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RYAN ANDRUS is general counsel at WCF Insurance. Asked about how he came to take this cover photo, Ryan said, "I took the photo on a trail run on November 3, 2018. Got up to the lake just in time for sunrise."



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

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.

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.

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New Beginnings

by Heather L. Thuet
Key Legal Group, LLC

"Every new beginning comes from some other beginning's ending."
— Seneca

For many, the new year symbolizes both an ending and a new beginning. An opportunity to reflect on the success and challenges of the past year, and to embrace with renewed vitality the gift of a new year.

Ring in the new year and bidding adieu to the old one is a tradition that spans the globe. Many individuals celebrate the first day of the new year on a day other than January 1 and celebrations occur throughout the year. For example, Rosh Hashanah began on September 6 and ended September 8. The Korean New Year, Seollal, is February 1, 2022, as is the Chinese New Year. 2022 will mark the year of the Tiger. Hindu New Year is March 22. The Islamic New Year, Hijri, begins at sunset on July 29.

Under the Roman calendar, New Year's Day had originally been observed on March 15th and corresponded with the vernal equinox. During his reign, Roman King Numa Pompilius revised the Roman year so that January replaced March as the first month. For the Romans, the month of January carried a special significance. Its name was derived from the two-faced deity Janus, the god of change and beginnings. Janus could see into the past with one face and into the future with the other. Janus

symbolized transitions such as the progress of past to future, from one condition to another, from one vision to another.



Romans celebrated January 1 by giving offerings to Janus in the hope of gaining good fortune for the new year. This day was seen as setting the stage for the next twelve months, and it was common for friends and neighbors to make a positive start to the year by exchanging well wishes and gifts of figs and honey with one another.

In many ways that tradition has carried over into modern times. While an offering to Janus may not be made, many will gather with family and friends and reflect on 2021 as it comes to a close. Plans and resolutions for the coming year will be made in the hopes of good health and good fortunes, both personally and professionally.

As I look forward to what lies ahead for the Bar, I am excited by what we have accomplished the past year. With the pandemic, we all embraced a sudden shift in how we practiced law. We pivoted from in-person hearings, depositions, and trials to remote attendance via Webex and Zoom.



This shift has enabled many to enjoy increased access to the legal process. Many who would have had to lose income, or risk losing their jobs, were able to make court appearances during their lunch break on their phones. Individuals called to jury duty were able to serve their public duty without travel and unnecessary inconvenience. Another example is the mother of three children under the age of five, whose spouse was serving in the military, who was subpoenaed as a fact witness. Prior to March 2020, she would have had to incur significant personal expense to secure childcare to attend a deposition. Instead, she was able to log onto Zoom from her home to provide testimony to the eight attorneys (who also did not have to travel).

We can expect and should advocate that the practice of law will continue to evolve. The change that was ignited by the pandemic continues to be driven by the need to narrow the access to justice gap, by consumers, and technology. As officers of the court, we should strive to keep these positive changes and look for other ways to make our judicial system more accessible.

Along these lines, the legal reform process continues to move forward. Utah's Licensed Paralegal Practitioner program has reached its two-year goal of twenty practicing LPPs, with more in the pipeline. LPPs are mid-level legal providers licensed to practice law in areas of family law, debt collection, and landlord-tenant disputes. The Utah Supreme Court created the LPP program to improve access to justice for Utah residents.

Other legal reforms, such as the sandbox, have caused many attorneys to express concern this past year. That's a good thing. Stay informed. Stay involved in the process. Legal reform is happening, and it is important for Utah attorneys to make their voices heard as the process continues to evolve.

As of October 31, fifty-two entities had applied for approval through the sandbox, with thirty-two being granted approval. Of the thirty-two approved entities, five were classified by the Utah Supreme Court as low risk, twelve as low-to-moderate risk, thirteen moderate risk, and one at a high-risk level. (One high-risk approved entity withdrew prior to offering services.) Twelve entities reported data in September 2021, nine entities are recommended to exit the sandbox, and there was one reported consumer-related complaint.

This past year, the Bar has continued to work on narrowing the access to justice gap as well. At the beginning of the pandemic, the Bar's access to justice department took the popular "Tuesday Night Bar" program online, with spectacular results. Additionally, the Bar's Access to Justice Commission held the A2J Summit in October, bringing together representatives from

dozens of community service providers to address legal needs. There are many who have donated their time and effort this past year, and I thank each of you.

Over the past year, many have taken advantage of the completely free and strictly confidential counseling services from Blomquist-Hale that are available to all attorneys, LPPs, and their family members. The professionals at Blomquist-Hale provide help with individual, marital, and family counseling, depression, stress, anxiety, personal and emotional challenges, substance abuse, financial problems, and so much more. Need to talk? Do not wait to call 1-800-926-9619.

Blomquist will continue to be available to all in 2022, and as part of the attorney well-being program, the Bar is developing a partnership with the Hazelden Betty Ford Foundation in California. This partnership will provide unprecedented services to Bar members. More details on this effort will be coming soon.

The Bar's Well-Being Committee has and will continue to offer resources to help. These resources are confidential. The Lawyers Helping Lawyers program offers immediate, confidential help from peer attorneys, and the Bar's Well-Being podcasts and materials are some of the most popular content on the Bar's website.

This past year, our society has seen a shift in priorities and the "Great Resignation." The phrase was coined by Professor Anthony Klotz from Texas A&M's Mays Business School. In an interview with Bloomberg in May, Klotz noted, "What we're seeing is a clear decrease in organizational commitment due to a confluence of factors. Employees have gained a new perspective on what's truly important to them. The pandemic brought death to our doorstep and that causes people to reflect."

For me personally, 2022 brings exciting changes. After nearly twenty years at the same firm, I am starting Key Legal Group, LLC. The past year has given me the perspective to know that a female-owned law firm focused on providing boutique legal services to clients while offering the flexibility of working remotely and in a way that best fits individual needs is not just a dream but a reality. I can be reached at Heather@Key.Legal, www.Key.Legal, or 801-829-1096.

Like the Romans of old, I challenge you to take this opportunity to look back on the past while also looking to the future. Embrace the transitions of life. Be bold. Don't wait another year to do the thing you've been wanting to do.

I wish each of you a very happy, healthy, and prosperous 2022!

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Modifications to Bar Interactions with the Legislature and How You Can Participate

by Doug Foxley, Frank Pignanelli, Stephen Foxley, Steven Styler, and Nancy Sylvester

The 2022 General Legislative Session convenes January 18 and adjourns March 4. Although the pandemic will likely still be a concern, there will be a return to more traditional communications with lawmakers through personal visits. Masks will not be required, but crowding in front of the chambers will be limited. Because virtual participation is now a mainstream activity, many lawmakers and committee witnesses will on occasion participate remotely.

We really appreciate the participation of our lawyer legislators in providing a preview of legislative activity in the December 9, 2021 Fall Forum. These lawmakers explained a likely examination into and possible legislation regarding small claims courts, modifications to criminal penalties, changes to the judiciary, family law amendments, and uniform laws, among others.

Lawmakers will be consumed by the process of distributing surpluses caused by a rebounding economy and a massive infusion of federal funds. While this sounds easy, it requires extreme discipline to ensure that one-time and ongoing commitments are funded appropriately in the event of future downturns. Utah's high credit rating demonstrates that this is a normal practice for our legislature.

Additionally, this is an election year with new districts having been drawn after the special session in November. These dynamics can influence which issues are considered and those that are postponed for later review.

Adjacent to this article is a list of the lawyer legislators serving in the 2022 session. This is a remarkable group of people who champion the interest of our profession and access to justice for all citizens. Not only are they open to discussions with the Bar, they welcome communications from colleagues regarding legislation. We encourage Utah State Bar practitioners to interact with their local lawmakers, with attention to the conditions provided in this article.

Please remember that the Utah State Bar's legislative activities are limited by design and follow United States Supreme Court precedent outlined in *Keller v. State Bar of California*, 496 U.S. 1 (1990). When the Utah Supreme Court adopted rules that directed the Utah State Bar to engage in legislative activities, it identified specific guardrails to align with the limitations expressed in *Keller*. These defined areas of the Bar's involvement in legislative activities include matters concerning the courts, rules of evidence and procedure, the administration of justice, the practice of law, and access to the legal system. Public policy positions are determined by the Bar commissioners after receiving input from the Government Relations Committee (GRC).

Doug Foxley, Frank Pignanelli, Stephen Foxley, and Steven Styler are licensed attorneys and lobbyists for the Utah State Bar.



NANCY SYLVESTER serves as General Counsel for the Utah State Bar.



The GRC is led by Jaqualin Peterson and Sara Bouley, and each section of the bar has a designated representative. The GRC meets weekly during the legislative session, with meetings conducted online again this year to allow for sufficient social distancing. The Bar posts its positions to the public on its website so practitioners may have transparency and clarity into this process. Please contact your section leaders if you are interested in pursuing involvement with the committee or would like the Bar to take a position on a particular bill.

In the past, the Bar granted sections authority to advocate a position on the section's behalf if there was a matter where the section had a particular interest or expertise. *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), a case involving the Texas State Bar, introduced new guidance on section position-taking, which the Utah State Bar has implemented. Sections may no longer take official positions on legislation but may still do legislative work with safeguards, including using boiler plate language.

If a section promotes legislation (including legislation based on appellate guidance), it must use boiler plate language in substantially this form when communicating with a legislator:

The following bill is a product of [section name].
The [section] is self-funded and voluntary, and this bill has not been approved by the Utah State Bar.
The Bar has not taken, nor will it take, a position on the bill except to the extent that it addresses

access to justice, the regulation of the practice of law, the administration of justice, or improving the quality of legal services for the public.

Sections may take a vote on proposed legislation that has originated within or outside of the section. But in communicating with legislators, the section must clarify that the vote was designed to get a feel for how practitioners felt about the policy and the vote is not its official position. Practitioners presenting to the legislature must make clear that they are not representing the Bar – unless specifically authorized to do so – and that they are appearing in a personal capacity. If a practitioner expresses views at variance with a Bar policy or official position, the practitioner must clearly identify the variance as the practitioner's personal views only.

Utah State Bar licensees play a critical role in the legislative process. Practitioners with experience offer perspectives desired by lawmakers and their staff. Thus, we strongly encourage participation under the parameters outlined above. If you have any questions about how we can help, please feel free to reach out to the Bar or your lobbyists.

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Practice Areas: Property Rights, Fair Housing, and Property Management.



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Michael S. Kennedy (R) – District 14
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Practice Areas: Inactive, Family Physician.



Daniel McCay (R) – District 11
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Education: Bachelors and Masters, Utah State University; J.D., Willamette University College of Law

Practice Areas: Real Estate Transactions, Land Use, and Civil Litigation.



Mike McKell (R) – District 66
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Education: B.A., Southern Utah University; J.D., University of Idaho

Practice Areas: Personal Injury, Insurance Disputes, and Real Estate.



Todd Weiler (R) – District 23
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Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Civil Litigation and Business Law.

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Nelson Abbott (R) – District 60
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Education: B.A., Brigham Young University; J.D. and M.B.A., Brigham Young University

Practice Areas: Auto Accidents and Personal Injury.



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Education: B.A., Brigham Young University; MPA, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Practice Areas: Commercial, Real Estate, and Government Entity Litigation.



Timothy D. Hawkes (R) – District 18
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Education: B.A., Brigham Young University; J.D., Columbia University School of Law

Practice Areas: Current: General Counsel, Water Law. Past: Civil Litigation, Mediation, and Appellate.



Ken Ivory (R) – District 47
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Education: B.A., Brigham Young University; J.D., California Western School of Law

Practice Areas: Mediation, General Business, Commercial Litigation, and Estate Planning.



Brian King (D) – District 28
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Education: B.S., University of Utah; J.D., University of Utah S.J. Quinney College of Law

Practice Areas: Representing claimants with life, health, and disability claims; class actions; and ERISA.



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Merrill Nelson (R) – District 68
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Stephanie Pitcher (D) – District 40
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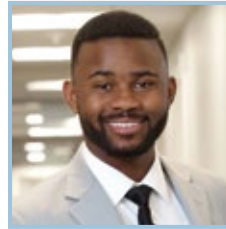
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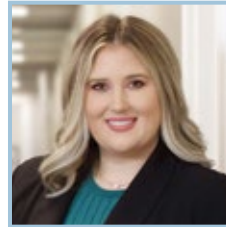
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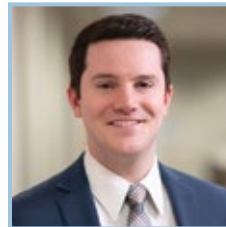
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Understanding the Utah Supreme Court's Docket: A Practitioner's Guide

by Carol Funk

As practitioners, understanding the Utah Supreme Court's docket can be essential to providing effective advocacy. Some pathways to the Utah Supreme Court are relatively well known; others are more obscure. And each has its own likelihood of success. Set forth below is an in-depth guide to the Utah Supreme Court's docket; its exercise of jurisdiction, both original and appellate; and the background odds when asking the Utah Supreme Court to exercise jurisdiction or to provide a particular type of relief.

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

UTAH'S SLIGHTLY QUIRKY TWO-TIER APPELLATE SYSTEM

The appellate process usually involves a distinct, two-tier system. An intermediate court of appeals traditionally reviews, as a matter of course, the vast majority of challenges to final judgments entered in district courts, juvenile courts, and agency proceedings. The court of appeals may also elect, with some degree of discretion, to review challenges to orders issued in not-yet-final proceedings. And the court of appeals may exercise original jurisdiction when asked to check misuse or abuse of governmental authority, or to otherwise ensure persons or entities act in accordance with their legal obligations, through issuance of a writ.

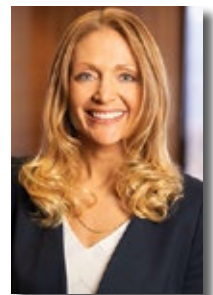
A "supreme" court, on the other hand, usually handpicks much of its docket. A supreme court traditionally determines which challenges it will review regarding intermediate appellate court rulings. It also has original appellate jurisdiction over matters committed exclusively to it, such as challenges to criminal proceedings resulting in imposition of the death penalty. And like an intermediate court of appeals, a supreme court has original jurisdiction to address misuse or abuse of governmental authority, or to otherwise ensure persons or entities act in accordance with the law, through issuance of a writ. A supreme court may also oversee admission to its bar and disciplinary proceedings instituted with respect to members thereof. State supreme courts may also determine whether to answer questions of state law certified to them by federal courts.

Utah's appellate process mirrors a traditional system – but in a slightly quirky, roundabout sort of way.

The Utah Court of Appeals engages in the practices typical of intermediate appellate courts. The Court of Appeals thus reviews most challenges to orders entered in district courts, juvenile courts, and agency proceedings. But as explained below, many of those matters arrive in the Court of Appeals for appellate review only after first making a brief stop in the Utah Supreme Court.

The Utah Court of Appeals is statutorily assigned to exercise appellate jurisdiction only in limited types of proceedings. *See* Utah Code Ann. § 78A-4-103. For example, the Court of Appeals has original appellate jurisdiction over orders issued in juvenile

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courts; criminal proceedings not involving a first degree or capital felony; domestic relations matters such as divorce, child custody, and adoption; formal adjudicative proceedings; and certain informal adjudicative proceedings as reviewed by a district court. *Id.* But the Court of Appeals has not been tasked, by statute, with reviewing orders issued in many common civil actions, such as those alleging negligence, breach of contract, malpractice, or products liability. *See id.*

Any matter not within the Court of Appeals' original appellate jurisdiction is, instead, assigned to the Utah Supreme Court. *Id.* § 78A-3-102(3)(j) (providing that the Utah Supreme Court has appellate jurisdiction over all "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction"). This statutory division of labor suggests the Utah Supreme Court operates much like the Court of Appeals in many instances, reviewing orders or judgments issued in numerous civil, criminal, and agency proceedings. But that is not, in fact, how the process plays out.

The Utah Supreme Court rarely provides first-level appellate review, and the Court of Appeals almost always does, through an unusual "pour-over" procedure the Utah Legislature created.

Under this procedure, the Court of Appeals has been given appellate jurisdiction over the categories of cases set forth above *as well as* all "cases transferred to the Court of Appeals from the [Utah] Supreme Court." *Id.* § 78A-4-103(2)(j).

