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Cover Photo

Aurora Borealis by Utah State Bar licensee Hon. M. Alex Natt.

HON. M. ALEX NATT is the Presiding Judge of the Utah Labor Commission's Adjudication Division and a very amateur photographer. He took this photo on May 11, 2024 at 1:10 a.m. from his driveway in the Snyderville Basin with an iPhone 14 and standard exposure. Asked about his photo, Judge Natt said, "The Aurora was visible to the naked eye but the colors really popped with the iPhone capture. A remarkable experience to see it dancing here in Utah!"

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Utah Bar JOURNAL

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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.

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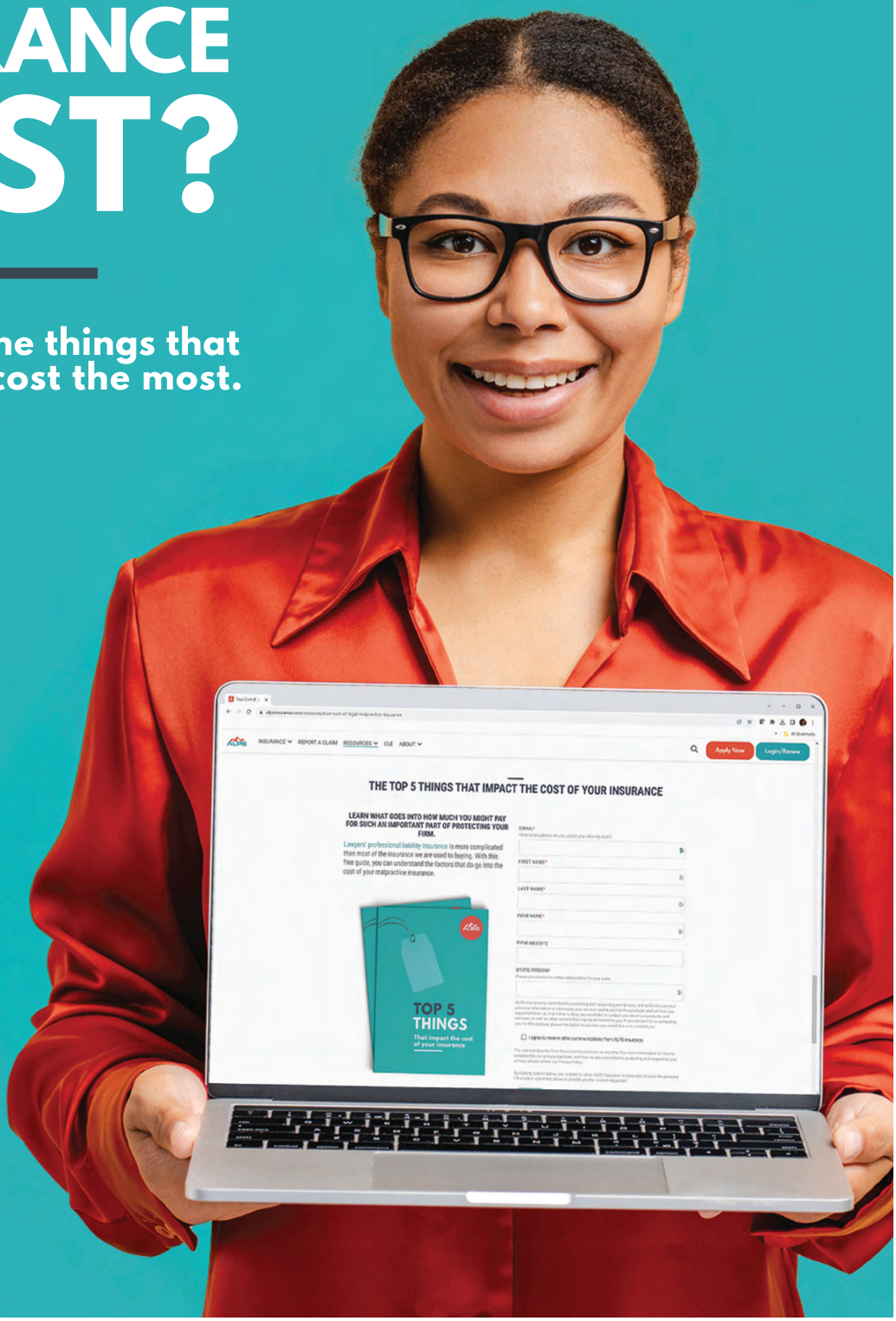

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3. No one person shall have more than one letter to the editor published every six months.

4. Letters shall be published in the order they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. If and when a letter is rejected, the author will be promptly notified.

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Transforming Lives in Utah with Outreach and Homeless Court Programs

by Cara Tangaro

Homelessness in Utah is heartbreaking. It is especially difficult when these unsheltered individuals are left to navigate the court system on their own when they are coping with trauma and mental health issues.

According to the National Sexual Violence Resource Center, many survivors of sexual assault, abuse, and harassment face intricate housing challenges. Experiencing violence can threaten a person's housing stability, while homelessness or housing insecurity can heighten the risk of experiencing violence. *Sexual Violence & Hous. Res. Collection*, Nat'l Sexual Violence Res. Ctr., https://www.nsvrc.org/sexual-violence-housing-resource-collection (last visited July 30, 2024).

Alarming information about homelessness includes:

- Homeless individuals experience domestic violence at a rate of 49%, significantly higher than the 2% rate among the general population. A substantial portion of homeless women in Utah are victims of domestic abuse. *Comty. Educ.*, Fourth Street Clinic, https://fourthstreetclinic.org/community-education/ (last visited July 30, 2024).

- Factors such as bankruptcy, divorce, and various other issues also contribute to homelessness. *Id*.

- A criminal record can significantly hinder homeless individuals and their families from obtaining or retaining public benefits, housing, or employment. Government agencies, potential landlords, public housing authorities, and employers commonly screen for and exclude those with criminal histories, exacerbating the challenges faced by this vulnerable population. *More on Legal Perils of Homelessness*, The Human Toll of Jail, http://humantollofjail.vera.org/legal-perils-of-homelessness/ (2016).

Despite this, I am optimistic and hopeful that Utah's legal field is doing its part to provide solutions. I have had the privilege of accompanying judges with the Salt Lake City Justice and District Courts paddling down the Jordan River offering "Kayak Court" to help people living in camps on the riverbanks. Some of these people suffer from myriad legal issues and do not have the means to reconcile them.

I know from the few times I have worked alongside volunteer defense attorneys, social workers, and the Salt Lake City Prosecutor's Office that consulting with consenting unsheltered individuals to resolve their legal woes is a holistic, collaborative approach that works. That is why I am bringing attention to these inventive efforts that have resulted in outreach and homeless court programs.

These programs have played a crucial role in connecting the community's most vulnerable population with essential services. These services address, among others, the following:

- Domestic Violence
- Rape Recovery
- Veteran Resources
- Housing
- Mental Health
- Substance Abuse
- Cell Phone Service
- Workforce Services
- Pet Services
- Clothing

Important programs that offer such services do not exist without dedicated teams that go into communities, parks, and streets to engage with homeless individuals. I

especially want to mention the Salt Lake City Prosecutor's Office that works tirelessly to administer homeless court programs and organize outreach teams. I was fortunate to work with a team that offered immediate support to build trust with people who lacked confidence in authority. Other teams include:

Homeless Engagement and Response Team (HEART)

Every day, HEART tackles the critical issue of homelessness using a variety of tools. Their efforts include annually allocating over $15 million to support homeless services, ensuring public spaces remain clean and safe, and funding hundreds of units of permanent supportive housing.

Mobile Outreach Teams

These teams travel to areas with high concentrations of homeless individuals, providing necessities such as food, clothing, and hygiene kits. More importantly, they offer information about shelters, healthcare services, and pathways to permanent housing.

Healthcare Outreach

Partnering with local health departments and non-profits, healthcare outreach programs offer medical care to those who might not otherwise seek it. This includes mental health services, addiction counseling, and regular health check-ups.

Employment Assistance

Outreach workers assist homeless individuals in finding job opportunities, preparing resumes, and securing interviews. They also connect them with job training programs to improve their employability.

* * *

I would be remiss if I didn't acknowledge the private defense attorneys and public defenders who also take time out of their busy schedules to make a difference. Their cooperative efforts allow outreach and homeless court programs to meet in places that are familiar and easy to get to, helping people feel comfortable and respected. The goal is to help people get back on their feet, become self-sufficient, graduate from the programs, and improve their quality of life. The courts achieve this goal by helping solve their legal problems, stopping the cycle of going in and out of jail while encouraging responsibility. And it is working!

I was thrilled to learn about a participant named B (shortened version of the woman's real name). She received services in both outreach and homeless court programs and exemplifies the transformative impact of these initiatives. B was struggling with several justice court cases, had been homeless, and was staying at shelters with her dog. The homeless court program helped address B's legal needs, secured medically vulnerable housing for her, and helped connect her with other services. She graduated from the homeless court program in early 2024 and has not had any involvement with the criminal justice system since her graduation.

I believe the legal profession's approach to tackling homelessness through outreach and homeless court programs is a testament to the power of compassionate, inventive service. Investment in these programs with continued collaboration and community support will be crucial in sustaining their impact and benefits, such as:

Legal Resolution

Homeless individuals can address outstanding warrants and minor offenses, which often prevent them from accessing housing and employment.

Access to Services

Participants are connected to services like housing assistance, job training, and mental health counseling. The court mandates follow-through on these services as part of the program.

Community Reintegration

Resolving legal issues and connecting individuals with support services helps to facilitate their reintegration into the community, reducing recidivism and homelessness.

These programs provide a pathway to lasting change throughout communities across the state. I am honored to have witnessed the transformative power of outreach and homeless courts. However, there is always more to be done. I challenge Utah lawyers to get involved by donating your time to serve meals at the Women's Resource Center or Volunteers of America Youth Center, donate a billable hour, buy items off the Amazon list for shelters, or add your legal services to the homeless court programs.

By building on these successes and continuing to innovate, Utah can serve as a prime example for tackling the legal issues of the homeless with empathetic and creative approaches.

Judge Jeanne Robison, Judge Clemens Landau, and Utah State Bar Communications Director Jennifer Weaver contributed to this article.

Utah's Nursing Homes Need Serious Reform

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DID YOU KNOW?

- A recent study ranked Utah 50th in the nation after examining elder abuse, abuse prevention, long-term care nursing home quality, and 13 other measures of elder abuse protection![1]
- Most Utah Nursing Homes are owned by two small, municipal entities, but operated by for-profit corporations and private equity groups!
- Many nursing home corporations and private equity groups have created a "corporate shell game" structure, making it hard to reach assets and difficult for even Medicare and Medicaid regulators to identify who owns and operates the nursing homes![2]
- Citing deficient care and a "lack of oversight" Utah's Disability Law Center recently filed a complaint with federal regulators against the Utah Dept. of Health and Human Services, requesting an investigation and audit of Utah's nursing home regulators![3]

In this environment, winning Utah nursing home cases demands more than knowing the "standard of care"—it means mastering the corporate structures and operations of the industry.

The Elder Care Injury Team at **Eisenberg Lowrance Lundell Lofgren** has put in the work. We can handle and win even the most complex elder injury cases. We accept referrals and co-counsel assignments throughout Utah and Washington.

