraisers

Call us for a free Consultation

801-355-6655
www.salesandauction.com

New Location: 954 S 4400 W, Suite 390 in SLC!

A review of editorial opinions published by major news outlets and scientific journals from 1996 to 2015 shows that of 1,110 cited publications during this period about metrification of the United States, essentially all advocated American transition to the metric system by relying on these two arguments. *Published Articles about the Metric System, Metrication, and Related Standards*, U.S. METRIC ASSOC. (Aug. 10, 2022), <https://usma.org/published-articles-about-the-metric-system-metrication-and-related-standards>.

Since the arguments upon which proponents of the metric system rely were originally formulated, however, America has grown to overshadow Europe in economic and scientific power; and emerging studies seem to support the claim that the imperial system may be the more intuitive and readily understood of the two systems. Consequently, rather than being moot, both arguments exclusively advanced over two centuries for converting to the metric system would appear now to prescribe the opposite course of action than that for which they were proposed (and Cate Blanchett has her answer).

Is it possible that Jefferson, Adams, Reagan, and Napoleon were right all along? Do the proponents of the metric system bely ulterior motives in their insistence the U.S. convert? Is there an element of academic snobbery in the hype about the metric system? Is it even possible that the metric system itself comes to us as some kind of political artifice born in protest of British imperialism? Has the time come to repeal the Metric Conversion Act?

Conclusions

There may be reason for judges and attorneys crafting local rules – or even the rules of civil procedure – to require that weights and measures in evidence be converted into customary units when supplied to juries. Could verdicts rendered by juries presented evidence in the metric system be collaterally attacked on the basis the metrics were not converted? In fact, it appears they have been. *See Commonwealth v. Rivera*, 918 N.E.2d 871, 874 (Mass. App. Ct. 2009) (finding non-harmless error where jury required to apply metric system without testimony about metric unit conversions).

Despite all the advocacy over the years in favor of the metric system and denouncement of the imperial system as anachronistic, the belief in the superiority of the metric system might still be argued to be a large-scale example of groupthink. Perhaps there is still wisdom in the old Latin maxim, *via antiqua via est tuta* (the old way is the safe way).



Providing hope where it's hard to find.

For attorney Beau Burbidge, hope is pushing against seemingly insurmountable odds to bring a case to court. It's providing fairness for all, helping the underdog, and giving clients a powerful voice for justice.

BurbidgeMitchell.com | 801-355-6677

BURBIDGE | MITCHELL



Hannah Leavitt-Howell Cherise Bacalski Melissa Jo Townsend Freyja Johnson
Emily Adams Sara Pfrommer (of counsel)

THE TRIAL IS JUST THE BEGINNING WE'RE WITH YOU TILL THE END

Don't wait for the appeal. Help the trial court get it right the first time around. From trial consulting and motion work to post-trial motions, our team of appellate attorneys is here for you. And if you need to appeal? We can help with that, too.

UTAH APPELLATE REPORT

The Utah Appellate Report is back! Get weekly case summaries and practice points from the [UAR](#). Subscribe today: theappellategroup.com/uar



theappellategroup.com | 801.924.0854

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 SUPREME COURT

Taylor v. Taylor **2022 UT 35 (Aug. 18, 2022)**

The parties agreed to arbitrate their divorce, but after arbitration husband filed an objection to the award in district court. Husband argued on appeal that district courts had a non-delegable duty to decide divorce cases, and that the arbitration violated public policy. The supreme court rejected the challenge because “[t]he Utah Uniform Arbitration Act does not permit a party who participates in arbitration without objection to then contest an arbitration award by arguing that it is based on an infirm agreement to arbitrate.” The court also commented that even absent that defect, **an agreement to arbitrate alimony and property division in a divorce would not violate public policy.**

State v. Randolph **2022 UT 34 (Aug. 4, 2022)**

In this appeal from the district court’s grant of the State’s motion for pretrial detention, the Utah Supreme Court answered several unsettled questions concerning the standard of review that applies to such decisions.

The court held: (1) the ultimate determination of whether substantial evidence exists to support the charge is reviewed de novo, but if the district court makes factual findings in support of that decision, they are given deference and overturned only if clearly erroneous; (2) the determination that there is clear and convincing evidence the defendant is a substantial danger or likely to flee is given deference and overturned only if clearly

erroneous; and (3) the determination of whether there are no effective conditions of pretrial release is also reviewed for clear error. The court then addressed the meaning of “substantial evidence” in the bail context: “The substantial evidence standard is met when the prosecution presents evidence capable of supporting a jury finding that the defendant is guilty beyond a reasonable doubt.”

Huitron v. Kaye **2022 UT 36 (Aug. 25, 2022)**

Three years after the fact, the plaintiff filed a personal injury suit against the estate of the individual responsible for a fatal automobile accident. Although the Probate Code’s “Nonclaim Statute” bars a personal injury claim against the estate asserted after the one-year presentment deadline, the supreme court held **the statute did not bar claims seeking insurance proceeds from decedent’s liability insurance by filing a claim against the estate;** however, such a suit would be limited to obtaining damages from available liability insurance proceeds.

UTAH COURT OF APPEALS

Turley v. Childs **2022 UT App 85 (July 8, 2022)**

The court of appeals adopted a new appellate standard of review for unopposed summary judgment motions. The previous standard was that any challenge to the district court’s entry of an unopposed summary judgment motion would be reviewed only for plain error. In light of the court’s recent decision in *Kelly*, 2022 UT App 23 (where it held that plain error review is not available in ordinary civil cases unless expressly authorized by rule), the court concluded that **an unopposed summary judgment motion should be**

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

reviewed for correctness as to the question of whether the movant's papers, on their face, indicate that the movant is entitled to summary judgment. But absent extraordinary circumstances, that is the end of the court's inquiry and any defenses or counterarguments that the nonmovant might have raised in a never-filed opposition memorandum are unpreserved and cannot be raised or considered on appeal.

***Jessup v. Five Star Franchising*
2022 UT App 86 (July 8, 2022)**

On appeal from the district court's order granting summary judgment in this case involving alleged breach of a lease, **the court of appeals reaffirmed the scope of appellate review of a summary judgment decision.** First, "the fact statements of the moving and opposing memoranda constitute the constellation of facts to be considered by the district court on summary judgment, and . . . those same facts are to be considered by the reviewing court on appeal. "Second, in order to preserve legal theories for our review, a party resisting an opponent's motion must articulate those theories for the district court."

***11500 Space Ctr. v. Private Capital Grp.*
2022 UT App 92 (July 29, 2022)**

Following the district court's entry of an order granting summary judgment to the defendant, the plaintiff appealed that ruling and "the entire judgment, including all interlocutory orders." Several months later, the district court entered a judgment in compliance with Utah R. Civ. P. 58A(a) as well as an order awarding fees to the defendant. On appeal, the Utah Court of Appeals questioned whether it had jurisdiction to hear an appeal from the judgment and fee order, which were entered months after the operative notice of appeal was filed. Despite the technical prematurity of the notice of appeal, **the appellate court held that the plaintiff's reference to "the entire judgment" and "all interlocutory orders" in the notice was sufficient to alert the opposing party to the scope of the appeal and to confer jurisdiction on the appellate court to address the final judgment and all underlying rulings.**

***Bennion v. Stolrow*
2022 UT App 93 (July 29, 2022)**

After resolving a claim by agreement, plaintiff insisted the settlement amount be paid through a single check that did not account for a third-party lien. Affirming the lower court's

decision on a motion to enforce the agreement, the court of appeals held that payment via two checks – one to a third-party lienholder and the other to the plaintiff and his attorney – was appropriate under the settlement agreement, where its language indicated that the settlement was "subject to" the lien.

10TH CIRCUIT

***Irazar v. Yehia*
38 F.4th 1282 (10th Cir. July 11, 2022)- RBC**

The appellant was a journalist who filed a lawsuit pursuant to 42 U.S.C. § 1983 alleging a First Amendment retaliation claim based on a police officer obstructing appellant's filming of a traffic stop. The magistrate below dismissed the complaint based upon qualified immunity, and the Tenth Circuit reversed. **The court held that "[a]lthough neither the Supreme Court nor the Tenth Circuit has recognized such a right, "there is a First Amendment right to film the police performing their duties in public" which was "clearly established . . . based on the persuasive authority from six other circuits, which places the constitutional question 'beyond debate.'"**

***Nelson v. United States*
40 F. 4th 1105 (10th Cir. July 15, 2022)**

The Tenth Circuit affirmed the district court's award of attorney's fees to the plaintiff in this personal injury case under the Equal Access to Justice Act, which provides that the United States is liable for fees to the same extent it would be liable under any statute which specifically provides for such an award. The court concluded that **the "any statute" language in the EAJA includes state statutes such as the one the plaintiff relied on, and that it was not limited to statutes that directly apply to the U.S. as the government had argued.**

***United States v. Hernandez-Calvillo*
39 F.4th 1297 (10th Cir. July 22, 2022)**

After being convicted of conspiring to encourage or induce a noncitizen to reside in the United States knowing or recklessly disregarding that such residence violates the law, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv), the two criminal defendants successfully moved to dismiss the indictment on the basis the statute is unconstitutional. **The Tenth Circuit affirmed, holding the statute criminalizes a substantial amount of constitutionally protected speech, creating a real danger**

it will chill First Amendment expression, such that it is substantially overbroad. Judge Baldock dissented, expressing the view the statute is subject to a reasonable and constitutional construction.

***In re: EpiPen Mktg., Sales Practices & Antitrust Litig.*
44 F.4th 959 (10th Cir. Jul. 29, 2022)**

As a matter of first impression, the Tenth Circuit joined several other circuits to hold that **“when one district court transfers a case to another, the norm is that the transferee court applies its own Circuit’s cases on the meaning of federal law.”** Still, the transferor court’s governing circuit-level case law “merits close consideration.”

***Cruz v. Farmers Ins. Exch.*
42 F.4th 1205 (10th Cir. Aug. 3, 2022)**

Plaintiff brought suit under 42 U.S.C. § 1981, alleging defendants unlawfully terminated his contract on the basis of race. Reversing the district court’s grant of summary judgment in favor of defendants, the Tenth Circuit held the district court abused its discretion in excluding statements of a district manager under the rules governing statements of an opposing party’s agent. In doing so, the court clarified a **statement of an agent may be admissible under Rule 801(d)(2)(D), even if the declarant was not a final decision-maker, if he or she was involved in the process leading up to a challenged decision.**

***Tavernaro v. Pioneer Credit Recovery, Inc.*
43 F.4th 1062 (10th Cir. Aug. 8, 2022)**

As a matter of apparent first impression, the Tenth Circuit held that **a misleading, deceptive, or false statement by a debt collector is actionable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e only if the statement is “material, which is to say capable of influencing the consumer’s decision-making process.”** Splitting from the Eleventh Circuit and other courts, the Tenth Circuit concluded that materiality is measured by reference to an objectively “reasonable consumer,” rather than the hypothetical “least sophisticated consumer.”

***Mitchell v. Roberts*
43 F. 4th 1074 (10th Cir. Aug. 9, 2022)**

The Tenth Circuit **affirmed the magistrate’s ruling dismissing the plaintiff’s time-barred sexual assault claims with prejudice, following the Utah Supreme Court’s holding in *Mitchell v. Roberts*, 2020 UT 34, that Utah’s Revival**

Statute was unconstitutional because it deprived the defendant of a vested statute of limitations defense. The court rejected the plaintiff’s argument that she should be allowed to voluntarily dismiss her claims without prejudice under Rule 41(a), with a curative condition that she only be allowed to refile if the Utah Constitution is amended to permit legislative revival of time-barred sexual abuse claims. The magistrate properly considered the parties’ equities and did not abuse her discretion in rejecting the proposed curative condition, which she concluded was no cure at all because it would expose the defendant to the possibility of a third lawsuit at some unknown time.

