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Mar/Apr 2023



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Cover Photo

Zion National Park, 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 became 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.



HOW TO SUBMIT A POTENTIAL COVER PHOTO

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs by email .jpg attachment to barjournal@utahbar.org, along with a description of where the photographs were taken. Photo prints or photos on compact disk can be sent to *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall.



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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 emailing barjournal@utahbar.org.

GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

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

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

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

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

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. Author(s) are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via email, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

PUBLICATION: Author(s) will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

LETTER SUBMISSION GUIDELINES

1. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org at least six weeks prior to publication.
2. Letters shall not exceed 500 words in length.
3. No one person shall have more than one letter to the editor published every six months.
4. Letters shall be published in the order they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. If and when a letter is rejected, the author will be promptly notified.

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2023 Utah State Bar Elections

A link to the online election will be supplied in an email sent to your email address of record. You may update your email address information by using your Utah State Bar login at <https://services.utahbar.org/>. (If you do not have your login information, please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Candidate for President-Elect

Cara M. Tangaro is the sole candidate for the office of President-elect. Utah State Bar bylaws provide that if there is only one candidate for the office of President-elect, the ballot shall be considered as a retention vote and a majority of those voting shall be required to reject the sole candidate.

CARA M. TANGARO

Recently Utah's legal community has seen drastic changes, far more than any other time in my career, which constitutes twenty-two years of legal practice and fifteen years as a solo and small firm practitioner. Those changes, in large part, start at and are explored by the Bar Commission. I have served as a Third Division Bar Commissioner for five years and have injected my perspective and experiences to ensure solo/small firm attorneys have a voice in our changing landscape. As a Commissioner I have also worked to ensure the Bar is advancing our profession and providing valuable services to lawyers across the state. I'm proudest of my work regarding attorney wellness. I was on the original task force regarding this focus, and then Chairperson of the Well-being Committee along with Justice Paige Petersen. I am humbled to be nominated by the Utah State Bar Commission, and for the opportunity to serve as your President-elect. As President-elect, I will work with all lawyers, sections, committees, and other stakeholders to continue to provide valuable services to lawyers and the public.



First Division Bar Commissioner Candidate

Uncontested Election: According to the Utah State Bar bylaws, “In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected.” J. Brett Chambers is running uncontested in the Third First Division and will therefore be declared elected.

J. BRETT CHAMBERS

Dear Colleagues: I appreciate the opportunity to represent the First Division on the Utah State Bar Commission. Over the past nine years, I have had the privilege of working with many of you. I understand the unique challenges and concerns facing our district and believe it is important to have a voice on the Commission that represents our perspectives and needs.



As a commissioner, my top priority will be to ensure that your opinions and concerns are heard and taken into account. I will work to create an open and inclusive Bar where all members feel comfortable sharing their thoughts and ideas.

In addition to representing the distinct voices of our district, it is important for the Commission to stay current with developments in the legal field. I will work to ensure that the Bar is proactive in addressing new challenges and opportunities, and is responsive to our members' needs.

I welcome your input and ask you to please contact me with any concerns for our division: jbc@utahlawfirm.com.

J. Brett Chambers is an attorney at Harris, Preston & Chambers LLP. He is the current Cache County Bar President and has served as First Division Bar Commissioner since November 2022.

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Third Division Bar Commissioner Candidates

KIM CORDOVA

I have been a lawyer for over twenty years, beginning as a prosecutor and now managing a small criminal defense firm with my partner Edward K. Brass. I train attorneys across the state on juvenile justice issues. I was an appointee of Governor Herbert where I worked directly with the Legislature on formulating policies to improve criminal justice. Currently, I am one of the ABA delegates for Utah. In this role, I have been exposed to the workings of the Utah State Bar Commission and have grown to admire and respect the staff and commissioners.



There are continuous challenges that face the legal profession as the profession grows in numbers and evolves. I see in those challenges the opportunity to serve. While I enjoy being an ABA delegate, I would like to expand my role as a representative for the Third Division. I am committed to collaborating and listening to my colleagues and representing the voices that may not always be heard. I am familiar with the challenges of government lawyers, small firms, and of large government agencies. My experience in and out of the courtroom brings a new perspective to the Commission and I humbly ask for your support.

TRACI A. GUNDERSEN

Thank you, fellow members of the Utah State Bar, for taking your time to cast a vote in this election of Bar Commissioners. My name is Traci Gundersen, and my bar number is getting relatively low enough that I can start appropriating the phrase that, "Old age and treachery will always beat youth and exuberance." I've been practicing law for over twenty years, and that time has passed by in a blink.



Nearly all of my professional experience has been in the state of Utah. It is my home and I care about the people who live and work here. I believe in service to the community in general, and I have truly enjoyed serving on the Bar Commission during my past term. As a commissioner, my goal is to promote access to justice, encourage excellence in the profession and in the legal services we provide to our clients, and to educate citizens so that they understand how the law works for them. I would appreciate your vote again, and can be reached at tagunder@gmail.com with any comment, question or concern. Thank you for your vote!

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MARK O. MORRIS

It has been a privilege to serve as a Bar Commissioner for the last five years. My reasons for serving are probably best articulated in the Commentary piece I authored in the *Utah Bar Journal* in January. Briefly, I am proud of what we do as lawyers, and I am very, very motivated to see that the Utah Bar's experience of collegiality among lawyers and judges is perpetuated and protected. Our profession, and the Bar, are under a great deal of scrutiny these days, and while there is always room for improvement, we have much to be proud of. The coming years will continue to present challenges to all of us, and I certainly have the passion and perspective to continue contributing to the idea that we are a profession, we help people, and we are uniquely situated to make Utah a better place to live and work. Because I feel that a fair amount of work lies ahead, and because I feel a continuing obligation to give something back to our profession, I would appreciate your support again.

**JOHN H. REES**

I am John Rees and am seeking an opportunity to serve as a bar commissioner.

The bar and legal community are facing significant challenges. The bar commission needs people that will work to achieve reasonable and practical solutions to these challenges. My history includes being a reasonable voice and working together with others to create and implement appropriate strategies that succeed.

I am running for at least three reasons. First, I care deeply about members of the bar and their well-being and success. Second, I am passionate about the people we serve, especially those in need. Finally, as lawyers, we have the obligation to lead appropriate efforts to improve our community through the development and implementation of applicable laws.

My experience has prepared me to serve in the position of bar commissioner. I practiced at a major downtown law firm for over thirty years, and served as general counsel for a client. I am currently a solo lawyer. I taught a law practice management course. I served as co-chair of the innovation in law practice committee, founder and initial chair of the cyberlaw section, co-chair of one of the bar's annual meetings, and chair of the business law section.

**GLEN K. THURSTON**

I want to help improve the Bar and make Utah an even better place to practice law. I would do this by promoting access to justice and regulatory reform and promoting the pro bono efforts of attorneys throughout the state. I also would like to "audit," so to speak, the Bar, prompting a careful analysis of the various programs of the Bar, all to better streamline interactions between lawyers and the Bar.

I would help the Commission to carefully consider whether the goals of said programs are congruent with the results. For example, while the New Lawyer Training Program claims to "teach[] new attorneys to develop the habits, practical skills, and judgment necessary to the effective practice of law" the program may not be helpful for new attorneys working at firms that already have a similar mentoring program. I would also apply a similar analysis to any issue that came before the Commission. The skills I have learned at law school, as well as those learned earning a Ph.D., combined with my perspective from outside the established legal community, qualify me, I believe, to make such analyses.

[linkedin.com/in/glenkthurston/](https://www.linkedin.com/in/glenkthurston/)

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Power and Hope

by Kristin K. Woods

I recently attended the National Conference of Bar Presidents' midyear meeting in New Orleans. The theme of the conference was "Hope-Based Leadership." As I sat and spoke with fellow bar leaders and executives from around the country, a major theme that arose in both formal presentations and casual conversations was the political, policing, and race/religion/gender-based controversies that have arisen more and more frequently over the last few years in our country. As bar leaders, we are often thrust into the middle of these issues as our communities grapple with the legal, community, and political ramifications that arise in analyzing just where things went wrong, and what these things mean for us going forward. The voices of lawyers are often called on to weigh in on the way forward and try to come up with solutions. As we mourn with the communities that are most directly affected by these events, all of us feel the twinges of sadness and discomfort that come up as we consider how we can all live in the same country, under the same laws, but have such disparate results.

What is the place of a bar president in these situations? A state bar is made up of, in my opinion, the most brilliant and analytical minds in the state. Unified, these voices can be a very powerful voice for change. We have seen the power of the Utah State Bar when it comes to affecting laws and legislation that involve the practice of law and the administration of justice. We have seen the power of lawyers coming together to attend educational panels and seminars that discuss painful and poignant community events. Our panel on policing last year garnered 2,796 attendees, as a diverse panel of police, attorneys, and community leaders came together to discuss difficult issues.

I put to you that starting, hosting, and continuing open dialogue within and outside the bar is squarely within the purview of the bar, and the bar president. Yes, opinions and proposed solutions can vary. However, the failure to address an issue head on is a mistake. Bryan Stevenson speaks powerfully about the power of proximity. When it comes to the tough issues, confronting them head on, becoming proximate with the members of the affected community, and not being shy to have difficult conversations are things all of us can do, especially when we feel helpless. One thing I have learned by rubbing shoulders with some of the brightest legal minds in the nation is

to listen. Listen. LISTEN. None of us know what it's like to be in the other's shoes. None of us are perfect. None of us have this figured out. We need to listen and learn from each other.

I have been blessed through my bar service to travel and speak

with many in different situations than me. As I learn how to be a better and better Bar President, the diversity of thought and experience that others reveal to me prove to me over and over again that I know very little, and my job is to listen and to facilitate the discussions that will allow us all to learn collectively, how we can create a better world for all of us. The voices of lawyers are so powerful. If we can strive to combine that power with hope and humility, maybe, just maybe, we can figure it out together.

"When it comes to the tough issues, confronting them head on ... and not being shy to have difficult conversations are things all of us can do."



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The Unexpected New Frontier in Property Law



**The most contentious
new question in
domestic litigation
may be...**

“Who gets the dog?”

by Aaron S. Bartholomew and Sharon Yamen

We in the twenty-first century do love our pets. Celebrities bequeath their fortunes to their pets. Dogs and cats – animals perfectly capable of walking themselves – are “walked” in strollers like a newborn baby. There are pet hotels, pet insurance, pet vacations, gourmet pet food, pet clothes, pet carriers, and the list goes on and on. The relationships between domestic animals and “their humans” have become so interconnected and involved that social scientists now study what they term “pet culture.” David D. Blouin, *Understanding Relations between People and their Pets*, 6 SOC. COMPASS 845, 856–69 (Nov. 2012), <https://compass.onlinelibrary.wiley.com/doi/10.1111/j.1751-9020.2012.00494.x>.

AARON S. BARTHOLOMEW teaches business law at Utah Valley University and practices law from his office in Utah County focusing on contracts and real estate.



SHARON YAMEN is a graduate of Hofstra University School of Law. Recently relocated from Utah to New York, she currently consults small business start ups and is an Assistant Professor at the Collins College of Professional Studies, Legal Studies Division at St. John’s University.



So, it came as no surprise when a lawyer posted the following on Instagram: “Just settled a divorce over visitation of a parrot. [The decree will provide that] [n]either may teach it negative phrases about the other. I went to law school for this.” Matt Adler (@madler09), INSTAGRAM (July 7, 2018), <https://www.instagram.com/madler09/?hl=en>. If you feel like you need to reread the last statement, your eyes are not deceiving you. Did you ever think after all that time and resources spent on a graduate-level legal education you could possibly one day be dedicating litigation to the problem of the visitation, care, and custody of a parrot, or any pet for that matter? Although this comment may garner some chuckles, is it so farfetched to think that if corporations for legal purposes are entities acting as a single, fictional person, that pets could be as well? It begs the question, in the eyes of the law, should pets be people too, at least in how they fare in a divorce proceeding?

The Issue

With the ever-growing popularity of pet ownership and an evolving array of cultural issues discussed hereafter, the custody of domestic animals, pets, and furry friends is becoming a primary issue in divorce cases all over the country. Early in 2020, *Time* magazine issued an article on the growing concern, highlighting several cases that were profiled by local media around the country, including the New York divorce case of Paul Giarrusso and Diane Marolla. Melissa Chan, *Pets Are Part of Our Families. Now They're Part of Our Divorces, Too*, TIME (Jan. 22, 2020, 6:31 PM), <https://time.com/5763775/pet-custody-divorce-laws-dogs/>. “These dogs are like kids. . . . They’re everything to me,” Giarrusso said. *Id.* His ex, Marolla, felt the same way: “I will compromise everything,” she said in the interview, “but I won’t compromise these dogs.” *Id.* And they meant it too. *See id.* Custody of their sixteen-year-old miniature Italian greyhound and fourteen-year-old dachshund-chihuahua mix was the issue of their divorce case, and they spent thousands of dollars litigating it all the way to the New York Supreme Court. *Id.* Their case has all the hallmarks and outcomes of a highly contentious child custody case, complete with weekly visitation orders. *See id.*

The way these litigants view their pets is no longer an oddity or unique, and presently courts are ill-equipped to deal with these issues. Over the last ten years, a few states have tested the waters in creating statutory schemes to deal with the regular stream of cases requiring guidance and tests to resolve questions of custody over domestic animals.

What was a stream, may be turning into a flood. During and since the pandemic, society has become more acutely aware of

the important bond between people and their domestic animals, and the rate of pet ownership has been steadily increasing. While so many lived with isolation, regular contact with their pets became a primary source of comfort and socialization.

The issue of custody of animals in divorce cases is not a blip on the radar or a novel issue that will silently disappear from courts’ dockets anytime soon. If anything, it is becoming a primary issue in every divorce case where the parties have pets. What began as an issue isolated to a few states’ legislatures is now one being raised in courts and legislatures all over the country, and Utah may be next.

Pet Ownership Popularity

The nuclear family is a thing of the past, starting with a generation of millennials chipping away at its core meaning and defining “family” outside of what have been traditional and societal norms; many millennials view the concept of family as something wholly different. Lily Velez, *As Birth Rates in US Plummet, Are Pets Standing In For Children?*, VETERINARIANS.ORG (Nov. 2022), <https://www.veterinarians.org/birth-rates-in-us/> [hereinafter Velez, *Pets Standing In For Children*]. The standard notion of getting married after college, having two kids and a house with a white picket fence, is delayed or does not happen at all. Family is now in the eye of the beholder, defining for one’s self what it means for them.

In the United States, fertility rates are declining while pet ownership is on the rise. However, this phenomenon is not just in the United States, this is happening across the world in other industrialized countries. Tom Binnings, *Fewer Babies – More Pets*, COLORADO BIZ MAGAZINE (May 30, 2018), <https://www.cobizmag.com/fewer-babies-more-pets/>. The birthrates have been declining for several years, but in 2020 U.S. “birth rates reached a record low . . . , showing a 4% decline in the number of births from the year prior. This figure is not only double the average yearly decline since 2014, but represents the lowest number of births since 1979.” Velez, *Pets Standing In For Children*. Pets, often viewed as “fuzzy, low-maintenance replacements for children,” outnumbered children in the U.S. for the first time in 2006. Electa Draper, *Decline in Birth Rates Breeds Future Worry, Author Says*, DENVER POST (Mar. 10, 2013, 2:43 PM), <https://www.denverpost.com/2013/03/10/decline-in-birth-rates-breeds-future-worry-author-says/>. Similarly and contemporaneously, the ownership of small dogs weighing twenty pounds or less has doubled, making it the most popular kind of dog to own and this rise is continuing with no end in sight. Karol Ozerchowski, *Americans are Having Dogs*

Instead of Babies, FAUNALYTICS (Feb. 18, 2015), <https://faunalytics.org/americans-are-having-dogs-instead-of-babies/> [hereinafter Ozerchowski, *Dogs Instead of Babies*].

Sociologists postulate that the link between lower birth rates and higher pet ownership exists because the same age group that is getting married later, having fewer children, or forgoing parenthood entirely, is also leading the charge in small dog ownership. *Id.* Pet ownership is sometimes seen as a surrogate to traditional parenthood and studies show “that dogs form bonds of dependency with their owners not unlike the ones babies form with their parents.” *Id.* With a bond like that, stating that this group has “forgone parenthood” might be offensive since the belief is that their pets **are** their children.

In a recent survey of millennials who are pet owners and do not want children, participants stated they believe people with children are more stressed than people without children. Pet owners view their pet as their child, prefer the company of the pet over the company of children, and also say having a pet is more affordable and easier than having a child. Finding pet care if they need to leave the home for an extended period, leaving them at home alone

for a short period, and having more flexibility in their day-to-day makes it less stressful than caring for a child. They base decisions such as homeownership on their pets’ needs and “decisions were chiefly driven by the buyer’s dog (outranking marriage and kids as incentives).” Velez, *Pets Standing In For Children*. They buy clothing, celebrate birthdays, buy holiday presents, have portraits done, take out loans to cover vet costs, and make travel arrangements based on pet-friendly attractions. *Id.* These furballs have social media pages and albums dedicated to them, so it is no surprise when our four-legged friends see psychiatrists, are medicated for behavioral and depression issues, wheeled around in strollers, and have special dietary needs often requiring the most expensive food on the market. Ozerchowski, *Dogs Instead of Babies*. It is no wonder there is a shifting view of pets in the law.