1 Wallethub.com/edu/states-with-best-elder-abuse-protection/28754.
2 GAO-23-104813 "Nursing Homes: CMS Should Make Ownership Information More Transparent for Consumers" (available online).
3 Disability Law Center Complaint Against Utah Department of Health and Human Services and Request for OIG, OCR and CMS Assistance and Intervention, July 10, 2024. See https://healthlaw.org/resource/hhs-and-ocr-complaint-complaints-filed-against-utah-medicaid/.

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Familiar Faces: A New Approach to Criminal Justice in Utah

by The Honorable Clemens Landau

The Familiar Faces program, sponsored by the Salt Lake City Prosecutor's office and housed at the Salt Lake City Justice Court, aims to divert individuals who are struggling with homelessness and facing lower level, non-violent criminal charges from the criminal justice system. Spearheaded by the Salt Lake City Prosecutor's Office, the Salt Lake Legal Defender's Office, and the Salt Lake City Justice Court, the new program has been inspired by a successful model from Florida.

The Florida program has garnered national attention for its holistic and compassionate approach to criminal justice. Individuals who repeatedly find themselves entangled in the legal system – often due to circumstances such as mental health issues, homelessness, and substance abuse – are met with compassion and much-needed resources to help break the pattern of recidivism. Local stakeholders, recognizing the potential for such a program in Utah, have adapted this model to meet the specific needs of Salt Lake City.

The result is an innovative court program that targets individuals who frequently cycle through jails, homeless shelters, emergency departments, and other crisis services. The program aims to break the cycle and foster long-term stability and reintegration of these individuals into their communities.

At the outset of the program, the Salt Lake City Prosecutor's office conducted data analysis to identify individuals with low-level, non-violent charges who frequent jails, shelters, and emergency services. By pinpointing these individuals, the program aims to address the root causes of their repeated interactions with the criminal justice system.

Key stakeholders, including case managers, housing specialists, and peer support advisors, collaborate to create a network of support tailored to each individual's needs. This collaborative effort ensures that individuals receive the resources best suited to address their unique challenges, thereby promoting stability and self-sufficiency.

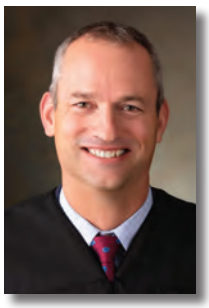
One of the most innovative aspects of the Familiar Faces program is its unique courtroom space. Traditional court settings often intimidate and discomfort individuals with mental health issues or trauma histories. Familiar Faces, however, operates in a courtroom at the Salt Lake City Justice Court that was remodeled during the pandemic with the generous support of the Utah Bar Foundation and the National Center for State Courts.

This space features an oversized wrap-around couch, a high-top table with resource materials, a small food-serving area, and a seating area for individuals still in custody. It also includes a sizeable soundproof booth for confidential meetings with defense attorneys, assessment providers, and probation specialists, several smaller booths for remote court interactions from across the state, and a massive table in the center.

In August 2023, during one of the program's first sessions, an individual transferred from the Salt Lake County Jail to the court arrived at this big table. The care team introduced themselves to the person, including a defense attorney, city prosecutor, justice court judge, experienced case workers in Salt Lake City's homeless services, and peer support advisors. The participant, meeting the team, exclaimed, "I've never sat at a table like this before!"

And he was right – the adversarial court system rarely comes together in collaborative settings to chart a way forward compassionately and open-heartedly for a struggling person. This commitment to connecting individuals with a wide range of support services is at the heart of Familiar Faces.

JUDGE CLEMENS LANDAU was appointed to the Salt Lake City Justice Court in 2018 by Mayor Jackie Biskupski.



The unique layout of the Familiar Faces courtroom features an oversized wrap-around couch, a high-top table with resource materials, a small food-serving area, and a seating area for individuals still in custody. It also includes a sizeable soundproof booth for confidential meetings.

The program recognizes that legal issues are often intertwined with other challenges and offers resources that address mental health, housing, employment, and other critical needs. Sometimes, those needs include feeding people in need of a healthy meal. At the program's inception, the court provided assorted snacks and refreshments for program participants and staff.

After a particularly successful holiday session involving homemade soup in December 2023 – and by unanimous request of the participants themselves – the court pivoted to offering soup, bread, and usually some dessert during each program session. The opportunity to share a meal – and both literally and figuratively break bread together – turned out to be a key component to creating a trusting relationship between program participants and staff.

These days, it is not uncommon for me to cook the meals and serve them to the program's participants while the rest of the care team strategizes how to meet a particular participant's complicated housing or healthcare needs. The shared meal serves as an additional opportunity for individuals to connect in a trusting environment with case managers and other support personnel.

At the end of the day, the central purpose of the Familiar Faces program is to promote community reintegration and accountability. By addressing the underlying issues that contribute to a person's repeated legal troubles, the program helps the individual regain stability and self-sufficiency. This approach not only benefits the individuals but also helps enhance public safety and helps reduce the burden on the criminal justice system.

A strong emphasis on accountability encourages individuals to take responsibility for their actions while providing the support they need to make positive changes. Familiar Faces hopes to play a small role in creating a more just and compassionate legal system by offering a pathway to stability and success.

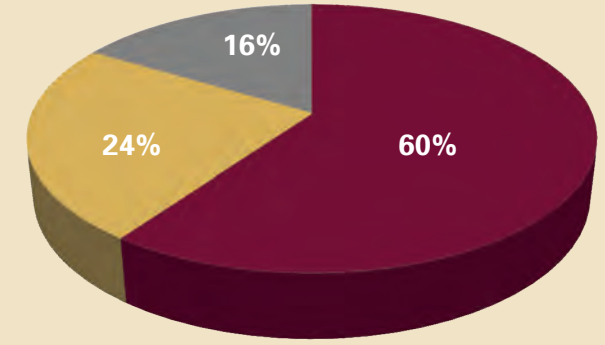
Although Familiar Faces is still in its early stages, it has already shown promising results. Over one hundred individuals have been enrolled in the program over the past year, and approximately thirty of those individuals have successfully completed the program. Participants have reported feeling more supported and less stigmatized, leading to improved engagement with the judicial process and community services.

Success looks different for each program participant. The first steps often include signing up for services such as Medicaid and food stamps. Housing concerns often come next. Each participant brings with them a history of interactions with and opinions of the various shelters, overflow, emergency, and other housing options. The application processes can be quite difficult for participants to navigate, and some coaching and lots of patience are usually required before mutually acceptable housing is secured.

Medical and mental health concerns are similarly complex, especially because program participants often lack awareness

Familiar Faces Defendants

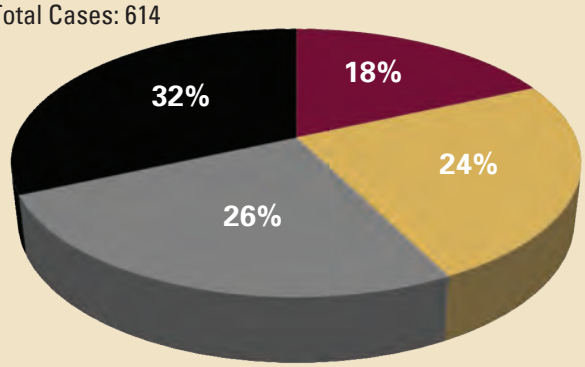
Total Defendants: 122



- Defendants currently in the program (73)
- Defendants who have completed the program (29)
- Defendants no longer in the program (20)

Familiar Faces Cases

Total Cases: 614



- Active cases (112)
- Dismissed/closed cases (149)
- Cases no longer in Familiar Faces (158)
- Cases with warrants (195)

of the seriousness of the health challenges they are facing. Program participants can sometimes overcome these challenges, but their entrenched anosognosia is occasionally insurmountable. But even in such cases, the program has successfully ended many individuals' involvement with the criminal justice system, even though their complex health challenges remain unsolved.

Although the program has created a brighter future for many participants, it is worth emphasizing that it only serves a small sub-section of Salt Lake City's unsheltered population. Specifically, it serves the group of unsheltered individuals who:

- Have multiple non-violent criminal cases;
- Struggle with mental health and/or substance abuse issues; and
- Have demonstrated a sincere commitment to behavioral change.

While Familiar Faces therefore cannot be viewed as a cure-all for the many challenges that arise at the intersection of homelessness and criminal justice, it has nevertheless helped many of the individuals it serves untangle themselves from the criminal justice system and make some positive changes in their lives.

Along the way, it has also helped both the court and its key justice partners to get more connected to the service providers and support networks that already exist in Salt Lake City to help individuals genuinely interested in changing their circumstances.

Utah State Bar Communications Director, Jennifer Weaver, assisted with this article.

Parsons Behle & Latimer Opens St. George Office

Parsons Behle & Latimer is pleased to announce the opening of its new office in St. George, Utah to better serve Southern Utah clients. Parsons' attorneys C. Edward Cather III and Darren Neilson are joined in our new location by five attorneys from the St. George office of Gallian Welker, including Matthew D. Ekins, Michael I. Welker, Russell J. Gallian, Brian K. Eggleston and Tyson N. Raymond. Welcome to our new attorneys!

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The Right (and Wrong) to Self-Representation

by Wendy M. Brown

Every person accused of a crime has the constitutional right to the assistance of counsel, as well as the corollary right to self-representation. The latter cannot be exercised without a knowing and voluntary waiver of the former. But a rash of recent decisions from the Utah Court of Appeals raises the question whether we, as criminal practitioners, fully understand what is required for a valid waiver of counsel.

Aimed at judges, prosecutors, and criminal defense attorneys, this article seeks to explain recent case law and provide practical guidance. Together, we can ensure that no one is deprived of their constitutional rights without making the informed decision to give them up.

Patton, *West*, and *Lee*

In the span of less than a year, the Utah Court of Appeals issued three opinions reversing criminal cases because the people charged had not knowingly and intelligently waived their right to counsel.

First, in *State v. Patton*, 2023 UT App 33, 528 P.3d 1249, Patton indicated he was "not worried about" the case and would represent himself. *Id.* ¶ 3. The trial court advised him of the maximum penalties associated with the charges he faced. The court also explained,

> [T]he county attorney's office is staffed with attorneys who are familiar with the Rules of Criminal Procedure and the Rules of Evidence. So I anticipate that if you represent yourself, you'll probably be operating at a bit of a disadvantage, but if you still want to do that and represent yourself, you can.

Id.

The court asked, "Do you still want to represent yourself?" and Patton said, "Yes, sir." *Id.*

Next, in *State v. West*, 2023 UT App 61, 532 P.3d 114, West had been tried and convicted with the assistance of counsel. *See id.* ¶¶ 5, 9. After trial, she "filed several pro se post-trial motions, claiming in each that she was no longer represented by counsel." *Id.* ¶ 11. Before sentencing, the trial court asked West "if she would 'like a new lawyer,' to which [she] responded in the negative." *Id.* ¶ 12. This exchange was unaccompanied by "any colloquy and without questioning West about her understanding of the significance and the risk of proceeding without counsel." *Id.*

Finally, in *State v. Lee*, 2024 UT App 2, 542 P.3d 974, Lee informed the trial court, at his arraignment, that he no longer wanted his retained attorney to represent him. *Id.* ¶ 3. Asked whether he wanted to hire a different attorney, Lee answered, "I haven't made that decision today yet, but for right now, I'm choosing to represent myself." *Id.* (internal quotation marks omitted). The trial court indicated skepticism that Lee would be able to represent himself but nevertheless asked what the court of appeals called "a few superficial questions." *Id.* ¶¶ 1, 3. These questions covered how many criminal cases the defendant had been involved in, how many times he'd been involved in any type of court case, whether he had ever represented himself, whether he was familiar with the Utah Rules of Criminal Procedure, and why Lee believed it would be in his best interest to represent himself. *Id.* ¶ 3.

