

Utah Bar.® JOURNAL



Volume 35 No. 5
Sep/Oct 2022



Shorter Name. Same Great Results.

The Firm has changed its name to Cutt, Kendell & Olson ("CKO"). But the results have never been better. CKO is pleased to announce that 2022 has been its most successful year since the firm started handling catastrophic injury cases over 22 years ago. CKO's 2022 results (thus far) include:

\$92 MILLION
RECOVERED

59
CASES CLOSED

\$7.54 MILLION
JURY VERDICT

CKO works with other lawyers, accepting referrals and co-counsel arrangements, in tort, insurance and professional malpractice cases. Due to CKO's reputations and track record, the vast majority of cases handled by CKO are referred or co-counseled.



Contact us if you'd like to discuss a case.

215 State St Suite 900, Salt Lake City, UT 84111 | 801-901-3470
WWW.CKOLAW.COM

BAR JOURNAL EDITORIAL BOARD

Editor-in-Chief

Alisha Giles

Departments Editor

Ryan Beckstrom

Southern Utah Correspondent

Stephen Dent

Paralegal Representative

Greg Wayment

Managing Editor

Andrea Valenti Arthur

Utah Law Developments Editor

Victoria Carlton

Editors Emeritus

William D. Holyoak

Judge Catherine E. Roberts (Ret.)

Bar Staff Liaison

Christine Critchley

Articles Editors

Victoria Luman

Jacqueline Carlton

LaShel Shaw

Jessame Jensen

Erin Burke

Judicial Advisor

Judge Gregory K. Orme

Copy Editors

Hal Armstrong

Paul Justensen

Nicole Lagemann

Editor at Large

Todd Zagorec

Young Lawyer Representative

Scotti Hill

Advertising/Design Manager

Laniece Roberts

MISSION & VISION OF THE BAR:

The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.

We envision a just legal system that is understood, valued, and accessible to all.

Cover Photo

Sunset Sail at Sand Hollow by Utah State Bar member Chrystal Mancuso-Smith

CHRYSTAL MANCUSO-SMITH is a partner at Kimball Anderson where she maintains a broad civil litigation practice, including personal injury, and is proud to serve as a Bar Commissioner for the Third Division. Asked about her cover photo, Chrystal said it, "Captured the perfect ending to a camping trip with my son and husband that included scuba diving, wind surfing, and, of course, s'mores."



HOW TO SUBMIT A POTENTIAL COVER PHOTO

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs by e-mail .jpg attachment to barjournal@utahbar.org, along with a description of where the photographs were taken. Photo prints or photos on compact disk can be sent to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.



Like the Utah Bar Journal on Facebook at www.facebook.com/UtahBarJournal.

Table of Contents

Letter to the Editor	8
President's Message Using the Bar to Make Life Easier by Kristin K. Woods	11
Views from the Bench Utah's New Rule Providing for Water Law Case Assignments to Judges Who Have Been Educated About Water Law by The Honorable Kate Appleby	14
Article Reflections on Independent Clearing House Part Two: The Clawback Cases by Ronald W. Goss	16
Utah Law Developments "He's going to be all right" – Privileges, Evidence, and Candor in Provider-Patient Communications by Taylor Kordsiemon & Austin Westerberg	24
Utah Law Developments Appellate Highlights by Rodney R. Parker, Dani Cepernich, Robert Cummings, Nathanael Mitchell, Adam Pace, and Andrew Roth	31
Article A Practitioner's Guide to the Utah Court of Appeals: Jurisdiction, Procedure, and Outcome by Carol Funk	34
Article The Law Firm and the Monastery: Five Lessons on Living with Change by Michael Patrick O'Brien	46
Southern Utah/Book Review The Hallows by Victor Methos Reviewed by Jay Winward	49
Utah State Bar Services Life-Altering Events: Prepare Now to Protect Your Practice, Clients, and Family by R. Craig Johnson Contributions by Scotti Hill, Martha Knudson, Linda Webster, and Peter Webster	51
Focus on Ethics & Civility Informal Legal Advice by Keith A. Call	56
State Bar News	58
CLE Calendar	68
Classified Ads	69

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others: \$30; single copies, \$5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Statements or opinions expressed by contributors are those of the authors and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. Publication of advertisements is not to be considered an endorsement of the product or service advertised.

Copyright © 2022 by the Utah State Bar. All rights reserved.



DEWSNUP • KING • OLSEN • WOREL
HAVAS • MORTENSEN • MILNE

ATTORNEYS AT LAW

Est. 1990

Experienced. Tenacious. Resourceful.



Let us work with you to enhance your clients' case.

Catastrophic Injury • Medical Malpractice • Product Liability • Aviation Disasters
Personal Injury • Wrongful Death • Oil, Gas, Mining and Construction Accidents

dkowlaw.com

801.533.0400 • 800.404.8520

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

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

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.

EDITING

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

AUTHOR(S)

Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. 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.

PUBLICATION

Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

RESPONSIVE. ACCOMMODATING. UNDERSTANDING.

“ALPS is a fantastic company and one that I very much appreciate our relationship. They are responsive and accommodating and truly understand the meaning of customer service. I would Highly recommend them to any one!”

► Strong & Hanni Law Firm, A Professional Corporation, Salt Lake City, UT

Utah law firms can connect directly with ALPS Insurance Specialist, Larry Vaculik, at lvaculik@alpsinsurance.com or by calling (800) 367-2577.

Learn more about how ALPS can benefit your firm at

www.alpsinsurance.com/utah



4.8 / 5

Endorsed by



THE NATION'S LARGEST DIRECT WRITER OF LAWYERS' MALPRACTICE INSURANCE



Letter to the Editor

Dear Editor:

Today I received the latest issue of the *Bar Journal* and eagerly read Judge Fonnesebeck's article entitled Navigating the Half-Empty/Half Full Dichotomy of Virtual Court Hearings. I very much appreciated her perspective and strongly agreed with her comments. However I believe she overlooked one important benefit of virtual court hearings, access for individuals for disabilities. Many people required to interact with the judicial system experience unique challenges when appearing in person. A virtual option may be able to resolve some of these difficulties. I for one often have a difficult time hearing everything that is being said when I appear in the courtroom because of my hearing loss. The ability to regulate the volume during a virtual hearing has helped this greatly and allowed me to better represent my clients since I can fully understand what is being said.

Another benefit to virtual hearings is the opportunity for victims to exercise their right to be present at hearings, not to mention the ability to appear and give testimony when they are subpoenaed, without endangering their physical safety. Many times I have had to escort a victim out of the courthouse after a hearing because a defendant has attempted to make contact and intimidate a victim who was present. Consequently, I would urge judges to be flexible when considering whether to allow parties to appear remotely for hearings.

A Utah Bar Member in Good Standing

EDITOR'S NOTE: *The Bar Journal does not ordinarily publish anonymous letters to the editor. However, having verified the identity of the writer, the Editorial Board approved the writer's request to remain anonymous, given the circumstances.*

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.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

LAWPAY[®]

AN AFFINIPAY SOLUTION

+

Utah State Bar

Proud Member Benefit Provider

“I love LawPay! I'm not sure why I waited so long to get it set up.

– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.



22% increase in cash flow with online payments



Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA



62% of bills sent online are paid in 24 hours

**PAYMENT
RECEIVED**



YOUR FIRM
LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

**** * 9995

TOTAL: \$1,500.00

VISA



POWERED BY
LAWPAY

eCheck

DISCOVER

PAY ATTORNEY

Get started at

lawpay.com/utahbar
866-730-4140

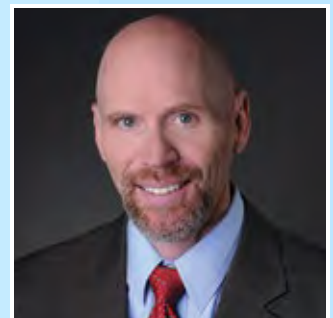
Data based on an average of firm accounts
receivables increases using online billing solutions.

LawPay is a registered agent of Synovus Bank, Columbus,
GA., and Fifth Third Bank, N.A., Cincinnati, OH.

Medical Malpractice Co-Counsel You Can Count On



- Experienced
- Creative
- Knowledgeable
- Respected



RECENT CASE RESOLUTIONS:

\$7.8M: Severe brain injury

\$4M: Ruptured appendix nerve injury

\$1M Policy: Leg amputation from blood clot

\$1M Policy: Delayed breast cancer diagnosis

\$1M Policy: Delayed prostate cancer diagnosis

\$1M Policy: Gynecological surgery scarring

\$1M Policy: Cosmetic surgery wrongful death

\$1M Policy: Bariatric surgery nerve damage

**Give us a call to discuss
how we can help you
with your complex medical
malpractice case!**


G. ERIC NIELSON
AND ASSOCIATES
— A MEDICAL MALPRACTICE LAW FIRM —

4790 Holladay Blvd. • Salt Lake City

801-424-9088 • www.ericnielson.com

Using the Bar to Make Life Easier

by Kristin K. Woods

The struggle is real, my friends. In all aspects of life, it seems that there requires an incredible amount of effort to just get by, and, if you want to excel, you have to tap into that superhuman strength that we all have down deep but is painful to find. It's a lot!

That being said, when we pay money to belong to an organization such as the Utah State Bar, at the very least we expect our organizations to make our lives a little bit easier in certain ways. I pay to go to yoga class so that my teacher can lead me through a series of stretches that make my body feel good. I could do those stretches on my own, but I pay her so that I can just show up, zone out, and have the expert tell me what to do. It's EASIER. I pay for my monthly car wash membership so I can drive through and let teenagers spray my car down, so I don't have to spend the two hours on Saturday scrubbing down the Jeep. It's EASIER for me. I choose to be lazy on my Saturday mornings. And don't ask to see my DoorDash bill. It's EASIER!!! You get the point.

It is true that we do not have a choice to pay our fees to be a member of the Bar. But I put to you that understanding the membership benefits that come with your Utah State Bar membership is a way to make your life easier as an attorney. In addition to the free legal research tools accessible from your lawyer portal and the discounts you receive from certain vendors, the Bar facilitates your additional membership in sections that specialize in the areas of law you practice. If you're not familiar with the official sections of the Bar, see the list in the sidebar on the right.

I, myself, belong to several sections, and I have benefitted greatly from the listservs, CLE offerings, and networking they offer. In addition to sections, you may be interested in getting involved in our local bar organizations. The Utah State Bar advertises and offers you the opportunity to join them when you

SECTIONS OF THE UTAH STATE BAR

Antitrust Law	Family Law
Appellate Practice	Franchise Law
Banking & Finance	Government & Admin
Bankruptcy Law	Health Law
Business Law	Indian Law
Cannabis Law	Intellectual Property
Collection Law	International Law
Community Association	Juvenile Law
Constitutional Law	Labor & Employment
Construction Law	Legal Entrepreneur Law
Corporate Counsel	Limited Scope Representation
Criminal Law	Litigation
Cyberlaw	Military Law
Dispute Resolution	Non-Profit/Charitable Law
Education Law	Real Property
Elder Law	Securities Law
Entertainment, Communication, and Media Law	Senior Attorneys
Environmental Law	Small Firm Practice
Estate Planning Law	Tax Law

DIVISIONS OF THE UTAH STATE BAR

Paralegal Division	Young Lawyers
--------------------	---------------

renew your license. For example, the Southern Utah Bar Association (SUBA) is very active in St. George, and I enjoy the camaraderie that I get from belonging to SUBA. On the following page is a list of local bars you may consider joining.



REGIONAL BARS

Box Elder Bar	Salt Lake County Bar
Cache County Bar	Sixth District Bar
Central Utah Bar	Southern Utah Bar
Davis County Bar	Tooele County Bar
Eastern Utah Bar	Uintah County Bar
Garfield County Bar	Wasatch County Bar
Park City Bar	Weber County Bar

SPECIALTY BARS

Hellenic Bar	Utah Federal Bar
LGBT & Allied Lawyers	Utah Minority Bar Association
Utah Association for Justice	Utah Prosecution Counsel
Utah Criminal Defense Lawyers	Women Lawyers of Utah
Utah Employment Lawyers	

One thing that Utah State Bar Executive Director Elizabeth Wright and I have shared as we look to revamp and reimagine how the Bar serves its members is the fact that the Utah State Bar's website is in drastic need of revision. I am proud to announce that we will soon be rolling out a new website that is much easier to navigate and will be a repository of information, education, and communication to our members. Look for that in the coming weeks!

My friends and colleagues, the struggle may be real. However, if you are not taking advantage of your Bar membership fully, you may be missing out on opportunities to make your life EASIER as an attorney. My goal is to continue to push our organization in a way that prioritizes the support and advocacy for Utah lawyers. And, although we will all have battles to fight day-to-day, one thing that should not be an obstacle is your Bar membership.

Keep up the good work!

In-Person Meetings are Back!

The **UTAH LAW & JUSTICE CENTER** offers meeting space for professional, civic, and community organizations

Customized seating arrangements are available, as well as:

- reasonable rates
- central downtown location
- audio-visual equipment and support
- complete catering
- personal attention
- free, adjacent parking
- registration area

For information and reservations, contact:
Mary Misaka, Law & Justice Center Coordinator
reservations@utahbar.org | (801) 297-7030



STRONG & HANNI ABOVE THE BAR

At Strong & Hanni, our attorneys strive to be above the bar in all that we do... from the way we practice law to how we devote professional time and resources to the way we use our civic influence to ensure inclusion for all.

Our appellate attorneys represent a wide range of clients with a variety of issues, including appeals stemming from large civil trials to small pro bono matters to indigent criminal matters. They are dedicated to ensuring that all clients—no matter the background—receive competent and zealous appellate advocacy. Our attorneys also strive to promote diversity and inclusion in the legal community through their work with the Utah Center for Legal Inclusion, Women Lawyers of Utah, Utah Indigent Defense Commission, and American Inns of Court.

We would love to help you with your appeal in any capacity including consultation during trial, preparation of the briefs, arranging moot courts, or handling the appeal start to finish.



Scarlet R. Smith

ssmith@strongandhanni.com



S. Spencer Brown

sbrown@strongandhanni.com

***We love the law and strive
to be “Above the Bar.”***

801.532.7080 • strongandhanni.com



Utah's New Rule Providing for Water Law Case Assignments to Judges Who Have Been Educated About Water Law

by The Honorable Kate Appleby

The Utah Judicial Council (the Council) in May adopted a rule, effective November 1, establishing district court water judges. *See* Utah Code Jud. Admin. R. 6-104. The new rule provides that the Council will designate “at least three district court judges who volunteer as water judges” and establishes a procedure for assigning certain kinds of water law cases to those judges. Parties in the initial stages of litigation may request such an assignment, and the case will be given to one of the state’s water judges; a request made later in the litigation may be reassigned at the discretion of the judge who already has the case. Judges who volunteer as water judges will either have, or will cultivate, the expertise necessary to adjudicate these often complex and long-in-duration cases with important consequences for the litigants and the state.

Why do water law cases require judges with special training?

Water law cases involve precious public resources, and adjudicating claims to these resources requires understanding not only this complex area of the law, but also water science, management, and technology.

How did this rule originate?

Seeing the need for developing special expertise in the area of water law, the Judicial Council sought to address the challenge quickly and efficiently. The rule is modeled on Utah’s district court tax judges rule, which has long been in place and successfully channels cases to judges who volunteer for this specialized assignment. *See* Utah Code Jud. Admin. R. 6-103. The proposed water judges rule was posted for public comment and adjusted in part based upon comments received.

Does any case involving water automatically qualify for assignment to a water judge?

No. At the beginning of actions filed under Utah Code, Title 73 (titled Water and Irrigation), Chapters 3 and 4 (Appropriation and Determination of Water Rights respectively), parties may request assignment to a water judge, and it will be assigned to one. For already-pending adjudications, such as cases that were initiated before this rule goes into effect, the judge assigned to the case has discretion to grant a motion to reassign the case to a water judge.

Why is the rule limited to actions filed under Chapters 3 and 4?

These chapters involve the largest, most significant types of water law adjudications. With experience, if it becomes apparent that the rule should include other areas for nearly automatic assignment to a water judge, the rule could be amended. Meanwhile, if a case appears to warrant reassignment because it involves complex water law issues not arising under Chapter 3 or 4, a party may request its reassignment to a water judge.

Who decides whether a case that isn’t a Chapter 3 or 4 case will be reassigned?

The supervising water judge – a judge elected by the other water judges – makes this determination based upon the request of one of the parties.

KATE APPLEBY is a Senior Judge of the Utah Court of Appeals. Judge Appleby is also a Convener of Dividing the Waters, a program of the National Judicial College.



What is the role of the supervising water judge?

Aside from deciding whether cases not filed under Chapter 3 or 4 should be reassigned, the supervising water judge has administrative responsibilities such as coordinating the water judges' schedules and making appropriate adjustments to each water judge's case load.

Are three water judges enough to handle the cases?

That's not clear. The designation is voluntary, and the hope is that more than three judges will volunteer. The rule is based on the district court tax judges rule, which also sets a floor of three judges; at present, more than three judges have volunteered as tax judges and more than three judges may well come forward for water judge assignments. Serving as a water judge will interest judges who have or who have had water law cases, and judges interested in learning about water science and working on some of the most challenging issues of our times.

How will the water judges receive training?

The supervising judge, working with the Standing Committee on Judicial Branch Education and the Utah Judicial Institute, will oversee water law education for the water judges. This is likely to include sessions at the annual and district court conferences and perhaps will include training outside of those conferences. Other resources are available through Dividing the Waters, an

affiliate of the National Judicial College dedicated, among other things, to providing educational and networking opportunities for judges with water law cases and on-line courses.

How can someone find out about important district court water decisions?

A water judge who decides a case of first impression shall post the decision on the courts' website. Tax judges already do this. The idea is to make the judges' decisions, and their reasoning, available for the consideration of others.

What are the next steps for this project?

Recruitment of judges willing to serve as water judges is already under way, and training is available for them with additional educational opportunities being planned. Beginning in November, the courts will monitor water law case data to consider whether the new rule could be improved. This evaluation may include seeking feedback from water law stakeholders.

The new rule is an effort to establish a mechanism for assigning certain types of water law cases to judges who have been trained in the law and science of water. In coming months, after some experience, stakeholder observations of their experience will be important to assess how well the rule is working. Meanwhile, the rule will help improve the resolution of these challenging cases.

AMY M. ZHENG, M.D., M.PHIL, CHSE

Experienced Emergency and Urgent Care Expert Witness

- + Board certified in emergency medicine, in active practice
- + Experienced national lecturer and professor
- + Published VA Inspector General reports, resulted in \$53 million for veterans
- + Explains complicated medical concepts in easy to understand terms
- + Winner of the American College of Emergency Physicians teaching award



CONTACT

C: 858-299-5266 | E: amyzhengconsulting@gmail.com | W: amyzhengconsulting.com



Reflections on Independent Clearing House Part Two: The Clawback Cases

by Ronald W. Goss

The collapse of a Ponzi scheme is usually followed by bankruptcy. Trustees are given statutory powers to avoid or “clawback” certain pre-bankruptcy transfers to augment the pool of assets available for distribution to creditors. The primary avoiding powers are the fraudulent transfer and preference provisions of the Bankruptcy Code. Prior to Independent Clearing House, Utah’s largest Ponzi scheme of the 1980s, these powers had rarely been used against innocent investors. The Clearing House case changed all that.

A Short History Of Clawbacks

There are two types of fraudulent transfers, actual and constructive. Actual fraudulent transfers are transfers made with subjective intent to “hinder, delay or defraud” creditors. The law dates from the Statute of 13 Elizabeth (1571). Constructive fraudulent transfers are a more recent development. The statutes replace subjective intent with an objective measurement test. Under current law the test is whether an insolvent debtor receives something of “reasonably equivalent value” in exchange for a transfer.

The modern era of fraudulent transfer law began in 1918 when the Commissioners on Uniform State Laws promulgated the Uniform Fraudulent Conveyance Act (UFCA). The UFCA codified the “better” decisions based on the Statute of 13 Elizabeth. The UFCA also introduced a constructive fraudulent transfer provision, which allowed a creditor to avoid a conveyance by an insolvent debtor unless the debtor received “fair consideration” and the transferee took the conveyance in “good faith.” The good faith concept sought to prevent transferees from knowingly participating in the transferor’s fraud, or, at a minimum, engaging in willful blindness. Twenty-five jurisdictions, including Utah, enacted the UFCA.

In 1938, Congress passed the Chandler Act, which amended the 1898 Bankruptcy Act to, among other things, add a constructive fraudulent transfer provision patterned after the UFCA. *See* 11 U.S.C. § 107(d) (repealed 1978).

The next important development in fraudulent transfer law was the Bankruptcy Reform Act of 1978, commonly known as the Bankruptcy Code (the Code). Like the UFCA and the Chandler Act, the Code contains both actual and constructive fraudulent transfer provisions. Congress substituted “reasonably equivalent value” for “fair consideration” as the measurement test, without significant change in meaning, and shifted the burden of proof of transferee good faith. Trustees are no longer required to prove that a transferee lacked good faith; instead transferees must prove their own good faith as an affirmative defense. *See* 11 U.S.C. § 548(c).

In 1984, the Commission on Uniform State Laws adopted the Uniform Fraudulent Transfer Act (UFTA), designed to conform state law to the Code in most respects. The UFTA provisions parallel those of the Code, often using identical language. Many states, including Utah, replaced the UFCA with the UFTA.

In 2014, the Commission on Uniform State Laws modified UFTA slightly and renamed it the Uniform Voidable Transactions Act (UVTA) to emphasize that the law regulates non-fraudulent actions. In 2017, Utah enacted the UVTA. *See* Utah Code Ann. §§ 25-6-101 to -502.

Bankruptcy trustees have two means to avoid fraudulent transfers. Section 548 of the Code is a true avoiding power. As originally enacted section 548(a) allowed trustees to clawback fraudulent transfers made within one year of the bankruptcy filing. In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act extended the reachback period to two years. *See* 11 U.S.C. § 548(a)(1). Section 544(b) is a borrowing statute that allows

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.



a trustee to step into the shoes of an actual creditor who could have avoided the transfer under nonbankruptcy law. *Id.* § 544(b). To utilize this derivative power trustees must identify a “triggering creditor.” Trustees use section 544(b) in conjunction with the UFTA or UVTA because these statutes provide a longer, four-year reachback. If the triggering creditor is the IRS, trustees can extend reachback to ten years utilizing the collection period under IRC Section 6502(a). *See Mukamal v. Citibank N.A. (In re Kipnis)*, 555 B.R. 877, 878, 880–81 (Bankr. S.D. Fla. 2016).