There are only a few types of cases the Utah Supreme Court cannot transfer. The Utah Supreme Court may not, for example, transfer to the Court of Appeals matters involving capital felony convictions, election or voting contests, retention or removal of public officers, discipline of lawyers, or final orders of the Judicial Conduct Commission. *Id.* § 78A-3-102(4). Otherwise, however, the Utah Supreme Court can and routinely does transfer nearly every case within its original appellate jurisdiction to the Court of Appeals. *See* Utah R. App. P. 42(a) ("At any time before a case is set for oral argument . . . , the [Utah Supreme] Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction.").

During the review period noted above, the Utah Supreme Court transferred over 2,000 cases originally in its appellate jurisdiction to the Utah Court of Appeals for resolution, retaining relatively few for its review in the first instance. The Utah Supreme Court thus manages its docket so that, rather than operating largely as an appellate court of first resort, it functions primarily as a traditional supreme court.

PATHWAYS FOR SKIPPING DIRECTLY TO UTAH SUPREME COURT REVIEW

Utah's two-tier appellate process thus operates much like a traditional system. But it nevertheless creates opportunities for parties to bypass the Utah Court of Appeals and have their matters heard by the Utah Supreme Court in the first instance. The availability of those opportunities depends on the type of case at issue.

Request for Retention

As noted above, most civil and many criminal cases do not head directly to the Court of Appeals for appellate review. Instead, they initially land in the Utah Supreme Court, which will almost always pour the case over to the Court of Appeals when transfer is permissible. Such cases are almost always poured over, that is, with one exception. During the case's brief stop in the Utah Supreme Court, the parties will have an opportunity to persuade the Utah Supreme Court to keep and resolve the matter in the first instance. Thus, after the notice of appeal is received by the Utah Supreme Court, the parties will be notified that they may submit a letter, if they wish, advising the Utah Supreme Court as to why it should retain the case.

The Utah Supreme Court agrees to retain and resolve a matter about a third of the time the request is made.

Retention requests are not often filed, but they are relatively effective, in matters in which the issue (or issues) presented are of substantial importance to the jurisprudence of the state. During the review period noted above, letters requesting retention were filed in 272 of the 2,000-plus matters within the Utah Supreme Court's original appellate jurisdiction and eligible for transfer. Of those 272 requests, 102 (37.5%) were granted. The Utah Supreme Court thus agreed to retain and resolve over one-third of the matters in which retention was requested, serving as appellate court of first resort in those cases.

Recall to the Utah Supreme Court

Moreover, a case that is transferred to the Court of Appeals for resolution does not always stay there. Sometimes, as noted above, the appeal raises only one or two issues, and those issues present a thorny question of first impression, a question as to whether a prior decision of the Utah Supreme Court remains good law, or another matter of such importance to the State's jurisprudence that it is best resolved by the Utah Supreme Court in the first instance. If so, the Court of Appeals may conclude the parties will be better served by having their case transferred *back* to the Utah Supreme Court for resolution. The Court of Appeals may then suggest that the Utah Supreme Court recall the case.

The Utah Supreme Court regularly recalls matters from the Court of Appeals.

If the Utah Supreme Court agrees, it will recall the case from the Court of Appeals. And recall occurs with some regularity. During the review period noted above, the Utah Supreme Court recalled almost forty matters – a small but significant portion of the Utah Supreme Court's docket. Recall is most likely to occur after briefing has been completed and the matter has been placed on the Court of Appeals' oral argument calendar. But recall may also occur earlier in the proceeding; in matters submitted on the briefs, without argument; or even after oral argument in the Court of Appeals.

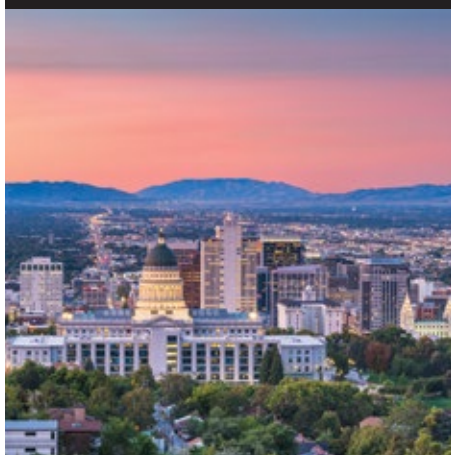
While recall may prove more efficient in the long run, it can feel highly inefficient in the short term. Even if the case has already been fully briefed to the Court of Appeals, the parties will likely submit a new round of briefing to the Utah Supreme Court, particularly given that the matter is now before a supreme court with power to overturn its precedent. After rebriefing, the case will be placed on the Utah Supreme Court's oral argument calendar, resulting in what may seem a lengthy delay before the appeal is resolved. But recall still takes less time than having the case heard and resolved by the Court of Appeals, if the case is

then reviewed and the issues are ultimately decided by the Utah Supreme Court, a year or more down the road.

If a party suspects its case is a candidate for recall, and wishes to avoid the delay of having its case briefed, calendared for argument, and then transferred to the Utah Supreme Court, a party has two options. First, as noted above, a party may request that the case be retained during the brief window in which the case initially lands in the Utah Supreme Court. If the request for retention is granted, the matter will stay in the Utah Supreme Court for resolution.

Second, a party may submit a "Motion for Transfer" or "Motion for Recall" in the Court of Appeals. Although the appellate rules do not expressly provide for such a motion, the rules authorize motions generally. *See* Utah R. App. P. 23. And, while rarely submitted, motions seeking transfer or recall are sometimes successful. Thus, a party might consider moving for transfer or recall once full briefing has been completed, alerting the Court of Appeals at that time that the case may more appropriately be resolved by the Utah Supreme Court. If the Court of Appeals agrees and suggests recall, the Utah Supreme Court might then recall the case for resolution.

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In unusual circumstances, recall may occur even though an earlier request for retention was denied. During the review period noted above, that scenario played out several times – sometimes following full briefing in the Court of Appeals and sometimes following a change in the case's status (e.g., following a temporary stay of the appeal and remand to the district court for resolution of a preliminary issue). When reviewing a retention request, the Utah Supreme Court lacks the appellate record and in-depth briefing. Accordingly, 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, etc. In such circumstances, the Court of Appeals might suggest (and a party might request) recall, even if the Utah Supreme Court earlier declined to retain the case.

Certification to the Utah Supreme Court

As noted above, many kinds of cases do not initially land in the Utah Supreme Court for appellate review. Matters over which the Court of Appeals has original appellate jurisdiction (e.g., juvenile proceedings, non-first-degree-felony criminal proceedings, domestic relations matters, and some adjudicative proceedings) head directly to the Court of Appeals for resolution. But there is a procedure by which those cases, too, may be transferred to the Utah Supreme Court for appellate review in the first instance. That process, also crafted by the Utah Legislature, is certification.

Under Utah Code Section 78A-4-103(3), the “Court of Appeals upon its own motion only . . . may certify to the [Utah] Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.” Utah Code Ann. § 78A-4-103(3); *see also id.* § 78A-3-102(3)(b) (providing that the Utah Supreme Court has appellate jurisdiction over “cases certified . . . by the Court of Appeals”). Certification requires the vote of four of the seven judges on the Court of Appeals, *id.* § 78A-4-103(3), and the Utah Supreme Court is statutorily prohibited from transferring *back* to the Court of Appeals any certified matter, *id.* § 78A-3-102(4)(f).

The Court of Appeals regularly certifies matters to the Utah Supreme Court.

During the review period noted above, the Court of Appeals certified over forty cases to the Utah Supreme Court – again, a small but significant portion of the Utah Supreme Court's docket. Likewise, the appellate rules do not expressly authorize motions seeking certification, but such motions may prove useful, particularly if submitted when the matter has been fully briefed.

As with retention and recall, a case is a strong candidate for certification if it raises only a few issues and presents a question of first impression, a question as to whether a prior decision of the Utah Supreme Court remains good law, or another matter of such importance to the State's jurisprudence that it is best resolved by the Utah Supreme Court in the first instance.

ADDITIONAL PATHWAYS TO UTAH SUPREME COURT RULINGS

First-level appellate review thus usually occurs in the Court of Appeals but sometimes occurs in the Utah Supreme Court. That review most often pertains to final judgments entered at the conclusion of district court, juvenile court, or agency proceedings. But there are other, less common pathways to having matters heard in appellate courts. And those pathways sometimes lead the Utah Supreme Court to exercise jurisdiction over matters not presented as traditional appeals from a court or agency's final judgment.

Petition for Interlocutory Review

As noted above, in many jurisdictions intermediate appellate courts may, with some degree of discretion, review challenges to orders issued in not-yet-final proceedings. In Utah, parties may seek to appeal from *any* non-final (i.e., interlocutory) order “by filing a petition for permission to appeal from the . . . order with the appellate court with jurisdiction over the case.” Utah R. App. P. 5(a). The petition may be granted “if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice.” *Id.* R. 5(g).

Petitions seeking review of non-final orders are subject to the above-noted rules regarding transfer, recall, and certification. For matters within the Utah Supreme Court's original appellate jurisdiction, petitions seeking interlocutory review will land there first, before being transferred to the Court of Appeals, if transfer is permissible. In such cases, the parties may include in their petition “a concise statement why the [Utah] Supreme Court should decide the case.” *Id.* R. 5(c)(2). In other words, a party may request retention in its petition. If the matter is retained, or if the matter is not subject to transfer, the Utah Supreme Court will determine whether to grant the petition and provide appellate review. Otherwise, the case will be transferred to the Court of Appeals, which will determine whether to grant the petition and provide appellate review. If the petition is granted by the Court of Appeals and the matter later appears appropriate for resolution by the Utah Supreme Court, the matter may be recalled.

Likewise, if the petition for interlocutory review falls within the Court of Appeals' original appellate jurisdiction, the Court of Appeals will determine whether to grant the petition and provide appellate review. If it turns out the matter is more appropriately resolved by the Utah Supreme Court, the Court of Appeals may certify the matter to the Utah Supreme Court.

The Utah Supreme Court often reviews orders even when the proceedings are still ongoing.

Petitions for interlocutory review are frequently filed, and they are also relatively effective. During the review period noted above, the Utah Supreme Court granted (and retained, where applicable) nearly fifty petitions for interlocutory review. Review of interlocutory orders thus constitutes an appreciable portion of the Utah Supreme Court's overall docket.

Petition for Extraordinary Relief

The Utah Supreme Court also has "original jurisdiction to issue all extraordinary writs." Utah Const. art. VIII, § 3. By seeking an extraordinary writ, a party may obtain limited judicial review or other judicial intervention when no other pathway for relief exists. Extraordinary writs are most commonly sought to address alleged abuse or misuse of governmental authority or to challenge imprisonment or detention. They may also be sought to otherwise ensure persons or entities act in accordance with legal requirements or obligations. The Utah Legislature cannot substantively restrict the Utah Supreme Court's writ power, *Patterson v. State*, 2021 UT 52, ¶ 169, —P.3d —, which operates as an ever-present check on the exercise of governmental authority.

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

The Utah Supreme Court's rules also provide that petitions for extraordinary relief may be filed in the state's appellate courts. *See* Utah R. App. P. 19(a) ("An application for an extraordinary writ referred to in Rule 65B ... directed to a judge, agency, person, or entity must be made by filing a petition with the appellate court clerk."). But the Utah Supreme Court "typically


... address[es] only those petitions that cannot be decided in another forum." *Carpenter v. Riverton City*, 2004 UT 68, ¶ 4, 103 P.3d 127 (per curiam). Indeed, petitions for extraordinary relief often raise disputed questions of fact, which appellate courts generally do not resolve. *See id.* Accordingly, extraordinary relief should be pursued in the state's appellate courts only when pursuit of relief in the district court would be impractical or inappropriate. *See* Utah R. App. P. 19(b)(5) (providing that a petition seeking an extraordinary writ must contain, "[e]xcept in cases where the writ is directed to a district court, a statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court").

The Utah Supreme Court rarely grants petitions seeking an extraordinary writ.

Moreover, petitions seeking extraordinary relief are rarely successful when filed in the state's appellate courts. The Utah Supreme Court, in particular, rarely issues extraordinary writs. During the review period noted above, approximately forty petitions seeking an extraordinary writ were retained for review by the Utah Supreme Court. Of those petitions adjudicated to conclusion during the review period, the vast majority were

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denied without oral argument and without a written opinion. Fewer than ten made it onto the Utah Supreme Court's oral argument calendar and resulted in a written opinion. And only a couple resulted in the issuance of a writ.

The rare cases in which the Utah Supreme Court ultimately granted extraordinary relief illustrate the kinds of situations in which the Court's writ power acts as a check on the exercise of governmental authority, when no other avenue for relief exists. *See, e.g., In re G.J.P.*, 2020 UT 4, ¶ 54, 459 P.3d 982 (granting petition for extraordinary writ where juvenile court improperly ordered entity to serve as guardian ad litem, contrary to the entity's "statutorily granted role"); *State v. Boyden*, 2019 UT 11, ¶ 46, 441 P.3d 737 (granting petition for extraordinary

relief where the district court failed to consider the State's motion, which asserted a conviction had been obtained due to fraud or misrepresentation).

Federally Certified Questions

As set forth in the Utah Constitution, the Utah Supreme Court also has "original jurisdiction . . . to answer questions of state law certified by a court of the United States." Utah Const. art. VIII, § 3; *see also* Utah Code Ann. § 78A-3-102(1) ("The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States."). The Utah Supreme Court's rules of procedure set forth the process by which certified questions are considered and reviewed. *See* Utah R. App. P. 41(a) ("The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to

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do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.”).

The Utah Supreme Court accepts and answers almost all federally certified questions.

The Utah Supreme Court has no legal obligation to accept certified questions. *See id.* R. 41(e) (“Upon filing of the certification order . . . , the [Utah] Supreme Court shall promptly enter an order either accepting or rejecting the question certified to it . . .”). Nevertheless, the Utah Supreme Court accepts most certified questions and addresses them in written opinions. During the review period noted above, federal courts certified questions to the Utah Supreme Court seventeen times.

And the Utah Supreme Court accepted the certification in almost every instance.

The Utah Supreme Court does not always answer the certified question exactly as the federal court submits it. The Utah Supreme Court describes its role in such matters as “resolv[ing] disputed questions of state law in a context and manner useful to the resolution of [the] pending federal case.” *Scott v. Wingate Wilderness Therapy, LLC*, 2021 UT 28, ¶ 18, 493 P.3d 592 (second alteration in original) (citation and internal quotation marks omitted). That task sometimes requires the Utah Supreme Court to “reformulate the question or provide a more expansive answer than a literal reading of the certified question.” *Id.* (citation and internal quotation marks omitted).

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And even when a certified question has been accepted, briefed, and argued, it may not necessarily be resolved. At all times, the Utah Supreme Court retains discretion in determining whether to answer a certified question. *In re Kiley*, 2018 UT 40, ¶ 21, 427 P.3d 1165. Following briefing and argument, the Utah Supreme Court may ultimately conclude, due to inadequacies in the parties' arguments or difficulties inherent in the matter's procedural posture, that the questions presented are not appropriate for resolution in the context of certification. The Utah Supreme Court will then revoke acceptance of the certified question and decline to address the issues. *See id.* The Utah Supreme Court does not, however, transfer certified questions to the Court of Appeals.

PETITIONS SEEKING A WRIT OF CERTIORARI

The procedures set forth above provide several pathways to the Utah Supreme Court. But the matters that dominate the Utah Supreme Court's docket are petitions seeking a writ of certiorari. Such petitions constitute a request that the Utah Supreme Court review a decision issued by the Utah Court of Appeals. *See* Utah R. App. P. 45(a) ("Unless otherwise provided by law, the review of a judgment, an order, and a decree . . . of the Court of Appeals shall be initiated by filing in the Utah Supreme Court a petition for a writ of certiorari to the Utah Court of Appeals."). Petitions seeking a writ of certiorari are frequently filed, comprising the predominant portion of the Utah Supreme Court's caseload. During the review period noted above, of the roughly 1,250 matters that appeared on (and were not transferred off of) the Utah Supreme Court's docket, around 770 (62%) were petitions seeking a writ of certiorari.

"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 such a petition, the Utah Supreme Court considers "whether a decision on the question presented is likely to have significant precedential value." *Id.* Review may thus be granted in matters that, for example, (1) present "a question regarding the proper interpretation of . . . a constitutional provision, statute or rule that is likely to affect 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.*

The Utah Supreme Court grants about 15% of petitions seeking a writ of certiorari.

Given this high standard, most petitions seeking a writ of certiorari are denied. During the review period noted above, 715 petitions seeking a writ of certiorari were filed and ruled upon by the Utah Supreme Court. Only 114 (15%) were granted; 601 (85%) were denied.

