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Cover Photo

Zion National Park, Utah – Upper Emerald Pools (Heaps Canyon) by Utah State Bar member Michael Steck.

MICHAEL STECK is a litigation and transactional solo practitioner representing business clients in Utah and Arizona. He relocated from the Wasatch front to St. George after developing lung complications from his second combat tour with the Utah Army National Guard – he recently accredited to help other Veterans with disability claims. He finds great solitude through photography and canyoneering in Southern Utah. Michael enjoys donating his artwork to non-profits for fundraising purposes and would like to connect with more organizations. If you know of an interested organization, please reach out via email to michael@clariorlaw.com.

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Utah Bar JOURNAL

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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.
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President-Elect and Bar Commission Election Results

The Utah State Bar is pleased to announce the results of the elections for President-Elect and Bar Commission seats for the upcoming fiscal year. **Erik Christiansen** was successful in his retention election as President-elect of the Utah State Bar. He will serve as President-elect for the 2022–2023 year and then become President for the 2023–2024 year. Congratulations to **Matt Hansen** who was elected in the Second Division; **Beth Kennedy** and **Cara Tangaro**, who were elected in the Third Division; and to **Tom Bayles**, who ran unopposed in the Fifth Division. Sincere appreciation goes to all of the candidates for their great campaigns and thoughtful involvement in the Bar and the profession.

PRESIDENT-ELECT

ERIK A. CHRISTIANSEN

Erik Christiansen is a commercial litigation trial attorney at Parsons Behle & Latimer and co-chair of the firm's securities litigation practice group. He represents clients in a variety of commercial, financial, and securities litigation matters.

Erik is the past chair of the Utah State Securities Commission. He has also served as an expert witness in multiple securities litigation matters.

Prior to joining Parsons, Erik practiced in California, where he still maintains an active practice.

SECOND DIVISION

MATT HANSEN

Matt Hansen is a trial attorney with over twenty years of experience in civil and criminal law. He has represented national businesses, small businesses, as well as government entities.

He attended Brigham Young University and obtained a degree in Finance. Matt went on to obtain a Law Degree and a Master's Degree in Business from the University of Utah.

Currently, Matt is a Deputy County Attorney for the Davis County Attorney's Office. In this capacity, he prosecutes special victim cases and other general felony matters. Similarly, he has worked as a prosecutor for the Weber County Attorney's Office and the Salt Lake County District Attorney's Office.

When not working, Matt enjoys spending time watching his daughters dance, cheer, golf, and play basketball.

THIRD DIVISION

BETH KENNEDY

Beth Kennedy is an appellate attorney at Zimmerman Booher. Her previous experience includes being a judicial clerk to Chief Justice Matthew B. Durrant at the Utah Supreme Court. Beth is a former President of the Women Lawyers of Utah and a founding board member of the LGBT & Allied Lawyers of Utah. She currently serves as a member of the Utah Supreme Court Ethics and Discipline Committee and as an executive committee member of the Appellate Practice Section of the Utah State Bar.

CARA TANGARO

Cara Tangaro is a successful criminal defense attorney practicing for over twenty years in Utah. She practices in justice and district courts from Logan to St. George and from Tooele to Moab. Previously she was a prosecutor for the Salt Lake County District Attorney's office.

Cara is a past president of Utah Association of Criminal Defense Lawyers, a member of the Utah Supreme Court Advisory Committee on Rules of Criminal Procedure, and a member of Women's Lawyers of Utah.

FIFTH DIVISION

TOM BAYLES

Tom Bayles is a long-time resident of St. George, where he has practiced law since 1998. Tom works at ProvenLaw, PLLC where his focus is estate planning, estate tax planning, real estate tax planning, and business succession planning. His experience includes serving as president of the Southern Utah Estate Planning Council, the St. George Exchange Club, the Southern Utah Bar Association, and as co-chairman of the Utah State Bar Spring Convention.

Tom earned an associates degree from Dixie State College, a bachelor's degree in economics from Weber State University, a master's in business administration from Washburn University School of Business, and a juris doctor from Washburn University School of Law, along with a tax proficiency certificate.

In addition to his legal aspirations, Tom is a renowned barbeque aficionado with plans to become a judge certified by the Kansas City Barbeque Society.

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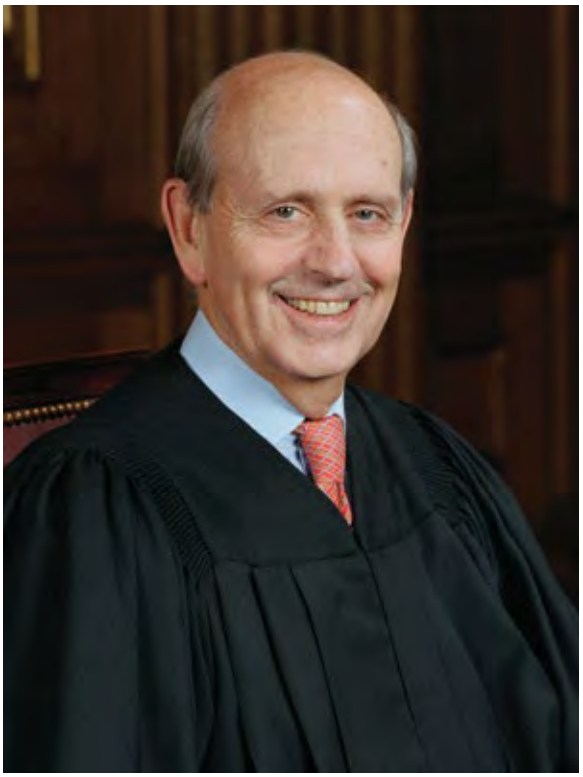
Celebrating Stephen Breyer: Gentleman, Constitutional and Administrative Law Scholar, and Metaphysician of Tomato Children and Marshmallow Guns

by Todd Zagorec

When Justice Stephen Breyer announced his decision to retire from the Supreme Court, the Court's Office of Public Information released a collection of messages from his fellow justices. Sup. Ct. of the U.S. Off. of Pub. Info., *Statements from the Supreme Court Regarding Justice Stephen G. Breyer's Retirement* (Jan. 27, 2022). They are warm and personal, focusing on his friendship, civility, sense of humor, and optimism.



To Chief Justice Roberts he is a "dear friend," and "a reliable antidote to dead airtime at our lunches," with a "comprehensive collection of riddles and knock-knock jokes." Justice Thomas describes time spent by him and his wife, Virginia, with Justice Breyer and his wife, Joanna, as "an absolute joy … our friendship and deep affection redoubles and endures." Justice Alito describes him as "brilliant, erudite, friendly, good-natured, and funny," and mentions how he will miss Justice Breyer's "unique questions at argument," and "amusing observations at lunch," as well as how Justice Breyer and his wife, Joanna, worked "to promote a congenial atmosphere at the Court."

Justice Sotomayor calls him a "dear friend, … funny, optimistic, and giving … [committed] to seeking consensus and ensuring collegiality." To Justice Kagan he is "the best possible friend … kind and warm and funny … [with] boundless optimism and a great heart." Justice Gorsuch notes his "legendary" good humor. Justice Kavanaugh calls him "a man of great wisdom and humor, a collegial consensus-builder and unfailing optimist." Justice Barrett describes him as "a model of civility," "incredibly gracious," and one "who aims to persuade through exuberance rather than bite."

These recollections by Justice Breyer's colleagues seem heartfelt and genuine. They also sound very much like *Professor* Stephen Breyer when he taught my third-year Administrative Law class. That was a long time ago, when he was also *Judge* Breyer on the U.S. Court of Appeals for the First Circuit. Professor Breyer was thoughtful and well-organized, with a comprehensive understanding of his subject matter. He literally wrote the book, now in its ninth edition – but I would be remiss not to give equal credit to the other co-authors, as well. Stephen Breyer, Richard Stewart, Cass Sunstein, Adrian Vermeule, & Michael Herz, Administrative Law and Regulatory Policy (9th ed. 2022). Most importantly and memorably, he was also patient, engaging, and respectful with his students, never belittling or intimidating anyone.

TODD ZAGOREC is an Editor at Large of the Utah Bar Journal. His day job is Legal Department Mentor and Counsel, UPL Limited.

Our graduation requirements included writing a third-year paper under the one-on-one supervision of a faculty member. Professor Breyer announced many times during class that he had several ideas in mind that might make good third-year paper topics, if anyone was interested. One of the regrets of my life is that I didn't take him up on that offer. Instead, I chose a forgettable labor law topic with another professor because I thought it would be easier. I'll just note that "because I think it'll be easier" is rarely a good reason for doing anything.

Chief Justice Roberts's tribute includes the intriguing observation that Justice Breyer's "fanciful hypotheticals during oral argument have befuddled counsel and colleagues alike." This, coupled with Justice Alito's fondness for his "unique questions at argument," is worth a closer look.

Some examples of what they might have had in mind:

- In a discussion of the scope of the commerce clause, Justice Breyer posits a grower of genetically altered tomatoes somewhere in the country which somehow result in "tomato children" with unspecified consequences for the city of Boston. *Gonzalez v. Raich*, No. 03-1454, oral argument before the U.S. Supreme Court, November 29, 2004, at 30.

- In a strip search case, he recalls that when he was "8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear .... Or not my underwear. Whatever. Whatever. I was the one who did it? I don't know. I mean, I don't think it's beyond human experience, not beyond human experience." *Safford Unified School District #1 v. Redding*, No. 08-479, oral argument before the U.S. Supreme Court, April 21, 2009, at 58.

- In a case involving the threatened use of a gun, he asks counsel to consider the possible legal implications of carrying a hypothetical gun made of marshmallows. *United States v. Taylor*, No. 20-1459, oral argument before the U.S. Supreme Court, December 7, 2021, at 23.

- In a pharmaceutical patent case, he wonders about the patentability of discoveries that might be characterized as laws of nature, such as, for example, a discovery that one's

little finger changes color as an indication of the adequacy of a dosage of aspirin. *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, No. 10-1150, oral argument before the U.S. Supreme Court, December 7, 2011, at 13.

- In a discussion of whether burglary is necessarily a crime of violence, he offers the following example: "Now I have – this is my hypothetical. You've heard of cat burglars. Well, this gentleman is called the pussycat burglar, and the reason is, he's never harmed a soul. He only carries soft pillows as weapons. If he sees a child, he gives them ice cream." *Caracburi-Rosendo v. Holder*, No. 09-60, oral argument before the U.S. Supreme Court, March 31, 2010, at 42.

- In a case about the alleged depletion of groundwater in another state, he compares groundwater to the fog in San Francisco:

> San Francisco has beautiful fog. Suppose somebody came by in an airplane and took some of that beautiful fog, and flew it to Colorado, which has its own beautiful water – air. And somebody took it and flew it to Massachusetts or some other place. I mean, do you understand how I'm suddenly seeing this and I'm totally at sea. It's that the water runs around. And whose water is it? I don't know. So you have a lot to explain to me, unfortunately, and I will forgive you if you don't.

Mississippi v. Tennessee, No. 143, Orig., oral argument before the U.S. Supreme Court, October 4, 2021, at 23–24.

Piled one on top of the other like this, the list resembles a cabinet of curiosities, but it's more than simply entertaining. Fanciful? Yes. Befuddling? Very likely. But if you track down the transcripts and read these excerpts in context, it becomes clear that: (a) the hypotheticals also pinpoint crucial issues in the arguments; (b) Justice Breyer takes his responsibility very seriously; (c) he isn't full of himself; and (d) he thoroughly enjoys what he does.

Chief Justice Roberts's tribute also lauds Justice Breyer's "pragmatism." I don't know if that is intended to refer to Justice Breyer's theory of constitutional interpretation, but it is the very word Justice Breyer himself has used to describe his approach

to the constitution. *See, e.g.*, Stephen Breyer, MAKING OUR DEMOCRACY WORK, 80–87 (2010).

His pragmatic interpretation of the constitution relies on an examination of text, history, tradition, precedent, purposes, and consequences – but with emphasis on purposes and consequences in order to achieve the constitution's basic objectives of creating a workable democratic government and protecting individual rights, while recognizing the distinct responsibilities and comparative competencies of the other branches of government and the states. Each element of that summary cries out for further explanation. For a fuller exposition you would be well rewarded by a trip to your library or local bookstore for a copy of Breyer's *Making Our Democracy Work*. The examples and discussion that follow are taken from that book.

Justice Breyer is not an "originalist" or a "textualist." He recognizes the value of history and text as part of the process but sees too many inadequacies for either to be the sole determinant of meaning. Intent can be hard to determine, either because evidence is lacking or contradictory (disagreements among the founders were common), phrases are vague and general, or because issues arise which the founders never could have imagined. For example, James Madison likely never considered whether the remote use of an infrared imaging device to detect marijuana cultivation inside a structure would constitute an "unreasonable search."

Strict reliance on original intent can also lead to troubling results. Think of *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). There were probably some Radical Republicans in the 1860s who thought the Fourteenth Amendment required integrated schools, but you can bet that was a minority opinion. An originalist view would therefore say the case was wrongly decided, which seems like an unconscionable conclusion today in a country espousing the equal protection of the law.

Words matter, but reliance on the literal meaning of the text can also be problematic. The Sixth Amendment guarantees the accused the right "to be confronted with the witnesses against him." Consider a murder trial where the victim, perhaps in the hospital before dying, identifies the murderer. A literal reading of the text would render the deceased victim's statement inadmissible. Would we be comfortable with that?

As indicated above, Justice Breyer's solution to these problems is to employ all the traditional legal tools (text, history, tradition, precedent, purposes, and consequences), but primarily to emphasize purposes and consequences. When deciding a constitutional matter, the Court should focus, not necessarily on the precise words, but on the values underlying those words. The questions for the Court are not necessarily what James Madison and Alexander Hamilton thought, or how the dictionary defines the words (although those are helpful tools and should not be ignored) but whether the statute or actions in question, and the Court's ruling and its consequences are consistent with

"the Constitution's basic objective of creating a workable democratic government." Breyer, MAKING OUR DEMOCRACY WORK, at 74. By so doing, and applying "unchanging constitutional principles to a world of continuous change," *id*. at 217, the Court can make decisions that work for society, and encourage public acceptance of those decisions as legitimate.

Of course, not everyone subscribes to the theory, and Justice Breyer's pragmatism is neither easy nor perfect, but it is a thoughtful and intelligent model for preserving the relevance and values of a centuries-old document, and one which James Madison himself (as long as we're talking about the founders) might find complimentary things to say about.

Madison is a bit of a conundrum for originalists. He, perhaps more than any of the other founders, was responsible for the original Constitution, but his own intent seems to have been that the original intent of the founders (himself included) be ignored. "But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as an oracular guide in expounding the Constitution." 4 *Annals of Congress* 776 (1796), quoted in Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. LAW REV. 267, 277 (1997).

In fairness, Madison pointed to the state ratifying conventions as better evidence of original intent since they were the ones who actually adopted the instrument. He wasn't saying original intent doesn't matter; he was just trying to deflect attention away from the original drafters of the instrument – principally himself. He was a bit of a moving target, sometimes sounding like an originalist, sometimes like a textualist, but at other times like a pragmatist. He's a fascinating character, and I recommend Noah Feldman, THE THREE LIVES OF JAMES MADISON (2017); Richard Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997); and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARVARD L. REV. 885 (1985).

Madison's rules for Constitutional construction also included the following: "An interpretation that destroys the very characteristic of the government cannot be just," and "where the meaning of the Constitution is 'doubtful,' it should be 'fairly triable by its consequences.'" Noah Feldman, THE THREE LIVES OF JAMES MADISON, 319–20 (2017), citing THE PAPERS OF JAMES MADISON, ed. William T. Hutchinson and William M.E. Rachal, *Speech of February 2, 1791*, 13:373–75 (1962). That doesn't sound so different from Justice Breyer's practical focus on purposes and consequences.

