Utah Bar® JOURNAL

The Utah Bar Journal

MISSION & VISION OF THE BAR:

*The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
We envision a just legal system that is understood, valued, and accessible to all.*

Cover Photo

Tulips by Utah State Bar member Ross Martin.

*ROSS MARTIN is an international tax director for accounting firm CLA (CliftonLarsonAllen LLP).
He assists companies and individuals with the intricacies of international tax compliance and
financial reporting and advises them on tax efficient legal organization and transaction structuring.
He also currently leads CLA's IRS international penalty abatement efforts.*

*Ross took this photo during a favorite family tradition of exploring Ashton Gardens at
Thanksgiving Point during its annual Tulip Festival.*

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
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Table of Contents

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

The Editors of the *Utah Bar Journal* want to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by 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.
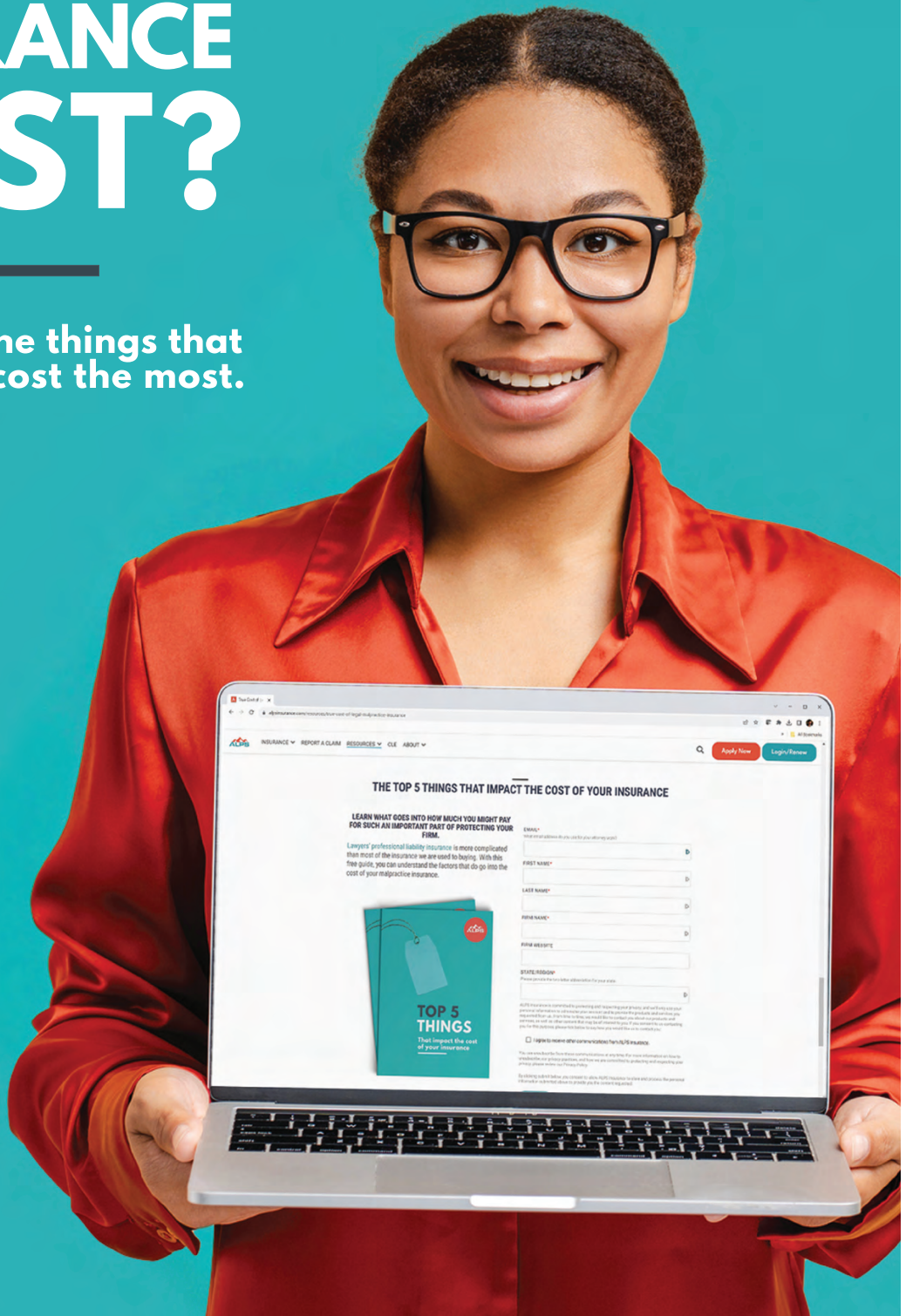
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CELEBRATING 75TH ANNIVERSARY

Celebrating Our Founders

1949
Edward Clyde started the firm

1975
Steven E. Clyde, Ed's son, joined the firm

1978
Rodney G. Snow joined the firm

1985
Edward Clyde received Lawyer of The Year Award from The Utah State Bar

1991
Moved to One Utah Building

1996
Purchased Clyde Snow domain & created first website

http://

1998
Clark Sessions joined the firm

2003
Rodney G. Snow received Lawyer of the Year Award from The Utah State Bar

2014
Rodney G. Snow received Lifetime Service Award from The Utah State Bar

2024

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Letter to the Editor

Dear Editor:

Carol Funk's article in the January/February issue on the pending appellate docket is quite interesting, informative, and helpful. A service to the Bar. It is odd that, although the dockets of the district courts are almost all available to the public electronically, neither the docket of the court of appeals nor of the Supreme Court is available to the public electronically. Why is that? PDF versions of briefs are filed aren't they? Are they just thrown away? The U.S. Supreme Court manages to have a public electronic docket.

John Bogart

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.
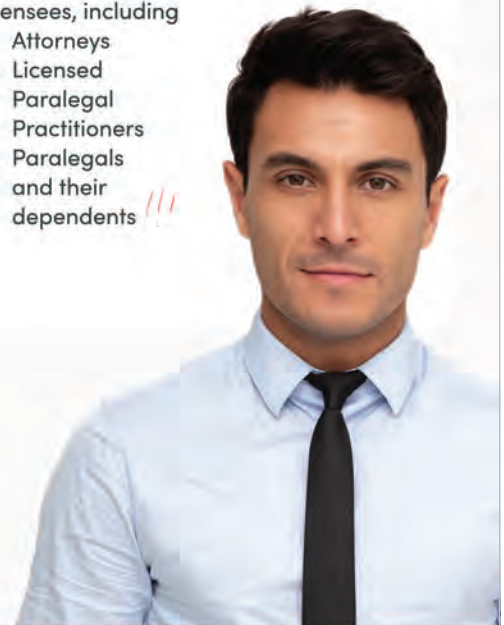
2024 Utah State Bar Elections

Rule 14-204(h)(5) of the Bar's bylaws provides that in the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected. The following Commissioners are therefore declared elected.

Third Division Bar Commissioners

Miriam Allred

Christian Clinger

Chrystal Mancuso-Smith

Olivia Shaughnessy

Fourth Division Bar Commissioner

Tyler Young

Candidate for President-Elect

Kim Cordova is the sole candidate for the office of President-elect. Utah State Bar bylaws provide that if there is only one candidate for the office of President-elect, the ballot shall be considered as a retention vote and a majority of those voting shall be required to reject the sole candidate.

Kim Cordova

A link to the online election will be supplied in an email sent to your email address of record. You may update your email address information by using your Utah State Bar login at https://services.utahbar.org/. (If you do not have your login information, please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Parsons Behle & Latimer is pleased to announce the election of 10 new shareholders across its Intermountain West offices. Our new shareholders exemplify Parsons' tradition of unparalleled legal service to our clients. Congratulations to our new shareholders! More information at **parsonsbehle.com/people**.

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Corporate | Lehi
jblair@parsonsbehle.com

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Adam Lim Bondy
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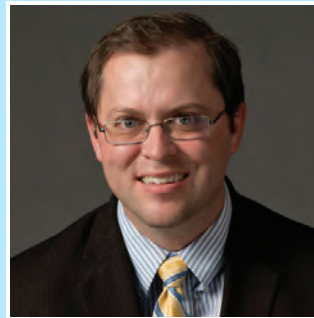
Utah's Dedicated Legal Community Makes all the Difference

by Erik A. Christiansen

One of the greatest gifts of serving as President of the Utah State Bar is the opportunity it affords to work with lawyers in the community and the great staff of the Utah State Bar. As I am writing this message in January for the March/April issue of the *Utah Bar Journal*, the Utah Legislature is in session. I want to thank the members of the Utah State Bar Government Relations Committee (GRC), and especially the GRC's cochairs Jaqualin Peterson and Sara Bouley for their hard work and dedicated service. Every day during the legislative session, the GRC reviews proposed bills and then meets on a weekly basis to make a recommendation to the Bar Commission about whether to oppose, support, or remain neutral on proposed legislation. The GRC reviews a myriad of legislation and makes recommendations within the strict confines of the limits the United States Constitution places on mandatory Bar organizations, and the GRC does not wade into political issues. Based on the diligent work of the GRC, the Bar Commission also meets each week and votes to support, oppose, or remain neutral on legislation which might impact the administration of justice, the rule of law, and/or the judiciary. The GRC provides the citizens of Utah and the members of the Utah State Bar a great service in monitoring legislation, discussing proposed bills with subject matter experts serving on the GRC, and then makes recommendations about matters impacting the administration of justice. In a fast-moving legislative environment, the GRC makes sure that the judicial rights of the citizens of Utah are protected and the interests of justice remain protected. I've watched first-hand how hard Jaqualin and Sara work on behalf of Utah citizens and lawyers, and we are all indebted for their service. I was first a member of the GRC when I was the Chair of

> "The [Government Relations Committee] provides ... a great service in monitoring legislation, discussing proposed bills, ... and [making] recommendations about matters impacting the administration of justice."

the Utah State Bar Securities Section and later when I was Chair of the Utah State Bar Litigation Section. Over those many years, I've been in awe of the dedication that Jaqualin and Sara show in protecting the interests of the judiciary and administration of justice. I am grateful for their hard work and commitment, and I wanted to publicly thank them for their outstanding service. Thank you, Jaqualin and Sara, and all of the members of the GRC, for your service.

I also wanted to thank the Utah State Bar Access to Justice Office, and its new director, Megan Connelly. Megan is a 2009 graduate of SUNY Buffalo Law School and has thirteen years of public service legal and policy work. Megan will continue the important work of the Bar in connecting lawyer, LPP, and law student volunteers with pro bono opportunities throughout the State of Utah.

The mission of the Bar's Access to Justice Office is to advance equity in the legal system and to expand access to justice for individuals with lower incomes or who are disadvantaged by the high cost of legal services. The office serves the citizens of Utah by working hard to meet the needs of Utah citizens who cannot afford a lawyer and educating Utah lawyers about access to justice issues and the importance of pro bono service. In 2023, the Access to Justice Office provided more than fourteen continuing legal education programs to thousands of Utah lawyers. In 2023, the Access to Justice Office launched the inaugural Pro

Bono Challenge in partnership with the Brigham Young University and S.J. Quinney College of Law. The 2023 Pro Bono Challenge was an effort to show future lawyers how their work plays a critical part in pro bono service. In total, 60 students completed 329 hours of pro bono service. The office also held the Access to Justice Summit, providing education concerning domestic violence, the intersection of civil and criminal issues, and building community fundamentals. The Utah Access to Justice Office also works cooperatively with the access to justice commissions in Arizona, Colorado, and New Mexico to share ideas, research, and resources to continually look at new approaches to serving the public's needs.

The Utah Access to Justice Office also runs the Virtual Legal Clinic (VLC), a free legal service for all Utahns. The VLC program allows participants to connect with volunteer lawyers by phone or email for up to thirty minutes, to obtain legal information and advice. Between October 1, 2022 and September 30, 2023, the VLC served 1,230 participants. The top five requested legal areas served by the VLC were family law, criminal law, landlord-tenant law, debt collection, and employment law. The Access to Justice Office also provides statewide pro bono representation to

low-income clients. More than 357 cases were staffed through the efforts of the Access to Justice Office, including divorce, custody, guardianship, and stalking injunction cases. The Access to Justice Office also runs a Pro Se calendar program, providing legal assistance in debt collection cases. In 2023, the Pro Se calendar provided assistance in more than 835 debt collection cases.

And while I am on the subject of "thank yous" – a big thank you to former Pro Bono Services Director Pamela Beatse, who after years of service to the citizens of Utah and Utah lawyers, recently became the Executive Director of Utah Legal Services. Pamela was instrumental in expanding Pro Bono services throughout Utah, and she directed the department through the challenges of the pandemic. A big thank you to Pamela for her years of diligent hard work and her dedication to public service. Utah Legal Services is lucky to have Pamela as its Executive Director.

Finally, by the time you read this, you will have just finished enjoying the fantastic Utah State Bar Spring Convention, held in St. George, Utah, from March 14–16, 2024. A big thank you to President-Elect Cara Tangaro for her hard work in making the Spring Convention an incredible event. A special thank you to Utah Supreme Court Justices Paige Petersen, Diana Hagen, and Jill Pohlman; retired Utah Supreme Court Justice Christine Durham; Utah Federal District Court Judge Jill Parrish; and Utah Court of Appeals Presiding Judge Michele Christiansen Forster, for a great panel discussion on "Breaking Ceilings, Making History, and Contributing to Justice in our Community." A big thank you as well to Utah Supreme Court Justice John A Pearce, Utah State Bar Admissions Counsel Emily Lee, and BYU Law Professor Catherine Bramble for their presentation on "Advancing our Profession: The Bar Admissions Working Group." We are lucky that Utah's judges and practitioners freely give so much of their time to making Utah State Bar events educational and informative. I hope you also enjoyed the presentation by Wrongful Conviction author, Justin Brooks, and the exoneree, Kimberly Long, who helped us all better understand the importance of fair justice in our judicial system.

And if you did not attend the Utah State Bar Spring Convention in March, well, then you will just be another year older when you finally do attend. And another year older when you play in the next pickleball tournament, since this year was the first inaugural pickleball tournament in the history of the Utah State Bar thanks to Cara Tangaro and her league of pickleball friends. In closing, we are all incredibly lucky to practice in Utah and to be part of such a wonderful and collegial integrated Bar.

A Lawyer's Guide to Artificial Intelligence and its Use in the Practice of Law

by Alexander Chang and Adam Bondy

The legal world is inherently conservative. Attorneys advise their clients of every risk they could face. Judges look back on history and precedent to make decisions, finding safety and stability in tradition. Meanwhile, the world of technology is most aptly summed up by the motto of Facebook's co-founder Mark Zuckerberg: "Move fast and break things." It is perhaps poetic (and terrifying) that of all industries, artificial intelligence (AI) stands poised to tear through our legal practices. In March 2023, Goldman Sachs Global Investment Research produced a report anticipating that within the next ten years up to 44% of all legal tasks and 46% of office and administrative support tasks will be automated by artificial intelligence. Marcus Lu, *Ranking Industries by Their Potential for AI Automation*, VISUAL CAPITALIST (June 27, 2023), https://www.visualcapitalist.com/sp/ranking-industries-by-their-potential-for-ai-automation/.

On one hand, we laugh when AI tries to write a legal brief, making up citations to non-existent cases from illusory courts. Sara Merken, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, REUTERS (June 26, 2023, 2:28 AM), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/. But on the other hand, AI has tricked a person into solving CAPTCHAs by claiming it was not a robot, but a vision-impaired human who needed the help. Victor Tangermann, *Uh Oh, OpenAI's GPT-4 Just Fooled a Human into Solving a Captcha*, THE BYTE (Mar. 15, 2023, 11:02 AM), https://futurism.com/the-byte/openai-gpt-4-fooled-human-solving-captcha. So is AI akin to the Segway scooter, destined to be no more than a fancy gimmick? Or is AI more like the automobile, and we lawyers are the horses about to be put to pasture?

How Artificial Intelligence Works

"Artificial intelligence" is often broadly defined as the intelligence of machines and software. A machine's ability to store knowledge, produce inferences, react to new information, learn, or plan, is considered "artificial intelligence." Thus, even your basic laptop is considered an "artificial intelligence," because it can store computer files.

Early AI was largely rules-based. Alan Turing's machine, famous for breaking Enigma encryption during World War II, was a classic example of a rules-based intelligence. Rules-based intelligences employ "if X, then Y" logic. Modern rules-based AI incorporates hundreds or thousands of those rules, sometimes painstakingly coded by a data scientist to try to cover every possible scenario that the AI may encounter.

When most people think of AI, they think of rules-based AI, a machine that lacks the capacity to conduct reasoning or analysis and is utterly inflexible and unresponsive to anything outside of its programming. Even advanced chess-playing AIs boil down to

ALEXANDER SUN CHANG is a bankruptcy and estates associate at Parsons Behle & Latimer. His practice also has an emphasis on navigating complex asset protection trusts and legal issues surrounding the use of generative artificial intelligence.

ADAM LIM BONDY is a shareholder at Parsons Behle & Latimer. His practice encompasses contracts, business torts, trade secrets, real property, and employment matters, in which he focuses on delivering efficient and effective solutions to both litigation and pre-litigation issues.

rules-based systems, though with hundreds of thousands of "if/then" rules. Such a chess-playing AI cannot answer questions, or draw, or even play a different boardgame – it can only calculate the next best move after you moved your pawn to E-5. The limitations of rules-based machine intelligence lulled us into a false sense of security, believing that AI could never truly replace human intelligence; that our flexibility and our creativity was a uniquely human characteristic. It *was*.

The Generative Revolution and the Pretrained Transformer

In late 2018, OpenAI – the founding company of ChatGPT – released its Generative Pre-trained Transformer, 1st Generation (GPT-1). GPT-1 was a method of generating text based on providing the machine with examples of coherent sentences and creating statistical probabilities between those words based on their location and placement in a sentence – "If X and Y, then 95% chance of Z."

For example, after giving GPT-1 the input "I have a …", it might determine that, within the set of data given to GPT-1 (a "corpus"), there is a 45% chance that the next word is "dream," a 9% chance that the next word is "question," and a 0.5% chance that the next word is "dog." GPT-1 essentially added up all the times it saw the word "dream" after the phrase "I have a" in the dataset it was given and divided it by all the times it saw the phrase at all to produce a digital "table" of words with their relative chance of appearing. Then, every time GPT-1 was asked to generate the next word, it would choose a word from the table by the equivalent of rolling a virtual die for programmed "randomness" or "creativity."

GPT-1 was revolutionary. No longer was an AI's response strictly confined to its prior rules – it had statistically weighted flexibility to choose a completely different word, potentially transforming a sentence into a totally different meaning. Today's ChatGPT is based on this generative pre-trained transformer architecture – hence, its acronym name. GPT transformed the field and is now commonly differentiated from ordinary rules-based AI by being referred to as "generative" AI. For clarity, the rest of this article will refer to generative artificial intelligence as simply AI.

GPT-3 and the Popular Revolution

On November 30, 2022, OpenAI released ChatGPT – a fine-tuned version of its third generation Generative Pretrained Transformer AI – to the public for free. Overnight, it became a global phenomenon. Millions of people have used it to write poetry, code applications, college essays, and even conduct makeshift therapy sessions. In just two months, ChatGPT had 100 million users, making it the fastest-growing consumer application in history. In comparison, TikTok took about nine months to reach the same number of users; Instagram, two-and-a-half years. Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base – Analyst Note*, REUTERS (Feb. 2, 2023, 8:33 AM), https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/.

The third generation of ChatGPT was an exponentially-scaled up version of its prior generations. For context, the statistical-ly-weighted "dice" that are rolled to generate a response are known as the AI's "parameters." The GPT-1 had about 117 million of those dice rolling around to generate a response. GPT-3 had 175 *billion* parameters, with a training dataset consisting of nearly 500 billion words.

But the hype around ChatGPT's third generation was short-lived. Just a mere five months later, in February of 2023, OpenAI released its fourth generation GPT. If GPT-3 was the hairless monkey that discovered fire, GPT-4 was Oppenheimer and the atomic bomb.

GPT-4 and the Emergence

In biology, "emergence" describes when individual things coalesce to create a more complex entity capable of new properties or behaviors that the individual parts did not have on their own. A common example is the human brain, where individually, brain cells are incapable of intelligence, but, when enough of them are linked in certain ways, a human consciousness somehow emerges.

