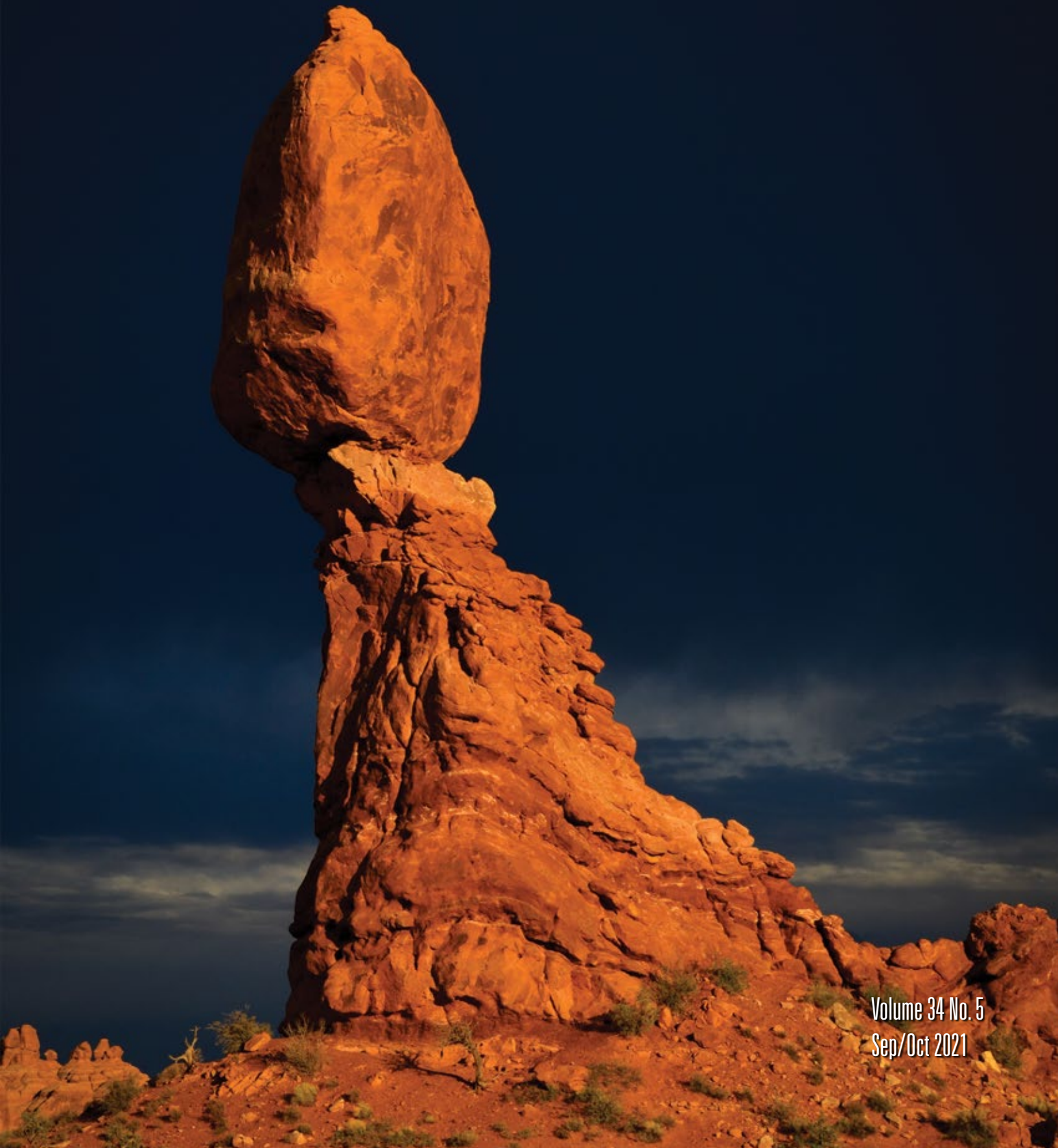


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*Balanced Rock, Arches National Park* by Utah State Bar member Steven Black.

*STEVEN G. BLACK is General Counsel for the portfolio companies of the Savory Restaurant Fund, a unique private equity fund that focuses on the development of successful restaurant brands.*

*Asked about his photo, Steven wrote: "This photo was taken during the summer monsoon season in Arches National Park. As rain clouds gathered in the east, the sun found a break in the clouds near sunset to create contrasting soft light on Balanced Rock with dark clouds in the background."*



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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. Articles that are germane to the goal of improving the quality and availability of legal services in Utah will be included in the *Bar Journal*. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

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

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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.

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# Cats, Lawyers, and Zoom

by Heather L. Thuet

"I'm not a cat," said the sad eyed kitten: a lawyer having Zoom difficulties in the midst of the pandemic in February 2021. Courts usually don't let cats argue cases, and oral arguments rarely go viral. But the video was shared widely and brought joy to many. The kitten, err, lawyer, Rod Ponton, said he was happy people got a much needed laugh.



You won't find an arena in which lawyers do not participate. Lawyers are entrepreneurs, politicians, and statespeople. We are members of the media, professional athletes, farmers, and religious leaders. Oh, yeah, we are also neighbors, friends, mothers and fathers, aunts and uncles, parents and grandparents. In short, attorneys have a lot going on. We deserve a day.

While lawyers may not always be seen as soft cuddly kittens or puppy dogs, we can and should take steps every day to enhance the experience of those around us and ourselves.

### Love Your Lawyer Day is November 5, 2021.

Yes, it is a made-up holiday created in 2001 by a Florida lawyer named Nader Anise, a legal marketing specialist, who wanted to create a day designed for the simple purpose of honoring and respecting lawyers. In 2015, the American Bar Association made it official, declaring the first Friday in each November "Love Your Lawyer Day."

It couldn't have come quickly enough for Anise. "Lawyers are basically vilified in society and by society, mainly for just doing their job," he told the *South Florida Sun-Sentinel*. "I just wanted to create a day to say to lawyers, 'Thanks, for doing a good job,' especially those who give access to justice."

So why should people "love their lawyers"? What is it that makes lawyers, and what we do, loveable? And how, exactly, does one celebrate "Love Your Lawyer Day"?

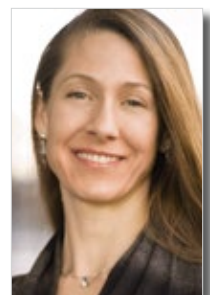
Lawyers have been embedded in the fabric of society since the beginning. Of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers. The fifty-five framers of the Constitution featured thirty-two lawyers. Of the forty-six presidents of the United States, twenty-seven were attorneys. Clearly, this nation of laws had at its foundation some of the greatest legal minds ever known.

The ABA suggests celebrating "Love Your Lawyer" day by contacting one or more lawyers and telling them you appreciate them, making a charitable donation in a lawyer's name, or perhaps taking one to lunch. Attorneys can celebrate by doing some pro bono work, volunteering, or doing anything that improves access to justice.

Loving your lawyer includes loving yourself. One of my key areas of focus during my tenure as Bar president will be on improving lawyer well-being.

