

Utah Bar. JOURNAL



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Jul/Aug 2023



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Cover Photo

Gunlock Falls, by Utah State Bar member Steven G. Black.

STEVEN G. BLACK is General Counsel for the portfolio companies of the Savory Restaurant Fund, a unique private equity fund that focuses on the development of successful restaurant brands. Steven is a co-founder of the law firm of Hansen Black Anderson Ashcraft PLLC. Asked about his photo Steven said, "After a record snowpack, the falls at Gunlock Reservoir began to flow again this year! This photo was taken near the top of the falls using a slow shutter speed with my camera mounted on a tripod."



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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 email .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.



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The Editors of the *Utah Bar Journal* want to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by emailing barjournal@utahbar.org.

GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys, paralegals, and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Articles germane to the goal of improving the quality and availability of legal services in Utah will be included in the *Bar Journal*. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

ARTICLE LENGTH: The *Utah Bar Journal* prefers articles of 5,000 words or less. Longer articles may be considered for publication, but if accepted such articles may be divided into parts and published in successive issues.

SUBMISSION FORMAT: Articles must be submitted via email to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the email must include the title of the submission and the author's last name.

CITATION FORMAT: All citations must follow *The Bluebook* format, and must be included in the body of the article. Authors may choose to use the “cleaned up” or “quotation simplified” device with citations that are otherwise *Bluebook* compliant. Any such use must be consistent with the guidance offered in *State v. Patton*, 2023 UT App 33, ¶ 10 n.3.

NO FOOTNOTES: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

ARTICLE CONTENT: Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If in doubt about the suitability of an article, an author is invited to submit it for consideration.

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

EDITING: Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

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

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

LETTER SUBMISSION GUIDELINES

1. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org at least six weeks prior to publication.
2. Letters shall not exceed 500 words in length.
3. No one person shall have more than one letter to the editor published every six months.
4. Letters shall be published in the order they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
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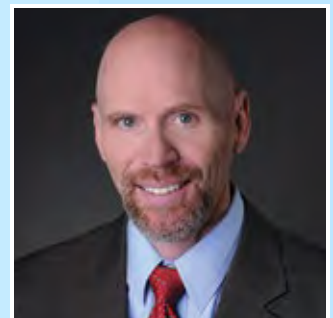


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President's Message

Hello!

by Erik A. Christiansen

On June 29, 2023, my role as Katie Woods's wingman came to an end, and I was sworn in as the President of the Utah State Bar. I want to personally thank Katie for her excellent term as President, and for her calm, cool, and collected service to the Utah State Bar. Working with Katie was an incredible experience, and I am lucky to have spent the last year learning from her leadership and observing her hard work first-hand. I drew the lucky straw when I got to follow Katie around for a year. Katie was an innovator in bringing Tava and Unmind, the Utah State Bar's well-being services, to members of the Utah State Bar. And Katie was a strong leader in helping transition the Utah Office of Legal Services Innovation to the Utah State Bar. But more than her professional accomplishments, Katie is a warm and kind person, whom I am lucky enough to count as a friend. As I start my one-year term as President, I know I have big shoes to fill, and I will do my best to remember Katie's leadership and service as a role model.

In May, I was fortunate to attend a CLE where retired D.C. Circuit Judge Thomas B. Griffith was the speaker. Judge Griffith reminded the lawyers in the room of George Washington's letter transmitting the United States Constitution, where Washington wrote that "the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable." Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 649 (1995). Judge Griffith called special attention to the phrase, "a spirit of amity" and counseled that the phrase has special meaning for lawyers. Judge Griffith challenged us as lawyers to use the law to

unite, to moderate, and to unify. Indeed, the Utah Standards of Professionalism and Civility have at their core the goal of having lawyers "treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." Utah Code Jud. Admin. R. 14-301(1). In a divided world, lawyers are uniquely equipped to bring dignity to debate, to seek to counsel moderation, to compromise, and to create a "spirit of amity." Washington's statement that "mutual deference and concession" were "indispensable" to the drafting of the Constitution is similar to President Jefferson's inaugural declaration that "[w]e are all Republicans, we are all

"Numerous studies have shown that when you are of service to others, you are more likely to feel joy and happiness."

Federalists." *Schneiderman v. U.S.*, 320 U.S. 118, 137 n.15 (1943) (quoting RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, VOL. I, pg. 310). By this Jefferson meant that our Union is stronger when we are united under a common banner, no matter our political divisions. Both Washington and

Jefferson emphasized that fostering affections between citizens was critical to preserving our democratic republic.

In my term as President of the Utah State Bar, I hope to remember the insight provided by Judge Griffith, and the wise words of George Washington and Thomas Jefferson. We, as lawyers, have a special duty to take the high road, to look for common ground, to foster civility, to bring dignity to disputes, and to create a "spirit of amity" among people. In my term as President, I hope to find ways to compromise for the sake of unity, to create consensus on difficult issues, and to preserve the special role of lawyers in the preservation of our democratic republic.



During my term, I also hope to encourage more lawyers to participate in Bar activities. Numerous studies have shown that when you are of service to others, you are more likely to feel joy and happiness. When people ask me why I give time to the Utah Bar, it is precisely for that reason – it brings me joy. When you work collaboratively with other lawyers, you get to know them as people and you grow to see them as friends, rather than adversaries. Through my service to the Bar, I've come to appreciate so many great lawyers in Utah, and to admire their skills, personalities, differences, and commitment to the legal profession. Service to the Bar fosters that spirit of amity and helps you as a lawyer feel better connected to the profession, to

the legal community, and to the judiciary.

Finally, a special thanks to the staff of the Utah State Bar. They work hard, they are dedicated employees, they are a delight to work with, and they love the Utah State Bar. They don't shy away from challenges, and they work collaboratively with the Bar Commission and leaders of sections and committees to provide you as lawyers with the many benefits you receive. Bar staff also foster the sense of community that is such an integral part of the Utah State Bar, and they make it look easy. It is not. I look forward to continuing to work with the excellent staff at the Utah State Bar and to continue the tradition of excellence that preceded my term.



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President's Message

Goodbye

by Kristin K. Woods

What does one say in her last President's Message? It all started on a cold, wintery day in January in Northern Utah in 1985 Wait, that's too far back. Man, what a year! I had the distinct honor of serving as your president for the past twelve months. Last year I spent so much time on phone calls, on Zoom meetings, at conventions, and traveling to Salt Lake City that I literally don't know what I'm going to do with all of my free time. Perhaps I should invent a new cryptocurrency, or learn how to play the mandolin?



Being sworn-in by Justice Hagen.

This past year we were involved in some major issues, including the Supreme Court's Legal Services Innovation Office (sandbox) project. We were also involved in legislative activity, which ranged from "concerning" to "constructive" this session, from a lawyer's point of view. We got back into the groove of in-person conventions and heard from some stellar presenters and speakers. I had the experience of representing the state of Utah at the National Conference of Bar Presidents, the Western States Bar Conference, and the Jackrabbit Bar Conference. I got to be a part of our very own Constitution Day, admissions ceremonies at the State Capitol building, Fall Forum, and Law Day. I met people from around the country and was able to brag about all the good things that the Bar is doing, including our revolutionary investment into



Speaking at the new lawyers admissions ceremony.



Giving the 50-Years-of-Practice pin to attorney Jinks Dabney.

attorney wellness programs. I can report back that Utah is now the leader when it comes to innovative and effective attorney wellness programs, and I very much hope that you are taking part in your free benefits. I was able to meet and mingle with a lot of you, and to meet our new admittees who are fresh onto the Utah legal scene.



Executive Committee dinner at the Western States Bar Conference (from left to right): Erik Christiansen, Traci Gunderson, my sister Abby, me, my wife Kaylee, Mark Morris, and Elizabeth Wright.

I would be remiss if I did not say that the staff and employees of the Utah State Bar made this year so, so manageable for me. They are an incredible group of people. Elizabeth Wright is an extraordinary executive director, and she has an incredible staff that make the Bar hum like a well-oiled machine. All of the individuals that I was able to associate with at the Law and Justice Center deserve a round of applause from me, and I wish I could give them more.

To the members of my Bar Commission: thank you for being the best, most supportive team a girl could have asked for. I was only as good as my commission, and they made this year a great and productive one.

And, finally, to my co-pilot and President-Elect, Erik Christiansen, thank you for your service and assistance this year. I am leaving you in great hands. Erik is not only one of the finest lawyers I have ever met, but he is an extraordinary leader and teacher. I will rest easy knowing that I'm passing the reins to someone of his caliber.

To all of you: thank you for your support! I received many kind emails from many of you, and I appreciated being buoyed by your words. Here's hoping I see you around. I'll leave you with the wise words of sports broadcaster Ernie Harwell: "It's time to say goodbye, but I think goodbyes are sad and I'd much rather say hello. Hello to a new adventure!"



Selfie with your next President, Erik Christiansen.

Procedural Fairness

by The Honorable E. Blaine Rawson

Turning off Idaho's Highway 20 onto Highway 33, shortly after Sugar City, Idaho, you have a wonderful view of the Upper Snake River Valley with the Grand Tetons looming in the distance. You pass through patchwork farmlands, then across the Teton River bridge, before arriving in Teton City, Idaho. A green sign at the end of town announces a population of slightly over 700 (a population boom since the sign announcing a population of 560ish from my youth). My hometown. The place I spent the first nineteen formative years of my life.

For many years, I have hoped that I would get the chance to serve as a judge someday. However, given my background, I was not sure it would work out for me.

Context

My upbringing was very humble. I was adopted as a newborn by a very young couple from south-eastern Idaho. Generally, college degrees and professional jobs were not found among Teton's hard working, blue-collar residents. Teton was a town of farmers, truck drivers, and tradespeople.

And my parents fit right in. Neither of my parents graduated from high school, nor had any of my grandparents. As a result of my parents' lack of formal education, job opportunities were limited and low paying. During the earlier part of my childhood, my father worked on a masonry crew as a hod carrier until the company struggled during the recession in the 1980s. He was then unemployed for some time, and then went to work at the potato processing facility where my mom worked. To assist with the family finances, my mom began working in the late 1970s at a potato processing facility on rotating shifts. Despite raising six kids and already working a full-time job, she later took a second job at McDonald's (working the drive-thru) when my family needed more money. Mom worked both jobs until she passed away about ten years ago. My siblings and I worked on farms and ranches, babysat neighbors' children, mowed lawns, worked odd jobs, sold nightcrawlers to fishermen, and did whatever was necessary to earn money for ourselves and to help the family get by.

My parents were loving parents who tried to do their best for their children. Nonetheless, there were many challenging times growing up. Like many kids, I looked longingly towards those who had more and seemed to live better. Looking back, however, I am grateful for these times, my family, our community, and the valuable hard lessons learned, which have helped prepare me for my current judicial role. Although I didn't learn anything about bail hearings or alimony calculations while stacking hay or moving sprinkler pipe in the potato fields, I have come to realize that my parents and the good people of my community taught me other very important things that benefit me decades later as I have begun my new career as a Second District Court judge.

Procedural Fairness

A concept central to serving as a judge in 2023 is the idea of "procedural fairness," also known as "procedural justice," which is defined as "the perceived fairness of court proceedings. Those who come in contact with the court form perceptions of fairness from the proceedings, from the surroundings, and from the treatment people get." *Procedural Fairness/Procedural Justice*, JUDGES.ORG, https://www.judges.org/wp-content/uploads/2020/03/Procedural_Fairness_Bench_Card.pdf (last visited June 17, 2023). This is important because research "has shown that higher perceptions of procedural fairness lead to better acceptance of court decisions, a more positive view of individual courts and the justice system, and greater compliance with court orders." *Id.*

The concept of procedural fairness is so central to the operation of Utah's courts that the State of Utah has created a system for citizens to act as "courtroom observers" and report on how procedural fairness is addressed in each courtroom. *See*

JUDGE E. BLAINE RAWSON was appointed to Utah's Second District Court by Governor Spencer J. Cox in September 2022. He serves Davis, Morgan, and Weber counties.



<https://judges.utah.gov/courtroom-observation-program/>. In his 2021 State of the Judiciary address, Chief Justice Durrant stated,

[W]e are devoted to ensuring that all who seek justice in our judicial system are treated with respect, fairness, and impartiality. We recognize that many Utahans are intimidated by the judicial process We feel a compelling need to communicate to those who feel they have been left behind by society that they will not be left behind by our court system. We want them to know that a court is a sanctuary, a place where they can go to seek remedy for wrongs done them, to seek vindication of their rights, and to seek justice; a place where they will be on equal footing with every other Utah citizen; a place where they will find a judge who is committed to treating them with dignity and respect, and to ensuring that their basic rights are protected.

State of the Judiciary, UTAH.GOV, <https://legacy.utcourts.gov/resources/reports/statejudiciary/2021-StateOfTheJudiciary.pdf> (last visited June 17, 2023).

The United Nation's Universal Declaration of Human Rights begins with a recognition of the need to accord each human being their dignity: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited June 17, 2023).

Humble Lessons Learned

I am grateful for the lessons learned in my humble home and community about the need to recognize the dignity and intrinsic value of each person. My parents were true friends with many in our community who were looked down upon by others and that society seemed to forget. I was taught to value and befriend those with mental health challenges, financial difficulties, and low social standing. I am grateful for these teachings and my parents' example, and hope to continually apply these lessons during my time on the bench.

At my mother's funeral, I had dozens of people (everyone from janitorial staff to upper management) stop to tell me how my mother,

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who worked near the entrance of the potato processing facility, would inquire every shift about their families, health, and lives, generously doling out hugs and words of encouragement when needed. I appreciate how she reached out to everyone, regardless of status. My mom's acts of kindness and caring were consistent with the actions I saw from many other wonderful people in our community. I had many teachers, coaches, neighbors, and friends treat me with respect, dignity, and kindness despite our financial struggles, lack of social standing, or other challenges.

In my chambers at the Layton courthouse, I have a wooden map of Idaho and a photo of the beautiful farmlands of the Upper Snake River Valley. Prior to hearings and calendars, I reflect often on the examples and unspoken lessons of my parents, grandparents, and countless others in my community who, through the lives they lived, informed and instructed me in the application of the elements of procedural fairness. I try to take a little bit of the best of Teton every time I walk into the courtroom.

I am also grateful for the lessons I have learned about hard work and grit, which were mandatory life lessons in the Rawson household and in Teton City. No job was too menial; no task unworthy of giving it your all. Problems were met head-on with increased effort.