After engaging in this questioning, the trial court

> "provisionally" found that [the defendant] had knowingly and voluntarily waived his right to counsel but remained "not entirely convinced," promising to "have more of a discussion" about waiver at a

WENDY M. BROWN is the Criminal Appeals Section Head for the Utah Indigent Appellate Defense Division.

> scheduling conference one month later. But at that scheduling conference, this promised discussion consisted only of the court asking, "Mr. Lee, do you choose to still represent yourself in this case?" and Lee answering, "Yes sir."

Id. ¶ 4.

In each of these cases, the court of appeals reversed, determining that the waiver of counsel was not knowing and voluntary. Each opinion includes a detailed analysis that will not be regurgitated here, but anyone seeking to fully understand why these cases came out as they did would do well to read the court's own words. For purposes of this article, what is most important is the facts recounted above and understanding that the exchange (or lack thereof) that preceded each waiver was insufficient in every case.

Frampton

Aside from the fact that each of these three cases resulted in a reversal, *Patton*, *West*, and *Lee* share another similarity: Each opinion looked to *State v. Frampton*, 737 P.2d 183 (Utah 1987), to decide whether the waiver at issue was valid. *Lee*, 2024 UT App 2, ¶ 10; *West*, 2023 UT App 61, ¶ 31; *Patton*, 2023 UT App 33, ¶ 13. You might wonder, then, what's so important about *Frampton*. Turns out, a lot.

Before getting to the facts of the case, the following framework might be helpful – both the Utah Court of Appeals and Utah Supreme Court have repeatedly emphasized the importance of *Frampton*. The following comes from a footnote in *Patton*:

> Our supreme court has "urged" and "strongly recommend[ed]" trial courts to employ the full *Frampton* colloquy. *State v. Pedockie*, 2006 UT 28, ¶¶ 40, 42, 137 P.3d 716. Recent cases highlight that this urging has not been universally embraced. We encourage trial courts to keep a prepared *Frampton* waiver-of-counsel colloquy script at the ready on the bench, for use when the occasion arises.

2023 UT App 33, ¶ 14 n.5.

Said another way, if we had all already heeded the court's advice about *Frampton*, this article would be unnecessary. But for one reason or another, there appears to sometimes be a disconnect between longstanding precedent and the current practice in trial courts. In an attempt to bridge that gap, let's dive into the specifics of *Frampton*.

A defendant informed the trial court that "he intended to represent himself." *Frampton*, 737 P.2d at 186. Over objection, "the court appointed a public defender as standby counsel for defendant" but advised the defendant "that he had a constitutional right to defend himself and that he would be accorded 'every courtesy along that line.'" *Id.*

On appeal, the Utah Supreme Court ultimately concluded that the defendant had not met his appellate burden of showing his waiver of counsel was invalid. *Id.* at 189. This conclusion rested on several facts, including that the defendant had previously been to trial twice on the same charge – the first ended in a hung jury and the second in a mistrial; defendant knew he was entitled to appointed counsel; defendant was aware of the value of counsel, given the hung jury in the first trial; defendant represented himself at the second trial; defendant filed eighteen motions on his own behalf before the third trial; defendant informed the court that he was going to defend himself and objected to the judge's decision to appoint standby counsel; defendant refused any help from standby counsel; defendant spoke to the jury about the statute under which he was charged; and defendant knew he was charged with a felony and was aware of the possible penalties associated with it. *Id.* at 188–89.

In determining that these facts supported a conclusion that the *Frampton* defendant had knowingly waived his right to counsel, the supreme court noted "that an accused's decision to defend himself is a waiver of the right to assistance of counsel. However, it is the trial court's duty to determine if this waiver is a voluntary one which is knowingly and intelligently made." *Id.* at 187. Regardless of the specifics, for a valid waiver, "the record will establish that '*he knows what he is doing and his choice is made with eyes open*.'" *Id.* (emphasis added) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

How that showing is made might vary from case to case, but "[g]enerally, this information can only be elicited after

penetrating questioning by the trial court. Therefore, a colloquy on the record between the court and the accused is the *preferred method* of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation." *Id*. (emphasis added).

So where does that leave us? *Frampton* declined to draw a line in the sand, explaining only that robust questioning is preferred. And we know that the questions posed and record evidence available in that case were sufficient to conclude that the defendant's waiver of counsel was valid. On the other end of the spectrum, we have *Patton*, *West*, and *Lee* giving us examples of what is not enough.

But *Frampton* contains another helpful gem. In footnote twelve of the opinion, the supreme court quotes from the Bench Book for United States District Court Judges, which provides a list of sixteen questions trial courts should consider asking defendants who seek to represent themselves. *See Frampton*, 737 P.2d at 187 n.12. Perhaps by moving that list out of the footnotes and reworking it a little, this article can serve as your new guide for determining whether a defendant has knowingly, intelligently, and voluntarily waived their right to counsel.

What do we do with this information?

While case law speaks in terms of the trial court's obligations when conducting a waiver-of-counsel colloquy, the requirements should be familiar to all criminal practitioners. That is because we all have an obligation and a vested interest in ensuring that anyone waiving a constitutional right (in particular, the right to counsel, which exists in part to protect all other rights) does so knowingly and voluntarily. Taking a few extra minutes on each waiver-of-counsel colloquy might seem like a big ask, when every trial court is juggling so many cases. But consider the alternative: Using the time and resources necessary for an appeal just to have the case remanded, then doing it all over again. I think we can all agree it's worth getting it right the first time around. So how do we get it right?

If you are a trial court judge, stick to the script. True, an appellate court is unlikely to reverse merely because a colloquy looks a little different from *Frampton*. But when it comes to protecting constitutional rights, it's better to be safe than sorry. If you want to be sure you're doing things right, follow the language the supreme court has given us.

If you are a prosecutor who finds yourself opposite a pro se defendant, ensure a proper colloquy has taken place. If a colloquy seems thin, ask the court to ask additional questions. You are there to ensure justice, and whatever else "justice" means, it must include the protection of constitutional rights. It is also important that you do what you can to make sure any eventual trial is done right.

Finally, if you are a defense attorney whose client has indicated a desire to represent themselves, help the trial court by bringing the following list to its attention. More importantly, remember that so long as you are hired or appointed to represent the defendant as your client, you owe them your effective assistance. This might mean helping your client understand the court's colloquy. It might even mean encouraging the trial court to ask additional questions particularly relevant to your client's situation. What it cannot mean is the abdication of our duties as defense counsel the moment the possibility of self-representation is raised. In short, if a client expresses a desire for self-representation, take whatever steps you can to help them understand the ramifications of that decision.

Thus, for all of us in our different capacities, I now present *the checklist*.[1]

Checklist for Waiver-of-Counsel Colloquy

☐ Does anyone have concerns about the defendant's competency?

- If yes, resolve all competency concerns before considering allowing self-representation.
- If no, proceed with the colloquy.

☐ (To the defendant) Anything you say during this conversation can be used against you.

☐ Have you ever studied law?

- Until noted otherwise, to this and the questions that follow, each "yes" answer weighs in favor of finding that the defendant can validly waive their right to counsel; each "no" weighs against so finding.

☐ Have you ever represented yourself or any other defendant in a criminal action?

☐ Do you understand that you are charged with [state the crimes with which the defendant has been charged]?

☐ Do you understand that if you are found guilty of [state the first crime with which the defendant has been charged], the court could sentence you to as much as _____ years in prison and fine you as much as $_____?

- Then repeat the question for each other crime with which the defendant has been charged.

☐ Do you understand that if you are found guilty of more than one crime, this court can order that the sentences be served consecutively, that is, one after another?

☐ If you represent yourself, you are on your own; I cannot provide any guidance as to how you should try your case. Do you understand this?

☐ Do you understand that the Utah Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

☐ Are you familiar with the Utah Rules of Evidence?

☐ Do you understand that the Utah Rules of Criminal Procedure govern the way in which a criminal action is tried in court?

☐ Are you familiar with the Utah Rules of Criminal Procedure?

☐ If you decide to take the witness stand, you must present your testimony by asking questions of yourself. You cannot just take the stand and tell your story. You must proceed question by question through your testimony. Do you understand this?

☐ In my opinion, you would be far better defended by a trained lawyer than by defending yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

- Amend as necessary, based on the individual defendant's knowledge of or familiarity with the law, rules of procedure, and rules of evidence.

- This advisory does not include a question and does not weigh in a court's analysis of whether an eventual waiver is valid. Instead, this advisory should be given as a standalone statement.

☐ In light of the penalties that you might suffer if you are found guilty and in light of all the difficulties that come from representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

- A "no" to this question or the one that follows should end the colloquy and the defendant should not represent themselves.

☐ Is your decision entirely voluntary on your part?

☐ (After weighing all of the answers the defendant has given, make the appropriate finding from the following two options)

- (1) I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself; or

- (2) I find that the defendant has not knowingly and voluntarily waived his right to counsel. I will therefore order that counsel remain on this case/appoint counsel.

☐ (Finally, consider the appointment of standby counsel to assist the defendant and to replace the defendant if the court should determine during trial that the defendant can no longer be permitted to represent himself.)

Conclusion

The language quoted in *Frampton* and attributed to *Faretta v. California*, 422 U.S. 806 (1975) should be our guiding star: Before a defendant waives his or her constitutional right to counsel, we should be sure that **the defendant "knows what he is doing, and his choice is made with eyes open**."

There is no one right way to do this, but there is the safest way, and that is by relying on the guidance the Utah Supreme Court gave us nearly forty years ago. Have a checklist. Engage in probing questions. Listen to the answers. And make sure no one ends up trying to navigate this system alone unless we're certain they know what that means.

Finally, if you're unsure how to proceed, reach out. My office, the Utah Indigent Appellate Defense Division, has been statutorily tasked with "providing training and continual legal education on appellate defense to indigent defense service providers." Utah Code Ann. § 78B-22-903(4). We view this mandate broadly and are happy to collaborate with, train, or simply have conversations with any attorneys, courts, or offices seeking our help. We look forward to hearing from you!

1. Borrowed in large part from *Frampton*'s footnote twelve, cited above; supplemented by a checklist I know is in use by several district courts; and rounded out with my own advice.

Appellate Highlights

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

Bennion v. Stolrow
2024 UT 14 (May 16, 2024)

In this personal injury action, the parties reached a settlement of $150,000 and signed an agreement reflecting that amount. When it came time to pay, the defendant stated he would issue the settlement amount in two checks – one to the plaintiff and one to a collection agency that held a healthcare lien on any settlement funds. The plaintiff balked at the proposed distribution and moved to enforce the settlement agreement, asking for a single check issued to him alone. The district court declined to order issuance of a single check, and the Utah Court of Appeals affirmed. On certiorari, the Utah Supreme Court reversed, holding that **the plain language of the parties' settlement agreement required payment to the plaintiff alone.** Per the agreement, the plaintiff was expressly responsible for any lien and would be required to indemnify the defendant if the lien spawned litigation.

