

Utah Bar. JOURNAL

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Metate Arch in the Devil's Garden by Utah State Bar member George Sutton.

GEORGE SUTTON is recently retired after a forty-five year career that included being Utah Commissioner of Financial Institutions and a shareholder at Jones Waldo. Asked about his cover photo, Mr. Sutton said that "Metate Arch can be found in the Devil's Garden, west of the Hole In The Rock road near Escalante. A truck or Jeep is recommended due to heavy washboarding on an otherwise easily passable road."



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GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

CITATION FORMAT: All citations must follow *The Bluebook* format, and must be included in the body of the article.

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

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

NEUTRAL LANGUAGE: Modern legal writing has embraced neutral language for many years. *Utah Bar Journal* authors should consider

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

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

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LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or

- obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
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7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
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President's Message

Hello!

by Kristin K. Woods

I am honored to have received your support and to serve as your President for the 2022–2023 year. I have been a member of the Utah State Bar Commission for seven years, and these past two years have been by far the most unorthodox ones I've observed. But we made it together!

If you're reading this message, you have endured two years of trials. And not just the legal ones. You've endured COVID-19 related shutdowns, inconveniences, reschedulings, and cancellations. You've made it through the virtues and vices of technology, and the experimental procedures that judges and courts have thrown at you while zealously representing your clients. Have you had an evidentiary hearing over Zoom? I have. It's different. It's HARDER in so many ways, and it's EASIER in so many ways.

Not only have YOU had a lot to deal with, but you have had to remain calm. Like a guide in the Sahara Desert, you have had to lead your clients through this new legal way-of-life while remaining cool, collected, reliable, and providing your stressed-out clients with some semblance of hope as they go through turmoil. That is HARD TO DO. And you've done it. I applaud you!

As we start to come out of these unorthodox times, I am excited to lead our Bar forward. A little about me: I'm a country girl who grew up with a horse in her backyard in St. George. I spent my weekends playing in the dirt and hiking with the rattlesnakes, which prepared me for my future in the law (just kidding ... kind of). I graduated with a degree from Brigham Young University in psychology and received my law degree from the University of Missouri in Kansas City. I married my beautiful wife in June, and we are the proudest dog-moms you'll ever meet. I am a sole family law practitioner in St. George, and I am a proud Utah Jazz, Las Vegas Raiders, and San Francisco Giants fan. I hope to be able to meet many of you at Bar events this year.

Now that you know a little about me, I hope you've discerned that there's nothing fancy about me. I work hard, and I expect my bar associations to work hard for me. To that end, I am proposing several initiatives this year to better educate members of our Bar about Bar services. I encourage members to reach out to me (or their division's commissioner) to complain, compliment, or otherwise encourage action on certain things.

My philosophy is that the Bar should first and foremost serve and protect lawyers. Hey, we're the ones paying bar dues, right? And though the other missions of the Bar are incredibly important (i.e., access to justice, pro bono work, etc.), I wish to be a Bar President who advocates for lawyers. As we tackle important and novel issues such as the regulatory sandbox, allocating budget funds, and providing access to quality CLE and other membership benefits, please be assured that I will act with you in mind.

As a rural, sole practitioner in the State of Utah, I bring a unique perspective to my office. I hope that this perspective will translate into representing you and your professional endeavors in making a living and assisting the citizens of this great state. Please do not hesitate to reach out to me at kwoods.barpresident@utahbar.org, and let me know how I can best represent you.

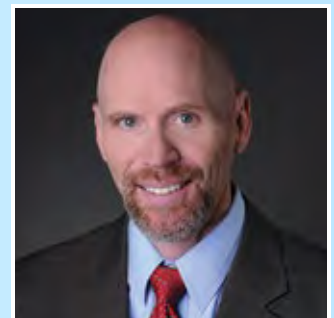
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President's Message

Goodbye

by Heather L. Thuet
Key Legal Group, LLC

This past year I have had the honor to serve as your President. My efforts have been focused internally on fiscal responsibility within the Bar and externally on developing collegiality among the Bar. As my year of leadership draws to a close, I reflect on the past year's experiences.

I am thrilled to report that the Bar's financials are in a good place going forward. We weathered the storm of the pandemic, and we end the year with a surplus. If you are interested, the Bar's financials are published each month in the commission meeting materials at <https://www.utahbar.org/bar-operations/meetings-utah-state-bar-commission/>.

My other goal as President of the Bar was to bring people together, to extend the hand of fellowship to my fellow attorneys and Bar members. After the long COVID hiatus, it was so nice to return to in-person events. Beginning with the July 2021 Summer Convention in Sun Valley, we have had record attendance at events. It was a joy to bring back BarReview, a once-a month evening to gather and reconnect with one another. Our kick-off event at the Alta Club in the fall was well-received. From there, the BarReview momentum grew with greater attendance as well as a large outpouring of donations at the BarReview event in November 2021. We ended up donating an enormous Santa Sack full of gloves, socks, hats, and shoes. The generosity of our Bar was overwhelming and brought warmth and joy to many little hands and feet. It renewed my belief that our Bar is made up of great people. Our April BarReview event was combined with a clothing drive for the VOA Homeless Youth

Ball. Once again, we received many donations from the great people who make up our Bar.

While talking with attendees at the BarReview in March about their passions outside the office, I came up with the wild idea of hosting a talent show. The concept was to provide a forum at BarReview for attorneys and judges to share their talents and have some fun. Events were held in April and May with finalists presenting at the final Talent Show on June 30, 2022. I want to personally thank each of the participants for sharing their passion and talents. I also want to thank attendees and audience members who showed up and cheered on their colleagues.

These experiences have highlighted that our Bar is a diverse group of generous people. People, who are more than just lawyers, judges, and colleagues. They are people who have family and friends, with responsibilities and interests, outside of work. People with lives. Some struggling with the loss of a parent, a diagnosis of cancer, a spouse struggling with drug addiction, ailing parents, or a child with depression. People who enjoy socially connecting outside the office and courtroom. Prosecutors sitting next to defense attorneys enjoying a personal interaction.

It has solidified my belief that while there are a few in our Bar who deserve every lawyer joke that's ever been uttered; the rest of us are hard-working people with good intentions. And the popularity of these events has demonstrated that our Bar is both interested and capable of building a stronger profession, and that benefits both attorneys and the public.

Thank you for the opportunity to serve as your President. After seventeen years of volunteering with the Utah Bar, I have learned a lot.



KC Usbijima performed at the BarReview Talent Show.



Tracy Cowdell's Band De Novo performed at the BarReview Talent Show.



Candice Ragsdale performed at the BarReview Talent Show.



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Navigating the Half-Empty/Half-Full Dichotomy of Virtual Court Hearings

by The Honorable Angela Fannesbeck

I was asked to write this piece after having served nearly five years on the Juvenile Court bench and well into my third year on the District Court bench. It was also right in the middle of the Omicron variant spike, and the two-year anniversary of the Administrative Order for Court Operations During a Pandemic was looming large. And with much respect to Dickens, it was not the best of times. Although, in fairness, it probably was not the worst of times either.

It was an age of expanding access to justice, it was an age of declining civility and decorum,

It was the epoch of belief, it was the epoch of incredulity,

It was the season of anxiety inducing calendars, it was the season of . . .

Well, you get the point.

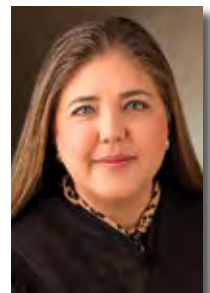
What I want to share with you in this essay is a reflection of some of the benefits and pitfalls of Webex or other virtual hearing platforms, and how they coincide with professional ethics and a lawyer's responsibilities to the court and clients. Let me start by saying I am neither for nor against virtual hearings in the court. They simply are better in some situations than others. I also full well recognize that every user, whether judge, attorney, judicial assistant, plaintiff, defendant, victim, support person, or other, has an opinion on the efficacy and appropriateness of Webex. And I get that this may feel like an old hat, overdone, conversation as COVID-related restrictions are easing and ending. However, I expect some growing pains in the courts as we all struggle with the whens and whys of virtual courtroom proceedings moving forward.

The words "Equal Justice Under Law" are emblazoned on the façade of the United States Supreme Court. The term access to justice can mean a lot of things to a lot of people. But, generally

speaking, access to justice means that any person has the ability to use the legal system to advocate for their rights and interests. There is no doubt that virtual hearings have allowed (forced) the justice system, including here in Utah, to expand its views of access to justice. As a system, we are finally becoming responsive to the needs of courtroom participants. Parties can now successfully and effectively appear for status hearings, reviews, scheduling hearings, and pre-trials while on a break at work. Court patrons no longer must ask for half or full day leave from work, use personal time, or expend hard-earned accrued vacation time to ensure their appearance before a judge. It allows parties to keep their jobs, many of whom we order to have gainful employment and then sanction when they do not. It helps to address the significant transportation issues that many courtroom participants experience when they do not have access to a vehicle or public transportation, or do not possess a valid driver's license. This may be particularly true in rural jurisdictions where there is no public transportation available, and the judicial district covers a large geographical area. These time saving benefits are invaluable to a court patron.

Further, the cost of fuel itself can be prohibitive to a party. A sixty-mile round trip to the courthouse may be the difference between a meal for a family and attendance at in-person proceedings. These are small potatoes when we talk about the cost of an attorney. If an attorney can attend multiple hearings, over multiple locations within a few hours, without a lengthy

THE HONORABLE ANGELA F. FANNESBECK is the presiding judge of Utah's First District Court. Prior to her appointment to the district court bench in August 2019, Judge Fannesbeck served for five years on the First District Juvenile Court.



drive, clients reap the benefit of not being charged for travel time and related expenses. Clients will receive the benefit of more actual legal work being performed on their dollar rather than frittered away on extraneous costs. Such cost savings are a benefit to court participants.

Webex hearings benefit lawyers, as well as their clients. By allowing attorneys and their staff to appear remotely for oral arguments, scheduling matters, status hearings and reviews, attorneys are now able to be multiple places at the same time. More time in the office likely means more work getting completed and more billable hours. This increased productivity should be a boon to the entire system.

In addition to the above, the list of other or intangible benefits is extensive: Out of town witnesses and victims are saved the expenses associated with travel; victims can testify from a safe location; the public-at-large has nearly unfettered access to a courtroom without leaving their living room; safety concerns to court staff are reduced; conflict during hotly contested matters, especially in domestic cases, is reduced; there is less delay in most proceedings; and court patrons are generally more satisfied with their experience, etc. There are numerous articles and scholarly writings on these subjects, with more to come, if you wish to delve deeper into these topics. Needless to say, there are many tangible and intangible benefits to the court system in allowing both attorneys and patrons to appear via virtual platforms.

While there are certainly many advantages to a virtual system, Webex hearings also have their drawbacks. Chief among the complaints is that virtual hearings do not comply with the confrontation clause of the Sixth Amendment wherein the accused has a right “to be confronted with the witnesses against him.” In this same vein it calls into question the ability to reliably identify the defendant. An identification is difficult via video screen when the image is generally the size of a two-inch square box. This situation is even more difficult if the defendant cannot appear via video and has access to audio only. I am not convinced that a voice identification is sufficient.

Similarly, the presentation of evidence is already a complicated process. Again, the ability to screen share evidence, while available, is often ineffective. The size of the screen that the parties, witnesses, attorneys, and even the judge are viewing impacts the ability to truly read and see what is being presented. If the evidence is a tangible object, and not a written document, a virtual evidence process has little value.

We must also consider that the impact of witness testimony may be less credible and therefore given less weight when elicited virtually. While this is likely unintentional, the ability to perceive body language, eye contact, and other mannerisms that impact the credibility of a witness, either positively or negatively, are likely missed to some degree in a virtual proceeding.

And then there are all the technology problems that are part and parcel of virtual hearings. The ability to hear the testimony and/or hear the questions asked by the attorney may be impacted without a judge ever knowing that a problem exists. The stability of a person's internet connection may also impact the ability of the person to see and hear. Further, the ability to work through technology issues while on the record is difficult at best. Most of us simply do not have the skills to work through tech problems in the time allotted for a hearing. About a year ago I was forwarded a meme that I have shared several times since. A séance is underway: “Can you hear us?,” “Are you there?,” “We can't see or hear you.” The caption reads: “Virtual meetings are basically modern day seances.” This does not reflect court reality, but it is funny because it perfectly captures what happens during every Webex hearing.

So too there are negative intangible consequences to virtual proceedings. Virtual proceedings are considerably more informal than in-person hearings. The form and function of appearance and dress have become noticeably more casual. While there is some wisdom in casual attire, it seems to have degraded to a point where we regularly see pajamas, torn or ripped clothing, revealing or sexually provocative attire, clothing with vulgar sayings or pictures, or sometimes no clothing at all.

It is also not unusual for appearances to be made from bed, the driver's seat of a vehicle, a bus, or other form of public transportation. Folks appear from bathrooms and park benches. In one unfortunate instance I had a defendant appearing from a park bench get confronted by a police officer while on Webex with me. Some who appear have forgotten decorum and common decency. We have smokers, vapors, drinkers, big-gulpers, eaters, swearers, yellers, and those with big or inappropriate hand gestures. And I am not just talking about the parties.

So, what does all of this mean? As the courts transition to more in-person proceedings, it is likely that judges will continue to exercise discretion about which types of cases are best heard

via Webex and which are best face-to-face. I also imagine this will vary from district to district, courthouse to courthouse, and even judge to judge. What will be important is that attorneys remember their professional and ethical responsibilities to both the courts and their clients. I regularly tell my teenager to “remember who you are and what you stand for” when he heads out the door to a ballgame or party. We all need to remember to do the same.

Specifically, the Utah Code of Judicial Administration and the Supreme Court Rules of Professional Practice provide us with guidance that applies to both in-person and virtual proceedings. The Preamble of Rule 14-301 of the Utah Code of Judicial Administration, also known as the Standards of Professionalism and Civility, states, “A lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.” The preamble continues,

In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal

problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

The preamble also makes clear a lawyer’s responsibility to educate clients as to these rules by stating, “We further expect lawyers to educate their clients regarding these standards”

Rule 14-301 makes clear that it is our responsibility as judges and lawyers to ensure that all hearings, regardless of whether in-person or virtual, satisfy and meet the needs of the client as well as the administration of justice. That means a Webex hearing must be as effective and as efficient as an in-person proceeding in moving a case forward. Webex hearings should not be used to further delay proceedings. Webex hearings should also not be used to unnecessarily delay or defer communication with opposing counsel. Simply put, a Webex hearing does not negate the obligation to diligently move a case forward. If it appears that improper delays are hampering the case, the court may very well schedule an in-person proceeding despite objections from the parties or their attorneys. Attorneys should also be cognizant that they may be inadvertently causing delay if they are



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scheduled to be in multiple proceedings at the same time. If your name is called, be ready to go. If you are online in multiple proceedings and you are not available or fail to answer when called upon by the court, you may go to the end of the calendar causing even further delay. In the same vein, clients should be advised of their responsibility to assist in moving a case forward and of the requirement to timely appear for all proceedings.

This Rule 14-301 also reminds us that appropriate decorum, dress, and behavior are expected of counsel and their clients, regardless of whether a hearing is conducted in the courtroom or via a virtual platform. The comments to subpart (1) state, “Lawyers should maintain the dignity and decorum of judicial and administrative proceedings.” Likewise, Rule 3.5 of the Rules of Professional Conduct prohibits a lawyer from engaging “in conduct intended to disrupt a tribunal.” This provision is further clarified by the comments wherein it directs that a

lawyer has an affirmative duty to refrain from “disruptive conduct.” How you present yourself to the court matters. If you are online, it should be easy for a court to determine who is an attorney and who is not. Dress appropriately. Refrain from eating, smoking, or moving around. Take small sips when necessary but otherwise avoid drinking. And please, identify yourself appropriately with your on screen “nameplate.” “Attorney R. Smith” is easy to identify and call upon, but R.S, R. Smith, or Rob does not distinguish you as a member of the bar. It would also be prudent to advise your clients to appropriately identify themselves, when they are able. Unsurprisingly, the court has had the “pleasure” of sending Webex invites to a variety of folks with “cute” email addresses who then use those same drug reference laced monikers as their on screen identifier. If you would not do it in a courtroom, do not do it in an online proceeding.

Rule 8.4 of the Utah Rules of Professional Conduct focuses on misconduct by an attorney. I would rather refer to it as a catch all provision. Subpart (a) confirms that it is professional misconduct to “violate or attempt to violate the Rules of Professional Conduct” while subpart (d) indicates that it is professional misconduct for an attorney to “engage in conduct that is prejudicial to the administration of justice.” In a nutshell,

[A]ppropriate decorum, dress, and behavior are expected of counsel and their clients, regardless of whether a hearing is conducted in the courtroom or via a virtual platform.

attorneys (and judges) have the obligation to ensure that despite the changes forced upon the court system by a global pandemic, we uphold the values of our justice system.

So, whether the hearing is virtual or in-person, you should:

- (1) Be prepared and be present;
- (2) Be professional in all aspects of your presentation (dress, words, surroundings); and
- (3) Be proactive in preparing and advising your clients.

In conclusion, virtual hearings have both virtue and vice that can be successfully navigated by the court, the attorneys, and the participants. But all must play an active role in determining the proper time, place, and nature of such hearings. We must

ensure that virtual proceedings have the same integrity and efficacy of in-person proceedings. We must hold ourselves to the same standards that would be expected in a courtroom.