I am grateful to have found similar characteristics among my new work family in Utah's Second Judicial District. The other judges, clerks, judicial staff, bailiffs, and others are diligent and

sincere. They are wonderful at explaining important issues to the public and working patiently with them during the various legal processes. In my relatively short time on the bench, I have been so impressed by those who work daily in the judicial and law enforcement systems and their instinctive adherence to treating participants within those systems fairly, humanely, and kindly. I have also noticed that when I discuss legal issues with other judges, they often begin by addressing fairness principles before discussing the substantive legal merit. These examples have assisted me in my attempt to focus on procedural fairness. The qualities I found so admirable in my rural Idaho community are equally distributed among those who serve within Utah's Second Judicial District.

I still have so much to learn. I know that I am far from perfect in my application of procedural fairness principles. Crowded dockets and tight time frames, numerous judicial duties and obligations vying for my attention, the adversarial nature of our justice system, often emotional and difficult fact patterns, my own imperfections, the difficult circumstances the participants find themselves in and numerous other factors can interfere with the ability to achieve procedural fairness on any given day, during any given case. Yet the goal is achievable, and the goal is important. I am thankful for a lifetime of experiences and examples to help me work towards those goals. And I am grateful for the wonderful judges, clerks, and staff that I work with every day for their examples and efforts to treat those involved in the judicial system with dignity and respect.

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What All Attorneys Should Know About Assisting Victims of Domestic Violence in Utah

by Kristen Olsen

We are all likely familiar with the looks of disappointment from family members and friends when they have legal issues that are entirely outside our wheelhouse. In my experience, the phrase “*I’m not that kind of lawyer*” is never a crowd-pleaser at parties. The unspoken sentiment among certain relatives is that I could have been more helpful had I pursued a career as a dentist or auto mechanic. Yet, by nature of our profession, regardless of our chosen practice areas, we will remain a first point of contact for people who are in need of legal services. How we respond to certain types of inquiries could actually save lives.

When a close friend confided in me that she had been a victim of domestic violence (DV) and needed a divorce, my knowledge about corporate civil litigation was decidedly unhelpful. I told her about Utah Legal Services and thought I’d let the experts take it from there. Years later, we talked again about her experience fleeing a violent relationship and the custody battle that followed. She let me know that finding legal counsel was only the first step and that she needed so many additional resources in order to effectively navigate her situation and process the trauma she was experiencing. She also explained what it feels like to engage with the legal system during such a traumatic situation.

“During my divorce,” she recalled, “I was making all these huge life decisions, but using only a fraction of my brain power because I was in fight or flight mode. When you’re in that state, you can’t make good informed decisions, just survival decisions.” Interview with Domestic Violence Survivor in Utah, (Feb. 2023) [hereinafter, *Interview With DV Survivor*]. Fortunately, through no help from me, she was able to get in

contact with a DV shelter in her area and connect with a victim advocate. She also joined a victim support group, which she described as a vital resource during that time.

When I asked her about what additional resources would have been helpful, she replied, “I was able to get counseling after my divorce, but I wish I could have done it during [it] because I could have processed what was happening and used grounding techniques that would have helped me during my [divorce] mediation.” *Id.* She added, “I wish I would have known about

[free childcare resources] so I could have used those services during legal appointments. It was very stressful figuring that out as a single parent.” *Id.*

Not surprisingly, my friend’s story is not unique. At least one-third of women in Utah will experience some form of intimate partner

physical violence, sexual violence, or stalking within their lifetime. See *Domestic Violence Among Utah Women: A 2023 Update*, UTAH WOMEN & LEADERSHIP PROJECT, No. 46, Mar. 1, 2023, at 1–2. The actual number is likely higher since DV is a chronically underreported crime. See *id.* One reason that DV incidents go unreported is that victims lack information about available resources that could help them achieve independence

“[A]ttorneys are in a unique position to help, even if [domestic violence]-related law is outside their practice area.”

KRISTEN OLSEN is the Policy & Compliance Director at Timpanogos Legal Center where she helps advise victims of domestic violence as they navigate the court system.



if they chose to report DV crimes and leave the abusive relationship. *See id.* at 2. Indeed, “[a]ccess to resources and personal advocacy for friends and loved ones are key to preventing and decreasing DV.” *See id.* at 3.

Fortunately, attorneys are in a unique position to help, even if DV-related law is outside their practice area. Once we educate ourselves about victim resources available in our communities and across the state, we can disseminate potentially life-saving information to victims who are brave enough to approach us for help. I recently transitioned from corporate law to work as an attorney for Timpanogos Legal Center (TLC), a nonprofit organization that empowers victims of DV and low-income Utahns to navigate the legal system through innovative and trauma-informed legal services. TLC also compiles comprehensive and current information about victim resources in each county and judicial district throughout the state. It updates these resources annually so everyone, including attorneys, can easily access accurate information about victim resources in their counties/judicial districts. Accessing this information will give you the ability to provide informed referrals to victim resources, which in turn, can empower victims to gain the confidence they

need to permanently flee abusive relationships.

In addition to knowing about available victim resources, attorneys should familiarize themselves with the basics of trauma-informed lawyering. When you are interacting with victims of DV, either through formal legal representation or informally as a trusted friend or relative, keep in mind that as victims embark on the journey of escaping violence or abuse, they often experience symptoms of trauma that impact their ability to engage or participate in the legal process.

“The trauma experiences of clients have a direct relationship to how they relate to their attorneys and the courts, because trauma has a distinct physiological effect on the brain, which in turn affects behavior in the short-term and long-term.” Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. Spring 2016, at 359, 366 [hereinafter, *Trauma-Informed Lawyering*]. My friend who opened up about her experience explained that

a lot of abuse comes with gaslighting that makes the victim feel like they can’t make decisions and they don’t know how to do things. You’ve been told by [your abuser] that you’re stupid and can’t make decisions. It’s hard to switch and all the sudden believe yourself and trust yourself during the divorce process.

Interview With DV Survivor.

While meeting with victims at legal clinics hosted by DV shelters throughout the state, I have encountered clients who are unable to share important facts about their stories, who become angry or agitated while discussing their cases, or who shut down and are unable to answer questions or follow through with instructions. I have learned that these are all normal reactions to trauma, and understanding that fact helps me provide trauma-informed services.

Trauma-informed lawyering entails learning to identify when an individual is experiencing trauma and then adjusting your services and counseling to incorporate an understanding about their trauma history. *See Trauma-Informed Lawyering* at 366. If an individual asks for help, but then appears overwhelmed or disinterested with your response, consider that the victim may be having difficulty processing information as a result of



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trauma. *See id.* at 383. Depending on your relationship with the victim, you could help them apply for services or reach out to organizations for help on their behalf. If you are helping a close friend or family member who is having difficulty taking action, you could offer to drive them to a shelter or to meet with a victim advocate whenever they are ready.

It is important to remain patient as you work with victims, to validate their feelings, to not pry into details that victims appear unwilling to share (to avoid retraumatizing them), and to exercise compassion and empathy even if they become combative or suspicious. *See id.* at 380–89. When confronted with a victim who responds with anger or blame, consider asking the rhetorical question: “What happened to this individual?” instead of “What is wrong with this individual?” *See id.* at 363 (citing Nancy Smyth, *Trauma-Informed Social Work Practice: What Is It and Why Should We Care?*, SOCIAL WORK/ SOCIAL CARE & MEDIA (Mar. 20, 2012)). Finally, keep in mind that you are often in a position to help a victim identify their own need for additional resources, including therapeutic services or behavior health intervention. *See id.* at 371. Once these needs are identified and acknowledged by the victim, you may be in a position to help them connect to the victim resources referenced in this article.

While there is no guarantee that, at your next family reunion or neighborhood barbeque, you won’t still disappoint the folks

who inquire about their property line issues, lease agreements, or the constitutionality of paying property taxes, you can certainly be prepared to respond to a victim in need of help. You can, in a trauma-informed manner, let them know that there are a number of victim services throughout the state that can help them not only with their legal needs, but also with housing, childcare, food security, counseling, and support. You can provide contact information and compassionately encourage them to seek the help they need. In so doing, you will play a pivotal role in their success as they flee violence and begin their journey towards safety, healing, and independence.

To find specific resources in your area, visit www.timplegal.org/resources/resources, and click on your county or judicial district. To find statewide victim resources, visit <https://www.timplegal.org/resources/statewide-resources-for-survivors>. If you have specific questions about finding helpful victim resources, understanding orders of protection, accessing information about legal clinics, or learning about the eligibility requirements of certain organizations, feel free to call the legal advice hotline operated by Timpanogos Legal Center weekdays to speak with a DV-informed attorney between 9 a.m. and 2 p.m. at 801-649-8895. Finally, if you want to proactively help victims navigate the legal system, consider volunteering with Timpanogos Legal Center, Utah Legal Services, Legal Aid Society of Salt Lake, or any other victim resource organization.

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Drafting a Special Needs Trust in Utah: A Primer

by Kathie Brown Roberts and Allison Barger

This article is the first part in a two-part series exploring required provisions of special needs trusts, Utah specific requirements, and common drafting errors as highlighted by a policy specialist at the Utah Department of Health and Human Services. The second part of the series of articles will focus on the public benefits available to disabled individuals in Utah, program parameters for such benefits, and how to qualify for available benefits.

General Overview and History of SNTs

Special Needs Trusts (SNTs) were first authorized in the 1993 Omnibus Budget Reconciliation Act (OBRA '93) as set forth in 42 U.S.C § 1396p(d)(4)(A), allowing the establishment of excluded trusts for disabled recipients of means-based governmental benefits.

Means-based public benefits are a category of public benefits that require an applicant to qualify financially and (usually medically) before receiving the benefit. Typically, means-based benefit programs look at both the income and assets of an applicant to determine whether they are eligible to receive the benefit. The most common means-based public benefits are the Medicaid and Supplemental Security Income (SSI) programs. In Utah, qualification for SSI will usually result in qualification for Medicaid benefits. The Veterans Administration also offers the Improved Pension program (Aid and Attendance) to eligible veterans and spouses of veterans, which is also means-based. Utah has several ancillary public benefits programs that are means based, covered in part two of this series.

Prior to the enactment of OBRA '93, a means-based beneficiary's receipt of an inheritance or a personal injury settlement would

prevent that beneficiary from qualification under SSI and Medicaid because their assets would be considered "countable" for those programs. After OBRA '93, a parent, grandparent, legal guardian of the individual, or a court could create a SNT to hold the assets of the beneficiary. The assets within the SNT would not be considered "countable" for such programs and would not impact the beneficiary's means-based benefits. As of December 13, 2016, a person who is mentally capable (but satisfies the government's definition of "disabled") can establish their own first-party SNT.

Another type of SNT created by OBRA '93 was the "Pooled Trust," under 42 U.S.C § 1396p(d)(4)(C), more fully described below, but created a means of pooling assets of disabled individuals for investment purposes in a trust established and managed by a non-profit corporation.

For the purposes of OBRA '93, a "disabled individual" is an individual "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3).

Types of SNTs and Utah Specific Language

The primary distinction between a first-party and third-party SNT is the origin of the assets composing the corpus of the trust and the obligation of a first-party SNT trustee to repay Medicaid upon the death of the trust beneficiary. A first-party SNT and a pooled trust may hold assets belonging to a disabled individual. A third-party SNT holds assets belonging to/or originating from someone other

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than the disabled individual. Assets held by properly drafted SNTs will not be countable for qualification for means-based public benefits.

First-Party SNTs

The requirements for a first party SNT are specific. A properly drafted first-party SNT in Utah requires familiarity with four sources of authority: (i) 42 U.S.C § 1396p(d)(4)(A); (ii) Utah Code § 26B-6-412; (iii) the Utah Department of Health and Human Services Medicaid Policy Manual § 512-2.3; and (iv) the Social Security Administration's Programs Operations Manual System (POMS). *See* UTAH MEDICAID POLICY MANUAL § 512-2.3 (2017), <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>; *Program Operations Manual System (POMS)*, SSA, <https://secure.ssa.gov/apps10/poms.nsf/partlist> (last visited June 1, 2023). Failure to properly draft a first-party SNT will cause the trust corpus to be considered countable for the purpose of qualification for SSI and Medicaid.

Required Provisions for First-Party SNTs in Utah

42 U.S.C. § 1396p(d)(4)(A) requires that a first-party SNT contain the following provisions:

- The trust must be irrevocable;
- The trust contains the assets of an individual under age sixty-five;
- The trust beneficiary is disabled as defined in 42 U.S.C. § 1382c(a)(3);
- The trust is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court; and
- The State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

In addition to the above list of provisions, Utah Code § 26B-6-412 requires:

- The trustee has discretionary power to determine distributions;
- The individual may not control or demand payments unless an abuse of the trustee's duties or discretion is shown;



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- The trust is irrevocable, except that the trust document may provide that the trust be terminated if the individual no longer has a disability, as defined in 42 U.S.C. § 1382c; and
- The trust is invalid as to any portion funded by property that is or may be subject to a lien by the state.

The Utah Department of Health and Human Services Medicaid Policy Manual is compiled by a policy team at the Utah Department of Health and Human Services. According to the policy coordinator, Marcel Larsen-Jones, the content of the policy manual “is created with applicable Federal and State statute, federal regulation, and guidance from CMS.”

In addition to the provisions cited above, Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual provides the following additional guidance for valid first-party SNTs in Utah. These provisions clarify that in addition to the Social Security Administration, a State Medicaid Review Board can make a disability determination for an individual; that a first-party SNT is for the sole benefit of the trust beneficiary; that trusts before the date of December 13, 2016, may not be established by the individual; that the trust may be amended under certain narrow circumstances even though the trust is irrevocable; and there is a specific language requirement for payback to the state of Utah after the death of a Medicaid recipient.

Below is an excerpt from Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual:

Exclude from resources the assets placed in a SNT when the trust meets all of the following criteria:

- The trust is established for an individual who meets the Social Security criteria for being disabled (Social Security Administration or State Medicaid Review Board decision).
- The trust is established for the **sole benefit** of the disabled individual by the individual, a parent, grandparent, legal guardian of the individual or the court.
- Trusts established by the disabled individual must be created on or after December 13, 2016.
- The disabled individual is under age sixty-five when the trust is established and **when the assets are transferred to the trust.**
- The trust contains the assets of the disabled individual, **or assets that would have become the individual’s assets but for actions to place them directly into the trust.**
- The trust is irrevocable, meaning that no one can amend, revoke or terminate the trust except that the trust may contain language that says the trust may be amended but only if necessary to conform with subsequent changes to federal or state requirements.
- The trust terminates upon the death of the disabled individual or exhaustion of the trust corpus and **specifically states that upon the death of the disabled individual, the trustees will notify the state Medicaid agency and pay all amounts remaining in the trust to the state up to the total medical assistance the state has paid on behalf of the disabled individual.**

Finally, SNT drafters are advised to double-check their trust provisions with Subchapter SI 01120.203 of the POMS. Although not statutory authority, the POMS is perhaps the most widely-cited resource with respect to SNT drafting, both first- and third-party SNTs, and policy. For example, the foregoing POMS section elaborates on the priority of the Medicaid payback requirement in a first-party SNT by adding that “the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses except those set forth in SI 01120.203E.”

