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Maple Canyon by Utah State Bar member Allison Moon.

ALLISON MOON proudly served as the Financial Litigation Unit Chief for the Utah U.S. Attorney's Office from 2015 to 2020. She is now a Trial Attorney for the U.S. Securities and Exchange Commission. About her photo, Allison said, "I took this photo while on a hike in Maple Canyon – a little nook twenty-five miles east of Nephi. True to its name, the canyon is full of maples and other deciduous trees that put on a spectacular display, and, if you are lucky, as I was this day, there will be a light dusting of white snow on the ground to contrast with the bright oranges and yellows of fall, the deep green conifers, and the azure blue sky."



HOW TO SUBMIT A POTENTIAL COVER PHOTO

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs by 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.
8. If and when a letter is rejected, the author will be promptly notified.



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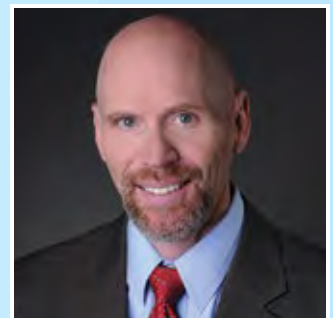


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Get Involved: Make Your Utah State Bar Better

by Erik A. Christiansen

In the couple of months that I have served as President of the Utah State Bar, I've received some interesting emails from lawyers. Some of the emails are complimentary, some are not, and more than a few are from people who might be in serious need of some psychiatric help. Recently, I was fortunate enough to attend a presentation by two lawyer members of the Utah Legislature. They displayed some emails they received from people, a few of which were filled with profanity, insults, and even death threats. One of the legislators labeled those "ineffective" communications. I agree with that characterization. I enjoy getting effective emails from lawyers and members of the public, but if you want to be effective, you probably should draft a polite, respectful, and semi-coherent email.

Members of the Bar Commission, the President-Elect, and the President are all elected by you – members of the Utah State Bar – and we enjoy getting input on how we can better serve the citizens of Utah and improve the lives of Utah lawyers. If you want to help us do a better job, just remember that insults, tirades, conspiracy theories, and accusatory communications will go promptly into the "ineffective" communications file.

The emails I've received in the last couple of months got me thinking, however, about why lawyers should get involved in Utah State Bar activities and how much Utah lawyers know about what the Bar does. To begin with, more than 85% of what the Bar does falls into two categories: (a) admissions and licensure, and (b) attorney discipline. The vast majority of what the Bar does is self-regulate the legal profession.

Where does the Utah State Bar derive its authority to self-regulate lawyers? Article VIII, section 4 of the Utah Constitution provides that "[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and

discipline of persons admitted to practice law." The Utah Supreme Court, in turn, has delegated that authority to the Bar. The Bar simply administers under delegated authority from the Utah Supreme Court the "admission to practice law" and the "discipline of persons admitted to practice law." The Bar is not, as many people misunderstand, a trade association.

First and foremost, the Utah State Bar is a regulator. Nearly 85% of your annual dues go to self-regulatory functions. The remainder of your dues go to assisting with the administration of justice, to improving the legal profession, to providing continuing legal education opportunities, to assisting the public in gaining access

to justice, to providing resources and benefits to Utah lawyers, and to providing opportunities for lawyers and judges to interact and learn from one another, which promotes civility.

With respect to the citizens of Utah, the Utah State Bar provides many benefits apart from license and discipline, including, among

others: a lawyer referral service called Licensed Lawyer, the Fee Dispute Resolution Program, the Fund For Client Protection, the Consumer Assistance Program, the Modest Means Lawyer Referral Program, the Licensed Paralegal Practitioner Program, the Utah Office of Legal Services Innovation, and numerous pro bono assistance programs.

With respect to Utah lawyers, apart from lawyer licensing and discipline, the Utah State Bar provides Utah lawyers numerous benefits, including, among others: Fast Case, the Professional Development office, the New Lawyer Training Program, the Fall Forum, the Spring Convention, the Summer

"The opportunity to develop relationships with a large number of lawyers providing service to the Bar is one of the best benefits of service to the Utah State Bar."



Convention, the ethics hotline, ethics opinions, Tava Health, Unmind, Lawyers Helping Lawyers, the *Utah Bar Journal*, the ebuletin, and numerous on-line and in-person continuing legal education (CLE) opportunities. For example, in June and July of this year alone, more than 4,000 Utah lawyers attended an on-line or in-person CLE offered by the Bar. There are numerous opportunities for Utah lawyers to get involved with and participate in each of these activities, including thirty-eight sections and the two divisions of the Utah State Bar.


I first got involved with the Utah State Bar when I served on the Young Lawyers Division Executive Committee. I also served as the chair of the Utah State Securities Section and chair of the Utah Litigation Section. Every time I provided service to a Bar division or section, I came away with a greater appreciation for the Bar, for its members, and for the work Utah lawyers do to improve the practice of law and enhance access to justice. I also had the opportunity to serve with members of the judiciary and to see firsthand the hard work judges do to improve the profession in Utah. I also came away with new friendships with fellow members of the Bar: friendships which greatly increased my appreciation of my fellow lawyers, made the practice of law less

stressful, and contributed to the civility of our profession.


Once you've served on a Bar section or division with another lawyer, it makes the next case you have with that lawyer go much more smoothly than if you were simply litigating with an attorney whom you don't know outside of the courtroom. The opportunity to develop relationships with a large number of lawyers providing service to the Bar is one of the best benefits of service to the Utah State Bar. Some of my favorite lawyers in the Bar are lawyers whom I met and served with on Bar divisions or sections. It makes the practice of law a much more enjoyable and collegial profession.

As I finish the first couple of months in my term, I wanted to encourage you to get involved with the Utah State Bar, to make time to improve our profession, to learn about the Bar, to take advantage of the myriad of opportunities the Bar provides for you to interact with and learn from our excellent judiciary, and to develop relationships with other Utah lawyers. I also wanted to let you know a few of my priorities this coming year. I want to continue to advance the critical role our integrated Bar plays in serving the citizens of Utah and Utah lawyers. I want to facilitate closer collaborative relationships between lawyers, members of the judiciary, and legislators. I want to enhance members' connections to the Utah State Bar, including by improved communications with members, better coordination and communication with other regional and affinity Bar organizations in Utah, and better understanding and support Utah lawyers as the practice of law rapidly evolves. In this regard, I want to help Utah lawyers prepare for the coming artificial intelligence revolution and changes in attorney licensure and education, and to continue to provide opportunities for the diverse citizens of Utah to be reflected in the profession and on the bench.

To accomplish each of these goals, I encourage you to join me. Rather than firing off an email, get involved in a division or section, run for a seat on the Bar Commission, apply for a supreme court committee, and take the time to give back to the profession that likely has given you so much. I will welcome you, encourage you, and look forward to the opportunity to work collaboratively with you to make the practice of law in Utah more fun, more collegial, less adversarial, and better for the citizens of Utah. In the paraphrased words of the late great Warren Miller, if you don't do it this year, you'll just be another year older when you do get involved. Why wait?



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Finding a Better Way: An Alternative Path to Attorney Licensure in Utah

by Catherine Bramble

Thomas Edison famously said, “There’s a way to do it better. Find it.” The spring 2020 adoption of Emergency Diploma Privilege by the Utah Supreme Court was successful in admitting over 170 individuals to practice law in Utah through the completion of 360 hours of supervised practice in place of the bar exam. As a result of this success, in the fall of 2020, the court created a working group chaired by Associate Chief Justice John Pearce – the Utah Supreme Court Working Group on Attorney Licensure – to investigate, research, and consider whether there is a better way to license new attorneys. The working group is composed of fourteen legal professionals including judges, local practitioners, and law professors.¹

The current method of Utah licensure – passing the Uniform Bar Exam – requires applicants to take a two-day exam that involves significant amounts of memorization spread over thirteen different topics of law. And, if national and local law school recommendations are followed, involves 500+ hours of study, a commercial Bar prep course that can cost upwards of \$4,000, and twelve weeks off from work to ensure the best possible chance of passing.

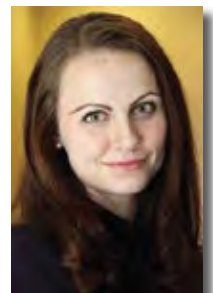
The working group met with leading scholars in bar reform, the president and board members of the National Conference of Bar Examiners (NCBE; the organization that creates and administers the current bar exam), the deans and professors from both Utah law schools, attorneys from other jurisdictions, and even attorneys from other countries to thoroughly understand the complex and controversial issue that is attorney licensure. The working group also met with the authors of the most comprehensive study ever done on what minimum competence for new attorneys entails. The study, titled “Building a Better Bar,” was published in the fall of 2020. Deborah Merritt, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, ACCESSLEX INST. RESEARCH PAPER NO. 21-02 (2020). It was the first qualitative study ever done on minimum competence for attorneys in the United States and

incorporated the findings of past quantitative studies. It identified “Twelve Building Blocks of Minimum Competence.” They are:

- The ability to act professionally and in accordance with the rules of professional conduct;
- An understanding of legal processes and sources of law;
- An understanding of threshold concepts in many subjects;
- The ability to interpret legal materials;
- The ability to interact effectively with clients;
- The ability to identify legal issues;
- The ability to conduct research;
- The ability to communicate as a lawyer;
- The ability to see the “big picture” of client matters;
- The ability to manage a law-related workload responsibly;
- The ability to cope with the stresses of legal practice; and
- The ability to pursue self-directed learning.

Interestingly, among the building blocks are many skills the bar exam has never tested, such as the ability to interact effectively with clients and the ability to conduct research. Additionally, the study provides ten recommendations related to assessment of the building blocks – among them recommendations that written exams are not well suited to assessing all aspects of minimum

CATHERINE BRAMBLE is an Associate Professor at BYU Law School and serves as a member of the Utah Supreme Court Working Group on Attorney Licensure.



competence and that multiple choice questions should be used sparingly, if at all. Other recommendations include that more time should be provided on exams and questions should be open-book to accurately reflect the time lawyers can and should take in practice to carefully research the law and conduct thorough legal analysis rather than providing a rushed answer based on memorized legal knowledge.

The working group found the Twelve Building Blocks Study highly persuasive, both because of its thoughtful methodology and because its findings and recommendations resonated with the experience of the working group members in their careers as practicing attorneys.

The working group also reviewed the most comprehensive study the NCBE has ever completed on minimum competence, which was similarly published in the fall of 2020. The NCBE's study identified many of the same skills the Twelve Building Blocks study identified – legal research, client counseling and advising, and client relationship and management to name a few – as being critical to minimum competence. Given the NCBE's own study revealed significant deficiencies in the current bar exam, such as its limitation in assessing many of the critical skills both studies identified, the NCBE announced that it planned to undertake a multi-year process to create a new bar exam by 2026 – the NextGen Bar Exam – a revised standardized test that the NCBE believes will better assess all aspects of minimum competence.

As of the fall of 2023, the NCBE has announced that the NextGen Bar Exam will be nine hours spread over two days. The exam will continue to be closed book, timed, offered only twice per year, and still require significant memorization by test-takers. Reactions from jurisdictions to the NextGen Bar Exam have been mixed. Karen Sloan, *New Bar Exam Gets Lukewarm Reception in Previews*, REUTERS, (July 19, 2023) <https://www.reuters.com/legal/legalindustry/new-bar-exam-gets-lukewarm-reception-previews-2023-07-19/#>. Some have expressed concern that the new exam will be too easy while others are concerned that the new exam will not be a big enough departure to fix the current exam's shortcomings. Paul Caron, *NextGen Bar Exam is Complete Abandonment of Competence as Standard for New Lawyers*, TAXPROF BLOG (July 24, 2023), https://taxprof.typepad.com/taxprof_blog/2023/07/ncbe-nextgen-bar-exam-is-complete-abandonment-of-competence-as-standard-for-new-lawyers.html. However, with the current bar exam slated to be discontinued in 2027, jurisdictions relying solely on the NCBE for their licensure procedures will be required to administer the NextGen Bar Exam beginning July of 2027.

In the meantime, in the fall of 2021 after a year of research and information-gathering, the working group unanimously agreed that there likely is a better way to ensure minimum competence in the licensing of new attorneys – a system that could minimize the negative costs and effects of the bar exam while also continuing to ensure minimum competence to protect the public; a system that could be superior to one single standardized exam by assessing skills that have never before been tested on the bar exam; a system that would require, teach, and reinforce the skills attorneys need to be successful in legal practice while deemphasizing skills that are less relevant to legal practice.

Armed with a clear definition of minimum competence thanks to the Twelve Building Blocks Study, the working group set out to determine how each building block could be appropriately assessed. Other professions have long understood that a written exam is not the only way and, in fact, is often an inferior way to assess if a person possesses a certain skill. Airplane pilots, for example, are required to complete a certain number of hours in a plane with an instructor sitting by their side as a part of the licensure process. Medical students are assessed on appropriate bedside manner by completing simulations in which they must demonstrate that they can successfully interact with a patient.



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The working group considered all available forms of assessment including curricular requirements, supervised practice hours, written non-speeded exams, and online training modules. The working group also discussed who should qualify to pursue an alternative path, how such a path could be feasible for both admissions offices to administer and law schools to support, how to ensure that such a path was as attractive to applicants as the bar exam in not requiring significantly more time or expense, and whether the alternative path could be replicated in other jurisdictions that may also be interested in creating an alternative path. Finally, the working group started from the premise that when it comes to assessment, redundancy should be viewed as a positive; in other words, if a certain building block is assessed in multiple ways that would only further support the candidate's proficiency in that area.

At the end of 2022, the working group presented to the Utah Supreme Court a fifty-four-page report summarizing its efforts of the past two-and-a-half years that included a detailed proposal for an "Alternative Path to Licensure."

The proposal begins with three qualifications candidates must meet to pursue the alternative path. First, the candidate must elect to pursue the alternative path at the time of Bar application; the candidate cannot simultaneously pursue admission by bar exam. Second, the candidate must have graduated from an ABA-accredited law school no more than five years prior to the date of application. Third, only law school graduates who have *not* sat for a bar exam in Utah or any other jurisdiction are eligible to pursue the alternative path.

The proposal has three main requirements for admission: first, graduation from an ABA-accredited law school; second, demonstration by the candidate of the twelve building blocks of minimum competence; and third, completion of a final survey prior to admission.