Finally, I'd like to pay tribute to my Administrative Law professor by calling attention to the dissent in *National Federation of Independent Business v. Department of Labor*, Nos. 21A244 and 21A247, slip op., 595 U.S. ___ (2022), where the Court stayed enforcement of OSHA's emergency temporary standard (the Standard) requiring either vaccination or masking and testing for employees of large private employers. The dissent appears under the names of Justices Breyer, Sotomayor, and Kagan. I don't know who held the pen, but it has Professor Breyer's fingerprints.

The case might have ramifications far beyond the COVID-19 pandemic, as it could represent something of a departure from established administrative law principles. There are three opinions: the majority opinion, a concurring opinion by Justice Gorsuch (joined by Justices Thomas and Alito), and the dissent. The majority opinion employs the traditional framework of considering whether administrative action is within the scope of the Congressional delegation of authority but seems to signal stricter scrutiny of those actions and less deference to executive agencies. The concurring opinion goes further, showing less deference not only to the agency, but to Congress itself.

The majority opinion notes that the risk of contracting COVID-19 is pervasive, not unique to the workplace, and concludes that the Standard amounts to a broad public health measure rather than a workplace safety standard. In short, OSHA exceeded its statutory authorization.

Justice Gorsuch's concurring opinion argues that even if the Standard were within the scope of OSHA's statutory authorization, enforcement of the Standard would still be stayed as it amounts to an impermissible delegation of Congress's legislative responsibility.

Justice Gorsuch invokes principles he calls the "major questions doctrine" and the "nondelegation doctrine." According to the major questions doctrine, Congress must speak clearly when delegating the power to make decisions about questions of "vast national significance." Justice Gorsuch found no such clear delegation. The nondelegation doctrine prevents Congress from "intentionally delegating its legislative powers to unelected officials." In the view of Justices Gorsuch, Thomas, and Alito, even if the delegation of authority had been clear in this case (satisfying the major questions doctrine test), the Standard is legislation by another name and would therefore fail under the nondelegation doctrine. It is hard to read the concurring opinion, and perhaps even the majority opinion, as other than an effort to roll back what they perceive as overreaching by an aggressive administrative state.

The dissent (Justices Breyer, Sotomayor, and Kagan) rejects the argument that OSHA has exceeded its statutory authority. To the dissenters it is a matter of deferring to an agency with particular expertise, so long as it has discharged its responsibilities reasonably and within the scope of its statutory authority.

The governing statute is the Occupational Safety and Health Act, 29 U.S.C. §§ 651–678, which not only authorizes but requires OSHA to issue;

> an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the Secretary of Labor] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. § 655(c)(1).

To Justice Breyer and the other dissenters, the statute is clear and the Standard fits squarely within the mandate to protect employees from "grave danger" posed by "new hazards" and exposure to "harmful agents." The statute provides that the agency's determinations are "conclusive if supported by substantial evidence." 29 U.S.C. § 655(f). The record was replete with evidence of the seriousness of the threat of infection in the workplace and the effectiveness of testing, masking, and vaccination in mitigating the risk. OSHA's determination therefore satisfied the statutory standard of review. The Standard was also drafted to address the threat without being unnecessarily broad. Vaccination is not required if an employee prefers weekly testing and masking, the Standard expires after six months, and exemptions exist for religious objections, medical necessity, employees working from home, alone, or outdoors. To the dissenters this was an easy case; the Standard was simply OSHA doing its job and was entitled to judicial deference.

The dissent concludes with a discussion of the question "[u]nderlying everything else in this dispute . . . ," namely, who decides how to protect workers from COVID-19? Justice Breyer and the other dissenters answer the question with a question: "An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?"

That is administrative law, or at least a salient part of it – the comparative competencies of agencies and courts and the appropriate degree of deference to be accorded an agency's actions. To Justice Gorsuch, OSHA's Standard is "government by bureaucracy supplanting government by the people." To Justice Breyer, the majority's decision "substitutes judicial diktat for reasoned policymaking." Do you prefer rulemaking by specialized agency officials, themselves unelected but answerable to elected officials, or by the Court, answerable to . . . whom exactly?

I confess to personal bias (shouldn't we all?), but I find the dissent more persuasive than the majority, whose opinion feels to me like an unsubtle movement away from settled administrative law, competence, and accountability. However, I acknowledge that view of the world does not appear to be in the ascendancy, and it places me comfortably in the minority.

The Court is losing a deep thinker and a kind man. I wish I had a time machine. If I did, I'd go back to Cambridge, Massachusetts in 1983 and ask Professor Breyer to supervise my third-year paper on the role of the judiciary in the pragmatic regulation of tomato children menacing Boston with marshmallow guns.

MEET SOME OF KIRTON McCONKIE'S

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The Changing Face of Legal Education

by Carolynn Clark

Utah has long been an innovative state, and recent changes in the legal profession and legal education are no exception. This may come as a surprise considering that the law and we as legal professionals can be resistant to change. But a confluence of pressures and opportunities, including the growing access to justice gap, forced changes necessitated by a global pandemic, and advances in technology have made change both necessary and possible.

For example, many lawyers will be familiar with the relatively new Licensed Paralegal Practitioner (LPP) designation that allows nonlawyers who have had the requisite education and training to practice law in a limited capacity in the areas of family law, landlord/tenant law, and debtor/creditor law. This program started in 2018, and there are now eighteen LPPs who have been qualified to practice in Utah. Likewise, the Utah Supreme Court has authorized a regulatory sandbox that allows entities to use new business structures and service models to provide legal services in Utah after going through a review and approval process. The goals of both the LPP program and the regulatory sandbox are to break down previous barriers to legal services.

Coupled with these changes to legal services, there are also innovations in the area of legal education in Utah. It has become clear that, in addition to individuals pursuing programs like those mentioned above, there are many who are interested in receiving a legal education but who do not intend to become lawyers. In the fall of 2018, the S.J. Quinney College of Law at the University of Utah enrolled its first class of students for the Master of Legal Studies (MLS) program. The MLS program is a one-year executive master's degree, which teaches legal topics similar to what many first-year law students might learn, but with more practical application to working professionals and also with more specialized offerings like mediation and employment law. Taking advantage of technology, the program is able to run in three formats: an in-person format with classes running every other weekend at the law school; a fully online format that launched in the fall of 2021; and now a distance format for those living in and around the St. George area that allows students to attend with an in-person cohort from the University of Utah's distance campus in St. George.

The MLS degree is a great fit for individuals who deal with law and regulations in their work, interact with general counsel as part of their job duties, or could simply use legal know-how to improve or scale-up their current job skills. In addition, the degree was approved in early 2021 as fulfilling the educational requirement to become an LPP. A new rule change passed recently also allows approved coursework – like that provided in the MLS program – to count towards some of the practical hours required to become an LPP.

The MLS degree promotes the view that the law does not just belong to lawyers, but that legal knowledge can be of use to anyone, even if they do not intend to practice law as an attorney. Many types of professionals can benefit from a legal education, which leads to one of the unique and beneficial aspects of the MLS degree itself: students in the program come from a diverse range of backgrounds and professions. For instance, in addition to law firm staff and court personnel, the MLS program has drawn applicants from human resources, government contracting, the military, marketing and media, education, and even stay-at-home parents to name just a few. Further, the degree regularly draws applicants from a wide age range – from those who have just finished their undergraduate degrees to individuals who have been in their careers for decades – with the average age of the in-person cohort being forty-one years old. This creates classrooms with a wide variety of perspectives and viewpoints, providing a rich

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learning environment for both students and professors.

MLS graduates are a great benefit to their organizations as they can spot legal issues and pitfalls early and know when to call in a lawyer for additional legal help. Moreover, an MLS graduate will be able to better inform the attorney of legally relevant facts and will better understand why an attorney might handle the case in a particular way.

Finally, the advent of the MLS degree is an important piece in solving the access to justice problem here in Utah. The fact that many who need legal services do not have affordable access to them has been front and center in the creation of the LPP program and the regulatory sandbox. The MLS degree is also an important part of the solution to this problem as the ability to receive a legal education is crucial in providing access to legal services. In addition to being one path for people wishing to become LPPs, the MLS program can also provide legal education to those who may not otherwise have the opportunity to attend law school. Further, with the advent of a fully online format, the MLS degree can now reach those who geographically would not otherwise be able to receive a legal education.

Utah is indeed a place of innovation. Legal services and legal education are evolving and continue to evolve. With current discussions regarding expansions to both the LPP program and the regulatory sandbox and plans to include certificates and other credentialing in specialized legal topics at the S.J. Quinney College of Law, we will continue to see access to legal services and education expand in new and surprising ways. Stay tuned!

Ensuring Compliance with Utah's New Consumer Privacy Act

by Danica P. Baird

Utah has joined California, Virginia, and Colorado as the latest state to enact its own comprehensive data privacy legislation. Utah's law is similar to that of other jurisdictions but most closely resembles Virginia's law. However, Utah's new requirements are not quite as burdensome.

Background

This session, the Utah Legislature unanimously passed the Utah Consumer Privacy Act into law. Utah Consumer Privacy Act (UCPA), S.B. 227, 2022 Leg. Sess. (Utah 2022). The law will become effective on December 31, 2023, and failure to comply with the new law could result in penalties of up to $7,500 in statutory damages per violation plus additional fees for actual damages to the consumer. Utah Code Ann. §§ 13-61-401(1), 13-61-402(3).

Applicability of the UCPA

The law will apply to companies that (1) conduct business in Utah or target Utah consumers, (2) have an annual revenue of at least $25,000,000, and (3) either (a) process or control the personal information of at least 100,000 Utah consumers or (b) control or process the data of 25,000 or more consumers and also derive 50% or more of their annual revenue from selling personal data. *Id.* § 13-61-102(1).

However, certain types of businesses are exempted from compliance, such as governmental entities or third parties acting on behalf of the government, tribes, institutions of higher education, nonprofit corporations, covered health entities or business associates under the Health Insurance Portability and Accountability Act (HIPAA), or air carriers. The law also exempts the processing of certain information from coverage, such as information governed by HIPAA and other related health acts or the Gramm-Leach-Bliley Act. *Id.* § 13-61-102(2).

Utah's law also employs a narrower definition of consumers, which is defined as residents of Utah acting in an individual or household context. *Id.* § 13-61-101(10)(a). The law expressly excludes individuals who are acting in an employment or a commercial context. *Id.* § 13-61-101(10)(b).

Consumer Rights and Company Obligations

The new law grants consumers several rights:

1. The right to confirm whether a company is processing their personal data;
2. The right to access their personal data;
3. The right to delete their personal data;
4. The right to obtain a copy of their personal data in a format that is portable, readily usable, and easily transferable; and
5. The right to opt out of targeted advertising or sale of personal data.

Id. § 13-61-201. A consumer may exercise a right by submitting a request to the company. *Id.* § 13-61-202. Generally, companies must respond to consumer requests (or a request from a minor or protected person's parent, guardian, or conservator) within forty-five days. *Id.* § 13-61-203. When responding to customers, companies must let the customer know what actions the company took to comply with their request. *Id.*

A company may ask for a one-time forty-five-day extension if it can demonstrate that the extension is "reasonably necessary" due to the complexity of gathering the information. Utah Code Ann. § 13-61-203. The company must inform the consumer of

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the need for an extension, the length of the desired extension, and the reason for the extension. *Id*. A company may also receive an extension if it believes a request is fraudulent and is unable to authenticate the request before the forty-five-day window expires. *Id*.

In certain situations, Utah's law allows companies to charge a fee when processing these requests and is broader than both Virginia's and Colorado's. Virginia's law allows companies to charge a fee when responding to a consumer data request if the requests are "manifestly unfounded, excessive, or repetitive," and Colorado's law allows for companies to charge a fee only if a second request is made in a twelve-month period. *See* Va. Code Ann. § 59.1-573(B)(3); *see also* C.R.S § 6-1-1301. However, Utah allows companies to charge a fee in both of these cases. It also allows the company to charge a fee if it "reasonably believes the primary purpose in submitting the request was something other than exercising a right" or is harassing, disruptive, or poses an undue burden on the controller. Utah Code Ann. § 13-61-203.

Notably, unlike California, Utah's law also does not require businesses to conduct and document data protection assessments concerning their data-processing policies and procedures. Nor does it require businesses to set up a method whereby consumers may appeal a business decision regarding consumer rights.

Additionally, Utah's law grants consumers additional rights related to the processing of sensitive data. Except for in few limited situations, sensitive data is defined as information about an individual's race or ethnic origin, religious beliefs, sexual orientation, citizenship or immigration status, specific geolocation data, genetic data, biometric data, or a person's medical history, mental or physical health condition, or medical treatment. *Id*. § 13-61-101(32). If a company plans to collect sensitive information, it must present consumers with a clear notice and opportunity to opt out of the processing. *Id*. § 13-61-302(3).

Moreover, the law prohibits companies from discriminating against any consumer who exercises any rights by denying service, charging different prices, or providing different levels or quality of service. *Id*. § 13-61-302(4). However, the law does not prohibit companies from offering programs such as loyalty rewards or club card programs. *Id*.

The law also requires contractual agreements for companies that either utilize a third-party processor or that act as a processor for another company. *Id*. § 13-61-301(2). This agreement must bind the processor to confidentiality and to the same obligations as the controller (the company that controls how data is used). *Id*. The agreement must also explain the processor's obligations for processing consumer data, the purpose of processing, and the responsibilities of both parties. *Id*. The law requires processors to adhere to the controller's instructions and to have "appropriate technical and organization measures" in place "so far as reasonably practicable." *Id*.

Additionally, the controller must "establish, implement, and maintain reasonable administrative, technical, and physical data security practices" to reasonably protect the confidentiality of consumer information and to "reduce reasonably foreseeable risks of harms" to consumers. Utah Code Ann. § 13-61-302(2).

Privacy Notice

Similarly to Virginia and Colorado, Utah requires companies to post certain privacy policies on their website. This notice must explain the following:

1. The categories of personal data processed;

2. The purposes for which the personal data is processed;

3. How consumers may exercise a right;

4. The categories of personal data shared with third parties (if any); and

5. The categories of third parties with whom the controller shares personal data (if any).

Id. § 13-61-302(1). This privacy notice must also "clearly and conspicuously" include a provision informing consumers of their right to opt out of the targeting advertisement or sale of personal data. *Id*. If it processes sensitive information, it must also provide the notice explained above.

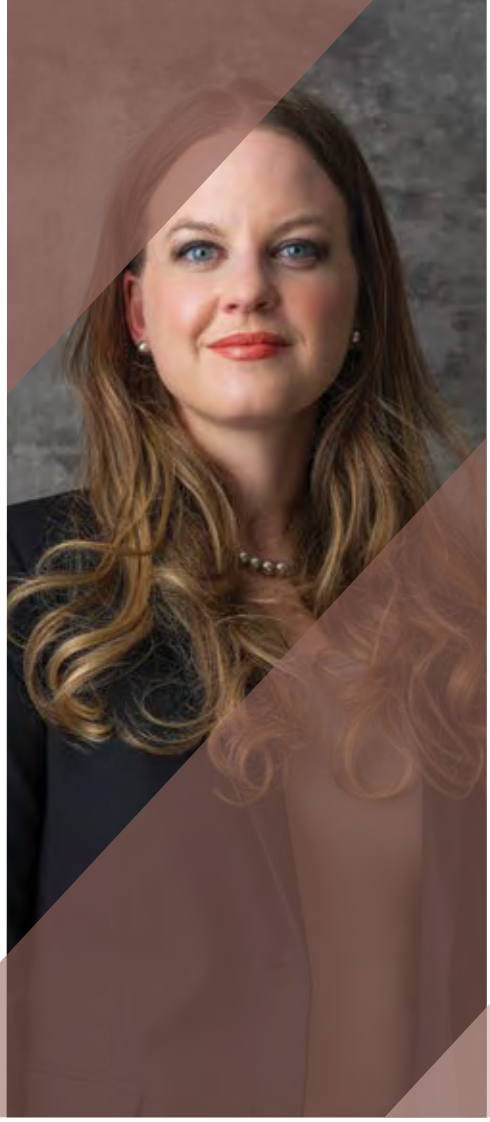
Enforcement

Notably, unlike California and similar to Virginia and Colorado, Utah does not include a private right to action. Instead, Utah's law limits enforcement to the state attorney general, who must give companies at least thirty days to cure before initiating an action and issuing fines. *Id*. § 13-61-402(3).