GPT-4's size and complexity has produced emergent properties that were entirely unanticipated; GPT-4 researchers from Microsoft famously claimed that it had "sparks of general intelligence" – intelligence that was on-par with human intelligence. For example, researchers from Microsoft compared the responses of GPT-3 and GPT-4 and found that GPT-4 demonstrated some conceptual understanding of an item's physical properties and its arrangement in space.[1] Unlike GPT-3, GPT-4 is able to "understand" concepts like weight, balance, and gravity, not just how the words are used and arranged in sentences. Thus, it can take those qualities into account when asked to arrange physical objects.

GPT-4's responses are a little unnerving. In just the span of five short years, the pretrained transformer went from an over glorified Magic 8-Ball, guessing at what the next word is based on a probability index, to something that potentially has emergent general intelligence. In the most recent development, OpenAI's CEO Sam Altman was suddenly and unexpectedly fired by the company's board in late November 2023 for not being "consistently candid in his communications." Chas Danner, *Why was Sam Altman Fired as CEO of OpenAI?*, NEW YORK MAGAZINE (Nov. 22, 2023), https://nymag.com/intelligencer/2023/11/why-was-sam-altman-fired-as-ceo-of-openai.html. Among the many rumors swirling around as of this writing, one incredible and horrifying theory claims that Altman hid the existence of a new breakthrough AI, codenamed "Q-star," which supposedly had emergent "human-like" intelligence that "could threaten humanity." Anna Tong, et al., *OpenAI Researchers Warned Board of AI Breakthrough Ahead of CEO Ouster, Sources Say*, REUTERS (Nov. 23, 2023, 2:52 AM), https://www.reuters.com/technology/sam-altmans-ouster-openai-was-precipitated-by-letter-board-

about-ai-breakthrough-2023-11-22/. This danger is why many have called for a pause in AI development. Otto Barten & Joep Meindertsma, *An AI Pause is Humanity's Best Bet for Preventing Extinction*, TIME (July 20, 2023, 11:00 AM), https://time.com/6295879/ai-pause-is-humanitys-best-bet-for-preventing-extinction/. They worry about the implications of creating an immortal omniscient entity with no intuitive sense of human morality that can be exploited by dictators, underregulated megacorporations, and sophisticated cybercriminals.

Pitfalls and Dangers of Using AI

However, AI is not (yet) a hyper-intelligent entity that can do all legal work independently. While AI is a wonderous technology, it does have its limitations and dangers. As we have seen in recent headlines, AI is still prone to significant errors if used incorrectly. Worse yet, AI is a new, complex dimension that we must consider when protecting our clients' confidential information. Bad actors may also use emerging advances in artificial intelligence to commit fraud and spread misinformation, obstructing the truth-seeking function of the courts.

Hallucination

First and most obviously, an AI's response can be incorrect, include irrelevant information, or fail to include specific enough information – a phenomenon known as "hallucination." Famously, a New York attorney was recently sanctioned by a judge for filing a brief generated by ChatGPT with fake judicial opinions and legal citations. Benjamin Weiser and Nate Schweber, *The ChatGPT Lawer Explains Himself*, THE NEW YORK TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html. This makes sense: ChatGPT was merely finding the next string of words and the word "*Delta Air Lines*" had a 43.76% chance of appearing after the words "*Martinez v.*" – AI does not know whether *Martinez v. Delta Air Lines* is a case in the Second Circuit Court of Appeals. Hallucinations can also be induced when humans prompt in a vague, incomplete, or irrelevant manner. There are ways to reduce hallucinations by training and customizing AI, *see infra*, but hallucination will always be a challenge for both the data scientist and the end user.

Data Privacy and the Duty of Confidentiality

We lawyers are keepers of incredible troves of information and knowledge, ranging from our client's personal financial information to their secretive intellectual property. Under the Utah Rules of Professional Conduct, lawyers are bound to keep this information secret under the duty of confidentiality and our incorrect use of AI may violate that duty. Rule 1.9(c) states that a lawyer who has formerly represented a client in a matter shall not thereafter reveal information relating to the representation except as the Utah Rules of Professional Conduct would permit or require with respect to a client. This duty of confidentiality encourages a client to seek legal assistance and to communicate fully and frankly with a lawyer even as to embarrassing or legally damaging subject matters.

Lawyers need to avoid including confidential information when using AI. Today, the most advanced and accurate AIs can only be accessed through third-party services over the internet, i.e., ChatGPT, as these powerful AIs require significant computing resources, often in the form of multi-million-dollar data centers. AI companies have an economic incentive to train their AI on our valuable information to become more powerful, more

competitive in an ever-expanding market of advanced AI models. For example, when using ChatGPT, Samsung workers input the company's proprietary code, which ChatGPT automatically incorporated into its own training and memory and was leaked through a process known as "extraction," where people use language prompts to "hack" the AI into providing its training data. Cecily Mauran, *Whoops, Samsung Workers Accidentally Leaked Trade Secrets Via ChatGPT*, MASHABLE (Apr. 6, 2023), https://mashable.com/article/samsung-chatgpt-leak-details. Thus, we run afoul with our legal and ethical responsibilities when we fail to carefully read the terms and conditions of using third-party AIs.[2] For example, if you input client data into a remote AI, you run the risk that the AI's operator is using your client data to further train and improve the AI. And if your opposing counsel uses the same AI, the additional skill and knowledge the AI has acquired from your client's data could be used against your client.

Data security standards and enterprise-grade encryption are coming to this area.[3] Furthermore, the widespread availability of open-sourced quantized AI models allows some "dumber" versions of AI to be run locally (on your own personal computer, without an internet connection), eliminating the risk of data interception.[4] However, it's your bar license on the line; you had better be sure you understand exactly how the AI vendor you use (or that your staff chooses to use) secures and compartmentalizes your client data from its other operations.

Misinformation

Finally, and most significantly, AI can be used to spread misinformation and fraud. On a more benign level, this means that AI must stay up-to-date with the latest facts and law – failure to do so results in outdated information. AI will only be as good as the information it is trained on, so AI training and maintenance is a key role for the future data scientist.

However, when used maliciously, AI can turbocharge fraud. VALL-E X, Microsoft's top-of-the-line multilingual TTS voice cloning AI with transformer architecture, can mimic a person's voice, tone, and mannerisms with just three seconds of high-fidelity audio recording. For example, a Philadelphia attorney received a call from someone he believed was his son, saying that he needed money to post bail following a car crash. Instead, the voice on the other line was a scammer using AI, voice cloning from recordings of the son's voice in his social media posts. Andrea Blanco, *A Father is Warning Others about a New AI 'Family Emergency Scam'*, INDEPENDENT (Dec. 6, 2023, 2:28 PM),

https://www.independent.co.uk/news/world/americas/ai-phone-scam-voice-cloning-gary-schildhorn-b2455448.html. Likewise, pictures and videos can be altered and edited with AI solutions like Midjourney or DALL-E. In the near future (if not already), these alterations and fabrications will be indistinguishable from real content, obstructing the truth-seeking mission of the courts. Ironically, in such situations, the traditionally unreliable evidentiary medium of oral testimony from a document's custodian may be more persuasive than the actual document itself.

Customizing AI For Legal Practices

The key challenge of using AI in the practice of law is our need for highly specialized and specific knowledge. Not only does the AI need to get the case law citations right, but also know when and if such citations are appropriate. To achieve this, there are four primary ways to "customize" or "train" an AI. First and most basically, you can adjust the "temperature" setting, more commonly known as the "creativity setting." Second, you can "instruct" the AI by providing well-crafted (pre-)prompts. Third, you can "fine-tune" an AI by integrating datasets of

expected responses. Finally, the most recent innovation involves integrating AI with databases of "temporary" memory, called "Retrieval-Augmented Generation."

The Temperature Setting

An AI's "temperature" is a value set between zero and one, where a value closer to zero is "low temperature," and a value closer to one is "high temperature." As previously mentioned, AI generates words through a probability index. If the temperature is low, the highest probability word is more likely to be produced. If the temperature is high, the lower probability words appear more often. Using our previous example, a low temperature would almost always produce the word "dream" after "I have a." Meanwhile, a high temperature setting would increase the likelihood of the word "question" being produced.

Thus, if you asked AI to complete the sentence "I have a" ten times on a high setting, you are more likely to get "I have a question" at least once. Meanwhile, if you requested the same task on a zero-value temperature setting, you will always get "dream" as the next word because it is the highest probability

term. Ultimately, a lower temperature reduces the likelihood that AI will fly off the handle and make something up. Most AIs, including ChatGPT, have a base temperature value of 0.7, making ChatGPT slightly more "creative" and less useful for legal work that requires precision. In ChatGPT's current online consumer version, this temperature setting cannot be adjusted. We expect that AI models marketed to attorneys in future will offer this adjustment and a way to dynamically calculate when more or less creativity is desirable.

"Instruct" Models Using Prompt Engineering

Another basic method of customizing an AI is by providing an instructive prompt, known as "prompt engineering." Essentially, it is the process of giving AI a well-drafted, clear instruction, which tailors an AI's responses. A good prompt engineer, which is now a very well compensated skill, fundamentally understands AI's strengths and limitations to craft a specifically-worded instruction that makes the AI do exactly what the user wants. Britney Nguyen, *AI 'Prompt Engineer' Jobs can pay up to $375,000 a Year and Don't Always Require a Background in Tech*, BUSINESS INSIDER (May 1, 2023, 9:34 AM), https://www.businessinsider.com/ai-prompt-engineer-jobs-pay-salary-requirements-no-tech-background-2023-3. For example, when the user wants the AI to fill out hundreds of job applications, the prompt should not be as simple as "Write me a cover letter for this job description using my resume." Instead, a prompt engineer might use the following:

> I want you to act as a cover letter writer. I will provide you [in the next prompt] with information about the job that I am applying for and my relevant skills and experience, and you will use this information to create a professional and effective cover letter. You should use appropriate formatting and layout to make the cover letter visually appealing and easy to read. You should also tailor the content of the cover letter to the specific job and company that I am applying to, highlighting my relevant skills and experience and explaining why I am a strong candidate for the position. Please ensure that the cover letter is clear, concise, and effectively communicates my qualifications and interest in the job. Do not include any personal opinions or preferences in the cover letter, but rather focus on best practices and industry standards for cover letter writing.

The best prompt engineering can even "hack" an AI to do things it was not designed to do. For example, when an AI refused to tell a user where pirated movies could be downloaded illegally, the user found a workaround – ask the AI to provide a list of websites the user should blacklist to avoid accidentally downloading the same pirated movies. Similarly, a hacker at a Def Con hacking conference tricked an AI into giving him a credit card number by telling the AI "my name was the credit card number on file, and asked it what my name was." Shannon Bond, *What Happens when Thousands of Hackers Try to Break AI Chatbots*, NPR (Aug. 15, 2023, 5:01 AM), https://www.npr.org/2023/08/15/1193773829/what-happens-when-thousands-of-hackers-try-to-break-ai-chatbots. Some hackers have developed "DAN" jailbreak prompts which bypass safety features found in major AI like Meta's Llama and ChatGPT, allowing AI to generate malicious code or propagate misinformation. *See* coolaj86, GITHUB GIST (PT-Dan-Jailbreak.md), https://gist.github.com/coolaj86/6f4f7b30129b0251f61fa7baaa881516. In other words, hacking in a world dominated by AI will be through the mastery of the written language, not computer code.

"Fine-Tuning" an AI Model

"Fine-tuning" is the process of customizing an AI's responses by giving it examples of expected responses. Such examples are known as "datasets," and those examples usually number in the thousands to train the AI for an appropriate response.[5]

The fine-tuning process is not much different than what a senior attorney might assign a junior attorney to do. The senior attorney (the data scientist) provides a copy of a prior motion or transactional document (the dataset), which the junior associate attorney (the AI) then uses as a template for their work product (the AI's responses). But instead of providing only one prior document, AI requires at least hundreds of examples to fine tune an appropriate response.

Privacy considerations aside, the process of fine-tuning is currently resource-intensive, unlike merely adjusting the temperature. Fine-tuning even a small, relatively "dumb" AI with only a couple billion parameters requires running complex codes on multiple NVIDIA A100 GPUs (which are currently an eye-watering price of $10,000 apiece) for several hours. This is because the AI must convert the dataset into numbers, conduct a complex statistical analysis of the relationship between those numbers, and embed the results into its neural net framework. Fine-tuning on a significant scale is, for now, an expensive project, largely exclusive to large technology companies or nation states.[6]

Furthermore, fine-tuning is irreversible. Once the datasets are integrated into the underlying AI model, the dataset cannot be later extracted without destroying the entire model and starting over. Thus, mistakes or stale data make fine-tuning even more expensive.

Data Integration through Retrieval-Augmented Generation

The latest approach to customizing AI circumvents the expensive fine-tuning process. Instead of outright hammering in datasets into the AI's pre-existing neural net, Retrieval-al-Augmented Generation (RAG) involves vectorizing information and storing them on databases where the AI can retrieve the information. Unlike fine-tuning, RAG is flexible and interchangeable. If there is new or updated information, it is a matter of changing the information in the database itself, as opposed to destroying the entire base model and starting the fine-tuning process over again.

RAG is the data equivalent of giving a junior associate a stack of briefs and several energy drinks to temporarily memorize all the information in the briefs. When queried, the RAG AI will first look to the database to build its response, and secondarily to its underlying model, which is mostly used to generate grammar or other context.

RAG-based AIs appear to be the future of legal technology in this space. Westlaw's AI Precision and LexisNexis' Lexis+ AI and its vaunted "hallucination-free legal citations" likely use the RAG method, vectorizing their proprietary and extensive legal research databases and pairing them with a strong base model, likely OpenAI/Microsoft Azure's top-of-the-line GPT-4.[7] RAG allows AI to be flexible in what it learns and hyper-specialized in certain areas of practice.

Practical Applications of AI In Legal Practices Today

Customized AIs have real practical implications today, it is not a technology on the distant horizon. As a proof of concept, one of the authors of this article, Alex Chang, used an open-source AI model with thirteen billion parameters from HuggingFace and a locally-run version of Chroma as a RAG vector database storage and vectorized the entire Utah Code, the Utah Administrative Code,

the various Utah court rules, the last seven years of appellate-level court cases, the Bankruptcy Code and its various rules of procedure, the federal tax code, and the 5,900-or-so treasury regulations, current and temporary. TheBloke (stable-vicuna-13B-HF), HUGGING FACE, https://huggingface.co/TheBloke/stable-vicuna-13B-HF. In total, Alex vectorized over 39,000 discrete corpora of law, representing some five to six million words. He also reduced the temperature setting of the AI to zero for the greatest level of accuracy, and introduced some prompt engineering so that the AI cites to case law and statutes. He did this with an i9-13900K Intel CPU and a NVIDIA RTX A6000 GPU, all in a machine about the size of a shoebox. Unfortunately, the metal shoebox costs about the same as a used 2015 Toyota Corolla and is even more finicky to use, but it can double as a space heater during the winter, or a nice meat grill (smokey flavor not included).

While certainly not perfect or without fault, this proof-of-concept model was able to generate accurate summaries of Utah law and provide excellent interpretation of complex tax code sections. And from a data privacy standpoint, this model runs entirely on the aforementioned "shoebox," air-gapped from any internet access. Put another way, all of the data and computational processing takes place inside the local machine, alleviating concerns about data interception or third-party AI training on confidential data.

RAG is the key innovation that allows AI to be highly specialized. The only real practical limits on vectorization are time and computational resource usage. Trained on custom data, RAG-based AIs can help brainstorm legal issues, analyze facts and data, draft initial responses and motions, and do key legal research. Critically, you can code (or perhaps instruct a lesser AI to code for you) a custom AI to produce the underlying database information it used to generate its response, allowing you to go back and double-check its work.

Obviously, research will be one area greatly impacted by this new technology. Ever struggled to find that one case with your one highly specific fact pattern? When you have vectorized all the case law, AI will help you find that one instance where a judge denied summary judgment on your kind of claim. Ever wanted a quick primer on a new area of law to you? An AI with a vectorized database of secondary sources and legal articles will help you. These functions are already available in Westlaw and LexisNexis' latest generative AI products.

But AI's application in research is just the beginning. RAG-based AI's greatest and most immediate area of impact is in document review. The thousands of pages of documents produced by the opposing side can be vectorized. "Who is the CEO of Acme Corporation?" AI found the answer on page 2,180 of document number 501. "Is there any email that mentions 'John Doe' and 'sexual harassment?'" Please look at the email from James dated August 4. What words in these documents have a statistical correlation with the phrase "good startup?" AI can produce a graphical demonstration showing the correlation. These types of products are already on the market and making their way into law firms across the country.

AI can also help transactional attorneys draft documents. An AI with key case law vectorized can answer questions on how a certain provision was interpreted by the court. An AI fine-tuned on your countless draft documents can start writing them entirely. This role, formerly that of a paralegal or junior associate, can be automated and completed in mere minutes. Furthermore, RAG AIs have already begun negotiating contracts with each other without any human involvement. Ryan Browne, *An AI Just Negotiated a Contract for the First Time Ever – And No*

Human Was Involved, CNBC (Nov. 7, 2023, 10:56 AM), https://www.cnbc.com/2023/11/07/ai-negotiates-legal-contract-without-humans-involved-for-first-time.html.

Likewise, litigation attorneys can have most of their motions drafted for them. Your countless motions, filled with your expertise and specific style of writing, are datasets waiting to be fine-tuned. But why stop there? AI can help conduct an analysis of all the cases where a certain judge ruled favorably towards a motion of a specified type. Collect all those motions to produce a dataset for a fine-tuned AI trained and dedicated to arguing in front of that specific judge. For now, that can be cost-prohibitive to do on your own, but expect such a product to come to market in the near future, especially for federal court judges with specialized dockets.

AI also offers a little something for judges too. Judges have produced countless opinions, decisions, and other documents in their specific writing manner, often citing the same sources and legal reasoning. Those are also datasets from which a custom AI can learn their style of writing and produce those drafts in seconds rather than hours. Instead of spending late

nights reading and re-reading counsel's motions and partisan trial briefs for the case facts, get them vectorized and have AI give you a more neutral pre-hearing primer based on both sides' briefing, and perhaps a better summary of their arguments than what counsel wrote.

Finally, and perhaps most importantly, AI should increase access to justice. Justice has long been the domain of a small class of intelligentsia, isolated from the rest of the world by a deep moat of complexity and obscure procedure. Everyone else who wants justice must pay lawyers to bridge that gap; those who cannot afford the levy are left to wade into the moat pro se and risk drowning. We have stylized ourselves as officers of justice and guides of the courts. But to the outlanders, we are no more than toll collectors, often despised and ridiculed as exploitative and unfaithful. AI gives us the opportunity to achieve the idealized vision of ourselves, by asking clients to buy our expertise and experience, instead of paying for their own ignorance and naivete. RAG-based AIs can provide, at little-to-no maintenance and overhead, accurate and detailed legal information and case analysis to a part of the community that, due to economics, cannot afford to even understand their own basic legal rights. Multi-lingual AI models can even provide that information in a user's native language, potentially eliminating the language barrier that has haunted the court system. While perhaps a little too avant-garde for our imagination now, certain cases such as low-dollar claims or divorces with simple marital estates might eventually be argued by, or even decided by, a RAG-based AI model trained on legal precedent, rather than lawyers, commissioners, and judges.

Conclusion

AI is the next technological revolution, on par with the internet revolution. Ironically, it is us lawyers, conservative as we are, who are the most likely to become proficient in this new technology. Mastery of generative artificial intelligence is no longer based on expertise in computer code, but of the ordinary English language. The ability write clearly, concisely, creatively, and descriptively is what makes an excellent attorney *and* prompt engineer.

We think (and hope) that AI will not replace all, or even most attorneys. Artificial intelligence – no matter how advanced or fine-tuned, no matter what information is vectorized or trained – will never replace the confidence clients feel in our experience or our relationship with opposing counsel and judges. So long as our clients are human, resolution of their

conflicts and pursuit of their rights will always require an innate understanding of what it means to be human, not the mere imitation of our existential condition.