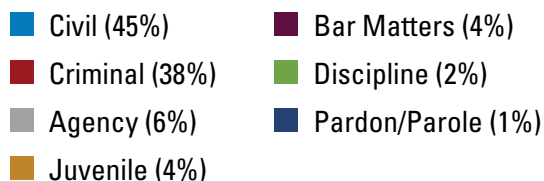
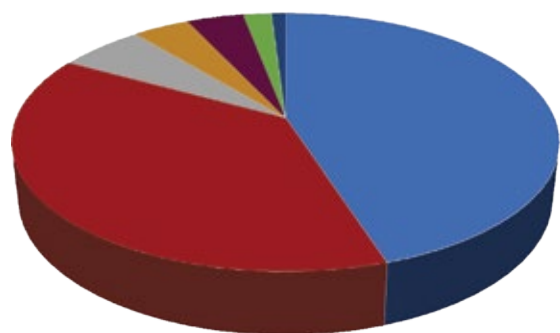
Moreover, the grant of a petition for a writ of certiorari does not necessarily mean the Court of Appeals' ruling will be reversed. With respect to petitions seeking a writ of certiorari filed in 2016, for example, the Utah Supreme Court granted the petition and issued an opinion in twenty-two matters. In about 60% of those cases, the Utah Supreme Court affirmed or largely affirmed the Court of Appeals' judgment, albeit with reasoning that may have differed from the Court of Appeals' opinion. Roughly 30% of the time, the Utah Supreme Court reversed in whole or in significant part. Twice, the petitions were ultimately dismissed for procedural reasons.

The Utah Supreme Court's grant of review does not indicate reversal is likely.

The Utah Supreme Court's 2018 docket reflects similar numbers. The Utah Supreme Court granted the petition for writ of certiorari and issued an opinion in twenty-five matters. In about 70% of those matters, the Utah Supreme Court affirmed or largely affirmed the Court of Appeals' judgment. Roughly 25% of the time, the Utah Supreme Court reversed in whole or in significant part. One petition was ultimately vacated as moot. The Utah Supreme Court's 2017 docket is unusual, in that few petitions were granted and they resulted in reversal more often than affirmance. But, overall, for petitions filed between 2016 and 2018, a grant of review by the Utah Supreme Court did not suggest the Court of Appeals' judgment would likely be reversed in whole or in significant part.

SUBJECT MATTER ADDRESSED ON THE UTAH SUPREME COURT'S DOCKET

Given the many types of proceedings the Utah Supreme Court may adjudicate, its docket reflects all types of matters – civil cases, criminal cases, juvenile proceedings, agency proceedings, attorney and judicial discipline proceedings, proceedings before the Board of Pardons and Parole, and proceedings involving the Utah State Bar. Still, civil and criminal matters make up most of the Utah Supreme Court's caseload. During the review period noted above, with respect to matters that appeared and ultimately remained in the Utah Supreme Court, as well as matters that were certified and recalled, the breakdown is roughly as follows:



REACHING A RESOLUTION IN THE UTAH SUPREME COURT

Relatively few matters that initially appear on the Utah Supreme Court's docket will result in the issuance of an opinion by that Court. Most matters are transferred, and most petitions are denied, without ever culminating in the issuance of a written decision.

During the review period noted above, nearly 6,000 matters were opened in Utah's appellate courts. As of October 13, 2021, just over 1,000 of those matters had been adjudicated by the Utah Supreme Court and were deemed closed. Around 250 of those matters resulted in the issuance of a written opinion. In other words, about a quarter of the Utah Supreme Court's caseload resulted in the issuance of a written decision, while the vast majority of matters appearing on the Court's docket never made it that far.

CONCLUSION

Given the unique nature of Utah's appellate system, understanding the Utah Supreme Court's docket and the manner in which the Court exercises jurisdiction can be essential to providing effective advocacy. Many pathways are available to the Utah Supreme Court, each with its own likelihood of success. The bottom line, however, is that every step in the process will prove an against-the-odds challenge – whether asking the Court to exercise jurisdiction, to reverse, or to grant another form of relief.

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

UTAH SUPREME COURT

State v. Watts **2021 UT 60 (Nov. 17, 2020)**

The appellant challenged his conviction for dealing in materials harmful to a minor on First Amendment grounds. Affirming, the supreme court concluded that the relevant statute's inclusion of nudity in the definition of harmful to minors did not violate the First Amendment. The court rejected the defendant's argument that the sexual conduct requirement contemplated in *Miller v. California*, 413 U.S. 15 (1973), applied to minors, and clarified that **both content and context are relevant to whether material qualifies as obscene.**

State v. Evans **2021 UT 63 (Nov. 4, 2021)**

The Utah Supreme Court held that **the court of appeals did not err in affirming the district court's denial of the defendant's motion to suppress DNA evidence obtained from a buccal swab pursuant to a valid warrant.** The court rejected the defendant's arguments that the officers had used excessive force when executing the warrant to counter the defendant's physical resistance to having his cheek swabbed, and also rejected the defendant's argument that the officers required statutory authorization to use physical force to obtain the buccal swab.

Hayes v. Intermountain GeoEnvironmental Servs., Inc. **2021 UT 62 (Nov. 4, 2021)**

In this certified case, the Utah Supreme Court interpreted the scope of the economic loss statute, Utah Code § 78B-4-513. That statute codifies the economic loss rule with respect to actions for defective design or construction. The claims at issue were negligence claims asserted against a geotechnical engineering

firm that had provided a geotechnical report opining the property that includes the home owned by plaintiffs was safe for residential construction, provided certain recommendations were met.

Interpreting the term “design” used in the statute, the court held that the claims were claims for defective design because “[t]he geotechnical report is a necessary component of the structural design of a home and is thus integral to the design itself.”

Christiansen v. Harrison W. Constr. Corp. **2021 UT 65 (Nov. 4, 2021)**

The district court did not err in dismissing a suit brought by an estate and family members against the decedent's employer, where plaintiffs failed to plead allegations sufficient to meet the intentional-injury exception to the Workers' Compensation Act. Associate Chief Justice Lee and Justice Himonas each wrote concurrences setting out their respective approaches to the doctrine of stare decisis.

Donovan v. Sutton **2021 UT 58 (Sept. 30, 2021)**

This case arose from a nine-year-old beginner skier's collision with the plaintiff, who sued the child and the child's father asserting negligence and negligent supervision. As a matter of first impression **the court held that the standard of care applicable to skiers is simply that a person has a duty to exercise reasonable care while skiing.** The court affirmed the district court's grant of summary judgment to the defendants, concluding that under the circumstances the child was not negligent and that the father did not negligently supervise her.

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

UTAH COURT OF APPEALS

***State v. Hurwitz* | 2021 UT App 112 (Oct. 28, 2021)**

This is one of the first “unintelligible transcript” cases from the COVID-19 era to reach the appellate courts in Utah. The defendant appeared remotely by video conference at a sentencing hearing. The official transcript of the hearing was riddled with the notation “inaudible,” but the parties stipulated to supplement the record with the audio recording of the hearing. **The court rejected the defendant’s argument that his right to allocution had been violated because of a poor audio connection that prevented the court from hearing his statement.** The court listened to the audio itself and was able to understand nearly everything that the defendant said, but concluded the opinion with guidance on improving the quality of transcripts and how it will treat future unintelligible transcript cases.

***H&P Invs. v. iLux Capital Mgmt., LLC*
2021 UT App 113 (Oct. 28, 2021)**

In a breach of contract case involving the failure to convey stock, the court held that Utah Code § 70A-2-713 applied to the damages calculation, but rejected application of the “New York Rule,” which would calculate damages using an intermediate value between the date of breach and a reasonable time thereafter. Section 713 sets damages as “the difference between the contract price and the market price at the time the buyer should have covered, i.e., when it learned of the breach.” While Article 2 of the UCC expressly does not apply to “investment securities,” the court **relied on the official comment to apply the UCC “by analogy to securities” if “such application [is] sensible and the situation involved is not covered by” by Article 8, which covers securities.**

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***Hayden v. Burt & Payne PC*
2021 UT App 102 (Sept. 30, 2021)**

The court of appeals affirmed dismissal of the plaintiff’s complaint against her former employer for failing to notify her of her right to extend her group insurance coverage within thirty days after the termination of her employment. **Utah’s mini-COBRA statute, Utah Code § 31A-22- 722, does not create a private right of action.**

10TH CIRCUIT

***United States v. Hisey*
12 F.4th 1231 (10th Cir. Sept. 14, 2021)**

The Tenth Circuit reversed the district court’s dismissal of the defendant’s habeas petition seeking to vacate his conviction for unlawfully possessing a firearm under 18 U.S.C. § 922(g)(1). A violation of § 922(g)(1) requires, among other things, a prior conviction of a crime punishable by a term of imprisonment for a term exceeding one year. The defendant had pleaded guilty, admitting that he had a prior felony conviction in Kansas. The Tenth Circuit explained that **in deciding whether the prior conviction was punishable by a term of imprisonment exceeding one year, it considers whether, under the relevant jurisdiction’s law, the underlying crime could have subjected this particular defendant to imprisonment exceeding one year.** Because this defendant qualified for probation and drug treatment under Kansas law, such that the trial court could not have sentenced him to imprisonment, the defendant was actually innocent of the crime of unlawfully possessing a firearm under § 922(g)(1).

***Lorance v. Commandant, U.S. Disciplinary Barracks*
13 F.4th 1150 (10th Cir. Sept. 23, 2021)**

A military court-martial convicted Lorance of murder (among other serious crimes) during the U.S. military action in Afghanistan. After that conviction was affirmed on appeal in the military justice system, Lorance filed a petition for writ of habeas corpus in federal district court, alleging he was convicted in violation of the Constitution. During the pendency of that action, Lorance accepted a full and unconditional presidential pardon for the crimes upon which the conviction was based. The district court concluded that Lorance’s petition was moot in light of the presidential pardon and dismissed the case. On appeal, the Tenth Circuit reversed, **holding as a matter of first impression that Lorance’s acceptance of an unconditional presidential**

pardon did not, by itself, constitute a confession of guilt or otherwise waive his habeas rights. Moreover, Lorange's petition was not moot: Though he was released from custody after acceptance of the pardon, Lorange allegedly continued to suffer unconstitutional collateral consequences of the conviction that might be remedied through habeas proceedings.

***In re John Q. Hammons Fall 2006, LLC*
15 F.4th 1011 (10th Cir. Oct. 5, 2021)**

In 2017, Congress increased the quarterly fees charged in trustee districts. Debtors challenged the fees and sought a refund. Rejecting the trustee's argument that such an amendment was not on the "subject of Bankruptcies," the Tenth Circuit held that the provision was subject to the constitutional requirement of uniformity and **held, as a matter of first impression, the 2017 amendment to statutory provisions governing debtor fees for certain Chapter 11 debtors was nonuniform and therefore unconstitutional.**

***Peterson v. Nelnet Diversified Sols., LLC*
15 F.4th 1033 (10th Cir. Oct. 8, 2021)**

In this suit against their employer, call-center representatives argued the Fair Labor Standards Act required backpay for time devoted to turning on computers and launching software. The district court concluded that the *de minimis* doctrine applied and awarded summary judgment and costs to the employer. Reversing, the Tenth Circuit held that **the *de minimis* doctrine did not excuse the employer's obligation to pay employees for pre-shift tasks of booting computers and software, even if the impact was approximately \$0.48 per shift per employee.**

***Crane v. Utah Department of Corrections*
15 F.4th 1296 (10th Cir. Oct. 21, 2021)**

In this case, the Tenth Circuit clarified that **a claimant under the Americans with Disabilities Act need only show that her disability was a "but-for cause" of the alleged discrimination.** The court further repudiated prior case law suggesting that the "sole causation" standard applicable to claims under the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), also applied to ADA claims.

***Estate of Dillon Taylor v. Salt Lake City*
16 F.4th 744 (10th Cir. Oct. 26, 2021)**

As a matter of first impression, the Tenth Circuit sided with the majority of federal courts to hold that the exclusionary rule – regularly applied in criminal cases to exclude evidence obtained in violation of the defendant's

constitutional rights – **did not apply in the context of a civil claim under 42 U.S.C. § 1983.** Thus, in the instant case, statements allegedly obtained in violation of the plaintiff's Fourth Amendment rights were nevertheless competent evidence in deciding his claim of excessive force under § 1983.

***Adams v. C3 Pipeline Construction Inc.*
17 F.4th 40 (10th Cir. Nov. 2, 2021)**

In this sexual harassment lawsuit, a group of defendants other than the named defendant prevailed on a motion for summary judgment early on. The same day the court entered the summary judgment order, the court also ordered the plaintiff to effect service on C3 Pipeline within two weeks. Ultimately, the court entered a default judgment against C3 Pipeline. Defendants argued that the plaintiff's subsequent appeal of the summary judgment order was untimely because that order was final and entered long before Ms. Adams' notice of appeal. The Tenth Circuit held that, **while non-appearing parties do not necessarily prevent an order from being final, "the dismissal of served defendants is not final and appealable when the district court 'makes clear' it 'expect[s]' further proceedings against the unserved defendants."**

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Introducing the Statewide Office for Indigent Appeals

by Debra M. Nelson, Ben Miller, and Wendy M. Brown

Over the last few months, a small staff has come together to begin tackling big ideas. We discuss constitutional rights, individual clients, and our vision of a more fair and just legal system. We are the Indigent Appellate Defense Division. And though we are in our infancy as an office, we want to tell the legal community about the creation of our division and our mission moving forward.

A brief history of indigent appellate defense in Utah

Utah had historically delegated the responsibility of indigent defense services on appeal to its political subdivisions – twenty-nine counties and 247 cities. But more than twenty-five years ago, in response to concerns over the quality of representation in these critically important cases, the Supreme Court Task Force on Appellate Representation of Indigent Defendants recommended creating a “statewide appellate public defender’s office.”

Despite this recommendation, little action was taken in the subsequent years, spurring former Chief Justice Durham to write in 2008 that the issue of indigent appellate representation remained an “area of concern.” As a result, the Judicial Council established a committee to address the concerns surrounding appellate representation. This committee, once again, recommended the creation of a statewide office.

After the ACLU filed a suit over Utah’s “failing” indigent public defense system, the legislature at long last stepped forward to create, first, the Indigent Defense Commission (IDC) in 2016 and then, last year, the Indigent Appellate Defense Division (IADD) within IDC’s Office of Indigent Defense Services.

DEBRA M. NELSON is the Chief Officer of the Indigent Appellate Defense Division.

BEN MILLER is the Deputy Chief of the Indigent Appellate Defense Division.

WENDY M. BROWN is a Senior Appellate Attorney with the Indigent Appellate Defense Division.

With the creation of IADD, Utah now has the long-sought-after statewide office dedicated to indigent appellate defense. IADD’s mandate is to oversee all indigent appellate representation in the third through sixth-class counties (all counties except Washington County and the counties along the Wasatch Front), as well as to serve as a resource for all attorneys involved with appellate defense throughout the state.

IADD is dedicated to protecting and defending the rights and dignity of each of our clients through zealous, compassionate, and client-centered advocacy. The goal of the office is to ensure throughout the state the delivery of indigent defense services – at the trial and appellate stages – that do not merely meet the *Strickland v. Washington*, 466 U.S. 668 (1984) constitutional standard for effective assistance but provide all clients the highest quality of representation. *See id.* at 688.

A brief overview of our newly created office

In April 2020, Debra M. Nelson was hired as the inaugural Chief Appellate Officer of IADD. The function of the office was hindered, however, by budget cuts due to the impact of COVID-19. But with the continued support of the legislature, the office has grown over the last few months with the hiring of additional staff: Deputy Chief Appellate Attorney, Ben Miller; a senior appellate attorney, Wendy M. Brown; and a paralegal, Ashlee Olson. Our staff have more than forty years of combined appellate experience and are prepared to handle appeals in-house, manage the assignment of appeals to qualified attorneys, and provide support to criminal appellate and trial attorneys across the state.



By statute, our office has the responsibility to provide “appellate defense services in counties of the third, fourth, fifth, and sixth class” in appeals from all criminal convictions other than aggravated murder, competency adjudications, and denials of bail. *See* Utah Code Ann. §§ 78B-22-901 to -904. In the typical criminal case, once there has been a final judgment and the trial attorney files the notice of appeal, Lisa Collins, the Clerk of the Utah Court of Appeals, will appoint IADD as appellate counsel if the person is indigent. Once that occurs, IADD will either contract the case to a qualified attorney or handle the case in-house among our experienced staff.