Conclusion

The Utah law creates significant regulatory changes affecting how companies collect and manage data while imposing several new obligations and potential liabilities. Consequently, it is important for attorneys to consult with their clients to make sure they are prepared for these upcoming changes and are compliant with the new law well before December 2023.

Emily Adams



Cherise Bacalski

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The Appellate Group

Appellate Highlights

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

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

UTAH SUPREME COURT

Zilleruelo v. Commodity Transporters, Inc.
2022 UT 1 (Jan. 20, 2022)

The district court granted summary judgment to the defendant on statute of limitations grounds, concluding that the limitations period was not tolled during the time the plaintiff was mentally incompetent because the plaintiff had signed a power of attorney appointing an agent who could have filed suit on his behalf. On appeal, **the court interpreted the tolling statute, Utah Code section 78B-2-108(2), and held that the existence of a legal guardian or preexisting power of attorney has no impact on whether the statute is tolled during the period of incompetency.**

Diderickson v. State
2022 UT 2 (Jan. 27, 2022)

On certiorari, the criminal defendants argued the court of appeals erred in affirming the district court's denial of their motion for satisfaction of judgment and in affirming the district court's refusal to reduce a restitution order by the amount of a pre-conviction settlement agreement the defendants had reached with the victim. The supreme court **rejected the defendants' argument that private parties should be allowed to enter into settlement agreements that bind courts in criminal cases when setting restitution.**

Ahhmigo, LLC v. Synergy Company of Utah
2022 UT 4 (Feb. 3, 2022)

In this appeal from confirmation of an arbitration award, the supreme court held that a party's brief mention in the lower court of the argument that the arbitrator manifestly disregarded the law by ignoring a stipulation between the parties failed to preserve the issue. **The court also summarized its prior treatment of manifest disregard in a discussion that appears to contemplate revisiting the scope of the doctrine in a future case.**

State v. Sorbonne
2022 UT 5 (Feb. 3, 2022)

Under Utah Code section 76-2-402(2)(a), an individual is "justified" in "threatening or using force" if he "reasonably believes" the force is necessary for self-defense. Interpreting this statutory provision, the Utah Supreme Court concluded that **the statutory requirement of reasonable belief "encompasses both a subjective and an objective component – the defendant must believe the force is necessary and the belief must be reasonable under the relevant circumstances."** The "relevant circumstances" may include, among other things, an alleged victim's "prior violent acts or violent propensities" and "any patterns of abuse or violence in the parties' relationship."

Hills v. Nelson
2022 UT 6 (Feb. 10, 2022)

The court reversed the district court's order of judicial dissolution of a limited liability company and remanded for further proceedings. The court held that **the LLC had an absolute right under Utah Code section 47-2c-1214 to elect to purchase the interest of the member who petitioned for dissolution, in lieu of dissolution, and that the district court erred by rejecting this election for equitable reasons.** The court further held that it was error for the district court to order judicial dissolution without providing notice and an opportunity to be heard to the defendant member, because that was a violation of the defendant's due process rights.

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

State v. Sisneros
2022 UT 7 (Feb. 10, 2022)

On certiorari, the Utah Supreme Court **affirmed the court of appeals' holding that the prosecution of the defendant in Weber County for aggravated robbery after he had already been convicted of theft by receiving in Utah County for the theft and robbery of a used car was barred by Utah's Single Criminal Episode Statute.** In doing so, the court addressed the reach of that statute. The court held the crimes were "incident to an attempt or an accomplishment of a single criminal objective"~~ a~~ required element of the first statutory criteria that the two charges arose under a single criminal episode. The court declined to address the State's argument regarding the proper definition of a "victim," holding that regardless the definition, the charges still arose under a single criminal episode. "While multiple victims can sometimes indicate distinct criminal objectives, this is not always the case."

Cunningham v. Weber County
2022 UT 8 (Feb. 17, 2022)

After sustaining injuries in a SWAT training exercise, a firefighter and his spouse sued the governmental entity that conducted the training. The district court granted summary judgment in favor of the defendant. Reversing, the supreme court held a preinjury release employing broad language was not enforceable because it was not clear and unmistakable. Additionally, the court held that **the Governmental Immunity Act waived immunity for gross negligence and waived immunity for a loss of consortium claim based upon injuries allegedly caused by negligence.**

State v. Soto
2022 UT 9 (Feb. 17, 2022)

On certiorari, the Utah Supreme Court affirmed the court of appeals' holding that **court personnel contact with jurors during the defendant's criminal trial at issue triggers a rebuttable presumption of prejudice against the defendant.** A uniformed highway patrolman assigned to protect the supreme court and a court IT technician told members of jury while in an elevator, "in so many words, to find the defendant … guilty, and, according to at least one juror, to 'hang him.'" The court also clarified that for the State to rebut this presumption, it must prove that the contact was harmless beyond a reasonable doubt.

State v. Smith
2022 UT 13 (Mar. 1, 2022)

On certiorari, the Utah Supreme Court held that **the community caretaker doctrine did not justify the seizure of a man found sleeping in his car in a McDonalds parking lot.** Following an in-depth discussion of the doctrine, the court held that the State had failed to rebut the presumption of unreasonableness that applied once the defendant challenged his warrantless seizure as unreasonable under the Fourth Amendment.

State v. Johnson
2022 UT 14 (Mar. 1, 2022)

The defendant appealed his conviction for aggravated robbery, arguing the 911 call recording admitted at trial was inadmissible hearsay. **The court, for the first time, directly addressed the scope of the "present sense impression" exception to the rule against hearsay, found in Rule 803(1).** The court articulated the proper standard for evaluating whether the statement was made with sufficient immediacy once the declarant perceived the events and the degree of spontaneity with which the statement was made. Under this standard, the district court did not abuse its discretion in admitting the call, though the court noted the case presents a "close call." Justice Himonas wrote a dissenting opinion, in which Justice Lee joined.

UTAH COURT OF APPEALS

Raser Technologies Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.
2022 UT App 20 (Feb. 17, 2022)

A Utah-based business sued Merrill Lynch in Georgia. The plaintiff amended its complaint to include two Utah-based claims, but then voluntarily dismissed them and re-filed that same day in Utah. The Georgia court later entered final judgment against the plaintiff. In Utah, the district court concluded that the doctrine of res judicata applied and dismissed the claims. Affirming, **the court of appeals rejected the plaintiff's argument that Georgia court did not adjudicate the Utah-based claims on the merits due to plaintiff's voluntary dismissal** and held that res judicata barred re-litigation of the claims, in part because those claims could and should have been brought before the Georgia court, which had entered final judgment.

Kelly v. Timber Lakes Property Owners Association
2022 UT App 23 (Feb. 17, 2022)

The Utah Court of Appeals addressed the "important, oft-avoided question" of whether plain error review applies in civil matters. Citing the interests underlying the preservation rule and the history of plain error review in Utah, the court concluded that **"plain error review is not available in ordinary civil cases unless expressly authorized by rule."**

10TH CIRCUIT

United States v. Cozad
21 F.4th 1259 (10th Cir. Jan. 3, 2022)

Dissatisfied with the government's plea offer, Cozad entered an open plea, arguing for a lighter sentence before the district court. The court held this decision against Cozad, ruling that her open plea warranted a sentence in the middle, rather than the low end of the sentencing guideline range. **As a matter of apparent first impression among all federal circuit courts, the Tenth Circuit held that the district court's decision to sentence Cozad more harshly because she pled guilty without the benefit of a plea bargain was both procedurally unreasonable and an abuse of discretion.**

Takwi v. Garland
22 F.4th 1180 (10th Cir. Jan. 10, 2022)

In this immigration appeal, Takwi was contesting removal back to Cameroon. The Bureau of Immigration Appeals (BIA) dismissed his appeal. The Tenth Circuit reversed. "Applicants for asylum enjoy a presumption of credibility on appeal to the BIA unless the [Immigration Judge] explicitly makes an adverse credibility determination." The court held that **"[b]y definition, a finding cannot be explicit if it is ambiguous." Rather, "[f]or an IJ's credibility finding to be explicit, the IJ must state in no uncertain terms that [the IJ] finds that the applicant's testimony is or is not credible."**

In re Barrera
22 F.4th 1217 (10th Cir. Jan. 19, 2022)

After selling their home, the debtors converted their Chapter 13 bankruptcy to a liquidation under Chapter 7. The Chapter 7 trustee sought proceeds from the sale of the home. Applying 11 U.S.C. § 348(f)(1)(A), the Tenth Circuit held that **post-petition proceeds from the sale of a home did not belong to the Chapter 7 bankruptcy estate in the converted case, because the proceeds did not exist on the date of the filing of the Chapter 13 petition.**

United States v. Toki
22 F.4th 1277 (10th Cir. Jan. 31, 2022)

On remand from the U.S. Supreme Court after that court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), the Tenth Circuit held that **assault with a dangerous weapon under Arizona and Utah law cannot constitute a "violent felony" for purposes of 18 U.S.C. § 924(c), which criminalizes use or carrying of a firearm during a crime of violence.** Both Arizona and Utah's assault with a dangerous weapon statutes criminalize reckless conduct. After Borden, a predicate crime that can be committed with reckless intent cannot support a secondary charge under Section 924(c).

United States v. Anthony
25 F.4th 792 (10th Cir. Feb. 8, 2022)

In this appeal from the dismissal of the defendant's § 2255 habeas petition, the Tenth Circuit answered the question of when a judgment of conviction becomes final in a deferred restitution case for purposes of the § 2255 limitations period. **The judgment of conviction is not final until the sentence ~~which~~ includes restitution ~~becomes~~ final upon the conclusion of direct review.** Because the defendant's restitution appeal was still pending, his judgment of conviction was not final.

United States v. Casados
26 F.4th 845 (10th Cir. Feb. 18, 2022)

As a matter of first impression, the Tenth Circuit **sided with the Sixth and Eighth Circuits to hold that the Mandatory Victims Restitution Act does not permit the victim's representative to substitute his or her own expenses for those of the victim.** Accordingly, the court reversed the district court's restitution order requiring the defendant to pay for $7,000 in travel costs of the victim's children

FTC v. Zurixx, LLC
26 F.4th 1172 (10th Cir. Mar. 1, 2022)

This case involved a real estate fraud scheme. The parties stipulated to a preliminary injunction and had a receiver appointed. The receiver sought relief from the district court judge when a landlord in Puerto Rico (Efron) would not let the receiver into space leased by the defendants. Efron was held in contempt. The question was whether the contempt order was final for appellate purposes. In a case of first impression, the Tenth Circuit held that **"[n]onparties like Efron need not await entry of final judgment to appeal a civil contempt order." Such nonparties "must establish the finality of a contempt order by showing that the district court (1) "made a finding of contempt" and (2) "imposed specific, unavoidable sanctions."**

Strong & Hanni Law Firm Welcomes Nine New Attorneys

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Jennifer L. Falk
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Ellen H. Welch
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Michael F. Wunderli
Associate

Colleen E. Mooney *Shareholder (no photo available)*

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Assessing the Statute of Limitations in a Nonjudicial Foreclosure Context

by Spencer Macdonald

In April 2018, the Utah Court of Appeals issued a decision in *Deleeuw v. Nationstar Mortgage LLC*, 2018 UT App 59, 424 P.3d 1075. More recently, in October 2021, the same court issued a decision in *Daniels v. Deutsche Bank National Trust*, 2021 UT App 105, 500 P.3d 891. Both cases addressed the application of the statute of limitations in the context of nonjudicially foreclosing on a trust deed. However, the two cases reflect fairly divergent approaches to limitations analysis, namely, whether the event commencing the limitations period is the date of the last payment *made* (as found in *Daniels*) or the last payment *owed* (as found in *Deleeuw*). As these respective triggering events could, in practice, be many years apart, the divergent approaches in *Deleeuw* and *Daniels* may create some uncertainty as to how litigants should approach the limitations issue in a foreclosure setting.

Nonjudicial foreclosures in Utah are governed by Title 57 Chapter 1, of the Utah Code. Interestingly, however, this chapter does not specify a statute of limitations. Instead, Utah Code Section 57-1-34 (Sale of trust property by trustee – Foreclosure of trust deed – Limitation of actions) provides that:

> [a] person shall, within the period prescribed by law for the commencement of an action on an obligation secured by a trust deed:
>
> (1) commence an action to foreclose the trust deed; or
>
> (2) file for record a notice of default under Section 57-1-24.

The above-referenced "period prescribed by law" is not stated in the statute, but was later identified in 2018 in *Deleeuw*:

> The parties disagree on which "period prescribed by law" applies in this situation. Deleeuw asserts that the statute of limitations applicable here is Utah Code section 78B-2-309, the six-year statute of limitations for an action on an instrument in writing, and that the limitations period began to run on September 1, 2008 – the date that he first failed to make a monthly mortgage payment. *See id*. § 78B-2-309 (2012). Nationstar, however, asserts that the applicable statute of limitations is found in Utah Code section 70A-3-118(1), the six-year statute of limitations for negotiable instruments under the UCC, which began to run on February 5, 2016, the date Nationstar accelerated the payments under the Note. *See id*. § 70A-3-104(1) (2009) (negotiable instrument); *id*. § 70A-3-118(1) (statute of limitations).

2018 UT App 59, ¶ 11. Thus, the limitations period turns on the application of one of the two foregoing statutes: Utah Code Ann. § 78B-2-309 ("Within six years – Mesne profits of real property – Instrument in writing – Fire suppression") or Utah Code Ann. § 70A-3-118(1) ("Statute of limitations") (the UCC statute). Again from *Deleeuw*:

> The statute of limitations for an action on an instrument in writing generally begins to run *at the time of the breach* – that is, the date of the first missed payment. *See Goldenwest Fed. Credit Union v. Kenworthy*, 2017 UT App 191, ¶¶ 3, 7 n.4, 406

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> P.3d 253 (running the statute of limitations from the time of breach, which is the time of the first missed payment or the maturity date). In contrast, the UCC statute of limitations states that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, *within six years after the accelerated due date.*" Utah Code Ann. § 70A-3-118(1) (emphasis added). Thus, while both statutes prescribe six-year limitation periods, they contain potentially different triggering dates for the commencement of the six-year periods.

Deleeuw, 2018 UT App 59, ¶ 12. Here the court of appeals juxtaposed the application of Utah Code Section 78B-2-309 (the limitations period runs "at the time of … the first missed payment") against the UCC statute, Utah Code Section 70A-3-118(1) (the limitations period runs six years "after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date"). Of these, the court in *Deleeuw* applied the latter:

> When two statutory provisions conflict, the more specific provision governs. *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980). Our supreme court has stated that "where the Uniform Commercial Code sets forth a limitation period for a specific type of action, this limitation controls over an older, more general statute of limitations." *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984). As such, the more specific UCC statute of limitations applies to the Note and the Deed of Trust at issue here.
>
> . . . .
>
> The obligation secured by the Deed of Trust in this case is the Note from November 2003 in which Deleeuw promised to pay $224,000. The [UCC] statute of limitations began to run in February 2016 when that Note was accelerated. Because the six-year statute of limitations has not yet expired, Nationstar is permitted to foreclose.