The numbers are, frankly, frightening. In a study conducted for the Utah State Bar in 2020, researchers found 44.4% of lawyers reported feelings of depression and 10.5% reported prior drug abuse. The study also showed Utah attorneys were 8.5 times more likely to report thoughts of hurting themselves than the general population.

To combat this challenge, the Utah Supreme Court created a Well-Being Committee, co-chaired by Justice Paige Petersen and Cara Tangaro. The committee is tasked with assisting Utah legal professionals with improving their health, well-being, and professional success. The committee focuses on five specific areas for attorneys. Each of these work in conjunction with the others to provide a balanced life, which gives an attorney the foundation needed to be successful. The five areas are Social Well-being, Intellectual and Occupational Well-being, Emotional Well-being, Physical Well-being, and Spiritual Well-being.



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In addition, the Lawyers Helping Lawyers Committee provides access to free counsel from attorneys who have been through many of the challenges facing attorneys today. For too many in the legal profession, it's always the "other person" that has the problem. That's why the Bar created the Lawyers Helping Lawyers Committee. You may think you are too smart, too talented, too energetic to ever face a problem in your personal or professional life. But know there are those who came before who have fought some of those same demons and won. You don't have to face the challenges alone. Your peers stand ready to help. Help from the Lawyers Helping Lawyers Committee is completely confidential.

Another aspect of loving yourself is learning to break what Martha Knudson, the Executive Director of the Bar's Well Being Committee, calls the "chronic stress cycle." As Martha points out, the presence of stress itself does not create a problem. Chronic stress – the stress that becomes long-term – causes burnout and lower cognitive ability over time, and various mental and physical health problems. You can listen to the whole podcast here: [https://www.utahbar.org/wp-content/uploads/2020/07/JulyPodcast\\_mixdown.mp3](https://www.utahbar.org/wp-content/uploads/2020/07/JulyPodcast_mixdown.mp3).

Nothing is more important to your clients, your family, you, and the profession than your well-being. Don't fall into the trap of thinking you have to do everything alone, that seeking help is a sign of weakness, or that a bad time will pass without you doing something to fix it. It's not always that way, and resources are available to help you. Use them.

According to the ABA, Love Your Lawyer Day is a way "to help promote a positive and more respected image of lawyers and their contributions to society." Promoting a positive and more respected image of lawyers is going to take more than a marketing campaign. But there are steps each of us can take to improve our own well-being along with our reputation and standing in the community and to help one another through the difficult times all of us face.

It is an honor to serve as President of the Utah State Bar. I enjoyed seeing so many of you at the summer convention in Sun Valley. I look forward to working with you, through whatever challenges the next year brings. Love yourselves. Love your profession. Love your clients. Love your judges. Love each other. Get outside. Work out. Have lunch with opposing counsel. Get involved. Work with your section chairs to make your section, the Bar, and the legal profession better. You won't regret it.

Also remember to embrace your inner kitten, and be "prepared to go forward with it," with or without the filter.

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# The Judicial Conduct Commission: Not So Mysterious

by The Honorable David N. Mortensen

While serving as the presiding judge in the Fourth District Court, one of my duties consisted of acting as the reviewing judge on motions to disqualify other district court judges. Not infrequently, a party, sometimes acting pro se, but often represented by counsel, would move to disqualify a judge based upon the fact that they had recently filed a complaint against that judge with the Utah Judicial Conduct Commission – the JCC. Not only would these parties be quickly disappointed to find out that the filing of a complaint against a judge does not automatically result in disqualification, but they would also learn that the motion to disqualify was the first time the judge had even heard that a complaint had been filed. *See* Utah State Bar Ethics Advisory Committee, Informal Op. 05-3 (“A judge is not required to enter disqualification based solely on the fact that a judicial conduct commission complaint has been filed [against the judge].”); *see also* Utah State Bar Ethics Advisory Committee, Informal Op. 97-8 (explaining that a judge need not enter disqualification solely because a party sued the judge in the judge’s judicial capacity). That is just one of the nuances of the processes of the JCC. And while the JCC may seem mysterious, a lot of information is easily available. But to save everyone the hassle of looking it up, hopefully the following will help clear up any confusion that might exist, or maybe the following will be a revelation about a commission you have never heard of.

Currently I have the honor of serving with a collection of good and conscientious commissioners who take their constitutional oath of office seriously.<sup>1</sup> We meet monthly and conduct a session open to the public, as well as a closed session where we discuss and adjudicate claims of alleged judicial misconduct.

Complaints to the JCC can be quite serious and, if egregious enough, can result in a recommendation that a judge be suspended without pay or removed from office. The JCC may take the following actions in connection with a complaint: dismissal, dismissal with warning, reprimand, censure, suspension, removal from office, and involuntary retirement. Understanding the history, structure, and processes of the JCC can help counsel and their clients understand how complaints are processed and what expectations they can have when complaints are filed.

## The Creation and Structure of the Utah Judicial Conduct Commission

In 1984, the Utah Legislature rewrote, and the voters approved, a new Article VIII of the Utah Constitution.<sup>2</sup> The new Article VIII of the Utah Constitution, of course, expressly vests the judicial power in the Utah Supreme Court and a general jurisdiction court known as the district court, as well as the other courts the legislature in its wisdom may establish.<sup>3</sup> The new Article VIII also ushered in the Utah Judicial Council, introduced nominating commissions into the judicial selection process, introduced judicial retention elections, and created a new entity – the JCC. *See* Utah Const., art. VIII, § 13; Utah Code Ann. §§ 78A-11-101 to -113.

The composition of the JCC is quite unique. The JCC enabling statute, *see* Utah Code Ann. §§ 78A-11-101 to -113, sets forth that the commission will consist of eleven members: two members of the Utah House of Representatives, each from a different political party, appointed by the speaker of the House; two members of the Utah State Senate, each from a different political party, appointed by the president of the Senate; two members of the Utah State Bar appointed by a majority of the Utah Supreme Court; three persons who are not members of the Utah State Bar, no more than two from the same political party, appointed by the governor and confirmed by the Senate; and two judges that must serve in different districts, serve on different levels of courts, and cannot be members of the Utah Supreme Court. *Id.* § 78A-11-103(1).

There appear to be some unique aspects to Utah’s JCC. As far as my research has indicated, no other state’s JCC has legislators as members. Often, in other states, a commission will only have a token member from the general public. And while having all three

*JUDGE DAVID N. MORTENSEN was appointed to the Utah Court of Appeals in May 2016 by Gov. Gary R. Herbert. Prior to his appointment, Judge Mortensen served as a trial judge in the Fourth District Court for almost ten years.*



branches of government, plus the public, serve on a commission may seem odd, the wisdom is that all interest holders in our judicial system have a seat at the table.<sup>4</sup> The general public need only turn to the public members to verify that the common person's common sense is brought to bear in reviewing the conduct of judicial officers. The legislature need not wonder whether more significant oversight of judicial conduct might be needed when members of both houses have seats at the table. And, finally, the Utah Bar and the judiciary as a whole know that members of the commission understand and likely share their perspective and concerns.

