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Cover Photo

The Path of the Subway by Utah State Bar member Michael Steck.

MICHAEL STECK is a solo practitioner focusing on business litigation and transactional matters. When asked about how he captured this cover photo, Michael said: "Spring and mountain water deeply cuts through sandstone just before the infamous Subway section of the Left Fork of North Creek inside Zion National Park. I came upon this spot at mile five of the ten-mile hike to visit the Subway in a bottom-up approach that allowed for more photography gear than the more challenging top-down technical approach that requires a wetsuit, harness, and rope to descend."

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

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

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

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

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

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

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

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4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
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(Don't) Kill All the Lawyers

by Heather Farnsworth

"The first thing we do, let's kill all the lawyers."
– Dick the Butcher (William Shakespeare, HENRY IV, Part II, Act IV, Scene 2).

As a lawyer, you've no doubt heard the above quote, or some variation, along with a litany of "lawyer jokes." While at first glance it appears Shakespeare was expressing contempt toward attorneys, this often misquoted quote is, arguably, even more often misinterpreted. Surely it draws a laugh from the audience and continues to sell t-shirts and mugs at nearly every Shakespearean festival, but within the context of *Henry IV*, it was in fact a nod to the value of attorneys. The famous line was spoken by Dick the Butcher, a follower of the rebel Jack Cade, who thought that if he disturbed law and order, he could become king. It is argued that Shakespeare likely meant it as a compliment to attorneys and judges, who instill justice in society and prevent tyranny. *See* Debbie Vogel, *"Kill the Lawyers," A Line Misinterpreted*, N.Y. TIMES (June 17, 1990), *available at* https://www.nytimes.com/1990/06/17/nyregion/l-kill-the-lawyers-a-line-misinterpreted-599990.html. While scholars of Shakespeare indicate the meaning may not be so black and white, attorneys embrace this interpretation for obvious reasons. *See* Jacob Gershman, *To Kill or Not to Kill All the Lawyers? That Is the Question*, WALL ST. J. (Aug. 18, 2014), *available at* https://www.wsj.com/articles/shakespeare-says-lets-kill-all-the-lawyers-but-some-attorneys-object-1408329001. Several law firms champion this interpretation on their websites while simultaneously championing themselves as lawyers. *See* Seth Finkelstein, *"The First Thing We Do, Let's Kill All the Lawyers": It's a lawyer joke*, THE ETHICAL SPECTACLE (July 1997), *available at* https://www.spectacle.org/797/finkel.html. Even the late Supreme Court Justice John Paul Stevens once chimed in with his interpretation in a footnote to a dissenting opinion from a 1985 case: "As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting). Either way, the statement continues to be embraced hundreds of years later as either a battle cry or a badge of honor.

While no one is calling for the literal "killing" of attorneys, a disturbing trend is emerging: using the attorneys' code of professional responsibility in what appears to be an attempt to stifle and silence attorneys. For example, a recent article in the *Salt Lake Tribune* details the case of a police union filing an ethical complaint against a local attorney and city council member due to statements she made on social media regarding a recent police shooting. *See* Leia Larsen, *Salt Lake Police Union Wants City Council Member Disciplined for Calling Palacios-Carbajal Shooting Unlawful*, SALT LAKE TRIB. (Oct. 1, 2020), *available at* https://www.sltrib.com/news/politics/2020/10/01/salt-lake-police-union/. In summary, the attorney indicated that she "believe(d)" the shooting of a suspect to be "unlawful[]" on her private Facebook page. (According to the article, the attorney did not make a public post, but her private post was reported on by news outlets). The union filed a complaint with the Office of Professional Conduct claiming an ethical violation. The Office of Professional Conduct later cleared the attorney. Similarly, in an earlier instance, another police union faced off with another local attorney over a social media advertising spot, calling for his removal from a Judicial Nominating Commission. *See* Scott D. Pierce, *Utah Lawyer Promoted Filming Police with #ShootTheCops hashtag: Despite changing it, police group wants him punished*, SALT LAKE TRIB. (June 5, 2020), *available at* https://www.sltrib.com/news/2020/06/05/utah-lawyer-promotes/. Additionally, in another article written by a local attorney, the attorney states he was threatened with criminal action and an ethical complaint was filed with the Office of Professional Conduct for his political opposition to the Kaysville Fiber project. Jason, *Michelle Barber's Abuse of Power and Misappropriation of City Resources*, MEDIUM, (Aug. 15, 2020), *available at* https://medium.com/@UtahSanders/michelle-barbers-abuse-of-power-and-misappropriation-of-city-resources-e88ddd9adff9.

I'm not condoning, nor condemning, the individual statements of these individual attorneys in these individual instances

– but I am concerned with the emerging pattern of seeking ethical professional sanctions against attorneys for their personal social media statements and political activities. Certainly I can appreciate there may exist specific egregious scenarios where this is the appropriate response. I can also appreciate the necessity for judges to abstain from political activities and I concur that attorneys in specific roles (Bar President, for example) should be cognizant of their roles as representatives of many with opposing viewpoints. I realize it would be entirely inappropriate for me to claim my views as the views of the bar (as much as it pains me at times). However, I believe it is a slippery slope when we threaten lawyers professionally for their personal political opinions and activities. Make no mistake: the market is free to do this. If you are my client, and you don't care for my politics, and you wish to choose alternative representation, by all means do so. That is entirely appropriate. But, to pursue an ethical complaint against the license of a lawyer, because of her or his opinion statement made personally or as a politician, threatens our rights to free speech and threatens democracy. If we silence lawyers, we are not only infringing on their rights, but we are precluding them from meeting their social responsibilities. Lawyers not only have a right to speak out against perceived social injustices and to participate in politics, it is our affirmative duty to do so.

The case for this affirmative duty comes from the preamble to the Rules of Professional Conduct, which states, "A lawyer is a representative of clients, an officer of the legal system and a ***public citizen having special responsibility for the quality of justice.***" Preamble at [1] (emphasis added). A lawyer's affirmative duty as a citizen is as follows:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

Utah R. Prof'l Conduct Preamble [6].

Lawyers, by our very nature and training, have a duty to participate, to engage in reform, and to speak up about perceived injustices. We have a duty to look beyond our own circumstances and to use our influence to assist others in our community. We are obliged to demonstrate compassion for human suffering, as Shakespeare said, "For pity is the virtue of the law, And none but tyrants use it cruelly." Alcibiades, William Shakespeare, Timon of Athens, act 3, sc. 5.

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Remembering Judge Kwan

by Douglas Stowell, Adam Crayk, and Christopher Bown

Judge Michael Kwan passed away in his home with his wife by his side on July 21, 2020, at the age of fifty-eight. Judge Kwan graduated law school from Whittier College School of Law and was certified in Chinese law by East China University of Politics in 1993. He was appointed to the bench at the Taylorsville Justice Court in 1998 and served there until his death. He was the first Chinese-American judge in the State of Utah. In 2002, Judge Kwan's Domestic Violence Program was awarded the Peace on Earth Award from the Salt Lake Area Domestic Violence Advisory Council. In 2008, he received the Governor's Award for reducing drug and alcohol abuse and related crimes through his work on the bench. In his personal life, he was the founder and former President of the OCA-Utah Chapter and served as both President of the Chinese Railroad Workers Descendants Association and Chair of the Asian Association of Utah. Judge Kwan has been commended for his work by many in our community, including Chief Justice Matthew B. Durrant of the Utah Supreme Court, Governor Gary Herbert, Taylorsville City, and numerous colleagues. He was recognized as a great judge, a fierce protector of equal rights, and a proponent of justice for all. He will be greatly missed by many and will not be forgotten.

We were asked to write this article because we worked with Judge Kwan as public defenders in his court since our firm was awarded the Taylorsville Justice Court public defender contract in 2005, and we worked closely with Judge Kwan until his death. While all the things that have been said about him by the community are true, we were also able to see the human side of Judge Kwan on a weekly basis. We got to know Judge Kwan and appreciate the time we got to spend with him.

Judge Kwan served as a great mentor to attorneys at our firm. Our attorneys were trained in the art of lawyering by Judge Kwan, and we are better for it. During the course of our cases, Judge Kwan found teaching moments; we knew we would have to come ready to do our best to provide cogent responses and well-reasoned arguments. We knew we were expected to do our job well, and we are so appreciative of him for expecting more from us as attorneys.

As the court's assigned defense attorneys, we were there when Judge Kwan started one of the first drug courts in the nation. Looking back on this time, it was uncanny how he implemented and practiced many of the best practices that have now been vetted by the National Association of Drug Court Professionals. The Judge would have each individual come up and discuss their accomplishments and failures and afterward, he would take the time to give them words of encouragement and praise. He was always proud of the success stories of his drug court. But his focus on the individual did not stop with this drug court attendees.

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CHRISTOPHER BOWN is a partner at Stowell, Crayk & Bown and focuses his practice on private criminal defense, public defense, and estate planning.

During his daily proceedings, he would get to know the individuals who were appearing in his court. He would spend extra time on their progress even though we had a big calendar, and he would praise them or encourage them as the circumstances warranted. His focus on the individual was truly evident in his ability to remember these individuals and discuss their progress and accomplishments. People rarely left Judge Kwan's court feeling like they had not been heard and received the appropriate outcome.

Judge Kwan was a completely unbiased judge who we never felt was favoring one side over the other. We always received a fair chance to be heard in his courtroom. People do not always understand that aspect of the criminal justice system. Not everything about the criminal justice system is a determination of guilt or innocence. While that is a necessary and essential part of our system, what makes a defendant or a victim feel like justice has been served is when he or she has had the opportunity to be heard. That was one of Judge Kwan's natural abilities. He would listen to the explanation the defendant would give him upon pleading guilty. He would listen to the problems the defendant was experiencing and would try and help solve the challenges that were presenting obstacles to compliance. He would listen to the defendant's testimony at trial and weigh it as he would for any other witness when deciding matters involving the defendant. He listened, and because he listened to all sides in his courtroom, justice was served.

Judge Kwan was a champion of minority rights and helping those less fortunate than himself. Because our firm does immigration law, there were many times he would contact us to help at some type of informational meeting or community gathering to discuss immigration rights and how to go through the immigration process. We never felt pressured to do these types of events; it was just Judge Kwan's interest in serving the community that he instilled in all members of his court to help those in need. Judge Kwan would never accept a plea unless all consequences were understood, especially if immigration consequences existed. Everyone's rights were important to him, as well as the defendant's understanding of the consequences.

In addition, the Judge was constantly trying to remind us and the prosecution of our duties to seek justice for our clients. On January 15, 2020, Judge Kwan invited our office and the prosecutor's office to the showing of the movie, *Just Mercy*. It was humorous because the movie theater was empty except for our group and yet we still sat in our appointed seats mirroring our locations in the court. The Judge sat up front in the middle by himself with some of his clerks to the side. We sat on the left side of the Judge, and the prosecutor sat on the right side. After the movie some of us stuck around and discussed the movie with the Judge. The Judge never said what he wanted us to get out of the movie, but he agreed with our statements about being a defense attorney and a prosecutor. He did say, "I just want you guys to remember that each individual is important and deserves the hard work of both sides." It was interactions like these, outside of the courtroom, where Judge Kwan continued to be the champion of justice and of the individual.

Judge Kwan was a technology guru, and his seat up at the bench showed his unique talent for technology. His working area had two computer screens, and he effortlessly switched from video court to live court without the accompanying technological delays most courts experience. He could help people troubleshoot problems because he knew the technology he was using and was not afraid of it. He was clearly ahead of the curve during our recent COVID-19 pandemic protocols. He was one of the first judges to start using Webex technology and adapting it to the needs of his court. He found ways for us to link up with our public defender clients and have private discussions with them. Judge Kwan's court worked smoothly and efficiently with the switch to video appearances, and it was a success.

We know we speak for others when we say Judge Kwan will be missed by everyone. We looked forward to seeing him in court because he challenged us, and we enjoyed working with him. We know there will be memorials to Judge Kwan and maybe even a courtroom or building named in his honor, however his legacy is not just the work he did at the Taylorsville Justice Court, but the indelible mark he left on each and every one of us. Maya Angelou said it best when she said, "Your legacy is every life you've touched." We are grateful for the opportunity to have been a part of Judge Kwan's legacy, and we are sure others feel the same. Rest in peace Judge Kwan; your legacy will continue.

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Getting to the Bottom of the Access-to-Justice Gap

by Tyler Hubbard, Justice Deno Himonas, Rebecca L. Sandefur, and Jim Sandman

INTRODUCTION

Mark Woodbury recently published an article in the Utah Bar Journal entitled "Response to Narrowing the Access-to-Justice Gap by Reimagining Regulation," which we'll refer to here as the Response. Mark Woodbury, *Response to Narrowing the Access-to-Justice Gap by Reimagining Regulation*, 33 UTAH B.J. 30 (Sep./Oct. 2020). In this article, we address some of the concerns raised in the Response, and then we take the opportunity to share further research about the access-to-justice gap, which the Response does not address.

The Legal Services Corporation Report

According to the Response, "the data sets cited by [Narrowing the Access-to-Justice Gap by Reimagining Regulation] do not support the conclusion that we have an access-to-justice problem." *Id.* at 30 (citing Utah Work Grp. on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation* (2019)). Narrowing the Access-to-Justice Gap by Reimagining Regulation (the Work Group's Report) relied on a 2017 report by the Legal Services Corporation (LSC) for the following proposition: "An astonishing '86% of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.'" Utah Work Grp. on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation* 1 (2019) (citing Legal Servs. Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (2017)). Here, we explain the Legal Services Corp (LSC) report; it convincingly shows that the United States has an access-to-justice problem.[1]

The LSC's 2017 report, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, was based on two rigorous studies and relied on data analyses conducted at the University of Chicago by the National Opinion Research Center (NORC), an independent, objective, and highly respected research organization.

First, NORC conducted a national survey of the civil legal needs of 2,028 adults living in low-income households in the United States. "Low income" was defined as households at or below 125% of the Federal Poverty Level (FPL), which is the cut-off for eligibility at an LSC-funded legal aid program. In 2017, when the survey was conducted, 125% of the FPL was an income of

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JUSTICE DENO HIMONAS was appointed to the Utah Supreme Court in 2015, before which he served for over ten years as a Third District Court judge.

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$15,175 for an individual and $31,375 for a family of four. The survey inquired about a variety of experiences that give rise to civil legal needs and asked respondents whether and how they sought help in dealing with those situations.

Second, the 133 legal aid programs that LSC funds across the United States conducted an "intake census" of people who sought assistance over a six-week period in March and April of 2017. The census tracked whether the applicants were eligible for service and, if so, what level of service, if any, they received.

Both components of the study showed that the market for legal services is dysfunctional. It is simply not serving the needs of low-income people adequately. For example, the intake census, which the Response does not address, showed that *41% of the civil legal problems for which people sought assistance at LSC-funded legal aid programs received no help of any kind.* And these people were just a subset of those who have civil legal needs: they were people who were financially eligible for service, who self-identified their problem as a legal problem, who knew where to go for help, and who were able to visit or otherwise contact a legal aid office and complete the application process. Many additional people with legal needs exceed the very low-income eligibility cap for legal aid (but cannot afford to pay for legal services), do not self-identify their problem as legal, do not know where to go for help, or are unable to access or complete the application process – and none of them were captured in the intake census.

The NORC survey certainly did not show, as the Response claims, that people do not get help with civil legal problems "because they don't really want it." Instead, the survey showed that the process of getting legal assistance is confusing, complicated, and opaque. The NORC survey and other studies show that a major reason people do not seek legal assistance is because they do not self-identify their problem as a legal problem. The survey also showed that people who do recognize their problem as legal often do not know where to turn for help. By a small margin, the most common reason cited for not seeking legal assistance, cited 24% of the time, is that the person with the problem decides to deal with it on their own. But the percentages of people not seeking help who report not knowing where to look (22%) or not being sure whether their problem is legal (20%) suggest that decisions to deal with a problem on one's own may be less than well informed. Against this backdrop, it is not surprising that cost was cited as a concern by only 14% of those who did not seek legal assistance. There are many indicators of dysfunctional markets, in addition to consumer complaints about price, and the NORC survey pinpointed a number of them.

Using both the survey results and the intake census, the professionals at NORC concluded that 86% of the civil legal problems of low-income Americans receive no or inadequate legal assistance. The determination whether legal assistance when provided was adequate or inadequate was based on data from the intake census, during which experienced legal aid professionals assessed the sufficiency of the service rendered for dealing with the problem presented.

The LSC report thus documents the need for more services, different services, and better services to meet the needs of low-income people – all goals of regulatory reform.

Additional Research Documenting the Access-to-Justice Gap

The LSC report is not the only research that evinces an access-to-justice gap in the United States, including research in the State of Utah. Research – from credible sources such as the American Bar Association, the Utah Foundation, the State Bar of California, and the American Academy of Arts and Sciences – supports the LSC report and provides other indicators of an access-to-justice gap. The Response, for the most part, does not acknowledge or discuss this research.

Both the World Justice Project and the Utah State Bar recognize the existence of the access-to-justice gap in the United States. The World Justice Project Rules of Law Index ranks the United States 109th of 128 for whether "people can access and afford legal justice." World Justice Project, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2020 14, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf. **And out of the thirty-seven high-income countries, the United States ranks dead last.** *Id.*

The Utah State Bar also recognizes the access-to-justice gap. It recently "respond[ed] to the Utah Supreme Court with wholehearted support for their hard work and admirable efforts to increase access to justice and in support of a limited and controlled environment like the Sandbox, where innovations to increase access to justice can be entertained, experimented with, and hopefully proven successful." Utah State Bar Comm. on Reg. Reform, Findings and Recommendations Concerning the Apr. 24, 2020 Standing Order No. 15 and Associated Proposed Changes to the Rules of Professional Conduct 4 (2020). The Utah State Bar concluded that "[n]o one can credibly oppose" the efforts to "address the lack of access to lawyers for the indigent and poor." *Id.*

We agree with these authorities. There is an access-to-justice gap. Here we highlight four indicators, backed by research, that confirm the gap's existence: a large number of people who have unmet legal needs, a large number of self-represented litigants, high default rates in litigation, and a large number of people who are turned away from civil legal aid programs.

Unmet Legal Needs

The first indicator of the access-to-justice gap is the large number of people who receive no legal help when facing legal problems. This indicator has been brought to light by studies conducted by the Utah Foundation, the California State Bar, and others.

The Utah Foundation surveyed Utahns in 2019 about their legal needs and released a report in 2020 called *The Justice Gap*. *See* UTAH FOUNDATION, THE JUSTICE GAP 1 (2020). Based on its research, the Utah Foundation concluded that lower-income Utahns[2] had a combined 240,000 legal problems in 2019. *Id*. at 23.[3] But they received "some type of legal aid" on only 40,000 of these issues. *Id*. So, concludes the Utah Foundation, the access-to-justice gap in Utah "is an estimated 200,000 legal issues, from financial and employment law to legal health care and public benefits need." *Id*. at 39.

The Utah Foundation also asked survey respondents whether they "tried to get help with the problems indicated in the survey." *Id*. at 1. Sixty percent did. *Id*. Only half of those who tried "were successful" in getting help – with about 20% getting "assistance from a social or human service agency," 20% finding "help online," 20% hiring a paid attorney, and about one-third using "free legal help." *Id*.