The bulk of the proposal focuses on each of the building blocks in turn, relying on combinations of curricular requirements completed at an ABA-accredited law school, supervised practice hours, a non-speeded written exam, and online training modules. To highlight a few of the specific requirements, candidates will be required to complete 240 supervised practice hours post-graduation, fifty hours of which must be pro bono services. Candidates will also be required to pass a closed universe written exam in which they are provided a set of legal materials they must read, interpret, and apply to a new set of facts similar to the Multistate Performance Test (MPT) included on the current bar exam but without the speeded element of the MPT. Finally, candidates will be required to complete a training in well-being to learn how to handle the stresses of legal practice and a training in self-directed learning.

The Utah Supreme Court has expressed interest in the proposal but wants feedback from interested constituencies prior to deciding whether to adopt the proposal as an alternative path to attorney licensure in Utah. As a result, during the fall of 2023 and early 2024, the working group is hosting a series of information and feedback-gathering sessions with judges, attorneys, law professors, law students, and other interested groups. To find out more about an upcoming information session in your area, please contact Emily Lee, Utah State Bar General Counsel for Admissions, at elee@utahbar.org.

"There's a way to do it better. Find it." As members of the working group, we look forward to continuing to work with the Utah Supreme Court and members of the legal profession throughout Utah to find a better path to attorney licensure.

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1. The members of the Working Group include: Catherine Bramble (associate professor, J. Reuben Clark Law School), Raj Dhaliwal (attorney, Ray Quinney & Nebeker), Louisa Heiny (associate dean for academic affairs, S.J. Quinney College of Law), Esabelle Khaosanga (attorney, Strindberg & Scholnick), Emily Lee (general counsel for admissions, Utah State Bar), Senator Michael K. McKell (attorney, Utah legal team, and Utah state senator), Marty Moore (attorney, former Bar commissioner), Judge Camille Neider (second district court), Judge Amy Oliver (Utah Court of Appeals), Associate Chief Justice John Pearce (Utah Supreme Court), Sarah Starkey (legal counsel, LHM Group), Evan S. Strassberg (attorney, Michael Best & Friedrich LLP), Dane Thorley (associate professor, J. Reuben Clark Law School), and Elizabeth Kronk Warner (dean and professor, S.J. Quinney College of Law). The members of the working group serve in their personal capacities, and their views are not necessarily those of their respective employers and/or institutions.

Nursing Home Malpractice? Preventable Elder Care Injury? We're Here to Help!

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Do JPEC Evaluations Make a Difference in the Quality of Utah's Judiciary?

by Mary-Margaret Pingree

For over a decade, the Judicial Performance Evaluation Commission (JPEC) has been gathering and sharing data with voters to help them make informed decisions about whether to retain Utah judges, and providing judges with valuable feedback about their performance. JPEC gathers information from attorneys, court staff, jurors, and the public about the performance and quality of our Utah judges. Many of you may have previously participated in this process by completing surveys that ask you to assess a judge's legal ability, administrative skill, procedural fairness, integrity, and judicial temperament.

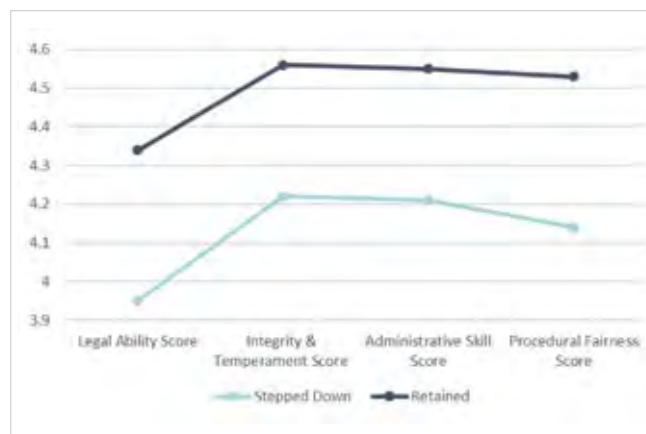
Do your efforts have an impact on the quality of our judiciary in Utah? Do JPEC evaluations impact the performance of individual judges or make a difference in the quality of our state judges overall?

This year, under the direction of Dr. David Curtis, University of Utah graduate students examined these questions and explored the relationship between the quality of the Utah judiciary and JPEC's work. This independent study¹ found that JPEC's evaluation process is positively associated with improved judicial performance in a number of ways. We would like to share three of their conclusions below.

Judges with scores significantly lower than their peers were 25% more likely to step down.

This study compared the scores of judges who stepped down at the end of their terms with those who decided to stand for retention. After controlling for natural retirements due to age and time on the bench, the research team found that judges who stepped down from the bench were more likely to have lower evaluation scores than those who chose to run for retention election. This statistically significant association was true for all measured categories: legal ability, integrity and temperament, administrative ability, and procedural fairness.

Additional analysis provided another insight: a one-point decrease in a judicial performance evaluation score is associated with a 15–30% increase in the likelihood of a judge stepping down.



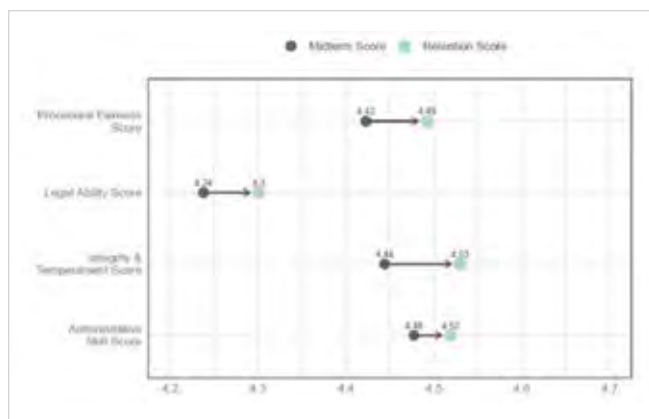
Judge scores increase after their first evaluation.

In Utah, judges are evaluated frequently. Most judges receive two evaluation reports during a six-year term. Supreme court justices are an exception, receiving three evaluation reports during a ten-year term. The first evaluation, or midterm report, is intended to provide judges with feedback halfway through their term. This report provides objective feedback that judges can use to improve their performance. The second evaluation (third for the supreme court) is completed before a judge's upcoming retention election. This evaluation provides similar feedback but is also shared publicly and used by voters to make retention decisions.

The graph below shows the change, in one term, between the first and second evaluation scores for judges. The data shows improvements for judges in every category between their first and second evaluations.

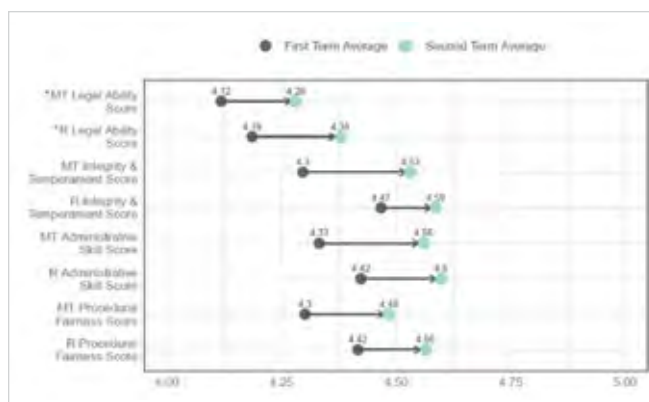
MARY-MARGARET PINGREE is the Executive Director of the Judicial Performance Evaluation Commission



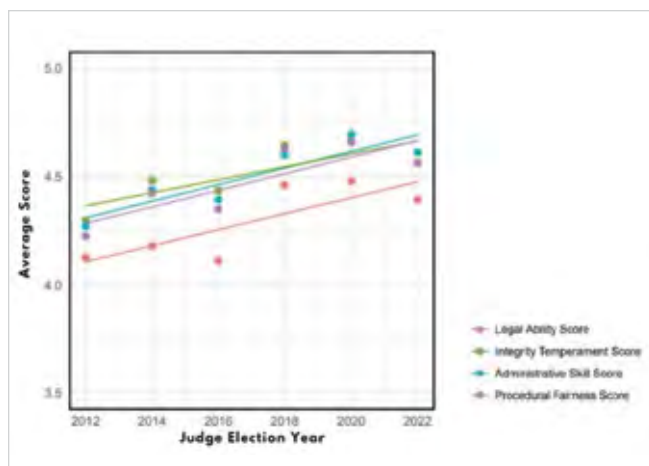


Judge evaluation scores have improved steadily over time.

For those judges who have been on the bench for five, ten, or twenty years, prolonged participation in JPEC's evaluation process is associated with improved performance across cycles. Judges who have completed at least two full evaluation terms increase their average scores from their first term to their second term.



JPEC published its first evaluation reports in the 2012 election. Since that time, average judge scores have steadily improved as shown in the graph below.



Why do we share this data with you? Because you are a critical part of the judicial evaluation process. Your input strengthens the judiciary by providing judges with feedback that helps them improve. Your feedback also gives voters valuable information about judges and their performance.

Attorney surveys will close in mid-November. Surveys are conducted anonymously by a third-party surveyor and all results are aggregated and anonymized before they are sent to JPEC. JPEC and judges do not see individual scores, only the comments you choose to share. Your honest feedback – whether positive, negative, or somewhere in between – is critical to measuring and ensuring judicial competency and quality in Utah. Please take the time to complete a survey if you have received one.

If you have questions about evaluations or your survey, please feel free to reach out to me directly at mmmpingree@utah.gov.

1. Cameron Carter, Sarah Cochran, Angela McGuire, Shanna Jagers, Tania Akter, & Kevin Edminster, UTAH'S JUDICIAL PERFORMANCE EVALUATION COMMISSION: PROGRAM OUTCOME EVALUATION (Jan. 2023).

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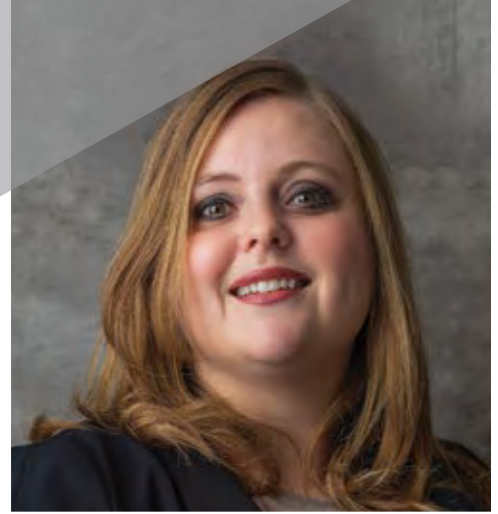
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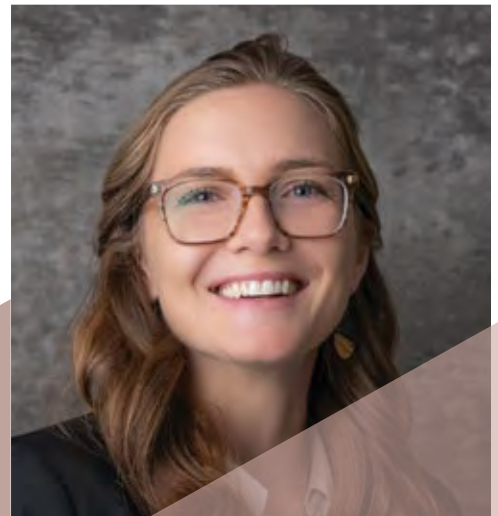
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Appellate Highlights

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

Matter of Discipline of Kinikini **2023 UT 17, 533 P.3d 1156 (July 20, 2023)**

In this attorney discipline case, the supreme court rejected the attorney's argument that, where the basis for discipline is the attorney's criminal conduct, the court must evaluate the actual conduct, not just the elements of the crime. **The Rules of Professional Practice direct a court to consider only the elements of the crime itself when determining whether that crime reflects adversely on an attorney's honesty, trustworthiness, or fitness to practice law.**

Utah Court of Appeals

Graves v. Utah County Government **2023 UT App 73 (July 6, 2023)**

Graves, a former commissioner for Utah County, sued the county, his fellow commissioners, and a county employee, claiming they defamed him in connection with the disclosure to the media of internal reports of alleged harassment. The court of appeals affirmed dismissal of Graves' vicarious liability claims against the county on the basis of governmental immunity, holding that **Utah's Governmental Immunity Act does not waive the "broad, background" immunity of a governmental entity for intentional torts, including deliberate defamation.** However, the appellate court reversed dismissal of the underlying claims against the individual defendants, reasoning that **the Act waives immunity for individual governmental employees who engage in "willful misconduct."** Because Graves

adequately alleged that the individual defendants engaged in "willful" defamation, the individual defendants were not immune and Graves' claims against them could proceed past the pleading stage.

Anderson v. Daggett School District **2023 UT App 76 (July 20, 2023)**

In this appeal from a hearing officer's determination upholding the termination of a teacher, the court of appeals addressed its jurisdiction over the matter. The court of appeals had previously transferred the plaintiff's petition filed in that court to the district court. The district court dismissed for lack of jurisdiction. On appeal, the court first evaluated its jurisdiction, which turned on the interplay between two versions of the statute governing appeals from final decisions of a school board. **After discussing the law regarding retroactivity and applying the distinction set out in *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939, 951 (1997), the court held that the amended statute is procedural because it addresses which court has jurisdiction as opposed to creating jurisdiction.** Under the amended statute, the court of appeals has jurisdiction. **The court additionally held the hearing officer had applied the wrong standard and should have reviewed the case under the consistency and proportionality standard.** Even though that standard had not been specifically applied to public educators, such individuals are public employees and the standard applies equally to cases involving their termination.

Mariani v. Dep't of Pub. Safety – Driver License Div. **2023 UT App 79 (July 20, 2023)**

The defendant retained immunity for a claim based upon personal injuries sustained incident to a motorcycle skills test under the licensing exception of the Governmental Immunity Act. The court of appeals concluded that statutory changes had abrogated the proximate cause approach set forth in *Barneck v. Utah Department of Transportation*, 2015 UT 50, 353 P.3d 140.

State v. James**2023 UT App 80 (August 3, 2023)**

In this criminal appeal, the Utah Court of Appeals addressed a trial court's failure to invite the defendant to exercise his right of allocution under Article I, Section 12 of the Utah Constitution and Utah R. Crim. P. 22(a). The trial court's failure to "address the defendant personally" and "permit [him] to address the court" in line with the right of allocution was not only an error, but an obvious one that prejudiced the defendant. **Adopting the approach laid out by the Tenth Circuit in *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017), the appellate court explained that denial of the right to allocution is "presumptively prejudicial" and warrants reversal absent a showing of "extraordinary circumstances."**

Kendall v. Utah Est. Planners PLLC**2023 UT App 82 (August 3, 2023)**

In this legal malpractice case, the court held that the requirement for expert testimony applies equally in cases tried to the bench and to a jury. It **rejected an argument that a different (and**

more lenient) standard for evaluating the necessity of expert testimony should have applied because the trial judge operates as a "sophisticated trier of fact" for whom expert testimony is not always necessary.