### Frequency of Complaints

At present, considering all judges and justices, including the appellate, district, juvenile, and justice courts, as well as pro tempore and active senior judges that also serve, Utah's judiciary consists of 318 judges. The number of complaints fluctuates year to year. For example, looking at 2016 through to the present, a low of fifty-one complaints to a high of eighty-five complaints have been filed in a given year. In the fiscal year that just ended, there were eighty complaints against sixty-seven judges. Current trends show essentially a similar pattern.<sup>5</sup>

Having said all this, one need only look to other jurisdictions throughout the country to conclude that Utah's judiciary is a rather ethical bunch. In many other states, and typically those where judges are elected instead of appointed, we frequently hear of serious ethical lapses, including bribery, sexual assault, case fixing, and horribly racist comments made from the bench. A monthly newsletter confirms that multiple judges are disciplined throughout the country every month for very serious things. And while we do see serious ethical lapses on occasion here in Utah, in actuality they do not arise that often and generally pale in comparison to the foregoing illustrative examples taken from other states.

Judges throughout the state know they are answerable to the JCC. Not seen on the public side of the bench, more than a few judges have posted reminders of the reality of oversight for any judge who happened to be seated at the bench. For example, one judge had posted a notice: "The Judicial Conduct Commission is listening." Another judge more pointedly posted a different reminder: "Make sure your brain is loaded before you shoot off your mouth." And another reminded himself: "People are here because they are *already* having a bad day."

### Nature of Complaints

To be sure, a large portion of complaints are submitted by parties, not attorneys, complaining about the outcomes of their

cases – the merits. And while, theoretically at least, if a judge truly ignores the law or otherwise is incompetent, a basis for commission action might exist, the JCC is likely to conclude that complete dismissal of the complaint is the proper course of action. And it's not difficult to understand why, as these parties are largely confusing the purposes of the JCC with the purposes of the appellate courts. And even if these parties claim that adverse rulings show bias, the JCC will follow our supreme court's precedent that no deduction of bias or prejudice can be inferred simply because a judge rules against a party. *See Dabl v. Dabl*, 2015 UT 79, ¶ 52, 459 P.3d 276.

### JCC Processes

Besides the Utah statute establishing the composition of the JCC, the JCC itself also promulgates administrative rules, which complainants and judges are wise to reference. *See Utah Admin. Code R595-1 to -4*. Proceedings before the JCC commence with a written complaint. While the JCC prefers written complaints, and appreciates those who employ the forms supplied by the JCC, when complaints are otherwise made, the executive director brings the matter before the JCC, which decides whether to proceed with an investigation in the absence of a written complaint.

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Next, the JCC staff undertake a preliminary investigation and, based upon that investigation, make a recommendation whether to dismiss the complaint or proceed to a full investigation. The preliminary investigation may involve a review of pleadings and other court papers, witness interviews, a review of the audio recording of any relevant hearings, and a review of any other evidence submitted by the complainant. Attorneys appearing in the case may also be interviewed. Often, where the claims do not actually allege a violation of the Code of Judicial Conduct, the paradigmatic example being where the complaint only addresses the merits of an underlying decision, the complaint is simply dismissed because assuming the allegations are true, no violation of the Utah Code of Judicial Conduct can be found. This nuance tends to cause a lot of grief for many non-attorney complainants who feel their case was wrongly decided and cannot conceptualize why that does not constitute judicial misconduct.

Where the JCC votes to proceed with a full investigation, JCC staff – **for the first time** – will forward relevant materials to the judge and ask the judge to respond. Additional investigation may be undertaken by staff. An updated report and recommendation is submitted to the JCC, which votes on whether to dismiss the complaint or move forward with charges and a hearing. If the judge admits the violation and a public reprimand does not appear warranted, a warning with dismissal may be issued. While the case is dismissed, the case may be referred to or considered an aggravating factor in any future JCC complaint adjudications.

If formal charges are filed, the judge is invited to file a formal response. At that point the complaint will be dismissed or resolved via a confidential hearing or submitted on stipulated facts. Then based either on findings made at the conclusion of a confidential hearing, or based upon the stipulated facts, the JCC will decide upon a resolution.

Staff will then file the JCC findings and sanction recommendation, along with statutorily required materials, with the Utah Supreme Court. The JCC's recommendation becomes public upon filing. All other materials are made public only upon order of the Utah Supreme Court. Finally, the Utah Supreme Court implements, rejects, or modifies the JCC recommendation. Utah Code Ann. § 78A-11-111.

### Hearing before the JCC

Due process rights apply in a hearing before the JCC. *See In re Worthen*, 926 P.2d 853 (Utah 1996). Judges can, and often are, represented by counsel. Witnesses can be called, and other evidence, such as audio and video recordings and documents,

is received. Most often, however, the case is presented on stipulated facts that have been worked out between the judge's counsel and JCC staff. Almost always, the judge will testify at the hearing, and the judge or the judge's counsel will address what might be the most appropriate sanction.

### Who Makes Complaints

While by far the most common complainant is a party, any person who becomes aware of potential judicial misconduct can make the complaint. At times family members or other supporters of a party may submit a complaint. Obviously, lawyers can and do submit complaints. It must be acknowledged that often lawyers have their clients submit the complaint, likely from fear of reprisals from a judge because of the complaint.<sup>6</sup> Any retaliation, however, would constitute a violation of the Code of Judicial Conduct. Utah Code Jud. Conduct R. 2.16(B) ("A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or lawyer."). And consistent with a judge's duty to take appropriate action when a judge receives information indicating a substantial likelihood that another judge has committed a violation of the Code of Judicial Conduct, the JCC does receive complaints from the judiciary, most often by way of the Judicial Council. Utah Code Jud. Conduct R. 2.15(C). Finally, on occasion a judge will realize he or she has violated the Code of Judicial Conduct and self-report the violation.

### Common Complaints

Although the JCC has addressed claims of workplace harassment, inappropriate political statements, improper ex parte contact, and ill-advised participation in fund-raising ice-bucket challenges, the typical claims brought to the JCC address merits of the underlying decision, often asserting that the judge got the facts or the law wrong. Nearly always, these claims are dismissed and the complainant is advised that questions regarding the correctness of a decision may be directed to an appellate court. The JCC also points out that it lacks the power to change the result in any case.

In many other cases, the complainant asserts that the judge was intemperate in the treatment of a litigant or a witness. All judicial proceedings are audio recorded, even in courts not "of record." Therefore, the JCC almost always has an audio recording of the event to review. JCC staff will regularly interview the attorneys involved to ascertain whether they perceive any bias or lack of judicial demeanor. When cases proceed to a full investigation, clerks of court may also be interviewed to gather their perceptions of the events. I should note that, thus far in my tenure on the



JCC, every time we have agreed that a judge has lacked good judicial demeanor, when contacted in the full investigation, each judge owned the less than appropriate expressions, appeared sufficiently contrite and repentant, and sought to resolve the complaint on a stipulated basis with the JCC.