Another clawback power is the power to avoid preferences, a unique bankruptcy concept introduced in the 1898 Bankruptcy Act. Under the Bankruptcy Act, trustees had to show that the preferred creditor had reasonable cause to believe the debtor was insolvent at the time of payment. The 1978 Bankruptcy Code substantially rewrote preference law. Under the 1978 Code, a preference is a transfer by an insolvent debtor to a creditor within ninety days of bankruptcy (or one year if the creditor is an insider) that enables the creditor to receive a greater percentage of its claim than it would receive if the transfer had not been made and the creditor participated in a Chapter 7 distribution of the debtor’s assets. 11 U.S.C. § 547(b).

The preference statute serves two broad purposes. It discourages creditors from racing to the courthouse to dismember a failing business instead of working with debtors and, to some extent, promotes equal distribution of the debtor’s estate among unsecured creditors. The statute strikes a balance between the nonbankruptcy policy of rewarding diligent creditors and the bankruptcy policy of creditor equality by limiting the reachback period to ninety days before bankruptcy for transfers to general creditors and one year for transfers to insiders.

The Road to Independent Clearing House

In the early 1980s Ponzi clawback law essentially consisted of four decisions. The first was a 1924 preference case under the 1898 Bankruptcy Act against seven investors in Charles Ponzi’s scheme. *Cunningham v. Brown*, 265 U.S. 1, 7–8 (1924). The investors argued that they received their own money. *Id.* at 9. The Supreme Court refused to apply tracing fictions and established the principle that money fraudulently obtained from investors is property of the debtor thus susceptible to preferential disposition. *See id.* at 11–13.

The first profits case was *Eby v. Ashley*, 1 F.2d 971 (4th Cir. 1924), an actual fraudulent transfer action under the 1898

Davis County’s Premier Litigation Law Firm

Experienced Litigators



Thank you for all the referrals!
— Michael K. Hepworth

Personal Injury | Real Estate | Defamation
Contested Divorce | Business | General

801-872-2222 | HepworthLegal.com



Bankruptcy Act. The defendant invested \$3,000 and received payments totaling \$4,576. *Id.* at 972. The statute allowed trustees to clawback fraudulent transfers made within four months of bankruptcy if the bankrupt did not receive a “present fair consideration.” The Fourth Circuit, with virtually no analysis, held that the investor had not given a present fair consideration for his \$1,576 profit. *See id.* at 973.

More than forty years elapsed between *Eby* and the next profits case, *Conroy v. Shott*, 363 F.2d 90 (6th Cir. 1966), an action by a trustee under an Ohio actual fraudulent conveyance statute. The defendant had made loans to a Ponzi operator and received back all his principal plus a return of \$342,900. *Id.* at 91. Under the Ohio law, transferees were required to have knowledge of the transferor’s fraudulent intent. *Id.* The court found that the defendant had constructive knowledge, which satisfied the statute. *Id.* at 93.

The only profits case under a constructive fraudulent transfer statute was *Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980), where the trustee sued investors under a provision of the 1938 Chandler Act. The district court held that payments exceeding an investor’s principal were not made for “fair consideration.” *Id.* at 662. Adequacy of consideration was not an issue in the appeal. The investors’ only argument for reversal was that their

payments were not made with funds of the debtor. *See id.* at 662–63. This was essentially the same argument Ponzi’s investors made in *Cunningham v. Brown*, and it failed for the same reason it failed in that case: the investors were unable to trace their deposits. *Id.* at 663–64. Next came the Clearing House cases.

Merrill v. Allen

Merrill v. Allen (In re Universal Clearing House Co.), 60 B.R. 985 (Bankr. D. Utah 1986), was a constructive fraudulent transfer action to recover commissions paid to the Clearing House sales agents as compensation for recruiting new investors. The issue was one of first impression. The trustee contended that the services provided no value, drawing an analogy from *In re Ponzi*, 15 F.2d 113 (D. Mass. 1926), where Charles Ponzi’s trustee objected to an agent’s claim for unpaid commissions and the court disallowed the claim because the services furthered Ponzi’s fraud and deepened his insolvency. *Id.* at 114.

In the months after filing *Allen*, Ralph Mabey resigned as bankruptcy judge and was succeeded by John Allen; Ron Bagley resigned as trustee and Robert Merrill was appointed successor trustee; and R. Kimball Mosier left Roe & Fowler and the author assumed the legal chores in the Clearing House cases.

The new trustee filed a motion for summary judgment supported by affidavits from the trustee’s accountant and a former sales agent. In an unpublished decision, Judge Allen held that the agents’ services provided no “legally cognizable value” because they furthered the commission of a Ponzi scheme and deepened the debtor’s insolvency. *Merrill v. Allen (In re Universal Clearing House Co.)*, No. 81A-02887, Adv. No. 82PA-0253, 1985 Bankr. LEXIS 6195, at **8–10 (Bankr. D. Utah May 3, 1985).

On appeal, the district court reversed the judgments. *Merrill v. Allen (In re Universal Clearing House Co.)*, 60 B.R. 985, 1002 (Bankr. D. Utah 1986). District Judge David Winder used a different method for valuing services. Agents’ services should be valued based on market value, not their impact on the debtor’s scheme. *Id.* at 1000. He noted that a bad business decision by an officer of a legitimate business would not warrant return of the officer’s salary. *Id.* at 999. The bankruptcy court’s reasoning, he added, could be applied to anyone “who in any way dealt with, worked for, or provided services” that unknowingly contributed to the scheme. *Id.*

Merrill v. Abbott

Merrill v. Abbott (In re Indep. Clearing House Co.), 41 B.R. 985, 994 (Bankr. D. Utah 1984), was a Ponzi clawback action of unprecedented scope. The trustee sued approximately 2,100 investors to clawback payments based on three causes of action: preference; constructive fraudulent transfer; and disgorgement of



Digital Forensics • eDiscovery • Expert Testimony



Scott Tucker
 Certified Digital Forensic Expert
 Call for a free case assessment.

Digital Forensics
 Analysis of forensic artifacts can reveal the who, what, when, where, how, and sometimes even why.

Electronic Discovery
 Data surrounds us: documents, messages, photos, GPS, and more in computers, mobile devices, and the cloud.

Expert Testimony
 Get written and oral testimony from an industry veteran, or for sensitive matters, a confidential consulting expert.

801.999.8171

www.aptegra.com

scott.tucker@aptegra.com

all monies received. As he did in *Allen*, the trustee again moved for summary judgment.

In 1984, there was no generally recognized definition of a Ponzi scheme. Judge Allen began his lengthy opinion by providing one:

A “Ponzi” scheme . . . refers to an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attract additional investors.

Merrill v. Abbott (In re Indep. Clearing House Co.), 41 B.R. 985, 994 n.12 (Bankr. D. Utah 1984), *aff’d in part, rev’d in part sub nom. Merrill v. Dietz (In re Universal Clearing House Co.)*, 62 B.R. 118 (D. Utah 1986). Courts soon picked up on it and the definition continues to be cited.

The first claim was aimed at investor preferences. The only significant dispute was whether the “ordinary course of business” defense under section 547(c)(2) of the Code applied to Ponzi payments. The issue was one of first impression. The ordinary course defense was a creature of the Code with no antecedent under the prior Bankruptcy Act. Judge Allen held that the defense did not apply to Ponzi payments because they are “unusual, extraordinary, and unrelated to any business enterprise” intended to be protected by the defense. *Id.* at 1014–15.

The second claim targeted “net winners,” the eighty or so investors whose payouts exceeded their principal investment. Judge Allen labeled their payments “fictitious profits,” and the term stuck. *Id.* at 1008 (internal quotation marks omitted). He held that investors do not give “reasonably equivalent value” for payments which exceed their original investment, relying primarily on *Eby v. Ashbey*, *Rosenberg v. Collins*, and *Lawless v. Anderson (In re Moore)*, 39 B.R. 571 (Bankr. M.D. Fla. 1984), a Florida bankruptcy case decided three months earlier. *Abbott*, 41 B.R. at 1009. Judge Allen offered no independent analysis, noting only that these cases produced “just and equitable results.” *Id.*

The third claim sought to recover *all* investor payments. The defendants were “net losers”; they received no profits whatsoever, just 3% to 76% of the amount invested. *Id.* at 1005. The trustee sought to achieve exact equality by redistributing all payments. His claim was based on three theories. The first was the bankruptcy court’s general equity powers. Judge Allen gave this short shrift, explaining that equitable powers are limited by the express provisions of the Code. *Id.* The second theory called for recharacterizing

investor payments as unlawful dividends based on the corporate trust fund doctrine. *Id.* at 1007. Judge Allen held that the investors were creditors, not shareholders, and principles of corporate law generally do not apply to Ponzi schemes. *Id.* at 1008. The third theory was that all payments to undertakers were actual fraudulent transfers. *Id.* at 1006. Judge Allen rejected this theory, too, finding the affidavit of the trustee’s accountant insufficient to establish fraudulent intent, adding that even if the fraudulent intent was present the defendants had a complete defense under Section 548(c) because they took their payments for value and in good faith. *Id.* at 1007.

Investors appealed judgments on the trustee’s first and second claims, and the trustee cross-appealed from dismissal of his third claim. The appeals were consolidated and heard by district judges Bruce Jenkins, David Winder, and J. Thomas Greene, sitting *en banc*. On July 23, 1987, the court issued an opinion authored by Judge Jenkins affirming in part and reversing in part the bankruptcy court’s decision. *Merrill v. Abbott (In re Indep. Clearing House Co.)*, 77 B.R. 843, 888 (D. Utah 1987). It was the most sweeping opinion ever written in a Ponzi clawback case.

The district court rejected the bright-line rule that the ordinary course of business defense does not apply to preferences in

CRAIG COBURN

Mediation–Arbitration Services

KNOWLEDGE

Construction
Commercial
Complex Civil
Public Policy

EXPERIENCE

Litigator since 1980
ADR Neutral since 1985

COMMON SENSE

Cuts to the Chase
Resolves Disputes



Richards Brandt

801.531.2000

www.rbm.com

Lenora-Spencer@rbmn.com

Utah ADR Services

801.865.7622

www.utahadrservices.com

mbstrassberg@msn.com

Ponzi cases. The court reasoned that “[j]ust because a debtor does not have a legitimate or ‘ordinary’ business does not mean that transfers he makes in the course of that business may not be made in the ‘ordinary course of business.’” *Id.* at 874.

The district court affirmed judgments against “net winners” clawing back their “fictitious profits.” It characterized the “property” investors gave the Clearing House as “use of . . . money to run a Ponzi scheme,” which had “negative” value. *Id.* at 859. The court found that the investor contracts violated public policy, and therefore payments that fulfill contractual obligations do not satisfy an “antecedent debt.” *Id.* at 858.

The district court agreed with the bankruptcy court that the trustee’s general equity theory lacked merit. The avoiding powers “are conferred only by statute. Without such a statute, the trustee has no avoiding powers.” *Id.* at 855. The court also rejected the corporate trust fund theory, again agreeing with the bankruptcy court that the investors were creditors, not shareholders. *Id.* at 865–66.

The actual fraudulent transfer theory presented a bigger problem for the district court. The trustee’s summary judgment evidence proved that the Clearing House was a Ponzi scheme, and this was sufficient to establish actual intent to defraud. The court reasoned that a Ponzi operator knows the scheme will eventually collapse leaving later investors unpaid, and knowledge to a substantial certainty constitutes intent. *Id.* at 860–61. This left only the “good faith” defense. Under section 548(c) of the Code, a transferee may retain fraudulently transferred property if the transferee took it “for value” and “in good faith.” Investors who receive less than their investment always give “value” for partial repayment. The problem was good faith. The court held that the trustee’s evidence did not support a blanket finding that every investor took every payment in good faith and remanded the case for further findings. *Id.* at 861–62.

The Legacy of the Clearing House Cases

The modern era of Ponzi clawbacks began with the Clearing House. Once a rarity, clawbacks are now virtually automatic in Ponzi cases, and issues first considered in *Merrill v. Allen* and *Merrill v. Abbott* continue to engage courts and litigants.

Sales Agent Commissions

In *Merrill v. Allen*, the Utah bankruptcy and district courts reached totally opposite conclusions on whether unknowing sales agents give reasonably equivalent value for commissions received for attracting new investors to a Ponzi scheme. The bankruptcy court held that soliciting new investors has no legally cognizable value, *Merrill v. Allen (In re Universal*

Clearing House Co.), No. 81A-02887, Adv. No. 82PA-0253, 1985 Bankr. LEXIS 6195, at *10 (Bankr. D. Utah May 3, 1985), and the district court held that the value of services is determined by their market value, not the impact on the debtor’s scheme, *Merrill v. Allen (In re Universal Clearing House Co.)*, 60 B.R. 985, 1000 (D. Utah 1986). The “debtor’s benefit” versus “market value” dichotomy in agent commission cases continues to divide courts. *Compare Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) (services have no value as a matter of law), *with Orlick v. Kozyak (In re Fin. Federated Title & Tr., Inc.)*, 309 F.3d 1325, 1331–33 (11th Cir. 2002) (value of services determined by market value).

The Utah district court itself is divided. Judges Nuffer, Shelby, and Benson have adopted a bright line, no-value-as-a-matter-of-law rule. *See Klein v. Brennan*, No. 2:19-cv-00687-DN-PK, 2021 WL 1531229, at *12 (D. Utah Apr. 19, 2021) (Nuffer, J.); *Georgelas v. Desert Hill Ventures, Inc.*, 510 F. Supp. 3d 1061, 1074–75 (D. Utah 2021) (Shelby, C.J.), *appeal docketed*, No. 21-4036 (10th Cir. Mar. 19, 2021); *Wing v. Dockstader*, No. 2:08 cv 776, 2010 WL 5020959, at *5 (D. Utah Dec. 3, 2010) (Benson, J.), *aff’d on other grounds*, 482 F. App’x 361 (10th Cir. 2012). Judge Parrish, on the other hand, follows Judge Winder’s market-value approach from *Allen*. *See Windham v. Allen*, No. 2:18-cv-00054-JNP, 2020 WL 6743268, at **3–4 (D. Utah Nov. 17, 2020) (Parrish, J.).

The diametrically opposite results are the product of different value methodologies. The no-value-as-a-matter-of-law line of cases are subjective and transaction-specific focusing on the effect the services have on the debtor’s Ponzi scheme. These cases always find that the services have zero or negative value. The other line of cases, beginning with Judge Winder’s *Allen* decision, apply an objective standard using market rates for similar services to legitimate businesses, ignoring the debtor’s particular scheme. Since there is conflict among the circuits, it may take a decision from the Supreme Court to resolve the issue definitively.

The Ordinary Course of Business Defense

In *Merrill v. Abbott*, the Utah bankruptcy and district courts disagreed on whether the ordinary course of business defense applies to Ponzi preferences. Later cases are also divided. Most agree with the Utah bankruptcy court that the ordinary course defense does not apply to payments that further a Ponzi scheme. *See, e.g., Danning v. Bozek (In re Bullion Rsrv. of N. Am.)*, 836 F.2d 1214, 1219 (9th Cir. 1988). The Tenth Circuit adopted a middle position allowing trade creditors, but not investors, to assert the defense. *Sender v. Nancy Elizabeth R. Heggland*

Family Tr. (In re Hedged-Invs. Assocs., Inc.), 48 F.3d 470, 476 (10th Cir. 1995).

Good Faith

When a Ponzi payment is made with intent to defraud creditors (they all are), the “good faith” defense allows an investor to retain the payment by establishing that the investor gave value in good faith. *See* 11 U.S.C. § 548(c). A good-faith transferee who gives less than reasonable equivalence is allowed a reduction in liability to the extent of the value given. When an investor fails to prove up the good faith defense, the investor must disgorge *all* payments received, even the investor’s principal.

“Good faith” is not defined in the Code and scarcely mentioned in the legislative history. *Abbott* was one of the first Ponzi cases to examine the good faith defense, but its analysis was internally inconsistent and is usually ignored. The court described the test objectively using a “mixed anatomical metaphor,” *Jobin v. McKay (In re M & L Bus. Mach. Co.)*, 84 F.3d 1330, 1337–38 (10th Cir. 1996), as “whether the transaction . . . bears the earmarks of an arm’s length bargain,” but elsewhere called good faith a “subjective question,” *Merrill v. Abbott (In re Indep. Clearing House Co.)*, 77 B.R. 843, 862 (D. Utah 1987).

Most courts now hold that the good faith defense is an objective standard based on inquiry notice, not what an investor actually knew. *See, e.g., Jobin*, 84 F.3d at 1338. Courts examine the circumstances surrounding a transfer for “red flags” that would put a reasonable person on inquiry notice that the debtor was making the payment for a fraudulent purpose. Once on inquiry notice, a transferee must conduct a diligent investigation of the facts that put it on notice. If a diligent inquiry would have led to discovery of the fraudulent purpose, a transferee does not take in good faith regardless of the value given.

The inquiry notice standard is difficult to apply, unpredictable, and invites litigation. Trustees can easily identify suspicious circumstances and call them “red flags,” and if an investor does some sort of investigation, it can be challenged for not being thorough.

Ponzi investors rarely, if ever, make *any* investigation before accepting a payment; they just take the money. Investors who fail to conduct a red flag investigation sometimes find relief under the “futility exception.” The exception allows an investor to maintain a good faith defense without an investigation by demonstrating that a diligent investigation would not have uncovered the transferor’s fraud. *See Christian Bros. High Sch.*

Helping attorneys and their clients...for almost four decades.

- A real estate broker who understands all the aspects of an estate sale, from working with court appointed representatives to the myriad of heirs of the deceased. One third of my business is estate sales. Divorce cases don’t scare me and I’m able to get the property sold following court orders and if necessary, testifying before the judge.
- I have the complete team of estate liquidators, from appraisers, cleaners, contractors, and movers for the smallest to the largest homes or condominiums.
- Referrals available of other attorneys that I have worked with in Utah. I own my own firm and am reasonably priced with no hidden transaction fees to your clients. 38 years full time experience and in the top 5% of sales agents in the Salt Lake Board of REALTORS. Also member of the Washington County and Park City Boards of REALTORS.



Babs De Lay, Principal Broker
Urban Utah Homes & Estates

babs@urbanutah.com | 801.201.8824



Endowment v. Bayou No Leverage Fund, LLC (In re Bayou Grp., LLC), 439 B.R. 284, 317 (S.D.N.Y. 2010). The futility exception is only recognized by a few courts, and it was recently rejected by the Texas Supreme Court in a UFTA case. *See Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 126, 133 (Tex. 2019).

The Ponzi Scheme Presumption

Because individuals rarely admit they intended to defraud their creditors, for more than 400 years courts have relied on circumstantial evidence known as “badge[s] of fraud,” fact patterns surrounding a transfer from which fraudulent intent may be inferred. *See Twyne’s Case*, 76 Eng. Rep. 809 (K.B. 1601). Among the badges are lack of consideration; a close relationship between transferor and transferee; pendency or threat of litigation; and retention of possession of the property. The existence of several badges was often held to create a rebuttable presumption of fraudulent intent. Modern law has codified and expanded the number of badges but generally rejects the rebuttable presumption concept. *See* 11 U.S.C. § 548(a)(1)(A). Except in Ponzi scheme cases.

A Ponzi scheme has been described as “one *big* badge of fraud.” *Stoebner v. Ritchie Cap. Mgmt., L.L.C. (In re Polaroid Corp.)*, 472 B.R. 22, 35 (Bankr. D. Minn. 2012). The concept that Ponzi payments are made with intent to defraud creditors was first introduced by the Sixth Circuit in a pre-Code case, *Conroy v. Shott*, 363 F.2d 90, 92 (6th Cir. 1966). But it was Judge Jenkins, in *Merrill v. Abbott*, who elucidated a cogent and persuasive rationale: a Ponzi scheme is doomed from the outset to collapse and leave creditors unpaid; the fraudster must know this will happen; and knowledge to a substantial certainty constitutes intent. Thus, intent to defraud creditors may be inferred from the mere existence of a Ponzi scheme. As Judge Jenkins put it, “no other reasonable inference is possible.” *Merrill v. Abbott (In re Indep. Clearing House Co.)*, 77 B.R. 843, 860 (D. Utah 1987).

Abbott’s “reasonable inference” morphed into the “Ponzi scheme presumption” in which proof that a debtor operated a Ponzi scheme creates a presumption that payments to investors are made with intent to hinder, delay, or defraud creditors. A large majority of federal courts have adopted the presumption. Some courts have expanded it to include non-investor payments. Courts also added a companion presumption of fraudulent intent when a debtor enters a plea agreement and admits to operating a Ponzi scheme. *See, e.g., Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 814 (9th Cir. 2008). The presumptions are powerful weapons in a trustee’s clawback arsenal and nearly impossible to rebut.

The Ponzi scheme presumption has come under criticism, notably by the Minnesota Supreme Court in *Finn v. Alliance Bank*, 860

N.W.2d 638 (Minn. 2015). *Finn* rejected the presumption in UFTA cases because it found no statutory basis or policy justification for circumventing the requirement that fraudulent intent be proved on a transfer-by-transfer basis. *Id.* at 646–48. However, most courts that have considered the issue apply the presumption in UFTA cases. *See, e.g., Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014) (Florida UFTA); *Wing v. Layton*, 957 F. Supp. 2d 1307, 1313–14 (D. Utah 2013) (Utah UFTA). Since the UFTA and UFTA are frequently used by trustees in conjunction with section 544(b) of the Code, and receivers are totally dependent upon state statutes, more litigation is likely.

Fictitious Profits Reconsidered

No aspect of *Merrill v. Abbott* was more widely accepted than the holding that Ponzi investors do not give reasonably equivalent value for “fictitious profits.” The “principal only” or “no interest” rule has been embraced by nearly every federal court that has addressed the issue in the last thirty years. The rule figured prominently in the Madoff case where 90,000 disbursements of fictitious profits totaled \$18.5 billion. *Picard v. Estate of Stanley Chais (In re Bernard L. Madoff Inv. Sec. LLC)*, 445 B.R. 206, 215 (Bankr. S.D.N.Y. 2011). Despite its overwhelming acceptance, close examination of the principal-only rule reveals significant cracks in its foundation.

“Reasonably equivalent value” is only partly defined in the Code. “Reasonably equivalent” is not defined but is interpreted commonsensically to mean “approximately equivalent” or “roughly equivalent.” “Value” is defined in the alternative as either “property” or “satisfaction or securing of a present or antecedent debt of the debtor.” 11 U.S.C. § 548(d)(2)(A).

Under the “property” prong of “value,” *Abbott* arrived at the principal-only rule through the following syllogism: (1) the “property” investors gave the Clearing House was “use of . . . money to run a Ponzi scheme”; (2) such property has “negative” value; (3) therefore, the Clearing House received no “value” in exchange for payments exceeding an investor’s principal. *Merrill v. Abbott (In re Indep. Clearing House Co.)*, 77 B.R. 843, 859 (D. Utah 1987). The flaw in this syllogism is its major premise and strange interpretation of “property.”