Knight v. Knight**2023 UT App 86 (August 10, 2023)**

This case contains a detailed analysis of several alimony issues. The court held that a spouse cannot include expenses in an alimony claim that are to replace services previously performed by the other spouse during the marriage – in this case, pool and yard maintenance. It held that the wife's health insurance expense should be limited to the cost of a high deductible plan. Although the parties had such a plan during the marriage, the husband's family had funded an HSA to cover the deductible. The HSA funding, however, was not part of the marital lifestyle because it was a gift from husband's parents. The trial court erred by adopting a personal grooming figure for wife that was supplied by husband's counsel, who asserted without evidence that it "makes 'quite a nice budget.'" The



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court also erred by rejecting wife's claimed grooming and savings expenses on the sole basis that husband did not claim a need for a comparable expense, finding that such an approach simply invites parties to game the system.

Griffin v. Snow Christensen and Martineau
2023 UT App 88 (August 17, 2023)

In this case, the trial court held after an evidentiary hearing that the person served with a summons was not a “managing agent” and that service was therefore defective under Rule 4. The court of appeals reversed and held that, in *In re Schwenke*, 2004 UT 17, 89 P.3d 117, the supreme court **departed from the strict language of Rule 4 and “directed courts to apply this rule ‘in a manner that will best effectuate’ its ‘purpose of giving the defendant adequate notice,’ such that service would be considered ‘fair in light of all the surrounding circumstances.’”** Judge Oliver dissented, asserting that the supreme court has not adopted a test that departs from the text of the rule and that the decision “risks actual notice becoming the test.”

Christensen v. Labor Comm’n
2023 UT App 100 (August 31, 2023)

Affirming the administrative board’s decision on retaliation, the court **clarified the standard for proving an adverse action under the Utah Antidiscrimination Act and held the statute does not permit recovery of noneconomic damages.** The court also held that neither back pay nor reinstatement were appropriate remedies in the absence of constructive discharge or job loss.

10th Circuit

Crow Tribe of Indians v. Repsis
74 F.4th 1208 (10th Cir. July 24, 2023)

In this lengthy dispute between the Tribe and Wyoming regarding the Tribe’s treaty hunting rights, the Tribe filed a motion for relief from the Tenth Circuit’s judgment entered in 1995 under Rule 60(b) based on a Supreme Court decision issued in *Herrera v. Wyoming*, 139 S. Ct. 1686 in 2019. The district court held it lacked jurisdiction to grant relief from the judgment because **the Tenth Circuit had relied on alternative grounds for**



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affirmance from the basis of the district court's order. After concluding the motion was timely, the Tenth Circuit reversed, holding that the district court abused its discretion in holding it lacked jurisdiction. The district court had misapplied the Supreme Court's decision in *Standard Oil Co. v. U.S.*, 429 U.S. 17 (1976). Under that case, "a district court acting on a Rule 60(b) motion does not disrespect an appellate court's mandate because the motion implicates possible later events unrelated to the prior mandate issued by the appellate court."

***Chase Manufacturing, Inc. v. Johns Manville Corp.*
79 F.4th 1185, No. 22-1164 (10th Cir. August 21, 2023)**

The district court dismissed Chase Manufacturing's claims of monopolization and unlawful tying arrangements under the Sherman Antitrust Act. The Tenth Circuit reversed and remanded Chase's monopolization claim. Such a claim requires, in short, the plaintiff prove "(1) monopoly power, (2) exclusionary conduct, and (3) antitrust injury." In assessing whether a monopolist's actions satisfy the exclusionary conduct prong, the court adopted the Eleventh Circuit's standard in *McWane, Inc. v. FTC*, 783 F.3d 814, 834 (11th Cir. 2015): "[t]he test is not total foreclosure [of the competitor from the monopolist's market], but whether the challenged practices bar a substantial number of rivals

[from entering] or severely restrict the market's ambit."

Matney, et al. v. Barrick Gold of North America, et al. – RBC

80 F.4th 1136, 22-4045 (10th Cir. September 6, 2023)

Participants in an employer-sponsored defined-contribution retirement plan sued under ERISA, alleging that the employer's benefits committee breached the duty of prudence by offering high-cost funds and incurring high recordkeeping fees, and that employer and board of directors breached their duty to monitor fiduciaries by failing to oversee committee's actions. In an issue of first impression, the Tenth Circuit joined the Third, Sixth, Seventh, and Eighth Circuits in finding that claims for imprudence can be based upon fees being too high compared "to available cheaper options." **But the court, adopting the Eighth Circuit's pleading standard, held that for a plaintiff "to raise an inference of imprudence through price disparity, a plaintiff has the burden to allege a 'meaningful benchmark.'"** Whether a comparison is "meaningful" will be "context specific." "A court cannot reasonably draw an inference of imprudence simply from the allegation that a cost disparity exists; rather, the complaint must state facts to show the funds or services being compared are, indeed, comparable. The allegations must permit an apples-to-apples comparison."

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DAVID GARDNER
Shareholder – Litigation
dgardner@kmclaw.com



JEFFREY ROBINSON
Shareholder – International
jrobinson@kmclaw.com



SWEN SWENSON
*Shareholder – First Amendment and
Religious Organizations*
sswenson@kmclaw.com



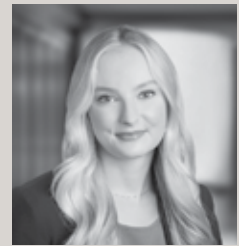
JEFF CHRISTENSEN
Associate – Tax and Estate Planning
jchristensen@kmclaw.com



RUSSELL GRIGGS
Associate – Intellectual Property
rgriggs@kmclaw.com



HONG HER
Associate – Real Estate
hher@kmclaw.com



MICHELLE JAMES
Associate – Corporate
mjames@kmclaw.com



THOMAS PALMER
Associate – International
tpalmer@kmclaw.com



NATALIE WHITE
Associate – International
nwhite@kmclaw.com



JESSICA SMITH
Associate – Intellectual Property
jasmith@kmclaw.com



ALEX CLARK
*Legal Counsel – First Amendment
and Religious Organizations*
asclark@kmclaw.com



CAMILLE HANSEN
Legal Counsel – International
chansen@kmclaw.com

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Questions for the Bench: Judge Jay Winward

EDITOR'S NOTE: *We appreciate Judge Winward responding to questions about his experience on the bench. A St. George native, Judge Winward practiced at private law firms and the U.S. Attorney's Office before taking the Fifth District bench this past February. He is a mentor and friend to many in the local community, including the students he teaches at Utah Tech University.*

What was your career path to the bench?

When I graduated from law school, I worked in the St. George branch office of a Phoenix-based law firm that focused on securities litigation. Unfortunately, that firm disbanded, and my family and I planned to relocate to the Wasatch Front to work in-house at a technology company. That plan imploded when my wife's parents, as well as my own, informed me that I could relocate to Salt Lake City, but my children were staying in Southern Utah. My father, a general practitioner in St. George, suggested we team up and form Winward Law, PLLC. For a decade, I worked on a broad range of matters, including criminal defense, domestic, civil litigation, business formation, and contract matters.

It was a difficult decision to leave private practice, but it was impossible to refuse John Huber when he offered me a position in the U.S. Attorney's Office for the District of Utah as an Assistant United States Attorney. For five years, I prosecuted federal crimes with some of the best litigators in the country. During that time, I also served a temporary detail in Bogota, Colombia on behalf of the United States Office of Overseas Prosecutorial Development and Training. There I worked with dedicated and talented Colombian prosecutors.

I was confirmed to the Fifth District bench in February 2023.



How would you generally describe the process for becoming a judge?

I struggle to describe the process or paint it with a broad brush because in retrospect it is daunting and is so different for every candidate. Humbling. Difficult. Stressful. Lengthy. It takes years to build relationships, reputation, and practical skills – and all that is meaningless if the timing is not right. In the process, you are putting yourself up against attorneys who are incredible with sparkling resumes and decades of experience. It is a marathon – a marathon where you don't quite know where the finish line is.

The process for selecting judges in Utah has been described as the gold standard. Why?

Utah employs a merit-based system for selecting judges. Utah's process is based on "the Missouri Plan" – named after the first state to adopt it. This has been the "gold standard" for over ninety years. The plan calls for nonpartisan commissions of lawyers and non-lawyers to recruit and evaluate candidates for judgeships. The commissions present nominees to the governor, who then makes an appointment. In Utah, senate hearings and confirmation are required. This important step allows state lawmakers input on the process. Most merit systems require judges to face single-candidate retention elections and that is true in Utah.

Alexander Hamilton once said that the judiciary would be the "least dangerous branch" of government since it has "no influence over either the sword or the purse." That is true, unless the judicial selection process is overrun by interest groups that favor alternatives for selecting judges. Alternatives that undoubtedly would benefit or be advantageous to those same interest groups. Politicizing judicial selection will devastate the fairness, impartiality, and independence of the judiciary. Utah's gold-standard approach ensures that the judiciary remains the "least dangerous branch."

What has surprised you about being a judge so far?

I have been surprised by how valuable and important good lawyering is to me as a judge. By good lawyering, I mean preparedness, collegiality, nimbleness in the courtroom, instincts, diplomacy, decorum, and the ability to communicate clearly.

The vast majority of lawyers are very good, and their efforts benefit their clients and the court. Sometimes attorneys can make things much more difficult for their clients and the court.

As a new judge, what have you learned so far?

I value a legal brief that succinctly summarizes the facts, points out the controlling law, and applies the law to the facts. I appreciate a lawyer who can take me from point A to point Z without detours or superfluous fluff.

What advice would you give to a young attorney?

Be prepared. Overly prepared. And then be prepared for the unexpected. There is never a reason to be presumptuous, impetuous, caustic, temperamental, or trite. Be yourself, roll with the punches, be smart, and be prepared.

You are a St. George native and practiced in town for over fifteen years before becoming a judge.***Why should law students and young attorneys consider practicing in Southern Utah?***

They shouldn't consider it. Southern Utah is terrible. Nobody should move anywhere south of Utah County, let alone to St. George. J. Golden Kimball once said: "I believe if I had a house in hell and a house in St. George, I'd rent out the one in St. George and live in hell. I really would."



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Kidding aside. There is no better place to practice than Southern Utah. Previous practitioners and judges instilled and demanded cordiality, and current judges and bar members have kept that “bar” high. Southern Utah practice includes complex civil cases, sophisticated arguments, and high-level lawyering. Practicing in Southern Utah allowed me to work on cases with worldwide interest, <https://www.bbc.com/news/magazine-32481834>, counsel CEOs and criminals, and try cases before justice-court judges and federal juries. I negotiated leases at exclusive shopping centers and prosecuted boating violations at Lake Powell. A practice in Southern Utah spans the gamut. Also, I have noticed that younger lawyers often get valuable in-court experience in Southern Utah. Any law student who wants to work on interesting cases, work with collegial attorneys, and get valuable experience should consider Southern Utah.

What advice would you give to attorneys regarding legal writing?

A biography about Woodrow Wilson includes an entertaining quote:

A member of the Cabinet congratulated Wilson on introducing the vogue of short speeches and asked him about the time it took him to prepare his speeches. He said: “It depends. If I am to speak ten minutes, I need a week for preparation; if fifteen minutes, three days; if half an hour, two days; if an hour, I am ready now.”

Josephus Daniels, *THE WILSON ERA; YEARS OF WAR AND AFTER*, 1917–1923, p. 624 (1946).

The principle applies to legal writing. Substitute minutes for pages. There is rarely (read never) a need for an overlength brief. Be succinct and persuasive. Have an argument that moves the ball forward. In football, a team needs to gain ten yards for a first down. And they only have four plays to do it. In writing, if you have ten one-yard arguments you aren’t going to persuade the judge. But if you have three or four arguments that move the judge towards your position, then you are going to be successful more often than not.

My other suggestion: find someone who can edit your work and provide valuable feedback. I was lucky to have talented and detail-oriented colleagues, especially at the U.S. Attorney’s Office, who gave me needed feedback on my writing. On the bench, I turn to our law clerks. They practice writing, attend writing seminars, and make other efforts to hone their craft. Also, be the editor for someone else. Reviewing others’ works and hearing their voice in the writing will improve your own.

Any parting thoughts?

Attorneys are often portrayed as schemers who will do or say anything to win or make a buck. We who practice in Utah know that’s not true. Treating clients, judges, and each other with respect and dignity will bolster trust in our profession. Cutting ethical corners or engaging in unprofessional conduct will undermine the public’s confidence in the role we as lawyers play in the community. As Coach Lasso put it, “Doing the right thing is never the wrong thing.”

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Shyla Giri | Mergers and Acquisitions, Securities



Richard W. Poll | Corporate, Securities, Intellectual Property

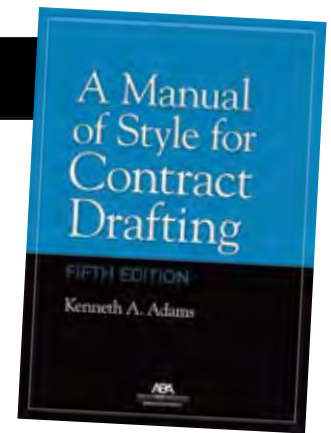
SCM is pleased to announce that **Shyla Giri** has joined the firm as of counsel, and **Richard Poll** has joined as an associate. Both attorneys are part of the Corporate Practice Group.

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A Manual of Style for Contract Drafting

by Kenneth A. Adams

Reviewed by Landon Troester



One year ago, I was hired as a first-year associate and started working in the realm of transactional law. Contract redlines, disclosure schedules, and other drafting projects quickly piled up on my desk. It was exciting to get started but also intimidating. While I did take a contract drafting class in law school, I didn't feel well prepared for the daily work expected of transactional associates. Much of law school is research oriented and most of what remains is litigation focused. I was left with a lot of questions about how to conduct my new work. How much should I be "rocking the boat" on existing drafts of agreements? When building an agreement of my own, how heavily should I rely on the internal precedent of the firm by looking at past agreements in our files? At a more basic level, what makes a good contract? What makes contract clauses effective, clear, and concise?