***Day v. Skywest Airlines*
45 F.4th 1181 (10th Cir. Aug. 22, 2022)**

Appellant filed a personal injury lawsuit against Skywest Airlines based upon a flight attendant negligently hitting her with a beverage cart. The district court dismissed the complaint holding that the Airline Deregulation Act (“ADA”) preempted the lawsuit. The ADA preempts state law claims “related to a price, route, or service” of an airline. **Noting that the Tenth Circuit had yet to address what activities fell within the definition of “service,” the court held the appellant’s claims were not preempted because her “contract and negligence claims [we]re not based on state laws impermissibly ‘connected with’ airline prices, routes, or services.”**

Full-Spectrum Dispute Resolution

- divorce, parentage, and modifications
- personal injury/medical malpractice
- commercial and business disputes
- attorney-client conflicts and complaints
- any other need for dispute resolution

R. CLAYTON HUNTSMAN

With a practice spanning more than 45 years, Clay has alleviated stress, hardships, and cultivated peaceful transitions with his clients. Now he brings that same skill-set to mediation.



SOUTHERN UTAH
MEDIATION SERVICES

(435) 599-4140

southernutahmediationservices.com



THOMAS R. LEE



LEE | NIELSEN

TRUSTED
—
APPELLATE
—
EXPERIENCE



JOHN J. NIELSEN

Our decades of appellate experience on both sides of the bench will help you make your best case at any stage. As advocates or advisors, at trial or on appeal, you can trust in our integrity and expertise to help you navigate the appellate process.

LEENIELSEN.COM



801.683.6880

Overcoming Imposter Syndrome: What it is, What it isn't, and What You Can Do About It

by Martha Knudson

Lawyers are high achievers. We have advanced degrees and plenty of accolades and accomplishments to our names. If anyone should feel competent and successful, we should. But a lot of us harbor a secret fear that despite all these objective markers of success we're not nearly as capable as others think we are. I'm in this camp. Sure, I graduated magna cum laude from law school, made partner at my law firm, was a successful general counsel of a top ten national real estate management firm, and worked on the teaching team of an Ivy League graduate program. But despite all this, there are still days when I feel I've fooled everyone, and it's only a matter of time before I'm found out as a fraud.

Am I a fraud? Of course not. Like a lot of people, my thoughts about my abilities just get skewed sometimes. Having this happen may sound silly, but having an intrusive amount of these types of fears are no joke. Left unchecked, they can snowball and have a serious impact on one's career and peace of mind. What I'm talking is the Imposter Syndrome, a psychological phenomenon where people experience a mixture of self-doubt and anxiety that prevents them from recognizing their own skill and success despite overwhelming evidence to the contrary. See J. Hibbard, *The Imposter Cure: How to Stop Feeling Like a Fraud and Escape the Mind-Trap of Imposter Syndrome* 30 (2019).

Signs that you too might experience this phenomenon include sometimes believing you've fooled others into thinking you're more capable than you are, crediting your successes to luck, charm, networking, being in the right place at the right time, or even others' misjudgment. Other signs include discounting your legitimate contributions to team achievements, putting yourself down when someone recognizes your skill, and negatively comparing yourself to others rather than taking pride in your efforts. See *id.* at 6–10, 31–32.

If this sounds like you, the good news is that you are far from

alone. About 70% of both women and men are estimated to experience this phenomena in their lifetimes. Jaruwat Sakulku & James Alexander, *The Imposter Syndrome*, 6:1 INTERNATIONAL JOURNAL OF BEHAVIORAL SCIENCE 73 (2011). Feelings of imposter-itis are actually a very common experience for high achievers like lawyers who work in pressure cooker, competitive cultures where standards are high and performance is constantly scrutinized. Hibbard, at 30, 34–36. The curious thing is that those of us who experience this aren't imposters at all. We sometimes just think we are.

To be clear, feeling unsure doesn't make you an imposter. We all wonder how we measure up sometimes, especially in competitive environments like the legal industry. Wondering this or feeling insecure about our abilities, interactions, or performance from time to time is normal. It can even be adaptive, helping us to spot knowledge gaps and improve. Also, for many women and diverse professionals, having thoughts of being an outsider at work or sometimes feeling like a fraud isn't the phenomenon commonly known as Imposter Syndrome but a by-product of systemic or implicit bias, not seeing themselves represented in leadership, or other incidents of exclusion. Richika Tulshyan & Jodi-ann Burey, *Stop Telling Women They Have Imposter Syndrome*, HARVARD BUS. REV. (Feb. 11, 2011) <https://hbr.org/2021/02/stop-telling-women-they-have-imposter-syndrome>.

Imposter Syndrome is different. It's a cognitive distortion about

MARTHA KNUDSON, JD, MAPP is the Executive Director of the Utah State Bar's Well-Being Committee for the Legal Profession.



both how we define competence and how we judge whether we measure up to our own impossibly high standards. In other words, we grade our own report cards using an unattainably high curve. The inevitable discrepancy only increases our self-doubt, igniting harsh self-criticism as a form of motivation, and driving a variety of unsustainable coping behaviors like overwork, procrastination, or avoidance. This becomes a cycle where no matter how hard we work, how much we do, or what we achieve, we still feel inadequate. Over time, this cycle is unsustainable contributing to job dissatisfaction, career burnout, attrition, and diminished physical and mental well-being. *See id.* ¶ 34–37.

SPOTTING OUR FLAWED BELIEFS ABOUT COMPETENCE AND SUCCESS

Distorted beliefs about what success requires and how we measure up can predispose us to experiencing imposter episodes. Learning to identify these distorted beliefs and understanding how they might be impacting us is key to overcoming the Imposter Syndrome. *See id.* at 40–43; *see* Valerie Young, *The Secret Thoughts of Successful Women: Why Capable People Suffer from the Imposter Syndrome and How to Thrive in Spite of It* (2011).

CRAIG COBURN

Mediation–Arbitration Services

KNOWLEDGE

Construction
Commercial
Complex Civil
Public Policy

EXPERIENCE

Litigator since 1980
ADR Neutral since 1985

COMMON SENSE

Cuts to the Chase
Resolves Disputes



Richards Brandt
801.531.2000
www.rbm.com
Lenora-Spencer@rbm.com

Utah ADR Services
801.865.7622
www.utahadr.com
mbstrassberg@msn.com

The Perfectionist

No one is perfect, but with this distorted belief you think you should be. You set excessively high standards and believe you should deliver a perfect performance 100% of the time. Any mistake or partially achieved goal is taken as proof of not being good enough, meaning that even if 98% of a goal is achieved, you probably forget that part and instead pummel yourself for the missed 2%. Criticisms, even constructive, can be painful and serve to only confirm imposter beliefs. Common coping behaviors are agonizing over minor details, overworking to be flawless, and unduly avoiding risk. *See* Hibbard at 40–41.

The Expert

This distorted belief is the knowledge version of the perfectionist where competence means you should always know the answer. *See id.* at 43. No one can know everything, but if you experience this distortion, you discount all the things you do know and focus on what you don't. The experience of not knowing triggers feelings of self-doubt and the fear you only got where you are because you've fooled people. Common coping behaviors are overworking to gather all the knowledge and skill you can. But there is always more to learn, so what you have is never ever "enough" to make you feel successful. *See id.*

The Natural Genius

Like the perfectionist, the natural genius sets the bar for success impossibly high. But instead of judging yourself by whether you're perfect, the distorted belief is thinking you must get things right on the first try. If you don't, or you struggle to master a new skill, you think this means that something is wrong with you and conclude you're a fraud. Common behaviors include giving up quickly when challenge hits and avoiding risk to avoid failure. *See id.* at 42.

The Soloist

The soloist distortion is the believing that success only counts if you do it on your own. Any need for help means you aren't competent and makes you feel like an imposter. Coping behaviors include refusing to ask for help, turning it down when offered, and either overworking or procrastinating. *See id.* at 42–43.

The Superwoman/man

For the super, competence is measured by how many roles you can successfully juggle. The distorted belief is that you should be able perform all your roles (lawyer, husband, wife, mother, father, son, daughter, coach, volunteer, etc.) all perfectly and with ease. If you fall short in any of your many roles, you feel

guilt and shame because, to you, it's proof of incompetence. Coping behaviors include always saying yes and then pushing yourself relentlessly to outwork everyone to avoid the self-doubt. Among other concerns, this overload of anxiety and pressure makes career burnout likely. *See id.* at 44–45.

I'm a combo of perfectionist and soloist, with a little superwoman thrown in. While these beliefs still pop up sometimes, I now see them as the distortions that they are. Knowing this helps me to reframe my thinking with more accurate beliefs. This was hard at first. Long held beliefs are ingrained and automatic. We take these thinking paths automatically and without thinking. But with effort and repetition, these paths have faded in favor of healthier ones more in keeping with real-life evidence of my ability.

The following three strategies are also useful when working to reframe imposter-itis:

Spot Your Triggers.

Imposter thoughts and feelings aren't present all the time, and usually only occur under certain conditions. Knowing your triggers can help you from heading down the imposter spiral.

See id. at 30. Are there conditions, stressors, or people that trigger you? Mine include unexpected challenge, some people who shall remain nameless, and ambiguity. Here's an example.

"Can we talk tomorrow morning? I have something to discuss." Getting a message like this is standard stuff, but the ambiguity of it used to get me feeling all impostery. It would up my anxiety and send me into rumination about possible worst-case scenarios. Of course, the conversation would inevitably turn out to be no big deal, but the damage would already have been done. My fear that the ambiguous message meant something negative about my skills had already upped my anxiety levels and sucked my time, energy, and productivity.

Fortunately, this kind of imposter episode rarely happens to me anymore. Not because ambiguity has suddenly disappeared from my inbox, but because I can spot the trigger and reframe my reactions to align with the evidence. Now, when I get a request like this my initial reaction might still sometimes be a sudden fear I'm getting called to the principal's office, but it doesn't last long because I see if for what it is, a distortion.

CONGRATULATIONS TO
L. S. "LEE"
McCULLOUGH, II

FOR HIS FIRST
50 YEARS OF
PRACTICING LAW



Remember Feelings Aren't Facts.

A misinterpretation of emotions is another driver of Imposter Syndrome. *See id.* at 46–50. Everyone feels anxious and nervous sometimes. That's just life and the practice of law. But for those of us prone to imposter episodes, these emotions get misinterpreted as evidence of incompetence. For example, to us, being nervous before a court hearing could get misconstrued as proof that we can't handle the challenge. Or, being anxious in a new leadership role might mean we aren't capable enough for the position. These skewed interpretations prompt more self-doubt and fear, altering how we view ourselves and our abilities, and driving behaviors like perfectionism, chronic overwork, or risk avoidance.

The takeaway here is that while emotions can be powerful, feelings are not facts. *See id.* Emotions are indicators that something is going on, but our interpretations of what they mean aren't always accurate. Just because my client emailed me asking to talk doesn't mean that I screwed up or that's he is mad at me. He just wanted to discuss an ongoing project. It was my misinterpretation of his message that caused me to spend the rest of the day feeling like I was in trouble.

If we can learn to recognize that discomfort doesn't automatically mean something negative about how we're doing, we can come to a different and more realistic conclusion. To move forward, slow down, look at the actual evidence beyond the emotion, and re-evaluate your conclusion. Remember, just because you feel fear or anxiety doesn't mean you don't have what it takes. *See id.* at 49–58.

Cultivate Self-Compassion.

While self-criticism and unrealistically high standards might at times seem like the best strategy for improvement, research shows it to be counterproductive, causing us to avoid challenge or not even to try. *See* Kristin Neff, *Self-Compassion: The Proven Power of Being Kind to Yourself* 160–165 (2011). The antidote is the practice of self-compassion. *See* Hibbard at 131–134. Instead of an inner critic berating our every move, self-compassion is an inner motivational coach treating us with kindness while also encouraging us to succeed. It's a three-step process:

1. Recognizing when we're having a hard time or in distress without overreacting or being judgmental.
2. Being understanding, supportive, and kind to ourselves when we're struggling.
3. Remembering that everyone struggles and makes mistakes sometimes.

See Neff, *Self-Compassion: The Proven Power of Being Kind to Yourself*, 43–44.