Administrative expenses in Subchapter SI 01120.203E of the POMS that are forbidden to be paid before the State(s) [which rendered services to a beneficiary] are:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;

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- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

Therefore, although Utah Code Section 26B-6-412 and Section 512-2.3 of the Utah Department of Health and Human Services Medicaid Policy Manual do not specifically address permissible and impermissible administrative expenses to be paid after the death of the special needs trust beneficiary, the POMS does. Trustee powers that allow such payments before Medicaid would cause the trust to fail.

Third-Party SNTs

A third-party SNT is created by someone for the benefit of a beneficiary with a disability and will be funded with third-party assets, that is, assets not owned by the beneficiary. There is no specific statutory authority (federal or state) recognizing or authorizing third-party SNTs, but the POMS, which are also followed by Utah Medicaid, authorizes third-party SNTs in Subchapter SI 01120.200 et seq. Third-party trusts can be created and funded for a beneficiary of any age. However, the only way a

SNT can be created for a spouse is through a testamentary trust under a last will and testament. *See* 42 U.S.C. § 1382b(e)(2).

Third-party SNTs can be stand-alone trusts or testamentary in nature, arising from the death of the grantor either under a living trust or by last will and testament. Only stand-alone trusts can be funded prior to the death of the grantor and can receive bequests from individuals other than the grantor. Both stand-alone and testamentary trusts can be named as designated beneficiaries of life insurance policies or retirement accounts; however, care should be taken to make sure the testamentary trust in particular is properly designated and that the trust will comply with IRS rules.

There are several advantages to third-party SNTs. A third-party SNT does not have to be a sole benefit trust. One of the most significant advantages of a third-party SNT is that it is not subject to a Medicaid payback requirement, and Medicaid cannot lay claim to the assets in the third-party SNTs. Consequently, the grantor has control over designating the residual beneficiaries of the third-party SNT.

A note about inheritance. If a disabled beneficiary is inheriting



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estate assets from a decedent, the decedent must have created the third-party SNT or directed the bequest to an existing third-party SNT for an inheritance to be considered third-party assets or “originating from” someone other than the beneficiary. Although in certain circumstances, a trust may be modified or reformed in Utah to correct drafting language attempting to create a SNT, if a beneficiary is entitled to inherit from an estate, a third-party SNT cannot later be established to receive inheritance funds. At this point, the assets are the beneficiary’s and can only be funded into a first-party trust. Advance planning is key to the creation and funding of a third-party SNT.

Pooled Trusts

A pooled trust, authorized in 42 U.S.C. § 1396pd(4)(c), is similar to a bank that holds the assets of individual account holders and created and managed by a non-profit organization. Pooled trusts usually do not require a specific deposit amount (unlike some Trust departments) and many have low administration fees. They may hold either first-party funds or third-party funds. One primary benefit of a pooled trust is professional trust administration of assets to ensure compliance with means-based program parameters. Although pooled trusts accept assets of individuals at any age, transfer of assets by an individual over the age of sixty-five into a pooled trust in Utah will be considered a transfer for less than fair market value, affecting the ability of such individual to qualify for certain Medicaid benefits. *See UTAH MEDICAID POLICY MANUAL § 512-2.3 (2017)*, <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>.

To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the state from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state plan under this subchapter. The pooled trust instruments usually consist of an overarching “master trust” and a joinder agreement that contains provisions specific to the individual beneficiary.

ABLE Accounts

ABLE accounts were created by the Achieving a Better Life Experience Act that was passed in December 2014. ABLE accounts are a great complement to SNTs. Similar to 529 college savings accounts, ABLE accounts are for individuals with a disability where the onset of the disability began before age twenty-six. Recently passed federal legislation will raise the eligible age of onset to forty-six in January 2026. An ABLE account can only be established by an individual with a disability or a parent or guardian of the individual. Only one

account can be created per individual. Many states have their own ABLE programs, but individuals can enroll in any state’s program, as long as the state accepts out-of-state residents, which many do.

There is an annual limit for contributions to an ABLE account. The total annual contribution limit from any source is equal to the annual gift tax exclusion, which is \$17,000 in 2023. SNTs can also contribute to ABLE accounts, subject to the total annual contribution limit. However, if the individual is employed and does not participate in an employer-sponsored retirement plan, they can contribute their earnings up to the poverty line amount from their earnings in addition to the annual contribution limit. The funds in an ABLE account are not counted for purposes of eligibility for SSI up to \$100,000. Utah Medicaid excludes ABLE accounts in their entirety. *See UTAH MEDICAID POLICY MANUAL § 521-44 (2016)*, <https://bepmanuals.health.utah.gov/Medicaidpolicy/DOHMedicaid.htm>.

Distributions from an ABLE account can be made for qualified disability expenses, which includes a wide variety of things such as education, food, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management, and administrative services or other disability-related expense. Importantly, payments for food and shelter from an ABLE account do NOT result in a reduction in SSI benefits if the individual is receiving SSI. This is a great advantage to individuals who are receiving SSI benefits, as the SSI benefit amount is hardly enough to pay for everyday living expenses. The IRS makes sure that expenditures from an ABLE account are qualified disability expenses, so it is important to maintain records regarding disbursements.

When the individual dies, Medicaid may seek reimbursement from the funds for amounts paid by Medicaid after the creation of the ABLE account. However, if there are excess funds in the ABLE account or the individual did not receive Medicaid benefits, a beneficiary may be designated on the account.

Most Common Drafting Errors

Jeff Dart, a policy specialist from Utah Department of Health and Human Services, reviews Utah SNTs submitted to Utah Medicaid. According to Mr. Dart, the most common drafting flaw in first-party SNTs submitted for his review is failure to provide the Medicaid payback provision after the death of the special needs individual.

With respect to third-party SNTs, Mr. Dart states that drafters do not make it clear that a trustee is prohibited from accepting assets

originating from the trust beneficiary into trust (commingling third-party assets with first-party assets). Further, he advises ensuring that third-party SNTs specifically state that the assets do not belong to the trust beneficiary and would not have otherwise belonged to the trust beneficiary.

According to other Utah Medicaid policy specialists, other common drafting errors include:

- Use of Support Trust Language: Although the drafter makes distributions discretionary, the drafter includes mandatory language to distribute income and/or principal to the beneficiary for health, education, maintenance and support.
- Inserting a Medicaid Payback provision in a third-party SNT.
- Impermissible delegation of authority to trustee-pooled trust. For example, a pooled trust trustee cannot delegate responsibilities to a for-profit entity to be retained by the Trustee.
- Not specifically prohibiting the SNT beneficiary from serving as trustee of their SNT.
- Failing to make the trust irrevocable.

- Not educating the trustee on their responsibilities with the trust.
- Creating a SNT for an individual who has not been determined disabled by the SSA or the State Medicaid Review Board.
- Not placing the assets into the trust (they are listed in the schedules and exhibits but not actually moved to the trust ownership/control).
- Not setting up the financial accounts to identify the trust as the owner.

In conclusion, SNTs are essential planning tools for individuals with disabilities for enhancing their lives. Proper drafting can preserve critical public benefits for individuals with disabilities and save significant time and money for the beneficiary. However, in assisting clients who are receiving means-based public benefits or have family members receiving those benefits, it is also important to understand some basic elements of what is available and how those benefits could be impacted without proper planning. Therefore, the second part of this series will explore public benefits in Utah and proper SNT trust administration to preserve means-based benefits such as SSI and Medicaid.

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What Motivates Lawyers?

by Joshua Baron

The Price of Shoveling Manure

Traditionally, many law firm managers have assumed that compensation was their main tool for motivating lawyers to work hard for their clients and to produce profits for their firm. Yet we know that salary alone is not enough to make someone love their job. Consider a hypothetical employee who is paid \$1 million per year to shovel manure. That employee probably wouldn't say, "I love my job because I get paid a ton of money to shovel manure." The person would be more likely to say, "I hate my job, but I can't quit because I get paid so much. I guess I'll have to keep doing it because no one else will match my pay."

Law firm managers who misunderstand what motivates their lawyer employees may try to solve motivational problems using tools that are destined for failure.

More than fifty years ago, Frederick Herzberg argued that there are two primary sets of factors that influence employee satisfaction: extrinsic factors and intrinsic factors. *See, e.g.,* FREDERICK HERZBERG ET AL., *THE MOTIVATION TO WORK* (1959). Herzberg called them "hygiene factors" and "motivational factors." Extrinsic factors relate mostly to the employee's external environment. Examples of extrinsic factors include salary and company policies. Intrinsic factors are internal to the job itself. Examples of intrinsic factors include the meaningfulness of the work, achievement, recognition, responsibility, and advancement.

But Herzberg's contribution wasn't simply showing that employees are motivated both intrinsically and extrinsically. His insight was that these factors work on two distinct spectrums. Extrinsic factors meet needs, without which an employee can be extremely

dissatisfied. Intrinsic factors breed fulfillment in a job, and can motivate employees to truly love their jobs and do their best and most creative work. Put another way, the extrinsic factors will never make employees love their jobs. But almost all employees will hate a job if the extrinsic factors are mismanaged. The intrinsic factors, on the other hand, won't meet the employee's needs, but if the extrinsic needs are met, intrinsic factors can create a highly fulfilling and motivating environment.

"Just as you can't treat a plant that's suffering from a lack of water by giving it extra sunlight, an overworked lawyer can't compensate for unhealthy stress by earning more money."

Notice that salary is an extrinsic factor. Salary will never turn a horrible job into a wonderful one. If you aren't paid enough to pay your rent, you'll hate your job. But salary doesn't transform tedious work into meaningful work.

Similarly, vacation time or time off work is an extrinsic factor. If you don't have enough time to rest, you'll quickly run out of energy or develop serious health problems. But a job you hate doesn't suddenly become meaningful when you get Fridays off.

Environmental Factors Are Not Interchangeable.

I have a friend who's an extremely successful lawyer with a sterling reputation. She was earning a healthy income and had plenty of work to do. Yet her mental health began to suffer. Her practice was successful. She was recognized for her skill and

JOSHUA BARON is a criminal defense lawyer whose practice focuses on defending serious felonies. He is a new member of the Lawyers Helping Lawyers Board.



professionalism. And yet, she was struggling. With the help of a therapist, she evaluated whether she still wanted to be a lawyer. She realized that she actually liked practicing law, there was just too much of it. To be healthy, she needed to set some inviolate boundaries around her work schedule. Her boundaries involved tradeoffs. She had to be more careful at managing her caseload, which meant saying no to cases that might have once seemed attractive. She had to rethink some of her financial goals. But she realized that she didn't have much of a choice because she wasn't going to be able to sustain her career much longer under unhealthy conditions. The process didn't happen overnight, but over the course of six months, she was able to make some radical changes in her practice. Once she made healthy changes, she came to enjoy her practice as she hadn't in years and was able to do even more extraordinary work for her clients.

Something I learn from her story is that environmental factors are not interchangeable. Just as you can't treat a plant that's suffering from a lack of water by giving it extra sunlight, an overworked lawyer can't compensate for unhealthy stress by earning more money. My friend hit a wall and recognized that

she had to start changing things or leave the practice altogether.

Meditation, going for walks, and taking relaxing baths are all useful tools for dealing with unusual stress. But if our environment is fundamentally unhealthy, we need to have the courage to change things and learn what our personal minimum environmental requirements are to properly function. A person with clinical depression, anxiety, or other mental health disorders needs to be even more careful to create a healthy environment for themselves and to do so with the guidance of a mental health professional.

Intrinsically Satisfying Work

Have you ever looked at your schedule for a day or for a week and thought, "I can't wait to do that!" That's intrinsically satisfying work. It's work that you're doing for its own sake. Not because it earns you more money, but because the work itself excites you.

Some of us might think that only artists, professional athletes, and English teachers get the privilege of doing work that's exciting for its own sake. That every now and then you might find someone who's found the work that fits their passion. But that most of us have to endure a lot of drudgery for forty years or so and then retire to devote ourselves to our hobbies.

Cal Newport and other proponents of Self-Determination Theory argue that what you do is not as important as how you do it. *See, e.g., CAL NEWPORT, SO GOOD THEY CAN'T IGNORE YOU (2012).* They observe that most people can find intrinsic satisfaction in many different vocations as long as three psychological needs are met: (1) autonomy, (2) competence, and (3) relatedness. Autonomy is control over your actions and the knowledge that your choices are important. Competence is confidence that you are good at what you're doing. Relatedness is connection to the people around you.

Managers at law firms that provide a generally healthy environment have gone a long way toward maximizing the potential of their employees. However, if they ignore the intrinsic factors, they leave a lot of value on the table and may lose great employees to more satisfying opportunities.


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How Do You Make Legal Work More Intrinsically Satisfying?

If extrinsic factors like salary, time off, and management practices are mismanaged, no amount of intrinsic motivation will attract and keep high-performing employees. However, once those extrinsic needs are met, law firm managers should look for ways to give employees greater autonomy, competence, and relatedness. Each can make the work more intrinsically satisfying.