About a year ago, during the height of the pandemic, I participated in training hosted by the National Council of Juvenile and Family Court Judges, where the following was shared by an unknown trial

judge in the southern United States.:

On a poignant note, it seems obvious to say we are facing a dark and storm-tossed ocean of unknown challenges. Like each of you, I have an emotional, if not spiritual, attachment to the constitutions and laws we are sworn to uphold. We are the judiciary. We are always necessary, and it is in times of crisis when our constitutions and laws are most tested, and therefore when we are most needed. This is our time.

I urge you to remember the important role that the judicial process plays in our society. And while things may not seem as dire today, I urge you to remember that real lives and real people are impacted by the decisions we make every day in our jobs. Let it be said that we have risen to the challenges before us and that the system is better for it.



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Reflections on Independent Clearing House

Part One: The Ponzi Scheme

by Ronald W. Goss

Independent Clearing House and its evil twin, Universal Clearing House, was the largest Utah Ponzi scheme of the 1980s, a fraud of unparalleled magnitude. In 1980 and 1981, approximately 3,000 individuals and entities invested more than \$29 million in a bogus accounts payable factoring program promising high returns and touted as a safe investment. When the scheme collapsed and the companies filed for bankruptcy in September 1981, the trustee discovered that the factoring program did not exist and all payments to investors had been made with funds deposited by later investors, a textbook Ponzi scheme.

The litigation that sprang from the Clearing House bankruptcies was a major milestone in the judicial evolution of Ponzi scheme “clawbacks,” the avoidance and recovery of certain pre-bankruptcy transfers. Much has been written about Ponzi clawbacks in recent years, but the historic significance of the Clearing House case is usually overlooked. Clearing House was the model for clawbacks in virtually every Ponzi case that followed, including the better-known cases, Bennett Funding, Towers Financial, M & L Business Machine, the Foundation for New Era Philanthropy, Reed Slatkin, Bayou Group, Petters Company, and of course, Bernie Madoff.

The author was one of the attorneys for the Clearing House trustee and had a hand in the bankruptcy cases and clawback litigation. This article will recount the story of the Clearing House fraud and place the clawback litigation in its proper perspective. Part One describes the Ponzi scheme and the bankruptcy and criminal proceedings that followed its collapse. Part Two examines the groundbreaking clawback decisions of the Utah bankruptcy and district courts and their impact on later cases. This article is drawn from reported and unreported decisions, other court filings, and, somewhat less reliably, the author’s memory.

Anatomy of a Fraud

Clearing House was one of four large Utah Ponzi schemes in the early 1980s. The others were Grove Finance Company, AFCO Enterprises, and Vasilacopulos & Associates. Grove Finance and AFCO began as legitimate businesses before resorting to fraud, Grove by selling its own debentures and AFCO by engaging in Ponzi-type borrowing to meet its financing needs. Vasilacopulos was a diamond investment scam, and like Clearing House, a “classic” or “pure” Ponzi scheme, conceived and carried out as an outright fraud.

Ponzi schemes take many forms. They have been built around a wide variety of phony enterprises, as diverse as precious metals, tropical plants, solar energy modules, foreign currency, frequent flyer miles, payday loans, carpet cleaning, worm farming, hedge funds, leasing thoroughbred racehorses for breeding, office equipment leases, litigation settlements, working capital for Malaysian glove manufacturers, and converting Irish castles to luxury hotels. Some Ponzi schemes involve a combination of legitimate and fraudulent activities. Usually, the legitimate activities are merely a façade to conceal the fraud. A classic Ponzi scheme, like the Clearing House, is a total fraud from day one.

The fraud at the heart of the Clearing House scheme was a purported accounts payable factoring enterprise. The program was touted as a low-risk, high-reward opportunity for the “little guy,” not a speculative venture. Investors, referred to as

RONALD W. GOSS is a retired lawyer residing in Washington. Prior to his retirement in December 2020, he was employed by KeyBank as Senior Counsel.

“undertakers” (for their contractual undertakings), were told that the Clearing House assumed the accounts payable of client companies then negotiated discounts with the creditors of these companies in return for early payment. The difference between the discounted amount negotiated by the Clearing House and the full amount eventually repaid by the client company was the source of the company’s profits. Investors’ money would provide working capital to fund payments to the client companies’ creditors. These representations turned out to be a complete fraud. No factoring program or client companies ever existed, and all payments were made from principal deposits of other undertakers.

People who give money to Ponzi operators are usually referred to as investors. This label is often misleading. Very few Ponzi schemes actually involve capital injections in return for an equity interest. Sometimes, as in Hedged-Investments, J. David Dominelli, Reed Slatkin, and Bernie Madoff, investors give money to a Ponzi operator to invest in securities or trade in foreign currency on their behalf. In other schemes, such as Vasilacopulos & Associates and Rust Rare Coin, the Ponzi operator purports to purchase some commodity for the

investor, such as gold, silver, diamonds, rare coins, or precious metals, then hold it for safekeeping and eventual resale at a higher price. In these cases, the perpetrator usually maintains a small inventory for show but when the scheme collapses investors are never able to trace their purchases to any identifiable property. In many cases, including Charles Ponzi’s scheme, AFCO, Raejean Bonham, and the Clearing House, the victims were private lenders that provided capital to the Ponzi operator for a fixed period at a specified rate of return under a promissory note or other debt instrument. For convenience, all will be referred to as investors.

The Clearing House investors committed a sum of money for a nine-month term. They signed two documents: an individually numbered “Contract” providing for deposit of a specified sum of cash, and a “Commitment to Assume Debt” setting out the details of how the funds were to be used. The investors could elect to receive “earnings” in fixed monthly payments or in a lump sum at the end of the nine-month period. They were also allowed to withdraw their investment early on thirty days’ notice in which case they would receive 75% of the contracted-for return. Those who chose to wait until maturity to withdraw their

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earnings would receive a return of \$84 per month per \$1,000 invested. Most, however, elected to receive monthly payments. All told, more than 5,000 undertaker contracts were issued over the life of the Ponzi scheme.

Unlike theft-like fraud where the perpetrator intends to keep all the money, a Ponzi operator must return some money to investors to maintain the illusion that the business is legitimate. The payments create the appearance of success and bait the hook for new investors. Typically, Ponzi operators never miss a payment until the moment the scheme collapses, and investors do not discover the fraud until there is a bankruptcy filing or SEC receivership.

The eminence grise behind the Clearing House scheme was Richard T. Cardall, a disbarred lawyer and convicted felon. In 1975, Cardall was convicted of securities fraud and sentenced to forty-five years in prison by Utah's legendary U.S. District Judge, Willis Ritter. His sentence was later reduced to eighteen years, but Cardall only served three. In 1978, a month after Judge Ritter died, Cardall's sentence was commuted and he was released from prison. *See Cardall v. United States*, 599 F. Supp. 912, 914 n.1 (D. Utah 1984). Cardall's ability to scheme was not exhausted, and shortly after his release he embarked upon his next, and last, fraud: Independent Clearing House.

The Clearing House scheme began in Arizona sometime in 1979 under the name General Arizona Clearing House. It expanded to California under the name General Clearing House and National Clearing House. Securities regulators in those states enjoined the investment program, and in 1980 Cardall relocated the operation to Salt Lake City where the names of the principal entities were changed to Independent Clearing House and Universal Clearing House. The Clearing House maintained an office on Atherton Drive in Salt Lake City staffed by clerical employees who were unaware that they were aiding a fraud. Cardall went to some length to conceal his control of the Clearing House operation. He maintained a low profile and was identified, if at all, only as a consultant. The reality was that Cardall exercised total control over the scheme.

Ponzi operators often create multiple interrelated entities to carry out their fraud. The "robotic tools" of Cardall's scheme included Business Consultants, Inc., Payable Accounting Company, Accounting Services Company, Tonder Payable Service Company, and Fiscal Services, Inc. The Clearing Houses were structured to conceal the identities of their owners and those in control. Each was organized as a Massachusetts business trust

purportedly domiciled in the Grand Cayman Islands. The named trustees were two Belize trusts and a married couple residing in George Town. The Belize trusts were fictitious entities. The husband was a taxi driver and his wife a desk clerk at the Holiday Inn. They had been paid a small sum for use of their names on various documents but knew nothing about the Clearing House operation.

Ponzi schemes are dependent upon a continuous, heavy influx of new capital. From the earliest schemes to modern versions, Ponzi operators have used sales agents as money finders. The agents are paid commissions, finder's fees, or referral fees for attracting new investors. The Clearing House solicited investors through a network of about 125 commissioned agents organized hierarchically as sales agents, district managers, and area managers. The agents procured new investors and serviced their contracts, including delivering monthly earnings checks. The agents were required to be investors themselves and did not know that the investment they were peddling was a scam. They parroted what their managers told them, assuring investors that the business was legitimate and their investments safe. If a prospective undertaker asked for the names of the client companies, agents were instructed to say that the companies desired anonymity. The agents were also given specific rules (which should have aroused suspicion or at least curiosity), including, "Do not use the words investor, interest, or guaranty," and, "If a client wants to show an attorney or anyone the contract, the agent must take it."

Ponzi investors generally are not unsuspecting little old ladies living on pensions, nor are they invariably greedy, stupid, or unsophisticated. Fraud victimization does not vary significantly across demographic variables of education, race, gender, income, region, urban or rural location. Ponzi investors tend to be slightly older with some college education but little investing experience. However, even highly intelligent, well-educated people have been defrauded by Ponzi schemes. Former U.S. Treasury Secretary, William E. Simon, invested in at least two schemes: Hedged-Investments and the Foundation for New Era Philanthropy; Mary Estill Buchanan, Colorado's first female Secretary of State, also invested in Hedged-Investments; the trustees of Princeton, Harvard, and the University of Pennsylvania invested their universities' funds in the Foundation for New Era Philanthropy; the mayor of San Diego, two state court judges, several lawyers, and more than a dozen pension funds invested in J. David Dominelli's foreign currency fraud; actors John Malkovich and Kevin Bacon, broadcaster Larry King, and

Holocaust survivor and Nobel Peace Prize winner Elie Wiesel were among Bernie Madoff's many victims.

News of Ponzi investment opportunities often travels by word of mouth from friends, relatives, business associates, and not infrequently fellow church members. Affinity fraud is common with Ponzi schemes. Charles Ponzi preyed on fellow Italian immigrants; Foundation for New Era Philanthropy targeted nonprofit organizations; Michael Calozza conned Sons of Norway members; Reed Slatkin bamboozled other Scientologists; Bernie Madoff courted wealthy Jewish people; William "Doc" Gallagher pursued elderly investors; and the Clearing House, like other Utah scams, exploited members of the LDS Church.

A Ponzi scheme is inherently insolvent from its inception because it has no income-generating business and can only pay investors and meet its other obligations by attracting cash infusions from new investors. Its insolvency is ever deepening, and like a chain letter the scheme cannot go on indefinitely. The longer a rob-Peter-to-pay-Paul program continues, the more its liabilities pyramid, and eventually the investor pool will dry up and the scheme will collapse. The iron laws of mathematics inevitably doom all Ponzi schemes.

Six factors determine the lifespan of a Ponzi scheme: (1) the number of investors; (2) the rate of return; (3) the payout structure; (4) the extent to which investments are rolled over instead of being paid out at maturity; (5) the amount of money diverted to purposes unrelated to the investment program; and (6) intervention

by law enforcement. Charles Ponzi's scheme collapsed in a little less than one year after a newspaper article exposed his fraud. The Clearing House offered a high rate of return and diverted large sums of money (perhaps as much as \$12 million) to various side ventures but managed to stay afloat for about a year because sales agents continued to grow the investor pool, few undertakers withdrew their funds early or had to be paid in full at maturity, and the required cash outflows were mostly limited to monthly earnings payments and office overhead.

Bernie Madoff's mega-fraud is a rare example of a long-lived Ponzi scheme. From the early 1980s until his arrest in late 2008, Madoff operated the largest, longest-running Ponzi scheme in history. He pretended to manage stock investments for wealthy clients. He fabricated account statements showing securities held or traded and each client's gains and losses. The statements were phony, the reported gains fictitious, and his customers did not actually own the listed securities. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 129 (Bankr. S.D.N.Y. 2010). The extraordinary longevity of Madoff's scheme was mainly due to his ability to manage cash outflows and the failure of law enforcement to detect his fraud. In all, he took in about \$36 billion but only paid out about half that much.

For a while, investors deposited significantly more money with the Clearing House than it needed to service the undertaker contracts. This allowed Cardall to plunder the cash deposits and divert millions to various speculative, high-risk ventures, including

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oil and gas leases, mining interests, a condominium development in Mexico, and an offshore reinsurance scheme, none of which produced any revenue. He also siphoned off investor money to buy a house for his father, a condominium for his daughter, and automobiles for his son and several cronies.

By the summer of 1981, more money was going out than coming into the Clearing House from new investors, and the Ponzi scheme was tottering on the brink of collapse. As the end drew near, Cardall called a meeting of the office staff and warned them that there might be an investigation, and to tell investigators, “You don’t know anything.”

The last monthly payments to investors were delivered in July 1981. When the Clearing House missed the August payments, sales agents, following their managers’ instructions, told undertakers that the lack of immediate funds was due to a combination of regulatory harassment, a couple of unsuccessful short-term investments, and the failure to receive a wire transfer from abroad. In early September, the Clearing House sent a lulling letter to undertakers assuring them that their investments were safe, and that the companies had ample assets to pay all principal and earnings. The letter stated there was a buyer for a

land development project in Mexico owned by the Clearing House and the proceeds would take care of all its debts. The letter was completely false.

The Clearing House scheme would have failed much sooner but for a judicial error. In July 1980, near the outset of the scheme, the Utah Securities Commission issued a stop order enjoining one of the Clearing House entities, Payable Accounting Corporation, from entering into new undertaker contracts. The company retained an expert in securities law, Wallace Bennett, and brought an action in state court to vacate the stop order. The Third Judicial District Court ruled that the undertaker contracts were not securities under Utah law and rescinded the injunction. The Securities Commission appealed but failed to obtain a stay pending appeal. While the appeal was pending the Clearing House bilked two thousand or more investors out of millions of dollars. The Utah Supreme Court eventually reversed the district court and held that the investment contracts were securities. *Payable Accounting Corp. v. McKinley*, 667 P.2d 15, 16, 21 (Utah 1983). But the decision came too late to help investors; the Ponzi scheme had already collapsed.

Rational choice theory assumes that criminals are reasoning actors who weigh costs and benefits before committing a crime. Since all Ponzi schemes must eventually collapse, the only rational goal is to keep the scheme going long enough to attract a final gigantic wave of new investor money then abscond with the funds and disappear. This does not appear ever to have been Cardall’s goal. Like many, if not most, Ponzi perpetrators, he stuck around to the bitter end, which came on September 16, 1981, when Independent Clearing House and Universal Clearing House filed Chapter 11 petitions in the Utah bankruptcy court.

On the evening of the bankruptcy filings, FBI agents armed with search warrants descended on the Clearing Houses’ office at 1020 Atherton Drive, Salt Lake City. As the agents approached the office, they observed Cardall and his secretary loading boxes into his car and driving away. The agents stopped the car and retrieved the boxes, which contained computer hardware, records, and documents related to the Clearing House operation.

The Bankruptcy Cases

Chapter 11 is designed primarily as a mechanism for distressed but nonetheless viable businesses to restructure their debts under a court-approved plan of reorganization and then return to the mainstream of commerce. Since the Clearing House was a criminal scheme from its inception, there was never the remotest possibility it would ever resume operations. The

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bankruptcy filings appear to have been a misguided tactic to delay discovery of the fraud and deflect responsibility from the perpetrators to the bankruptcy trustee.

On September 25, 1981, Bankruptcy Judge Ralph Mabey appointed Dr. Ron Bagley as trustee. Dr. Bagley was a certified public accountant and a professor in the business department at the University of Utah. He immediately retained William Fowler, the dean of the Utah bankruptcy bar, and his law firm, Roe & Fowler, as attorney for the trustee. For the next year, the trustee and Fowler relied heavily on a young associate, R. Kimball Mosier (now Bankruptcy Judge Mosier), to handle the legal work as the Clearing House cases progressed.

At the same time that he appointed the trustee, Judge Mabey ordered the Clearing House bank accounts frozen. Before the bank received notice of the order, the Clearing House's attorney, Gerald Turner, withdrew and disbursed all the money from the accounts. Turner was eventually held in civil contempt and ordered to return the funds, but never did. His role in the Clearing House fraud eventually led to a money judgment, a felony conviction, and disbarment.

Trustees typically find a Ponzi debtor's records in disarray, incomplete, or missing. In *M&L Business Machine*, a well-known Colorado Ponzi scheme, the debtor's records were so disorganized and its affairs so convoluted that the trustee believed the debtor had a computer inventory worth \$2.5 million, and she attempted to operate the business for several months before realizing that it was a fraud. When the trustee inspected the purported inventory, she found 700 boxes containing bricks, dirt, and hardened foam, but no computers. *Jobin v. Ripley (In re M & L Bus. Mach. Co.)*, 198 B.R. 800, 803 (D. Colo. 1996).

Following his appointment, Dr. Bagley's biggest challenge was to gather basic information about the Clearing House operation and determine the nature, location, and value of all its assets. The schedules of assets and liabilities filed in the bankruptcy case were virtually useless to the trustee. They were prepared from information provided by Cardall and listed nonexistent or preposterously overvalued assets. Cardall and the other principals invoked their Fifth Amendment privilege against self-incrimination and refused to assist the trustee in any way. Most of the useful records had been seized by the FBI for use in its criminal investigation when agents executed the search warrant of the Clearing House office. The trustee tried to obtain these documents, but they were considered grand jury materials and the U.S.