Self-compassion motivates us to make necessary changes to improve and overcome challenges because we care about ourselves, not because of self-flagellation. Research links it to increased work and life satisfaction, and lower levels of anxiety and depression. *See* Hibbard *supra* at 131–134, *see* Neff (citing research on impact of self-compassion).

PUTTING IT ALL TOGETHER

The next time your self-critic kicks into high gear and imposter feelings pop up, put these strategies to work.

Notice your emotions.

Recognize when you are struggling. Reconsider whether you're misinterpreting what these feelings mean.

Trace the trigger.

What activated these feelings? If it's a trigger that's a big clue that thought distortions are in play.

Spot and reframe distorted beliefs.

Is being perfect the only way to be successful? Do you really have to go it alone? Cross-examine the distorted belief, and consider the evidence you do have what it takes.

Treat yourself with kindness and respect.

Berating yourself for being human in the face of challenge is counterproductive. Everyone feels overwhelmed and anxious sometimes. Offering yourself encouragement and treat yourself like a friend.

Understanding my own Imposter Syndrome has been a huge relief and an even bigger help. It still pops up for me sometimes, but I'm now able to own that my achievements are a result of my intelligence, determination, and love of learning, not some fluke or inhuman ability to con everyone around me. I'm proud of my career and what I've achieved. Sure, I must still work hard, I still struggle and get frustrated with myself sometimes. But I've reevaluated what this means. It means that I'm human.

MEET SOME OF KIRTON McCONKIE'S NEWEST ASSOCIATES



HILARY ADKINS
Litigation
hadkins@kmclaw.com



BRYANT BROWN
International
bbrown@kmclaw.com



JONATHAN BURT
Labor and Employment
jburt@kmclaw.com



TREVOR CROWLEY
Corporate
tcrowley@kmclaw.com



BLAKE FAULKNER
Corporate
bfaulkner@kmclaw.com



ERIK HAMBLIN
Litigation
ehamblin@kmclaw.com



ANDREW LAJOIE
Litigation
alajoie@kmclaw.com



DONALD LUNDWALL
International
dlundwall@kmclaw.com



LAUREN MALNER
Real Estate
lmalner@kmclaw.com



JOHN OLDROYD
Intellectual Property
joldroyd@kmclaw.com



JOSH SUNDLOFF
Litigation
jsundloff@kmclaw.com

KIRTON | McCONKIE

Resolving The *Dahl* Conundrum: The Public Policy Conflict Between Asset Protection Trusts and The Equitable Division of Marital Assets

by Alexander Chang and Bart J. Johnsen

Utah has a strong public policy favoring the equitable distribution of marital assets upon divorce. *See Dahl v. Dahl*, 2015 UT 79, ¶ 25, 495 P.3d 276. The Utah Legislature has also endorsed the asset protection trust (APT), allowing a settlor to be an irrevocable trust's beneficiary and receive spendthrift protections from their creditors. *See Utah Code Ann. § 25-6-502*. However, a public policy conflict arises between trust and divorce law when, upon divorce, only one spouse is the beneficiary of an APT that contains marital property.

In *Dahl*, the Utah Supreme Court narrowly avoided addressing this conflict when an APT was the subject of a divorce proceeding. *See Dahl v. Dahl*, 2015 UT 79. The supreme court was able to reach the marital property inside the trust without invalidating the APT statute because the trust was revocable under Utah law, and the divorce court could reach the property of a revocable trust. *Id.* ¶ 32. The supreme court noted that an irrevocable APT funded by marital assets in a divorce proceeding would “create a serious conflict between trust law and divorce law.” *Id.* ¶ 39 n.13.

The resolution to this conflict seems black-and-white: either the courts are powerless to equitably distribute marital assets inside APTs, or the APT statute and its nearly two decades-long statutory history is at least partially invalid. In the absence of the Utah Legislature's intervention, the courts must navigate this issue carefully when inevitably faced with this conflict in the near future.

ALEXANDER CHANG is a law student at the University of Utah and completed his directed research project on Utah's asset protection trust statute.



The Asset Protection Trust and Its Features

APTs are typically irrevocable, self-settled spendthrift trusts – an aberration of the centuries-old common law rule that a settlor's creditors can reach trust assets if the settlor is also a trust beneficiary. *See RESTATEMENT (SECOND) OF TRUSTS § 156 (AM. L. INST.1959)* (“[W]here a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum among which the trustee under the terms of the trust could pay to him or apply for his benefit.”). Seventeen jurisdictions, including Utah, have overridden the common law by statute, allowing a settlor to also be a trust beneficiary without sacrificing protection from creditors. *See Utah Code Ann. § 25-6-502*.

Key protective features of a properly-constructed APT include that a creditor's sole remedy – in law or in equity – is a fraudulent/voidable transfer action under the Uniform Voidable Transfers Act (UVTA). *See Utah Code Ann. § 25-6-202, -502(3), -502(9)(a)*. Furthermore, APTs have a reduced statute of limitations for a voidable transfer claim, requiring the claim to be brought within two years instead of the UVTA's four. *Compare Utah Code Ann. § 25-6-502(9)(c), with Utah Code Ann. § 26-5-305*. Utah's APT statute also features a unique notice provision that reduces timeliness of a UVTA claim to just 120 days if the transferor gives actual or publication notice of the transfer to creditors. *See Utah Code Ann. § 25-6-502(9)(c)(ii)*.

BART J. JOHNSEN is a shareholder at Parsons Behle & Latimer where he exclusively practices family law.



Most importantly, the settlor may substantially benefit from and indirectly control trust property. The statute allows a settlor to use real or personal property of the trust without compensation, serve as co-trustee, consent to or veto distributions, and pay property taxes, insurance premiums, maintenance expenses, or other expenses of trust property. *See* Utah Code Ann.

§ 25-6-502(7). An APT can essentially be structured so that the settlor enjoys a luxury lifestyle using trust assets while being practically judgment-proof.

The Dahl Conundrum

In *Dahl*, wife and husband contributed marital property to a Nevada APT that named Dr. Dahl and his “spouse” as the beneficiaries. *Dahl*, 2015 UT 79, ¶ 34. Upon their divorce, the wife’s beneficiary status was terminated by operation of the trust agreement’s

language. *Id.* The wife sought a declaratory judgment, arguing the trust was void or the trust was revocable. *Id.* ¶ 7. Fortunately for the wife (and the court), the Nevada APT included a provision that allowed the husband to unilaterally amend any provision of the trust. *Id.* ¶¶ 29–32. Analyzed under Utah law, the unlimited power to amend a trust includes the power to terminate, making the Dahl trust revocable and its protections from creditors invalid. *Id.* The court deftly dodged the “serious conflict” that would occur if the APT was otherwise irrevocable, while pointing the finger to the legislature to act. *Id.* ¶ 39 n.13.

However, the *Dahl* conundrum persists to this day. Theoretically, a Dr. Dahl could transfer the entire marital estate to a properly-drafted APT, wait two years before filing for divorce, and deprive Ms. Dahl of her equitable share. Ms. Dahl’s only remedy to reach



CERTIFIED **DIVORCE** REAL ESTATE EXPERT

Specializing in:

- ✓ Divorce Real Estate Transactions
- ✓ Expert Witness Testimony
- ✓ Fair Market Valuations
- ✓ Traditional Sales

Joe Gordon
Broker / Owner / CDRE
Gordon Real Estate Group
801-577-6304
josephgordonghomes@gmail.com




www.UtahDivorceRealEstate.com

the trust assets is a voidable transfer action – she cannot allege alter ego, fraud in the inducement/restoration, or any other cause for relief “in law or equity” under the APT statute. *See* Utah Code Ann. § 25-6-502(3)(a). Thus, two years after Dr. Dahl’s transfer, Ms. Dahl’s sole legal recourse to reach the trust assets is time-barred by the APT’s shortened statute of limitations for voidable transfer claims.

But why stop there? Dr. Dahl could, using the notice provision under Utah Code Section 25-6-502(9), legally rob Ms. Dahl blind, and all before their first wedding anniversary. In *Dahl*, the APT trust agreement’s language automatically removed Ms. Dahl as a beneficiary if Dr. Dahl ever divorced her, despite Ms. Dahl also conveying her interest in marital property to the trust. *See Dahl v. Dahl*, 2015 UT 79, ¶¶ 27, 34, 495 P.3d 276. A Dr. Dahl could also draft a similar APT naming himself and his “spouse” as beneficiaries under the guise of “protecting the family’s money.” Ms. Dahl – within the trusting confines of marriage and unaware of the complex legal trap set by her soon-to-be-ex-husband – transfers both marital assets and her separate property inheritance from her late father. Ms. Dahl then publishes notice of her transfer to unknown creditors, reducing the statute of limitations for a voidable transfer action to just 120 days. Dr. Dahl files for divorce a little after 120 days.

Ms. Dahl Likely Cannot Void Her Own Transfer

Under the UVTA, the “debtor” (the transferor) is a person who is liable on a claim, and a claim is broadly defined as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Utah Code Ann. § 25-6-102(3). The debtor is liable to their creditor (the person who has a claim) if they make a transfer with actual intent to hinder, delay, or defraud any creditor of the transferor. *See* Utah Code Ann. § 25-6-202(1)(a). The debtor is also liable if the transfer was made without consideration of equivalent value and the transferor intended to incur debts beyond their ability to pay as they come due. *See* Utah Code Ann. § 25-6-202(1)(b). The most natural reading of the statute presumes that the debtor and creditor are two separate individuals.

Here, however, Ms. Dahl’s voidable transfer action – brought outside the confines of the bankruptcy code’s exceptional statutory expansion of standing under 11 U.S.C. § 544 – requires her to awkwardly allege that she is liable to herself as a creditor, triggering significant questions of standing. *See Haymond v.*

Bonneville Billing & Collections, Inc., 2004 UT 27, ¶¶ 1, 7, 89 P.3d 171 (affirming dismissal of plaintiff’s claims for lack of standing because her injuries were “largely self-inflicted” – plaintiff’s claims rested on the defendants’ collection activities after the plaintiff wrote a check without sufficient funds); *Republic Outdoor Adv., LC v. Utah Dep’t of Transp.*, 2011 UT App 198, ¶ 30 n.12, 444 P.3d 547; *but see Bagley v. Bagley*, 2016 UT 48, 387 P.3d 1000 (personal representative sues herself as tortfeasor under the wrongful death statute). Even if she did have standing, Ms. Dahl may also have a difficult time proving that her transfer to the APT had actual intent to hinder, delay, or defraud herself or another creditor. Equally challenging is proving that she intended to incur debts beyond her ability to pay as they come due after the transfer – debts that she somehow owes to herself upon Dr. Dahl’s petition for divorce.

Ms. Dahl’s Voidable Transfer Claim is Time-Barred

Assuming her claim is otherwise valid, Ms. Dahl’s claim is also time-barred by the 120-day statute of limitations after her publication of notice of the transfer. Under Utah Code Section 25-6-502(9)(c)(ii), unknown creditors of the debtor must bring a voidable transfer claim within 120 days after the debtor publishes notice of the transfer. Ms. Dahl is arguably an unknown future creditor of her own transfer to the APT. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) (An “unknown” creditor is one whose “interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].”).

Furthermore, the statute of limitations on Ms. Dahl’s voidable transfer claim is likely not subject to equitable tolling because Ms. Dahl has knowledge of the transfer and the terms of the trust agreement. *See Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981) (“Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff’s failure to file a claim within the relevant statutory period.”); *but see Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25, 108 P.3d 741 (equitable tolling available in “exceptional circumstances” where “the application of the general rule would be irrational or unjust.”); *Fitzgerald v. Spearhead Invs., LLC*, 2021 UT 34, ¶ 16, 493 P.3d 644 (equitable tolling available when “plaintiff knew of the existence of his cause of action but the defendant’s conduct caused him to delay in bringing [suit].”). Ms. Dahl’s time-barred voidable transfer claim is thrown out before she can argue the merits.