In re Estate of Goldberg
2024 UT 15 (June 6, 2024)

Previously, in *Snow Christensen & Martineau v. Lindberg*, 2013 UT 15, 299 P.3d 1058, the Utah Supreme Court held that **an attorney may form an attorney-client relationship with a trust. In this case, the supreme court clarified that an attorney who represents a trustee in his or her official capacity does not necessarily also represent the trust itself. Instead, whether an attorney who represents trustees in their official capacity also represents the trust depends on "context."** The court considered several factors in deciding whether the attorneys in this case represented a trust, including the role of the attorneys in administration of the trust, the source of payment for the attorneys' services (whether from trust funds or the trustee's own funds), and the language of the engagement letter.

Utah Court of Appeals

State v. Oreilly
2024 UT App 79 (May 23, 2024)

The criminal defendant appealed her conviction, arguing that she was denied her constitutional right to counsel and is entitled to a new trial because her trial counsel had an actual conflict of interest because he represented both her and her codefendant. The court of appeals first rejected the State's argument that the defendant could not proceed under the theory an actual conflict existed because she did not timely object to the attorney's joint representation. **The court clarified that under Utah precedent, the failure to timely object does not bar the issue. Instead, it means the defendant does not benefit from an automatic reversal of the conviction and instead is required to show "an actual conflict [that] adversely affected her attorney's representation."** Applying this standard, the court held the defendant had failed to carry her burden of establishing an actual conflict that affected her counsel's performance.

Graves v. Utah County
2024 UT App 80 (May 23, 2024)

The court of appeals withdrew its prior opinion following Utah County filing a petition for rehearing. Previously, the court had affirmed the dismissal of defamation and emotional distress claims against Utah County. In its replacement opinion, **the court**

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

held that the Governmental Immunity Act does not waive immunity for intentional acts of government employees based on the "fraud or willful misconduct" language in the Act. Rather, the language is an exception to the exclusive remedy provision of the Act.

Mayhew v. Labor Comm'n
2024 UT App 81 (May 31, 2024)

Utah's workers' compensation law includes a statute of repose, set out in Utah Code § 34A-2-417(2). The statute provides that, generally, a claim for compensation is barred unless the employee is able to prove his or her entitlement to compensation "by no later than 12 years from the date of the accident." However, that bar does not apply if, at the 12-year mark, the employee is still "actively adjudicating" the claim before the Labor Commission Appeals Board. The Utah Court of Appeals rejected an interpretation of this provision that would require an employee to be continuously "adjudicating" his or her claim both before and after the twelve-year mark in order to preserve the claim. Instead, the court held that **the statute "contemplates a 'snapshot' in time:" If the employee is "actively adjudicating" his or her claim as of the twelve-year mark, that is sufficient.**

Springdale Lodging v. Town of Springdale
2024 UT App 83 (May 31, 2024)

In this appeal from the grant of summary judgment in the Town's favor in a judicial review action challenging the denial of an application to rezone the plaintiff's property, the court of appeals held that Utah Code § 10-9a-801(8)(a) does not apply to such actions. Under that section, "If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be." **The court held the plain language, which refers to "land use authority" and "appeal authority," applies only to land use decisions on land use applications, which does not include legislative decisions.** Because the denial of the application to rezone property was a legislative decision, the district court erred in applying this section to bar consideration of the plaintiff's attorney's declaration. The court then considered whether the denial was "properly enacted," holding the declaration created issues of

fact about whether the applicant had been given an "opportunity to be heard." In doing so, it provided guidance on what is required for an "opportunity to be heard."

Corn v. Groce
2024 UT App 84 (May 31, 2024)

In this divorce case, father appealed the district court's denial of his petition to modify parent-time and calculation of mother's net income for child support purposes. On appeal, father argued the district court erred in finding no substantial and material change warranting modification of parent-time. Father argued that the district court should have required a "lesser" showing because, among other things, he was seeking to modify parent-time rather than custody, and he was seeking modification of a stipulated order. **While affirming the district court, the appellate court explained that a lesser showing may be "sufficiently substantial and material" when custody is not at issue. Specifically, the court explained that the "lesser" showing applies: 1) "[w]here a petitioner is seeking to modify parent-time rather than custody," and 2) based upon "the nature of the underlying custody order," meaning whether the order is a court's merits-based decision or simply the result of a stipulation or default.**

Martin v. State
2024 UT App 89 (June 21, 2024)

In this petition for postconviction relief, the court of appeals **applied the "general rule" among other jurisdictions to have addressed the issue "that defense counsel – whether trial or appellate counsel – 'cannot be deemed ineffective for failing to raise an argument contrary to controlling law.'"** Even though the Utah Supreme Court's opinion in the petitioner's direct appeal from his conviction "could be read as an indication that the court might be willing to reconsider" case law under which the disputed expert testimony was admitted, the court held the petitioner's counsel's "failure to marshal extra-jurisdictional authority and peer-reviewed studies in a bid to obtain an overruling of [the relevant case] and its progeny fails." It "decline[d] to classify clairvoyance – at least under the circumstances presented here – as a component of attorney competence."

10th Circuit

Mohamed v. Jones
100 F.4th 1214 (May 7, 2024)

In this civil rights action, a prisoner brought Eighth Amendment claims against prison officials, relying on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court declined to dismiss these claims, concluding that, under *Bivens*, the Eighth Amendment provided the prisoner with an implied cause of action for the alleged constitutional violations. Prison officials appealed the ruling but the Tenth Circuit dismissed the appeal, holding, as a matter of first impression, that **a lower court decision extending *Bivens* is an interlocutory order and not immediately appealable.**

Doe v. Board of Regents
100 F.4th 1251 (May 7, 2024)

State university employees had standing to challenge university's policies regarding religious exemptions from COVID-19 vaccine mandate rules as violating Free Exercise and Establishment Clauses, and the university's decision to fire the plaintiff employees did not render their claims for injunctive relief moot. "We hold that a government policy may not grant exemptions for some religions, but not others, because of differences in their religious doctrines, which the Administration's first policy did. We further hold that the government may not use its views about the legitimacy of a religious belief as a proxy for whether such belief is sincerely-held, which the Administration did in implementing the first policy. Nor may the government grant secular exemptions on more favorable terms than religious exemptions, which the Administration's second policy does. Finally, we hold that the policies at issue in this appeal were motivated by religious animus, and are therefore subject to strict scrutiny."

United States v. Tyree-Peppers
104 F.4th 1236 (June 24, 2024)

Tyree-Peppers' federal probation officer filed a petition to revoke his supervised release based on certain alleged violations of the terms of his release, including his recent arrest by state officials on charges of first-degree murder. While Tyree-Peppers awaited trial on the state charges, the petition remained pending and, eventually, his term of supervised release ended. After Tyree-Peppers was acquitted of the murder charge, the federal district court revoked his supervised release based on other violations. On appeal, Tyree-Peppers argued that the district court lacked jurisdiction to revoke his supervised release because, under eighteen U.S.C. § 3583(i), the delay between the end of his supervised release term and the revocation was not "reasonably necessary" to adjudicate the violations upon which revocation was based. The Tenth Circuit disagreed, holding, as a matter of first impression, that **delay of revocation proceedings to allow for resolution of "serious" state charges which may form the basis for revocation is "reasonably necessary" under the statute.**

Fowler v. Stitt
104 F.4th 770 (June 18, 2024)

Oklahoma governor's executive order directing the health department to stop amending sex designations on birth certificates violated equal protection. Governor's statement that "I believe that people are created by God to be male or female. Period." evidenced purposeful discrimination on the basis of transgender status. But the court rejected a substantive due process claim that without amended birth certificates, plaintiffs are forced to involuntarily disclose their transgender status, thus violating their privacy rights, because requests by third parties for disclosure of birth certificates, such as in connection with applications for employment, are not state action. Judge Hartz dissented from the equal protection analysis.

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Doing Good, Doing Well

by Megan Connelly

Utah is rightfully known as the "Giving State" with a tremendously charitable and generous population. This culture is extremely valuable when seeking to address some of the persistent and wicked problems facing our community.

For those without the financial resources to hire an attorney there is no access to justice. It is estimated by the Legal Services Corporation that over 80% of the civil legal needs of low-income people are unmet. The provision of pro bono services is essential if access to justice is to be a reality for all.

The Utah State Bar Pro Bono Commission is a state-wide body tasked with improving voluntary pro bono legal services throughout the state. Pursuant to Rule 2-201 of the Utah Rules of Judicial Administration, the Utah Judicial Council endorsed the creation of the Pro Bono Commission, which was launched in April 2012. We are grateful for the leadership of Presiding Judge Michele Christiansen Forster and Hon. Angela Fonnesbeck who co-chair the commission.

> *"October is 'Celebrate Pro Bono Month,' an opportunity to provide free legal services to those in need and honor the good work performed by lawyers every day."*

The commission oversees a myriad of pro bono programs while recruiting and training volunteer lawyers from private law firms, in-house counsel, and government offices to provide vital legal services to those in need and increase access to equal justice. Programs include subject matter areas of family law, immigration, bankruptcy, debt collection, and guardianship while also providing volunteers with different levels of involvement from brief advice, to limited scope, up to full representation. A signature program includes secondary professional liability insurance for volunteers from the Utah Bar. Last year, over 3,600 Utahns received pro bono assistance through these programs.

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

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

The Utah State Bar's Access to Justice Office will be hosting a number of events and service opportunities for attorneys in October. The annual Access to Justice Summit will kickoff the monthlong salute to service on Friday, October 4th. You can learn more about the event and sponsorship opportunities by contacting probono@utahbar.org.

Pro bono is short for the Latin phrase pro bono publico, which means "for the public good." Doing good can also have a positive impact for attorneys professionally and personally. Research demonstrates that altruistic acts and volunteering, in particular, offer many benefits, including improved health and life satisfaction. Those who volunteer their expertise as lawyers gain professional development through exposure to broader responsibilities at early

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career stages and a sense of more meaningful work. Research also reveals that law firms gain through greater retention of junior lawyers within workplaces where volunteering is encouraged.

Making Connections and Building Community

Relatedness is how one connects, or relates to others, and whether an individual feels a sense of belonging at work. Chronic incivility depletes the legal profession's one true resource – its people. Collegiality, on the other hand, fosters psychological safety – the feeling that the work environment is trusting, respectful and a safe place to take risks. When lawyers don't feel psychologically safe, they are less likely to seek or accept feedback, experiment, discuss errors, and to speak up about potential or actual problems. Harvard Law School professors Scott Westfahl and David Wilkins emphasize the importance of networks and connecting in a Stanford law review article. *The Leadership Imperative: A Collaborative Approach to Professional Development in the Global Age of More for Less*, 69 Stan. L. Rev. 1667 (2017). Networks and connections allow lawyers to leverage their technical and professional skills in new ways, collaborate meaningfully to solve complex client problems and provide the space to find different ideas, people, and opportunities. Another study further supports the assertion that relationships, in all forms (to self, others, work, community, and to your direct partner/supervisor) are the ultimate key to lasting satisfaction in the legal profession.