Autonomy

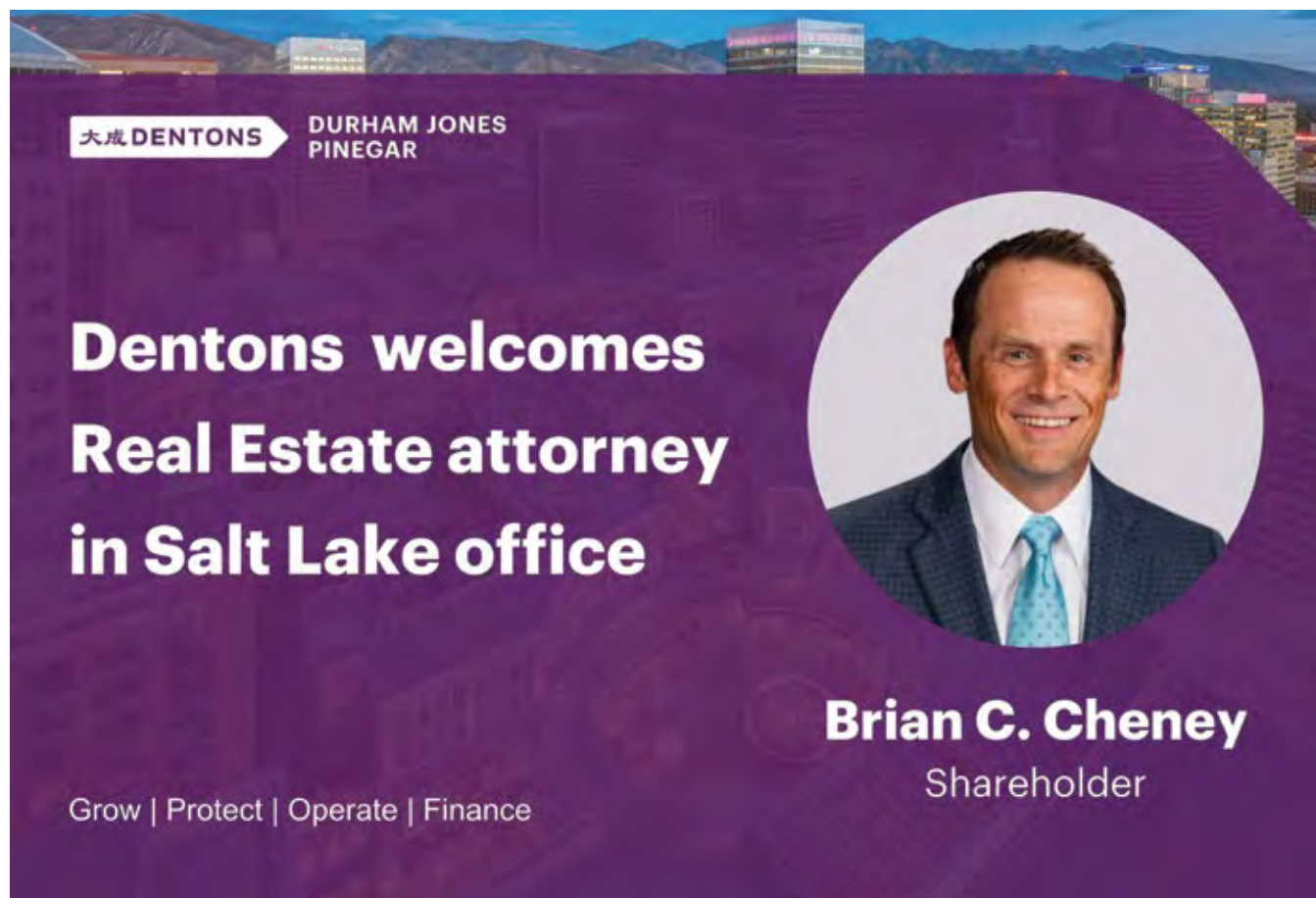
A lawyer I greatly respect once said, “In order to be a good lawyer, you have to indulge all your compulsive tendencies and repress all your impulsive tendencies.” There was probably some truth in that advice. Mistakes by lawyers can be costly. But when managers indulge their compulsive tendencies too much, they become micromanagers and their employees never grow.

In one of my early legal jobs, every word I wrote was reviewed

by my supervisor. I couldn’t write a letter to a client saying, “We received these documents. We’ll let you know when we’ve had a chance to review them,” without the letter getting redlined. From my supervisor’s perspective, he probably thought, “This is important. These clients paid us a lot of money to do this. I can’t permit any errors.”

Employees tend to respond to greater trust by growing and becoming more capable. In a Harvard Business Review case study, the managers of a group of stockholder correspondents tested some approaches to greater autonomy. In one intervention, “Supervisors who had proofread and signed *all* letters now checked only 10%.” The extra trust paid off. The correspondents’ motivation grew and the quality and accuracy of their letters improved as well.

When we have control over our work it is more intrinsically satisfying.



The graphic features a purple background with a city skyline at night. In the top left, the Dentons logo (大成 DENTONS) and the name of the local office (DURHAM JONES PINEGAR) are displayed. The main headline reads "Dentons welcomes Real Estate attorney in Salt Lake office". To the right is a circular portrait of Brian C. Cheney, a man in a suit and tie. Below the portrait, his name and title "Shareholder" are listed. At the bottom left, the firm's core values are listed: "Grow | Protect | Operate | Finance".

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**Dentons welcomes
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Competence

Years ago I hired a bright new law school graduate in my criminal defense practice and gave him this challenge: “You’re going to be our immigration expert.” While this may have been an exciting dose of autonomy, I failed to give him the tools to become a competent expert in an extremely complex area of law. He’s gone on to excel in other areas of law, which demonstrates to me that his poor performance as an immigration lawyer wasn’t due to a lack of intelligence. It was due to my failure to properly train and support him.

It can be easy to forget how painful and time consuming it was for us to learn to practice law. Law firm managers may underestimate the time and resources necessary to train new lawyers and support staff.

Learning new things can be stressful, but it can be an exciting and satisfying type of stress if we’re making consistent progress. When inexperienced lawyers receive guidance from more experienced lawyers who give them tasks that stretch their ability without completely overwhelming them, the learning gains can be impressive.

Interesting work is intrinsically satisfying if we’re able to do it competently.

Relatedness

As law firms utilize more remote work options, it becomes more important than ever to deliberately build connections. Remote work can make it more difficult to feel connected to the law firm team as well as to the law firm’s clients. Adam Smiley Poswolsky advises remote teams to consciously create workplace rituals that promote positivity, vulnerability, and consistency. Adam Smiley Poswolsky, *How Leaders Can Build Connection in a Disconnected Workplace*, HARV. BUS. REV. (Jan. 21, 2022), <https://hbr.org/2022/01/how-leaders-can-build-connection-in-a-disconnected-workplace>.

Relatedness rituals could include a weekly in-person lunch that includes remote employees, a group text in which everyone shares their biggest accomplishment for that week, or an email in which all team members share a challenge with which they are dealing.

A law firm can also promote connection with the firm’s clients by learning about the challenges and victories its clients are experiencing.

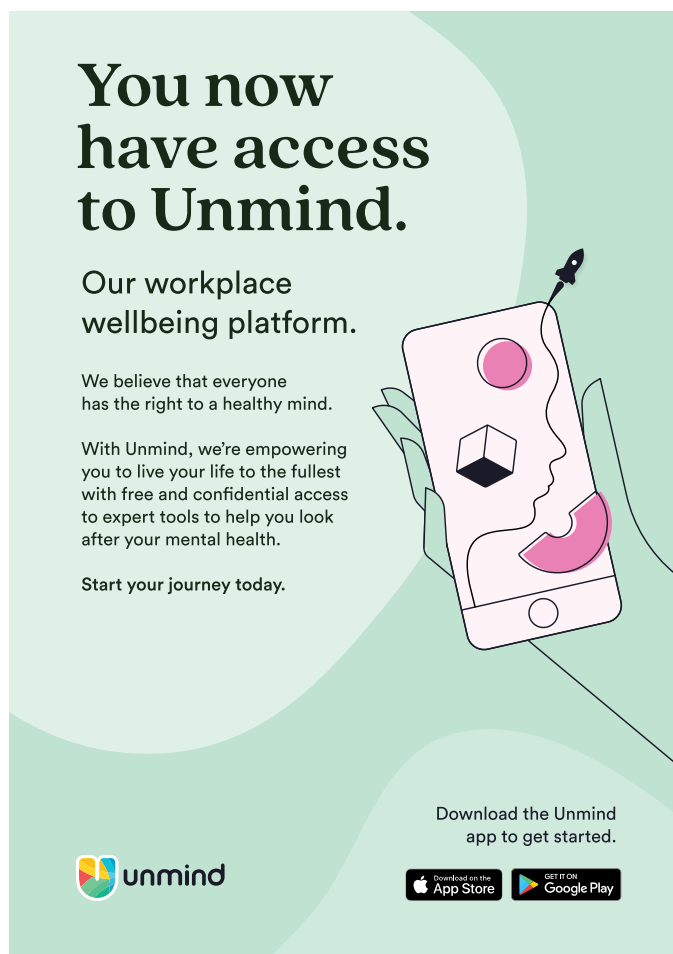
Whether remote or in person, our work is more intrinsically satisfying when we are connected to the people with which we work.

Beware the Compensation Trap.

It’s tempting to focus undue attention on compensation because it’s easy to measure and compare. But not everything that’s measurable is meaningful. Focusing exclusively on compensation is a trap that doesn’t serve managers or employees.

Managers and employees share responsibility for avoiding the compensation trap. It can be difficult to quantify the autonomy, competence, and relatedness of a new job opportunity from the employee’s perspective. But failing to take those factors into account can lead us to accept offers that appear attractive, only to fall into similar unhealthy patterns of frustration over and over again. Managers need to appreciate the full experience of their employees’ work experience, not just the easily quantifiable number of hours they work and the amount they’re paid.

Legal work can be healthy and meaningful. When we recognize what really motivates us and what motivates employees, we’ll have a chance to engage in work that meets our needs and intrinsically motivates us.



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Appellate Highlights

by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, 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

State v. Miller

2023 UT 3, 527 P.3d 1087 (March 16, 2023)

Rule 4(c) saves State's premature notice of appeal, filed three years before final judgment. The court reasoned that there was "no doubt" that the order finalized the court's oral ruling from three years prior, even though that order had been decided by a different judge. The court also held that a victim of stalking need not know that the defendant is the source of the emotional distress the stalking is causing.

Hi-Country Ests. Homeowners Assoc. v. Frank, **2023 UT 7 &**

Hi-Country Ests. Homeowners Assoc. v. Mountaintop Props., LLC,
2023 UT 8, 529 P.3d 337 (March 16, 2023)

An HOA formed in 1973 sued homeowners for past-due assessments. When the HOA was formed, it owned only eight of the 2,000 acres included in the HOA today. The court held that the lot owners ratified the defective HOA documents and therefore owed the HOA past-due assessments. Rejecting a statute of frauds challenge, **the court held that the HOA members' decades-long treatment of the HOA as a legitimate governing entity, constitutes ratification of the HOA's authority** and satisfies the statute of frauds.

Utah Court of Appeals

State v. Elkface

2023 UT App 24, 527 P.3d 820 (March 9, 2023)

Vacating sentences based upon ineffective assistance of counsel, the court of appeals held **counsel performed deficiently by failing to seek disqualification of the judge or obtain a valid waiver, where the judge would have been subject to disqualification under Rule 2.11(A) due to his prior involvement with the defendant.**

Nielsen v. LeBaron

2023 UT App 29, 527 P.3d 1133 (March 23, 2023)

This appeal arose out of a legal malpractice action stemming from allegations that counsel failed to deposit settlement funds in a minor's trust account. The lower court dismissed after concluding that counsel did not owe continuing duties to ensure that conservators appropriately applied the funds. Reversing, the court of appeals held that, although the statute and case-specific facts may be relevant to the issue of breach, **the Uniform Probate Code did not negate an attorney's common law duty of reasonable diligence with respect to management of client funds.**

Barker v. Labor Comm'n

2023 UT App 31, 528 P.3d 1260 (April 6, 2023)

The Labor Commission attributed 75% of appellant's chronic obstructive pulmonary disease (COPD) with emphysema to his history of smoking, and the balance to industrial causes, and reduced his award of disability benefits accordingly. The court of appeals held that **the employer bears the burden of proof when it comes to the apportionment of benefits – an issue not specifically addressed in the Occupational Disease Act.** But because the employee's disability was

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

caused by only one disease – COPD with emphysema – apportionment was not appropriate except in limited circumstances not present here.

RainFocus v. Cvent

2023 UT App 32, 528 P.3d 1221 (April 6, 2023)

Cvent filed a federal lawsuit against RainFocus alleging trade secret misappropriation, tortious interference, and related claims. RainFocus then sued Cvent in state court alleging that Cvent's repeating of allegations in the federal lawsuit to customers and others amounted to defamation. The court of appeals held that **Cvent's repeating the federal lawsuit allegations to others amounted to excessive publication removing the statements from the absolute privilege.**

Nelson v. Nelson

2023 UT App 38 (April 13, 2023)

In this appeal, the court of appeals discussed the distinction between doctrines of res judicata and the law of the case in a divorce case, concluding **proceedings seeking to modify the decree and an order to show cause based upon the original decree would be treated as separate cases for res judicata purposes.** It further held that claim preclusion did not bar subsequent claims for unpaid child support, where the first case did not involve an affirmative claim for arrears, and such a claim did not arise out of the same transaction as those giving rise to the petition to modify.

Brown v. City of Fruit Heights

2023 UT App 39 (April 13, 2023)

In reviewing the district court's grant of summary judgment to the defendant in this slip-and-fall case, the court of appeals concluded that the district court did not impermissibly weigh evidence despite the use of phrases such as "I do not find" or "not enough evidence" in its oral ruling. The court of appeals clarified that **"[i]t is nevertheless good practice, even in oral rulings, for district courts to be cognizant of word choice when making rulings, in order to head off unnecessary appellate wrangling."**

10th Circuit

United States v. Orduno-Ramirez

61 F.4th 1263 (March 10, 2023)

The issue before the panel in this appeal was whether a post-plea intrusion into a criminal defendant's 6th Amendment rights amounts to a *per se* violation. Following Orduno-Ramirez's

plea, he learned that five jailhouse recordings of conversations with his lawyers were produced to the government in response to an overly broad subpoena in an unrelated case. The Tenth Circuit previously held in *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) that a pre-plea and pre-conviction intrusion was a *per se* violation thereby negating the need to prove prejudice. Here, the Tenth Circuit held that **a post-plea intrusion does not amount to a *per se* violation** because it did not raise the same concerns as a pre-plea intrusion.

United States v. Slinkard

61 F.4th 1290 (March 14, 2023) &

United States v. Jimenez

61 F.4th 1281 (March 14, 2023)

Fed. R. Crim. P. 32 codifies a criminal defendant's right to "allocution" at sentencing, including the right to "to make a statement in his own behalf" and "to present any information in mitigation of punishment." In *Slinkard* and *Jimenez*, **the Tenth Circuit held that a district court is prohibited from interfering with the right to allocution by "conveying to the defendant that allocuting would be a waste of time."** In each case, before allowing the defendant to speak, the district court announced that it would not vary from the sentencing guideline range in passing sentence. In explicitly or implicitly suggesting it had already made up its mind on the variance issue, the district court impermissibly limited the scope of the defendant's allocution.