Ms. Dahl Has No Legal Recourse to Reach the Trust Assets

As previously mentioned, Ms. Dahl's sole remedy to reach the trust assets is a voidable transfer action under Utah Code Section 25-6-502(3)(a). Ms. Dahl is also not an exception creditor of the APT's spendthrift provision. *See* Utah Code Ann. § 75-5-503. Because Ms. Dahl either has no standing to allege a voidable transfer claim against herself or her claim is time-barred, Ms. Dahl has no legal remedy to reach the trust assets.

Certainly, the divorce court may find that Dr. Dahl dissipated marital assets and award Ms. Dahl a hefty judgment against the husband. *See Jefferies v. Jefferies*, 895 P.2d 835, 838 (Utah Ct. App. 1995) (holding that a transfer made pursuant to the Uniform Transfers to Minors Act was irrevocable and the children's assets were beyond the jurisdiction of the court, but the transferor could be held accountable for dissipation of marital assets); *Andersen v. Andersen*, 757 P.2d 476, 479 (Utah Ct. App. 1988) (awarding a monetary judgment against the spouse dissipating the marital assets); *see also Riechers v. Riechers*, 679 N.Y.S.2d 233 (Sup. Ct. 1998) (awarding wife a judgment for half of husband's foreign APT's assets). Ms. Dahl may also sue under other causes of action (i.e., fraud) to obtain a judgment, and Dr. Dahl would have some difficulty filing a bankruptcy to discharge the judgment. *See* 11 U.S.C. § 541 (preempting federal law allows the bankruptcy trustee to bring a voidable transfer claim within ten years if the transfer was made to a self-settled trust).

However, the wife is also unable to collect on the judgment if everything is inside the trust. Ms. Dahl may garnish her ex-husband's wages and attach any property that he foolishly left outside of the trust, but she is otherwise denied the "just and equitable adjustment of economic resources so that [she] can reconstruct [her life] on a happy and useful basis." *Wilson v. Wilson*, 296 P.2d 977, 979 (Utah 1956). Meanwhile, Dr. Dahl can continue to live in the family home rent free and use the trust's assets for his own benefit. The result is harrowing: one spouse readily enjoys the spoils of their fraud, waiting for the other now destitute spouse to beg for scraps in a settlement.

Even if Dr. Dahl did not defraud and rob Ms. Dahl in such a shameless manner, the existence of APTs remains a problem for equitable division of assets. An APT that allows only Dr. Dahl use and control of marital assets post-divorce is contrary to the intent of court-facilitated separation of married couples. *See*

Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah 1988) ("The purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible."). APTs can practically operate as a non-consensual pre- or post-nuptial contract. One spouse can unilaterally isolate marital property into a complex legal instrument that cannot be upset by a divorce tribunal bound by statutory trust law, destroying one of the fundamental purposes of family law courts.

Legislative Response and Other Jurisdictions

In 2019, perhaps in response to *Dahl*, the Utah Legislature passed an amendment to the APT statute, mandating that an APT trustee must give thirty days' notice to all persons who have a spousal-support order against the settlor before making any distributions to the settlor as a beneficiary. *See* Asset Protection Trust Amendments, 2019 Utah Laws 526. The amendment does not address equitable division of marital assets in the event of divorce – on the contrary, it appears that the Legislature intends for marital property inside APTs to be beyond the reach of divorce courts. *See* Utah Code Ann. § 25-6-502(5)(g). The legislature did not answer the supreme court's call to act.

Other jurisdictions provide little guidance, as the *Dahl* conundrum has not arisen in an APT jurisdiction. However, the prevailing rule in non-APT jurisdictions is that the corpus of an irrevocable trust is not marital property subject to division in a divorce, but if either spouse has a beneficial interest in the trust, then their interest can be divided. *See Findlen v. Findlen*, 1997 ME 130,

Criminal Forensic Evaluations



JONATHAN BONE, PsyD
Salt City Psychology

With his advanced, specialized training in Forensic Psychology, Dr. Bone is uniquely qualified to assist with your criminal cases. His services include:

- consultations
- communication with difficult clients
- prepping clients for trial
- mental health defense strategies
- prosecutorial assistance
- evaluations and more



Salt City PSYCHOLOGY
life • integrated

801.758.7370 | www.saltcitypsychology.com

¶ 15, 695 A.2d 1216 (holding that the trial court could not divide an irrevocable trust's assets for the benefit of husband and wife, but it could divide the parties' interest in the trust); *In re Chamberlin*, 918 A.2d 1,5 (N.H. 2007) (holding that the irrevocable trust's assets were not marital property because the assets did not belong to either spouse at divorce, but that one spouse's right to receive interest payments from an irrevocable trust is marital property); *Lipsey v. Lipsey*, 983 S.W.2d 345, 351 (Tex. App. 1998) (holding that a spouse could create a self-settled trust from separate property and such income remains separate property so long as the income is not distributed during marriage and there is no right to compel distribution).

Ultimately, the solution to the *Dahl* conundrum must likely come from the courts when the issue is inevitably presented again in contentious divorce litigation. The solution should be narrow and nuanced, walking a fine line between Utah's strong public policy in favor of equitable division of marital assets and the legislature's continuing and robust endorsement of the APT as a valid legal instrument.

A Potential Solution

A court facing the *Dahl* conundrum should find that an irrevocable trust funded by marital assets is void for being against public policy if the trust grants, presently or in the future, only one spouse use and enjoyment of trust property or control of the trust after the divorce.

Voiding a trust for being against public policy is not a new legal frontier. Under Utah's APT statute, a trust funded with assets derived from unlawful activities is against public policy and thus void. *See* Utah Code Ann. § 25-6-502(5)(k); *see also* Utah Code Ann. § 75-7-404. A trust may also be void if the performance of the intended trust or provision directs the trustee to commit a criminal or tortious act. *See* RESTATEMENT (SECOND) OF TRUSTS § 61(A) (AM. L INST. 1959). The key distinction between voidable and void is whether the trust affects only people who have an interest in impeaching it, or whether the trust is injurious to the public interest. *See Ockey v. Lehmer*, 2008 UT 37, ¶ 19, 189 P.3d 51; *Baldwin v. Burton*, 850 P.2d 1188, 1193 (Utah 1993); *see also* BLACK'S LAW DICTIONARY 1604 (8th ed. 2004) ("A contract is void *ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.").

A *Dahl* conundrum APT is injurious to the public. Upholding such a trust would likely spawn a large marital fraud industry, with Utah's 120-day statute of limitations notice provision attracting soon-to-be-ex-spouses eagerly searching for a shortcut to annul their marital bonds without having marital assets subject to equitable division. It may also become standard practice for wealthier spouses to shield "their" marital property in an APT as a workaround of the divorce courts, nullifying state-supervised equitable division of assets and all its public policy justifications.

However, outright declaring that all irrevocable trusts funded with marital assets are contrary to public policy is likely too broad – such a ruling would harm innocent and bona fide third-party beneficiaries, such as charitable trusts or trusts for the couple's children. Thus, a court's ruling should apply only to those trusts which allow one spouse to use trust property or control the trust in exclusion of the other at the divorce or anytime thereafter.

In practice, this requires the divorce court to carefully review the trust agreement, as APTs can be – and often are – structured in a manner where a non-fiduciary trust protector, appointed by the settlor, can turn on or off settlor powers or even add or remove trust beneficiaries, including the settlor. Indeed, trust protectors can play a key role in the trust, ranging from controlling the trustee (e.g., approving or objecting distributions, trustee compensation, appointment or removal of trustees, approving or objecting trustee investment actions, etc.) to modifying and amending the trust. The divorce court should pay close attention to the use and control, directly or indirectly, of the trust property, not necessarily whether a spouse is a beneficiary. Additionally, a trust which gives only one spouse substantial powers (i.e., appointing themselves as trustee or authorizing compensation to themselves as "guardian" of a child beneficiary) should be viewed with deep suspicion.

Conclusion

Asset protection trusts, for better or for worse, are likely here to stay in Utah. The conflict between APTs and the equitable division of marital assets in divorce is looming and inevitable and courts should be prepared to consider the issue when it arises. The resolution, however, does not necessarily require the court to forsake one law for another. A court can and should nimbly craft a ruling that accepts both APTs and the just and equitable division of marital assets in divorce.

Parsons Behle & Latimer is on the move again and is pleased to announce the addition of 10 new associates across our Intermountain Region offices. Our new associates further enhance Parsons' scope of client services in litigation, intellectual property, real estate, environmental and national resources, and corporate law. Meet our new associates at parsonsbehle.com.



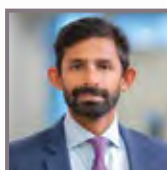
Kaleigh C. Boyer
Idaho Falls, Idaho
Corporate and Litigation
kboyer@parsonsbehle.com



Sean Robison
Salt Lake City, Utah
Environmental &
Natural Resources
srobison@parsonsbehle.com



Kevin Dorman
Lehi, Utah
Corporate
kdorman@parsonsbehle.com



Karthik N. Sonty
Salt Lake City, Utah
Intellectual Property
and Healthcare
ksonty@parsonsbehle.com



Hunter Johnson
Salt Lake City, Utah
Corporate
hjohnson@parsonsbehle.com



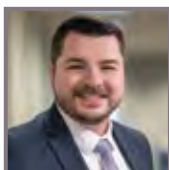
Christian D. Sorensen
Salt Lake City, Utah
Tax
csorensen@parsonsbehle.com



Mindy Kidd
Salt Lake City, Utah
Real Estate
mkidd@parsonsbehle.com



Leah Trahan
Missoula, Montana
Litigation
ltrahan@parsonsbehle.com



Benjamin D. Perkins
Salt Lake City, Utah
Litigation
bperkins@parsonsbehle.com



Jake Ward-Herzik
Reno, Nevada
Environmental &
Natural Resources
jward-herzik@parsonsbehle.com

A Different **LEGAL PERSPECTIVE**

201 South Main Street, Suite 1800 | Salt Lake City, Utah 84111 | 801.532.1234

**PARSONS
BEHLE &
LATIMER**

IDAHO | MONTANA | NEVADA | UTAH | [PARSONSBEHLE.COM](https://parsonsbehle.com)

When NFTs and Intellectual Property Collide

by Alexis Nelson

In December 2019, Nike was granted U.S. Patent No. 10,505,726 for cryptographic digital assets covering footwear, thereby securing its place in non-fungible token (NFT) history. While many NFTs gaining notoriety as of late depict memes or famous photographs, NFTs can be associated with either digital or physical assets (such as a shoe), which assets ultimately exist separately from the NFTs themselves. In contrast to most other digital creations, however, an NFT's unique identifying code hosted on the blockchain makes it one-of-a-kind.

Blockchain technology creates a shared, immutable, decentralized ledger of all transactions across a peer-to-peer network. Though most commonly associated with cryptocurrency systems, blockchain technology can be applied to virtually any industry. IBM, for example, has created a "Food Trust" blockchain to trace the journey that food products take to get to their locations.

A blockchain collects information in groups, or blocks, that hold sets of information. When a block is filled to capacity, it is closed and linked to a previously-filled block, forming a chain of blocks, or a "blockchain." All new information that follows is compiled into a new block, and new blocks are always added to the end of the chain when filled.

Unlike a database, which typically utilizes tables of data, each block in a blockchain is permanent and immutable once it is filled and closed. Also unlike a database, each block in the blockchain is stored linearly and chronologically. To this end, each block contains its own hash, the hash of the block before it, and an exact timestamp recorded when the block is added to the chain. Each block thus forms part of a permanent timeline.

The decentralized nature of blockchain technology means that all transactions stored on the blockchain can be transparently viewed by anyone. Of course, individual records stored within the blockchain are encrypted. Blockchain participants can thus remain anonymous while blockchain transactions themselves are transparent. By maintaining a secure and decentralized

record of transactions in this manner, participants can confirm transactions without the need for a central clearing authority.

The Nike patent connects a real-world physical shoe to a virtual collectible digital shoe (represented as an NFT) to authenticate and track exchanges and purchases of each. When a consumer buys a pair of real-world physical shoes, a "CryptoKick" NFT is generated. The CryptoKick includes a digital representation of the shoe that is linked with the consumer and assigned a cryptographic token. The consumer may utilize the CryptoKick to securely trade or sell the physical pair of shoes, trade or sell the digital shoe, or store the digital shoe in a cryptocurrency wallet or locker. In addition, the consumer may "breed" the digital shoe with another digital shoe to create "shoe offspring," which may then be custom manufactured as a new pair of physical shoes in the real world.