When asked specifically whether they would hire a lawyer if they needed one, about 52% of lower-income Utahns said that they would "still try to solve the problem themselves." *Id*. at 4. Contrary to what the Response says, that may be, at least in part, because of cost: "More than two-thirds of Utah's lower-income survey respondents indicated that they could not afford a lawyer if they needed one." *Id*. at 1. Further research shows that cost does not just discourage lower-income Utahns from hiring an attorney: "Cost is far and away the biggest barrier for hiring a lawyer, according to a 2017 Lighthouse Research statewide phone survey of more than 1,000 respondents. These responses came from businesses and a random sample of Utahns – not

necessarily lower-income populations." *Id*. at 3.

The *California Justice Gap Survey*, conducted in 2019, painted a similar picture of legal needs in California. It found that 55% of Californians "experienced at least one civil legal issue in their household in the past year," and 13% experienced six or more. The State Bar Of California, THE CALIFORNIA JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF CALIFORNIANS 21 (2019). Although the incidence rate was higher for those living in households with incomes at or below 125% of FPL than for those in households with incomes above this level, the difference was small: 60% of poor households vs. 54% of households above 125% of FPL. *Id*. Health, finance, and employment were the main legal problem types identified by all Californians, regardless of income. *Id*. at 22.

Approximately 85% of all Californians received no legal help, or inadequate legal help, for the civil legal problems they experienced. *Id*. at 25. A significant justice gap persists even at higher levels of income: Californians between 501 and 600% of FPL received no legal help or inadequate legal help for 74% of their civil legal problems; those above 601% of FPL, received no or inadequate legal help for 78% of their problems. *Id*. at 65. The *California Justice Gap* Survey revealed that there are two components to the justice gap: a knowledge gap and a service gap. For many problems, Californians simply do not know that the problem they experience has a legal component or remedy, or do not know where to look for legal help – this is the knowledge gap. The service gap occurs when Californians who seek legal help for their problems do not receive adequate help to resolve those problems.[4]

California and Utah are not unique. Other studies show that many people never take their legal problems to an attorney or to the courts. A 2013 study of "Middle City" ("a middle-sized city in the Midwest"), "found that people took just over a fifth (22%) of their civil justice situations to someone outside their immediate social network, and only some of those made it to lawyers: 8% involved contact with a lawyer and 8% had court involvement of some sort." Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016). A separate study, published in 2014, found that only 15% of people facing civil justice issues "sought formal help," and only 16% "even considered consulting a lawyer." Am. Bar Ass'n, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016).

One reason, perhaps, that many people do not even try to get formal help is their lack of faith in the legal system. As part of the Utah Foundation's survey, lower-income Utahns were "asked how often the legal system can help them solve the type of problems identified in the survey." Utah Foundation, THE JUSTICE GAP 38–39 (2020). Sadly, just "18% responded 'most' or 'all of the time,' while 23% responded 'not at all' or 'rarely.'" *Id*.

Taken together, these studies show that "[w]hen ordinary Americans face civil justice problems, turning to law is a relatively uncommon response." Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016). And when individuals do not turn to the law, they often cannot receive the law's protections. They cannot access justice.

Self-Represented Litigants

The second indicator of the access-to-justice gap is the large number of self-represented litigants. Studies show that this is a problem both in Utah and nationwide.

Take the Third District Court for the State of Utah. A study revealed that "[a]t least one party was unrepresented throughout the entirety of the suit in 93% of all civil and family law disputes disposed of in the Third District in 2018."[5] Utah Work Grp. on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation* 7 (2019) (emphasis omitted); *see also id*. at 7 n. 26 ("The data set forth in this paragraph were provided by court services personnel for the Administrative Office of the Courts of Utah."). And, in many cases, we see a power imbalance, with one side having an attorney and the other braving it alone:

In 2019, there were just over 100,000 civil cases in the Utah State Court system. The majority of them were for debt collection. Of the 62,436 debt collection cases, nearly all of the petitioners or plaintiffs were represented by attorneys, but only 2% of the respondents or defendants were represented by attorneys. A slightly less lopsided ratio occurred with the 14,182 landlord/tenant eviction cases, where 90% of petitioners had legal representation, but only 5% of respondents had attorneys. Utah Foundation, THE JUSTICE GAP 4 (2020).

Utah is not the only state with a large percentage of unrepresented litigants: it is representative of the nation as a whole. "The National Center for State Courts estimates that in almost 75% of civil cases in state courts, one or both parties go unrepresented." John G. Levi & David M. Rubenstein, *Introduction*, DAEDALUS, Winter 2019, at 7, 8. That percentage rises for housing court, where "more than 90% of tenants facing eviction have no lawyer, while more than 90% of the landlords do." *Id*. The ABA

has cited similar statistics: "[I]n some jurisdictions, more than 80% of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases." Am. Bar Ass'n, Report on the Future of Legal Services in the United States 12 (2016).

The high number of self-represented litigants in Utah and the nation shows an access-to-justice problem in two ways. First, there are likely many cases in which a self-represented party wants or needs a lawyer, but for some reason cannot obtain one. That is an access-to-justice problem. But we do not argue that all of these unrepresented parties need access to a lawyer to have access to justice. After all, not all cases merit a lawyer. For example, a lawyer would simply not be worth the price tag in a $200 small-claims case. But that does not mean that *some* legal advice in some form would not be helpful. As of right now, a large majority of litigants must take an all-or-nothing approach: hire a lawyer or receive no legal advice. That leads us to the second problem shown by these statistics: by not having the chance to receive some legal advice, these self-represented litigants are denied access to justice.

High Default Rates

The third indicator of the access-to-justice gap in the United States is the default rates in state courts. "According to the National Center for State Courts, the results in 18% of landlord-tenant cases, 24% of debt-collection cases, and 29% of small-claims cases were default judgments." Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, Daedalus, Winter 2019, at 128, 131. Defaults – especially uninformed defaults – indicate that individuals have not engaged with the justice system at all to resolve their dispute (for whatever reason). And since those who default automatically lose their cases (even if the claim against them would not otherwise be meritorious), they effectively receive no access to justice.

Insufficient Civil Legal Aid

The final indicator of an access-to-justice gap (although there are surely other indicators) is the high number of people turned away from civil legal aid programs.

For example, in Massachusetts a study found that "[c]ivil legal aid programs turned away 64% of eligible low-income people in 2013…and nearly 33,000 low-income residents were denied legal representation in life-essential matters involving eviction, foreclosure, and family law, including cases of child abuse and domestic violence." Am. Bar Ass'n, Report on the Future of Legal Services in the United States 12 (2016).

The same story has played out nationally, according to the LSC:

> In 2017, low-income Americans will approach LSC-funded legal aid organizations for help with an estimated 1.7 million civil legal problems. They will receive legal help of some kind for 59% of these problems, but are expected to receive enough help to fully address their legal needs for only 28% to 38% of them. More than half (53% to 70%) of the problems that low-income Americans bring to LSC grantees will receive limited legal help or no legal help at all because of a lack of resources to serve them.

Legal Servs. Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 13 (2017).

This problem affects "moderate-income individuals" perhaps even more than the poor because they – unlike the poor – "do not meet the qualifications to receive legal aid." Am. Bar Ass'n, Report on the Future of Legal Services in the United States 12 (2016).

CONCLUSION

As these studies show, the access-to-justice gap in Utah, and in the United States, is real, and it is vast. We thus need to expand access to justice for the people in this state: "lawful resolution" must happen "for more people and problems than it does now." Rebecca L. Sandefur, *Access to What?*, Daedalus, Winter 2019, at 49, 51.

1. The information in the following paragraphs comes from James Sandman, the President of LSC at the time the report was published (and member of an Advisory Committee on the study and report) and co-author.
2. The *Justice Gap* report defined "lower-income" to mean "those households earning below 200% of the federal poverty line." Utah Foundation, The Justice Gap 1 (2020). "An estimated 800,687 Utahns – or 26% of the population – lived at or below 200% of poverty in 2018." *Id.*
3. The legal problems analyzed in the study were in the areas of employment law, housing, finance, public assistance, health law, public service, family law, domestic violence, discrimination, disability rights, adult care, immigration, education, Indian law, military members, wills, guardianship, and powers of attorney. *Id.* at 8–9
4. Leah Wilson, the Executive Director of the California State Bar during the California Justice Gap Survey, provided us with these paragraphs summarizing that survey. She worked with the Board of Trustees to ensure that a California-specific justice-gap study was included in the State Bar's strategic plan and oversaw its completion and publication.
5. For purposes of this finding, the Third District was defined to include all adult courts, including justice courts.

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The Utah Courts' Response to the COVID-19 Pandemic

by The Honorable Paul C. Farr and the Honorable Todd Shaughnessy

Court is Adjourned

On March 11, 2020, the regular season basketball game between the Utah Jazz and Oklahoma City Thunder was cancelled, right at tipoff, as it was announced that a player, later determined to be Rudy Gobert, had tested positive for COVID-19. The following day the National Basketball Association, which had over $8.7 billion in revenue in 2019, announced the cancellation of the season. If it had not seemed real or serious before, it certainly did then. What followed was a sea change in the way we all went about our lives and the way we transacted business. This was certainly true for the courts.

On March 13, just one day after the cancellation of the NBA season, the Utah court system announced that non-essential in-person hearings would be cancelled, or conducted by video where possible. The decision to suspend in-person hearings in all but the most extraordinary circumstances, to move virtually all court operations to remote hearings, and the many decisions that followed over the coming weeks and months, were not easily made. Those responsible for the decisions, including the Utah Judicial Council and Utah Supreme Court, understand the significant financial, emotional, and personal interests involved in cases before the courts and the crucial need for the courts to remain open for business during our most challenging times. The decisions undoubtedly resulted in delayed justice for many individuals and institutions. Ultimately, three principles have guided all of the decisions made: first, and most important, the health and safety of patrons who visit the courts and the employees who work there; second, discharging our constitutional responsibility to hear and decide cases presented to us; and third, deference to the advice of public health professionals and adherence to their evidence-based recommendations.

Some have asked why individuals can shop in-person at stores or dine in restaurants when, at the same time, the courts remain closed to in-person proceedings particularly when those proceedings often involve such important issues in the lives of the parties and the communities the courts serve. The difference between shopping in stores or dining in restaurants and going to court lies in the unique ability the courts have to compel attendance. Individuals can decide for themselves whether to shop or dine out, but courts (and attorneys as officers of the court) can require people to come to court, on penalty of contempt. Courts can *require* this not only of those accused of crimes, but also parties and witnesses to civil cases, counsel, and – importantly – jurors. In this respect, it is important to remember that Utah's courts interact with thousands of citizens. In fiscal year 2019, for example, the courts handled 711,346 case filings, with each representing one or two parties, often counsel for each, as well as potential witnesses and jurors. The Judicial Council and Utah Supreme Court had to consider the health and safety concerns of all of these individuals in making the difficult decision to discontinue in-person proceedings and subsequent decisions to re-open the courts to in-person proceedings.

This article will acquaint the Bar with the steps the judiciary has taken over the past six months and provide information about the path forward. Additional information also is available at the courts' website: https://www.utcourts.gov/alerts/.

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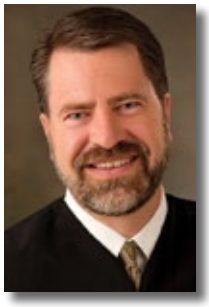

Governance of the Judiciary in Utah

Many state judicial systems are funded and operated almost entirely at the local level, with varying degrees of cooperation and interaction on a statewide basis. Utah is very fortunate – particularly in times such as these – to have a unified judicial system, which creates statewide authority for the general administration of the courts at all levels. The administration of the judiciary in Utah implicates the authority of two bodies, the Utah Judicial Council (the Council) and the Utah Supreme Court (the Court). While most readers will be familiar with the Court, the Council may be unfamiliar to some. Under Article VIII section 4 of the Utah Constitution, the Court is responsible for adopting rules of procedure and evidence, rules to manage the appellate process, and rules to govern the practice of law in the state. Under Article VIII section 12, the Council has responsibility to adopt rules for the administration of the judiciary in the state and, by statute, that includes responsibility for general management of the courts, adoption of uniform policies for general administration of the courts, including facilities, court security, support services, staffing, budgeting, and all other administrative matters. The Council also oversees and directs the operations of the Administrative Office of the Courts. The Chief Justice chairs the Council, which consists of the following additional members: a Supreme Court Justice; a judge of the Court of Appeals; six District Court judges; three Juvenile Court judges; three Justice Court judges; a Utah State Bar representative; and the State Court Administrator, who serves as secretary to the Council. Current membership of the Judicial Council can be found here: https://www.utcourts.gov/committees/members.asp?comm=1.

Occasionally matters arise that implicate the responsibilities of both bodies. When this occurs, the Council and the Court work together to coordinate a response. Such was the case with the judiciary's response to the COVID-19 pandemic and specifically the adoption of the first administrative order, and those that have followed.

The Administrative Order

In the early days of the pandemic, individual courts and judges were scrambling. Individual judges, court locations, and districts were adopting standing orders to try to address what was then a pandemic of uncertain reach and breadth. Given how little was known at the time, individual judges and courts understandably were taking different approaches. This created a patchwork of policies and procedures, many of which were inconsistent with each other. It quickly became clear that a statewide, coordinated response was necessary.

Many years ago, the judiciary adopted a pandemic response plan. The coordinated response would, first of all, need to trigger the requirements of that plan; this is discussed in more detail below. Second, it quickly became clear that to be effective the administrative order would need to invoke both the Council's administrative authority and the Court's rule-making authority. Because of this, the Council and the Court jointly issued the first Administrative Order on March 21, 2020, and have jointly issued each subsequent Administrative Order. So, to the extent the Administrative Order implicates rules of procedure or evidence, it has been adopted and approved by the Court; to the extent it implicates administration of the judiciary generally, it has been adopted and approved by the Council. As a consequence, the terms of the Administrative Order control over conflicting provisions in the rules of procedure and evidence, as the Administrative Order now makes clear. The Chief Justice signs as Chair of the Council and separately as Chief Justice of the Court.

The initial Administrative Order was adopted on an expedited basis. Because time was of the essence, the drafters did not have the luxury of submitting it for public comment. And because we were venturing into the uncharted waters of converting almost the entire system to remote hearings, little was known about the problems and pitfalls this would present. In short, the Council and the Court understood that the first Administrative Order was

imperfect and envisioned that it would require modification as conditions changed.

An Addendum was issued on April 23, and a new Administrative Order on May 1. An Amended and Restated Order was issued on May 11, and another on June 26. The most recent Administrative Order was issued October 2, 2020. The Council and the Court meet regularly to discuss other potential changes to the Administrative Order and welcome your input. The various orders may be viewed here: https://www.utcourts.gov/alerts/docs/20200626%20-%20Amended%20Pandemic%20Administrative%20Order.pdf.

The first and perhaps most important part of the Administrative Order is its mandate that courts of the state remain open to conduct business such as accepting filings, answering phones, and all other business that can be conducted remotely. It incorporates from the Risk Phase Response Plan the color-coded system (red, yellow, and green) for court operations and establishes restrictions and guidelines for courts generally, and for each court level in particular, while operating in each color phase. In adopting these operational restrictions, the Council and the Court relied heavily on our court level boards. The appellate courts, district courts, juvenile courts, and justice courts each have a statewide board composed of representative judges from all parts of the state. These boards serve as the "voice" of their respective court levels and have been essential as the Council and the Court consider what kinds of proceedings will occur, and how they will occur, at each court level. The boards also have provided invaluable input as the Risk Response Plan was revised and updated to deal with the COVID-19 pandemic.

The color key below provides a quick look at what court operations in each color phase consist of. Perhaps most importantly, except where exigent circumstances require it, in-person hearings are prohibited while courts were in the red phase.

Among the most difficult issues the Council confronted was whether to temporarily suspend jury trials. The Council is mindful,

RED	YELLOW	GREEN
All restrictions included in the Yellow phase will be followed.	Social distancing in common areas, work spaces, and courtrooms – maintain 6-foot distance.	Remote hearings can be considered when it is the most effective use of time and resources.
All court patrons, including parties and attorneys, will interact with the court system remotely, unless exigent circumstances require in-person contact.	Court patrons are encouraged to wash their hands frequently, and use hand sanitizer where available.	Courts will continue to consider the needs and requests of vulnerable persons and provide reasonable accommodations.
The courts will continue mission-critical functions. All court hearings will be conducted remotely unless the court is persuaded exigent circumstances require an in-person hearing.	Courtrooms may have new capacity limits based on the size of the room and social distancing requirements.	Business travel by court staff to an area where the CDC, WHO, or the Utah Department of Health recommends self-quarantine upon return is prohibited.
Judges may continue any matter into the future except for in-custody criminal cases and mission-critical juvenile court cases.	In-person patrons will be subject to COVID screening. If they cannot meet the safety criteria, they will be given contact information and not allowed into the courthouse.	
Any in-person hearing under exigent circumstances must be limited to those who are required to attend. Yellow-phase requirements apply. Anyone who is able to attend remotely must be allowed to do so.	Face covering is required for court patrons and staff. Patrons are encouraged to bring their own face covering. If a patron refuses to wear face covering, entrance will be denied and they will be provided court contact information.	

of course, of the constitutional right to a jury trial in criminal and civil cases, of the rights of criminal defendants to a speedy trial, and of the critical role juries play in resolving disputes. The Council also is aware of the fact that many times the prospect of a jury trial is the key ingredient needed to cause stipulated resolution of a case. Against these weighty considerations, however, the Council must consider the health and safety of jurors and prospective jurors and their families and loved ones. Although parties, witnesses, and others may be willing participants in a trial, jurors are not. It's one thing for participants to voluntarily risk exposure to COVID-19, but quite another to compel someone to face that risk in the name of jury service. Beyond jurors, the Council must consider the health and safety of other participants in the trial, including witnesses, parties, counsel and their staff, as well as our own court staff. Also important, and yet difficult to quantify, is the risk that jurors compelled to appear may not give a case their undivided attention with the cloud of possible exposure hanging over the courtroom. Finally, things like age, race, and ethnicity are all known risk factors associated with COVID-19. Based on some studies, as much as 45.4% of the population is at increased risk as the result of other health conditions. Mary L. Adams, et al., *Population-Based Estimates of Chronic Conditions Affecting Risk for Complications from Coronavirus Disease, United States*, 26, No. 8 Emerging Infections Diseases, (Aug. 2020), https://wwwnc.cdc.gov/eid/article/26/8/20-0679_article. Eliminating prospective jurors based on these or other risk factors could skew the jury pool in a constitutionally impermissible manner. Needless to say, this was not an easy decision last spring, but ultimately the latter series of concerns prevailed, at least for now.