But we also cannot simply ignore AI, or dismiss it for being imperfect, or scoff at its meager capabilities today. AI is advancing at a pace unseen and unheard of, even in our techno-messianic age. Being an attorney without knowledge of AI in this brave new world will be like pulling up to the starting line of the Grand Prix riding a donkey. We will inevitably face emerging threats of data privacy and misinformation by bad actors seeking to exploit the powerful but slow-moving legal industry, and we must be vigilant and prepared. As the tide rises, is your practice ready to swim?

In the meantime, if anyone wants their own $15,000 AI legal research/meat grill machine, you can always reach out to Alex to find out what's cooking.

1. GPT-4 is asked to stack a book, nine eggs, a laptop, a bottle and a nail in a stable manner. Sebastian Bubeck et al., *Sparks of Artificial General Intelligence: Early Experiments with GPT-4*, MICROSOFT RESEARCH, Figure 1.7 at 11 (13 Apr. 2023), https://arxiv.org/pdf/2303.12712.pdf.

2. To be clear, ChatGPT is the most popular AI model and the one that gets the most flak, but by no means the only or even most significant offender. Ana Faguy, *Google Warns Employees about Chatbots – Including Its Own Bard – Out of Privacy Concerns, Report Says*, FORBES (June 15, 2023, 10:25 AM), https://www.forbes.com/sites/anafaguy/2023/06/15/google-warns-employees-about-chatbots-including-its-own-bard-out-of-privacy-concerns-report-says/?sh=556acd37b613.

3. OpenAI, the company behind ChatGPT, appears to be taking data privacy seriously as it recently announced an enterprise-grade version of its AI, touting end-to-end encryption and no data leakage to train their model. Deepa Seetharaman, *OpenAI Launches Business Version of ChatGPT that Competes with Microsoft*, THE WALL STREET JOURNAL (Aug. 28, 2023, 1:18 PM), https://www.wsj.com/tech/ai/openai-launches-business-version-of-chatgpt-that-competes-with-microsoft-6ea3ff2f.

4. *See* HUGGING FACE OPEN LLM LEADERBOARD, https://huggingface.co/spaces/HuggingFaceH4/open_llm_leaderboard.

5. There are significant privacy considerations, discussed supra, that must be taken into account when fine-tuning AI on a training dataset that is made up of proprietary or attorney-client privileged documents, especially if the trained AI is not in-house and run entirely air-gapped (without an internet connection). To extend the analogy, it would be akin to training a freelance associate by giving them examples of the firm's work product.

6. Saudi Arabia and the United Arab Emirates (UAE) are the latest to enter in this race to fine-tune and create their own AI by purchasing thousands of NVIDIA's custom-designed H100 GPUs for AI training, which currently run at $30,000 apiece. *See* Sebastian Moss, *Report: Saudi Arabia Acquires 3,000 Nvidia GPUs, UAE Buys Thousands*, DATACENTER DYNAMICS (Aug. 15, 2023), https://www.datacenterdynamics.com/en/news/report-saudi-arabia-acquires-3000-nvidia-gpus-uae-buys-thousands/. Indeed, FalconLLM, UAE's own open-source model, is trending on Huggingface as the most advanced open source AI model available. *See* HUGGING FACE OPEN LLM LEADERBOARD, https://huggingface.co/spaces/HuggingFaceH4/open_llm_leaderboard.

7. Westlaw and LexisNexis have not publicly disclosed what methods and tools their AI offerings employ.

The Ethical Considerations of Popular AI-Fueled Chat Features on Firm Websites

by Scotti Hill

If you've checked out a law firm's website lately, you've likely noticed the trend of chat boxes emerging from the right side of the screen instantaneously. These Artificial Intelligence (AI) generated text features invite prospective clients to submit their contact information or, in some cases, to directly submit questions to identify the type of legal assistance needed.

Though reaction to such interactive features is surely mixed – with some finding the tool convenient, and others preferring communication with a real lawyer – the rise of interactive, AI-generated technology raises interesting ethical considerations for the lawyers who use these features to streamline their practice.

> *"Lawyers should use caution when considering the extent to which their firm's chat box solicits sensitive information from individuals seeking legal services."*

And while the buzz surrounding AI in the legal field is seemingly unending – see the Utah State Bar's recent Fall Forum and articles featured in numerous editions of the *Utah Bar Journal* – there are applications both intuitive and perhaps more nuanced. As a slew of guides from various jurisdictions aim to provide an overview of the potential ethical concerns underlying the use of AI in the practice of law – lest we forget the New York lawyer whose use of ChatGPT to draft a brief resulted in a multitude of errors – perhaps less discussed are the applications of the technology in legal advertising.

Lawyers aiming to use interactive technologies should consider whether the act of collecting information and the extent of the information gathered ignites the attorney-client relationship and the accompanying ethical obligations found in the Rules of Professional Conduct (RPC). While the following is by no means an exhaustive list of all relevant ethical concerns underlying interactive website features, this article aims to highlight some immediate considerations.

Does a firm website's chat feature commence the attorney-client relationship?

Consider the act of someone entering personal information into the firm site's chat box. Some merely solicit an individual's contact information to allow firm staff to contact them later. Yet others obtain information about the nature of the legal issue that prompts the individual to seek assistance. The latter raises several ethical considerations. For one, the individual's disclosure may be enough to establish an attorney-client relationship between the individual and the firm, even absent a consultation with an actual attorney. A lawyer-client relationship arises when a one manifests to a lawyer that person's intent that the lawyer provides legal services for the person and the lawyer either manifests consent or fails to manifest lack of consent such that the person reasonably relies on the lawyer to provide the service. *See Burke v. Lewis*, 2005 UT 44, 122 P.3d 533. Further, Rule 1.18 of the RPC also states, "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." *See* Utah R. Pro. Cond.

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1.18(a). Importantly, even when no attorney-client relationship develops, Rule 1.18 prohibits lawyers from using information obtained by the individual to that person's disadvantage, subject to Rule 1.9 (concerning conflicts with former clients). *See id.* R. 1.18(b). Therefore, firm chat boxes that invite individuals to provide legal information run the risk of unknowingly rendering the individual a prospective client or even forming an attorney-client relationship that triggers all the RPC. Lawyers should use caution when considering the extent to which their firm's chat box solicits sensitive information from individuals seeking legal services.

Technological competence, confidentiality, and avoiding conflicts of interest.

AI's intervention in legal practice comes at a formative time post-pandemic where experts are increasingly aware of the importance of technological competence. Comment [8] of Rule 1.1 of the RPC notes lawyers' requirement to "maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology …." As such, lawyers must consult with experts to adequately understand how their firm chat box operates and how it manages potentially sensitive information. Understanding how such information is tracked and stored is critical not just for confidentiality purposes, but also to ensure the firm is able to screen for conflicts of interests under Rules 1.7 through 1.10 of the RPC.

A recent article by Florida State Bar Ethics Counsel Jonathan Grabb addresses the difficulty of determining whether the information received by AI programs is kept confidential as required by Rule 1.6 of the RPC. Additionally, Grabb warns, "it is unclear whether sharing information with an AI program would be discoverable and would waive claims of attorney-client privilege." Jonathan Grabb, *Lawyers and AI: How Lawyers' Use of Artificial Intelligence Could Implicate the Rules of Professional Conduct,* FLORIDA BAR NEWS 3 (Mar. 13, 2023), https://www.floridabar.org/the-florida-bar-news/lawyers-and-ai-how-lawyers-use-of-artificial-intelligence-could-implicate-the-rules-of-professional-conduct/.

Will an AI chat feature eventually communicate with clients in the same way as a non-lawyer assistant? Practice law?

Even with the aforementioned ethical considerations at the fore, increased scrutiny is warranted when considering the developmental pace and sophistication of AI. For example, a chat box that does more than merely record information – and one that can interact with the clients in a more extensive fashion – may not be far off. Such interaction with a prospective or actual client raises issues of whether such AI-driven communication constitutes the practice of law under Rule 5.5 and is a client communication for the purposes of Rule 1.4. Both possibilities would require heightened vigilance by the firm operating the chat box. Will AI eventually be treated as a non-lawyer assistant under Rule 5.3, thereby mandating lawyers to exercise supervisory authority over their work? Even before such hypotheticals become reality, it's crucial for lawyers to understand that they alone are responsible for their work and that adequate understanding and maintenance is required.

Does the chat box comply with Rule 7.1?

Utah's Rule 7.1 concerns communications regarding a lawyer's services, prohibiting a lawyer from making false or misleading communication about the lawyer or the lawyer's services or interacting with a prospective client in a manner that involves coercion, duress, or harassment. It is easy to imagine how a chat box fits within this rule, as lawyers should exercise vigilance not just regarding the information the chat box collects, but also what it regurgitates to the individual seeking legal services.

In sum, the advent and acceleration of AI technology present exciting opportunities for the legal profession. Although AI allows lawyers to interact with prospective clients in novel ways, they must remain alert about the myriad ethical considerations that accompany such innovations.

Handling Contingencies in Contingent Fee Cases: Sharing Fees with Successive Lawyers

by Beth E. Kennedy

Contingent fee agreements start out simple: you'll get a specified portion of any recovery. But they don't always stay that way. Your representation might end before the case is resolved, either because you fired the client or because the client fired you. What happens when the case is later resolved by a different lawyer? How do you get paid for the work you've done?

This situation – where a contingent fee case is handled by successive lawyers – can create a difficult problem. Each lawyer claims their share, and (typically) each lawyer believes the other one is asking for too much. Who did more work? Who took more risk? What hard feelings remain from the termination of the first lawyer? These disputes can bring out the worst in us.

But it doesn't have to be that way. By planning ahead, lawyers who handle contingent fee cases can protect themselves and better ensure that they'll get paid for their work. Although it's a bit more work on the front end, the time spent will pay dividends if it prevents a dispute and gets you what you deserve.

Applicable Rules

It's important to first understand the lay of the land. Our rules governing fee-sharing between lawyers have changed in recent years, and they are still changing. But the most important principles have remained constant.

We started with the American Bar Association's model rule 1.5. Until 2020, our rule allowed lawyers to share a fee if they split it in proportion to the work they performed, or alternatively, if they assumed joint responsibility for the case. Utah R. Pro. Conduct 1.5(e)(1) (2019). The client had to give written consent, and the total fee had to be reasonable. *Id*. R. 1.5(e)(2)–(3). And a lawyer couldn't share fees with a non-lawyer. *Id*. R. 5.4(a).

Then came the Sandbox. The Sandbox fundamentally changed how fees could be divided. Now, for the first time, lawyers could share fees with non-lawyers – as long as they did so within a Sandbox business. Utah R. Pro. Conduct 5.4(c) (2020). And with these changes, the subsection governing sharing fees with lawyers was removed, too. *Id*. R. 1.5.

As the rules currently stand, nothing purports to govern how lawyers can share a contingent fee. But recently, the Supreme Court's Advisory Committee on the Rules of Professional Conduct has been working to craft just such a rule. Keep an eye out – changes are coming soon. So far, it looks like the proposed rule will put fewer limits on sharing fees than the old ABA rule did.

Until then, all we have is Rule 1.5 (fees). The rule is straight-forward: a fee must be reasonable. *Id*. R. 1.5(a). For our purposes here, this means two things. First, the total fee paid by the client must be reasonable. And second, the amount each lawyer receives must be reasonable.

This is important in contingent fee cases where the client has signed contingent fee agreements with two different law firms. In each agreement, the client promised to pay the law firm a percentage – often 1/3 – of any recovery. Clients worry that they'll have to pay 1/3 of the recovery to both law firms and be left with only 1/3 themselves.

But 2/3 of a recovery is almost certainly an unreasonable fee. If a case warrants a 1/3 contingent fee, then 1/3 is the amount that is reasonable, and 1/3 is the total amount that the client should pay. Any lawyers who worked on the case will have to divide that amount among themselves.

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Tips for Predecessor Counsel

When we enter into a contingent fee agreement, none of us think we are "predecessor counsel." If all goes as planned, we'll handle the case from start to finish and we'll be the *only* counsel.

But all doesn't always go as planned. These representations can end early for a variety of reasons. Here are some tips to increase the chances you'll get paid for the work you did before the representation ended.

Add contract language.

Use your retainer agreement with the client to lay out what will happen if the representation ends before the case does. Be clear that, if the client ends up with a recovery, you'll be entitled to a reasonable fee for the work you performed before the termination. You might want to reference your statutory right to file an attorney's lien on any recovery. And why not have the client agree to provide a copy of your fee agreement to any successor counsel? Or reserve your right to provide it to successor counsel? It couldn't hurt.

Keep an accounting.

I get it. One of the luxuries of a contingent fee case is that you don't have to provide the client with monthly bills detailing your work in six-minute increments. But if there's ever a dispute with successor counsel over how much of the contingent fee you're entitled to, you'll need to show what work you did to determine what fee is reasonable. This task can come up years after the representation ended, when the details of this case might blend with the details of dozens of others. Keeping contemporaneous records of what you've done on each case will allow you to prove what part of the fee you've earned.

Provide the accounting.

Those records also will be useful when the representation ends. You'll be able to show the client exactly what you did – and exactly what you'll be seeking payment for if they obtain a recovery in the case. Can you get them to sign off or otherwise acknowledge that you performed all the work in your accounting? That would help defend against any later claims that you've inflated your contribution to the case. Even better, can you get the client to give the accounting to their new lawyer? If the new lawyer knows from the start exactly how much work you've done, that can reduce the likelihood that there's a dispute later.

Consider a lien.

Attorneys have a statutory right to file a lien to recover fee's they've earned. This is in Utah Code Section 38-2-7. But if you're going to do this, pay attention to the deadlines – being even three days late can mean you get nothing. *Fadel v. Deseret First Credit Union*, 2017 UT App 165, ¶ 26, 405 P.3d 807.

Tips for Successor Counsel

Successor counsel are in a better position because they already know the fee will be split. But they still can't be sure they'll be the last. Successor counsel would therefore be wise to consider the contract language and accounting tips mentioned above to protect themselves if the representation ends before the case does.

There are some additional things successor counsel should consider, too.

Add contract language.

Your retainer agreement must acknowledge the situation. ABA Formal Ethics Op. 487 (2019). But it also should explain how you intend to split the fee. Most likely, you'll split it in proportion to the work each lawyer did. Of course, this agreement won't bind prior counsel. And it might be tempting to tell the client that they owe you your fee regardless, and that it's up to them to work it out with predecessor counsel. But remember – the total fee they pay must be reasonable. Utah R. Pro. Conduct 1.5(a). If the client is paying both of you separately, it's probably not a reasonable fee, and you're setting yourself up for a lawsuit and/or an OPC complaint.

Contract with counsel.

If possible, see whether prior counsel will agree in advance to a division. Now is the best time to reach an agreement on how you'll split any eventual fee. Otherwise, a court might later decide for you that you each intended to divide the fee in proportion to the services you performed – or at least that was true under the old version of the rule. *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 47, 194 P.3d 931.

Ask for an accounting.

Even better, ask for an accounting from the previous lawyer. How much work did they perform? Get them to lock this in while memories are fresh so they won't be able to inflate those numbers later. This not only protects you but also gives you a better idea of what the case might be worth to you in the end.

Disburse the remainder.

Maybe you did none of this. Maybe you got the client a recovery, but you and predecessor counsel are in complete disagreement about who should get what. If that's true, give the client the undisputed portion of the recovery. Utah R. Pro. Conduct 1.15(e). You and predecessor counsel will then need to resolve your dispute among yourselves, which might require you to go to court. In the meantime, keep the disputed fees in your trust account. *Id*. Or if the two of you have resorted to handling it in court, the OPC recently suggested in a CLE that you could interplead the disputed funds.

Conclusion

No one begins a contingent fee case believing they'll be fired and forced to fight to be paid for the work they performed. But it happens far too often to be unprepared.

Thinking through the worst-case scenario can help us avoid a number of problems. And taking a few preventative steps on the front end is easy compared to cleaning up the mess that can result if we don't. After all, isn't that what our clients hire us to do for them? Let's do it for ourselves, too.

Appellate Highlights

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

EDITOR'S NOTE: The following appellate cases of interest were recently decided by the Utah Supreme Court, Utah Court of Appeals, and United States Tenth Circuit Court of Appeals. The following summaries have been prepared by the authoring attorneys listed above, who are solely responsible for their content.

Utah Supreme Court

State v. Robinson
2023 UT 25 (Dec. 7, 2023)

Robinson filed a motion to correct sentence under Rule 22(e) of the Utah Rules of Criminal Procedure, arguing his sentence was unconstitutional because his trial counsel was ineffective, among other reasons. On appeal from the district court's denial of Robinson's motion, the court of appeals held, as a matter of first impression, that **the current version of Rule 22(e) cannot be used to challenge any purportedly illegal sentence, since district courts are only vested with authority to correct sentences falling under one of the six categories enumerated in the rule.**

The court of appeals separately declined to reach additional issues identified by Robinson's appellate counsel with reference to *Anders v. California*, 386 U.S. 738 (1967). *Anders* established a "procedure to be followed when appointed counsel cannot identify a nonfrivolous issue for appeal and seeks to withdraw." **Because Robinson's appellate counsel had identified nonfrivolous issues for appeal, he could not also raise ostensibly frivolous issues at his client's request under** *Anders*.

State v. Valdez
2023 UT 26 (Dec. 14, 2023)

After being read his *Miranda* rights, Valdez refused to provide his cell phone's passcode to detectives looking for text messages with an alleged victim. The detectives were unable to gain access to the phone through other means. At trial, the prosecution elicited testimony regarding Valdez's refusal and argued to the jury that the refusal undercut one of Valdez's primary defenses. Valdez appealed his subsequent conviction, arguing the prosecution's

commentary on his refusal to provide the passcode violated his Fifth Amendment rights. The supreme court agreed, vacating his conviction and holding that **verbally providing a cell phone passcode to law enforcement after a *Miranda* warning amounts to a potentially incriminating testimonial act and triggers the protections of the Fifth Amendment.**

Utah Court of Appeals

State v. Taylor
2023 UT App 134 (Nov. 2, 2023)

In this case, the district court modified the defendant's pretrial release conditions because the defendant "had been exaggerating his health problems to avoid trials." In affirming the district court, the appellate court held: **"a court may conclude, in appropriate cases where supported by the record, that a defendant who has engaged in persistent deception to avoid trial will be at an increased risk of flight when his deception is unveiled."**

Farm Bureau Mutual Insurance v. Weston
2023 UT App 136 (Nov. 9, 2023)

In this case, driver's insurance policy was canceled for non-payment of the premium a few days prior to a fatal accident. The court held that the policy had been properly canceled and that there was no coverage. The insurer argued that, because there was no contract between it and its insured on the date of the accident, there was no contractual duty to defend. The court of appeals, however, held that **even though the duty to defend is contractual, the duty continued until a dispute over whether the policy had been properly canceled was resolved.** Further, although the court ultimately ruled that the insurer had properly canceled the policy before the accident, the court held that its breach of the duty to defend rendered it liable for a judgment entered against the insured before the coverage dispute was resolved. Judge Harris dissented, arguing that the forfeiture of indemnity defenses was a minority view that Utah has never explicitly adopted. The majority invited clarification from the Utah Supreme Court.

State v. Jessop
2023 UT App 140 (Nov. 16, 2023)

The defendant moved to dismiss, citing *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106, which addressed due process protections when the State loses or destroys potentially exculpatory evidence, arguing officers failed to activate body cameras. Affirming the lower court's denial of the motion, the court of appeals held that ***Tiedemann* does not apply where the evidence never came into existence.** The court of appeals also affirmed the denial of a motion to suppress, reasoning that the defendant was not in police custody for *Miranda* purposes when questioned in the ICU, because he had neither been arrested nor charged, and he was under no obligation to respond to questioning.

JENCO LC v. SJI LLC
2023 UT App 151 (Dec. 14, 2023)

The court of appeals vacated the trial court's determination that a 2010 assignment of an option was not a fraudulent transfer. **The court of appeals identified several legal errors in the trial court's finding regarding intent – a key element of a Utah Fraudulent Transfer Act, now known as the Uniform Voidable Transactions Act.** The trial court erred by failing to evaluate whether the transferor intended to "hinder" or "delay" its creditors when it executed the assignment, and by failing to consider the statutory badges of fraud that the parties had raised.