Enter a treatise that I think is useful for young associates and experienced practitioners alike: *A Manual of Style for Contract Drafting* by Kenneth Adams (MSCD). The 5th edition was recently released, and with new attorneys entering our ranks this October, it's a good time to share a book that teaches attorneys more about contracts and how to write them better.

The MSCD sets out to build a comprehensive analysis of the language practitioners use in their contracts and provides recommendations and reasoning for using language that mitigates ambiguity, improves readability, and pushes drafters to avoid simple copy-and-pasting. It persuasively argues that blind reliance on what has "worked" before, in different deals with different parties, who had different goals, is misplaced. Beyond the challenges in tweaking preexisting clauses to fit the new situation, simple copy-and-paste clauses from past contracts can often bring ambiguous and archaic language choices. In

contrast to the copy-and-paste method, Adams introduces a more systemic understanding of how contract language works and how drafters can improve their approach. Critically for a young associate, it also provides proposed language to mitigate the risk inherent in developing your own clauses when necessary.

The premise of the book is deceptively simple, but Adams has gone into impressive detail on issues across the spectrum of contract matters. Subjects range from small (whether to use

"execute" or "sign" in the concluding sentence before the signature block) to large (a chapter-long discussion on the ambiguity of "material" as a qualifier).

Readers may find the book's scope intimidating. However, the structure of the book guides

readers to the issues that are most important to them – it is a manual of style after all, not a novel. The broader themes addressed in the introduction and first chapter of the book serve as a helpful guide for those new to the subject. Attorneys looking to clean up their writing may find chapter 7 (Sources of Uncertain Meaning in Contract Language) useful. Chapters 8–12 delve into greater detail, addressing types of ambiguity and repeat offenders, including the complexity involved in describing "reasonable efforts" and "materiality."

LANDON TROESTER is an associate at Clyde Snow & Sessions. His practice focuses on business transactions and related business law issues, as well as securities and bankruptcy law.



A Manual of Style for Contract Drafting

by Kenneth Adams

ABA Publishing (5th Ed. 2023)

668 pages

Available in hardcover.

From a new drafter's perspective, chapter 3 shines especially bright. It sets out the "categories" of contract language – such as obligations, prohibitions, conditions, and statements of policy – which underlie the substance of contract terms. Adams describes how different verb structures impose different types of rights and obligations on the parties, and he sets out a model for choosing proper and consistent structures to describe the many different types of contractual clauses. By following that system, drafters can build internally consistent frameworks for using the different categories of language. Adams describes this as "an antidote to the random and chaotic verb structures of traditional contract language." As a new attorney this section was invaluable to me. Understanding the difference between a party's obligation to act and a party's discretion to choose whether to act sounds obvious enough, but the MSCD helps users consistently describe differing categories of contract language. Doing so sets a foundation for drafters to be able to read their contracts for ambiguity and internal consistency that is valuable all on its own. The Tenth Circuit has also referred to the MSCD to help analyze contract provisions that are in dispute, pointing to the MSCD's guidance on how to identify defined terms. *Lawson v. Spirit AeroSystems, Inc.*, 61 F.4th 758, 764 (10th Cir. 2023).

The MSCD does not try to solve every drafting problem, though it covers many. As one commentator has noted, one of the challenges with contract drafting for sophisticated parties is that "plain language drafting is not suitable because contracts deal with things for which there is no plain language equivalent." Elijah Z. Granet, *Review: A Manual of Style for Contract Drafting*, NOTES ON THE STYLE OF THE LAW (Mar. 31, 2023), [available at https://www.legalstyle.co.uk/2023/03/review-manual-of-style-for-contract.html](https://www.legalstyle.co.uk/2023/03/review-manual-of-style-for-contract.html). Contracts are a unique form of legal writing, requiring advocates to forecast and mitigate the risk of future events while also controlling complexity within the document itself. There are recurring challenges in every contract, and Adams tries to touch on each of those, but the MSCD is more than an encyclopedia of optimal language. It is a practice manual on effective writing. Its lessons help drafters avoid creating internal inconsistency and, hopefully, encourage users to catch dysfunctional and archaic language that has survived merely because it was in the last agreement someone had written. The MSCD does not address every circumstance, but it does give users the tools to handle the uniqueness of each transaction.

The MSCD also helps lawyers provide the feedback that makes their participation valuable during contract drafting and negotiation. Legal scholars have argued that business lawyers add value to transactions by becoming "transaction cost

engineers," advising not just on the general mechanics of a deal but also on the structure and format to help break stalemates and accurately "engineer the costs of the transaction for both parties." Rachel Landry, *Exit Engineering*, N.Y. UNIV. J. OF L. & BUS. (forthcoming), Cardozo Legal Studies Research Paper No. 707, [available at https://ssrn.com/abstract=4413611](https://ssrn.com/abstract=4413611). More recent scholarship goes further by arguing that many business lawyers also function as "exit engineers," not only helping get the one-off deal completed but also helping to minimize the transaction costs for startup companies, whose M&A or IPO objectives may be injured if the company enters into contract terms that will be undesirable to future purchasers. *Id.* This type of work is how business lawyers provide value to their clients, and a strong understanding of the mechanics of contract language strengthens a lawyer's contributions to their client's interests. The MSCD fits into this framework by helping to mitigate ambiguity and clarify writing while leaving attorneys free to address new situations as they arise.

One question remains, and it's one that contract drafters face each time they are working with a new client, a new supervising partner, or a new counterparty: What is a user of the MSCD supposed to *do* when they are given a draft that diverges from the manual of style? Clients aren't likely to be willing to pay you to turn a low-risk supplier agreement into a contractual masterpiece, particularly when your starting draft is a "tried and true" version that is already in use. Law firm partners have varying tastes, with some being far more open to changes than others. Opposing counsel may not appreciate receiving revisions that harmonize the entire agreement with your own preferred formatting and language choices without compelling reasons for such changes. Also, while the MSCD sets out Adams' proposed best practices across a broad array of issues, not all changes are created equally. Removing outmoded language from the introductory clause is less likely to have an impact than identifying ambiguous verb choices in the performance obligations themselves.

When I emailed the author and mentioned that I wanted to write about these questions in this review, he sent me an article he had written, directed at new associates faced with contract drafting. In it, he suggested that the critical lesson is to be an informed consumer of contract language. We often don't have the time, nor our clients the budget, to justify aligning every draft with our own internal gold standard, but our drafting will improve by being thoughtful and intentional with our language choices. The MSCD helps its users do just that.



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The Federal Trade Commission's Ongoing Efforts to Ensure Truth in Advertising

by Chris W. Hogue

With the ubiquitous nature of social media in today's world, most of us have seen at least one story about a celebrity influencer promoting a product to millions of social media followers while failing to mention they were actually being paid to promote that product. At the very least, this undermines the authenticity of the product endorsement, or worse, misleads the follower into purchasing that product. The Federal Trade Commission (FTC) serves a critical role in regulating advertising to protect consumers from false, misleading, or deceptive claims. Under its consumer protection mandate, the FTC combats untruthful advertising through enforcement actions, regulatory guidance, and consumer education. This article provides an overview of the FTC's multifaceted approach to ensuring truth in advertising and summarizes recent updates to its guidance on endorsements and testimonials.

FTC Authority Over Advertising

The FTC's oversight of advertising is derived primarily from its authority under Section 5 of the FTC Act to prevent "unfair or deceptive acts or practices." 15 U.S.C. § 45. False or misleading advertising falls under the umbrella of deceptive practices the FTC can prohibit. The FTC's deception enforcement policy specifies several factors in analyzing whether an act or practice is deceptive:

- **There must be a representation, omission, or practice that is likely to mislead consumers.** The FTC examines the overall net impression made by the ad, not just isolated words or phrases. FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (1983), as appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).
- **The act or practice is examined from the perspective of a reasonable consumer.** The test is whether it is likely to mislead reasonable consumers. If the representation or practice impacts or is directed primarily to a particular

group, the FTC examines reasonableness from the perspective of that group. *Id.*

- **The representation, omission, or practice must be material.** Essentially, it must be important to consumers' decisions or conduct regarding the product. *Id.* at 182.
- **The representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances.** This analysis considers the facts surrounding the transaction. *Id.* at 175–76.

The FTC need not show actual deceit or even that any consumers were actually misled. Rather, it must simply show that the conduct in question has a tendency or capacity to deceive consumers acting reasonably. *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

Over the years, the FTC has brought numerous enforcement actions against companies for making false, unsubstantiated, or misleading claims in advertising. Recently, for example, the FTC sued a seller of supposed COVID-19 treatments for claiming its nasal spray could prevent or treat COVID-19. The complaint alleged that the spray seller lacked competent and reliable scientific evidence to support these claims. Complaint, *FTC v. Marc Ching*, No. 2:20-cv-03331 (C.D. Cal. Apr. 14, 2020), 2020 WL 1991284.

CHRIS W. HOGUE has practiced in technology law and digital content since 2014. Over the past decade he has held several in-house counsel roles in early and mid-stage global technology companies as well as practiced through his own firm, HogueLaw PLLC.



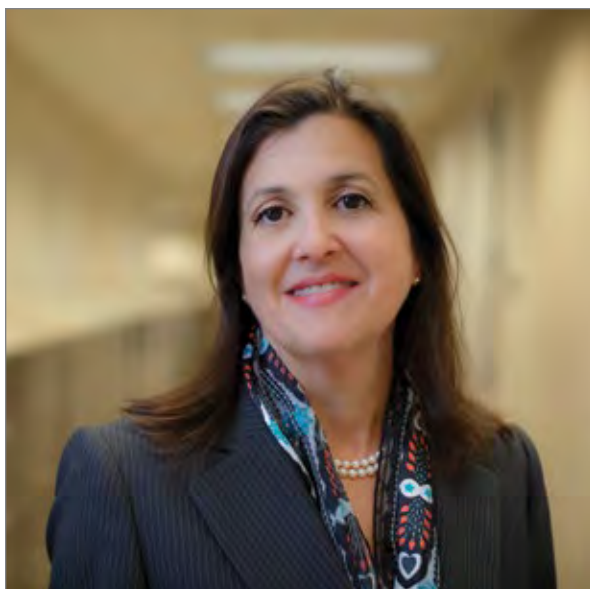
In another recent case, the FTC took action against the operators of websites that purported to provide independent reviews of products and services. The FTC alleged the defendants posted fake positive reviews to increase sales and false negative reviews to harm competitors. Complaint, *FTC v. 427K, Inc.*, No. 4:22-cv-01069-JSW (N.D. Cal. Feb. 28, 2022). This illustrates how the FTC combats deception relating to online reviews and endorsements.

In addition to its deception authority, the FTC can also challenge unfair practices under Section 5 of the FTC Act. 15 U.S.C. § 45. Unfair practices involve conduct that substantially injures consumers, violates established public policy, or is unethical or unscrupulous. FED. TRADE COMM’N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), as appended to *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984). The FTC has brought unfairness cases against companies for activities like questionable debt collection practices. See *FTC v. Security Credit Servs., LLC*, No. 1:13-cv-00799 (N.D. Ga. Mar. 19, 2013).

Regulatory Guidance on Advertising Issues

In addition to enforcement actions, the FTC periodically issues regulatory guidance on advertising and marketing issues. Often taking the form of guides, this guidance provides direction on how companies can comply with laws the FTC enforces. While guides do not have the force of regulations, they represent the FTC’s views on carrying out business in a lawful manner. See 16 C.F.R. § 255.0(a).

One of the FTC’s best known advertising guides is the “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” 16 C.F.R. § 255. Originally issued in 1980, 45 Fed. Reg. 3870 (Jan. 18, 1980), the FTC recently proposed extensive updates to the Endorsement Guides to address changes in the marketplace, especially the rise of social media influencers, 87 Fed. Reg. 44288 (July 26, 2022). The guides define an endorsement as an advertising message consumers likely believe reflects someone’s independent opinions or experiences with a product. 16 C.F.R. § 255.0(b).



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The Endorsement Guides walk through the FTC's views on topics like when endorsements must disclose material connections and how advertisers should substantiate claims made through endorsements. They also offer numerous examples to illustrate the FTC's guidance in practice. For instance, Example 5 explains that tagging a brand in a social media post can constitute an endorsement if done as part of a paid relationship. 16 C.F.R. § 255.0(g)(5)(ii).

In updating the Endorsement Guides, the FTC clarified principles like the need to substantiate both express and implied claims made through endorsements. 87 Fed. Reg. 44311 (July 26, 2022). New examples address issues like posting fake reviews and threats against negative reviewers. 87 Fed. Reg. 44313 (July 26, 2022). The proposed revisions reflect the FTC's close monitoring of deceptive practices in connection with consumer reviews, influencer marketing, and social media endorsements.

In addition to the Endorsement Guides, the FTC has issued guidance on other advertising methods and claims. There are guides covering environmental marketing claims, 16 C.F.R. § 260, disclosures in digital advertising, FED. TRADE COMM'N, COM DISCLOSURES (Mar. 2013), and the use of endorsements and testimonials in direct-to-consumer prescription drug ads, Matthew Chesnes & Ginger Zhe Jin, *Direct-to-Consumer Advertising and Online Search*, FED. TRADE COMM'N WORKING PAPER NO. 331 (Aug. 2016). The FTC also regularly posts guidance articles on its Business Center website advising companies on topics like native advertising, earning claims, and disclosures. *See Business Guidance*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance> (last visited Sept. 5, 2023).

This combination of general guides and specific guidance articles aims to help companies follow truth in advertising standards. However, as technology and marketing practices continue evolving, expect the FTC to update and expand its guidance.

Consumer Education and Outreach

Educating consumers is another vital part of the FTC's advertising mission. The FTC publishes extensive consumer and business education material to help the public recognize and report false advertising and deception. This includes general guidance on advertising as well as education focused on particular claims and industries.

For example, the FTC offers numerous articles and consumer alerts explaining how to recognize false claims in places like websites, social media, and email. It provides tips on spotting

fake reviews and misleading earnings claims. For certain industries, the FTC targets education to empower consumers before making purchases. There are FTC guides helping consumers assess advertising claims about mortgage loans, credit repair services, and earning opportunities, for instance. *See, e.g., Credit, Loans, and Debt*, FED. TRADE COMM'N, <https://consumer.ftc.gov/credit-loans-debt> (last visited Sept. 5, 2023); *Loans and Mortgages*, FED. TRADE COMM'N, <https://consumer.ftc.gov/credit-loans-and-debt/loans-and-mortgages> (last visited Sept. 5, 2023); Lisa Lake, *There Are No "Quick Fixes" to Clean Up Your Credit*, FED. TRADE COMM'N, <https://consumer.ftc.gov/consumer-alerts/2019/06/there-are-no-quick-fixes-clean-your-credit> (June 24, 2019); Jim Kreidler, *Is it a Legitimate Investment Opportunity or a Scam?*, FED. TRADE COMM'N, <https://consumer.ftc.gov/consumer-alerts/2023/07/it-legitimate-investment-opportunity-or-scam> (July 20, 2023).