Safeway Stores 46 Inc. v. WY Plaza LC

65 F.4th 474 (April 7, 2023) – DNC

In this lease dispute, the Tenth Circuit held **the district court erred in sua sponte granting summary judgment to the defendant on the plaintiff's declaratory judgment claim on the basis of laches.** Although the defendant had raised laches in opposition to the plaintiff's motion for summary judgment, it did not assert it as a basis for summary judgment in its favor. Thus, the plaintiff did not have notice that it needed to come forward with all of its evidence on this issue.

DIRTT Envtl. Sols., Inc. v. Falkbuilt, Ltd.

65 F.4th 547 (April 11, 2023)

In this trade secret case involving a Colorado corporation, a Canadian competitor, and individuals based in Utah, the court held as a matter of first impression that **it was abuse of discretion to dismiss the action on forum non conveniens grounds while at the same time allowing the action to proceed against other defendants.**

Valdez v. Macdonald**66 F.4th 796 (April 24, 2023)**

In this 42 U.S.C. § 1983 action alleging excessive force against a municipality and its police officers, the trial court denied the municipal defendant's motion for summary judgment and its subsequent motion for judgment as a matter of law. After an adverse verdict, the municipal defendant elected to appeal only the district court's denial of its motion for summary judgment. Because the municipal defendant failed to appeal the district court's denial of its Rule 50(a) motion, the Tenth Circuit declined to review any mixed questions of law and fact raised on appeal. **Citing the *Haberman* rule, which holds that “[p]ost-trial appeals of summary judgment denials are proper only if they concern pure issues of law,” the Tenth Circuit explained that it simply could not “engage with the facts of the case or examine the summary judgment record” on appeal.**

Other**Use of “cleaned up” or “quotation simplified”**

In three opinions issued in April 2023, the Utah Court of Appeals included a footnote addressing the proper use of the parentheticals “(cleaned up)” and “(quotation simplified).” The court explained, “These parentheticals are powerful editing tools because they make legal writing less tedious, more streamlined, and more concise. But their appeal begets a temptation to misuse them.” Proper use includes to “indicate the omission of internal quotation marks, brackets, ellipses, emphases, internal citations, and footnote signals in published sources, as well as the traditional parenthetical notation referencing a prior case or cases being quoted.” They should not be used “with (1) quotations from unpublished sources not readily available to the public (namely, briefs, lower court documents, and transcripts) and (2) quotations of parenthetical language from cases citing other cases.” The Court noted it “expect[s] practitioners who choose to employ these devices to abide by these . . . strictures.” See *Rain Focus Inc. v. Cvent Inc.*, 2023 UT App 32, ¶ 6 n.7; *State v. Patton*, 2023 UT App 33, ¶ 10 n.3; *Fernwood Place LC v. Layton Partners Holding LP*, 2023 UT App 43, ¶ 9 n.4.

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Strong & Hanni is excited to welcome John H. Rees to our Intellectual Property and Business group. John is a proven attorney that works with clients to develop strategies and solutions for complex legal challenges and managing legal risk.

His legal practice focuses on appropriate use, licensing, and protection of intellectual property. This includes matters involving software and database licensing, SaaS agreements, terms of use, and counseling clients who are doing business in an online environment. He helps clients with adopting and building value in brands by clearing trademarks for use, counseling with clients regarding the use of trademarks, and protecting trademarks, including domain name management and domain name disputes. He also has experience in complex business transactions, including complex contract and transaction negotiations, and corporate and real estate lending..

John has worked closely with several clients as corporate counsel.



Access to Justice at the Utah State Bar

by Pamela Beatse and Kimberly Farnsworth

We are often told that pro bono service is something our profession *should* do. We want to challenge this by changing the implication from obligation to opportunity. While Rule 6.1 of the Utah Rules of Professional Conduct makes pro bono service part of our professional responsibilities, it is also something that we get to do. Pro bono opportunities help us to develop lasting connections with other professionals, grow new practice areas, receive mentorship and training, improve our well-being, receive recognition, and expand our perspectives and understanding of our communities.

From its inception, the Utah State Bar has made pro bono opportunities available to its licensees. Providing these services fulfills the Bar's responsibilities to (1) advance the administration of justice; (2) aid the courts in the administration of justice; (3) promote professionalism, competence, and excellence; (4) provide a service to the public, the judicial system, and Bar members; (5) educate the public about the rule of law and responsibilities under the law; and (6) assist Bar members in improving the quality and efficiency of their practice. *See* Utah Code Jud. Admin. R. 14-102(b).

In 2011, the Bar's Access to Justice (ATJ) Office was formally established in furtherance of these responsibilities. It is the mission of the ATJ Office to advance equity in the legal system and expand access to justice at all levels for people with lower incomes or who are disadvantaged. The ATJ Office fulfills this mission by creating a culture of service and respect in Utah where pro bono and reduced rate services are optimized to help people, families, and communities in need. This is accomplished through programs,

commissions, committees, and direct legal services. For example, the ATJ Office oversees the Access to Justice Commission, which studies – and proposes changes to address – systemic access to justice issues. And the ATJ Office also oversees the Pro Bono Commission, which directs pro bono service initiatives. In addition, the ATJ Office monitors the pro bono activities in each of the eight judicial districts, fields all public requests for information on pro bono or reduced rate legal services, and provides staffing and volunteers for Bar signature programs like the Pro Se Debt Collection Calendar Volunteer Program.

A Primer for the Utah Pro Bono Opportunity Portal

Pro bono legal work is valuable for legal professionals, but finding opportunities that fit your interests, skills, and abilities can be challenging. To overcome this, Utah joined several other states, including Texas, Colorado, New York, and Wisconsin, in implementing the Utah Pro Bono Opportunity Portal from Paladin, a legal technology company that specializes in organizing pro bono work.

Paladin was founded by a lawyer who wanted to help private sector lawyers increase involvement with public interest work. Her own experience with pro bono work made her realize how impactful it was, but she also noticed that doing pro bono work required a great deal of proactive effort. To find a case that fit her interests and abilities, she spent significant time searching through opportunities, rather than working on them. To solve this problem, she started Paladin to help lawyers efficiently review and engage with pro bono opportunities. Joe Borstein, *Mind The Gap: Felicity Conrad And Paladin's Legal Justice*

PAMELA BEATSE is the Utah State Bar Access to Justice Coordinator.



KIMBERLY FARNSWORTH is a BYU law student and Access to Justice Pro Bono Promoter.



Mission, ABOVE THE LAW, (Mar. 15, 2017, 2:14 PM) <https://abovethelaw.com/2017/03/mind-the-gap-felicity-conrad-and-paladins-legal-justice-mission/>.

For Utah lawyers and LPPs, the Bar's adoption of this portal means that the days of culling through emails, weblistings, and newsletters for interesting opportunities that fit with your schedule are over. You can now visit one site and be connected to a pro bono opportunity within minutes. Simply apply the filters that match your interests and availability and then select the matter(s) that suit you. Utah's Pro Bono Portal is located on the Bar's website, under Attorneys → Access to Justice → Pro Bono Opportunities. It can also be found at this link: <https://app.joinpaladin.com/utahprobono/>. The portal currently includes almost 200 opportunities, covering a wide variety of practice areas, locations, and time commitments. You can search for a particular organization's opportunities using the search bar at the top of the page, or you can simply apply filters until you've narrowed down the listings to only a few that are tailored to your interests.

One of the most important filters is the "Engagement Type" filter. It currently includes four different types of legal work: Brief Service, Limited Scope Representation, Litigation, and Transactional. Some brief service and limited scope representation opportunities may also involve litigation or transactional work, but they are coded this way by the portal to make it as easy as possible for potential volunteers to differentiate between larger and smaller pro bono commitments.

Brief Service opportunities are typically the shortest time commitment opportunities on the portal. The Virtual Legal Clinic is a good example. The Clinic receives legal questions from people in Utah. Using this information, the ATJ Office matches them with an attorney or LPP who has experience in the related field of law. At their convenience, volunteers then answer those questions with a twenty to thirty minute phone call. Volunteers can sign up to take just one question a month or up to four questions a month if they have more time. There are many other clinics tagged as brief service opportunities on the portal, and all of them generally require a short time commitment, left to the discretion of the volunteer.

Limited Scope opportunities may run longer than Brief Service, but typically only involve a time commitment of a few hours. For instance, volunteers may sign up for a pro se consolidated calendar to provide limited scope representation at a hearing in either family law or debt collection. This usually involves two to five hours of work. After the volunteer assists that individual with the portion of their court experience scheduled for that time, they are no longer assigned to the case.

Litigation opportunities generally run longer than limited scope, but many of these full-representation opportunities are also relatively short. Guardianship cases from the Guardianship Signature Program are a common type of litigation case on the portal. Many are projected to take under five hours. Transactional opportunities on the portal vary but may include things like assisting clients with wills and powers of attorney.

Other filters on the portal include Location Needs (remote or in-person), Practice Area, and Skills Developed. The Causes and Communities filter allows volunteers to filter by a particular group or legal problem for which they feel passionate.

Once you've used these filters to find an opportunity you like, simply click the "Express Interest" button on the opportunity listing page. A pop-up box will open for you to enter your contact information. The pro bono organization that posted the opportunity will receive your information and connect with you to provide more information about your placement and volunteering.

If you'd like to see a run through of how to find and use the portal, there is a short video available on the Access to Justice YouTube Playlist, available at <https://youtu.be/uNjIVkm52o>. We are grateful for all the amazing pro bono work our lawyers and LPPs have done for low-income individuals, and we hope that the portal will help you engage more efficiently.

New Pro Bono Rule: CLE Credits for Service

Another exciting development in the access to justice world comes in the form of new Rule 14-419 of the Utah Rules Governing the Utah State Bar. As of May 1, 2023, the Utah Supreme Court approved a pilot program that will give CLE credit for pro bono work. There are some limitations, which we'll explain below.

To take advantage of this new program, pro bono work must be completed on or after May 1, 2023. One hour of CLE credit will be awarded for every five hours of qualifying pro bono service, with a maximum of two hours of elective CLE credit. Rule 14-419(b) explains that "[t]o receive Pro Bono Legal Services CLE credit under this rule, the services rendered must be referred from a Utah court, the Utah State Bar, or a sponsoring entity." Pursuant to Rule 14-803(7), pro bono legal services include: "(a) legal services rendered to a person of limited means; (b) legal services to charitable, religious, civic, community, governmental or educational organizations in matters designed to address the needs of persons of limited means; (c) legal services to charitable, religious, civic, or community organizations in matters in furtherance of their organizational purposes."

Moreover, Rule 14-419(b) explains, the “Pro Bono referral must remain under the direction of the Utah court, the Utah State Bar, or the sponsoring entity that provided the referral.” This language means that not all pro bono service will qualify, although many will, as the definition for “sponsoring entity” explains. Rule 14-803(1)(c) defines a sponsoring entity as “a not-for-profit legal services organization, governmental entity, law school, Utah State Bar affiliate or other organization so designated by the Utah State Bar as providing pro bono legal services.” So, this means that helping your neighbor with their divorce probably won’t qualify for credit, but working with a non-profit likely will. If you are currently volunteering with an organization that is not a sponsoring entity but would qualify for the designation, please encourage the organization to submit an application to the ATJ Office.

The ATJ Office has made it simple to receive credit for your Rule 14-419 pro bono service through the use of an online certification form where you can enter your pro bono hours. That form is available here: <https://airtable.com/shr4ytUhz8EpRU1gT>. Once you have entered five or ten hours and the ATJ Office verifies that the work was done, staff will send you a certificate of compliance and transmit your credit(s) to the MCLE department.

Some Final Thoughts for Now

We believe volunteering is important, not just in the way it fulfills our professional obligations, but also in the way it serves our communities and helps us to be better legal professionals. It is important to ensure our community has better access to justice. However, there are other benefits for you, too. These include experiencing an increased sense of well-being, increased professional growth, and increased connections with others in the profession. The ATJ Office is committed to helping our attorneys and LPPs experience all of those benefits, so we provide free training on our pro bono practice areas, ethics and professionalism, and on how to access the portal. Please reach out to us at ATJ@utahbar.org for details on scheduling a CLE or accessing the next training.

Utah’s legal professionals are making a substantial difference for many members of our community who are not able to access a legal practitioner through traditional means. We appreciate your service and commitment to the public good as you all seek to balance the many responsibilities you have as practitioners in this great profession.

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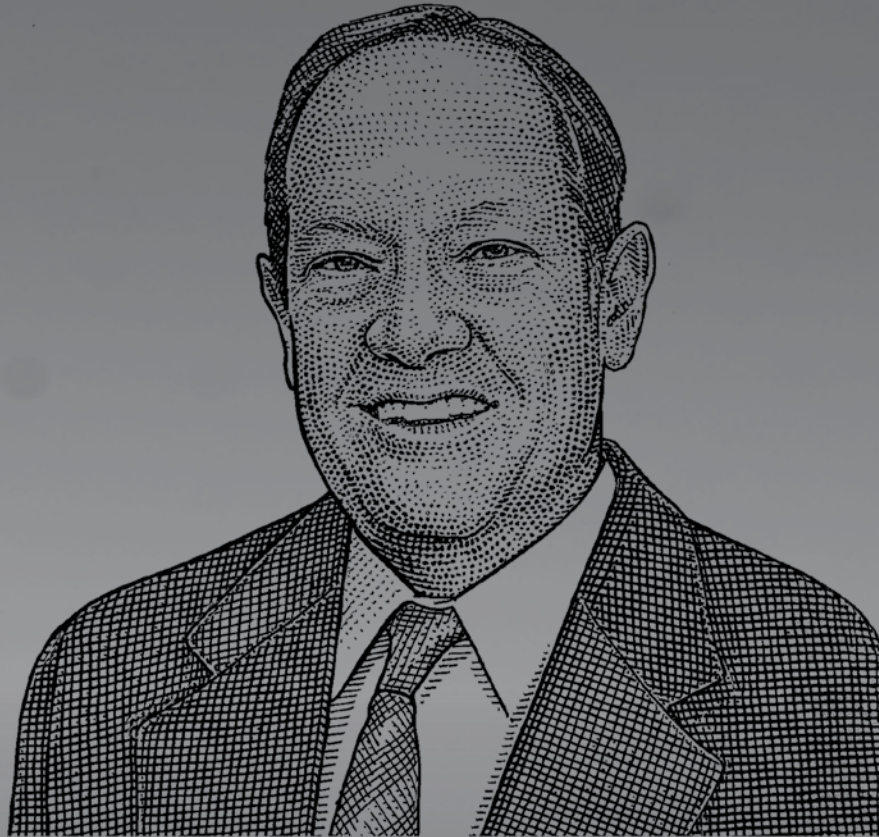
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Bradley H. Parker

(1951-2023)

Our dear friend and founding partner, Bradley H. Parker, passed away on June 6, 2023. Brad was a brilliant lawyer and tireless advocate for those in need. His loss will be felt deeply by his family, friends, and our entire legal community. All of us at Parker + McConkie wish to express our profound gratitude for Brad's example and our commitment to carrying on his legacy of using the practice of law to serve others with compassion and integrity.