Pandemic Response Plans

The judiciary's statewide Risk Phase Response Plan was updated and revised on June 23, 2020, and is available at https://www.utcourts.gov/alerts/docs. The plan, together with its appendices, is a detailed operation manual for the courts during the pandemic. It specifies the three phases of operation, red, yellow, and green, and how the courts will move between phases. From mid-March through August, all courts in the state were operating in the red phase. While in the red phase, most in-person proceedings are prohibited. Although in-person proceedings are not allowed, the business of the courts has continued through remote hearings conducted on the Webex online platform. In late March courts began holding remote hearings via Webex. To date, the courts have held more than 49,000 virtual meetings, which equates to more than 42,000 hours of work. This includes more than 432,000 individual participants. There have been more than 140,000 hearings on more than 63,000 cases in the district courts and more than 133,000 hearings on more than 96,000 cases in the justice courts. Juvenile courts have conducted over 21,000 hearings on more than 8,000 cases. The courts started from scratch. Webex hearings were unavailable to the courts prior to mid-March 2020. Although arraignment and smaller jail calendars have been conducted by video transmission for years, the size, scope, and scale of transitioning all in-court proceedings to Webex was unprecedented. Our IT staff scrambled to secure licenses, software, and hardware necessary to facilitate every judge in the state, at every level, being able to conduct a video hearing at any time of the day or night and invite an almost unlimited number of participants to attend those hearings. Our staff had to learn this new system, educate stakeholders and the public about it, and integrate it with our existing case management systems. And they had to do all of this with more than 50% of them working remotely from home.

The courts also had enthusiastic support from the stakeholders with whom we work on a daily basis. Personnel from all of the county jails and the prison worked tirelessly to set up Webex systems in their facilities and transition their work from transporting inmates to and from courthouses to holding video court in custody. Prosecutors, public defenders, attorneys, and others in the community upon whom the courts rely have supported (and endured) the sometimes long learning process with few if any complaints. Finally, our judges of all ages and at all levels – not necessarily known for embracing the latest fads or living life on the cutting edge of technology – have embraced this new way of doing business.

These Webex hearings have kept the wheels of justice turning, sometimes more slowly than we all would like. We are all anxious to resume something more closely resembling our professional lives prior to March 2020 as soon as possible but recognize that much has been learned in this process that will help us more effectively and efficiently serve the public when the pandemic finally ends.

Before a court may resume with in-person proceedings, the Council's Management Committee (the Committee) must designate the county in which the court is located as being in the yellow phase. Any court may request that the Committee move a county from a red designation to a yellow designation. The request must be accompanied by documentation from the local health department. This documentation must show whether the COVID-19 infection rate has been accelerating, stabilizing, or decelerating over the prior two-week period. It also must include information regarding ICU usage, the percentage of positive tests, and the percentage of individuals

infected per 100,000. Based on these data, the Committee makes a decision regarding a county's designation. In so doing, the Committee understands that its members are not epidemiologists or public health professionals. Rather than attempt to draw conclusions from the data, the Committee instead relies on the information and sometimes conflicting opinions of public health professionals at the local and state levels.

In addition to the county designation of yellow, each individual court must submit a Pandemic Response Plan specific to that location for approval by the Committee. There are 184 courts in the state (including justice, juvenile, and district courts). The Pandemic Response Plan follows a template created by the Council. It consists of eight pages and thirty-five separate items for consideration. These items include personal protective equipment, spacing, scheduling of hearings, cleaning, coordination of employee schedules, and many other items. Each court must demonstrate that it has considered, and made plans to accommodate, each of the designated items. The goal is to ensure the safety of patrons and employees once in-person hearings resume. Once a plan is approved and the county in which the court operates has been designated yellow, the court may hold in-person hearings consistent with their Pandemic Response Plan and the Statewide Risk Phase Response Plan.

In the yellow phase, in-person hearings and jury trials are permitted, but precautions such as social distancing in the courthouse and courtroom, wearing masks, and regular sanitization must be strictly followed.

Work of the Management Committee

Each member of the Council serves on one of four executive subcommittees, which serve as the workgroups for various Council responsibilities. These subcommittees typically meet more often than the full Council. This allows them to respond and act on behalf of the Council in a more timely manner on issues that arise within the spheres of their responsibilities. The Committee is the committee responsible for acting on the Council's behalf with respect to ongoing COVID-19 related issues. It serves as the clearinghouse for issues related to the Administrative Order and Risk Phase Response Plan and has been tasked with managing courts' transitions through the color-coded phases of the plan. The members currently serving on the Committee include Chief Justice Durrant, Judge Kate Appleby of the Utah Court of Appeals, Judge Todd Shaughnessy of the Third District Court, Judge Mark May of the Third District Juvenile Court, and Judge Paul C. Farr, a justice court judge in the Third District. The Committee also benefits from the experience and service of many senior level administrators, trial court executives, general counsel, and staff with the Administrative Office of the Courts.

In prior years the Committee met once per month. In 2020, because of COVID-19, the Committee has already met forty-seven times and presently has an additional nineteen meetings scheduled through the end of the year for a total of sixty-six meetings. The Committee currently meets at least twice each week to address COVID-19 issues. Each of these meetings has an agenda, typically scores of pages of attachments for review, and minutes are dutifully kept. The Committee functions because of its outstanding executive assistant, Jeni Wood, who

prepares, organizes, and coordinates all of its work.

The Committee is ultimately responsible for approving for operation each and every one of the 184 courts in the State. It also is responsible for determining, on a county by county basis, whether and when it is appropriate to move from red to yellow to green phases (or back again) and addressing issues as they arise under the Administrative Order and Risk Phase Response Plan. The Committee also monitors on a weekly basis the COVID-19 data for each county in the state. In this respect, the Committee relies heavily on the trial court executives for each district and court level, who serve as the primary interface between the Council and judges in a district.

Current Status

Utah's appellate courts continue to hold live-streamed oral arguments remotely; this will continue at least through the end of the year. Parties and the media will be notified when the appellate courts resume in-person oral arguments.

Several counties have already been moved to yellow, and some counties previously moved to yellow have been moved back to red with the recent surge in COVID-19 cases. District, juvenile, and justice courts in those counties in the yellow phase that have had their local Pandemic Response Plans approved are currently holding in-person hearings and jury trials. A list showing the counties currently in the yellow and red phases can be found at the courts' website: https://www.utcourts.gov/alerts/. Courts in red counties will continue to hold hearings via Webex, and in-person hearings when exigent circumstances require it.

The Risk Phase Response Plan addresses how jury trials will be conducted, recognizing that they are complex to administer and present unique challenges. The Committee created a working group of district and justice court judges to study and make recommendations for how jury trials should be done. The working group's recommendations for two approaches appear as Appendix C to the Risk Phase Response Plan. Because social distancing cannot be achieved with most traditional jury boxes and assembly rooms, courtrooms must be reconfigured to accommodate jury trials. The working group offers two approaches. In the first, jurors are seated in the audience portion of larger courtrooms, counsel tables and lecterns are reconfigured, and the public views the proceedings remotely. In the second approach, developed by our IT staff, jurors and a bailiff are seated in a different room, socially distanced, and observe the proceedings via closed circuit video and audio. Live images of the jurors are transmitted to screens in the jury box – allowing the jurors to observe everyone in the courtroom, from the well, and allowing courtroom participants to observe the jurors, just as would occur with a traditional jury box. A video demonstration of this system can be found at https://youtu.be/Zvsqf8qeaVU.

Jury trials must comply with one of these options. Jury selection also must be revamped. No longer can we summon large numbers of people to sit in a courtroom or assembly room awaiting jury selection. Jury selection must be done remotely, by Webex, or in a staged fashion. Also, information will need to be obtained from prospective jurors about COVID-19 related issues. The working group prepared a sample jury questionnaire to obtain information about jurors' attitudes and concerns on this subject. The working group offers a variety of other recommendations and we urge practitioners to consult these resources as jury trials resume.

Post-Pandemic Changes

The COVID-19 pandemic has forced people and organizations, including courts and lawyers, to rethink the ways in which they do business. Some aspects of court procedure, such as jury trials, are significantly better when conducted in person. But some hearing types are easily conducted by remote means. For example, pretrial conferences where parties are represented by attorneys are easily handled by video. Such remote hearings allow private attorneys to appear in multiple courts during the same morning or afternoon. Remote arraignments allow parties who live outside of the jurisdiction to appear without the expense and burden of travel. Individuals who previously had to take a day off of work to attend a court hearing may be able to take a quick break and attend a hearing on their cell phones. Failures to appear may decline. The courts may become more accessible and less intimidating.

In addition to parties and their lawyers, these changes benefit the public and provide greater transparency. Members of the public can access court calendars at https://www.utcourts.gov/cal/ and find a link to the courts' Webex hearings. Any interested party can now watch court proceedings from the comfort of home.

We have learned many lessons during this challenging time, and believe these lessons ultimately will make the courts stronger and more efficient over time. As a result, we would expect that many of the positive changes made will continue even after the pandemic has passed.

We are grateful to the many members of the Bar for their patience, understanding, and support during this unprecedented time. We look forward to seeing you in court again.

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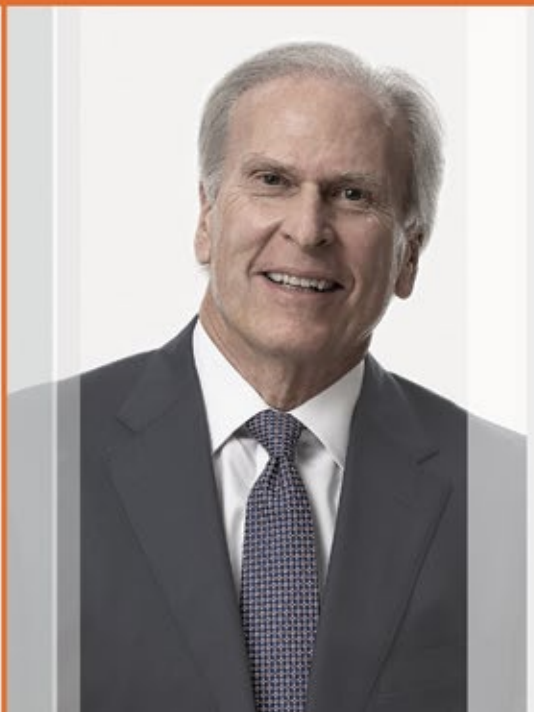

Are The Advisory Committee Notes To Judicial Rules Always Advisable?

A Case Study of Rule 804(3) of the Utah Rules of Evidence and Why its Committee Note Should be Disregarded.

by Jeffrey G. Thomson, Jr.

Introduction

Fifteen years ago the Utah Supreme Court noted, "There has been significant debate regarding what weight should be afforded advisory committee notes to judicial rules." *Burns v. Boyden*, 2006 UT 14, ¶ 18 n.6, 133 P.3d 370. It is a debate that has played out on the national stage in the United States Supreme Court. *Compare Tome v. United States*, 513 U.S. 150, 160–63 (1995) (Kennedy, J., concurring), *and id.* at 167–68 (Scalia, J., concurring).[1] After a brief summary of that debate, the Utah Supreme Court concluded "that, although not authoritative, the advisory committee notes to the Utah Rules of Evidence merit great weight in any interpretation of those rules." *Boyden*, 2006 UT 14, ¶ 18 n.6.

Yet just four years ago the Utah Supreme Court stated that "Advisory Committee Notes are not law. They are not governing rules voted on and promulgated by this court. They set forth only the advisory committee's views of our rules. And although they may provide helpful guidance, they cannot override the terms of the rules themselves." *In re Larsen*, 2016 UT 26, ¶ 31, 379 P.3d 1209. Indeed, three years ago the Utah Supreme Court and the Utah Court of Appeals both "reiterate[d] that district courts are bound by the language of [the] rule[s]" of evidence. *State v. Lowther*, 2017 UT 34, ¶ 41, 398 P.3d 1032; *State v. Thornton*, 2017 UT 9, ¶ 46, 31 P.3d 1016; *Strand v. Nupetco Assocs. LLC*, 2017 UT App 55, ¶ 4, 397 P.3d 724 ("Courts are, in short, bound by the text of the rule.").

What happens, then, when a rule's advisory committee note contradicts the rule's actual text?[2] Does it still merit "great weight" in interpreting that rule?

This article considers these questions through the illustrative lens of Rule 804(b)(3) of the Utah Rules of Evidence known as the statement against interest exception to the rule against hearsay. Referencing a 2011 amendment to that rule, this article provides a case study of conflict in what the advisory committee note says the amended rule means and in what the rule's actual post-amendment text says. And, just as the Utah Supreme Court in *In re Larsen*, 2016 UT 26, 379 P.3d 1209, repudiated a committee note that conflicted with one of the rules, this article concludes that where an advisory committee note and a rule's text disagree, the rule's text should prevail. Thus, as it pertains to Rule 804(b)(3) of the Utah Rules of Evidence, courts and parties should disregard that rule's advisory committee note.

Rule 804(b)(3)'s Statement Against Interest

Prior to 2011, the statement against interest exception to the evidentiary rule against hearsay read:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ***
>
> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position

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> would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Utah R. Evid. 804(b)(3) (2011).

Notably, before 2011, where the theory of evidence admissibility under this rule rested on the declarant's statement against his or her penal interest and if it was being offered to "exculpate the accused" in a criminal proceeding, the offering party had the additional requirement of showing that the hearsay was supported by "corroborating circumstances [that] clearly indicated[ed] the trustworthiness of the statement." *Id*.

This corroborating circumstances requirement, however, did not apply if the hearsay was offered "for inculpatory use." Ronald N. Boyce & Edward L. Kimball, *Utah Rules of Evidence 1983 – Part III*, 1995 UTAH L. REV. 717, 808–13 (1995). Thus, the requirement of corroboration most often applied to criminal defendants seeking to admit an unavailable declarant's statement against interest in the hopes of casting doubt on the defendant's own guilt. *E.g., State v. Gentry*, 747 P.2d 1032, 1038 (Utah 1987). By contrast, if the government offered a declarant's inculpatory statement against, say, a codefendant, the government only had to show that the statement was inculpatory. The corroboration requirement did not apply to the government's use of the statement.

The Rule's Amendment and the Advisory Committee Note

In 2011, however, "the rules [of evidence] were restyled…." *State v. Lucero*, 2014 UT 15, ¶ 12 n.5, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. Among this restyling, Rule 804(b)(3)'s exception to the rule against hearsay was broken into subparts (A) and (B) and amended to read as it does today:

> The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> ***

> A statement that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Utah R. Evid. 804(b)(3) (2012).

Significantly, while subpart (A) of the amended rule did little more than rephrase the first sentence of the pre-2011 rule, making it more visibly appealing and readable, subpart (B)'s amendment of the second sentence of the pre-2011 rule was a substantive one, markedly different from its predecessor. By its plain language, the former corroborating circumstances requirement is now no longer limited to hearsay being offered to exculpate the accused. Instead, it broadly applies "in a criminal case" if the theory of admissibility is the hearsay's being against penal interest, and it applies to either party offering it, whether it be for an inculpatory or an exculpatory purpose and whether it is offered by the defendant or by the government.

That is easy enough. Although it is not as favorable to the government as it was before, to this article's author speaking from the perspective of a prosecutor, it is nonetheless fair and it makes sense. Corroboration, like a buttress, shores up the walls of hearsay against the waves of unreliability. But here's the wrinkle and, hence, the conflict. About this particular change, the 2011 Advisory Committee Note specifically states:

> The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

But the amendment to Rule 804(b)(3) was not stylistic only. It did change how a court would rule on the admissibility of a declarant's statement against penal interest, broadening the application of the corroboration requirement to both parties and to all statements offered, either for exculpatory or inculpatory reasons.

Confronting this conflict today, should a trial judge follow the plain language of the current rule or take the advisory committee's reassurance to heart and apply the pre-2011 meaning of the rule? The latter is certainly a tempting argument to make, especially as a government attorney. And the Utah Supreme Court has previously referenced this type of "stylistic-in-nature"-only committee note to another rule to articulate why its interpretation did not change. *State v. Richardson*, 2013 UT 50, ¶ 19 n.1, 308 P.3d 526. To answer this question, it is helpful to know the nature and purpose of advisory committees and their notes.

Judicial Advisory Committees

In a government, as ours, where the legislative and judicial powers of governance are separated into different distinct departments, judicial advisory committees, which assist the judiciary in making law, might be subject to challenges of a uniquely constitutional nature.[3] In Utah, however, because the judicial department's authority to create committees and adopt rules is now founded in Article VIII, Section 4 of the Utah Constitution,[4] the distinctiveness of advisory committees is not one of a constitutional concern. *See Burns v. Boyden*, 2006 UT 14, ¶ 18 n.6, 133 P.3d 370.

> To assist the Supreme Court with [its constitutional directive to 'adopt rules of procedure and evidence to be used in the courts of the state'], the Supreme Court establishe[d] a procedure for the creation and operation of advisory committees; [and] the adoption, repeal and amendment of rules of procedure and evidence. . . .

Utah S.Ct. R. Prof'l. Prac., General Prov., Art. 1, *available at* https://www.utcourts.gov/resources/rules/ucja/view.html?title=Advisory%20Committees%20and%20the%20Rulemaking%20Process&rule=ch11/Ch11_Art1.htm (citing Utah Const. art. VIII, § 4).

This procedure, publicly accessible online, provides for the creation and composition of assisting advisory committees. Utah S.Ct. R. Prof'l Prac. 11-101. *Id.* R. 11-01. It outlines how they function. Utah S.Ct. R. Prof'l Prac. 11-102 & 11-103. *Id.* R. 11-02 & R. 11-103. And it explains the process by which the Utah Supreme Court takes action on their proposals. Utah S.Ct. R. Prof'l Prac. 11-105. *Id.* R. 11-05. Finally, it directs the notice, invitation for comment, and distribution process of rules proposed or adopted.

Utah S. Ct. R. Prof'l Prac. 11-106. *Id.* R. 11-06.

While a committee's meetings are not public, a person's attendance can be allowed and a committee does publish the dates of its meetings, the minutes from its meetings, the materials considered in its meetings, and the links for comments to be made regarding its proposals. *See, e.g.*, Supreme Ct's Advisory Committee on Rules of Evidence, https://www.utcourts.gov/utc/rules-evidence/ (last visited Oct. 1, 2020).

Importantly, a committee's role is one of assistance. Utah S.Ct. R. Prof'l Prac., General Prov., Art. 1. It makes recommendations. But it is the Utah Supreme Court, and that court alone, that is ultimately constitutionally charged with and responsible for "adopt[ing] rules of procedure and evidence to be used in the courts of the state…." Utah Const. art. VIII, § 4. There is no independent or overriding authority in an advisory committee's votes or proposals. Such committees are subservient to the Utah Supreme Court.

Advisory Committee Notes

"Petitions for the adoption, repeal or amendment of a rule of procedure, evidence, or professional conduct, may be submitted by any interested individual to the chair of an advisory committee, or the Supreme Court." Utah S.Ct. R. Prof'l Prac., General Prov., Art. 1, 11-102(1). The appropriate advisory committee will then meet, discuss, and vote on the proposal. Utah S.Ct. R. Prof'l Prac. 11-102. In doing so, the committee may also formulate notes about the proposal. Utah S.Ct. R. Prof'l Prac. 11-103. These notes, however, reflect "only the advisory committee's views of [the] rule[]." *Matter of Larsen*, 2016 UT 26, ¶ 31, 379 P.3d 1209.

Once a committee has finalized a recommendation and any of its accompanying notes, it transmits them to the Utah Supreme Court for approval to allow for public comment. Utah S.Ct. R. Prof'l Prac., 11-103. It goes without saying that it is difficult to foresee or predict every potential application of a rule. Thus, the proposal and the notes are then published for a forty-five day comment period. *Id.* After that period ends, a committee reconvenes to review the comments and make any agreed-upon modifications, followed by another public comment period if the changes made are substantial. *Id.*

With the final proposed rule, committee notes, a summary of the public comments, and a committee's response to those comments, a committee then transmits its packaged recommendation to the Utah Supreme Court. *Id.* Now before the supreme court, the proposal is adopted, modified, or rejected. *Id.* at Rule 11-105. Unless otherwise stated, it goes into effect sixty days after its adoption. *Id.* And thus it becomes a part of the *corpus juris*.