Deleeuw v. Nationstar Mortgage, LLC, 2018 UT App 59, 424 P.3d 1075, ¶¶ 13, 18. Prior to *Deleeuw*, the UCC statute of limitations had been utilized by federal courts addressing this point. *See, e.g., Lewis v. Caliber Home Loans, Inc.*, No. 2:16-cv-01252, 2018 WL 485967, at *1 (D. Utah Jan. 18, 2018), *appeal docketed*, No. 18-4020 (10th Cir. Feb. 16, 2018) (cited in *Deleeuw*, 2018 UT App 59, ¶ 14). The Utah Court of Appeals has also applied this statute in several cases since *Deleeuw*. *See Johnson v. Nationstar Mortgage LLC*, 2020

UT App 127, ¶ 19, 475 P.3d 140; *Fitzgerald v. Spearhead Investments, LLC*, 2021 UT 34, ¶ 5, 493 P.3d 644; *Bradsen v. Shellpoint Mortgage*, 2022 UT App 10, ¶ 27, — P.3d —.

However, in 2021 the court of appeals in *Daniels* took a substantially different approach. Rather than applying the UCC statute per *Deleeuw*, the trial court in *Daniels* applied Utah Code Section 78B-2-113(1) ("Effect of payment, acknowledgment, or promise to pay"), which states:

> (1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:
>
> (a) the debt arose;
>
> (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or
>
> (c) a payment is made on the debt by the debtor.[1]

The trial court applied this statute "read in conjunction with section 78B-2-309," *Deutsche Bank National Trust*, 2021 UT App 105, 500 P.3d 891, ¶ 18 (again, as opposed to applying the UCC statute cited in *Deleeuw*). Then,

> [a]fter considering the parties' arguments, the [trial] court concluded that the applicable limitations period began to run "from the latest event described" in section 78B-2-113(1), namely, the date on which (1) the Debt arose, (2)

Homeowners made written acknowledgment of or promise to pay the Debt, or (3) Homeowners made a payment on the Debt. The court rejected Bank's argument that Homeowners' communications with Ocwen regarding loan modification constituted written acknowledgment that would renew the limitations period of the Debt.

. . . .

Thus, the court determined "that the six-year statute of limitations … began to run on the date of [Homeowners'] final payment towards the [D]ebt, which was February 25, 2010." The court therefore concluded that "pursuant to Utah Code Ann. § 57-1-34, the statute of limitations [expired] on February 25, 2016," and with its passing, Bank's "right to enforce the Trust Deed through a trustee's sale or judicial foreclosure action" had also expired.

Id. ¶¶ 20–21. This departure from *Deleeuw* creates some potential ambiguity for litigants because

(A) in *Daniels* the Utah Court of Appeals expressly acknowledged the holding in *Deleeuw* pertaining to the application of the UCC statute, Utah Code Ann. § 70A-3-118(1), to foreclosures on a trust deed, *id*. ¶ 28, and yet

(B) the court in *Daniels* nevertheless did not apply the UCC

statute to ascertain the commencement of the limitations period, and

(C) the court in *Daniels* instead used an alternative approach based on stitching together Utah Code Section 78B-2-113(1) ("Effect of payment, acknowledgment, or promise to pay"), which the court of appeals has elsewhere characterized as a "tolling statute," not a limitations statute, *see Dale K. Barker Company PC CPA Profit Sharing Plan v. Turner*, 2021 UT App 119, ¶ 19, 500 P.3d 940, with Utah Code Section 78B-2-309 (which, per *Deleeuw*, does not apply in a foreclosure context).

In other words, in *Deleeuw* the court of appeals held that date of the last payment *owed* (or else the date of acceleration) commences the limitations period, whereas in *Daniels* the court of appeals apparently held that the date of the last payment *made* (or perhaps the first payment *missed*) commences the limitations period:

> We agree with the district court that the Trust Deed was no longer enforceable as security on the Debt after the limitations period had run. After Homeowners' personal liability for the Debt was discharged in bankruptcy, Bank no longer had the right to collect from Homeowners; rather, what remained after discharge was Bank's right to foreclose against the Property. But based on the applicable statute at the time, the trustee's sale had to have been completed by the time the limitations period for enforcing the underlying obligation expired, which was six years from the date of Homeowners' last payment. *See* Utah Code Ann. § 57-1-34 (LexisNexis 2010); *id.* § 78B-2-113(1)(c) (2018); *id.* § 70A-3-118 (2009).
>
> . . . .
>
> In contrast, the limitations period at issue here – which was triggered in February 2010 when Homeowners made their final payment – ran in February 2016 and extinguished Bank's ability to foreclose.

Daniels, 2021 UT App 105, ¶¶ 47, 50. In the end, however, even if the court of appeals in *Daniels* had accepted the defendant bank's arguments as to the commencement of the limitations period, the outcome may still have been unfavorable to the bank because the court of appeals also held that the plaintiff borrowers had never acknowledged the debt, *id.* ¶¶ 20, 30–36, which had been an essential component of the defendant bank's legal argument.

Daniels was not the first divergence from *Deleeuw*. In December 2018, the Utah Court of Appeals in *Jeppesen v. Bank of Utah*, 2018 UT App 234, 438 P.3d 81, applied Utah Code Section 78B-2-309 rather than the UCC statute. However, in that case the court specifically noted, citing *Deleeuw*, that "[n]either side has argued that the six-year statute of limitations for negotiable instruments under the Uniform Commercial Code applies, which has potentially different triggering dates." *Jeppesen*, 2018 UT App 234, ¶ 19 n.4.

In the end, the divergences from *Deleeuw* reflected in *Daniels* and *Jeppesen* may be attributable to both factually and legally distinguishable elements in those cases. Nevertheless, prior to *Daniels* both state and federal courts were apparently fairly uniform in applying the UCC statute, Utah Code Ann. § 70A-3-118(1), rather than the one applied in *Daniels*, *id.* § 78B-2-309. Now, with *Daniels* in view, and unless and until the Utah Court of Appeals or the Utah Supreme Court addresses this apparent divergence, litigants will need to be circumspect in their expectations regarding how trial courts approach limitations analysis in a foreclosure context.

1. This current version of the statute became effective May 10, 2016. Previous to that the statute provided: "The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed."

Finding Theodore and Ariminta:
Love, Loss and Settling the American West

by Byron Burmester*

Reviewed by Luisa Gough

"History is who we are and why we are the way we are." – David McCullough. Historian Addresses Wesleyan, New York Times (June 4, 1984), https://www.nytimes.com/1984/06/04/nyregion/historian-addresses-wesleyan.html.

It wasn't until adulthood that Byron Burmester first heard the tale of his great-great-grandmother's rape and murder. Intrigued, Burmester searched for more details. So began his nearly twenty-year journey combing through libraries, historical-society documents, family letters, and numerous other sources until finally completing this memoir *Finding Theodore and Ariminta: Love, Loss and Settling the American West*. While at its core the book is a deeply personal tale of family and finding one's self, the themes that emerge are accessible and relevant to all, a reminder that history serves as "a guide to navigation in perilous times." *Id*.

Finding Theodore and Ariminta: Love, Loss and Settling the American West
by Byron Burmester
Publisher: Heritage Books (2020)
Pages: 280
Available in paperback

As with most tales of the American West, this story begins in Europe with immigrants travelling across land and water to reach America and create a better life. Both children of German immigrants, Theodore and Ariminta took different paths to reach the American West. Ariminta travelled via the common route – a wagon train on the Oregon trail – although the experiences of these pioneers were never common. Along the way, Ariminta's family barely survived a deadly buffalo stampede and an attempted kidnapping of her mother and brother by Native Americans. Theodore, however, took a less-familiar path: travelling via the isthmus of Panama. This fifty-mile trek through the hot, humid jungle was not for the faint of heart but took only around eight weeks, a much faster option than the Oregon trail. Theodore made the trip as a teenage boy, without the aid of family. After reconnecting with his family in San Francisco, they made their way up to Oregon.

Once in Oregon, a recurring theme emerges in the lives of Theodore and Ariminta, that "chance and planned encounters with other people" alter the course of our lives. As an intelligent and strong-willed young woman, Ariminta was renowned in the Oregon territory and took up correspondence with many suitors, sight unseen. One such young man was Theodore Burmester, who heard about Ariminta through a friend. The two began regular correspondence and eventually Theodore became so smitten that he impetuously rode down (without invitation) to ask Ariminta's father for a job and meet the woman who had so

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* The author Byron Burmester, who goes by Fred, is a Deputy District Attorney for Salt Lake County.

enamored him in writing. Unsurprisingly, Ariminta's father was not too taken by this forward young man, described by family members as "a little saucy and impertinent." Despite her father's protestations, the young lovers fled the house to spend the day alone, getting to know one another in person. In an attempt to thwart their relationship, Ariminta's father took his family to San Francisco for a month. But there was no stopping the inevitable. On the evening of her eighteenth birthday, Ariminta quietly packed up and snuck out of the house, leaving a farewell note explaining she had left to marry Theodore. The couple quickly exchanged vows at a schoolmate's house and then caught a stagecoach to Salem, Oregon.

To our modern sensibilities, this course of events may appear rash and reckless. But upon reflection, we may find that many of our own best life decisions come through these chance encounters with previously unknown people. My decision to go to law school – late in life with four young children – was the result of conversations and experiences with individuals within the community who were completely unknown to me. This was a life-altering decision for me and my family, one that brought challenges but also great rewards. As the book highlights, "we may cross paths with a stranger and our lives are changed forever." Seeing how these seemingly foolhardy decisions play out in the course of the lives of Ariminta and Theodore provides perspective to our own similar life experiences.

From the start, Theodore and Ariminta shared love and loss, a forerunner for the remainder of their lives and the book. Their first two children did not survive beyond birth. Seeking a better life, they relocated to the Idaho Territory and Theodore embarked on a new career: practicing law. Theodore and his new legal partner joined the fledgling Boise legal community, consisting of approximately a dozen active attorneys. They were known "for charging large fees and for seldom, if ever, losing or lowering fees." (Some things never change!) And Theodore was "the push" of the operation. Theodore's new profession provided financial stability for their family – they built a ranch house and employed two ranch hands to run the operation – as well as new social circles – they often entertained other attorneys and their spouses.

Unfortunately, tragedy was not far off. With only a few judges and attorneys in the Idaho Territory, Theodore's work required him to travel frequently and leave Ariminta alone on the ranch with their two young boys. On one such occasion, a ranch hand took advantage of Theodore's absence and attempted to rape Ariminta. She fought him off, and he took to beating her. After she managed to lock herself in the bedroom, the attacker emptied his revolver on Ariminta by shooting through the door and the window, eventually hitting her in the hip. To ensure her destruction, the assailant set the house on fire. Then, he shot himself twice. Ariminta escaped the deadly fire, but the ranch hand did not. His charred corpse was left in place for two days in an attempt "to inflict more suffering and humiliation on this fiend." After hearing word of the events, Theodore later recalled that he rode "17 miles in an hour and ¼ to find my wife murdered and my house in ashes – riding with the speed of race horses to the carnival of death – Oh that night's ride I can never forget." Prior to her passing, the couple shared a few last words, both poignant and humorous. Theodore told Ariminta, "Those who go are happier than those they leave behind." To which Ariminta replied, "Ha Ha I know you will be more miserable than I am no matter where I go – or whether I go at all." Ariminta clung to life for ninety-six hours before

succumbing to her injuries. For those readers who enjoy detailed medical descriptions, the book does not disappoint.

Ariminta's passing was a great loss to many. Businesses closed for the funeral and the Idaho Supreme Court "specially adjourned so that all could attend and express the great sorrow of their community and their sympathy for the bereaved husband and children." (Cleaned up). The local paper ran an editorial in her honor, comparing Ariminta to Lucretia, the Roman noblewoman who took her life after she was raped to protect her family's dignity. But none felt the loss so acutely as Theodore. He told family that if it wasn't for his two boys, he would certainly have killed himself. In reviewing the book, I cannot accurately describe the great feeling of loss experienced in reading Theodore's words. But it is easy to empathize, as suffering and loss are universal.

Following Ariminta's death, Theodore's life spun out of control. He sent his boys to live with his mother-in-law and, rather than rebuild the ranch, he lived as a vagabond, staying in boarding houses, hotels, and even occasionally sleeping in his office (a habit unfortunately shared by many attorneys to this day). During this time of upheaval, Theodore had a falling out with a friend after he was retained to represent the friend's estranged wife in their divorce. Things became so tense between them that Theodore borrowed a weapon as "security." As chance would have it, Theodore and the former friend happened upon each other the following day. After exchanging tense words, the two men drew their revolvers. A shootout followed: Theodore remained standing, his opponent did not. Within a matter of months, Theodore had lost his wife, his residence, and was now on trial for murder. The trial was a public spectacle. Twelve of the thirteen attorneys in Boise participated in the trial. The book provides a detailed account of the trial pulled from local newspapers, and it offers a glimpse into early legal practice, which shares many similarities to modern-day litigation. Ultimately, Theodore was acquitted based on the fact that it was unclear who fired the first shot. But after the trial, Theodore was vilified and nearly died by hanging. He fled Idaho and returned to Oregon to collect his children and start his life anew.

In an effort to move on and rebuild, Theodore quickly remarried. And, seeking new refuge, Theodore followed his brother to Utah territory. The rebuilding effort, however, failed to bring Theodore a life free from challenges. One of his two sons from his marriage with Ariminta died suddenly, and his new marriage quickly fell to pieces. Even though his new marriage quickly dissolved and Theodore's ex-wife returned to Oregon, Theodore remained with his lone surviving son to rebuild in Utah.

Utah, as Theodore discovered, was "populated by small predominantly Latter-day Saint settlements." The "gentiles," as the nonbelievers were called, and the members of The Church of Jesus Christ of Latter-day Saints were often at odds. As a reader who hails from Oregon, the political history between the two groups was fascinating and a bit disconcerting, given that many of the same political challenges exist today. The book treads lightly, handling the subject with care, while also acknowledging the undeniable struggles the disparate groups faced trying to live in harmony. The issues come to a head in Theodore's life when – at the height of the conflict over polygamy – Theodore is asked to defend a descendant of Brigham Young from criminal conspiracy charges after he tried to set up a sting operation to catch local "gentile" leaders engaging in prostitution. Again involved in a high-profile case, although this time as an attorney, Theodore was the subject of many salacious news articles. In fact, the *Salt Lake Tribune* characterized his closing arguments as containing "a great deal of vulgarity and obscenity which is not fit for publication." The trial, recounted in great detail, was a loss for Theodore, and he devoted the remainder of his career to mostly collections actions, with only the occasional criminal case.

Burmester's book is a well-researched tale that provides a glimpse into both the private struggles of his ancestors and legal practice within the American West, including Utah. While it reads as more a collection of small vignettes, the stories are engaging and relatable. They provide a reminder of how history, known and unknown, can shape us.

The Introduction

by Stephen P. Dent

I have a friend named Parker. We met at a junior-high party in 2001 – a party where I remember feeling uneasy about unfamiliar faces. The first thing Parker ever said to me was, "Do you want some chocolate milk?" It was a simple introduction. It made me feel welcomed. It quenched my thirst for belonging. And it launched a friendship that is going strong twenty years later.

It matters how we make people feel the first time they meet us. And it's a matter of persuasion. Think about your own life experiences. On a first date, you want your companion to believe that you are worth a second date. In a job interview, you want to convince the employer to hire you. When you move into a new neighborhood, you want your neighbors to feel comfortable inviting you to Bunco night.