IADD has been charged with many other responsibilities as well. Chiefly, IADD is obligated to develop and implement (1) proper appellate performance standards, (2) appropriate caseloads for appellate attorneys, and (3) “any other information relevant to appellate defense services” in Utah. *Id.* § 78B-22-903(2). We also have stewardship over juvenile delinquency appeals.

Currently, we are in the process of drafting appellate performance standards to guide both our staff and all contract attorneys handling IADD appellate cases. These core principles are centered around the role of the appellate attorney in the protection of a person’s constitutional rights to an appeal and the need to ensure all attorneys have the training, resources, and support needed to provide zealous representation in each case without exception.

We hope these standards reflect the importance Utah places on the assistance of counsel and public defense, standards Governor Cox spoke of last March when he said, “The fundamental principles of equality and fairness cannot be fully realized under our justice systems without a well-resourced public defense system and prompt access to effective assistance of counsel.” Press Release, Office of the Governor, Governor Cox Declares March 18 Public Defense Day (March 18, 2021), *available at* <https://bit.ly/3tIAL8U>.

Additionally, we will be conducting regular CLEs on various issues of importance to attorneys who handle either criminal trials or appeals, and assembling resources – such as case summaries, sample briefs and motions, and secondary materials – that criminal defense attorneys can easily access.

Finally, we plan to engage in outreach to judges, practitioners, and other stakeholders to see how we can best be of assistance and to raise awareness of our presence as a resource for indigent appellate defense services. We are eager to play a vital role with any interested person or group in training, education, and strategy.

IADD is committed to being a key player seeing the highest level of indigent appellate services provided throughout the state of Utah. We look forward to getting to work with so many of you. Please reach out to us with questions, ideas, suggestions, or advice. We can be reached at IADD@utah.gov, and we welcome your help on the critical endeavor of improving indigent appeals throughout the state of Utah.



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Parsons Behle & Latimer extends its deepest congratulations to Hal J. Pos and Juliette P. White for well-deserved recognition by the Utah State Bar as well as sincere thanks for their enduring vision and leadership within the firm and important contributions to the Utah legal community.



Hal J. Pos was presented the Edward W. Clyde Distinguished Service Award by the Energy, Natural Resources & Environment Law (ENREL) Section of the Utah State Bar. This prestigious award is given to attorneys based on their overall contributions to the ENREL Section of the Bar and to the practice of environmental law. Pos has been a member of the section for many years and served as 2000-2001 ENREL chairperson. He has led a storied career for more than 37 years at Parsons Behle & Latimer as one of its preeminent environmental and natural resources attorneys and former Parsons' president and CEO.



Juliette P. White was chosen as the recipient of the Utah State Bar's 2021 Professionalism Award. The Professionalism Award is given by the Board of Bar Commissioners to an attorney whose deportment in the practice of law represents the highest standards of fairness, integrity and civility. In addition to being a skilled national litigation trial lawyer, White serves as a director and vice president at Parsons and is a senior member of the firm's intellectual property litigation practice team. She is a tireless advocate for Utah nonprofit organizations; individuals with intellectual and developmental disabilities; and for providing access to justice for all people in Utah.

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Third Party Subpoenas in the Context of Attorney Disciplinary Investigations

by John Bogart

In 2020, Utah Supreme Court overhauled attorney disciplinary proceedings. Although a number of the procedures and burdens remain substantively unchanged, there are some changes that deserve notice, in particular subpoenas to third parties.

Attorney discipline is, essentially, a three-step process: (1) complaint and investigation, (2) presentation to a panel of the Supreme Court Ethics and Discipline Committee (ethics panel) by the Office of Professional Conduct (OPC), and (3) litigation before the district court. Complaints may be dismissed by OPC on investigation, or held to be unfounded by the ethics panel, or a settlement may be reached, ending the process before it reaches the district court. That general outline of process is unchanged.

Under the new rules, however, both the accused lawyer (Respondent) and OPC have subpoena powers during the investigation phase (the phase prior to presentation to an ethics panel) without need of court involvement. Rule 11-512(a) of the Utah Supreme Court Rules of Professional Practice provides that “the Respondent may, for good cause, request the Committee chair authorize service of a subpoena.” The chair is the chair of the Ethics and Discipline Committee of the Supreme Court, out of which the various ethics panels are constituted. Utah Sup. Ct. R. Pro. Practice 11-502(e). Under Rule 11-523, OPC files a written request with the Committee chair for a subpoena, which “must describe the purpose for seeking the subpoena.” The Respondent can object to OPC’s request, but the Committee chair “will grant or deny the subpoena request, without a hearing, based on weighing: (1) the materiality and necessity of the requested documents ... and (2) the burden to the custodian.” *Id.* R. 14-523(b). These two provisions raise some questions.

Start with a curiosity in the text of Rule 11-523 governing an OPC subpoena. In considering whether to approve an OPC request to serve a subpoena, the Committee chair weighs two factors: (a) “the materiality and necessity” of the request and

(b) the burden on the custodian. Turning to subpoenas by a Respondent, a different standard governs whether the subpoena request should be approved by the Committee chair. The “materiality and necessity” of the request and the burden on the custodian are no longer the factors to be weighed. Instead, issuance of a subpoena is based on “good cause.” Utah Sup. Ct. R. Pro. Practice 11-512. As there was a deliberate choice of different language, “good cause” must mean something different from, i.e., require consideration of factors other than or in addition to, “the materiality and necessity” of the request and the burden on the custodian. But what are they? What is “good cause” for a subpoena? Is this a lower standard, i.e., may a Respondent serve a subpoena even if the information sought is neither material nor necessary? Does the Respondent need to show *more* than necessity and materiality? Does the burden on the recipient not matter when a Respondent seeks a subpoena? Why are there different standards, or are there?

Here is another curiosity in the subpoena provisions: OPC may have a subpoena served on Respondent, but Respondent may not serve a subpoena on the OPC. The subpoena provision applicable to Respondent provides for service only on third parties. Utah Sup. Ct. R. Pro. Practice 11-512(a) (the Respondent may apply for leave to serve a subpoena “before the screening panel authorizes the OPC to commence an Action against the Respondent ... on a third party.”). Rule 11-523, on the other hand, provides that the OPC may serve a subpoena (if approved

JOHN BOGART had a civil litigation practice focused on private antitrust and similar complex litigation. He was an adjunct at SJ Quinney College of Law and Loyola Law School Los Angeles.



by the Committee chair) “on a Respondent or third party.” So, while OPC may subpoena Respondent, Respondent may not subpoena OPC. So Respondent must rely on voluntary disclosures by OPC. *See* Utah Sup. Ct. R. Pro. Practice 11-531(b) (OPC *may* disclose a summary of its investigation). That imbalance in discovery opportunities is troubling as there is no penalty at all for OPC withholding information.

Now look at the process for objecting to a subpoena. A subpoena served by Respondent can be challenged by making objections either to the Committee chair or to a district court. Utah Sup. Ct. R. Pro. Practice 11-512(d) (“The Committee chair or the district court wherein the subpoena enforcement is being sought will hear and determine any attack on an issued subpoena as provided for in Rule 45.”). The Committee chair reviews the Respondent’s subpoena and, finding that it meets the good cause standard, authorizes issuance. The recipient then goes back to the very same person with any “attacks” on the subpoena. That is surely not a good way to get an impartial review of the subpoena, or to provide the third-party recipient a fair hearing on objections. The third-party recipient can take objections to a district court, either as appeal from the

Committee chair’s decision or in the first instance, so perhaps the imbalance is not too bad. At least in this instance, the third party has one low-cost avenue to object to the subpoena.

If OPC serves a subpoena, there is only one avenue for objection: go to court (which supports the idea that the standards for issuance of a subpoena from OPC and Respondent are different). Utah Sup. Ct. R. Pro. Practice 11-523(e) (“A district court in the district in which the attendance or production is being sought may, upon proper application, quash the subpoena, or enforce the production of any documents subpoenaed as provided for in Rule 45 of the Utah Rules of Civil Procedure.”).

Why are there different processes for objecting to the two sorts of subpoenas? Is there a presumption in favor of OPC subpoenas to third parties? Is the chair unable to fairly consider objections to an OPC subpoena while able to do so for a Respondent subpoena? If so, why would that not infect consideration of third-party objections to Respondent subpoenas? In other words, why is the objection process tilted against challenges to an OPC subpoena?

The Rules for both sorts of subpoenas embody a deeper unfairness, this to third parties because both of the Rules purport to *bar* appeals from a district court order concerning a subpoena “before entry of a final order in the proceeding.” Utah Sup. Ct. R. Pro. Practice 11-512(d); 11-523(e). Before we can get to the unfairness, it is worth noting that there is no definition of “proceeding” or “final order in the proceeding” in chapter 11. Does the “proceeding” include the “Action” (which is defined, a civil suit filed by OPC in the district court) or is the “proceeding” terminated before or by the filing of an “Action”? Is it the investigative phase, or both the investigative phase and hearing before the ethics panel, or does it have some other boundary? It is quite obscure exactly when this limited right to appeal an order even becomes available.

Consider now the position of a third party objecting to a subpoena. OPC and Respondent subpoenas are limited to requests for documents, electronically stored information, or tangible things. Innocenza receives a subpoena from OPC for personal and business records to which she objects. What is she to do? Interestingly, the rules do not actually tell us how a third party objects to or “attacks” a subpoena. There are references to Rule 45 of the Utah Rules of Civil Procedure, but those references apply Rule 45 to service of the subpoena, allocation of costs, and to how a district court is to respond to “a proper application”

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concerning the subpoena. Utah Sup. Ct. R. Pro. Practice 11-523(c), (d), & (e). But what a third party does in order to assert objections or to “attack” a subpoena is left in darkness (assuming that “attack” and object mean the same thing). Does the third party send a notice listing objections? A letter? Some formal document? Must it be in writing? Must it be exhaustive? Are the objections sent to both OPC and Respondent or just whoever served the subpoena? What sort of service is required?

If the objections are not resolved by OPC and the third party, somebody then must take the dispute to court. Innocenza will need to hire a lawyer to address the business records, at the very least, as she may not object on behalf of an entity. Even if no business records are called for, she may need a lawyer. Rule 11-523(e) says that OPC can take the dispute to the district court “in which the attendance or production is being sought.” Innocenza may hire counsel out of a worry that the district court will order her to appear, as the Rule says it can. But appear for what, she may wonder. Rule 11-523(a) says OPC may only subpoena documents, information, or tangible things, so what does “appearance” mean in Rule 523(e)? And there are the questions of the previous paragraph.

The subpoena Innocenza received, after all, was not an ordinary subpoena. There is no court listed, no case name, no case number, and nothing to tell her what court is supposed to have jurisdiction to hear her objections. If she seeks protection from the subpoena, she will have to pay a filing fee and file, well, what, she will wonder? A “proper application” the rule says, but what is that? Maybe she gets from Rule 11-523 to Rule 45 of the Utah Rules of Civil Procedure because she reads very carefully and guesses that, in light of Rule 45(e)(3), a “proper application” may be a statement of discovery issues under Rule 37 of the Utah Rules of Civil Procedure. But then again, maybe not. The subpoena is not, after all, issued under Rule 45 because there is no civil case pending, the subpoena does not come from a court. The rule easily could have said that a statement under Rule 37 is the proper means but does not. Will a letter objecting to the subpoena suffice as a proper application? Is there a deadline for making objections? Innocenza might, quite reasonably, think she needs help to understand how to assert her objections.

Innocenza has made her objections, and the district court has overruled the objections. She can do nothing more, according to Rule 11-523, until the “proceeding” is concluded. As noted above, that “proceeding” is undefined so she may have trouble deciding when her truncated appeal right is triggered. As she is

a third party, she is not entitled to notice regarding the “proceeding,” if that ends up being defined as ending when or before an “Action” is filed because the pre-action proceedings are supposed to be confidential. Utah Sup. Ct. R. Pro. Practice 11-561(a). How will she know when her right to appeal attaches?

Innocenza has now been forced to produce documents and information to the parties to some proceeding from which she is excluded. She will have no way of monitoring the use or distribution of her documents and information. As to all of this, once the district court rules, her recourse is to wait until all the damage is done and is effectively irreparable and only then she may file an appeal. To what end? What could she obtain from the court of appeals or the Supreme Court as remedy? A note thanking her for complying with the district court order and apologizing for that court’s error? The documents are out, the time lost. While there may be policy reasons to limit appeals by OPC and Respondent, what are the arguments for denying third parties due process and the ability to challenge decisions about subpoenas?

These issues would be less troubling if it was at least clear that the Committee chair actually has the authority to issue subpoenas,

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or that OPC or Respondent had such power in advance of the existence of an “Action”, i.e., an actual court case. Do they?

A natural starting point for grounding the subpoena power of the ethics committee, its chair, or the OPC or the Respondent, is the Utah Constitution. The rule making powers of the Utah Supreme Court are set out in Article VIII, Section 4:

The Utah Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Utah Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Utah Supreme Court by rule shall govern the practice of law, including admission to

practice law and the conduct and discipline of persons admitted to practice law.

The last sentence is the one that might give a hook. It gives the supreme court the power to make rules concerning “the conduct and discipline of persons admitted to practice of law.” The supreme court has the power, which it has exercised, to set up a rule-governed process for disciplinary investigations and actions. That power would encompass the ability to make rules requiring those in practice (lawyers and licensed paralegals) to cooperate with investigations, to provide documents and information in an investigation, and so on. But my question is not whether the supreme court can do those sorts of things, but instead where the power lies to force third parties, who are not lawyers or licensed paralegals, to provide documents and information. A subpoena to a third party is not within the scope of “conduct and discipline of persons admitted to practice law” because the subpoena recipients do not even purport to practice law. Innocenza and her company are neither lawyers nor providers of legal services, so they are outside that power of the Supreme Court, and, by definition, there is no case pending before any Utah court. No help here.

If the subpoenas under the disciplinary rules are not grounded in the state constitution, might they be grounded in a statute?

There are no statutes directly addressing subpoenas in the lawyer disciplinary processes, at least not before a disciplinary case is filed in the district court, i.e., before it becomes an “Action.”

There are indications in the minutes of the Advisory Committee that suggest that the Advisory Committee believed that there is support for such subpoenas in the Administrative Procedures Act or the Rules of Administrative Procedure. Sup. Ct. Oversight Comm. for the Office of Pro. Conduct, Meeting Minutes (Oct. 5, 2020), *available at* <https://www.utcourts.gov/utc/opc/wp-content/uploads/sites/41/2020/10/2020.10.05-Approved-Meeting-Minutes.pdf>; Sup. Ct. Oversight Comm. for the Office of Pro. Conduct, Meeting Minutes (Oct. 26, 2020), *available at* <https://www.utcourts.gov/utc/opc/wp-content/uploads/sites/41/2020/10/Approved-OPC-Minutes-2020.10.26.pdf>.

Subpoenas are mentioned in two places in the Administrative Procedures Act: section 63G-4-203(1)(e) and section 63G-4-205. Utah Code Section 64G-4-203(1)(e) says state agencies may issue subpoenas to compel production of evidence for informal proceedings (but discovery is otherwise prohibited). Utah Code Section 63G-4-205 provides that agencies may set out rules for discovery in formal adjudicative proceedings, including subpoenas.

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These are no help because neither OPC nor, more importantly, the ethics committee (whose chair approves subpoenas) is an agency under the Administrative Procedures Act. Utah Code Section 63G-4-103(b) defines “agency” for purposes of the act. It expressly states that the term “does not mean . . . the courts” and none of the listed entities or categories plausibly encompasses supreme court Committees or their members. Utah Code Ann. § 63G-4-103(b). Hence the ethics committee is not an agency. As it is not an agency, it hard to see how its chair could get authority to issue subpoenas under the Rules of Administrative Procedures as those rules govern administrative procedures authorized by the Administrative Procedures Act.

There is caselaw that may seem on point, *Nemalka v. Ethics & Disciplinary Committee*, 2009 UT 33, 212 P3d 525. The discussion of subpoena powers by the supreme court in that case, however, is based directly on the now-repealed Rule 14-503(g), which stated: “Any party or a screening panel, for good cause shown, **may petition under seal the district court** for issuance of a subpoena, subpoena duces tecum or any order allowing

discovery prior to the filing of the formal complaint.” *Id.* ¶ 17 (emphasis added). But there is no district court issuing a subpoena under the new Rules, so *Nemalka* is no help.