“Property” is not defined in the Code, but it is one of the most familiar terms in the law and sufficiently precise to discern Congressional intent. “Property” is a noun meaning something that can be owned, used, and transferred. “Use of money to run a Ponzi scheme” is a verb phrase describing a criminal activity. Courts construe undefined words in statutes according to their plain, ordinary meaning. If we stick to plain meaning, the “property” investors give to Ponzi operators is money.

Judicial valuations of property are normally based on market values. In *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994), the Supreme Court noted that outside the foreclosure context “reasonably equivalent value” has a similar meaning to “fair market value.” Money is a fungible commodity with a viable market. The price of money includes interest, which represents the time value of money, inflation, and the risk of default. See *Till v. SCS Credit Corp.*, 541 U.S. 465, 477, 479 (2004).

Ponzi schemes often promise artificially high, sometimes “eye-popping” interest rates. Investors plainly do not give reasonably equivalent value for excessive returns wholly unrelated to market rates. But when a principal sum is repaid with interest at a market rate, the transfer is not something for nothing. From an objective standpoint, it is a transfer for reasonably equivalent value.

Abbott also arrived at a principal-only rule under the “antecedent debt” prong of “value.” 11 U.S.C. § 548(d)(2)(A). The court reasoned that Ponzi investment contracts are unenforceable as a matter of public policy, and therefore investors’ only claims against Ponzi operators are for restitution of their initial principal investment. *Abbott*, 77 B.R. at 857–58. Each payment to an investor is netted against his principal, and when the payments equal the principal the operator’s debt is satisfied and the investor’s claim extinguished. *Id.* at 857.

The Code defines “claim,” in the broadest possible terms as any “right to payment,” whether the right is contingent, unmatured, or unliquidated, 11 U.S.C. § 101(5)(A), and “debt” as “liability on a claim,” *id.* § 101(12). Under the “conduct theory” a “claim” arises when the debtor takes some action that might lead to liability, even though the claimant has not suffered immediate harm, acted to enforce the claim, or is aware that an injury exists. See *Watson v. Parker (In re Parker)*, 313 F.3d 1267, 1269 (10th Cir. 2002). In Ponzi cases, this is the moment an investor gives money to the perpetrator.

It takes a tremendous leap of logic to go from declaring a Ponzi contract unenforceable to establishing a rule limiting investors’ claims to restitution of their principal. Assuming Ponzi contracts are unenforceable, it does not follow that a judge has free rein to create substantive law defining the nature and extent of investors’ legal claims.

There is no generally applicable federal law of contracts, torts, or unjust enrichment. A settled principle of bankruptcy law known as the “*Butner* doctrine” provides that the substance of claims, including whether a claim exists, its elements, the burden of proof, defenses, and measure of damages are all defined by nonbankruptcy (usually state) law. See *Butner v. United States*, 440 U.S. 48, 54–55 (1979) (right to rents); *Raleigh v. Illinois Dep’t of*

Revenue, 530 U.S. 15, 20 (2000) (burden of proof); *Cohen v. De La Cruz*, 523 U.S. 213, 216–18 (1998) (punitive damages).

Utah law does not cap restitution and fraud damages at return of a claimant’s principal. Restitution damages include interest when the amount of unjust enrichment is ascertainable. *Kimball v. Kimball*, 2009 UT App 233, ¶¶ 41–42, 217 P.3d 733. Under Utah law, fraud plaintiffs may recover consequential damages, including a market rate of return. See *Ong Int’l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 457 (Utah 1993). Punitive damages are also allowed when there is intentional fraud. Utah Code Ann. § 78B-8-201(1)(a).

Ponzi schemes are a species of securities fraud. The Utah Uniform Securities Act imposes liability on those who sell unregistered securities or make untrue statements of material fact or omit to state material facts in connection with sales of securities. *Id.* § 61-1-22(1)(a). Damages include the consideration paid, interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security. *Id.* § 61-1-22(1)(b). Treble damages are also recoverable if the violation was reckless or intentional, always the case in Ponzi schemes. *Id.* § 61-1-22(2)(a).

The *Butner* doctrine stands as a bulwark against judicial meddling with creditors’ nonbankruptcy entitlements. A court violates the *Butner* doctrine when it substitutes a judge-made, claim-limiting rule of decision for the measure of damages defined by state law.

Fraudulent transfer law is not designed to ensure that a debtor’s assets are distributed *pari passu* among equally deserving creditors. The law is only concerned that an insolvent debtor uses its limited assets to satisfy legitimate debts. When state law provides a fraud victim the right to recover compensatory damages, interest, costs, attorney fees, and punitive damages, all make up an investor’s claim and constitute a legitimate debt of the Ponzi operator. Ponzi payments reduce the investor’s tort claim and the operator’s corresponding debt dollar-for-dollar, thus the values exchanged are exactly equivalent. Only after an investor’s tort claims are fully satisfied should Ponzi payments properly be considered “fictitious profits” subject to clawback.

Final Observations

Independent Clearing House was the granddaddy Ponzi scheme of the modern era. The sizable body of clawback law that has built up around Ponzi schemes has its underpinnings in *Merrill v. Allen* and *Merrill v. Abbott*. These decisions originated the concepts and principles of Ponzi clawbacks and established the procedural and substantive framework for determining transferee liability followed in nearly all subsequent cases.

“He’s going to be all right” – Privileges, Evidence, and Candor in Provider-Patient Communications

by Taylor Kordsiemon & Austin Westerberg

In the (criminally underrated) sitcom *Arrested Development*, the character Buster Bluth is rushed to the hospital after a vicious seal attack. The rest of the Bluth family anxiously awaits updates concerning Buster’s condition. Finally, the doctor approaches the family and says, “Buster is going to be all right.” The family sighs with relief and gratitude. The doctor, confused at the family’s positive attitude, continues, “Buster lost his left hand. He’s going to be *all right*.”

It is possible *Arrested Development* exaggerated a bit, but it is no secret that communicating with patients and their family members is one of the most difficult aspects of a physician’s job. One factor inhibiting such communications is physicians’ fear that what they say will be used against them in a subsequent malpractice action. To help alleviate that problem, the Utah Legislature recently enacted the Utah Medical Candor Act, House Bill 344, which is set to have a significant impact on Utah’s healthcare system; how hospitals, doctors, and patients govern themselves in the aftermath of an adverse medical event; and what health care provider communications can enter evidence in subsequent litigation. *See* Utah Code Ann. §§ 78B-3-450 to -454.

The Medical Candor Act (the Act) builds and expands on a body of Utah law intended to facilitate open communication among health care providers and patients by limiting the admissibility of certain medical records in legal proceedings. To understand the Act and how it fits with Utah’s other evidentiary rules, this

article will proceed in several parts. First, it will discuss Utah’s version of what is commonly referred to as an “I’m Sorry” law or “apology” statute. Second, it will discuss Utah’s peer- and care-review privileges and their application. And third, it will describe the Act and how it relates to Utah’s apology statute and the peer- and care-review privileges.

Utah’s Apology Statute

Generally speaking, “I’m Sorry” laws or “apology” statutes refer to evidentiary rules that make expressions of sympathy from a health care provider inadmissible in malpractice actions to prove liability. Utah has not one, but two apology statutes located at Utah Code Section 78B-3-422 and Rule 409 of the Utah Rules of Evidence (because the two provisions are substantively identical, they are hereinafter collectively referred to as “Utah’s apology statute” or the “apology statute”). Utah’s apology statute prohibits admission of the following types of communications from a medical-malpractice defendant for the purpose of proving liability: (1) statements of apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence; and (2) descriptions of the sequence of events relating to the unanticipated outcome of medical care or the significance of events.

Although Utah’s apology statute appears broad at first glance, the Utah Court of Appeals significantly limited its scope in *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037. In that case, the court determined that an “admission of error”

TAYLOR KORDSIEMON is an attorney at Kirton McConkie. His practice includes medical malpractice defense, construction litigation, and commercial litigation.



AUSTIN WESTERBERG is an attorney at Kirton McConkie. His practice includes medical malpractice defense and general civil litigation.



is not inherent in the definition of “apology” and, therefore, is not inadmissible as a statement of apology. *Id.* ¶ 28. The court similarly concluded that admissions of fault are not unambiguously proscribed as descriptions of events or their significance. *Id.*

¶ 29. After analyzing legislative history, the court held that the apology statute cannot exclude admissions of fault from evidence. *Id.* ¶¶ 30–33.

No Utah appellate court has considered the scope of Utah’s apology statute since *Lawrence*, but both the reasoning of *Lawrence* and subsequent events have given rise to questions in its wake.

First, the *Lawrence* court’s cursory conclusion, made without citation to any supporting authority, that descriptions of events or their significance “may or may not include an admission of fault” does little to explain that prong of the apology statute. *See id.* ¶ 29. If an admission of fault cannot meet the definition of a description of the significance of events giving rise to an adverse medical outcome, then it is unclear what sort of statements do fall under that definition.

Second, in reaching its conclusion that an admission of error is not inherent in an apology, the *Lawrence* court relied primarily on a case from the Ohio Court of Appeals holding that the definition of “apology” as used in Ohio’s “I’m Sorry” law did not “include statements of fault.” *See id.* ¶ 28 (citing *Davis v. Wooster Orthopaedics & Sports Med., Inc.*, 952 N.E.2d 1216, 1221 (Ohio Ct. App. 2011)). However, the Ohio Supreme Court has since held that the “plain and ordinary meaning of ‘apology’” includes “a statement that expresses a feeling of regret for an unanticipated outcome of the patient’s medical care and may include an acknowledgement that the patient’s medical care fell below the standard of care.” *Steward v. Vivian*, 91 N.E.3d 716, 721 (Ohio 2017). Therefore, *Davis v. Wooster Orthopaedics & Sports Med., Inc.*, 952 N.E.2d 1216, 1221 (Ohio Ct. App. 2011), has been abrogated on the exact grounds the *Lawrence* court relied on. It remains to be seen whether and to what extent the Ohio Supreme Court’s decision in *Steward v. Vivian*, 91 N.E.3d 716, 721 (Ohio 2017), will undermine or weaken *Lawrence*.

Health care providers would do well to keep *Lawrence* at the forefront of their minds as they interact and communicate with patients or their guardians in the aftermath of an adverse event. Likewise, litigants in medical-malpractice cases would do well to consider both *Lawrence* and the questions surrounding it as they dispute the admissibility of statements from defendant-providers.


Utah’s Peer- and Care-Review Privileges

“Peer review” refers to an internal process in which physicians evaluate the quality of their colleagues’ work to ensure it satisfies the governing standard of care. “Care review” similarly refers to an internal process that retroactively examines potential errors or gaps in any medical care provided. Both peer and care reviews are intended to improve a hospital’s overall quality of care.

The peer- and care-review privileges, on the other hand, maintain confidentiality of information and documents specifically created for use in peer- or care-review proceedings by precluding their discovery and admission in litigation (hereinafter, peer and care review will be collectively referred to as “peer review,” and the peer- and care-review privileges will be collectively referred to as the “peer-review privilege”). “The policy behind the [peer-review] privilege is . . . to protect health care providers who furnish information regarding the quality of health care rendered by any individual or facility, pursuant to such a review.” *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537, 539–40 (Utah 1993). Every state and the District of Columbia has adopted the peer-review privilege in some form or another, although its operation varies throughout the states.

MEDIATION-ARBITRATION

STUART T. WALDRIP, JUDGE (RET.)



- 50+ years resolving disputes; 13 years ADR in Utah
- U of U Law, BYU Law Prof.
- Fellow, American College of Trial Lawyers
- Business, Construction, Professional Negligence, Insurance, P.I., Intellectual Property, Probate, Real Estate & other complex civil matters

IDR INTERMOUNTAIN DISPUTE RESOLUTION, INC.

RESULTS | CLOSURE

WWW.IDR-ADR.COM / WWW.UTAHADRSERVICES.COM

CASE ADMINISTRATOR: MIRIAM STRASBERG

UTAH ADR SERVICES | MBSTRASSBERG@MSN.COM

801-943-3730

Utah is no exception, with its own version of the peer-review privilege codified in the Utah Health Code (the UHC) at Utah Code Sections 26-25-1 through 26-25-5 and in Rule 26 of the Utah Rules of Civil Procedure. As interpreted by the Utah Supreme Court, the UHC and Rule 26 together establish an evidentiary peer-review privilege protecting peer-review materials. *Allred v. Saunders*, 2014 UT 43, ¶¶ 9, 19, 342 P.3d 204. That said, precisely how the UHC and Rule 26 interact with each other is less than obvious.

For example, the plain text of the UHC does not appear to provide a “privilege,” which ordinarily refers to “a peculiar benefit, favor, or advantage, a right not enjoyed by all.” See *Thomas v. Daughters of Utah Pioneers*, 197 P.2d 477, 507 (Utah 1948) (Latimer, J., concurring in part) (cleaned up). Rather, the UHC imposes a duty to keep peer-review materials confidential. Utah Code Section 26-25-3 prohibits admission or discovery of peer-review materials in “any legal proceeding” without exception. Section 26-25-5 takes it a step further by designating unauthorized disclosure of such materials a misdemeanor offense. This raises the question: is the peer-review privilege a “privilege” at all?

The answer lies with the Utah Constitution and Rule 26. Despite the evidentiary prohibition prescribed in the UHC, the primary power to amend the Rules of Evidence and Civil Procedure rests with the Utah Supreme Court, not the legislature. Under Article VIII Section 4 of the Utah Constitution, the legislature may amend the Rules of Evidence only “by joint resolution adopted upon a vote of two-thirds of all members of both houses of the Legislature.” *Allred*, 2014 UT 43, ¶ 3 n.2 (cleaned up). Notably, the legislature did not follow that course in enacting section 26-25-3. *Id.* ¶ 11. And for that reason, a Utah district court held the UHC’s attempt to impose new evidentiary rules violated Utah’s Constitution. *Id.* ¶ 11 (discussing *Jones v. University of Utah Health Science Ctr.*, No. 100419242, 2012 WL 602613 (Utah 3d Dist. Ct. Jan. 13, 2012)).

The legislature never cured that defect in the UHC. Instead, it chose to protect peer-review materials via amendment of Rule 26 (this time following the proper constitutional procedures). See *id.* ¶ 12. One might think that settled the matter – after all, so long as peer-review materials are inadmissible, does it really matter whether that prohibition originates in the UHC or Rule 26?

FREE, Confidential Help is Just a Phone Call Away

STRESS

FAMILY
ISSUES

DEPRESSION

ADDICTION

EMPLOYEE
Blomquist Hale
ASSISTANCE

Salt Lake City: 801-262-9619
Ogden: 801-392-6833
Orem: 801-225-9222
Brigham City: 435-723-1610
Logan 435-752-3241
Other Locations: 800-926-9619
blomquisthale.com



**LAWYERS
HELPING
LAWYERS**

Lawyers Assistance Program

801-579-0404
contact@lawyershelpinglawyers.org
lawyershelpinglawyers.org

The answer, of course, is yes. Because the UHC cannot amend the Rules of Evidence or Civil Procedure, it is effective only insofar as it does not conflict with those rules. And unlike the UHC's imposition of a duty, Rule 26 creates a true privilege:

Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include . . . all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers . . . for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider . . .

See Utah R. Civ. P. 26(b)(2)(ii) (emphasis added). Although not immediately apparent from the language quoted above, another section of Rule 26 confirms that, unlike the UHC's

evidentiary bar, the peer-review privilege created by Rule 26 is subject to waiver because any party claiming the privilege must "make the claim expressly." See *id.* R. 26(b)(9)(A). Thus, failure to expressly claim the peer-review privilege results in a functional waiver of the same. See *Vered v. Tooele Hosp. Corp.*, 2018 UT App 15, ¶ 23 n.5, 414 P.3d 1004.

The peer-review privilege is also subject to waiver as described in Rule 501 of the Utah Rules of Evidence. In *Allred*, the Utah Supreme Court held that Rule 26's peer-review privilege had been incorporated into the Rules of Evidence by Rule 501. See *Allred*, 2014 UT 43, ¶¶ 9, 14. By virtue of its inclusion among the other evidentiary privileges in the Rules of Evidence, the peer-review privilege likewise becomes subject to Rule 510, which provides that waiver may occur through either voluntary disclosure or failure to take reasonable precautions against inadvertent disclosure. See Utah R. Evid. 510(a).

The main takeaway from our discussion thus far should be that despite the strong prohibition against admission and discovery of peer-review materials imposed by the UHC, such materials may be discoverable and admissible if a party fails to assert the



RAY QUINNEY
& NEBEKER

Good People Drive Great Results

APPELLATE PRACTICE SPOTLIGHT

Ray Quinney & Nebeker offers an experienced team of appellate attorneys whose talent, understanding, and experience give clients a clear strategic advantage when entering an appellate proceeding.

Our practitioners provide in-depth understanding of the appellate process, coupled with practical insights and sound judgment, founded on years of experience in federal and state courts of appeals. Our lawyers' collective experience includes numerous federal and state appellate clerkships as well as membership on advisory committees on the rules of civil and appellate procedure. That specialized knowledge is leveraged alongside the firm's vast subject matter expertise to create exceptional advocacy at the appellate level.



CAROL FUNK

Carol Funk serves as Chair of the firm's Appellate Practice and has extensive experience as appellate counsel, including in the Utah Supreme Court, Utah Court of Appeals, and United States Court of Appeals for the Tenth Circuit. Ms. Funk has worked in multiple appellate courts and for a national appellate practice, serves on the Utah Supreme Court's Advisory Committee on the Rules of Appellate Procedure, and has been recognized by her peers as one of Utah's "Legal Elite" in appellate litigation.

— rqn.com
801.532.1500

privilege or otherwise waives it. With that in mind, hospitals and their agents must diligently assert the privilege and protect peer-review materials, lest they inadvertently waive the privilege. To do otherwise could court disaster, as an admission of would-be privileged information evincing flaws or errors in medical care could decimate a malpractice defense.

On the other hand, there may be circumstances where a waiver could work to the advantage of a hospital. For example, consider “sham peer review” litigation. A typical plaintiff in a sham peer review case is a physician alleging that the hospital investigated and disciplined the physician for pretextual, discriminatory, or otherwise unlawful reasons. In such a case, a defendant hospital’s best line of defense may arise from peer-review documents demonstrating the integrity of its peer-review proceedings or serious concerns with the physician’s practice. If admission of such documents were absolutely barred, then a hospital could find it difficult to rebut the physician plaintiff’s allegations of a sham review.

Lastly, it should be noted that Utah’s peer-review privilege and waiver thereof applies only in state court. The Federal Rules of Civil Procedure and Evidence do not provide for a federal peer-review privilege, and the vast majority of federal courts have declined to create one. *See Nilavar v. Mercy Health System-Western Ohio*, 210 F.R.D. 597, 604 (S.D. Ohio 2002) (contrasting the numerous cases holding that there is no federal peer-review privilege with the relatively scant authority holding the opposite). Importantly for our purposes as local practitioners, the federal district courts in Utah have rejected the existence of a federal peer-review privilege, *see P.J. ex rel. Jensen v. Utah*, 247 F.R.D. 664, 671 (D. Utah 2007), and have also declined to enforce Utah’s state-law privilege in federal court, *see United States ex rel. Polukoff v. Sorensen*, No. 2:16-CV-00304-TS-DAO, 2020 WL 5645319, at *3 (D. Utah Sept. 21, 2020).

In sum, Utah’s peer-review privilege is operative only in the state courts. Despite language in the UHC indicating otherwise, the peer-review privilege is subject to waiver under the terms of both Rule 26 of the Utah Rules of Civil Procedure and Rule 510 of the Utah Rules of Evidence. Therefore, hospitals, hospital administrators, physicians, and their counsel must diligently guard and, in most circumstances, aggressively assert the peer-review privilege according to their interests.

The New Kid on the Block: The Utah Medical Candor Act

As alluded to above, the Utah Medical Candor Act was introduced at the 2022 Utah Legislature General Session, with Representative Merrill E. Nelson and Senator Michael S. Kennedy respectively acting as the bill and floor sponsors. The Act enjoyed broad support in both chambers, with the vote count equaling 70 (Yeas) 0 (Nays) 5 (Absent or Not Voting) in the House and 20-4-5 in the Senate. Governor Cox signed the bill on March 14, 2022, and the Act became effective on May 4, 2022.

The Medical Candor Act created five new sections of Utah Code, four of which are relevant to our discussion on health care privileges and evidentiary law.

First, section 78B-3-450 defines the essential terms used in the rest of the Act. For present purposes, the most important terms to understand are the following:

- (1) “Adverse event” means an injury or suspected injury that is associated with a health care process rather than an underlying condition of a patient or a disease.
- (2) “Affected party” means:
 - (a) a patient; and
 - (b) any representative of a patient.
- (3) “Communication” means any written or oral communication created for or during a medical candor process.

See Utah Code Ann. § 78B-3-450(1)–(3).

Second, section 78B-3-451 creates the “medical candor process.” As prescribed in the Act, a health care provider may invite affected parties and other providers involved in the care at issue to participate in a medical candor process that (1) investigates adverse events involving an affected party, (2) communicates to the affected party information discovered during the investigation, (3) communicates to the affected party the provider’s plans to prevent recurrence of the adverse event, and (4) determines whether to offer compensation to the affected party for the adverse event.

Third, section 78B-3-452 provides that, to engage in a medical candor process, a health care provider must provide notice to both the affected party and any other providers involved in the care at issue. Adequate notice to an affected party must include certain conditions to which the affected party must agree. For present

purposes, the most notable condition that must be included in the notice and to which an affected party must agree is the following:

[A]ny communication, material, or information created for or during the medical candor process, including a communication to participate in the medical candor process, is confidential, not discoverable, and inadmissible as evidence in a judicial, administrative, or arbitration proceeding arising out of the adverse event.

Id. § 78B-3-452(2)(e)(i). Remember that “communication,” as used here, includes “any written or oral communication created for or during a medical candor process.” *Id.* § 78B-3-450(3).