### Interaction with JPEC

Nonlawyers, and occasionally members of the bar, can confuse the role of the JCC and the Judicial Performance Evaluation Commission (JPEC). The JCC exists to address judicial complaints in real time against the standards of the Utah Code of Judicial Conduct. JPEC, in contrast, is charged with supplying the voting public with information so that they can possess sufficient knowledge to make an informed decision on whether a judge should be retained. The JCC can recommend a sanction, including removal from the bench, at any time. But JPEC only informs the decision on retention, which comes near the end of the judge's or justice's term. The two commissions are not without some slight connection. As JPEC is performing its due diligence in making its recommendations, JPEC does confirm whether any judge or justice has been subject to JCC discipline. And where public discipline has occurred, the discipline will be separately identified and explained in a note in the narrative portion of the JPEC evaluation in the voter information pamphlet.

### Ethics Advisory Opinions

Somewhat unknown by both attorneys and judges is the collection of ethics advisory opinions published on the court's website (there is also a link on the JCC site). <https://www.utcourts.gov/resources/ethadv/index.asp>. This is a good place for justices, judges, attorneys, and the public to confirm whether certain actions constitute violations of the Code of Judicial Conduct.

### The JCC Works

After serving for a few years on the JCC, I am convinced that the JCC works as designed. In Utah, those who have grounds to believe that a justice or judge has violated the Utah Code of Judicial Conduct have a commission ready and able to hear and vet, and where appropriate, follow up on, the complaint. Finally, where warranted, sanctions, even severe sanctions, can result. *See In re Anderson*, 2004 UT 7, 82 P.3d 1134 (removal from office warranted); *In re Kwan*, 2019 UT 19, 443 P.3d 1228 (six-month suspension without pay warranted). Ultimately, the JCC is not really so mysterious.

1. The current list of commissioners includes: Rep. Craig Hall, Chair; Rep. Elizabeth Weight; Sen. Jani Iwamoto; Sen. Mike McKell; Cheylynn Hayman, attorney member;

Michelle Ballantyne, attorney member; Mark Raymond, public member; Georgia Beth Thompson, public member; Stephen Studdert, public member; Judge Todd Shaughnessy, 3rd District Court; Judge David Mortensen, Utah Court of Appeals.

2. Prior to the rewrite of Article VIII, only two methods existed to discipline a judge: removal or impeachment. Both methods required legislative action. *See In re Worthen*, 926 P.2d 853, 857 (Utah 1996).

Both processes were too cumbersome and removal from office was too draconian a penalty for either to be an effective means of dealing with allegations of judicial misconduct, as is demonstrated by the fact that no impeachment or removal from office proceedings were held in the eighty years that these remained the exclusive remedies under the constitution.

*Id.*

3. That wisdom included the contemporaneous creation of Utah's intermediate appellate court – the Utah Court of Appeals. Incidentally, it is the best legal job in Utah in my opinion.
4. To the deep thinkers out there, you may wonder about the constitutionality of this whole set up. Two things: first, as pointed out, the JCC is enshrined in Utah's Constitution; second, our supreme court has ruled the JCC constitutionally sound. *See In re Anderson*, 2004 UT 7, 82 P.3d 1134.
5. Annual reports of the JCC are available at: [www.jcc.utah.gov/annual-reports/](http://www.jcc.utah.gov/annual-reports/).
6. For many months judges and lawyers tried to tactfully suggest that I should not be spearheading a fund-raising campaign for a local law school since such fundraising is prohibited for judges. I was flattered by their concern and more than a little entertained by some of their attempts to kindly and tactfully tell me that I had so obviously violated the Utah Code of Judicial Conduct. Alas, it was another David Mortensen, of whom I was aware in no small part because we occasionally had been receiving each other's mail for years.



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# Judicial Performance Evaluation in Utah: Increasing Objectivity and Transparency

by The Honorable Christine Durham

As both a long-term participant in judicial performance evaluation and a relative newcomer to the Judicial Performance Evaluation Commission (JPEC), I have seen a lot and, especially recently, learned a lot. When Utah's current version of the Judicial Council (Council) came into existence (after constitutional revisions of Article VIII took place in the mid-1980s), it undertook formal evaluations of judges. At the time, there was limited research on the evaluation process, and the Council relied largely on surveys and self-reporting. The entire process was managed by the Council with the support of the Administrative Office of the Courts. Gradually, the review standards incorporated elements of the ABA model established in 1985. Notably, the entire enterprise was conducted entirely within the judicial branch.

That changed after the Utah Legislature created a task force to study performance evaluation, relying on the work of the Institute for the Advancement of the American Legal System. As a result, the Judicial Performance Evaluation Commission Act (Act) passed in 2008. For the first time, evaluation of Utah's judges and sharing of public information for retention purposes were moved outside the judicial branch to an independent body. The legislature also provided funding for professional staff, survey development, and research (funding that had not existed for the program run by the Council). The shift began an era in which Utah, already an early adapter in judicial performance evaluation, became one of the national leaders in creating best practices and responding to new research and thinking. In 2014, for example, Utah was cited as having "pioneered the incorporation of procedural justice as a dimension on which judges should be evaluated as part of an official program." David B. Rottman & Tom R. Tyler, *Thinking about Judges and Judicial Performance: Perspective of the Public and Court Users*, 4 Oñati Socio-Legal SERIES 1046, 1058 (2014). The article also noted at the time that "the Utah Judicial Performance Evaluation Commission... [is] unique among such state commissions in being independent from the judiciary." *Id.* at 1059.

In more recent years, in addition to expanding performance standards to include procedural fairness, JPEC has consistently used expertise in survey development and statistical analysis, and has continued to be innovative in meeting the primary goals of evaluation: (1) providing the voting public with information about individual judges standing for retention elections; (2) giving individual judges and the Judicial Council information that supports professional development and education for judges; and (3) enhancing trust and confidence in the courts as institutions. The structure and work of JPEC, as contemplated by the Act, has consistently been designed to further these goals. Since joining JPEC in 2018, I have seen implementation of major projects to refine and improve its processes. These include:

1. an overall review of the challenges of evaluating justice court judges with very low caseloads, some of whom work part-time and/or in rural areas (making it difficult to identify attorneys and other survey responders with sufficient personal experience with them);
2. the expansion and intensive training of a cadre of volunteer court observers who can provide information on procedural fairness issues, in-court demeanor, communication skills, etc.;
3. an emphasis on identifying and minimizing the impact of implicit bias and unconscious stereotypes on performance evaluation; and

*FORMER CHIEF JUSTICE CHRISTINE DURHAM served on the Utah Supreme Court for thirty-five years, and as Chief Justice for ten years. She now practices appellate law with Zimmerman Boober and is a member of JPEC.*





4. increasing public awareness about the performance evaluation project, the work of the JPEC, and the usefulness of the public information it provides.

The third project described above addresses a consistent problem with professional evaluation: the degree to which all evaluators bring, usually unaware, their own predilections, expectations and assumptions (often based on stereotypes) to the work. The story of American symphony orchestras has become a useful example. Observers had long pointed out the significant gender imbalance in orchestras across the country. By creating blind auditions, where aspiring players performed behind screens (although it turned out that the floors also had to be carpeted to avoid the click of heels), American orchestras in the space of a few years saw dramatic increases in female membership.