Maybe we have looked in the wrong places. Perhaps we could build from the authority of the district court to adjudicate attorney disciplinary matters. Utah Code Section 78A-5-102(4) gives district courts jurisdiction “over matters of lawyer discipline consistent with the rules of the Utah Supreme Court.” Maybe a subpoena to a third party is encompassed by the phrase “matters of lawyer discipline.” But that too is a dry bed. In context, “matters” surely refers to filed cases, not proceedings before some committee.

The Utah Supreme Court Rules of Professional Practice governing use of subpoenas in disciplinary proceedings seem to present some problems. Or, perhaps, an opportunity to think further about the process, to consider seriously the interests of all of the participant roles.

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H.B. 82 and Utah's Pursuit of Affordable Housing

by Victoria Carlton

In response to astronomical growth in housing costs, the Utah Legislature recently passed House Bill 82. The governor signed H.B. 82 into law in March 2021. The law prohibits municipalities and counties from restricting internal accessory dwelling units (IADU) in all residential zones. An IADU is a residential unit within a single-family dwelling or detached from a single-family dwelling but on the same lot.

Some municipalities, like Springdale, Utah, a town at the base of Zion National Park, previously restricted these types of rental units in residential zones. *See* Springdale Town Code § 10-7A-2. Now, however, these municipalities must allow IADUs, with some restrictions. *See* Springdale Town Code § 10-22-9 (noting the allowance of IADUs with certain restrictions); *see also* Santa Clara City Ordinance No. 2021-14 (adding Chapter 22 to Title 17 to its Code, allowing IADUs with a business license and permit recorded on the property); Nephi City Code Ordinance No. 09-21-2021-A (removing the secondary kitchen restriction, which referred to a restriction of secondary dwellings in residential zones. The Nephi City Council also noted possible amendments to clarify these types of units within the restrictions allowed by statute.). Homeowner's Associations are also prohibited from restricting internal accessory dwelling units. Utah Code Ann. § 57-8a-218(15).

The Housing Affordability Issue and IADUs

Simply google "housing crisis in Utah" and you will find various articles written in the *Salt Lake Tribune*, *Deseret News*, *Standard Examiner*, *Spectrum*, and other Utah news outlets. At the current rate of growth, some estimate that Utah needs 27,600 additional housing units annually to keep up with the demand for housing. Eskic D. Wood, et. al., *Housing Affordability: What are Best Practices and Why are They Important?* KEM C. GARDNER POLICY INSTITUTE, November 2020, <https://gardner.utah.edu/wpcontent/uploads/Best-Practices-Dec2020.pdf>. Yet, over the past five years, "the number of new dwelling units in Utah has averaged 21,150 units, about 75% of the number required to meet the annual demand over the next five years." *Id.* at 2.

In March 2021, the sponsor of H.B. 82, Representative Raymond P. Ward, stated before the Senate's Revenue and Taxation Committee that the legislature is aware of and "trying to deal with our housing affordability difficulty." He said,

Housing has become more expensive quite a bit faster than area mean income has and, in my mind, this is largely due just to the logic of supply and demand. If we constrain the supply, while there is still a high demand the cost will go up quite a bit, and if we allow an adequate supply the demand it will stay in balance.

Id.

He further explained that some residences occupied by two empty nesters used to house six to seven people. *Id.* An IADU would allow for additional housing, thereby easing up on the supply and thereby maintaining a balance closer to the housing supply-demand equilibrium.

IADUs are not a novel concept. Many states and municipalities across the country permit IADUs as a way to increase affordable housing. IADUs are attractive for a myriad of reasons, including: (i) providing an affordable housing option, decreasing the average rent by 58% on average, especially in owner-occupied, high-cost, residential neighborhoods; (ii) generating wealth for the tenant (decreasing the cost of rent and allowing the opportunity to save for purchasing a home) and landlord (decreasing mortgage costs); (iii) allowing IADUs to fit into the current neighborhood without disruption to the character of the

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municipality; and (iv) providing opportunity for a wide range of ages and situations, including empty nesters who may want to rent out a portion of their home or renters as they prepare to become permanent residents in the community. *See id.* at 16.

Part of H.B. 82's modifications included the creation of a two-year pilot program under the Olene Walker Housing Fund. This program works with lenders and borrowers by providing loan guarantees for individuals with a household income of less than the 80% of the area median income. Utah Code Ann. § 35A-8-504.5(1)(e). The Olene Walker Housing Fund Executive Director has been tasked to establish this pilot program "to provide loan guarantees on behalf of borrowers for the purpose of insuring the repayment of low-income ADU loans." *Id.* § 35A-8-504.5(2). The pilot program would require lenders to provide fifteen-year term loans at a fixed interest rate. *Id.* § 35A-8-504.5(3). Furthering this idea of affordable housing, and paying it forward, in a sense, the borrower is then required to rent the IADU to another low-income classified renter. *Id.* § 35A-8-504.5(c)(iv). The legislature has approved \$500,000 for purposes of implementing the pilot program and the "establishment of a loan reserve." *See* Fiscal Note H.B. 82.

Defining IADUs Under Utah Law and Municipalities' Ability to Set Restrictions

An accessory dwelling unit is defined by statute as a "habitable living unit added to, created within, or detached from a primary single-family dwelling and contained on one lot." Utah Code Ann. § 10-9a-103(1). H.B. 82 is specific to IADUs, which is a dwelling located entirely within the "footprint" of the primary dwelling. *Id.* §§ 10-9a-530(2), 17-27a-526(1)(b). This bill

only applies to owner-occupied housing in residential zones. *Id.*

A municipality under the new law allows IADUs to be restricted in up to 25% of a municipality's residentially zoned area. *See* Utah Code Ann. § 10-9a-530(2), § 17-27a-526(2). Or 67% of its residentially zoned areas, if a municipality has a state or private university with more than 10,000 students. *Id.* § 10-9a-530(2). This accounts for cities with high-densities due to student populations.

The modifications to Utah Code Sections 10-9a-530 and 17-27a-526 allows for municipalities and counties to impose certain restrictions to IADUs. These types of restrictions include:

- prohibiting IADUs on a residential lot of 6,000 square feet or less;
- requiring bedroom window egress;
- prohibiting the installation of a separate utility meter;
- requiring the IADU be designed without changing the appearance of the primary dwelling;
- prohibit an IADU if the primary dwelling is served by a failing septic tank;
- requiring an additional on-site parking space;
- prohibiting IADUs within mobile homes;
- requiring long-term rental of thirty-days or more;
- requiring a permit or business license;
- requiring the primary dwelling be owner-occupied; and,
- requiring the recordation of a notice of IADU with the county recorder's office.

See generally id. Whether or not a municipality enacts an ordinance governing IADUs, the state statute controls, and municipalities may no longer prohibit IADUs.

Conclusion

We are at a turning point in Utah's future for younger generations because housing affordability is going to continue to be an issue for a state with largely populated municipalities and counties locked between large mountain ranges (e.g., Provo and Salt Lake County). Housing demand has continued to soar and the price along with it, but the income for those already living in Utah has not. Will the younger generations be able to keep up and live in the same communities they grew up in? The legislature believes H.B. 82 is a step in that direction, allowing individuals to purchase a house, rent out a portion, and keep their costs down.

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Innovation In a Time of Crisis: The Utah Supreme Court's Order on Emergency Diploma Privilege

by Catherine Bramble

As the United States began to feel the effects of the global pandemic in March of 2020, third-year law students across the country watched news reports with growing concern about how the pandemic would affect their ability to take a two-day in-person exam in July that is required in almost every jurisdiction, including Utah, to become a licensed attorney. Should they plan on beginning their study for the Bar in May as advised by their law school? Would an exam even be offered, and if so, how would everyone's safety be ensured? If it wasn't offered and they couldn't be licensed, what would happen to the job offer they had already accepted or to their job search if they didn't yet have an offer? These questions and many others came to me from BYU Law students in my role as Director of Academic Advisement & Development at BYU Law School, but I had no good answers. Associate Dean for Academic Affairs Louisa Heiny at the University of Utah S.J. Quinney College of Law was hearing similar questions from students, and we began collaborating on possible responses.

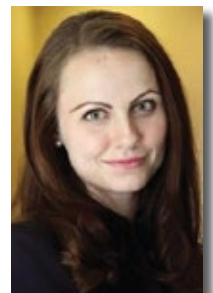
On Sunday, March 22, eleven legal scholars published a white paper titled "The Bar Exam and the Covid Pandemic: The Need for Immediate Action." The paper provided six possible alternatives to the Bar Exam, including postponement, online exams, exams administered in small groups, emergency diploma privilege, emergency diploma privilege-plus (the "plus" referring to additional requirements such as supervised practice hours), and expanded supervised practice. The paper argued that the first three options would fail to meet the needs of both new law school graduates and those suffering from the access to justice gap that it posited would only grow during the pandemic, while arguing that the latter three were viable options.

Associate Dean Heiny and I immediately forwarded the paper to our respective Deans, and within forty-eight hours Dean Gordon Smith of BYU and Dean Elizabeth Kronk Warner of the University

of Utah were in communication with the Utah Supreme Court about the impending Bar crisis. At the request of the court, we prepared a joint memorandum advocating for the adoption of an emergency diploma privilege. On April 2, the court held a joint conference with representatives from both law schools and from the Utah State Bar. The court recognized the need for action but also realized the importance of attention to detail. Which candidates would qualify for the privilege? How would the court ensure future clients were served by competent attorneys? If a supervised practice component were required, what kinds of work would qualify and how many hours would be required? How could the court encourage candidates to participate in pro bono work? Each justice brought unique perspective and concerns to the discussion.

That first joint conference was followed by many late-night, early-morning, and weekend emails; hours of additional discussion; drafts and redrafts; and finally, a Proposed Order that was published to the court's website on April 9, 2020, for public comment. Over the next seven days, 536 comments were submitted as the court received national attention in the form of both praise and criticism for its decision to lead out in being the first jurisdiction to propose such a solution. After the comment period closed, the court again carefully considered each provision of the Proposed Order, making adjustments as needed.

CATHERINE BRAMBLE is a legal writing professor at BYU Law School where she also serves as the Director of Academic Advisement & Development.



On April 21, 2020, Utah became the first state to grant an emergency diploma privilege. In the following months, Washington, D.C., Louisiana, Oregon, and Washington State followed suit. Many other states' law schools lobbied for diploma privilege but were ultimately unsuccessful, resulting in a year of what became known as "Barpocalypse." Exams were cancelled and postponed for months or indefinitely, online exams were offered through unproven testing software that crashed, proctoring software failed to recognize candidates because of the color of their skin, unforgiving test requirements resulted in inhumane conditions such as students urinating in their seats and one student giving birth between days one and two of the postponed exam, and in one jurisdiction a

test-taker tested positive for COVID-19 the day after taking an in-person exam.

In sharp contrast, and as a direct result of the Utah Supreme Court's willingness to respond to a global pandemic with innovation and courage rather than rigidity and fear, in Utah, 177 potential admittees were completing 360 hours of supervised practiced, gaining valuable work experience and making their way down a clear and safe path to licensure. In addition, as of December 31, 2020, these candidates had given a total of 3,025 hours of pro bono legal work to the citizens of Utah during a time when thousands were desperately in need of legal services.

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Gorsuch: The Judge Who Speaks for Himself

by John Greenya

Reviewed by Nicole Lagemann

I love a good biography and was excited to read John Greenya's book on the life of Supreme Court Justice Neil Gorsuch. Greenya's book – published in January 2018, just months after Gorsuch was appointed to the Supreme Court – is a fairly quick read and does a satisfactory job of getting the reader up to speed on the “newest” addition to the Court. The book is not an in-depth, deeply personal narrative of Gorsuch's life prior to appointment, but instead is a helpful summary of his prior writings and the recollections of various colleagues that quickly illustrate Gorsuch's background, attributes, and experiences and explain the path by which he came to be on the Court.

Greenya begins by introducing some of the immediate family members that were major influences on Gorsuch during his childhood in Denver, Colorado.

His grandfather was a well-known attorney in town with a long and distinguished career, and Gorsuch's parents, David and Anne, were attorneys who “raised their three children on the art of verbal sparring.” Greenya does a particularly good job of giving the reader a vivid sense of Anne's personality, which is likely due to his familiarity with her, having accepted the assignment in the mid-1980s to help her write a book about her time as head of the Environmental Protection Agency during the Reagan administration (after her forced resignation from that position). Anne was a determined and passionate individual, as illustrated by her reaction to a group of Republican lawyers who came to the house to persuade David to run for a state legislative position: Anne reportedly told them, “You've got the wrong Gorsuch,” and soon thereafter found herself campaigning (with nine-year-old Neil in tow) and winning the seat herself.

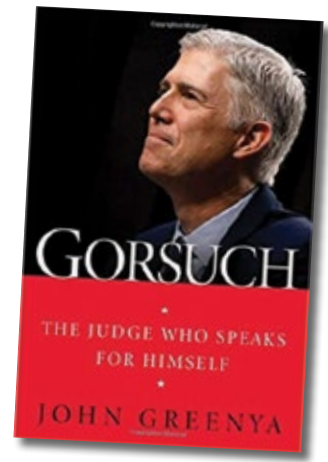
Greenya continues his narrative with a thorough discussion of Gorsuch's many educational opportunities, starting with his time at Georgetown Prep, where he was in student government and became a debate champion.

Gorsuch then studied at Columbia University, where, as a conservative student, he was “a political odd man out” yet

wrote for multiple school publications – including one newspaper that he founded with two friends. During this time, he wrote that while not all political beliefs were fashionable at Columbia, it was important that different viewpoints be heard: “Only in an atmosphere where all voices are heard, where all moral standards are openly and

honestly discussed and debated, can the truth emerge.”

Gorsuch thereafter attended Harvard Law School on a Truman Scholarship and was a classmate to Barack Obama. While Gorsuch and Obama were certainly on opposing sides of most political issues, they had many characteristics in common – both proving themselves to be articulate, respectful, and well liked, with each showing writing talent and a healthy sense of



Gorsuch: The Judge Who Speaks for Himself

by John Greenya

Publisher: Threshold Editions (2018)

Pages: 272

Available in hardcover, paperback, and ebook editions

NICOLE LAGEMANN is a member of the Journal's editorial board and is currently enjoying a break between clerkships at the Utah Court of Appeals to catch up on some reading.



humor. After graduating from Harvard, Gorsuch attended Oxford University on a Marshall Scholarship to study for a PhD in law. As part of this program, he chose to write his dissertation on the subject of assisted suicide and euthanasia, arguing against legalization based on the principle “that human life is intrinsically valuable and that intentional killing is always wrong.”

During his time at Oxford, Gorsuch met and married Marie Louise Burtleson, a fellow Oxford student. Greenya spends only a handful of pages on this aspect of Gorsuch’s family life (never even definitively stating how the two met), and this portion of the book certainly could have benefited from a bit more depth. This shortcoming is somewhat understandable considering Greenya was unfortunately unable to secure an interview with Gorsuch, but certainly other sources exist from which a few more details relevant to family life could have been gleaned to paint a more complete picture.

Greenya then walks the reader through Gorsuch’s various career experiences – first as a clerk on the Supreme Court for Justice Byron White and Justice Anthony Kennedy; next as an

attorney in private practice at a small start-up law firm; then as the Principal Deputy Associate Attorney General in the Department of Justice; and finally to the federal bench, sitting on the Tenth Circuit Court of Appeals. The writings and recollections Greenya shares while tracing this background show Gorsuch to be a hardworking and remarkably intelligent law clerk, a skilled litigator with unquestionable ethics who became a partner after two years, a committed public servant, and, in the end, a thorough and respected judge. Indeed, dozens of his law clerks across the political spectrum attested that Gorsuch “had the ability to transcend partisan politics and honor both the Constitution and the rule of law with ‘tremendous care and discipline.’”

At this point, Greenya takes a slight pause in the chronology of Gorsuch’s professional career to briefly discuss Gorsuch’s writing ability as it evolved over the years, as well as to compare Gorsuch with Justice Antonin Scalia. Greenya notes the two men had the same approach to law: “[I]t can be said of originalism and textualism – with only a little exaggeration – that Scalia invented the combination and Neil Gorsuch faithfully followed

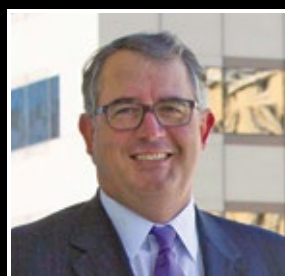
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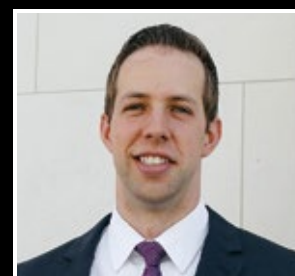
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it.” As Gorsuch has explained, he supports Scalia’s view that judges should strive

to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be – not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.