And fourth, section 78B-3-454 creates an evidentiary privilege for “[a]ll communications, materials, and information in any form specifically created for or during a medical candor process” and exempts such materials from discovery and precludes their admission in judicial proceedings. *Id.* § 78B-3-454(1). The privilege, however, has its limits and does not extend to (1) medical records generated in the regular course of business, (2) information required to be included in a patient’s medical records by state or federal law, and (3) any communications to an affected party before the affected party agrees to participate in the medical candor process. *Id.* §§ 78B-3-454(2)–(4). In addition, a health care provider may disclose privileged materials to “an agency, company, or organization for the purposes of research, education, patient safety, quality of care, or performance improvement”

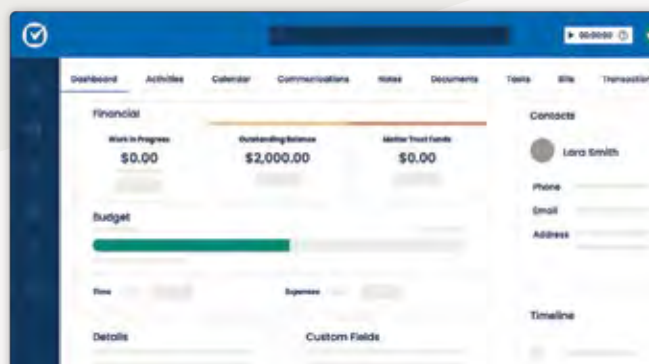
without waiving the privilege. *Id.* § 78B-3-454(9).

Further, unlike the UHC before it, the legislature properly amended the Rules of Civil Procedure via joint resolution when it passed the Medical Candor Act. *See* Utah R. Civ. P. 26(b)(2)(A)(ii). Thus, except to the extent that waiver applies, *see id.* R. 26(9)(A), there is no doubt as to the Act’s ability to keep out of evidence any privileged materials from a medical candor process.

Altogether, the Medical Candor Act operates as a sort of hybrid, combining elements of both the apology statute and peer-review privilege to form something entirely new. Like the apology statute, the Act works to facilitate provider-patient discussions by minimizing the risk that providers will face for honest communication. And like the peer-review privilege, the Act attaches its privilege to materials specifically prepared for use in a hospital procedural setting.

The Medical Candor Act is sure to affect the way health care providers and patients interact with each other following an unanticipated medical outcome. The chance to capitalize on the new privilege will incentivize hospitals and physicians to invite patients to participate in a medical candor process anytime it appears an adverse event has occurred. Providers will benefit because they will be able to speak honestly with patients without fear of inviting liability. Patients will benefit from the straightforward provision of information, which they can consider when deciding whether to accept compensation offered during the medical candor process or to proceed with a malpractice lawsuit. And hopefully, the overall quality of healthcare in Utah will benefit from the Act as well.

Manage everything from intake to invoice—all with one easy-to-use software.



Learn how Clio can level up your firm.
Plus, claim your exclusive Utah Bar Member discount by visiting clio.com/utbar.



SCAN ME





Hannah Leavitt-Howell Cherise Bacalski Melissa Jo Townsend Freyja Johnson
Emily Adams Sara Pfrommer (of counsel)

THE TRIAL IS JUST THE BEGINNING WE'RE WITH YOU TILL THE END

Don't wait for the appeal. Help the trial court get it right the first time around. From trial consulting and motion work to post-trial motions, our team of appellate attorneys is here for you. And if you need to appeal? We can help with that, too.

UTAH APPELLATE REPORT

The Utah Appellate Report is back! Get weekly case summaries and practice points from the [UAR](#). Subscribe today: theappellategroup.com/uar



theappellategroup.com | 801.924.0854

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

Smith v. Volkswagen Southtowne, Inc. **2022 UT 29 (June 30, 2022)**

Granting the defendant's post-trial motion for a directed verdict, the trial court concluded the plaintiff failed to present sufficient evidence of causation to support a claim of carbon monoxide exposure in the passenger compartment of a moving vehicle. The supreme court reversed, holding that **expert testimony, when taken in conjunction with the non-expert testimony and circumstantial evidence, was sufficient to support a non-speculative finding of causation, even if the expert did not quantify the concentration of carbon monoxide in the passenger compartment.** The decision also contains discussions on the standard of care, admission of expert testimony, and rule 60(b) of the Utah Rules of Civil Procedure.

ICS Corrections, Inc. v. Utah Procurement Policy Board **2022 UT 24 (June 23, 2022)**

Utah Code section 63G-6a-1702(2) (b) requires that a notice of appeal from a decision of the Utah Procurement Policy Board's "shall . . . be accompanied by a copy of any written protest decision." In this case, ICS Corrections' predecessor, CenturyLink, appealed a decision the Utah Division of Purchasing and General Services to the Division's Procurement Board, but the Board dismissed the appeal because CenturyLink failed to attach the Division's written decision to its appeal. The supreme court **affirmed dismissal of the appeal because the statute's plain language makes it clear and "controls and strict compliance with the statutory term, or the resulting consequence for non-compliance, is required."**

UMIA Insurance, Inc. v. Saltz **2022 UT 21 (June 9, 2022)**

The appellant in this case, a medical malpractice liability Insurer, sued its Insured for declaratory relief, arguing that a factually unusual claim against the Insured was not covered under the terms of his insurance policy. The Insured counter-claimed that he was entitled to coverage under a theory of waiver and sought damages for bad faith. On appeal from a jury verdict in favor of the Insured and the lower court's denial of the Insurer's motions for judgment as a matter of law, the Utah Supreme Court answered two questions of apparent first impression: **First, the court held that the common law claim of waiver extends to the third-party insurance context and may be established even without a showing of prejudice. Second, the court held that, as a matter of law, an Insurer breaches its duty of good faith toward the Insured when it retaliates against the Insured.**

Cardiff Wales v. Washington Cnty. Sch. Dist. **2022 UT 19 (May 26, 2022)**

The court of appeals previously held that in order for a sale of property to the government to be made under a "threat of eminent domain," which gives the owner a right of first refusal if the government later sells the property, the government must have authorized eminent domain proceedings by "specifically authoriz[ing]" an eminent domain lawsuit. On certiorari, the supreme court reversed. "Simply stated, **the court of appeals erred when it concluded that a government entity must approve the filing of an eminent domain complaint before a threat of condemnation exists and triggers the landowner's right of first refusal.** The statute requires only what section 78-34-20 says it requires, namely that 'an official body of the state or a subdivision of the state . . . has specifically authorized the use of eminent domain to acquire the real property.'"

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

Gamez v. Utah Lab. Comm'n**2022 UT 20 (May 26, 2022)**

In this appeal of a workers' compensation claim, the supreme court held that a **physician appointed to a medical panel under the Workers' Compensation Act should be disqualified where his or her impartiality could reasonably be questioned.** In doing so, the court disavowed the heightened "actual bias" applied by the Labor Commission Appeals Board and referenced in prior cases.

The Cove at Little Valley Homeowners Ass'n v. Traverse Ridge Special Service District
2022 UT 23 (June 16, 2022)

In this appeal from the district court's order granting the defendant's motion to dismiss, the Utah Supreme Court held the appellant failed to preserve two issues raised on appeal. Because neither party addressed the viability of the plain error exception in civil cases, the court declined to "make broad pronouncements about the doctrine." Instead, it **"again voice[d] [its] skepticism about whether the plain error exception to [the] preservation rule should be invoked in many civil cases unless expressly authorized by rule" and left "the broader question for a case in which it is briefed and before"**

the court. Ultimately, the court held that even if plain error review was available, the alleged errors were not plain.

UTAH COURT OF APPEALS**Duffin v. Duffin****2022 UT App 60 (May 12, 2022)**

In this divorce case, the trial court classified a home acquired during the marriage, originally titled in the husband's name, and paid for by the husband's father, as separate property in part because the home was not acquired through the work or efforts of the marriage. Reversing, the court of appeals held that **neither the name on the deed, nor the fact that father paid for the home, transformed the house from marital to separate property, where house was neither a gift nor inheritance.** In doing so, the court noted the trial court erred in applying the concept of "efforts of the marriage" as a condition for classifying property as marital.

State v. Beames**2022 UT App 61 (May 12, 2022)**

This appeal involved whether a criminal trial counsel was ineffective for not pursuing a motion to suppress based upon evidence found by a drug-sniffing dog. The defendant asserted her trial counsel was ineffective because the K9 "did not have probable cause to enter the car" which the defendant asserted violated her Fourth Amendment rights. The court of appeals agreed. The court adopted *Kimmelman v. Morrison*, 477 U.S. 365 (1986), and Justice Stevens' dissent in *Lockhart v. Fretwell*, 506 US 364 (1993), regarding what it means for a Fourth Amendment claim to be "meritorious" as a basis to prove ineffective assistance under the *Strickland* standard. "We agree with Justice Stevens's view and determine that *Kimmelman's* use of **the word 'meritorious' does not add an additional burden on a defendant to prove that the motion would certainly have been granted. We read it to simply mean that the defendant must show that the Fourth Amendment motion would likely have been successful**, which is consistent with the 'straightforward application of *Strickland's* outcome-determinative approach."

Shell v. Intermountain Health Services, Inc.**2022 UT App 70 (June 9, 2022)**

The plaintiff sought medical attention at one of the defendant's facilities while suffering a mental health crisis. He was told that he would either need to take a sedative or leave the facility. The plaintiff decided to leave without receiving any treatment. He alleged that while he was trying to make arrangements to be

Auctioneers & Appraisers

Erkelens & Olson Auctioneers has been the standing court appointed auction company for over 35 years. Our attention to detail and quality is unparalleled. We respond to all situations in a timely and efficient manner, preserving assets for creditors and trustees.

Utah's Leading Auction & Appraisal Service



**Erkelens
& Olson**
Auctioneers
& Appraisers

3 Generations Strong!

Rob, Robert & David Olson
Auctioneers, CAGA Appraisers

Call us for a free Consultation

801-355-6655
www.salesandauction.com

New Location: 954 S 4400 W, Suite 390 in SLC!

picked up, facility security guards assaulted him and dragged him out of the facility. The district court dismissed the plaintiff's claims against the facility because he had not complied with the pre-litigation requirements of the Utah Health Care Malpractice Act. The court of appeals reversed, holding **the Health Care Malpractice Act did not apply because the plaintiff did not receive health care as defined in the Act.** “[M]erely seeking treatment is not enough; there must be something done, or something that should have been done, by a provider, specifically on the patient’s behalf.”

10TH CIRCUIT

United States v. Starks **34 F.4th 1142 (May 27, 2022)**

While reviewing a challenge to a conviction for possession with intent to distribute, the Tenth Circuit **criticized the “unconventional” practice of instructing the jury on the applicable law before the presentation of evidence without repetition following closing arguments.** The court refused to “lay down a one-size-fits-all categorical rule on the subject,” but favorably cited extensive case law from other jurisdictions criticizing the practice as “problematic and even legally erroneous.” Further, under the circumstances of the case before the court, instructing the jury before the presentation of evidence may have seriously undermined the ability of the instructions to mitigate the prejudicial effect of several errors that occurred during the course of trial.

Shaw v. Schulte **36 F.4th 1006 (June 6, 2022)**

Plaintiffs sought recovery under 42 U.S.C. § 1983 based upon claims that officers unreasonably delayed a traffic stop to conduct K-9 sweeps. Affirming in part and reversing in part the denial of qualified immunity, the Tenth Circuit joined other circuits and held, **as a matter of first impression, the exclusionary rule and fruit-of-the-poisonous tree doctrine do not apply in the section 1983 context.** As a result, the officer was entitled to summary judgment for damages based on detention after the dog alert, because the alert provided probable cause to sweep the vehicle.

Tucker v. Faith Bible Chapel Int’l **36 F.4th 1021 (June 7, 2022)**

In this case the plaintiff, a former teacher and administrator/chaplain at the defendant school, asserted that the defendant fired him in violation of Title VII for opposing race discrimination at the school. Under the “ministerial exception” defense, anti-discrimination laws do not apply to employment disputes between a religious employer and its ministers. The defendant-school

asserted this defense through a motion for summary judgment, which the district court denied. The defendant immediately appealed. After a lengthy discussion, the Tenth Circuit held as a matter of first impression that **decisions denying a religious employer summary judgment on the “ministerial exception” defense based on disputes of fact constitutes an immediately-reviewable collateral order** under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

United States v. Wells **38 F.4th 1246 (July 6, 2022)**

Wells was convicted of four counts stemming from the assault of his wife. At the outset of the case, the district court issued a no-contact order restricting the defendant from contacting the victim. After conviction but before sentencing, Wells wrote the victim a letter lamenting how their lives had turned out. The prosecution characterized the violation as per se obstruction of justice. It sought a prison term of 30 years based, in part, on a two level-adjustment for obstruction of justice pursuant to the United States Sentencing Guidelines § 3C1.1. The Tenth Circuit rejected a per se rule, holding that **“violations of no-contact orders only amount to obstruction if the violation was a willful attempt to impede the administration of justice.”**

Mediator-Arbitrator

BRIAN J. BABCOCK

- Litigation attorney for approximately 30 years with experience in commercial business, real estate, and construction disputes
- ADR – Mediation and Arbitration
- Available for in-person, online or hybrid mediations/arbitrations
- Speaks Spanish



SCHEDULE THROUGH UTAH ADR SERVICES
801-943-3730 | mbstrassberg@msn.com



BABCOCK SCOTT & BABCOCK, P.C.
ATTORNEYS & COUNSELORS AT LAW. FIVE BUILD SOLUTIONS.

370 East South Temple, 4th Floor
Salt Lake City, UT 84111
801-531-7000
www.babcockscott.com

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

by Carol Funk

When considering 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 therein, 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 a two-part guide to the Court of Appeals. Part one, which appeared in the previous edition of the *Utah Bar Journal*, provided background information regarding the Court of Appeals' jurisdiction and docket, outlined how to initiate matters in that Court, and identified the steps by which matters move through the initial phase of adjudication. This part two addresses the remainder of the adjudicatory process – from receipt of the record and submission of full briefing through issuance of an opinion, post-opinion petitions, and remand.

This guide is based on the Utah Code; the Utah Rules of Civil Procedure; the Utah Rules of Appellate Procedure; the Utah State Courts *Guide to Appealing a Case*; Utah Supreme Court and 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 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 therein, as indicated on the Utah appellate courts' docket.

STEP-BY-STEP PROCESS: RECORD AND BRIEFING

After all steps in the initial phase of adjudication are complete, matters still pending in the Utah Court of Appeals will proceed toward resolution by written opinion of a three-judge panel. That process begins with receipt of the record, assignment of a briefing schedule, and submission of full briefing. The Utah Court of

Appeals' procedures and the parties' responsibilities with respect thereto are set forth below, including the substantive standards a party must satisfy when briefing a challenge in the state's appellate courts.

Receipt of the Record

Generally, the first step toward full briefing is for the Utah Court of Appeals to call for the record, which will include all papers, exhibits, and transcripts filed in the court or agency proceeding. *See* Utah R. App. P. 11(a), 11(d), 57(a). An appellant or petitioner usually need not take any steps to prepare the record, other than to request and pay for transcripts of proceedings they would like the record to include.

However, large or heavy documents and any exhibits other than documents, photographs, or binders are not automatically included in the record. If a party intends to rely on such materials in its arguments before the Utah Court of Appeals, the "party must make advance arrangements with the clerks for the transportation and receipt" of those items. *Id.* R. 12(b)(4).

A court or agency has twenty days to transmit the record once the Utah Court of Appeals has requested it. *See id.* R. 12(b), 57(b). Sometimes, however, the court or agency does not transmit the record within the allotted time. If the record is not received within the initial twenty-day window, the Utah Court of Appeals will call for the record a second time. This reminder, when needed, is usually sufficient, and the court or agency will then transmit the record during the second twenty-day window.

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



When the proceeding involves appeal of an interlocutory order, the Utah Court of Appeals may not call for the record. *See* Utah R. App. P. 5(j). The appealing party will instead prepare a paginated appendix of documents, selected from the record, to be filed with the party's principal brief. *Id.*

Assignment of a Briefing Schedule

When the record is received, the Utah Court of Appeals will promptly notify the parties that the record has been filed, and the court will also issue the briefing schedule. Utah R. App. P. 13.

The appellant will have forty days from the date of the notice to submit its opening brief; the appellee will have thirty days from the date the appellant's principal brief is filed to submit its brief; and the appellant will have thirty days from the date the appellee's brief is filed to submit a reply brief. *Id.* R. 26(a).

The parties may stipulate to extend each of these deadlines by up to thirty days. *Id.* Requests for further extensions of time are disfavored but may be granted upon a showing of good cause. *Id.* R. 22(b).

When the proceeding involves a cross-appeal, the appellant will file its opening brief; the cross-appellant will then file its opening brief, addressing the appellant's arguments and presenting the issue(s) raised on cross-appeal; the appellant may then file a reply brief, and if the appellant does so, the cross-appellant may then also file a reply brief, addressing any issues raised in response to the cross-appeal. Utah R. App. P. 24A.

Submission of Full Briefing – Form and Length

Rules 24 and 27 of the Utah Rules of Appellate Procedure set out the standards applicable to principal and reply briefs. These rules specify the content each brief should present, the order in which that content should appear, and the documents that should be submitted with the briefs as part of an addendum. Utah R. App. P. 24(a), 24(b), 27.

In terms of length, each party's principal brief is capped at thirty pages or 14,000 words. *Id.* R. 24(g). A reply brief, if filed, may not exceed fifteen pages or 7,000 words. *Id.* The word and page limits are more generous in cases involving cross-appeals, *id.* R. 24A(g), and in proceedings addressing the legality of a death sentence, *id.* R. 24(g).

Picking up the scent.

White collar crime is pervasive and persistent— leaving many businesses to struggle with the impact. Our **forensic and investigative accounting** teams help your clients to discover and **mitigate** the source of **fraud and theft**.

Bankruptcy | Restructuring
Forensic Accounting | Due Diligence
Economic Damages | Receiverships
Turnaround | Workout
Business Valuation | IP Valuation

Rocky Mountain **RMA**
ADVISORY

801.428.1600 rockymountainadvisory.com



CERTIFIED PUBLIC ACCOUNTANTS
FORENSIC & FINANCIAL CONSULTANTS

The word limits yield significantly longer briefs than the page limits. A party wishing to maximize the space permitted should abide by the word limit, not the page limit, when filing its brief.

Requests to submit an overlength brief are disfavored but may be granted for good cause. *Id.* R. 24(h). In addition, a party may join in or adopt by reference any part of a brief submitted by another party. *Id.* R. 24(c).

Submission of Full Briefing – Substance

Standards governing the substance of the parties' briefing appear in the Utah Rules of Appellate Procedure and in decisions of the state's appellate courts. When navigating proceedings in the Utah Court of Appeals, practitioners should be familiar with each content-based standard set forth below.

Adequate Briefing

Briefing in the Utah Court of Appeals "must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail." Utah R. App. P. 24(a)(8). In other words, a party must (1) identify the claim or error at issue; (2) identify and apply the applicable legal standard, with citation to supporting authority; (3) cite pages in the record where relevant evidence may be found; (4) cite pages in the record where the issue was raised and argued; and (5) cite pages in the record where any ruling on the matter was rendered.

An argument that fails to meet this standard may be dismissed as inadequately briefed. Accordingly, a party's brief must do more than generally allege a claim or error; it must provide a fully formed legal argument. Challenging an action as "unconsti-

Looking for unmatched appellate experience?



tutional,” for example, does not adequately brief a constitutional violation. *Amundsen v. Univ. of Utah*, 2019 UT 49, ¶ 47, 448 P.3d 1224. “[A] party must identify the [constitutional] provision allegedly infringed and develop an argument as to how that provision has been violated.” *Id.*

As a matter of fairness, an appellate court will not fill in gaps in a party’s argument or create an argument on a party’s behalf. See *Salt Lake City v. Kidd*, 2019 UT 4, ¶ 24, 435 P.3d 248. A party must present its argument with sufficient clarity that the opposing party may understand and respond to it. *Id.* ¶¶ 24, 35. If a party fails to do so, the opposing party may ask the appellate court to disregard the claim or challenge as inadequately briefed.

Burden of Persuasion

To be successful, an argument must be more than adequate; it must also be sufficiently reasoned and supported to persuade the Utah Court of Appeals as to the claim or error at issue. The showing needed to meet a party’s burden of persuasion will vary depending on the type of issue raised.

The burden of persuasion is heaviest, and most difficult to meet, when a party must show that a court or agency exceeded its discretion, acted contrary to plainly established legal principles, or made an erroneous fact finding. The burden of persuasion is generally lightest, and easiest to meet, when a party must show that a court or agency erred in its resolution of a purely legal question.

There’s no comparison.

The appellate specialists at Zimmerman Booher haven’t just argued appeals—some have also decided them. Since we first opened our doors in 2011, we’ve focused solely on appeals. Our team has briefed, argued, or otherwise participated in thousands of cases—for experience beyond compare. **801.924.0200 | zbappeals.com**



ZIMMERMAN BOOHER
APPELLATE ATTORNEYS

Compare In re E.R., 2021 UT 36, ¶ 15, 496 P.3d 58 (stating that findings of fact will be upheld unless clearly erroneous), and *Harrison v. SPAH Family Ltd.*, 2020 UT 22, ¶ 76, 466 P.3d 107 (observing that rulings to admit or exclude evidence will not be overturned unless they fall “beyond the limits of reasonability” (citation and internal quotation marks omitted)), with *In re E.R.*, 2021 UT 36, ¶ 16 (observing that no deference is given to “analysis of abstract legal questions” (citation and internal quotation marks omitted)), and *In re Adoption of C.C.*, 2021 UT 20, ¶ 32, 491 P.3d 859 (observing that no deference is given to summary judgment rulings).

Even when a court or agency has broad discretion to make certain types of decisions, its decision-making process must still rest on “sound legal principles.” *Utah v. Boyden*, 2019 UT 11, ¶ 21, 441 P.3d 737. Accordingly, a party may more readily show error in a court or agency’s exercise of discretion if its decision-making process was premised on a misunderstanding of the law.

Preservation

When asking the Utah Court of Appeals to review a ruling, a party must usually show the ruling was entered over the party’s objection or contrary to the party’s argument. In other words, a party must demonstrate the issue was preserved – i.e., presented in such a way that the court or agency had an opportunity to rule on it. See *State v. Johnson*, 2017 UT 76, ¶ 18, 416 P.3d 443.

The preservation requirement is designed to put the court or agency “on notice of the asserted error and [to] allow[] for correction at that time.” *Salt Lake City v. Kidd*, 2019 UT 4, ¶ 32, 435 P.3d 248 (citation and internal quotation marks omitted). Thus, for an issue to be preserved, it must be timely and specifically raised. *Id.*

A party generally may not argue an unpreserved issue in an appellate court unless an exception to the preservation rule applies. *Johnson*, 2017 UT 76, ¶ 18. The Utah Supreme Court has recognized three exceptions to preservation: plain error, ineffective assistance of counsel, and exceptional circumstances. *Id.* ¶ 19. “[A] party must establish the applicability of one of these exceptions to persuade an appellate court to reach” an unpreserved issue. *Id.*

It is difficult to establish the applicability of any exception to the preservation rule. A party’s burden of persuasion is therefore quite heavy when seeking relief from unpreserved error.