In a previous issue of the *Utah Bar Journal*, Grace Acosta wrote an article highlighting attorney obligations to be thoughtful and careful about their own assumptions and potential biases in assessing judges. See Grace Acosta, *Implicit Bias in Attorney Evaluation of Judges and Why it Applies to Everyone, Even You*, 32 UTAH B.J. 18, 18–20 (July/Aug 2019). There is significant scholarly literature documenting the problem in numerous fields, including business, education, and, of course, judicial performance evaluation. See e.g., Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 JUSTICE SYSTEM J. 301, 301–24 (2014). JPEC has been working on doing better.

Published with Ms. Acosta's article was a summary prepared by JPEC's executive director Jennifer Yim, which identifies efforts underway. See Jennifer Yim, *Implicit Bias Reduction at the Judicial Performance Evaluation Commission (JPEC)*, 32 UTAH B.J. 19, 19–20 (July/Aug 2019). First on that list is the institution of regular implicit bias training for all JPEC members. All training and presenters are not created equal in this arena, and the people that JPEC has worked with are those used by the Utah state courts, the Utah State Bar, and the National Conference of Bar Examiners. The use of the best and most current research on human decision-making and unconscious bias has made these sessions highly useful. The science of decision-making tends to be an area in which most of us do not "know what we don't know," and it is a real education to be exposed to the data. The training has also, I think, given JPEC members helpful vocabulary for addressing fairness questions across the board.

Second on JPEC's list was improving the survey process itself to

try to enhance the carefulness of responders. A professional survey consultant was brought in to help implement best practices in the design of questions. One example was the development of so-called "focusing questions," intended to get respondents to recall in detail their recent encounters with the judges they are evaluating. The modified questions were pre-tested and have been in use now for almost four years.

JPEC has also introduced a modified form of blind review, which I experienced for the first time during the most recent evaluation cycle. Although commissioners eventually learn the names of the judges evaluated, those names are withheld throughout the process of reviewing survey scores and comments from respondents. This is an important strategy to prevent unconscious bias involving gender, race, ethnicity, affinity, and a host of other possibilities.

Fourth on the list included reorganizing the deliberation process to encourage systematic practices. It can be too easy to use free-flowing and unfocused discussion in such settings, when in fact the evaluation process benefits from grounding in standards and careful asking and answering of the same questions in the same sequence. As a professional decision-maker for most of my career, I was impressed with the order and appropriate boundaries observed by JPEC in its deliberations.

Finally, JPEC is focused on what may be the most challenging task of all: giving survey responders the encouragement and tools to be able to monitor their own unconscious bias. In reviewing the comments in surveys, I noticed on several occasions, language (descriptors, adjectives, verbs) that seemed to reflect underlying stereotypes of judges based on inappropriate categories, especially gender. JPEC hopes to continue to help educate and train attorneys, jurors, staff, and court observers about the practices that can enhance their fairness and objectivity in helping Utah's voters and its judges in this important work. This fall, JPEC will release an online CLE about implicit bias that will be available to attorneys who evaluate the performance of judges.

In conclusion, I feel honored (and a little old) to have come full circle with judicial performance evaluation in Utah – from working on the legislation that first entrusted it to the Judicial Council, to being part of the task force that drafted the Act creating JPEC, to now having the opportunity to serve on JPEC. It is a worthy undertaking, serving the people, judges, and the courts.

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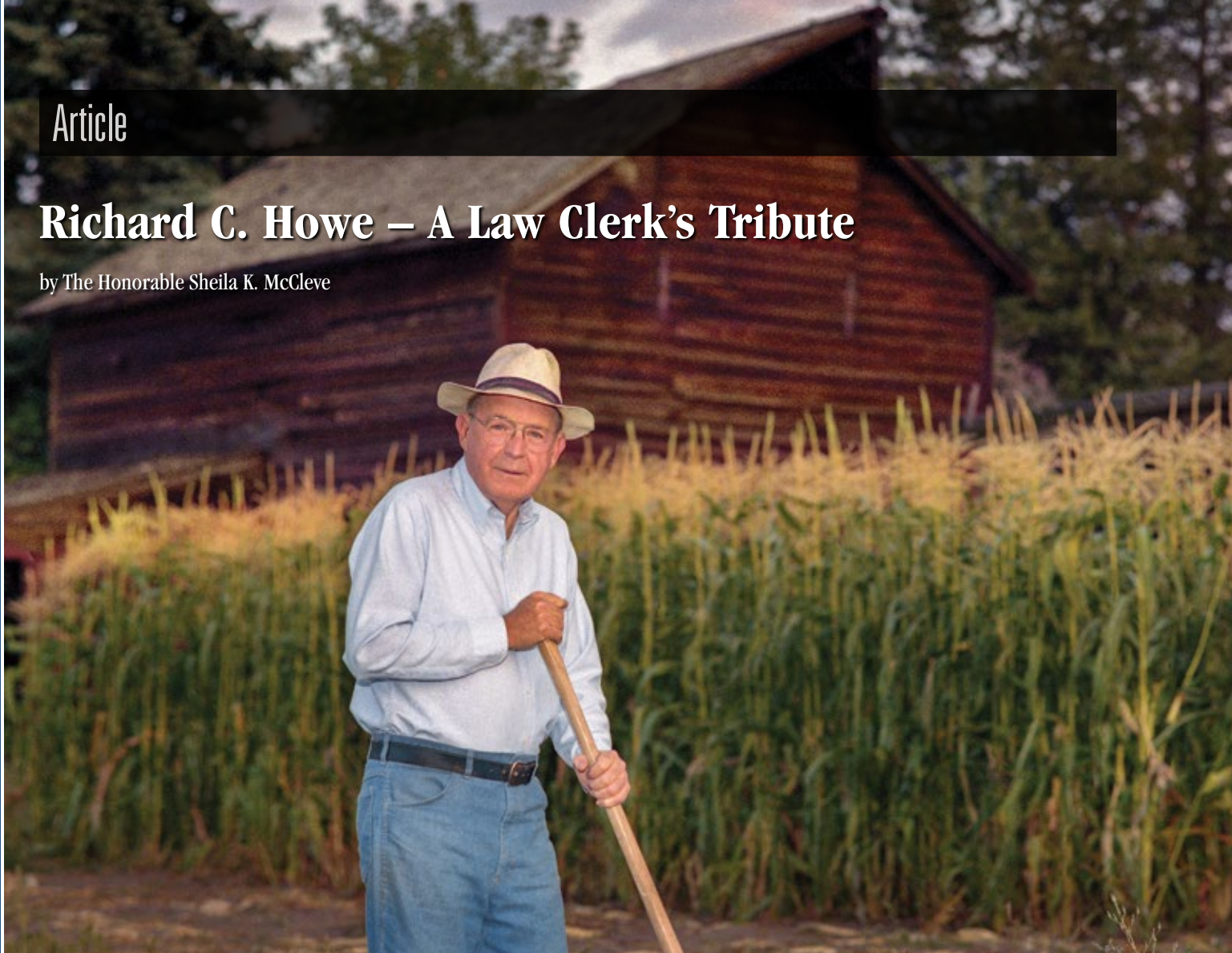
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## Richard C. Howe – A Law Clerk's Tribute

by The Honorable Sheila K. McCleve



The Honorable Richard C. Howe was an extraordinary ordinary man. I was privileged to serve as one of his first clerks at the Utah Supreme Court, and there learned of his extraordinary character and accomplishments as well as his identification with and empathy for ordinary people.