> *I volunteer because it allows me to use my legal skills to make a real difference in people's lives. Providing pro bono services not only helps those in need access justice, but it also reminds me why I became a lawyer in the first place. Volunteering with the Utah State Bar's pro bono program has been incredibly rewarding, and I encourage all attorneys to get involved.*
>
> Nathan Nelson

Pro bono presents a wonderful opportunity to expand one's professional network and make new connections within the legal community. By working with like-minded pro bono professionals while sharing a common goal of providing legal aid, you build lasting relationships outside the confines of a case, legal clinic, or workplace.

These connections can be invaluable in the long run: they can lead to mentorship, job opportunities, and even collaboration on future cases. Further, the diverse backgrounds of volunteers often mean you encounter individuals with unique perspectives and expertise, enriching your professional network with colleagues whom you may never have had an opportunity to meet otherwise.

> *I volunteer because it's refreshing to the soul and provides great experience.*
>
> Alex Vandiver

Ensure Access to Justice for all Utahns

One of the most powerful benefits of pro bono is the opportunity to play a critical, life-changing role in ensuring access to justice for people experiencing poverty. For many neighbors and community members, affording an attorney is out of the question, leaving them to navigate alone a complex legal system designed by attorneys for attorneys. Worse, many of the legal issues community members face significantly impact their housing security, financial stability, and long-term wellbeing. By undertaking pro bono work, you become a vital part of the solution, helping to bridge the access to justice gap and make civil legal aid accessible to those who need it the most. Your pro bono efforts have the power to change lives, secure housing for families, protect the rights of individuals, and provide much-needed relief to those navigating difficult and overwhelming legal matters. Not only does this benefit Utahns directly, it also serves to uphold the principles of justice and equality. Volunteering allows you to be a champion of justice, making a tangible difference in the lives of those who might otherwise be left without a voice.

There are a number of reasons to volunteer yet the most important reason to do pro bono is whatever your reason is. We hope you join us in some of these efforts to create a more just and equitable Utah while finding fulfillment as well.


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The Mind-Body Connection: Understanding the Relationship Between Chronic Stress and Chronic Pain

by Martha Knudson

In the high-pressure world of law, unrelenting stress and pressure can feel like an inevitable part of the job. With long hours, tight deadlines, and high-stakes cases, it's easy to see how physical discomfort can creep in. But what if those aches and pains aren't just from sitting at a desk all day?

This article explores the concept that there may be more to physical pain than just the physical – highlighting how the stress of the practice of law can be internalized into our somatic selves. Through an understanding the mind-body connection and increased awareness of our body's signals, we can open new avenues for managing both chronic pain and chronic stress.

The Connection Between Chronic Stress and Chronic Pain

Prolonged stress can alter how our brains perceive and process pain. Bessel van der Kolk, The Body Keeps the Score (2015). When we experience stress, our bodies release stress hormones. In the short term, this can be beneficial, giving us energy to help us rise to the occasion. But if the stress response is prolonged, what was initially helpful becomes harmful, heightening our sensitivity to pain, causing us to feel discomfort more keenly, and triggering inflammation which can exacerbate pain in existing physical conditions. *Id.*; *see* Eva Selhub, *Mindful Lawyering*, The Best Lawyer You Can Be: A Guide to Spiritual, Mental, Emotional, and Physical Wellness 125, 126–27 (Stewart Levine ed., 2018).

Chronic pain is a condition impacting around 20.4% of U.S. adults.[1] Carla E. Zalaya, et al., *Chronic Pain and High-Impact Chronic Pain Among U.S. Adults, 2019*, NCHS Data Brief; no. 390 (Nov. 2020), available at https://www.cdc.gov/nchs/products/databriefs/db390.htm. Defined as pain experienced on most days or every day over the past three months, it can cause physical limitations while also impacting our professional life, making it harder to concentrate, reducing our work efficiency, and negatively impacting our mood and work relationships.

Practical Tips for Lawyers: Navigating Chronic Pain and Stress

Acknowledging that physical pain might have deeper, stress-related roots can empower us to take proactive steps in managing both stress and pain. Here are some practical strategies:

Mindfulness and Awareness

A crucial first step is to be aware of how stress manifests in your body. As lawyers we can be very skilled at ***not*** doing this, ignoring what our body tells us in favor of grinding through our workload. Practices like mindfulness meditation can help us develop greater awareness of our mind-body dialogue so we can better recognize our physical responses and engage in self-care. It also has the capacity to reduce stress and manage stress more effectively. *See* Nathalie Martin, *Mindful Lawyering*, The Best Lawyer You Can Be: A Guide to Spiritual, Mental, Emotional, and Physical Wellness 27, 29–30 (Stewart Levine ed., 2018).

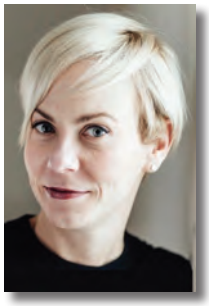
Schedule Regular Breaks Throughout Your Workday

Short regular breaks throughout the day can help lower stress, calm your mind, and give your body the opportunity to relax. Incorporating movement and light stretching during these breaks can aid in stress reduction and help alleviate pain symptoms. Breathing exercises are another effective tool for stress relief that can be done during work.

Prioritize Time for Connection

Close relationships and positive social connections can help us to manage stress and maintain our mental health, so it's important

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



we prioritize them. These interactions reduce inflammation in our body and trigger the release of hormones that create a sense of calm, helping bring our nervous system to a more normal and balanced state. *See* Kelly McGonigal, The Upside of Stress (2015).

Seek Mental Health Support

Chronic pain is correlated with mental health concerns like anxiety and depression. Nalini Vadivelu et al,. *Pain and Psychology – A Reciprocal Relationship*, 17(2) The Ochsner Journal 173–80 (2017). Engaging in psychological counseling (talk therapy) can be an effective treatment for both. Active licensees of the Utah State Bar have access to quality no-cost mental health services through Tava Health. Information on how to access these services may be found on the Bar's website or you can sign up by scanning this QR code.

Discuss Your Condition with Your Employer or HR Department

Open conversations about your chronic pain can lead to accommodations, such as ergonomic adjustments or flexible work hours, easing discomfort and improving productivity.

Utilize Pain Management Services

Consult healthcare providers for personalized advice. This might include medications, physical therapy, or lifestyle changes like diet and exercise modifications.

Discover Pain-Relief Tools

Simple aids like heating pads, supportive pillows, or compression garments can significantly reduce discomfort and improve daily functioning.

Through discomfort of one kind or another – physical, mental, emotional, or psychological – our body lets us know there is an underlying concern it wants us to address. It's up to us to learn to listen and to take daily steps to care for ourselves. Combining an understanding of the deeper layers of stress-related pain with practical strategies for recovery can help us to more effectively address both the symptoms and sources of stress, leading to a healthier and more fulfilling practice and life.

Utah State Bar Communications Director Jennifer Weaver contributed to this article.

1. Another recent study suggests that one in five adults in the U.S. population report coping with pain that lasts more than several months (variously defined as three to six months, but longer than "normal healing"). Richard L Nahin, et al., *Estimated Rates of Incident and Persistent Chronic Pain Among US Adults, 2019–2020*, 6 Jama Network Open (May 2023), available at https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2804995.

DENTONS

In Memoriam

Steven J. McCardell

1953 - 2024

Our colleague and friend, Steven J. McCardell, who, prior to his recent retirement, was a shareholder and Chief Compliance Officer of the firm, passed away unexpectedly on August 8, 2024.

Steve was a brilliant and masterful attorney who practiced in the corporate bankruptcy and commercial litigation areas and maintained a busy appellate practice. He also taught bankruptcy courses at both local law schools and lectured and published widely on challenging business reorganization concepts.

Steve had a sterling academic career. He graduated with honors from Brigham Young University and the J. Reuben Clark Law School, where he was also a member of law review. Steve financed his college education, in part, as a drummer in rock and roll bands.

Steve clerked from for prominent Federal Bankruptcy Judges Ralph R. Mabey and Glen E. Clark, both of whom had a long-term effect on Steve's extraordinary legal career.

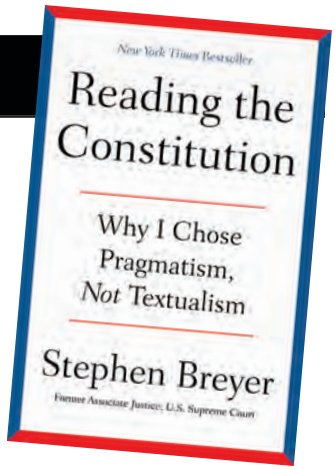
Following his clerkships, Steve joined the national firm LeBoeuf, Lamb, Leiby & MacRae. For twenty years he was an integral part of LeBoeuf's national corporate reorganization practice, including advising Ralph Mabey as examiner in the A.H. Robbins chapter 11 case and representing both Geneva Steel and CF&I Steel in large chapter 11 cases. In 1996, Steve argued before the United States Supreme Court in a case involving complicated mixed issues of bankruptcy, pension, and federal tax law. With Steve as its advocate, CF&I prevailed against the United States, facilitating the successful resolution of the bankruptcy case. *U.S. v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

In 2006, Steve joined Durham Jones & Pinegar, now Dentons Durham Jones Pinegar, where he continued a busy reorganization and litigation practice.

Steve was inducted into the prestigious American College of Bankruptcy and recognized multiple times as Best Lawyers' Bankruptcy Lawyer of the Year for Utah.

Steve was a loving and doting husband to his wife, Marion Wixom McCardell, and a wonderful and engaging father and grandfather to his four children and eleven grandchildren. He will be deeply missed by the Bar, his colleagues at Dentons, friends, and family members.

Reading the Constitution: Why I Chose Pragmatism, *Not* Textualism



by Stephen Breyer

Reviewed by Todd Zagorec

Former Associate Supreme Court Justice Stephen Breyer's new book is as meticulously researched, carefully written, and brilliant as one would expect but also challenging nightstand reading and in some ways not completely satisfying.

It is not a memoir of his time on the Court, although it draws heavily from cases decided during his tenure there. It is a critique of textualism and originalism as a jurisprudential philosophy, an explanation of Breyer's own philosophy of pragmatism, and a discussion of whether we are witnessing a paradigm shift of the abandonment of pragmatism in favor of textualism and originalism.

He seems alarmed by what he sees as an ill-considered reliance by the Court on textualism, but his tone is unfailingly calm, rational, and restrained, as if he were gently and politely pointing out that the house is on fire. In the preface, he shares some advice he received from Judge John Wisdom of the Fifth Circuit when Breyer first became a judge for when he strongly disagreed with an opinion drafted by a colleague.

> I should sit down and write a strong dissent, not sparing emotion, perhaps containing subtle insults, and certainly complaining fiercely (in language that the reader would notice) about how wrong that decision was. "Then," he added, "read it, tear it up, throw it in the waste basket, and start again, this time to write a judicial, i.e., a judge's, dissent." I have tried to follow that stylistic advice generally, and I shall try to do so here.

Stephen Breyer, Reading The Constitution: Why I Chose Pragmatism, Not Textualism, at xxvii (2024).

Those shredded pages in Justice Breyer's waste basket are the book I would really like to read.