The preservation requirement applies to almost all issues, including assertions that a party’s constitutional rights have been violated. The exception is subject matter jurisdiction, which may be challenged at any time. In addition, a party need not demonstrate that all arguments pertaining to a preserved issue were presented in the underlying proceeding. *State v. Smith*, 2022 UT 13, ¶ 41; *Bagley v. Bagley*, 2016 UT 48, ¶ 26 & n.23, 387 P.3d 1000. The distinction is a blurry one, but issues must be preserved while new arguments pertaining to preserved issues “raise no concerns.” *Smith*, 2022 UT 13, ¶ 41.

Addressing the Basis of the Challenged Ruling

When briefing a challenge in the Utah Court of Appeals, a party must address the basis of the court or agency’s ruling. In other words, a party must identify the reason for the ruling, engage with any analysis provided by the court or agency in support thereof, and demonstrate why the court or agency “got it wrong.” See *Living Rivers v. Exec. Dir. of the Utah Dep’t of Envtl. Quality*, 2017 UT 64, ¶¶ 41, 51, 417 P.3d 57 (holding argument was inadequately briefed because it “fail[ed] to engage with the substance of the [challenged] ruling”); see also *Petrzelka v. Goodwin*, 2020 UT App 34, ¶ 30, 461 P.3d 1134 (holding appellant failed to carry his burden of persuasion because he did not engage with “the stated basis for the court’s finding”).

Failing to engage with the basis of the challenged ruling is a common error. It is also highly consequential. Absent this analysis, a party will almost always fail to carry its burden of persuasion.

Demonstrating Harm

In addition, when seeking relief from a ruling, a party must usually show the ruling was not harmless – i.e., that there is a reasonable likelihood the error affected the outcome. See, e.g., *Utah Office of Consumer Servs. v. Pub. Serv. Comm’n of Utah*, 2019 UT 26, ¶ 17, 445 P.3d 464 (observing that relief may not be granted under the Utah Administrative Procedures Act unless the error was not harmless); *RJW Media Inc. v. Heath*, 2017 UT App 34, ¶ 33, 392 P.3d 956 (“Even if ... the trial court exceeded its discretion, an appellant has the burden to show that the error was substantial and prejudicial,” meaning “the likelihood of a different outcome is sufficiently high ... to undermine ... confidence in the verdict.” (first omission in original) (citations and internal quotation marks omitted)).

Failing to demonstrate that the challenged ruling was not harmless is another common, highly consequential error. A party will almost always fail to carry its burden of persuasion if it does not make this showing.

Requests to Overturn Precedent

A common misconception is that when an issue is governed by a prior decision of the Utah Court of Appeals, a party cannot ask the court of appeals to overturn its precedent but must wait and raise that challenge on petition for writ of certiorari before the Utah Supreme Court. That is not the case.

“Generally, as a matter of horizontal stare decisis, the first decision by a court on a particular question of law governs later decisions by the same court.” *State v. Legg*, 2016 UT App 168, ¶ 26, 380 P.3d 360 (citation and internal quotation marks omitted), *aff’d*, 2018 UT 12 417 P.3d 592. “Therefore, one panel on the court of appeals owes great deference to the precedent established by a different panel” *State v. Legg*, 2018 UT 12, ¶ 9, 417 P.3d 592. “But a panel still retains the right to overrule another panel’s decision if the appropriate standard is met.” *Id.* ¶ 11.

A party may thus ask the Utah Court of Appeals to overturn its precedent under the same standard that applies when asking the Utah Supreme Court to overturn one of its prior decisions.

Precedent of a Utah appellate court may generally be overturned if it has “proven to be unpersuasive and unworkable, create[s] more harm than good, and [has not] created reliance interests.” *Id.* (citation and internal quotation marks omitted). This standard and the requisite showing are set out more fully in *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553. The burden of persuasion is, however, a weighty one. The Utah Court of Appeals must generally be convinced “there has been a change in the controlling authority” or its “prior decision was clearly erroneous.” *Legg*, 2016 UT App 168, ¶ 26 (citation and internal quotation marks omitted).

Submission of Full Briefing – Reply Briefs

When submitting a reply brief, a party may respond only “to the facts and arguments raised in the appellee’s or respondent’s principal brief.” Utah R. App. P. 24(b). New issues may not be raised for the first time on reply, with the exception of subject

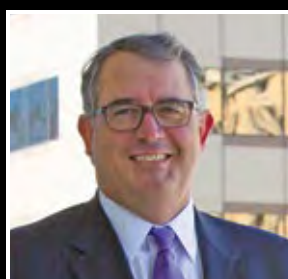
After 30 years of representing health care providers, Terry Rooney of Gross & Rooney is now accepting the representation of Plaintiffs in medical malpractice claims. Referrals and consultations are welcome.

**GROSS &
ROONEY**

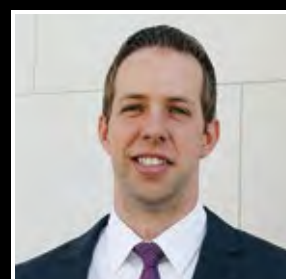
www.grossrooney.com
136 E. South Temple, 1500
801-935-4611



TERRY ROONEY



JEFFERSON GROSS



ADAM SORENSON

matter jurisdiction, which may be challenged at any time. Otherwise, issues raised “in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.” *Mackin v. State*, 2016 UT 47, ¶ 20 n.2, 387 P.3d 986 (citation and internal quotation marks omitted).

Although issues not raised in a party’s principal brief are waived, waiver is not the applicable standard when an issue is raised in the party’s principal brief and the opposing party fails to respond to it.

If the opposing party fails to respond to a claim or allegation of error, the party alleging the claim or error may argue on reply that it has demonstrated a “plausible claim” for relief. *See Broderick v. Apartment Mgmt. Consultants, LLC*, 2012 UT 17, ¶ 19, 279 P.3d 391. Demonstrating a plausible claim for relief will generally be sufficient to carry the party’s burden of persuasion if the claim or assertion of error is unopposed or if the argument in opposition is inadequately briefed. *See id.*

Submission of Full Briefing – Notice of Constitutional Challenges

In proceedings before the Utah Court of Appeals, if “a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General.” Utah R. App. P. 25A(a)(1). Likewise,

[w]hen a party challenges the constitutionality of a governmental entity’s ordinance, rule, or other administrative or legislative enactment in an appeal or petition for review in which the responsible governmental entity has not appeared, every party must serve its principal brief and any subsequent brief on the governmental entity.

Id. R. 25A(a)(2).

Submission of Full Briefing – Amicus Briefs

In addition to the parties’ briefing, amicus briefs may be submitted with the parties’ consent, upon request of the Utah Court of Appeals, or by leave of court granted on motion. Utah R. App. P. 25(b). Some entities may file amicus briefs as a matter of right, including any state agency represented by the Utah Attorney General’s Office. *Id.* The rules governing amicus briefs are set out in Rule 25 of the Utah Rules of Appellate Procedure.

STEP-BY-STEP PROCESS: CERTIFICATION AND RECALL

Following submission of full briefing, it will usually be apparent whether the matter is best suited for adjudication by the Utah Court of Appeals or whether the matter is better suited for adjudication by the Utah Supreme Court. A matter is well suited for adjudication by the Utah Supreme Court if (1) it raises one or more legal questions of significant importance to the state’s jurisprudence; (2) the parties’ briefing substantively analyzes the question(s) and the relevant legal authority; (3) there are no jurisdictional or preservation issues that would impede review of the question(s); and (4) the matter does not raise additional issues, which are not of substantial importance to the state’s jurisprudence.

When it appears a matter is best suited for adjudication by the Utah Supreme Court, the Utah Court of Appeals may certify the matter or request that it be recalled. Certification or recall may occur at any time prior to resolution, including before a matter is fully briefed or even after oral argument. But the Utah Court of Appeals will generally have sufficient information to identify matters appropriate for transfer following receipt of the record and submission of full briefing.

Relatively few cases are certified or recalled, but such transfers do occur. During the review period, roughly eighty matters were certified to or recalled by the Utah Supreme Court – an average of about fourteen matters per year. To maximize the likelihood of transfer, a party may elect to forgo any challenges not suitable for adjudication by the Utah Supreme Court – if that tradeoff is one the party is willing to make.

If a party plans to raise an issue that merits review by the Utah Supreme Court (such as a novel statutory or constitutional question) along with other issues of less jurisprudential importance (such as challenges to fact findings, evidentiary rulings, or an award of attorney fees), the party has two paths to consider. The party might raise only the jurisprudentially significant issue, hoping to maximize the likelihood the matter will be adjudicated by the Utah Supreme Court in the first instance. Or the party might press all its challenges, understanding the Utah Court of Appeals will adjudicate the proceeding, and any party dissatisfied with the ruling on the jurisprudentially significant issue may then ask the Utah Supreme Court to review the Utah Court of Appeals’ decision on that issue.

Certification to the Utah Supreme Court

As explained in part one of this Guide, the Utah Court of Appeals has original appellate jurisdiction over many types of matters – e.g., juvenile proceedings, non-felony criminal proceedings, domestic relations matters, and some adjudicative proceedings. *See* Carol Funk, *A Practitioner's Guide to the Utah Court of Appeals: Jurisdiction, Procedure, and Outcome*, Vol. 35 No. 4, UTAH B.J. 32 (July/Aug. 2022). Pursuant to Utah Code Section 78A-4-103(4), the Utah Court of Appeals “may certify to the [Utah] Supreme Court for original appellate review and determination any matter over which the Utah Court of Appeals has original appellate jurisdiction.” Certification requires the vote of four of the seven judges on the Utah Court of Appeals. Utah Code Ann. § 78A-4-103(4).

The Utah Court of Appeals “must consider certification only in . . . cases” where “it is apparent that the case should be decided by the Supreme Court and that the Supreme Court would likely grant a petition for a writ of certiorari in the case if decided by the Court of Appeals” and in “[c]ases that will govern a number of other cases involving the same legal issue or issues pending in the district courts, juvenile courts, or the Court of Appeals, or cases of first impression under state or federal law that will have

wide applicability.” Utah R. App. P. 43(c).

“The Court of Appeals may, on its own motion, decide whether a case should be certified.” *Id.* R. 43(b)(1). A party may also “file a suggestion for certification not exceeding five pages, explaining why the party believes that the case should be certified.” *Id.* An adverse party may then file a response, either supporting or opposing certification. *Id.*

By filing a suggestion for certification promptly after full briefing is submitted, a party may timely bring the question of certification to the Utah Court of Appeals’ attention.

Indeed, a party may file a suggestion for certification at any time after the docketing statement is filed. *Id.* But a suggestion for certification will not be successful prior to full briefing unless the Utah Court of Appeals can ascertain – absent briefing or, even earlier, absent the record – that transfer would be appropriate. And if an adverse party opposes certification, claiming a lack of preservation or jurisdiction, transfer is unlikely to occur until the Utah Court of Appeals receives the record and may investigate those questions.

dig deeper

ROCK SOLID COUNSEL FOR MINING AND NATURAL RESOURCE LEADERS.

More than 80 Dorsey lawyers are deeply engaged in helping mining, energy and natural resources clients. We understand the lifecycle of opportunities and challenges you face. Partner with us to experience business sensibility, industry depth and practical problem solving in leading geographical centers for mining and natural resources.

LEADING LAND USE & ZONING LAW PRACTICE

Nationally ranked in
U.S. News–Best Lawyers 2022
(BL Rankings LLC)

LEADING ENERGY: MINING & METALS (TRANSACTIONAL) PRACTICE

Chambers USA 2022

LEADING NATURAL RESOURCES & ENVIRONMENT PRACTICE

Chambers USA 2022

LEADING MINING LAW FIRM

Nationally ranked in
U.S. News–Best Lawyers 2021
(Woodward White, Inc.)



dorsey.com
© 2022 Dorsey & Whitney LLP

Certification usually results in an initial and sometimes lengthy delay. A party seeking certification must therefore consider whether, despite the delay, it still wishes to have the matter addressed by the Utah Supreme Court in the first instance.

Following certification, the parties will likely submit a new round of briefing to the Utah Supreme Court, and the case will then be put on the Utah Supreme Court's oral argument calendar, which may result in several months' delay prior to issuance of an opinion. But certification still decreases the overall length of the proceeding if the matter would otherwise be heard and resolved by the Utah Court of Appeals, only to have the Utah Court of Appeals' decision then reviewed by the Utah Supreme Court – a process that generally adds a year or two to the litigation.

Recall by the Utah Supreme Court

Matters not within the Utah Court of Appeals' original appellate jurisdiction are assigned to the Utah Supreme Court, Utah Code Ann. § 78A-3-102(3)(j), which transfers many such matters to the Court of Appeals for first-level appellate review, *id.* § 78A-4-103(3)(j); see also Carol Funk, *Understanding the Utah Supreme Court's Docket: A Practitioner's Guide*, Vol. 35 No. 1, UTAH B.J. 17, 18 (Jan/Feb 2022).

Just as a matter within the Utah Court of Appeals' original appellate jurisdiction may be certified to the Utah Supreme Court, matters within the Utah Supreme Court's original appellate jurisdiction that are transferred to the Utah Court of Appeals may be recalled. Recall, like certification, (1) occurs when it becomes apparent that a matter is best suited for adjudication by the Utah Supreme Court, and (2) may occur at any time prior to resolution.

But unlike certification, the appellate rules do not expressly provide for a suggestion of recall by the parties. Rather, in matters subject to recall, the parties will previously have had an opportunity to request retention, shortly after the proceeding was filed in the Utah Supreme Court. See Carol Funk, *A Practitioner's Guide to the Utah Court of Appeals: Jurisdiction, Procedure, and Outcome*, Vol. 35 No. 4, UTAH B.J. 32, 38 (July/Aug 2022).

In rare circumstances, however, recall may occur even if a party initially asked the Utah Supreme Court to retain the case and the Court declined to do so.

When reviewing a retention request, the Utah Supreme Court does not have access to the record and also lacks in-depth

briefing. Thus, a case in which retention is questionable at that early stage may nevertheless prove appropriate for recall, once full briefing has distilled the issues and the record provides insight as to preservation, jurisdiction, etc. In such circumstances, the Utah Court of Appeals might suggest recall, even if the Utah Supreme Court earlier declined to retain the case. Indeed, during the review period, several matters were recalled to the Utah Supreme Court despite the court's earlier denial of a retention request.

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

Following full briefing, matters that stay in the Utah Court of Appeals will generally be assigned to a three-judge panel and will follow one of two tracks. Along the first track, matters proceed directly to adjudication based on the briefing, without oral argument. Along the second track, matters proceed to oral argument, following the panel's determination that oral argument will aid in its consideration of the matter.

The Utah Court of Appeals generally does not alter the status quo without hearing oral argument. Matters not set for argument are therefore highly likely to result in affirmance of the challenged ruling and/or dismissal of the alleged claim.

Oral Argument

When a matter proceeds along the second track, there is often a several-month delay between the time the matter is fully briefed and the date on which oral argument is held. That delay may be as short as two or three months or as long as six to nine months, depending on how many matters are already in the oral argument queue. But the argument date will generally fall somewhere between three and seven months after the reply brief was submitted.

The total time allotted for oral argument is thirty minutes, with each side given fifteen minutes. Unlike the Utah Supreme Court, in which argument may extend well beyond the allotted time, the Utah Court of Appeals adheres closely to these limits. Each party must therefore focus on the most significant points it wishes to make and present those points clearly and concisely. Any lack of clarity or poorly phrased sentence may prompt follow-up questions, the responses to which may then consume much of the party's time.

When presenting oral argument, a practitioner should assume the panel is familiar with the facts presented in the briefing and focus their argument on the legal issues.

Additionally, as in a reply brief, no new issues may be raised. Finally, practitioners generally should not bring visual aids to oral argument but should include copies of any key exhibits in the addenda to the party's principal brief.

Expedited Decision

A party who wishes to have its matter heard and ruled upon as promptly as possible may, after all briefing has been submitted, request an expedited decision. Utah R. App. P. 31(a). If the request is granted, the appeal will be set for oral argument within forty-five to sixty days and, within two days after submission of the appeal, the Court of Appeals will issue an order – without opinion – adjudicating the matter. Utah R. App. P. 31(c). There are several types of matters in which expedited decision may be requested, including “appeals where all parties stipulate to” the process. Utah R. App. P. 31(b).

Supplemental Briefing

The Utah Court of Appeals sometimes requests supplemental briefing on matters not sufficiently addressed in the briefing. A request for supplemental briefing, when made, is usually issued after oral argument. There is, however, a tension between requests for supplemental briefing and the above-noted responsibilities of a party to, in the first instance, submit briefing that adequately addresses the issues and carries the party's burden of persuasion.

If the Utah Court of Appeals suggests during oral argument that it might order supplemental briefing, a party opposed to such briefing may, when appropriate, respond that it would improperly and unfairly relieve the petitioner or appellant of their burden to adequately brief the issue and/or carry their burden of persuasion. There may not be an equitable basis for requiring supplemental briefing on a matter not adequately addressed in the first instance.

Notice of Supplemental Authority

“When authority of central importance to an issue comes to the attention of a party after briefing or oral argument but before decision, that party may file a notice of supplemental authority” advising the Utah Court of Appeals of the authority and its relevance. Utah R. App. P. 24(j). Such notices are brief, usually done by letter, and generally include a copy of the cited authority.

Opinion

The Utah Court of Appeals will usually issue an opinion within one year of the date on which the matter is submitted for adjudication.

In matters in which oral argument is held, the opinion will usually issue within six months following the oral argument date. In other matters, the opinion will usually issue within ten months following submission of full briefing. In unusual cases, the court may take more than one year to issue an opinion after the matter is submitted, but such a lengthy delay is much more the exception than the rule.

STEP-BY-STEP PROCESS: POST-DECISION PETITIONS

Petition for Rehearing

A party may file a petition for rehearing asking the Utah Court of Appeals to correct a substantive error in an opinion, per curiam decision, or order resolving a matter on the merits. Utah R. App. P. 35(a)(1). No response to a petition for rehearing may be filed unless requested by the court, and the court will not grant a petition for rehearing absent a request for a response. *Id.* R. 35(a)(4).

Petitions for rehearing are rarely granted. The Utah Supreme Court almost never grants petitions for rehearing, and petitions for rehearing have only a slightly better chance of success when filed in the Utah Court of Appeals. During the review period, the

ANDREW M. MORSE MEDIATION SERVICES



Trial Lawyer
Mediator
Arbitrator

801.322.9183
amm@scmlaw.com

SNOW
CHRISTENSEN
& MARTINEAU



Utah Court of Appeals granted about 10% of the petitions for rehearing that were filed. But even if a petition for rehearing is granted, that does not necessarily mean a change in outcome. The court may merely amend its opinion to clarify or alter how it addresses an issue, without changing which party prevails.

If the Utah Court of Appeals' opinion contains a nonsubstantive or clerical error, "a party may promptly advise the appellate clerk by letter, with a copy to all other parties, identifying the error, suggesting how the error may be corrected, and stating the position of other parties regarding the requested correction." *Id.* R. 35(b)(1). "If the court concludes the letter requests a substantive revision, it may construe the letter as a petition for rehearing if timely filed under paragraph (a)(2) and call for a response." *Id.* R. 35(b)(2).

The Utah Court of Appeals does not sit en banc. Utah Code Ann. § 78A-4-102(2)(d). A party therefore may not ask the court to collectively review a panel's decision or order.

Petition for Writ of Certiorari

A party dissatisfied with the Utah Court of Appeals' ruling may ask the Utah Supreme Court to issue a writ of certiorari to the Utah Court of Appeals. Utah R. App. P. 45(a). A petition for a writ of certiorari constitutes a request that the Utah Supreme Court review a decision issued by the Utah Court of Appeals. *See id.*

"Review by a writ of certiorari is not a matter of right, but of judicial discretion . . ." *Id.* R. 46(a). In determining whether to grant a petition for a writ of certiorari, the Utah Supreme Court considers "whether a decision on the question presented is likely to have significant precedential value." *Id.* Review may be granted, for example, in matters that (1) present "a question regarding the proper interpretation of, or ambiguity in, a constitutional provision, statute or rule that is likely to recur in future cases"; (2) raise "a legal question of first impression in Utah that is likely to recur"; or (3) provide "an opportunity to resolve confusion or inconsistency in a legal standard set forth in a decision of the Court of Appeals, or in a prior decision of the Supreme Court, that is likely to affect future cases." *Id.* "The possibility of an error" in the challenged decision, "without more, ordinarily will not justify review." *Id.* Given this high standard, most petitions seeking a writ of certiorari are denied.

During the review period, the Utah Supreme Court received over 700 petitions seeking a writ of certiorari. The Court granted only 15% of the petitions.

The grant of a petition for a writ of certiorari does not suggest reversal is likely. For petitions filed between 2016 and 2018, for example, a grant of review by the Utah Supreme Court resulted in reversal in whole or in significant part less than 50% of the time, although the Utah Supreme Court's reasoning sometimes differed from the reasoning provided by the Court of Appeals.

STEP-BY-STEP PROCESS: REMITTITUR AND REMAND

Remittitur

Immediately after the time for filing a petition for writ of certiorari expires, the Utah Court of Appeals will issue a remittitur, terminating the Utah Court of Appeals' jurisdiction over the proceeding. Utah R. App. P. 36(a)(2). "If a petition for writ of certiorari is timely filed, the Utah Court of Appeals will automatically stay issuing the remittitur" until the petition has been ruled upon. *Id.* If the petition is denied, "the Court of Appeals will issue its remittitur five days after the order denying the petition is entered." *Id.* If the petition is granted, "jurisdiction of the appeal will transfer to the Supreme Court." *Id.*

Remand

If the Utah Court of Appeals' disposition of the matter involves remand to a court or agency, the "mandate rule" will govern the subsequent proceedings. *In re Discipline of Steffensen*, 2021 UT 1, ¶ 29, 481 P.3d 468. The mandate rule "dictates that a prior decision of a district court becomes mandatory after an appeal and remand." *Id.* (citation and internal quotation marks omitted). "In other words, a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." *Id.* (citation and internal quotation marks omitted).

CONCLUSION

When considering a challenge to a court or agency ruling, it is critical that a practitioner understand the types of relief that may be obtained, the procedures for seeking that relief and how to effectively utilize them, and, whenever possible, the background odds of success when pursuing a particular pathway. Absent this understanding, a practitioner may pursue a pathway with no real likelihood of success or otherwise squander a party's opportunity to succeed on its claim or to obtain relief from an erroneous ruling.