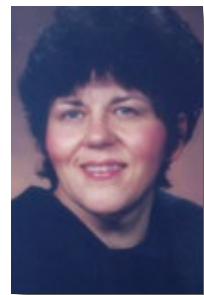
His ancestors were pioneers and early settlers of the Salt Lake valley. Justice Howe never forgot his ancestral heritage nor lost his love for the land they had settled. He was born, grew up and, with his engagingly charming wife, Juanita, raised his family on that land in the Murray/Cottonwood area.

For decades Justice Howe grew his garden on that land. Every season he delighted in sharing his harvest, particularly his prized Golden Jubilee corn, with other fresh-corn lovers at the supreme court. Although he sold the land just a few years ago, a street there now bears his name.

Justice Howe would say that at heart he was a farmer. And with a gleam in his eye and a little corner of a turned up smile, he would remind me, a Granite High School graduate, that he had also been a “Granite High Farmer” and was a proud graduate.

During the time I clerked for him, Granite High School acknowledged his many achievements by giving him an Honored Alumni Award. At the school assembly ceremony (that he had invited me to attend), he graciously and proudly

*JUDGE SHEILA K. MCCLEVE served as a law clerk for Justice Howe after stints as a prosecutor and administrative law judge. Now retired, Judge McCleve served as a circuit court judge for twelve years before becoming a district court judge in 1996. She served in that capacity until 2009.*





accepted the award, which I believe he sincerely cherished as much as any of the other, more notable ones he received.

Although I was his clerk, a relatively new lawyer, and he was a Supreme Court Justice with many preceding legal contributions, still, Justice Howe always treated me as an equal in the law. He revered the worth of individuals as a strongly held value. He once told me that he had seen role reversals in life, and he thought it best to look for the merits of each person rather than to worry about relative positions held. In fact, he said that it wouldn't surprise him if one day he worked for me, life being what it is. His view revealed his awareness of the significance of each individual.

Of course, we never reversed roles but when, as a district court judge, I sat pro tem on the supreme court alongside him, he was genuinely pleased. (It was a highlight of my career.) He was always happy for all of his clerks' accomplishments and took a certain pride in them. I believe that all of his clerks continue to be grateful for his influence in their lives.

Justice Howe brought a wealth of experience to the supreme court.

In his private practice he had solved many ordinary people's concerns, and he went beyond the paperwork and court appearances to try to help his clients have better lives. He also served as Murray City Judge, a legislator in both the Utah House and Utah Senate as well as Speaker of the House. No one, I believe, before or since Justice Howe, has served in both houses of the Utah State Legislature and also served on the Utah Supreme Court, including becoming Chief Justice.

He was a Democrat in a Republican state, a legislator, once his party's chair, who sponsored bills to improve the courts and then became a judge. He worked across the aisle to serve the ordinary citizens of his constituency and the state. And many of his influential legislative friends, on both sides of the aisle, would stop by at the court to see him and say hello whenever the legislature was in session.



On the bench Justice Howe would, more times than he had initially expected, find himself being “the swing vote” in a case. There was great collegiality among the members of the court. Each one brought a different viewpoint and varied capabilities from their experiences in the law. Justice Howe had a unique perspective on the laws he had been creating for so many years at the legislature. And from his experience in his practice, in addition to his work on the Murray City bench, he knew the impact of decisions in ordinary people's lives. Whether his individual determination would change the outcome of a particular case, whether he would join or be the sole dissent, Justice Howe firmly and boldly interpreted the law in a pragmatic, common sense way. He was interested in following

the law and solving problems. And he never betrayed his regard for the rule of law or his personal beliefs in the process.

Justice Howe was without malice or guile. He was not a self-promoter. You wouldn't learn of his extraordinary accomplishments from him. He preferred to make himself approachable, kind, and thoughtful of others. He was a gentle man, soft-spoken, with wit and humor, respectful of

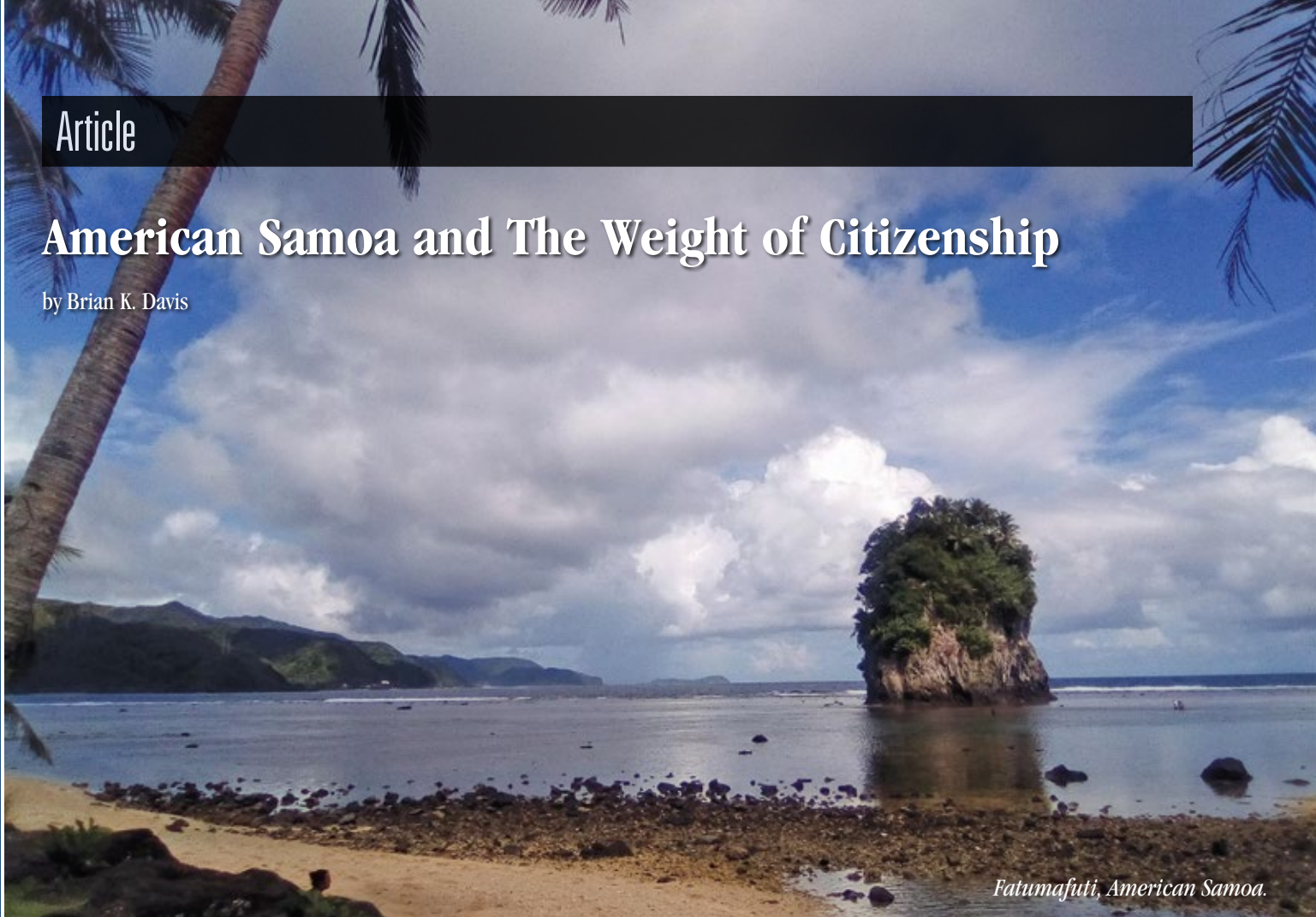
everyone. He was encouraging and collegial with his “inferiors” because he saw no one as inferior. He was truly humble.