Pets as “Property”

“[Y]ou can’t choose your family. But if you’re an animal your family can sure as heck choose you.” Jordan Burchette, *The 10 Biggest Inheritances Ever Left to Pets*, EVERPLANS, <https://www.everplans.com/articles/the-10-biggest-inheritances-ever-left-to-pets> (last visited Feb. 2, 2023).

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Until approximately ten years ago, the nearly universal view in all jurisdictions within the United States was that pets are personal property. Even the U.S. Supreme Court weighed in on the issue – and really summed up the status of the law here – in its 1897 decision, *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 693 (1897). The case concerned a dog “alleged to have been negligently killed by the railroad company.” *Id.* at 693. The Court squarely held that dogs were property, just like “rags and clothing” or “one’s home,” and were therefore subject to all limitations and conditions of ownership of such property. *Id.* at 695–96. Any recovery for the death of an animal is limited to its monetary value when last assessed. *Id.* at 696. While this holding specifically concerned dogs, there is nothing in the decision or the evolution of the law since that time that limits the application of the holding to dogs: for most of our shared legal history, the same could be said of cats, pigs, horses, and other animals considered domestic. *See generally id.*

The genesis of this perspective is what one would expect it would be: for most of human history, domestic animals “worked” or had a purpose beyond companionship. Dogs stood watch, guarded or herded livestock, and pulled sleds. Horses plowed fields, pulled wagons, and carried people. Cats were “mousers.” Pigs . . . well, let’s not talk about that in an article about how pets are now part of our families. These more traditional uses of domestic animals are still very much part of life in the modern world, but not universally. Particularly in the Western world, the role of domestic animals in society – at least in terms of dogs and cats but the same can be said for other animals – has dramatically shifted to be primarily one of sociality and companionship. *The Evolution of Pet Ownership*, PEDIGREE, <https://www.pedigree.com/article/evolution-pet-ownership> (last visited Feb. 2, 2023).

Even under this more contemporary view of domestic animals serving a role as companions, the law primarily has held to the perspective that pets are still personal property and subject to the same rules governing property. In a divorce, as personal property, pets are subject to “division” in the marital estate. Joseph Pandolfi, *Who Gets the Family Dog or Cat in a Divorce?*, DIVORCENET, <https://www.divorcenet.com/resources/who-gets-the-family-dog-or-cat-in-a-divorce.html> (last visited Feb. 2, 2023). Of course, the net result of this is that one divorcee is “awarded” the animal, and the other is not. And that is the end of the analysis.

Still, the “pets are property” perspective does not fully or accurately describe the way the law now treats them. Although the U.S.

Supreme Court described pets as “rags and clothing” in the 1897 *Sentell* decision, even an ambivalent view of contemporary pet culture would not consider pets as such. The law does not permit animals to be treated with the same indifference or recklessness society and individuals often treat other personal property. For instance, the law in Utah, and indeed most states, is heavily punitive for mistreating and abusing animals, and torture of an animal is a felony. *See, e.g.*, Utah Code Ann. § 76-9-301.

At the very least, the ownership of domestic animals is governed by special rules that reflect the reality that they live, breathe, feel, and hold a revered position in our lives and communities. Even still, those rules typically do not reflect the position that an animal may hold in a family, and what happens to that animal when the family is in dissolution through divorce. The name of a much-loved pet may not properly sit on a list of other personal property to be divided by the judge presiding in a divorce case.

So, what does a divorce court do to resolve the contested “ownership” of domestic animals?

The law is changing in fits and starts in several jurisdictions throughout the country to deal with this issue, and Utah should not be far behind. For those states who are beta-testing legislation to deal with this problem, there are innumerable questions that need to be asked and even more unsatisfactory answers.

The remainder of this article discusses some of this legislation enacted in other states, and the unresolved issues that remain.

Testing the Waters

Very recently, a number of states have attempted to address the elevation of pets as more than traditional property to be simply “divided” in a divorce decree.

Courts were the first to find themselves at a crossroads when it comes to our beloved furballs. Although the state code may view them as mere chattel, you must ask yourself whether a piece of furniture can comfort you when you are feeling blue? The piece of furniture may be the vessel to host the comfort, but our pets provide the comfort and therein lies the problem. A pet is “somewhere in between a person and a piece of personal property.” *Morgan v. Kroupa*, 167 Vt. 99, 702 A.2d 630, 633 (1997). “[M]odern courts have recognized that pets generally do not fit neatly within traditional property law principles.” *Id.* Therefore, a strict property analysis (*premarital purchase v. gift*) would be a rather cold view.

A notable case tackling this issue is the 2013 decision out of New York in *Travis v. Murray*, 977 N.Y.S.2d 621 (Sup. Ct. 2013), which was based on the decision of *Raymond v. Lachmann*, 695 N.Y.S.2d 308 (N.Y. App. Div. 1999). The decisions in both of those cases were foundational in catalyzing legislative enactments in both New York and Illinois. The court in *Raymond* had to resolve the issue of the ownership of a pet cat, Lovey. 695 N.Y.S.2d at 340. In *Raymond*, the court coined the standard “best for all concerned,” examining where Lovey had “lived, prospered, loved and been loved for” in determining ownership and custody of Lovey between divorcing parties, but not offering much else in their analysis to guide lower courts in making such decisions. *Id.* at 341. *Travis* was called upon to resolve the issue of the custody of Joey, the divorcing couple’s dog, and expanded the “best for all concerned” standard with additional considerations meant to guide such determinations: the benefits to each party by possessing the dog; the benefits to the dog by living with one party over another; who bore the majority responsibility of the dog’s needs; who spent more time with the dog and other relevant factors relating to this specific dog. 977 N.Y.S.2d at 624, 630–31.

Subsequent to these decisions, legislatures in both states have attempted to use them to craft accompanying provisions into the divorce code. Now enshrined in New York law, when determining equitable distribution of the parties’ companion animals in divorce proceedings, a court is to be guided by what is in the animals’ best interest; and in weighing the factors relevant to the animals’ best interest, a court must also evaluate the testimony, character, and sincerity of all the parties involved. *L.B. v C.C.B.*, 2022 NY Slip Op 22320 (N.Y.S.C., Kings Co. October 6, 2022), applying N.Y. Dom. Rel. Law § 236(B).

In Illinois, the legislature elevated companion animals to a new status which provides that a party “may petition or move for the temporary allocation of sole or joint possession of and responsibility for a companion animal jointly owned by the parties,” requiring the courts to “take into consideration the well-being of the companion animal.” 750 Ill. Comp. Stat. 5/501(f) (temporary orders); 750 Ill. Comp. Stat. 5/503(n) (final disposition). The Illinois laws specifically exclude service animals but leave the definition of companion animals quite vague. 750 Stat. 5/501(f); 750 Stat. 5/503(n). The new Illinois laws do not actually go so far as to shift the legal basis of the determination from ownership to custody. *See* 750 Stat. 5/501(f); 750 Stat. 5/503(n). Pets remain property under Illinois law. The court awards ownership of the pet, not custody or visitation. *See* 750 Stat. 5/501(f); 750 Stat. 5/503(n). However, the new provision

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allows courts to consider some factors similar to those that play a role in child custody determination, and to order joint ownership of a pet where appropriate. The new addition to chapter 750 section 5/503 reads in part: “If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties.” See also Laura Baldwin & Sean McCumber, *And They Call It Puppy Love: Pet Custody in Illinois*, DCBA BRIEF, 8, 10, (Nov. 2018), https://cdn.ymaws.com/www.dcba.org/resource/resmgr/brief_pdf/brief-nov-2018-v3.pdf.

In 2021, the Maine Legislature attempted to provide clearer and more tangible guidance in determining the disposition of pets in divorce proceedings when it passed “An Act to Provide for the Well-being of Companion Animals upon the Dissolution of Marriages.” 2021 Me. Legis. Serv. Ch. 285 (S.P. 222) (L.D. 535). The Act provides criteria to assist judges in determining a companion animal’s interests when considering and determining its future care and custody, including family members’ attachment, history of care, and other factors similar to standards applied in child-custody cases. Me. Rev. Stat. Ann. Tit. 19-a, § 953(10). The law even addresses the disposition of pets in cases of domestic violence. *Id.* § 953(10)(F).

Other states that have acknowledged the special problems of domestic animals in divorce proceedings have not been so clear, but rather have simply given a perfunctory nod to the issue and given judges in divorce proceedings authority to deal with it.

In 2019, California passed “Special Rules” for the determination of certain community property (aka pets). The California code now allows a court presiding over a divorce or legal separation to make orders regarding care and custody of pets as both temporary and permanent orders and “may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.” Cal. Fam. Code § 2605.

In New Hampshire, the legislature amended its divorce code to read: “Tangible property shall include animals. In such cases, the property settlement shall address the care and ownership of the parties’ animals, taking into consideration the animals’ wellbeing.” N.H. Rev. Stat. Ann. § 458:16-a(II-a).

Similarly, Alaska amended its property division statute for a court to order “if an animal is owned, for the ownership or joint ownership of the animal, taking into consideration the well-being of the animal.” Alaska Stat. Ann. § 25.24.160(a)(5). Interestingly, the Alaska law specifically confines its definition of “animal” to “vertebrate living creature not a human being.” Alaska Stat. Ann. §25.24.990.

Where is the Law Going?

Although certainly well-intentioned and something is usually better than nothing, these legislative attempts at addressing the pets-in-divorce question fall far short.

Even the best of these statutory schemes leave numerous unanswered questions:

What are the criteria for determining pet “custody”?

Some of the statutes provide some guidance as to what this should be, others provide the limited or murky “well-being” or “best interest” of the animal standard. What should the criteria be for this decision and what evidence should be required? Presently, the lack of clear guidance in even the more descriptive statutes is fodder for more litigation and appeals. Parties and courts need clarity, whether lawmakers decide to continue to treat animals as solely personal property or treat them entirely like human children. The guiding principles and criteria need to be clear.



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Who makes recommendations to the court?

No matter the issue, divorce courts regularly employ the experience and perspective of experts on a range of issues, including finances and child custody. Will courts do the same for pets? Will courts seek the assistance and expertise of guardians ad litem or custody evaluators who specialize in animal bonding? Do the courts have enough resources to do so? If so, who pays for these experts and what will their qualifications be? Network television's *Dog Whisperer*, Cesar Milan?

Who pays for the care and maintenance of pets post-divorce? And how does that question impact the issue of custody?

These can be difficult questions because caring long-term for a domestic animal may be an expensive venture and because employer-paid insurance typically does not cover pets. Does the "non-custodial" party have to contribute to the costs to care for the pet, similar to child support and division of medical expenses in child custody. What if that status changes? Are we opening the door to ongoing litigation regarding these issues, again, similar to child custody and maintenance cases? In terms of pets, do better finances always mean better care for the animal?

Is shared/joint custody of animals possible? And what about "shared" time, like parent-time with children?

So far, the statutory schemes in other jurisdictions appear to answer no to these questions. Should that be the final word, or should more flexible arrangements about custody and visitation be possible? In the end, are we going to treat this just like custody arrangements with children? How far do we go down that rabbit hole?

What about the animals that are more than companion animals?

What about service animals and emotional support animals? And what about companion animals that are also working animals, like on a farm? Are they treated the same or should there be special rules for them?

Since a pet is generally "bought" or "acquired" and not "born" to its owners, unlike a child, how does when the pet is acquired factor into a court's decision?

The clear case is when a pet is acquired during marriage; but what about the common case of a companion animal being brought into a marriage by one of the parties, or given to a party as a gift? Traditionally, the pet may not be considered marital property under those circumstances. Will those conventions hold in determining custody of the animal in a divorce? How do we deal

with the potential of a constitutional "taking" issue if a court awards "custody" of a pet when it is not a marital asset? Remember the 1897 *Sentell* decision has never been overturned and it is still good law – as far as the U.S. Supreme Court is concerned, pets are still property and should be treated by the traditional conventions of personal property. *See* 166 U.S. at 695–96. Does the law as enshrined in *Sentell* for more than 100 years still stand? Are dogs property, just like "rags and clothing" or "one's home" and therefore subject to all of the limitations and conditions of ownership of such property?

How does this apply to unmarried couples splitting up?

Many of the same conventions about care, custody, parent-time and maintenance of children apply to unmarried couples exactly in the same way as in divorce. Should the treatment of pets be any different?

These are extremely complicated problems, and no doubt there will not be one solution that will appease all pet lovers. At the same time, with the increasing sentiment that pets are part of modern families, the issue is not going away: courts and legislatures will be called on to resolve these questions. As Utah looks at the status of its own laws considering how domestic animals fare in divorce proceedings, it should consider and learn from the missteps of other jurisdictions and pave a more straightforward path in resolving these questions.

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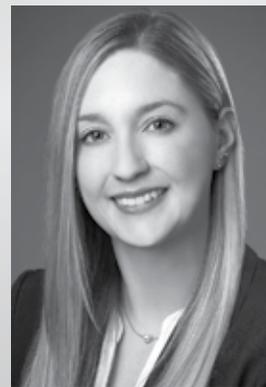
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Appellate Highlights

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

In re A.B.

2022 UT 39 (Nov. 25, 2022)

The supreme court affirmed the court of appeals' reversal of a juvenile court's decision to place the mother's child in the custody of her aunt and uncle. On appeal, the guardian ad litem and the aunt and uncle argued that the courts should apply a deferential standard of review not just to best interest determinations, but "to 'all aspects' of juvenile court determinations." In affirming the court of appeals, the Supreme Court held that "[u]nlike the best interest determination . . . with nearly unlimited possible scenarios and factors for the juvenile court to consider, a neglect determination requires a court to operate within a closed universe. **Once the facts have been established, the juvenile court is limited to determining whether the statutory criteria for neglect have been met.** Doing so is primarily a law-like endeavor." Therefore, the court held that the proper standard of review was a non-deferential mixed question of fact and law standard.

Williamson v. MGS by Design, Inc.

2022 UT 40 (Nov. 25, 2022)

A sales agent alleged her former employer violated state statute by failing to pay commissions. The company successfully moved to dismiss, arguing a provision in the statute referencing an agreement required a signed writing as a condition of recovery. Reversing the dismissal, the supreme court held **the plain language of the Utah Sales Representative Commission Payment Act did not condition recovery on the existence of a signed writing.**

Kingston v. Kingston

2022 UT 43 (Dec. 22, 2022)

In this case, the trial court prohibited the father, who was a member of the Kingston polygamist group, from encouraging the children "to adopt the teachings of any religion" without the mother's consent. The court held that **the father has a fundamental right to encourage his children in the practice of religion despite the court's award of sole legal custody to the mother.** It held that the award of legal custody to the mother limits the father's parental right only to the extent necessary to provide mother with the authority to make major decisions for the children, and that the trial court's prohibition was not narrowly tailored to address potential harms the trial court identified.

UTAH COURT OF APPEALS

Tooele County v. Erda Community Association

2022 UT App 123, 521 P.3d 872 (Nov. 10, 2022)

The Erda Community Association sued Tooele County, petitioning for judicial review of a county planning commission decision. The County moved to dismiss the petition, asserting the Association failed to exhaust its administrative remedies. The district court denied the motion, concluding that the Association was not required to exhaust its administrative remedies because it properly alleged that the County "acted outside the scope of its defined, statutory authority." On interlocutory appeal, the court of appeals reversed, holding that, **regardless of whether the County's approval of a particular land-use decision was erroneous or in contravention of a statute or ordinance, the County had a "defined, statutory authority" to consider such applications.** Accordingly, the "outside the scope" exception to the exhaustion requirement did not apply.

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

In re A.G.**2022 UT App 126, 522 P.3d 31 (Nov. 10, 2022)**

The issue presented here was “whether, under the language of [Utah Code § 80-4-307], parents who intend to relinquish their parental rights in connection with a child welfare proceeding may effectuate that relinquishment under oath orally in court, without ever signing anything, or whether they must at some point sign a document effectuating that relinquishment.” In reversing the trial court’s decision, the court of appeals held that **the plain language of the statute requires a signed document to relinquish parental rights and an oral relinquishment in court is insufficient.** The statute requires the relinquishing parent to “certify” that the parent “executing the . . . relinquishment has read and understands the . . . relinquishment and has signed” it “freely and voluntarily,” with the relinquishment being “effective when the voluntary relinquishment . . . is signed.”

State v. Calata**2022 UT App 127 (Nov. 17, 2022)**

In this appeal of restitution awarded following a conviction arising out of a high-speed chase, the court of appeals held that **the defendant failed to establish ineffective assistance of counsel based on claims that his attorney should have argued for apportionment of fault between the defendant and officers for damages caused by the chase.** The decision

has an interesting discussion of arguments for and against applying apportionment of fault in criminal restitution cases.