While an advisory committee's notes are included in the rule's publication, the Utah Supreme Court votes on, adopts, and promulgates the rules themselves and not the notes. *Matter of Larsen*, 2016 UT 26, ¶ 31, 379 P.3d 1209. Thus, as new and perhaps unanticipated situations arise, at times the Utah Supreme Court has later "repudiate[d]," "rescind[ed]," or "stricken" committee notes that were found to conflict with the language of the adopted rules. *Id.* ¶¶ 30–31. This is what the Utah Supreme Court did in *Matter of Larsen*, 2016 UT 26, 379 P.3d 1209. *Id.*

In re Larsen Case

In *In re Larsen*, the court was asked to address a conflict between one of its adopted rules and that rule's advisory committee note. *Id.* ¶¶ 21–31. The rule was Rule 3.3 of the Utah Rules of Professional Conduct, *id.* ¶ 21, which prohibits a lawyer from "knowingly" making a false statement to a court, Utah R. Prof'l Conduct 3.3(a)(1). Tyler Larsen, a former prosecutor, had made a false statement to a judge about how much money a probationer in a criminal proceeding had paid and about the position of the Davis County Attorney's Office. *Id.* ¶¶ 2–7.

After he was charged with violating the rule, the district court "found that," while not "intentional," what Mr. Larsen did was a "reckless misrepresentation," that is, "a misstatement that a reasonable diligent inquiry would have avoided.'" *Id.* ¶¶ 5–6. The district court, it appeared, had relied on the rule's advisory committee note, which explained "that 'an assertion purporting to be on the lawyer's own knowledge …in a statement in open court, may properly be made only when the lawyer knows the assertion to be true or believes it to be true on the basis of a *reasonably diligent inquiry*.'" *Id.* ¶ 28 (alteration in original).

Are the Committee Notes Always Advisable?

While what the note stated was "correct as a statement of best practices," the Utah Supreme Court explained, "it [was] an elaboration on the requirements of rule 3.3" because it extended the rule to apply to an attorney's "constructive knowledge or recklessness" and not just the "actual knowledge" actually required by the rule's actual text. *Id.* ¶¶ 28–29. In other words, the problem with the committee note was it amplified the rule's meaning and application beyond the bounds of the rule's text, taking the requirement of an attorney's actual knowledge and enlarging it to include his constructive knowledge or recklessness. This created a conflict between the rule's text, which was the law, and the committee note, which was not. Accordingly, the court "repudiate[d] Comment 3" of the rule's note and, because the district court had not found that Mr. Larsen had made a false statement "knowingly," "reverse[d] the conclusion that Larsen violated rule 3.3." *Id.* ¶¶ 30–31. In summary, the court found the advisory committee note to be not so advisable. Rather than giving it "great weight," *Burns v. Boyden*, 2006 UT 14, ¶ 18 n.6, 133 P.3d 370, it was discarded.

Rule 804(b)(3) and its Conflicting Note

A similar conflict exists when interpreting and applying Rule 804(b)(3) of the Utah Rules of Evidence with its corresponding Advisory Committee Note. The problem with the note is it reduces the rule's meaning and application, diminishing if not altogether disregarding the rule's text by saying that the amendment was "stylistic only," there being "no intent to change any result in any ruling on evidence admissibility," when the rule's actual text now applies its corroboration requirement to all parties in a criminal proceeding and to all inculpatory statements, whether they are offered to inculpate or exculpate, changing how a court would rule on the admissibility of such a statement. This, too, creates a conflict between the rule's text, which is the law, and the committee note, which is not.

Conclusion

Because "courts are 'bound by the text of'" a judicial rule, *State v. Cuttler*, 2015 UT 95, ¶ 18, 367 P.3d 981, it being what the Utah Supreme Court adopts–and not the history, comments, notes, or discussions surrounding it–the rule is what should prevail. It is the law. Just as the Utah Supreme Court concluded that the committee note in *In re Larsen* should be repudiated "so as to avoid confusion going forward," 2016 UT 26, ¶ 30, and to prevent the misapplication of the law, when it comes to Rule 804(b)(3), it is likewise inadvisable to follow its Advisory Committee note. The rule ought to prevail. Courts and parties, therefore, should ignore the Note to ensure the equal and complete operation of this rule to all parties to whom it applies. This is one of those times where following an advisory committee note is simply not advisable.

1. It is a debate most analogous to the one surrounding the jurisprudential use of legislative histories, in particular committee reports, in interpreting statutes. For a fairly detailed discussion of that debate, *see* William N. Eskridge, Jr., et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy 971-1035 (4th ed. 2007), and Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 29–30 & 369–98 (2012). That debate remains an unsettled one within the Utah Supreme Court. *Compare, e.g., Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 15, 267 P.3d 863 (Durrant, J., majority), *with id.* ¶ 52 (Lee, J., dissenting). However, one of the distinct differences from that debate and the one over the use of judicial advisory committee notes is that members of judicial advisory committees are not elected representatives. The process by which they assist the Utah Supreme Court in making this body of the law raises unique questions about law in a representative democracy.
2. To be clear, this article addresses not the question of interpreting an ambiguity in a rule and supplementing that ambiguity by reference to an advisory committee note; rather, this article more narrowly discusses the conflict arising from a committee note that contradicts the text of an otherwise clear rule. As noted in the endnote 1 above, whether an advisory committee note should ever be resorted to is worthy of its own independent discussion not taken up by this article.
3. Whereas the doctrine of the separation of powers is implied by the structure of the United States Constitution and by its "vesting of certain powers in certain bodies," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2205 (2020), the Utah Constitution contains a clause that expressly separates or divides and distributes its powers of government "into three distinct departments," Utah Const. art. V, § 1. And the "legislative power" is the power to "make" "laws" or "rules of general applicability." *Carter v. Lehi City*, 2012 UT 2, ¶¶ 32–58, 269 P.3d 141. Rules of evidence and procedure are of general applicability. Thus, some might see a constitutional challenge to the judiciary department's power to make such rules.
4. The Utah Constitution explicitly and exceptionally confers on the judicial department the authority to "adopt rules of procedure and evidence to be used in the courts of the state." Utah Const. art. VIII, § 4; accord Utah Code Ann. § 78A-3-103. In fact, the Utah Legislature cannot "adopt rules of procedure and evidence;" rather, it can only under certain conditions "amend[] the rules the supreme court creates." *Brown v. Cox*, 2017 UT 3, ¶ 17, 387 P.3d 1040. Now, before 1984, the judicial department's authority to create rules of evidence was a legislatively delegated one. *Burns v. Boyden*, 2006 UT 14, ¶ 11, 133 P.3d 370; *State v. Banner*, 717 P.2d 1325, 1333 (Utah 1985); Utah Code Ann. § 78-2-4 (1984). However, a "1984 amendment to the Utah Constitution gave [the Supreme Court] primary constitutional authority to promulgate procedural and evidentiary rules…." *Boyden*, 2006 UT 14, ¶ 11. In 1986, the Utah Legislature repealed Section 78-2-4 as cited in *State v. Banner*, 717 P.2d 1325 (Utah 1985), and, in the name of implementation, reenacted the section with language that parroted the 1984 constitutional amendment. 1986 Utah Laws 135. In 1993, the legislature enacted Sections 36-20-1 et seq., creating its own judicial rules committee. 1993 Utah Laws 1356. However, the legislature recently repealed this. 2019 Utah Laws 1539.

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Appellate Highlights

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

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

UTAH SUPREME COURT

Wittingham v. TNE Limited Partnership 2020 UT 49 469 P.3d 1035 (July 15, 2020)

The supreme court held that **a trust deed executed by an administratively dissolved limited partnership was merely voidable – as opposed to void.** Applying the test first articulated in *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51, the supreme court assessed whether the legislature had declared that the contract at issue was unlawful and absolutely void, and whether the transaction harmed the public as a whole.

Matter of Adoption of K.T.B., 2020 UT 51 (July 21, 2020)

The district court struck a filing by a mother seeking to intervene in an adoption proceeding due to a procedural deficiency in the filing, and then excluded her from participating in the adoption proceedings because she had failed to intervene within 30 days as required under the Utah Adoption Act. On appeal, the court reversed the district court's ruling and held that **the "strict compliance" requirement in the Utah Adoption Act is unconstitutional as applied to the mother, where the mother's deficient filing "fulfilled the purpose" of the act, but did not strictly comply with it.**

In re Adoption of B.B. 2020 UT 52 469 P.3d 1083 (July 23, 2020)

In this challenge to an adoption proceeding, the Utah Supreme Court **affirmed the district court's denial of the child's biological father's motion to revoke his relinquishment of the child.** The court rejected the father's argument that Utah Code § 78B-6-112(a)(5) requires a separate hearing or procedure to establish that consent was "truly voluntary;" and that the failure to notify him of his right to seek counseling invalidates his relinquishment on due process grounds.

In re Adoption of B.B., 2020 UT 52 (July 28, 2020)

This adoption case involved a child whose unmarried biological parents are members of the Cheyenne River Sioux Tribe, and the question whether the Indian Child Welfare Act required the court to transfer the case to tribal court. Reviewing the evidence in the record, the court **held the birth mother *was* domiciled in Utah (where she lived at the time the action was filed) because the evidence indicated that *when she moved to Utah* – the relevant point in time for the domicile inquiry – she intended to remain permanently.** The court also held that **the birth mother's "relinquishment of custody and signing away of parental rights in the formal adoption context does not amount to an 'abandonment' because it is not done with the 'intention of relinquishing…parental rights and obligations' immediately or unconditionally."**

Ragsdale v. Fishler, 2020 UT 56 (Aug. 5, 2020)

This appeal arose from the district court's denial of a woman's petition for a civil stalking injunction against her neighbor who routinely flipped her off and swore at her over the course of four years. The district court concluded that the conduct did not constitute stalking because it was directed at the woman's business and not at her personally; the conduct would not cause a reasonable person to suffer fear or emotional distress; and the conduct was protected by the First Amendment. On appeal, the court concluded that **the district court misapplied the civil stalking statute,** reversed the district court's rulings on each of these points, and remanded for further proceedings.

Arrequin-Leon v. Hadco Construction 2020 UT 59 (Aug. 17, 2020)

The supreme court **rejected the argument that, when a party elects an expert deposition instead of a report, the expert's testimony is not limited by the sponsoring party's disclosures.** Nevertheless, a party that fails to "lock

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in" an expert's testimony during an expert deposition still runs a risk of the admission of surprise testimony at trial.

State v. Lopez, 2020 UT 61 (Aug. 18, 2020)

The Utah Supreme Court held that any right a defendant has to compel victim testimony is necessarily limited by the trial court's power to quash "unreasonable" subpoenas under Utah R. Crim. P. 14(a)(2). **In order to compel a victim to testify at a preliminary hearing, a defendant must show that "additional, live testimony from the victim is necessary to present evidence on a specific point material to the probable-cause determination" and "reasonably likely to defeat the State's *prima facie* showing of probable cause."**

Luna v. Luna, 2020 UT 63 (Aug. 20, 2020)

In this case involving a car wreck, a passenger sued the driver of his vehicle and the driver of the car that hit them. The other driver settled first, and the district court granted summary judgment for the first driver because the plaintiff testified in a deposition that his driver had the green light. The court of appeals affirmed and held deposition testimony was a judicial admission. The supreme court reversed, holding that **"a party's deposition testimony is best categorized as an ordinary evidentiary admission that can be contradicted with other appropriate evidence."**

UTAH COURT OF APPEALS

Segota v. Young 180 Co.
2020 UT App 105, 470 P.3d 479 (July 9, 2020)

Segota, dissatisfied with his truck purchase, sued the dealership and the dealership's bond company, alleging breach of contract and fraud. But he failed to serve initial disclosures or conduct any discovery, prompting a flurry of summary judgment motions from the defendants after the close of fact discovery. The Utah Court of Appeals affirmed dismissal of the claims, holding that **the trial court did not abuse its discretion in denying Segota's tardy request for extension of fact discovery or in penalizing him under Utah R. Civ. P. 26(d)(4) for failure to make timely initial disclosures.**

Linebaugh v. Gibson
2020 UT App 108, 471 P.3d 835 (July 16, 2020)

The court of appeals reversed the district court's decision dismissing a boundary by acquiescence claim. The district court found that because the fence at issue was created to contain animals, the parties' "predecessors could not have acquiesced in the fence serving as the boundary line between the parties." Finding error, the court of appeals explained that **"boundary by acquiescence 'is determined by the parties' *objective actions* in relation to the boundary and not their mental state.'"** While possibly relevant, the initial purpose of the fence "is not dispositive."

Pipkin v. Acumen
2020 UT App 111, 472 P.3d 315 (July 30, 2020)

The allegedly defamatory emails and social media posts at issue in this lawsuit critiqued the propriety of a bylaw which allowed the Utah Republican Party to expel party members who made it onto the primary ballot via a signature-gathering route. The court affirmed the district court's grant of summary judgment to the defendants, **concluding that the statements at issue were not capable of a defamatory meaning as a matter of law.** Although the statements contained strong language that adoption of the bylaw "flouts current election law," "constitutes a class B misdemeanor," and was "illegal," in context, these statements were exaggerated commentary that no reasonable reader would understand to accuse the individual plaintiffs of criminal conduct for voting for the bylaw.

Pead v. Ephraim City, 2020 UT App 113 (Aug. 6, 2020)

This case involves the narrow intersection of timelines to file a complaint under Utah's Whistleblower Act against a governmental entity that is subject to the Governmental Immunity Act. Under the GIA, a claimant is required to file a notice of claim and allow the governmental entity sixty days to respond before filing a complaint in court. Once the sixty-day notice of claim period has expired, the WBA's 180-day statute of limitations comes into play. In this case, the sixtieth calendar day from the plaintiff's notice of claim fell on Sunday December 24, and December 25 was a legal holiday. The plaintiff filed his complaint on December 26, which was the last day of the 180-day statute of limitation period under the WBA. The court of appeals held that **the computation of time to file a notice of claim under the GIA is governed by Utah Code § 68-3-7, which requires the exclusion of weekends and holidays from the last day.** The plaintiff was therefore not allowed to file his complaint until December 27, which was one day after the expiration of the WBA statute of limitations. Accordingly, the court reversed the district court's denial of the defendant's motion to dismiss and remanded with instructions to dismiss the plaintiff's claim with prejudice.

State v. Leech, 2020 UT App 116 (Aug. 13, 2020)

Relying on Utah R. Evid. 804(b)(1), the trial court admitted an accomplice's preliminary hearing testimony over defendant's objection. On appeal from a conviction on all counts, the Utah Court of Appeals reversed and remanded on a single count, holding that the admission of the accomplice's testimony was prejudicial error. **Although prior case law held that a defendant has the same "opportunity and similar motive" to cross examine a witness both at a preliminary hearing and at trial, that line of cases was abrogated by subsequent amendment of article I, section 12 of the Utah Constitution, which limited the purpose of preliminary hearings to determination of probable cause.** Because only the determination of probable cause was at issue during the preliminary hearing, Leech had no motive to attack the accomplice's credibility as he would at trial.

Jensen v. Cannon 2020 UT App 124 (Aug. 27, 2020)

More than a decade after the divorce decree was entered, the wife filed this separate action seeking relief from the decree on the basis the husband had failed to disclose certain assets. In affirming the district court's disposition of the claims, the court of appeals confirmed that **a claim for fraudulent nondisclosure requires proof of fraudulent intent. It also held that Utah R. Civ. P. 60(d) is not limited to claims of fraud on the court,** but held the district court was nevertheless correct in granting judgment in the husband's favor on the wife's negligence-based claims.

TENTH CIRCUIT

Generation Res. Holding Co., LLC 964 F.3d 958 (10th Cir. July 10, 2020)

The Tenth Circuit concluded that **the defendant law firms were not "transferees" under the fraudulent transfer statute in bankruptcy, 11 U.S.C. § 550,** and therefore the trustee was not entitled to recover fees that the law firms earned through a contingent fee arrangement with the debtor to recover unpaid contract amounts.

Frappied v. Affinity Gaming Black Hawk, LLC 966 F.3d 1038 (10th Cir. July 21, 2020)

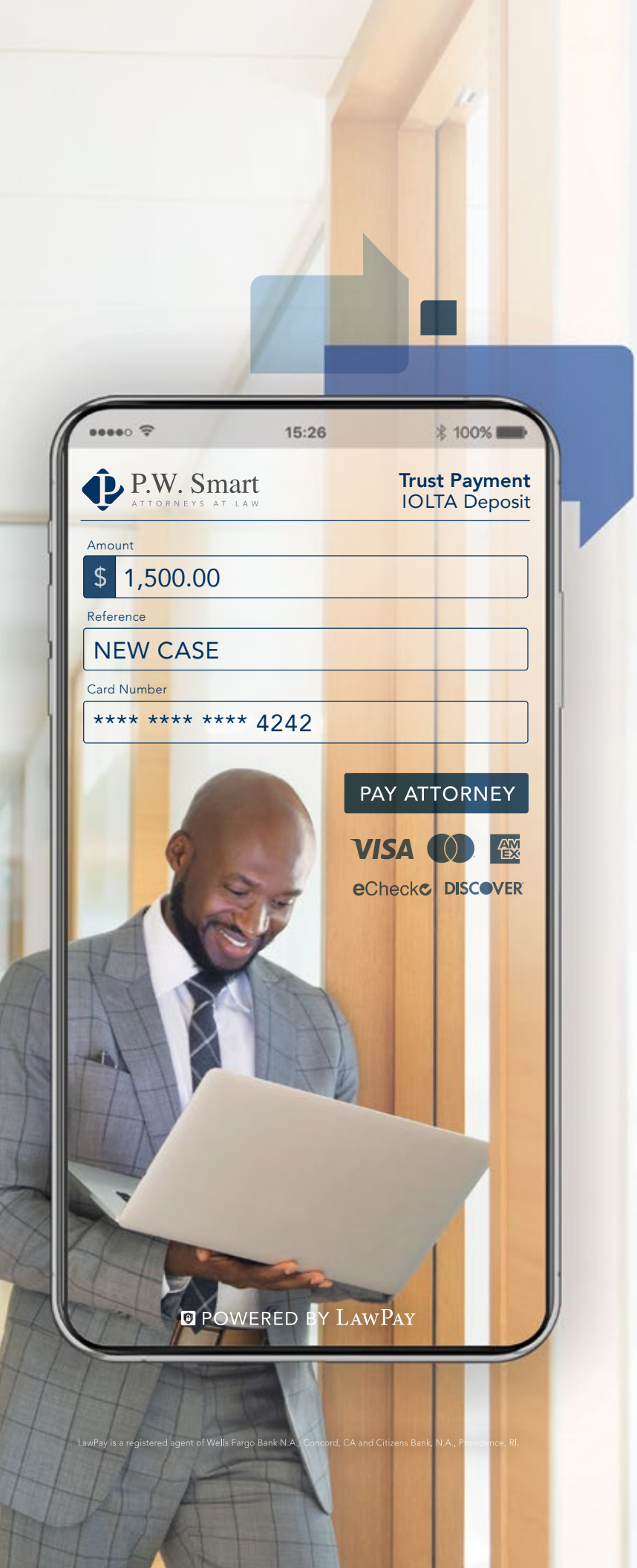
In this discrimination case, the plaintiffs asserted disparate impact and disparate treatment claims under Title VII and the Age Discrimination in Employment Act. The Tenth Circuit affirmed dismissal of the Title VII disparate treatment claim but reversed dismissal of the Title VII and ADEA disparate impact claims and summary judgment in the defendant's favor on the ADEA disparate treatment claim. In doing so, **the court held, as a matter of first impression, that a sex-plus-age claim is cognizable under Title VII.**

In re Stewart, 970 F.3d 1255 (10th Cir. Aug. 14, 2020)

Counsel received $348,404.41 for representing debtors in a bankruptcy, but then failed to disclose his fee arrangement as required by statute and rule. Reversing the bankruptcy court's $25,000 sanction, the Tenth Circuit held that **the presumptive sanction for failure to disclose fee arrangements under section 329(a) of the bankruptcy code would be disgorgement of the entire fee, absent a showing of good cause for a lesser sanction.**

In re McDaniel, 973 F.3d 1083 (10th Cir. Aug. 31, 2020)

In this bankruptcy case, the creditor maintained that its student loans were exempted from discharge, absent a showing of undue hardship. The Tenth Circuit disagreed and, as a matter of first impression, held that **the statutory exception for an "educational benefit" under section 523(a)(8)(A)(ii) of the bankruptcy code did not encompass private student loans.**



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Use of Historical Evidence in the Utah Courts

by Kenneth Lougee

Interpretation of the provisions of the Utah Constitution is a continuing problem in the courts. While the Utah Supreme Court has given some guidance, that guidance often leads to further historical interpretation problems for lawyers and the trial courts. The supreme court tells us to look to the intentions of the founding generation without explicit instructions as to how this is to be done:

> When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted. In interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.
>
> There is no magic formula for this analysis – different sources will be more or less persuasive depending on the constitutional question and the content of those sources. We reject the State's suggestion in its brief that there is a formula of some kind for adequate framing and briefing of state constitutional issues. We use these sources to discern the original public meaning of the text. This court should look to the original meaning of the Utah Constitution when properly confronted with constitutional issues. **The goal of this analysis is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.**
>
> When we examine the historical record to help us understand the original public meaning of the text, we must resist the temptation to place **undue reliance on arguments based primarily upon the zeitgeist. Otherwise, we risk converting the historical record into a type of Rorschach test where we only see what we are already inclined to see.** Merely asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.