Keeping Pace with Rapid Advancement

Foley's Innovative Technology Sector team focuses on future-proof legal strategies. Whether your business deploys technology or needs to account for its impacts, we can help you realize the benefits and mitigate the risks.

For more information, please contact:
David R. Wright | Managing Partner | Salt Lake City
801.401.8910 | dwright@foley.com

FOLEY.COM



AUSTIN | BOSTON | BRUSSELS | CHICAGO | DALLAS | DENVER | DETROIT | HOUSTON | JACKSONVILLE
LOS ANGELES | MADISON | MEXICO CITY | MIAMI | MILWAUKEE | NEW YORK | ORLANDO | SACRAMENTO
SALT LAKE CITY | SAN DIEGO | SAN FRANCISCO | SILICON VALLEY | TALLAHASSEE | TAMPA | TOKYO | WASHINGTON, D.C.

FOLEY
FOLEY & LARDNER LLP

The Law Firm and the Monastery: Five Lessons on Living with Change

by Michael Patrick O'Brien

As I watched my friends – the monks from the old Trappist monastery in Northern Utah – cope for the last five years with the closure of their beloved Huntsville abbey, I never dreamed I'd have to try to emulate their fine example of living with significant change. Then the 150-year-old law firm where I had worked for almost four decades closed its doors.

Due to severely changing forces in the Salt Lake City legal market – including new intense competition for talent and clients from global mega-firms – my law firm made the difficult decision to wind up its business. Some thirty lawyers (including me) from my firm, known as Jones, Waldo, Holbrook & McDonough, have joined another legacy Utah firm, Parsons Behle, & Latimer.

I hope and believe this decision will help us confront the onslaught from the legal leviathans. It is a good strategy, but not without its consequences.

I started at Jones Waldo right after law school ended in 1986 and never left. I enthusiastically applied to this wonderful workplace a concept the Trappist forefathers had coined a thousand years ago to describe the charism of the monks. Thus, I became “a lover of the brethren and the place.”

Needless to say, the sudden demise of the only place you've worked during your entire adult life is traumatic. When asked what emotion he felt about these circumstances, Mark Tolman – one of my fine law partners – said, “All of them.” Surprisingly, it is possible to feel grief, fear, sadness, and uncertainty at the same exact moment you are feeling excitement, hope, anticipation, and gratitude.

As I've navigated my way through these challenging times, I've realized they are not much different from what my friends the Utah monks experienced during the last few years. Beginning in the 1970s, after a family divorce, I basically grew up at the

Huntsville monastery with the monks as surrogate fathers. I tell this story in my new book, *Monastery Mornings*. See Michael Patrick O'Brien, *MONASTERY MORNINGS: MY UNUSUAL BOYHOOD AMONG THE SAINTS AND MONKS* (Paraclete Press 2021).



The Utah monastery – founded seventy-five years ago in July 1947 – closed its doors in 2017 due to a variety of changing forces in the monastic world. A dozen or so of the remaining monks had to go somewhere else. Some joined other abbeys. Most moved together to live in a Salt Lake City retirement community that could help meet their geriatric and medical needs.

As a longtime friend of the Trappists, I watched this play out in real time. In the moment, my concern was for the well-being of

MIKE O'BRIEN is a writer and an employment attorney at Parsons Behle & Latimer.



the monks. It turned out, however, to be hours well-spent for my own personal edification too. As I watched, I absorbed five important lessons about facing change that may just help me with my own difficult professional transition.

Lesson One: Find Happiness Where You Are

Utah Trappist monk Father Alan Hohl – a former Navy aviator – cherished the Huntsville abbey where he spent two-thirds of his long life. He devoted many of his adult years to watering the monastery's lush, cultivated fields. He built a barn from leftover pallet wood. He led the monks in daily chants. He loved to putter around and patch up the simple Quonset hut building where he lived and prayed.

Father Alan was terribly sad when it all ended, and the monastery closed. Yet, instead of wallowing in his despair, he raved about the small retirement home apartment where he lived out his final five years. He thought it was like a palace.

With great joy, he told me how he had converted one bedroom into a chapel where he could say mass each day. He loved watching the World Series each fall. And once he pointed to his refrigerator and excitedly told me, "It always has a beer in it!" The old monk somehow had managed to find happiness where he was, instead of despairing about where happiness once had been.

Lesson Two: Heal Pain with Love

Shortly after the Trappists first arrived in Utah, Brother Nicholas Prinster decided to leave his boyhood home in Grand Junction, Colorado. He opted out of medical school, disclaimed his rights to the successful family business, and joined the new monastery.

For the next seven decades, the tall, strong, silent man herded cattle in Huntsville, ran the abbey farm, and built beautiful clocks for his family, friends, and neighbors. His heart was broken when his lovely monastery closed.

Although I am told he struggled to discern any divine will in the painful decision, he accepted it . . . quietly. The last time I saw him at the Salt Lake City retirement home, he was smiling and placidly pointing out the beautiful flowers growing along the path where I was pushing his wheelchair.

Brother Nicholas knew how to confront and heal the pain all too present in any life, including in the life of a monk. He once explained this formula in a eulogy he wrote for a family member, "We are all of us broken. We live by mending, and the glue that we are mended with is the grace of God, and what is the grace of God but love?"

Lesson Three: Live in the Moment

Father Patrick Boyle from St. Louis arrived at the Huntsville abbey in 1950, right after watching Stan Musial hit a home run for his beloved Cardinals. Once at the Utah monastery, he rarely left. Despite staying put, he met (and blessed) hundreds of visitors each year in the abbey bookstore. He was the last monk to leave the premises when the abbey closed in 2017.



After the move, I asked Father Patrick how he felt about leaving the only home he had known for sixty-seven years. I still was mourning the loss of the monastery, so his answer surprised me. He said, "It was a piece of cake." He explained, "The past is the past, and God will take care of the future, so my job is to live in the present."

Father Patrick calls this attitude the "sacrament of the now moment." He never misses an opportunity to remind me, "You know what Mike? It works!"

Criminal Forensic Evaluations



JONATHAN BONE, PsyD
Salt City Psychology

With his advanced, specialized training in Forensic Psychology, Dr. Bone is uniquely qualified to assist with your criminal cases. His services include:

- consultations
- communication with difficult clients
- prepping clients for trial
- mental health defense strategies
- prosecutorial assistance
- evaluations and more



Salt City PSYCHOLOGY
life • integrated

801.758.7370 | www.saltcitypsychology.com

Lesson Four: Be with Brothers and Sisters

Like all the other Utah monks, when the Huntsville abbey closed, Father Patrick had the chance to move to another Trappist monastery anywhere in the United States. At age 89, he visited and considered Gethsemani Abbey in Kentucky, which is the motherhouse for the Utah abbey.

The 175-year-old Gethsemani Abbey is, by all accounts, a holy and beautiful place. One of its best-known residents, Thomas Merton, described the adjoining Kentucky fields, sun, mud, clay, and wind as “our spiritual directors and our novice-masters.” Declining an invitation to live there would be difficult, yet Father Patrick chose to relocate to the retirement home in Salt Lake City with the other Utah monks.

Trappists take a vow of stability. The order’s website has described that vow this way:

By our vow of stability, we promise to commit ourselves for life to one community of brothers or sisters with whom we will work out our salvation in faith, hope, and love . . . [we] entrust ourselves to God’s mercy experienced in the company of brothers or sisters who know us and accept us as we are.

When I asked Father Patrick why he chose to live in two small rooms in a Salt Lake City retirement home instead of at the beautiful abbey in the rolling hills of Central Kentucky, he said, “My vow of stability is not just to a place, it also is to my brothers.” This includes new brothers (and sisters), for Father Patrick now says mass every day with a retired diocesan priest who lives just across the hall.

I think what Father Patrick is trying to tell me – by both his vow and most recent actions – is that life is a constant process of finding and building community, over and over again.

Lesson Five: One Bite at a Time

Father David Altman was the last abbot (leader) at the Utah Trappist monastery. He lived an interesting life before he became a monk. Born of Jewish parents in Philadelphia, he dated women, studied accounting, and made good money crunching numbers in the Southern California sunshine for defense contractors. He gave it all up to become a monk, but it was not easy.

Father David once explained, “Monastic religious life is much like a marriage, where the primary focus is on efforts to make

relationships work, and this is challenging work.” A newspaper reporter asked him how he did it. He said, “Like a flea eats an elephant . . . one bite at a time.”

He’s used the same basic technique for the last five years during his time of great change, and he’s done so with both grace and dignity. He left behind a monastery he loved to live in a retirement home he barely knew where, as the “youngest” of the remaining monks, he has made relationships work in a completely new setting as he watches over his surviving older brothers.

The Law Firm and the Monastery

A law firm, of course, is not a monastery. The two institutions exist for different purposes and seek different things in distinct ways. Some might even apply the appellations of heaven and hell to contrast them, but to do so probably would elevate clever prose above actual reality.

Despite their differences, monasteries and law firms are alike too. They are communities. They are places where people commit substantial time, energy, pride, devotion, and even love towards a common goal. And like monasteries, law firms can rise or fall depending on the strengths of the relationships within.

Thanks to my long affiliation with the Utah monastery, and after watching the monks adapt to significant and difficult change, I just may have a game plan for transitioning to a new law firm after leaving behind the one I have loved for thirty-seven years.

Like Father Alan, I will try to find happiness where I am.

Like Brother Nicholas, despite feeling somewhat broken by difficult circumstances, I will look for the love that soothes the pain.

Like Father Patrick, I will try to sustain/build community with my brothers and sisters – both old and new. As I do so, I will seek to live in the moment, trying not to worry too much about what may or may not happen in the future.

And like Father David and the flea that ate the elephant, I will take on these important and somewhat daunting tasks one bite at a time.

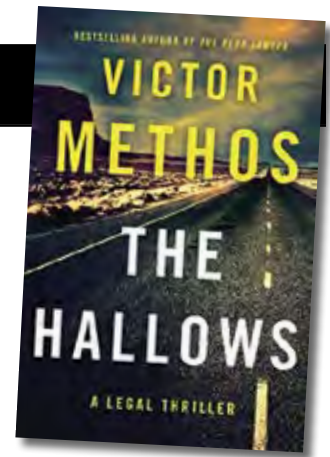
I can never fully express, verbally or in writing, the deep sadness I now feel each time I think about my dearly departed Jones Waldo. What I can articulate, however, is a summation of what I now understand – thanks to the Utah monks – about facing and living with change.

Within every goodbye is the promise of a hello.

The Hallows

by Victor Methos

Reviewed by Jay Winward



When I was a young boy, I spent many blistering summer days travelling throughout Southern Utah with my dad. From St. George to Manti, Kanab to Filmore, all year I looked forward to road trips in our Chrysler “riding circuit.” In those days, lawyers were generalists. My dad was a criminal defense attorney and a prosecutor. He did divorces and real estate disputes. He represented businesses, municipalities, and individuals.

I would sit in courtrooms with a yellow legal pad and G.I. Joe action figures. I visited the clerk’s office to buy twenty-five-cent candy bars from an unattended box of treats that relied on the honor system and a small jar with a slit in the lid. During the cattle call, I often daydreamed and doodled. When I paid attention, I learned the art of persuasion. I also learned the importance of collegiality. I had a front row seat to courtroom instincts in action.

Those long-gone days in musty courthouses are nostalgic. I can’t drive through Kanab without thinking of late afternoon lunches at Houston’s Trail’s End Restaurant with the judge, clerks, and every attorney crowded around dimly lit tables. Or playing croquet in the lush green grass of Judge Tibbs’ backyard in between dockets. My childhood gave me an appreciation for the practice of law, the court system, and our beautiful state.

That’s why I was excited to learn that Victor Methos, a novelist and Utah Law alum, wrote a legal thriller set in Southern Utah. *The Hallows* tells the story of Tatum Graham, a big shot Miami lawyer who returns to his native Southern Utah to be a prosecutor. While I cannot relate to much of Tatum’s bling and bluster, I can relate to the path from defense attorney to prosecutor. I can also relate to practicing law in my native Southern Utah.

Warning, the following contains spoilers: both predictable and bombastic.

The book opens with Tatum defending a man, Marcus, accused of strangling his girlfriend. Tatum exhibits Miami flare. He’s decked out in a pinstripe suit and a Rolex. He shows no scruples as he winks at detectives and prosecutors during his closing. When the jury leaves to deliberate, Tatum casually insults Sarah

Pascal, a detective on the case and his ex-girlfriend, telling her how she and the “clowns” at the prosecutor’s table botched the investigation. Then in a quick turn he invites Sarah to lunch, an invitation that she inexplicably accepts. The inexplicable becomes unbelievable when the duo sit down to eat and don’t

return immediately to the courthouse when they receive separate calls that the jury is back. Instead, Tatum insists that the jury can wait one more hour, and they enjoy crab and spinach dip while conversing about Sarah’s infidelities.

But the improbable story of Tatum Graham is just beginning and is well on its way to fanciful. The jury acquits Marcus and instead of celebrating, or at a minimum avoiding trouble, Marcus gets into a confrontation with the victim’s seventeen-year-old sister, punches

The Hallows
by Victor Methos
Publisher: Thomas & Mercer (2019)
Pages: 350
Available in hardcover, paperback,
e-book and audio book formats

JAY WINWARD is an Assistant United States Attorney in St. George.



her, drags her into his house, and strangles her in the same way he strangled her sister. Tatum learns that his client killed again. He snaps, throws his phone into the Atlantic, gives away his Ferrari and his house (not to his cheating girlfriend Maggie, but to his cheating ex-girlfriend Sarah), leaves his collection of watches and clothes, and takes his Tesla on a multi-day road trip to his hometown, River Falls, Utah. (Please ignore the line on page twenty-two about only stopping to “gas up.” For information about Tesla’s fully electric vehicle line up, visit www.tesla.com.)

Like many locations in novels, River Falls, Utah is made up. A fictional town placed in a factual location. I anticipated a plot set in a Southern Utah town. I grew up in a much smaller version of St. George, after all. But the town described in *The Hallows* has little to no resemblance to any town in Utah. There are mentions of real places (Beaver, Utah¹; Mesquite and Las Vegas, Nevada; UNIV, Provo, and Salt Lake), but geographic accuracy is wanting, to put it mildly. Tatum makes a call “up north” to “Saint George” ignoring the fact that St. George is north of nowhere in Utah. River Falls is ostensibly in the desert of Southern Utah, just north of Las Vegas and sweltering 110-degree heat, but on his first night in town the narrator stares out into the “woods.” Women wear long dresses, but the town is hiding a full-blown prostitution ring. Citizens won’t drink coffee, but alcohol flows like water.

Back to the in . . . credible hero Tatum. He rolls into River Falls on electric fumes and promptly buys a condo with his credit card. He reunites with his estranged father who is dying of cancer and his long lost first love, Gates Barnes. Gates is the

county attorney and is steeped in an election race that leaves her no time to try the murder of a young girl. The public is clamoring for justice, but Gates has left the case in the hands of two novice deputies despite her claim that her campaign turns on the outcome. Gates convinces Tatum to join her at the county attorney’s office and help convict two alleged murderers.

Once Tatum joins the team, he promptly insults law enforcement for their poor investigation and their inaccurate reports. He exhumes the victim’s body, brings in experts, and creates an investigation out of whole cloth. Despite having left the town when he was nineteen, he knows the judge very well and explains that the judge (in her mid-seventies) is not required to retire. *See* Utah Code Ann. § 49-18-701. He calls a defendant a derogatory word beginning with the letter “p,” in court. And that sanction-less tactic somehow elicits a confession. Every move Tatum makes results in new evidence, and every instinct is rewarded. Through his efforts he uncovers a dastardly cabal of degenerates including the mayor, sheriff, and even Roscoe the local high school football coach. Even Gates’s opponent for county attorney is caught up in the scrum.

Of course, there are a few bumps in the road for Tatum. A rival high-priced New York defense attorney flies into River Falls to defend one of the accused. A star witness is merely a child. And the victim, a soon to be nursing student at Dixie State, is actually an escort who works at a bar called Skid Row in Las Vegas. For good measure, Skid Row is a front for a meth and cocaine distribution operation.

Victor Methos’ self-described legal thriller *The Hallows* is at times a page turner, but at times inconsistent and implausible. He deserves credit for setting the story in Southern Utah. Fortunately, Marcus Tatum’s bombastic nature is not representative of the typical Southern Utah lawyer. This region has changed a lot since my youthful days sitting in courtrooms. But collegiality and talent have persisted. Methos also deserves credit for writing a book that has been well received by a broader audience. The University of Alabama School of Law awarded Methos the 2020 Harper Lee Prize for Legal Fiction. The book’s toughest critics will be practicing attorneys and Utahns. So don’t be surprised if you find yourself repeating the refrain, “Oh come on! Really!?” out loud while reading this book.

1. Is Beaver, Utah the “Home of the Best Water in the Country?” Is there a welcome sign that touts that fact? At a population of approximately 3,115, Beaver, Utah has more people than 207 other towns in Utah alone – refuting the claim that it is one of the least populated in the nation. *See* Page 23.

ANNE CAMERON MEDIATION

ATTORNEY | MEDIATOR | COLLABORATIVE PROFESSIONAL



VIRTUAL AND IN PERSON
MEETINGS AND MEDIATIONS

PARK CITY, SALT LAKE CITY
AND ZOOM LOCATIONS

FOCUSING ON FAMILY LAW

DOCUMENT DRAFTING FOR
PRO SE DIVORCE, CUSTODY,
AND FAMILY LAW

1526 UTE BLVD., SUITE 206, PARK CITY, UT 84098
5200 S. HIGHLAND DR. STE. 303, SLC, UT 84117

435-640-2158 | 435-659-8732

ANNE@AACLAWUTAH.COM

WWW.AACLAWUTAH.ORG

WWW.UTAHCOLLABDIVORCE.COM



Utah State Bar Services

Life-Altering Events: Prepare Now to Protect Your Practice, Clients, and Family

by R. Craig Johnson

Contributions by Scotti Hill, Martha Knudson, Linda Webster, and Peter Webster

On Monday, July 18th, lawyer R. Craig Johnson passed away after a battle with cancer. A beloved member of Salt Lake City's legal community, Craig worked as an expert in the field of mining law for decades, serving as a shareholder at Parsons Behle and Latimer at the time of his diagnosis. Among his many accomplishments was his collaboration, alongside his wife Nancy, with the Utah State Bar's Well-Being Committee on developing resources for lawyers facing catastrophic events. In a wide-ranging effort drawing upon experts in various fields, the Johnsons were a vital part of the Bar's November 19, 2021, CLE titled Life Altering Events: Prepare Now to Protect Your Practice, Clients, and Family. To honor Craig's legacy of service, the following is the first in a series of articles that aims to provide practical insight and strategic advice for lawyers facing catastrophic events. We begin by hearing about Craig's journey in his own words.



R. Craig Johnson
1950–2022

My name is Craig Johnson. I have been diagnosed with a terminal brain cancer called Glioblastoma. It is non-survivable. I share my story to raise awareness of the unique issues cancer, or any life-altering event, can have for ourselves, our colleagues, and our clients.

I'm seventy-one years of age, and live in Park City, Utah. I'm an attorney by profession, specializing in international mining

transactions. I've had a great career, working on some of the largest projects in the world, and in many places around the globe including the La Oroya project in Peru, the Resolution project in Arizona, and numerous other projects in various parts of the world.

On November 15, 2020, I got up early as usual, and went down

to turn on the TV so as not to wake my wife. When I turned on the TV, I realized that I could not read a single word on the screen. It was like looking at some alien language. I knew they were letters. I just could not fathom what they meant. I struggled for some time, trying to ascertain what was wrong, to no avail. A bit later my wife got up, and readied for her day. I had not yet told her. As the day continued, I finally asked her to take me to Park City Hospital. They did an MRI and found a one cm spot near my occipital lobe. After exploratory surgery and further testing the diagnosis of an aggressive form of glioblastoma was confirmed.

This will kill me, but as I've undergone treatment, I realize how lucky my wife and I are in our ability to meet this moment professionally, financially, and emotionally. I'm at the end of my legal career, my wife and I have worked to save our money as much as possible, and we have made thoughtful decisions about our insurance coverage. For example, after I turned sixty-five, we reviewed our options and decided to move to Medicare with a supplemental, instead of keeping my firm's medical insurance. That decision has now saved us thousands of dollars in medical costs allowing me to undergo therapy under the excellent care of the wonderful people at the Huntsman Cancer Institute. Not all are so fortunate.

Shortly after being diagnosed, I learned of another lawyer with glioblastoma. He's a thirty-seven-year-old father of three young children whose wife works in the home. Due to his illness, it appears he will soon lose his legal job from his firm, lose his insurance, and be pushed to the COBRA option which will be a huge cost and not last long enough. His family will likely be forced to sell their home and will struggle with payments and with trying to pay all the costs of modern living. It will be extremely difficult for them.

Pondering my own situation, that of this young lawyer, and the challenges I've watched other colleagues with cancer face, I've realized there are unique issues involving the legal profession that come with this consuming disease, regardless of its form. It's not only financial issues that arise, but also law practice ones – how long can you continue to work, what are the malpractice risks and how should you deal with them, how do you speak with clients about the situation and transition them if necessary? Wrapped around all these concerns are the emotional and family-support challenges that come with a life-altering diagnosis.

I share my story to help you, my colleagues. No one ever thinks that a devastating illness or accident will happen to them. But life is unpredictable. It's important we plan for ourselves and

our families, and if the unexpected happens we need access to answers, resources, and support. To that end, my wife and I have worked closely with the Utah Bar, the Huntsman Cancer Institute, our colleagues, and our friends to help provide guidance, support, and a roadmap of areas that require attention.

A broad description of this roadmap follows and helpful links, checklists, documents, and other free resources for each area are available at: wellbeing.utahbar.org under the heading Life Events.

SECURE SUPPORT AND FORM A CARE TEAM.

Emotional support from others is crucial. If you experience a life-altering healthcare event, you and your family are going to need it. This is a very human need. Unfortunately, when faced with a life-altering diagnosis or event, many people don't think, or want to think, about the accompanying emotional health issues. This is often true for both the patient and the caregivers. People can become numb, not know what to feel or think, be in denial, or become angry or depressed. According to Linda Webster, a highly specialized nurse with forty-five years of relevant experience, this can be especially true when the patient is a well-educated professional such as an attorney.

The Utah State Bar can help connect you with support. Utah's Lawyers Helping Lawyers will provide you with a peer who has faced similar challenges, can listen, share their experience, and provide support to those who are struggling. This is a free and confidential service that falls under the protection of Rule 8.3 of the Utah Rules of Professional Conduct. Lawyers Helping Lawyers can be reached at 801-900-3834. Licensed members of the Utah Bar and their dependents also have access to professional counseling services through Blomquist Hale Solutions. They can be reached at 1-800-926-9619. Services include help with stress, mental health concerns, grief, and financial issues.