The FTC also engages in outreach targeting specific vulnerable populations. Resources exist to help elderly consumers avoid fraud and deception. For military consumers, the FTC manages Military.Consumer.gov to address financial scams and misleading offers directed at that community. And for Spanish-speaking consumers, a significant portion of FTC materials and guidance is available in Spanish.

In recent years, the FTC has also tried educating social media influencers on following endorsement guidelines. In 2019, the FTC sent educational letters to prominent social media figures reminding them about disclosing brand relationships. While not enforcement actions, these letters served as high-profile warnings to spur compliance. Expect the FTC's consumer and business education efforts to continue evolving as platforms, technologies, and advertising techniques change.

Key Principles in the Endorsement Guides

The remainder of this article takes a deeper dive into the FTC's Endorsement Guides, focusing on key principles and new examples from the FTC's proposed updates. Again, while these guides do not have the force of regulations, they capture the FTC's views on truthful endorsement practices.

Definition of Endorsement

The Endorsement Guides broadly define an endorsement as: "Any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser." 16 C.F.R. § 255.0(b).

This definition covers endorsements in both traditional and social media. It encompasses statements, images, tags, likes,

reviews, and more. In reality, any message in advertising which consumers likely perceive as representing someone's independent opinions or experiences with a product can be an endorsement.

The Endorsement Guides also address fake endorsements. One important example describes that while paid negative reviews of a competitor are not endorsements, fake positive reviews used to promote one's own product are. 16 C.F.R. § 255.0(g)(12).

Liability for Deceptive Endorsements

The guides advise that both advertisers and endorsers can be liable for false or unsubstantiated claims made through endorsements. Advertisers have responsibility for claims made through their ads, whether by directly making statements or using endorsers. *See* 16 C.F.R. § 255.1(d).

While endorsers have liability for deceptive endorsements they make, advertisers may also be liable for failing to adequately monitor endorsers for compliance issues. *See id.* The Endorsement Guides state advertisers should guide, monitor, and take action to remedy endorser non-compliance. *See* 16 C.F.R. § 255.1(d)(3).

This principle applies even when advertisers merely disseminate existing endorsements, like sharing (a.k.a. re-tweeting) positive tweets. Advertisers should always confirm that endorsements still reflect an endorser's honest views before rebroadcasting them. *See* 16 C.F.R. § 255.2(a) & (b).

Substantiation of Endorsement Claims

A core requirement of the Endorsement Guides is that advertisers must substantiate claims made through endorsements. *See* 16 C.F.R. § 255.2(a). As with any advertising claims, consumer endorsements must also be substantiated as consumer endorsements themselves are not competent and reliable scientific evidence. *See id.*

Also, results depicted in endorsements must represent outcomes consumers generally achieve from using the advertised product or service. *See* 16 C.F.R. § 255.2(b). When endorsements reference exceptional results well beyond the norm, the ads should clearly and conspicuously disclose what consumers can expect to experience. *See id.*

Disclosures of Material Connections

Under the Endorsement Guides, connections between endorsers and advertisers that could affect how people evaluate endorsements must be disclosed. *See* 16 C.F.R. § 255.5. This includes monetary payments as well as the receipt of free

products or services. Essentially, any connections likely to affect the weight consumers give endorsements should be disclosed when they are not reasonably expected. *See* 16 C.F.R. § 255.5(a).

Social media influencers, for example, should disclose brand sponsorships and gifts. Consumers may give greater credence to reviews and opinions from people they perceive as unbiased. Clear connection disclosures allow consumers to consider endorsements in full context.

Endorsements Directed at Children

The Endorsement Guides caution that children require special considerations. *See* 16 C.F.R. § 255.6. Young children may have difficulty understanding the persuasive intent behind advertising. Practices permissible for ads targeting adults might be inappropriate when directed at children. Specific guidance on advertising to children can be found through the Children's Advertising Review Unit (CARU) program. *See* CARU, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING (2021), available at https://bbbnbp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru_advertisingguidelines.pdf.

There is no dispute that false, misleading, and deceptive advertising can cause great harm to consumers and free-market competition. The FTC combats these practices using enforcement tools, regulatory guidance, and consumer education. Key principles for truth in advertising are found in guides like those for endorsements and testimonials. Companies should follow established guidance on proper endorsement use and substantiation of claims. With its multilayered approach, the FTC promotes truthful advertising and protects consumers from deception.

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Associate | Missoula
Litigation
wcasey@parsonsbehle.com

Alexander S. Chang

Associate | SLC
Litigation
achang@parsonsbehle.com

Ethan J. Foster

Associate | Reno
Litigation
efoster@parsonsbehle.com

Chuck F. Rasmussen Goodwin

Associate | SLC
Litigation
cgoodwin@parsonsbehle.com

Emily Marie Hill

Associate | Boise
Corporate
ehill@parsonsbehle.com

Corey J. Hunter

Associate | SLC
Employment
chunter@parsonsbehle.com

Stewart J. Merrick

Of Counsel | SLC
Environmental
smerrick@parsonsbehle.com

Andres F. Morelli

Of Counsel | Park City
Litigation
amorelli@parsonsbehle.com

Kaitlynn B. Morgan

Associate | SLC
Litigation
kmorgan@parsonsbehle.com

Anna M. Paseman

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Utah's New Income Tax Reimbursement Statute

by William J. Whitaker and L. Stanford McCullough

In the 2023 Utah legislative session, legislators amended Utah Code Section 75-7-505, giving more flexibility to Utah estate planners and their clients. The new amendment helps keep certain irrevocable trust property outside a person's taxable estate for federal estate tax purposes, consistent with the person's intent.

Before this amendment, the property of an irrevocable trust that was intended to be outside the taxable estate of the creator of the trust (commonly called the "grantor" or "settlor" of the trust) may have nevertheless been included in the settlor's estate if the trust contained a special clause, commonly called a "discretionary income tax reimbursement clause," that allows the trustee, in the trustee's discretion, to reimburse the settlor for income taxes attributable to trust property.

Background – Income Tax and Estate Tax Inclusion

This amendment affects each Utah irrevocable trust that (1) is intended to be outside the taxable estate of the settlor of the trust; (2) has a discretionary income tax reimbursement clause; and (3) is treated as owned by the settlor for income tax purposes, (i.e., it is a grantor trust). Because the federal income tax rules are separate and distinct from the federal gift, estate, and generation skipping transfer (GST) tax rules, there are differences in the treatment of trust property for the different tax purposes.

For example, depending on how the trust instrument is drafted, trust property could be treated as the settlor's, or not the settlor's, whether for income tax purposes or for estate tax purposes, leaving four general categories of trusts:

Trust property is Settlor's for tax purposes?

- Income tax: **Yes**
- Estate tax: **Yes**

Example: fully revocable trust, certain Utah Domestic Asset Protection Trusts (UDAPT's)¹

- Income tax: **No**
- Estate tax: **Yes**

Example: irrevocable non-grantor incomplete gift trust (sometimes called an "ING" trust), certain UDAPT's

- Income tax: **Yes**
- Estate tax: **No**

Example: irrevocable grantor trust (sometimes called an "intentionally defective grantor trust") of which settlor is not a beneficiary and has no retained interest; referred to below as an "Irrevocable Grantor Gift Trust"

- Income tax: **No**
- Estate tax: **No**

Example: irrevocable non-grantor trust of which settlor is not a beneficiary and has no retained interest

There are many other names for various types of trusts, but most trusts should fit into one of the four categories above. The examples noted in the table above are not exhaustive.

The focus of the amendment, and this article, is on the trusts that are intended to be the settlor's for income tax purposes,

WILLIAM J. WHITAKER is an estate planning attorney who enjoys working with clients and professionals on tailored estate plans. Bill is a partner with Fabian VanCott in Salt Lake City, and is licensed in Utah, Idaho, and South Dakota.



L. STANFORD MCCULLOUGH is a tax attorney at the McCullough Group. He is also Treasurer Secretary of the Tax Section of the Utah State Bar.



but outside of the settlor's estate for estate tax purposes (see the third section in the table above). For convenience, this article refers to such trusts as "Irrevocable Grantor Gift Trusts."

Irrevocable Grantor Gift Trusts

Many individuals who wish to engage in estate tax planning are advised to set up an Irrevocable Grantor Gift Trust. One of the many potential benefits of such a trust is the requirement that the settlor of the trust pay the income tax liability on trust property with non-trust funds. Not only does this reduce the future estate tax liability of the settlor by reducing his or her taxable estate by the amount of taxes paid, but it also allows the trust to retain funds that would otherwise be used to pay those income taxes without any additional gift or estate tax consequences to the settlor. Essentially, each dollar of income tax paid by the settlor represents a dollar that stays in the trust.

Because future income tax liability is unknown and changes year to year, sometimes drastically (e.g., sale of closely held business interests with a low basis), many Irrevocable Grantor Gift Trusts include a discretionary income tax reimbursement clause that permits – but does not require – the trustee to reimburse the settlor from trust assets for the income tax attributable to the trust property but paid by the settlor. This provides flexibility for changing circumstances.

Settlor's Creditors Reaching Trust Assets – Revenue Ruling 2004-64 and State Law

A trust's discretionary income tax reimbursement clause may cause estate tax inclusion issues for the settlor of an Irrevocable Grantor Gift Trust, depending on state law. In Revenue Ruling 2004-64, Situation 3, the IRS issued guidance on the estate tax consequences of a discretionary income tax reimbursement clause (where "A" is the settlor):

[A]ssuming there is no understanding, express or implied, between A and the trustee regarding the trustee's exercise of discretion, the trustee's discretion to satisfy A's [income tax] obligation would not alone cause the inclusion of the trust in A's gross estate for federal estate tax purposes. This is the case regardless of whether or not the trustee actually reimburses A from Trust assets for the amount of income tax A pays that is attributable to Trust's income. The result would be the same if the trustee's discretion to reimburse A for this income tax is granted under applicable state law rather than under

the governing instrument. However, such discretion combined with other facts (including but not limited to: an understanding or pre-existing arrangement between A and the trustee regarding the trustee's exercise of this discretion; a power retained by A to remove the trustee and name A as successor trustee; **or applicable local law subjecting the trust assets to the claims of A's creditors**) may cause inclusion of Trust's assets in A's gross estate for federal estate tax purposes.

Internal Revenue Bulletin 2004-27, *available at* https://www.irs.gov/irb/2004-27_IRB (last visited Sept. 8, 2023) (emphasis added). From this, we learn that a discretionary income tax reimbursement clause may cause estate tax inclusion where state law subjects the trust assets to the claims of the settlor's creditors.

Prior Version of Utah Code Section 75-7-505

Before the amendment, Utah Code Section 75-7-505(2) provided that "[w]ith respect to an irrevocable trust other than an irrevocable trust that meets the requirements of Section 25-6-502 [i.e., a UDAPT], a creditor or assignee of the settlor may reach the maximum amount that **can** be distributed to or for the settlor's benefit." (2017) (amended 2023) (emphasis added).

An Irrevocable Grantor Gift Trust's discretionary income tax reimbursement clause arguably provides a maximum amount from the trust that **can** be distributed to the settlor for his or her benefit and that amount would therefore be subject to the settlor's creditors. In other words, the amount subject to the claims of creditors for a particular year would be equal to the trust's income tax liability for that year. However, it is also possible that the total amount in the trust (not just the amount of the reimbursement) would be subject to estate tax inclusion under Revenue Ruling 2004-64 and Section 2036 of the Internal Revenue Code.

Therefore, prior to the amendment, a discretionary income tax reimbursement clause would risk estate tax inclusion for the settlor of a Utah Irrevocable Grantor Gift Trust.

New Version of Utah Code Section 75-7-505

The new version of Utah Code Section 75-7-505 includes specific language that prevents the assets of a Utah Irrevocable Grantor Gift Trust from being subject to the claims of creditors due to a discretionary income tax reimbursement clause:

[A] creditor of a settlor may not satisfy the creditor's claim from an irrevocable trust solely because the trustee may make a discretionary distribution reimbursing the settlor for income tax liability of the settlor attributable to the income of the irrevocable trust, when the distribution is: (i) subject to the discretion of a trustee who is not the settlor; (ii) subject to the consent of an advisor who is not the settlor; or (iii) at the direction of an advisor who is not the settlor.

Most discretionary income tax reimbursement clauses meet the requirements of (i), (ii), or (iii), above, and so qualify for the desired creditor protection.

(Note that there were other minor, cosmetic changes to section 75-7-505, which are not addressed in this article.)

Other States Already Have Similar Legislation

Utah joins several other states that have already enacted similar legislation based on the guidance provided in Revenue Ruling 2004-64. Some of these states have had this legislation on the

books for a decade or more.

Of course, not all states have the same specific language. Some states go even further by including a statutory discretionary income tax reimbursement provision for trusts that don't have them already. For example, 12 Delaware Code Section 3344 provides in part:

Unless the terms of the governing instrument expressly provide that a trustor [i.e., settlor] may not be reimbursed by a trust for the trustor's personal income tax liability, if the trustor of a trust is treated under 26 U.S.C. § 671 et seq. as the owner of all or part of the trust [i.e., if all or part of the trust is a "grantor trust" for income tax purposes], the trustee (other than a trustee who is the trustor or a person who is a "related or subordinate party" with respect to the trustor within the meaning of 26 U.S.C. § 672(c)) may, in the trustee's sole discretion, or at the direction or with the consent of an adviser (who is not the trustor or a person who is a "related or subordinate party" with

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respect to the trustor within the meaning of 26 U.S.C. § 672(c)), reimburse the trustor for any amount of the trustor's personal federal, state, county, metropolitan-region, city, local, foreign, or other income tax liability that is attributable to the inclusion of the trust's income, capital gains, deductions, and credits in the calculation of the trustor's taxable income.