S. Salt Lake City v. Maese, 2019 UT 58, ¶¶ 18–20, 450 P.3d 1092 (emphasis added) (internal quotation, alteration, and citations omitted).

A recent case, *Mitchell v. Roberts*, 2020 UT 34, 469 P.3d 901, involved the understanding of the founding generation with respect to the Utah Constitution's due process clause. Specifically, the court found that lapsed causes of action could not be revived by the legislature as revival would violate the due process clause. The purpose of this article is not to challenge the court's findings; rather it is to suggest methods of discerning the intent of the founders in future cases.

The *Mitchell* court relied upon limited Utah evidence of the founder's intent with respect to revived statutes and due process: a law review article and the statements of three members of the 1895 Constitutional Convention. Beyond this, the court relied upon its decisions made following the convention. But there is a rich amount of contemporaneous historical information that was not before the court and which lawyers and judges should consider in future cases that turn on questions of interpretation of the Utah Constitution.

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It is hard for us in the 21st Century to understand the constitutional generation, especially when we assume that they were just like us. We should never forget, "The past is a foreign country; they do things differently there." L.P. Hartley, THE GO-BETWEEN (1953).

When Utah became a state, the legal, commercial, and mining interests were exclusively non-Mormon, to the extent that until 1915 no Latter-day Saint had sat on the Utah Supreme Court. Daniel Jackling had not begun open pit mining in Bingham Canyon, but there was extensive silver mining throughout the state and in Carbon County miners had begun working the coal deposits. In contrast to the largely non-Mormon mining communities, Mormon settlements were predominantly engaged in subsistence agriculture. At the nascent state level, political battles were waged through factions, with even the non-Mormon commercial interests divided into two camps: those who aligned with the national Republican party and the "Silver Republicans" who wished to inflate the currency, to make it easier for Utah debtors to pay debt during the depression years of 1895 and 1896.

I suggest that in *Mitchell*, the court cited no evidence of what common, ordinary members of the constitutional generation actually thought. But this evidence is available and should be advanced in future cases. There are two sources, rarely consulted, that help us understand who the actors were, both published in 1912 by Frank Esshom. "Pioneers and Prominent Men of Utah" provides biographical information on prominent Latter-day Saints, while "Bar and Bench of Utah" does the same for the non-Mormon lawyers who had followed the mining and commercial interests to Utah. Beyond Esshom, the constitutional generation is also accessible through Utah newspapers, which are available electronically. Salt Lake City had four daily papers, each devoted to its particular political, religious, and economic audience. There were about 100 smaller papers printed throughout the new state, all of which are easily accessible. The State Archives may be accessed electronically. And where those sources are not sufficient, there are considerable numbers of diaries, journals, and other writings from the constitutional generation that are now available. As Salt Lake City is the center of the genealogical

universe, much information on Utah's constitutional generation is available online through Ancestry or Family Search.

Once we understand who the actors were, we can begin to understand what they actually believed they were doing in forming a new constitution. Their most important consideration was replacing the federal territorial law with new state law. The Utah Constitution was not written on a blank slate, as Utah had a rich legal history developed in the territorial period.

When we look at the constitutional language, we must never forget that between 1850 and 1896 Utah was an organized territory of the United States. The territory was governed under the 1850 Organic Act passed by Congress. The Utah Supreme Court explained the difference between territorial law and statehood: "The territorial government derives its authority from congress, and congress derives its authority from the people of the United States, while the state government derives its authority from the people of the state. The latter is a sovereignty. The territory was not." *State ex rel Bishop v. McNally*, 13 Utah 25, 43 P. 920, 920 (Utah 1896). Indeed, the president nominated and the Senate confirmed territorial officers such as the governor and the judges of the territorial courts. The people in the Territory had no say in these appointments

The legislative powers of the territory were given to a Territorial legislature. However, Section 6 of the Organic Act provided that any laws passed by the Territorial legislature were subject to the approval of Congress. Because it was a non-sovereign state, Congress could and did legislate directly for the territory, including on issues of due process, without regard to the wishes of the citizens. Most famously, Congress passed the Edmonds Tucker Act of 1887. Through that act, in addition to providing strong penalties against polygamists and disallowing women's suffrage, Congress legislated forfeiture without due process of property belonging to the Church of Jesus Christ of Latter-day Saints and the seizure of funds belonging to the church's Perpetual Emigration Fund, which assisted poor Latter-day Saints in emigrating from Europe to Utah.

The 1896 constitution must be understood against this prior history. When the constitution placed the legislative powers of the people in the Utah State Legislature, the intent was to include not just the powers of the territorial legislature but also the plenary powers previously exercised by Congress. The legislature did not receive part of the power previously exercised by Congress, it received all of the congressional legislative powers. That understanding mediates all other considerations of the 1896 constitution.

In understanding what the founders believed about due process when they drafted the Utah Constitution, these historical underpinnings are even more important than the words spoken at the convention. For example, we should look to what they believed about due process in reviving stale complaints.

The 1884 Territorial Code provided, "No part of it [the Territorial Code] is *retroactive*, unless expressly so declared." The territorial generation may have understood this provision to allow revival of lapsed limitations differently than *Mitchell*. In territorial times, federal case law controlled, and the United States Supreme Court had declared that legislatures could revive lapsed causes of action under federal Constitutional law.

> No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

Campbell v. Holt, 115 U.S. 620, 628 (1885).

The first session of the new statute legislature passed the same retroactive provision as was found in the territorial law. That statute is now codified at Utah Code 68-3-3. In readopting the retroactive provision, it must be assumed that the founders adopted advisedly in light of the United States Supreme Court's *Campbell* decision. "But there is a persuasive inference that the Utah Legislature was acting in conformance with the public understanding of the scope of the right contained in the document they had drafted just months before.…" *S. Salt Lake City v. Maese*, 2019 UT 56, ¶ 83 n.31, 450 P.3d 1092. "Thus, certain provisions of the 1898 Code, having been drafted in 1896 and approved in 1897, can provide persuasive evidence about what the people of Utah would have understood our state constitution to mean." *Id.* ¶ 46. In other cases and circumstances, we should look not only to the convention but also to how the founding generation used their new legislative powers, particularly with respect to due process.

The founders of the constitution and the first legislature promptly proceeded to invade 19th-century vested property interests protected by the due process clause. In 1896, it was commonly believed that a restriction on the hours of employment was a violation of both the deprivation of liberty or the deprivation of property clauses of the United States Constitution. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). Yet the Utah Founders had no difficulty invading both interests. Article 16 of the Utah Constitution provides a broad protection of the rights of labor, and Article 16, Section 7 gave the legislature the power to enforce those broad rights of labor. Responding to that direction, the first legislature passed a statute that:

> The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger; [and that] [t]he period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger;

Act of March 30, 1896, c. 72, of Utah, codified as 49-3-2 R.S.U. 1933.

The law was promptly challenged by one Holden who was fined for employing labor underground for more than eight hours.

> It is claimed that the enactment of the statute in question was forbidden by section 7 of article 1 of the constitution of the state, which is that 'no person shall be deprived of life, liberty or property without due process of law.' The petitioner insists that his trial was not, and that his imprisonment is not, according to 'the law of the land,' because the statute fixing the period of the labor of a laboring man in underground mines was, as he claims, forbidden by the constitution, and therefore void.

Holden v. Hardy, 14 Utah 71, 85–86, 46 P. 756 (1896).

The Utah Supreme Court upheld the law under the Utah Constitution.

> And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers entrusted by the constitution to the lawmaking power.

Id. at 95–96. The Utah Supreme Court was upheld by the United States Supreme Court. *Holden v. Hardy*, 169 U.S. 366 (1898).

This suggests that the founder's notions of due process are much more subtle than the absolute rights found in *Mitchell*. So how should we address these issues in future cases? By looking to sources of information regarding what the founding generation actually believed. For instance, the Utah Constitution's Declaration of Rights was discussed broadly in the territorial newspapers, and if reporters found that discussion was of interest to their readers, we can use their words for insight into the intent of a larger portion of the founding generation, which can be useful to put speakers into context as to their experience and prejudices.

Some ideas are easily seen; the founders' intent to protect industrial workers, for instance, was more important than contemporary notions of due process. The same is true of the original wrongful death act, which was passed to give a remedy to dependents of workers killed in the mines. Today, that history should inform us about the Worker's Compensation Act that replaced portions of that wrongful death act. We should recognize that intent.

So how does history get presented to the courts? I would suggest that in many cases, expert testimony would provide the courts with sounder reasoning about the founding generation. In putting forward such evidence, lawyers need to understand the historical endeavor. History is always open to interpretation, at least when what you are trying to determine is not the dates when the convention sat but the intent behind words and deeds. But the American History Association has adopted a code of ethics for historians who testify in the courts. These historians are expected to footnote their evidence and not misrepresent how they understand the sources.

Rule 702 provides that a witness who is qualified by experience or education may testify in the form of an opinion. Rule 702 is not limited to medical doctors, engineers, or other scientists. When I entered graduate school, one historian had been engaged in an environmental case concerning the historical range of the desert tortoise. He researched the diaries and writings of the first pioneers to enter the area to see how many times the tortoise was mentioned and where the writer was located when the tortoise was sighted. That is merely an example of the uses of historians in legal questions, and it applies equally to the intentions of the founding generations.

For the benefit of our clients and the courts, in constitutional history cases, we should not look just at what was said at the convention, but consider the entire historical record, being careful to remember the context for the sources we rely on, and engage experts where appropriate. Good historical advocacy will properly frame the relevant questions and allow a more complete understanding of the constitutional generation's intent.

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Out From The Darkness Of Addiction And Into The Light Of Recovery

by Kent B. Scott

Introduction

My name is Kent, and I am a recovering alcoholic and drug addict. I am also a lawyer who has practiced for forty-seven years. I have five children and fourteen grandchildren whom I love very much. I have also been married for over fifty-two years and serve in the community in which I live. My best times were being a Little League baseball coach. I love my job, and I am honored to be part of this noble profession. I have two children and a son-in-law who are lawyers. I am very proud of the good people they have become. My sister is also a lawyer.

During my career, I have spent one year in suspension from the practice of law and a second year on probation supervised by attorney Bob Babcock with whom I have formed a lasting partnership for the past forty-four years. For the past thirty-seven years, I have been a member of a twelve-step group in which I have attended close to 5,000 meetings and have stayed sober the past 13,500 days, one day at a time.

Today, my wife knows where I am and what I am doing, and so do I. My kids know that when they call I will answer. My grandchildren have never seen me drunk on alcohol or high on heroin or cocaine. Today I am alive and am grateful to share the following story with you. I hope that someone finds some good in its reading.

My story is not a "how I got sober." It is the story about the concern of lawyers, judges, the Utah Bar, the Office of Professional Conduct, and several Utah Bar leaders who were genuinely concerned about my well-being. My wife and I are most grateful for the concern and help that we have received from members of Utah Bench and Bar. My "go to resource" was Judge Royal I. Hansen and his family. We have remained friends for over the past fifty-five years of time. How about that for good fortune? I also owe my sobriety to a boatload of friends like Rex Thornton who camped out on my lawn and got me running early every morning. He literally ran me into sobriety, and together we have several marathons to our names.

Approximately seventeen years ago I was asked to share my recovery story in an article titled, "Darkest Before the Dawn," that was published in the *Utah Bar Journal*. *See* Kent Scott, *Darkest Before the Dawn*, 16 Utah B.J. 16 (Aug./Sept. 2003). At present, I have been asked to write a follow up article that would include "the rest of the story."

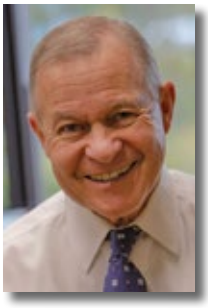
This is one grateful man's story of lawyer wellness that I hope will encourage someone to reach up and reach out for help in finding and growing in their own program of lawyer wellness. Addiction is a disease of responsibility and accountability. In order for recovery to occur, the affected individual needs to find a desire to reach out for help and to work on the recovery principles that are set forth in the following pages of this article.

Beginnings

My story about the road to addiction is pretty garden variety. We alcoholics and addicts are people of all persuasions and members of all kinds of organizations. We are good people who would normally not mix but for our addiction and alcoholism. We have discovered a source of healing that empowers us to stay sober one day at a time. There exists among us fellowship of undescribable joy as we all have been rescued from a common disaster. And it works if you work at it!

Born and raised in Salt Lake City, I played football on a state championship team and attended church because I liked church basketball and girls. I did not drink or use any drugs during high school or college. I met my wife in college where we both affiliated with the Greek sorority and fraternity system. O HAPPY DAYS!

KENT B. SCOTT is a shareholder with the firm of Babcock Scott and Babcock where he is a trial attorney, mediator and arbitrator.



We were planning to travel throughout Europe on $10 a day when I was informed about my newly earned status as a father-to-be. At that time, I was given the opportunity to attend law school at the University of Utah.

At the age of twenty-one, I had graduated from college, was married two years, became a father, and began law school. I also worked part time at a blue-collar job to make ends meet. I was having a "FULL LIFE." One problem: I became overwhelmed and discovered alcohol as a first-year law student. I thought that I had discovered the magic panacea to the challenges and difficulties of law school. During that first year, I also discovered that I was not as slick, hip, or cool as I thought. Everyone in my law class was just as intelligent, even more so. As it turned out, the law class of 1973 contained a number of very bright and exceptional people. When the first semester grades came out it was confirmed that I was not going to be much of an academic star. Someone had to be in the bottom 50%, and that someone included me.

The descent from *magna cum laude* to just another guy in the lower 50% of the class was painful. However, my biggest mistake and my biggest problem was not sharing with someone about how I was using alcohol to numb the pain of my self-perceived difficulties. I drank alone. I drank in great quantities. I drank with shame. Most definitely, I drank to numb the pain and to create grandiose realities about fitting in and being a worthwhile young lawyer. In other words I could not drink like a gentleman or a normal drinker. I was self-medicating to fill in that big hole of insecurity that I was creating in my insides, and I did not pay attention to the slippery slope on which I was treading.

The Utah Survey on Lawyer Well-Being

Unfortunately, my challenges are far from unique in the legal profession. Too many of us struggle with some sort of well-being and health-related concern. Fortunately, our profession is beginning to pay attention. In 2019, the Utah Bar hired researchers from the University of Utah to conduct a study identifying the state of Utah lawyer well-being and the existence and impact of depression, stress, and substance abuse. The goal of this research was to understand where we currently stand and to identify any potential risk and protective factors that can guide our efforts toward effective improvement. In other words, the Utah Bar wanted to better understand *what* is happening, *why* it is happening, and

how we can make a positive difference.

Preliminary study results suggest that the health and well-being of Utah lawyers are at risk. "These concerns include:

- 44.4% of responding lawyers reporting feelings of depression
- 10.5% reporting prior drug abuse
- 48.7% reporting some level of burnout
- Lawyers in the study being 8.5 times more likely to report thoughts of being 'better off dead or hurting themselves as compared to the general working population."

Matthew S. Thiese, *The Utah Lawyer Well-Being Study: Preliminary Results Show Utah Lawyers at Risk*, 33 Utah B.J. 29, 30 (Mar./Apr. 2020). These findings are not only incompatible to a sustainable legal profession, but they also represent our friends and colleagues.

Dancing in the Dark with My Addictions

For a more complete story on my early years of developing addictions to drugs and alcohol and for the first fifteen years of my early recovery, see my previous article,"Darkest Before the Dawn." *See* Scott, *supra*, at 16.

This was not a fun place to be. Moreover, I did not want to share my secret with others. I became self-centered and isolated and was driven by a hundred forms of fear. Fear that if you really knew me, that you would not like me. Fear that you would know me for the insignificant and fragile person that I felt I was. I even recruited my wife into my little secret society [ENABLER] so that she could "protect" me from the adversities of not showing up when I was supposed to show up and not suiting up where I was supposed to suit up. We alcoholics and addicts are very skilled at recruiting good people to help us maintain our addictive behaviors. Alcoholism can become a communicable disease which affects others who put their trust in us. I became very creative so I could control and manage my addictions without the imposition of adverse consequences. In other words, I became very dishonest with others, but more importantly, with myself.

There is a Solution – The Five Pillars of Recovery

For me, the solution was simple in its saying and difficult in its application. Indeed, "faith without works is dead." *1 John* 3:16–18 (King James).

Following are five pillars of recovery that I have used and worked in my march to sobriety. A number of these pillars are counterintuitive to being an advocate in an adversary system. Therein lies the challenge for what we need to do in order to work on and achieve recovery. My five pillars of recovery were and still are:

1. Acceptance.

It is what it is, so do not fight it. When I am disturbed it is because I find some person, place, or situation unacceptable to me. I need to accept life on life's terms. Otherwise, I will never know joy or happiness. I need to concentrate not so much on what needs to be changed in the world as on what needs to be changed in me and my attitudes.