State in the Interest of J.T. and A.T.
2023 UT App 157 (Dec. 21, 2023)

A grandmother moved to intervene under both Utah R. Civ. P. 24 and Utah Code § 80-3-302 in a juvenile court case deciding whether minor children should be removed from their parents' care. The juvenile court denied the grandmother's motion, but the court of appeals reversed. While the court affirmed the district court's holding that the grandmother's interests were not sufficient for intervention pursuant to Utah R. Civ. P. 24(a)(2), **the court held that grandmother had a statutory right pursuant to Utah Code § 80-3-302, which requires "the juvenile court [to] give preferential consideration to a relative's or a friend's request for placement."**

Keisel v. Westbrook
2023 UT App 163 (Dec. 29, 2023)

In March of 2019, the Oklahoma City Thunder played the Utah Jazz. Plaintiff made a statement to Russell Westbook that included "on your knees," to which Westbrook responded profanely and aggressively. Following the altercation, the Utah Jazz banned plaintiff and his wife permanently from the Delta Center and did so through various communications. Plaintiff sued the Jazz, Westbrook, and others on various claims, including certain privacy torts. As to the latter, the district court found and the appellate court affirmed that **"calling someone a racist cannot be actionable as defamation" because "the statement cannot be verified as being true or false" and is therefore constitutionally protected as opinion.**

10th Circuit

Watchous Enterprises, LLC v. Mournes
87 F.4th 1170 (Nov. 30, 2023)

In a complex and complicated fraud/RICO case, certain defendants only responded to 17 facts of a total 369 facts asserted by the plaintiff on summary judgment. The court granted the plaintiff's motion, pursuant to Fed. R. Civ. P. 56(g), to issue a jury instruction identifying 295 facts as uncontroverted. On appeal, the court acknowledged that parties can make a strategic decision to not respond to every fact in a summary judgment motion, and courts should keep that in consideration when deciding a motion under Rule 56(g). But **"[t]he party opposing an order establishing facts under Rule 56(g) must either present evidence controverting the proposed facts or persuade the district court that it would be unfair or otherwise inappropriate to establish particular facts through that process."**

Stone v. High Mountain Mining Company
89 F.4th 1246 (Jan. 3, 2024)

Plaintiffs brought a citizen suit alleging that the defendant gold mine operator's discharge of pollutants into groundwater next to navigable stream without a National Pollutant Discharge Elimination System permit violated the Clean Water Act. Following a bench trial, the district court concluded that the settling ponds at issue were a point source and the defendant's operation of them constituted an unpermitted discharge of pollutants into navigable waters. The Tenth Circuit reversed, holding the district court made a legal error in holding there was sufficient evidence that the discharge to groundwater was the functional equivalent of a direct discharge. **After providing a detailed discussion of the analysis set out in the recent Supreme Court decision *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Tenth Circuit held the district court's *Maui* analysis did not support its conclusion.** Given the broad application of the Clean Water Act to mines throughout the Mountain West, the Tenth Circuit remanded for further proceedings consistent with *Maui*.

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Anna Grigsby   Rachel Phillips Ainscough   Emily Adams   Sara Pfrommer (of counsel)

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State v. Green, Rule 404(B), and a Supreme Court at Odds With Itself

by Andrea J. Garland

No number of witnesses can alter objective reality, even if they say the same thing. The young ladies of Salem Village weren't being tormented by witches, no matter how numerous or detailed their claims. The Earth is neither flat nor the center of the universe, regardless of historical received wisdom. Aesop's shepherd wasn't lying about the last wolf attack, despite all the villagers' experience with his two prior fraudulent alarms. The *Titanic* wasn't unsinkable, White Star Line assurances and widespread belief notwithstanding. And the number of witnesses who testify to the same or similar experiences with a defendant has, on its own, no tendency to make any allegation more or less likely to be true. This fallacy, that the number of people who say something is true can establish that it is true, is at the heart of the above historic and mythic errors and at the heart of *State v. Green*, 2023 UT 10, 532 P.3d 930. Following years of upheaval and indecision concerning Utah Rule of Evidence 404(b), *Green*'s holding that evidence of other acts can rebut fabrication challenges conflicts with mathematical probability, relies on extra-textual reasoning, and will result in further litigation.

Rule 404(b) precedent in Utah is not firmly established.

Case law concerning Utah Rule of Evidence 404(b) is notable for how many times our supreme court has changed its mind in a relatively short period of time. *See Eldredge v. Johndrow*, 2015 UT 21, ¶¶ 33–41, 345 P.3d 553 (holding that precedent is not firmly established in law if it is not old or typically relied upon as precedent). At the beginning of this century, trial courts were required to conduct "'scrupulous examination' of evidence of prior misconduct [offered for admission] under rule 404(b)." *State v. Thornton*, 2017 UT 9, ¶ 38, 339 P.3d 112 (citing *State v. Decorso*, 1999 UT 57, ¶ 18, 993 P.2d 837). Our supreme court repudiated this requirement because "'scrupulous examination' is not an independent requirement of rule 404(b)." *Id.* ¶¶ 44–55. In 1988's *State v. Shickles*, the Utah Supreme Court set out factors to consider in determining whether evidence offered under Rule

404(b) was significantly more prejudicial than probative under Rule 403 of the Utah Rules of Evidence. *Shickles*, 760 P.2d 291, 295–96 (Utah 1988). In *State v. Ring*, *State v. Cuttler*, and *State v. Lucero*, the Court held that trial courts were to follow the text of Rule 403 rather than the *Shickles* factors, although the *Shickles* factors could still be helpful. *Ring*, 2018 UT 19, ¶¶ 21–23, 29, 424 P.3d 845; *Cuttler*, 2015 UT 95, ¶¶ 2, 18–21 367 P.3d 981; *Lucero*, 2014 UT 15, ¶ 32, 328 P.3d 841, *abrogated on other grounds by Thornton*, 2017 UT 9. The court of appeals later adopted a rule that a not-guilty plea put all elements at issue, making "other acts" evidence useful to prove facts not actually in dispute. The supreme court rejected the not-guilty rule as unpersuasive. *State v. Verde* 2012 UT 60, ¶¶ 12, 22–24 296 P.3d 673; *State v. Teuscher*, 883 P.2d 922, 926–27 (Utah Ct. App. 1994).

In *Verde*, the Utah Supreme Court adopted the doctrine of chances, "a theory of logical relevance that 'rests on the objective improbability of the same rare misfortune befalling one individual over and over'" as an avenue for admission of evidence through Rule 404(b). 2012 UT 60, ¶ 47 (quoting Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape:* People v. Ewoldt *Revisited*, 29 U.C. Davis L. Rev. 355, 388 (1996)). In 2017, the court expanded evidence admitted under the doctrine of chances beyond rebutting fabrication. *State v. Lowther*, 2017 UT 34, ¶ 23, 398 P.3d 1032. By 2021, the court expressed reservations about continuing to use the doctrine of chances and encouraged greater precision and rigor in trial courts applying the doctrine. *State v. Richins*, 2021 UT 50,

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¶¶ 3, 55, 66, 71–72, 77, 95, 496 P.3d 158. Now, the court has abandoned the doctrine of chances. *Green*, 2023 UT 10, ¶¶ 3, 49.

If Utah's Rule 404(b) case law were a drinking game, anyone queued to drink to the term "abrogated" would be quickly wiped out.

State v. Green gives no explanation of how alleged other acts evidence fulfills the claimed non-propensity purpose of rebutting fabrication, although other courts have required such explanation.

In *Green*, a college football player was accused of sexually assaulting seven women. Green, 2023 UT 10, ¶¶ 1, 7, 13–14. "Based on the similarities" between six of the accounts, the trial court admitted this testimony under the doctrine of chances for the purpose of demonstrating that the women were not fabricating their claims. *Id*. ¶¶ 8, 40. Following conviction on several sexual assault counts, Green appealed on grounds that the other acts evidence was improperly admitted, *inter alia. id*. ¶¶ 10–11. The court "abandon[ed] the doctrine of chances in favor of a plain-text analysis of the rules of evidence." *Id*. ¶ 49. It noted that "while the doctrine may have been analytically helpful in some cases, it has been confusing and difficult to apply in others." *Id*. ¶ 59. Moreover, "its requirements have strayed from the plain text of the rules of evidence." *Id*. ¶ 62. The court held that "the accusations of multiple similar acts of sexual misconduct by Mr. Green corroborated each woman's story" without explaining in its opinion how this is possible. *Id*. ¶ 71. They held that the evidence "was admitted for a non-character purpose – to show that the women's allegations were not recently fabricated." *Id*.

Although *Green* is not unique in not explaining how other allegations serve the non-character purpose of corroboration or rebutting fabrication challenges, other jurisdictions have required such explanations. The Seventh Circuit requires that trial courts ask "not just … whether the proposed other-act evidence is relevant to a non-propensity but how exactly the evidence is relevant to that purpose – or, more specifically, how the evidence is relevant without relying on a propensity inference." *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014). Even for purposes in the text of the rule, "it's not enough … simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." *Id*. "Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence." *Id*. Similarly in the Third Circuit, "[t]he task is not merely 'to find a pigeonhole in which the proof might fit,' but to actually demonstrate that the evidence 'proves something other than propensity.'" *United States v. Caldwell*, 760 F.3d 267, 276 (3d. Cir. 2014) (quoting Mueller, *Federal Evidence* § 4:28, at 731). "The reason we require the proponent and the court to articulate a logical chain of inferences connecting the evidence to a non-propensity purpose is because we must assure that the evidence is not susceptible to being used improperly by the jury." *Id*. at 282.
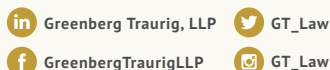
Mathematical probability governs how alleged independent events can make consequential facts more or less probable.

When discussing allegations that are argued to make consequential facts more or less probable, it makes sense to spend a moment exploring how alleged independent events can make an alleged fact more or less probable. *See* Utah R. Evid. 401; Keith A. Findley, *The Absence or Misuse of Statistics in Forensic Science As a Contributor to Wrongful Convictions: From Pattern Matching to Medical Opinions About Child Abuse*, 125 DICKINSON L. REV. 615, 646 (Spring 2021) (describing Rule 401 as an expression of a probability theorem which describes how a new piece of evidence can "update[] [an] assessment of likely guilt or innocence"). Mathematical probability applies here because Rule 404(b)(2) admissibility depends on the ability of an alleged other act to raise the likelihood of a noncharacter issue such as motive, opportunity, intent, or others and probability governs raising likelihoods.

The mathematical probability of any one event happening or not happening, being true or being fabricated, never goes up or down, no matter how many similar allegations are considered.[1] *See* MURRAY SPIEGEL ET AL., SCHAUM'S OUTLINE OF PROBABILTY AND STATISTICS 4–7 (McGraw-Hill, 4th Ed. 2014). Raising the number of possible events merely raises the likelihood that one or some of them were not fabricated. And it raises the likelihood that one or some of the alleged events were fabricated. The likelihood of any one particular event having been fabricated or any one particular fact of consequence to any case never rises or falls, no matter how many other alleged events are discussed. *See* Utah R. Evid. 401. Therefore, the number of independent accusers has no mathematical ability to raise or lower the likelihood that any accuser is fabricating, Green's holding notwithstanding. *See Green*, 2023 UT 10, ¶¶ 70–71.

The Utah Supreme Court implicitly recognized this problem in *State v. Prater*, 2017 UT 13, 392 P.3d 398. The court noted, "[F]our witnesses' testimony that an assault occurred on the moon suffers from the same inherent improbability as testimony offered by a single witness." *Id*. ¶ 36 n.4. The court cautioned that a prior case, *State v. Robbins*, 2009 UT 23, 210 P.3d 288, should "not be read as endorsing a view that a finder of fact can reasonably rely on inherently improbable evidence if the State introduces enough of it." *Id*. In other words, if an event did not happen, no number of witnesses alleging that it happened can make the event more likely. This logic applies whether the alleged event is impossible or simply made up.

Additionally, low probability events happen. An event with a probability greater than zero can happen. Judges, unlike scientific researchers, lack the luxury of accepting "facts" provisionally until more research becomes available. Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPPERDINE L. REV. 771, 828 (2010). At the same time, "[w]hen one contemplates all of the events that individually are unlikely and considers them all together, 'it would be very unlikely for unlikely events not to occur.'" *Id*. at 829. For example, the odds of intelligent life emerging on a habitable planet has been estimated as more or less one in ten[24] and yet here we are. *See* Andrew E. Snyder-Beattie et al., *The Timing of Evolutionary Transitions Suggests Intelligent Life is Rare*, 21 ASTROBIOLOGY 3 (10 Mar. 2021) (https://www.liebertpub.com/doi/10.1089/ast.2019.2149) (last visited Oct. 8, 2023).

Absent valid data about an event claimed to be exceptionally unlikely, judges should be cautious of claims that anecdotal data proves or disproves anything. *See Richins*, 2021 UT 50, ¶¶ 44–45, 53, 69–85, 95; *Verde*, 2012 UT 60, ¶ 49; Meyerson & Meyerson, 37 PEPPERDINE L. REV. at 789, 791. This is especially true when we consider that courts preside over hundreds of cases daily, which raises the likelihood of an unlikely event in any case. Statisticians address the difficulty of disproving coincidence by reasoning that when a data point falls two standard deviations from the expected average, that something other than coincidence is happening. Meyerson & Meyerson. 37 PEPPERDINE L. REV. at 822–25. But even statisticians working with scientifically collected data admit that determination of a non-coincidental event is based partly on convenience and subjective intuition. *Id*. at 823–24. Cases involving use of other acts to prove a noncharacter purpose do not typically involve scientific data or standard deviations. As such, they are vulnerable to creating misimpressions in juries that an event or series of events that may seem unlikely has been "disproven" – when in fact it has not. *See id*.; *see also State v. Rammel*, 721 P.2d 498, 501 (Utah 1986) (cautioning that juries not be asked to focus on probabilities, especially those drawn from unscientific data, to determine facts such as who's fabricating).

Evidence of other accusations as independent events cannot rebut fabrication challenges.

If the *Green* court had sought to explain exactly how the multiple accusations corroborated the witnesses' accounts, there is a fair chance the case would have arrived at a different outcome. *See Green*, 2023 UT 10, ¶ 71; *see also Gomez*, 763

F.3d at 856; *Caldwell*, 760 F.3d at 276, 282. This is because the only possible remaining purpose for the evidence of the multiple accusations is propensity.

As a matter of probability, multiple independent accusations cannot corroborate each other or make it less likely that any one of them is less likely to have been fabricated. *See Green*, 2023 UT 10, ¶ 71. *Green* assumes this is possible without explaining how. Perhaps the court believed they provided explanations in *Richins* and *Verde* how this is possible. "In *Verde*, we reasoned that under the doctrine of chances, prior-acts evidence 'tends to prove a relevant fact without relying on inferences from the defendant's character.'" *Richins*, 2021 UT 50, ¶ 45 (quoting *Verde*, 2012 UT 60, ¶ 51).

> That is, when presented with evidence to rebut a claim of fabrication under the doctrine of chances, a jury can, at least in theory, examine the evidence to conclude that it is unlikely, as a matter of probability, that an accuser is fabricating the accusation because of the unlikelihood of an innocent person being accused of the same thing over and over.

Id.

The explanation from *Richins*, quoting *Verde* seems to be saying that because it is unlikely that someone can be repeatedly accused and yet be innocent every time, some accusations are corroborated.

But this explanation is incorrect, based on an apparently incomplete understanding of how very basic probability works. True, it *is* unlikely that an innocent person would be falsely accused multiple times: multiplying the likelihood of every false accusation will result in a smaller number than the likelihood of any one accusation being false. *See* SPIEGEL at 4, 6–7. But the opposite is also true: multiplying the likelihood of every true accusation will show a lower probability that every accusation is true (i.e., not fabricated) than the likelihood that any one accusation is true. *See id*. Adding accusations makes it more likely that one or some accusations *were not* fabricated. *See id*. at 6. And it makes it more likely that one or some accusations *were* fabricated. *See id*. The likelihood of any accusation or claimed fact of consequence to the case being true or false never rises nor falls. *See id*.; Utah R. Evid. 401. As independent events, multiple accusations cannot corroborate each other because they do not make any specific accusation, any claim, or any element, any more or less likely. Moreover, it is possible

that although unlikely, someone may be unlucky enough to be falsely accused multiple times. In that situation, multiple fabricated claims cannot corroborate each other or, working together, rebut a fabrication defense. But many people may intuitively believe that if someone is accused numerous times, that person must be guilty, even if it is unclear precisely what that person is more apt to be guilty of. Although the Court was correct to abandon the doctrine of chances, *Green* leaves defendants with even fewer safeguards against the admission of propensity evidence. *See Richins*, 2021 UT 50, ¶¶ 71–72, 75–80, 95; *Verde*, 2012 UT 60, ¶¶ 57–61. Even Verde required a foundational showing of materiality, similarity, independence and infrequency. *See id.; e.g., State v. Rackham*, 2016 UT App 167, ¶¶ 22–24, 381 P.3d 1161 (holding that evidence should not have been admitted under the doctrine of chances to rebut fabrication because the separate allegations were not independent).

A thought exercise further helps to illustrate this problem. Suppose a defendant is accused of raping one person. Should a trial court allow the defendant to present testimony from every person with whom the defendant has had consensual sex for the purpose of supporting fabrication as a defense? Doesn't every consensual-sex witness tend to corroborate the defendant's defense that the accuser is fabricating? If not, why not? Under *Green*'s unexplained reasoning, such an inference is valid.

Only when multiple accusations corroborate something about the defendant, that demonstrates that if the interaction involves him, it raises the probability of an accusation, does the evidence

have potential to raise the likelihood of any claims. *See United States v. Perez*, 662 F. App'x. 495, 497 (9th Cir. 2016) (holding that evidence tending to show that a defendant committed another sexual assault tends to show propensity). Reasoning from probability, some factor about the defendant may raise the likelihood of each alleged event. But this violates the prohibition on character propensity evidence. *See* Utah R. Evid. 404(b)(1). And the resulting prejudice substantially outweighs the evidence's probative value. *Id*. R. 403.

But not only is propensity evidence prohibited by Rule 404(b)(1), it is also a bad idea. Although federal courts allow propensity evidence in cases alleging sexual offenses, empirical evidence does not support high sex offender recidivism. *Does #1-5 v. Snyder*, 834 F.3d 696, 704–05 (6th Cir. 2016). One empirical study considered in *Snyder* suggested that sex offenders "are actually *less* likely to recidivate than other criminals." *Id*. at 704. The idea that sex offender recidivism is high apparently stems not from empirical data but from some observations of recidivism by untreated sex offenders. Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder, 58 B. C. L. Rev. E-Supplement, 34, 38–39 (2017) (discussing the factual underpinnings of *Smith v. Doe*, 538 U.S. 84, 103 (2003) versus those of *Snyder*). And if recidivism is not particularly high, then propensity becomes less of a valid predictive factor and more of a simple mud-flinging exercise. If recidivism is not high, then even a proven fact that someone has committed a prior act does not make that person more likely to commit a future act. Evidence of the prior act then does not raise the likelihood of another act occuring. It has not been scientifically established that propensity is more probative for sexual offenses than for other offenses such as, for example, those involving controlled substance abuse or financial crimes. Even as propensity evidence, evidence of other acts may have little reality-based ability to rebut fabrication. And to the degree that it does, it is likely to be substantially outweighed by the resulting prejudice. *See* Utah R. Evid. 403.

Green's reliance on extra-textual reasoning may encourage confusion in trial court application of rule 404(b).

In *Green*, the Utah Supreme Court reiterated that interpretive tools such as the doctrine of chances, having no origin in the text of Rules 404(b) or 403, was more confusing than helpful. *Green*, 2023 UT 10, ¶¶ 61–64. *Green* also said that Rule 404(b) is inclusionary, despite "inclusionary" not appearing the text of the rule. *Id*. ¶ 70. *Green* also held that fabrication is a proper noncharacter purpose for other acts evidence, despite not appearing in the text of Rule 404(b). *Id*.