Here is a list of the states (including Utah and Delaware) that have enacted legislation addressing discretionary income tax reimbursement clauses and the scenario set forth in Revenue Ruling 2004-64²:

1. Alaska (Alaska Statutes Section 34.40.110(m)(2))
2. Arizona (Arizona Revised Statutes Section 14-10505(A)(2)(a))
3. California (California Probate Code Section 15304(c))
4. Colorado (Colorado Revised Statutes Section 15-5-818(5))
5. Connecticut (General Statutes of Connecticut Section 45a-499fff)
6. Delaware (12 Delaware Code Sections 3536(c)(2) and 3344)
7. Florida (Florida Statutes Sections 736.0505(1)(c) and 736.08145)
8. Georgia (Georgia Code Section 53-12-82(a)(2)(B)(ii))
9. Idaho (Idaho Code Section 15-7-502(4))
10. Illinois (760 Illinois Compiled Statutes (ILCS) 3/505(a)(3))
11. Iowa (Iowa Code Section 633A.2304(3))
12. Kentucky (Kentucky Revised Statutes Section 386B.5-020(7)(c))
13. Maryland (Maryland Code, Estates & Trusts Section 14.5-1003(a)(1))
14. Massachusetts (General Laws of Massachusetts Code 203E Section 505(a)(2))
15. Michigan (Michigan Compiled Laws Section 700.7506(1)(c)(ii))
16. Mississippi (Mississippi Code Section 91-8-504(c))
17. Missouri (Missouri Revised Statues Section 456.5-505(3))
18. Montana (Montana Code Section 72-38-505(1)(b))

19. Nebraska (Nebraska Statutes Sections 30-3850(a)(2)(C) and 30-3881(b))
20. Nevada (Nevada Revised Statutes Section 163.5559(1)(a))
21. New Hampshire (New Hampshire Revised Statutes Sections 564-B:5-505A and 564-B:8-816(c))
22. New Jersey (New Jersey Revised Statutes Sections 3B:31-39 and 3B:11-1(b))
23. New York (New York Estates, Powers and Trusts Law (EPTL) Sections 7-3.1(d) and 7-1.11)
24. North Carolina (North Carolina General Statutes Section 36C-5-505(a)(2a))
25. Ohio (Ohio Revised Code Section 5805.06(B)(2)(c))
26. Oregon (Oregon Revised Statutes Section 130.315(1)(d))
27. Pennsylvania (Pennsylvania Statutes 20 Pa.C.S.A. Section 7745(2))
28. Rhode Island (Rhode Island General Laws Section 18-9.2-2(10)(ii)(I))
29. South Dakota (South Dakota Codified Laws Section 55-1-36.1)
30. Tennessee (Tennessee Code Section 35-15-505(c))
31. Texas (Texas Property Code Section 112.035(d))
32. Utah (Utah Code Section 75-7-505(2)(c))
33. Virginia (Code of Virginia Section 64.2-747(a)(2))
34. Wyoming (Wyoming Statutes Section 4-10-506(a-c))

Trusts Created Prior to Enactment

The new Utah amendment came into effect on May 3, 2023. What happens to existing Irrevocable Grantor Gift Trusts with discretionary income tax reimbursement clauses that were created prior to the effective date? If the settlor of such a trust survives the effective date, there should be no estate tax inclusion due to such a clause.

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Whether an asset is includible in the decedent's estate is a determination that is made as of the date of death. However, there are statutory provisions that "look back" in time to determine if an asset should be includible in a decedent's estate. For example, Internal Revenue Code section 2035 indicates that if the settlor of a trust relinquished any power with respect to any property during a three-year period ending on the date of the settlor's death, and if the value of such property would have been included in the settlor's estate under certain other Internal Revenue Code sections (including Section 2036) if the power had been retained by the settlor at death, then that property will be includible in the settlor's estate.

So, prior to the amendment, if a discretionary income tax reimbursement clause would have caused estate inclusion for a settlor, and the settlor disclaimed his or her ability to receive a distribution under such a clause within the three-year period ending on the date of the settlor's death, then the trust property may arguably have been includible under Internal Revenue Code Section 2035.

However, with respect to this new amendment, it seems unlikely that the IRS could successfully argue that the settlor of a trust

disclaimed or "relinquished" anything by reason of the Utah legislature enacting the amendment, meaning that there should be no inclusion under section 2035.

Conclusion

If the statutory requirements are met, recently amended Utah Code Section 75-7-505 prevents creditor claims that may arise from having a discretionary income tax reimbursement clause in a Utah Irrevocable Grantor Gift Trust. Furthermore, the amended statute helps close the door on the estate tax inclusion exposure that would otherwise exist.

The authors thank Stephen R. Sloan and David E. Sloan for reviewing and providing comments on earlier drafts of this article.

1. UDAPTs are governed by Utah Code Section 25-6-502 and are typically set up for creditor protection purposes. Because UDAPTs are self-settled trusts (i.e., the settlor is also a beneficiary), they are generally includible in the settlor's estate for federal estate tax purposes.
2. See Edwin P. Morrow III, *State Asset Protection for IGTs (or PTEs owned by IGTs) that May Pay Income Tax Burden on Trust Income for Grantors* (2023), available at https://www.actec.org/assets/1/6/50_State_Chart_re_Asset_Protection_for_IGTs_That_Pay_Income_Tax_for_Grantor.pdf?hssc=1.

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Need Ethics Help?



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

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

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



ethicshotline@utahbar.org

Giving Light: A Lawyer's Role as Advisor

by Keith A. Call

A lawyer friend recently told me about his experience buying a used car in a private transaction. He negotiated aggressively and ended up getting a great deal. But in the end, feeling like he had “won” the negotiation was not entirely satisfying. He thought the transaction would have still been “fair” if he had paid an extra \$500 or \$1,000, and he wondered if the seller needed that extra money more than he did. He asked me if I thought he had done the right thing.

One of the most important rules of ethics is probably one you don't know exists, or you have at least forgotten about. It is in the second part of Utah Rule of Professional Conduct 2.1, which provides, “In representing a client, a lawyer shall exercise independent professional judgment **and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.**” (emphasis added).

Lawyers wear different hats. Those of us who litigate, try cases, and negotiate deals for our clients usually wear warrior hats. We zealously advocate for the most advantageous outcomes for our clients. And, of course, there is nothing wrong with that.

But an equally important role is the lawyer's role as *advisor*. Rule 2.1 requires that we give “candid advice” to our clients. Comment [1] of Rule 2.1 explains that this means “straight-forward advice expressing the lawyer's honest assessment,” and adds that this can often involve “unpleasant facts and alternatives that a client may be disinclined to confront.” However, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” Utah R. Pro. Cond. 2.1, cmt. [1].

In other words, lawyers should not sugarcoat the facts when advising a client. This means we should objectively advise our clients on the probable results of a matter and the likely costs of obtaining the result. This will sometimes require the lawyer to candidly explain that their client is wrong, or has done something wrong, even if the client does not want to hear it. It also

requires the lawyer to fully and clearly explain the facts when something bad happens in a case. These can be difficult conversations, but they are ethically required.

Your role as advisor may also extend beyond technical legal advice. Rule 2.1 permits you to refer to moral, economic, social, and political factors in rendering your advice. “Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” Utah R. Pro. Cond. 2.1, cmt. [2]. For example, maybe your client can get that extra \$500 in a negotiation, but that does not always mean they should. Lawyers have an important responsibility to advise their clients about what is moral and “right.”

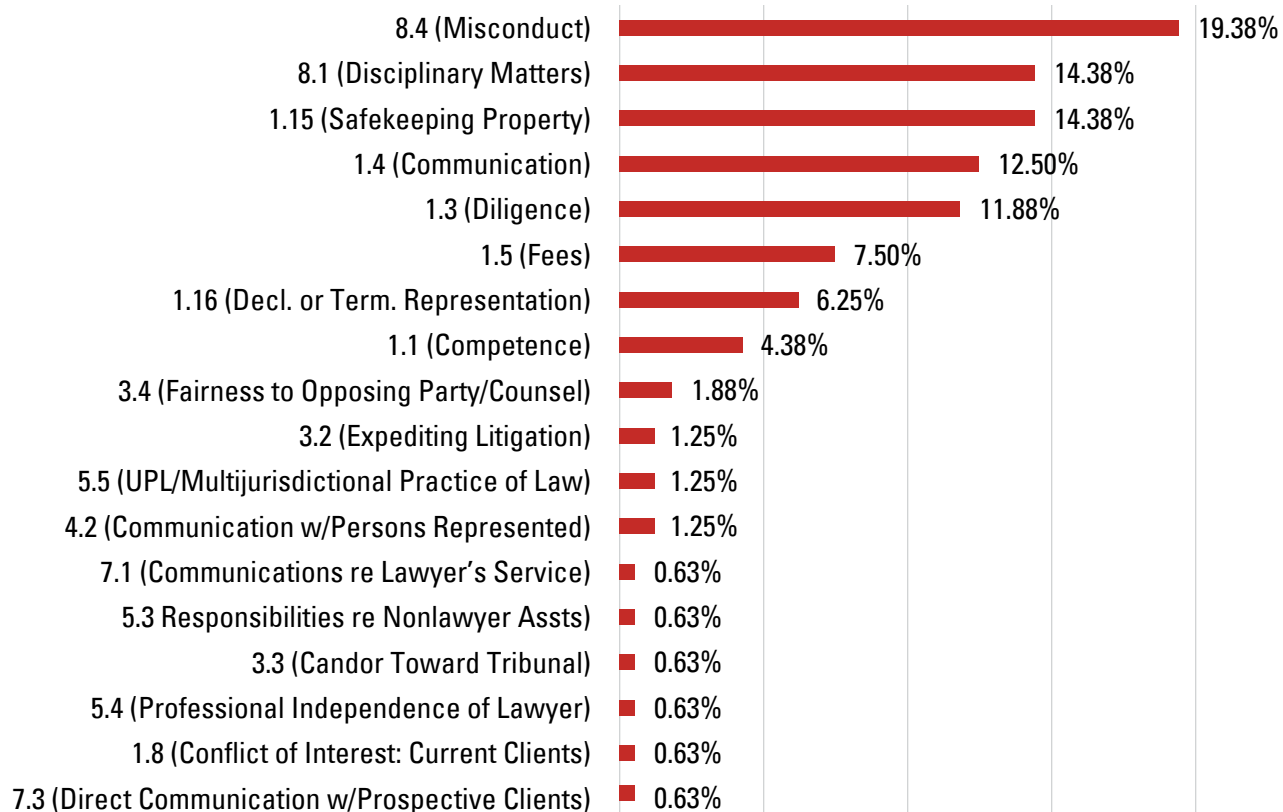
Having provided our best advice – including legal, moral, economic, social, and political factors – it is the lawyer's responsibility to follow the client's decision about the course of action to pursue, provided it is not criminal or fraudulent. See Utah R. Pro. Cond. 1.2. That is so even if the lawyer disagrees with the client's decision, unless the client insists on taking action that the lawyer considers to be repugnant or with which the lawyer has a fundamental disagreement, in which case the lawyer is permitted to withdraw. See Utah R. Pro. Cond. 1.16(b).

It is unlikely you will be charged with unethical conduct for violating Rule 2.1. The Utah Office of Professional Conduct has issued numerous reports that summarize its prosecution activities. The OPC's 2021 Annual Report contains the following chart showing which rules were violated in connection with 2021 disciplinary actions:

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



Rule Violations as Percentage of the 160 Total Violations found in Discipline Orders (Year 2021)



OFFICE OF PROFESSIONAL CONDUCT, ANNUAL REPORT 22 (Feb. 2022), <https://www.opcutah.org/wp-content/uploads/2022/04/OPC-ANNUAL-REPORT-2021.pdf>.

Rule 2.1 is noticeably absent from this list. There are relatively few Utah cases or ethics opinions that tackle the key elements of Rule 2.1, although there are a few from other jurisdictions. For example, the Minnesota Court of Appeals has stated that an in-house lawyer's advice to management regarding its possibly illegal activity was part of his or her "most basic duties to his or her client – to be competent, to be diligent, to use good judgment, to render candid advice." *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855, 866 (Minn. Ct. App. 2008). The Missouri Supreme Court has held that a lawyer in a criminal case is duty bound to advise the defendant regarding the advantages and disadvantages of choosing a plea. *See Evans v. State*, 477 S.W.2d 94 (Mo. 1972). And the Washington Court of Appeals, in invalidating a prenuptial agreement, warned that lawyers handling prenuptial contracts "should seriously consider the implications of RPC 2.1. . . . Marital tranquility is not achieved by a contract which is economically unfair or achieved by unfair means." *In re Marriage of Foran*, 834 P.2d 1081, 1089 n.14

(Wash. Ct. App. 1992); *see also* Ted Weckel, *Helping Our Clients Tell the Truth, Part II*, 26 UTAH B.J. 42 (Jul/Aug 2013) (providing excellent discussion of Rule 2.1 in context of criminal defense matters, including the complexities of providing moral advice and representing a client with zeal and loyalty).

For me, Rule 2.1 carries with it a sense of sanctity, something that sets the legal profession apart and makes it a true "*profession*." Lawyers should be more than robotic hired guns whose objective is to make money by doing their clients' bidding. We have an ethical and moral obligation to our *clients* and to *society* to be trustworthy *advisors*.

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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Honoring the Career of Jeannine Timothy: A Legal Advocate Like No Other

by Scotti Hill

Nestled in a large office filled with light from the wide, north-facing window in the Utah State Bar building (otherwise known as the Utah Law and Justice Center), for years Jeannine Timothy worked diligently to manage a large volume of inquiries from individuals dealing with a range of legal issues.

Her office, carefully arranged and decorated with art and memories from years of travel, was on the first floor of the building – a modest and seldomly frequented area that housed one of the Bar’s most critical functions. Jeannine Timothy retired on August 31 after twenty-six years of service to the Bar. As head of the Consumer Assistance Program (CAP), many were among the fortunate recipients of Jeannine’s assistance, and still many others are those lucky enough to call her a friend.

CAP assists clients in resolving issues with their attorneys. The program helps clients with issues that may not necessarily rise to the level of a Bar complaint, with the program facilitator serving as an intermediary between the attorney and their frustrated client. “CAP may be able to help a consumer get their file, locate their attorney or LPP, resolve a communication problem, and provide some general information about the legal system. CAP can also provide information about lawyer and LPP ethical obligations to the consumer and provide referrals to other resources and agencies,” according to the Bar’s website. Once a consumer submits a complaint form, the administrator reaches out to both parties to devise a solution. Any file created pursuant to the complaint is destroyed once the matter is resolved. In addition to administering CAP, Jeannine oversaw the Disciplinary



Process Information line, which provided guidance to lawyers engaged in the disciplinary process.