For the legal writer, the first impression is in a brief's introduction. An introduction is not a mere formality. It is the first opportunity to persuade. I propose two ideas to keep in mind when writing an introduction. First, be purposeful (always). Second, be memorable (sometimes).

Below, I explain both tips and provide exemplary excerpts from Utah lawyers. I take no position on the merits or outcomes of their arguments, only on the quality of their introductions. As a caveat, my view is that the tips discussed below are most effective and useful for lengthy briefs, especially dealing with complex facts and legal issues.

Be purposeful (always).

What's the point of a legal brief? It's to persuade the judge to rule in your client's favor. If the brief is all about persuasion, then the introduction should be all about persuasion. Too many times we lose ourselves in formality. We bog down the reader with legalese. Consider the following common opening:

> COMES NOW, Plaintiff Reginald Cousins (hereinafter "Cousins" or "Plaintiff"), by and through his undersigned counsel of record Rhonda Pearlman and Ilene Nathan of Pearlman & Nathan LLC, hereby move this Court for summary judgment in the above-caption matter.

In my view, we should retire such boilerplate openings and instead use the first sentences to start the path of persuasion.

In *Point Made*, legal writing expert Ross Guberman explores what makes "a compelling introduction." Ross Guberman, Point Made 1 (2d ed. 2014). He writes that an introduction should establish a theme by "reducing a dispute and its resolution to their essence." *Id*. He proposes four techniques to achieve this objective.

Get down to brass tacks.

Guberman's first tip is that the introduction should get down to brass tacks, i.e., the context giving rise to the dispute. *Id*. Advocates should "answer the key questions you would have if you were reading about your case in the newspaper. *Who* are the parties? *When and where and how* did the dispute take place? *What* question is the case trying to answer? *Why* should you win?"

Here's an effective first line that tells us the parties and the nature of the dispute:

> This case concerns GenWater's claim that Med Water, Nathan Van Zweden, and David Rotzler misappropriated trade secrets related to GenWater's water filtration devices made for hospitals and labs.

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GenWater Tech. v. Van Zweden, No. 20200414-CA (Utah App. Nov. 30, 2020), 2020 WL 13016089 at *1 (Troy Booher, Dick Baldwin, Taylor Webb, Bruce Pritchett, and Jonathan Rudd signed this brief).

Next, consider this brass-tacks opening from Monica Call and Jordan Bledsoe, who represented Qualtrics in a business dispute:

> This case arises from a straightforward business transaction. The American Automobile Association ("AAA") asked suppliers to respond to a Request for Information (the "RFI") on a project. In response to the RFI, CX and Qualtrics submitted a joint bid, and Qualtrics also submitted a standalone bid. CX and Qualtrics also submitted a joint bid in response to AAA's subsequent request for proposal (the "RFP"). AAA determined Qualtrics' standalone bid best met its needs and selected it. While CX's disappointment at losing its bid for AAA's project is understandable, its response here is not: CX is asking this court to award it business that AAA declined. In doing so, CX seeks to subvert a transaction that AAA and Qualtrics had every right to pursue. CX has no right, in contract law or otherwise, to seek this relief and its claims should be dismissed.

Motion to Dismiss at 1, *CX Solutions, Inc. v. Am. Auto. Assoc.*, No. 190401710 (Utah 4th Dist. May 27, 2020), 2020 WL 8616500 at *1.

This paragraph answers key questions. From the outset, we know who the parties are, what the dispute is about, and how and when the dispute arose. Answering these questions upfront orients the reader. It also builds the defendant's theme that a spurned plaintiff is seeking to undermine a legitimate business deal.

Number your path to victory.

Guberman's next tip is to "number your path to victory." Guberman, *supra*, at 13. Give the judge a list of reasons why you should win. Guberman warns, however, to avoid making the list "circular and thus unpersuasive." *Id.* "If, say, you're moving for a preliminary injunction, writing 'The balance of equities favors the petitioners' won't cut it. *Why* do those equities favor the petitioner?" To explain *why* you should win, use the word *because* in your list.

After explaining the brass tacks, the Qualtrics brief quoted above numbered its path to victory. Here are the opening sentences to the last five paragraphs of the introduction:

- *First*, and most fundamentally, even if the Court accepts CX's dubious claims of an "Oral Agreement," CX alleges no breach of that purported Oral Agreement.
- *Second*, CX's breach of contract claim fails for the additional reason that the Oral Agreement is invalid under the statute of frauds.
- *Third*, CX's breach of contract claim should be dismissed because a written agreement, the Qualtrics Partner Network Agreement, controls the parties' relationship and supersedes any alleged Oral Agreement.
- *Fourth*, without a valid contract, CX's claim for breach of the implied covenant of good faith and fair dealing must be dismissed.
- *Finally*, the conspiracy claim against Qualtrics should be dismissed because CX has failed to allege an underlying tort.

Each paragraph contains a *because* statement explaining each reason to dismiss. The brass tacks and numbered path to victory provide the court with a convenient roadmap to the brief.

Explain why the court should care.

Next, Guberman suggests that the introduction should "give the court a reason to want to find for you." Guberman, *supra*, at 27 (capitalization adjusted). In other words, answer the judicial question, "Why should I care?" *Id*. This technique focuses on making your opponent's position seem unworkable or untenable. *Id*. It's about highlighting the slippery slope. Not every brief requires this technique. But it is worth using when you could "trigger at least one of these three judicial fears":

1. The fear of misconstruing a doctrine or statute.

2. The fear of creating new duties, rules, or defenses.

3. The fear of reaching an unfair result or causing harm.

Id. at *27.

In a movie copyright dispute, the defendant (represented by Jeff Hunt, David Reymann, and Cheylynn Hayman) moved for summary judgment. The motion's introduction argues that the plaintiff's position is untenable and misconstrues the Copyright Act and Tenth Circuit precedent. It then points out the slippery slope:

> The Court plays a critical gatekeeping role in this inquiry. Courts rarely allow copyright claims such as this one to reach a jury because, as courts have emphasized time and again, when it comes to evaluating two literary works, courts are more than capable of putting on their "ordinary observer" hats and making judgments on that issue as a matter of law. Allowing baseless claims of infringement to reach a jury would stifle the ability of writers, directors, and other artists to create works of art and distribute them to the public, in addition to being financially ruinous.

Defendants' Second Motion for Summary Judgment at 1, *Dutcher v. Bold Files LP*, No. 2:15-cv-110-DB-PMW (D. Utah Aug. 13, 2018), 2018 WL 3007138 at *1.

Why should the court care? Because (in the defendant's view) accepting the plaintiff's position will stifle creativity and create financial harm.

In a dispute over debit-card transaction fees, Utah attorney Tyler Green represented the plaintiff in North Dakota federal court. The defendant sought dismissal or, in the alternative, transfer from North Dakota to the District of Columbia. In response to the transfer request, Green and his colleagues wrote the following in their introduction:

> Unable to dismiss this case as untimely, the Board next asks the Court to transfer it to a circuit with more favorable precedent. If the Board can persuade the Court to ship this case to the D.C. Circuit, it won't have to explain why it ignored Congress's command and sided with multi-billion-dollar banks over small businesses. But this Court is just as capable as a court in Washington, D.C. of resolving this administrative-law case, and North Dakota residents have a right to challenge conduct that harms North Dakotans in a North Dakota court. Indeed, the logical endpoint of the Board's forum shopping is that all challenges to federal regulations must be filed in the District of Columbia. That is not the law. Otherwise, Congress would have

> made D.C. the exclusive venue for APA challenges rather than allowing those challenges in any "court of competent jurisdiction." 5 U.S.C. § 703.

Plaintiff's Opposition to Defendant's Motion to Dismiss or, in the Alternative, Transfer at 1, *Corner Post, Inc. v. Bd. of Gov. of Fed. Reserve Sys.*, No. 1:12-cv-05-DMT-CRH (D. Utah Mar. 11, 2022), 2021 WL 6880950 at *1.

This introduction offers multiple reasons why the court should care. It's forum shopping, it's unfair to North Dakotans, and it's a slippery slope. Note how Green draws attention to the slippery slope by explaining the "logical endpoint" of his opponent's argument.

You won't always have use for this technique. But where possible, it's worth adding compelling reasons for why the court should care. If you have a good argument that your opponent's position is untenable, you should say so in the introduction.

Draw a line in the sand.

As Guberman puts it, "Many legal disputes boil down to a clash between two competing views. By contrasting those two views in your introduction, you can preempt your opponent's attempts to make the case into something it's not." Guberman, *supra*, at 39. This technique is effective when arguing that your opponent's position is far afield. You can mark the line in the sand with something like, "this case is not about . . . ."

Ruth Bader Ginsburg used this technique in a 1977 amicus brief:

> The issue in this case is not whether the Constitution compels the University to adopt a special admission program for minorities, but only whether the Constitution permits the University to pursue that course.

Amicus Brief of the American Civil Liberties Union, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187972 at *6.

Brent Burnett used a similar technique in a 2014 appellate brief:

> This case is not about the meaning of the Public Trust Doctrine, its existence, or whether the Division violated it, instead this case is solely about procedure.

Response Brief of Defendants, *Friends of Great Salt Lake v. Utah*, 2017 UT 15 (No. 20131050), 2014 WL 12708708 at *4.

Burnett's introduction then "acknowledges the existence of the Public Trust Doctrine" and argues that his client should win because his opponents "failed to pursue the appropriate administrative remedies." *Id*. By drawing a line in the sand, the introduction orients the reader to Burnett's focus: procedure.

Be memorable (sometimes).

I'll start with a caveat. Most briefs do not need a memorable introduction. Most briefs need only a straightforward introduction applying some or all of Gubmerman's tips listed above. Don't overplay your hand. Don't be overly dramatic. Don't be hyperbolic. But sometimes, have some fun and consider adding a bit of flare to your introduction.

Consider memorable openings from your favorite books, movies, or plays. Here are some examples:

- "Mr. and Mrs. Dursley of number four, Privet Drive, were proud to say that they were perfectly normal, thank you very much." Wizards and muggles alike will recognize these words and anticipate a giant arriving on a flying motorcycle with baby Harry.

- "Hello. My name's Forrest. Forrest Gump. Do you want a chocolate?" That opening line calls to memory a bus stop, Jenny, Vietnam, a floating feather.

- "Look down, look down, don't look 'em in the eye." Les Misérables fans will see Javert standing above the toiling prisoners.

Those introductions make you want more. They glue your eyes to the page, the screen, or the stage. Similarly, a memorable introduction in a legal brief will urge the audience to keep reading. It will also make the reader remember your brief.

I still remember Tyler Green's opening paragraph of his amicus brief in *Lucia v. Securities and Exchange Commission*:

> In our constitutional drama, the States are not Fredo Corleone, sniveling in a boathouse to a later-born entity and demanding respect. *See The Godfather: Part II* (Paramount Pictures 1974). Rather, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Amicus Brief of Utah et al. at 1, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1156627 at *1.

That's a fun first paragraph. Two sentences. A Godfather reference. A case quote. Look at the word choices: "drama," "sniveling," "later-born entity." The syntax enlivens the page and nudges readers to continue. It also makes for a memorable passage.

Although not a brief, Magistrate Judge Bennett penned a memorable introduction to an order resolving a discovery dispute. Here are the first two paragraphs:

> The opening scene in the musical *Fiddler on the Roof* has a silhouetted figure playing a violin on a rooftop during which the protagonist, Tevye, directs a lengthy aside to the audience. In this aside, Tevye states that everyone in his small village

> of Anatevka is "a fiddler on the roof" because each person "is trying to scratch out a pleasant, simple tune without breaking his neck." After acknowledging the difficulty and danger of such a precarious situation, Tevye anticipates what the audience is thinking and asks, "And how do we keep our balance?" He then answers that question in one word: "Tradition!"
>
> In many ways, civil litigators live in Anatevka. With ominous warnings in the Federal Rules of Civil Procedure such as "any ground not stated in an objection is waived," civil discovery litigation is difficult and, like fiddling on a roof, can even feel dangerous. In this environment, civil litigators do their best to scratch out a living without breaking their necks. Given the precarious nature of civil discovery practice, many attorneys – like the Anatevkans – rely on "tradition" for stability.

Smash Tech., LLC v. Smash Sols., LLC, 335 F.R.D. 438, 440 (D. Utah 2020).

We are barraged with information every day. Life is full of TL; DR (too long; didn't read) moments. A memorable introduction earns attention. It makes the audience read on and remember. That's what happened when I came across *Smash Tech*. I read an entire order about a civil discovery dispute. I'm not even a civil litigator. And I still remember the order two years later. Why? The introduction drew me in.

Conclusion

You should always write introductions with a purpose. A purposeful introduction is the trailhead on the path to persuasion. Sometimes, it's also worth having a little fun and making your introduction memorable. Next time you write a brief, take advantage of the opportunity to make a compelling first impression. In the end, persuasion starts at the beginning.

Postscript

The Southern Correspondent is a section of the *Utah Bar Journal* dedicated to publishing articles from attorneys in the state's southern half. We have had some excellent articles so far. We welcome submissions from lawyers practicing in the following counties: Beaver, Emery, Garfield, Grand, Iron, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Washington, and Wayne Counties. The journal's publication guidelines are on page 6. Please contact me with questions at stephen.dent@usdoj.gov.

Lastly, this article includes illustrative examples of legal writing. The author takes no position on the merits of the arguments contained in those examples.

Lawyers Helping Lawyers – Recovery Through Service

by W. Matthew Hall

The movement of a large, blue-black uniformed individual way too close to my vehicle snapped me out of my cannabis-induced reverie as I packed yet another bowl into my glass pipe. With less than a second to spare before the Orem police officer knocked on my window, I hurriedly threw everything under the seat of my car.

Everything came into focus at once, fueled by a panic-induced rush of adrenaline, though my mind struggled with what to do with it all – that I was surrounded by four or five police cars, the hand of the officer knocking on my window, his asking me, "What did you throw under there?" It wasn't the first time my drug use led to my path crossing that of law enforcement, nor would it be my last.

I've been trying to escape my mind for as long as I can remember being alive. I'm not sure if it's my genetics or my upbringing – probably a combination of the two – but I remember thinking that the only way I would ever make it to Heaven is if I died before I turned eight years old, i.e. the "age of accountability." When I woke up, alive, the morning of my eighth birthday, I thought "Well, I guess that's it. I've got to do this life thing. I'm screwed."

That deep discomfort with who I was, that certainty I would never measure up to what felt like the impossibly high standards of my youth, led me to seek anything and everything that made me feel different, "not-me." I was the kid that none of the other kids wanted to play with because I was so obsessed with the Atari 2800 and Coleco-Vision. But when I found books … wow … those were the magic ticket. What parent or teacher could argue that I was spending "too much" time reading when schools were bribing kids with personal pan pizzas from Pizza Hut to read? But make no mistake – I was addicted to books as surely as I became addicted to controlled substances later in life.

They say that hate and love are aligned – that the true opposite of love is indifference – and that couldn't have been truer in my life. I took the first chances I got in junior high and high school to get close to mind-altering substances, by joining the fight against drugs, as a D.A.R.E. teen role model, then as the co-teen director of Operation Snowball, a thirteen-school anti-drug organization, and then as a member of the Mayor's Youth Council. These activities reflected and satisfied my obsession with drugs while living the life I was "supposed" to live as one of seven LDS kids in my Chicago-suburb high school.

And then, the summer after I graduated high school, a friend pulled out some weed late one night. "You've been against drugs your entire life," he said. "Don't you think you'd be a better advocate if you actually knew what you were advocating against?"

"That … makes a lot of sense," I replied. And that night – or maybe the next – I escaped my overactive brain more powerfully than I ever did through the most engrossing novel. Far from being the bad/dangerous stuff that I'd been warned against, marijuana made me feel relaxed, happy, intense, but most important, not-me.