The Nike patent (granted a mere 196 days after filing as part of the United States Patent and Trademark Office (USPTO) Track One program) vividly illustrates the new world we find ourselves in, where physical and virtual worlds collide and NFTs have gone mainstream. This new world has created new opportunities for monetizing intellectual property. With it, however, comes new challenges and considerations with respect to intellectual property protection.

The USPTO has now confirmed that they will be undertaking the study requested by Senator Thom Tillis and Senator Patrick Leahy in June 2022 to engage in a joint effort with the Copyright

ALEXIS NELSON is a patent attorney with Kunzler Bean & Adamson.



Office to examine issues related to NFTs and understand “how NFTs fit into the world of intellectual property rights.” In their letter to the USPTO on June 9, 2022, the Senators remarked that “NFTs are already in global use today and their adoption continues to grow since their relatively recent introduction,” with NFTs being “found in nearly all spheres – from academia to entertainment to medicine, art, and beyond.” Some of the questions that will be addressed in the study include:

- How do transfers of rights apply? How does the transfer of an NFT impact the IP rights in the associated asset?
- How do licensing rights apply? Can and how can IP rights in the associated asset be licensed in an NFT context?
- What intellectual property protection can be afforded? What IP protection can be afforded to the NFT creator? What if the NFT creator is a different person or entity from the creator of the associated asset?

While we wait for official guidance from the USPTO on these matters, the following considerations may be instructive.

Intellectual Property Licenses

Traditionally, intellectual property has been monetized by granting licenses to third parties. As NFTs become more ubiquitous, they should also be factored into the scope of such license agreements. On one hand, intellectual property owners may wish to license their intellectual property to developers in blockchain technology to reap the benefits of this emerging market. On the other hand, it may be wise for licensors to impose restrictions on or expressly preclude a licensee from creating NFTs based on the work being licensed.

DC Comics learned this lesson the hard way when Jose Delgo, a former DC and Marvel comics artist, made \$1.85 million dollars by selling NFTs of his drawings online. Many of the NFTs that Delgo sold featured Wonder Woman® and other licensed characters.

Here, an ounce of prevention is worth a pound of cure. Existing remedies for trademark, copyright, and design patent infringement may be asserted against NFT creators whose NFTs infringe the intellectual property rights of a third party. The immutability of blockchain transactions and the pseudo-anonymous nature of NFT ownership, however, make it nearly impossible to identify the infringer once the NFT has been sold. As a result, the process of enforcing intellectual property rights and obtaining recourse against the infringer may be futile.

Patent Marketing and Licensing

Of particular interest to patent owners may be the prospect of tokenizing patents as NFTs for the purpose of monetization and licensing. Patents tokenized as NFTs would include a “smart contract” stored on the blockchain. A smart contract is computer code that can be built into the blockchain to facilitate, verify, or negotiate a contract agreement. Smart contracts operate under a set of conditions to which a user agrees. Beneficially, once those conditions are met, the smart contract is executed immediately and automatically carried out without requiring third-party involvement. Since blockchain transactions are encrypted and tracked on the blockchain, patent transactions performed via NFTs would provide both security and transparency to parties. Purchasing an NFT patent on the blockchain would automatically give the buyer of the NFT all of the rights to the patent as set forth in the smart contract, including the right to sue for infringement.

Blockchain-enabled patent transactions have tremendous potential for facilitating efficient patent monetization and licensing, as well as for mitigating risk associated with patent transactions. Though still an emerging technology, platforms for blockchain-enabled patent transactions (such as that contemplated by the partnership between IBM and IPWe®) purport to provide transparency and certainty to both buyers and sellers, automate execution of license agreements, and automatically collect fees and/or royalties on behalf of the licensor. Indeed, one of the unique aspects of NFTs is the ability for the licensor to collect a

ANDREW M. MORSE

MEDIATION SERVICES



Trial Lawyer
Mediator
Arbitrator

801.322.9183
amm@scmlaw.com

SNOW
CHRISTENSEN
& MARTINEAU



fee not just when the NFT is originally sold, but each time it is resold as well. This capability requires that the smart contract include a properly worded license.

Because smart contracts are digital and automated, blockchain-enabled patent transactions may increase speed and accuracy of patent transactions, in addition to reducing and/or eliminating expenses and delays associated with due diligence practices, license negotiation, and error reconciliation. Blockchain-enabled patent transactions may also simplify the process of collecting and maintaining prior art data and data related to patent families. In addition, the permanence of blockchain data may facilitate tracking and recording revenues received from patent assets.

Patent licensing attorneys need not worry about job security quite yet though. Blockchain-based patent marketplace platforms have not been tested, and deals associated with patent ownership and licenses may continue to exist outside of the blockchain even if blockchain-based patent transactions become commonplace. Since NFTs do not automatically transfer an ownership or

license unless a smart contract is associated with the purchase, it will remain the buyer's responsibility to ensure exactly what they are buying when they purchase a patent NFT.

Patent NFTs may also give the erroneous impression that they can be relied upon to guarantee the authenticity of a patent. In the United States, however, a U.S. patent assignment, grant, or conveyance must be recorded in the U.S. Patent & Trademark Office within three months from the date of conveyance or prior to a subsequent conveyance. Otherwise, the conveyance is void against any subsequent purchaser or mortgagee. 35 U.S.C. § 261. Conveyances of patent NFTs may thus be void if not also recorded with the USPTO.

Buyers (and their attorneys) will need to continue to authenticate the title to the patent or obtain a warranty of title from the seller before purchasing a patent NFT. Otherwise, transferring the NFT may continue to perpetuate errors in the patent NFT rather than ensuring an accurate chain of title to the patent.

FREE, Confidential Help is Just a Phone Call Away

STRESS

FAMILY
ISSUES

DEPRESSION

ADDICTION

EMPLOYEE
Blomquist Hale
ASSISTANCE

Salt Lake City: 801-262-9619
Ogden: 801-392-6833
Orem: 801-225-9222
Brigham City: 435-723-1610
Logan 435-752-3241
Other Locations: 800-926-9619
blomquisthale.com



**LAWYERS
HELPING
LAWYERS**

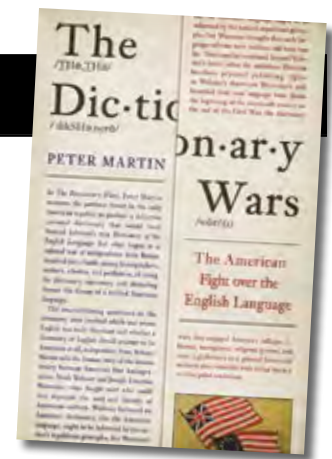
Lawyers Assistance Program

801-579-0404
contact@lawyershelpinglawyers.org
lawyershelpinglawyers.org

The Dictionary Wars

by Peter Martin

Reviewed by The Honorable Michael Leavitt



We are in the business of words and their meaning. A law professor once put it, “Practicing law is just figuring out what words mean. That’s it.” Good lawyers understand the meaning of words and even better lawyers can convince a court that the words mean what their client wants or needs them to mean.

When looking to determine a word’s meaning, courts often begin with a dictionary. *See, e.g., GeoMetWatch Corp. v. Utah State Univ. Research Found.*, 2018 UT 50, ¶ 21, 428 P.3d 1064; *Nicholson v. Jacobson Constr. Co.*, 2016 UT 19, ¶ 10, 374 P.3d 3; *State v. Canton*, 2013 UT 44, ¶ 13, 308 P.3d 517. Indeed, “a starting point for a court’s assessment of ordinary meaning is a dictionary.” *O’Hearon v. Hansen*, 2017 UT App 214, ¶ 25, 409 P.3d 85 (cleaned up).

Mindful of this, a suggested read from Amazon for *The Dictionary Wars* caught my attention. In it, author Peter Martin transports the reader to an infant United States and tracks the development of America’s identity through the lens of language and the establishment of a truly American dictionary. In the lives of most early Americans, the dictionary occupied a lofty place on the shelf right next to the Bible, with both seen as “twin and equally incontestable sources of authority, one secular and the other divine. . . .” Lexicographers of the day saw the publishing of a dictionary as more than a mere means of producing income but as a defense of the American way of life itself. The passion with which they defended their claims on the English language denoted a calling much greater than a mere occupation.

Prior to the American Revolution, the English language derived its spelling, pronunciation, and definitions largely from Englishman Samuel Johnson, regarded as the prime authority

on the subject. Published in 1755, Johnson’s dictionary was considered by many as the final say as to the meaning of words. In fact, despite his unfavorable opinion of the American dialect as “an undisciplined and barbarous uncouthness of speech,” even Americans “could not get enough of him.”

After the birth of the new nation, Americans grappled with whether independence from Great Britain also meant independence from

Johnson’s English. Noah Webster, considered by some to be the Father of American English, believed true independence from England meant independence from its language. “As an independent nation,” believed Webster, “honor requires us to have a system of our own, in language as well as government.” Webster believed his life’s calling and purpose was to codify English as every-day

Americans spoke it and to distance American English from Johnson and the British. This included ridding it of British spelling, pronunciation and definitions, and moreover, purging American English from the “vulgaries of Shakespeare and Chaucer,” even going so far as to create a new interpretation of the Bible, eliminating from it certain “crass” terms like “womb,” “fornication,” “stink,” and other “phrases very offensive to delicacy, and even decency” and replacing them with words that could “be uttered in company without a violation of decorum.”

JUDGE MICHAEL F. LEAVITT was appointed to the Fifth District Juvenile Court in 2014 by Gov. Gary R. Herbert. He serves Beaver, Iron, and Washington counties.



The Dictionary Wars
by Peter Martin
Princeton University Press (2020)
376 pages
Available in paperback, e-book
and audio book formats.

Johnson, Webster argued, was the source of this vulgarity, alleging that Americans' "blind admiration" of Johnson's English served as "the insidious Delilah by which the Samsons of our country are shorn of their locks." His mission, it appeared, was equal parts literary and religious.

Beginning in 1806 with *A Compendious Dictionary of the English Language*, Webster began his quest to shape American English. By using the term *compendious*, Webster meant concise and intended this to be but a first foray into the art of defining words. After twenty years of writing, hiring proof-readers, and finding a publisher, he completed his large, unabridged *An American Dictionary of the English Language* in 1828. This work would be revised several times by both Webster and his successors.

Of course, no pursuit is truly American if it is not challenged. Not all Webster's contemporaries were on board with his endeavors. Many found his methods inconsistent and unnecessary, even unsophisticated. Others believed that English as taught by the British was a best practice and any attempt to Americanize it was a degradation of the language. While Webster saw the establishment of our own language as part and parcel of the American Revolution, others recognized that, like the blood of an estranged sibling, language was a link with England we simply could never shed. Reviews were harsh. "In fifty, or perhaps a hundred of our village schools," one read, "this *Compendious Dictionary* of Mr. Webster is insinuating suspicion and spreading hurtful innovations in orthography." Others called Webster's American English "barbarous phraseology."

Still others competed to create their own form of American English, relying more or less on their British counterparts and even on Webster's work itself. Webster did not receive the competition lightly. His main competitor was Joseph Worcester. Though Worcester was already working on his own dictionary, he was hired to work with Webster's son-in-law, Chauncey Allen Goodrich, in editing Webster's first dictionary, with Goodrich acting as a go-between for Webster and Worcester. Together, Goodrich and Worcester made significant changes to Webster's original definitions and pronunciations, which "horrified" Webster, who quickly expressed his dissatisfaction to both.

Undeterred, after completing his duties for Webster, Worcester proceeded with his own project, publishing his *Comprehensive and Explanatory Dictionary of the English Language* in 1830. In it, Worcester credited Webster's pioneering work in the field,

drawing inspiration from it and claiming merely to add to it.