Fuja v. Woodland Hills**2022 UT App 140 (Dec. 8, 2022)**

The Fujas sent demand letters to Woodland Hills complaining about a building permit issued to their neighbors. Not receiving a response, the Fujas appealed the City’s lack of response to the Board of Appeals, which rejected their appeal because a city’s inaction was not a reviewable land use decision, and it was otherwise untimely based on the building permit being issued long before the appeal. The district court affirmed as did the court of appeals, holding **that inaction did not amount to an appealable “land use decision” pursuant to Utah Code § 10-9a-802.** The only land use decision at issue – the issuance of the initial building permit – was unreviewable as time-barred.

In re K.Y.**2022 UT App 142 (Dec. 15, 2022)**

After the failure of an extended period of reunification therapy, the juvenile court terminated mother’s parental rights. The court of appeals reversed, holding that **the lower court had failed to consider feasible alternatives to termination, including the possibility of a permanent custody and guardianship arrangement.** Instead, the court had only considered the feasibility of returning the children to mother.

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Zubiate v. American Family Insurance Company
2022 UT App 144 (Dec. 22, 2022)

Analyzing an arguably “inartful” complaint under Utah R. Civ. P. 8 and 12(b)(6), the court of appeals adopted the reasoning of federal authorities holding that, **while a complaint must “allege facts supporting the claim, a plaintiff is not required to specifically describe the legal theories upon which the claim rests.”** “Thus, as long as the plaintiff has set forth facts that allege ‘a legal right, the invasion of which by defendant has caused damage to the plaintiff,’ . . . that pleading is sufficient.”

Oldroyd v. Oldroyd
2022 UT App 145 (Dec. 22, 2022)

The court of appeals held that **work done on a home prior to marriage could not be treated as “contribution” of marital effort or expense that enhances marital property.** It also rejected application of the “extraordinary circumstances” exception to allow husband to reach ex-wife’s premarital assets to compensate him for his premarital contribution to the home.

In re H.C.
2022 UT App 146 (Dec. 22, 2022)

The court of appeals affirmed the juvenile court’s termination of reunification services with mother and award of permanent custody of the minor child to his father. In doing so, **the court rejected the mother’s arguments that the permanent custody order “overstepped the statutory distinctions between juvenile courts and district courts” and “overstepped**

the statutes that direct when and how permanency plans should be changed.” The court explained, the juvenile “court’s grant of permanent custody and guardianship to Father was both appropriate and necessary given the mandate of the applicable statutory scheme.” It had acquired original jurisdiction over the child when the State filed a petition for protective supervision services, alleging abuse and neglect. It continued to exercise jurisdiction over the child following his removal. And, because the juvenile court had ordered reunification services, it was required to hold a permanency hearing within 12 months. Having found the child could not be safely returned to mother, the juvenile court was required by statute to order termination of reunification services and “make a final determination regarding whether termination of parental rights, adoption, or permanent custody and guardianship is the most appropriate final plan for [the child],” Utah Code § 80-3-409(4)(a)–(b).

10TH CIRCUIT

Bledsoe v. Carreno
53 F.4th 589 (10th Cir. Nov. 15, 2022)

After DNA evidence and a suicide note exonerated an individual convicted of murder, he sued under § 1983 alleging officers fabricated and suppressed evidence. Resolving an issue of first impression, the Tenth Circuit held ***Parratt* abstention, which operates as a bar to procedural due process claims if there are adequate state post-deprivation remedies, did not apply to substantive due process claims.** As a result,



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Michael P. Affleck
Associate Attorney

Michael Affleck’s practice focuses on criminal defense and civil litigation. Prior to joining Clyde Snow Mr. Affleck worked as a prosecutor with the Salt Lake City Prosecutor’s office. Mr. Affleck graduated from the University of Utah’s S.J. Quinney College of Law in 2021. When not in the office, you can find him in a canoe, on a bike, and fly-fishing around the beautiful state of Utah.



Jake Taylor
Shareholder

Jake Taylor started working with us in January 2020, his practice focuses on white collar criminal defense, securities enforcement, regulatory defense, and government and independent investigations. Prior to joining Clyde Snow, Mr. Taylor served as a Deputy District Attorney at the Salt Lake County District Attorney’s Office. He also previously served as an Assistant Attorney General at the Utah Office of the Attorney General. At both agencies, he prosecuted numerous white collar cases in Utah state courts.



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an individual may state a claim for deprivation of substantive due process regardless of state-law tort remedies.

Wells Fargo Bank v. Stewart Title Guaranty Company
55 F.4th 801 (10th Cir. Dec. 12, 2022)

Wells Fargo sued Stewart Title alleging that the bank's defaulting debtor had not been able to deliver good title to one parcel of property securing the loan. Following trial, the district court agreed with the bank and awarded it the amount of its loss, based on the value of the parcel. These decisions were affirmed as factual findings supported by the evidence. The court erred, however, in failing to award prejudgment interest. Applying Utah law, the court of appeals held that damages were calculated based on "known standards of value" – generally accepted methods of appraising real property. **Even though the appraisers disagreed on value, there were no inherent uncertainties, such as need for repairs, that would require the factfinder to make discretionary decisions. Thus, prejudgment interest should have been awarded.**

United States v. Nevarez
55 F.4th 1261 (10th Cir. Dec. 19, 2022)

On appeal from denial of a motion to dismiss based on a Speedy Trial Act violation, the Tenth Circuit affirmed, holding that defense counsel's objection before the deadline for trial was premature and therefore ineffectual. **The appellate court emphasized that "[a]n actual violation of the Speedy Trial Act must exist at the time the motion is made."**

Sumpter v. Kansas
56 F.4th 871 (10th Cir. Dec. 28, 2022)

After exhausting an appeal of a state conviction, the petitioner sought a writ of habeas corpus in federal court. The Tenth Circuit held, as a matter of first impression, **petitioner was required to obtain a certificate of appealability on claims raised in his cross-appeal before the state appellate court.** Because he could not obtain the certificate on the issues raised in his cross-appeal, the court dismissed those claims for lack of jurisdiction.

Rocky Mountain Wild v. U.S. Forest Service
56 F.4th 913 (10th Cir. Dec. 30, 2022)

The Tenth Circuit affirmed summary judgment in favor of the U.S. Forest Service in this Freedom of Information Act case. Among other things, the court held the Forest Service had put forth reasonable efforts to comply with the FOIA request. This included joining the Seventh Circuit in holding **it was not inherently unreasonable for the Forest Service to allow employees to customize the terms they used to search their own records, particularly given the Forest Service identified the particular terms used.**

United States v. Maldonado-Passage
56 F.4th 830 (10th Cir. Dec. 23, 2022)

For "**all you cool cats and kittens**" who are interested in the interpretation of the murder-for-hire statute, 18 U.S.C. § 1958(a), in this sentencing appeal the Tenth Circuit, as a matter of first impression, adopted the "**plot-centric**" interpretation. Under that interpretation, the statute criminalizes each plot or scheme to murder an individual rather than each use of the facilities of interstate commerce in service of a murder-for-hire scheme. Even under this interpretation, however, the court affirmed the district court's order sentencing the Tiger King to separate sentences for two violations of § 1958(a). The evidence established two independently operating plots to kill Carol Baskin.

Fresquez v. BNSF Railway
52 F.4th 1280 (10th Cir. Nov. 10, 2022)

The Tenth Circuit addressed, for the first time, the **difference between front pay in lieu of reinstatement and damages for loss of future earnings capacity.** Front pay compensates a plaintiff "for the immediate effects of [defendant's] unlawful termination of her employment" and "approximate[s] the benefit [plaintiff]s would have received had she been able to return to her old job," whereas lost future earnings compensate a plaintiff "for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of" the defendant's unlawful conduct.

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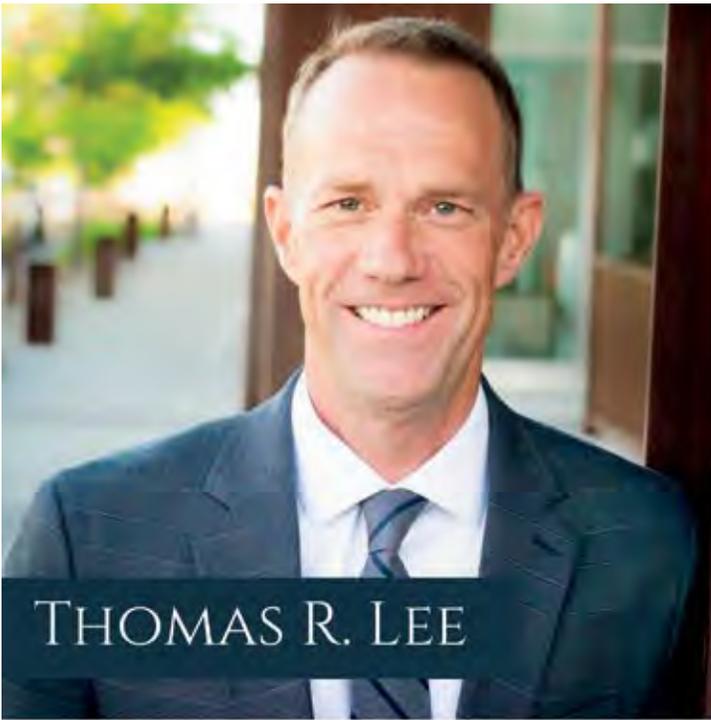
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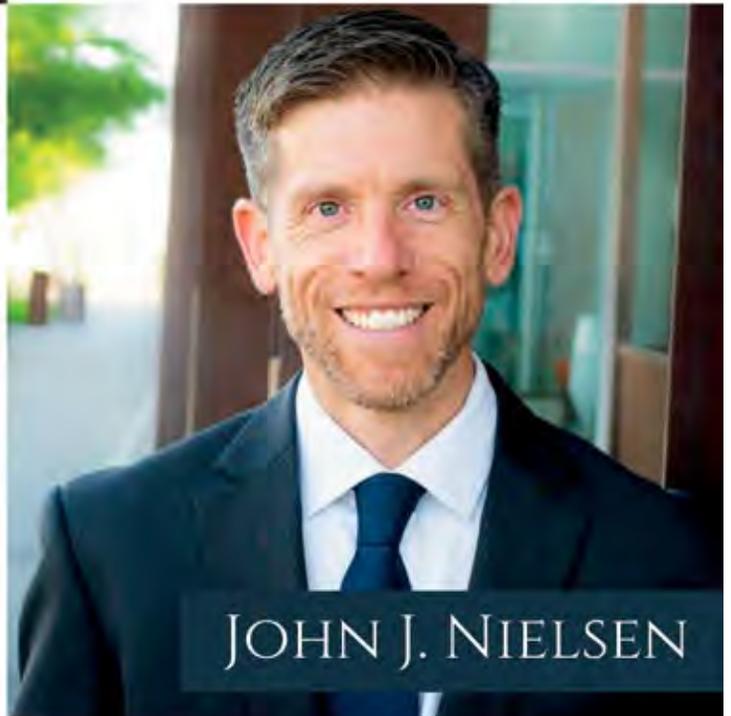
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Persuasion Science for Trial Lawyers

by John P. Blumberg

Reviewed by Donald J. Winder

You see, Rudy, in law school they don't teach you what you need to know. It's all books and theories and these lofty notions of the practice of law as a profession, like between gentlemen, you know. It's an honorable calling, governed by pages of written ethics.

— The RAINMAKER, by John Grisham

In law school, it's the Socratic method, Latin words, legalese, the case method, and much more. All designed to allow lawyers to talk to other lawyers and present their cases to judges. But what about those other important people with whom we must relate, like clients, witnesses, and jurors? Before law school, we were just average people who had no problem communicating. After law school, our spouses and children had difficulty understanding us. When did it become important to say “prior” instead of “before,” and “subsequent” instead of “after”? Many lay persons confuse the meaning of these words, but lawyers seem determined to make the simple complicated. (And what's a “lay person” anyway? A non-lawyer?) Learning how to communicate is one of the reasons why every lawyer must read John Blumberg's book, *Persuasion Science for Trial Lawyers*.

I have known John for decades through our affiliation in the American Board of Trial Advocates. He is the consummate trial attorney. John has tried hundreds of cases, including over seventy jury trials, published dozens of articles, and taught on the faculty of several trial academies. John is here to help us relate. Relate to our clients, jurors, and other laypersons. Also, to relate better to other lawyers and judges. But that's only the beginning. His book explores the brain science of how people accept or reject information and translates decades of

published research into nuggets that can be used by lawyers in fulfilling their responsibility to persuade.

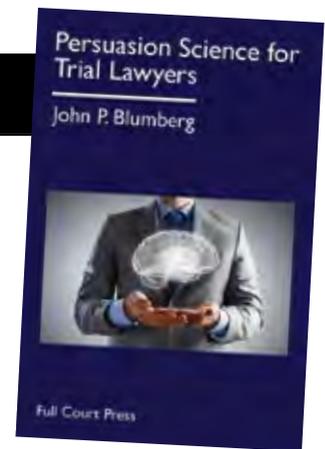
Persuasion Science for Trial Lawyers isn't limited to trial advocacy; it begins by exploring the psychology of attorney-client dynamics. For example: A client arrives for her appointment. What is our inclination as lawyers? To pepper her with questions. To get to the heart of the matter as soon as possible. After all, we know

what's important and what isn't. What does the client want to do? To tell her story. Treat your client the way you would a friend who wants to tell you something important. So let your clients, and for that matter witnesses, tell their stories. Then, after you give them advice, ask them what questions they have. John explains,

This is very different from, ‘Do you have any questions?’ Many people may feel that an affirmative response to ‘Do you have any questions?’ would imply a lack of intelligence, so they answer, ‘No.’ By asking ‘What are your questions,’ you indicate that you expect that they will have questions, and it is more likely that they will ask for clarification.

The book then moves to the psychology of relationships. Be civil to everyone, especially opposing counsel. You may be adversaries,

DONALD J. WINDER had a trial practice for almost fifty years in Salt Lake City. He is now happily retired.



Persuasion Science for Trial Lawyers

by John P. Blumberg

Full Court Press (2021)

252 pages

Available in paperback, ebook, and audio versions.

but you don't have to be enemies. It will only make the transaction or trial last longer and be more expensive and stressful for everyone. In other words, allow the good person you are to shine through, and the reaction is often reciprocal.

John then introduces us to "The Science of Jury Education." Lawyers must be teachers and jurors are our students. Learning requires understanding, then absorbing, which leads to remembering. And the use of pictures, analogies, metaphors, and storytelling will enhance learning. John writes:

Jurors who are presented with subject matter that was previously unknown or only vaguely understood must be motivated to pay attention and enjoy the learning experience. . . . As teacher, the trial lawyer's instructional aids will include documents, pictures, witnesses, and experts. But a good teacher will understand that his or her students have limitations on the amount of information that they can process. The science of education has demonstrated that extraneous, unnecessary, and redundant information can use up valuable and limited processing capacity. Accordingly, eliminate it from the trial presentation.

This book covers all stages of trial, from trial preparation to closing argument, and I think that these principles apply not only to trials, but also to mediation and negotiation. John translates the science from peer-reviewed studies to make it easily understandable to lawyers. The chapters explore curiosity, simplicity, cognitive overload, mental fatigue, bias, prejudice, and how complexity can result in jurors resorting to truisms and so-called "common sense." John writes,

The model of a fair jury is one that will be unbiased and impartial. In reality, no juror is truly unbiased or impartial. Every person who is seated as a juror brings a lifetime of attitude-shaping experiences that will color perceptions and motivate preferred outcomes. These motivations are biases in the truest sense because they affect the process of reasoning, including how evidence is evaluated and decisions are made. Regardless of whether people believe they harbor no bias, they actually do and, depending on the strength of the bias, they will construct a rational model that supports the outcome they favor.

John reminds us that making decisions (such as reaching the verdict) is not just based on logic, critical thinking, or common sense. Research has shown there are many things influencing

our decisions which have little or nothing to do with conscious thoughts. The emotional brain often makes a decision, leaving the rational brain to find reasons to justify the decision.

Using some of the ideas examined in *Persuasion Science for Trial Lawyers*, I can see how a plaintiff's opening statement must incorporate the interplay of these many principles and techniques. Start with the rules. "The driver knew there would be children present, knew that required safe driving and vigilance to protect the children." Then move quickly to culpability: "The defendant was texting as he drove." Continue telling the story in a series of short sentences, focusing on the harm caused and what happens when the rule isn't followed. Don't just tell it. Involve the senses. Use pictures and illustrations. Keep it simple and focused. Eliminate anything not necessary to the themes of the case. Remember, the listener's attention fades over time. (Maybe that's why Ted Talks are eighteen minutes long.) Compel your conclusions not through force but by allowing the jurors to discover those conclusions on their own.

Whether you are preparing to try your first case, or are a veteran of many trials, you must study *Persuasion Science for Trial Lawyers* in-depth.

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The California Privacy Rights Act (CPRA): Key Changes to California's Privacy Laws

by Rachel Naegeli and Robert Snyder

Just when you thought you were finished addressing your client's privacy compliance following the implementation of the General Data Protection Regulation in Europe, a patchwork of privacy legislation erupted across the United States. As you know, the first state to address consumer privacy with comprehensive privacy legislation was California with the California Consumer Privacy Act in June 2018 (CCPA). Colorado, Connecticut, Utah, and Virginia followed suit with their own consumer privacy laws. As a transactional attorney in Utah, you have likely walked your clients through a process to determine whether any of those laws applied to them and took them down the path to compliance. Perhaps you thought (even hoped) that process was over, but no! California's newest layer of privacy requirements came into force on January 1, 2023. Your clients have until July to figure out whether the new set of requirements applies to them and to take the necessary steps to comply.