Although Greenya considers Gorsuch to be far from a clone of Scalia and believes he will be “his own, distinctive man,” he concludes that Scalia would “undoubtedly be pleased” with his replacement.

Returning to the chronology of Gorsuch’s life story, Greenya moves to the Gorsuch confirmation proceedings, focusing on the statements of many main characters in the saga. One such statement is the quote that provided the subtitle for the book: After some questioning regarding dark money donated in support of his nomination, Gorsuch asserted, “Nobody speaks for me. Nobody. I am a judge. I don’t have spokesmen. I speak for myself.” Greenya’s text does an overall good job of recounting the back-and-forth of the nomination process, which included the elimination of the filibuster for Supreme Court nominees and illustrates the increasing politicization of the nomination process. (And for anyone frustrated or concerned by Senate Majority Leader Mitch McConnell’s prior refusal to allow consideration of the Merrick Garland nomination in 2016, there will be much eye-rolling at McConnell urging Democrats to join “in giving Gorsuch fair consideration and an up-or-down vote,” and at McConnell’s complaints that in opposing Gorsuch’s nomination, Democrats were trying “to transform judicial confirmations from constructive debates over qualifications into raw ideological struggles” and that Democrats believed “any method was acceptable so long as it advanced their aim of securing power.”)

While Greenya does an overall good job at giving the reader a sketch of the many aspects of Gorsuch’s journey from young student to Supreme Court nominee, there are a couple negatives that merit a mention. First, the author acknowledges, “the book is *about* Neil, but it is also *for* his mother,” leaving the reader to question whether the book was an even-handed account of the subject or whether some less-favorable elements may have been intentionally avoided. Second, and more annoying, poor editing

of the book makes the text a somewhat frustrating read. This complaint is not limited to the typos, repetitive statements, or organizational issues scattered throughout the book, but also includes several obvious inconsistencies in the text. For instance, in the beginning paragraphs of chapter one, the author mentions that Gorsuch’s grandfathers were both medical doctors, but then in the next paragraph he dwells on the career of Gorsuch’s paternal grandfather as an attorney, leaving the reader quite confused. As another example, the text describes a case as one “in which Justice Breyer had upheld the three-drug protocol used in lethal injection in the death penalty,” but in reality Justice Breyer wrote a dissenting opinion in that case, questioning the constitutionality of the death penalty. A careful reader will notice such inconsistencies and be left wondering if there are other inaccuracies lurking in the book.

For a reader looking for a thorough and reliable dissertation on the life of Justice Gorsuch, this book may not be the best fit. But for someone simply interested in a quick read on the early life and career of Justice Gorsuch, this book does a good job of compiling a wide array of sources relevant to many facets of his journey and would be a suitable place to start to learn more about him.

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Living in Utah, Working for Out-of-State Clients

by LaShel Shaw and Keith A. Call

I once saw a bumper sticker on a car with a Montana license plate that said, “Montana is full. I hear South Dakota is really nice, though.” That made me laugh out loud and echoed much of how we feel about Utah. However, every indication is that Utah will continue to grow. Some small percentage of Utah’s population growth is likely coming from out-of-state lawyers moving to Utah.

With the COVID-19 crisis, many professionals are rethinking the advantages of crowded cities. The allure of cities can’t be denied, with their restaurants, culture, variety of experiences, and proximity to major airports. But population centers are a tough gig in the coronavirus age: social distancing is an inherent challenge, and the increasing viability of remote work allows professionals to smoothly transition to suburbs, small towns, and rural locations.

Lisa Pansini, *Attorneys Moving Away from Big Cities During Covid*, ROCKET MATTER’S LEGAL PRODUCTIVITY (Aug. 5, 2020), <https://www.rocketmatter.com/mobile-lawyers/attorneys-moving-away-from-big-cities-during-covid/>.

With a relatively low population, lots of open space, and easy-to-access recreational opportunities, Utah has a lot to offer to the urban refugee lawyer. In this article, we explore the Utah ethical rules applicable to lawyers living in Utah who do not have a Utah bar license.

LASHEL SHAW is an associate at Snow, Christensen & Martineau. Her practice includes government defense, IP litigation, and general commercial litigation.



Rule 5.5

The unauthorized practice of law in Utah is governed by Utah Rule of Professional Conduct 5.5. Under the Utah rule (which is slightly different than the ABA Model Rule), “[a] lawyer who is not admitted to practice in this jurisdiction shall not . . . establish an office or other systematic and continuous presence in this jurisdiction for the practice of law” or “hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.” Utah R. Pro. Conduct 5.5(b). Some limited exceptions are enumerated for licensed attorneys in good standing in other U.S. jurisdictions to practice law in Utah on a limited temporary basis. *Id.* 5.5(c).

Applicable Ethics Opinions

In 2019, prior to the pandemic, the Utah State Bar Ethics Advisory Opinion Committee considered whether Rule 5.5(b) would be violated if “an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah.” Utah Bar Ethics Advisory Opinion Comm., Op. No. 19-03 (2019) (hereinafter EAOB Opinion), ¶ 1. The EAOB recognized an argument that living in Utah while practicing law for out-of-state clients could be read to violate Rule 5.5(b). *Id.* ¶ 8. However, citing several constitutional concerns as well as other non-Utah legal authorities, the EAOB concluded that Rule 5.5(b) permits an out-of-state lawyer to establish a private

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



residence in Utah and to practice law from that residence for clients from the state where the attorney is licensed. *Id.* ¶¶ 2, 18. The EAOC Opinion emphasized that the out-of-state lawyer may not establish a “public office” in Utah or solicit Utah business. *See id.* ¶¶ 1–2.

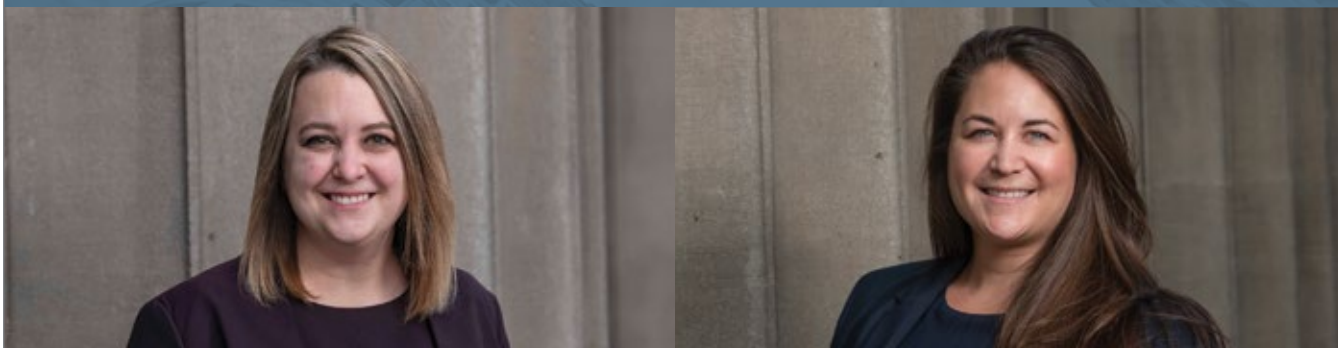
Subsequent ethics opinions from the American Bar Association (ABA) and other jurisdictions have reached similar conclusions, although most of them do not go quite as far as the EAOC Opinion. For instance, in Formal Opinion 495, the ABA concluded that “[l]awyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted” so long as (1) the jurisdiction where they are physically present has not prohibited it; (2) “the lawyer’s website, letterhead, business cards, advertising, and the like clearly indicate the lawyer’s jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction”; and (3) they do not actually provide legal services for matters subject to the local jurisdiction. ABA Standing Comm. on Ethics & Pro.

Responsibility, Formal Opinion 495 at p. 1–3 (2020). *See also* Penn. Bar Assoc. Comm. on Legal Ethics & Pro. Responsibility & Philadelphia Bar. Assoc. Pro. Guidance Comm., Joint Formal Op. 2021-100; The Florida Standing Comm. on the Unlicensed Practice of Law, FAO 2019-4 (2020); *In re Application of Jones*, 123 N.E.3d 877 (Ohio 2018) (DeWine, J., concurring); Maine Bar Pro. Ethics Comm., Op. 189 (2005).

Gray Areas and Words of Caution

We can conclude from the EAOC opinion that out-of-state lawyers may safely practice law for home-state clients if the lawyer stays at home in a private home office and does not establish a “public office.” But how far lawyers may stray from their private living rooms is unclear. May lawyers work from the local public library or corner coffee shop? May lawyers practice law from a private office suite in an office building, provided there is no public signage? May lawyers practice law for one day from inside their national law firm’s Utah office? How about a week, a month, or a year? At some point, many questions like these seem to raise technical distinctions without any substantive differences.

MEET OUR NEW ATTORNEYS



LaShel Shaw | 801.322.9288 | lss@scmlaw.com

Brenda E. Weinberg | 801.322.9124 | bew@scmlaw.com

Snow Christensen & Martineau is pleased to announce that associates **LaShel Shaw** and **Brenda E. Weinberg** have joined the firm. LaShel is an accomplished litigation attorney with expertise in both intellectual property and government defense. She previously worked in the Salt Lake County District Attorney’s Office as a civil litigator. Brenda is a trial attorney whose practice consists of appellate practice and commercial litigation. Before joining SC&M, she was a shareholder at Felix & Weinberg.

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The safest course for the time being, of course, is for the non-Utah lawyer to stay home. That is the best way to assure the protection of Utah's safe harbor rule. *See* Sup. Ct. R. Pro. Prac. 11-522(a) (precluding Office of Professional Conduct from prosecuting conduct that complies with an ethics advisory opinion that has not been withdrawn, but only if the conduct completely complies).

The EAOC Opinion also forbids lawyers who are not licensed in Utah from soliciting Utah business. The EAOC left the boundaries of that restriction undefined. Sending out a direct mailer to potential Utah clients in Utah would obviously be forbidden. But what about attending a Bar function, a lunch, or a Jazz game with people who may or may not become clients? What about telling friends at a child's Utah soccer game that you are a lawyer? The rules and opinions leave these and other similar questions unanswered.

Out-of-state lawyers should be extra careful with their internet websites, especially when they are associated with Utah law firms. In *Kelly v. Utah State Bar*, 2017 UT 6, 391 P.3d 210, an applicant for admission to the Utah Bar had previously been found to have engaged in the unauthorized practice of law after appearing on the website of a Utah law firm, even though the website included a disclaimer that the attorney was only licensed in Massachusetts and not licensed in Utah. *See Kelly*, 2017 UT 6, ¶¶ 6 n.9, 21 n.39.

Possible Amendments to Rule 5.5

The Utah Supreme Court is currently considering amendments to Rule 5.5(b) that would partially codify the EAOC Opinion. The proposed new rule would codify the EAOC's conclusion that lawyers physically located in Utah may provide legal services remotely to clients located in a jurisdiction where the lawyer is admitted, so long as the lawyer does not establish a "public-facing office." The proposed rule would continue to prohibit non-Utah lawyers from representing that they are admitted to practice law in Utah. Unfortunately, the proposed amendments do not define what is meant by a "public-facing office" or otherwise clarify the gray areas we identify above. *See* Draft Amendments to Utah R. Pro. Conduct 5.5(b) (Nov. 5, 2021), *available at* <https://www.utcourts.gov/utc/rules-comment/wp-content/uploads/sites/31/2021/11/RPC05.05.FOR-COMMENT.pdf>.

Conclusion

Bumper sticker jokes notwithstanding, if you are a lawyer who has recently moved to Utah, we welcome you. We hope this article helps you navigate the ins and outs of living in Utah while serving your home-state clients.

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



Kara H. North

Johnson Livingston is excited to announce their newest partner, Kara H. North. After starting in insurance defense in Nevada, Kara realized her real passion was for helping Plaintiffs, something she's done for the past ten years. Her practice will now focus 100% on Plaintiff's personal injury. Welcome to the Dream Team, Kara!

When not helping clients, Kara enjoys playing pickleball and supporting BYU sports with her husband and son.

801.948.9670 kara@johnsonlivingston.com

Need Ethics Help?



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

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

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



ethicshotline@utahbar.org

2022 Spring Convention Awards Announcement

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2022 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2022 Spring Convention Award no later than Friday, January 21, 2022. Use the Award Form located at utahbar.org/nomination-for-utah-state-bar-awards/ to propose your candidate in the following categories:

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

We appreciate your thoughtful nominations.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the November 18, 2021 Meeting held on Zoom.

1. The Commission approved the financial audit, which was clean.
2. The Commission approved the Outstanding NLTP Mentoring awards for Ann Marie (Annie) Taliaferro and Hon. Brody Keisel.
3. The Commission tabled the vote on the new gate and fence for the south side of the Bar building in lieu of an email vote once there is information about the cost of a lifetime warranty.
4. The Commission approved January 20, 2022, for the next Bar Review event.
5. The Commission approved endorsing and supporting the Hazelden Betty Ford Lawyer Well-being programming project with an eye toward soliciting financial support from various legal institutions to reach the \$50,000 goal.
6. The Commission approved the following consent items:
 - October 15, 2021 Commission Meeting minutes
 - Fund for Client Protection recommended payments.

The minute text of this and other meetings of the Bar Commission are available at the office of the Executive Director.

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



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Notice of Petition for Readmission to the Utah State Bar by Jeremy D. Eveland

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Verified Petition for Readmission (Petition) filed by Jeremy D. Eveland, in *In the Matter of the Discipline of Jeremy D. Eveland*, Third Judicial District Court, Civil No. 150907576. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the District Court.

IN MEMORIAM

This "In Memoriam" listing contains the names of former and current members of the Utah State Bar, as well as paralegals, judges, and other members of the Utah legal community whose deaths occurred over the past year, as reported to the Utah State Bar. To report the recent death of a former or current Bar member, paralegal, or judge please email BarJournal@utahbar.org.



JUDGES

Mark DeCaria
Richard C. Howe

ATTORNEYS

Henry L. Adams
Wesley C. Argyle
Kirk W. Bennett
Adam C. Bevis
Clella Cindy Lehua Blakely
Louis Henry Callister
Paul N. Cox
Randall Dean Cox
Richard B. Cuatto
Grant McEwan Cutler
Dennis Einar Dahl
Donald L. Dalton
Eugene Halston Davis
Robert J. DeBry
Earl DeVon Deppe
Gordon W. Duval
Michael S. Eldredge
Kevan C. Eyre
P. Gary Ferrero
Peter L. Flangas
Max Clive Gardner

Robert Gordon
Ronald Dwayne Hatch
George W. Hellstrom
James C. Hoffman
Stephen G. Homer
Michael Dean Hughes
R. Michael Hutchins
Stephen Walter Julien
Larry B. Larsen
James B. Lee
Kay M. Lewis
Joseph Warren Long
Elizabeth E. Rose Loveridge
Paul Lydolph III
Charles L. "Chuck" Maak
Dennis L. Mangrum
Milo S. Marsden
John G. Marshall
Grant S. Maw
John "Jack" S. McAllister
Robert Ladd Moody
Edward P. Moriarity
Monte J. Morris
Grant Nagamatsu
Alfred J. Newman

Ronald Offret
Stanley Hanks Olsen
Harold Lee "Pete" Petersen
John David Richards III
J. Todd Rushton
David E. Salisbury
Dee W. Smith
Stephen Jay Sorenson
Edward "Ned" Spurgeon
Lawrence E. Stevens
John C. Sumner
Keith E. Taylor
Alden B. Tueller
David W. Tundermann
Lance A. Wald
Michael K. Wall
Loren "Larry" E. Weiss
Alan M. Williams
John L. Young

PARALEGALS

Pauline M. Fontaine
Michele M. Sheppick
Holly J. Turner
Sandra D. Tiller

UTAH STATE BAR.

2021 FALL FORUM AWARDS

Congratulations to the following people who were honored during the 2021 Fall Forum:



Juliette Palmer White
Professionalism Award



Bertie Kee-Lopez
Community Member Award



Edwin S. Wall
James B. Lee Mentoring Award



Ann Marie Taliaferro
Charlotte L. Miller Mentoring Award



Kent B. Scott
Paul T. Moxley Mentoring Award

Notice of Bar Commission Election – Second, Third, and Fifth Divisions

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

- one member from the Second Division (Davis, Morgan, and Weber Counties),
- two members from the Third Division (Salt Lake, Summit, and Tooele Counties), and
- one member from the Fifth Division (Beaver, Iron, and Washington Counties)

each to serve a three-year term. Terms will begin in July 2022.