Bradley H. Parker, Parker + McConkie

"Brad, my law partner of 47 years, was my dear friend who always had my back and could always be counted on. He loved to fight for the underdog and was one of the most insightful lawyers I have ever known. It was my great privilege to work at his side."

James W. McConkie II

Parker
McConkie⁺

Bank Failures and IOLTA Accounts: Understanding FDIC Insurance Limitations and a Lawyer's Duty to Safeguard Client Trust Funds

by David M. Grant

With the recent bank failures of First Republic Bank on May 1, 2023, Signature Bank on March 12, 2023, and Silicon Valley Bank on March 10, 2023, and with current rating downgrades of regional banks with locations in Utah, such as Zions, Western Alliance, and U.S. Bank, it seems timely to explore how the Federal Deposit Insurance Corporation (FDIC) insurance limitations apply to client funds held by lawyers through Interest on Lawyers Trust Accounts (IOLTAs). Not only will this article cover how FDIC limits apply to IOLTAs, but it will discuss a lawyer's duty to safeguard client property from the risks associated with bank failures. And it will provide recommendations for lawyers to manage bank failure risks related to IOLTAs.

The FDIC was created by Congress as an independent agency to examine and supervise banking institutions, manage and resolve bank failures, and insure deposits held in FDIC-member banks. Credit union accounts are not insured by the FDIC. Instead, they are insured by the National Credit Union Administration (NCUA). While the NCUA essentially offers the same types and amounts of coverage as the FDIC, and while the concepts discussed herein should translate from one system to the other, some differences may apply in the way specific limitations are computed and the way claims would be processed. It is beyond the scope of this article to discuss the ways NCUA and FDIC insurances vary.

FDIC Insurance Limits for IOLTA Accounts

Under 12 C.F.R. § 330.5 and 12 C.F.R. § 330.7, IOLTA accounts held at FDIC-insured banks, if they meet certain disclosure requirements, are treated as "fiduciary accounts," which are "deposit accounts owned by one party but held in a fiduciary capacity by another party." Fiduciary accounts are characterized on a pass-through basis as the deposits of the principal (i.e., the client), rather than as deposits owned by the agent (i.e., the attorney). As such, the deposits are treated as if they were made directly by the principal.

For this pass-through treatment to extend to client funds held in

an IOLTA account, all of the following three requirements must be met: (1) the funds must in fact be owned by the client, not the attorney, (2) the bank's records must indicate the account is an IOLTA account, and (3) the records of the bank or those of the attorney must indicate the identity of the client as well as the client's ownership interest in the deposit. Because of the duties imposed on attorneys with respect to IOLTA accounts under and as implied by the Utah Rules of Professional Conduct, professionally compliant IOLTA accounts will also conform to the above FDIC pass-through requirements for fiduciary accounts. Utah Code of Jud. Admin. R. 14-1001.

In its brochure entitled "Your Insured Deposits," as updated on April 3, 2023, the FDIC states, "The standard deposit insurance amount is \$250,000 per depositor, per insured bank, for each account ownership category." As such, client funds held through a qualifying pass-through fiduciary account will receive FDIC deposit insurance coverage up to \$250,000 for each underlying client, as aggregated and covered to the statutory limit, considering all funds held by each of the same underlying clients at the same depository institution, for each ownership category. In other words, each underlying client will have total FDIC insurance on all their deposits at a particular bank up to a total of \$250,000 for each ownership category.

Client trust funds held in IOLTA accounts can have various types of owners, including individuals, married couples and individuals in other family groups, members of class actions, executors of

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estates, partnerships, corporations, and other business organizations, and trustees of revocable and irrevocable trusts. In total, the FDIC's deposit insurance coverage rules currently protect deposits in fourteen different ownership categories. It is important for lawyers with IOLTA accounts to understand the particular rules and limitations for each of these categories in order to know what exposure their clients have to being underinsured in their deposits. A brief summary for some of these more common categories, as taken from the FDIC's "Your Insured Deposits" brochure, is provided next.

Single Accounts

A single account is a deposit owned by one person. This category includes: (1) an account held in one person's name only, without a beneficiary designation; (2) an account established for one person as an agent, nominee, guardian, custodian, or conservator, including Uniform Transfers to Minors Act accounts, escrow accounts and brokered deposit accounts; (3) an account held in the name of a business that is a sole proprietorship; (4) an account established for or representing a deceased person's funds – commonly known as a decedent's estate account; (5) a grantor's retained interest in an irrevocable trust; and (6) an account that fails to qualify for separate coverage under another ownership category. The FDIC adds together all single accounts owned by the same person at the same bank and insures the total up to \$250,000. 12 C.F.R. § 330.6.

Joint Accounts

A joint account is a deposit owned by two or more people. FDIC insurance covers joint accounts owned in any manner conforming to applicable state law, such as joint tenants with right of

survivorship, community property, tenants by the entirety, and tenants in common. To qualify for insurance coverage, all of the following requirements must be met: (1) all co-owners must be living people; (2) all co-owners must have equal rights to withdraw deposits; and (3) all co-owners have personally signed a deposit account signature card, or alternatively, the insured bank has information in its deposit account records establishing co-ownership of the account. 12 C.F.R. § 330.9.

Trust Accounts

Under current law, FDIC insurance coverage for revocable (12 C.F.R. § 330.10) and irrevocable (12 C.F.R. § 330.13) trusts are computed differently; however, effective April 1, 2024, the rules for both types of trust accounts are to change so that both revocable and irrevocable trusts will both be treated as being part of the same category of deposit accounts. 12 C.F.R. § 330.10 (2024) (as revised in 2022), *see* RIN 3064-AF27. In general, the rules for both types of trusts compute the amount of FDIC coverage based upon the number of beneficiaries, with certain limits imposed after March 31, 2024. Lawyers who hold IOLTA accounts with any kind of trusts should carefully review the rules to determine the FDIC deposit insurance coverage applicable.

Business/Organization Accounts

Deposits owned by businesses and organizations, such as corporations, partnerships, limited liability companies, associations, etc., including both for-profit and not-for-profit organizations, are insured under the same ownership category. Such deposits are insured separately from the personal deposits of the organization's shareholders, partners, or members. All deposits owned by one of these organizations at the same bank are combined and insured up to \$250,000. 12 C.F.R. § 330.11

Consider the following example of how deposit insurance limits would be calculated for an individual with various ownership interests in accounts at the same bank:

If Mary Smith were to have a personal deposit account at Bank XYZ with a balance of \$200,000, and Mary's attorney were to also hold \$100,000 in an IOLTA client account at Bank XYZ on behalf of Mary, then by aggregating the two account values we would see Smith is \$50,000 underinsured in her total Bank XYZ deposits (\$200,000 plus \$100,000 equals \$300,000; and \$300,000 less \$250,000 equals \$50,000).

To build upon this same example, let us consider what additional deposit insurance might be available if Mary Smith were also serving as the executor of her father's estate and if her attorney



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held another \$1,000,000 in his IOLTA account at Bank XYZ on behalf of said estate. Even if Mary had three siblings, all of whom were equal heirs of their father's estate along with Mary, the estate would still only be entitled to deposit insurance protection of \$250,000. Furthermore, albeit Mary's single \$250,000 FDIC insurance limit at Bank XYZ would be fully reached (even exceeded) through her ownership of the first two accounts mentioned early, because the FDIC would consider Mary's deceased father to be the sole owner of the account, the estate of her father would also be entitled to \$250,000 of insurance protection, even though Mary has both individual and executor accounts (through the IOLTA) at Bank XYZ.

Furthermore, if Mary were also to establish a family trust for the equal benefit of her two children when she dies, and then hold deposits in the name of such trust at Bank XYZ, then such account would also be insured up to \$500,000 (two beneficiaries multiplied by \$250,000 equals \$500,000). In summary, though Mary and her family members have various accounts at the same bank, because they are held through different ownership categories, each category will receive deposit insurance. So, it further follows that even if the lawyer's IOLTA account at Bank XYZ also held funds on behalf of a corporation wherein Mary is a shareholder,

such corporation, as a pass-through owner, would also be entitled to FDIC insurance coverage of up to \$250,000 on such account, even though Mary has interests in other deposit accounts at the same institution in different ownership categories.

Where does the FDIC get its funding and how secure are depositors?

Under the Federal Deposit Insurance Act (FDIA), the FDIC receives no Congressional appropriations – instead it is funded by deposit insurance premiums paid by banks. The FDIA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) authorize the FDIC Board of Directors to maintain a Deposit Insurance Fund (DIF), with a minimum required deposit reserve ratio of 1.35%. This reserve ratio reflects the amount of funds held in the DIF as a percentage of all deposits held at insured institutions. Under Dodd-Frank, when the reserve ratio falls below 1.35%, the Board must adopt a plan to restore the reserve ratio to at least 1.35% within eight years. Beyond the liquidity provided through the DIF, the FDIA provides that the “full faith and credit of the United States is pledged to the payment of any [FDIC] obligation.” 12 U.S.C. § 1825(d). Since the start of federal deposit insurance in 1934, all depositors have been made



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whole up to their insured limit after a bank failure.

Besides making claims against FDIC insurance when a bank fails, other remedies may be put in place to further help depositors and calm financial markets. For example, in the cases of Silicon Valley Bank, a “systematic risk exception” was invoked as the Treasury Department, and the boards of the FDIC and Federal Reserve rolled out new backstops to fully protect all deposits held at that bank, as such was reported in a joint public statement by those three organizations on March 12, 2023. In the more recent case of First Republic Bank, the FDIC was appointed as receiver and, soon thereafter, sold the bank’s assets to JPMorgan Chase Bank, in an effort to make depositors whole. *See* FDIC PR-34-2023. While bailouts like the ones described above, may not always be available with future bank failures, the possibility of such may offer some reassurance to attorneys holding large IOLTA accounts, with values exceeding the FDIC deposit insurance limits.

It is entirely possible to imagine a future world where this article is rendered obsolete through future legislative and government action taken to further and permanently protect deposits. Conversely, it is also possible that other schools of thought will prevail and at some point, banks will be allowed to fail without relief for depositors in excess of FDIC-insured limitations.

Duty to Safeguard Client Property

The author has not found any cases in which a lawyer was disciplined for failure to protect client funds against uninsured losses when a bank has failed. The Rules of Professional Conduct, however, clearly require that “[a] lawyer should hold

property of others with the care required of a professional fiduciary.” Utah R. Prof. Cond. 1.15 cmt. 1. It is generally understood that a fiduciary acting with a duty of care means that such fiduciary must act competently under the circumstances. Thus, in the case of a lawyer who is aware, or should be aware, that failure is likely for a bank wherein such lawyer’s IOLTA account is held, it follows that such lawyer should take steps to protect clients against the risks associated with underinsurance. It is conceivable that failure to do so could subject that lawyer to discipline. When the banking environment becomes unstable, generally, as may be the case at the present time, these considerations become ever more relevant.

The author found only one reported legal malpractice case where a court considered the issue of whether an attorney was liable to a client for failure to protect IOLTA funds against uninsured losses in the event of a bank failure. It involved an attorney in New York who placed client funds exceeding FDIC insurance limits into his IOLTA account, and the bank wherein such funds were held then failed giving way to losses on the underinsured deposit amounts. *Bazinet v. Kluge*, 788 N.Y.S.2d 77 (N.Y. App. Div. 2005). The *Bazinet* court held,

There is no requirement imposed by law that an attorney . . . place escrow funds in an account fully insured by the FDIC, and there are no allegations that [the attorney] knew that [the bank] was in danger of closing. The proximate cause of [the depositor’s] injury, if any, was [the bank’s] unforeseen demise.

Id. at 78.



In Utah, to establish a claim for legal malpractice, a client must prove that the attorney failed to use the same degree of care, skill, judgment, and diligence used by reasonably careful attorneys under similar circumstances; and the attorney’s failure to use that degree of care was a cause of client’s harm. *See Crestwood Cove Apartments Bus. Tr. v. Turner*, 2007 UT 48, 164 P.3d 1247; *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, 70 P.3d 17. So, what should a reasonably careful attorney do to help protect IOLTA funds against losses due to bank failure? The concluding section of this article will provide some suggestions.

Recommendations

Following are a list of recommendations for lawyers to take in protecting clients and their funds held in IOLTA accounts:

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Engagement Letters

Always use a client engagement letter that specifically lists the names of the parties involved and their interests in any IOLTA accounts. As shown above, for an IOLTA to qualify as a fiduciary account and thereby receive pass-through treatment, the bank or the attorney must indicate the identity of the client as well as the client's ownership interest in the deposit. The engagement letter is one reasonable place to document this important information. In fact, some institutional policies require the bank to inspect the engagement letter before an attorney can deposit amounts in IOLTA accounts.

Maintain Proper Accounting Records

Lawyers must maintain proper accounting records showing what IOLTA funds belong to each client. Moreover, because different categories of account owners exist, as discussed above, it is important for lawyers to know who all of the underlying account owners are and document their names. If, for example, the lawyer is holding IOLTA funds for a trustee of an irrevocable or revocable trust, the lawyer should know the names of all trust beneficiaries. Likewise, if a lawyer is holding IOLTA funds for a class of plaintiffs in a class action lawsuit, the lawyer should know the names and respective ownership interests of each member of the class.

Review Account Balances

Lawyers should regularly review and be aware of all client balances held in their IOLTA accounts. The larger the amount held in an IOLTA, the higher the potential risk of being underinsured from an FDIC deposit insurance standpoint in the event of bank failure.

Avoid Delays in Distributions

Because the duty of care extends to safeguard client assets in the lawyer's possession, the lawyer should not delay making distributions. Again, the larger the amount, the higher the risk of being underinsured.