You might be wondering who in California thought yet another privacy act was needed. It turns out it was the California citizens themselves who decided that the CCPA needed improvement and passed their own ballot initiative, known as Proposition 24, in November 2020. The resulting law is called the California Privacy Rights Act (CPRA).

The combination of the CCPA, a state legislative bill, and the CPRA (collectively California Data Laws), has created a new layer of requirements for some Utah businesses that process the

personal information of California residents. To clarify, the CPRA does not replace the CCPA; the CPRA "amends" existing provisions of Title 1.81.5 of the California Civil Code and adds requirements. The CPRA became effective on January 1, 2023, but the final regulations have yet to be released. While many unknowns remain, one thing is certain: the California Data Laws will yield some of the strongest privacy protections in the country. It is important to take steps now to ensure your clients are not caught in a compliance gap in July.

This article highlights some of the recent changes to California Data Laws – focusing on how to tell whether they apply to your clients – and explains some steps you should take now to help your clients comply.

Is My Client Subject to the California Data Laws?

To help your client identify whether it is subject to the California Data Laws, you must first become familiar with three key definitions and the California Data Laws' threshold requirements. The definitions for "personal information," "consumer," and "covered business" can serve as guideposts for organizations on the path to compliance, helping them understand if their operations fall into areas regulated by the California Data Laws. The threshold requirements then help an organization understand if its operations are significant enough to be regulated by the California Data Laws.

RACHEL NAEGELI works at Kirton McConkie's St. George office where she is a member of the firm's International Section and Cybersecurity and Data Privacy Section. Her practice focuses on international transactional law and data privacy law compliance.



ROBERT SNYDER works at Kirton McConkie. He focuses on technology companies, corporate law, and privacy law. He helps both emerging and established companies and those operating internationally. He is the vice chair of the Utah Bar's Cyberlaw Section.



Personal Information

The CCPA broadly defines personal information to include any information that either directly or indirectly:

- Identifies, relates, or describes a particular consumer or household, or
- Is reasonably capable of being associated with or could reasonably be linked to a particular consumer or household.

The CCPA protects data even if it is unrelated to a single individual when it covers households and devices. Further, in addition to extending protections to individual's name and contact information, it protects information connected to any unique identifier. The CPRA adds to this, providing eleven personal information categories with examples. The examples are only illustrative and must qualify under the CCPA definition to be considered personal information.

Personal information does not include information lawfully made available from government records or deidentified or

aggregate consumer information (which is discussed later in this article). The CPRA broadens the exceptions to truthful information lawfully shared that is a matter of public concern.

Consumer

The CCPA provides personal information rights and protections for consumers. Consumers are natural persons who are California residents. California residents include individuals who are either: (1) in California, for other than a temporary or transitory purposes; or (2) domiciled in California but currently outside the state for a temporary or transitory purpose. This definition will not change under CPRA.

Covered Business

The California Data Laws' obligations only apply to certain businesses. For purposes of this article, we will call a business a "Covered Business" when it meets the "Business" definition under CCPA. An organization is a "Covered Business" when it does business for profit in California, collects a consumer's personal information (directly or indirectly), and functions as a

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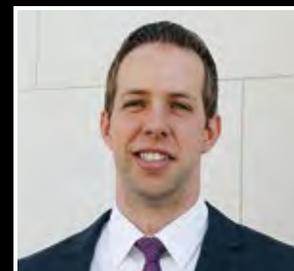
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controller. A controller is an entity that determines the purposes and means of processing (alone or jointly with others). The CCPA does not apply to nonprofit or public entities.

The CPRA broadens the scope of organizations that are subject to the California Data Laws. Under CPRA, the definition includes joint ventures or partnerships composed of other Covered Businesses that each have at least a 40% interest in the entity. In addition, CPRA provides that persons doing business in California may voluntarily certify to the California Privacy Protection Agency that they will comply with and be bound by the California Data Laws.

Threshold Requirements

The California Data Laws do not apply to all businesses that meet the definition of a Covered Business. The California Data Laws require that a Covered Business's activities reach one of three thresholds before their provisions apply. To meet the threshold, the Covered Business must either:

- Have an annual gross revenue that exceeds \$25 million

(adjusted for inflation). The CPRA clarifies that a business should look at its revenue for the preceding calendar year, beginning on January 1, to determine whether it meets the annual gross revenue threshold.

- Annually buy, receive, share, or sell the personal information of more than 100,000 consumers, households, or devices for commercial purposes (alone or in combination with others, which is a 50,000 increase from the CCPA); or
- Derive 50% or more of annual revenues from selling consumers' personal information, which the CPRA defined to include annual revenues from sharing consumers' personal information for cross-context behavioral advertising purposes.

Upon meeting one of these thresholds, a Covered Business must comply with the obligations imposed under the California Data Laws. These obligations include fulfilling statutorily defined consumer rights.



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Consumer Rights Under the California Data Laws

The California Data Laws provide consumers with specific rights regarding their personal information that Covered Businesses must honor. The CCPA lists six such rights, which will be discussed in more detail below. They include: the right to know, the right to delete, the right to opt-in, the right to opt-out, the right to freedom from discrimination, and the right to initiate a private cause of action for data breaches. The CPRA expanded these rights in important ways and added two additional rights: the right to correct personal information and the right to limit use and disclosure of sensitive personal information. The following section will highlight some of the ways CPRA expands consumer privacy rights.

The Right to Know

The “right to know” gives consumers a right to be informed of the personal information that a Covered Business collected, sold, or disclosed about them during the past twelve months. With the CPRA, consumers also have the right to know about personal information shared for cross-context behavioral advertising.

The Right to Delete

Consumers have the right to request that a Covered Business delete their personal information. The CPRA further requires Covered Businesses to forward deletion requests to service providers, contractors, and to all third parties to whom the Covered Business sold or shared the information. An exception applies if such efforts prove impossible or involve disproportionate effort. The CPRA revised the statutory reasons a Covered Business may keep personal information. Among other reasons, under Section 1798.105, a Covered Business may be entitled to retain information for the purposes of detecting security incidents and engaging in public or peer-reviewed scientific, historical, or statistical research. Cal. Civ. Code § 1798.105.

The Right to Opt-Out

The California Data Laws grant consumers who are at least sixteen years old the right to direct a Covered Business to stop selling their personal information. The CPRA recently expanded this right to include prohibiting the Covered Business from sharing for cross-context behavioral advertising purposes. The California Data Laws require a Covered Business that sells personal information to provide consumers with a specific notice about their rights to opt-out of such sale or sharing of their personal information. The Covered Business’s webpage must contain

links titled “Do Not Sell or Share My Personal Information” that send consumers to a webpage where they can opt-out.

The CPRA provided greater options for consumers relating to their sensitive personal data. Consumers may direct Covered Businesses to limit the use of their sensitive personal information to expressly permitted purposes. Covered Businesses that use or disclose sensitive personal information beyond the authorized business purposes must have a conspicuous homepage link titled “Limit the Use of My Sensitive Personal Information.” The link must lead consumers to a webpage where they can exercise their opt-out right.

The CPRA permits one homepage to exercise all three opt-out rights.

The Right to Correct

Under the CPRA, Covered Businesses must inform consumers of their right to correct inaccurate personal information. Future regulations will explain how often and under what circumstances a consumer may request a correction of inaccurate personal information (Cal. Civ. Code § 1798.185(a)(7) (effective Jan. 1, 2023)). Covered Businesses must use commercially reasonable efforts to fulfill a consumer’s request to correct data.

The Right to Freedom from Discrimination

The CCPA protects consumers who exercise their CCPA rights from retaliation. With the CPRA, this right is now specifically available to employees, applicants for employment, and independent contractors. However, this prohibition against discrimination does not bar businesses from offering and managing loyalty rewards, premium features, discounts, or club card programs.

Honoring Consumer Rights

For requests related to the previously described rights, the Covered Business must promptly take steps to verify the identity of the individual making the request. Requests must be satisfied within forty-five days of receipt. The Covered Business receiving the request may take an additional forty-five days to satisfy the request when reasonably necessary and if consumer receives notice of the extension within the first forty-five day period.

There are some exceptions that may relieve your client of its obligation to disclose information. One such exception relates to household data. In this context, household means a person or group who all: (a) reside at the same address, (b) share a common device or the business’s service, and (c) use the same group account or unique identifier. Under the CPRA, when a request relates to household data, certain rights do not apply including the rights to:

- delete personal information,
- correct inaccurate personal information,
- know the personal information collected by the business, and
- request disclosure from the business about the personal information that it sells.

Notification and Other Requirements

The CPRA clarifies how Covered Businesses are required to inform consumers of their personal data processing practices and places limitations on the processing itself.

Notification Requirements

Consumers are entitled to learn a wide range of information about a Covered Business's personal information practices from mandatory notifications. Specifically, they can learn about the personal information a Covered Business collects, sells, or discloses, the categories of third parties purchasing or receiving their data, and how to exercise their CCPA rights. The general

notice obligations fall into four distinct notice types:

- **Privacy policies** are required for Covered Business.
- **Collection notices** must be issued whenever personal information is collected by a Covered Business.
- **Opt-out right notices** must be provided by Covered Businesses that sell personal information.
- **Financial incentive notices** must be given whenever a financial incentive, price difference, or service difference related to the collection, retention, or sale of personal information is given.

The CPRA expanded these notice requirements but, as of the time of this writing, has not changed the types of notices required. This may be an area for further development, however. The California Privacy Protection Agency is expected to update or issue new regulations regarding required notices later this year.



Parsons Behle & Latimer Welcomes Whitney McKiddy

Parsons Behle & Latimer is pleased to announce that Whitney McKiddy has joined Parsons' litigation and appeals teams as a new associate. A litigator and appellate attorney, Ms. McKiddy represents clients with issues related to complex commercial litigation, intellectual property and employment law.

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Limitations on Data Processing and Other Requirements

In addition to providing consumers with rights and requiring various notices, the California Data Laws require Covered Businesses to limit the amount of data processed and the time the data is retained, take additional steps regarding data security, undertake risk assessments, and obtain prior consent from consumers under certain circumstances. Some of these important limitations and obligations are highlighted below.

Data Minimization

The CPRA implemented a new data minimization requirement. Covered Businesses cannot keep a consumer's personal information (including sensitive information) longer than reasonably necessary for each disclosed collection purpose. To comply with the new CPRA data minimization principles, your clients must:

- a. Only collect and use personal information (including sensitive information) as indicated and agreed upon by the data subject.
- b. Not collect more information than necessary.
- c. Only retain personal data (or sensitive personal data) for the time agreed upon with the data subject or no longer than needed to fulfill the business needs.
- d. Develop a routine schedule for deletion or deidentification.

Legal Purposes for Data Collection

Covered Businesses must provide consumers with further notice when collecting or using personal data in ways that may be incompatible with previously disclosed reasons for collecting or using the data. The CPRA directly restricts personal information use and sharing to what is "reasonably necessary and proportionate" to achieve:

- The collection or processing purpose.
- Another disclosed purpose compatible with the context in which the personal information was collected. Prohibits further processing in a manner incompatible with those purposes.

Before these changes made by the CPRA, the CCPA only contained a generalized restriction on using collected personal information for additional purposes without providing notice to the consumer.

Data Security

The CPRA creates an explicit obligation for a Covered Business to implement reasonable security procedures and practices. These mechanisms must be appropriate to the nature of the personal information to protect the information from unauthorized access, destruction, use, modification, and disclosure. In the future, regulations may require a Covered Business to perform cybersecurity audits on an annual basis if its personal information processing presents a significant risk to consumers' privacy or security.

Risk Assessment

Risk assessments and cybersecurity audits are new requirements under CPRA. Risk assessments will need to be regularly submitted whenever processing activities present a significant risk to consumers' privacy or security. Cal. Civ. Code § 1798.185(a)(15). The regulations to be released by the California Privacy Protection Agency will provide further direction. While draft regulations were published in 2022, revised regulations are not expected until late January 2023, and they will not be finalized until later in the year.

Prior Consent Requirements

In certain circumstances, Covered Businesses must secure the prior consent of consumers before personal information can be processed. The CPRA increased the number of circumstances where prior consent is required. Some of these circumstances include:

- Sharing personal information of a consumer under sixteen for cross-context behavioral advertising purposes.
- Using or disclosing a consumer's sensitive personal information outside of the statutorily permitted purposes after receiving the consumer's limitation request.
- Entering a consumer into a financial incentive program.

Other circumstances will require a Covered Business to obtain the prior consent of a consumer, but these are the most common situations.

Notable Exceptions and Exemptions

The California Data Laws provide for multiple exceptions to compliance. One of those exceptions, which is also commonly found in other laws, applies to deidentified or aggregated data. While other exceptions also exist, it is worth noting that often those exemptions apply to data that is already regulated by federal law.

Deidentified and Aggregated Data

The CPRA considers data deidentified when the data cannot reasonably be used to infer information about, or otherwise be linked to, a particular consumer. To this end, the Covered Business must commit to maintain and use this information in a deidentified form and contractually obligate recipients of the deidentified data to comply with all the CPRA's deidentification provisions.

Although similar in nature to deidentified data, aggregated consumer information relates to a group or category of consumers from which individual consumer identities were removed. The identities cannot be linked or reasonably linkable to any consumer or household, including via a device.

Since deidentified or aggregated data is not subject to the Data Laws, Covered Businesses can strategically avoid some of the notice requirements and rights granted to consumers. For example, as part of a data subject's request for deletion, a Covered Business could deidentify the data instead, which would fulfill the deletion request. Covered Businesses that want to avoid much of the regulation associated with personal data should consider whether deidentifying or aggregating data will work with their business operations.

Other Exceptions

The CPRA added exemptions that were not initially recognized by the CCPA. Most of these exceptions are discrete and tailored for specific circumstances. Thus, while they may be helpful to

your client, they will likely be of limited use and will not totally exempt a Covered Business's personal information processing from the California Data Laws. For example, this article has already identified the household data exception from the right to know, delete, and correct.

Other exemptions cover data that is already subject to federal or other regulation. A common example includes commercial credit reporting agency actions, which are exempt from the CPRA's deletion and sale or sharing of opt-out rights. Another example involves student grades, educational scores, or educational test results, which are exempt from the CPRA's deletion right, but subject to the Family Educational Rights and Privacy Act. Another exception exists for free speech and press rights related to non-commercial activities, which are protected by California's Constitution.

Additional exceptions exist under the California Data Laws. The few provided in this article are only intended to give the reader a feeling for the types of exceptions that might apply and are not intended to be comprehensive.

Should I Help My Clients With CPRA Compliance Now?

The CPRA was implemented on January 1, 2023, but the regulations are not expected until late January and will not be finalized until some months later. This creates a bit of a dilemma as businesses will not know how to fully comply until mid-2023, but the answer is yes.

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Please join us in congratulating **Joel D. Taylor**, **Andrew L. Roth** and **Bryson R. Brown** on becoming shareholders of the firm.

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Preparing for compliance is important as penalties are significant, but good faith efforts to comply may be considered mitigating factors. The CPRA created the first state agency dedicated to data privacy compliance. The potential fines remain the same as the CCPA at \$2,500 per violation and up to \$7,500 per intentional violation, with potential increases involving consumers less than sixteen years old. A business's failure to implement and maintain reasonable security procedures also can result in a private right of action when there is unauthorized access and disclosure to nonencrypted or nonredacted personal information. An agency or court may consider a violator's good faith cooperation when considering administrative fines or civil penalties in an enforcement action.

Despite some of the ambiguity that exists with the regulations still pending, the CPRA as implemented includes sufficient information to allow you to guide your client through some initial steps toward compliance with the California Data Laws.

1. Evaluate if your client's business meets any of the CPRA thresholds.

2. Advise your clients on establishing policies and procedures to comply with data subject rights and data minimization principles.
3. Impress on your clients the need to develop the technical ability to fulfil the consumer rights.
4. Update privacy notices to reflect new CPRA requirements.
5. Perform data security and data assessments that meet your industry's standards.

We hope this this article is helpful in identifying the most recent changes related to the protection of personal information in California. It was not intended to provide a comprehensive overview of the California Data Laws, but to instead highlight some of the changes brought by the CPRA. Stay tuned. Your clients' journey on the path to privacy law compliance is probably not over. We anticipate the coming months will only bring more changes.

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Jordan Stott is an experienced intellectual property lawyer focusing on the protection of innovative products, the development of brands, and enforcement of rights. He has represented clients ranging from start-ups to multinational corporations.



Darren Neilson
Litigation | Salt Lake City
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Darren Neilson is a member of the firm's corporate restructuring and Chapter 11 bankruptcy team as well as its litigation practice. Mr. Neilson is a problem solver and enjoys helping his clients through their legal issues, whether a distressed business or general legal advice.



Jamie K. Tract
Corporate | Reno
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Jamie Tract is a corporate transactional attorney who focuses her practice on complex contract drafting and negotiation, start-ups and business formation, and corporate governance. She has represented clients on a wide range of business and real estate transactional matters.