2. Take care of your side of the street.

Avoid chasing rattlesnakes. If you get bit by the snake, run to the nearest emergency room for treatment. In other words, there is no good purpose in holding onto resentments toward opposing counsel, judges, or clients. It only adds to the rocks that you have to carry in your backpack of resentments. This backpack will only weigh you down leading to hypertension, depression, anxiety, and addictive behaviors.

3. Take the cotton out of your ears and put it into your mouth.

After having spent forty-seven years in the law I am finally convinced that I have learned more through listening than talking. Any value that I might be to others as a mediator or arbitrator requires skillful listening. What is skillful listening? Simply, focus on what is being said rather than centering your attention on what you want to say. Avoid talking over each other. Maybe you will better connect with the judge or your opposing counsel by better understanding one another and one another's point of view.

4. Help others.

In my view, helping others is the central core value that has empowered me to manage my addictions. Notice that I used the word "manage." I believe that I am always at risk for relapsing in my addictions. I am like a man who has had his legs cut off. I will never be able to grow new ones . However, I have been given a couple of man-made legs and an occasional wheelchair. I have stopped drinking and using drugs many, many, many times. However, to stay stopped is another matter. For me, I believe that the best way to manage or even be rid of my addictions is to work each day one day at a time on the five pillars of sobriety.

5. It works if you work it – one day at a time.

Act your way into good thinking rather than think your way into good acting . If you have to, "fake it until you make it." I attribute

a great deal of my sobriety to a twelve-step group made up of men and women who have a desire to stop drinking or using. There are many other twelve-step groups for all forms of addiction. These groups have patterned their programs around the Twelve Steps of Alcoholics Anonymous. Alcoholics Anonymous World Services Inc., *Alcoholics Anonymous* (4th ed. 2003). Those twelve steps can be summarized in six words: "Trust God, clean house, help others." And I always have to remember that these principles are referred to as "steps," "not elevators." I learned early that I needed to do more than learn the steps. I needed to work the steps. I also learned that the steps were easier to learn from someone who themselves have worked them. In the absence of that, a supportive friend, a judge, or a fellow lawyer can make a difference. In my case, I found all three in Judge Hansen.

Lawyer Wellness – A Plan and a Vision for You

We lawyers are professionals who serve in an honored profession. To this point, we've earned grades and test scores that have allowed us to be admitted to good law schools for training and understanding what this profession is all about. We have endured many hours of lectures and endless hours of study time from case law books. We have attended and passed several required classes in law school. We have both studied and passed the bar exam. We have endured long hours of work and effort on behalf of our clients, in response to requests and orders from judges and demands from opposing counsel. We have volunteered our time, talents, and strengths to the practice of law.

Also, we lawyers are a generous lot, despite what others may say or think. Look around and see who is involved with government affairs, community service, and non-profit institutions. Remember, that while the doctors were bleeding George Washington to death, our Founding Fathers were writing the Constitution, with its Bill of Rights and had previously authored the Declaration of Independence.

The question today is whether or not the legal profession is capable of serving society's needs and is up to the challenge of preserving the rule of law. Are our legal institutions capable of delivering equal access to justice? What happens if we continue to experience addictive behaviors, depression, and anxiety at the current rates? What will the quality of justice look like in our society? Our best choice is to buckle up and focus on lawyer wellness. I remembered the counsel given to me by my twelve-step sponsor who died forty-seven years clean and sober: "Suit up, show up, and wait for the miracle to happen." It can, and it will.

The following are a few recommendations for your consideration, particularly if you are in your first ten years of practice.

- Everyone: acknowledge the problem and take personal responsibility for its solution.
- Everyone: reduce the stigma of mental health and substance use disorders.
- Judges: monitor for impaired lawyers. If not you, then who?

- Law firms and solo practicioners: encourage connectivity and quality mentoring through personal example, pro bono work, and bar-related service. Create a culture of quality mentoring. Avoid "check-box" mentoring. Remember, there are no graduation certificates for being a mentor or a mentee. We can all learn and grow through the Utah Standards of Professionalism and Civility.

- Law schools: create a system for detecting and assisting students experiencing anxiety and stress. This can be one of your greatest contributions to a better and a nobler profession.

- Utah State Bar: establish a mental health committee and a confidential diversionary program for impaired attorneys. Also, consider adding to the growth of Lawyers Helping Lawyers and providing them with a budget and paid personnel to advance well-being. Look at what we are spending in the prosecution of lawyers through the Office of Professional Conduct (OPC). Their efforts are well needed, and the Utah Bar's continued support of the OPC is critical. Why can we not at least equal the OPC's resources in order to prevent the downfall of our attorneys and preserve their talents? Think about preserving the value to those attorneys, their families, and the legal profession. How much time and money do we spend on the prosecution of lawyers compared with the amount of money we spend on addressing and implementing programs dealing with lawyer wellness and lawyer rehabilitation?

Young Attorneys – Consider the Odds

For those of you who are either in law school or in your first ten years of practicing law consider your odds as reported in a recent medical journal article.

- 72% of your peers have named instability as a serious problem for your profession to address.

- 42% of lawyers and 45% of judges believe that civility and professionalism is a significant problem among the members of the Bar.

- 21% of attorneys qualify as problem drinkers, with a higher rate of 38% occurring in younger attorneys. The statistics also show that women qualify as problem drinkers in an increasing number.

- 28% of attorneys experience depression.

- 23% of lawyers reported high stress symptoms.

- 19% of lawyers report anxiety symptoms.

See Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46, 46–52 (2016).

Conclusion

My story of dancing in the darkness with addiction and emerging into the light of recovery remains an ongoing story for our fellow Bar members. As for myself, I believe that recovery starts and ends with the affected individual. There is no beginning without a personal desire to do whatever is necessary to break the chains of addiction. There is no ending unless the affected individual works the principles outlined in the twelve steps and practices the principles set out in the Utah Standards of Professionalism and Civility.

Stress does not have to be the enemy. Properly channeled, stress can provide a good resource for serving the needs of the client and addressing the challenges of the legal profession. It is the lack of acknowledgement of stress disorders that continue to build until that stress explodes and is expressed through negative behaviors.

Lastly, consider the need to handle and eliminate fear and self-centeredness. Fear is the condition of fighting both the loss of something you have or not getting something you want without doing the footwork. As lawyers, and particularly young lawyers, we have weathered fears about passing our law classes, fears over passing the bar exam, fears about displeasing a partner, and lastly fears about losing a case or not getting the outcome that we wanted. Simply stated, fears are a creation of our own design and can be addressed by applying the principles set out in both the twelve steps and the Utah Standards of Professionalism Civility.

The Well-Being Committee for the Legal Profession (WCLP), co-chaired by Justice Paige Petersen and attorney Cara Tangaro and managed by Executive Director Martha Knudson, is a significant step forward in acknowledging that our well-being is vital to our being at our best personally and professionally. The WCLP has also launched a website with resources designed to help you learn to best care for it. It can be found at www.wellbeing.utahbar.org. Use it. Connect with it. Build your well-being. Above all, help others to do the same. As you do, I think you will find that there is no greater joy in watching someone (yourself included) walk out of the darkness of addiction and into the light of recovery. Happy Journey!

AUTHOR'S NOTE: *The author sincerely thanks Martha Knudson, Executive Director of the Utah State Bar's Well-Being Committee for the Legal Profession, for her assistance with this article.*

The Innovation of Public Outreach and Education

by Tina Wilder and Michelle M. Oldroyd

When we think of both innovation and of attorney well-being, one's connection to our wider community may not immediately come to mind. With innovation, we often think of technology and change. With well-being, we tend to consider our choices about health and our work styles. As part of our work with the Innovation of Law Practice Committee, we hope to expand the definition of innovation to include the development of our own well-being through meaningful connection to others.

We contend that all attorneys and our profession benefit from members of our industry reaching out into our wider community – to schools, to civic groups, to neighbors and social circles, even to other groups of professionals – to share about our work and our respect for the American rule of law. Our nation is in a time of turmoil and crisis; we could all be inspired by a reminder about our civic duty to one another and the manner with which our rights and our responsibilities correspond with each other. Meaningful connections begin with being willing to learn from and understand our neighbors, friends, and colleagues.

An example of promoting innovation and connection from BYU Law School:

BYU Law School's Dean, Gordon Smith, created a new initiative entitled "Listen Together." It is a reading group that faculty members take turns personally curating. The faculty member selects thought-provoking pieces as students learn to explore and meaningfully consider complex societal issues.

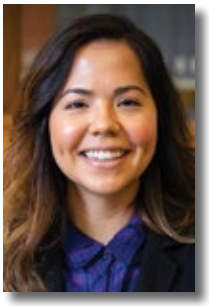
In an era where computer algorithms have the ability to prevent us from seeing viewpoints that would make us even slightly uncomfortable, this reading group is an innovation in education and building human connection. It allows students to discover the viewpoints of their colleagues, to foster understanding amongst a diverse community, and, most importantly, to be heard and understood.

Dr. Martin Luther King Jr. is credited with saying, "In the end, we will remember not the words of our enemies, but the silence of our friends." Dr. King's words are powerful in demonstrating that in order to innovate we must be willing to connect with our communities on difficult issues. And we must be familiar enough with our neighbors' viewpoints to be able to articulate on their behalf. Perhaps we will never reach a consensus on the exact right answer to solving difficult issues. But if we take Dr. King's words to heart, we will at least show our fellow community members that we see them and that we will not remain silent when their pain is known to us.

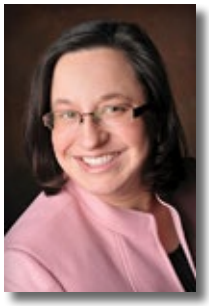
This reading group model is also innovative by giving an opportunity for law students to learn how to discuss difficult issues in society while imploring empathy and respect for all human beings.

It is also a model that is easily adaptable. Neighbors and communities can easily adopt the model of a reading group that addresses issues important to members of their own neighborhood. In discussing with sensitivity rather than shying away from difficult issues, we allow our neighbors to be seen and heard while fostering human connection. Moreover, meetings can take place

TINA WILDER works as a legal technology librarian at BYU Law School and teaches legal technology skills to students and alumni.



MICHELLE M. OLDROYD is the Director of Professional Education for the Utah State Bar and sits on the Innovation in Law Practice Committee, where she advises the committee about professional development for lawyers on innovation related topics, including about public outreach and education.



virtually with the continued physical distancing guidelines in place.

The hope is that by creating a place where we can safely discuss important and delicate issues in society, we are equipping legal professionals with the skills necessary to build a better tomorrow for themselves and their communities. And because of that connection we reaffirm within ourselves the need for basic human dignities to be afforded to others.

A lawyers' skills in dealing with difficult societal issues, puts them in the best position to serve their communities and to build connection within their own neighborhoods:

Who better than a lawyer to share respect for the rule of law and for our way of governing ourselves? And, as we open a new school year, this time with concerns for health and for safety, a calming presence as a virtual guest in any classroom could be the voice of a community member sharing with young people about how we all play an important role in the stability and sustainability of our way of life and our way of making rules that apply to everyone equally.

An example from the Utah State Bar on lawyers fostering connection and innovation:

Law Day and Constitution Day celebrations with the Bar and our public student communities can also be meaningful parts of our outreach objectives. Without Law Day each year, the accomplishments of some of our brightest youngsters may not be celebrated as the next generation of lawyers and leaders emerge for those around them to respect and invite to further service. Further, it is incumbent upon our profession not only to advocate for the law and for process, but also to teach those around us why these procedures and skills of persuasion and advocacy are necessary for the endurance of our communities and democracy. We need look no further than youngsters, who are of age, and yet who question that value of voting or serving on a jury to see why lawyers belong in our classrooms, civic halls, and even in virtual conversation with our wider community to instill the basics of how we structure government, why we all play a role in democracy, and ask whose voice is missing only to seek it out and to honor the range of perspectives that can be taken on an issue. Lawyers inherently know the value of seeking out multiple points of view to arrive at a collective truth; we are skilled in inviting those unheard to find power in their argument, and we believe in the principles of balance and due process in our community institutions.

Constitution Day further emphasizes for young people the notion that our Constitution is at work in our community every day, in their own lives in modern times. A document written so long ago may seem like the curriculum of an ancient studies course but is really defining how the students use their cell phones and what they can post on an app, in addition to defining how they will raise a family and earn a living or how they will serve their communities and change the rules if they feel it necessary. By celebrating Constitution Day each year, Utah lawyers bring their neighbors up-to-date and bring our profession a chance for renewal. We seek innovation for the dialogue of our courtrooms, and we know better our place in our profession through this annual outreach.

A final example from BYU Law School on inviting lawyers to foster connection and innovation:

BYU Law hosts a monthly series titled the Future of Law Lecture Series, exploring the implications of technological advances and design innovations on law. Each month a well-known professional in law, technology, and innovation is welcomed and presents to the law school community regarding changes in the future of law practice.

This past month, BYU Law welcomed their virtual guest Jordan Furlong, a renowned legal market analyst and forecaster. When asked about the most essential skill today's law students should develop and take into law practice, Mr. Furlong emphasized the importance of empathy.

"Empathy. Empathy for other people. The best lawyers, the lawyers who are loved by their clients, the lawyers whose clients sing their praises have empathy."

Thus, even a well-known legal-services market analyst understands that power of human connection on innovation and law.

Conclusion:

Our ideals and our values can be lessons for those around us and simultaneously strengthen our own resolve to continue to strive for them for our own clients. As much as our nation may be changing, our industry is also changing. Outreach is one mechanism for us to ensure our survival as a recognizable, valuable part of defining our community and serving one another. It is in that service, too, that our well-being and sense of professional (even personal) satisfaction are enhanced by showing others our joy and ourselves as part of our work. As well, our communities are healthier for us sharing who we are

and our point of view about democracy. All points of view being explored and discussed with respect develops not only our civility, but also our collective well-being and diversity. We can only be more inclusive and more engaged in our work by continuing to share and test our willingness to include others around us in our professional development.

Another aspect of sustaining our profession, both for the long term as a resource in communities, as well as through attending to our collective need for well-being and balance while working, is to notice how much the practice of law reflects our community and its needs. Consider access to justice questions – we are shaped by who can reach a lawyer and whose cases make their way to public decision-making. Outreach is necessary both to educate the wider community – in all of its forms, well-served and underserved alike – about how to and when to access an advocate and/or the courts as a resource to resolve an issue. Further, we notice that lawyers occasionally will be drawn to resolve community issues, or even lingering societal issues, by deliberating taking a certain matter to court and help it work its way through our system, to give due process to an important question of law and an important life question for the clients involved. Taking those matters, shepherding them in our system and navigating proper proceedings enable social issues to find reform and resolution. This kind of advocacy can employ the formal and informal skills of lawyers in outreach and in sustaining the vitality of our industry as problem-solvers and peacekeepers.

Finally, as a Bar and an innovation committee, we are continuously seeking new ideas and suggestions. We want to remain relevant as a membership organization, to reflect our community, and to ensure that all of us can share in what our courtroom resolutions can offer to remedy problems we are facing. We teach the generation behind us both to respect what we have fought for and simultaneously to prepare themselves to challenge our outcomes seeking better solutions in a time when they know better and our society has grown to new heights in perspective and understanding. We grow our own profession by ensuring its cyclical nature, only to know that somewhere in a dissent of what is written now will be the lifeblood of what is argued over next.

Appreciating Differences Through Personal Connection

by Keith A. Call

The recent passing of Justice Ruth Bader Ginsberg gives us all pause to reflect on her numerous contributions. She left a legacy far greater than just her judicial opinions. In an age of ideological polarization and high levels of social contention, she somehow mastered the art of vigorously promoting her views while, at the same time, reaching across ideological divides to make personal, meaningful connections, never losing sight that another person's views do not make him or her a bad person. Her deep and genuine friendship with her ideological nemesis, Antonin Scalia, is an example for us all.

It is reported that Justice Ginsberg and Justice Scalia, with their spouses, began a tradition of spending New Year's Eve together in the 1980s. "Evenings began with champagne and opera playing in the Ginsburgs' Watergate apartment; dinner was prepared by Justice Ginsburg's husband, Marty, who some years served venison or boar from [Justice Scalia's] post-Christmas hunting trip." Eugene Scalia, *What We Can learn from Ginsburg's Friendship with My Father, Antonin Scalia*, WASH. POST, (Sept. 9, 2020), https://www.washingtonpost.com/opinions/eugene-scalia-rbg-friendship-oped/2020/09/19/35f7580c-faaa-11ea-a275-1a2c2d36e1f1_story.html.

Making personal connections helps us see the "human" behind "humanity." I do not mean to say we should not fight for things we believe in. But we must also practice listening and understanding, and at least *respecting* that other viewpoints almost always have *some* underlying validity. As Justice Scalia's son commented about the relationship between Justice Ginsburg and Justice Scalia, "This appreciation for differences was as integral to the justices' friendship as the similarities." *Id*. Indeed, the welcomed debate and differences made their friendship all the more meaningful. Sometimes our eyes can be opened best by those who see things from another angle.

Another example comes from my daughter's experience while working at a residential treatment facility for troubled teens located in Utah County. She was trained on how to use physical restraints on any resident who became a danger to herself or to others. Unfortunately, she had to rely on her training one day when she forcibly restrained a teenage girl to prevent her from seriously harming herself. Sometime later, after leaving the residence, this girl made contact with my daughter and they became social media friends. The girl profusely thanked my daughter for restraining her. If my daughter had not done so, the girl says she would have punched my daughter and then, "Who knows what would have happened?"

My daughter took great comfort and satisfaction in doing a hard thing – using physical force – to save another person from harm. That is, until she read Paris Hilton's account of being forced to live in a Utah County residential treatment center when she was a teen. Ms. Hilton reported experiencing severe mental, emotional and physical abuse while at the school. *See, e.g.*, Alicia Rancilio, *Paris Hilton Says She 'Feels Free' after Documentary about Time at Utah Boarding School* (Sept. 14, 2020), KSL.COM, https://www.ksl.com/article/50017099/paris-hilton-says-she-feels-free-after-documentary-about-time-at-utah-boarding-school. While it is impossible to compare Ms. Hilton's experience with my daughter's training and experience, Ms. Hilton's reports of physical abuse as a young resident certainly gave my daughter a new perspective and pause to at least think about the possible differences – and similarities – between "physical restraint" vs. "physical abuse."

Another example comes from my own life. When I was a kid, I had no affinity or interest whatsoever in Asian culture. It seemed weird and totally unrelatable to my life in Heber, Utah (especially back in the 1970s and 1980s before Heber became cool). Then, when I was nineteen, I accepted an assignment to serve as a missionary for The Church of Jesus Christ of Latter-Day Saints in, of all places,

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Osaka, Japan. At first, the culture still seemed weird. Eating raw fish was weird. Wearing surgical masks in public was weird (and common, even in the 1980s). And it was wildly strange to me to learn about Shintoism, Japan's predominant religion, and its various historical myths and beliefs that, to my young mind, seemed completely absurd. And then, I remember vividly, having a Japanese person tell me how wildly absurd it was to believe that God and Jesus appeared to a young fourteen-year-old boy in upstate New York (a personal conviction I hold dear).

This was eye opening for me. I came to understand much more fully that, what I thought was a wildly absurd belief (or at least tradition) for someone else, could be matched by someone else's perception that my sincere belief is wildly absurd. I quickly became much more appreciative and respectful for Shintoism and its many beautiful and uplifting teachings – not to mention gaining a fondness for sushi and, more recently, greater understanding about mask-wearing.