I won't be able to do it justice, but here is the substance of the book in a nutshell (the one that got published, not the one in the waste basket):

- Textualism and originalism are variations on the same theme: that a judge should look primarily, if not exclusively, at the language on the page and give it the meaning a reasonable person would have given it at the time it was written.
- Pragmatism is a purpose-oriented method that may begin with the words on the page, but doesn't end there. The words are supplemented with consideration of history, precedent, tradition, purposes, and consequences in order to arrive at a ruling consistent with and in furtherance of the values and intent underlying those words. The comparative weights to be assigned to those tools vary on a case-by-case basis depending on such things as the nature of the matter at issue and the generality or specificity of the pertinent language. It is not a novel approach nor an easy one, but simply a description of how judges have historically decided cases – for which Breyer cites a pantheon of judicial luminaries including John Marshall, Oliver Wendell Holmes, and Felix Frankfurter.
- For statutory construction, textualism only works if the statute is clear, but in disputed cases – especially those that reach the Supreme Court – the statutory language is rarely

TODD ZAGOREC is an Editor at Large of the Utah Bar Journal. He recently retired from his day job as Legal Department Mentor and Counsel, UPL Limited.

clear. In such cases, why ignore useful tools like legislative history, the historical context in which the statute was enacted, and the practical consequences of the court's ruling (as the textualist ostensibly does)?

- For Constitutional interpretation, the variation of textualism known as originalism is even less helpful than in the statutory context. Compared to statutory language, which is often quite specific, constitutional provisions tend to be more general embodiments of values and more susceptible to competing interpretations. Therefore, if we hope to give effect to the founders' intent to establish the structural framework for a workable and enduring society, constitutional jurisprudence implies a nuanced approach based on underlying values and purposes rather than a rigid application of rules based on centuries-old dictionaries.
- Textualism and originalism don't serve the ends of justice well because:
  - The original meaning of a statute or a Constitutional phrase can be hard to determine, and judges are not good historians.
  - The founders themselves intended that the Constitution be interpreted in a purpose-based manner in order to make it workable, adaptable, and therefore durable (citing John Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819), as the principal authority for the proposition).
  - Originalism saddles us with a world view that prevailed when many groups were marginalized (e.g., enslaved people and women). A strict originalist would probably feel constrained to conclude that *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), was incorrectly decided.
  - Throughout the history of the republic, judges have used the full panoply of tools available to them to decide cases (text, history, precedent, tradition, purposes, and consequences). If we abandon that in favor of the recent trend toward textualism and originalism, are we to overturn all those cases? What then becomes of the stability and predictability produced by the doctrine of *stare decisis*?

  - "Summarizing my criticism in a single sentence, however, I have found the legal world too complex, too different from the world the textualist assumes, to believe that the theoretical virtues the textualists mention can justify the textualist approach." Breyer, *supra*. at 26.

- We might be witnessing a paradigm shift in Supreme Court jurisprudence. Breyer describes three previous paradigms: the *Lochner* Court, the New Deal Court, and the Warren Court.

  - The *Lochner* Court recognized freedom of contract as a property right guaranteed by the due-process clause and relied on it to blunt Progressive Era and New Deal reforms – in an exercise of activist judicial power to minimize disruption of a system that had generated significant national prosperity. Breyer, *supra*. at 235.

Reading the Constitution: Why I Chose Pragmatism,* Not *Textualism

by Stephen Breyer

Simon & Schuster (2024)

368 pages

Available in hardcover, e-book, and audiobook formats.

  - In response to the Great Depression (and FDR's threatened court-packing), the New Deal Court shifted to a doctrine of judicial restraint and deference to the legislative branch.

  - In the context of evolving national and international attitudes in the aftermath of World War II, the Warren Court abandoned judicial restraint in the realm of human rights, but otherwise left the legislature generally free to experiment in the economic and social spheres.

  - It is possible that textualism and originalism constitute a fourth paradigm shift, toward a less activist approach to human rights, but a more activist, less deferential approach to legislative and executive economic and social initiatives.

There is a lot in there. It would be an excellent reading assignment for a second-year law school course in jurisprudence but will probably be a challenge for readers outside the legal profession.

The critique of textualism is thorough and detailed but also feels very familiar. He has been making the same argument for years. It's a persuasive argument (I'm on board), but if you have read his previous books, you've already heard it. And if you read this one, you'll hear it many more times. Repetition is an effective teaching technique, and by the time you finish the conclusion on the last page, the general outline of the argument will be embedded in your hippocampus. A casual reader, however, might find it repetitive, and may well give up and turn out the light before then.

The title suggests a book solely about the Constitution, but the dissection of constitutional interpretation only begins on page 114. Readers must first work their way through chapters about statutory interpretation, which include fairly detailed parsing of cases that require serious concentration. Be prepared to focus on the technicalities of such things as post-grant review of patent validity, the statute of limitations for filing habeas corpus petitions, the calculation of railroad employee retirement benefits, and the nuances of sovereign immunity as it applies (or doesn't) to international organizations.

I'm not saying it isn't worth the effort. This is an important contribution to the field by a brilliant former Associate Supreme Court Justice. It does, however, require a degree of patience and focus that readers might find hard to marshal.

Some of the prose feels a little dry. It is, after all, a treatise (albeit a short one). But Breyer is also capable of more imaginative imagery, as where he describes legislation as "wholesale," since it is drafted to apply to a wide range of circumstances, while jurisprudence, dealing with specific situations, is "retail." *Id*. at 22. Elsewhere, he notes that technical statutory construction is an exercise for the head, while value-laden Constitutional interpretation calls on the heart. *Id*. at xxviii. Give me more of that.

My favorite part was the section about paradigm shifts. It only got about thirty pages, though, which felt scant. He sees the historical shifts he describes as changes in *methodology*, but I think it's a fair question whether they are in fact changes in *ideology*. Are the *Lochner* Court, the New Deal Court, and the Warren Court really examples of neutral, unbiased justices reaching conclusions based on the objective application of traditional tools of jurisprudence, or are they simply examples of changes in political ideology? One doesn't have to be a cynic or a disciple of the legal realism school to raise the question.

Similarly, is the current paradigm shift to textualism one of

methodology or ideology? Isn't it likely to be some of both? Is it really the result of methodological differences – untainted by ideology – that the "conservative" justices so often all reach the same result, while the "liberal" justices all reach another?

Breyer hesitates to declare that the shift to textualism is actually taking place. He presents the evidence of a shift in the Court toward textualism, but then offers reasons why such a shift, if it is happening, will take time and is unlikely to be permanent, in particular: new justices will need time to settle in before they feel comfortable making significant changes; the justices will compromise because they get along well personally and care about the public perception of the institution; the justices will realize the limitations of textualism; and the public will simply not accept too much change too quickly. *Id*. at 246–60. Maybe, but I think he recognizes at some level that the shift is in full swing, if it hasn't happened already.

The concluding paragraph of the preface hints at what might be his true feelings:

> In the ninth century, a group of monks on the Island of Iona, led by Saint Columba, produced the Book of Kells, a beautifully illustrated volume, which one can see to this day at Trinity University in Dublin. There are those who believe that the monks produced this book because they thought a great darkness had fallen over Europe and the Book of Kells could preserve a ray of light. This book is not the Book of Kells, but, in my more pessimistic moments as I write, I think of those monks.

Id. at xxix.

If he feels as strongly as his preface seems to suggest, why do his conclusions about the paradigm shift sound tentative? Why does he insist the whole debate is one of methodology and not ideology? The dedication page might offer a hint: "This book is dedicated to my colleagues on the Court: CJ Rehnquist, John, Sandra, Nino, Tony, David, Clarence, Ruth, CJ Roberts, Sam,

Sonia, Elena, Neil, Brett, and Amy." Relationships and collegiality mean a lot to him. These people are his friends, and he sincerely doesn't want to hurt feelings or question motives. The more formal acknowledgments of "CJ Rehnquist" and "CJ Roberts" seem indicative of his reverence for the institution and its public image.

Setting the book down for the last time, I found myself puzzling over the heretical question of whether the distinction between textualism and purpose-oriented pragmatism is even real. Aren't one justice trying to divine the *original intent* of a Constitutional phrase and another trying to give effect to its *purpose* engaged in essentially the same exercise? I can picture Justice Breyer throwing his hands in the air, exasperated that I have utterly missed the point. And perhaps I have. Still, is it possible it's just a difference of emphasis?

A purpose-oriented pragmatist won't ignore the text. Rather, they will start with the overriding purpose of the legislation, or the underlying values inherent in the Constitutional clause, and then give the text the most reasonable interpretation in light thereof. A textualist will start with the words on the page, and unless they are absolutely clear (which will rarely be the case for disputes that end up on the Supreme Court docket), they will look beyond the document to give those words a reasonable interpretation in light of the intent. Both use the same tools, but assign different weights to them and perhaps use them in a different order. Breyer admits that possibility and cites cases to illustrate. One such case is *NLRB v. Noel Canning*, 573 U.S. 513 (2014), interpreting the Recess Appointments Clause of the Constitution, where he contrasts opinions authored by himself and by Justice Scalia, and he concludes that "[t]he differences, I believe, primarily boil down to emphasis, perhaps here driven by judicial instinct." Breyer, *supra*. at 200.

Judicial instinct. Where does one acquire that? Presented with a toolbox of text, history, precedent, tradition, purposes, and consequences, why do different judges use different tools, in different order, and assign them different weights? *Reading the Constitution* is an attempt to answer that question without consideration of ideology. It will be up to the reader to decide if it does so convincingly.

The Multijurisdictional In-House Counsel

by Keith A. Call and MinJae Kim

You never planned to return to Utah when you left to attend law school in a coastal state. After practicing there for several years, you receive an offer to go in-house with a fast-growing Utah company. You are greatly relieved to learn that in Utah, because you are a lawyer admitted and in good standing in another United States jurisdiction, you are allowed to work as in-house counsel while your Utah Bar application is pending. But when your company's CEO begins asking you to advise on issues cropping up in other states, you feel somewhat uneasy that you may be engaging in unauthorized practice of law. Are you?

It depends. This article examines applicable rules and highlights valuable resources to help the Utah-based multijurisdictional lawyer steer clear of unauthorized practice of law.

Quick Reminder – In-House Counsel Must Register in Utah

If you are not currently licensed in Utah but will be practicing in Utah as in-house for a Utah company, you must apply for admission to the Utah Bar. *See* Utah Code § 78A-9-103(3); Utah Code Jud. Admin. R. 14-719. You may work as in-house counsel while that application is pending. Utah Rule of Professional Conduct 5.5(d) provides:

> A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction without admission to the Utah State Bar if … the services are provided to the lawyer's employer or its organizational affiliates while the lawyer has a pending application for admission to the Utah State Bar and are not services for which the forum requires pro hac vice admission[.]

If you want to avoid taking the Bar exam, see if you can be admitted to the Bar as "House Counsel" under Utah Code of Judicial Administration Rule 14-719. That rule limits the type of services House Counsel may provide in Utah, but it does allow you to provide legal advice to your employer.

What About Legal Services Involving Other States' Laws?

In-house counsel are frequently asked to advise their employers on matters that implicate the laws of other states. For example, you may be negotiating a contract that will be governed by the laws of New Jersey, or you might have an employee problem at your employer's office in California. Does your Utah Bar license permit you to advise your client on such matters? Again, it depends.