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Medical Malpractice Prelitigation Panel Hearings: A Helpful Step in the ADR Process

by Brian Craig

No one can ignore the rising cost of health care and health insurance premiums. To help control the cost of health care and medical malpractice insurance, the Utah Legislature enacted the Utah Health Care Malpractice Act, found in Utah Code Sections 78B-3-401 to -426. While not binding, the prelitigation panel review hearing with the Utah Division of Professional Licensing (DOPL) serves a useful purpose in medical malpractice cases in Utah. At least seventeen states have created similar medical review panels, also known as screening panels, in response to spiraling health care costs. See Anna Karas, Note, *The Constitutional Strength of Indiana's Medical Review Panel Process: How to Overcome the Inevitable Challenges*, 18 IND. HEALTH L. REV. 189, 189 (2021). These panel review hearings represent an alternative form of dispute resolution (ADR) in helping the parties evaluate the merits of each case.

While decisions in prelitigation panel review hearings are not binding after the Utah Supreme Court decision in *Vega v. Jordan Valley Medical Center, LP*, 2019 UT 35, 449 P.3d 31, the hearings still serve a vital role. The primary purpose is to expedite early evaluation and settlement, or other appropriate disposition, of medical malpractice claims. In addition, the prelitigation panel functions to guide and solidify claims before they reach court.

The Notice of Intent

Counsel for plaintiffs, or petitioners as they are referred to in prelitigation panel hearings, first draft the notice of intent. The notice of intent is akin to the complaint filed in district court. Utah Code Section 78B-3-412(2) requires that the notice include: (1) a general statement of the nature of the claim; (2) the persons involved; (3) the date, time, and place of the occurrence; (4) the circumstances surrounding the claim; (5) specific allegations of misconduct on the part of the prospective defendant; and (6) the

nature of the alleged injuries and other damages sustained. Ideally, the notice of intent includes a chronological description of the petitioner's treatment and the specific allegations concerning the breach in the standard of care. A well-drafted notice of intent serves as a useful guide for panel members and respondents in knowing the specific allegations and claims. The notice of intent also helps DOPL staff determine what types of specialists are needed on the panel.

Panel Composition

Each panel consists of: (1) an attorney who serves as chairperson of the panel; (2) a lay member who is not a health care provider, hospital employee, or attorney; (3) a licensed health care provider practicing in each specialty in which each respondent health care provider practices; and (4) a hospital administrator, if a hospital or its employees is named as a respondent. Any objections to panel members must be raised within five days of the notice of selection of panel members. Some panels may involve several types of specialists, such as specialty physicians in different practice areas, nurses, physician assistants, and hospital administrators.

Preparation of Exhibits

Before the hearing, counsel should prepare any exhibits, including medical records, images, timelines, and reports. Where medical records cannot be obtained, DOPL may issue a

BRIAN CRAIG is a full-time instructor at Purdue University Global where he teaches undergraduate courses. He also serves as a prelitigation panel chairperson with the Division of Professional Licensing.



subpoena with an affidavit, or a written release signed by the patient. Creating Bates numbers in documents is especially helpful for voluminous medical records. Bates numbering, also known as Bates stamping, assigns unique identifiers to each page in a collection of documents. Software programs, such as Adobe, can create Bates numbering as a header or footer to any document or to a collection of documents. Highlighting some text in the medical records using software can serve a useful purpose but highlighting the entire page or multiple paragraphs is less helpful. Counsel should also avoid writing comments on the medical records. As a general rule, prepare exhibits and medical records in chronological order. An exhibit with a brief timeline of treatment can also assist panel members to better understand the nature of the case and claimed injuries. Counsel should send exhibits as a packet to panel members via email the day of the hearing. Lawyers that appear in DOPL hearings should also review the applicable statutes in the Utah Health Care Malpractice Act, the Prolitigation Panel Review Rule in the Utah Administrative Code, and information on the DOPL website.

Video Hearings

Since the COVID-19 pandemic, DOPL hearings have been held by video using Google Meet rather than a conference room in the Heber M. Wells Building in downtown Salt Lake City where DOPL maintains its offices. While advantages and disadvantages exist with video hearings vis-à-vis in-person hearings, participants have generally embraced video hearings. Using video hearings saves travel time for participants, speeds up the timeframe in scheduling the hearing to accommodate different schedules, and allows for a more regionally diverse panel.

Make sure to have a good video feed with a webcam and a strong Internet connection. Do not rely just on a phone but use a desktop or laptop. Dress professionally. If possible, set up the remote hearing in a room free from any noise or visual distractions. Mute yourself when not speaking. Observe traditional courtroom decorum. Because hearings are confidential, do not record the proceedings.

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An Informal Hearing

Some lawyers for petitioners treat the prelitigation panel as just a perfunctory step before filing the complaint in district court. But lawyers for plaintiffs should use the prelitigation panel hearing as an opportunity to present their best evidence. Often, a unanimous meritorious finding can lead to further settlement negotiations and a favorable settlement.

Counsel can present evidence by proffer, direct examination, or a combination of the two. While not required, attendance by parties is viewed favorably by panel members to show that the parties take the process seriously. Panel members may question why a party chooses not to attend the hearing.

During the hearing, counsel can share their screen using Google Meet to show exhibits, such as medical records, CT scans, and X-rays. For example, a radiologist can share results of the CT scan with panel members. Where appropriate, consider using a three-dimensional model. Experts should try to explain things in a clear manner and remember that the panel includes lay members.

A review of the medical records is often one of the most helpful parts of the hearing. One key takeaway for many physicians and other health care providers is the importance of maintaining accurate and comprehensive contemporaneous medical records. The saying “if it wasn’t documented [or charted], it wasn’t done” in health care often rings true. Panel members may question a health care provider who testifies of a specific treatment or conversation with a patient not found in the medical records.

Prelitigation panel hearings are less formal and rigid than traditional court hearings. Under Utah Code Section 78B-3-417, no party has the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel members may, however, ask questions of parties and counsel. Keep objections to a minimum. Some legitimate objections can be raised, but do not debate every issue and be respectful.

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As a general rule, hearings last approximately one hour followed by deliberations. Hit the high points during the hearing and spend less time on extraneous matters. Because some cases may have hundreds of pages of medical records, focus on the key pieces of evidence. Counsel should come prepared to present their case in twenty to thirty minutes. When multiple respondents are named in the same case, the providers who first provided treatment will usually go first, followed by subsequent providers, and then the hospital or health care facility. For cases with multiple parties, be respectful of everyone's time.

Careful Deliberations

Panel members carefully consider the claims and review medical records, testimony, proffer, and evidence during deliberations. Some deliberations, especially cases involving multiple respondents, involve lengthy discussions. The lay member and chairperson do not simply side with the experts on the panel. All panel members reach their own conclusions after careful deliberations. Panel members try hard to reach unanimous decisions to give a clear message to parties, but some cases may result in a divided or split opinion.

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The Decision

The notice of panel decision written by the chairperson attempts to give the parties and their lawyers useful insight into whether panel members think the claims have merit. The notice of panel decision also explains the reasoning behind the decision. The decision attempts to convey to the parties the strengths and weaknesses of the case. Some cases may involve clear liability and the decision indicates how the provider breached the standard of care. Other cases may involve no breach in the standard of care but may have just a bad outcome with complications following a surgery or condition. Other cases may be a "close call" that require further inquiry. After the hearing, counsel will receive a certificate of compliance from DOPL and then decide whether the case should proceed. Failure to obtain the certificate of compliance will likely result in a dismissal at the district court level.

Case Evaluation

The prelitigation panel hearing serves an important role in ferreting out frivolous cases that lack merit. For example, a female petitioner in one case claimed that the physician who performed an appendectomy also removed one of the woman's ovaries during the surgery. A later ultrasound clearly showed the presence of both ovaries, contradicting the allegations. Other cases may require further discovery or involve factual disputes. Prolitigation panel hearings can help determine what really happened and assist in the proper administration of justice.

Even though some parties may stipulate that no useful purpose would be served by convening a panel hearing under R156-78B-13 of the Utah Administrative Code, the hearing can help the parties and their lawyers evaluate the strengths and weaknesses of the case. Forgoing the hearing is a missed opportunity to obtain an objective opinion by panel members. As U.S. Supreme Court Justice Sandra Day O'Connor observed, "The courts of this country should not be the places where the resolution of disputes begins. They should be the places where disputes end – after alternative methods of resolving disputes have been considered and tried." Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future ... Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 8 (1985) (citation omitted). In medical malpractice cases, the Utah Legislature has created a constructive system to assist in the dispute resolution process.



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Motion for Mental Health: A BYU Law Student Perspective

by Sarah Johns

As a 2L student at BYU Law School, I have the privilege to interact daily with a community of compassionate, brilliant, and capable individuals, many of whom give their best to our law school each and every day whilst bearing their own silent struggles.

The task of writing an article about mental health in law school is quite difficult. I can't write a story of tragedy because that's not what this experience is. Law school is a time filled with rich opportunities where the future feels brighter than ever. And yet, I come to this discussion having dealt with some of my most intense mental health struggles during my time in law school.

Law school doesn't intentionally beat your mental health to a pulp, it simply keeps you busy enough that you begin to neglect those things that matter most to maintain positive mental health. Crisis sneaks up on law students like a thief in the night. All at once, things can shift from manageable to uncontrollable, from hopeful to doubt-ridden, or worse, from decent to despairing. At the same time, the competitive nature of an American legal education beckons you to mute those struggles, to put your head down, and to keep working. We are told to believe that employers don't care how well you manage your personal life and other skills, but that they want to see an impressive GPA and a resume filled with time-consuming co-curriculars. This culture breeds neglect of all things that do not contribute to those GPA and co-curricular goals, and yet, when tragedy strikes, neither a stellar GPA nor extensive co-curriculars can offer much solace.

How then can the legal community urge its budding professionals to be their best without stifling their ability to pursue those things that will most benefit their mental health? After all, mental health, like physical health, is a by-product of habits and behaviors and is not an end in and of itself. Just as a healthy diet, exercise, and good sleep all lend to the by-product of superior physical health, mental health cannot be addressed or maintained on only one plane. Mental health is the result of our combined choices. Therefore, feeding only one's academic or professional pursuits will invariably fail to meet the full spectrum of one's mental health needs.

These realizations and their accompanying stresses fueled my desire to start the Law Student Well-Being Club (LSWC) at the end of my 1L year. I hope that the LSWC can better utilize our greatest strength and most underutilized mental health resource: our community. When disasters strike, it is the rallying of communities that provides visibility, comfort, and physical relief to those in need. Why can't the same be true of personal mental health "disasters"? The LSWC aims to create visibility of the mental health issues that may currently, or at future times, surface in our community. We also hope to create a culture of comfort for those that are in need and encourage both well-off and struggling students to tend to the range of their mental health needs. Lastly, we try to supply relief through activities and acts that brighten our peers' days (and maybe even pull them out of their studies for a minute or two).

Nothing suggested herein is novel, but when facing the Mt. Everest of mental health, taking small steps forward is far better than standing still. When things inevitably shift from manageable to uncontrollable, from hopeful to doubt-ridden, or worse, from decent to despairing, I hope that my peers recognize the community of compassionate, brilliant, and capable individuals ready to rally around them. And as we someday disperse to the care of new legal communities, I hope that they too are prepared to meet mental health challenges with visibility, comfort, and relief for those in need. I am very grateful for my association with the Lawyers Helping Lawyers community. I hope that all Utah legal professionals will embrace this resource with open arms and realize the power of a caring community to assist those in need.

SARAH JOHNS is a current 2L student at Brigham Young University's J. Reuben Clark Law School and is serving as the president of both the BYU Law Student Wellbeing Club and BYU Law's chapter of the J. Reuben Clark Law Society. Sarah is looking forward to spending this summer working at Obeidat Law in Amman, Jordan.





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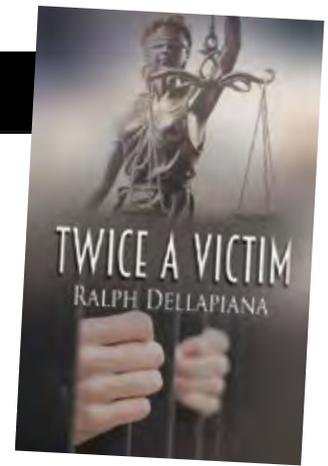
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Twice a Victim

by Ralph Dellapiana

Reviewed by Andrea Garland



T*wice a Victim*, a legal thriller by Ralph Dellapiana, a trial lawyer at the Salt Lake Legal Defender Association since 1995, is an excellent read. It has engaging characters, a fascinating legal plot, pyrotechnic displays of evidentiary argument, and an excellent portrayal of our criminal legal system as a blunt instrument.

In *Twice a Victim*, the question is not who-did-it but whether there will be justice after the sad murder of a baby. The main character, Frank Bravo, is a public defender assigned to defend the baby's mother, Kala Tausinga. Given the high stakes, Bravo attempts plea bargaining but ultimately must defend his client before a jury.

Bravo appears at first to have nothing going for him: he's overworked, he's lost everything in an ugly divorce, he's assigned to represent a woman accused of killing her own baby, and someone has slashed his tires. Worse, he thinks his new client might be innocent. In real life that's a curse because nothing good can happen to an innocent client. That person will spend hours in court, probably months in jail, and will likely lose relationships, job, and home – and that's when everything goes well and you get a not-guilty verdict. Defending a “dead baby case,” where his client has made some problematic admissions to police, Bravo has everything stacked against him. Except he's a good guy and a great lawyer. As the word “Bravo” implies in the semaphore alphabet, he's undervalued. But as the word also means in Italian, “Well done!” he does a good job and is, as the false cognate implies, brave. And because of all this, sometimes people want to help him out.

Specifically, women like to help him out. *Twice a Victim* has an interesting all-female supporting cast. There's Mary, his committed

and clever co-counsel; Kala, his client; Bella, his brilliant daughter; and, surprisingly, Mia Montes, victim-advocate and employee of the prosecution. The story takes off when Montes, a domestic violence survivor who trains to kick her ex's ass, should she ever see him again, is inspired to try to assist Team Bravo at the risk of her own career. She obtains assistance from powerful and mysterious friends, The Sisterhood. (These are platonic relationships in which Bravo may feel “something” arising from friendly cooperation, but he keeps things friendly during the story, only dating women that he meets on the internet – an unusual choice but one that seems to intensify Bravo's focus on his case.)

Villains in *Twice a Victim* are appropriately villain-y. Kala's husband can be terrifying. Randy

Johnson, the prosecutor, while honest and committed to his own cause, refuses to seriously consider that he may have charged the wrong person. He is willing to believe the worst about any defendant and portrays innocent details as incriminating, even the messy house of a woman nine-months pregnant. Similarly, an attorney general who professes to want to help trafficking victims, has the trafficked women arrested for soliciting.

Anyone interested in the nuts and bolts of trying a murder case can learn a lot from *Twice a Victim*. The book describes

Twice a Victim
by Ralph Dellapiana
Wild Rose Press (2022)
334 pages

Available in paperback and ebook.

ANDREA J. GARLAND is an appellate lawyer at the Salt Lake Legal Defender Association.



discovery, plea bargaining, working with experts, difficult witnesses, clients who must be cajoled into acting in their own best interest, picking a jury, evidentiary rulings, and even the role of jury instructions, *inter alia*. No one is phoning it in: fantastic trial lawyers at the top of their game cross-examine each other's witnesses and the judge is engaged and thoughtful. For example, when Bravo forces the investigating detective to admit he was unaware that the client's husband was not the murdered baby's father, Bravo thanks him "to reward him for cooperating with [Bravo]" on an easy question. Then, he gets him to admit that the husband could have cleaned the messy apartment and that the husband waited for hours to call 911. Bravo nails down the dates the detective worked on the case and then hits him with, "So, I'm not exaggerating when I say

your department did only a one-day investigation in this case?" Regardless of whether a reader favors prosecution or defense, most will physically squirm at this point or at least imagine physical discomfort on the prosecution side.

Twice a Victim explores domestic violence in some depth, critiquing the chicken-egg problem of demanding that victims make wiser choices to avoid being charged themselves. It examines the roles that both religion and vigilantes may play in addressing domestic abuse – in the story's universe, vigilantes have the advantage of clear objectives. It describes both the burden of trial work and the engrossing glee of a viable strategy. It is informative and absorbing and is available in electronic form and paperback on Amazon and Barnes & Noble.com.

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The Day Your Life Changed Forever

by Keith A. Call

You may not know this, but on November 30, 2022, your life changed forever. On that day, a previously little-known software company based in San Francisco released ChatGPT, a chatbot that is designed to be able to “converse” with humans on a variety of topics using natural language. It uses machine learning (artificial intelligence) to generate responses to user input, allowing it to have “conversations” that are similar to what humans might have.

For example, you can ask ChatGPT to “explain *Ferris Bueller’s Day Off* as an existentialist text while drawing thematic parallels between the film and Franz Kafka’s *The Metamorphosis*.” The chatbot will write a pretty impressive essay for you! This is a high school teacher’s and college professor’s nightmare.