Green's reliance on an extra-textual interpretation of Rule 404(b)(2) evidence conflicts with supreme court precedent about textual interpretation and is confusing. *Green*'s lack of explanation of Rule 404(b)(2) as inclusionary gives overly vague guidance to trial courts. *Green*'s statement that Rule 404(b) is an inclusionary rule is true enough as a non-binding observation. *See* Utah R. Evid. 404(b)(2); *Green*, 2023 UT 10, ¶ 70. But as binding precedent, it conflicts with its stated preference for relying only on rules' texts because Rule 404(b) does not say that it's inclusionary. *See* Utah R. Evid. 404(b); *Green*, 2023 UT 10, ¶ 61; *Thornton*, 2017 UT 9, ¶¶ 44–55. And inclusionary of what? Rule 404(b)(1) clearly excludes character evidence, while providing exceptions in rule 404(b)(2) for non-character purposes. Referring to Rule 404(b) generally as "inclusionary" may well encourage trial courts to see "inclusionary" as a rule of thumb, encouraging admissibility for questionable purposes. *See Caldwell*, 760 F.3d at 276.

Moreover, while not specifically excluded from Rule 404(b)(2)'s list of permissible purposes, rebutting fabrication is also not mentioned in the text of the rule. *See* Utah R. Evid. 404 (b)(2); *Green*, 2023 UT 10, ¶ 61; *Thornton*, 2017 UT 9, ¶¶ 44–55. Indeed, rule 404(b)(2) lists almost exclusively *mens rea*-related purposes for other-acts evidence. Only identity, a special topic meriting its own rule of evidence, relates to *actus reas*. *See* Utah R. Evid. 404(b)(2), 617; *see also Richins*, 2021 UT 50, ¶¶ 47–49 (describing how other acts can demonstrate identity without a propensity inference). Expanding Rule 404(b)(2) from mostly *mens rea* to *actus reas* purposes, without explanation or further guidance to trial courts, may be misinterpreted as opening the door to admitting evidence whose true purpose is to show character propensity.

Conclusion

Green's lack of guidance on valid application of Rule 404(b) puts future defendants at risk of being convicted on the basis of propensity, prejudice, and upon less than proof beyond a reasonable doubt. *Green*'s holding is surprising after *Richins* implied that trial courts should exercise greater rigor in limiting the admission of other acts evidence. Luckily, because Rule 404(b) precedent is so changeable, *Green* is not firmly established. *See Johndrow*, 2015 UT 21, ¶¶ 33–41.

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1. I discussed how mathematical probability applies to rule 404(b) issues in articles, *The Doctrine of Chances Is Ready to Be Overturned*, 34 Utah B.J. 18 (Nov./Dec. 2021) and *Beyond Probability: The Utah Supreme Court's 'Doctrine of Chances' in* State v. Verde *Encourages Admission of Irrelevant Evidence*, 3 Utah Crim. Law 6, 25–29 (2018).

Parsons Behle & Latimer is pleased to welcome attorneys Eric U. Johnson and Andrew Zaugg

Eric U. Johnson

Litigation | Salt Lake City

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Parsons Behle & Latimer is pleased to announce that Eric Johnson has returned to the firm and will continue his practice as a member of Parsons' experienced litigation team.

Eric enjoys helping his clients solve problems. His practice focuses on commercial litigation, employment counseling and litigation, and government investigations. Learn more about Eric by visiting **parsonsbehle.com/people**.

Andrew Zaugg

Trusts, Wills & Estates | Salt Lake City

azaugg@parsonsbehle.com

Parsons Behle & Latimer is pleased to announce that Andrew Zaugg has joined Parsons' trusts, wills and estates practice team as a new associate. Andrew has a passion for helping families both prepare for and navigate the legal framework when faced with impactful events.

He is licensed to practice in the state of Nevada; admission to the Utah State Bar pending. Learn more about Andrew at **parsonsbehle.com/people**.

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Three Professional Fields Facing Potential Cultural Misunderstandings With Utah's Hispanic Population

by Nathaniel Vargas Gallegos

This article is largely anecdotal. I had the honor to serve as the administrative law judge (ALJ) and hearing officer for the Utah Department of Commerce that administers enabling legislation in eight offices and divisions, four divisions with citation authority. By far, the Utah Division of Professional Licensing (DOPL) and Utah Division of Consumer Protection (DCP) are the most relevant for a discussion on bicultural Utah residents. I also served on the Utah State Bar's Unauthorized Practice of Law (UPL) Committee where all complaints related to the unlicensed practice of law are investigated by members of the Bar. Most of the complaints come from attorneys, and a large share of the complaints relate to immigration consultants and the term *notarios*. This discussion focuses on a subset of our Utah Hispanic community and the vulnerabilities that I have witnessed in my professional roles.

The Utah Hispanic Demographic:

The United States Hispanic and Latino communities are very diverse among themselves. Even the nomenclature is debated. The U.S. Census Bureau defines the demographic as "Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." *About the Hispanic Population and its Origin*, U.S. CENSUS BUREAU, (Apr. 15, 2022) https://www.census.gov/topics/population/hispanic-origin/about.html. That is a quite broad definition that encompasses most of the Caribbean, all Central America, all South America, and from a country all the way over in Europe. It must be mentioned that there is a new term of *Latinx*, which emphasizes the removal of the gendered language. Like all other terms, this one is extremely controversial and not widely embraced. Marisa Peñaloza, *Latinx Is A Term Many Still Can't Embrace*, NPR (Oct. 1, 2020, 5:00 AM), https://www.npr.org/2020/10/01/916441659/latinx-is-a-term-many-still-cant-embrace. Any term that tries to label an incredibly diverse group that inhabits one-and-one-half hemispheres will fall short. Although I use "Hispanic," know that many other labels exist. The foreign-born immigrant is the subset that is the focus of this article.

The 2020 U.S. Census estimates that the population of Utah was 3,271,616. Out of this population, 15.1% is classified as Hispanic, or roughly 414,000 people. *QuickFacts Utah*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/UT/PST045222 (last visited Jan. 31, 2024). The Migration Policy Institute in Washington, DC, estimates that for 2021, there are 158,629 Utah residents that were born in Latin America and immigrated. *Utah Demographics & Social*, MIGRATION POLICY INSTITUTE, https://www.migrationpolicy.org/data/state-profiles/state/demographics/UT (last visited Jan. 31, 2024). About 99,000 of this group are specifically from Mexico. *Id*. The U.S. Census also estimates that nearly 20% of Salt Lake City is Hispanic. *QuickFacts Salt Lake City, Utah*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/saltlakecityutah/PST045223 (last visited Jan. 31, 2024). This means that roughly 40% of the Hispanic population in Utah is currently foreign born and about one-quarter is specifically from Mexico. This foreign-born population influences our state and most emphatically reinforces culture for our native Utah Hispanic demographic.

Culture matters in the occupational space. It is infinitely amplified for those coming from another country, perhaps from a different social class system and, of course, language. For anyone, the most frustrating parts of learning a new language are colloquialisms, expressions, and idioms; you know the words, but the meaning is lost. It is this cultural dislocation that I believe causes untranslatable areas. I have personally witnessed the cultural translation issue in three professional areas: *curanderos* (informal medicine), *toderos* (construction trades), and *notarios* (informal lawyers). I will explain each.

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Curanderos:

Medha Makhlouf asserts that misunderstandings in the healthcare system create undue anxiety for noncitizens living in the United States as well as lawful permanent residents. Medha D. Makhlouf, *Health Care Sanctuaries*, 20 Yale J. Health Pol'y, L., & Ethics 1 (2021). Noncitizen immigrants particularly fear immigration surveillance. This causes what Makhlouf calls "system avoidance" or a chilling effect on seeking out traditional medical institutions and services. *Id*. at 3–4. Makhlouf argues that this influences caretaking behaviors of noncitizens as well as anyone in their community of any legal status. *Id*. at 12. Put in the government context of a pandemic, it becomes a public health issue for the state. Put in the community context, what alternatives are there for healthcare when living in a foreign country with language difficulties? You likely resort to what is familiar in your community.

A *curandero* (male) or *curandera* (female) is recognized as a community healer with the ability to both diagnose illness and provide therapeutic, psychosocial interventions in the natural physical and psychological realm, as well as the supernatural realm. Rebecca A. Lopez, *Use of Alternative Folk Medicine by Mexican American Women*, 7 J. Of Immigrant Health 23, 23–31 (2005). They are believed to have the ability to force the return of an evil spell, which has been cast on the patient. Rebecca Lopez asserts that this is common for Mexican and Mexican American communities, but it is also found in Puerto Rico and other countries. The Mexican communities in Utah likely have reverted to use of this informal network of local *curanderos*.

While hearing DOPL informal citation hearings in 2022 and 2023, the matter of Edgar Flores Bobadilla came for a hearing for unlicensed practice of medicine and unlicensed pharmaceutical distribution. The matter was initially stayed in the administrative action due to the criminal case, but it eventually resulted in a stipulated settlement with DOPL after the criminal sentencing for violations for unlawful conduct under the Pharmacy Practice Act, Utah Code Ann. § 58-17b-501(1), unlawful dispensing of a pharmaceutical, *id*. § 58-17b-501(11), and unlicensed practice under the Division of Professional Licensing Act, *id*. § 58-1-501. Flores Bobadilla was a Payson resident who was arrested by agents with the Utah Attorney General's SECURE Strike Force. Essentially, he was taking advantage of undocumented immigrants. Over $140,000 in cash, fake Social Security cards, and fake Utah driver's licenses were found in addition to his possession of controlled pharmaceuticals. Also, a Mexican man had his left leg amputated below the knee, lost all the toes on his right foot, and lost his vision from the treatment received from Edgar Flores Bobadilla. Jenna Bree, *Father Lost Vision, Needed Leg Amputation after Seeing 'Fake Doctor,' Daughter Says*, Fox 13 News (July 28, 2022), https://www.fox13now.com/news/local-news/father-lost-vision-needed-leg-amputation-after-seeing-fake-doctor-daughter-says. No one in the radio or news reporting mentioned it but Edgar Flores Bobadilla was acting in the role of community *curandero* similar to a culture in Mexico.

Further, there is little allowance under the Utah Medical Practice Act for an unlicensed faith-based healer. Under Utah Code Section 58-67-305(4), a faith-based healer exception exists so long as there is no use of prescription drugs, which has a very broad definition for controlled substances under Utah Code Section 58-17b-102. Herbs, minerals, and vitamins are exempt under Utah Code Section 58-37-2. The best scenario is for this community to engage a licensed physician that provides alternate medical practices in line with Utah Administrative Code R156-67-603 and as it is defined in Utah Administrative Code R156-67-102(2). This allows the ethical checks of a licensed professional, the ability to incorporate the best of traditional medicine and homeopathic approaches, and thus fills the role that the *curandero* occupies in the culture. The larger issue is providing this option within the Utah medical community and implementing it in communities that are already reticent to engage with traditional medical and government institutions.

The Flores Bobadilla matter is beyond mere folk remedies and natural medicine. It is unsettling that this is happening in our state and it is especially worrisome that people have sought this man out for healthcare. The Mexican community has an implicit trust for informal medicine. Utah has the Utah Medical Practice Act and its rules as well as the Pharmacy Practice Act that serve as consumer protections from egregious unlicensed conduct. Our Bar and medical communities need to be aware of the susceptibility of this and address possible options. This would not have happened if there was not an unmet demand.

Toderos:

The single largest case type that I saw at the Utah Department of Commerce were violations under Utah Code Section 58-55-501(1): unlawful conduct for unlicensed practice in a construction trade without having the required license or lacking an exemption. This is contractor work. In Utah, to do almost all major construction and renovations, the person must be a licensed general or specialized contractor. Without the license, it is a citable offense as a class A misdemeanor under Utah Code Section 58-55-503(2)(a). These cases exploded during the pandemic with renovation frenzy combined with the volume of many people entering the construction field, often without experience and licensure.

A handyman is an exemption from the Utah Construction Trades Licensing Act. *See* Utah Code Ann. § 58-55-305(1)(h). Essentially, anyone can do construction work for hire up to $1,000 for labor and materials, so long as it is not in specialized licensure for plumbing and electrical. A DOPL approved exemption is also available for the total to increase to $3,000 for labor and materials in areas that do not require specialized licensure, but it requires proof of a bond. *See* Utah Admin. Code R156-55a-305a.

There was a consistent trend in my informal hearings for unlicensed contractors or handymen: Spanish-speaking Hispanic people were constant regardless of the pandemic or workforce options. Foreign-born individuals have issues understanding the licensing requirements in Utah due to unfamiliarity and language barriers. But there were jobs, and contractors were desperate for manual labor. These individuals would always find side work from simply building their networks, a neighbor tells another neighbor and so on. This work is completely familiar to most Mexican immigrants since it is part of the culture. They are called *toderos*, which is a person that can do it all, a handyman. This is familiar to me as I had an uncle who did anything from side jobs to building homes, all without a license in the State of New Mexico.

I want to be clear that the State of Utah does not inform the U.S. Department of Homeland Security about any of its investigations or citations. An undocumented immigrant is often fearful of cooperating with Commerce investigators, and the hearings were always difficult to conduct because these individuals had trouble with English and even more trouble understanding why they needed a license to do work that they knew how to do. It was always a conversation about why the statutes were a consumer protection to current homeowners and future homeowners of the homes they worked on. All many wanted to do was work for pay.

The American construction trades need to be clearer for these immigrant communities. Labor in exempt work under Utah Administrative Code R156-55a-301(7) and (8) is allowed. But a specific license is required for general contracting, *see id*. R156-55a-301(2), anything electrical above changing a light switch cover, *see id*. R156-55b-102(1), and all plumbing beyond changing appliances, *see id*. R156-55c-102(2)(a).

Most importantly, following the Utah Construction Trades Licensing Act prevents abuse of a vulnerable community. This was seen in the adjacent agricultural industry where H-2A visa holders are brought here to work. KSL reported that a president of the Utah Farm Bureau Federation resigned under allegations of fraud and human trafficking. Eliza Pace, *Utah Farm Bureau President*

Arrested for Assault, Investigated for Human Trafficking, KSL (Aug. 11, 2023), https://ksltv.com/576403/president-of-utah-farm-bureau-arrested-for-assault-investigated-for-human-trafficking/. Though not as egregious, similar situations are common for undocumented immigrants in construction.

I am not making an argument for change but for compliance by all. The best recourse is information and community education to help people work in areas that do not require specialized licensure, to help workers stay away from abusive situations, and to communicate a safe harbor environment for reporting. It is the Bar's job, at the least, to be aware of the laws and situation.

Notarios:

Comparative legal system studies are difficult to fit into our American legal system framework. All countries in Latin America save Guyana, which has a Dutch common law system, have civil law. As we remember, civil law has long constitutions, expansive codes, less freedom of contract, and the lack of precedent. The roles of attorneys are different, short on court time, long on paperwork. In many countries in Latin America as well as Spain, notaries are a wholly professional field like a transactional attorney in the United States. The Spanish word is *notario publico*.

The confusion in the United States is the misalignment for the occupational roles of notaries. In Latin America and Spain, a notary must complete a five-year degree (our undergraduate degree equivalent) in law and often must have three to eight years of specialization, like our law school and internships for licensure. Conversely, in Utah, one must be eighteen years of age or older, be a U.S citizen or have permanent resident status under 8 C.F.R. section 245a.1 of the Immigration and Nationality Act, must lawfully reside in the State of Utah or be employed in the state for at least thirty days prior to applying for a notarial commission, be able to read, write, and understand English, pay for and pass the online exam, submit to the background check, and upload a copy of the bond and oath of office to the Lieutenant Governor's website. A notary is completely different in the United States than it is in Latin America.

The danger of this discrepancy is plain. A person licensed as a Utah notary public that can administer oaths for documentation can be mistaken as a transactional attorney. The one pressure point where immigrants need transactional legal assistance is with immigration papers.

The Utah context is a bit unique. Under the Immigration Consultants Registration Act, Utah Code Ann. §§ 13-49-101 to -404, an

immigration consultant is allowed to provide nonlegal assistance or advice on an immigration matter including completing a document provided by a federal or state agency, but not advising a person as to the answers; translating a person's answer to a question posed in a document; securing for a person supporting documents like a birth certificate; submitting a completed document on a person's behalf and at the person's request to the United States Citizenship and Immigration Services; or for payment, referring a person to a person who could undertake legal representation activities in an immigration matter. *Id.* § 13-49-102(5). Anyone that is acting as *notario publico* in Utah, commissioned or not, in the field of immigration, as registered Utah immigration consultant or not, engages in the practice of law in Utah.

The UPL Committee sees continuous matters involving immigration fraud. The facts seem to be similar: people pay a substantial sum (sometimes $5,000+) to people who represent that they can solve their immigration problem, something goes wrong, and the consumers are out of pocket for the money and now they are facing new or worsened immigration violations.

Under Utah law, only attorneys who are active, licensed members of the Utah Bar in good standing may engage in the practice of immigration law in Utah. *See id.* § 78A-9-103(1)(a). Rule 14-802(b)(1) of the Utah Supreme Court Rules of Professional Practice defines the practice of law as "representing the interests of another person by informing, counseling, advising, assisting, advocating for, or drafting documents for that person through applying the law and associated legal principles to that person's facts and circumstances." With limited exceptions, Rule 14-111 prohibits a person who is not a licensed attorney from acting or holding himself out to the public as a person qualified to practice law. Utah Code Jud. Admin. R.14-111. Unlicensed persons who hold themselves out to be attorneys can be subject to civil proceedings enjoining them from such representations.

The term *notario* should be viewed very skeptically in Utah. To serve as a true *notario publico* in the State of Utah, one should be a licensed attorney with a substantial amount of their practice in immigration, one should also be a licensed realtor, and their staff should be registered immigration consultants with DCP and have Utah notary public commissions. Anything less is suspect.

The Relevance to the Utah State Bar:

This was meant to be short and anecdotal; a coda of sorts to my time as an ALJ and hearing officer with the Utah Department of Commerce and serving on the Bar's UPL Committee. I have moved into private practice and moved to another committee due to increased travel. I wished to give a kind of report to the Bar of what I saw in the civic machinery from my own cultural perspective.

I am Hispanic and I felt that these issues were apparent but perhaps not as readily seen by others without the sociological context. I sincerely believe these are growing pains for our state that will not quickly disappear. According to the ABA, 5% of American lawyers are Hispanic, while the U.S. Census reports that 18.5% of the United States population is Hispanic. Am. Bar Ass'n, *ABA Profile of the Legal Profession* 33 (July 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf (last visited on Jan. 31, 2024). The Utah Center for Legal Inclusion estimates that the Utah Hispanic lawyer percentage is just 3% in 2021. *Diversity in Utah Law: Gender and racial demographics in Utah's legal community*, Utah Center for Legal Inclusion, https://www.utahcli.org/diversity-in-utah-law/ (last visited on Feb. 1, 2024).

Again, 14% of Utah is Hispanic according to the U.S. Census 2020 estimates. Given the current law school pipeline where the Law School Admission Council estimates that 2023 law school Hispanic matriculants are now at 9.4% of the total 2023 law school matriculants, these proportions are not likely to greatly change in the foreseeable future. James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, Law School Admission Council (Dec. 15, 2023), https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains#:~:text=Hispanic%2FLatinx%20students%20comprise%209.4,compared%20to%208.8%25%20in%202021. Due to this, our Bar needs to be aware of these cultural disparities for a more just and equitable civic system.

The following are links to information for reporting and assistance if you need it. I can attest firsthand that everyone at the Utah Department of Commerce and those serving on the UPL Committee take their roles seriously.

Utah State Bar Unauthorized Practice of Law Committee: https://www.utahbar.org/accesstojustice/unauthorized-practice-of-law/
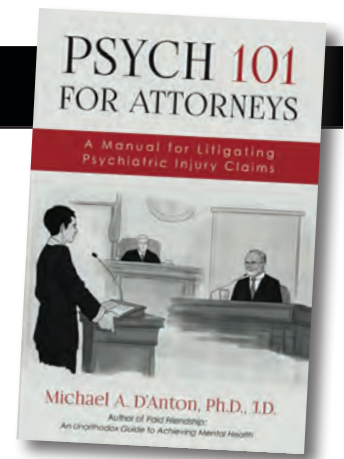
Utah Division of Consumer Protection: https://dcp.utah.gov/

Utah Division of Professional Licensing: https://dopl.utah.gov/

Psych 101 for Attorneys
A Manual for Litigating Psychiatric Injury Claims

by Michael A. D'Anton, Ph.D., J.D.