For many, such intermediary assistance is invaluable, a mechanism for problem solving and feeling understood in what is, for many, an emotional and overwhelming episode of their lives.

As the Bar was initially contemplating CAP’s creation, proponents envisioned a program that would reduce formal Bar complaints and create an easier path for clients with issues that could be remediated by a neutral third party. As an initiative of former Bar President Charlotte Miller, Utah’s CAP was

modeled after a similar one in Mississippi. Indeed, various jurisdictions have some variation of CAP to help their jurisdiction’s disciplinary office with the volume of complaints – and to assist the public with issues that can be remedied by minimal intervention. Oregon, for example, employs a Consumer Assistance Office (CAO), which serves as an intake system that interfaces with the public as a prerequisite to disciplinary actions.

SCOTTIA. HILL is Assistant Disciplinary Counsel with the Office of Professional Conduct.



Enter Jeannine. A graduate of the S.J. Quinney College of Law, she'll be the first to admit that she never anticipated attending law school. She wanted instead to be an English teacher. But at the encouragement of her lawyer cousin and daunted by the exorbitant number of applicants to English graduate programs the year she sought to apply, she decided instead to take the LSAT. Because of her devotion to writing, educating, and working with children, Jeannine gravitated toward family law. After graduation, she began cultivating a specialty in this field and began working in stepparent adoption. From 1992–2003, she was one of only a few lawyers in Utah that volunteered to assist HIV positive and AIDS patients with a range of legal issues as part of the Ryan White Program. Additionally, she has worked for several years as a Guardian ad Litem. It's this specialty that led her to pen articles in the *Utah Bar Journal* and get on leadership's radar.

"She is truly the kindest, most patient and thoughtful person. She was always willing to help, always willing to listen and honestly do her best for everybody and is a true public servant," says former Utah State Bar Executive Director John Baldwin. "I can't say enough about how wonderful it was to work with her."

On October 1, 1997, an article titled "Lending an ear to lawyer complaints" ran in the *Salt Lake Tribune*. Configured prominently atop the article's text, an image of Jeannine reaching for a photograph denotes a sense of eagerness, as if Jeannine, as head of this exciting new program, is ready to

spring into action. This impression was not far off.

To date, CAP has assisted thousands of clients with a range of issues, allowing for avenues of remediation foreclosed prior to the program's creation. Jeannine has left CAP in the capable hands of Cathy James, who took over the program in early October.

In addition to pioneering a crucial program for Utah's Bar, Jeannine serves as an example of the power and resilience of women lawyers. She has demonstrated this not only in the empathy and attention she has directed to those she assisted, but also in her devotion to her own family. Indeed, the CAP program and the practice of law for Jeannine was necessarily balanced by her most important role – a devoted mother. Despite the naysayers who advised her that her personal life would inevitably become subservient to her career, she proved that female attorneys can and should prioritize their families while doing the work they love.

As a lawyer who has spent the last four years working in the Utah Law and Justice Center, Jeannine has become not just a trusted colleague, but a dear friend. Her warmth and kindness are unparalleled and perhaps the best antidote to those who may be skeptical of our profession. While we will miss her dearly, we are enormously grateful for the legacy she leaves behind, one others will continue to cultivate for years to come.

Thank you, Jeannine.

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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the September 22, 2023 Meeting and Retreat held at the Snowpine Lodge in Alta, Utah.

- The August 17, 2023 meeting minutes were approved by consent.
- The Commission approved the purchase of a table at the UMBA Scholarship and Awards Banquet for \$1,000.
- The Commission approved the Fall Forum Awards:
 - o Professionalism Award: Hon. George Harmon
 - o Mentoring Awards:

James Lee Award: Hon. Augustus Chin

Paul Moxley Award: Philip Lear

Charlotte Miller Award: Rebecca Ryon

- o Community Member Award: Kaitlyn Pieper

- o Award for Special/Distinguished Service: Heather Tanana

- During the Strategic Planning Retreat, the Commission voted to conduct the 2024 Summer Convention as a virtual event, and then begin alternating between in-person and virtual events, with the next in-person event to be held in 2025.

The minute text of this and other meetings of the Bar Commission are available on the Bar's website at: www.utahbar.org.

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www.utahbar.org/leadership-academy

Thirty-Second Annual **Lawyers & Court Personnel Food & Winter Clothing Drive**

Selected Shelters

Jennie Dudley's Eagle Ranch Ministry

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

The Rescue Mission

Women & Children in Jeopardy Program

Drop Date

December 15, 2023 • 7:30 a.m. to 5:30 p.m.

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

Volunteers will meet you as you drive up.

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

Volunteers Needed

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

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

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What is Needed?

All Types of Food

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

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

New & Used Winter & Other Clothing

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

New or Used Misc. for Children

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

Personal Care Kits

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

2023 Fall Forum Awards Recipients

Congratulations to the following people who will be honored during the 2023 Utah State Bar Fall Forum!



Hon. Augustus G. Chin
James Lee Mentoring Award



Phillip W. Lear
Paul Moxley Mentoring Award



Rebecca A. Ryon
Charlotte Miller Mentoring Award

Hon. George M. Harmond, Jr.
Professionalism Award



Kaitlyn Pieper
Community Member Award



Heather J. Tanana
Distinguished Service Award



Tim Dance
Outstanding NLTP Mentor Award



S. Grace Acosta
Outstanding NLTP Mentor Award



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500 South Main Street | Salt Lake City

Registration & Continental Breakfast begin at 7:30 am

CLE Agenda starts at 8:15 am

The agenda will include:

- AI and its effects on the law and legal technology
- Well-being and ethics discussions
- Professionalism and civility CLE
- Plenary dialogue on the judiciary, legislature, and updates that affect practice
- Breakout sessions sponsored by the Litigation Section, Family Law Section, and many others

APPROXIMATELY

6 HRS

CLE CREDIT OFFERED *

*Subject to change

The full agenda and registration
are now available at:

utahbar.org/FallForum

Thank You!

The Bar sincerely thanks the following attorneys who volunteered to grade the most recent Bar exam:

Miriam Allred	Brody Flint	Clark Harms	Jonathan Parry
Rachel Anderson	Nathaniel Gallegos	Anthony Kaye	Justin Pendleton
Justin Baer	Michael Garrett	David Knowles	Letitia Toombs
Kelly Ann Booth	Stephen Geary	Michael Lichfield	James Walker
Clinton Brimhall	Alisha Giles	Patrick Lindsay	Thaddeus Wendt
Katherine Bushman	Sarah Goldberg	Colleen Magee	Matthew Wilson
Jeffrey Enquist	Brian Hansen	Jamie Nopper	Sarah Vaughn
	Chase Hansen	Michael Palumbo	

I N M E M O R I A M

The Jan/Feb 2024 issue of the *Utah Bar Journal* will include an in memoriam list of Utah legal professionals who passed away during 2023. If you are aware of any current or former members of the Utah State Bar, including paralegals and judges, whose deaths occurred during 2023, please let us know. Email their name(s) and, if possible, a link to their obituary to: BarJournal@utahbar.org.

To be included in the list, names must be received by December 15, 2023.



Notice of Bar Commission Election

Third and Fourth Divisions

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

- three members from the Third Division (Salt Lake, Summit, and Tooele Counties), and
- one member from the Fourth Division (Wasatch, Utah, Juab and Millard Counties).

Bar Commissioners serve a three-year term. Terms will begin in July 2024.

To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held.

Nominating petitions are available at <https://www.utahbar.org/bar-operations/election-information/>. Completed petitions must be submitted to Christy Abad (cabad@utahbar.org), Executive Assistant, no later than February 1, 2024, by 5:00 p.m.

2024 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2024 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.



Please submit your nomination for a 2024 Spring Convention Award no later than Friday, January 22, 2024. Use the Award Form located at <https://www.utahbar.org/awards/> to propose your candidate in the following categories:

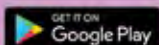
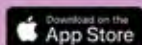
1. **Dorathy Merrill Brothers Award** – For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award** – For the Advancement of Minorities in the Legal Profession.

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

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Celebrating Pro Bono

October is “Celebrate Pro Bono Month,” an opportunity to provide free legal services to those in need and honor the good work performed by lawyers every day. This is also meant to inspire others to consider volunteering. Utah lawyers are joining their colleagues across the country to honor the work being done to increase meaningful access to justice through their commitment to pro bono work.

The American Bar Association launched the National Celebration of Pro Bono in 2009 because of the increasing need for pro bono services during harsh economic times and the unprecedented need for attorneys to meet this demand. Every October since 2009, legal organizations across America participate in the National Celebration of Pro Bono to draw attention to the need for pro bono participation, and to thank those who give their time year-round.

2023 Pro Bono Challenge

This year Utah’s statewide Celebrate Pro Bono initiative returned after a break due to the COVID-19 pandemic. The initiative brings together legal services providers with law schools, law firms, local bar associations, and individual volunteers to offer free services to those unable to afford a lawyer. Volunteers participated in a number of events and activities that offered assistance to Utahns in need. Activities included legal advice clinics, educational programs, recognition celebrations, and other events.



Access to Justice staff tabling during the Pro Bono Challenge.



BYU law students participating in the Pro Se Debt Collection Calendar from the J. Reuben Clark Law School.

This year the Access to Justice Office launched the inaugural Pro Bono Challenge in partnership with the J. Reuben Clark Law School at Brigham Young University and S.J. Quinney College of Law at the University of Utah. The 2023 Pro Bono Challenge was an effort to show future attorneys how their work plays a part in the national effort by focusing on local projects held during a designated timeframe. This event captured the interest and energy of local legal practitioners who collaborated on approved pro bono projects that were available at both schools. Bringing law students from the schools together in a spirit of cooperation, competition, and service helped to foster a lifelong pursuit of pro bono. Participants worked hard to meet the growing demands of Utahns who need help. Students volunteered on the Pro Se Debt Calendar to represent clients with a supervising attorney, researched and wrote responses for Utah Free Legal Answers, and staffed a number of clinics as well. In total, sixty students completed 329 hours of pro bono service. SJ Quinney students accounted for 243 hours while BYU students completed eighty-six hours. Congratulations to all who participated!

Utah Access to Justice Summit

Each year, the Access to Justice Commission holds a Summit that brings together legal and social service providers to learn, network, and engage with each other. This year’s Access to Justice Summit explored the current local landscape of the local community’s access to justice, local issues, and innovative efforts to reach those in need. Summit sessions included:

- A Plenary on Domestic Violence
- Bridging the Legal Divide – a Holistic Approach



The Community Building Fundamentals breakout session featured speakers from the Park City Tuesday Night Bar, Peace House, and Mountain Mediation

- Intersection Between Civil and Criminal Issues
- Community Building Fundamentals
- Doing the Work Scared

Pamela Beatse, Access to Justice Director (ATJ), delivered welcoming remarks emphasizing our shared history, the service and sacrifice of providers, and the tremendous hope they bring to clients, which leads to renewal and change. She recognized that sometimes the work requires us “to do it scared.”

Always a crowd favorite, during the One Minute Blitz organizations pitched their work for prizes. Awards went to:

- Youth Futures Utah
- Timpanogos Legal Center
- YWCA Utah

Special Clinics and CLEs

The Pro Bono Celebration allows the ATJ Office to hold extra clinics and Continuing Legal Education events throughout October. This year, it held a special clinic for business, consumer protection, contracts, and employment law hosted by the Association of Corporate Counsel for our region. It is also planning an immigration clinic with the Refugee Justice League. And it held special CLEs on discrimination and consumer protection including fraud, scams, and identity theft.

Every year, Utah lawyers help thousands of clients by providing free legal assistance. The month of October is an opportunity to focus attention on the significant need for pro bono services as well as a celebration of the outstanding work of those in the legal community who volunteer their services throughout the year.

Share your experiences with the Bar by reporting your hours to the ATJ Office. Not only is this a great way to highlight the great work you are doing, but you also now qualify for free CLE credit. The pro bono work needs to be done through a Bar-approved sponsoring entity. You can qualify for two credits, one credit for every two hours served. If you have questions, please reach out to probono@utahbar.org.



Over 100 nonprofit leaders, legal services providers, public officials, and community members attended the 2023 Access to Justice Summit.



ANNUAL MCLE COMPLIANCE

MCLE Reporting Period is July 1, 2023 – June 30, 2024

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 of the CLE must be Verified CLE (live), 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 (self-study) or Verified CLE (live). Each lawyer or paralegal practitioner shall pay a filing fee in the amount of \$10 at the time of filing the Certificate of Compliance.

For a copy of the new MCLE rules, please visit <https://www.mcleutah.org>. For questions, please contact the MCLE office at staff@mcleutah.org or by phone at (801) 746-5230.

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.

Pro Bono Appointments

Russell Yaune

SUBA Talk to a Lawyer Legal Clinic

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William "Bill" Frazier
Ward Marshall
Tyson Raymond
Lewis Reece

Family Justice Center

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Lindsey K. Brandt
Dave Duncan
Michael Harrison
Victor Moxley
John Seegrist
Jessica Smith
Babata Sonnenberg
Catherine Sundwall
Nancy Van Slooten

Timpanogos Legal Center

Amirali Barker
Bryan Baron
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Utah Bar's Virtual Legal Clinic

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Mark Baer
Josh Bates
Jonathan Bench
Dan Black
Mike Black
Douglas Cannon

J. Brett Chambers
Anna Christiansen
Adam Clark
Riley Coggins
Jill Coil
Kimberly Coleman
John Cooper
Robert Coursey
Jessica Couser
Hayden Earl
Matthew Earl
Craig Ebert

Jonathan Ence
Rebecca Evans
Thom Gover
Robert Harrison
Aaron Hart
Tyson Horrocks
Robert Hughes
Michael Hutchings
Gabrielle Jones
Justin Jones
Ian Kinghorn
Suzanne Marelius
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Tyler Needham
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Jacob Ong
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Clifford Parkinson
Alex Paschal
Katherine Pepin
Leonor Perretta
Cecilee Price-Huish
Stanford Purser
Jessica Read

Brian Rothschild
Chris Sanders
Alison Satterlee
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Peter Shiozawa
Liana Spendlove
Brandon Stone
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Alex Vandiver
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Jenny Jones
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Jonathan Benson
Mary Bevan
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Brent Chipman
Daniel Crook
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Ana Flores
Jennie Garner
Denise George
Jeffrey Gittins
Jason Groth
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Ray Hingson
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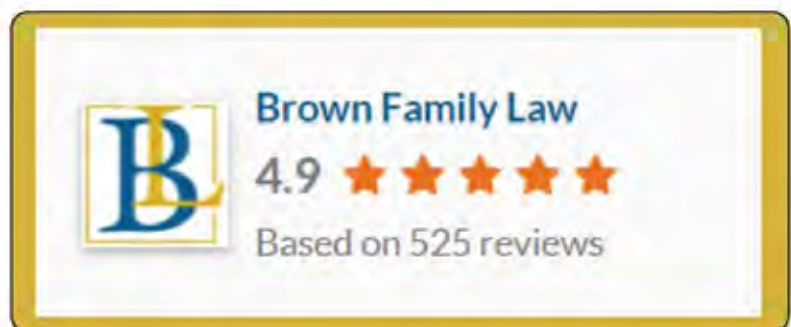
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Attorney Discipline

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

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.