In addition to emotional support, you will also need practical and logistical help. If facing a life-altering medical event, you likely already have a medical professional in your corner. Think about expanding your care team early on to include a patient navigator, case worker, or social worker who can answer questions, offer support, or direct you to resources. Most hospitals provide these services. Ask your medical provider to direct you.

Family and friends also will want to offer support. Accept it. But be specific about what you do and don't need. People don't always know how to best help unless you tell them.

IDENTIFY YOUR FINANCIAL RESOURCES.

Life-altering events inevitably impact your finances. This area of attention is one where both pre-planning and acting quickly after diagnosis are vital. Planning involves securing appropriate insurance before you have a problem instead of crossing your fingers and hoping for the best. Make sure you understand the depth and breadth of your current coverage and whether there are any potential gaps.

If you experience a life-altering healthcare event, act quickly after diagnosis to understand the costs of treatment, available insurance coverage, and access to FMLA and short or long-term disability benefits. Please be aware that there are timelines for designations for these and life insurance benefits that are vital to meet. A helpful checklist is available at wellbeing.utahbar.org under the Life Events heading.

GET ADVANCED CARE DIRECTIVES AND ESTATE DOCUMENTS IN PLACE.

It's hard to think about and plan for the "what ifs," especially when you're healthy and busy in your practice and your life. Like the proverbial cobbler, attorneys' families often are the last to "have shoes." Here, to get motivated it can be helpful to think of yourself as one of your clients. What would you tell a client to do?

Undoubtedly you would advise your client to do advanced care directives and estate planning. Advanced care planning allows you to share your health care wishes with all potential providers and family members when you cannot speak for yourself. This can relieve confusion and decision-making burdens during moments of crisis or grief. Taking care of estate planning does the same, while also allowing for a thoughtful and financially sound plan.

MLC INSURANCE AGENCY

In partnership with the Utah State Bar's
Well-Being Committee for the Legal Profession

Offering insurance products tailored to the needs of the legal profession.

- Life
- Cancer
- Stroke
- Heart Attack
- Short-Term Disability
- Long-term Disability
- Health
- Business
- Business Auto
- And more....



Give us a call for a quick quote on your business and insurance needs.

Phone: (435) 649-0970 | email: morgan@mlcagency.com
www.mlcagency.com

Putting these things in order now relieves stress and suffering later. Find a Utah attorney to help you get affairs in order now. The Utah Bar has also provided links to free documents and services that can be found at wellbeing.utahbar.org under the Life Events heading.

MAKE SUCCESSION PLANS NOW AND CONSIDER POTENTIAL MALPRACTICE AND ETHICAL CONCERNS.

Catastrophic events can befall even the most prepared lawyers. Whether it's an unforeseen illness or major life disruption to natural disasters and cyberattacks, planning ahead is vital to ensuring your legal practice survives and is compliant with your various ethical obligations. Consistency over time to avoid abrupt transitions is also something savvy business clients look for in an increasingly dynamic world. Unexpected changes are more difficult to manage than anticipated changes, but in each case, the solution is the same: succession planning.

Succession Policy

Every lawyer should craft a personalized succession plan for the following three scenarios: (1) a sudden, unexpected short-term absence, (2) a long-term absence, and (3) an immediate and permanent absence. Each plan should be written with a general audience in mind so that the appropriate measures can be implemented by a firm, loved ones, and colleagues alike.

Succession plans should contain:

- (A) Definitions section that outlines the term of the proposed absence.
- (B) Plan Implementation section that designates who is authorized to implement the plan, conduct hiring if needed with a ready job description on hand, and access to secure storage information of relevant passwords, contacts, bank account information, and other login info.
- (C) Timeline section detailing the order of events for winding down the practice (or covering an extended absence).
- (D) Communications plan to detail how the news of your absence will be shared with relevant shareholders, clients, the public.

Ethical safeguards

Craft a **file maintenance policy** that outlines how you will handle the return of client files upon the termination of representation and copies of files. *See* Utah R. Pro. Conduct 1.15; Utah R. Pro. Conduct 1.16. Please *also see* Utah State Bar Ethics Advisory Opinion Committee's Opinion 96-02 for additional information on what constitutes the client's file and Utah State Bar Ethics Advisory Committee Opinion 97-01 for what to do if you have a client's property but are unable to contact them.

IOLTA compliance

An essential aspect of safekeeping client property is ensuring that unearned funds are maintained separately from earned funds. This distinction ensures that client funds are adequately protected from a lawyer's creditors in the event assets are seized or the practice falls victim to a cyberattack. In 2020, Office of Professional Conduct reported nearly 7% of complaints stemming from lawyers' alleged misuse of client funds. *See* OFFICE OF PROF'L CONDUCT, *Annual Report* 28 (2021), <https://www.opcutah.org/wp-content/uploads/2021/02/OPC-Annual-Report-2019-2020.pdf>. Ensuring you establish and maintain your IOLTA account properly is vital to an ethical practice and to winding up in the event of a major disruption.

Contact bank/credit union for process on how to close IOLTA account, report to the Utah Bar Foundation within thirty days of any change in IOLTA status. *See* Utah Sup. Ct. R. Pro. Practice 14-1001(k).

Client communication

Create a draft letter to clients informing them of the absence, including information about returned fees, the client file, and contact information of lawyers you may refer to the client. **NOTE:** the client retains the choice of whether to seek out the referral the lawyer has provided. A client's file cannot be transferred without the client's consent. *See* Utah R. Pro. Conduct 1.6, ABA Standing Comm. on Ethics & Pro. Responsibility, Formal Opinion 99-414.

Ensuring technological compliance

Making sure your law practice is compliant with existing technology is not just a wise business decision – it's an ethical requirement. Lawyers who fail to invest in the minimal technological safeguards may be neglecting their duty of zealous advocacy (being able to use Webex for remote hearings for example) or safekeep client property (i.e., a properly secure database), which could render you the subject of a Bar complaint. This is necessary under Utah R. Pro. Conduct 1.1, cmt 8. Ensuring nonlawyer staff/office managers are compliant with the rules is mandated by Utah R. Pro. Conduct 5.3.

Advertising/selling your law practice

If you are contemplating any major changes to firm including firm names, *see* Utah R. Pro. Conduct 7.1. If you are considering selling your law firm practice, *see* Utah R. Pro. Conduct 1.17.

The bottom line is this. Planning ahead is important for your practice, your clients, and your family. While it's hard to think about the unthinkable happening, it can happen to any of us at any time. The Johnson family and the Utah State Bar encourage you to prepare now and to make use of the free tools and resources available at wellbeing.utahbar.org.

The Utah Minority Bar Association

is pleased to welcome
its 2022–2023
Executive Board!



Tony Graf, President;
Marina Tateoka, Treasurer;
Jessica Ramirez, Secretary;
Gabriela Mena, Immediate Past President;
Andres Gonzalez, President-Elect

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

SAVE THE DATE! **UMBA's 2022 Annual Banquet**

Thursday, November 10, 2022
Little America Hotel, SLC

Each year UMBA has the privilege of honoring attorneys, judges, firms, and community leaders for their contributions to the legal community and awarding scholarships to diverse law students at the S.J. Quinney College of Law and J. Reuben Clark Law School.

UMBA's Banquet and scholarships would not been possible without the generous support of our sponsors! If your firm or organization would like to sponsor this year's UMBA Banquet, please contact Tony Graf at utahminoritybar@gmail.com or visit <http://utahminoritybar.org/> for more information regarding sponsorship opportunities and Banquet details.

Thank you for your continued support!
UMBA Executive Board



UTAH MINORITY BAR ASSOCIATION
PROMOTING DIVERSITY IN THE LAW

Informal Legal Advice

by Keith A. Call

Have you ever been in a social setting when a friend or family member approaches you and says, “Hey, I’ve got a quick legal question for you. Gotta second?” If you have been a lawyer (or even a law student) for more than a minute, I can guarantee you have. I heard of one lawyer who even felt like she had been designated as the “ward lawyer” because she often gets approached with this type of question at church.

This is a tough one. I’m not aware of any published Utah cases or ethics opinions that directly address this issue. But there are several potential ethical and liability pitfalls whenever your brother-in-law hits you up with a “quick legal question.” Here are just a few of them.

Attorney-Client Relationship

By giving informal legal advice, you may be unwittingly creating an attorney-client relationship, with all of its attendant duties and responsibilities. An implied attorney-client relationship can result when the “client” seeks and receives the advice of the “lawyer” in matters pertinent to the lawyer’s profession. *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727 (Utah Ct. App. 1990). For an implied attorney-client relationship to exist, the “client” must actually and reasonably believe that the attorney represents the client’s interests. *Roderick v. Ricks*, 2002 UT 84, ¶ 41, 54 P.3d 1119. Courts will examine the totality of the circumstances surrounding the alleged representation. *Norman v. Arnold*, 2002 UT 81, ¶ 17, 57 P.3d 997. Under the rules of ethics, an attorney-client relationship “can arise from brief informal conversations, in person or by telephone, even though no fee is ever discussed or charged and no contract of employment is signed.” Utah State Bar Ethics Advisory Op. 97-02 (Jan. 24, 1997).

Competence

The first rule of ethics requires a lawyer provide competent representation and advice. Utah R. Pro. Cond. 1.1 This requires appropriate legal knowledge, skill, thoroughness, and preparation. That’s hard to do when Soccer Dad or Mom starts asking questions about unfamiliar areas of the law on the sideline.

Conflicts of Interest

Handing out informal legal advice usually does not give you the opportunity to screen for potential conflicts of interest. Indeed, you may not even know who the relevant parties are. This can inadvertently lead to forced withdrawal by you or a partner or, worse, violating the ethical rules relating to conflicts of interest.

Confidentiality of Information

Informal advice is by definition, well, informal. Due to its informality, there may be a temptation to ignore rules regarding confidentiality and inadvertently share confidential information with other family members or friends. Lawyers have an obligation to keep the confidences of prospective clients, even if they never actually become a client. Utah State Bar Ethics Advisory Op. 05-04 (Sept. 8, 2005).

Unauthorized Practice of Law

It’s even possible that the informal legal advice will violate other states’ rules regarding the unauthorized practice of law. Suppose you are at a family reunion in Colorado (or maybe even Utah) and your cousin asks you about a ski accident he had at a Colorado ski resort. Unless you are licensed to practice law in Colorado, any advice you give him might run afoul of Colo. R. Pro. Conduct 5.5.

So What Should You Do?

For those of you who want a way out of advising Uncle Bob about his water rights, Sister Davis about her divorce, or Neighbor Alison about her bad car repairs, read these two short articles: *Attorneys Beware: Do Not Provide Informal Legal Advice to Friends or Relatives*, PARAGON UNDERWRITERS (March 1, 2019), <https://www.paragonunderwriters.com/attorneys-beware-do-not-provide-informal-legal-advice-to-friends-or-relatives/>;

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



Jennifer Anderson, *How to Stop Your Family and Friends from Asking You for Legal Advice*, INFOTRACK.COM (Nov. 24, 2021), <https://www.infotrack.com/blog/how-to-stop-your-family-and-friends-from-asking-you-for-legal-advice/>. Those articles will give you some great tools for just saying “no.”

My personal view, however, is different. In most of my articles, I have advised you to take the conservative approach, doing whatever it takes to keep yourself out of trouble. But in this case, I believe the law is a *service* profession and lawyers have at least a moral obligation to lend a hand where they can. Lawyers should not shy away from helping people unless we get paid a fee and set up a formal attorney-client relationship. If we are so afraid of lawsuits and ethics complaints that we can’t informally advise our neighbor, then we have messed up our profession and we need to fix it. Heaven knows I do that all the time with my next-door-neighbor-doctor!

If you do decide to engage in informal advice to your neighbor, adopt the following practices to minimize your risks:

- Stay in your lane. Don’t try to look smart (or appear helpful) by giving legal advice on topics you are unfamiliar with. After all, you are not really helping anyone if you try to give legal advice in areas where you are not competent.
- Keep your advice general, show empathy, and suggest additional resources. Don’t feel compelled to solve your friend’s problem on the fly.
- Keep things professional, including by keeping confidences. Don’t let the informality of the situation draw you into making professional or ethical mistakes.
- Depending on how far your conversation goes, you may want to follow up in writing to clarify that you are not their attorney. That may feel awkward, but there are ways to do it tactfully. For example, you could write a text or email offering an attorney referral or other resource, and casually clarify you are not their lawyer.

Being asked for informal legal advice can sometimes be annoying or even weird. On the other hand, it may be an opportunity to use your years of legal training and experience to help someone in need. It’s completely understandable if you want to simply avoid doing so, and there are usually ways to do so gracefully. For those who don’t want to miss an opportunity to help, I hope this article helps you do so safely.

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

Need Ethics Help?



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

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

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



ethics hotline@utahbar.org

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 6, 2022 meeting held during the Summer Convention at the Loews Coronado Bay Resort – Coronado, California.

- The Commission reappointed Kim Cordova as Bar ABA Representative.
- The Commission appointed the Budget and Finance Committee as follows: Brad Merrill, Rick Hoffman, Tyler Young, Marty Moore, Katie Woods, Todd Gordon (CPA), and Marvin John (CPA). Ex Officio members: Lauren Stout, Elizabeth Wright.
- The Commission reorganized as follows: Katie Woods (president), Erik Christiansen (president-elect), Commissioners Tom Bayles, Traci Gunderson, Matt Hansen, Rick Hoffman,

Greg Hoole, Beth Kennedy, Chrystal Mancuso-Smith, Marty Moore, Mark Morris, Andrew Morse, Shawn Newell, Cara Tangaro, and Tyler Young.

- The Commission approved the following members of the Executive Committee: Katie Woods, Traci Gunderson, Chrystal Mancuso-Smith, Andrew Morse, Mark Morris, and Erik Christiansen.
- The Commission adopted the following resolution on bank signatures: the Executive Committee members are signatories on checks for amounts paid over \$1,000.

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/>.

Thank You to Our Summer Convention Sponsors & Exhibitors

SPONSORS

Ballard Spahr, LLP

Dentons Durham Jones Pinegar

Gordon & Rees Scully Mansukhani

Kipp & Christian, P.C.

Kirton McConkie

Manning Curtis Bradshaw & Bednar

Parsons Behle & Latimer

Ray Quinney & Nebeker

Snell & Wilmer

Snow Christensen & Martineau

Thorpe North Western

Wilson Sonsini

Workman Nydegger

EXHIBITORS

ALPS

BYU Law

Clio

Filevine

Frost Law

GreenFiling

InfoTrack

Netdocuments

Sage Forensic Accounting

Sandline

Tiber

Utah Bar Foundation

Utah Center for Legal Inclusion

Utah @Ease

University of Utah Law

Utah Supreme Court Board of
Continuing Legal Education



UTAH STATE BAR.

FALL FORUM

"UTAH LAWYERS AS
COMMUNITY BUILDERS"

Friday, November 4 • Little America Hotel, SLC



LOOK FOR THE MOST CURRENT INFORMATION AT:

www.utahbar.org/fallforum

Pro Bono Honor Roll

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

Private Guardian ad Litem

David Corbett
Harold Mitchell
Jessica Read
Orson West
Amy Williamson
Delavan Dickson

Pro Se Debt Collection Calendar

Miriam Allred
Seng Mai Aung
Mark Baer
Pamela Beatse
Laura Carlson
Keenan Carroll
Ted Cundick
KC Decker
Marcus Degan
Marcus Degen
Michael Eixenberger
William Emery
Mary Essuman
Leslie Francis
Greg Gunn
Hong Her
Scotti Hill
Michelle James
Zachary Lindley
Zack Lindley
Darren Neilson
Matt Nepute
Gianna Patchett
Paige Ricks
Brian Rothschild
Christopher Sanders
George Sutton
Austin Westerberg
*with special thanks to
Kirtan McConkie and
Parsons Behle & Latimer for
their pro bono efforts on
this calendar.

Pro Se Immediate Occupancy Calendar

Alex Baker
Joel Ban
Pamela Beatse
Keenan Carroll
Marcus Degen
Leslie Francis
Annika Hoidal
Nicole Johnston
Matt Nepute
Lauren Scholnick

Pro Se Immediate Occupancy/Debt Collection Calendar (2nd Dist – Farmington)

Keil Myers
Matt Nepute

SUBA Talk to a Lawyer Legal Clinic

Braden Bangerter
N. Adam Caldwell
Travis Christiansen
Adrienne Ence
Bill Frazier
James Purcell
Lewis Reece
Liz Tyler

Family Justice Center

Rob Allen
Steve Averett
Kate Burckle
Kate Burckle
Dave Duncan
Kit Erickson
Amy Fiene
Michael Harrison
Jenny Hoppie
Rachel Howden
Jacob Kuamoo
Abigail McEuen
Analisa McKay
Brandon Merrill
Sandi Ness
Breeze Parker
Dailyah Rudek
Kim Sherwin
Babata Sonnenberg
Jordan Truman
Brittany Urness
Nancy Van Slooten

Timpanogos Legal Center

McKenzie Armstrong
Amirali Barker
Bryan Baron
Jenny Hoppie
Heather Jemmett
Sol M Muamain
Keil Myers
John Seegrist
Alexandra Thomas
Nancy Van Slooten

Utah Bar's Virtual Legal Clinic

Nathan Anderson
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
Jeffrey Daybell
Matthew Earl
Craig Ebert
Jonathan Ence
Rebecca Evans
Thom Gover
Sierra Hansen
Robert Harrison
Aaron Hart
Rosemary Hollinger
Tyson Horrocks
Robert Hughes
Michael Hutchings
Gabrielle Jones
Justin Jones
Suzanne Marelus
Travis Marker
Gabriela Mena
Tyler Needham
Nathan Nielson
Sterling Olander
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
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

Utah Legal Services pro bono case

Geena Arata
Christopher Beus
Marca Brewington
James Cannon
Kim Cordova
Donna Drown
Carolina Duvanced
Angela Elmore
Alexandra Foster
Samantha Frazier
Aaron Garrett
Curtis Grow
M. Darin Hammond
Liisa Hancock
Sierra Hansen
Rori Hendrix
Tana Horton
Barry Huntington
Ryan James
Jenny Jones
Aaron Kinikini
Linzi Labrum
Keli Myers
Elisse Newey
Jacob Ong
Erin Ott
Kayla Quam
Tamara Rasch
Lillian Meredith Reedy
David Rummmler
Shawn Smith
Babata Sonnenberg
Christopher Sotiriou
Megan Sybor
Reid Takeota
Scott Thorpe
Wendy Vawdrey
Jordan Westgate
Marshall Witt
Russell Yauney
Anthony Zhang

2022 Fall Forum Awards

Nominations will be accepted until Friday, September 23 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.

A WORLD OF DIFFERENCE

START YOUR JOURNEY

Fastcase is one of the planet's most innovative legal research services, and it's available free to members of the Utah State Bar.

LEARN MORE AT
www.utahbar.org

fastcase

UTAH STATE BAR
ORGANIZED 1931



Utah's Recommended Divorce Attorneys

Thank you for your referrals!



UTDIVORCEATTORNEY.COM

801-685-9999

Attorney Discipline

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

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).

SUSPENSION

On April 13, 2022, the Honorable Samuel P. Chiara, Eighth Judicial District, entered an Order of Suspension against Roland F. Uresk, suspending his license to practice law for a period of one year. The court determined that Mr. Uresk violated Rule 1.1 (Competence), Rule 1.3 (Diligence), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

In 2018, the court entered an order of discipline placing Mr. Uresk on probation for three years. One of the conditions of the probation was that complaints received by the Office of Professional Conduct (OPC) during the probationary period would be reviewed by the Court as a possible material breach. During the term of probation, the OPC received three

complaints against Mr. Uresk. As the subject of the three investigations by the OPC during the probationary period, Mr. Uresk was sent various requests for information by the OPC. Mr. Uresk failed to respond to the requests for information from the OPC.

Mr. Uresk failed to perfect an appeal for his client resulting in the Utah Court of Appeals affirming the lower court's decision to the detriment of Mr. Uresk's client. On three occasions, the court of appeals indicated to Mr. Uresk that payment had not been made for the transcript. In one instance, the court of appeals noted in an order that the transcript still needed to be paid for. Mr. Uresk received that order, but he did not fully read the order, including the note about the transcript. At no time did Mr. Uresk follow up with the court of appeals or the County, who Mr. Uresk believed had paid for the transcript, about the transcript. He simply assumed it had been taken care of.

Adam C. Bevis Memorial Ethics School

September 21, 2022 or March 15, 2023
6 hrs. CLE Credit, including at least 5 hrs. Ethics
 (The remaining hour will be either Prof/Civ or Lawyer Wellness.)

Cost: \$100 on or before September 9 or March 7,
 \$120 thereafter. Sign up at: opcutah.org

TRUST ACCOUNTING/ PRACTICE MANAGEMENT SCHOOL

Save the Date! January 25, 2023
6 hrs. CLE Credit, including 3 hrs. Ethics
 Sign up at: opcutah.org



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

801-257-5518 • DisciplineInfo@UtahBar.org

SUSPENSION

On September 14, 2020, the Honorable David J. Williams, Second Judicial District, entered an Order of Suspension against Dustin R. Matthews, suspending his license to practice law for a period of three years. The court determined that Mr. Matthews violated 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:

Criminal matter #1

Mr. Matthews violated a protective order in place that prohibited him from having any contact with the victim. Mr. Matthews violated this order by repeatedly contacting her via text messages, emails, and phone calls. In addition, Mr. Matthews logged into her Facebook page and posted personal messages. Mr. Matthews was convicted of one count of Attempted Stalking.

Criminal matter #2

Mr. Matthews attempted to make a turn while riding his motorcycle and crashed. Officers at the scene reported a strong odor of alcohol coming from Mr. Matthews. Mr. Matthews was transported to the hospital for his injuries. The police department obtained a warrant for Mr. Matthews' blood to test his blood alcohol level. When officers attempted to take his blood, Mr. Matthews resisted and repeatedly kicked the officers. Mr. Matthews was convicted of one count of Assault Against a Police Officer/Military Service Member, one count of Attempted Obstructing Justice, one count of Driving Under the Influence of Alcohol/Drugs, and one count of Disorderly Conduct After Request to Stop.

Criminal Matter #3

The police were dispatched to Mr. Matthews's residence after a report of an assault. After questioning, the police gathered that Mr. Matthews had gotten into an argument with his wife. During the argument, Mr. Matthews pushed his wife to the ground, grabbed her hair, and slammed her head against the floor. His wife was pregnant at the time and two children were in the home. Mr. Matthews was convicted of one count of Assault and two counts of Domestic Violence in the Presence of a Child.