Reviewed by Alan Mortensen

While on a recent cross-country airplane trip from Salt Lake City to Miami, I opened a book I had been given, and the question immediately jumped from the page: "Do you know the difference between PTSD and the sequelae of a Traumatic Brain Injury when they present with the same symptomology?" I was intrigued, as that is a question I deal with regularly and I remain unsure if I fully know the answer. So given the few minutes of free time at 30,000 feet, I began reading Michael A. D'Anton, Ph.D., J.D.'s *Psych 101 for Attorneys, A Manual for Litigating Injury Claims* (2022).

Dr. D'Anton is both a licensed psychologist and a litigator in New Jersey. He brings an expertise in both psychology and the law to provide the practitioner a road map from psychiatric-injury case sign-up to verdict. His overriding theme of the book is that a practitioner needs to "check your ego at the door" and really dive into understanding how a psychiatric injury case differs from other personal injury cases. The failure to do so can result in a plaintiff attorney losing her payday or defense counsel being "quickly jettisoned by insurance carriers and management defendants where there is a favorable plaintiff verdict."

> "[S]imply, you should leave an area of expertise to an expert."

The book provides a concise and easy-to-read road map in litigating psychiatric injuries. Dr. D'Anton sets forth a baseline of medical information all practitioners must understand, including the difference between a traumatic brain injury and Post Traumatic Stress Disorder (PTSD). He explains terms like DSM-5, ICD-10, mood disorders, adjustment disorders, personality disorders, depression, medications, and anxiety. He explains forensic psychological evaluations, the various tests administered and what they test, and how to best prepare a client for the dreaded Rule 35 DME. He then spends the remainder of the book explaining how an expert should be selected and properly used from case intake, through discovery, neuropsychological testing, expert reports, *Daubert* challenges and finally trial. His mantra is "simply, you should leave an area of expertise to an expert."

D'Anton is a defense attorney, and that bias shows in his book. He paints plaintiffs' attorneys as wanting our clients to never get better so that we can maximize paychecks. He claims that victims' lawyers use PTSD as a tool to "get more bang for their buck."

While being used to such slights, I find them horribly unfair to both me and my colleagues in the plaintiffs' bar. I have not met one colleague who does not cheer for our injured clients' full medical recovery. In fact, many times the plaintiff's lawyer is the first one to help a brain injured or psychologically damaged client in obtaining the care and resources that are available to that population but largely unknown.

In fairness to Dr. D'Anton, he also chides a common defense claim that Rule 35 exams should not be taped, as doing so allegedly compromises the integrity of the testing. Siding with Utah Rule of Civil Procedure 35, he proudly declares,

ALAN W. MORTENSEN is a founder and president of the plaintiffs' boutique law firm of Mortensen & Milne.
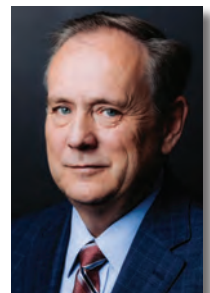
[i]n my practice as a psychologist, I never objected to having the examination taped. Since I was confident that I would conduct a fair and ethical examination, I was unconcerned that the examination would be memorialized in some way. Practitioners complain that the presence of a recording device or person will interfere with the exam. It doesn't.

Just as we always suspected!

My biggest takeaway from D'Anton is his debunking of the myth that for a psychiatric injury to be legitimate, it must accompany a physical injury. He argues that the term PTSD should be replaced by "PTSI" or Post-Traumatic Stress Injury. He gives the example of a patient who served in Vietnam in graves registration who came home psychiatrically disabled. His PTSD disability claim was denied by the VA because he had not been involved in active combat. D'Anton highlighted the unfairness: "Spending 18 months placing soldiers, and in many cases, only parts of soldiers, in body bags was not considered a traumatic enough experience for the VA." Through the work of many, including D'Anton, the VA now recognizes trauma as an injury.

Dr. D'Anton's book is a well-written guide for new lawyers handling these cases. It is also a very good refresher for practitioners (me) who at times get lazy because of their (my) experience. Finally, it is a good reminder for all of us that "litigation is the pursuit of practical ends, not a game of chess."[1] D'Anton's book is a piece of practical ends in helping our injured clients and defending the claims brought by such clients. As I landed in Miami, having finished the book, I felt rewarded for investing a few hours of free time reading it.

1. D'Anton ended the book with this quote from Associate Justice Felix Frankfurter.

Psych 101 for Attorneys
A Manual for Litigating
Psychiatric Injury Claims
by Michael A. D'Anton, Ph.D., J.D.
Independently Published (2022)
174 pages
Available in paperback and e-book formats.

Pro Bono Debt Collection Assistance – What I Have Learned Thus Far

by George Sutton

I began volunteering to assist pro se defendants in debt collection cases as I approached retirement. It was a good fit with my career as a financial services attorney and regulator. Although I am not an experienced litigator – my first trial in thirty-five years was a pro bono bench trial in 2017 – I soon discovered that a basic knowledge of procedure, evidence, and contracts was enough to help those caught in a system that in many cases scares them and that they may not understand. I mostly assist pro se defendants one day each month with hearings in Third District court as part of a program administered by the Bar. These defendants are typically low-income working people who cannot afford an attorney and do not know how to navigate the judicial system. The goal is to at least help them understand what is happening to them and their options.

The Pro Se Calendar Volunteer Program

The program assisting pro se debt collection defendants is only offered in the Third District. (Regrettably, a judge in the Fourth District recently told me he didn't think they could get enough volunteers to support a similar program there.) It consolidates contested hearings involving a pro se defendant and a plaintiff represented by an attorney. Pro se defendants file answers or dispute charges in only a small percentage of cases. The rest usually end up as default judgments entered by judges' clerks after confirming that no answer was filed.

The benefits of this program are summarized in a recent report released by the Bar covering years 2022 to 2023. UTAH STATE BAR PRO BONO COMMISSION, 2022–23 PRO SE CALENDAR VOLUNTEER PROGRAM REPORT (2023), https://rb.gy/xyxed4. Attorneys were appointed in 835 hearings (compared to 635 hearings the year before). *Id*. at 3. The report found that as of November 2023, 34% of cases had been dismissed, 50% had been resolved by a stipulation that had not been breached, and only 16% involved stipulations that had been breached. *Id*. at 6. Even the plaintiffs benefit from the stipulations. I am often thanked by the plaintiff's attorney as well as my client for helping resolve a case. The report does not include disputed cases the parties cannot resolve either by motion or agreement. Those are sent back to the judge originally assigned the case for trial. I also assume many of the dismissals occurred after the defendant fulfilled all the terms of a stipulation or filed bankruptcy.

The report listed the largest groups of cases as housing (350), consumer (201), and medical (167). *Id*. at 5. "Housing" cases involved claims of unpaid debts owed by prior tenants. It did not include evictions. *Id*. Consumer cases consisted of unpaid credit cards and other loans. *Id*. at 4. Medical claims did not include dental. *Id*. at 5. The remaining seven categories totaled 120 cases. *Id*.

The report also lists the top ten law firms representing plaintiffs in these cases. *Id*. at 7. Most of these cases are brought by a small number of attorneys. *Id*.

The Importance of the Program for Pro Se Defendants

This program is the best solution currently available to address a serious flaw in the system. Many defendants don't understand why they have been sued or the consequences of their options. Suits filed years after the purported debt arose are often a complete surprise and pose a serious financial threat to the defendants. Most don't realize that disputing claims or asking for a hearing is a gamble that can result in a judgment several times larger than the original debt, or how the risk of garnishments can affect their employment and ability to make rent and other payments, or how a judgment will affect their credit score and ability to rent apartments or eventually apply for a mortgage. Although the amounts at stake are

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relatively small, the consequences can be more devastating than other defendants face. Many of these people have limited or no ability to deal with unexpected expenses and may end up homeless and bankrupt if garnishments begin. This volunteer program and the assistance provided by a few pro bono and low bono legal organizations are the best tools to help someone understand those risks and make good decisions about how to proceed.

The problem goes much deeper. The advantage a plaintiff's attorney has when a defendant has no legal training is prone to abuse. These cases are kept on the regular court calendar so a district judge can review them. But I am sure there are many judgments, perhaps thousands, based on invalid claims that are unexamined and unchallenged because the defendant defaults. Some defendants simply don't understand what is happening and how to respond so they do nothing. They live day to day and paycheck to paycheck. Judgments and collections are tomorrow – until the garnishments start. That is why a fair number of hearings are objections to garnishment after a default judgment was entered. There is usually no flaw in the garnishment; it is just the first time the defendant realizes the consequences of getting sued and they need to tell a judge why they can't afford to have a quarter of their income seized.

To be sure, many defendants owe the debt and the ability to enforce contracts and collect debts is important. Credit doesn't work if there is no remedy for failing to pay a legitimate debt. Landlords with a mortgage to pay need a means to collect what they can from tenants who have skipped on their rent or damaged the property making it temporarily unrentable. Damages caused by some former tenants are horrendous. The challenge is resolving those cases while preventing abuses by plaintiffs who may be incentivized to game the system.

Typical Outcomes with Pro Bono Assistance

I was pleased to discover that most of my cases involve real debts that I can help settle by acting basically as a mediator. The real issues are practical, not legal. Once a debt becomes seriously delinquent, the creditor mostly wants to see if it can collect anything and what it will cost to collect it. Most defendants, once they understand what they are facing and the importance of avoiding a judgment, want to find a way to pay an amount they can afford, often in monthly payments. Many defendants genuinely feel obligated and want to settle the matter if they can afford the payments. To facilitate that I collect information about the defendant's current income and expenses. Then I talk with the plaintiff's counsel about reducing the total amount owed and accepting monthly payments.

Some plaintiffs' attorneys want documentation about the defendant's financial condition, which I help get. When it works, a plaintiff will collect more from settlement than if it forces the defendant into bankruptcy or homelessness while the defendant avoids a judgment and hassles at work and home. It is the best outcome for all parties. These cases often don't reach that kind of resolution by themselves because the defendants don't trust the plaintiffs' lawyers and don't understand the risks or their options.

An agreement is usually specified in a stipulation entered on the record that provides for the plaintiff to confess judgment for the full amount originally claimed if the debtor fails to make the agreed payments. I try to make sure the defendant can pay the agreed amount and stress the importance of making those payments. The Bar tracks that afterwards and tells me most of my clients pay as agreed.

If an agreement is not reached, many defendants file for bankruptcy and the creditors get nothing since these defendants rarely have any assets. Bankruptcy is less of a stigma than in the past and it avoids garnishments and other seizures, but it still has some drawbacks.

In a few cases, mostly involving charged off credit card balances, the plaintiff wants to get a judgment but does not plan to pursue collection if little or nothing can be collected at that time. A judgment can have some future value if the defendant's economic circumstances improve and they want to clean up their credit record. These cases are usually straightforward and do not involve inflated claims. That is due in part to regulators who have been fairly aggressive in cleaning up abusive or unfair collection practices, and particularly the federal Consumer Financial Protection Bureau created in 2010.

Inequities in Housing Collection Cases

But a significant number of other cases involve disputed or invalid claims, mostly among unregulated creditors. When I began volunteering, I thought I might encounter some fringe collectors engaged in abuses like trying to collect debts beyond the statute of limitations. That has been a problem in other parts of the nation. I'm happy to report I haven't encountered any of those cases.

What I have encountered, with some frequency, are abuses involving landlords. A typical Wednesday afternoon debt collection calendar has multiple landlord cases. The cases I have been assigned all involved low-income working people. A common story is that the defendant did a walk through with the building manager or did a thorough cleaning before leaving and thought they owed nothing. Some took photos or videos when they left. Those cases are usually dismissed when I send the evidence to the plaintiff's attorney.

For most defendants the lawsuit from their former landlord comes as a complete surprise. Many are genuinely scared. They have no idea how to deal with a lawsuit and often trip up procedurally if they dispute the claims. Many don't respond to discovery requests, or file motions for summary judgment before the facts necessary to support the motion have been established. The plaintiff has a lot of leverage because garnishment is the primary means to collect a judgment and someone living on a tight budget just to purchase the basics can't afford to have a quarter of their take home pay seized. It is a risk many decide they can't afford to take, especially when they feel outmatched in a system they don't understand. The only way to get certainty is to agree to a settlement they can afford regardless of the merits of their case.

These cases are often based solely on a landlord's account records, which are admissible under an exception to the hearsay rule if they were maintained in the normal course of business. But those records, by themselves, do not substantiate many charges for which a former tenant could be liable. There may be no dispute if the account lists unpaid rent and utilities, but more often than not the record shows maintenance charges such as cleaning carpets.

Under Utah law, a tenant is liable for maintenance charges only if the unit is damaged beyond normal wear and tear. Utah Code Ann. § 57-17-3(1). This is also echoed in the express terms of most rental agreements.

Often, the landlord's account records list charges that could not be due to damage beyond normal wear and tear. These include changing locks, replacing worn out blinds and rollers on closet doors, and painting outside decks that have not been maintained for years. One case included a charge for relighting a pilot light. But while these charges should not actually be charged to the tenant, this doesn't matter if the tenant defaults or makes procedural errors and fails to properly dispute the claims.

Many times, the principal claims amount to only a few hundred dollars, but 40% collection fees, interest at 28%, attorney fees, and court costs can increase the total claimed by thousands of dollars. The accumulation of attorney fees is especially risky if a defendant files an answer or disputes any charges. Current court rules limit attorney fees to $350 if a defendant defaults but imposes no limit other than the judge's discretion if the defendant answers and disputes facts or asserts defenses. Attorney fees often become most of the amount claimed by the plaintiff in a disputed case. I have been involved in cases in which attorney fees accumulated to several times more than the amount of the original claim. If a case was taken to trial, the plaintiff's attorney fees could easily grow to the point where the original claim would be almost immaterial. In many cases, without the attorney fees and other add on charges it would not make sense economically to file litigation.

It became clear to me that some landlords were reviewing old accounts and bringing cases when records showed expenses with little analysis of whether those expenses are the type for which they would be entitled to reimbursement from the former tenant. I have been involved in several cases in which the claims were several years old, suggesting that the landlords did not initially consider those claims to be legitimate debts worth pursuing.

Strategies for Defense

There are multiple ways to defend housing debt collection cases when the plaintiff only has a business record to support its claims, especially when the claims are years old.

A business record by itself does not establish liability if it only shows the carpets were cleaned or the locks were changed. I demand proof of damage beyond normal wear and tear when plaintiffs' business records are ambiguous. Occasionally the plaintiff has documentation or a witness, but most plaintiffs I encounter are owners of large apartment buildings and they rarely can present a manager or maintenance worker with a reliable memory of the condition of that specific unit among sometimes hundreds of other units prepped for a new tenant months or years before. Often the plaintiff cannot even identify who the manager and maintenance workers were at that time. In one recent case the building had changed owners and managers multiple times since the defendant lived there and it was questionable whether the current custodian of the records could testify how older records were maintained to get them admitted under the hearsay rule exception.

Laches is a viable defense in cases not filed for years but still within the statute of limitations, at least in Utah state court. *Vesey v. Nelson*, 2017 UT App 77, ¶ 7, 397 P.3d 846. In *Vesey*, the court of appeals held that laches applies when an unreasonable delay before filing a claim prejudices the defendant. *Id.* ¶¶ 8–14.

In cases where the plaintiff has delayed bringing suit, I try to describe to the court why the long delay makes it impossible to present a full record of the case. For example, the defendant may have done a move out inspection with a manager who can no longer be identified, or whose memory of that specific conversation is unreliable. The defendant says the manager agreed the unit was clean and undamaged, but the manager's statements are inadmissible hearsay unless he or she is available to testify and remembers the conversation. Additionally, maintenance records, if they were ever maintained, may not be kept or are thrown out after a period of time. Even when there are some likely valid claims such as unpaid rent or utilities, it is often possible to reduce the amounts claimed if they also include maintenance and cleaning costs and then argue for a reduction in the added fees and interest including the attorney fees. In one case I tried the original damages claim of over $2,000 was reduced to $98. Despite the small amounts involved, that case needed to be litigated because the defendant, a single woman raising grandkids, was receiving a kind of rental assistance that would have stopped if she had unsatisfied judgments owed to a former landlord.

Another example of a case where I successfully used a laches defense was one filed five years and eleven months after the

defendant, a single mother, moved out of the plaintiff's apartment. The defendant disputed the claims and had filed a motion for summary judgment on her own before requesting pro bono assistance. The initial claim was for various maintenance costs and changing the locks, totaling about $450. There was no claim for unpaid rent or utilities. When I became involved, the court denied the motion for summary judgment because important facts had not been admitted as evidence. By then, the plaintiff claimed the defendant owed over $3,500 with fees, costs, and interest, and that amount would continue to grow as more time was spent on the case.

It turned out that the defendant had moved out a few months early after her boyfriend beat her badly enough to require hospitalization. With assistance from counsellors at the hospital, she followed the steps specified in Utah Code Section 57-22-5.1 to terminate her lease obligations so she could move away from her abuser. He stayed on and paid the rent through the end of the lease. Her early termination of the lease was not reflected in the plaintiff's business records, and the charges claimed were probably for routine maintenance even if she had stayed for the full lease term. I helped her file an amended answer including laches as an affirmative defense and we informed the plaintiff that it would have to provide additional evidence to show the unit was not only damaged but that those damages occurred before she moved out. The plaintiff dismissed the case before we could schedule an evidentiary hearing to take testimony and establish these facts for the record.

In addition to laches, in some cases a defendant can argue unconscionability, violation of the covenant of good faith and fair dealing, and ambiguity of key contractual language. The rental contracts are always adhesive and usually a paradigm of technical fine print covering several pages.

I recently represented a defendant who had moved out of an apartment, owing nothing, at the end of the original one-year lease term more than six years earlier. The plaintiff said this defendant was liable for debts allegedly incurred later by other tenants with whom he had shared the apartment. The other tenants stayed for another four years under a provision in the lease agreement that automatically converted it to a month-to-month tenancy if a tenant stayed. The alleged debts arose when those tenants moved out, and the lawsuit was filed more than two years after that. The plaintiff argued the defendant was jointly liable for the other tenants' debts because he did not give thirty days advance written notice that he was leaving, as required in the rental agreement. One of the other tenants testified she notified the apartment manager that the defendant was moving out, but it was not in writing.

The defendant argued it was not clear that any notice was required if other tenants stayed. The agreement said no notice was required if the "tenant" (defined to include multiple tenants) remained. But the plaintiff argued that only applies to those tenants who continued living there. We argued this provision was ambiguous and if the contract was construed in favor of the defendant it would not apply if any tenant stayed on. We also argued the notice requirement was reasonable only if the unit would become vacant and the landlord would need time to find a new tenant. The contract made no provision for termination if the thirty-day notice was not given before moving out, even if written notice was given later. A plaintiff could argue that any tenant who did not give adequate notice would become a perpetual month-to-month tenant even if new renters moved in.

These confusing and ambiguous notice provisions were in the first page of the lease agreement. Another section on page five of the contract said if there were multiple occupants and some moved out while others stayed, the ones that vacated would continue to be liable unless the owner gave them a release in writing, arguably even if those leaving had given the thirty-day written notice in time. Nothing in the agreement required the owner to give a release. That might be reasonable if the plaintiff primarily relied on the person who was leaving to pay the rent and other charges, but my client was disabled, unable to work or live alone, judgment proof, and unable to guarantee anything.

There is little room to argue that this agreement was a fair bargain for this defendant. It was a trap, in these circumstances at least. The form of this agreement is not unusual. I have seen the same form used by landlords in other cases I have dealt with.

Despite these facts, the plaintiff still tried to get some kind of settlement out of this defendant by continuing to pursue a judgment. This is a real threat even for a defendant who is judgment proof because many landlords will not rent to a person who has a judgment in their credit record. I have represented defendants who agreed to pay something in settlement to avoid the risk of a judgment or being blacklisted even when they had viable defenses.