ADMONITION

On July 10, 2023, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against a lawyer for violating Rule 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

A lawyer was retained to represent a client in a criminal matter over one year after the client had entered into a plea agreement and was convicted and sentenced. Over the next several years, the lawyer attempted to negotiate with the client's prosecutor to allow the client to withdraw their guilty plea. When such negotiations failed, the lawyer filed a petition for post-conviction relief. The Court ultimately found the client's petition was time-barred. The lawyer filed a Notice of Appeal, but ultimately did not pursue the appeal. Separately, the lawyer also assisted the client with matters before the Utah Board of Pardons and Parole.

Although the lawyer engaged in frequent email communications and periodic telephone calls with the client throughout the lawyer's representation, the communications were insufficiently informative because they failed to provide the client with specific and detailed information regarding the negative outcome of the client's petition for post-conviction relief.

PUBLIC REPRIMAND

On July 28, 2023, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Brent A. Blanchard for violating Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

A client filed a complaint with the OPC against Mr. Blanchard regarding communication issues they were having with his representation in a civil lawsuit. Shortly after the complaint was filed, Mr. Blanchard contacted the client and continued his work on the case. The client emailed the OPC, copying Mr. Blanchard on the email, and requested that the matter be closed.

The OPC determined to continue with its investigation, as permitted under the Rules of Discipline, Disability and Sanctions of the Utah Supreme Court Rules of Professional Practice. As part of its investigation, the OPC sent letters to Mr. Blanchard requesting a response to the client's allegations. Mr. Blanchard did not respond to the letters. The OPC issued a Notice to Mr. Blanchard. Mr. Blanchard did not respond to the Notice.

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March 20, 2024 or September 18, 2024
\$100 on or before March 12 or September 10,
\$120 thereafter.

To register, email: CLE@utahbar.org

Aggravating factors:

Prior record of discipline.

Mitigating factors:

Absence of a dishonest or selfish motive, personal and emotional problems, good faith effort and timely efforts to correct any consequences of his alleged misconduct, remorse, absence of any harm to a client and lack of underlying misconduct.

RESIGNATION WITH DISCIPLINE PENDING

On June 20, 2023, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Jeffrey B. Brown for violation of Rule 1.2(a) (Scope of Representation), Rule 1.5(a) (Fees), and Rule 7.1(b) (Communications Concerning a Lawyer's Services) of the Rules of Professional Conduct.

In summary:

In 2021, Mr. Brown provided legal services for a husband and wife (Couple) from about 2002–2006. The Couple did not consider Mr. Brown their attorney after he completed the legal work in or about 2006. Mr. Brown did not have any contact with Couple from about 2006 until about 2021.

Mr. Brown wrote Couple a letter which stated he was reviewing their file and the law had changed which could affect some of the legal services provided by Mr. Brown. Mr. Brown indicated that he would proceed with providing his legal services to Couple, outlining the steps he would take and providing information regarding his hourly rate. The letter also stated Mr. Brown would assume Couple wished him to proceed with legal services unless Couple let him know in writing.

Couple sent an email to Mr. Brown and stated that they took an active interest in their estate, had kept it up to date through the years, were sufficiently covered and did not need his services. Mr. Brown wrote back to Couple, acknowledging their email and stating that Couple had not completed this planning as he had not counseled them to do so, that he needed to confirm some information from the Couple to complete the first step in the process but he was going to continue with the first step anyway unless he heard from the Couple not to do so. Two weeks later, Mr. Brown wrote Couple a letter and enclosed documents he had prepared for their signatures. Mr. Brown

used information from the Couple's 2006 documents to prepare the new documents for the Couple.

The Couple wrote back to Mr. Brown and stated that the information that he had used was outdated and the documents contained incorrect information. The Couple further stated that they did not need anything further and wished to close the correspondence on the matter.

Mr. Brown sent the Couple two billing statements for his legal services. Mr. Brown again wrote the Couple, acknowledging their email and an earlier voicemail that Couple had left for Mr. Brown, both of which asked him not to proceed with any legal services. In the letter, Mr. Brown also stated that he could not represent clients who do not follow his counsel.

The Couple wrote back to Mr. Brown and stated they had received two billings for services for which they did not ask. They further stated that they felt the billings were harassment and asked Mr. Brown to respect their wishes not to correspond with them anymore. Mr. Brown wrote back to Couple and stated that it was his final attempt to contact Couple to get them going in the right direction. Mr. Brown further stated that if the Couple did not proceed with his advice, he intended to send a letter withdrawing as their attorney. Mr. Brown again wrote Couple indicating he was terminating the relationship.



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

801-257-5518

DisciplineInfo@UtahBar.org

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Message from the Chair

by Liberty Stevenson

Greetings! I am Liberty Stevenson, and it is my privilege to serve as this year's Chair of the Paralegal Division of the Utah State Bar. I am honored to represent this amazing Division and all the outstanding paralegals who comprise it. I believe that with hard work, great ideas contributed by everyone, a little imagination and fun, and above all healthy communication, our year will be unforgettable.

I am so fortunate this year to have such a talented and determined group of paralegals serving as board members backing me up because there is no way this year would be successful without their contributions. I am grateful to each of them for their willingness to commit their time to the Paralegal Division Board of Directors. Our board members are volunteers committed to serving our members and the Division, and to do that, in addition to their regular jobs, they sacrifice their time away from their personal lives and families, to ensure our division is thriving. Each of our board members brings their unique style and ideas to the division and together we are building an updated foundation, which we hope future boards will be able to learn from and continue to improve on.

We have already started our year off on a positive note. One of my goals this year for the board members was to make sure they were all in a position on the board that inspires and motivates them in the work they are doing. If our board members are not inspired or challenged, the repercussion is felt throughout the Division by our members. With that in mind, my first order of business was to reorganize the board, taking into consideration individual preferences and interests. Each board member this year is serving in a position where they are happy, excited, thriving, and most importantly – fully immersed and participating. I have already seen the positive impact this reorganization has had on the board, and I am excited to see how this plays out over the year.

Another important goal I have made this year for the Division is to become more involved in the community, offering support by

contributing monetarily but more importantly committing our time and efforts and reaching out to the community to let them know that the Paralegal Division fully supports them in every way possible. We always encourage our Division members to join us in our community service projects, and any member is welcome to do so by simply reaching out to us and expressing their interest. We hope to see our members as excited as we are to participate in our events throughout the year. For our first community service project this year, Alex Vaka'uta and Gretchen Lowe, our Community Service Committee Co-Chairs, reached out to Legal Aid to offer support and assistance for Legal Aid's 80's Gala on September 8, 2023. I am proud to announce that the Paralegal Division purchased a table for the Gala and some of our board members were in attendance to represent the Division. All proceeds for this event enable Legal Aid to provide pro bono legal services to victims of domestic violence, and it is our pleasure to have been able to contribute and participate this year. I know this event is just the first in several that Alex and Gretchen will be organizing over the year and I am excited to see what they have in store for us.

Every year the Paralegal Division strives to bring exciting and new CLE seminars to our members to assist in meeting our annual required CLE hours, and to keep everyone informed of changes and new concepts pertaining to our positions as paralegals. This year as our first CLE, the Division sponsored Session #6 of the Utah State Bar Summer Convention on July 6, 2023, titled *Effectively Working with LPPs and Paralegals in Your Practice*. This session was presented by Leslie Staples,

LIBERTY STEVENSON is a paralegal at Bean Family Law and is a NALA Certified Paralegal. Liberty is the current Chair of the Paralegal Division of the Utah State Bar.



Gretchen Lowe, Kimberly May, and Marci Cook, and was moderated by the Director of Professional Education with the Utah State Bar, Michelle M. Oldroyd, Esq. Everyone involved in this event worked hard and did a fantastic job preparing for and presenting this CLE, and it was our first success of the year. Additionally, the division offers free Brown Bag Lunch CLE's several times throughout the year. We also offer our annual Paralegal Day Luncheon in May and our annual Paralegal CLE Day/Meeting in June. None of these events would be possible without the ambition, creativity, and determination of our Education Committee, co-chaired this year by Kimberly May and Marci Cook. Kym and Marci jumped right in and began preparing for and organizing our first free Brown Bag CLE Lunch, which took place virtually on September 21, 2023, at noon. All Brown Bag Lunch CLE's will take place virtually this year, and our other CLE events we offer will be held both in-person and virtually to accommodate as many of our members as possible. I know Kym and Marci have some great ideas for our events this year, and I have no doubts about their abilities to deliver excellence.

This year Peter Vanderhooft is our Communications (Social Media) Committee Chair, and Jennifer Carver is our Marketing/Publishing Committee Chair. Between these two board members, all our events will be announced on our website, Facebook, and Instagram by Peter, as well as in our newsletters and bar journal articles by Jennifer. Peter and Jennifer commit a great deal of time and effort to make sure all our members have the information they need and are aware of the events we

are participating in. I invite you to follow us on Facebook and Instagram, to visit our website at <https://paralegals.utahbar.org/>, and to keep your eyes out for our newsletters. Everything you will need to know is available through these resources.

If any of our members have any suggestions, or information they feel would be beneficial to the Division as a whole I invite you to please reach out to us through the Division's email address at utahparalegaldivision@gmail.com. If you would like to direct your message to me personally, please just put my name in the subject line, and I will get back to you as soon as possible.

I would like to thank each of our board members for the hard work they are putting into making this year remarkable. Although I have only mentioned a handful of our board members by name in this article, every member is going above and beyond expectations in their positions on the board, and I could not be prouder of the work they are each doing and the contributions they are making. Without each of them, we would not have the success this year is already destined for. It is our sincere hope that our members will be inspired by the work they see us do this year and will want to join us in our different community service projects and CLEs we will be involved in throughout the year. I cannot wait to see you all in action!

If you are working on something exciting that you really care about, you don't have to be pushed. The vision pulls you.

— Steve Jobs



Classified Ads

RATES & DEADLINES

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

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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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Assistant Executive Director
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Executive Assistant
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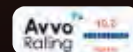
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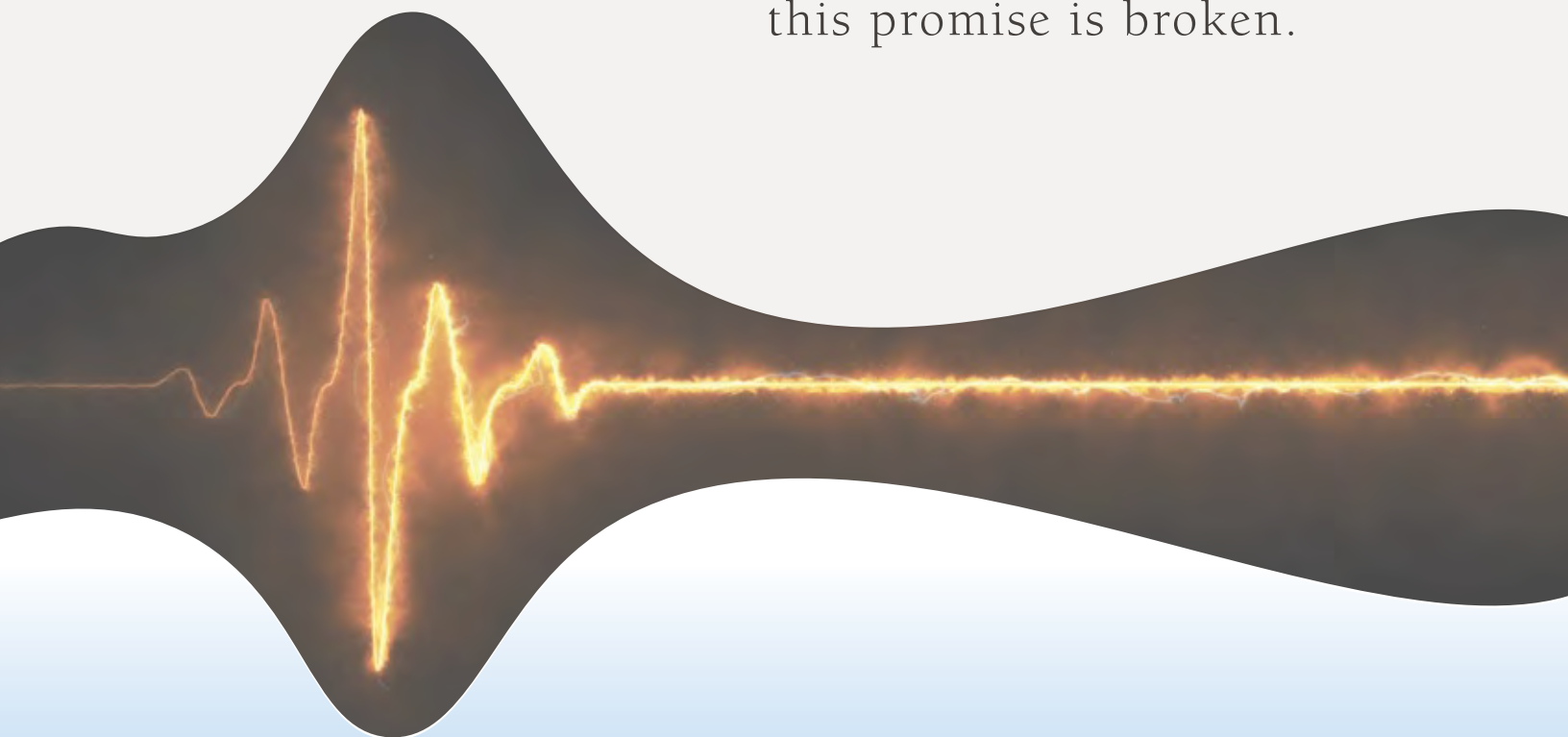
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