The Honorable Justice Howe was the epitome of civility on the bench. He embodied it as a person. He was a gentleman who always brought honor to the state of Utah.

While he may have regarded himself as an ordinary man who had a connection to ordinary people, Justice Howe was uncommon in character as well as achievement. He was an extraordinary example of how to regard others and how to behave towards them, no matter their positions or their problems. The people who knew him are better for his influence on them. The law is better for his involvement with it.

# American Samoa and The Weight of Citizenship

by Brian K. Davis

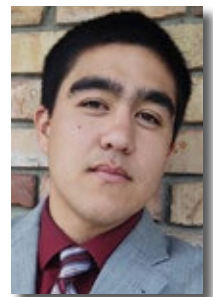


*Fatumafuti, American Samoa.*

*Jus soli* (right of the soil), otherwise known as birthright citizenship, is a right nearly all Americans recognize and presume to be true for any person born on American soil. But for the nearly 55,000 residents of American Samoa, a U.S. territory in the South Pacific, this is not the case. Indigenous people born in American Samoa are considered U.S. nationals, not citizens. 8 U.S.C. § 1408. The American Samoan Government (ASG) prefers keeping national status believing citizenship would destroy *Fa'a Samoa* (the Samoan Way). Line-Noue Memea Kruse, *THE PACIFIC INSULAR CASE OF AMERICAN SĀMOA* 79 (2018). *Fa'a Samoa* consists of two main pillars: (1) the communal land system; and (2) the *matai* title system. “Communal lands [are] identified. . . as specific tracts of large, medium, and small lands collectively owned and controlled by the *āiga* (family). . . .” *Id.* at 8. The *matai* title system is a chiefly title bestowed upon one person to “exercise control over family communal lands. . . and command the decision-making process of the other family members.” *Id.* ASG thinks citizenship would violate *Fa'a Samoa* by subjecting the territory to the American land system thereby terminating the communal land system and weakening their Samoan identity. *Id.* at 79. ASG is therefore happy to maintain the status quo, but individual American Samoans do not always share that perspective.

Three American Samoans, presently living in Utah, challenged their classification as nationals in the federal Tenth Circuit. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1157–58, 1160 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021). They contend, that as nationals, they are an inferior class who are consequently “denied the right to vote, the right to run for elective federal [or] state office, and the right to serve on federal and state juries.” *Id.* at 1160; *see also* Kruse, *supra*, at 79–80. In other words, the plaintiffs’ ability to pursue the American dream and be recognized as Americans is being handicapped by their legal status even though they were born under the American flag. The plaintiffs, therefore, asked the Tenth Circuit to apply *jus soli* to American Samoa, making the island’s residents, and accordingly the plaintiffs, citizens instead

*BRIAN K. DAVIS is a staff attorney for Utah Legal Services, Inc. in the Native American Unit. He previously clerked for the chief justice of the High Court of American Samoa.*





of nationals. The federal government and ASG, however, assert that only Congress may bestow citizenship upon the people of American Samoa and, more importantly, that citizenship would violate American Samoan sovereignty and jeopardize *Fa'a Samoa*. See *Fitisemanu*, 426 F. Supp. 3d at 1158, 1176–78, 1196.

The federal District Court of Utah agreed with the plaintiffs, holding *Wong Kim Ark* applied the Citizenship Clause of the Fourteenth Amendment to the people of American Samoa. *Id.* at 1157–58, 1197. The Tenth Circuit Court of Appeals reversed the district court, finding the *Insular Cases* to be the more compelling analysis. *Fitisemanu v. United States*, 1 F.4th 862, 865, 869 (10th Cir. 2021). Thus, the ultimate question is whether the Citizenship Clause of the Fourteenth Amendment and its progeny apply to American Samoa or whether the *Insular Cases* decision circumvents the Citizenship Clause's application. The answer for now appears to be that citizenship does not extend to American Samoa and only an act of Congress will truly resolve the issue.

### The Beginnings of Citizenship

The terms “citizen of the United States” and “natural-born citizen” are used in the Constitution but are not defined. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (quotation marks omitted). Prior to the Fourteenth Amendment, the Supreme Court consistently relied on English common law in holding white persons were afforded birthright citizenship. See *id.* at 674–75. But the Court held in the infamous *Dred Scott* case that free black men were not afforded citizenship under the Constitution. *Wong Kim Ark*, 169 U.S. at 676. The Fourteenth Amendment sought to rectify this putrid decision and “put it beyond doubt that all blacks, as well as whites, born... within the jurisdiction of the United States, are citizens of the United States.” *Id.* Congress and the States thus ratified: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States....” U.S. Const. amend. XIV, § 1. Since its ratification, the Supreme Court has interpreted the Citizenship Clause in three cases, all of which occurred before the turn of the 20th Century.

### Establishing National Citizenship

*Slaughter-House Cases* was the seminal decision for interpreting the Citizenship Clause and concerned a state's statute on the slaughter of animals and whether an exclusive privilege could be granted to any of its citizens. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 57–66 (1873). The Court framed the issue as defining the term “citizenship,” noting that before the Fourteenth Amendment “[n]o such definition was previously found in the Constitution.” *Id.* at 72. This led some scholars to believe

no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and

resided always in the District of Columbia or in the Territories, though within the United States, were not citizens.

*Id.*

The Fourteenth Amendment eliminated all doubt by declaring “that persons may be citizens of the United States without regard to their citizenship of a particular State.” *Id.* at 73. A person may therefore be a citizen of both the United States and a State, but “it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.” *Id.* at 74. Thus, “there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other.” *Id.*

The *Slaughter-House Cases* Court's interpretation of the Fourteenth Amendment appears to extend citizenship to the territories, including American Samoa. The inclusion of territories in the setup question creates a strong inference that citizens of a territory are also citizens of the Union. The *Slaughter-House Cases* also explicitly overturned the *Dred Scott* decision and implied the reestablishment of birthright citizenship. *Slaughter-House Cases*, 83 U.S. at 73. Hence, if the Fourteenth Amendment includes all territory of the United States, then “it is only necessary” that a person “be born... in the United States to be a citizen of the

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Pago Pago Harbor, American Samoa.