The use of chatbots, including ChatGPT, in the law raises a number of ethical concerns. One major concern is the potential for chatbots to perpetuate biases and discrimination. For example, if a chatbot is trained on biased data, it may perpetuate those biases in its responses and decision-making. This could lead to unfair treatment of individuals or groups of people based on their race, gender, age, or other characteristics.

Another ethical concern related to the use of chatbots in the law is the potential for them to erode privacy and confidentiality. Chatbots may collect and store sensitive personal information about individuals, which could be accessed by unauthorized parties or used for purposes other than those for which it was collected. This could have serious consequences for individuals, particularly in the context of legal proceedings.

Finally, there is the issue of accountability. Chatbots do not have the same level of accountability as human lawyers, and it may be difficult to hold them accountable for errors or mistakes they make. This could lead to a lack of confidence in the legal system and may undermine the public’s trust in the legal

profession. It is important that the use of chatbots in the law is carefully regulated and monitored to ensure that they are used ethically and responsibly.

By the way, those last three paragraphs were generated 100%, unedited, by ChatGPT in about five seconds after I put in the following prompt: “Write three short paragraphs regarding the ethics of using chatgpt in the law.”

Just for fun, I have used ChatGPT to:

- Create a short script of a sit-com in which the characters from Seinfeld visited Harry Potter’s school at Hogwarts.
- Write a complete, two-page letter to my daughter who is living in Germany. One of my daughters (not the one living in Germany) was completely fooled by the letter and thought I wrote it.
- Write a very convincing letter from my daughter back to me, by copying and pasting my letter to her and adding a couple of simple prompts.
- Write a mock essay in response to a writing assignment given by a college professor. (I spoke to the professor, who would have given “my” paper an A.)
- Explain the rule against perpetuities.

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



This is bound to change how lawyers do their work. I suppose it is only a matter of time until we will be able to copy and paste our opponent's legal brief and have a chatbot spit out a well-written and convincing opposition, complete with legal citations. Courts will also soon have to grapple with attempts to use information generated (or should I say "regurgitated"?) by chatbots.

In fact, ChatGPT is already working towards a law degree, or so it seems. Four law professors at the University of Minnesota recently had ChatGPT take the exams for four law school classes, which included ninety-five multiple choice questions and twelve essays. They blindly graded the answers. ChatGPT got an average score of C+. Not a stellar score, by any means, but it got a passing grade in all four courses. See Jonathan H. Choi, et al., *ChatGPT Goes to Law School*, MINN. LEGAL STUD. RES. PAPER NO. 23-03 (Jan. 25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905.

One company skipped right past the law degree. DoNotPay.com bills itself as "The World's First Robot Lawyer." "Fight corporations,

beat bureaucracy and sue anyone at the press of a button," it says. DoNotPay, www.donotpay.com (last visited Jan. 16, 2023). DoNotPay recently announced plans to take on two speeding ticket cases in court, with its AI instructing the defendants how to respond to their assigned judges. In even more dramatic fashion, DoNotPay's founder, Joshua Browder, offered to pay \$1,000,000 to any lawyer or person with an upcoming case in front of the United States Supreme Court who agrees to wear AirPods and let their robot lawyer argue their case by repeating exactly what it says. See Bailey Schulz, *DoNotPay's "First Robot Lawyer" to Take on Speeding Tickets in Court via AI*, USA TODAY (Jan 9, 2023, 4:25 PM), <https://www.usatoday.com/story/tech/2023/01/09/first-ai-robot-lawyer-donotpay/11018060002/>. It seems Mr. Browder's spirits were quickly dampened after several State Bars sent him unfriendly letters, including a threat of jail time. See Bobby Allyn, *A Robot Was Scheduled to Argue in Court, Then Came the Jail Threats*, NAT'L PUB. RADIO (Jan. 25, 2023, 6:05 PM), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail->

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threats. I'll be watching to see if Mr. Browder comes to play in Utah's legal sandbox.

Do not over-estimate AI's accuracy, however. Aside from earning only a C+ in its law school coursework, SCOTUSblog.com gives ChatGPT a failing grade on its general knowledge of the Supreme Court. See James Romoser, *No, Ruth Bader Ginsberg Did Not Dissent in Obergefell*, SCOTUSBLOG (Jan. 26, 2023, 10:57 AM), <https://www.scotusblog.com/2023/01/no-ruth-bader-ginsburg-did-not-dissent-in-obergefell-and-other-things-chatgpt-gets-wrong-about-the-supreme-court/>. Many others have been critical of ChatGPT's accuracy. In fairness, ChatGPT's owners are open about the fact that the current version of their AI is a "free research preview," and they are working to make its AI system more accurate and safe.

As the chatbot skillfully pointed out with just a tiny bit of help from me, there are many ethical concerns with the power of this technology. And, while definitely useful and even fun, the immense power of this technology beyond law and legal ethics is staggering

to me. We should all be very concerned about the power of this technology to perpetuate prejudice, promote fake news, maliciously and improperly influence public policy and elections, and an endless number of other bad things. I dunno, is it too outrageous to wonder if this technology in the wrong hands could be used to start a war??? Hasn't existing social media already done that? See Thomas Zeitzoff, *How Social Media is Changing Conflict*, 61(9) J. OF CONFLICT RESOL., 1970 (Oct. 2017).

It is hard for any one person to imagine all the directions this powerful new technology will take us. But mark November 30, 2022, on your calendar and mark my word (and I feel compelled to reassure you that this is me, Keith Call, writing this), this technology will forever change all of our lives.

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

GOOD PEOPLE DRIVE GREAT RESULTS

Ray Quinney & Nebeker welcomes Steven G. Jones and Tiffany Brooks Healy as Shareholders.



STEVEN G. JONES is Chair of the Environmental and Natural Resources Section. He has extensive experience handling a wide variety of environmental matters in both the litigation and transactional arenas. Mr. Jones has litigated cases under every major environmental statute, including CERCLA, RCRA, the Clean Water Act and Clean Air Act, and acted as lead defense counsel in both citizen suits and environmental enforcement actions brought by state and federal agencies. He has extensive experience in

obtaining state and federal permits for projects, acting on behalf of both public and private clients, as well as defending those permits once they have been obtained. He also has broad experience in insurance coverage issues, acting on behalf of insureds.



TIFFANY BROOKS HEALY focuses her practice on intellectual property counseling and the preparation and prosecution of patent applications worldwide. With a background in Computer Science, she has prepared and prosecuted hundreds of patent applications in a variety of technology areas.

Her counseling practice involves helping clients to understand the patent landscape for their products and advising clients regarding patent infringement risk for corporate transactions and product development. In addition, she conducts and manages intellectual property due diligence and intellectual property reviews associated with corporate transactions.



RAY QUINNEY
& NEBEKER

RQN.COM
801.532.1500

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 27, 2023, meeting held at the Utah State Bar Law and Justice Center in Salt Lake City, Utah.

- The Commission approved the nomination of Cara Tangaro as President-Elect.
- The Commission approved awarding the Dorothy Merrill Brothers Award to Ashley Peck.
- The Commission approved awarding the Raymond S. Uno Award to Sade Turner.
- The Commission approved the creation of a new Well-Being Award and approved awarding the first one to Martha Knudsen.

The minute text of this and other meetings of the Bar Commission are available on the Bar's website.

2023 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2023 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 2023 Summer Convention Award no later than Monday, May 22, 2023. Visit www.utahbar.org/nomination-for-utah-state-bar-awards/ to view a list of past award recipients and use the form to submit your nomination in the following Summer Convention Award categories:

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

2023 Spring Convention Award Recipients

During the 2023 Utah State Bar Spring Convention, the following awards will be presented:



ASHLEY A. PECK
Dorothy Merrill Brothers Award
for the Advancement of Women
in the legal profession



SADÉ A. TURNER
Raymond S. Uno Award
for the Advancement of Minorities
in the legal profession



MARTHA KNUDSON
Utah Legal Well-Being
Impact Award

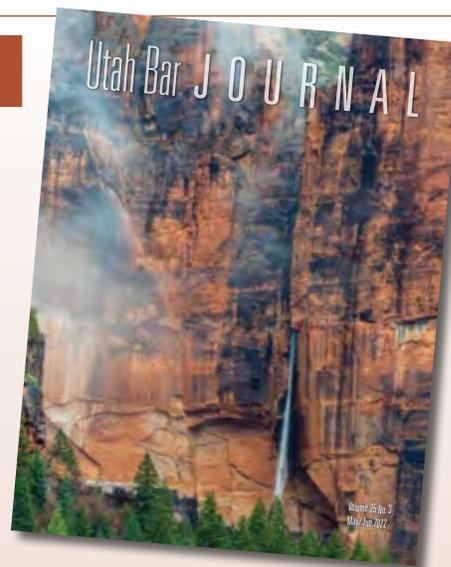


Spring Convention

2022 *Utah Bar Journal* Cover of the Year



The winner of the 2022 *Utah Bar Journal* Cover of the Year award is *Upper Emerald Pools, Zion*, taken by Utah State Bar member Michael Steck. Mr. Steck's photo appeared on the cover of the May/June 2022 issue. A prolific photographer, Michael says he finds great solitude in photography and canyoneering in Southern Utah. The *Utah Bar Journal* is grateful that he is always so willing to allow us to use his incredible photographs for our covers, including the cover of this very issue!



Congratulations to Mr. Steck and thank you to all of the contributors who have shared their photographs of Utah on *Bar Journal* covers over the years!

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

Fourth Annual Well-Being Week in Law

Get ready to prioritize your well-being! The highly anticipated Fourth Annual Well-Being Week in Law is returning from May 1–5, 2023, and we want you and your organization to be a part of it. This transformative event was created in 2020 to educate legal professionals on the importance of proactively focusing on our physical and mental health, as well as to combat the challenges many of our colleagues face. Since its inception, participation across the country has skyrocketed, with many bar associations, law firms, governmental agencies, and thousands of individuals taking part.

Participating in this event is both simple and accessible. The national Institute for Well-Being in Law (IWIL) will be offering free, bite-size, and evidence-based resources and activities on each day of the week, all of which can be found at www.lawyerwellbeing.net. You can also find promotional materials to help you share information about this important event internally, on your website, and on social media.

In addition, the Utah State Bar will be posting Well-Being Week materials and hosting local Well-Being Week events, including a CLE at noon on May 2nd. Stay tuned for updates through the Bar's website.

We invite you to become a well-being champion and join us in prioritizing our physical and mental health by making plans for Well-Being Week in Law today!



**WELL-BEING
WEEK
IN LAW**

MAY 1–5, 2023

Introducing Utah State Bar Members' New Partner for Mental Health and Well-Being Support

The Utah State Bar is excited to announce a new partnership with Unmind, a leading provider of mental health and well-being support for professionals. We believe that a thriving law practice is built on a foundation of good mental health. That's why we want to make sure our members have access to tools to help them protect their well-being, no matter where they might fall on the well-being spectrum – be it thriving, surviving, or anywhere in between.

With Unmind, Utah State Bar members can access a robust range of evidence-based mental health and well-being

resources, including tools for stress management, better sleep, building resilience, goal-setting, improving relationships, leadership, boosting happiness, improving self-care, and mental health support. Unmind was created for busy professionals so many of these tools are bite-sized and designed to be used wherever you are, for whatever you might need.

To access Unmind, members can either download it from the App Store or navigate to www.utahbar.unmind.com. To create an account, you only need to identify The Utah State Bar as your sponsor and enter your bar license number. Your use of

Unmind is completely confidential. The Bar won't be able to identify who is using the platform or have access to your personal data.

Unmind compliments our other new mental health care partner for Bar members, Tava Health. Tava provides an easy, risk-free way to connect with skilled therapists. It's available to all active Bar members and their dependents, including spouse/domestic partner and children aged thirteen to twenty-five.

The Utah Bar has fully covered the cost for up to six therapy sessions per-person, per-year.

To access this service, go to: www.care.tavahealth.com/signup and create an account selecting The Utah State Bar as the organization that will cover your sessions. You can select a therapist and schedule right on the platform. Tava's services are completely confidential.

The Utah State Bar is committed to helping Utah legal professionals create thriving practices. Taking care of your well-being is not a luxury, but a necessity. It plays a crucial role in how we think, feel, behave, and perform. You deserve to be at your best. Unmind and Tava Health can help.

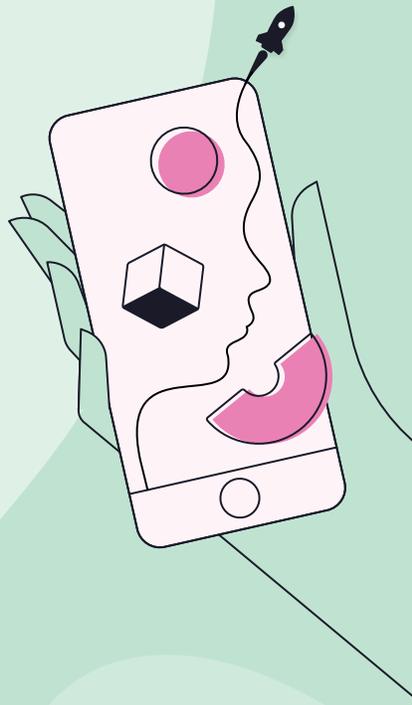
You now have access to Unmind.

Our workplace wellbeing platform.

We believe that everyone has the right to a healthy mind.

With Unmind, we're empowering you to live your life to the fullest with free and confidential access to expert tools to help you look after your mental health.

Start your journey today.



Download the Unmind app to get started.





Get started with your free online therapy benefit

Get back to feeling like you! Your psychological well-being can affect your physical health, relationships, and work performance. Tava's network of vetted therapists helps you step out of the fog and get back to a happier, more fulfilled you.

Tava is a free, confidential mental health benefit available to all members and employees of the Utah State Bar and their dependents (age 13-25). The benefit provides up to 6 free sessions annually with licensed clinicians through Tava's secure, web-based technology platform. All you need for a live, video-based session is reliable internet access and a connected device with a camera (smartphone, computer, or tablet).

Free to Use

No claims, no co-pays, no deductibles. You and your dependents will have 6 sessions (per person per year) completely covered.

Convenient

Self-scheduled online video sessions means you get care whenever works best for you: days, nights, or weekends.

Confidential

We don't tell your employer who used the service. Your identity and anything you discuss is confidential.

Top Quality

Quality care from quality therapists. Tava's clinicians are licensed, vetted, and use evidence-based treatments.

Whether you're feeling stressed, stuck, or burdened with something else, Tava can help. Support is available for a range of issues such as:

Addiction
Anxiety
Depression
Eating disorders
Family issues

Grief and loss
LGBTQ+ issues
Life changes
Postpartum issues
PTSD

Trauma
Relationship issues
Work pressure
Stress
and more...

Schedule your first appointment today at

care.tavahealth.com

Notice of Legislative Positions Taken by Bar and Availability of Rebate

Positions taken by the Bar during the 2023 Utah Legislative Session and funds expended on public policy issues related to the regulation of the practice of law and the administration of justice are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative and public policies activities related to the regulation of the practice of law and the administration of justice by Supreme Court Rule 14-106, which may be found at <https://www.utcourts.gov/rules/view.php?type=UCJA&rule=14-106>. Lawyers and LPPs may receive a rebate of the proportion of their annual Bar license fee expended for such activities

during April 1, 2022, through March 31, 2023, by notifying Financial Director Lauren Stout at lauren.stout@utahbar.org.

The proportional amount of fees provided in the rebate include funds spent for lobbyists, staff time spent on legislative matters, and expenses for Bar delegates to travel to the American Bar Association House of Delegates. Prior year rebates have averaged approximately \$7.38. The rebate amount will be calculated April 1, 2023, and we expect the amount to be consistent with prior years.

Distinguished Paralegal of the Year Nominees Requested

The Distinguished Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association to a paralegal who has met a standard of excellence through their work and service in this profession.

We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that their hard work is recognized, not only by a professional organization, but by the legal community.

Nomination forms and additional information are available by contacting Greg Wayment at wayment@mcg.law.

The deadline for nominations is Friday, April 21, 2023, at 5:00 pm. The award will be presented at the Paralegal Day Celebration held Thursday, May 18, 2023.

Annual Paralegal Day Luncheon



For all Paralegals & their
Supervising Attorneys

Thursday, May 18, 2023
Noon to 1:30 pm
The Grand America Hotel

Speaker TBA

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2022, that amount is 1.18% of the mandatory license fee.

Annual CLE Compliance

CLE Reporting Period is July 1, 2022 – June 30, 2023



All active status lawyers admitted to practice in Utah are now required to comply annually with the Mandatory CLE requirements.

The annual CLE requirement is 12 hours of accredited CLE. The 12 hours of CLE must include a minimum of one hour of Ethics CLE and one hour of Professionalism and Civility CLE.

At least six hours of the CLE must be Live CLE, which may include any combination of In-person CLE, Remote Group CLE, or Verified E-CLE. The remaining six hours of CLE may include Self-study CLE or Live CLE.

For a copy of the new MCLE rules, please visit <https://www.mcleutah.org>. For questions, please email staff@mcleutah.org, or call 801-746-5250.

Notice of Utah Bar Foundation Open Board of Director Position

The Utah Bar Foundation is a nonprofit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and civil legal aid services for lower income Utahns.