This did not set well with Webster and thus began a decades-long battle between Worcester and Webster, Webster's heirs, and George and Charles Merriam, brothers who purchased the right to continue publishing Webster's dictionaries after his death (hence the modern-day Merriam-Webster Dictionary). Each alleged plagiarism, a lack of intellect, deceit, and breach of various agreements against the other. They constantly debated one another over whose definitions and pronunciations were more correct, often through the social media of the day – the newspaper article or self-published pamphlet. And Goodrich, the once-loyal son-in-law, would find himself playing both sides and double-crossing his father-in-law in the process. These battles, particularly Webster's efforts to protect his work, led to his active involvement with the U.S. Congress in helping to establish copyright law in the United States, much of which remains the law today.

As a history buff, *The Dictionary Wars* was a satisfying view into the window of early nineteenth century America and its efforts to grow up and establish itself on the world's stage. It is an inside look into the personal lives of some lesser-known American forbearers, to read their thoughts, and to witness the zeal with which they defended their work. The reader sees first-hand the way these people interacted (and feuded) with family members, colleagues, and community members in the pursuit of their passion for language. Martin thoroughly documents his work with primary sources, including letters, pamphlets, and newspaper articles, highlighting the zeal each person brought to the fray and their artful use of the English (American) language in doing so.

As a law buff, *The Dictionary Wars* is evidence that determining the true meaning of words has never been an exact science, but, in true American fashion, may develop over time through debate, litigation, and changes in common usage. Our courts continue to grapple with what parties intended words in a contract to mean or the definition of a statutory term originally used decades ago. In other words, so long as the meaning of words remains up for debate, there is work for lawyers and judges to do.

Mostly, *The Dictionary Wars* offers the reader a renewed appreciation for the rich, beautiful, and sometimes chaotic nature of the language on which each of us relies in the pursuit of our profession.

Lessons From *Alex Jones*: The Rules Governing Inadvertently Produced Documents

by Keith A. Call

For those of you who live in a cave, Alex Jones is a talk show host/podcaster who has promoted various conspiracy theories. One tragic conspiracy he promoted is that the Sandy Hook shooting massacre was a hoax. As you are likely aware, a Texas jury recently awarded nearly \$50 million to the parents of one of the Sandy Hook victims who sued Jones and his cohorts for defamation, and a Connecticut jury awarded nearly \$1 billion. As of this writing other cases against Jones are pending.

One of the Perry Mason moments of the Texas trial was when the plaintiff's lawyer surprised Jones by cross-examining him about text messages from his cell phone that he did not know had been produced. You can watch some of the drama here, *see* The Age & Sydney Morning Herald, *Memorable Moments from the Alex Jones Trial*, YouTube (Aug. 4, 2022), <https://www.youtube.com/watch?v=OFHTedORIAL>, in which the following exchange occurred:

Q [by Mark Bankston, plaintiff's lawyer]: Did you know that twelve days ago, . . . your attorneys messed up and sent me an entire digital copy of your entire cell phone, with every text message you've sent for the past two years, and when informed, did not take any steps to identify it as privileged or protected in any way, and as of two days ago, it fell free and clear into my possession, and that is how I know you lied to me when you said you didn't have text messages about Sandy Hook, did you know that?

A [by Mr. Jones]: I . . . see, I told you the truth. This is your Perry Mason moment. I gave them my phone, and [interruption by the Court].

See id. at 1:07.

I'm sure you do not want to be like Mr. Jones' defense counsel in that video, so let's review the Utah rules regarding inadvertent disclosure of documents.

Utah Rule of Civil Procedure 26

The analysis in Utah starts with Utah Rule of Civil Procedure 26(b) (9) (B), which states:

If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

This language is clear. Once notified by the producing party that privileged material has been produced, the receiving party may not use the material until the claim of privilege is resolved. Either party may seek appropriate relief from the court.

The federal rule is similar. *See* Fed. R. Civ. P. 26(b) (5) (B).

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



Ethical Rules

Let's begin the ethics part of this discussion with Utah Rule of Professional Conduct 1.1, Competence. I have harped on this rule before when writing about electronic discovery issues, but it bears repeating: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" Utah R. Prof. Cond. 1.1.

Comment [8] to Rule 1.1 makes it clear that competence may include knowledge of electronics: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . . ." Utah R. Prof. Cond. 1.1, cmt. [8]. If computers and electronics are not your strong suit, engage in some meaningful CLE and get help.

Rule 4.4(b) directly addresses the inadvertent disclosure of privileged information: "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." Utah R. Prof. Cond. 4.4(b).

A comment to Rule 4.4 clarifies that the duty to notify a sender regarding inadvertently produced information applies to an electronic document's metadata. Utah R. Prof. Cond. 4.4, cmt. [2]. For example, suppose your adversary electronically produced a set of documents that redacted privileged information, but the redacted material is still visible in the metadata. Under Rule 4.4, you would have an obligation to notify your adversary that his or her redactions were not completely effective.

The comments also suggest that the lawyer's *ethical* duties stop after the lawyer has notified the sender. Whether the lawyer is ethically required to take additional steps (such as those required by Utah Rule of Civil Procedure 26) is beyond the scope of the ethical rules. *Id.* In other words, the drafters of Rule 4.4 did not try to resolve questions of privilege or waiver. They left that for the parties and, if necessary, the court to decide. From an ethical rules perspective, the decision to voluntarily return or delete an inadvertently produced document "is a matter of professional judgment ordinarily reserved to the lawyer." *Id.*, cmt. [3].

The supreme court adopted current Rule 4.4(b) in 2005. Prior to that, when Rule 4.4(b) did not exist, the Bar's Ethics Advisory Opinion Committee (EAOC) addressed a similar issue under Rule 8.4(d), which addresses conduct prejudicial to the administration of justice. Even without the benefit of our current Rule 4.4(b), the EAOC determined that "an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure." Utah State Bar Ethics Op. No. 99-01, 1999 WL 48784, *2 (Jan. 29, 1999). In that case, the attorney had come into possession of an adverse party's materials through his *client*, not through the opposing attorney. *See id.* at *1.

What Utah's rules do not explicitly address is whether a lawyer is obligated to stop reading the materials once she realizes they may be privileged. The rules may be purposely vague on this issue. Some argue for limiting the scope of a lawyer's ethical duties in this context because lawyers who receive such communications should not be subject to professional discipline in situations not of their own making. *See* Anthony E. Davis, *Inadvertent Disclosure – Regrettable Confusion*, NEW YORK LAW J. (Nov. 7, 2011), <https://www.law.com/newyorklawjournal/almID/1202524676226/>. If you do proceed to read such materials, however, be aware of the risk that you are subjecting yourself to potential disqualification from the case or other civil sanctions. *See* Keith A. Call, *Fragile Contents: Dropping the Box Can Waive Privileges; Opening the Box Can Get You Sanctioned*, 30 UTAH B.J. 42, 42–43 (July/Aug. 2017).

Summary

In summary, when an attorney in Utah comes into possession of information that he or she has reason to know was inadvertently sent, the lawyer has an *ethical obligation* to notify the sender. Under our current rules, that is where the ethical duty stops.

Once notified, the sending party has the right to assert privilege. If privilege is asserted, the lawyer has a duty under the civil discovery rules to destroy or sequester the information and not use it until the issue of privilege is resolved by the parties or the court.

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

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.

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

2022 Fall Forum Awards Recipients

Congratulations to the following people who will be honored during the 2022 Utah State Bar Fall Forum!



Terence L. Rooney
NLTP Mentor
of the Year



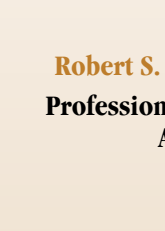
Hon. Su J. Chon
James Lee
Mentoring Award



Phillip S. Ferguson
Charlotte Miller
Mentoring Award



Jennifer S. Huntsman
Paul Moxley
Mentoring Award



Robert S. Clark
Professionalism
Award



Shawn Newell
Community
Member Award



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), 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.

Thirty-First Annual Lawyers & Court Personnel Food & Winter Clothing Drive

Selected Shelters

Jennie Dudley's Eagle Ranch Ministry

The Eagle Ranch Ministry has been feeding the homeless and those in need for over forty years under the 5th South freeway, headed by Jennie Dudley, who started this venture with a simple barbecue set and donated food. Though donations and volunteers, she has a substantial portable kitchen that fulfills this purpose with the help of many volunteers. Her "Chuck Wagon," as she calls it, has served the needy, Spirit, Soul and Body, on the streets of Salt Lake City since 1985, never missing a Sunday, Thanksgiving or Christmas in those years. The Chuck Wagon arrives with all the equipment to cook Sunday Brunch, Thanksgiving Dinner or Christmas Dinner, trusting God for the food and volunteers to prepare and serve the food that arrives. Her Eagle Ranch Distribution Center also provides items to Churches, Agencies and Ministries who are serving the needy. Leonard has personally volunteered at the Chuck Wagon over the years and is very proud of the fact that his youngest son, Roman, was blessed by Jennie when he was about nine months old at one of the Chuck Wagon dinners. Jennie is a teacher, ordained minister and the founder of Eagle Ranch Ministries (eagleministries.net/jennie.html). She studied under Wilford and Gertrude Wright, son in law and Daughter of John G. Lake, where she was called to "GO feed My People, Spirit, Soul and Body."

The Rescue Mission

Women & Children in Jeopardy Program

Drop Date

December 16, 2022 • 7:30 a.m. to 5:30 p.m.

Utah Law and Justice Center – East Entrance
645 South 200 East • Salt Lake City, Utah 84111

Volunteers will meet you as you drive up.

**If you are unable to drop your donations prior to 5:30 p.m.,
please leave them on the rear dock, near the building, as we will
be checking again later in the evening and early Saturday morning.**

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to firm members, as a reminder of the drop date and to coordinate the collection for the drop.

If you are interested in helping please call (801) 363-7411
or email Leonard W. Burningham: lwb@burninglaw.com

Sponsored by the Utah State Bar

Thank You!

What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

New & Used Winter & Other Clothing

- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

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.

Family Justice Center

Rob Allen
Steve Averett
Lindsay Brandt
Dave Duncan
Amie Erickson
Kit Erickson
Michael Harrison
Brandon Merrill
Sandi Ness
Kim Sherwin
Babata Sonnenberg
Nancy Van Slooten
Rachel Whipple

Private Guardian ad Litem

Michael Branum
Allison Librett
Elizabeth Lisonbee
Christina Miller
Harold Mitchel
Amy Williamson

Pro Bono Initiative

Maya Anderson
Jonathan Benson
Nathan Bracken
Michael Brown
Heidi Chamorro
Jessica Couser
Daniel Crook

Marcus Degen
Dave Duncan
Craig Ebert
Ana Flores
Sara French
Peter Gessel
David Head
Layne Huff
Beth Jennings
Ezzy Khaosanga
David Leigh
Allison Librett
Ysabel Lonazco
Adam Long
Kenneth McCabe
Kendall MicLelland
Grant Miller
Kendall Moriarty
Keil Myers
Lenor Perretta
Clayton Preece
Stewart Ralphs
Clay Randle
Brian Rothschild
Galen Shimoda
Jay Springer
Charles Stormont
Michael Thornock
Leilani Whitmer

Pro Se Debt Collection Calendar

Hilary Adkins
Lajoie Andrew
Greg Anjewierden
Miriam Allred
Mark Baer
Joel Ban
Pamela Beatse
Keenan Carroll
Ted Cundick
Marcus Degen
Mary Essuman
Blake Faulkner
Leslie Francis
Ector Hannah
Pok Jazmynn
Zachary Lindley
Amy McDonald
Matt Nepute
Vaughn Pederson
Brian Rothschild
Christopher Sanders
George Sutton
Joseph Watkins
Austin Westerberg
Shields Zach

Pro Se Immediate Occupancy Calendar

Alex Baker
Joel Ban

Pamela Beatse
Keenan Carroll
Marcus Degen
Lauren Difrancesco
Leslie Francis
Annika Hoidal
Nicole Johnston
Matt Nepute
Sarah Puzzo
Lauren Scholnick
Alex Vandiver

SUBA Talk to a Lawyer Legal Clinic

Braden Bangerter
Travis Christiansen
William "Bill" Frazier
Aaron Randall
Lewis Reece
Colby Winsor

Timpanogos Legal Center

Steve Averett
Amirali Barker
Lindsay Brandt
Sol Huamani
Sol M Huamain
Heather Jemmett
Keil Myers
Amy Sauni
Babata Sonnenberg

Notice of Petition for Reinstatement to the Utah State Bar by J. Mark Edwards

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Petition for Reinstatement (Petition) filed by J. Mark Edwards, in *In the Matter of the Discipline of J. Mark Edwards*, Third Judicial District Court, Civil No. 180903193. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the District Court.