Both Utah Rule of Professional Conduct 5.5(a) and ABA Model Rule 5.5(a) provide: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

KEITH A. CALL is a Partner at Spencer Fane LLP. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

MINJAE KIM is currently a 2L at the Brigham Young University J. Reuben Clark Law School.

Rule 5.5(c) explains when a lawyer admitted in another United States jurisdiction (and not disbarred or suspended in any jurisdiction) may provide legal services on a temporary basis in "this jurisdiction," i.e., the jurisdiction adopting the rule. This includes legal services that "arise out of or a reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Utah R. Pro. Cond. 5.5(c)(4); ABA Model R. Pro. Cond. 5.5(c)(4).

Let's map this out. Let's assume you are in-house counsel for a Utah company and that you are admitted in Utah, but not in New Jersey. You are negotiating a contract with a New Jersey company. The contract will be governed by New Jersey law. Utah's Rule 5.5(a) prohibits you from practicing law in New Jersey in a way that violates New Jersey's rules. So you must consider whether your proposed activities will violate any New Jersey rule.

The only way to nail this down with certainty is to consult New Jersey's rules. Fortunately, New Jersey's version of Rule 5.5 specifically allows a lawyer admitted in another state, e.g. Utah, to negotiate the terms of a transaction on behalf of a client in the jurisdiction where the lawyer is admitted (Utah), provided that the transaction is related to the jurisdiction in which the lawyer is admitted (Utah). N.J. R. Pro. Cond. 5.5(b)(3)(i).

Happily, it appears you are good to go in New Jersey. Go ahead and negotiate that agreement. Sadly, however, Rule 5.5(a) may require you to consult the rules of each jurisdiction involved for whatever activity you seek to undertake involving a sister state. This may at times feel prohibitive, and we hope the Utah Office of Professional Conduct and Utah Courts would apply this rule with reason and flexibility. *See* Utah R. Pro. Cond. Preamble (14) ("The Rules of Professional Conduct are rules of reason."). Nevertheless, it is worth doing the extra work needed to stay safe.

A helpful resource can be found at https://www.acc.com/advocacy/right-to-practice. This survey, compiled by the Association of Corporate Counsel, will point you to each jurisdiction's requirements for in-house lawyers admitted to practice elsewhere, including links to each state's version of Rule 5.5. That is the place to start if your legal services involve any United States jurisdiction in which you are not officially licensed.

The Risks Outweigh Your Employer's Aversion to Being Told "No."

Clients typically like it more when their lawyers enable the clients' vision rather than telling the clients "no." It's no different when your client is a company that employs you. You're a significant cost center, and your employer wants to hear "yes." What if your employer pressures you to provide legal services that run afoul of the rules in another state where you are not admitted?

You know your employer best, and you need to push back in the way best suitable to your employer. As a lawyer, one of your jobs is to limit your client's risk, and engaging in unauthorized practice of law poses significant risks to your client. The most significant risk is having their in-house lawyer (you!) sanctioned for engaging in the unauthorized practice of law. You could become subject to state bar disciplinary proceedings in both Utah and any state where you engage in unauthorized practice of law. There are also such risks as missing out on beneficial contract provisions or critical claims or defenses in litigation if you are not intimately familiar with the nuances of another state's laws.

Tread Carefully

In an increasingly interconnected and competitive world, we want to accept work when we reasonably can. In-house lawyers have the added challenge of having one client they must keep happy. If you are asked to provide legal services for your employer in a different state, make sure you familiarize yourself with that state's rules before you proceed. Inform your employer if you cannot proceed or you feel it is not wise to proceed.

You owe that to your employer and yourself.

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

Commission Highlights

The Utah State Bar Commissioners received the following reports and took the actions indicated by vote during the June 21, 2024, meeting held at the Law & Justice Center in Salt Lake City.

- The Commission received a report on the budget meeting with the court.
- The Commission received a report on ongoing litigation against the Bar.
- The Commission received an update on hosting the 2025 Jackrabbit Bar Conference.
- The Commission voted to transfer designated reserves to pay for Unmind and Euclid/Clearvantage database cloud migration.
- The Commission voted on the recipients of the Annual Meeting Awards.
- The Commission voted to appoint Kristin Woods as the Judicial Council Representative.
- The Commission voted to approve the 2024–25 Bar Commission Executive Committee: Cara Tangaro, Kim Cordova, Erik Christiansen, Matthew Hansen, Tyler Young, and Olivia Shaughnessy. The Executive Committee was approved for bank signatures.
- The Commission voted to allow the Unauthorized Practice of Law Committee to file a complaint against a frequent UPL offender.
- Minutes of the March 14, 2024 Bar Commission Meeting and the list of 2024–25 Bar Committee Chairs were approved by Consent Agenda.

The minute text of this and other meetings of the Bar Commission are available on the Bar's website at https://www.utahbar.org/bar-operations/commission-meetings/.

Celebrating Fifty Years of Legal Excellence

Earlier this summer the Utah State Bar honored thirty-two distinguished attorneys for achieving the remarkable milestone of fifty years of active licensure. This momentous occasion was celebrated with a luncheon and formal presentation at the Utah Law & Justice Center in Salt Lake City. The event brought together the legal community to recognize and celebrate the half-century of dedication, service, and significant contributions these esteemed attorneys have made to the profession and society. The attorneys who were honored include:

Richard G. Allen
James A. Arrowsmith
Robert D. Atwood, Jr.
Paul J. Barton
Willard R. Bishop
James R. Black
Roger S. Blaylock
Richard D. Burbidge
Michael R. Carlston
Scott H. Clark
Jonathan A. Dibble
Christine M. Durham
David E. Gee
John C. Green
Stephen F. Hutchinson
Ralph B. Johnson
Michael R. Loveridge
Robert R. Mallinckrodt
Raymond N. Malouf, Jr.
Stephen R. McCaughey
James W. McConkie
Craig F. McCullough
W. Andrew McCullough
James R. Morgan
Robert K. Mouritsen
Stephen I. Oda
Anthony L. Rampton
John A. Snow
Marcus Taylor
Ronald W. Thompson
Gregory B. Wall
Whitney B. Warnick

Honorees who were present for the celebration were:

James A. Arrowsmith
John C. Green
W. Andrew McCullough
Christine M. Durham
Anthony L. Rampton
James R. Black
Roger S. Blaylock
Robert R. Malinckrodt
Robert K. Mouritsen

Thank you to the members of the Bar Examiner Committee that participated in grading the July 2024 Bar Examination.

We appreciate all of the time and support you dedicate to the Utah State Bar.

UTAH STATE BAR®

FALL FORUM AWARDS

Nominations will be accepted until Friday, September 13 for awards to be presented at the 2024 Fall Forum. We invite you to nominate a peer who epitomizes excellence in the work they do and sets a higher standard, making the Utah legal community and our society a better place.

"No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude."

The Fall Forum Awards include:

The James Lee, Charlotte Miller, and Paul Moxley Outstanding Mentor Awards.
These awards are designed in the fashion of their namesakes, honoring special individuals who care enough to share their wisdom and guide attorneys along their personal and professional journeys. Nominate your mentor and thank them for what they have given you.

The Distinguished Community Member Award.
This award celebrates outstanding service provided by a member of our community toward the creation of a better public understanding of the legal profession and the administration of justice, the judiciary or the legislative process.

The Professionalism Award.
The Professionalism Award recognizes a lawyer or judge whose deportment in the practice of law represents the highest standards of fairness, integrity, and civility.

Please use the Award Nomination Form at https://www.utahbar.org/awards/ to submit your entry.

Annual Meeting Awards

The following awards were presented on July 12, during the Utah State Bar's Annual Meeting at the Utah Law & Justice Center:

Judge of the Year

Hon. Sachuda Bazzelle

Section of the Year

Young Lawyers Division

Pictured: YLD Chair Ashley Biehl with Cara Tangaro, the new Bar President.

Committee of the Year

Character & Fitness Committee

Pictured: Character & Fitness Co-Chair Michael Barnhill with Bar Executive Director Elizabeth Wright.

Pro Bono Honor Roll

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

Family Justice Center

Rob Allen
Eyad Alsamhan
Sarah Alvarado
Steven Averett
Lindsey K. Brandt
Alixa Brobbey
Dave Duncan
Chad Funk
Michael Harrison
Madison Kurrus
Maggie Lajoie
Analisa McKay
Victor Moxley
Dailyah Rudek
Nancy Van Slooten
Jessica Smith
Babata Sonnenberg
Elizabeth Tyler
Rachel Whipple
David Wilding

Private Guardian ad Litem

Amanda Bloxham Beers
Chase Kimball
Alison Librett
E Jay Overson

Pro Bono Initiative

Jessika Allsop
Jessica Arthurs
Justin Ashworth
Noah Barnes
Amanda Bloxham Beers
Jonathan Benson
Corttany Brooks
Alexander Chang
Brent Chipman
Jessica Couser
Dan Crook
Dave Duncan
Ana Flores
Sergio Garcia
Anaya Gayle
Peter Gessel
Jeffry Gittins
Taylor Goldstein
Viviana Gonzalez
Samantha Hawe
Brent Huff
Whit Johnson
Ezzy Khaosanga
Dino Lauricella
Christopher Martinez
Kendall McLelland
Michael Meszaros
Maxwell Milavetz
Eugene Mischenko
Susan Morandy
John Morrison
Carlos Navarro
Matthew Nepute
Tracy Olson
Cameron Platt
Clayton Preece
Stewart Ralphs
Earl Roberts
Brian Rothschild
Joe Rupp
Jonathan Rupp
Lauren Scholnick
Jake Smith
Ethan Smith
Richard Snow
Andrew Somers
Morgan Tingey
Nicholle Pitt White
Oliver Wood

Pro Se Debt Collection Calendar

Miriam Allred
Mark Baer
Anna Bailey
(Law Student J. Reuben Clark Law School)
Matt Ballard
Alex Chang
Megan Connelly
Ted Cundick
Kit Erickson
Jeremy Eveland
Leslie Francis
Denise George
Benson Killpack
(Law Student J. Reuben Clark Law School)
Zach Lindley
Alyssa Niesen
Rachel Prickett Passey
Jennifer Reinhardt-Tessmer
Ashton Ruff
Jessica Smith
Chris Smith
(Law Student University of Utah S.J. Quinney College of Law)
George Sutton
Brian Tucker
Alex Vandiver
Austin Westerberg
Angela Willoughby

Timpanogos Legal Center

Jenny Arganbright
Ali Barker
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Utah Law and Justice Center: Exclusive Facilities for Legal Professionals

The Utah State Bar is pleased to announce a new benefit for active Utah Bar licensees in good standing: **complimentary use of facilities at the Utah Law and Justice Center** for quick, law, practice-related meetings of up to two hours (for example, notarization, client meetings, signings). Licensees can enjoy free parking, Wi-Fi, and basic room setup. However, please note that any additional requirements, such as a notary or witnesses, will need to be arranged independently.

Additionally, the center is a great place to host your law-related events or meetings with a variety of rooms to choose from, including a boardroom, suitable for an array of configurations to accommodate your specific needs. We regularly host Continuing Legal Education (CLE) sessions and can also set up law-related banquets, board meetings, one-on-one consultations, legal signings, mediations, and other legal activities. Check out our updated and simplified room rates – starting at $125 for half a day and $200 for the full day – on our website: utahbar.org/uljc-rental-info/ or by scanning the code below.