The Utah Bar Foundation is governed by a seven-member Board of Directors. The Utah Bar Foundation is a separate organization from the Utah State Bar.

If you are interested in serving on the Utah Bar Foundation Board, please call the Foundation office at (801) 297-7046 before April 21, 2023.

For additional information on the Utah Bar Foundation, please visit our website at www.utahbarfoundation.org.

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 5, 2023, 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 email address to the Bar. If you need to update your email address of record, please contact onlineservices@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.

Notice of Petition for Reinstatement to the Utah State Bar by Carlos J. Clark

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice that Carlos J. Clark has filed an application for reinstatement in *In the Matter of the Discipline of Carlos J. Clark* Third Judicial District Court, Civil No. 160904350. Any individuals wishing to oppose or concur with the application are requested to do so within twenty-eight days of the date of this publication by filing notice with the Third District Court.

Notice of Petition for Reinstatement to the Utah State Bar by Tony B. Miles

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice that Tony B. Miles has filed an application for reinstatement in *In the Matter of the Discipline of Tony B. Miles* Second Judicial District Court, Civil No. 190700888. Any individuals wishing to oppose or concur with the application are requested to do so within twenty-eight days of the date of this publication by filing notice with the Second District Court.

IN MEMORIAM

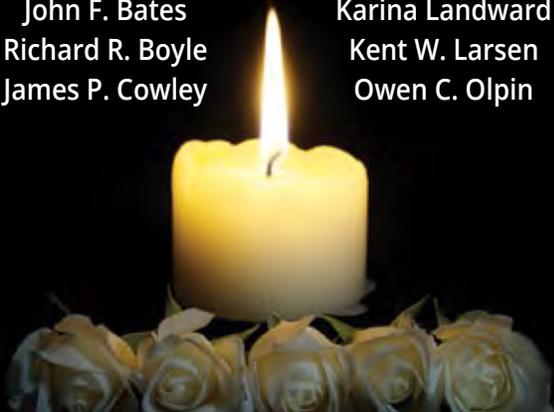
After the publication deadline for our last issue, we received the following names to add to our list of attorneys, paralegals, judges, and other members of the Utah legal community who passed away during 2022.

JUDGE

William L. Nixon

ATTORNEYS

John F. Bates	Karina Landward
Richard R. Boyle	Kent W. Larsen
James P. Cowley	Owen C. Olpin



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:



To access your Utah State Bar Benefits, visit:
utahbar.org/business-partners

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.

Clean Slate Summit

Miriam Allred
Jackie Ball
Pamela Beatse
Keenan Carroll
Scotti Hill
Jason Jones
Richard Poll

Family Justice Center

Steve Averett
Bryan Baron
Sara Blamires
Lindsey Brandt
Sarah Calvert
Angela Cothran
Tiffany Degala
Dave Duncan
Kit Erickson
Tagg Francis
Tate Frodsham
Scott Goodwin
Michael Harrison
Tana Horton
Sol V. Huamani
Jefferson Jarvis
Erin Jones
Victor Moxley
Sandi Ness
Dailyah Rudek

Stacy Runia
John Seegrist
Sonja Smith
Babata Sonnenberg
Marca Tanner Brewington
Brittany Bunker Thorley
Nancy Van Slooten
Amy Waldron
Paul Waldron
Logan Warnick
Henry Wright
Tonya Wright
Oliver Yun
Yihao Yun

Pro Bono Appointments

Eric Barnes
Brandon Baxter
Michael Harrison
Nancy Sylvester

Pro Se Debt Collection Calendar

Hilary Adkins
Miriam Allred
Mark Baer
Pamela Beatse
Keenan Carroll
Anna Christiansen

Ted Cundick
Marcus Degen
Leslie Francis
Denise George
Brittney Herman
Andrew Lajoie
Zach Lindley
Amy McDonald
Matt Nepute
Vaughn Pederson
Brian Rothschild
Christopher Sanders
Karthik Sonty
Chris Sorenson
George Sutton
Alex Vandiver
Adam Wahlquist
Austin Westerberg

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

Pro Se Immediate Occupancy Calendar

Mark Baer
Alex Baker
Joel Ban
Pamela Beatse
Keenan Carroll
Marcus Degen
Lauren DiFrancesco
Leslie Francis
Matt Nepute
Nancy Sylvester
Mark Thornton
Alex Vandiver

*with special thanks to
Greenberg Traurig for
their pro bono efforts on
this calendar.

Pro Bono Initiative

Maya Anderson
Skyler Anderson
Noah Barnes
Jonathan Benson
Corttany Brooks
Simeon Brown
Bob Couser
Jessica Couser
Dan Crook
Marcus Degen
Dave Duncan
Ana Flores
Jennie Garner
Jonathan Good
Josie Hall
Sam Hawe
Victoria Higginbotham

Jeremy Jones
John MacFarlane
Travis Marker
Virginia Maynes
Alex Maynez
Kenneth McCabe
Kendall McLelland
Susan Morandy
T.R. Morgan
Tyler Needham
Katie Panzer
Chris Peterson
Cameron Platt
MacKenzie Potter
Clayton Preece
Stewart Ralphs
Brian Rothschild
Jacob Smith
Richard Snow
Jay Springer
Charles Stormont
Kate Sundwall
Nicholle Pitt White
Leilani Whitmer
Kelsy Young

Timpanogos Legal Center

MacKenzie Armstrong
Amirali Barker
Brett Boulton
Lindsey Brandt
Kit Erickson
Jefferson Jarvis
Joe Johnson
Kelli Meyers
Maureen Minson
Breeze Parker
Madison Wilson

Utah Legal Services

Jared Allebest
Eric Barnes
Josh Bates
Brandon Baxter
Marca Brewington
Jeremy Eveland
Anaya Gayle
Aaron Hart
Troy Jensen
Lillian Reedy
Ryan Simpson
M. David Steffensen
Colby Winsor

Utah Bar's Virtual Legal Clinic

Ryan Anderson
Josh Bates
Jonathan Bench
Jonathan Benson

Dan Black
Mike Black
Douglas Cannon
Anna Christiansen
Adam Clark
Jill Coil
Kimberly Coleman
John Cooper
Robert Coursey
Jessica Couser
Jeff Daybell
Hayden Earl
Matthew Earl
Craig Ebert
Jonathan Ence
Rebecca Evans
Thom Gover
Sierra Hansen
Robert Harrison
Tyson Horrocks
Robert Hughes
Michael Hutchings
Gabrielle Jones
Ian Kinghorn
Suzanne Marelus
Greg Marsh
Gabriela Mena
Tyler Needham
Nathan Nielson
Sterling Olander
Aaron Olsen
Jacob Ong
Ellen Ostrow
McKay Ozuna
Steven Park
Clifford Parkinson
Alex Paschal
Katherine Pepin
Leonor Perretta
Cecilee Price-Huish
Stanford Purser
Jessica Read
Chris Sanders
Alison Satterlee
Thomas Seiler
Luke Shaw
Angela Shewan
Peter Shiozawa
Farrah Spencer
Liana Spendlove
Brandon Stone
Charles Stormont
Mike Studebaker
George Sutton
Jeannine Timothy
Jeff Tuttle
Christian Vanderhoof
Alex Vandiver
Jason Velez
Kregg Wallace
Joseph West

Call for Nominations for Pro Bono Publico Awards

The deadline for nominations is March 31, 2023

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 5, 2023:

- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To access and submit the online nomination form please go to: <http://www.utahbar.org/award-nominations/>. If you have questions please contact the Access to Justice Director, Pamela Beatse, at: probono@utahbar.org or 801-297-7027.

PRO BONO POWERHOUSES



MARK W. BAER

"I've been doing pro bono for decades. It's a personal moral imperative for me. There are a lot of people who've had a very rough go of it. Somebody ought to be out there to lend them a hand."



JOEL BAN

"Pro Bono is so rewarding because so many people I talk to didn't even know about housing assistance or other programs to help them stay in their homes."



LESLIE FRANCIS

"It's nice to feel you've accomplished something good for other people. Pro Bono does that."



MARK THORNTON

"I had a case where a young family came to court not knowing if they'd have a roof over their head that night. When they left court, they knew they had a home and a plan, thanks to this program."



TED CUNDICK

"My most rewarding work as a lawyer comes from helping people that don't know where to turn."



MIRIAM ALLRED

"The most rewarding thing is when the client says 'thank you' for reaching depths they cannot reach."



GEORGE SUTTON

"We have a responsibility to the profession and to society to do all we can to close the Access to Justice Gap."

Ethics Advisory Opinion Committee Seeks New Members

The Utah State Bar seeks applicants to fill two vacancies on the Ethics Advisory Opinion Committee (EAOC). Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in resume or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate,

government, etc.) and substantive areas of practice.

- A brief description of your interest in the Committee, including relevant experience, ability, and commitment to contribute well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions.
- Includes lawyers with diverse views, experience, and background. Priority will be given to applicants from outside of Salt Lake County, particularly central or southern Utah.

Please note, the EAOC meets virtually over Zoom on the second Tuesday of each month at 4:00pm.

Interested candidates can submit the resume and letter of interest to EAOC Chair John Snow at JSnow@parsonsbehle.com.



2023
LAW 65 YEARS ANNIVERSARY DAY



CORNERSTONES *of*
DEMOCRACY

Law Day is turning 65 this year, and once again Utah is joining in this national celebration of the Rule of Law and our industry.

Save the Date!

FRIDAY
May 5

Annual Law Day Luncheon – Friday, May 5, 2023
Grand America, Imperial Ballroom

A celebration of the Utah State Bar and our Utah State Courts

Honoring our Law Related Education students, teachers, and volunteers

Giving awards to the Young Lawyer of the Year, Salt Lake Peer Court, and showcasing pro bono and well-being efforts of the Bar

Please plan to join the event and/or to sponsor a table at the event for your firm, honorees, or for our students.

CLE event, via Zoom, to be hosted the week of May 1, regarding civics, civility and collaboration as the cornerstones of the practice of law and its community influence. Watch your inbox to register!

For additional information or to be involved,
please contact Michelle Oldroyd, via CLE@utahbar.org.

Ethics Advisory Opinion Committee Opinions

Opinion No. 22-02

Issued March 7, 2022

ISSUES

Now that the Utah Rules of Professional Conduct have been altered regarding “Information About Legal Services” by deleting Rules 7.2 through 7.5 of the Utah Rules of Professional Conduct and substantially rewriting the remaining Rule 7.1, what prior Opinions of the Ethics Advisory Opinion Committee (EAOC) are still applicable? Which Opinions can no longer be relied upon?

Now that the Utah Rules of Professional Conduct have been altered regarding paying for referrals and fee-sharing with nonlawyers (Rules 7.2 and 5.4 of the Utah Rules of Professional Conduct), what prior Opinions of the EAOC are still applicable? Which Opinions can no longer be relied upon?

OPINION

Opinions that relied upon communication being “false or misleading” are still applicable. Opinions that concluded certain arrangements were not fee sharing with nonlawyers or paying for referrals are still applicable. Opinions that disapproved of arrangements because they involved paying for referrals or fee-sharing with nonlawyers should no longer be relied upon, as the proposed arrangements might be permitted by the Utah Supreme Court under Standing Order No. 15. Opinions that disapproved of in-person solicitation should no longer be relied upon as in-person solicitation is no longer prohibited, but coercions, duress and harassment continue to be prohibited.

Opinion No. 22-03

Issued March 7, 2022

ISSUES

How are conflicts of interest between a child suffering personal injury and a parent who retains a lawyer to represent the child resolved?

What duties does the lawyer owe to the child, regardless of instructions received from the parent?

What duties does the lawyer owe to the child when the parent has discharged the lawyer from the lawyer’s representation of the child?

OPINION

In representing the interests of the child, the conflict rules found in Rules 1.7, 1.8, and 1.9 of the Utah Rules of Professional Conduct

apply even when the lawyer is retained by the parent. Further, the lawyer is obligated to protect property belonging to the child pursuant to Rule 1.15 of the Utah Rules of Professional Conduct.

BACKGROUND

This request was posed to the EAOC based upon the following facts: Lawyer A represents both a parent and child with personal injury claims. Parent wishes to donate her portion and the child’s portion of the settlement to charity. It is not clear from the submitted facts whether the settlement offer was a joint offer or whether separate settlement offers were made to parent and the child. The EAOC thus addresses both scenarios.

Opinion No. 22-04

Issued April 11, 2022

ISSUE

Is it ethical for a personal injury law firm to advertise or solicit legal services in Utah when the firm does not have a member of its firm licensed in Utah?¹

OPINION

Assuming the Regulatory Sandbox has not approved of the new business venture responsible for the advertising material, or method of solicitation/advertising, it is a violation of Utah R. Pro. Cond. 7.1 (Communication Concerning a Lawyer’s Services) that prohibits false or misleading communications for a law firm to advertise or solicit legal services in Utah if that firm does not have an attorney member of the firm, licensed in Utah. Such advertisements or solicitations may be permissible if an appropriate disclaimer or qualifying language is included.

BACKGROUND

A law firm (Firm) is located outside the state of Utah. No attorney in the firm is licensed to practice law in Utah. Nevertheless, Firm places advertisements for legal services on billboards in Utah. Firm also solicits clients by mailing targeted advertisement to potential clients in Utah and by distributing or posting fliers and pamphlets within Utah.

1. This Opinion contemplates that the firm in question practices in areas of the law controlled or affected in some way by Utah state law. The concerns addressed by this Opinion do not necessarily apply to firms that practice entirely federal law.

PLEASE NOTE: This is an abbreviated version of these opinions.

For the full text of this and all other Ethics Advisory Opinions, visit: <https://www.utahbar.org/ethics-blog/>.

Utah State Bar Request for 2023–2024 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar committees which participate in regulating admissions and discipline and in fostering competency, public service, and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____

Phone # _____ Email _____ Fax # _____

Committee Request:

1st Choice _____ 2nd Choice _____

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

Please list any Utah State Bar sections of which you are a member:

Please list pro bono activities, including organizations and approximate pro bono hours:

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Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

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Date _____ Signature _____

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Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.

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Drafts, reviews, and grades questions and model answers for the Bar Examination.

Character & Fitness

Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

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Please note, the disciplinary report summaries are provided to fulfill the OPC's obligation to disseminate disciplinary outcomes pursuant to Rule 11-521(a)(11) of the Rules of Discipline Disability and Sanctions. Information contained herein is not intended to be a complete recitation of the facts or procedure in each case. Furthermore, the information is not intended to be used in other proceedings.

PROBATION

On December 9, 2022, the Honorable Joseph M. Bean, Second Judicial District Court, entered an order of discipline against Roy D. Cole, placing him on probation for a period of one year based on Mr. Cole's violation of Rule 1.16(b) (Declining or Terminating Representation), Rule 1.16(c) (Declining or Terminating Representation), and Rule 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:

A client retained Mr. Cole to represent him in a custody matter. The court sent notice of an order to show cause hearing that was to be an evidentiary hearing. Two days before the hearing, Mr. Cole requested to appear at the hearing by telephone. A day before the hearing, Mr. Cole notified the client he was going to withdraw if the client did not bring his bill current or if Mr. Cole was unable to get a continuance. That same day, Mr. Cole filed a motion to withdraw from the case.

The court denied Mr. Cole's request to appear by telephone. Mr. Cole did not appear at the hearing and the client proceeded *pro se* after the court denied the request for a continuance. The client was not prepared for an evidentiary hearing without

counsel but had to proceed because Mr. Cole did not appear. The court granted an award of attorney's fees against the client. At the time of the hearing, the client believed Mr. Cole was his attorney and would appear at the hearing on his behalf.

Aggravating factors:

Prior record of discipline; selfish motive; and substantial experience in the practice of law.

SUSPENSION

On October 19, 2022, the Honorable Samuel P. Chiara, Eighth Judicial District, entered an Order against Roland F. Uresk, extending the suspension of his license to practice law for one additional year and imposing a fine of \$500 for contempt of court.

In summary:

Mr. Uresk was suspended from the practice of law for a period of one year effective June 1, 2022 (Order). On at least three occasions after the effective date of his suspension, Mr. Uresk was listed as the attorney of record, appeared before a court on behalf of another and allowed that court to believe that Mr. Uresk was a practicing lawyer. In one case, Mr. Uresk sought a continuance on behalf of a client, which was granted. By doing

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so, he was practicing law while on suspension.

Mr. Uresk failed to comply with Rule 11-570 of the Utah Supreme Court Rules of Professional Practice upon his suspension. This rule would have alerted a court and opposing counsel of the status of his license after suspension and would have alerted the court of Mr. Uresk's inability to represent any individual. Mr. Uresk was aware of the original Order of Suspension and he knew or should have known what was required of him under the Order. Mr. Uresk misled the court by not withdrawing, not filing the correct notice under Rule 11-570 and by not indicating to the court on the record that he could not represent a client for any purpose.

DELICENSURE/DISBARMENT

On September 21, 2022, the Honorable Chelsea Koch, Third Judicial District, entered an Order of Delicensure against Russell W. Hartvigsen, delicensing him from the practice of law. The court determined that Mr. Hartvigsen violated Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.4(b) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15 (d) (Safekeeping Property), Rule 1.16(a) (Declining or Terminating Representation), Rule 1.16(d) (Declining or Terminating Representation), Rule 3.4(c) (Fairness to Opposing Party and Counsel), Rule 8.1(b) (Bar Admissions and Disciplinary Matters), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

This case involves multiple client matters. In one matter Mr.