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
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
Kent Scott
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Angela Shewan
Peter Shiozawa
Farrah Spencer
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

Jennifer Arganbright
Justin Caplin

Wills for Heroes

Joe Alvarez
Scott Anderson
Skyler Anderson
Cheri L. Christensen
Craig Day
Danny Fein
Jen Joslin
Trina Kinyon
Katie Lawyer
Gabriela Mena
Andres Morelli
Katherine Pepin
Liberty Stevenson
Jason Tholen

I N M E M O R I A M

The Jan/Feb 2023 issue of the *Utah Bar Journal* will include an in memoriam list of Utah legal professionals who passed away during 2022. If you are aware of any current or former members of the Utah State Bar, including paralegals and judges, whose deaths occurred during 2022, please let us know. Email their name(s) and, if possible, a link to their obituary to: BarJournal@utahbar.org.

To be included in the list, names must be received by December 15, 2022.



OUR PROVEN PROCESS FOR DIVORCE



**Thank You for Trusting Us
with Your Clients Who Need
a Good Divorce Attorney**



MARCO BROWN



801-685-9999

www.BrownFamilyLaw.com

Attorney Discipline

Visit 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**

Effective December 15, 2020, the Utah Supreme Court re-numbered and made changes to the Rules of Lawyer and LPP Discipline and Disability and the Standards for Imposing Sanctions. The new rules will be in Chapter 11, Article 5 of the Supreme Court Rules of Professional Practice. The final rule changes reflect the recommended reforms to lawyer discipline and disability proceedings and sanctions contained in the American Bar Association/Office of Professional Conduct Committee's Summary of Recommendations (October 2018).

ADMONITION

On July 28, 2022, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.8(i) (Conflict of Interest: Current Clients: Specific Rules) of the Rules of Professional Conduct.

In summary:

A client retained an attorney to represent him in divorce proceedings. During a temporary orders hearing, the client and his wife stipulated to the sale of the marital home. Five days later, the attorney filed a Notice of Lien on the home pursuant to Utah Code Section 38-2-7. The client agreed to have the lien taken however, the lien was taken inconsistent with the statute. The home was sold and the attorney's lien for attorney's fees

were paid in full from the proceeds of that sale. The attorney withdrew from his representation of the client. A final decree of divorce was later entered.

PUBLIC REPRIMAND

On August 8, 2022, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Paul D. Benson for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), and 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:

This case involves three matters. In the first matter, a client retained Mr. Benson for the purpose of filing for bankruptcy.

Adam C. Bevis Memorial Ethics School

March 15, 2023 or September 20, 2023
6 hrs. CLE Credit, including at least 5 hrs. Ethics
 (The remaining hour will be either Prof/Civ or Lawyer Wellness.)

Cost: \$100 on or before September 9 or March 7,
 \$120 thereafter. Sign up at: opcutah.org

TRUST ACCOUNTING/ PRACTICE MANAGEMENT SCHOOL

Save the Date! January 25, 2023
6 hrs. CLE Credit, including 3 hrs. Ethics
 Sign up at: opcutah.org



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

The client understood from Mr. Benson that they should spend their tax refund before filing for bankruptcy, so they spent their tax refund and dropped off the receipts to Mr. Benson's office. The client also understood from Mr. Benson's staff that it would take two to three weeks before they would have the bankruptcy case number. When the client had not heard anything, they began calling Mr. Benson's office but did not receive a call back. Eventually, the client was able to speak with a staff member who stated Mr. Benson needed more information. The client provided the information and indicated they had left messages regarding questions they had but had not received a response. Eventually, Mr. Benson filed the client's bankruptcy petition. Mr. Benson failed to provide a thorough explanation to the client regarding how her tax refund would be calculated and how much of it would be taken by the trustee when Mr. Benson filed the client's bankruptcy petition.

In the second matter, a client retained Mr. Benson to file a Chapter 13 bankruptcy. Mr. Benson filed the petition but failed to provide required information to the Court to further the client's case. The client faxed information on multiple occasions to Mr. Benson but did not receive a response. The client also faxed information to Mr. Benson regarding a dispute with a creditor but did not receive a response. The client only had contact with Mr. Benson two or three times during the representation. Mr. Benson failed to timely respond to motions to dismiss filed by the trustee in the client's case.

In the third matter, Mr. Benson filed a bankruptcy petition on behalf of a client. Mr. Benson failed to timely pursue the bankruptcy in a manner consistent with the client's interest. Mr. Benson failed to timely submit proof of the financial education class in the first bankruptcy and failed to timely file a motion to reopen. Mr. Benson filed a second bankruptcy on behalf of the client. Regarding the second bankruptcy, Mr. Benson failed to timely submit proof of the financial education class. Mr. Benson failed to respond to the client's attempts to communicate with them. Mr. Benson charged and collected excessive fees from the client considering the work completed and results obtained, particularly given that the bankruptcy had to be refiled.

INTERIM SUSPENSION

On May 23, 2022, the Honorable Sean M. Petersen, Fourth Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against Sonny J. Olsen, pending resolution of the disciplinary matter against him.

In summary:

Mr. Olsen was placed on interim suspension based upon convictions for the following criminal offenses: Aggravated Assault, a 3rd Degree Felony; and Criminal Mischief (DV), a Class A Misdemeanor.

RESIGNATION WITH DISCIPLINE PENDING

On May 6, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Kyle W. Jones for violation of Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Jones represented a mortgage lender (Lender) in a debt collection matter against a husband (Husband) and wife (Wife). Another company (Second Lender) acquired the account and at that time Mr. Jones was instructed to take no further action on behalf of the Lender.

Mr. Jones negotiated with the debtors representing that he was negotiating on behalf of his client. The couple agreed to settle the matter for a sum, payable before a certain date. During the negotiations, Mr. Jones represented that he had talked with his client and they had given a large discount to the couple but would not give another discount. Mr. Jones also indicated that the offer needed to be accepted and paid by a certain date.

Wife sent Mr. Jones a settlement check in the amount of \$13,000 payable to Lender for a portion of the settlement amount. Mr. Jones acknowledged receipt of the payment and told Wife the balance owing to fully resolve the matter and gave a date it was purportedly due. Mr. Jones did not inform Wife the loan had been sold and did not tell Wife that Lender was not the current entity to whom the check should be made payable. Mr. Jones endorsed the check and presented it for deposit.

At that time, the couple was unable to pay the remaining balance. Mr. Jones continued settlement negotiations with the couple and indicated he was speaking on behalf of Lender. Wife asked if Lender would accept a certain amount to settle the account. Mr. Jones emailed Wife stating the amount was acceptable. He further stated that once he received the money, the debt would be satisfied, he would mail the Satisfaction of Judgment and the lien on the couple's home would be lifted. Mr. Jones did not inform Wife the loan had been sold nearly

three years prior and did not explain the correct entity to whom the check should be made payable. When Wife asked if the check should be sent to Mr. Jones' office and made out to Lender, Mr. Jones responded in the affirmative. Mr. Jones endorsed the check in the amount of \$20,000 and presented it for deposit.

The case against the couple was dismissed with prejudice. In addition to the removal of the lien by Lender, Wife also requested a "charge off" letter from Lender. Mr. Jones indicated he would obtain the letter from Lender or provide one himself. Wife continued to email Mr. Jones because she had not received the Satisfaction of Judgment or Release of Lien. Mr. Jones did not respond.

The couple decided to sell their home and requested documentation from Mr. Jones demonstrating the loan had been paid off so they could provide proof to the title company. Mr. Jones responded stating that the full amount had been paid and that the case had been dismissed with prejudice. He attached a copy of the order of dismissal. Wife spoke to the loan companies to sort out why there was still a lien attached to her home. Wife discovered that Lender and Second Lender had no record of receiving the funds she paid to Mr. Jones.

The OPC requested that Mr. Jones provide documents demonstrating where the first payment to Mr. Jones had been held during the pendency of the matter. The letter also requested that Mr. Jones specify when he sent the second payment to Second Lender given the delay in releasing the lien. Mr. Jones responded but did not provide the requested records. The OPC wrote to Mr. Jones and again requested the documents he previously failed to provide. Mr. Jones responded again claiming the funds were held in trust but without providing the records.

The OPC obtained the bank records by Subpoena. An examination of the records demonstrated that the first payment was not held in trust during the pendency of the matter. There were no checks issued from Mr. Jones' trust account to First or Second Lender either referencing Wife or in an amount near the payment she made. Shortly after Wife's second payment was deposited into Mr. Jones' trust account, Mr. Jones began transferring money to his personal account. There were no checks issued from Mr. Jones' trust account to First or Second Lender either referencing Wife or in an amount near the second payment she made.

Working from home can be great...

But it's no place for a client!



The **UTAH LAW & JUSTICE CENTER** offers private, professional meeting space for your **client conferences, depositions, mediations, and more!**

Our meeting rooms feature:

- reasonable rates
- a central, downtown location
- free internet access
- free, adjacent parking
- audio-visual equipment and support
- beverages
- personal attention

For information & reservations, contact:

Travis Nicholson, Building Facilities & Events Manager
tnicholson@utahbar.org | (801) 297-7029

New Opportunities

by Cedar Cosner

The last two years have been a trying time for the Young Lawyers Division (YLD) and the legal community at large. Seemingly overnight, members of YLD, like all lawyers, were forced to quickly adapt to new rules in a profession that traditionally demanded an in-person presence with clients and in the courtroom. Young lawyers also had to find new ways to network and build those critical relationships that can define a successful career. In a professional environment that changed every day, YLD was challenged with the tasks of continuing to foster the success of its members and to ensure that its valuable offerings to the community endured.

Through the indefatigable efforts of Past Presidents Grace Pusavat and Grant Miller and the other members of our board in navigating the tumultuous pandemic landscape, YLD not only kept its services alive, but significantly bolstered many of them. With the sea change of legal practice to a virtual environment, YLD developed new ways of delivering legal services to the community. Flagship programs such as “Wills for Heroes” and the “Veterans’ Legal Clinic” developed new means of reaching into previously underserved communities in the virtual space. And YLD strengthened its bonds with significant partners, including the J. Reuben Clark Law School, members of the bench, and all of you.

Without the efforts of YLD’s members, its success would not have been possible. Because you volunteered your time, YLD was able to provide pro bono legal assistance to numerous veterans, firefighters, and law enforcement. Because you cared about your community, YLD was able to revive the Unsheltered Youth Prom at the VOA youth center and provide support to high school debate programming that is integral to building relationships with those future young lawyers you will meet in your practice.

And because you would not give up, the camaraderie that exemplifies the Utah legal community persevered.

Not all of YLD’s offerings were possible during the pandemic, and while I believe they can return stronger than ever, they will need your help to do so. YLD faces a unique opportunity to redefine service to the community by melding its traditional ways of doing things with lessons learned from the past two years. In recognition that a lawyer’s YLD membership eventually ends, YLD also seeks to provide additional support to lawyers either transitioning into or out of the organization.

“[T]here are few better ways of helping guide your time in YLD than by reaching out with your ideas.”

There is no right answer to resolving YLD’s current challenges, and YLD will need to listen closely to all of its members to find the appropriate approaches. This means it will not only call upon you to volunteer, but to lead. Indeed, there are few

better ways of helping guide your time in YLD than by reaching out with your ideas. Sit on a committee, run with your ideas, and let us make YLD an effective representative of all its constituents. Our door is always open.