My first draft of this article started with a provocative political quiz. I reviewed the Democratic and Republican national party platforms and formulated questions that would convince all you Democrats that you are really Republicans and all you Republicans that you are really Democrats. It was long and clumsy so I left the quiz off. However, the point is that if we will take time to really understand and consider the core values that underlie political agendas, I believe we will almost always find vast swaths of ideas and principles that make some sense and have great value.

We should all take many lessons from RBG. Without conceding our passion for causes we believe are just, I hope individuals in our community – especially lawyers – can find ways to have a lot more human-to-human connection with those who do not look or think exactly like we do. And perhaps we could combine that with a little less shouting from anonymous mobs or the mental safety of social media. Such personal connections will not only enrich our personal lives but will undoubtedly lead us to greater ideological understanding and mutual tolerance. I know that for me, it was a personal connection with many individual Japanese people that made it impossible for me not to fall in love with Japanese food, culture, traditions, and ways of thinking.

Annual Food and Clothing Drive

We are aware that the needs of the homeless community are greater this year than any other since we began our Food & Clothing Drive in 1990; this year would have been our 31st year. However, after reviewing COVID-19 policies on websites of some of the agencies that serve the homeless community and that accept donations of cash, food and clothing, personal care kits and other items, and considering the fact that a number of law firms have most of their staff working from home, we have determined that the potential risks and unknown consequences associated with the COVID-19 pandemic make it unrealistic to have the food and clothing drop off at the Utah Law and Justice Center this December.

We would encourage all Utah Bar members and staff to take this opportunity to make cash donations to the charities each wishes or to support those that we have supported over these many years, including the First Step House, the Rescue Mission, the Women & Children in Jeopardy Program, and Jennie Dudley's Eagle Ranch Ministry. If you desire to provide cash donations for distribution to any of these agencies, please make your checks payable to the Leonard W. Burningham IOLTA Trust Account, and I will be happy to apportion those donations among these agencies as I have done in the past.

Kindest regards,
Leonard W. Burningham, Chairman

Bar Executive Director John Baldwin Set to Retire at End of Bar Year

For the first time in more than three decades, the Utah State Bar will have a new executive director at the beginning of the new Bar year. John Baldwin has elected to retire effective June 30.

John has supervised the Bar through recessions, tough financial times, and, to wrap up his career, a pandemic. He's seen the Bar grow from 5,500 attorneys to more than 13,000, with all the challenges that accompany such growth.

"I've been fortunate to work with such dedicated and talented Bar leaders and staff," John said, "and I've been able to be a part of the vision and development of some great benefit programs for both the public and for attorneys."

The Bar implemented its New Lawyer Training Program, expanded its Access to Justice program, created the award-winning Licensed Lawyer attorney referral service, and instituted an on-line legal clinic under John's management.

"John has done a tremendous job guiding the Bar through unprecedented times," said current Bar President Heather Farnsworth. "We are fortunate we had the opportunity to benefit from his talent and leadership."

John also administered the creation of the Practice Portal and an updated website. Most recently, he supported efforts of the Bar and the Utah Supreme Court in the creation of the Licensed Paralegal Practitioner program and the implementation of the Court and Bar's attorney well-being program. In addition, he is helping navigate the Bar through the waters of regulatory reform.

"John is an institution," said immediate past president Herm Olsen. "He had superb qualifications to lead the Bar, and he only became better over time. He deserves a long rest on a warm sandy beach somewhere. He is a consummate gentleman."

Those who worked for John paint a similar picture. "He really cares about the people that work for him," said a Bar employee, echoing a common theme among Bar staff members. "He makes you feel like you're important, no matter what your job is," said another. "He helped make this a great place to work."

In addition to his duties at the Bar, John serves as a committee chair for Utah Center for Legal Inclusion, and taught business law to undergraduates and MBA students at the University of Utah and at the Gore School of Business at Westminster College. He also served on the Board of Directors of the University of Utah Alumni Association and as President of the Beehive Honor Society at the University of Utah.

"I've been friends with John for fifty years," said Assistant Executive Director Richard Dibblee. "Only my wife of forty-two years has spent more time with me. Even though we're the same age, I've always looked up to John as my mentor."

John isn't sure what his future holds. "I haven't confirmed my plans quite yet. So many things depend now on the conditions of COVID," he said.

The Bar will soon begin an extensive nationwide search for John's replacement.

Licensing Renewal and Imposition of Late and Reinstatement Fees

The annual Bar licensing renewal process has begun and can be done online only. An email containing the necessary steps to re-license online at https://services.utahbar.org was sent on June 5th. **Online renewals and fees submitted after October 31st will be considered late and an additional $100 late fee will be assessed. Your license will be suspended unless the online renewal is completed and payment received by December 1st. Renewal after suspension for non-payment will require an additional $200 reinstatement fee.** Upon completion of the online renewal process, you will receive a licensing confirmation email.

To receive support for your online licensing transaction, please contact us either by email to onlinesupport@utahbar.org or, call 801-297-7021. Additional information on licensing policies, procedures, and guidelines can be found at http://www.utahbar.org/licensing.

This one-time extension by ninety days of the deadlines for the assessment of late fees and suspension for non-payment is for this licensing year only.

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 free legal clinic during August and September. To volunteer call the Utah State Bar Access to Justice Department at (801) 297-7049 or go to http://www.utahbar.org/public-services/pro-bono-assistance/ to fill out our Check Yes! Pro Bono volunteer survey.

Expungement Day

Helen Anderson
John-David Anderson
Bryan Baron
John Boden
Laura Cabanilla
Victoria Chen
Kate Conyers
Brett Coombs
Clay Crozier
Melinda Dee
Daniel Diaz
Richard Dowse
L. Donna Drown
D. Joshua Egan
Hannah Follender
Sarah Goldberg
Luisa Gough
Thom Gover
W. Matthew Hall
Daniel Hallmeyer
J. Brent Huff
Thomas Nathanael Hutchings
Nathan Hyde
R. Dennis James
Jason Jones
Bryson King
J. D. Lauritzen
David McKenzie
Gabriela Mena
Grant Miller
Sara Montoya
Andres Morelli
Tyler Needham
Casey Nelson
Kimberly Peterson
Emily Rains
Carey Seager
Nanette Serrano
Noella Sudbury
Daniel Surfass
Earl Tanner
Stephen Terrell
Daniel Vincent
Virginia Ward
Glinda Ware
Fabiana Wells
Janette White
Robert Wood

Family Justice Center

Geidy Achecar
Steven Averett
James Bachman
Chuck Carlston
Leilani Clifford
Elaine Cochran
Darren Fafai
Michael Harrison
Brandon Merrill
Kathleen Phinney
Linda Smith
Babata Sonnenberg
Nancy Van Slooten

Private Guardian ad Litem

Nadine Hansen
Allison Librett
Keil Myers
William Pohl
Samuel Sorensen
Amy Williamson

SUBA Talk to a Lawyer Legal Clinic

Jared Brande
Travis Christiansen
Bill Frazier
Maureen Minson
Adam Ravitch
Trent Seegmiller
Robert Winsor

Timpanogos Legal Center

Danica Baird
Linda Barclay
Bryan Baron
Cleve Burns
V. Trent Cahill
Carolina Duvanced
Michael Harrington
Brittani Harris
Robin Kirkham
Eryn Rogers
Marca Tanner Brewington
Jaime Topham
Roland Uresk

Utah Bar's Virtual Legal Clinic

Julia Babilis
Jonathan Benson
Dan Black
Mike Black
Russell Blood
Jill Coil
John Cooper
Jessica Couser
Lauren DiFrancesco
Elizabeth Dunning
Matthew Earl
Rebecca Evans
Thom Gover
Robert Harrison
Aaron Hart
Rosemary Hollinger
Tyson Horrocks
Bethany Jennings
Annie Keller-Miguel
Suzanne Marelius
Travis Marker
Gabriela Mena
Andres Morelli
Tyler Needham
Jacob Ong
Ellen Ostrow
Steven Park
Katherine Pepin
AJ Pepper
Leonor Perretta
Cecilee Price-Huish
Jessica Read
Amanda Reynolds
Brian Rothschild
Chris Sanders
Alison Satterlee
Adam Saxby
Thomas Seiler
Farrah Spencer
Liana Spendlove
Julia Stephens
Brandon Stone
Mike Studebaker
Claire Summerhill
George Sutton
Jonathan Thorne
Jason Velez
Jay Wilgus

Utah Legal Services Cases

Jared Allebest
Amirali Barker
Joshua Bates
Cameron Beech
Alan Boyack
Jared Brande
Erin Byington
James E. Cannon
Kimball Forbes
Aaron Garrett
Kevin Goertzen
David Hanks
Blaine Hansen
Joshua Harward
Jenny Jones
Sarah Larsen
Malone Molgard
Darren Nielson
Chike Ogbuehi
Chip E. W. Parker, Jr
Kent Scott
McKinley Silvers
Marca Tanner Brewington
Michael Thornock
Jory Trease
David Westerby
T. Christopher Wharton
Lane Wood
Kasey Wright

Utah State Bar®

Spring Convention in St. George

March 25–27

Dixie Center at St. George

1835 Convention Center Drive | St. George, Utah

APPROXIMATELY

10 HRS.

CLE CREDIT*

*Will include Ethics and Professionalism/Civility credits. Credit-type subject to change.

2021 "Spring Convention in St. George" Accommodations

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

Hotel	Rate (Does not include 12.32% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$135	10–K	2/25/21	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$125	5–2Q 5–K	2/25/21	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$169	5–2Q 5–K	2/25/21	4
Desert Garden Inn (fka Crystal Inn) (435) 688-6066 / crystalinns.com	$85	5–2Q 5–K	2/25/21	1
Fairfield Inn (435) 673-6066 / marriott.com	$129	5–2Q 10–K	03/01/21	0.2
Hampton Inn (435) 652-1200 / hampton.com	$139	5–2Q 5–K	2/25/21	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132 $142	10–2Q 20–2K	3/01/21	0.1
Holiday Inn St. George Conv. Center (435) 628-8007 / holidayinn.com/stgeorge	$132–K $142–2Q's	10–2Q 5–K	3/01/21	0.2
Hyatt Place (435) 656-8686 / hyatt.com	$139–Q $149–K	10–2Q 10–K	3/01/21	.02
Red Lion (fka Lexington Hotel) (435) 628-4235 / redlion.com	$109	20–K	2/25/21	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / stgeorgeinnhotel.com	$116	5–2Q 5–K	2/25/21	1
TownePlace Suites by Marriott (435) 986-9955 marriott.com/hotels/travel/sguts-towneplace-suites-st-george/	$169	5–2Q 5–K	2/25/21	3.4

Notice of Bar Commission Election

THIRD, FOURTH, AND FIFTH DIVISIONS

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

- Two Members in the Third Division (Salt Lake, Summit, and Tooele Counties)
- One Member in the Fourth Division (Utah, Wasatch, Juab, and Millard), and
- One Member in the Fifth Division (Washington, Iron, Beaver, Sanpete, Sevier, Piute, Wayne, Garfield, Kane, Carbon, Emery, Grand, and San Juan Counties)

Each position will serve a three-year term. Terms will begin in July 2021. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Election information and Nominating Petitions are available at http://www.utahbar.org/bar-operations/leadership/. Completed petitions must be submitted to John Baldwin, Executive Director, no later than February 1, 2021 by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

UTAH SUPREME COURT BOARD OF CONTINUING EDUCATION

David P. Hirschi
Chair

Sydnie W. Kuhre
MCLE Board Director

October 19, 2020

Dear Utah Bar Members:

Over the past two years, the Supreme Court Board of Mandatory Continuing Legal Education ("Board") has been considering various changes to the Mandatory Continuing Legal Education Rules ("Rules") governing Utah licensed attorneys. We have heard from many of you regarding Rules that you would like to see changed, and we have worked with the Supreme Court in instigating changes that the Court has deemed necessary and appropriate to continue to carry out the mission of the Board to ensure access to quality continuing legal education to all members of the Bar.

You have either received or shortly will be receiving copies of the proposed Rule changes. The purpose of this letter is to give you some insight as to why the Board and the Supreme Court believe these changes are needed and appropriate at this time.

As a Board we have seen a few major issues relating to the current Rules that need to be addressed. First, there appears to be a great deal of confusion among Bar members relating to compliance cycles and the reporting of CLE hours on a timely basis. The Board has concluded that biennial compliance cycles are inherently confusing since we receive numerous calls each year from several members of the Bar trying to confirm their applicable compliance cycles. Second, many of us tend to procrastinate completion of the required CLE until late in the compliance cycle. With a two-year compliance cycle, we find that some attorneys try to "cram" the 24 required hours into a few months prior to the end of the cycle. This typically results in many members of the Bar taking CLE courses that have little or nothing to do with their area of practice or missing their compliance cycle deadlines. Accordingly, the Board has proposed and the Supreme Court has agreed to consider an annual reporting cycle of 12 hours per year for all Bar Members commencing with the compliance cycle beginning July 1, 2021.

Another reoccurring issue has been the lack of access to quality CLE programming, especially for lawyers practicing in rural communities or areas distant from the Wasatch Front, and for out-of-state practitioners. We have proposed to the Supreme Court and the Court has agreed to consider a number of changes to the Rules that will significantly affect the need for in-person CLE, allowing all required CLE credits to be completed through a combination of self-study and verified e-CLE programming. Quality in-person courses will continue to be available, but attendance at in-person programming will no longer be required.

The wellbeing of attorneys practicing in Utah has always been a concern of the Supreme Court and the Bar. The Board has been working with the Court, the Utah Bar and the Bar's Well-Being Committee in incorporating into the Rules wellness topics that we believe will be beneficial to Bar members. Accordingly, the revised Rules proposed by the Board will allow ethics and professionalism credits to be earned through attendance at accredited CLE courses dealing with a variety of wellness and law office practice topics.

Other changes to the Rules proposed by the Board include (a) streamlining the Rules to make them more understandable and consistent with current Utah Bar regulations, (b) allowing for self-study credits for attorneys participating as presenters in a panel discussion, (c) allowing more flexibility in broadcast CLE programming, (d) clarifying and expanding the types of programs that qualify for Ethics and Professionalism and Civility CLE, and (e) allowing for legal specialty groups to earn some CLE credits by attending CLE programs designed specifically for, and limited to, those group members. In addition to the Rules affecting attorneys, the Board will also be submitting to the Supreme Court revised Licensed Paralegal Practitioner Rules.

The Board and the Supreme Court have spent considerable time and effort in developing these new proposed Rules. As a Board, it is our hope that you will review and consider the revised Rules carefully and provide your feedback to the Supreme Court and the Board. Please send your comments to: https://www.utcourts.gov/utc/rules-comment/.

Very truly yours,
UTAH SUPREME COURT BOARD OF CONTINUING LEGAL EDUCATION

David P. Hirschi, Chair

cc: Supreme Court
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Attorney Discipline

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Contact us – Phone: 801-531-9110 | Fax: 801-531-9912 | Email: opc@opcutah.org

ADMONITION

On July 20, 2020, the Honorable Eric A. Ludlow, Fifth Judicial District, entered an Order of Discipline: Admonition against an attorney for violating Rule 7.1 (Communications Regarding a Lawyer's Services) of the Rules of Professional Conduct.

In summary:
An attorney was a volunteer small claims judge. The attorney's website clearly delineated the location and tenure of the attorney's service as a judge pro tem, but it did not state that such service was rendered as a volunteer, rather than one of gainful employment. The attorney's advertisements and website identified the attorney as a "Former Judge" and an "Ex-Judge." The court found that the statements were misleading in that an ordinary reader would have an exaggerated perception of the attorney's actual judicial experience.

Mitigating Circumstances:
Timely good faith effort to make restitution or to rectify the consequences of the misconduct involved.

ADMONITION

On August 5, 2020, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rules 1.4(a) (Communication) and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:
A client retained an attorney to represent them in a small claims trial. The attorney did not adequately communicate with the client regarding the scope of the employment and how and under what circumstances any additional legal work requested by the client would be performed.

The affidavit and summons served on the client gave an incorrect trial date. Because of the error in dates on the affidavit and summons neither the client nor the attorney appeared and a default judgment was entered against the client. The client and their spouse learned of the default judgment from their insurance carrier. The client and their spouse contacted the attorney separately and claim that the attorney informed them the attorney would file a motion to have the judgment set aside and that the court would notify them by mail when a hearing date was scheduled.

The attorney filed a motion to set aside the default and emailed a copy to the client. The docket for the case indicates that the clerk called the attorney to ask that they refile the motion with an order. The clerk called the attorney again a week later to make the same request but could not leave a message because their voicemail was full. The client's spouse sent an email to the attorney and left a voicemail message but the attorney did not respond. The client's spouse called the court to find out the status of the case and learned that although the attorney had filed the motion, the court was attempting to contact the attorney without success.

Exactly when the attorney ceased representing the client was uncertain to the client. This confusion did not give the client reasonable notice of the termination of the representation and it may not have allowed the client sufficient time to seek new counsel promptly. The client obtained new counsel who assisted them with the remainder of their case.

Aggravating Factors:
Substantial experience in the practice of law.

Mitigating Factors:
Absence of a prior record of discipline; absence of a dishonest or selfish motive; and personal or emotional problems.

PUBLIC REPRIMAND

On May 26, 2020, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Public Reprimand against Ricky D. Bonewell for violating Rules 1.4(a) (Communication) and 5.3(a) (Responsibilities Regarding Non-Lawyer Assistants) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Bonewell to represent them in a workers' compensation matter. The client contacted the Labor Commission one and a half years after retaining Mr. Bonewell to inform them his medical issues were getting worse. The Labor Commission responded and informed the client that they showed no case pending for adjudication and suggested that he contact Mr. Bonewell for a status update on his case.

During this time, Mr. Bonewell employed staff that did not leave notes on existing cases, took files home with them and used a USB thumb drive to transfer client files from their home computers to computers in Mr. Bonewell's office. In addition, client files and computer files were scattered over multiple locations. Mr. Bonewell's law clerk, a suspended attorney, found the client file in another client's bankruptcy file. Eventually, the law clerk restarted the client's case and completed the preliminary work.

The law clerk communicated with the client using Mr. Bonewell's email address but failed to provide adequate and accurate information. Eventually, the client contacted the Labor Commission again because nothing had happened on his case since he retained Mr. Bonewell three years prior and because Mr. Bonewell was no longer responding to him. The Labor Commission responded giving the client some direction on how he could proceed and notified him that an application for hearing needed to be filed before the statute of limitations deadline. The client reached the law clerk the day before the statute of limitations deadline and the law clerk filed the claim.

PUBLIC REPRIMAND

On August 5, 2020, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Public Reprimand against Roy D. Cole for violating Rule 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Cole to represent them in a custody matter. Mr. Cole's fee agreement with the client included a provision that if he withdrew or was fired and the client filed a bar complaint, he would bill for the time it took to defend himself, his actions, his decisions in the case, whether he won or lost. The client's wife submitted information to the OPC regarding Mr. Cole's representation of the client. Mr. Cole billed the client for one-half hour of time for his office to draft a letter in response to the information.

Aggravating Factors:
Prior record of discipline; substantial experience in the practice of law.