When I had the chance to smoke with my dormmates at Ricks College a few months later, I took it. And, shortly thereafter, I accepted one of my friend's offer to purchase weed from him. Using a pipe cobbled together from parts purchased from a hardware shop, I began my great "scientific experiment" to see how drugs really affected me, smoking pot in my dorm room

W. MATTHEW HALL is the Co-Founder and CFO of JUMP by Limitless Flight, the world's first realistic wingsuit flight simulator. Before joining JUMP, Matthew worked as an in-house corporate attorney for a variety of software companies.

before various activities. I took a test in an electronics engineering technology class while high and got the top grade in the class. "Hmm, maybe this doesn't make people stupid and spacy after all?" I thought. But then I got high before a Folk and Clog Team dance practice, and I couldn't remember what I was learning. "Ok, so it interferes with my kinesthetic memory. Very interesting."

But when I was called into Dean Kevin Miyasaki's office in the spring of 1997, because I guess cracking the window in one's dorm room is NOT sufficient to dissipate the pungent odor of burning cannabis, he didn't seem to appreciate the scientific mission on which I was engaged. I was given a choice – voluntarily withdraw, or go before a council of my peers, after which I would most certainly be expelled.

I chose the withdrawal option and ended up at Utah State University. There, I tried more, harder drugs, got arrested, turned confidential informant to work off my charges – a terrible, cowardly choice that merely prolonged my path to recovery – kept using, got married, had our first child, and then, in a karmic twist of fate, went to jail for selling drugs to a confidential informant myself.

The next few years produced more children, half-hearted attempts at getting clean when I'd lose a job for using drugs or get caught by my wife, another arrest, and eventually law school. My deep-seated fear and insecurity drove me to attack my schoolwork with all the desperation of a drowning man. I would use drugs the first half of each semester, then quit in time to study for finals. It was a miserable existence – constantly in fear of getting caught getting high in the parking lot, always sure that "this" semester would be the one where I would fail out and be proven to be the imposter that I was certain I was. I was seen in that parking lot, once, by a classmate – we locked eyes with the pipe up to my lips, her face turning from an expression of recognizing me to confusion at what I was doing. She didn't turn me in, but instead, gave me a hug of love and acceptance when I saw her in the library a few hours later – an act of love and acceptance that humbles me even today.

It wasn't until nearly six years after that encounter with Christlike love in the Howard W. Hunter Law Library, until after my wife finally took the kids and left me, that I found the 12 Steps in the rooms of recovery, that I learned that love and acceptance really are the answer – at least, for me. I learned that I could be relieved of the deep fear and insecurity that plagued me my entire life by turning toward a power greater than myself, by connecting with others, by digging deep into my character weaknesses with others who had done the same, by asking to have them removed, and, finally, by serving others. I learned for myself what William Blake so eloquently put:

I sought my soul, but my soul I could not see.
I sought my God, but my God eluded me.
I sought my brother and I found all three.

I learned that hope exists. That the opposite of addiction is connection. That the 12 Steps work … if you work at them. And that ultimately, through loving and accepting others, I can learn to love myself. After three years of continuous clean time, and five years working at recovery, my life is better than I ever could have imagined. I have amazing relationships with friends and family, fulfilling work, and meaningful opportunities to serve and love others.

One way I serve is through Lawyers Helping Lawyers (LHL).

Lawyers Helping Lawyers went through some down time, but we have an active board now and are growing every month. We have launched a new phone number: (801) 900-3834. We are ready to talk with those wanting to talk. Among other resources, we have a small but growing cadre of recovering alcoholics and addicts who can listen, share their strength and hope, and provide support to those who think (or know) they might have a problem with drugs or alcohol.

We are confidential. Lawyers Helping Lawyers falls under the protection of Rule 8.3 of the Utah Rules of Professional Conduct. What does that mean for you? Whether you are calling for yourself or asking for help for a colleague, we are bound and protected by Rule 8.3. That means what you say to LHL stays with LHL. Calling on behalf of a colleague in trouble also satisfies your requirement to report under the Rules of Professional Conduct.

Lawyers Helping Lawyers is also working hand in hand with the Wellness Committee for Legal Professionals. That committee has been disseminating helpful information for legal professionals and creating programs that can help us all. Also in collaboration, Blomquist and Hale continues to provide legal professionals and their family with therapeutic support at little to no cost.

Besides being ready to talk to those wanting a peer-to-peer conversation, Lawyers Helping Lawyers also needs volunteers. We need those who have overcome struggles and who will talk with others about similar problems. The issues we would like to work on include (but are not limited to): professional or business problems, family struggles, trauma, identity issues, substance abuse or misuse, overcoming adversity, and many other issues we face. We are looking for a wide swath of volunteers to share a broad range of experience and diverse solutions. Please email our Chair, S. Brook Millard, at bmillard@robertdebry.com to express interest.

In addition to those willing to help individually, we also need volunteers willing to share openly about their experience and solutions in small or large group settings. Please email our Vice-Chair, Dani Hawkes at danielle@hawkesfamilylaw.com to discuss this role.

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.

UTAH STATE BAR®
ETHICS HOTLINE

ethicshotline@utahbar.org

I Have No Idea What I'm Talking About

by Keith A. Call

My mind was pretty much blown away when I learned that the Utah Supreme Court was planning to (basically) allow fee sharing even with non-lawyers, allow non-lawyer ownership of law firms, eliminate most of the ethical rules on lawyer advertising, and create a regulatory sandbox for broad experimentation on the delivery of legal services. *See* Keith A. Call & Kendra M. Brown, *Titanic Changes to Rules of Professional Conduct Under Consideration*, 33 UTAH B.J. 44 (July/Aug. 2020). But that was relatively mild compared to a headline I recently saw: "Major law firm buys property in the metaverse and opens virtual office." *See* Debra Cassens Weiss, ABA JOURNAL (Feb. 17, 2022), https://www.abajournal.com/news/article/major-law-firm-buys-property-in-the-metaverse-and-opens-virtual-office?.

What? Will you please repeat that?

It's true. Arent Fox, with offices in Washington, D.C., Chicago, New York, Los Angeles, Boston, San Francisco, Lake Forest, and Ann Arbor, now has an office in … the Metaverse.

When I saw that, I immediately called my friend at Arent Fox. "What?" I said, "Are you all planning to have lawyer avatars give legal advice to client avatars?" Without directly denying that, my friend convinced me this new office is mostly about marketing. "Hey, all you tech companies, we've got an office in the metaverse, so we get you!" I'd say it's working out pretty well so far. *See, e.g.*, this article.

I couldn't help asking myself, "What does all this mean, especially for legal ethics?" Candidly, I have no idea! I have not yet "been" to the metaverse, let alone tried to practice law there. I don't think anyone really knows what all this means for the practice of law or legal ethics. We're entering a Brave New World.

For those of you who have not done the Google research I have, let me try to explain what the metaverse is. "A metaverse is a network of 3D virtual worlds focused on social connection. In futurism and science fiction, it is often described as a hypothetical iteration of the Internet as a single, universal virtual world that is facilitated by the use of virtual and augmented reality headsets." Wikipedia, *Metaverse*, https://en.wikipedia.org/wiki/Metaverse (last visited Apr. 1, 2022).

Okay, that was way too complicated. Think of it this way. Imagine you are playing a souped-up video game where you take on the personality of a cartoon character (an "avatar") created after your own image and personality, and your character moves around in this "virtual world" socializing with other people/avatars, eating, shopping, working, driving Ferraris, and, I suppose, giving or receiving legal advice. This is often done using virtual reality (VR) headsets that make the experience seem even closer to reality. VR headsets can even "trick" our brains into making our virtual perception seem very real, including sensations and emotions such as speed, fear of heights, and social anxiety. Different software companies can create different metaverses in which different "players" can participate.

While this all appears on the surface to be fun and games, the legal and ethical implications will certainly become very real. *Fortune* magazine reports that your avatar will soon be able to work and make actual money. *See* Yvonne Lau, *You'll Soon Be Able to Put Your Metaverse Avatar to Work*, FORTUNE (Feb. 7, 2022), https://fortune.com/2022/02/07/metaverse-avatar-work-make-money-nft/. A woman in the U.K. reported being sexually and verbally assaulted by 3–4 male avatars who essentially gang

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

raped her avatar. *See* Michelle Shen, *Sexual Harassment in the Metaverse? Woman Alleges Rape in the Virtual World*, USA TODAY (Jan. 31, 2022), https://www.usatoday.com/story/tech/2022/01/31/woman-allegedly-groped-metaverse/9278578002/. In all seriousness, that must have been extremely traumatic.

Any lawyer can see a host of unanswered questions from these scenarios. Can there be causes of action in the metaverse for wrongful termination, theft, or assault? How would damages be assessed and collected? Would Ferrari have any intellectual property or license rights in the "Ferrari" I "drove"? What about criminal penalties? How and where are these legal rights (if they are legal rights) to be enforced, and by what authority? Will they be governed by the specific metaverse creator's terms and conditions, which most users will never read and may not understand?

For purposes of this column, the possibility to give and receive legal advice and other legal services in the metaverse is unquestionably real. What rules of ethics apply, and who will enforce them? Must one be licensed to provide legal services in the metaverse? Where, and by what governing body? Must the Model Rules of Professional Conduct (and state rules that follow them) be completely rewritten to account for these possibilities (or should we say "eventualities")?

This is an area full of unanswered questions. In fact, I'm quite sure we don't even know the right questions to ask! Millennials, Zoomers, and other users of the metaverse are super smart, however, so as we come up with the right questions, I have confidence they will come up with some great answers. Meanwhile, try your best not to engage in the unauthorized practice of law anywhere in the uni-metaverse, and "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Utah R. Prof. Cond. 1.1, cmt [8].

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.

Utah State Bar Licensee Benefits

Put Law Practice Tools at Your Fingertips

Your Utah State Bar license comes with a wide range of special offers and discounts on products and services that make running your law practice easier, more efficient, and affordable. Our benefit partners include:

ALPS

Clio

fastcase

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PageVault

Podium

SimpleLaw.com

To access your Utah State Bar Benefits, visit:

utahbar.org/licensee-benefits

Where to Eat in San Diego

by San Diego native Cherise Bacalski, with recommendations by San Diego transplant Mike Green

San Diego is uniquely situated between land and water. On the one side, San Diego is grounded by mountains more timeworn than the rivers cutting through them, and on the other side, it is animated by an ever-altering seascape.

With one hand in the mountains and one hand in the tide, San Diego's culinary scene also participates in this tangled ebb and flow combining age-old traditions with the freshest vibes around.

When you're in San Diego this summer attending the Utah Bar Convention, you should consider catching a bite at some of the following local eateries.

If you're wining and dining your friends, bougie Mike makes the following recommendations:

Truly, nothing *feels* more San Diego than **Tom Ham's Lighthouse** located on Harbor Island. Tom Ham's offers stunning ocean views with first class dinning. Mike enjoys their pan seared salmon: it's a skin-on salmon complimented with saffron rice, cauliflower, baby carrots, rapini, Yucca root, and tomatillo pesto. Tom Ham's wine and cocktail list is world class, and you won't be disappointed by the ambiance.

If you're looking for award-winning cuisine with award-winning views, **Mister A's** offers modern American cuisine with French and Mediterranean influence. Just minutes from downtown, Mr. A's boasts gorgeous views of the San Diego skyline. Apart from winning local and national awards, this culinary gem was also voted *most romantic by any stretch of the imagination* by someone at some point and that's good enough for me. Mike loves their roasted rack of lamb with herbes de provence, cannellini beans, and thyme garlic jus. There is a dress code, so dress to impress – or at least to code.

Top of the Market to ya! This San Diego legend is perched atop The Fish Market Restaurant and offers expansive bay views from Coronado to Point Loma. Top of the Market is famous for its rooftop cocktails, intimate seating in its elegant dining room, and attentive service. Because freshness is so important, Top of the Market owns and operates its own seafood processing and distribution facility. Mike highly recommends the local swordfish with forbidden rice, baby bok choy, green harissa, pickled onion, ginger, and cilantro. Not feeling like seafood? Their bone-in pork chop with du puy lentils, pancetta, fennel, pineapple chutney, and charred kale is to. die. for.

You can't stay on Coronado Island without experiencing the **Crown Room Brunch at the Hotel Del**. They call it "a true feast for the senses," and it is. It boasts a lavish and legendary Sunday brunch featuring a chilled seafood bar, regionally inspired dishes, international cuisine, and carving stations. You just might enjoy a gourmet Bloody Mary bar, made-to-order mimosas, or a candy and dessert bar. Mike has, and he'll do it again. And again. And again.

Looking for an extraordinary dessert? We both recommend **Extraordinary Desserts**. I can't tell you how many Saturday nights I've spent at this sweet place located just a short walk away from Balboa Park.

CHERISE BACALSKI's childhood home borders the Cuyamaca mountain range; she moved to the beach as a teenager. Today she enjoys scaling Utah's epic rock faces when she's not working with her brilliant colleagues at The Appellate Group. Cherise is also Chair of the Appellate Practice Section of the Utah State Bar.

MIKE GREEN is a partner at Cowdell and Woolley, PC practicing municipal, criminal prosecution, and civil litigation. Mike is also an Army Judge Advocate in the Utah National Guard and Draper City Council-member.

If you're heading a little north to explore North County's secluded beaches, I make the following recommendations:

For a beachy surfside breakfast burrito that will blow your socks off (but really, you should not be wearing socks in San Diego in July), check out my favorite breakfast-only place **Pipes Cafe**, perched along Highway 101 in Cardiff, a tiny surf town nestled in between Del Mar and my own hometown, Encinitas! These insanely large breakfast burritos are best chased with Pipe's fresh squeezed OJ and followed by **VG's Donuts**, just around the corner. Pipes closes at 2 pm, so get there early – and then go put your feet in the water while you enjoy a donut.

Just down Highway 101 from Pipes, **Ki's Restaurant** defies categorization. If you want an organic, healthy oceanside meal with a twist, Ki's is for you. You can always find a breathtaking view of the ocean – upstairs and downstairs. After your meal, enjoy a hike through Annie's Slot Canyon as you digest. I brought my whole extended family to Ki's after undergrad graduation, and it was just lovely. But if you're dining for two or want or a more upscale, dine-on-the-shore experience, **Chart House** is right across the street! You won't want to miss it.

After oral argument at the Fourth District Courthouse downtown, there's nothing I enjoy more than hopping into my rental car and heading north to Rancho Sante Fe to grab fresh pastries and French cuisine at the **Champagne Bakery** and then putting my feet in the water at the Torrey Pines State Beach. If you're more adventurous – and perhaps a bit of an exhibitionist – you can take those pastries a little south to Black's Beach where clothing is optional. Just a word of caution, the descent requires a bit of a hike. I personally sprained a most beloved ankle whilst descending the footpath near midnight in stiletto hiking shoes. Damned teenaged nonsense.

While you're in San Diego, don't forget to visit Old Town! Old Town San Diego is an absolute favorite with the locals. Wander the streets nibbling on strawberry, chocolate, and cinnamon tortillas grilled right there on the street corner. Mike claims **Old Town Café** has the best tortillas in Old Town. But don't end your tour there! If an energetic ambience is your thing, you simply cannot miss **Rockin' Baja Lobster**! It boasts uber fresh Mexican cuisine and a live rock music scene. In law school, my international commercial arbitration team ended a day here before heading to La Jolla Shores for a legit bonfire – and it was the highlight of our trip.