I am excited to see what YLD can accomplish in the coming year. As before, YLD will strive for excellence in its community involvement and professional support. With your help, we can make it happen.

CEDAR COSNER is of-counsel at Lowe Hutchinson Cottingham & Hall and is the current President of YLD.





Message From the Chair

by Katie Lawyer

Hi from the Paralegal Division of the Utah State Bar! I am Katie Lawyer, the current Chair of the Paralegal Division of the Bar. I'm so excited to take over this year and continue all the great things we do as well as work on some new possibilities. We have an amazing group of paralegals in Utah, and I can't brag enough about how great everyone is!

Since the return of in-person events, our division has had the opportunity to help in one of our favorite events, Wills for Heroes. The Young Lawyers Division invites us to help the incredible first responders all over Utah prepare these

important documents, and our paralegals come out to help, finalize, and notarize. In August, we had one of our members, Ms. Utah, Trina Kinyon, come and volunteer at Wills for Heroes in Weber County!

We have many amazing members that volunteer their time for many amazing organizations and events, and I want to thank all the paralegals who have come out and helped in the past. I hope everyone keeps their eyes out for more opportunities to volunteer in the future. To keep up on any calls for help, make sure to follow our social media and Division emails!

Please Welcome Three New Utah Licensed Paralegal Practitioners

We are pleased to announce an additional three Licensed Paralegal Practitioners, bringing the total to date to thirty. Please welcome:

Bonnie Morriss, LPP, PP – Family Law

Bonnie Morriss has been a paralegal working in Family Law for over fifteen years. She has worked for McConkie Law Office, Brenda Beaton, and currently works for Melanie Cook Law. She is looking forward to building her own LPP practice and has received so much support and encouragement from her employer and other attorneys. In addition to being a Licensed Paralegal Practitioner, Bonnie is also a certified Professional Paralegal through the National Association for Legal Support Professionals. Bonnie is passionate about helping people and bridging the gap for those individuals that have not had access to legal services.



Brooke Byall, LPP – Housing and Consumer Protection

Brooke Byall has worked as a paralegal at Celeste C. Canning PLLC since 2017. She is a graduate of Purdue University, receiving her Bachelor of Science in Legal Support and Services with a concentration in Paralegal Studies. Celeste C. Canning has been extremely supportive of the LPP program, and Brooke is excited to continue working with



the firm as a Licensed Paralegal Practitioner with licensure in landlord/tenant law and debt collection. As a new LPP, she is committed to providing affordable legal representation.

Monica Short, LPP, PP – Family Law

Monica Short has been a paralegal for over fourteen years. She is a Licensed Paralegal Practitioner in Family Law. She is a founding member of LOTUSLEGAL and the Senior Paralegal at the firm. She works personally with each client to help them find peace and new positive outcomes. Monica received her bachelor's degree from Southern Utah University in 2006. Monica then received her paralegal certificate from Weber State University in April 2015. She continued building her knowledge and skills and earned her Professional Paralegal Certificate from the National Association for Legal Support Professionals in April 2022. Monica looks forward to continuing to provide legal services to families and making a difference in their lives. Monica is thankful for the opportunity that the LPP program has provided to her and the community that she serves.



For more information about how to hire a Utah Licensed Paralegal Practitioner, please visit the Utah State Bar's website at: <https://www.licensedlawyer.org/Find-a-Lawyer/Licensed-Paralegal-Practitioners>.



BAR POLICY: Before attending a seminar/lunch your registration must be paid.

November 4, 2022

TBA



FALL FORUM

Little America Hotel, Salt Lake City. Watch for the latest details at www.utahbar.org/fallforum.

January 25, 2023

6 hrs. CLE, including 3 hrs. Ethics

Trust Accounting/Practice Management School. Sign up at: opcutah.org.

March 15, 2023

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

Adam C. Bevis Memorial Ethics School. Cost: \$100 on or before March 7, \$120 thereafter. Sign up at: opcutah.org.

TBA

2023 IP Summit. Sponsored by the Intellectual Property Section of the Utah State Bar. Held at the Grand America Hotel in Salt Lake City.

TBA

1 E-Verified CLE Credit (pending approval)

Criminalizing Institutional Complicity. Webinar featuring Professor Amos Guiora.

TBA

1 E-Verified CLE Credit (pending approval)

The Responsibility of an Enabler. Webinar featuring Professor Amos Guiora.

TBA

TBD

Professor Mangrum on Utah Evidence. Webinar.

TBA

1 E-Verified CLE Credit (pending approval)

Am I My Brother's Keeper? Questions of Civility and Duty. Webinar featuring Professor Amos Guiora.

TBA

1 E-Verified CLE Credit (pending approval)

The Ethical Responsibilities of an Institutional Leader. Webinar featuring Professor Amos Guiora.

March 16–18, 2023

TBD

SPRING CONVENTION 2023! Please save these dates and plan to join us for this wonderful tradition, as we gather for the event in-person again!

SAVE THESE DATES!

**MARCH
16–18**



*Spring Convention
in St. George*

All content is subject to change.

All registrations can be accessed on the Practice Portal or at: utahbar.org/cle, where you will find the latest information on monthly section luncheons and more CLE to come, to help our licensees with their annual compliance.

RATES & DEADLINES

Bar Member Rates: 1–50 words: \$50, 51–100 words: \$70. Confidential box is \$10 extra. Cancellations must be in writing. For information regarding classified advertising, call 801-297-7022.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For **display** advertising rates and information, please call 801-910-0085.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: April 1 deadline for May/June issue.) If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

JOBS/POSITIONS AVAILABLE

Established AV-rated Business & Estate Planning Law Firm with offices in St. George, UT and Mesquite, NV is seeking a Utah-licensed attorney with 3–5+ years' of experience in business, real estate, construction, or transactional law. An active bar license in Nevada and tax experience are also preferred, but not necessary. Ideal candidates will have a distinguished academic background and relevant experience. We offer a great working environment and competitive compensation package. St. George and Mesquite are great places to live and work. Please send resume and cover letter to Barney McKenna & Olmstead, P.C., Attn: Daren Barney at daren@bmo.law.

Established AV-rated Business & Estate Planning Law Firm with offices in St. George, UT and Mesquite, NV is seeking a **Firm Administrator**. Legal or paralegal experience would be ideal, however, office management experience is the most important criteria. Responsibilities include recruiting staff, training, personnel records, employee benefits, employee relations, risk management, legal compliance, implementing policies and procedures, computer and office equipment, recordkeeping, insurance coverages, managing service contracts, marketing, responding to client inquiries and providing administrative support to the Shareholders. There is also opportunity to do paralegal work. Please send resume to Barney McKenna & Olmstead, P.C., Attn: Daren Barney, daren@bmo.law.

OFFICE SPACE/SHARING

45-YEAR LAW PRACTICE CLOSING SOON! OFFICE SPACE for turn-key occupancy now available. Share or purchase/take-over now available in sunny St. George, America's fastest-growing city. 4 offices, conference room, waiting room, private bathroom, kitchen nook; good desks, credenzas, tables, bookshelves, filing cabinets, computers, phone land-line, supplies, lots of extras for walk-in occupancy and personal property purchase. Seller would consider keeping one office plus access to conference room for mediation business. CALL Clay or Bonnie at 1-435-628-2846, or email at rchuntsman@infowest.com.

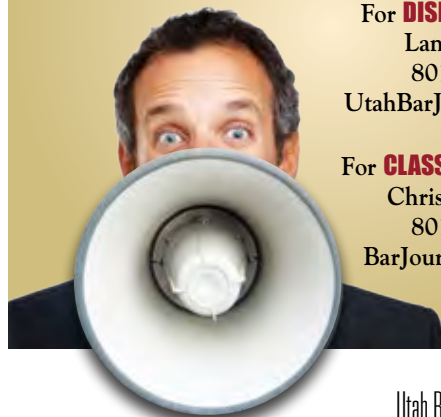
FOR RENT: Executive window office and interior office in Kimball Junction. Large furnished window office and medium interior office. Great main or satellite office from SLC practice. Available October 1, 2022. High speed Wifi and conference room. \$750/\$1,150/month separately or \$1,600/month for both, option \$100/month underground parking. 435-640-2158 or anne@aaclawutah.com.

DOWNTOWN PRACTICE MADE SIMPLE. Beautiful executive offices with established law firm on State at Third South close to Matheson and Hatch courthouses. Ideal for 2 or 3 attorneys with staff. Receptionist services, conference rooms, parking and warm associations with experienced attorneys. Contact Richard at (801) 534-0909 / richard@tjblawyers.com.

Get the Word Out!

If you need to get your message out to the members of the Bar...

Advertise in the Utah Bar Journal!



For **DISPLAY** ads contact:
Laniece Roberts
801-910-0085
UtahBarJournal@gmail.com

For **CLASSIFIED** ads, contact:
Christine Critchley
801-297-7022
BarJournal@utahbar.org

SERVICES

CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

NEW YORK ESTATE ADMINISTRATION ATTORNEY.

Admitted in New York and Utah serving all counties. 30 years experience in Probate, Administration, Judicial Accountings, Contested Proceedings. etc. Hourly, flat and contingent fee arrangements. We search for and locate missing and unknown heirs and witnesses. Richard S. Dillworth, Esq., Sandy, UT. Contact: RSD@dillworth-law.com or (516) 852-8339.

INSURANCE EXPERTISE: Thirty-nine years of insurance experience, claims adjusting, claims management, claims attorney, corporate management, tried to conclusion over 100 jury trials with insurance involvement, participated in hundreds of arbitrations and appraisals. Contact Rod Saetrum J.D. licensed in Utah and Idaho. Telephone (208) 336-0484 – Email Rodsuetrum@saetrumlaw.com.

EXPERT JUDGMENT ENFORCEMENT: Hundreds of clients. Millions and millions of dollars collected. If I can't collect it, no one can. I will collect judgments from \$1,000 to \$100,000,000+ on hourly retainer or commission. Jonathan D. Kirk, Kirk Law. Telephone: (801)980-0388 – Email: jonathan@kirklawutah.com.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, Farmington, (801) 721-8384. Licensed in Utah and California – over thirty-five years experience.

A WORLD OF DIFFERENCE

START YOUR JOURNEY

Fastcase is one of the planet's most innovative legal research services, and it's available free to members of the Utah State Bar.

LEARN MORE AT
www.utahbar.org

fastcase

UTAH STATE BAR
ORGANIZED 1931

OVER \$1 BILLION WON FOR CLIENTS

PAST RESULTS DO NOT GUARANTEE FUTURE SUCCESS



SECOND HIGHEST WRONGFUL
DEATH VERDICT IN THE USA
- TOPVERDICT.COM 2020

OVER 200 7 & 8-FIGURE
VERDICTS & SETTLEMENTS



NEVADA REFERRAL & CO-COUNSEL RELATIONSHIPS

NEVADA'S LARGEST & HIGHEST RATED INJURY LAW FIRM

"The Richard Harris Law Firm is top of class when it comes to getting the most out of Nevada personal injury cases. I know Rick Harris well and have complete confidence in him and the amazing attorneys that make up his team. Recently Rick's firm received a \$38 million dollar verdict on a difficult premises case. If you're looking to partner with a quality Nevada law firm, Rick Harris is your best option by far."

~ Craig Swapp, Craig Swapp and Associates

RICHARD HARRIS
LAW FIRM 
833.222.2222

RichardHarrisLaw.com

801 SOUTH 4TH STREET | LAS VEGAS, NV 89101

6900 SOUTH MCCARRAN BLVD., #1010 | RENO, NV 89509



Super Lawyers

FEELING OVERWHELMED?

Medical malpractice cases are expensive, time consuming and hard fought.
Team up with us so we can shoulder that burden for you.



YOUNKER | HYDE | MACFARLANE

P A T I E N T I N J U R Y

257 East 200 South
Suite 1080
Salt Lake City, UT 84111

Norman J. Younker, Esq.
Ashton J. Hyde Esq.
John M. Macfarlane, Esq.

801.335.6467
yhmlaw.com
patientinjury.com