RESIGNATION WITH DISCIPLINE PENDING

On April 12, 2022, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of D. Brian Boggess for violation of Rule 1.2(a) (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), Rule

1.16(d) (Declining or Terminating Representation), Rule 7.1 (Communications Concerning a Lawyers Services), Rule 8.1(b) (Bar Admission and Disciplinary Matters), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary

This case involves several matters. In the first matter, a client retained Mr. Boggess for two separate accident claims. The client had a claim against an auto insurance company for an automobile accident and a claim against a drug store for a slip and fall accident. Mr. Boggess received a settlement check for the slip and fall accident. The check was made out to Mr. Boggess and the client. Mr. Boggess signed the back of the check as the client's attorney in fact. The client was never notified a settlement had been reached and never received any funds from Mr. Boggess.

Mr. Boggess signed the client's name to a release and settlement with the auto insurance company without her knowledge or authorization. Mr. Boggess received a settlement check from the auto insurance company made out to himself, the client, a law firm and Medicare Secondary Payer Recovery. Mr. Boggess signed the back of the check for all parties as their attorney in fact. The client was never notified that a settlement had been reached in the auto insurance matter and never received any of the funds from Mr. Boggess. The client's Social Security payments were offset to pay Medicare.

The OPC sent letters to Mr. Boggess requesting his response to the allegations. Mr. Boggess did not respond at first, eventually sending a letter stating that he had attempted to send the client her settlement proceeds but was unable to locate her. The OPC requested banks records to demonstrate that the client's money remained in Mr. Boggess' trust account. Mr. Boggess did not respond. A review of Mr. Boggess' trust account records demonstrated that the account dropped below the amount he was supposed to be holding for the client.

In the second matter, a federal employee was injured at work. The employee filed a claim for compensation under Federal Employees Compensation Act (FECA) with the Office of Worker's Compensation (OWCP) for her medical expenses and lost wages. OWCP accepted the claim and began paying compensation to the employee. Later, the employee retained Mr. Boggess to represent her in filing a lawsuit against the negligent third-party that caused the injuries for which she received FECA

benefits. Prior to filing the lawsuit, Mr. Boggess was advised, in writing, of the government's statutory right of reimbursement under FECA out of any proceeds from the lawsuit.

The lawsuit settled but Mr. Boggess did not satisfy or otherwise assure satisfaction of the United States' FECA disbursements upon receipt of the settlement proceeds but instead deposited the settlement proceeds in his trust account and distributed the proceeds to himself and his client.

In the third matter, a client retained Mr. Boggess to represent him in a child support and custody matter. Other than the assignment of a Commissioner to the case in 2019, there is no activity on the docket from the time Mr. Boggess entered his appearance until mid-2020 when the client filed a pro se petition to modify.

Mr. Boggess' communication with the client decreased in frequency and Mr. Boggess has not communicated with the client since 2019. The client never received an invoice from Mr. Boggess. The OPC issued a Notice of Informal Complaint (NOIC) to Mr. Boggess. Mr. Boggess requested and was granted an extension of time to respond. Mr. Boggess did not respond to the NOIC.

In the fourth matter, a client retained Mr. Boggess after he was involved in a motor vehicle accident. The client received a settlement offer from opposing counsel where the client would make a single payment to the opposing party. The client made many attempts to obtain information from Mr. Boggess about the advisability of accepting the settlement offer but Mr. Boggess was either unavailable or delayed providing information. The client contacted a second attorney to encourage Mr. Boggess to move faster. The second attorney and client continued to attempt to contact Mr. Boggess.

The client terminated Mr. Boggess' services and requested an accounting and a refund of unearned fees. Mr. Boggess did not provide either. The OPC issued a NOIC to Mr. Boggess. Mr. Boggess did not respond to the NOIC.

In the final matter, a client retained Mr. Boggess to represent her in a grandparent custody case in Nevada. A couple months later, the client contacted Mr. Boggess asking for an update and expressed her concern about not hearing from him. Mr. Boggess responded and indicated that he had filed the documents. About six weeks later, the client asked for a status update. About a week later, Mr. Boggess filed a Petition for Visitation in the district court in Nevada.

Shortly thereafter, an Order of Suspension was entered in the Supreme Court of Nevada against Mr. Boggess. The Order indicated, in part, that Mr. Boggess violated the terms of his stayed suspension and imposed the previously stayed twenty-one-month suspension and imposed a three-year suspension.

The client attempted to contact Mr. Boggess. Mr. Boggess did not respond. The client requested an accounting and a refund from Mr. Boggess. Mr. Boggess apologized and said he would provide a partial refund. The client again requested an accounting and refund. Mr. Boggess did not respond.

DELICENSURE

On March 5, 2021, the Honorable Noel S. Hyde, Second Judicial District, entered an Order of Delicensure against Richard H. Reeve, delicensing him from the practice of law. The court determined that Mr. Reeve violated Rule 1.15(a) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), Rule 5.4(a) (Professional Independence of a Lawyer), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client retained Mr. Reeve following the wrongful death of her husband. At the time, Mr. Reeve was an employee of a law firm. The litigation involved was a federal class action that resulted in a master settlement agreement (Agreement). This Agreement resolved all issues related to the claims that resulted from the death of the client's husband. The administrators of the Agreement indicated that the amount of the settlement would be made payable to the law firm. However, Mr. Reeve intervened and insisted that the check be made payable to himself, individually. Mr. Reeve deposited the funds into a personal account. Mr. Reeve thereafter accessed funds in the account for his personal use and purposes. Mr. Reeve did not communicate to the client that the funds had been received.

Mr. Reeve left the employment of the first law firm and became employed with a second law firm. There was an agreement that Mr. Reeve would continue to act in connection with the case when the matter arrived at the second law firm. The client contacted Mr. Reeve's paralegal regarding the status of her case. The paralegal communicated concerns regarding the case to representatives of the second law firm. The representatives made a phone call to Mr. Reeve who falsely represented that all funds received in the case were in first law firm's trust account and he had not used any funds. The representatives contacted the first law firm

and confirmed that no funds had been deposited or held in their trust account. Mr. Reeve substantially misrepresented facts in relation to the settlement, receipt of funds, continuing of litigation, and disbursement of funds.

The client expressed concern over the continuous integrity of the funds. Mr. Reeve prepared a screenshot of the funds to suggest to the client and her son that the funds had been preserved and had just been turned over to her several months late. The Court found that the screenshot was a misrepresentation and did not accurately represent the facts, that Mr. Reeve knew this at the time he prepared the document.

Mr. Reeve made an agreement with his paralegal wherein he agreed to pay her a certain percentage of the attorney's fee portion from any personal injury or wrongful death matters on which she assisted him. The paralegal was to be paid a specific amount tied to this case, and even calculated the amount due to her. The case in which she was to receive funds was a case in which the attorney who signed the agreement had failed to safeguard the funds of the client.

DELICENSURE

On April 1, 2022, the Honorable Robert C. Lunnen, Fourth Judicial District, entered an Order of Delicensure against Aaron D. Banks, delicensing him from the practice of law. The court determined that Mr. Banks violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.16(d) (Declining or Terminating Representation), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

This case involves two client matters. In the first matter, a client was involved in an automobile accident and retained Mr. Banks to represent her and her claim for damages to her automobile and personal injuries she incurred as a result of the accident. During the months after the client retained Mr. Banks, she often expressed concern about the payment of numerous medical bills that she was incurring as a result of her injuries and corresponding medical treatment. During this time, Mr. Banks did not discuss with or explain to the client any requirement to satisfy her personal injury protection (PIP) coverage. Mr. Banks failed to timely obtain the needed information to obtain a PIP exhaustion letter from her auto insurance carrier which caused unreasonable delay in the payment of her of medical bills and asserting her claim.

Mr. Banks informed the client that he was communicating with the insurance adjustor for her claim. The insurance adjustor only had one or two conversations with Mr. Banks and they never discussed settling the client's claim. Mr. Banks falsely represented to the client that the insurance company had made an offer to settle the client's personal injury claim. Mr. Banks generated an email purportedly from the insurance adjustor to the client with a settlement and release. The settlement and release was not sent by the insurance company. The client signed the settlement and release and Mr. Banks told the client payment would be received within three weeks. Mr. Banks later claimed the payment was delayed because the insurance company had hired outside counsel to review the claim.

The client attempted to obtain her case file from Mr. Banks but was unsuccessful. Additional efforts by her new attorneys to obtain the case file were not successful.

In the second matter, a client hired Mr. Banks to file a petition to adopt her biological daughter. The client's father (Father) had adopted her daughter a few years prior and agreed to consent to the adoption. Mr. Banks sent a consent form to Father and requested he sign and return the document to Mr. Banks. Father signed the consent form promptly, had it notarized and returned the completed form to Mr. Banks.

Mr. Banks told the client that he needed to postpone the final adoption hearing, the court had dropped the ball but he would set a new hearing, proposing two different dates for the client. The client selected a new date and made arrangements with Mr. Banks for Father to receive a subpoena by email. Then, Mr. Banks again informed the client the hearing was cancelled and gave a new date for the final adoption hearing. The client received a message from Mr. Banks after arriving at the courthouse for the new final adoption hearing date. The message from Mr. Banks indicated that he had received a signed order from the judge and a hearing was no longer necessary. Mr. Banks claimed that he sent the order to the client by mail.

Mr. Banks never filed a petition for adoption on behalf of the client, so there were no proceedings and no order as represented by Mr. Banks to the client. The client was unable to hire another attorney to file the adoption because she did not have the money to pay for another round of legal fees.

PRO BONO HONORS

The Utah State Bar honors the pro bono work of lawyers admitted through the Utah Supreme Court's 2020 Emergency Diploma Privilege Order. Thanks to their efforts, over 3,000 pro bono hours were provided to Utahns and Utah communities in need during the height of the COVID-19 pandemic.

PLATINUM ADMITTEES

COMPLETED 200 OR MORE HOURS OF PRO BONO WORK

Haley Brooks Cousin
360 hours

Patrick Neville
360 hours

Katherine Rane
360.8 hours

Aro Han
327.5 hours

Annette Nicol
358.4 hours

Lynna Shin
202.8 hours

John Lahtinen
349.7 hours

Candace Waters
203.7 hours

GOLD ADMITTEES

COMPLETED 100 OR MORE HOURS OF PRO BONO WORK

Daniel Crook

Annie Keller-Miguel
Jake Mitchell Nelson

Christian C. Wilde

SILVER ADMITTEES

COMPLETED 50 OR MORE HOURS OF PRO BONO WORK

Geena Arata
Amber McFee

Steven Mehr
Katie Okelberry

Alex Vandiver
Derek Walton

BRONZE ADMITTEES

COMPLETED UP TO 50 HOURS OF PRO BONO WORK

Roger Adams
Caleb O Andrews
Stephen Arroyo
Spencer Brown
Anna Christian
Jonathan Ence
Iqan Fadaei
Daniel Fronk

Annemarie Garrett
Luke J Hanks
Blaine Hansen
Esabelle Khaosanga
Maren Laurence
Amy McDonald
Whitney McKiddy
Peter Ott
Tulsi Patel

Seth Russell
Taylor M. Smith
Mark Steffensen
Elizabeth Stubbs
Spencer Thevenin
Daniel J Thomas
Rachel Whipple
Jaime Wiley



BAR POLICY: Before attending a seminar/lunch your registration must be paid.

September 16, 2022

Cache County Golf & CLE.

Presented by the Litigation Section of the Utah State Bar.

September 20, 2022

What Every Estate Planner Needs to Know About Family Law.

Presented by the Estate Planning Section of the Utah State Bar.

September 21, 2022

6 hrs. CLE, including at least 5 hrs. Ethics

Adam C. Bevis Memorial Ethics School

Cost: \$100 on or before September 9, \$120 thereafter. Sign up at: opcutah.org.

September 30, 2022

Trial Skills Refresher

September 30, 2022

Utah County Golf & CLE

Presented by the Litigation Section of the Utah State Bar.

October 14, 2022

Becoming Reacquainted with the Family Law Courts

Presented by the Family Law Section of the Utah State Bar.

October 28, 2022

Business Evaluation and Forensic Accounting - Differing Attorney and Evaluator Views

Presented by the Family Law Section of the Utah State Bar.

November 4, 2022

TBA



FALL FORUM

Little America Hotel, Salt Lake City. Watch for the latest details at www.utahbar.org/fallforum.

January 25, 2023

6 hrs. CLE, including 3 hrs. Ethics

Trust Accounting/Practice Management School

Sign up at: opcutah.org.

March 15, 2023

6 hrs. CLE, including at least 5 hrs. Ethics

Adam C. Bevis Memorial Ethics School

Cost: \$100 on or before March 7, \$120 thereafter. Sign up at: opcutah.org.

All content is subject to change.

All registrations can be accessed on the Practice Portal or at: utahbar.org/cle, where you will find the latest information on monthly section luncheons and more CLE to come, to help our licensees with their annual compliance.

RATES & DEADLINES

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

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

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

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

JOBS/POSITIONS AVAILABLE

Trust Administration & Probate Attorney – Provo, UT. McCullough Law is seeking trust administration and probate attorneys who excel in client relations and navigating the complexities of carrying out decedents' wishes. These individuals must be humble, self-motivated, and willing to invest in a long-term relationship with our firm. The incumbent will work with our executive team to build the trust administration and probate arm of our firm. The development of this area will require individuals to challenge the status quo and assist in structuring processes that align with best business practices rather than traditional legal service operations. Send resume to caryn@mlutah.com.

Estate Planning Attorney – Provo, UT. McCullough Law is seeking experienced, Utah-licensed, estate planning attorneys. With over 25 years of experience, our growing firm is revolutionizing the legal services industry. We are looking for attorneys who thrive in a fast-paced environment, and who are humble, self-motivated, continuously improving, and willing to invest in a long-term relationship with our firm. The incumbent will work with a team to prepare, review, and implement our customized estate-planning and asset-protection plans. These precise plans ensure the goals and objectives of the client are achieved. Candidates with tax backgrounds are preferred. Send resume to caryn@mlutah.com.

Attorney / Paralegal – Anderson Business Advisors is seeking qualified Attorneys and Paralegals in Draper, UT office. For Attorneys, we require 1+ years of estate planning experience and a law degree. Excellent compensation and benefits. Please contact Will Clark at wclark@andersonadvisors.com or (702) 803-1071 for information.

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

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

Cohne Kinghorn, P.C., seeks high quality attorneys who want control over their time, work, rates, and clients. For partners, we offer a transparent compensation structure and a symbiotic group that helps each other out. We have the support systems found in larger firms, but we keep overhead low. For associates, we offer lower billing requirements and the opportunity to develop business. We are a full-service law firm and have needs in various areas of law. We have room right now for partners, senior associates, and associates with 1–3 years of experience (or groups of lawyers). Please contact us at recruitment@ck.law.

OFFICE SPACE/SHARING

DOWNTOWN PRACTICE MADE SIMPLE. Beautiful executive offices with established law firm on State at Third South close to Matheson and Hatch courthouses. Ideal for 2 or 3 attorneys with staff. Receptionist services, conference rooms, parking and warm associations with experienced attorneys. Contact Richard at (801) 534-0909 / richard@tjblawyers.com.

SERVICES

CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmach/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

NEW YORK ESTATE ADMINISTRATION ATTORNEY.

Admitted in New York and Utah serving all counties. 30 years experience in Probate, Administration, Judicial Accountings, Contested Proceedings, etc. Hourly, flat and contingent fee arrangements. We search for and locate missing and unknown heirs and witnesses. Richard S. Dillworth, Esq., Sandy, UT. Contact: RSD@dillworth-law.com or (516) 852-8339.

EXPERT JUDGMENT ENFORCEMENT: Hundreds of clients. Millions and millions of dollars collected. If I can't collect it, no one can. I will collect judgments from \$1,000 to \$100,000,000+ on hourly retainer or commission. Jonathan D. Kirk, Kirk Law. Telephone: (801) 980-0388 – Email: jonathan@kirklawutah.com.

Insurance Expertise: Thirty-nine years of insurance experience, claims adjusting, claims management, claims attorney, corporate management, tried to conclusion over 100 jury trials with insurance involvement, participated in hundreds of arbitrations and appraisals. Contact Rod Saetrum J.D. licensed in Utah and Idaho. Telephone (208) 336-0484 – Email Rodssetrum@saetrumlaw.com.

PRIVATE INVESTIGATOR / SCOTT HEINECKE. A trusted name since 1983. Specializing in investigative research, Locating witnesses/defendants, witness statements, background checks, asset searches, nationwide court and public records research. Website: factfindersLLC.com Email: scott@factfindersLLC.com Call: (801) 441-6100. FactFinders Investigations, LLC, Utah P.I. Agency License Number P100008.

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

Get the Word Out!

If you need to get your message out to the 11,000+ members of the Utah State Bar...

Advertise in the Utah Bar Journal!

For current ad rates, or to place an ad in the *Utah Bar Journal*, please contact:

For **DISPLAY** ads
Laniece Roberts
801-910-0085

UtahBarJournal@gmail.com

For **CLASSIFIED** ads:
Christine Critchley
801-297-7022

ccritchley@utahbar.org

OVER \$1 BILLION WON FOR CLIENTS

PAST RESULTS DO NOT GUARANTEE FUTURE SUCCESS



SECOND HIGHEST WRONGFUL
DEATH VERDICT IN THE USA
- TOPVERDICT.COM 2020

OVER 200 7 & 8-FIGURE
VERDICTS & SETTLEMENTS



NEVADA REFERRAL & CO-COUNSEL RELATIONSHIPS

NEVADA'S LARGEST & HIGHEST RATED INJURY LAW FIRM

"The Richard Harris Law Firm is top of class when it comes to getting the most out of Nevada personal injury cases. I know Rick Harris well and have complete confidence in him and the amazing attorneys that make up his team. Recently Rick's firm received a \$38 million dollar verdict on a difficult premises case. If you're looking to partner with a quality Nevada law firm, Rick Harris is your best option by far."

~ Craig Swapp, Craig Swapp and Associates

RICHARD HARRIS
LAW FIRM 
833.222.2222

RichardHarrisLaw.com

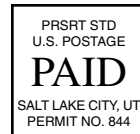
801 SOUTH 4TH STREET | LAS VEGAS, NV 89101

6900 SOUTH MCCARRAN BLVD., #1010 | RENO, NV 89509



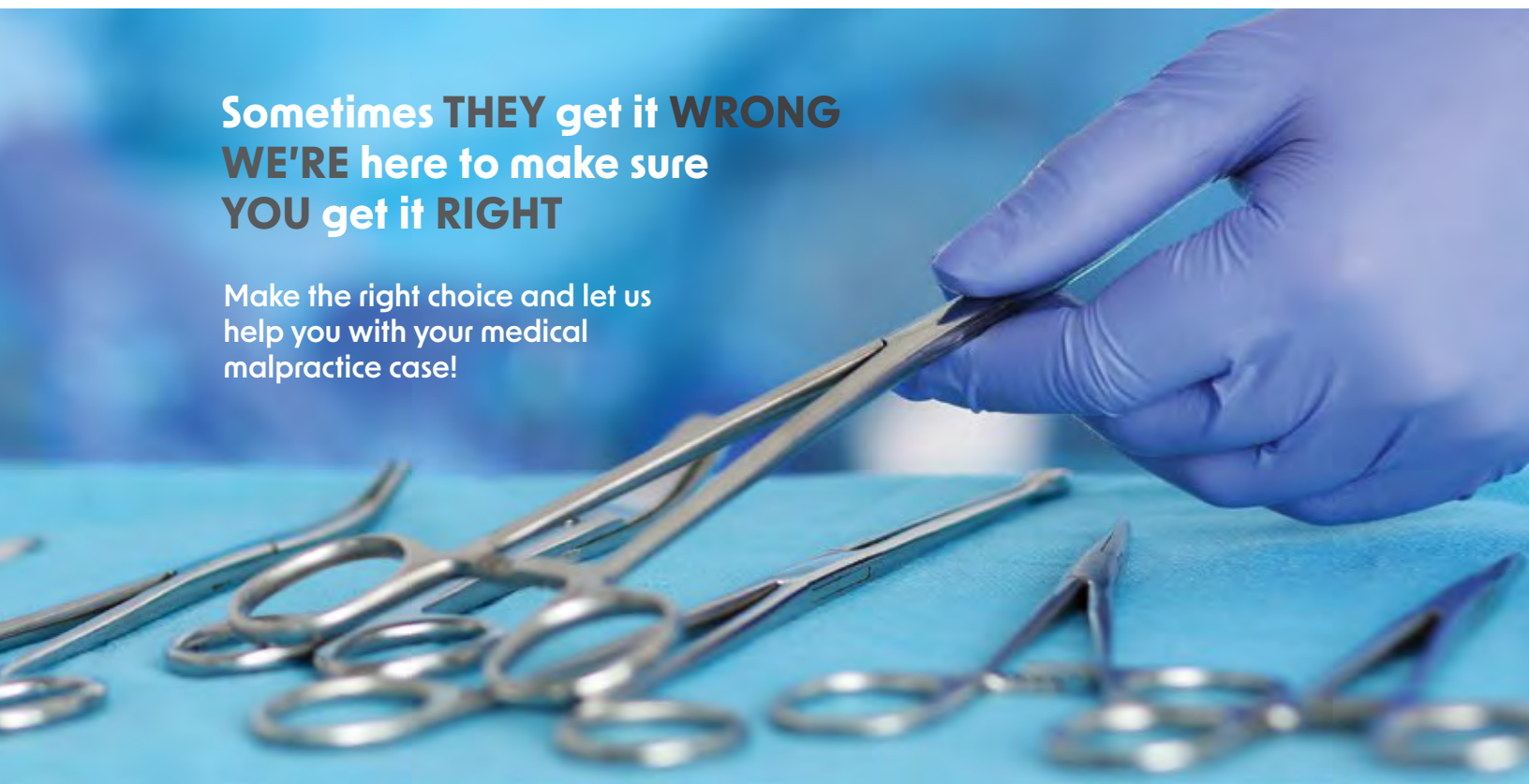
Super Lawyers

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111



Sometimes THEY get it WRONG
WE'RE here to make sure
YOU get it RIGHT

Make the right choice and let us
help you with your medical
malpractice case!



YOUNKER | HYDE | MACFARLANE

P A T I E N T I N J U R Y

257 East 200 South
Suite 1080
Salt Lake City, UT 84111

Norman J. Younker, Esq.
Ashton J. Hyde Esq.
John M. Macfarlane, Esq.

801.335.6467
yhmlaw.com
patientinjury.com