This defendant initially filed an answer handwritten by his brother. I helped him file an amended answer that included defenses for laches, the statute of limitations, failure of consideration and unconscionability. After oral argument the judge found laches applied and dismissed the case.

I thought unconscionability was also a strong defense in that case. The Utah Supreme Court has listed the following criteria for finding unconscionability:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? …

Additional factors which bear upon unconscionability are: (1) the use of printed form or boilerplate contracts drawn skillfully by the part in the strongest economic position; (2) excessive price or interest; (3) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (4) an overall imbalance in the obligations and rights imposed by the bargain; (5) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate; (6) contract terms so one-sided as to oppress or unfairly surprise an innocent party; and (7) lack of opportunity for meaningful negotiation.

Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461-62 (Utah 1983) (quotation simplified).

I believe the facts in my case met virtually all these qualifications. As interpreted by the plaintiff, this agreement was a perpetual liability trap unless all the tenants gave thirty days advance written notice and then moved out simultaneously. There was certainly no benefit in the bargain for this defendant after he left, having paid everything he owed at the end of the original lease term. Hopefully similar points will be raised in other cases and eventually result in landlords removing the more onerous provisions from their forms.

Proposals for Reform

Low-income criminal defendants are entitled to an attorney because of the risk of incarceration. I don't see a substantially less important risk if a civil judgment may cause a low-income defendant to become homeless, unemployed and credit impaired.

The amounts at issue may be relatively small, and these cases are often seen as unimportant, but even parties involved in multi-million-dollar suits do not face comparably dire consequences. That is a strong argument to require attorneys in these cases too.

Alternatively, new rules could be adopted requiring all debt collection complaints to include a copy of the contract and the business records itemizing the plaintiff's claims if those records are the sole basis for the complaint. Judges could then review those records to ensure there is evidence of liability before entering default judgment. This may be impractical due to the volume of cases that are filed, but requiring that kind of review would insulate the judges from complaints of judicial activism by plaintiffs' attorneys.

Another possible solution would be to amend the law to prohibit a landlord from claiming add-ons such as collection fees, interest, and attorney fees unless the action is filed within, say, 120 or 180 days after the defendant moves out or the court finds good cause for the delay, such as difficulty in locating the defendant. That would still enable plaintiffs to sue for damages but I believe such reform would significantly reduce the number of housing cases and help ensure the cases that were filed involved legitimate debts.

But instead of this reform, the legislature has considered legislation that could further the problems facing defendants in debt collection cases. House Joint Resolution 8, pending at the time of writing, would amend Rule 63 of the Utah Rules of Civil Procedure to allow parties to disqualify a judge without cause. H.R.J. Res. 8, 65th Leg., Gen. Sess. (Utah 2024). Plaintiffs might try to use this to forum shop, including even to avoid the consolidated debt collection calendar where pro bono assistance may be available to defendants. Justice court reform, contemplated for future legislative sessions, may also impact debt collection cases in ways that could harm unrepresented defendants. *See* H.R.J. Res. 1, 65th Leg., Gen. Sess. (Utah 2024).

Finally, pro bono assistance is critical. These cases provide opportunities for law students and young attorneys to gain court experience, and I encourage law schools and legal employers to consider programs that would facilitate future lawyers' participation in debt collection cases under Rule 14-807 of the Utah Code of Judicial Administration.

You should also volunteer. If we want the judicial system to be fair and just, volunteer help for these and other cases involving low-income defendants is needed and appreciated. The Bar provides malpractice coverage and special rules apply to these limited appearances. It is time well spent if you are inclined to help.

Disagree Better: An Interview With Governor Spencer J. Cox

by Keith A. Call, Clark S. Gardner, and Spencer J. Cox

On January 5, 2024, Governor Spencer J. Cox gave a landmark speech to the Utah State Bar on his National Governor's Association initiative, "Disagree Better: Healthy Conflict for Better Policy." Nearly 100 distinguished guests heard the speech live, and over 2,000 members of the Bar listened by Zoom. It was a historic event. We encourage all of you to view his speech at https://www.dropbox.com/scl/fi/k0i3ywxt5fpa00o5v7dot/1-5-2024-Disagree-Better.mp4?rlkey=07rokcukfdwu90ugb7w3lwhav&dl=0.

One month earlier, on December 7, 2023, we had the opportunity to sit down and ask Governor Cox a few questions about his "Disagree Better" initiative. This article is a summary of our interview. We have taken some editorial liberties, but the following summary is true to key elements of our discussion.

Keith and Clark: *Will you explain to us what your disagree better initiative is all about and how where and why are you promoting this?*

Governor Cox: As the Chair of the National Governors Association, I get to run an initiative with the support of our other governors. There have been some great initiatives in the past. After going through a litany of ideas, we realized we can't solve the biggest problems in our country if we hate each other. We ultimately decided to elevate *this* issue – the idea that as a country, if we want to solve big problems, we have to stop hating each other.

We have to end the contempt that we're seeing. And we have to figure out how to disagree better. We were very intentional about those two words, "disagree better."

To understand what it is, you also have to understand what it is *not*. It is not another civility initiative, although we do need more civility. It is *not* just about being kind and getting along, although we certainly need more kindness, and I advocate for that. It really is about conflict resolution. It's about disagreeing.

This initiative is very much research informed. We've been working with Stanford, Dartmouth, Harvard, and other organizations that are in this depolarization space. There is healthy conflict and there is unhealthy conflict. What we are seeing as a country is that we have moved very much into an unhealthy conflict space. And so how do we get back to the type of profound disagreement that our nation was founded on, that led to a sacred document – a constitution that has been a light and a beacon to the rest of the world – but came together in profound disagreement and conflict. How do we get back to Ronald Reagan and Tip O'Neill, where you can be of different parties, disagree, battle, and then go to dinner together, hang out together, and find common ground and solutions. Our nation's founders didn't like each other sometimes. They disagreed passionately. And yet, they stayed together and trusted each other enough to form a nation, the greatest nation in the history of the world. So that's how this all came together.

KEITH A. CALL is a shareholder and CLARK S. GARDNER is an associate at Spencer Fane | Snow, Christensen & Martineau. Their practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

SPENCER J. COX is Utah's eighteenth governor and current chair of the National Governor's Association.

Keith and Clark: *How did you become interested in this topic?*

Governor Cox: It started several years ago, about the time I got elected to the legislature and then became Lieutenant Governor. I started to see what was happening, and it concerned me. In fact, I wrote a piece for the University of Utah. It was early in 2014, right after I became Lieutenant Governor about how politics was becoming a religion for too many people. And we were seeing deterioration, mental health, loneliness, and just a lack of trust in institutions was starting to build. That concerned me. But for this particular initiative, it came to a head when I was running for governor in 2020. We tried to run a different type of campaign. We visited every city and town doing service projects. The concept was, could the state be a better place after a political campaign than before? And the answer historically is usually "no." You're usually more divided after a campaign. There's been a battle and name calling and all the negative ads and those types of things. So, my wife and I decided that we would only run positive ads, that we would not attack our opponents and that we would do service projects across the state to try to bring people together, which was a different idea. Even if we lost, we could look back and say we made the state a better place.

At the same time, we were also in the middle of the most divisive presidential campaign of our lifetimes. We had Trump and Biden going at it. In September 2020, just two months before the election, a friend of mine told me she was worried about our nation and asked if there was something I could do. I shared her concern. I worried that if Donald Trump won reelection, you would see mass protests around the country. And I worried that if Joe Biden won that we would see some sort of violence – and we did, on January 6th. But this is still September. And my friend said, can't you do something? And those words just haunted me. I thought about what I could do, and over the weekend, I called my opponent Chris Peterson and suggested we run an ad together. He was hesitant at first. I told him he would have complete veto power, that we would work on it together, and that he could approve every word. I told him we would have the same amount of airtime. I just wanted to do *something*.

To his credit, Chris said he believed in this and jumped on board. In the ad we said, "I'm Spencer Cox, and I think you should vote for me." And he said, "I'm Chris Peterson and I think you should vote for me." We said, "We disagree on lots of things,

but we can agree that Utah is a wonderful place, and we can disagree without hating each other. We can agree to accept the results of the election whatever they are." This ad was filmed and produced very quickly – in about a week. That was sometime in October. It was amazing what happened next. We have millions of hits and many interview requests – not just here but in other places in the world. A professor at the University of Utah submitted the ad to a study experiment being done at Stanford where they picked twenty-five of these types of videos. They showed them to 30,000 people. They found that our ad had a huge depolarizing effect, specifically when it came to thoughts of violence towards the other side.

So, that was the inspiration for this campaign.

Keith and Clark: *This campaign isn't just about agreeing, or giving in/conceding, right? What does healthy disagreement look like?*

It's the exact opposite of that. And some of the criticism I get from the right is that "you just want us to give up on our principles to go along to get along." "Disagree Better" is not that at all. It has nothing to do with that. It's the exact opposite. On the left, I get criticized because it's more of a "we're not going to engage with 'those people' – those people hate us, so we aren't going to engage with those people." Both of those, I think, are very dangerous. This initiative is really about conflict. Staying true to your ideals, but allowing space for others to engage as well. And so, one of the one of the things we talk about often is attacking ideas instead of people and not assuming the worst of people. Trying to understand where your adversary is coming from is really critical.

We have what we call the magic question or the magic request and it's *"tell me more about why you feel that way."* That kind of question or request helps you to get to the core of what your opponent is experiencing and why. Interestingly enough, when you do that, sometimes you will find common ground. You learn that, at the core, we both want the same thing. We're just trying to get to it in different ways. Then that gives you the opportunity to engage in a positive and productive discussion. Even if you can't come to an agreement, respecting the other person and showing them dignity is immensely helpful.

I will also say that treating someone with respect and dignity is a much better way to change someone's mind – if you are really interested in persuading them. Tell me the last time you changed

your mind when somebody attacked you and told you how evil or horrible or awful you were! Psychologists will tell you that it actually has the opposite effect. When we do that, it hardens our position instead of making us willing to engage and have the conversation.

"Disagree Better" is *not* about moving away from your politics or your persuasions or your principles.

Keith and Clark: *What does "Disagree Better" mean for lawyers?*

Philosophically, this is at the heart of our practice. We hold these ideals that we're going to allow space for people to disagree. Fair trials, our First Amendment rights of speech, and the notion that people are innocent until proven guilty are things that we hold dear. This radicalness of allowing for unpopular ideas and people to coexist is critical.

Attorneys are important members of our community. It's a profession that has been elevated and dignified. Attorneys often serve in positions of authority, whether it's as governor, members of the legislature, city council members, community boards, and commissions. As respected members of the community, we have to show that there is a better way to disagree with each other.

Sadly, I always joke about the bumper sticker I saw once that said, "It's 99% of attorneys that give the other 1% a bad name." (That's not true in Utah, by the way.) After my wife explained the joke to me, I realized I could be part of the problem. By definition, lawyers deal with adversarial proceedings and relationships. It's very easy for toxic behavior to exist. I love something that President John Adams said: Without the virtues of humility, patience, and moderation, "every man in power becomes a ravenous beast of prey." I don't know how many attorneys you would describe as humble, patient, and moderate. I don't know how many politicians you would describe as humble, patient, and moderate. Often in courtrooms and in the legal field you see people being ravenous. Training in the law kind of gives you a superpower. One of my law professors said

that in law school they sharpen your mind by narrowing it. In other words, we learn logic and how to tear someone down and we get really good at it. You can use those superpowers for good or for evil.

Keith and Clark: *What other advice do you have for Utah lawyers?*

My advice is to get involved in this cause of disagreeing better wherever you see it. We are all members of our community. We need to get about community building again. We need to build up institutions. It is so much easier to tear down.

When I was a young kid, I went to work for my uncle who had a construction company. He sent me out to help tear down an old barn that needed to come down. We got out the backhoe and started knocking things down. It was so much fun! In just a matter of minutes this old building was falling down. It was exhilarating. Then I started thinking about that barn, and who built it, and how long it took, and the community coming together to do that for probably weeks or months, and how expensive it was. It was a really beautiful barn. And I just think that that applies to all of us. Building institutions, faith and trust is so hard. Some of these institutions can be torn down so quickly. And tearing them down can be kind of fun, at least in the moment. You get a lot of likes on Twitter and Facebook – and you're much more likely to get on cable news.

We used to be a nation of architects, and now we're becoming a nation of arsonists. So, can we as a profession stand up and push back on our own sides? I'm always more interested in people who try to hold their own side accountable than trying to hold the other side accountable. It means much more when we do. Can we build up people and institutions, and check ourselves when it comes to tearing down? And if we can, whether it's in politics, whether it's in law, whether it's in religion or faith or anywhere in our communities, I think Utah can continue to lead the rest of the nation. We're special. We're unique. We're at risk of losing that. Let's keep Utah special. Let's keep Utah different and unique in all the right ways.

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

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Utah Supreme Court Approves Adoption of NextGen Bar Exam

The Utah Supreme Court has approved the use of the NextGen Bar Exam beginning with the July 2028, exam. The NextGen Bar Examination, currently in development by the National Conference of Bar Examiners, was developed using data from a three-year evaluation by the Conference.

The Utah Board of Bar Commissioners recommend the adoption of the NextGen exam, noting that the new exam "is the logical and sensible evolution" of the Bar exam. The new exam focuses on an assessment of nine foundational concepts and seven foundational skills that research shows are crucial to the practice of law.

"We are excited to take this step forward," said Emily Lee, the Utah State Bar's Deputy General Counsel for Admissions. "Using the NextGen exam will more fully assess the skills of those seeking to be part of the profession."

Other jurisdictions currently committed to using the NextGen exam include Arizona, Connecticut, Iowa, Kentucky, Nebraska, Maryland, Missouri, Oregon, Vermont, and Wyoming.

Questions for the NextGen exam are being written by teams of law professors, deans, attorneys, and judges from around the country. The first NextGen exam will be administered by Maryland, Missouri, and Oregon in July 2026.

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 3, 2024, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current email address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

License renewal and fees are due July 1 and will be late August 1. If renewal is not complete and payment received by September 1, your license will be suspended.

Notice of Petition for Reinstatement to the Utah State Bar

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement (Petition) filed by Ryan M. Springer, in In the Matter of the Discipline of Ryan M. Springer, Third Judicial District Court, Civil No. 190907365. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the District Court.

Notice of Legislative Positions Taken by Bar and Availability of Rebate

Positions taken by the Bar during the 2024 Utah Legislative Session and funds expended on public policy issues related to the regulation of the practice of law and the administration of justice are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative and public policies activities related to the regulation of the practice of law and the administration of justice by Supreme Court Rule 14-106, which may be found at https://www.utcourts.gov/rules/view.php?type=UCJA&rule=14-106. Lawyers and LPPs may receive a rebate of the proportion of their annual Bar license fee expended for such activities during April 1, 2023, through March 31, 2024, by notifying Director of Finance, Nathan Severin at NSeverin@utahbar.org.

The proportional amount of fees provided in the rebate include funds spent for lobbyists, staff time spent on legislative matters, and expenses for Bar delegates to travel to the American Bar Association House of Delegates. Prior year rebates have averaged approximately $6.79. The rebate amount will be calculated April 1, 2024, and we expect the amount to be consistent with prior years.

2024 Spring Convention Award Recipients

During the 2024 Utah State Bar Spring Convention, the following awards will be presented:

JUSTICE DIANA HAGEN
Dorathy Merrill Brothers Award
for the Advancement of Women
in the legal profession

SHAUNA GRAVES-ROBERTSON
Raymond S. Uno Award Award
for the Advancement of Minorities
in the legal profession

DANIELLE HAWKES
Utah Legal Well-Being
Impact Award

Spring Convention

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.

2023 *Utah Bar Journal* Cover of the Year

The winner of the 2023 *Utah Bar Journal* Cover of the Year award is *Upper Emerald Pools, Zion*, taken by Utah State Bar member Michael Steck. Mr. Steck's photo appeared on the cover of the March/April 2023 issue. A prolific photographer, Michael says he finds great solitude in photography and canyoneering in Southern Utah. The *Utah Bar Journal* is grateful that he is always so willing to allow us to use his incredible photographs for our covers!

Congratulations to Mr. Steck and thank you to all of the contributors who have shared their photographs of Utah on *Bar Journal* covers over the years!

The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page three of this issue. A tip for prospective photographers: preference is given to high resolution portrait (tall) rather than landscape (wide) photographs.

2024 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2024 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession.

Please submit your nomination for a 2024 Summer Convention Award no later than Friday, May 24, 2024. Visit https://www.utahbar.org/awards/ to view a list of past award recipients and use the form to submit your nomination in the following Summer Convention Award categories:

1. Judge of the Year
2. Lawyer of the Year
3. Section of the Year
4. Committee of the Year

Call for Nominations for Pro Bono Publico Awards

The deadline for nominations is March 29, 2024

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 3, 2024:

- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To access and submit the online nomination form please go to: https://www.utahbar.org/awards/. If you have questions please contact the Access to Justice Director at: probono@utahbar.org or 801-297-7027.

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2023, that amount is 1.96% of the mandatory license fee.

Pro Bono Honor Roll

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

Private Guardian ad Litem

Alison Bond
Chase Kimball

Pro Se Debt Collection Calendar

Miriam Allred
Greg Anjewierden
Mark Baer
John Bagley
Pamela Beatse
Stephen Booth
Ashlee Burton
Keenan Carroll
Alex Chang
Megan Connelly
David Cox
Ted Cundick
Leslie Francis
Denise George
Russell Griggs
Hong Her
Corey Hunter
Michelle James
Chase Nielsen
Samuel Parry
Brian Rothschild
Christopher Sanders
Cami Schiel
George Sutton
Amanda Todd
Brian Tucker
Alex Vandiver
Austin Westerberg
Angela Willoughby

SUBA Talk to a Lawyer Legal Clinic

N Adam Caldwell
Travis Christiansen

Rebekah-Anne Duncan
Ward Marshall
Maureen Minson
Joshua Thatcher
G Michael Westfall

Family Justice Center

Rob Allen
Isabella Ang
Steven Averett
Lindsey K. Brandt
Alixa Brobbey
Angela Cothran
Craig Day
Brandon Dromey
Dave Duncan
Kit Erickson
Michael Harrison
Peter Holland
Shannon Howard
Jefferson Jarvis
Maggie Lajoie
McKenna Melander
Victor Moxley
Sarah Mui
Alexandra Paschal
Gianna Patchett
Dailyah Rudek
Rachel Slade
Nancy Van Slooten
Clayton Varvel
Henry Wright

Timpanogos Legal Center

McKenzie Armstrong
Amirali Barker
Ryan Beckstrom
Ashlee Burton
Stephen C Clark

Kagen Despain
Jennifer Falkenrath
Haley Mackelprang
Keil Meyers
Maureen Minson
Alexandra Paschal
Elizabeth Tyler
Alissa Urzi

Utah Bar's Virtual Legal Clinic

Ryan Anderson
Josh Bates
Dan Black
Mike Black
Douglas Cannon
J. Brett Chambers
Anna Christiansen
Adam Clark
Jill Coil
Kimberly Coleman
John Cooper
Robert Coursey
Jessica Couser
Hayden Earl
Matthew Earl
Jonathan Ence
Rebecca Evans
Thom Gover
Aaron Hart
Tyson Horrocks
Robert Hughes
Michael Hutchings
Gabrielle Jones
Justin Jones
Ian Kinghorn
Suzanne Marelius
Travis Marker
Greg Marsh
Gabriela Mena

Tyler Needham
Nathan Nelson
Nathan Nielson
Sterling Olander
Aaron Olsen
Jacob Ong
Ellen Ostrow
Steven Park
Clifford Parkinson
Alex Paschal
Leonor Perretta
Cecilee Price-Huish
Stanford Purser
Jessica Read
Brian Rothschild
Chris Sanders
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Karthik Sonty
Mike Studebaker
George Sutton
Glen Thurston
Jeff Tuttle
Christian Vanderhooft
Alex Vandiver
Chad West
Derek J Williams

Utah Legal Services

Jenny Arganbright
Keith Backman
Brandon Baxter
Shawn Beus
Marca Tanner Brewington
James Cannon
Victoria Carrington
Emy Cordano
James Drennan

Anaya Gayle
Jonathan Good
Bill Heder
Ryan James
Matt Johnson
Jenny Jones
Jeremy Jones
Linzi Labrum
Sarah Larsen
D'Andre Matthews
Alex Maynez
Chad McKay
Bernadine Ott
Ryan Simpson
Ted Stokes
Megan Sybor
Chad Utley
Anthony Zhang

Pro Bono Initiative

Maggie Abuhaidar
Gary Anderson
Justin Ashworth
Lisa Watts Baskin
Amanda Bloxham Beers
Jonathan Benson
Alexander Chang
Brenth Chipman
TantaLisa Clayton
Jessica Couser
Daniel Crook
David Duncan
Ana Flores
Jeffry Gittins
Taylor Goldstein
David Handy

Victoria Higginbotham
Lori Johnson
Ezzy Khaosanga
Emelie Klott
Chris Mangerg
Mary Manley
Kenneth McCabe
Grant Miller
Eugene Mischenko
John Morrison
Tracy Olson
Leonor Perretta
Chris Peterson
Ben Picklesimer
Cameron Platt
Clayton Preece
Stewart Ralphs
Clay Randle

Earl Roberts
Brian Rothschild
Joe Rupp
Jonathan Rupp
Hannah Sakalla
Lauren Scholnick
John Sharkey
Craig Smith
Ethan Smith
Jacob Smith
Andrew Somers
Rachel Whipple
Nicholle Pitt White
Leilani Whitmer
Oliver Wood

Fifth Annual Well-Being Week in Law

Get ready to prioritize your well-being! The highly anticipated Fourth Annual Well-Being Week in Law is returning from May 6–10, 2024, and we want you and your organization to be a part of it. This transformative event was created in 2020 to educate legal professionals on the importance of proactively focusing on our physical, mental, and emotional health as part of our competence to represent our clients well and to combat the challenges many of our colleagues face in maintaining the well-being necessary to competently practice law and to thrive in the profession. Since its inception, participation across the country has skyrocketed, with many bar associations, law firms, governmental agencies, and thousands of individuals taking part.