To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at <http://www.utahbar.org/bar-operations/leadership/>. Completed petitions must be submitted to Christy Abad, Executive Assistant, no later than February 1, 2022, by 5:00 p.m.

Utah State Bar.

Spring Convention in St. George



March 10–12

Dixie Center at St. George

1835 Convention Center Drive | St. George, Utah

Convention Accommodations

Room blocks at the following hotels have been reserved. You must indicate that you are with the Utah State Bar to receive the Bar rate. After 02/14/22 room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does not include 12.32% tax)	Block Size	Miles from Dixie Center to Hotel
Fairfield Inn (435) 673-6066 / marriott.com	\$129	5–2Q 10–K	0.3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	\$132 \$142	10–2Q 20–K	0.2
Holiday Inn St. George Conv. Center (435) 628-8007 / holidayinn.com/stgeorge	\$132–K \$142–2Q's	10–2Q 10–K	0.4
Hyatt Place (435) 656-8686 / hyatt.com	\$139–2Q \$149–K	10–2Q 10–K	0.2

www.utahbar.org/springconvention/

Pro Bono Honor Roll

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

Family Justice Center

Rob Allen
Amy Fiene
Sierra Hansen
Michael Harrison
Brandon Merrill
Babata Sonnenberg
Rachel Whipple

Private Guardian ad Litem

Robin Kirkham
Keil Myers
Rebecca Ross
Jeannine Timothy
Amy Williamson

Pro Se Debt Collection Calendar

Greg Anjewerden
Mark Baer
Pamela Beatse
Keenan Carroll
Ted Cundick
Hannah Ector
John Francis
Leslie Francis
Annemarie Garrett
Aro Han
Jarom Harrison
Erin Kitchens Wong
Taylor Kordsiemon
Amy McDonald
Nick Nash
Alexandra Paschal
Jazmynn Pok
Chris Sanders
Taylor Smith
George Sutton
Carl Swensen Hansen
Alex Vandiver
Gavin Wenzel

Special thanks to Kirton McConkie and Parsons Behle & Latimer for their pro bono efforts on this calendar.

Pro Se Family Law Calendar

Jacob Arijanto
Brent Chipman
Jessica Couser
Delavan Dickson
Norine Ferguson
Kaitlyn Gibbs
John Greenfield
Danielle Hawkes
Hannah McGuire
Keil Myers
Davis Pope
Clay Randle
Spencer Ricks
Stacey Schmidt
Virginia Sudbury
Sheri Throop
Adrienne Wiseman

Pro Se Immediate Occupancy Calendar

Pamela Beatse
Daniel Boyer
Keenan Carroll
Marcus Degen
Leslie Francis
Aro Han
Sierra Hansen
Brent Huff
Abigail Mower Rampton
(Student Practitioner)
Keil Myers
Matthew Nepute (Student Practitioner)
Jess Schnedar (Student Practitioner)
Lauren Scholnick
McKinley Silvers
Alex Vandiver
Gavin Wenzel

SUBA Talk to a Lawyer Legal Clinic

Oscar Castro
Bill Frazier
K. Jake Graff
Brad Harr
Jenny Jones
Zachary Lindley
Chantelle Petersen
Lane Wood

Timpanogos Legal Center

Geidy Achecar
McKenzie Armstrong
Steve Averett
James Backman
Amirali Barker
Bryan Baron
Margo Blair
Dave Duncan
Jonathan Grover
Linda F. Smith
Babata Sonnenberg
Marca Tanner Brewington
Nancy Van Slooten

Utah Legal Services

Kyle Barrick
Michael P. Barry
Chad Carter
Jacob Cheung-Ka Ong
Brent Chipman
Travis Christensen
Victoria Cramer
R. Jesse Davis
T. Richard Davis
Angela Elmore
Robert Falck
Jonathan Felt
Aaron Garrett
Sierra Hansen

Rori Hendrix
 Barry L. Huntington
 Daniel Irvin
 Ryan James
 Jeremy Kanahele
 Anthony Kaye
 Shirl Don LeBaron
 Orlando Luna
 Jacqueline Mabatah
 Chad McKay
 Chip Parker
 Wayne Petty
 Elisse Tatiana Quinn
 Tamara Rasch
 Eryn B. Rogers
 Ryan Simpson
 Babata Sonnenberg
 Mathew Snarr
 Megan Sybor
 Marca Tanner Brewington
 Jenny Thomas Jones
 Scott Thorpe
 Jory L. Trease
 Steven E. Tyler
 Wendy Vawdrey

Utah Bar's Virtual Legal Clinic

Nathan Anderson
 Dan Black
 Mike Black
 Anna Christiansen
 Adam Clark
 Jill Coil
 Robert Coursey
 Jessica Couser
 Matthew Earl
 Jonathan Ence
 Rebecca Evans
 Thom Gover
 Robert Harrison
 Aaron Hart
 Rosemary Hollinger
 Tyson Horrocks
 Robert Hughes
 Michael Hutchings
 Bethany Jennings
 Gabrielle Jones
 Justin Jones
 Erin Kitchens Wong
 Suzanne Marelus
 Travis Marker
 Gabriela Mena

Abigail Mower Rampton
 Tyler Needham
 Nathan Nielson
 Sterling Olander
 Jacob Ong
 Ellen Ostrow
 Steven Park
 Katherine Pepin
 Cecilee Price-Huish
 Jessica Read
 Brian Rothschild
 Chris Sanders
 Alison Satterlee
 Kent Scott
 Thomas Seiler
 Luke Shaw
 Kimberly Sherwin
 Farrah Spencer
 Charles Stormont
 Mike Studebaker
 George Sutton
 Jeff Tuttle
 Alex Vandiver
 Jason Velez
 Lynda Viti
 Kregg Wallace



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Mitch M. Longson has become MCBB's newest Partner. Mr. Longson's practice focuses on helping businesses deal with commercial disputes and employment law matters.



Brandon S. Fuller has joined the firm as an Associate representing clients in all areas of commercial litigation, including trademark disputes, employment litigation and compliance, and litigation under the Uniform Commercial Code.

UMBA Celebrates 30 Years

The Utah Minority Bar Association ("UMBA") recently held its annual Scholarship and Awards Banquet ("Banquet") on November 16th. This year's Banquet marked UMBA's 30-year anniversary since its inception in 1991. UMBA had 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 was pleased to honor the following individuals:

- 1) Distinguished Lawyer of the Year: Magistrate Judge Cecilia M. Romero
- 2) Jimi Mitsunaga Excellence in the Law Award: Justice John A. Pearce
- 3) Corporate Attorney of the Year: Mandeep Gill (Global Payments Inc.)
- 4) Law Firm of the Year: Ray Quinney & Nebeker
- 5) Pete Suazo Community Service Award: Betty Sawyer (Project Success Coalition)

UMBA would also like to recognize Judge Dianna Gibson for her excellent work as our master of ceremonies. The agenda ran smoothly with her at the helm, and we are grateful for her generosity and willingness to serve.

Lastly, this year's Banquet would not have been possible without the generous support of our sponsors. UMBA would like to extend its sincere gratitude and appreciation to the firms, organizations, and individuals that made this year's Banquet a reality:

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Advanced MD	Judge Dianna Gibson	Cheryl Mori	Trujillo Acosta Law
Ballard Spahr	Inclusion Strategies	Justice John A. Pearce	University of Utah, Office of Equal Opportunity, Affirmative Action, and Title IX
Christensen & Jensen	J. Reuben Law School	Judge Tupakk A.G. Renteria	Utah Appellate Court Judges
Cooley, LLC	Judge Renee M. Jimenez	S.J. Quinney School of Law	Utah Center for Legal Inclusion
Kim Cordova	Michelle Kennedy	Salt Lake Legal Defender Association	Utah Legal Services
Dentons Durham	Manning Curtis	Strong & Hanni	Edwin S. Wall
Jones Pinegar	Bradshaw & Bednar	Traskbirtt, P.C.	Young Lawyers Division
Dorsey & Whitney	Maschoff Brennan		

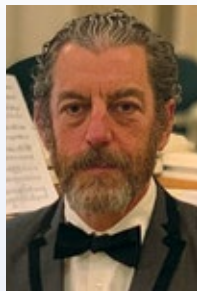
Thank you to everyone who attended, and we hope to see you next year!

UMBA Executive Board



UTAH MINORITY BAR ASSOCIATION
PROMOTING DIVERSITY IN THE LAW

2021 *Utah Bar Journal* Cover of the Year



Jeffrey Hall

The winner of the *Utah Bar Journal* Cover of the Year award for 2021 is *Bryce Canyon National Park in Winter*, taken by Utah State Bar member Jeffrey Hall. Hall's photo appeared on the cover of the Jan/Feb 2021 issue. When asked about how he came to take the photo, Jeff said: "Last year our family traveled to Bryce Canyon National Park at the end of December and hiked in the very cold, but beautiful snow covered red rock features of the park. I heartily encourage you to visit the park in winter.

Although the thermometer read six degrees the morning

I took this photo, we thoroughly bundled up, wore traction devices on our boots, and relished the bright sun and electric blue skies. Don't let the winter weather dissuade you. As my kids hear me say all the time: "There's no such thing as bad weather, there's only inadequate gear."

Congratulations to Mr. Hall, and thank you to all of the contributors who have shared their photographs of Utah on *Bar Journal* covers over the past thirty-four years!

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



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Attorney Discipline

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

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).

ADMONITION

On September 17, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 1.16 (d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:

A client contacted the Utah State Bar's Modest Means program looking for an attorney. Modest Means support sent an email with a list of attorneys for the client to choose from. The client contacted an attorney from the list and was told by the attorney to send a retainer so they could begin work on the matter. The client sent the attorney a money order. Because the client had not heard from the attorney, she sent an email and requested a status update. The attorney indicated that they were waiting for the Attorney General's office to send something to the client. A few months later, the client contacted Modest Means support

and asked for another referral because the attorney had not performed any work on their case.

The attorney contacted the client and apologized for the way the matter was handled and offered to do the case pro bono. The client gave the attorney documentation and information they requested. The attorney informed the client that a court order was being put into place. The clerk of the court told the client they were unable to locate an order. A review of the docket shows no order filed by the attorney on the client's behalf. At the end of the representation, the client requested a copy of her file. Several months later, the client requested a copy of her file from the clerk of the court.

The following mitigating factors warranted a downward departure in discipline:

Remorse, recognition of errors, offer to refund fee, mental health issues, refrain from taking on new legal work.

Adam C. Bevis Memorial Ethics School

March 16, 2022

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 March 7, \$120 thereafter.

Sign up at: opcutah.org

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Save the Date! January 26, 2022

6 hrs. CLE Credit, including 3 hrs. Ethics

Sign up at: opcutah.org



DISCIPLINE PROCESS INFORMATION OFFICE

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

ADMONITION

On September 20, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.1 (Competence) of the Rules of Professional Conduct.

In summary:

The complainant (the Complainant) in this matter was a tenant of a mobile home park (the Park) and was evicted. The Park filed a complaint for eviction against a tenant (the Tenant). The Tenant filed a complaint with the Utah Anti-Discrimination and Labor Division alleging discrimination by the Park and others. The Tenant listed the Complainant as one of the managers of the Park even though the Complainant had never been employed by the Park. The Utah Labor Commission issued a report in favor of the Tenant and eventually a complaint for enforcement of a civil action was filed in district court. The attorney accepted service of the complaint and filed documents on behalf of the Complainant without meeting the Complainant or obtaining any signatures. Later, the Complainant had their tax refund garnished and discovered that there was a judgment against them.

PUBLIC REPRIMAND

On November 2, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James R. Baker for violating Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Rules of Professional Conduct.

In summary:

A person contacted the Utah State Bar expressing a concern that he had met with an individual who may be practicing law without a license. The person, his siblings and his mother met with a non-lawyer (the Non-lawyer) to explore the possibility of preparing estate planning documents for his family. During the meeting he learned that Mr. Baker provided oversight to the Non-lawyer but the Non-lawyer handled all of the document drafting.

A second person contacted the Utah State Bar regarding the Non-Lawyer, forwarding sample documents to the Utah State Bar's UPL Committee. A member of the UPL Committee contacted the Non-lawyer to investigate the allegations. In the conversations, the Non-lawyer explained that he gathered information and filled in form documents prepared by Mr. Baker. Mr. Baker then reviewed the Non-lawyer's work and provided customization if needed. Mr. Baker did not meet with the clients and did not supervise the Non-lawyer.

PUBLIC REPRIMAND

On July 16, 2021, the Honorable Keith Kelly of the Third Judicial District entered an Order of Discipline: Public Reprimand against Jeffrey B. Brown for violating Rules 1.5(a) (Fees) and 7.3(b) (Direct Communication with Prospective Clients) of the Rules of Professional Conduct.

In summary:

Mr. Brown prepared estate documents, including a limited partnership agreement, for a client and her husband. Several



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years later, Mr. Brown sent to the client a letter notifying her that the limited partnership had expired for failure to renew and requesting that she should let him know in writing if she would like him to assist her in refiling it. The client did not respond to the letter. Mr. Brown sent a follow-up letter asking her to reply by mail, telephone, or email, or to let him know in writing if she did not wish him to contact her. The client did not respond to the letter. Mr. Brown sent a third letter and on the first page of the letter he indicated that it was the last time he would contact her unless she notified him that she would like to move forward with the advice he was providing, and that he would close his file if she did not respond. On the fourth page of the letter Mr. Brown indicated that the client would receive a bill for the advice he was giving to her in the letter, but that he would credit the payment of the invoice toward the flat fee for his recommended services. The client did not respond to the letter. Mr. Brown subsequently sent the client a bill, including a self-addressed envelope, for the unsolicited legal advice he provided in his previous letter.

PUBLIC REPRIMAND

On September 20, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joshua P. Eldredge for violating Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Underlying claims concerning Mr. Eldredge were dismissed by the Screening Panel. However, it was determined that Mr. Eldredge should receive a public reprimand for his failure to respond to the OPC, which caused unnecessary delay and cost in resolving the matter. The OPC was required to expend unnecessary time and resources in preparing the file for the Committee, and the Committee had to spend time preparing for and conducting the hearing. Attorneys are cautioned that failure to cooperate and provide information to the OPC may result in disciplinary action even if the underlying allegations are dismissed.

PUBLIC REPRIMAND

On November 2, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Matthew L. Harris for violating Rules 1.4(a) (Communication) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:


A client retained Mr. Harris to represent her in a divorce and custody matter. Mr. Harris charged the client's credit card for the representation. The client believed her husband was served with a petition but nothing was filed with the courts. About two months after she retained Mr. Harris, the client contacted Mr. Harris and informed him that she no longer wanted to pursue the divorce and asked for a refund. Mr. Harris stated he would get back to her. The client sent emails and made additional calls over the course of several months but Mr. Harris did not answer or return her calls or respond to her emails. Eventually, Mr. Harris' voicemail became full, and the client was unable to leave a message. The OPC sent a Notice to Mr. Harris. Mr. Harris did not timely respond to the Notice.

Aggravating factors:


Prior record of discipline.

PUBLIC REPRIMAND

On September 16, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Gregory V. Stewart for violating Rules 1.4(a) (Communication) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.



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In summary:

Mr. Stewart entered a notice of substitution of counsel and request for discovery on behalf of a client who had pled guilty to criminal charges. At an order to show cause hearing, Mr. Stewart moved to withdraw the motion to withdraw pleas and the court proceeded with sentencing. Shortly after the hearing, the client requested his file, including recordings and filings. During the representation, the client repeatedly asked Mr. Stewart to give him his file, including recordings and filings. The client repeatedly sent text messages, wrote emails and called Mr. Stewart attempting to contact Mr. Stewart and obtain updates and information about his case. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Stewart. Mr. Stewart did not timely respond to the NOIC.

RECIPROCAL DISCIPLINE

On July 15, 2021, the Honorable Robert A. Lund, Fourth Judicial District Court, entered an Order of Reciprocal Discipline: Suspension against D. Brian Boggess suspending Mr. Boggess for a period of three years for his violation of Rules 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 3.4(a) (Fairness to Opposing Party and Counsel), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

On June 4, 2020, the Supreme Court of Nevada entered an Order of Suspension, suspending Mr. Boggess from the practice of law for three years with a prior 21-month suspension running concurrently. The order of suspension was predicated on the following facts in relevant part. Mr. Boggess was retained by a client to prepare a Will and Trust. Mr. Boggess was named as the First Successor Trustee and Executor of the client's Will. Mr. Boggess was responsible for the clients bills and other affairs after the client became incapacitated. After the client died, despite being responsible for the client's bills, Mr. Boggess failed to pay them. Mr. Boggess failed to make any payments, other than to himself, of behalf of the estate for several years after the client's death and one year after recovering all trust assets.