Attorney would not turn them over. District Judge David Winder denied the trustee's motion to compel the government to produce the seized records. As a result, the trustee had no choice but to conduct a forensic investigation over many months, at considerable expense, to reconstruct the companies' financial activities from the few available records, subpoenaed bank documents, investors' proofs of claim, and witness depositions.

When a Ponzi scheme collapses and files for bankruptcy the operation typically has little cash and few tangible assets. Once plentiful capital has been used up, mostly paid out to investors, used to support the perpetrator's lifestyle, and diverted to side ventures. Ponzi operators sometimes use investors' money to acquire homes, cars, boats, and other property that the trustee can recover. In the Clearing House case, the only tangible asset on hand at the time of the bankruptcy filings was \$70,000 in its bank account and these funds were almost immediately misappropriated by Turner, leaving the estate with no liquid assets whatsoever.

Ernest Hemingway once noted that a big lie is often more plausible than the truth. For more than a year, Cardall fed misinformation to a group of investors and convinced them that the trustee and his attorneys were to blame for their losses. He claimed that they

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were mismanaging the estate for personal benefit and ignoring assets that could make investors whole. His big lie fueled a leap into fantasy for some investors; they refused to believe they had been duped and remained loyal to Cardall throughout the case, even after he and the other perpetrators were indicted for their Clearing House crimes.

In August 1982, a few Cardall loyalists formed a subcommittee of the unsecured creditors' committee and solicited donations from other investors. The trustee, supported by the Securities and Exchange Commission, filed a motion to enjoin the solicitation. Judge Mabey ruled that the solicitation violated the Bankruptcy Code's provisions regarding the powers of a creditors' committee and the court's control over fees and expenses. He enjoined the solicitation, ordered an accounting of the funds received, and directed that all funds be returned.

Cardall convinced a majority of members of the unsecured creditors' committee that the Clearing House owned assets worth more than \$188 million. These were the same assets listed in the bankruptcy schedules, which the trustee had investigated and found to be nonexistent. Committee members, with Cardall's assistance, prepared a disclosure statement and plan of reorganization designed to restore former management to administer these assets. The committee's lawyer refused to sign the documents, and the committee filed them without his signature. On September 13, 1983, the bankruptcy court ordered the committee's plan and disclosure statement stricken pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure (the counterpart of Rule 11 of the Federal Rules of Civil Procedure). In a report to creditors, the trustee observed that the committee's plan "was unrealistic, pandered to the false hopes of creditors and could not have been confirmed by the court."

Cardall supporters continued to oppose the trustee. Shortly after the unsigned plan was filed, two investors filed a complaint in U.S. district court to remove the trustee, his accountant, and attorney and surcharge them \$15 million for breach of fiduciary duties and loss of assets. District Court Judge Winder dismissed the complaint and enjoined the Clearing House creditors from filing future suits.

The trustee sued Cardall, other insiders, and several individuals and entities that received monies diverted from the investment program. He obtained several judgments and negotiated a few settlements, but the defendants were mostly judgment-proof and recoveries were insufficient to make a distribution to creditors. The only asset that might produce a return for creditors was the

trustee's statutory power to clawback preferences and fraudulent transfers. As the two-year statute of limitations for filing clawback actions drew near, the trustee was forced to choose between closing the estates as no-asset cases, leaving investor losses to rest where they fell, or using the avoiding powers on an unprecedented scale to try to equalize investor losses to some extent.

All Ponzi investors are victims of the same fraud. But when a scheme collapses, some turn out to be winners while others are losers. About eighty Clearing House investors were "net winners." They invested early and received all their principal plus the promised return on their investment. Most investors, about 2,100, were "net losers." They received some payments (between 3% and 76% of their investment) but suffered an overall loss. Finally, there were 924 investors who gave the Clearing House more than \$4 million shortly before the scheme collapsed. They received no return and lost their entire investment.

In 1983, Ponzi clawback law was virtually nonexistent. There were no reported cases under the recently enacted Bankruptcy Code, and cases under the prior Bankruptcy Act could be counted on one hand. Nonetheless, the Bankruptcy Code's fraudulent transfer and preference provisions seemed to fit, and the case law, though sparse, was favorable. Together, they seemed to provide the necessary tools to clawback investor payments.

On September 15, 1983, the trustee filed suit against approximately 2,100 investors who received payments from the Clearing Houses. It was by far the largest Ponzi clawback proceeding in history. The cases were consolidated as *Merrill v. Abbott*, and will be discussed at length in Part Two of this article.

Shortly after the *Abbott* suit was filed, some of the defendants fought back. They composed a letter and mailed it to all the defendants. The letter contained a form answer and counterclaim against the trustee. Cardall's fingerprints were all over the pleading, and later it was established that he was involved in drafting it. More than 300 defendants filled out and filed the form pleading. The trustee moved to strike their pleadings for lack of good faith. On December 29, 1983, the bankruptcy court entered an order granting the trustee's motion. The court dismissed the defendants' form pleadings and ordered each defendant to pay a \$100 sanction. None of the defendants paid the sanction or filed a new answer, and subsequently default judgments were taken against them.

On December 27, 1983, the trustee filed a disclosure statement,

which described in detail his forensic investigation, the operation of the Ponzi scheme, the diversion of funds, and the lies the Clearing House had told to investors. The disclosure statement explained that the only assets with significant value were clawback claims against the investors themselves. The accompanying plan of liquidation provided that the trustee would pursue these claims and make distributions to investors in such amounts and at such intervals as determined by the trustee in his discretion.

On February 28, 1984, the bankruptcy court approved the trustee's disclosure statement, and authorized him to send it to creditors along with the plan and a ballot to accept or reject the plan. Relatively few creditors voted on the trustee's plan. Mostly, they were the 924 investors that lost their entire investment. They voted for the plan as they had nothing to lose and stood to gain if the clawback litigation was successful. The clawback defendants were disenfranchised by operation of law. Under the Bankruptcy Code, only holders of "allowed claims" are entitled to vote on a Chapter 11 plan, and recipients of preferences or fraudulent transfers must first disgorge their payments before their claims are deemed allowed. 11 U.S.C. §§ 1126(a), 502(d). None of the clawback defendants sought temporary allowance of their claims for voting purposes. On May 8, 1984, the court confirmed the trustee's plan.

The Criminal Proceedings

A Ponzi scheme is first and foremost a criminal enterprise. Ponzi schemes violate the antifraud provisions of federal securities laws and a host of other federal and state statutes. Perpetrators have been convicted of numerous crimes, including mail, wire, and bank fraud, money laundering, conspiracy, tax evasion, racketeering, securities fraud, interstate transportation of money obtained by fraud, larceny by false promise, and failure to report currency transactions.

The criminal investigation of the Clearing House operation began in March 1981 when the Orem Police Department notified the FBI that it had discovered interstate transactions involving large sums of money suspected of being connected to a Ponzi scheme. This tip led to a twenty-six-month joint investigation by the FBI, the U.S. Attorney's Office, and U.S. Postal Inspectors. It was one of the largest fraud investigations up to that time. Forty Special Agents worked on the investigation, including ten Special Agent accountants, and investigators conducted some 1,100 interviews.

The criminal case was spearheaded by two young Assistant U.S. Attorneys, Samuel Alba and Stewart Walz, early in their long, accomplished careers. On May 11, 1983, a federal grand jury

returned a forty-eight-count sealed indictment charging Richard Cardall and twenty others connected with the Clearing House operation with wire fraud, mail fraud, interstate transportation of money obtained by fraud, bankruptcy fraud, and RICO. *United States v. Cardall*, 885 F.2d 656, 664 n.15 (10th Cir. 1989). On October 26, 1983, the grand jury returned a forty-nine-count superseding indictment.

The criminal case suffered many delays before going to trial. The district court ruled that the FBI's search of the Clearing House office had been unlawful and suppressed the evidence obtained in the search. The government appealed the ruling to the Tenth Circuit, which reversed the suppression order and upheld the validity of the search warrant. *United States v. Cardall*, 773 F.2d 1128, 1129, 1132–33 (10th Cir. 1985). The trial of the Clearing House defendants began on September 15, 1986, and lasted five months. District Judge Aldon Anderson presided over a seven-women, five-men jury. Two defendants entered guilty pleas mid-trial, and on February 17, 1987, the jury found Cardall and five other Clearing House principals guilty of various offenses.

Cardall was convicted on twenty-seven counts and received a twelve-year prison sentence for his Clearing House crimes. Three years later, he was diagnosed with terminal cancer and his sentence was reduced to time served. After his release from prison, Cardall returned to Salt Lake City where he died at his home on July 1, 1990.

Part Two of this article will examine the trustee's clawback litigation.

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Appellate Highlights

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

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

UTAH SUPREME COURT

***Daz Management, LLC v. Honnen Equipment Co.* 2022 UT 15 (Mar. 17, 2022)**

This was the second case brought by plaintiff Honnen Equipment Company based on damage to a tractor Daz Management, LLC had rented from it. The first involved a negligence claim and breach of contract claim against the driver of the tractor, who was a member of the LLC. After those claims were decided against Honnen in a bench trial, it brought this action asserting a breach of contract claim against Daz Management, which it had not named in the first case. The district court dismissed the claim on the basis it was barred by res judicata. On appeal, the court of appeals reversed. On certiorari, the Utah Supreme Court reversed the court of appeals and held the claim is barred. **The court of appeals erred in holding that the dismissal of the breach of contract claim was based on an “initial bar”; the fact the district court decided Mr. Daz was not a party to the contract was not a decision that “the wrong parties are before the court” to constitute an initial bar.** Rather, that requires that there be a failure to join a necessary party.

***WDIS v. Hi-Country Estates* 2022 UT 17 (Apr. 28, 2022)**

Landowners brought suit asserting that the homeowners’ association and its restrictive covenants were void ab initio because not all original affected property owners signed the restrictive covenants. The district court, relying upon the two-factor test in *Ockey v. Lebmer*, 2008 UT 37, denied the landowners’ summary judgment motion. The supreme court affirmed. **The court held that the Ockey “presumption**

that contracts are voidable [rather than void ab initio] unless they clearly violate public policy” applied to the restrictive covenants. The court applied the presumption based upon the freedom to contract, the fact that “voiding the covenants ab initio is a severe remedy,” and voiding covenants ab initio “will upset certain reliance interests.”

***State v. Archibeque* 2022 UT 18 (Apr. 28, 2022)**

In this interlocutory appeal, the Utah Supreme Court held, as a matter of first impression, that, in resolving a motion to quash a subpoena to the alleged victim at the preliminary hearing stage as provided in *State v. Lopez*, 2020 UT 61, the district court may not judge the sufficiency of the defendant’s showing based solely on an in camera proffer. The defendant had sought to make his required showing under *Lopez* that “the subpoena is necessary to present specific evidence that is reasonable likely to defeat the [State’s] showing of probable cause” in camera and only to the district court. The presumption disfavoring one-sided proceedings applied to this issue, and the constitutional rights the defendant asserted do not entitle him to the in camera review he sought.

UTAH COURT OF APPEALS

***State v. Thompson-Jacobson* 2022 UT App 29 (Mar. 10, 2022)**

In this case, the State waited “nearly seven years to bring [defendant] to Utah to face . . . charges” of aggravated sexual abuse of a child. The district court denied the defendant’s motion to dismiss on speedy trial grounds citing the defendant’s incarceration in Nevada thereby attributing the almost seven-year delay not to the State. In reversing the denial, the court of appeals held that **the State’s “failure to make any attempt to secure Thompson-Jacobson’s**

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

presence to address the Utah charges amounted to negligence, a neutral reason for delay for which responsibility ultimately rests with the government.”

Moreover, while the defendant did not present a meritorious particularized claim of prejudice due to the delay, the court of appeals held that “excessive delay presumptively compromises the reliability of a trial,” and therefore Thompson-Jacobson had also shown prejudice due to the delay.

State v. Dever

2022 UT App 35 (Mar. 17, 2022)

In this criminal case, the jury was instructed that the “testimony of a witness to a crime standing alone, if believed beyond a reasonable doubt, is sufficient to convict if the testimony establishes all of the elements of the offense.” **As a matter of first impression, the Utah Court of Appeals held that this so-called “no corroboration” jury instruction amounted to an improper comment on the evidence and erroneously directed the jury to favor the “testimony of a witness to a crime” over other evidence.** Because the victim was the sole “witness to [the] crime” at issue and other evidence was not overwhelming, the error was likely prejudicial and warranted a new trial.

Butler v. Mediaport Entertainment, Inc.

2022 UT App 37 (Mar. 24, 2022)

The Utah Court of Appeals affirmed the district court’s orders excluding the defendant–counterclaim plaintiff’s evidence of damages on the basis his damages disclosures were insufficient and the failure was not harmless. The court held that the disclosure, which provided only, “Because of the lack of documents available to [the defendant], he cannot provide an exact calculation of damages at this time. It is estimated that the damages suffered by [the defendant] approximate \$900,000,” “falls well short of the mark set out in rule 26.” Although it included an estimated total figure, the disclosure lumped all damages together and did not categorize them or provide any description of the method in which they would be calculated.

Zazetti v. Prestige Senior Living Center

2022 UT App 42 (Mar. 31, 2022)

Ms. Zazetti was injured when she slipped on a patch of ice at her apartment complex, leading her to sue the complex and a snow removal company. The district court dismissed the snow removal company on summary judgment, and the jury rendered a verdict for the complex. On appeal, Ms. Zazetti asserted that the trial court erred in giving the “open and obvious danger

rule” instruction to the jury in the residential landlord/tenant context. **While the court of appeals stopped “short of holding that the [open and obvious danger] rule applies in *all* cases involving landlords and tenants,” it held that the rule applies as to “the common area outside a landlord’s building” for residents and non-residents alike.**

Corona-Leyva v. Hartman

2022 UT App 45 (Apr. 7, 2022)

The district court issued a civil stalking injunction against an individual who repeatedly drove by and parked near the petitioners’ house, based upon testimony of the petitioner, his daughter, and a neighbor, who had called the police multiple times. Reversing the stalking injunction, the court of appeals held that **the district court incorrectly applied the stalking statute by analyzing the “fear for one’s safety” element under a subjective standard, instead of an individualized objective standard.**

Widdison v. Widdison

2022 UT App 46 (Apr. 7, 2022)

When it entered its original divorce decree, the district court failed to make a statutorily required legal custody determination with respect to the parties’ son. In a later petition to modify the decree, the district court awarded joint legal custody to both parents. The son’s mother appealed, arguing that such a change to the decree was improper without a showing of a material and substantial change in circumstances. In this scenario, however, the Utah Court of Appeals held that **such a showing was not necessary: “[S]ince the question of whether [the putative father] had legal custody of [the child] was unaddressed in the Decree, there was nothing for the court to ‘reopen’ or change.” Accordingly, the court did not err in effectively “decid[ing] legal custody in the first instance” as part of the modification proceedings.**

Knowles v. Knowles

2022 UT App 47 (Apr. 7, 2022)

In this appeal from a divorce decree, husband argued “that the district court miscalculated his ability to pay alimony by excluding expenses that it deemed unnecessary” such as “tithing paid to the parties’ church.” In reversing the district court’s order on this point, the court of appeals held “the court must assess the needs of the parties not by applying its own sense of which expenses are truly necessary but, instead, by examining whether their claimed expenses are consistent with the standard of living the parties established during the marriage.” **Because “the court did not analyze**

whether the parties' tithing payments were an expenditure consistent with the marital standard of living," the court of appeals remanded the matter.

Mahoney v. Dep't of Workforce Servs.
2022 UT App 50 (Apr. 14, 2022)

After quitting due to concerns about the adequacy of his employer's Covid protocols, an employee sought unemployment insurance benefits. His request for benefits was denied. Setting aside the denial, the court of appeals held that **the Workforce Appeals Board's decision was not supported by substantial evidence, where it erroneously determined that the employer provided protection to employees and failed to address the chief complaints that caused the employee to resign.**

10TH CIRCUIT

Chegup v. Ute Indian Tribe of the Uintah
28 F.4th 1051 (10th Cir. Mar. 18, 2022)

The district court dismissed a habeas petition filed by three tribe members who were banished from the Ute Indian Tribe, concluding that the banishment was not a detention in violation of the Indian Civil Rights Act ("ICRA"). The district court did not consider the tribe's argument that the petition was barred for failure to exhaust tribal remedies. The Tenth Circuit reversed and remanded, holding that **"tribal exhaustion is an obvious and compelling potential obstacle in this case"** which the district court should consider in the first instance because **"the question whether temporary banishment qualifies as detention requires deciding a significant and contentious issue"**

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about the scope of the right to habeas corpus under ICRA” and “the comity and sovereignty concerns that motivate tribal exhaustion doctrine are at their zenith when a federal court stands in direct supervision of a tribe’s sovereign actions.”