Disclose Bank Identity to Clients

Because deposit insurance for IOLTA accounts is determined on a pass-through basis, as discussed above, in the event of a bank failure, the FDIC will aggregate a client's interest in the IOLTA funds along with all other funds held by that client at the same institution, and the client will only receive insurance coverage once for each ownership category. As such, it would seem reasonable for lawyers to advise their clients with IOLTA interests as to the identity of the bank wherein the lawyer's IOLTA account is held, so the client can consider and take steps to protect themselves against overall underinsurance risks. The

engagement letter is an effective place to make this disclosure.

Consider Using Multiple Banks

For large deposits and depending upon the underinsurance risk exposure of a particular IOLTA account, taking into account the FDIC insurance limitations and rules set forth above, lawyers might consider establishing IOLTA accounts with more than one FDIC banking institution.

Know Your Bank

Because of growing regulatory requirements, for many years now banks have been stepping up their due diligence practices. These practices are sometimes referred to as Know Your Customer (KYC) checks. These KYC checks require banks to make sure that their clients are genuinely who they purport to be. Likewise, in an environment where banks increasingly seem to struggle, it is important for banking customers to Know Your Bank (KYB). While it is beyond the scope of this article to advise on all KYB practices, many resources, rating agencies, and professional advisors exist who can help a lawyer assess the health of an institution wherein IOLTA funds are held. With that said, here is a link to the FDIC's public regulatory enforcement actions: <https://orders.fdic.gov/s/searchform>. You know a bank is in trouble when they receive a "Prompt Corrective Action."

Avoid Bank Runs

Where at all possible avoid participating in bank runs, and the self-fulfilling-prophecy possibility which exists therein. Taking the steps above will, in most situations, protect client IOLTA funds from being underinsured.

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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.



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Truth

by Keith A. Call

Do you know what a “deepfake” is? If not, you need to learn.

Deepfake is a type of artificial intelligence that can be used to make images, audio, and video of fake events. Technology has developed to a point where an individual’s appearance, voice, movements, and mannerisms can all be convincingly replicated by computer, making it very difficult to separate truth from fiction.

Deepfakes can be whimsical and fun, but they can also be dangerous. For example, according to the Wall Street Journal, in 2022 Russia released a deepfake of Ukrainian President Volodymyr Zelensky calling on Ukrainians to surrender. Daniel Byman et al., *The Deepfake Dangers Ahead*, WALL STREET JOURNAL (Feb. 23, 2023, 9:58 AM), <https://www.wsj.com/articles/the-deepfake-dangers-ahead-b08e4ecf>.

This freaks me out, especially when I contemplate the 2024 campaign and election season. It feels certain that we will see deepfakes of our presidential candidates created by people who would love to see our democracy fail. Such deepfakes will be double trouble because “[a] climate of pervasive suspicion will allow politicians and their supporters to dismiss anything negative that is reported about them as fake or exaggerated.” *Id.* In other words, we will hear people argue that deepfakes (or is it really real?) are fake. I get dizzy thinking about the puzzling problem of identifying elusive truth.

This has caused me to further ponder the role of lawyers in discovering and advocating truth. Without meaning to diminish the critical role of mothers, fathers, and soldiers in any way, it may be that the ultimate success or failure of our democracy rests on the shoulders of lawyers. Perhaps I’m overthinking my own importance, but that is the kind of sanctity we should attach to our profession every day when we go to work.

It feels weird to affirmatively say it, but lawyers, especially we litigators, have a strange relationship with the truth. I can already see those words in an opposing brief, but it’s true for all

litigators. We don’t typically advocate for sterile “truth,” because who is to say what the truth is? We advocate for our clients, trusting in the adversary system – especially juries and judges – to separate truth from fiction.

Consider this:

Lawyers must be honest, but they don’t have to be truthful. Honesty and truthfulness are not the same thing. Being honest means not telling lies. Being truthful means actively making known all the full truth of a matter. Lawyers must be honest, but they do not have to be truthful.

Dennis A. Rendleman, “*Truthiness*” and Professional Responsibility, A.B.A.: ETHICS IN VIEW (Dec. 2019) (citation omitted), https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/truthiness_-and-professional-responsibility/?login.

Try explaining that to a child. Or to any non-lawyer.

Is it okay for lawyers to wash their hands of “truth” in the name of honest advocacy? Do lawyers have some obligation beyond blind advocacy of unexamined “facts”? I’d love to hear your thoughts on this. Send them to me at kcall@scmlaw.com.

I won’t solve this riddle in 1,000 words, but I can review some of the key ethical rules on the topic. As you review these rules, try to think of a recent situation where you could have done a

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



little better, or where you could still make a correction.

Utah Rule of Professional Conduct 3.3 addresses “Candor Toward the Tribunal.” Under this rule, it is unethical to “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” It is also unethical to “fail to disclose to the tribunal legal authority in the controlling jurisdiction directly adverse to the position of the client and not disclosed by opposing counsel.”

Rule 4.1 is similar, but broader. It addresses “Truthfulness in Statements to Others.” It is unethical for a lawyer to “[m]ake a false statement of material fact or law to a third person.” It is also unethical to “[f]ail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless [the] disclosure is prohibited by Rule 1.6.”

Rule 7.1 is supposed to temper “Communications Concerning a Lawyer’s Services.” It reads:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s

services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or
- (3) contains a testimonial or endorsement that violates any portion of this Rule.

There are many other rules that explicitly or implicitly include concepts of honesty, such as Rule 1.15 (“Safekeeping Property”), 8.1 (“Bar Admission and Disciplinary Matters”), 8.2(a) (statements about judicial officials), and 8.4(c) (it is professional misconduct to engage in dishonest conduct or misrepresentation).

I am still in the middle of the difficult journey of figuring out how to be both a good lawyer and a good person. But I remain convinced that it *must* be possible and must be sought after, even for the sake of democracy. I am inspired by the example and the following words of Abraham Lincoln, as quoted in Rendleman, *supra*:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young [person] choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Let us all consider what our role is in defining and defending truth, and resolve to do better, whatever that means for each of us.

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.



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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the April 21, 2023, meeting held at the Utah State Bar Law & Justice Center in Salt Lake City.

- The Bar Commission voted to allow the Access to Justice office to hire an associate staff attorney to look at debt trends in Utah, look at the value of brief legal advice or legal representation, and assist the courts in their administration of debt cases. This is a pilot program which the Access to Justice office hopes to make into a permanent staff position after two years.
- The Bar Commission discussed the future of Utah's Legal

Regulatory Sandbox. The court has been working with the Bar to bring the Legal Regulatory Sandbox over to the Bar as a Bar program.

- The Bar Commission discussed the proposed changes to Rule of Professional Conduct 7.1 and MCLE Rule 14-419.
- The Bar Commission received legislative updates and a final report on the 2023 Legislative Session from the Bar's lobbyists.
- The Commission approved by consent the minutes of the March 16, 2023 commission meeting.

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

Character & Fitness Committee Seeks New Members

The Utah State Bar is seeking individuals to serve on the Character and Fitness Committee for Admissions. This Committee is responsible for making determinations regarding the character and fitness of applicants seeking admission to the Utah State Bar. If you are interested, please submit a resume and statement of intent to Deputy General Counsel for Admissions by email to volunteers@utahbar.org. Service on the Committee for new members will begin with a training session at the end of August or early September.





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Annual Online Licensing

The annual Utah State Bar online licensing renewal process has begun. An email containing the necessary steps to renew online at <https://services.utahbar.org> was sent on June 5th.

Your renewal and fee payment are due by July 1st and will be late August 1st. If your renewal is not complete and fees paid before September 1st, your license will be suspended.

The Bar accepts all major credit cards and has eliminated the 2% surcharge. Payment can also be made by ACH/E-check. **NO PAPER CHECKS WILL BE ACCEPTED.**

Upon completion of the renewal process, you will receive a licensing confirmation email.

To receive support for your online renewal, please contact us either by email to onlinesupport@utahbar.org or, call 801-297-7023. Additional information on licensing policies, procedures, and guidelines can be found on our website at www.utahbar.org/licensing.



Notice of Petition for Reinstatement to the Utah State Bar by Steven D. Brantley

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by Steven D. Brantley, in *In the Matter of the Discipline of Steven D. Brantley*, Third Judicial District Court, Civil No. 990908003. 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.

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Summer Convention Awards

The following awards were presented at the
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Recognizing Leaders in Our Communities: Spring Pro Bono Publico Awards

Each May, the legal community celebrates Law Day. This year the theme was “Cornerstones of Democracy: Civics, Civility, and Collaboration,” acknowledging that each of us has a role to play in defending democracy and the guardrails that protect it. The event was held at the Grand America Ballroom in Salt Lake City. During this luncheon, the Access to Justice Office announced winners of the spring Pro Bono Publico Awards.

Pro Bono Publico Law School Group of The Year

J. Reuben Clark Law School's Public Interest Law Foundation



J. Reuben Clark Law School's Public Interest Law Foundation (PILF) at BYU was named the Pro Bono Publico Law School Group of the Year. This award is given to an exceptional law school group whose goal is to install the ethical and professional responsibility to provide legal services to all regardless of income. The PILF organization showed exceptional dedication and commitment through many public interest law projects at their school and within their community. Here are just a few examples of what all these law students accomplished:

- PILF students attended the Tuesday night Family Justice Center Clinic to assist people in person and online. They showed up even when they were not getting academic credit.
- They also served at Timpanogos Legal Center.
- They helped at the document review clinic and on special projects.
- In February, they hosted the annual PILF auction to raise money for stipends to allow students to do public interest work for their summer internships. The auction this year was very successful and raised over \$10,000.
- PILF students were pivotal in planning, advertising, setting up, and hosting the Fourth District Pro Bono Committee Celebration last October.

- PILF hosted the first Public Interest Career Fair at BYU. They invited local organizations to participate and encourage law students to find jobs in public interest work.

These students showed great professionalism and kindness, particularly for clients going through difficult circumstances. We commend them for their legal knowledge, their patience, and their understanding. They are creative and innovative leaders. They have expanded PILF's impact and strengthened local Utahns access to equal justice.

Pro Bono Publico Law Firm of The Year

Greenberg Traurig

Greenberg Traurig (GT) is the Pro Bono Publico Law Firm of the Year. This award is given to a law firm that does outstanding work to actively and successfully encourage pro bono service by their attorneys. As a newer firm in Utah, GT encouraged their attorneys to get involved and provide volunteer support. They got started right away taking a week on a pro se calendar to serve people without lawyers needing help with housing issues on the Third District immediate occupancy consolidated calendar. While many people provide limited scope representation, it is even more impressive when a firm commits to regularly appear each month on a set week. Greenberg Traurig committed to doing this and provided a firm lead to recruit and provide two to three lawyers each month. More than just showing up, they provided excellent legal service to many pro se clients who otherwise would not have had an opportunity to get legal representation.

GT expanded their pro bono work to be involved in national initiatives. For example, GT's Salt Lake attorneys helped the community by connecting Ukrainian refugees with local immigration non-profits. These refugees were able to file for either Temporary Protective Status, employment authorization, and/or advanced parole with GT's help. They supported more than 100 Ukrainian refugees in these national efforts. This was in partnership with the New York Legal Assistance Group and its Ukrainian Immigration Assistance Project. They also donated up to \$2 million in humanitarian aid in addition to financial donations from attorneys and professional staff.



Pro Bono Publico Young Lawyer of The Year

Alex Vandiver



Being a young lawyer can be challenging, and fitting in pro bono service takes dedication. Alex Vandiver exemplifies balancing these efforts as the 2023 Pro Bono Publico Young Lawyer of the Year. This is an award given to a young lawyer who has performed significant pro bono work as a member of the Utah State Bar.

Ms. Vandiver cares about people and shows her willingness to go above and beyond as a consistent volunteer through several Utah State Bar sponsored pro bono programs. She is a part of the litigation, trials, and appeals and the environmental and natural resources groups at Parsons Behle and Latimer. She routinely volunteers on the Pro Se Debt Collection calendar and is willing to tackle even the most complex and difficult hearings. She is a model volunteer showing care and discretion as she helps her limited scope clients decide to either settle or argue cases in various hearings.

Ms. Vandiver also volunteers weekly through the Virtual Legal

Clinic. Her service ensures these people in need can have a twenty to thirty minute phone call to discuss their issues. Ms. Vandiver is a true believer in the program. She helps recruit other volunteers and even published an article in the *Utah Bar Journal* to promote the clinic.

Even during law school at the University of Utah S.J. Quinney College of Law, she demonstrated her conviction and dedication as a Pro Bono Initiative Fellow overseeing several clinics that provided free brief legal consultation to low-income communities throughout the Salt Lake Valley. We are excited to see her continue to develop her practice and her pro bono efforts.

Pro Bono Publico Award – Call for Nominations

We are accepting nominations for the fall Pro Bono Publico award for Pro Bono Service of the Year.

If you know of someone who is doing exceptional pro bono service, please consider nominating them by visiting: <https://www.utahbar.org/awards/>.