Mr. Boggess was given a twenty-four-month suspension with all but three months stayed for a period of two years based on conditions. Mr. Boggess was aware of the terms of his stayed suspension and knew of his duty to promptly distribute the estate's funds and close the estate. Mr. Boggess failed to follow the terms of his stayed suspension.

Aggravating circumstances:

Prior record of discipline; substantial experience in the practice of law; pattern of misconduct; multiple offenses; refusal to recognize the wrongful nature of his conduct; and vulnerability of the victims.

Mitigating circumstance:

Personal or emotional problems.

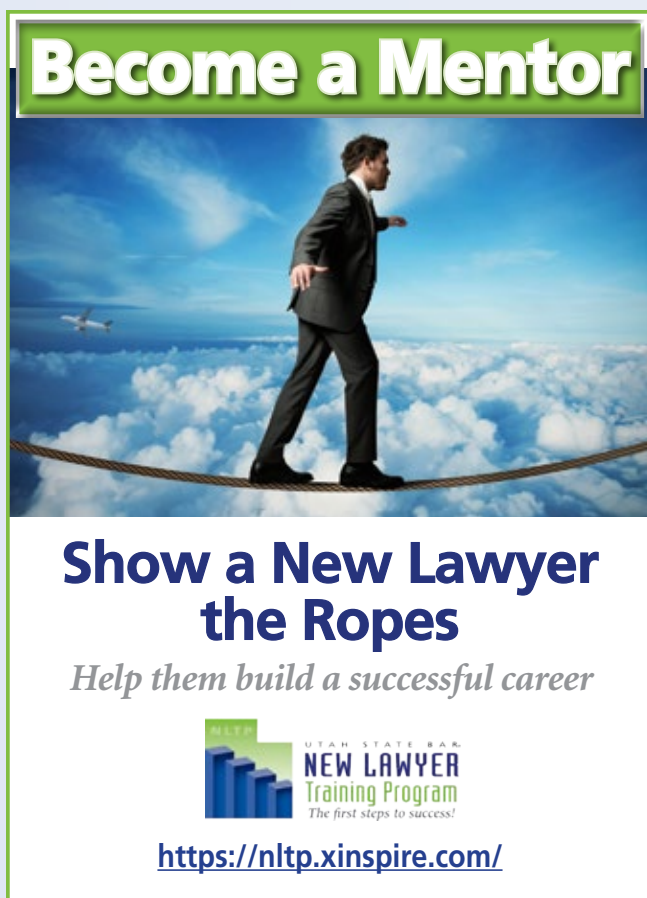
RESIGNATION WITH DISCIPLINE PENDING

On September 21, 2021, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Matthew R. Kober for violation of Rules 8.4(b) (Misconduct) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Kober pled guilty to Money Laundering Conspiracy, a violation of 18 U.S.C. § 1956(h).

Mr. Kober and a co-defendant concocted a scheme to defraud and obtain money by false and fraudulent pretenses by offering and inducing individuals to provide money for sports betting software or for his co-defendant to use the money to place sports bets. To further the scheme, Mr. Kober formed an LLC in Nevada listing himself as the sole officer and opened a bank account where he was the only signer on the account. After his co-defendant induced individuals to transfer money to the bank account, the co-defendant would instruct Mr. Kober which prior investors to send money to in an attempt to lead them to believe that they were successful in the sports bet and were making a profit. Mr. Kober also diverted investor money for his own personal use.



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Lessons I Learned as a First-Year Attorney

by Candace Waters

Find Your Own Way

Some people know exactly what they want to do in law school and have a fulfilling career doing that thing. The rest of us take a little time to find the area of law, the firm, and the pace that is best for us. Many of my friends made changes and are much happier. The story is the same when I talk to attorneys who have ten years of practice or more. I realized there are certain areas of law that I am not well suited for and switched my focus. I have learned about myself and my practice style. Now I can create a practice that is well suited for me.

Don't Take That Case

Early in my practice, I was eager to help everyone that I could. I felt an obligation to anyone who called me in need of legal help. I did not know how to spot potential bad clients or cases. The few times that I felt unsure about accepting a case, I did not know how to say "no" to a potential client. I have learned the hard way to trust my gut and to decline representation. I do not need to give a full explanation and can direct them to other resources. If a client seems problematic, if their story doesn't make sense, if she is rude, then do not take the case. If you don't have the time or the resources, then do not take the case.

Client Relationships Are Very Important

I always knew that treating your clients with respect was important. I observed this fact while working as a paralegal in Texas. The attorney was brilliant and very competent, but he was impatient and rude to clients. His clients did not like him, did not want to talk to him, and were generally unhappy with the representation. I have learned that taking extra time to talk to clients is important. Oftentimes, they need to tell you more details than necessary. Share their stress and worries. Clients want an attorney who will listen and empathize. Clients also want to learn and understand their case. I have learned that even when you make mistakes, clients will value you because of the relationship and trust you have built.

You Will Make Mistakes

The pressure to be perfect can be strong in the legal profession. After I got my bar number, I was so worried about making a mistake and facing a malpractice suit, disciplinary action, or both. Reading through the rules of ethics helped me remember the rules. Making me less likely to unwittingly do something

unethical. I also read the back of the *Bar Journal*. I gained a clear picture of common mistakes or actions to avoid.

The other thing that helped me get over my fear was through my mistakes. I always told my clients about the mistake and my plan to fix it. Each time my clients were gracious and reiterated their desire to work with me because of the relationship we had developed. My extreme fear of making mistakes has decreased to a healthy level that motivates me to be careful and mindful of my work.

When You Have Questions-Go Back To The Basics

There were many occasions where I would text my mentor with a question. I was hoping for an easy clear answer. Sometimes there were easy answers to my questions, but most of the time, she would guide me through a process. First, we would read the code together and look for the answer. Sometimes, we found it. Then, we would consult case law and secondary sources. Then we would put it together and decide the best course of action. What she taught me is to go back to the basics. There is a knowledge gap between law school and practice. My mentor taught me about some of the practical or customary aspects of practice. But for most legal questions, she taught me that I know exactly what to do.

You Need Many Mentors and Attorney Friends

My first year of practice was a very difficult time for me professionally and personally. I learned to reach out and ask for help. Different mentors with specialized areas of practice helped me with specific legal questions. I would ask attorneys who else I should know to gain more mentors. My post-graduation law school friends were able to commiserate about our collective challenges. I joined Facebook groups of attorneys so I could go ask questions and learn from others. All these people kept me afloat. I needed this community my first-year and will continue to need it every year in practice.

CANDACE WATERS is a trust and estate attorney at Lewis Hansen, LLC. She also serves as the secretary for the Elder Law Section and a Co-Chair of Wills for Heroes.



Please Welcome Five New Utah Licensed Paralegal Practitioners

by Greg Wayment

A year ago, we published an article welcoming seven new LPPs. We are now pleased to announce an additional five Legal Licensed Practitioners, bringing the total to date to eighteen. Please welcome:

Susan Astle, LPP – Family Law

Susan Astle is a Licensed Paralegal Practitioner for the state of Utah, licensed in Family Law. She currently works for the law office of McConkie Hales. Prior to joining the legal field, Susan enjoyed teaching at Canyon View in Alpine School District. She is actively committed to improving her community. She has served on the Millcreek Township Council and the East Mill Creek Community Council and energetically campaigned for Millcreek City's successful incorporation in 2016. She was elected to the school board for two terms at Canyon Rim Academy, a state charter school. Along with her civic involvement, Susan volunteers at her children's schools and assists regularly with high school swimming meets and USA Swimming meets.



Susan has an interest in providing legal resources, especially as it relates to helping families. By working in family law, and actively engaging with her community, Susan understands the need for accessible legal services as families navigate divorce and custody matters. As an LPP, Susan has an opportunity to help others by expanding legal services to those who may otherwise have limited access for various reasons. Susan is excited to be involved in Utah's legal community as an LPP.

Meredith Farrell, LPP, CP – Family Law

Meredith Farrell has been a paralegal for seven years at Anderson Hinkins, LLC in South Jordan, Utah. She has experience working in a wide array of practice areas, including family law, contract disputes, legal and medical malpractice, personal injury, insurance bad-faith claims, and landlord-tenant. Meredith received her Associates Degree in Paralegal Studies from Salt Lake Community



College in 2015 and then received her Certified Paralegal certificate from the National Association of Legal Assistants in 2019. Meredith is currently enrolled as a student at Southern Utah University where she is working on obtaining her Bachelor's Degree.

Meredith feels strongly about providing affordable legal services to the underserved population and offering everyone equal access to justice. Meredith has excitedly been following the formation of the LPP program for several years, and she is looking forward to the career opportunities that lie in store for this new profession.

Molly Jordan, LPP, CP – Family Law

Molly Jordan has worked as a paralegal at Moody Brown Law since 1998, specializing in family law. She is a graduate of Brigham Young University and a Certified Paralegal (CP) through the National Association of Legal Assistants (NALA). Moody Brown Law has been extremely supportive of the LPP program, and Molly is excited to continue working with this firm as a Licensed Paralegal Practitioner with licensure in Family Law (temporary separation, divorce, parentage, cohabitant abuse, civil stalking, custody and support, and name change). As a new LPP, she is committed to providing affordable legal representation in family law.



Jessica Moody, LPP, PP – Family Law

Jessica is a Licensed Paralegal Professional at Moody Brown Law in Provo, Utah. She is a graduate of Brigham Young University and a Professional Paralegal (PP) through the National Association for Legal Support Professionals (NALS). After graduating, Jessica worked as a paralegal at the Utah County Public Defender Association. She then took a lengthy hiatus to raise her four children. In 2016, she returned to the legal world, focusing on family law. Jessica is grateful to Moody Brown Law for their encouragement and support of her new endeavor. She looks forward to building her LPP practice and supporting Utah's efforts to improve access to legal services.



Melissa Parache, LPP – Family Law

Melissa has been a paralegal for over nineteen years. She began her career in Indian law and criminal law. Since the beginning of her legal career Melissa has sought ways to help make an impact in her community and for people that could not otherwise afford or know where to turn for legal assistance.



Melissa has extensive experience in multiple areas of law but quickly realized as she worked with indigenous people her passion was helping families and their children resolve disputes amicably and affordably. Melissa has been a certified mediator since 2013. One of the highlights to her career was being able to introduce mediation and use the knowledge and skills she has obtained over the years to help families resolve disputes in Indian country.

Melissa loves the law and enjoys helping people and enjoys resolving complex legal issues; when she heard about the new LPP Program, she was one of the first to complete the UVU classes and is excited to become one of the newly admitted LPPs. Throughout her years of working in the criminal and family law areas, she has witnessed countless people who have not been able to have the legal assistance they so desperately need due to lack of resources. Melissa is thrilled to be able to use her LPP to assist those less

fortunate and provide additional resources for them. Melissa's greatest strength is her ability to work with people. She's passionate and dedicated to the law and her career.

Melissa has extensive experience in complex litigation including Criminal Law (prosecution and defense), Indian Law, Family Law, and Alternative Dispute Resolution. Melissa began her career with Tsosie & Hatch where she was the firm's lead paralegal and office manager. It was there that she discovered what a difference she could make in the lives of those around her. Through Tsosie, Melissa was able to work with Echo Hawk Legal Services and Tribal hearings and trials throughout Indian country. She was able to manage and coordinate those cases with Federal and State officials, including the Utah State Governor's Office, Federal Bureau of Investigations and Courts of Indian Offenses. She has recently shifted to Green legal Group where she is excited to begin her new LPP practice.

She has a degree in paralegal studies from LDS Business College, she is a certified mediator (domestic and civil), licensed/bonded notary public, and P.O.S.T. certified.

For more information about how to hire a Utah Licensed Paralegal Practitioner, please visit the Utah State Bar's website at: <https://www.licensedlawyer.org/Find-a-Lawyer/Licensed-Paralegal-Practitioners>.

Heather Finch Memorial Scholarship Update

In August 2020, the Paralegal Division was pleased to announce the transfer of the Heather Johnson Finch Memorial Scholarship Endowment Fund to Salt Lake Community College (SLCC). The Division would especially like to thank Julie Eriksson and Nate Alder for all of their hard work completing the move. Also special thanks to Utah Valley University and Salt Lake Community College for facilitating the move of the scholarship.

At the time of the transfer, it had been ten years since Heather Johnson Finch's tragic death. Heather was the consummate professional and model to what every paralegal should strive to be. She devoted more than twenty years to the paralegal profession. Her life was given to hard work and service to the legal community through countless hours of volunteering, and in 2009 she received the Distinguished Paralegal of the Year Award, Utah's highest award for paralegals. She was serving as the chair of the Paralegal Division of the Utah State Bar at the time of her death. An avid hiker who aimed to summit the highest peak in every state, Heather died in an airplane accident in Nepal August 24, 2010, on her way to the base of Mount Everest.

To honor Heather's life and accomplishments, the Paralegal Division of the Utah State Bar created the Heather Johnson Finch Memorial Endowed Scholarship in 2010 – the first ever endowed scholarship for students pursuing undergraduate degrees in paralegal studies at Utah Valley University (UVU). Because UVU is no longer offering the Paralegal Studies program, in July 2020, plans were finalized to transfer the Heather Johnson Finch Memorial Endowed Scholarship to SLCC. The program at SLCC is the only paralegal education program in Utah that has been approved by the American Bar Association.

Heather's legacy and dedication to the paralegal profession will live on through this scholarship opportunity. Dedicated, aspiring, service-oriented students majoring in paralegal studies at SLCC will be able to benefit from pursuing the best paralegal education available, and the legal community will benefit when these students graduate and enter the workforce. Please join the Paralegal Division of the Utah State Bar in honoring the life of one of the finest paralegals in Utah by generously donating to this scholarship.

Instructions on how to donate to the Heather Johnson Finch Memorial Endowed Scholarship at SLCC, or to apply for the scholarship, can be found at <https://paralegals.utahbar.org/heather-finch-memorial-scholarship-fund.html>



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Making the Most of Your Mediation – Strategies and Best Practices. Fall Forum Trial Academy.

January 6, 2022

2021 Fall Forum – The Future of International Finance: Will the IMF Survive? 2021 Fall Forum – Session Five.

January 11, 2022

Truth or Dare – Identifying and Dealing with Deceptive Testimony. Fall Forum Trial Academy.

January 12, 2022

Cyber Security/Crime – Behaviors of Sexual Predators: Grooming. Paralegal Division of the Utah State Bar.

January 13, 2022

2021 Fall Forum – Seven Steps to Building Well-Being in Legal Organizations. 2021 Fall Forum – Session Six.

January 20, 2022

2021 Fall Forum – War Stories & Wisdom: A Utah Lawyers' Oral History Project, Part I. 2021 Fall Forum – Session Seven.

January 26, 2022

6 hrs. CLE Credit, including 3 hrs. Ethics

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Presented by the Office of Professional Conduct. Sign up at opcutah.org.

January 27, 2022

2021 Fall Forum – Judicial Safety and Courthouse Security: Our Obligations as Officers of the Court. 2021 Fall Forum – Session Eight.

February 16, 2022

Five Words that Changed America – *Miranda v. Arizona* and The Right to Remain Silent. Criminal Law Section of the Utah State Bar.

March 16, 2022

6 hrs. CLE Credit, including 5 hrs. Ethics

Adam C. Bevis Memorial Ethics School.

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

All content is subject to change. For the most current CLE information, please visit: utahbar.org/cle/#calendar

Unless otherwise indicated, registration information for all CLE events is located at <https://www.utahbar.org/cle/> in the box at the top left corner of the website or via the Practice Portal.

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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.

FOR SALE

Our father, Ronald C Barker, passed away. We are selling some of his law books. Most are in very good to fine condition, with occasional highlighting and notes made by him. Contact spbarkers@q.com. Pictures available. Pacific Reporter 2d, volumes 1–475, starting 1931, \$7500. West's Pacific Digest, Beginning 101 P. 2d, volumes 1–46 (brown) 1962, \$700. West's Pacific Digest, Beginning 367 P. 2d, volumes 1–60 (blue) 1978 \$900. Utah Reporter, 1969–2001 (94 volumes) \$1400. Includes Utah Digest, CD-ROM Edition (two boxes). Last three sets \$2800. All four sets \$9000.

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