United States v. Chavez

29 F.4th 1223 (10th Cir. Mar. 29, 2022)

Chavez was charged under 18 U.S.C. § 2113(a) with attempted bank robbery for attempting to force two people to withdraw their money from an ATM. The district court dismissed the charges because if Chavez had been successful, he would have taken the money from the individuals and not from the bank. After noting a circuit split between the Fifth Circuit, which aligned with the district court’s decision, and the Seventh Circuit, **the Tenth Circuit sided with the Seventh Circuit by holding that “[u]sing force to induce a bank customer to withdraw money from an ATM is federal bank robbery, so Chavez cannot show that the government is incapable of proving that his specific conduct amounted to attempted federal bank robbery.”**

United States v. Burris

29 F.4th 1232 (10th Cir. Mar. 30, 2022) – ALR

Previously convicted of possession of crack cocaine, Burris applied for a sentence reduction under the federal Fair Sentencing Act of 2010, which addressed sentencing disparities among crack and powder cocaine offenses, and the First Step Act of 2018, which made those changes retroactive. The government opposed Burris’ motion, disputing his calculation of the applicable sentencing guideline range. The district court declined to resolve the dispute, ruling instead that Burris’s sentence should not be

reduced regardless of what his new guideline range might be under the Acts. On appeal, the Tenth Circuit reversed and remanded, holding **the district court erred in failing to calculate the correct guideline range before exercising its discretion to deny Burris a sentencing reduction. The error, by its very nature, was not harmless because “the district court’s exercise of discretion was untethered from the correct calculation” of Burris’s significantly reduced guidelines range.**

United States v. Sutton

30 F.4th 981 (10th Cir. Apr. 5, 2022)

After a jailhouse fight based on claims of “snitching,” the government brought witness tampering charges against two of the participants. The district court denied the defendants’ motion for an acquittal based on insufficient evidence, and a jury convicted them. The Tenth Circuit, in interpreting 18 U.S.C. § 1512(b)(1), held that **for a witness tampering claim under § 1512, the government must: (a) “prove that [the defendant] had contemplated a particular proceeding”; and (b) prove that the proceeding contemplated by [the defendant] had been reasonably likely to be federal.** Because the government did not present sufficient evidence regarding defendants’ awareness of the latter, the Tenth Circuit vacated the convictions.

Eighteen Seventy, LP v. Jayson

32 F.4th 956 (10th Cir. Apr. 26, 2022)

The district court dismissed investors’ claims against a resident of the United Kingdom for lack of personal jurisdiction. Affirming, **the Tenth Circuit applied the purposeful direction test and held that the plaintiffs failed to show the defendant expressly aimed his conduct at the forum state.** The decision contains an extensive discussion of key purposeful direction cases.

Herrera v. City of Espanola

32 F.4th 980 (10th Cir. Apr. 27, 2022)

In this case involving claims by the plaintiff—homeowners against the City of Espanola under 42 U.S.C. § 1983 and the New Mexico Tort Claims Act based on the City’s refusal to provide water service to their home, **the Tenth Circuit joined other circuits in holding the “continuing violation doctrine” applies to and is available in § 1983 claims.** Ultimately, however, the continuing violation doctrine did not save the plaintiffs’ claims because “[n]o cumulative acts were required to constitute the violation.” But, the “repeated violation doctrine” allowed the plaintiffs to “pursue their § 1983 claims to the limited extent the claims are based on the City’s alleged policy, and enforcement thereof, for the three years predating [the] commencement of their action.”

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A Practitioner's Guide to the Utah Court of Appeals: Jurisdiction, Procedure, and Outcome

by Carol Funk

When contemplating a challenge to a judicial or administrative ruling, it is essential to understand the types of review available in the Utah Court of Appeals. It is also critical to understand how to initiate and navigate proceedings, the forms of relief that may be sought, and how to effectively pursue them. When possible, it is also useful to understand how frequently particular types of relief are granted. This critical information is set forth below, in an in-depth guide to the Utah Court of Appeals.

This guide is presented in two parts. The first, which follows below, provides background information regarding the Utah Court of Appeals' jurisdiction and docket, outlines how to initiate matters in that court, and identifies the steps by which matters move through the initial phase of adjudication. Part two, which will appear in the next edition of the *Utah Bar Journal*, addresses the remainder of the adjudicatory process – from briefing to issuance of an opinion, as well as post-opinion petitions.

This guide is based on the Utah Code; the Utah Rules of Civil Procedure; the Utah Rules of Appellate Procedure; the Utah State Court's *Guide to Appealing a Case*; Utah Supreme Court and Utah Court of Appeals opinions; the experience of the author, where relevant; and a review of all matters (nearly 6,000) filed in the Utah Supreme Court and the Utah Court of Appeals between January 1, 2016, and October 13, 2021 (the review period). Given the magnitude of that undertaking, the results set forth below are intended to provide general trends and highly informative approximations of the types of matters at issue and actions taken, as indicated on the Utah appellate courts' docket.

BACKGROUND: THE COURT OF APPEALS IS THE STATE'S APPELLATE WORKHORSE

The Utah Court of Appeals is statutorily assigned to exercise appellate jurisdiction only in limited types of proceedings. See Utah Code Ann. § 78A-4-103. For example, the Utah Court of Appeals has appellate jurisdiction over orders issued in juvenile courts, criminal proceedings not involving a first degree or capital felony, domestic relations matters, formal adjudicative proceedings, and certain informal adjudicative proceedings. *Id.*

Matters not within the Utah Court of Appeals' original appellate jurisdiction are assigned to the Utah Supreme Court. *Id.* § 78A-3-102(3)(j). But pursuant to a pour-over procedure the Utah Legislature created, the Utah Supreme Court may transfer to the Utah Court of Appeals most proceedings seeking appellate review of district court, juvenile court, and administrative rulings. See *id.* § 78A-4-103(3)(j).

There are some types of proceedings the Utah Supreme Court cannot transfer, such as those involving capital felony convictions, election or voting contests, retention or removal of public officers, discipline of lawyers, or final orders of the Judicial Conduct Commission. *Id.* § 78A-3-102(4). Otherwise, however, the Utah Supreme Court transfers to the Court of Appeals most matters seeking appellate review of district court, juvenile court, or administrative proceedings. See Utah R. App. P. 42(a) (“[T]he [Utah Supreme] Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction.”).

The Utah Court of Appeals thus provides appellate review in most types of matters and functions as the state's appellate workhorse.

Each year, approximately 1,000 to 1,100 new matters are filed in Utah's appellate courts, and roughly four-fifths of those matters are adjudicated by the Utah Court of Appeals. Between 2016 and 2020, for example, the average number of new matters annually filed in or transferred to the Utah Court of Appeals was 832 –

CAROL FUNK is an experienced appellate attorney and co-chair of Ray Quinney & Nebeker's Appellate Practice. She serves on the Utah Supreme Court's Advisory Committee on the Rules of Appellate Procedure.



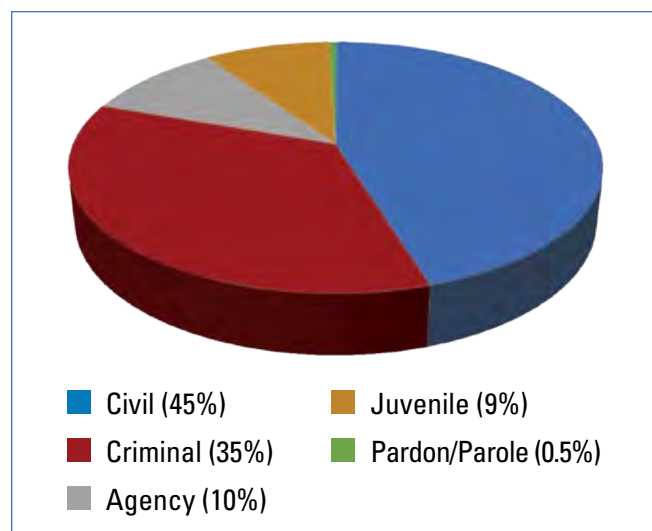
roughly 80% of all matters filed in the state’s appellate courts during that period. (In 2018, the percentage was slightly lower; the Utah Court of Appeals’ caseload constituted approximately 75% of all new matters filed in the state’s appellate courts that year.)

The responsibility for adjudicating this extensive caseload falls on the seven judges appointed to the Utah Court of Appeals, their law clerks, a small group of staff attorneys, and the court’s administrative staff. Although many matters filed in the Utah Court of Appeals do not result in published opinions, they must still be resolved through significant effort, often through per curiam opinion or dispositive order. Moreover, each court of appeals judge will, as part of a three-judge panel, participate in the issuance of around 100 opinions for publication each year and will author roughly one-third of those opinions.

In other words, on average, each Utah Court of Appeals judge will, as part of a three-judge panel, issue eight to nine opinions for publication each month, three of which the judge has authored, in addition to any concurring or dissenting opinions the judge also may write.

That is a *substantial* workload. And it is coupled with additional judicial responsibilities, including service on the Utah Supreme Court’s rules committees, review of petitions seeking permission to appeal from interlocutory orders, and disposition of the many motions filed in the Utah Court of Appeals each year.

The Utah Court of Appeals’ caseload also encompasses a wide range of matters. Most matters are civil or criminal, but the court’s docket also includes many juvenile court and agency proceedings, as well as some proceedings of the Board of Pardons and Parole. During the review period, the breakdown of matters filed in or transferred to the Utah Court of Appeals was as follows:



When appearing before the Utah Court of Appeals, attorneys should keep in mind the court’s extensive caseload as well as the wide range of subject matters each judge must address.

Each request, motion, or argument should be clear and concise. Arguments should be accompanied by pertinent background if the underlying proceeding is one that may be relatively unfamiliar to a judge on the panel. Points of error should be limited to a few well-argued contentions rather than a litany of poorly presented claims. Finally, a party should understand that the process may take longer than the party wishes, due to the numerous matters presented for the court’s review and the time required to address them.

STEP-BY-STEP PROCESS: INITIATING A PROCEEDING

Many types of proceedings may be filed in the Utah Court of Appeals, including appeals from final judgments, petitions to appeal from interlocutory orders, appeals from child welfare proceedings, petitions for review of administrative proceedings, and petitions seeking an extraordinary writ. The process for initiating each of those proceedings is explained below, along with the likelihood of success when requesting discretionary review.

Appeal from Final Judgment

The most common type of proceeding in the Utah Court of Appeals is appeal from a final judgment issued by a district or juvenile court. A final judgment “end[s] the controversy” by disposing of all claims against all parties. *Wittingham, LLC v. TNE Ltd. P’ship*, 2018 UT 45, ¶ 17, 428 P.3d 1027 (internal quotation marks omitted).

Because a final judgment disposes of all claims, it is usually entered at the conclusion of the litigation. But there is an exception. Upon motion, final judgment may also be entered mid-litigation with respect to a portion of a case – i.e., with respect “to one or more but fewer than all of the claims or parties” – if the court determines “there is no just reason for delay.” Utah R. Civ. P. 54(b). Accordingly, when a party successfully moves for certification under Rule 54(b), critical rulings are severed from the ongoing litigation and adjudicated “final,” allowing for immediate appeal.

Once final judgment has been entered, a party seeking appellate review must file a notice of appeal within thirty days, except in forcible entry or unlawful detainer actions, in which the notice of appeal must be filed within ten days. Utah R. App. P. 4(a).

The period for filing a notice of appeal may be extended upon motion in the district court. *See id.* R. 4(e). The filing of certain postjudgment motions, including a claim for attorney fees under Utah Rule of Civil Procedure 73, also automatically extends the deadline for filing a notice of appeal. *Id.* R. 4(b). Once any such motion has been resolved, however, the time for filing a notice of appeal begins to run. *Id.*; *see also* Utah R. Civ. P. 58A(f). A form notice of appeal is available on the Utah appellate courts' website. *See* <https://www.utcourts.gov/howto/appeals/#forms>.

When filing a notice of appeal, an appellant must also file a bond for costs on appeal, unless the appeal involves "a criminal case," "the bond is waived in writing by the adverse party, or ... an affidavit as provided for in Utah Code Section 78A-2-302 is filed." Utah R. App. P. 6. "The bond shall be ... at least \$300.00 or such greater amount as the trial court may order on motion of the appellee to ensure payment of costs on appeal." *Id.*

Once final judgment has been entered and the time for filing a notice of appeal has begun to run, any subsequent ruling in the proceeding below will usually constitute a separate judgment from which another appeal must be taken.

Thus, if a party wishes to appeal from a postjudgment ruling, the party must usually file a new notice of appeal. *See Caboon v. Caboon*, 641 P.2d 140, 142 (Utah 1982) (stating that postjudgment orders "are independently subject to the test of finality"); *UDAK Props. LLC v. Spanish Fork, UT Realty LLC*, 2020 UT App 164, ¶ 12, 480 P.3d 1052 (observing that after final judgment was entered, a subsequent ruling was made, and a timely appeal was taken therefrom).

Appeal from Interlocutory Order

Although many Utah Court of Appeals proceedings involve appeals from final judgments, parties may also request permission to appeal from interlocutory (i.e., non-final) orders. Utah R. App. P. 5(a). The request is made by filing a petition seeking permission to appeal, within twenty-one days after the order at issue is entered. *Id.*

Such petitions may be granted when the interest in efficient resolution of the litigation, through a single appeal at the conclusion of the proceeding, is outweighed by an interest in justice that requires immediate appeal. Accordingly, the Utah Court of Appeals may grant the petition "if it appears that the



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order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice.” *Id.* R. 5(g).

In practice, permission is most likely to be granted when a single claim of error is raised, the error carries substantial ramifications, and prompt resolution of the error will significantly alter the litigation and/or avoid substantial injustice.

The quintessential circumstance for seeking permission to appeal an interlocutory order is the denial of a motion to dismiss for lack of personal or subject matter jurisdiction. But Rule 5 is generous, in that permission to appeal may be granted with respect to *any* compelling claim of error, immediate resolution of which is necessary to avoid substantial injustice. *See id.* R. 5(a), (g).

The petition should be filed in “the appellate court with jurisdiction over the case.” *Id.* R. 5(a). As noted above, the Utah Supreme Court has original appellate jurisdiction over a broad

range of matters. Accordingly, petitions seeking review of interlocutory orders are often filed in the Utah Supreme Court, which then pours over the matter to the Utah Court of Appeals when transfer is permissible.

In such cases, a party may request that the Utah Supreme Court retain and grant the petition, rather than transferring the matter to the Utah Court of Appeals. *See id.* R. 5(c)(2). A request for retention is most likely to succeed when the appeal would present a single issue, which raises a question of first impression, a challenge to binding precedent, or another matter of such importance to the state’s jurisprudence that it is best resolved by the Utah Supreme Court in the first instance.

Petitions seeking permission to appeal from interlocutory orders are granted about 15% of the time.

During the review period, over 650 petitions seeking review of interlocutory orders were adjudicated by the Utah Supreme Court and Utah Court of Appeals; 15% of the petitions were granted; 85% were denied. If both parties joined in the motion, the grant rate improved to 50%.

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Looking at the courts individually, the Utah Supreme Court's grant rate is much higher. During the review period, the Utah Supreme Court granted forty-nine petitions and denied forty-nine petitions, yielding a grant rate of 50%. In contrast, the Utah Court of Appeals adjudicated over 550 petitions. Only 9% were granted; 91% were denied.

As a procedural matter, the Utah Court of Appeals will not grant a petition without first requesting a response. *Id.* R. 5(f). Indeed, no response is permitted unless requested. *Id.*

But responses are routinely requested. During the review period, the Utah Court of Appeals called for a response to more than half (around 60%) of the petitions it reviewed. Yet even when a response is requested, the Utah Court of Appeals' grant rate is still quite low. During the review period, the Utah Court of Appeals requested a response 371 times but ultimately granted only forty-nine petitions – a grant rate of 13%, following a request for a response. If the opposing party failed to file the requested response, the grant rate increased to 33%.

Appeal in Child Welfare Proceeding

The Utah Court of Appeals also reviews orders in child welfare proceedings. “A notice of appeal from an order in a child welfare proceeding . . . must be filed within 15 days of the entry of the order appealed from.” Utah R. App. P. 52(a). The time for filing the notice of appeal is, however, automatically

extended by the filing of certain motions under the Utah Rules of Civil Procedure. *Id.* R. 52(b). Appeals with respect to child welfare proceedings are governed by rules specific to that context. *See id.* R. 52–60. Accordingly, the general rules set forth below are often inapplicable in these types of matters.

Review of Administrative Proceeding

The Utah Court of Appeals also reviews orders or decisions of administrative agencies, boards, commissions, committees, or officers, when a right to review is provided by law. *See* Utah R. App. P. 14(a); *see also, e.g.*, Utah Code Ann. § 63G-4-401(1) (“A party . . . may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.”).

“[A] party seeking [such] review must file a petition for review” in the appellate court with jurisdiction over the matter, “within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order.” Utah R. App. P. 14(a).

Before filing a petition for review, however, a party should first ensure it has exhausted all available administrative remedies if, as often is the case, exhaustion is a prerequisite to doing so. *See Frito-Lay v. Utah Labor Comm’n*, 2009 UT 71, ¶ 30, 222 P.3d 55 (“The exhaustion of administrative remedies requirement mandates that the litigant follow all of the outlined administrative review procedures prior to a state court having subject matter jurisdiction to hear the case.”); Utah Code Ann. § 63G-4-401(2) (providing, with limited exceptions, that for purposes of the Administrative Procedures Act, “[a] party may seek judicial review only after exhausting all administrative remedies”).

Petition for Extraordinary Writ

Finally, by statute, the Utah Court of Appeals “has jurisdiction to issue all extraordinary writs.” Utah Code Ann. § 78A-4-103(2). A party may, through issuance of an extraordinary writ, obtain limited judicial review or other judicial intervention when no other pathway for relief exists. A party is most likely to seek an extraordinary writ to challenge unlawful imprisonment or detention or other alleged abuse or misuse of governmental authority. A writ may also be sought to otherwise ensure persons or entities act in accordance with legal requirements or obligations. *See* Utah R. Civ. P. 65B(d)(2).