Hartvigsen failed to competently prepare and arrange service of the petition for divorce and in another case, he failed to adequately prepare and schedule a mediation for the case or otherwise provide competent representation.

In all of the matters, Mr. Hartvigsen failed to diligently represent his clients. In a few cases, clients paid him for mediations, but he did not schedule or participate in the mediations. In several other matters, he did not timely file petitions for family law matters and/or he failed to timely serve petitions or other pleadings on opposing parties. In other cases, Mr. Hartvigsen failed to diligently pursue cases, including failing to pursue issues, missing hearings or failing to communicate with opposing counsel or third parties. In one case the client requested that the Office of Recovery Services (ORS) recalculate child support because her ex-spouse had become employed. Mr. Hartvigsen agreed to accept service on the client's behalf but failed to file anything to that effect with ORS. Mr. Hartvigsen also failed to respond to his client's requests for information. After about three months, ORS finally agreed to work directly with the client. Mr. Hartvigsen did not file a notice or request to withdraw, nor did he notify the client of a hearing date in her court case or appear for the hearing.

In three other cases, Mr. Hartvigsen failed to provide his clients' financial disclosures or discovery responses to opposing parties, even when ordered to do so by the court. Opposing parties were awarded attorney's fees. In one of those cases, after failing to provide his client's financial disclosures, Mr. Hartvigsen did not notify the client about a petition to modify temporary orders and he and the client did not appear at the hearing. Opposing party was awarded sole custody of the children, the client's visitation was ordered to be supervised, and the client was found in contempt and ordered to pay attorney's fees. In a different matter, Mr. Hartvigsen was directed at a hearing on an order to show cause for dismissal to certify the case for trial or request a mediated pretrial settlement conference within sixty days but he did not file anything.

In all the matters, Mr. Hartvigsen failed to reasonably communicate with his clients about matters in the case, failed to respond to requests for information and/or failed to explain matters and developments in the case to the clients so they could make informed decisions regarding the representation. In the case involving the order to show cause for dismissal, the client visited Mr. Hartvigsen's office and found it closed with no forwarding address. In another case, the client contacted Mr. Hartvigsen about questions related to opposing party moving



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 relicensure. Jeannine is happy to be of service to you.

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out of state and other time sensitive issues but he failed to adequately respond. In a paternity case, the client sent Mr. Hartvigsen multiple requests for information and documents but Mr. Hartvigsen failed to respond or he provided little meaningful information.

In four of the cases, Mr. Hartvigsen misrepresented to clients the status of the clients' cases, the work being done and that he had or would be sending refunds of fees. In one of these cases, he made misrepresentations about his efforts to serve and send the complaint and proposed stipulations to an opposing party. In two of the cases, he informed the client that he was contacting the court to schedule hearings in the case when the dockets did not reflect that this was happening.

In three of the matters, Mr. Hartvigsen had a fee agreement with the clients stating the fees were earned upon receipt, but Mr. Hartvigsen did nothing to earn the fees when they were collected. In eleven of the matters, Mr. Hartvigsen collected an excessive fee to represent the client given the work performed and the results obtained. In one case, the client paid a flat fee to request and attend a judicial settlement conference. A week later, a

second fee was taken from the client without authorization. Mr. Hartvigsen indicated he would reverse the second charge but failed to do so and did little meaningful work for the funds received. After not hearing back from Mr. Hartvigsen, the client requested the entire payment be refunded and for Mr. Hartvigsen to withdraw. Mr. Hartvigsen did not timely refund any of the money and he stopped returning the client's communications.

In two of the matters, Mr. Hartvigsen failed to deposit advanced fees into an attorney trust account and failed to maintain the funds he collected from the clients in an attorney trust account until the fees were earned and costs were incurred. In another matter, Mr. Hartvigsen failed to timely provide, upon request, an accounting of funds collected in advance. In seven matters, Mr. Hartvigsen failed to protect his clients' interests when the representation ended by failing to timely refund the advanced payments he had not earned in six of those matters, failing to file a withdrawal from the matter when the representation terminated in five of those matters and failing to return client files as requested in two of the seven matters. In one case, he stopped communicating with the client after he was paid and did not provide the client with a refund. Also, in the matter with

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ORS and another case, the clients made multiple requests for Mr. Hartvigsen to file a withdrawal as their attorney of record, but he failed to do so.

In a few cases, Mr. Hartvigsen failed to prepare proposed orders as ordered by the court. In one of these matters, he failed to prepare a proposed temporary order awarding child support to his client. Instead, opposing party filed a proposed order requiring Mr. Hartvigsen's client to pay child support to the opposing party. Mr. Hartvigsen did not object and the court signed the order. The client contacted Mr. Hartvigsen when she learned of the order. Mr. Hartvigsen filed a proposed corrected temporary order but the court declined to sign it because of opposing party's prior order that had been signed without objection. Mr. Hartvigsen did not file any motions or take any other action to correct the order and the client's paycheck was garnished for several months. The client retained new counsel who was able to correct the prior order. The OPC also sent a Notice of Informal Complaint in each matter requesting Mr. Hartvigsen's responses. Mr. Hartvigsen did not timely respond to the notices.

Based on these cases and additional other matters, the court found the following aggravating and mitigating factors:

Aggravating factors:

Dishonest or selfish motive, pattern of misconduct and multiple offenses involving twenty-three matters, refusal to acknowledge the wrongful nature of the misconduct involved either to the client or to the disciplinary authority, and lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Mitigating factor:

Absence of a prior record of discipline.

DELICENSURE/DISBARMENT

On November 30, 2022, the Honorable Sean Petersen, Fourth Judicial District, entered an Order of Discipline: Delicensure of Sonny J. Olsen for violation of Rule 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), Rule 1.8(h) (Conflict of Interest: Current Clients: Specific Rules), Rule 8.4(b) (Misconduct), and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

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In summary:

This case involves two matters. The first matter involved the following convictions: Mr. Olsen pled guilty to one count of Aggravated Assault, a 3rd Degree Felony, Utah Code Section 76-5-103(1) and one count of Criminal Mischief, a Class A Misdemeanor, Utah Code Section 76-6-106(2) (c).

Mr. Olsen's convictions were based on his knowingly threatening another with unlawful force to cause bodily injury with a dangerous weapon. Mr. Olsen also intentionally damaged the property of another who was a cohabitant.

In the second matter, a woman was facing the prospect of Guardianship proceedings by her family due to her increasing incapacity. The woman retained Mr. Olsen as her attorney to provide legal, business management, and consulting services for a monthly fee. Mr. Olsen assumed the additional role as the client's attorney-in-fact under a durable power of attorney, which gave him wide-ranging power to act on the client's behalf, including control of her bank accounts and the ability to sign checks on the client's behalf. Mr. Olsen nominated himself as the conservator of the client's estate in the event of her incapacity and made himself the co-trustee of her living trust agreement.

Approximately a year and a half later, Mr. Olsen formed a limited liability company (Company). Mr. Olsen drafted the Company's operating agreement which stated that its purpose was to hold and own control of interests in real property and manage other assets of the sole member, his client. Mr. Olsen drafted five separate assignments of interest, which transferred the client's interests in various real estate investments to the Company. Mr. Olsen drafted a vesting agreement that gave him a certain percentage of interest in the Company and a new employment agreement that increased his salary to provide more compensation to him and his client's financial advisor. Mr. Olsen failed to advise the client of the terms of the agreements and misrepresented the value of the Company's assets after the transfer. After the client's accountant learned that Mr. Olsen had created the operating agreement, Mr. Olsen misrepresented to the accountant that the client had approved the agreement and was represented by independent counsel in the transaction.

Mr. Olsen and the financial advisor each vested additional units in the Company. Using the access he had to the client's bank account, Mr. Olsen transferred money to himself to pay his personal tax liability associated with the transfer of units in the Company. Later, Mr. Olsen determined to sell back to his client the same units he received at double the price, using his authority under the durable power of attorney to transfer funds

from the client's accounts to himself.

Early the next year, Mr. Olsen again amended his employment agreement increasing his salary and, among other things, providing him additional vested units in the Company. While the client was hospitalized and in critical condition, Mr. Olsen transferred money from her bank accounts to himself and the financial advisor for the resale of Company units. These units were sold to the client at double the price. A few days later, the client was transferred to an intensive care until of a hospital out of state. The next day, Mr. Olsen instructed the financial advisor to transfer money to the client's account and he would make payments to each of them for their remaining Company units. Mr. Olsen used the client's funds to pay his and the financial advisor's personal tax liabilities associated with this resale. The client was transferred from the hospital to a rehabilitation facility. The next day, the client offered Mr. Olsen money to remove her from the facility. Mr. Olsen took a private plane to remove the client from the facility against medical advice. Mr. Olsen drafted a handwritten directive for the client that absolved him of liability if harm came to the client due to leaving the facility. The agreement also made Mr. Olsen the fully vested CEO

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of the Company. Under threats from the client's family regarding his responsibility for her condition, Mr. Olsen sought a more formal agreement from the client to indemnify him against the claims. Mr. Olsen hired another attorney (Attorney) to represent him in drafting of the indemnification agreement, which the client signed. Mr. Olsen later misrepresented to the client and a third attorney that Attorney was the Company's attorney.

Over the following months, Mr. Olsen continued to sell Company units back to the client and transferred money from the client's accounts to himself. Mr. Olsen did not obtain a valuation of the units. The client's accountants sent a letter to the client, Mr. Olsen and the financial advisor raising concerns regarding the transactions of the Company and its members and recommended an independent audit. Around this same time, the client was again hospitalized. Mr. Olsen drafted an agreement authorizing additional payments by the client to pay his personal tax liabilities. Mr. Olsen misrepresented the date the client signed the document.

An accounting firm was retained to conduct an audit and investigate Company transactions. Mr. Olsen represented to the accounting firm that Attorney was Company's attorney when in fact he was Mr. Olsen's personal attorney.

The client's condition continued to deteriorate to the point where her nurse told Mr. Olsen that the client required round the clock care. That same day, Mr. Olsen executed yet another employment agreement for the client to sign which included language purporting to release Mr. Olsen from all claims relating to his compensation and employment services or activities. The client terminated Mr. Olsen's employment.

DELICENSURE/DISBARMENT

On November 21, 2022, the Honorable Linda M. Jones, Third Judicial District, entered an Order of Discipline: Delicensure of Eric C. Singleton for violation of Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Singleton pled guilty to one count of Felony Bankruptcy Fraud, a violation of 18 U.S.C § 157(1) and (2).

Mr. Singleton devised, intended to devise and participated in a scheme to defraud the bankruptcy court, the bankruptcy trustee, his clients and their creditors through bankruptcy proceedings under Title 11, United States Code. Prior to filing bankruptcy for his clients, Mr. Singleton advised them to transfer money from the sale of their company to his client trust account to hold

from the collection of a judgment in a state court collection case. Mr. Singleton represented to his clients that a portion of the money included his attorney's fees to represent them in the state case and he would maintain the remainder of the funds in his client trust account for safe keeping until their bankruptcy case was completed and he would return the money to them. Despite the promises and without their knowledge, Mr. Singleton withdrew the money from the account and spent the money for his business and personal benefit.

To avoid his clients' appearance at state court supplemental hearings and to hide that the money had been removed from his trust account, Mr. Singleton filed three bankruptcy petitions on behalf of his clients. In connection with his filings in the three cases, he falsely represented the value of his clients' assets, their liabilities, that his client had signed the documents in one case, and the amount of their unsecured debt. He also failed to disclose that his client had received funds from the sale of the client's assets and that the funds had been transferred to Mr. Singleton. In one of the cases, the court made findings that Mr. Singleton knew the clients were not eligible to file a chapter 13 case. All three bankruptcy cases filed for his clients were dismissed.

At a state court supplemental hearing, Mr. Singleton lied to the court about still having funds of his clients in his trust account although he knew he had withdrawn and spent the money a year prior to his testimony. The court ordered Mr. Singleton to appear at another supplemental hearing. In an effort to delay supplemental hearings in the state case, Mr. Singleton filed two bankruptcy petitions for himself. In the first petition, he falsely stated his estimated liabilities. The bankruptcy court dismissed the first case because of Mr. Singleton's failure to comply with the credit counseling requirements. Mr. Singleton allowed the bankruptcy court to dismiss the second bankruptcy case because he failed to file all the required bankruptcy documents.

Based on this case and another matter, the court found the following aggravating and mitigating factors:

Aggravating factors:

Prior record of discipline, dishonest or selfish motive, pattern of misconduct and multiple offenses, refusal to acknowledge the wrongful nature of the misconduct, substantial experience in the practice of law, lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved, and illegal conduct.

Mitigating factors:

Imposition of other penalties.

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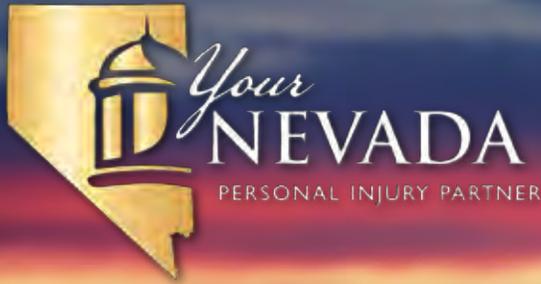
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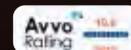
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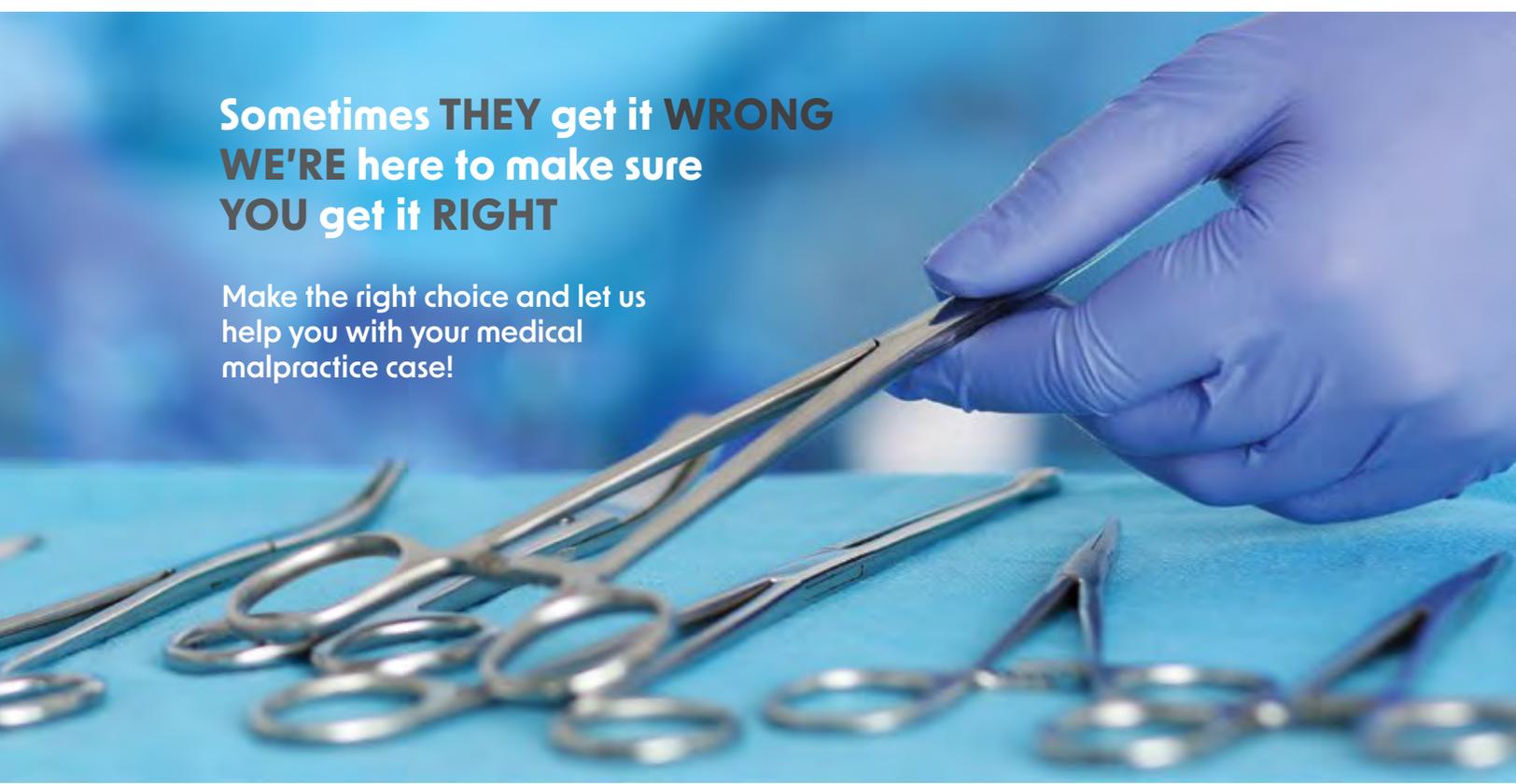
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