Discipline Process Information Office Update

What should you do if you receive a letter from Office of Professional Conduct explaining you have become the subject of a Bar complaint? Call Jeannine Timothy! Jeannine is available to provide answers to your questions about the disciplinary process, reinstatement and readmission. She is happy to be of service to you, so please call her.

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Moral Luck and an American Tragedy

by Kris Cherevas

Luck is a magical concept with its own symbols and charms. In criminal law, there is sometimes a role luck plays and that is what is discussed here – the problem of moral luck.

Moral luck is a philosophical term relating to the occurrence of when someone is subjected to moral judgment despite the fact that a significant aspect of what the individual is assessed for depends on factors beyond that person's control. *See* Stanford Encyclopedia of Philosophy. In legal theory, the idea of moral luck often looms as a heavy factor for lawyers and juries and is more commonly known as "the problem of moral luck" rather than a simple idea. The problem poses the question of whether the notions of responsibility, justification, and blame are subject to luck. Are we solely focused on the legality of a defendant's actions or is morality a consideration? It is clear that moral luck can play a role in all legal practice areas but is most exemplified in criminal cases.

Consider one example of the problem posed by moral luck: a man burgles his grandfather's house, but without the thief's knowing, his grandfather just died and left his entire estate to the grandson. The grandson has then just "stolen" his own property and legally speaking, he has done nothing improper. A benign fate has averted the wrong his actions might otherwise have committed. In his heart, the grandson is a thief, but he is guiltless of wrongdoing under any law of theft – "taking something that belongs to another." But it would appear that luck alone led to this result.

Another example questions: if person A goes through all the steps necessary to kill person B, will A be more blameworthy if B actually dies? The element of luck can play a role in various ways, which could intervene to save B's life, and possibly A's. If A fires a rifle at B and the bullet is deflected by a cigarette case in B's pocket, or a bird conveniently flying nearby takes the bullet instead of B, or if lightning strikes B dead before the bullet hits, the criminal charges against A would be reduced from murder to attempted murder. Under moral notions of responsibility, however, A's blameworthiness may not be any less severe because of the lucky intervention of the cigarette case, bird, or lightning. In wanting to kill B, A acted with everything under his control to accomplish that want, but all of this would not add up to the more severe criminal charges.

With respect to acts that involve an intention to inflict harm, the problem of moral luck questions whether an attempt to do wrong is morally equivalent to success in committing the wrongdoing. The law typically punishes success in committing the wrongdoing more severely than the attempt alone. To most, however, there is little, if any, difference in moral responsibility between a failed attempt to do wrong and a successful attempt. For some to see a difference in blameworthiness, the harm intended must occur in the manner intended. For others, the intended manner is morally irrelevant, so long as there is no variation in the amount of harm produced. The intrigue of the problem of moral luck is evident in both its functional and fictional incarnations.

The problem is perfectly conceptualized in the 1925 novel "An American Tragedy" by Theodore Dreiser, which was later produced into the 1951 film "A Place in the Sun" starring Montgomery Clift, Elizabeth Taylor, and Shelley Winters. A

KRIS CHEREVAS is an associate in the Subrogation & Recovery Department of Cozen O'Connor in San Diego where she represents insurance company clients in the pursuit of real property subrogation claims. She is licensed to practice in both Utah and California.

tragedy spun from when a poor man falls in love with two women, one poor and one rich. In order to gain the affections of the rich woman, he had portrayed himself as having his own riches. The poor man realizes that in order to have a future with the rich women, he must not only end his relationship with the poor woman, but also discard anything that ties him to his life as a poor man. He thus plots to kill the poor woman, and he takes every step in his control toward his intent; however, "luck" asserts itself before the final action, leading to the fate of all those involved. The young woman accidentally fell out of the boat they were in and drowned before the man could take any action to cause the drowning he had intended. The novel fictionalizes and exaggerates the true 1906 crime and legal drama from upstate New York where a man named Chester Gillette was tried and found guilty of the murder of a young woman named Grace Brown because Chester Gillette had aspirations of living a richer life with a richer wife.

Scholars refer to moral luck as a "problem" because our laws do not always coincide with moral views, and even if they were to correlate, to whose standard should they model? Moral luck may save someone from the legal consequences of his or her actions, but he or she may not be free of moral culpability. Both prosecutors and defense counsel use this as a theme at trial to pull in a jury. Prosecutors lead jurors to focus on a sense of justice and a clear concept of right and wrong. Defense attorneys tell the story of how luck intervened to save the defendant from committing any legal wrong. In the Hollywood movie, the jury was substantially persuaded by its sense of morality and convicted the man of murder merely on the wrong that he had in his heart and not on any proof he actually committed a murder.

The theory of moral luck crosses fields of philosophy, theology, and law, and satisfying conclusions are most elusive. The role luck plays in our own lives is most curious. The role luck plays in our cases could be alluring to juries.

2020 Salary Survey

by Greg Wayment

Once again, the Paralegal Division has completed a salary survey. The first one was conducted in 2008, followed up in 2012, 2015, and 2017. The goal of the paralegal salary survey is to firstly answer the question, "What can a paralegal in Utah expect to make?" but it also tracks trends in education, skills, CLE opportunities and requirements, membership in professional organizations, and benefits of paralegals in the state. The goal in doing so is to provide a baseline for paralegals when negotiating benefits, salaries, and bonuses.

The survey was open to Paralegal Division members and non-members alike. For sake of full disclosure, there was no eligibility screening, meaning anyone who had access to the link was welcome to answer the questions. By and large, most of the respondents (at least 92%) reported their job title as paralegal. The other 8% reported titles such as paralegal manager, training specialist, and senior appellant assistant, with one reporting as a legal assistant.

The 2020 survey contained fifty-seven questions and was taken by a total of 122 individuals, which is the exact same number as those who took it in 2017. This is down from a high of 173 who responded in 2015, but more than the eighty-four who took it in 2012. We would like to thank the 122 people who took the time this year to answer the survey questions! The following is a reporting and analysis of the results:

As has been the trend, the majority of respondents are employed in Salt Lake County (79%), with just 8% reporting from Utah County, and 2% in Weber and 3% in Washington Counties (Utah and Washington Counties are up). At 93% of the respondents, women still account for the large majority of paralegals working in Utah.

Just over 35% of respondents have been employed in the field for over twenty years, with an equal 20% in the one to five year category. As for current employment, almost 31% have been with the same employer for over ten years, and just roughly 7% more (or almost 38%) have held their current positions for between one and five years, indicating some growth in the profession. Surprisingly, we only had two respondents who report as working part-time, with one person reporting as self-employed.

Membership in paralegal organizations has remained robust, with 93% of respondents belonging to the Paralegal Division (up 23% from the last survey), and approximately 13% enjoying membership in the Utah Paralegal Association. Roughly 26% are members of the National Association of Legal Assistants (NALA). The vast majority of respondents, over 88%, are not required to have passed a national paralegal certification exam prior to being hired. Twenty-five percent answered affirmatively to obtaining a C.P. designation, and 8% answered to having obtained an A.C.P. designation.

Thirty-one percent of Utah paralegals report having earned a bachelor's degree (up 6%), while 12% have a paralegal certificate (down 10%). According to our survey, a significant number of paralegals in Utah have an associate degree (40%).

As for employers, 67% require their paralegals to have met a

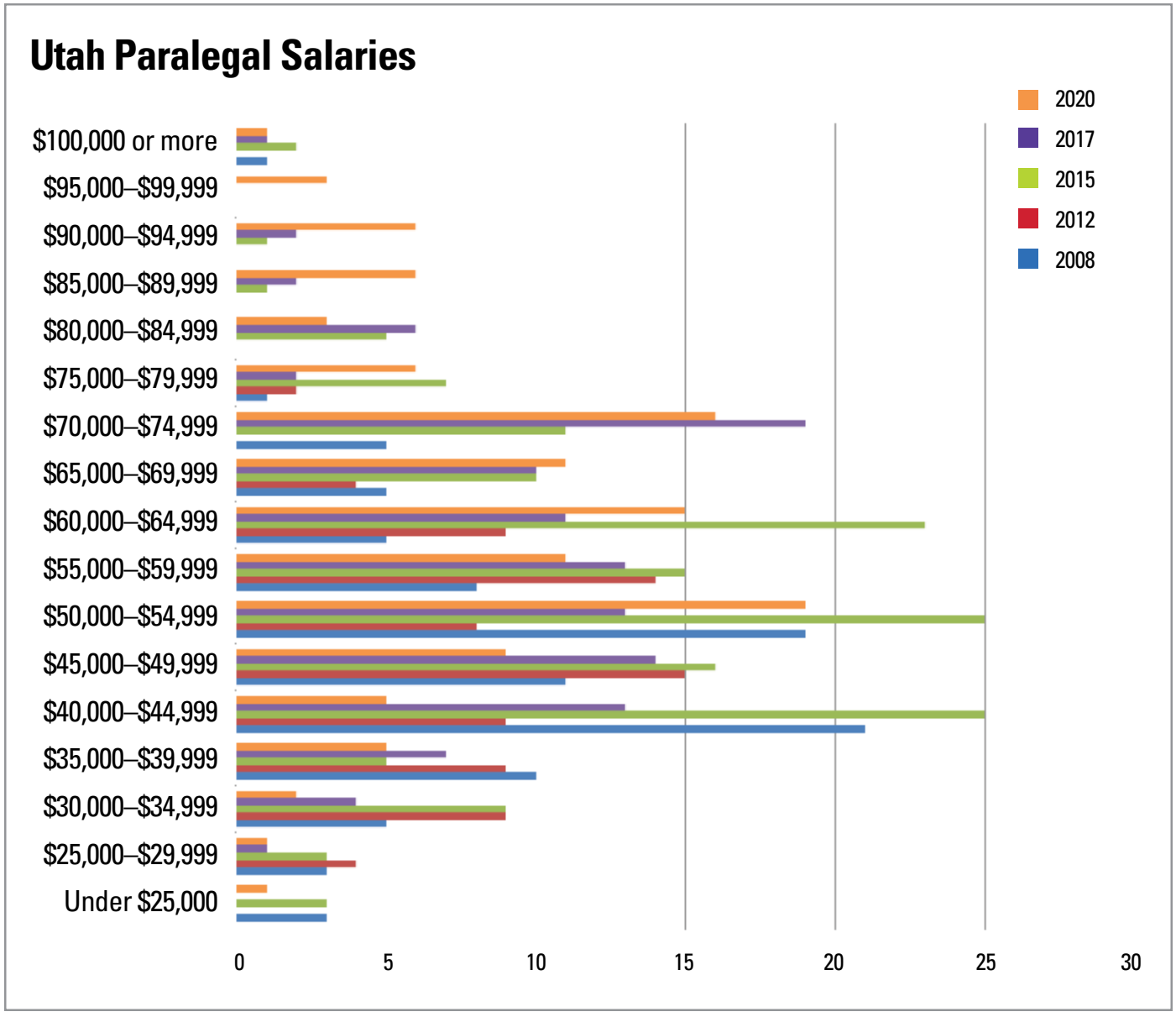
GREG WAYMENT is a paralegal at Magleby Cataxinos & Greenwood. He serves on the board of directors of the Paralegal Division and is currently the Division liaison to the Utah Bar Journal.

minimum education level; of these, 29% require a certificate from an American Bar Association-approved paralegal program (up 1%), which nearly 73% of Utah paralegals possess (up 3%). Education is not often directly tied to compensation, however, as 64% of respondents indicated that their employers do not consider education levels as a factor in setting compensation. Surprisingly, only about 21% of law firms require paralegals to have a bachelor degree.

The second part of our survey addressed firm environment, duties and responsibilities. Of respondents, nearly 44% work in private law firms, with approximately 21% working in corporations and 32% in the government sector. As for practice areas, we found that 50% of respondents practice in the litigation arena. The other significant areas of employment are corporate, criminal, and personal injury.

Fifty percent of respondents work in organizations that employ no more than five paralegals. As for firm size, the vast majority are either quite small or quite large, with nearly 36% employing between one and ten attorneys and 41% employing over forty attorneys.

Utah paralegals are near-unified in their most-used software being Microsoft Word at 94%. Other key softwares are Excel, Outlook, and Adobe. For legal research, the use of Westlaw is



favored at sixty-four respondents with Lexis/Nexis at thirty-six.

Following up on the second time we have asked (my favorite) question, "What software does your firm/you currently use to manage large formal document productions?" The overwhelming majority (fifty-three respondents) use Adobe. Concordance came in at four, Relativity had six, and iPro was up to ten. A few other responses included PIMS, eProsecutor, and NetDocs. We had one respondent reporting a company called Logikcull (which I had not heard of before). Twenty people skipped this question.

Overtime compensation appears to be up, with only 34% reporting no overtime and 29% reporting working one to five hours per month and 20% at six to ten hours per month. Four percent work over twenty hours a month in overtime. The question of whether respondents bill time to clients is still nearly evenly split. Of the 48% who do bill their time, the majority spend over 91% doing substantive work, with under 9% of their time spent on non-substantive/administrative work.

In this survey, we found that about half of employers are providing in-house CLE. Over 88% of employers pay for outside CLE (up 3%), which is a trend we are pleased to see has increased. Of those who pay for outside CLE, 98% of respondents receive payment of registration fees, with about 43% receiving hotel accommodations and 46% receiving mileage as well. A smaller number provide reimbursement for airfare and a per diem. Nearly 23% of paralegals have annual CLE budgets. We are also pleased to report that a majority of respondents report attending Paralegal Day and the Annual Meeting, but the biggest category of attendance (most likely because of COVID-19) was the brown bag CLE events, which have been hosted online the last six months with no registration fee.

Turning to paralegal salary, benefits and other compensation. The largest category of respondents, at 16%, report making between $50,000 and $54,999. The next largest category, at 13%, make between $70,000 and $74,999, with a close third in the $60,000 to $64,999 category. The lowest reported salary was under $25,000, with one respondent and there was one respondent who reported being in the $100,000 and higher category.

About 58% are reporting that their employers do have a bonus structure in place. Of those who do, about 25% tie bonuses directly to billable hours and fees collected. Fifty-eight percent of bonuses are based on personal performance, with 29% based on company success. The majority of reported yearly bonus amounts is between $1,000 and $4,999. The second largest category was between $5,000 and $9,999 (about half of those in the $1,000 to $4,999 category). We had eight in the $10,000 to $19,000 category. And the outliers are two at $20,000+ and eight in the $1 to $999 categories.

A large percentage at 68% (down 11%) reported receiving a raise in the last twelve months, with 20% reporting the percentage of the raise being 1–3% of their annual salary.

About an even number of paralegals report being paid salary vs. hourly (51% and 49% respectively). As for benefits provided, 79% of respondents have access to health insurance for themselves (down 10%) and roughly 75% having access to dental insurance. Over 84% have a 401(k) plan with their employer, and just under 20% have a profit sharing plan in place.

An astonishing 97% of respondents answered that they feel secure in their position, with 49% reporting that if they needed to find new employment, they are optimistic they could do so. We did have comments that some feared their age would be a factor in finding a new job, but mostly, people were concerned that with COVID-19 there would be fewer jobs available.

Because of the COVID-19 pandemic, we wanted to ask our Utah paralegals how the pandemic has impacted their employment. Of the 122 overall respondents, we had seventy provide comments. Not surprisingly, the number one response was that because of COVID-19, many paralegals are working from home either by choice or mandate. Also, a large number of paralegals did report decreased or eliminated bonuses and raises, and for some a small reduction in pay. Also, we asked if people are able to work from home because of health or family-related issues, and over 90% reported they could.

We greatly appreciate your participation and hope that this information is valuable for you during salary negotiations with your employers.

CLE Calendar

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

SEMINAR LOCATION: Utah Law & Justice Center, unless otherwise indicated. All content is subject to change.

November 4, 2020 | 12:00 pm – 1:00 pm

Dispute Resolution and Labor & Employment Law CLE.

November 4, 2020 | 12:00 pm – 1:00 pm

Utah Center for Legal Inclusion CLE.

November 5, 2020 | 10:00 am – 11:00 am

2020 FALL FORUM VIRTUAL CLE SESSION: Landlord-Tenant Issues for Attorneys to Be Aware Of. Featuring Barry Scholl & Marty Blaustein. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

November 10, 2020 | 12:00 pm – 1:00 pm **1 hr. CLE**

Professional Fees – Best Practices for Getting Paid in Bankruptcy and Bifurcated Fee Agreements in Chapter 7. Presented on Zoom by the Bankruptcy Law Section of the Utah State Bar. Free for section members, $20 for others.

November 12, 2020 | 11:30 am – 1:30 pm

2020 FALL FORUM VIRTUAL CLE SESSION: Diversity in Our Industry – Our Well-Being and Our Strength. A panel discussion including Judge Diana Hagen, the Utah Court of Appeals; Nate Alder, Christensen & Jensen; and Moderator: Martha Knudson. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

November 12, 2020 | 12:00 pm – 1:00 pm

DR/UCCR Brown Bag.

November 13 2020

Litigation Section CLE & Off-Road Shenanigans. Fairfield Inn & Suites by Marriott, Moab, 1863 N Hwy 191, Moab, UT.

November 17, 2020 | 4:00 pm – 6:00 pm **2 hrs. CLE**

Litigation 101 Series. Presented by Dan Garner and Gabriel White.

November 19, 2020 | 10:00 am – 11:00 am

2020 FALL FORUM VIRTUAL CLE SESSION: Our Justice Courts – What Lawyers Need to Know. A panel discussion of the Justice Court Judiciary, including Judge Augustus Chin. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

December 3, 2020 | 10:00 am – 11:00 am

2020 FALL FORUM VIRTUAL CLE SESSION: Nuts & Bolts: Contingency Fee Matters. Featuring Jeffrey Eisenberg. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

December 10, 2020 | 10:00 am – 11:00 am

2020 FALL FORUM VIRTUAL CLE SESSION: Armies of Enablers – Discussion with Survivors and Consequences in Communities. Featuring Amos Guiora, S. J. Quinney College of Law. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

December 17, 2020 | 12:00 pm – 1:00 pm **1 hr. Ethics (pending)**

2020 FALL FORUM VIRTUAL CLE SESSION: A Panel Discussion on Ethics with Our Bar President. A panel discussion featuring Heather Farnsworth and our colleagues from the Bar and Bench. Register for 4 Fall Forum Sessions of your choice for $75. Individual sessions are $25 each.

TO ACCESS ONLINE CLE EVENTS:

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

Classified Ads

RATES & DEADLINES

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

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

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

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

JOBS/POSITIONS AVAILABLE

Established AV-rated business, estate planning and litigation firm with offices in St. George, UT and Mesquite, NV is seeking two attorneys. We are seeking a Utah-licensed attorney with 3–4 years' of experience. Nevada licensure is a plus. Business/real estate/transactional law and civil litigation experience preferred. Firm management experience is a plus. Also seeking a recent graduate or attorney with 1–3 years' experience for our Mesquite office. Ideal candidates will have a distinguished academic background or relevant experience. We offer a great working environment and competitive compensation package. Please send a resume and cover letter to Daren Barney at daren@bmo.law.

Long Reimer Winegar LLP seeks an Associate Attorney. LRW is a regional Rocky Mountain law firm representing local and global clients. LRW seeks to grow its Park City office and is looking for a full-time Associate Attorney with at least 5 years' experience in the areas of estate planning, business law and tax planning, and should ideally be licensed to practice law in Utah. If interested, please send a cover letter, resume, and list of professional references to hgreene@lrw-law.com.

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

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