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Pursuit of an extraordinary writ may also allow a party to obtain limited judicial review of administrative or agency action when no statute authorizes appeal or review thereof.

The Utah Rules of Civil Procedure outline the process for seeking extraordinary relief. Rule 65B provides that “[w]here no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth” in the rule, including “wrongful restraint on personal liberty,” “wrongful use of public or corporate authority,” or “wrongful use of judicial authority, the failure to exercise such authority, [or] actions by the Board of Pardons and Parole.” Utah R. Civ. P. 65B(a); *see also id.* R. 65C (addressing petitions for post-conviction relief filed under the Post-Conviction Remedies Act).

A petition seeking an extraordinary writ may be filed as an original action in the state’s appellate courts. Utah R. App. P. 19(a). But extraordinary relief should be pursued in the state’s appellate courts only if it would be impractical or inappropriate to seek such relief in the district court. *See id.* R. 19(b)(5) (instructing that a petition seeking an extraordinary writ must, “[e]xcept in cases where the writ is directed to a district court, ... explain[] why it is impractical or inappropriate to file the petition ... in the district court”).

Indeed, petitions seeking extraordinary relief are rarely successful when filed in the state’s appellate courts.

During the review period, 142 petitions seeking extraordinary relief were filed as original proceedings in the Utah Court of Appeals. The vast majority were denied without oral argument or written opinion. Two petitions were briefed and argued, but both were ultimately denied. *See James v. Hruby-Mills*, 2019 UT App 30, ¶ 16, 440 P.3d 712; *In re M.L.*, 2017 UT App 61, ¶ 26, 397 P.3d 681. Only one petition was granted, without a written opinion. *Utah Appellate Courts Docket*, No. 20200110 (extraordinary writ granted, 2/6/2020). (Petitions for extraordinary relief filed as original proceedings in the Utah Supreme Court are also rarely successful. *See Carol Funk, Understanding the Utah Supreme Court’s Docket: A Practitioner’s Guide*, 35 UTAH B.J. 17, 22 (Jan/Feb 2022).)

**STEP-BY-STEP PROCESS:
INITIAL PHASE OF ADJUDICATION**

Matters initiated in or transferred to the Utah Court of Appeals will then proceed through the initial phase of adjudication. If necessary, the parties will complete the record by ordering any desired transcripts. Requests for retention may also be

submitted. In most proceedings, a docketing statement will be filed. And the matter will be screened for referral to the Appellate Mediation Office. The parties may also submit various motions, and the Utah Court of Appeals may itself move for summary disposition. Each of these steps is addressed below.

Step 1. Transcript Requests

Once a notice of appeal has been filed, an appellant has ten days to order any transcripts the appellant will rely on in the appeal, if the transcripts are not already part of the record below. *See Utah R. App. P. 11(e)(1)*. “A party requesting a transcript shall [also] make satisfactory arrangements for paying the fee to the reporter or transcriber and notify the ... appellate court [when such] arrangements were made.” *Id.* R. 12(a)(2).

Ordering a transcript is often essential to establishing a claim of error.

Appellate review “is strictly limited to the record presented on appeal.” *Capital One Bank (USA), NA v. Roberts*, 2014 UT App 120, ¶ 2, 327 P.3d 1226 (per curiam) (internal quotation marks omitted). Absent a record of what occurred, “the reviewing court presumes the regularity of the proceedings below.” *Id.*

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Thus, unless a party can demonstrate otherwise, the reviewing court will presume no reversible error occurred. *See, e.g., In re adoption of Connor*, 2007 UT 33, ¶ 16, 158 P.3d 1097.

“Accordingly, if an appellant seeks review of rulings, findings, and conclusions made” orally, during a hearing or trial, “the appellant must include a transcript of the proceeding.” *See Capital One Bank*, 2014 UT App 120, ¶ 2. Likewise, “[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.” Utah R. App. P. 11(e)(2). And if the transcript is the only record of the error raised and/or ruled on below, the transcript will be essential to the appeal.

Ordering a transcript may be helpful, but not essential, in other circumstances. For example, if the relevant issue was fully addressed in written arguments and resolved in a written ruling, all of which are in the record, a transcript of the hearing in which the issue was discussed may not be essential. In such cases, whether to order the transcript is a judgment call, depending on its perceived utility.

Sometimes, a transcript may be helpful to the appellee. For example, if the error at issue was invited by the appellant’s arguments made orally below, or if the appellee orally raised an alternative ground for affirmance, a transcript may be useful. And if “the appellant does not order” the transcript, “the appellee may” do so. *See id.* R. 11(e)(3).

As far as timing, an appellant should order transcripts as soon as possible after the notice of appeal is filed.

The transcript must be completed before the record will be sent to the Utah Court of Appeals. And the Utah Court of Appeals will not set the briefing schedule until it has received the record. A party seeking to expedite review in the Utah Court of Appeals should thus promptly order any transcripts or, if not ordering transcripts, promptly “file a certificate to that effect.” *See id.* R. 11(e)(1).

Step 2. Request for Retention

As noted above, many matters are filed in the Utah Supreme Court but transferred to the Utah Court of Appeals. When a matter subject to transfer is filed, the Utah Supreme Court informs the parties that the matter will be transferred to the Utah Court of Appeals unless, within seven business days, the Utah Supreme Court receives a letter advising it of reasons it should retain the case.

Any party may then submit a letter requesting that the Utah Supreme Court retain and resolve the matter in the first instance.

When determining whether to retain a matter, the Utah Supreme Court does not have access to the record of the proceeding below. A letter requesting retention should therefore provide all information relevant to the retention decision. That information includes a complete list of all issues the party intends to raise, a statement explaining how those issues were raised and preserved below, a summary of the challenged rulings, and an explanation of why those rulings merit review by the Utah Supreme Court.

A request for retention is most likely to be successful when the proceeding will raise a single issue and the issue presents a question of first impression, a challenge to binding precedent, or another matter of such importance to the state’s jurisprudence that it is best resolved by the Utah Supreme Court in the first instance. In such circumstances, requests for retention can be highly effective.

Indeed, during the review period, the Utah Supreme Court retained over one-third of the matters in which retention was requested.

Yet deciding whether to request retention may require a difficult judgment call. The Utah Supreme Court will be inclined to transfer to the Utah Court of Appeals matters that present several claims of error, if only one or two of the claims raise issues of significant importance to the state’s jurisprudence. In such cases, the Utah Supreme Court may wait to address the highly significant issues on review of the Utah Court of Appeals’ decision. Thus, when deciding whether to request retention, a party must determine how narrowly it is willing to focus its arguments and which claims of error it is willing to forgo, if any, to increase the likelihood that the Utah Supreme Court will retain the case.

Step 3. Docketing Statement

An “appellant, cross-appellant, or petitioner” must also file a docketing statement “[w]ithin 21 days after [filing] [its] notice of appeal, cross-appeal, or . . . petition for review.” Utah R. App. P. 9(b). The docketing statement “should not include argument” – the docketing statement is primarily used to determine if jurisdiction exists and for “screening purposes” related to the issues that may be raised. *Id.* R. 9(a). Accordingly, the docketing statement should “demonstrate that the appellate court has jurisdiction over the appeal” and “identify at least one substantial issue for review.” *Id.*

In other words, the docketing statement should identify the allegedly erroneous ruling without attempting to demonstrate why the ruling was erroneous. *See Guide to Appealing a Case, Utah State Courts, July 2020, at 11, available at https://www.utcourts.gov/howto/appeals/docs/00_Guide_to_Appealing_a_Case.pdf.*

Moreover, the docketing statement's recitation of the issues is not binding. An issue identified in a docketing statement need not ultimately be raised, and issues not identified in a docketing statement may still be raised in the proceeding. Utah R. App. P. 9(c)(4), (d)(4), (e)(4). The contents of the docketing statement are spelled out by rule, *id.* R. 9(c)–(e), and a form docketing statement is available on the Utah appellate courts' website, <https://www.utcourts.gov/howto/appeals/#forms>.

As a matter of practice, when a party is requesting that the Utah Supreme Court retain and resolve a proceeding, the party should file its docketing statement before or at the same time as its request for retention. In those circumstances, the docketing statement may provide additional background and procedural information that may be helpful to the Utah Supreme Court when determining whether to grant the retention request.

Step 4. Designation of Simplified Appeal, Where Appropriate

When an appeal involves “the application of well-settled law to a set of facts,” the Utah Court of Appeals “may designate [the] appeal for a simplified appeal process.” Utah R. App. P. 10(b)(1). The appellant may also “move for a simplified appeal process . . . within ten days after the docketing statement is filed or the case is transferred to the Utah Court of Appeals, whichever is later.” *Id.*

Proceedings appropriate for simplified appeal may include, for example, “appeals challenging only the sentence in a criminal case,” “appeals from the revocation of probation or parole,” “appeals from a judgment in an unlawful detainer action,” and “petitions for review of a decision of the Department of Workforce Services Workforce Appeals Board or the Labor Commission.” *Id.* R. 10(b)(2).

When proceeding via simplified appeal, the parties file memoranda rather than full briefing, and the memoranda are capped at roughly half the word or page limits that apply to full briefing. *Id.* R. 10(c).

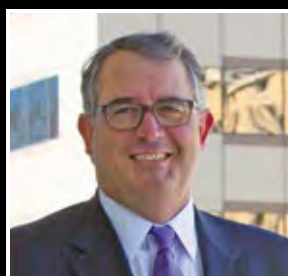
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Step 5. Mediation

Matters filed in or transferred to the Utah Court of Appeals are screened for referral to the Appellate Mediation Office. *Guide to Appealing a Case, Utah State Courts*, July 2020, at 7; see also Utah R. App. P. 28A(a). A referral to the Appellate Mediation Office, if made, usually occurs within a month or two after the notice of appeal or petition for review is filed and within a few days or a few weeks after the docketing statement is submitted.

When a matter is referred to the Appellate Mediation Office, the service is free to the parties; the process is confidential; and the parties are given an opportunity to negotiate a mutually acceptable resolution. *Guide to Appealing a Case*, at 7; Utah R. App. P. 28A(b). Moreover, if a matter is not initially referred for mediation, a party may contact the Utah Court of Appeals and confidentially request that the matter be considered for referral to the Appellate Mediation Office.

The Appellate Mediation Office is a useful resource in resolving matters before the Court of Appeals.

During the review period, the Utah Court of Appeals referred more than 400 matters to the Appellate Mediation Office. More than one-third of the time, the referral resulted in settlement by mediation. Thus, if a matter is referred to the Appellate Mediation Office, there is a substantial possibility the matter will be resolved.

Step 6. Motions

Motions are frequently filed in the Utah Court of Appeals, often shortly after the matter is initiated or shortly after the docketing statement is submitted. The motions most frequently filed by the parties are motions to stay, motions for summary disposition, suggestions of mootness, motions for voluntary dismissal, motions to remand for additional findings, motions to supplement the record, and motions for emergency relief. The Utah Court of Appeals may also move sua sponte for summary disposition. Each of these motions is addressed below.

A party may expedite consideration of most motions if it learns, prior to filing, that the opposing party does not oppose the motion.

If the title and body of a party's motion indicate the motion is unopposed, the Utah Court of Appeals may consider the motion without waiting until the period for filing a response has expired.

Moreover, in all cases, a party should not attempt to use a motion to "introduce" the merits of the matter to the Utah Court of Appeals. Arguments more appropriately presented in and

resolved upon full briefing should be reserved and raised in that format. Indeed, until briefing is complete, motions are usually addressed by the Utah Court of Appeals judge(s) assigned to review motions on that date. Those judges may or may not be on the panel assigned to hear the case, once briefing is complete.

Motion to Stay a Ruling, Order, or Judgment Entered Below

Bringing an appeal, petition, or other proceeding in the Utah Court of Appeals does not automatically stay the ruling entered below. A party may ask the Utah Court of Appeals to stay the ruling, but usually only *after* first seeking a stay in the lower court. Utah R. App. P. 8(a)(1); *id.* R. 8(a)(2)(C).

When seeking a stay in the Utah Court of Appeals, the movant must provide "(i) the reasons the trial court denied the request; (ii) the reasons for granting the relief requested and the facts relied on; (iii) copies of affidavits or other sworn statements supporting facts subject to dispute; and (iv) relevant parts of the record, including a copy of the trial court's order." *Id.* R. 8(a)(2)(A).

Motion for Summary Disposition – Lack of Jurisdiction

For many years, the Utah Rules of Appellate Procedure allowed parties to move for summary disposition in multiple circumstances. Summary disposition could be sought "at any time to dismiss the appeal or the petition for review on the basis that the appellate court lack[ed] jurisdiction." Utah R. App. P. 10(a)(1) (2019). Summary disposition could also be sought "[t]o affirm the order or judgment . . . on the basis that the grounds for review are so insubstantial as not to merit further . . . consideration . . . or . . . [t]o reverse the order or judgment which is the subject of review on the basis of manifest error." *Id.* R. 10(a)(2).

In early 2020, however, the rules changed. Currently, a party may seek summary disposition only on the basis that the appellate court lacks jurisdiction. See Utah R. App. P. 10(a)(1). "Any response to such motion must be filed within 14 days . . ." *Id.*

Only straightforward jurisdictional defects will be ruled upon by summary disposition.

If the issue is close or complicated, or otherwise one on which oral argument would be beneficial, the motion for summary disposition will not be granted. Instead, the Utah Court of Appeals will defer the matter to be addressed and considered, with all other issues, through the customary briefing process. For example, between February 19, 2020, and October 13,

2021 (i.e., the portion of the review period in which the current rule was in place), appellees filed thirty-eight motions for summary disposition. The Utah Court of Appeals deferred the motion for plenary consideration 21% of the time, 42% of the motions were denied, and 37% of the motions were granted.

Suggestion of Mootness

At any time during the proceeding, if “[a]ny party” becomes “aware of circumstances that render moot one or more of the issues presented for review,” the party “must promptly file a ‘suggestion of mootness’ in the form of a motion.” Utah R. App. P. 37(a). Similar to motions for summary disposition, only straightforward questions of mootness will be determined in this manner. Otherwise, the matter will be carried over and considered, with all other issues, through the customary briefing process.

During the review period, sixty-seven suggestions of mootness were filed. About one third (37%) were granted; a few (10%) were denied. The remainder of the time, generally, the issue was carried over to full briefing or the matter was voluntarily dismissed.

Motion for Voluntary Dismissal

“At any time prior to the issuance of a decision,” the party who initiated the proceeding “may move to voluntarily dismiss” it. Utah R. App. P. 37(b). “If all parties to an appeal or other proceeding agree that dismissal is appropriate and stipulate to a motion for voluntary dismissal, the [matter] will be promptly dismissed.” *Id.*

Requests for voluntary dismissal are frequently made and are almost always granted.

During the review period, 531 motions for voluntary dismissal were filed in the Utah Court of Appeals. Of those motions, 509 were granted, yielding a grant rate of 96%. The remainder of the time, generally, the matters were settled by mediation or the motion seeking voluntary dismissal was filed after the Utah Court of Appeals had already adjudicated the matter.

Motion to Remand for Findings – Ineffective Assistance of Counsel

In criminal matters involving a claim of ineffective assistance of counsel, “[a] party to [the] appeal . . . may move the court to remand the case . . . for entry of findings of fact, necessary for



Employment Litigator Matt Durham Joins Dorsey's Growing Salt Lake City Office

The international law firm of Dorsey & Whitney is pleased to announce that Matt Durham has joined the Firm as a Partner in its Labor & Employment Practice Group on May 10, 2022. Prior to joining Dorsey, Matt was a partner and previous chair of the Labor & Employment Group with Stoel Rives. Matt is one of 10 Stoel Rives attorneys who joined Dorsey's Salt Lake City office since March.

Matt defends employers in Utah and throughout the west before state and federal courts and administrative agencies in disputes involving employment discrimination, harassment, wrongful termination, wage and hour, drug testing, leave, noncompetition, workplace torts, benefits and labor/occupational safety issues. In addition to litigation, he routinely advises employers on developing and implementing personnel policies and complying with state and federal employment laws across a range of industries, including consumer products, retail, manufacturing, and education.

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the appellate court's determination of [the] claim of ineffective assistance." Utah R. App. P. 23B(a). "The motion will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective." *Id.* Generally, "[t]he motion must be filed before or at the time of the filing of the appellant's brief." *Id.*

Motion to Supplement the Record

A party may also move to supplement the record.

If anything material to either party is misstated or is omitted from the record by error, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in the Brief of Appellant, the parties by stipulation, the trial court, or the appellate court . . . may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted.

Utah R. App. P. 11(h).

Motion for Emergency Relief

When an expedited ruling on a motion is needed, a party may seek emergency relief. Utah R. App. P. 23C(a). Emergency relief means "any relief sought within a time period shorter than specified by otherwise applicable rules." *Id.* The requirements for filing such motions are set out in Rule 23C of the Utah Rules of Appellate Procedure.

Utah Court of Appeals' Motion for Summary Disposition

After the docketing statement is filed, the Utah Court of Appeals may move sua sponte for summary disposition. Utah R. App. P. 10(a)(2). Like the parties, the Utah Court of Appeals may move to dismiss the matter for lack of jurisdiction. *Id.* But the Utah Court of Appeals may also move to summarily affirm "if it plainly appears that no substantial question is presented." *Id.* While the Utah Court of Appeals may also "summarily reverse in cases of manifest error," *id.*, such reversals rarely occur.