I'll bet you thought we forgot **Hodad's**! We did not. Located in Ocean Beach, Hodads' burgers are easily tastier than they are tall. I dare you to shove a full bite into your widest mouth. Good luck with that. The line is long, but the burger is worth it. And if you're lucky, you might score a seat inside the chopped-in-half VW Bus hanging from the wall. This tiny shop in Ocean Beach is so packed, they have a hard time seating larger groups. Luckily, they now have a downtown San Diego location. But no matter which location you visit, don't forget to bring your tattoo!

We hope you enjoyed your culinary tour. If you end up trying one of these eateries, please send us a pic and let us know what you thought.

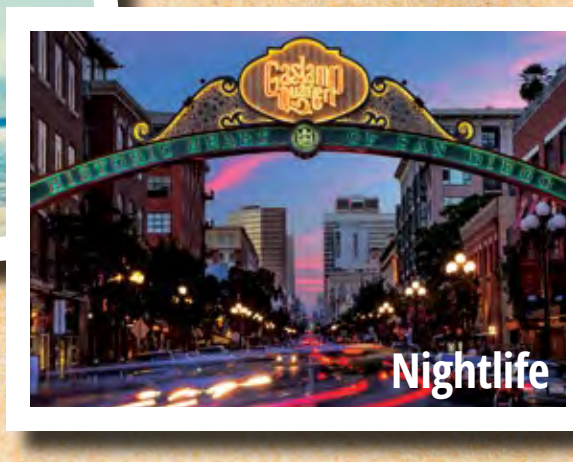
Utah State Bar®

Summer Convention

July 6–9 2022

San Diego

Loews Coronado Bay Resort



Approximately **10** CLE Credits Available.*

*Agenda pending.

For the latest information, visit:
utahbar.org/summerconvention

Utah State Bar®

Summer Convention Accommodations

Loews Coronado Bay Resort July 6–9, 2022

THE RESORT

The Loews Coronado Bay is situated on a private 15-acre peninsula surrounded by the Pacific Ocean and Coronado Bay. It is located minutes from downtown Coronado, a charming resort village, and a short drive to San Diego's world-famous attractions.

Resort Amenities

- Guest rooms including with bay, marina, pool or resort views
- Direct access to the Silver Strand State Beach
- Five restaurants and lounges
- Excursion dock and marina
- Three bayside tennis courts
- Three outdoor heated swimming pools
- Complimentary Wi-Fi in guest rooms
- Full service spa and salon

Resort Fee Waived

10% Discount off Spa Treatments

$15 Discounted Overnight Self-Parking

RESERVATIONS

Group room rates starting at $249 + tax.

Reservation can be made by calling the Loews Reservations Center at 800-815-6397. Refer to the Utah State Bar Summer Convention to receive the discounted rate.

Online reservations can also be made using the following reservations link.

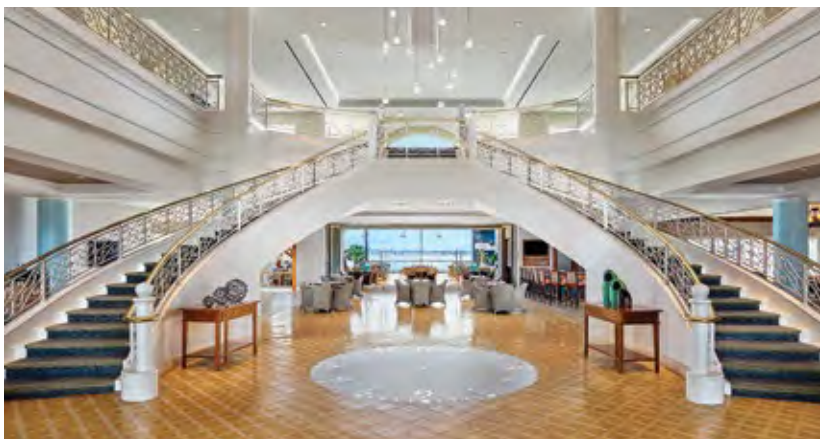
www.loewshotels.com/coronado-bay-resort/group-2022-utah-state-bar-summer-convention

Reservations need to be made on or before June 1, 2022 to receive the discounted rate.

Group rates are available:

June 29–July 15, 2022

based upon availability.



2022 Summer Convention Awards Nomination Request

The Board of Bar Commissioners is seeking nominations for the 2022 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession.

Please submit your nomination for a 2022 Summer Convention Award no later than Friday, May 20, 2022, using the Award Form located at www.utahbar.org/nomination-for-utah-state-bar-awards/.

Propose your candidate in the following categories:

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

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the March 10, 2022 meeting held at the Law & Justice Center in Salt Lake City and on Zoom.

1. The Commission approved the creation of a committee to review mental health service providers.
2. The Commission approved the purchase of a table for the First Annual UCLI Luncheon Celebrating Justice Durham March 24 at City Creek Marriott.
3. The Commission Approved Recommending Changes to Admissions Rules 14-701, 14-705, 14-712, 14-807, and 14-809.
4. The Commission approved by consent the minutes of the January 28, 2022 Commission Meeting.

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

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 6, 2022, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

Renewing your license online is simple and efficient, taking only about 5 minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee, not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will receive a licensing confirmation email. If you do not receive the confirmation email in a timely manner, please contact licensing@utahbar.org.

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

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2022 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Rachel Anderson
Ken Ashton
Bruce Badger
Ray Barrios
Autumn Begay
Wayne Bennett
David Billings
Matt Brahana
Nicholas Cutler
Nicholas Dudoich
Jeffrey Enquist
Mark Ferre
Melissa Flores
Nathaniel Gallegos
Michael Garrett
Stephen Geary
Mallorie Goguen
Clark Harms
David Jeffs
William Jennings
Blake Johnson
Paul Jones
Ben Kotter
Erika Larsen
Janet Lawrence
Skye Lazaro
David Leta
Tanya Lewis
Greg Lindley
Doug Monson
Jamie Nopper
Kara North
Todd Olsen
Jonathon Parry
Richard Pehrson
RobRoy Platt
Christopher Sanders
Leslie Slaugh
Scarlet Smith
James Sorenson
Marissa Sowards
Michael Stahler
Alan Stewart
Michael Swensen
Steve Tingey
Axel Trumbo
Jason Wilcox

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
Steve Averett
Camille Buhman
Dave Duncan
Amy Fiene
Athelia Graham
Michael Harrison
Morgan Luedtke
Brandon Merrill
Kimberly Sherwin
Linda F. Smith
Babata Sonnenberg
Brittany Urness
Nancy Van Slooten
Rachel Whipple

Private Guardian ad Litem

Chase Kimball
Allison Librett
Celia Ockey
Jennifer Reyes
Brent Salazar-Hall
Orson West

Pro Bono Appointments

Walter Bornemeier
Matthew Ekins
Chase Kimball
Kent Scott

Pro Se Debt Collection Calendar

Greg Anjewierden
Mark Baer
Pamela Beatse
Keenan Carroll
Qiwei Chen
Ted Cundick
Rick Davis
Marcus Degen
Mary Eussman
John Francis
Leslie Francis
Jarom Harrison
Carla Swensen Haslem
Scottie Hill
Taylor Kordsiemon
Zach Lindley
Amy McDonald
Darren Neilson
Jazmynn Pok
Brian Rothschild
Zachary Shields
Theo Smith
George Sutton
Carla Swensen
Candace Waters

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

Pro Se Family Law Calendar

Corttany Brooks
Heather Carter-Jenkins
Brent Chipman
Jill Coil
Elenia Cozean
Anita Dickinson
Michael Ferguson
Kaitlyn Gibbs
Danielle Hawkes
Daniel Heaps
James Hunnicutt
Kent Kottam
John Kunkler
Allison Librett
Chris Martinez
Davis Pope
Stewart Ralphs
Brent Salazar-Hall
Samuel Sorensen
Douglas Stowell
Rachel Sykes
Michael Thornock
Sherri Throop
Adrienne Wiseman

Pro Se Immediate Occupancy Calendar

Pamela Beatse
Keenan Carroll
Lauren DiFrancesco
Leslie Francis
Anikka Hoidal
Brent Huff
Matt Nepute

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

Keil Myers

Matt Nepute

SUBA Talk to a Lawyer Legal Clinic

Alyssa Anderson

Braden Bangerter

Travis Christiansen

William Frazier

Lewis Reece

Lane Wood

Timpanogos Legal Center

Geidy Achecar

McKenzie Armstrong

Amirali Barker

Margot Blair

Keil Myers

Utah Legal Services

Michael Branum

Brent Brindley

James Cannon

Brent Chipman

David Cook

Rori Hendrix

Linzi Labrum

Andrew Morelli

Tamara Rasch

Eryn Rogers

Ryan Simpson

Noella Sudbury

Reid Takeota

Wendy Vawdrey

Anthony Zhang

Utah Bar's Virtual Legal Clinic

Nathan Anderson

Ryan Anderson

Josh Bates

Jonathan Bench

Jonathan Benson

Dan Black

Mike Black

Anna Christiansen

Adam Clark

Jill Coil

Kimberly Coleman

Jonathan Cooper

Robert Coursey

Jessica Couser

Jeffrey Daybell

Matthew Earl

Craig Ebert

Jonathan Ence

Rebecca Evans

Thom Gover

Sierra Hansen

Robert Harrison

Aaron Hart

Rosemary Hollinger

Tyson Horrocks

Robert Hughes

Michael Hutchings

Gabrielle Jones

Justin Jones

Suzanne Marelius

Travis Marker

Gabriela Mena

Brian Rothschild

Tyler Needham

Nathan Nielson

Sterling Olander

Aaron Olsen

Chase Olsen

Jacob Ong

Ellen Ostrow

McKay Ozuna

Steven Park

Clifford Parkinson

Alex Paschal

Katherine Pepin

Cecilee Price-Huish

Stanford Purser

Jessica Read

Brian Rothschild

Chris Sanders

Alison Satterlee

Kent Scott

Thomas Seiler

Luke Shaw

Kimberly Sherwin

Emily Sopp

Farrah Spencer

Liana Spendlove

Brandon Stone

Charles Stormont

Mike Studebaker

George Sutton

Jeff Tuttle

Alex Vandiver

Jason Velez

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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).

PUBLIC REPRIMAND

On March 6, 2022, the Honorable Su J. Chon entered an Order of Discipline: Public Reprimand against Travis L. Bowen for violating Rule 1.15(c) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
Two clients retained Mr. Bowen to create a risk assessment and initial design. The clients each signed authorization letters and each paid a flat fee to Mr. Bowen's firm. The money paid was to retain Mr. Bowen for work he contemplated doing on behalf of the clients. Mr. Bowen placed the money he received from the clients into his firm's operating account without first earning the funds, not in any trust account.

PUBLIC REPRIMAND

On February 15, 2022, the Chair of the Ethics and Discipline entered an Order of Discipline: Public Reprimand against William H. Nebeker for violating Rule 1.3 (Diligence), Rule 1.4(a) (Communication), and Rule 1.4(b) (Communication) of the Rules of Professional Conduct.

In summary:
A man contacted Mr. Nebeker explaining he had been referred to Mr. Nebeker through the Utah State Bar's modest means program, explaining he would like to set up an initial consultation. Mr. Nebeker's office manager sent a client agreement and fee authorization to be sent back as soon as possible. The man signed the agreement and retained Mr. Nebeker to modify custody and modify distribution of a vehicle.

Adam C. Bevis Memorial Ethics School

September 21, 2022 or March 15, 2023
6 hrs. CLE Credit, including at least 5 hrs. Ethics
(The remaining hour will be either Prof/Civ or Lawyer Wellness.)
Cost: $100 on or before March 7, $120 thereafter.
Sign up at: opcutah.org

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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

Over the course of the next several months, the client would contact Mr. Nebeker's office requesting a status update on the document being prepared by Mr. Nebeker. The client spoke with Mr. Nebeker's staff but had very little direct interaction with Mr. Nebeker and was not given information about the progress of the case or issues in Mr. Nebeker's personal life that were affecting the representation.

About one year after the client retained Mr. Nebeker, a petition to modify was filed on behalf of the client in the case. Mr. Nebeker filed the petition without having the client review the document, which contained an error. The error included information that the client had provided a letter to the Court and the opposing party, when he had not. The client contacted Mr. Nebeker's staff informing them of the error, including that Mr. Nebeker was aware of the correct information.

PROBATION

On January 21, 2022, the Honorable James Brady, Fourth Judicial District Court, entered an order of discipline against Mari Alvardo Tsosie, placing her on probation for a period of twelve months based on Mr. Tsosie's violation of Rule 1.5(a) (Fees), Rule 1.15(d) (Safekeeping Property), Rule 1.16(d) (Declining or Terminating Representation), Rule 4.2(a) (Communications with Persons Represented by Counsel), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary, a client retained Ms. Alvarado Tsosie to represent her in a divorce matter. Ms. Alvarado Tsosie agreed to represent the client on a low-bono fee schedule due to the sympathetic situation that the client and her minor daughter were facing and considering the client's limited access to financial means. The client paid an initial retainer fee and executed a fee agreement. After a brief initial meeting, Ms. Alvarado Tsosie filed a Notice of Appearance in the case. Ms. Alvarado Tsosie contacted the client's previous attorney, discussing the case and arranging to obtain the client's file. Further, she contacted opposing counsel, introducing herself and thereafter communicating regarding an earlier mediation and settlement agreement. Ms. Alvarado Tsosie and her assistant communicated with the client by means of brief phone calls, with the majority of the communication coming from the assistant. In their second and final in person conversation, Ms. Alvarado Tsosie advised the client to agree to the terms of the proposed settlement agreement.

The client did not want to settle the case and wanted Ms. Alvarado Tsosie to file additional motions and to prepare to take the case to trial. Ms. Alvarado Tsosie told the client she had no alternative but to take the settlement offer and did not explain why she should accept the offer. Further, Ms. Alvarado Tsosie informed the client she would need to pay additional money in attorney's fees. The client retained a new attorney (Subsequent Counsel). Subsequent Counsel notified Ms. Alvarado Tsosie that he had been retained by the client and requested an accounting of Ms. Alvarado Tsosie's time and the return of the unused retainer and client file. Ms. Alvarado Tsosie did not provide an accounting or the unused portion of the retainer.

The client's case concluded sometime after Subsequent Counsel took over representation. Subsequent Counsel again requested the return of the client's unused retainer and an accounting. Ms. Alvarado Tsosie attempted to contact the client at the phone number she had for the client on file. The phone call was received by the client's daughter. In an email to Subsequent Counsel, Ms. Alvarado Tsosie stated that the client must meet with her in person if she wanted a refund and an accounting. Subsequent Counsel responded to Ms. Alvarado Tsosie and requested that she not contact the client and again asked for an accounting. Ms. Alvarado Tsosie again attempted to contact the client via text message, which was received by the client's daughter. Ms. Alvarado Tsosie did not earn the entire retainer paid by the client. The OPC sent a Notice of Informal Complaint (NOIC) to Ms. Alvarado Tsosie. Ms. Alvarado Tsosie did not timely respond to the NOIC.

Mitigating circumstances:
Inexperience in the practice of law; no prior record of discipline; no dishonest motive; admission that violations were wrong; admission of misconduct for failure to comply with Rule 8.1(b) was made early in the proceedings; remorse.

Aggravating circumstances:
Multiple rule violations: refusal to provide an accounting and refund promoted her self-interests over those of her client; failure to comply with the rules of the disciplinary authority; minimal effort or no efforts to pay any amount of restitution to her former client.