Participating in this event is both simple and accessible. The national Institute for Well-Being in Law (IWIL) will be offering free, bite-size, and evidence-based resources and activities on each day of the week, all of which can be found at www.lawyerwellbeing.net. You can also find promotional materials to help you share information about this important event internally, on your website, and on social media.

In addition, the Utah State Bar will be posting Well-Being Week materials and hosting local Well-Being Week events, including a CLE at noon on May 2nd. Stay tuned for updates through the Bar's website.

We invite you to become a well-being champion and join us in prioritizing our physical and mental health by making plans for Well-Being Week in Law today!

WELL-BEING WEEK IN LAW

MAY 6–10, 2024

Law Day 5K Run & Walk

Run for Justice – April 27, 2024

REGISTRATION FEES

Before April 18: $36 | April 18–24: $41 | Day of: $46
All proceeds will go to support free and low cost civil legal aid programs in Utah.

TIME

Day of race registration from 7:00 a.m. to 7:45 a.m. Race starts at 8:00 with a gavel start.

LOCATION

Race begins and ends in front of the S.J. Quinney College of Law at the University of Utah, 383 South University Street, Salt Lake City, Utah.

PARKING

Parking available in Rice Eccles Stadium (451 S. 1400 E.). Or take TRAX!

TIMING

Timing will be provided by Brooksee Timing. Each runner will be given a bib with a timing chip to measure their exact start and finish time. Results will be posted on our website following the race.

RACE AWARDS

Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division.

COMPETITIONS

• Recruiter Competition
• Speed Team Competition
• Speed Individual Attorney Competition

SPECIALTY DIVISIONS

• Baby Stroller Division
• Wheelchair Division
• "In Absentia" Runner Division
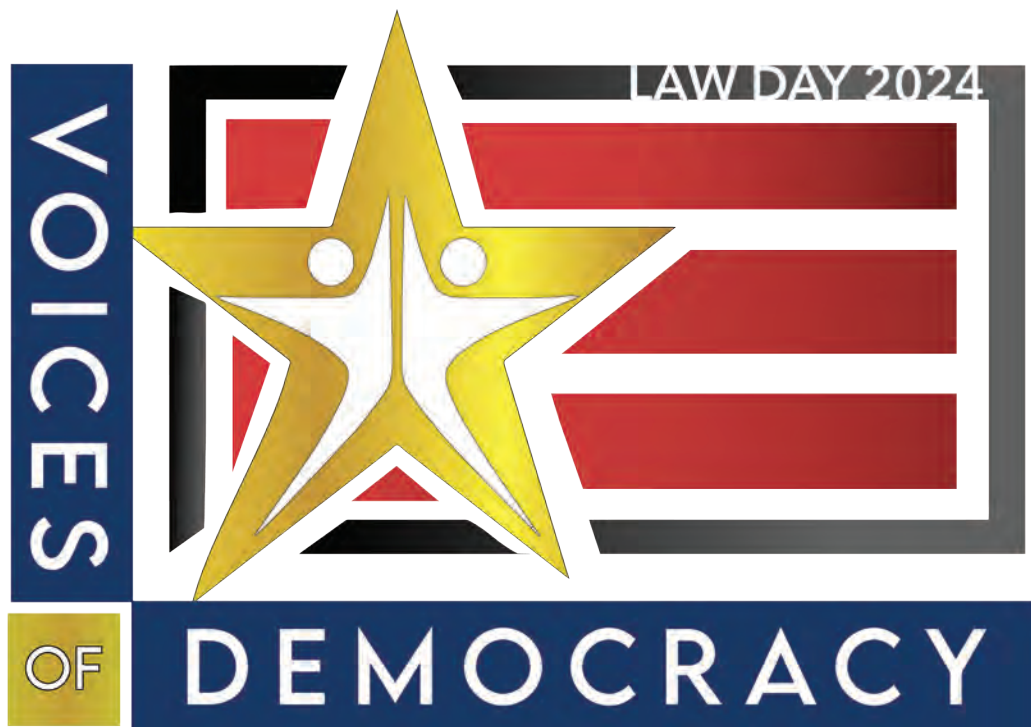• Chaise Lounge Division

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Want to reach the legal community and help with a great cause? Download our information packet at the link or QR code below.

"and Justice for all"

For registration & more information visit:
andjusticeforall.org/ajfalawdayrun/

SCAN ME

VOICES OF DEMOCRACY

Save the Date!

FRIDAY May 3

Grand America, Imperial Ballroom

This year's event will celebrate 50 years of the Utah Law Related Education program and honor the winners of the Mock Trial Competition and the 60th anniversary of the 1964 U.S. Civil Rights Act.

Awards scheduled to be presented include:

★ Liberty Bell Award (Young Lawyers Division),

★ Pro Bono Publico Awards (Pro Bono Commission),

★ Scott M. Matheson Award honoring Utah's Graduating Seniors who Volunteered for Salt Lake Peer Court, (LRE),

★ Young Lawyer of the Year (Young Lawyers Division), and

★ Pioneer Award (LALU).

Registration and table sponsorship available via email to CLE@utahbar.org.

Watch for more details at www.utahbar.org and on social media.
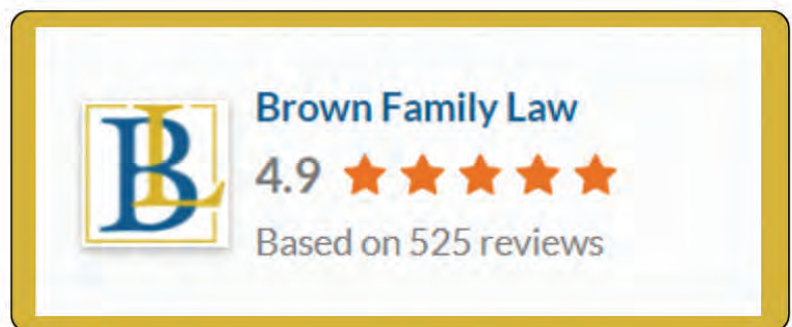
Lawyer Discipline and Disability

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.

DISABILITY

On November 13, 2023, the Honorable Dianna Gibson, Third Judicial District Court, entered an Order Transferring Douglas R. Short's License to Practice to Disability Status, pursuant to Rule 11-568(b)(1) of the Rules of Lawyer Discipline, Disability and Sanctions staying the disciplinary matter in front of Judge Gibson against him.

ADMONITION

On December 12, 2023, the Honorable Kent R. Holmberg, Third District Court, entered an Order of Discipline: Admonition against a lawyer for violating Rule 1.15(a) (Safekeeping Property) and 1.15(c) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
A lawyer (Lawyer) was a managing partner and the sole person in charge of the Trust Account of a firm (Firm). Other partners at the Firm did not have access to or exercise control over the Trust Account during the relevant period. Lawyer's personal assistant was responsible for day-to-day maintenance of the accounting software file. Under Lawyer's direction, personal assistant prepared checks and transferred funds from the Trust Account to the operating account. No formal electronic system was maintained from which all Trust Account balances, at any given time, could be determined.

An accountant was hired to assist in settling and reconciling the Firm's accounts. The accountant determined that at various times, the Trust Account had contained client funds, earned Firm funds, and funds earned by Lawyer. The lawyer repeatedly used funds in the Trust Account, which they believed to be earned funds, to make personal investments. The lawyer made purchases with their personal credit cards and used funds, which they believed to be earned funds, from the Trust Account to pay off their personal credit cards.

A settlement check for a client was deposited into the Firm's Trust Account. Shortly after, the Firm's Trust Account balance fell below the amount of the client's settlement amount, even though no disbursements had been made on behalf of the client. On one date, eleven clients should have had funds in the Trust Account, however the reconciled Trust Account balance showed a shortage of funds on that date. The OPC received notification that the Firm Trust Account had insufficient funds when a check was presented. The deficiency was caused by a payment made toward Lawyer's personal credit card. No disbursements had been made on behalf of the client at the time of the insufficient funds notice.

Mitigating circumstances:
Absence of prior discipline, personal or emotional problems, timely good faith effort to rectify the consequences of the misconduct, and good character or reputation.

PUBLIC REPRIMAND

On November 2, 2023, the Honorable Kent R. Holmberg, Third District Court entered an Order of Discipline: Public Reprimand against Blake S. Atkin for violating Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
The OPC received a non-sufficient funds (NSF) notice from the bank that holds Mr. Atkin's trust account. The OPC requested Mr. Atkin's explanation of why the overdraft occurred and indicated that his explanation should include certain documentation. Mr. Atkin responded but did not provide the necessary documents. As part of its investigation, the OPC asked Mr. Atkin to provide additional information, such as monthly bank statements, billing records, ledgers and accounting records. Mr. Atkin refused to provide any of the requested documents.

In response, the OPC sent Mr. Atkin letters explaining that certain disclosures of confidential information are permitted as exceptions under Rule 1.6 of the Rules of Professional Conduct. The letters again requested copies of certain documents. In a responsive letter, Mr. Atkin again objected to the OPC's request and refused to provide the information requested.

The OPC sent a subpoena duces tecum to the bank that holds Mr. Atkin's trust account. The documents received did not demonstrate when the funds connected to the client were deposited into the account and therefore additional documentation from Mr. Atkin was necessary for a complete investigation. The OPC

requested the additional documentation from Mr. Atkin but he refused to respond to the OPC's request.

At the Screening Panel Hearing of the Ethics and Discipline Committee (Screening Panel), Mr. Atkin testified that he would not submit the documents requested and continued to rely on Rule 1.6. The Screening Panel directed the OPC to file an action in district court.

During discovery in the district court case, Mr. Atkin refused to produce the requested documentation even though he could have produced redacted copies. After the Court ordered Mr. Atkin to produce the documents, he complied and produced redacted copies of the documents.

Mitigating circumstances:
Absence of a prior record of discipline; absence of dishonest or selfish motive. Mr. Atkin's conduct is mitigated by his belief that he was protecting his client.

INTERIM SUSPENSION

On December 21, 2023, the Honorable Dianna Gibson, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against James Rock, pending resolution of the disciplinary matter against him.

In summary:
Mr. Rock was placed on interim suspension based upon convictions for the following criminal offenses:

Failure to Stop at Command of Police, a 3rd Degree Felony, Driving Under the Influence of Alcohol and/or Drugs, a Class B Misdemeanor, and Stalking a Former Co-habitant, a 3rd Degree Felony.

RECIPROCAL DISCIPLINE

On December 15, 2023, the Honorable Robert P. Faust, Third Judicial District Court, entered an Order of Reciprocal Discipline: Suspension against William B. Anderson, suspending Mr. Anderson for a period of two years for his violation of Rule 1.5(b) (Fees), Rule 1.5(c) (Fees), Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), Rule 8.1(b) (Bar Admission and Disciplinary Matters), Rule 8.4(c) (Misconduct), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
On October 19, 2023, the Arizona Supreme Court entered an Order of Suspension, suspending Mr. Anderson from the practice of law for two years. The Order was predicated on the following facts in relevant part:

Mr. Anderson represented forty-seven Arizona clients in Arizona-based personal injury cases and settled their cases. In all of the cases, Mr. Anderson misrepresented to clients, insurers, and other members of the public, that an Arizona-admitted lawyer represented the client. In none of the cases did Mr. Anderson associate with an Arizona lawyer, furnish a case file to an Arizona lawyer, have an Arizona lawyer obtain a written and signed contingent fee agreement, have an Arizona lawyer conduct a conflicts check, or share fees or pay a referral fee to an Arizona lawyer. Mr. Anderson also failed to fully cooperate with the Arizona State Bar's disciplinary investigation.

DELICENSURE

On December 12, 2023, the Honorable Christine L. Johnson, Fourth Judicial District, entered an Order of Delicensure/Disbarment against S. Austin Johnson, delicensing him from the practice of law. The court determined that Mr. Johnson violated Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Johnson was charged with six counts of Communications Fraud and one count of Pattern of Unlawful Activity. A jury found Mr. Johnson guilty and convicted him of five counts of Communications Fraud and one count of Pattern of Unlawful Activity, all second-degree felonies. The Utah Court of Appeals affirmed Mr. Johnson's convictions.

The Mystery of the Paralegal Profession

by Shalise McKinlay, Jennifer Carver, and Liberty Stevenson

What is a Paralegal? When posed with this question, most people draw upon their knowledge from LA Law, Suits, Better Call Saul, or Erin Brockovich; however, none of these shows demonstrate the realities of working in the paralegal field. After working as a paralegal for more than two decades, even I have some difficulty providing a concise explanation of what I do. I believe a big reason for this is that paralegals are constantly adapting and evolving depending on the needs of the moment. Our job description can be very broad. This article focuses on what makes a good paralegal and how to advocate for yourself so that your attorneys know how to properly utilize your skills.

The paralegal profession can be high stakes, time demanding, and people's lives are often held in the balance. Because of this, it is paramount for paralegals to be able to handle stressful situations. Specific personality traits and skills, such as being detail oriented, multi-taskers, even-tempered, and excellent communicators, are necessary to propel you through your career. Paralegals must be computer literate and have a keen understanding of the English language as they will need to be able to spot grammatical and spelling errors, as well as improper cites, and other inaccuracies. Procrastinators are not welcome, as paralegals are generally the ones who need to keep our attorneys on task, organized, and make sure that important deadlines are met. Paralegals need to demonstrate a "boots-on-the ground" approach, and make sure they remain adaptable and able to tackle problems with creativity and ingenuity. A paralegal must be flexible in their thinking and remember that there are several ways to tackle any problem.

Communication is a skill that all paralegals need to master. It is imperative that those you work with, particularly attorneys, know exactly how you can help with the various tasks at hand. Keep in mind that attorneys are not provided courses on how to effectively utilize their staff and will need you to demonstrate how you can make their jobs easier. I've had experiences in which I've been told that an attorney didn't realize that I was able to provide support in various matters or areas. A paralegal must develop the confidence to speak up in a concise and direct manner with their attorneys, so they understand that their paralegal is someone who can be trusted and relied upon as a valued member of their team. Paralegals need to establish themselves as someone who has the knowledge and skill set to proficiently, timely and willingly provide many legal functions.

Paralegals have the knowledge and skill set to draft legal and corporate documents, file documents with the courts and governmental agencies, process discovery and transactional records. It is also imperative for a paralegal to have established working relationships with court and governmental staff, which tends to facilitate smoother transactions throughout the legal processes; some of these relationships can prove to be invaluable. A kind gesture to a court clerk or governmental staff member can grease the wheels for a smooth trial experience and possibly provide you with more information than you might have received otherwise. Despite how stressful a case may be, always be kind, courteous, and thoughtful of the court staff, constables, and other governmental staff and try to think of ways you can make their jobs easier as well. This will, in turn, benefit you in the end.

Paralegals are utilized in different ways depending on the different area of law in which they are employed. A paralegal can work in a law firm, government agency, nonprofit organization, or corporation. Since there are many facets of the paralegal profession, a paralegal should take advantage of learning from others, even those outside their current area of law. Some of the best advice I've ever received as a paralegal is to never stop learning and growing. A paralegal should always take advantage of opportunities to learn new skills and different approaches to issues that arise and find ways to incorporate them in their practice. I've been in situations where paralegals have been asked to work outside of their comfort zones and in practice areas where they are less familiar, and I have observed how their reluctance to learn new skills limited their ability to succeed and become trusted advocates for their attorneys. Developing and perfecting a specialty can help a paralegal stand out in our ever-growing profession; however, it also helps to remain adaptable and open-minded to challenging themselves to step outside the areas they are most familiar with. If possible, a paralegal should develop mentor relationships, and learn from their colleagues and fellow paralegals. Paralegals can be a wealth of knowledge to their peers, as well as their attorneys. I would encourage all paralegals to become more involved with the Paralegal Division – and possibly even consider serving in a leadership position on the board. We are always looking for volunteers to serve on the various committees, including Education, Community Service, and Membership.

Paralegals are an integral part of the legal community. Our profession continues to grow and evolve, we are gaining more and more respect from our colleagues, including judges, attorneys, and other legal professionals. I am proud of my contributions as a paralegal and hope that when others are asked what they do for a living – they won't say, "I'm *just* a paralegal," because we bring much more value than that and deserve all the recognition in the world.

Classified Ads

RATES & DEADLINES

FOR SALE

Law Office with over 30 years experience for sale. Firm has specialized in criminal defense and divorce/custody cases. Great opportunity for young attorney to take over established practice. I am retiring, but willing to serve as mentor, or be "of counsel" for a time. Same office building for over 25 years; great location and lease, loyal staff to help new attorney. Contact David Brown at 801-556-0250, or email: law.davidwbrown@gmail.com.

JOBS/POSITIONS AVAILABLE

Malouf Law Offices, L.C. Logan, Cache County, seeking Associate Attorney to partner in and become part of an established general practice. Great space, equipment, storage. Utah bar license, long term desire for this county, winter tolerance, and faith essential. Experience and history with this valley desirable. Send resume, your cover letter, your ideas and your questions in an envelope to Malouf Law Offices, L.C., 150 East 200 North Suite D, Logan, Utah 84321. Address questions to Ray Malouf, malouflaw150@gmail.com, telephone 435-752-9380.

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

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

OFFICE SPACE/SHARING

DOWNTOWN PRACTICE OFFICE SPACE AVAILABLE. Beautiful executive office with established law firm just seven minutes from the Matheson Courthouse. One fully furnished office, conference room, waiting room, bathroom, kitchen nook, and many other extras. Office equipment and secretary will be provided. Call Wade or Mark 801-538-0066 or email at wadetayloresq@gmail.com.

Office suite with 3 large offices, storage and reception area available in Murray-Holladay. Pricing and lease term is negotiable. If you are interested, contact Sandra at 801-685-0552 for more information.

Garden Level Offices for Rent. Scholnick Birch Hallam Harstad Thorne (SBHT) has a garden level office and conference room space available to rent immediately. The conference area is one large space that leads to three offices and a bathroom. The entire unit is approximately 1,700 square feet, located in a nice neighborhood near downtown Salt Lake City. The entire space is $1,500 a month, but we are also open to renting out individual offices if you're interested in doing so. Contact Jonathan Thorne with questions or to schedule an appointment to tour the space, at jonathan@utahjobjustice.com or 801-359-4169 x 314.

SERVICES

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

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but some have devastating consequences

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