The Utah Court of Appeals often moves for summary disposition. And when the Court files such a motion, it indicates the appellant or petitioner has little chance of prevailing.

During the review period, the Utah Court of Appeals moved for summary disposition in 801 matters – about 17% of the matters on its docket. About 80% of the time, the court then resolved the matter

by summary disposition. As noted above, resolution by summary disposition generally means the court dismissed the matter for lack of jurisdiction or summarily affirmed the ruling below.

A party may, of course, respond to the Utah Court of Appeals' motion and argue that summary disposition is not warranted. But arguments in opposition are rarely persuasive.

During the review period, responses were filed in many of the matters in which the Utah Court of Appeals moved for summary disposition. But the Court withdrew its motion or deferred its decision on the issue only eighty-nine times – a withdrawal/deferral rate of 11%. In other words, about 11% of the time, the jurisdictional defect was cured or an issue was identified that warranted further proceedings.

Step 7: Default Dismissal or Dispositive Order

Many matters filed in the Utah Court of Appeals are, early in the process, dismissed due to default or decided by dispositive order.

During the review period, roughly 10% of the Utah Court of Appeals' caseload was dismissed due to default or summarily decided by order during the initial phase of adjudication – before a briefing schedule was set. Resolution by order early in the proceeding indicates the case was adjudicated against the petitioner or appellant, without granting the relief sought.

Initial Phase of Adjudication – Summary

Much of the Utah Court of Appeals' docket is thus resolved during the initial phase of adjudication – by mediation, voluntary dismissal, summary disposition, or default dismissal.

STEP-BY-STEP PROCESS: BRIEFING, ORAL ARGUMENT, AND DECISION

Once the initial adjudicatory phase is complete, matters still pending in the Utah Court of Appeals will generally proceed to full briefing. Upon receipt of the record below, the Utah Court of Appeals will issue a briefing schedule. After all briefing is complete, the matter will be assigned to a panel of judges for disposition. The matter will also be set for oral argument, if warranted. A three-judge panel will then issue its ruling, often in a published opinion. At any time prior to resolution, however, matters that warrant review and disposition by the Utah Supreme Court may be recalled by or certified to that court. Each step in this process will be addressed in part two of this guide, to be published in the next issue of the *Utah Bar Journal*.

Strong & Hanni Law Firm Welcomes Nine New Attorneys

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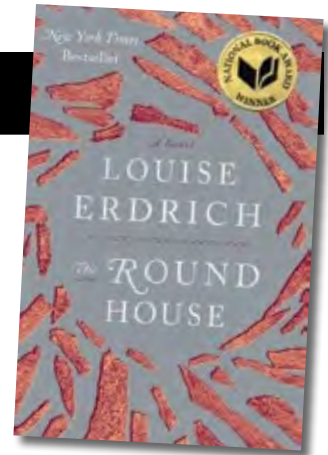
Strong & Hanni is pleased to announce that nine attorneys have chosen to join the firm. We are delighted to welcome these talented attorneys.

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The Round House

by Louise Erdrich

Reviewed by Scotti Hill



Jurisdiction is among the first legal doctrines instilled in the minds of eager 1Ls. While many recall the difference between personal and subject matter jurisdiction, the issue of indigenous sovereignty has puzzled American law students and is often given short shrift in legal coursework due to its relative complexity and fraught history.

The work of novelist Louise Erdrich investigates the contradictions at the core of indigenous identity in the modern United States – how individuals can be both First Nation and legal outsiders in the relatively modern conception of states and branches of government. Although published ten years ago, her 2012 novel *The Round House* feels prescient due to the series of recent legal developments in the arena of indigenous sovereignty, including the United States

Supreme Court's landmark ruling that affirmed the jurisdiction of the Major Crimes Act to the Muscogee (Creek) Nation. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Erdrich is a prolific writer of many novels, short stories, poetry, and children's books. As the daughter of a German American father and an Ojibwa mother, Erdrich's works often incorporate themes of colonialism, indigenous identity, and the navigation of grief. Hailing from Wahpeton, North Dakota, Erdrich's novels evidence her strong familial and ancestral affiliation to the Ojibwa tribe of the northern Midwest.

In addition to landing on the *New York Times* Bestseller list, she won the Pulitzer Prize for her 2020 novel *The Night Watchman*, and the National Book Award for *The Round House*, a compelling examination of the legal obstacles at the core of indigenous tribal sovereignty and the ensuing trauma such impediments cause for one family.

The novel centers on the narrative of Ojibwa teenager Joe Coutts as he navigates a profound tragedy within his own family – his mother's horrific rape and beating at the hands of someone within their tight-knit tribal community. The narrative, set on a reservation in North Dakota, recounts Coutts' difficulty reconciling the gruesome act – and his mother's subsequent mental decline – with the lessons imparted from his father, a tribal court judge. In particular, the issue of justice is among the novel's recurring themes, rendered complicated by the fact that the perpetrator remains at large, and the attack occurs outside of tribal jurisdiction.

The attack happens in a round house, a circular structure used in Ojibwa ritual, one that symbolizes the cyclical nature of time and a sacred connection to the earth. One fact gives rise to a spiraling effect at the core of the

novel and the young Coutts' pursuit of justice: Whether the act of discarding the mother outside of the round house after the attack renders the assailant subject to tribal criminal jurisdiction. The novel emphasizes with haunting clarity the trivial nature of such a boundary. Indeed, the narrative shows that the placement of one's own body against one's will, battered and grievously broken, results in irreparable emotional, physical, and legal harm.

SCOTTI HILL (she/her) is Ethics Counsel and Director of Professional Development at the Utah State Bar.



The Round House

by Louise Erdrich

Publisher: Harper Perennial (2012)

Pages: 317

Available in hardcover or paperback

The family tragedy at the core of the novel is emblematic of the epidemic of missing and murdered indigenous women in North America, the true scale of which is only recently receiving the sort of mainstream journalistic attention it deserves. Indeed, Erdrich's narrative highlights the ways in which tribal jurisdiction – not to mention racial and gender disparities – exacerbate this problem.

It is this fact that compels not just the legally minded among us, but all who read it. Just how may a non-indigenous individual evade prosecution for a horrific crime by mere virtue of a centuries-long jurisdictional quagmire?

Of course, the issue of indigenous sovereignty is complicated by a history of monumental Supreme Court decisions drastically reducing the scope of tribal territory and jurisdictional autonomy, in addition to sweeping federal statutory changes over the past century. The seminal Dawes Act of 1887 enabled the Executive Branch to empower the federal division of tribal landholdings, and the ensuing infrastructure abolished previously established land titles, sovereign governments, and treaties in favor of land allotments that more closely aligned with the creation of new

territories and states. The Major Crimes Act of 1885 enumerates the criminal acts that fall under federal jurisdiction if committed by a Native American on tribal territory, expanding the federal jurisdiction codified in the earlier General Crimes Act by considering federal jurisdiction appropriate for criminal acts perpetrated between Native Americans.

Erdrich's other novels address issues of legal relevance, including *Future Home of the Living God* (2017), a dystopian thriller in which a young woman aims to protect herself and her unborn child from a new law that forces women to surrender their children to the state. In addition, *The Night Watchmen* (2020) concerns the termination of tribal rights through Congressional legislation in the mid-twentieth century.

In *The Round House*, we discover (at the same time as Erdrich's protagonist) the identity of the criminal assailant, ushering in a wave of dismay after the novel's tense buildup to this climactic moment. The novel artfully encapsulates how the pain afflicting one person can reverberate across an entire community, a startling reminder of the tangible impacts underlying the statutory and legal doctrines we often neglect to fully consider.

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Legal Research Doesn't Have to Break the Bank: Free and Low-Cost Research Avenues

by Victoria Carlton and Annalee Hickman Pierson

The internet has millions of pages of resources and has changed the world of research, legal research included. LexisNexis began providing online limited legal resources as early as 1973 and its first World Wide Web database in 1994. In 1996, Thomson Corporation acquired West Publishing Company and launched westlaw.com. While law students mostly depend on only LexisNexis or Westlaw for legal research, lawyers in legal practice use dozens of additional websites to gain legal information. This Article covers some of those websites, with an emphasis on resources that are either free or low-cost, including Fastcase, Casetext, Google Scholar, Cornell's Legal Information Institute, Law Insider, Utah Courts' self-help resources, the law libraries at Brigham Young University and the University of Utah, and the Utah State Law Library.

Fastcase

Fastcase is a legal research tool that the Utah State Bar provides to its members for free. Fastcase, which recently merged with the legal research database Casemaker, features a robust database of federal and state statutes and cases. This free legal resource also includes access to law review articles and some secondary sources and treatises as a part of its collaboration with HeinOnline and Full Court Press. Fastcase includes its own version of a citator known as Authority Check and includes a heat map illustrating how a case has been cited. Fastcase can be accessed through the member portal on the Utah Bar website.

Casetext

An up-and-coming low-cost alternative to Westlaw and Lexis is Casetext. This is a legal research database and includes state and federal case law, statutes, and regulations. The citator for Casetext is SmartCite and, similar to other citators, uses flags to

indicate whether the law is good, bad, relies on an overruled case, or calls for caution. Casetext has also introduced CARA A.I., an artificial intelligence tool, where attorneys can upload pleadings and memoranda, and CARA A.I. tailors the results to cases and laws that are more relevant to the facts and issues. This legal resource can be found online at casetext.com.

Google Scholar

An often-overlooked legal resource is Google Scholar. Google has been in the case database arena for quite some time and provides a seamless and intuitive search engine, albeit its interface has not changed in years. Unfortunately, Google Scholar does not include a citator but does provide the options to conduct your own citation verification through the "Cited by" and "How cited" tabs, which allow the researcher to determine how a case has been cited. Google Scholar also does not include statutes in its database; for statutes, use the Utah Legislature's free website to search and access the Utah Code, and use the federal government's free website to search and access the U.S. Code. But for a free resource for case law, Google Scholar is a good place for free legal research. To access, go to scholar.google.com and select the option for "Case law" under the search bar.

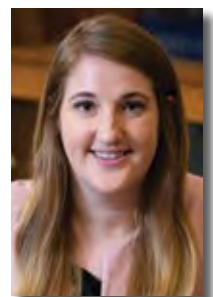
Cornell's Legal Information Institute

Cornell's Legal Information Institute is a nonprofit, public service of Cornell Law School. This legal research platform proclaims free access to state and federal constitutions, statutes, and regulations. It also includes the notes, history, and amendments for statutes. Cornell's legal research platform is available at law.cornell.edu.

VICTORIA CARLTON is an associate attorney at Snow Jensen & Reece in St. George, Utah, and her practice focuses on commercial and business litigation and local government representation.



ANNALEE HICKMAN PIERSON is the Head of Reference and Faculty Services at the Howard W. Hunter Law Library at Brigham Young University and is a legal research professor to 1Ls at BYU Law.



Law Insider

Law Insider is a contract database and provides resources to lawyers in the process of drafting contractual agreements and includes forms, clause examples for contracts, and defined terms. It is free up to a certain number of searches per day but does require a subscription for more in-depth research. Disclaimer: The use of Law Insider for contracts and clauses should be done in conjunction with another legal research database to confirm that certain clauses, defined terms, and other resources in this database are compliant with state and federal law.

Utah Courts' Self-Help Resources

The Utah Courts' website is likely the most useful court website in the country, not only for practitioners but also for everyday Utah citizens that find themselves entangled with Utah law. The courts' Self-Help Resources are individual webpages devoted to providing legal overviews of different areas of Utah law. These self-help resources cover topics such as divorce, child support, small claims, garnishment, protective orders, stalking injunctions, guardianships, expungements, among others. The most useful part of these self-help resource pages is the inclusion of links to forms, statutes, and applicable rules. At the very least, the courts' website is a good place to start when researching Utah law. The courts' website also includes free access to all appellate opinions, model jury instructions, and procedural rules.

Law Libraries at Brigham Young University and University of Utah

The law libraries at Brigham Young University and the University of Utah offer various resources for free to Utah Bar members. At both law libraries, Utah attorneys can access HeinOnline, Xchange, ProQuest, Lexis Digital Library, and the law libraries' respective print collections, which include treatises, legal encyclopedias, old Utah CLE materials, general self-help law books, and older versions of the Utah State Code. Utah attorneys can also check out circulating materials at both libraries. At Brigham Young University, a public Westlaw subscription can be accessed, as well as CDs for Utah Bar CLE self-study credits; at the University of Utah, a public Lexis subscription can be accessed, as well as Utah Legal Forms (through Gale). Remotely through Brigham Young University, attorneys can access Lexis Digital Library and some Utah Court briefs can be searched and downloaded from the law library's website, and attorneys can request scanned portions (that are copyright compliant) of the print materials in the law library. Remotely through the University of Utah, attorneys can access Utah Bar CLE self-study credits and several decades of older versions of the Utah Code to download.

Utah State Law Library

Lastly, the Utah State Law Library located in the Matheson Courthouse is open to the public and provides a wide array of resources that are free to use in-person and online. Some of these resources include access to its public Westlaw subscription, HeinOnline, Utah's Online Public Library (for newspaper and magazine articles, as long as you have an active Utah library card), Federal Depository Library, Utah Government Digital Library (which gives public access to digitally created Utah government publications and archives information from Utah government websites), and the law library's print collection. The State Law Library maintains a collection of more than 58,000 print volumes, which includes older versions of the Utah State Code, constitution, territorial laws, appellate briefs, and other items. The law library also includes a document delivery service, regardless of your location, and can also provide documents via e-mail. More information about the law library is available at utcourts.gov/lawlibrary.

Overall, these various free and low-cost resources may meet many of your legal research needs. One important aspect, though, to remember about these free and low-cost legal research resources is that you should appreciate them for what they are – free and low-cost. They will not be as robust or easy to use as Lexis or Westlaw, but they won't break the bank.

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When (and How) to Tell Your Boss They Are Being Unethical

by Clark S. Gardner (with supervision by Keith A. Call)

My supervisor, Keith Call, grew up as the youngest of eight children, including seven boys. There were many times when Keith had to choose between being an accessory to a rule violation and reporting the conduct to parental authorities. Being the accessory was often the easier choice. That choice usually came with some type of benefit, even if only short-term, and no one wanted to be labeled a tattletell.

Young lawyers can sometimes face similar choices. We all know we are required to faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Utah Supreme Court. This is just as true for a first-year lawyer as it is for a seasoned lawyer. It is also true even when a subordinate lawyer is acting at the direction of another person.

Utah Rule of Professional Conduct 5.2(a) makes this clear. It states, “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”

Is there any leeway for a subordinate lawyer? Can a brand-new lawyer really be subject to discipline for violating an ethics rule when they were only following the direction of their boss, or another senior attorney in their firm? The answer to this question is, predictably, “It depends.”

Rule 5.2(b) provides that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s *reasonable resolution* of

a question of professional duty.” (emphasis added). The comment adds, “Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules.” Rule 5.2(b) cmt. 1.

In short, subordinate lawyers are expected to be aware of and follow the Rules of Professional Conduct. In situations where an ethical decision is not black and white, a subordinate lawyer *may* find some cover in following the supervising lawyer’s “reasonable” interpretation and application of the rule. That said, subordinate lawyers should not blindly follow the directions of those senior to them. Subordinate lawyers have been extensively trained in the Rules of Professional Conduct and, because of that, are responsible to independently evaluate ethical dilemmas and determine whether the Rules are being followed.

So, what should a subordinate lawyer do when asked by a supervising or other attorney to do something they perceive to be unethical? Like Keith’s childhood choices, these situations can be difficult because, on the one hand, young lawyers want to stay employed, receive a paycheck, have good relations with their superiors, and not be labeled as a troublemaker. On the other hand, if the action would indeed amount to a rule violation, it could implicate a lawyer’s good standing before the Bar, something that can have severe long-term consequences. See Andrew J. Seger, *Marching Orders: When to Tell Your Boss “No,”* FLA BAR J., Feb. 2013, at 34.

CLARK S. GARDNER is an associate at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



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



Here are three things subordinate lawyers can (and should) do when faced with ethical dilemmas such as those we've described here.

1. In most situations, disagreements about ethical dilemmas can be solved simply by having a conversation. *See id.* The subordinate lawyer should take the time to study the applicable rule, including case law and commentary about the rule. Then, the subordinate lawyer should confidently ask their supervisor to explain the reasoning for their decision in light of the applicable rule. The subordinate lawyer should not be afraid to ask questions designed to challenge the supervisor's explanation. Any good supervisor appreciates an associate who is willing to reasonably challenge decisions and strategies. On the flip side, supervising attorneys should take the time to explain decisions to their subordinates and should be open to learning from someone younger or less experienced.
2. Subordinate lawyers can reach out to the Utah Bar Ethics Hotline, which can be reached at ethicshotline@utahbar.org. This is a great resource that will keep lawyers' questions confidential. *See id.*

3. If the subordinate lawyer still feels like they are being asked to participate as accessories to a rule violation, they should ask for help from another trusted third-party. *See id.* Ideally, that would be another senior lawyer in the firm. If that is not available, the subordinate lawyer would do well to seek advice from a trusted lawyer outside the firm. In doing so, the subordinate lawyer should be careful to avoid disclosing any privileged or otherwise confidential information.

As a child, Keith learned that "my brother made me do it" was not a good defense. It is not a good defense to a lawyer's ethical violations, either. If you are a subordinate lawyer and find yourself in a sticky ethical situation, don't just assume you'll be free of trouble simply because you're relying on your supervisor's direction. Talk openly to your supervisor about the issue and use the resources available to you. And, finally, be confident that your training and education have prepared you to make good decisions!