PROBATION

On December 14, 2021, the Honorable Douglas Hogan, Third Judicial District Court, entered an order of discipline against Albert N. Pranno, placing him on probation for a period of one year based on Mr. Pranno's violation of Rule 3.4(c) (Fairness to Opposing Party and Counsel) and Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
Mr. Pranno and his law partner (Partner) represented a client (Client) in a divorce action against the opposing party. The

court in the divorce action issued an order that neither party sell, transfer or otherwise dispose of any assets or incur further debt. The order also required any party who had taken, sold or disposed of any assets provide an accounting of the disposition to the other. Client sent an email to Partner stating that he was prepared to take money from his retirement fund to pay for legal fees if the divorce proceeded to trial. Partner responded to Client stating that the court had ordered the parties not to take money out of their accounts but that he might be able to take a loan against the funds with court approval. Client emailed Partner indicating he would use his retirement funds for attorney fees if they were going to trial. Partner emailed Client asking if he had started the process of taking funds out of the retirement account.

At some point, Client withdrew money from his retirement account and informed Partner of this. Partner instructed Client to sign the retirement fund check over to the law firm and they would put it in their trust account because they did not want it to hit Client's bank account. Mr. Pranno sent an email to Client informing him that they would set up a trust account for the retirement fund money where it would stay until it was used at trial. Mr. Pranno stated the money should not hit the Client's account anywhere and also told his Client that he would keep the retirement funds in his Trust Account for safekeeping. Mr. Pranno did not hold the funds in trust but used the funds for legal fees and to pay his Client's obligations. Client told Partner that he would bring in the retirement money and asked Partner if he could receive some money as cash back. After consulting with Mr. Pranno, Partner told Client that they would have cash waiting when he came in the office. The opposing party was not informed by Mr. Pranno nor Partner of the withdrawal from the retirement account.

RECIPROCAL DISCIPLINE

On January 1, 2022, the Honorable Andrew H. Stone, Third Judicial District Court, entered an Order of Reciprocal Discipline: Suspension against George M. Allen, suspending Mr. Allen for a period of two years for his violation of Rule 1.3 (Diligence), Rule 1.5(b) (Fees), Rule 1.7(a)(1) (Conflict of Interest: Current Clients), Rule 1.7(a)(2) (Conflict of Interest: Current Clients: Specific Rules), Rule 3.1 (Meritorious Claims and Contentions), Rule 3.3(a)(1) (Candor Toward the Tribunal), Rule 3.4(a) (Fairness to Opposing Party and Counsel), and Rule 3.7 (Conflict of Interest: Current Clients) of the Rules of Professional Conduct.

In summary:
On June 21, 2021, the Colorado Supreme Court entered an Order Approving Conditional Admission of Misconduct and Imposing Sanctions, suspending Mr. Allen from the practice of law for two years. The Order was predicated on the following facts in relevant part:

In the first matter, Mr. Allen represented members of a family and their closely held corporation in litigation brought by another shareholder of the corporation. He did not provide his clients with a written fee agreement when he started the representation. During the litigation, Mr. Allen's clients developed conflicting interests, but he did not obtain their written informed consent to continue the representation. Mr. Allen also failed to correct a statement of material fact included in a court filing after that statement was no longer true.

Mr. Allen represented another client in multiple legal proceedings despite having a close personal relationship with her, which created a conflict of interest. Mr. Allen also provided the client financial assistance while her cases were ongoing. In one of the proceedings, the court dismissed the case and sanctioned Mr. Allen after finding that the claims he had asserted were frivolous and vexatious. A court in another proceeding disqualified Mr. Allen from representing his client because he was likely to be a necessary witness. In a third case for the client – a criminal matter – he failed to exercise reasonable diligence and promptness.

Ethics Advisory Opinion Committee Opinion No. 21-02

Issued June 8, 2021

ISSUES

Rule 7.1 of the Utah Rules of Professional Conduct was recently amended. What firm names are appropriate under the amended Rule 7.1?

OPINION

A firm can use a trade name, including the names of departed lawyers, provided the name is not false or misleading as defined in Rule 7.1 and the Comments to it.*

*This request for an ethics advisory opinion was submitted anonymously. The Ethics Advisory Opinion Committee (EAOC) is charged with answering questions concerning the requesting attorney's conduct. The EAOC has chosen to answer this request because it appears to be a question that would assist the Bar as a whole. The fact that the EAOC has chosen to answer this request should not be interpreted as practice it will follow for future anonymous requests. Attorneys need to identify themselves when submitting requests.

DISCUSSION

In December 2020, the Utah Supreme Court amended the Utah Rules of Professional Conduct regarding communications concerning a lawyer's services. The Court deleted previous Rules 7.2 through 7.5 and then incorporated communications concerning a lawyer's services into a new and single Rule 7.1.

The key concept in the amended Rule 7.1 is that communications regarding a lawyer's services must not be false or misleading.

With respect to the questions posed, a communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Utah R. Pro. Cond. 7.1(a)(1).

The name of a firm is a communication to the public. Utah R. Pro. Cond. 7.1.

Comment [7] to Rule 7.1 provides:

Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Further, Rule 7.1 precludes lawyers from representing that they are practicing together when they are not in a firm. Utah R. Pro. Cond. 7.1 cmt. [9].

The requestor asks under what conditions a firm may use the name of a deceased or departing member. Rule 7.1 treats using the name of a deceased member of a firm and a departing member of a firm somewhat differently. However, in both cases the underlying presumption is that a succession of law practice by members of the same firm continues. Utah R. Pro. Cond. 7.1 cmt. [7].

The use of a continuous name by Firm One may become a misrepresentation if the member departing from Firm One returns to the practice of law in Firm Two. In such a case, Firm One would be required to change names so as to avoid misrepresenting to the public that the departed member continues to practice law there rather than at Firm Two.

Specifically, the requestor posits a situation where a sole proprietor (Jane Doe) practices with associates under the name "Jane Doe and Associates." Jane wishes to retire and sell the firm to her associates. The name "Jane Doe and Associates" has acquired a positive reputation in the community. Both Jane Doe and the purchasing lawyers wish to retain the name "Jane Doe and Associates" in order to increase the value of the firm and capitalize on the goodwill the firm has acquired over the years.

The purchasing lawyers may properly use "Jane Doe and Associates" as a trade name. Rule 7.1 allows the use of trade names that are not misleading. Utah R. Pro. Cond. 7.1 cmt. [7]. In the context of the question posed, the continued use of the trade name would not be misleading because it contains the name of a former member. Rule 7.1 specifically allows this practice. Utah R. Pro. Cond. 7.1 cmt. [7]. If, however, Jane Doe returned to the practice of law in the same geographic area or in the same subject matter, then the name "Jane Doe and Associates" would become misleading.

PLEASE NOTE: This is an abbreviated version of this opinion.
For the full text of this and all other Ethics Advisory Opinions, visit: https://www.utahbar.org/ethics-blog/.

Ethics Advisory Opinion Committee Opinion No. 22-01

Issued January 12, 2022

ISSUES

Is an in-house attorney for a Utah-based company required to obtain an in-house counsel license from the Utah State Bar if the attorney is a resident of another state, physically located outside the state of Utah, and the Utah-based company also has a presence in the attorney's resident state?

OPINION

An in-house attorney for a Utah-based company is not required to obtain an in-house counsel license from the Utah State Bar if the attorney is not a resident of the state of Utah and does not maintain a systematic and continuous presence in the state of Utah for the practice of law.

DISCUSSION

According to Rule 14-719 of the Rules Governing the Utah State Bar, in-house counsel are required to obtain an in-house counsel license with the Utah State Bar. Among the requirements for admission as an in-house counsel licensee, Rule 14-719(b)(6) requires an applicant to be "either (A) a bona fide resident of the State of Utah or (B) house counsel for an employer located in Utah."

Rule 14-719 dovetails with Rule 5.5 of the Utah Rules of Professional Conduct which restricts attorneys from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. Among other things, Rule 5.5 prohibits an attorney from establishing an office or other "systematic and continuous presence" in this jurisdiction for the practice of law without being licensed in that jurisdiction. According to Comment 4 to Rule 5.5, a lawyer may be deemed to have established a "systematic and continuous presence" under Rule 5.5 "even if the lawyer is not physically present in Utah."

In the question presented to the Committee for consideration, "Company" is a multi-state corporation with its corporate headquarters in Salt Lake City, Utah. Company also has an office in California. Company employs several "Lawyers" licensed in other jurisdictions who physically reside in California and work primarily at Company's California office.

These in-house Company attorneys work from home on a regular basis. Their business cards list the California office as their business address and each receives physical mail at the California office. None have a physical office in Utah, although they visit the corporate headquarters in Utah a few times each year, occasionally participate in online meetings or conference calls with management in Utah, and consult generally on corporate matters for the company. The Lawyers do not appear in Utah courts or hold themselves out as Utah attorneys. Because Company is a multi-state corporation, the Lawyers regularly apply the law of many jurisdictions in their practice, including Utah. However, the Lawyers do not exclusively practice Utah law.

In Utah Ethics Op. 19-03, issued on May 14, 2019, this Committee opined that the focus of Rule 5.5 is on regulating the practice of law within the state of Utah to protect the interests of potential clients in Utah. In that opinion, we addressed the question of whether an out-of-state attorney physically located in Utah could represent out-of-state clients without becoming licensed in Utah. We held that Rule 5.5 was not violated so long as the attorney did not establish a public office in Utah or solicit Utah clients. Simply living in Utah while continuing to handle cases from the attorney's home state does not constitute establishment of a systematic and continuous presence in Utah for practicing law in Utah. *See* Utah Ethics Op. 19-03, ¶¶ 7-8. The Committee reached the conclusion that the Utah State Bar has no interest in regulating an out-of-state lawyer's practice for out-of-state clients simply because he or she has a private home in Utah. *Id*. at ¶ 16.

The present question presents a new twist on this subject. In the present circumstance, an out-of-state attorney wishes to practice law in another state for the benefit of a client based in Utah. Based on the client-focused analysis in Utah Ethics Op. 19-03, one could argue that Utah has an interest in regulating the practice of law by out-of-state attorneys on behalf of a Utah resident. The Committee might reach the same conclusion if an out-of-state attorney injected themselves into the state for the sole purpose of soliciting Utah clients and practicing Utah law.

However, in the present case, the "client" also resides in California. Although its headquarters are in Utah, Company also has a physical office in California and this is the office where the Lawyers are based and practice. This fact allows the Lawyer to take advantage of subpart (c)(4) to Rule 5.5, which allows a lawyer admitted in another jurisdiction to provide legal services on a temporary basis in Utah that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." *See* Utah R. Prof'l Cond. 5.5(c)(4).

In the Committee's opinion, the circumstance presented does not require licensure in Utah as in-house counsel. Attorneys located in another state and practicing at an office in another state do not fall within the jurisdiction of the Utah State Bar simply because their employer also has a location in Utah. Occasional visits to Utah or consultations with Utah-based management are not sufficient to establish a "systematic and continuous presence" in Utah under Rule 5.5, nor would they be considered establishment of a "public-facing" presence in the state.

PLEASE NOTE: This is an abbreviated version of this opinion.
For the full text of this and all other Ethics Advisory Opinions, visit: https://www.utahbar.org/ethics-blog/.

Understanding the CLE Cycle

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

Two Year CLE Reporting Period –
These lawyers will comply with the old MCLE Rules and their final two-year CLE reporting period.

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

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

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

Annual CLE Reporting Period –
These lawyers will comply with the new MCLE Rules and the annual CLE reporting period.

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

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YLD's Spring Ball Focuses on Giving Back to Unhoused Youth

by Scotti Hill

The state of Utah's Annual Report on Homelessness for 2021 stated that during that year, 3,565 Utahns were experiencing homelessness on a given night. State of Utah, Annual Report on Homelessness, 2021, https://jobs.utah.gov/homelessness/homelessnessreport.pdf. Various factors contribute to the already tenuous situation – with the COVID-19 pandemic, a drastic increase in housing costs paired with limited inventory, as well as flat or stagnant wages exacerbating the problem.

The Utah State Bar's Young Lawyers Division (YLD), in partnership with the Volunteers of America (VOA) Homeless Youth Resource Center, wants to do something to help. As an ongoing initiative, YLD hosts a prom event for homeless youth. The goals of this event are twofold – to provide a youth-centered formal dinner to inspire socialization and to solicit professional clothing donations for job interviews. This year, the event took place on April 28th at the VOA Homeless Resource Center.

While YLD hopes to raise awareness about the issues affecting this vulnerable population, the event is meant to be one of celebration and socialization, utilizing volunteer judges and lawyers who serve the formal, sit-down dinner.

"There'll be fancy linen, centerpieces, all that jazz," said Kate Conyers, an event organizer in the event's press release.

While much reporting and community discourse has centered around the issues at the core of the homelessness crisis – among them affordable access to housing, legal assistance, and healthcare – YLD believes there are also smaller, targeted gestures that go a long way in showing solidarity with young people impacted by dire economic circumstances. For one, the idea of a professional clothing donation drive was the catalyst behind the "Cinderella Boutique Project," a ten-year program that allowed Utah students to borrow formal dresses and accessories for prom for free.

"After the event, the young men and women can keep the professional clothing and use them in job interviews," said Sam Dugan, YLD's Chair of the "Project VOA" initiative. "Any unclaimed suits or professional wear will be donated to other nonprofits in the community to help folks who need professional clothing."

For organizers, the event is meant to be a welcomed reprieve from the isolation of the past two years, an opportunity for the type of gatherings that build a sense of community.

"We're excited to wrap up this project with such a fun event," Conyers said. "Especially one that allows youth to attend a formal and pressure-free event with their peers in spite of their living and school situation."

The event draws over fifty attendees, youth ranging from 15–22 years old. These numbers are welcomed news considering the inevitable cancellations wrought by the COVID-19 pandemic.

"We have been unable to host this event for the past two years due to the pandemic, so we are excited to bring this event back to the youth at the VOA," said Dugan.

YLD President Grant Miller sees the event as a benefit not just for attendees, but for the young lawyers who participate.

"The Youth Prom at the VOA is a special project for us because it brings joy and inclusion to an underserved and vulnerable population group. Letting these young adults know that they matter is critically important to us. This event is a way to bring the compassion of young attorneys out of the courtroom and into other well deserving parts of our community."

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

CLE Calendar

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

Friday, May 6, 2022 | 12:00 noon

Law Day Luncheon. At the Grand America Hotel, 555 South Main Street, in Salt Lake City. Reach out to CLE@utahbar.org for additional information. Cost is $50 per individual, $500 for a table (Seats 10).

Thursday, May 12, 2022

Session 10 of the Virtual Spring Convention: A Conversation with the Bench on the Utah Constitution.
Sponsored by the Appellate Law Section and the Salt Lake County Bar Association.

May 16–17, 2022

2022 iSymposium.
The Cyberlaw Section of the Utah State Bar. For the most recent information and registration, visit: utahbar.org/cle/#calendar. Please direct any questions to: CLE@utahbar.org.

Tuesday, May 17, 2022

iSymposium. Sponsored by the Cyberlaw Section.

Friday, June 3, 2022

Annual Family Law Section CLE and meeting. Sponsored by the Family Law Section.

Friday, June 10, 2022

Annual Paralegal Seminar. Full Day event sponsored by the Paralegal Division.

Friday, June 17, 2022

Dispute Resolution Seminar. Full Day event sponsored by the Dispute Resolution Section.

July 6–9, 2022 **TBA**

Utah State Bar Summer Convention in San Diego!
Loews Coronado Bay Resort. For the latest information, visit: utahbar.org/summerconvention.

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

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Go to utahbar.org and select the "Practice Portal." Once you are logged into the Practice Portal, scroll down to the "CLE Management" card. On the top of the card select the "Online Events" tab. From there select "Register for Online Courses." This will bring you to the Bar's catalog of CLE courses. From there select the course you wish to view and follow the prompts. **Questions? Contact us at 801-297-7036 or cle@utahbar.org.**

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RATES & DEADLINES

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

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

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

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

JOBS/POSITIONS AVAILABLE

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

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

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