With your guidance, we handle all the details to ensure the space meets your requirements. Room rates include setup, tables, chairs, AV equipment, free parking, and Wi-Fi. We can also assist with catering orders and delivery, adding the food cost to your invoice with no extra surcharge.

For more information, please contact Travis Nicholson at travis@utahbar.org or visit our website: utahbar.org/uljc-rental-info/ for rental rates, capacity, and additional details.

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November 14 & 15, 2024

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- Breakout sessions including the Litigation Section Trial Academy, the Innovation in Law Committee, Utah Center for Legal Inclusion (UCLI), and other community organizations/sections of the Bar

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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.

PROBATION

On June 11, 2024, the Honorable Stephen Nelson, Third Judicial District, entered an Order of Discipline against John C. Heath, placing him on probation for a period of two years based on Mr. Heath's violation of Rule 7.1 (Communications Concerning Lawyer's Services) and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

On May 2, 2019, the Plaintiff Bureau of Consumer Financial Protection commenced a civil action in the United States District Court for the District of Utah against a number of defendants, including John C. Heath Attorney at Law PC, doing business as Lexington Law and Lexington Law Firm (Lexington Law), a firm that offered credit repair services. Clients were led to believe that these services would be provided by a lawyer. However, clients who called were transferred to an agent who was not a lawyer, letters sent for credit repair were not signed by lawyers, and clients would only speak to a lawyer if they specifically requested it. The firm's advertising led clients to believe that all services would be provided by lawyers, which was not the case. The advertising was misleading and in violation of Rule 7.1.

Mr. Heath/Lexington Law also engaged in abusive telemarketing practices in violation of the Telemarketing Sales Rule (TSR) and violated the advance fee provision of the TSR. Lexington Law made no attempt to comply with the TSR's express payment preconditions, resulting in clients being billed before receiving any services. This conduct was prejudicial to the clients and the administration of justice in violation of Rule 8.4(d).

PROBATION

On July 2, 2024, the Honorable Laura Scott, Third Judicial District, entered an Order of Discipline against Aaron Kinikini, placing him on probation for a period of one year based on Mr. Kinikini's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:

On March 26, 2021, Mr. Kinikini pleaded guilty to one count of

DISCIPLINE PROCESS INFORMATION OFFICE

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

801-257-5518
DisciplineInfo@UtahBar.org

ADAM C. BEVIS MEMORIAL ETHICS SCHOOL
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To register, email: CLE@utahbar.org

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4 hrs. CLE Credit, including 3 hrs. Ethics
To register, email: CLE@utahbar.org.

Felony Discharge of a Firearm, a Third-Degree Felony. Mr. Kinikini's conviction was based on the following facts: Defendant did knowingly or having reason to believe any person may be endangered by the discharge of a firearm, discharge a firearm in the direction of another person (a cohabitant). Mr. Kinikini had been placed on interim suspension on January 31, 2024.

Mr. Kinikini and the OPC stipulated that no aggravating or mitigating circumstances applied for purposes of the discipline imposed.

RECIPROCAL DISCIPLINE

On June 4, 2024, the Honorable Richard Pehrson, Third Judicial District Court, entered an Order of Reciprocal Discipline: Delicensure/Disbarment against Robert L. Booker for his violation of Rule 1.5(b) (Fees), Rule 1.6(a) (Confidentiality), Rule 1.15(a) (Safekeeping Property), Rule 1.16(b)(5) (Declining or Terminating Representation), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
On May 11, 2023, the Tennessee Supreme Court entered an Order of Enforcement, disbarring Mr. Booker from the practice of law. The Order was predicated on the following facts in relevant part:

Mr. Booker represented a client in a contested divorce case. He charged non-refundable fees without a written agreement, failed to explain the scope of his representation and the basis of his fees, failed to deposit client funds into an IOLTA account, and disclosed confidential client information without consent. Also, due to Mr. Booker's failure to explain to his client the basis or rate of fees to be paid, his effort to withdraw as counsel for non-payment of fees as agreed upon was not supported. Furthermore, Mr. Booker did not respond to Tennessee Disciplinary Counsel's letters and attempted to avoid formal service of the Petition in Tennessee.

Aggravating circumstances:
Prior disciplinary offenses, pattern of misconduct, multiple offenses, bad faith obstruction of the disciplinary proceeding, and substantial experience in the practice of law.

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Utah Minority Bar Association Is Pleased to Announce its 2024–2025 Executive Board!

by Olivia Rossi

If you are not familiar with the Utah Minority Bar Association (UMBA), we are an organization of Utah lawyers committed to promoting diversity and addressing issues that impact racial and ethnic minorities, especially within the legal community. UMBA membership is open to all Utah State Bar members in good standing.

My name is Olivia Rossi, and I am the newly appointed UMBA liaison for the *Utah Bar Journal*. *The Utah Bar Journal* has invited UMBA to submit regular articles in an effort to discuss and foster diversity and inclusion in our legal community. If you are a current or prospective UMBA member and interested in submitting an article on behalf of UMBA, please send your submissions to utahminoritybar@gmail.com.

In July UMBA held its yearly board elections, so I would like to use this initial opportunity to thank all the past board members for their hard work and dedication to UMBA and enthusiastically welcome our incoming board members!

UMBA Executive Board (L–R):
Wayne Latu, Secretary
Jessica Ramirez, President
Aline Longstaff, President-Elect
Andy Gonzalez, Past President

President: Jessica Ramirez

Jessica Ramirez is an associate at Kirkland & Ellis, LLP. She practices general commercial litigation and has experience in employment defense litigation, contract disputes, and property disputes. She currently sits on the Board of Directors for the Salt Lake Legal Defender Association and has previously served on the Board of the English Skills Learning Center and the Salt Lake Chapter of the Association for Latino Professionals of America.

President-Elect: Aline Longstaff

Aline Longstaff is an associate in the commercial litigation group of Snell & Wilmer. She advises clients in a variety of fields, including healthcare, insurance, and higher education, to help them better understand how best to pursue their interests before and during litigation. Aline's practice focuses on both the district and appellate levels in the areas of contract, complex commercial litigation, corporate governance, and real property disputes.

Prior to joining Snell & Wilmer, Aline served as a Judicial Law Clerk for then-Judge Diana Hagen in the Utah Court of Appeals and for Judge Bruce S. Jenkins in the U.S. District Court, District of Utah.

OLIVIA ROSSI is an attorney with the Office of Guardian ad Litem. She also serves as the new UMBA liaison to the Utah Bar Journal.

Past President: Andy Gonzalez

Andy Gonzalez is a Deputy District Attorney with the Salt Lake County District Attorney's Office. His practice focuses primarily on the prosecution of homicide, special victim, and major crash cases. Andy graduated from BYU Law in 2016 and has been a practicing attorney for nearly eight years. Originally from Los Angeles, Andy is an avid Lakers fan and enjoys a variety of hobbies, including golf, weightlifting, and basketball.

Treasurer: Iqan Fadaei

Iqan Fadaei is an associate at Michael Best & Friedrich LLP, where he advises clients on securities and financial services regulation. Iqan helps clients navigate the laws governing capital raising, the investment adviser/broker-dealer industry, private funds, digital tokens, and anti-money laundering. Prior to joining Michael Best, Iqan worked on consumer financial protection issues at the Consumer Federation of America, and helped defendants in eviction and debt proceedings at Utah Legal Services. He also interned for Chief Judge Robert Shelby and the Honorable Laura Scott.

Secretary: Wayne Latu

Wayne Latu is a litigation associate in the Salt Lake City office of Quinn Emanuel. He joined the firm in 2022. Focusing mainly on white collar defense, investigations, and general business-oriented trial. Wayne studied corporate law at Brigham Young University Law School, where he also received all-conference honors as a captain of the football team, served as vice president for student athletics, and graduated with a degree in piano performance and physical science. Wayne previously externed with the Honorable John Pearce in the Utah Supreme Court and currently serves as an advisor for BYU's football team.

Founded in 1991, the Utah Minority Bar Association (UMBA) is an organization of Utah lawyers committed to promoting diversity and addressing issues that impact racial and ethnic minorities, especially within the legal community. UMBA membership is open to all members in good standing of the Utah State Bar who believe in the mission and purpose of our association. Our new board is committed to continuing and growing UMBA's legacy in Utah.

SAVE THE DATE!
UMBA's Annual Student Scholarship & Awards Banquet

Thursday, November 14, 2024 | 5:30 pm
Little America Hotel, Salt Lake City

Each year UMBA has the privilege of honoring attorneys, judges, firms, and community leaders for their contributions to the legal community and awarding scholarships to law students at the S.J. Quinney College of Law and J. Reuben Clark Law School. The scholarships range from $1,000 up to $8,650. Last year, with the generous support of UMBA members, the legal community, and S.J. Quinney College of Law and the J Reuben Clark Law School, UMBA was able to award over $38,000 in scholarships to students. These scholarships were awarded based on the students academic achievements, record of service to racial and ethnic communities, and potential to positively impact and represent Utah's racial and ethnic communities in their future legal career. This year's banquet is tentatively scheduled for November 14th and I encourage all bar members to buy tickets early.

UMBA's banquet and student scholarships would not be possible without the generous support of our sponsors. Please visit our website at http://utahminoritybar.org/ or reach out to utahminoritybar@gmail.com for more information regarding student sponsorship opportunities and banquet details.

M B A UTAH MINORITY BAR ASSOCIATION
PROMOTING DIVERSITY IN THE LAW

Message from the Chair

by Jennifer Carver

Hello! I am Jennifer Carver; it is a great honor and privilege to serve as your Paralegal Division Chair for the 2024–2025 year. I'm excited to build on the fantastic work the Board of Directors and Paralegal Division of the Utah State Bar accomplished last year. We have a wonderful group of dedicated paralegals/licensed paralegal practioners (LPPs) on the board working hard to ensure our division thrives. Our board members volunteer their time and energy, balancing their professional responsibilities with their personal lives in order to keep our division running smoothly. I am incredibly grateful for their commitment and passion.

Our Board of Directors this year includes:

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Communications/Social Media Committee Chair

Greg Wayment
Marketing/Publications Committee Chair

Suzanne Potts
Ethics/Professional Standards Committee Chair

Liberty Stevenson
Immediate Past-Chair

I am particularly passionate about continuing our goals to focus on community service and education. I encourage all members to participate in our community service projects and CLE opportunities when time allows. Look for emails from the Utah State Bar to join. I believe participating in community service and continuing education can make a significant difference in the community we live in. If you are interested in becoming more involved with the Paralegal Division, we would love to have you join our Education and Community Service Committees.

To stay connected, please follow us:

Facebook
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Our website
https://paralegals.utahbar.org

If you have suggestions or ideas that could benefit the Paralegal Division of the Utah State Bar, feel free to reach out to us at utahparalegaldivision@gmail.com. We are looking forward to a fantastic year together!

JENNIFER CARVER works as a paralegal at the Disability Law Center, where she is dedicated to advocating for the rights of others.

Classified Ads

RATES & DEADLINES

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

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

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

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

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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.

Attorneys Needed – Anderson Business Advisors is seeking qualified Attorneys in Draper, UT office. We require 1+ years of estate planning experience and a law degree as well as bar registration in good standing. Excellent compensation and benefits. Please contact Will Clark at wclark@andersonadvisors.com or (702) 803-1071 for information.

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