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

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We redefine what is possible and shape the future. Together. Everywhere.
We do this every day by connecting the power of our people, our clients and our communities

The Utah State Bar's New Professional Development Office to Expand Resources for Licensees

by Scotti Hill

The Utah State Bar is committed to helping Utah's lawyers and Licensed Paralegal Practitioners (LPPs) be the best practitioners they can be. We offer a number of services and vendor benefits that help lawyers comply with the Rules of Professional Conduct, keep current with their areas of law, use technology to improve client service, and member benefits that make running a law practice easier, more efficient, and affordable. In order to better serve practitioners, the Bar has created a Professional Development Office to improve delivery of the practice services we currently offer and to develop new services and resources. I am pleased that I will be Ethics Counsel and Director of Professional Development, and I look forward to delivering practice management services and programs to Utah's lawyers and LPPs.

[T]he Bar has a created a Professional Development Office to improve delivery of the practice services we currently offer and to develop new services and resources.

Since 2019, I have been part of the General Counsel's Office, and my duties have involved answering inquiries to the Ethics Hotline. Since I began, the Bar has answered over 600 calls and emails from Bar members, providing informal ethics advice to Utah lawyers and LPPs on a wide range of issues.

Currently, the Ethics Hotline offers insight on a lawyer or LPPs prospective conduct under the Rules of Professional Conduct during any given business day. The Bar, like many other jurisdictions, would benefit from the creation of a designated position to oversee ethics guidance, as well as a variety of other resources ranging from business development, law office management, technology assistance, and practice insight. I have overseen the Bar's Ethics Hotline since its transition from the Office of Professional Conduct (OPC) and have discovered the

remarkable potential of this service to expand even further. In this regard, I am thrilled to be entering the role of Ethics Counsel and Director of Professional Development.

The expansion of the Ethics Hotline led to another exciting development, the creation of a Professional Development Office, a comprehensive service with information and insight on how to commence, manage, and maintain a legal practice, as well as

preparing for retirement or transition out of the practice of law. In addition, the General Counsel Office's collaboration with the Wellness Committee on a comprehensive CLE relating to catastrophic event preparedness inspired the creation of a whole suite of resources for those encountering sudden life changes.

Surveying the offerings of various state bars has been enlightening and a catalyst for implementing similar offerings here in Utah. Among the great ideas I've encountered are Nevada's "Handle-Bar" interactive website with comprehensive resources for all stages of legal practice, Arizona's ethics rules with citation to corresponding ethics opinions, and the New York Bar Association's Ethics Podcast, to name a few!

SCOTTI HILL (she/her) is Ethics Counsel and Director of Professional Development at the Utah State Bar.



In the coming year, the Utah State Bar will incorporate a comprehensive practice management suite onto our new website, with information such as:

- Links to the Utah Secretary of State/business registration site for setting up a law practice
- IOLTA information and FAQs
- Checklists and guides for starting a law practice
- Guide to staffing and hiring
- Guide to advertising your law practice
- Solo practice tool kit
- Easier access to Ethics Advisory Opinions, Ethics FAQs

- Links to products, services, and discounted rates including to practice management software
- Ethics articles and resources for a variety of topics
- Catastrophic event preparation and succession planning checklists, guides, and sample forms
- Working with the Bar's CLE department to devise new and timely ethics CLEs in addition to those already offered by OPC

In my time overseeing the Ethics Hotline, I have crafted a comprehensive Ethics FAQ as well as coordinated with our Ethics Advisory Opinion Committee to improve the archive of Ethics Advisory Opinions. I look forward to hearing your feedback as we work to improve our offerings and connect you with even more resources in the coming years.



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Michael Johnson is the current chair of the firm's Bankruptcy and Creditor's Rights section. His practice is concentrated in bankruptcy, corporate reorganizations, creditor's rights and commercial, and bankruptcy litigation. He joined Ray Quinney & Nebeker in 2009. Scan to read more about Michael Johnson's practice:



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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the May 26, 2022 meeting held at the Law & Justice Center in Salt Lake City and on Zoom.

- The Commission approved the 2022–2023 budget.
- The Commission approved reimbursement for the Western States Bar Conference.
- The Commission named Laura Gray the Lawyer of the Year.
- The Commission named Judge Laura Scott the Judge of the Year.
- The Commission named the Business Law Section the Section of the Year.
- The Commission named the Licensed Paralegal Practitioner Committee as the Committee of the Year.
- The Commission selected Debra Nelson and Noella Sudbury for special service awards.

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/meetings-utah-state-bar-commission/>.

Annual Online Licensing

The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at <https://services.utahbar.org> was sent on June 6th. **Online renewals and fees must be submitted by July 1st and will be late August 1st. Your license will be suspended unless the online renewal is completed and payment received by September 1st.** Upon completion of the online renewal process, you will receive a licensing confirmation email.

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

2022 Fall Forum Awards

Nominations will be accepted until **Friday, September 24** for awards to be presented at the 2022 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/award-nominations> to submit your entry.



Utah State Bar®

Summer Convention Awards

The following awards will be presented at the
Utah State Bar's Summer Convention in San Diego:



Laura Milliken Gray

Lawyer of the Year



The Hon. Laura Scott

Judge of the Year



Debra Nelson

Special Service Award



Noella Sudbury

Special Service Award



Richard D. Burbidge

Lifetime Service Award

Business Law Section

Section of the Year

**Licensed Paralegal
Practitioner Committee**

Committee of the Year



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Thank you for your support of this once-in-a-generation campaign and joining us in the fight for equal access to justice for everyone!

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Utah Legislature
Utah State Bar

George S. & Dolores Doré Eccles Foundation
Utah State Bar Family Law Section

David L. & Janet Deisley
Kanter Family Foundation
Wheels of Justice
Gary G. Sackett & Toni Marie Sutliff
Ira Rubinfeld
Utah Bar Foundation

Support from the legal community enables Utah Legal Services, the Disability Law Center, and Legal Aid Society of Salt Lake to address clients’ most basic needs: ensuring safety from violence, ending discrimination, stabilizing families, helping vulnerable populations such as the elderly and people with disabilities, and fostering self-sufficiency.

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Celebrating Fifty Years of Active Utah State Bar Membership

During a luncheon on May 26, 2022, the Utah State Bar honored the following attorneys for their fifty years of service to the community and the profession:

Mr. Robert Adkins	Mr. Gerald M. Conder	Mr. J. Keith Henderson	Mr. John Parsons
Mr. Frank Allen	Mr. Craig Cook	Mr. R. Dennis Ickes	Mr. Earl Peck
Mr. David Anderson	Mr. W. Kent Corry	Mr. David Irvine	Mr. Wayne Petty
Mr. Brent Armstrong	Mr. D. Jay Curtis	Mr. John Kennedy	Mr. Walter Plumb
Mr. John Ashton	Mr. Michael Doezie	Mr. David Knowlton	Mr. Richard Rappaport
Mr. Gary Atkin	Mr. William Evans	Mr. James Kruse	Mr. William Reagan
Mr. Stephen Austin	Mr. Stephen Farr	Mr. Michael Lowe	Mr. Lee Rudd
Mr. John Bates	Mr. Darwin Fisher	Mr. Larry Lunt	Mr. E. Scott Savage
Mr. J. Thomas Bowen	Mr. D. Jay Gamble	Hon. Michael Lyon	Mr. Steven Snarr
Mr. Herschel Bullen	Mr. Brent Giauque	Mr. Gayle McKeachnie	Mr. Rodney Snow
Mr. Leonard Burningham	Mr. Dennis Gladwell	Mr. Steven McMurray	Mr. Arthur Swindle
Mr. Blaine Butler	Hon. Pamela Greenwood	Mr. Robert Neeley	Mr. C. Jeffrey Thompson
Mr. J. Craig Carman	Mr. Stephen Harmsen	Mr. W. Durrell Nielsen, II	Mr. Allen Young
Mr. Nick Colessides	Mr. Lowell Hawkes	Mr. Clayton Parr	



Bar President Heather Thuet with some of the 50 year honorees.

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

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Lindsey Brandt
Kate Burckle
Dave Duncan
Kit Erickson
Athelia Graham
Michael Harrison
Jenny Hoppie
Brandon Merrill
Sandi Ness
John Seegrist
Linda F. Smith
Babata Sonnenberg
Brittany Urness
Nancy VanSlooten
Rachel Whipple

Private Guardian ad Litem

Delavan Dickson
Laura Hansen
Allison Librett
Elizabeth Lisonbee
Keil Myers
Jessica Read

Pro Bono Appointments

Tanner Clagett
Bill Heder
Kent Scott
Kevin Tanner
Jaime Topham

Pro Se Debt Collection Calendar

Miriam Allred
Greg Anjewierden
Mark Baer
Pamela Beatse
Brian Burnett
Keenan Carroll
Qiwei Chen
Anna Christiansen
Ted Cundick
Marcus Degen
Hannah Ector
Leslie Francis
Scotti Hill
Andrew Lajoie
Zack Lindley
Amy McDonald
Brian Rothschild
George Sutton
Carla Swensen-Haslem
Candace Waters
Austin Westenberg
*with special thanks to
Kirton McConkie and

Parsons Behle & Latimer
for their pro bono efforts
on this calendar.

Pro Se Family Law Calendar

Jacob Arijanto
Brad Carr
Brent Chipman
Mike Ferguson
Samantha Frazier
Jason Fuller
Russell Gray
Brent Hall
Sierra Hansen
David Hatch
Dani Hawkes
Danny Heaps
Tana Horton
Mark LaRocco
Chris Martinez
Kayla Quam
Stewart Ralphs
Tamara Rasch
Spencer Ricks
Douglas Stowell
Michael Thornock
Sheri Throop
Micah William Scholes
Mark Wiser
Scott Wiser

Pro Se Immediate Occupancy Calendar

Joel Ban
Pamela Beatse
Keenan Carroll
Jesse Davis
Marcus Degen
Lauren Difrancesco
Kit Erickson
Leslie Francis
Brent Huff
Matt Nepute
Lauren Scholnick
Nancy Sylvester
Jordan Westgate

SUBA Talk to a Lawyer Legal Clinic

Adam Caldwell
Travis Christiansen
Bill Frazier
Maureen Minson
James Purcell
Lewis Reece

Timpanogos Legal Center

Mackenzie Armstrong
Amirali Barker
Jonathan Grover
Sol M Huamain
Abi McEuen
Keil Meyers
Aubrey Staples
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Donna Drown
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Tana Horton
Jeremy Jones
Linzi Labrum
Alema Leota
Elijah Nielson
Melissa Parache
Jessica Read – mentor
Shawn Smith
Richard Stacey
Jordan Westgate

Utah Bar's Virtual Legal Clinic

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Ryan Anderson
Josh Bates
Jonathan Bench
Jonathan Benson
Dan Black
Mike Black
Anna Christiansen
Adam Clark
Jill Coil
Kimberly Coleman
Jonathan Cooper
Robert Coursey
Jessica Couser
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Matthew Earl
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Rebecca Evans
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Aaron Olsen
Chase Olsen
Jacob Ong
Ellen Ostrow
McKay Ozuna
Steven Park
Clifford Parkinson
Alex Paschal
Katherine Pepin
Cecilee Price-Huish
Stanford Purser
Jessica Read
Brian Rothschild
Chris Sanders
Alison Satterlee
Kent Scott
Thomas Seiler
Luke Shaw
Kimberly Sherwin
Emily Sopp
Farrah Spencer
Liana Spendlove
Brandon Stone
Charles Stormont
Mike Studebaker
George Sutton
Jeff Tuttle
Alex Vandiver
Jason Velez
Kregg Wallace
Joseph West

Wills for Heroes

Kristal Bowman-Carter
Zippy Ford
Lauren Forsyth
Nacia Franco
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Kristie Miller
Mindi Mordue
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Attorney Discipline

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

PRIVATE PROBATION

On January 31, 2022, the Honorable Douglas Hogan entered an Order of Discipline: Probation against an attorney for violating Rule 1.15(d) (Safekeeping Property) and Rule 3.4(c) (Fairness to Opposing Party and Counsel) of the Rules of Professional Conduct.

In summary:

The attorney's partner and Attorney represented a client (Client) in a divorce action against the opposing party. The court in the divorce action issued an order that neither party sell, transfer, or otherwise dispose of any assets or incur further debt. The order also required any party who had taken, sold or disposed of any assets provide an accounting of the disposition to the other. Client sent an email to Attorney stating that they were prepared to take money from their retirement fund to pay for legal fees if the divorce proceeded to trial. Attorney responded to Client stating that court had ordered the parties not to take money out of their accounts but that they might be able to take a loan against the

funds with court approval. Client emailed Attorney indicating they would use retirement funds for attorney fees if they were going to trial. Attorney emailed Client asking if they had started the process of taking funds out of the retirement account.

At some point, Client withdrew money from the retirement account and informed Attorney of this. Attorney instructed Client to sign the retirement fund check over to the law firm and they would put it in their trust account because they did not want it to hit Client's bank account. Attorney's partner sent an email to Client informing him that they would set up a trust account for the retirement fund money where it would stay until it was used at trial. Attorney's partner stated the money should not hit the Client's account anywhere and also told Client that they would keep the retirement funds in their trust account for safekeeping. Attorney's partner did not hold the funds in trust but used the funds for legal fees and to pay Client's obligations. Client told Attorney that they would bring in the retirement money and asked Attorney if they

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could receive some money as cash back. After consulting with partner, Attorney told Client that they would have cash waiting when they came in the office. The opposing party was not informed by partner nor Attorney of the withdrawal from the retirement account.

Mitigating Circumstances:

Attorney admitted violation of Rule 3.4(c) immediately at the beginning of trial; remorse; delay between the alleged violations and trial through no fault of the parties; inexperience in the practice of law; more than enough assets in the estate to cover the amount of money used for fees; absence of prior record of discipline.

ADMONITION

On February 18, 2022, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.2(c) (Scope of Representation) and Rule 1.7(a) (Conflict of Interest: Current Clients) of the Rules of Professional Conduct.

In summary:

An attorney and their law firm (Firm) represented a professional on various matters related to the professional's practice. The Firm also represented a University which was a significant client of the Firm. The attorney represented both the professional and the University in a matter where there was a significant risk that the representation of the professional and/or the University would be materially limited by the representation of the other client. The attorney continued with the representation despite the potential conflict and without obtaining informed consent, confirmed in writing, of either client.

The attorney represented the professional on a limited-scope representation without obtaining informed consent. Although the attorney stated that Firm represented University, he did not provide an engagement letter or retainer specifically limiting the representation clarifying his scope of his representation of the professional. The limitation on the representation was not made fully apparent to the professional until more than two years after the representation began.

Mitigating Circumstances:

Lack of prior record of discipline; reputation and good character; substantial length in the practice of law.

ADMONITION

On April 19, 2022, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.5(c) (Fees) of the Rules of Professional Conduct.

In summary:

A client retained an attorney to represent the client in a substantial personal injury case, entering into a contingent fee contract. Part of the contingent fee agreement provided that the attorney would receive a fee for his services only if the attorney was successful in obtaining a recovery through negotiation, verdict or other legal means. Costs and expenses were to be advanced by attorney and approved by client prior to being incurred.

The attorney told the client that litigation financing was necessary in order to advance the client's case and the funds were required to pay experts to work on the client's case. The attorney and the client met with a representative from a litigation financing company, terms were discussed and a litigation funding agreement was signed. The attorney took the client to the client's bank and assisted the client in depositing a portion of the funds into the client's account. The client was not given any more information regarding the litigation financing funds, including information on what costs the funds were being applied, who was being paid, if the attorney received funds as an attorney fee, or in which account the balance of the funds were being kept. The client and attorney never executed a written amendment to the contingent fee contract.

The client retained new counsel to represent the client in the matter. New counsel eventually received a simplistic handwritten ledger from attorney showing payment to client and attorney and another attorney who was assisting on the matter.

The client passed away before the client's personal injury case could be prosecuted to a conclusion.

PROBATION

On January 26, 2022, the Honorable Todd M. Shaughnessy, Third Judicial District Court, entered an order of discipline against Kevin C. Sullivan, placing him on probation for a period of twenty-four months based on Mr. Sullivan's violation of Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Sullivan followed another vehicle too close and was involved in an accident that caused property damage. Mr. Sullivan left the scene of the accident. In another incident the same day, Mr. Sullivan drove the wrong way on an off-ramp and hit another vehicle. Mr. Sullivan attempted to get into the other vehicle and drive away. Mr. Sullivan's blood alcohol level was above the legal limit.

Mr. Sullivan pled guilty to one count of driving under the influence of alcohol and/or drugs, a class A misdemeanor and one count of attempted theft, a class A misdemeanor.

Mr. Sullivan pled guilty to accident involving property damage, a Class B misdemeanor.

Mitigating circumstances:

Absence of a prior record of discipline; absence of a dishonest or selfish motive; personal problems; timely good faith effort to make restitution or to rectify the consequences of the misconduct; full and free disclosures to the disciplinary authority prior to the discovery of the misconduct; and remorse.

SUSPENSION

On March 15, 2022, the Honorable Jennifer Valencia, Second Judicial District, entered an Order of Suspension against Adam S. Hensley, suspending his license to practice law for a period of three years. The court determined that Mr. Hensley violated Rule 1.15(d) (Safekeeping Property) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Hensley was affiliated with a law firm and although he did not sign an employment agreement, he was provided with an outline that listed the parameters of the fee and expense structure. Mr. Hensley verbally agreed to pay the firm a percentage of gross fees on cases he originated.