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Pro Bono Honor Roll

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a recent free legal clinic. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

Private Guardian ad Litem

Gabriell Jones
Chase Kimball
Robin Kirkham
Allison Librett
Lillian Reedy
Micah William Scholes
Sherri Walton
Amy Williamson

Pro Bono Appointments

Sarah Spencer

Pro Bono Initiative

Noah Barnes
Jonathan Benson
Amanda Bloxham Beers
Corttany Brooks
Brent Chipman
Jessica Couser
Dan Crook
Dave Duncan
Hannah Ector
Annie Edwards
Russell Evans
Ana Flores
Jennie Garner
Denise George
Peter Gessel
Jason Groth
Samantha Hawe
Ezzy Khaosanga
Scheena Knox
Kenneth McCabe
Kendall McLelland
Grant Miller
Susan Morandy
Tracy Olson
Leonor Perretta
Cameron Platt
Clayton Preece
Stewart Ralphs

Brian Rothschild
Lauren Scholnick
Galen Shimoda
Jake Smith
Richard Snow
Jay Springer
Charles Stormont
Leilani Whitmer

Pro Se Debt Collection Calendar

Miriam Allred
Mark Baer
Pamela Beatse
Keenan Carroll
Frank Chiamonte
Kristin Clark
Ted Cundick
Regan Duckworth
Leslie Francis
Denise George
Gregg Gunn
Mindy Kidd
Taylor Kordsiemon
Zach Lindley
Amy McDonald
Jared Nelson
Vaughn Pederson
Jazmyynn Pok
Zachary Shields
Sarah Spencer
George Sutton
Nancy Sylvester
Austin Westerberg
Andrus Wirkus

SUBA Talk to a Lawyer Legal Clinic

Braden Bangerter
Thomas Crofts
Adrienne Ence
Bill Frazier
Rick Mellen
Tyson Raymond

Lewis Reece
Chase Van Oostendorp

Timpanogos Legal Center

Amirali Barker
Bryan Baron
Felipe Brino
Stephen Clark
Tyler Dalton
Adrienne Ence
Sol Huamani
Jefferson Jarvis
Matthew Johnson
Erin Kitchens
Keil Meyers
Maureen Minson
Candace Reid
Jessica Smith
Elizabeth Tyler
Anne-Marie Waddell

Utah Bar's Virtual Legal Clinic

Ryan Anderson
Josh Bates
Dan Black
Mike Black
Douglas Cannon
Anna Christiansen
Adam Clark
Riley Coggins
Jill Coil
Kimberly Coleman
Robert Coursey
Jessica Couser
Jeff Daybell
Hayden Earl
Matthew D. Earl
Craig Ebert
Jonathan Ence
Rebecca Evans
Thom Gover
Sierra Hansen

Robert Harrison
Aaron Hart
Tyson Horrocks
Robert Hughes
Justin Jones
Ian Kinghorn
Suzanne Marelus
Travis Marker
Greg Marsh
Nathan Nelson
Sterling Olander
Aaron Olsen
Jacob Ong
Ellen Ostrow
Mckay Ozuna
Steven Park
Clifford Parkinson
Alex Paschal
Katherine Pepin
Cecilee Price-Huish
Stanford Purser
Jessica Read
Brian Rothschild
Chris Sanders
Alison Satterlee
Thomas Seiler
Luke Shaw
Angela Shewan
Karthik N. Sonty
Charles Stormont
Mike Studebaker
George Sutton
Glen Thurston
Jeannine Timothy
Jeff Tuttle
Christian Vanderhooft
Alex Vandiver
Jason Velez
Kregg Wallace
Joseph West



MCLE Rule Changes effective May 1, 2023

The Utah Supreme Court has adopted the Mandatory Continuing Legal Education (MCLE) rule amendments below effective May 1, 2023.

The amendments update terminology, replacing "Live CLE" with "Verified CLE" and "Self-Study CLE" with "Elective CLE." Rule 14-404 clarifies issues around the New Lawyer Training Program. And Rule 14-419 offers a new avenue for Bar members to obtain "Elective CLE" credit through approved pro bono work.

Annual CLE Compliance July 1, 2022 – June 30, 2023

All active status lawyers admitted to practice in Utah are now required to comply annually with the Mandatory CLE requirements.

The annual CLE requirement is 12 hours of accredited CLE. The 12 hours of CLE must include a minimum of one hour of Ethics CLE and one hour of Professionalism and Civility CLE.

At least six hours must be Verified CLE, which may include any combination of In-person CLE, Remote Group CLE, or Verified E-CLE. The remaining six hours of CLE may include Elective CLE or Verified CLE.

**For a copy of the new MCLE rules, please visit <https://www.mcleutah.org>.
For questions, please email staff@mcleutah.org, or call 801-531-9077.**

Utah State Bar Request for 2023–2024 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar committees which participate in regulating admissions and discipline and in fostering competency, public service, and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____

Phone # _____ Email _____ Fax # _____

Committee Request:

1st Choice _____ 2nd Choice _____

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

Please list any Utah State Bar sections of which you are a member:

Please list pro bono activities, including organizations and approximate pro bono hours:

Please list the fields in which you practice law:

Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date _____ Signature _____

Utah State Bar Committees

Admissions

Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.

Bar Examiner

Drafts, reviews, and grades questions and model answers for the Bar Examination.

Character & Fitness

Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

CLE Advisory

Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.

Disaster Legal Response

The Utah State Bar Disaster Legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.

Ethics Advisory Opinion

Prepares formal written opinions concerning the ethical issues that face Utah lawyers.

Fall Forum

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Fee Dispute Resolution

Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.

Fund for Client Protection

Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.

Spring Convention

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Summer Convention

Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Unauthorized Practice of Law

Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

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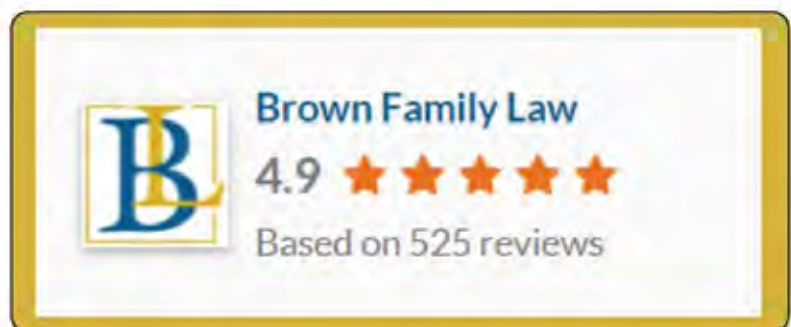
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Attorney Discipline

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

PROBATION

On May 15, 2023, the Honorable Don M. Torgerson, Fifth Judicial District Court, entered an order of discipline against Ricky D. Bonewell, placing him on probation for a period of one year based on Mr. Bonewell's violation of Rule 1.3 (Diligence), Rule 1.4(a) (Communication), and Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct.

In summary:

A client retained Mr. Bonewell to file an appeal of the decision in her disability case. The client provided a letter from her doctor that Mr. Bonewell requested to be used in a good cause for late filing hearing request. While the client believed everything in her case had been properly submitted, the letter was never submitted for her appeal. Moreover, a hearing was never requested for the appeal.

Mr. Bonewell did not communicate with the client after the initial consultation he had with her. The client only communicated

with Mr. Bonewell's staff after the initial consultation. The client frequently called or sent email messages to Mr. Bonewell's office to obtain a status update on her case but the staff did not provide answers to her questions. The client frequently spoke with a member of Mr. Bonewell's staff who blamed issues on former co-workers, being locked out of the system or who couldn't find her claim because her files were spread over four different systems.

The client terminated Mr. Bonewell's services and hired alternate counsel. The client filed a new claim and was awarded disability.

Aggravating factors:

Prior record of discipline; multiple offenses; vulnerability of victim; and substantial experience in the practice of law.

Mitigating factors:

Absence of a dishonest or selfish motive; and personal or emotional problems.



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.

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An Important Note:

MCLE hours earned in June (**up to 5 hours** available*) will count toward this year's compliance cycle.

Hours accumulated in July and August (**up to 9 hours** available*) will count toward next year's compliance cycle.

*Approval pending.

utahbar.org/summerconvention

2023 Paralegal of the Year: Congratulations Tonya Wright!

by Greg Wayment

On Thursday, May 18, 2023, the Paralegal Division of the Utah State Bar and the Utah Paralegal Association held the Annual Paralegal Day celebration. Kimberly Garner was the keynote speaker and spoke about professionalism and civility for paralegals. The Paralegal Division would like to heartily thank all those who organized and hosted this event.

One of the highlights of this event is the opportunity to recognize individuals who have achieved their national certification through the National Association of Legal Assistants (NALA). This year four individuals were recognized for obtaining a Certified Paralegal designation: Jessika Anne Allsop, Madison Morgan, Christopher A. Simon, and Leah Marie Wright. In addition, four individuals were recognized for obtaining an Advanced Certified Paralegal designation: Denise J. George, Chad G. Lambourne, Lauren C. Pump, and Ashley Sevy. Well done!

Paralegal Day is also the day to present the Distinguished Paralegal of the Year Award. The purpose of this award is to honor a Utah paralegal who, over a long and distinguished career, has, by their ethical and personal conduct, commitment, and activities, rendered extraordinary contributions and service to the paralegal profession.

This was again an outstanding year for nominations. Typically, the Paralegal Division receives four to five nominations, with perhaps two to three nominations being complete. This year, we received twenty-three complete nominations, all of whom were very strong candidates. I would like to thank all those who nominated a paralegal. Please don't be discouraged if your nominee was not chosen; we'd love to see your nomination again next year!

The hard-working individuals on the 2023 selection committee included: Judge Shaughnessy, Christopher Von Maack, Kennedy Nate, Katie Lawyer, and Michelle Yeates. We are pleased to announce that the winner of the 2023 Utah Distinguished Paralegal of the Year Award is Tonya Wright.



Tonya has been a litigation paralegal to Shaun Peck since March 2011. Tonya works with Shaun Peck and Loren Peck on a wide variety of litigation matters including personal injury, insurance disputes, contract disputes, collection disputes, sexual abuse claims, employment claims, family law, estate disputes, and malpractice claims.

Tonya Wright is a Licensed Paralegal Practitioner in the state of Utah with over twenty years' experience working in law. She was one of the first LPPs in the state of Utah to obtain licensure in all of the practice areas currently available to LPPs: Family Law (temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, name or gender change, and petitions to recognize a relationship as a marriage); Debt Collections; and Landlord/Tenant disputes.



Paralegal of the Year, Tonya Wright, with Shaun Peck, who nominated her for the award.

Tonya is an Advanced Certified Paralegal (ACP, Trial Skills) through NALA. She served as Chair of the Paralegal Division of the Utah State Bar (2020–2021), served as *ex officio* Immediate Past Chair and Bar Commission Liaison (2021–2022), and was a member of the Board of Directors for the Paralegal Division from 2018–2022.

Tonya currently serves on the Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure and the Utah LPP Steering Committee.

After working in debt collection for eight years, Tonya moved to Cache Valley and worked as a Deputy Court Clerk at First District and Juvenile Courts in Logan from 2006 to 2011, where she gained experience working in the civil, criminal, domestic and juvenile in-court desks.

In recognition of Tonya's dedication to the paralegal profession and her outstanding involvement with the community, we are honored to recognize her as the 2023 Utah Paralegal of the Year. Congratulations, Tonya Wright!

The Paralegal Division would also like to especially thank Judge Todd Shaughnessy, Christopher Von Maack, Kennedy Nate, Katie Lawyer, and Michelle Yeates for their work on the Paralegal of the Year Selection Committee. We would also like to thank Shaun Peck, Shawn Bailey, Brandon Baxter, and Rheane Swenson for their support of Tonya.

From Shaun Peck, founder of Peck Baxter Watkins & Bailey:

I have had the privilege of knowing Tonya for over twelve years. During this time, she has become an amazing paralegal, and so much more. When she started working at our firm, she had never worked as a paralegal. Of course, she had much to learn. She was not a strong writer. She knew nothing of the Rules of Civil Procedure or Evidence. What she did have was a strong desire to learn, a keen attention to detail, and an unquenchable determination to right wrongs. She was undeterred by what she did not know and dug into her work with a passion. She quickly made herself irreplaceable in many ways. She drastically improved her writing, made herself an expert on the rules that govern our work, and impeccably organized every case she was involved in.

Over the years, Tonya has progressed from simple paralegal tasks to drafting complex pleadings, legal research, and in-depth case analysis. She has become an essential, trusted and beloved member of our litigation teams. Tonya is the quintessential team player and mentor to everyone in the office, including every attorney. She knows everything, and how to get anything done – and well. She is incredibly unselfish with her time and

knowledge. She will drop whatever she is doing and help anyone who has a question about the rules or anything else.

Tonya's dedication to the field of law and the development of herself and other paralegals extends beyond my practice and our firm. Of her own accord, she continues to learn and grow in knowledge and skill, pursuing various licensures and certifications, and encouraging and assisting others who are engaged in this field. She is constantly looking for ways to help those in need. She has generously given of her time to help with projects for the Rocky Mountain Innocence Center and Wills for Heroes. In addition to all of this, Tonya is an amazing daughter, mother, and grandmother. She takes care of aging parents. She helps with her grandchild, and avidly supports her two children in their many adventures.

From Tonya:

I want to thank the Paralegal Division of the Utah State Bar and the Utah Paralegal Association for this award. I also want to thank the boards of both of these organizations. I want you to know that I see you. I know first-hand how much time you are putting in, and I hope you know how much paralegals around the state appreciate your willingness to serve. I am honored to be among the best paralegals in the state in my daily work and as part of these organizations. Thank you for being the consummate professionals and for promoting the profession and keeping it relevant. I am humbled to receive this award, especially because I feel like everyone who earns the title of paralegal deserves an award.

I want to thank Shaun Peck and everyone at Peck Baxter Watkins & Bailey for believing in me, for taking the time to submit a nomination for me, and for the years of support and encouragement. Thank you for trusting me with the delicate and complex legal issues we deal with every day. Thank you for putting up with my propensity to volunteer for everything. I am so blessed to be able to work with such fabulous humans on the daily.

I want to thank my husband who puts up with me (especially when I am in trial. I am *intense* when we are in trial). And my kids for always supporting me and encouraging me to keep going.

Now and then I receive requests from paralegal students at Ensign College or SLCC to interview me for one of their assignments.

One of the common questions I get is "what pieces of advice do you have for an upcoming paralegal?" My answers are always the same.

Don't be afraid of hard projects.

The process of digging your hands in the dirt to figure out how to complete large unknown tasks is how you learn. Paralegals are jacks of all trades; adept at multi-tasking, problem solving, and so much more. You will never forget the task you were afraid of after going through the process of seeking answers.

Do not be afraid to ask lawyers questions.

You might be worried you are annoying them. But lawyers like to talk. They do! And smart lawyers will understand that teaching you the complex things and involving you as a member of the team will make you a better paralegal. And in turn, you are more beneficial to them. It also promotes teamwork between attorney and paralegal. And a good team is unstoppable.

Don't be afraid to make mistakes.

Mistakes are unfortunately also part of learning. Hopefully the mistakes aren't huge mistakes! But I am willing to bet that, for those of you in this room who have ever forgotten to set up the court reporter for a deposition: you only made that mistake one time, and you never forgot it! Mistakes are inevitable. Frame each mistake into a learning opportunity.

My last piece of advice is to get involved.

I would encourage everyone to consider getting involved in the boards of Paralegal Division of the Utah State Bar and/or the Utah Paralegal Association. Donate your time to Wills for Heroes. Consider joining NALA or similar organizations. Consider taking certification exams offered by these organizations. It's not just the added credentials that are beneficial. It is so much more. The discipline, the skills you acquire, and the friendships you will form, are priceless. Some of my very best friends have come from my time on the board of the Paralegal Division and from going through the LPP program. I will always cherish these friendships and I am so grateful for all of you.

Again, thank you all so much for this recognition and for all that you do.

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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.

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It is time to step aside for someone to become part of my Logan solo practice. Wife says retire. Clients need this general practice to continue. Add your name and share the practice. Experience and faith useful. Desire to be in Logan essential. 435-770-3395. Established name and location.

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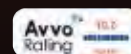
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