A client entered into a contract for attorney services with Mr.

Hensley and the firm for a personal injury matter. Mr. Hensley negotiated the client's matter and sometimes used firm letterhead for correspondence. The insurance company sent correspondence to the attention of the firm. Mr. Hensley negotiated a settlement of the claim, one for a bodily injury settlement and one for underinsured motorist coverage.

A partner of the firm discovered Mr. Hensley's scanned client file for the client on the firm's network server. The file contained two releases from two insurance companies. Neither the firm trust nor operating accounts contained any record of a payment for the client. Another partner of the firm contacted one of the insurance companies who confirmed it had settled the client's case and that the settlement check had been cashed. A copy of the cleared settlement check showed the check was made payable to the client, the firm, and Mr. Hensley. The back of the check appeared to have been signed by Mr. Hensley and another firm partner. The firm partner reviewed the signature on the back of the check and did not recognize it as his signature and had no knowledge of how it ended up on the check but is certain he did not personally sign the check. The check was deposited into the client-trust account for Mr. Hensley's professional limited liability company. The client received the full amount to which the client was entitled.

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The firm identified thirty-seven clients they believe Mr. Hensley hid from the firm and/or failed to disclose payments to the firm.

In a second matter, a client retained Mr. Hensley to represent her to resolve contractual issues regarding a mini mall, and paid a retainer for his services. A complaint was filed against the client and Mr. Hensley filed an answer on behalf of the client. The client retained new counsel to represent her in the matter. The client contacted Mr. Hensley and requested an accounting of everything he had done for her on the case. New counsel contacted Mr. Hensley and requested a copy of the client's file and an accounting for the legal services Mr. Hensley provided. Mr. Hensley mailed a copy of the client's file but did not provide an accounting.

RESIGNATION WITH DISCIPLINE PENDING

On March 1, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Steven M. Dubreuil for violation of Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

This case involves two matters.

A client retained Mr. Dubreuil for representation in a justice court criminal matter. Mr. Dubreuil, but not the client, attended the pretrial hearing and a date for a bench trial was set. The client informed Mr. Dubreuil that he would be traveling out of state and was informed by Mr. Dubreuil that it would not be a problem. The client did not appear at the bench trial and was tried in absentia and found guilty. Mr. Dubreuil contacted the client and told him he needed to hurry back for a court date but did not inform him that he had already been found guilty. At the change of plea/sentencing hearing Mr. Dubreuil told the client to be quiet and not say anything because Mr. Dubreuil would appeal.

Mr. Dubreuil appealed the decision to the district court. Neither Mr. Dubreuil nor the client appeared at the appeal hearing. The case was remanded to the justice court. Mr. Dubreuil did not notify the client of the appeal ruling. A remand hearing was held and neither Mr. Dubreuil nor the client attended the hearing. A bench warrant was issued for the client for his failure to appear. A warrant hearing was held and neither Mr. Dubreuil nor the client appeared at the hearing and the bench warrant remained in place. The client claims he could not contact Mr. Dubreuil during this time period and Mr. Dubreuil admits he tried to ignore the client.

Some time later, Mr. Dubreuil contacted the client to ask if he wanted him to finish the case. Mr. Dubreuil indicated he would

request a disposition hearing and that it should be finished within two to three weeks. Mr. Dubreuil texted the client and indicated he was working on the case and found out the judge issued a warrant and explained he needed to get the warrant recalled. Mr. Dubreuil texted the client a number of available court dates and the client chose one. The day before the purported hearing, the client contacted Mr. Dubreuil via text. Mr. Dubreuil replied and indicated that he had called the court and they reissued a warrant, set a new court for the next month and Mr. Dubreuil would see if he could get the warrant recalled. No hearing was scheduled for the client's case during that month.

Prior to a court scheduled hearing, Mr. Dubreuil told the client that there was still a warrant for his arrest and advised the client that he should not appear. Mr. Dubreuil attended the hearing on the client's behalf but the bench warrant remained in place. The client retained new counsel. With the assistance of new counsel, the bench warrant was recalled and the case was closed shortly thereafter.

In the second matter, Mr. Dubreuil was charged with two counts of Retail Theft, a Class B Misdemeanor. Mr. Dubreuil pled guilty to both charges and the court granted a motion for the pleas to be held in abeyance. The charges were dismissed with prejudice. Later, a notice of order to show cause was issued after Mr. Dubreuil failed to pay his fine as ordered. The orders to show cause were cancelled after Mr. Dubreuil's fines were paid and the cases were closed.

RESIGNATION WITH DISCIPLINE PENDING

On March 1, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Rhett G. Lunceford for violation of Rule 1.3 (Diligence) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary, in one matter a client retained Mr. Lunceford to represent her in a medical malpractice matter in 2010. Mr. Lunceford told the client that she had a good case, that he would have the medical records reviewed, and that her deposition would be taken before the insurance company would settle with her. Mr. Lunceford obtained the client's medical records shortly after he was retained.

About two years later, the client contacted Mr. Lunceford requesting a status update, indicating that it had been about a year since she had any contact or follow up from him. Mr. Lunceford informed the client that he was preparing documentation to present the case to the court and would follow up with her. In May of 2014, Mr. Lunceford told the client that an independent medical evaluation would be scheduled. No evaluation was ever scheduled. Mr. Lunceford told the client that a deposition was scheduled twice and cancelled, when in fact a deposition was never scheduled.

The client contacted Mr. Lunceford and/or his office many times for several years to request an update on the progress of her case but received no response from Mr. Lunceford. In 2016, Mr. Lunceford told the client they were looking for an expert. In seven years, Mr. Lunceford did nothing to determine the validity of the claims, nor did he have the records reviewed by any experts.

Mr. Lunceford told the client that the statute of limitations for her case was seven years. The client later discovered from another attorney who reviewed the case that the statute of limitations had run and that a case was never filed on her behalf by Mr. Lunceford.

In a second matter, a client retained Mr. Lunceford in 2006 to represent him in a medical malpractice case from an injury that occurred in 2005. Mr. Lunceford told the client he had a strong case and he would be going to California to hire an expert to review the records. Mr. Lunceford never hired an expert to review the records.

After obtaining some relief through an administrative process, Mr. Lunceford told the client that he would file a medical malpractice action in federal court. Mr. Lunceford led the client

to believe that something had been filed in federal court and he was seeking a hearing. Mr. Lunceford had not filed anything in federal court and a hearing had not been requested.

Over a period of several years, the client asked about the status of his case. Mr. Lunceford told the client that he was working on it. Mr. Lunceford told the client that a court date was scheduled in 2017. A few days prior to the court date, Mr. Lunceford told the client that the expert witness for the opposing party had a medical emergency so the court date was continued. The court date was never scheduled. Mr. Lunceford fabricated this information. Mr. Lunceford then told the client the court date had been rescheduled. Mr. Lunceford met with the client and the client's wife the day before the new purported court date to prepare them. During the meeting, Mr. Lunceford told the client and his wife that he had received notice from the court clerk that opposing counsel had died and as a result the court date was continued. The client's wife contacted the court and discovered there was no scheduled court date.

Mr. Lunceford failed to file the malpractice case on behalf of the client within the statute of limitations. The client lost his claim due to Mr. Lunceford's failure to file.

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Understanding the CLE Cycle

CLE Compliance is Currently Changing from a Two-Year Reporting Period to an Annual Reporting Period



Two Year CLE Reporting Period –

These lawyers will comply with the old MCLE Rules and their final two-year CLE reporting period.

July 1, 2020 – June 30, 2022 CLE Reporting Period – the CLE requirement is 24 hours of accredited CLE, to include 2 hours of legal ethics and 1 hour of professionalism and civility. **The traditional live credit requirement has been suspended for this reporting period.** Lawyers will have through June 30, 2022 to complete required CLE hours without paying late filing fees and through July 31, 2022 to file Certificate of Compliance reports without paying late filing fees.

PLEASE NOTE: Lawyers that comply with the July 1, 2020 – June 30, 2022 reporting period will be required to change from a two-year CLE reporting period to an annual CLE reporting period.

Your next CLE Reporting Period will be: July 1, 2022 – June 30, 2023 – the CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE or verified e-CLE. The remaining hours may include self-study or live CLE.

Annual CLE Reporting Period –

These lawyers will comply with the new MCLE Rules and the annual CLE reporting period.

July 1, 2021– June 30, 2022 CLE Reporting Period – the CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. **The traditional live credit requirement has been suspended for this reporting period.** Lawyers will have through June 30, 2022 to complete required CLE hours without paying late filing fees and through July 31, 2022 to file Certificate of Compliance reports without paying late filing fees.

Your next CLE Reporting Period will be: July 1, 2022 – June 30, 2023 – the CLE requirement is 12 hours of accredited CLE, to include 1 hour of legal ethics and 1 hour of professionalism and civility. At least 6 hours must be live, which may include in-person, remote group CLE or verified e-CLE. The remaining hours may include self-study or live CLE.

Young Lawyers Division: Year in Retrospect

by Grant Miller

The Young Lawyers Division (YLD) continues to be a force for good. During my tenure as YLD president this last year, I was earnestly impressed by the generosity, compassion, and indefatigable efforts of Utah's young lawyers. Their volunteerism allowed our public service projects to endure and expand during the pandemic era. YLD committed significant resources to the community, supporting high school debate, providing estate planning clinics for first responders, organizing legal assistance for military veterans, supporting law school interns, and even assisting in a prom for unsheltered youth.

Last autumn, our Debate Committee sponsored the "Young Lawyers High School Debate Tournament" with the help of our co-chairs Leilani Whitmer and Karly Walton. The tournament was held in a virtual setting where young lawyers judged high school debate rounds. Our Debate Committee was also able to sponsor several of these students with scholarships for summer debate camp so they can pursue development of their skills in critical thinking and verbal argument.

Last year, our Wills for Heroes Committee returned to in-person estate planning clinics for first responders. The committee's co-chairs Candace Waters and Blaine Hansen, with the assistance of Jennifer Hunter and the Paralegal Division, deftly navigated Wills for Heroes through four in-person events, despite the difficult vicissitudes of the pandemic, and partnered with the J. Reuben Clark Law School to host a two-day event bolstered by thirty-nine attorney volunteers. Wills For Heroes also held clinics in Bountiful last March and Park City last May with the help of about twenty attorney volunteers and just as many volunteer paralegals. In all, Wills for Heroes provided a will, living will, and healthcare directive for over 100 police officers and firefighters.

YLD has also maintained its service to our military veterans with the ongoing pro bono services offered through our Veterans Clinic. The Veterans Clinic proceeded in a virtual environment which enabled it to provide legal advice to military veterans all over the state. Veterans Clinic chair Joe Rupp was selected to receive

YLD's 2022 Young Lawyer of the Year award for his ongoing efforts with providing this valuable service to our veterans.

A new addition to YLD this year was the creation of the YLD Summer Intern Committee, which was established to help mentor law student interns as they begin to apply their legal training to practice. This committee, co-chaired by Sarah Laybourne and Kyra Woods, awarded four scholarships to help law students. The awards went to Megan Adler and Breeze Parker from J. Reuben Clark Law School as well as Corinne Doerner and Jena Mathews-Gonzalez from the S.J. Quinney College of Law.

An event we were eagerly excited to bring back was the Unsheltered Youth Prom at the VOA youth center. The prom was established with the help of Kate Conyers several years ago but had been suspended for the last two years due to the pandemic. The prom was open to all unsheltered youth staying at the VOA, featured free suits and dresses for the attendees, a banquet, and a photo booth truck, and was complete with a DJ and an exuberant dance floor. Led by committee chair Sam Dugan, YLD volunteers dedicated an extraordinary amount of time preparing for the event and were joined by Judge Laura Scott (Third District Court), Judge Michele Christiansen Forster (Utah Court of Appeals), and now Justice Diana Hagen (Utah Supreme Court), who graciously volunteered their time preparing the banquet.

In all, I am very proud of all that YLD was able to accomplish this last year. I'm eager to see the new leadership of YLD continue our tradition of service and taking our community involvement and public interest work to new heights.

GRANT MILLER is a trial attorney at the Salt Lake Legal Defender Association and is the Immediate Past President of YLD.





2022 Paralegal of the Year: Congratulations Brita Larsen!

by Greg Wayment

On Friday, May 20, 2022, the Paralegal Division of the Utah State Bar (the Division) and the Utah Paralegal Association held the Annual Paralegal Day celebration. Judge Elizabeth A. Hruby-Mills was the keynote speaker and spoke about "Solving Conflicts in Court: Civility, Communication, and Ethical Trends." The Division would like to heartily thank all those who organized and hosted this event. We'd especially like to thank Carli Castanares, CLE Events Manager, and David Clark, IT Manager at the Bar, for their support.

One of the highlights of this event is the opportunity to recognize individuals who have achieved their national certification through NALA. This year ten individuals were recognized for obtaining a Certified Paralegal designation: Susan Astle, Paula Brewer, Tammy Cousey, Nellie Doornbos, Denise George, Elizabeth Jameson, Molly Jordan, Julianne Katherman, Ashley Sevy, and Zachary Vance. In addition, five individuals were recognized for obtaining an Advanced Certified Paralegal designation: Krystal Day, Cindy Disraeli, Jenny McBride, Zirena McRaine, and Sona Schmidt-Harris. Well done!

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

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

The hard-working individuals on the 2022 selection committee included: Judge Todd Shaughnessy, Christopher Von Maack, Jennifer Fraser Parrish, Shalise McKinlay, and Karen McCall. We are pleased to announce that the winner of the 2022 Utah Distinguished Paralegal of the Year Award is Brita Larsen.



Brita's legal experience spans three decades and covers a range of practice areas. She is a detail-oriented professional with superb research, writing, and technology skills. Moreover, she has a proven ability to manage litigation matters (large or small) from discovery through trial.

Brita's experience knows no boundaries. On behalf of the International Academy of Trial Lawyers, she accompanied George Haley, one of Utah's preeminent trial litigators, to Belfast and Dublin to present to Barristers on the effective use of presentation materials in the courtroom. The presentation was well attended and well received. Several of George's contacts still talk about the presentation.

Judges have acknowledged Brita's work as well. In a preliminary trial in Cincinnati, Ohio, the honorable S. Arthur Spiegel complimented Brita for her work in running the trial presentation. The trial team

won on behalf of the client, and Brita's work was instrumental in securing that win.

Prior to joining Holland & Hart, Brita was a Senior Paralegal at Holme Roberts & Owen, where she worked with litigators and environmental attorneys on a variety of matters. For more than fifteen years, Brita also worked directly with in-house counsel in connection with discontinued operations of a large entertainment company, mainly dealing with Superfund sites across the country.

Brita received her Paralegal Certificate from Weber State University in June 2002. She formerly served on the board of the Egyptian Theatre in Park City.

In recognition of Brita's dedication to the paralegal profession and her outstanding involvement with the community, we are honored to recognize her as the 2022 Utah Paralegal of the Year. Congratulations, Brita Larsen!

The Paralegal Division would also like to especially thank Judge Todd Shaughnessy, Christopher Von Maack, Jennifer Fraser Parrish, Shalise McKinlay, and Karen McCall for their work on the Paralegal of the Year Selection Committee. We would also like to thank Charles Cobbins, all the attorneys at Holland & Hart, Romaine Marshall, and Ellen Ostrow for their support of Brita.

From James Barnett, Managing Partner of Holland & Hart Salt Lake City:

There are no limits to the ways in which Brita is worthy of this recognition. She is held in the highest of esteem, not only at Holland & Hart, but within the legal community in Utah and beyond.

I can unequivocally say, she is at the highest tier of litigation paralegals in terms of her skill, judgment, and professionalism. She frequently outworks the attorneys on the case and the other professionals. She goes above and beyond.

With more than three decades of serving the legal community, Brita is a trusted team member of Holland & Hart's commercial litigation, labor and employment, and environmental and natural resources teams. She excels in case management, e-discovery, database management, project management, research, investigative reporting, mediation-arbitration, trial presentation, timelines and organizational charts, expert discovery, cite checking... the list goes on and on.

I can say with confidence that not only I but all the attorneys at Holland & Hart trust Brita implicitly. Every litigator in our firm

wants to have Brita on their team when there is an important hearing or trial coming up. If there's a lot of evidence, or there are complex needs at trial, you know that Brita can deliver – and she has time and time again.

Brita mentors both young attorneys and other paralegals and she regularly advocates behind the scenes for other professionals. She encourages people to recognize and show their value and advocate for themselves.



Simply stated, Brita represents the gold standard for professionals within the legal community. She embodies the finest qualities that make our paraprofessional bar one of the best in the country. Brita, congratulations on your well-earned and well-deserved recognition.

From Brita:

I want to thank the Paralegal Division of the Utah State Bar and the Utah Paralegal Association for this incredible honor. I'm deeply honored to be counted amongst you in this profession. I want to thank Holland & Hart, and the attorneys and staff who took the time to put my nomination forward. I truly work with wonderful people and I'm grateful to call them my colleagues, but more importantly my friends. I have such a wonderful work family and I know you all appreciate your work families.

I also want to thank my husband Rick for all his support, and his patience and understanding when I'm a little bit cranky (or a lot cranky). I'm sure you all will agree with me that family support is truly important in our profession, and it makes our profession so much easier. I'm very lucky to have the best in my corner so thank you. Again, I want to thank you for this wonderful honor.



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This solicitation will be posted for 3 weeks, closing on the 13th of July at 2pm.



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