Union,” including those born in American Samoa. *See id.* at 74.

The *Slaughter-House Cases* Court, however, did not directly resolve whether citizenship extends to a territory. The *Slaughter-House Cases* Court’s analysis was cast as state versus federal citizenship and never mentions the territories. It could therefore be surmised that the Court left extending citizenship to the territories for another day. Furthermore, the *Slaughter-House Cases* is persuasive, not controlling, because the question of citizenship was secondary to the issue presented. Finally, the Supreme Court did not contemplate American Samoa’s unique territorial status as an unincorporated territory. Kruse, *supra*, at 76. Before the 20th century, territories acquired by the United States were on a path to statehood. *Id.* at 23, 66. This policy, however, shifted during the American imperialism phase when the federal government decided to acquire territory but not incorporate it into the United States. The American Samoa territory was therefore not destined for statehood. *Id.* at 76. The *Slaughter-House Cases* Court did not consider the concept of unincorporated territories when using the term “territory” because it likely presumed any territory would eventually become a State. Applying this presumption to American Samoa, it is doubtful that the *Slaughter-House Cases* Court would have extended citizenship to the island given that the federal government acquired the territory without a statehood intention. Ultimately, the *Slaughter-House Cases* interpreted the Citizenship Clause to mean a national citizenship but left open what being “in the United States” or “subject to the jurisdiction thereof” meant.

### Subject to the Jurisdiction Thereof

The next question the Court addressed was how to define the separate parts of the Citizenship Clause beginning with “subject to the jurisdiction thereof” in *Elk v. Wilkins*, 112 U.S. 94 (1884). *Elk* was about “whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, . . . a citizen of the United States, within the meaning . . . of the Fourteenth Amendment.” *Id.* at 99. The Supreme Court quickly found Indian tribes were “within the territorial limits of the United States” but were considered “distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties

made by the President and Senate, or through acts of Congress in the ordinary forms of legislation.” *Id.* Thus, even though the tribes were within the United States, “[t]he members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States” and “were never deemed citizens of the United States.” *Id.* at 99–100. In other words, the question was not whether Native Americans were born in the United States but whether they were “subject to the jurisdiction thereof.” *Id.* at 102 (quoting U.S. Const. amend. XIV, § 1). “[S]ubject to the jurisdiction thereof” is “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.” *Id.* Consequently, “Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes . . . , although in a geographical sense born in the United States,” are not “within the meaning of the . . . Fourteenth Amendment.” *Id.* Therefore, “Indians . . . , not being citizens by birth, can only become citizens . . . by being ‘naturalized in the United States,’ by or under some treaty or statute.” *Id.* at 103.

*Elk* is the most factually similar case to American Samoa. Like Native American tribes, American Samoans are an indigenous people group with a distinct culture and values. The American Samoan people were also given political recognition as evidenced by Congress entering into a cessation treaty with the *matai*. American Samoa is ultimately under the control of Congress but is given greater autonomy than the States to manage its own affairs. Accordingly, American Samoa may not be “completely subject to [the United States’] political jurisdiction,” therefore excluding them from citizenship. *See id.* at 102. Thus, under *Elk*’s holding, American Samoans may only be naturalized through some act of Congress.

*Elk*, however, was a narrow case specifically addressing the Native American tribes within the United States and did not address territories. Furthermore, the *Elk* Court found that Native Americans owed allegiance to their tribes. *Id.* American Samoans, as nationals, owe permanent allegiance to the United States. 8 U.S.C. § 1408. Consequently, American Samoans do not neatly fall into the *Elk* exception. And *Elk* was later narrowed by the Court in *Wong Kim Ark*.

## The Adoption of *Jus Soli* Citizenship

The last of the three major cases on citizenship is also the most decisive. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a man was born in California to Chinese parents who had emigrated to the United States. *Id.* at 652. This man traveled to China for a visit and upon return to the United States was barred entry because he was purportedly not a citizen of the United States. *Id.* at 653. (This event took place during a xenophobic era in which the United States stopped Chinese citizens from entering the country under the Chinese Exclusion Act.) If the man was a citizen of the United States, then the Chinese Exclusion Act did not apply, therefore raising the question of

whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States... becomes at the time of his birth a citizen of the United States, by virtue of the... Fourteenth Amendment.

*Id.*

The Supreme Court answered the question in seven parts. The Court first concluded that “citizen of the United States” and

“natural-born citizen” were not defined in the Constitution and therefore turned to the common law. *Id.* at 654. Consequently, part two is an extensive analysis of English common law on birthright citizenship. The Court determined that

by the law of England[,]... aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject.

*Id.* at 658.

It thus follows that the English notion of birthright citizenship “continued to prevail under the Constitution as originally established,” bringing the Court to the third section of its analysis: American common law. *Id.* Here, the Court noted early decisions appeared to have assumed birthright citizenship or without question adopted birthright citizenship from English common law. *Id.* at 658–66.

Part four of the opinion dealt with the counter to birthright citizenship, which is that citizenship followed the parent, *jus*

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*sanguinis* (right of blood), and “was the true rule of international law.” *Id.* at 666. The Court, however, dispensed with this argument by finding the question of citizenship was far from settled in numerous countries in Europe. *Id.* at 667. Therefore, no theory could be deemed a definite rule of international law. *Id.* In the end, “there is no authority, legislative, executive or judicial, in England or America, which maintains or intimates that the statutes . . . conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion.” *Id.* at 674. It is therefore “beyond doubt that, before . . . the adoption of the [Fourteenth Amendment], all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, . . . were native-born citizens of the United States.” *Id.* at 674–75.



*Lafiga Point American Samoa.*

At last, the Supreme Court reached the Fourteenth Amendment in part five. Here, the Court reaffirmed that the “main purpose [of the amendment was to] . . . establish the citizenship of free negroes, which had been denied in [*Dred Scott*], . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.” *Id.* at 676. Therefore, “the opening sentence of the Fourteenth Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.” *Id.* at 687–88. Accordingly,

[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident

aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns . . . and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. *The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.* Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.

*Id.* at 693 (emphasis added).

The Court spent the final two sections applying the above rule to the facts in *Wong Kim Ark* and to other similarly-situated cases and concluded the plaintiff in *Wong Kim Ark* was a U.S. citizen *jus soli*. *Id.* at 694–705.

*Wong Kim Ark* remains the definitive case on birthright citizenship because of its depth and longevity. It clearly answers the question left open in the *Slaughter-House Cases* by applying birthright citizenship to all possessions of the United States regardless of whether it is a State or a territory. The *Wong Kim Ark* Court also unmistakably delineated between those who are considered citizens and those who are not through the exceptions to fundamental citizenship and the exception for the Native American tribes. American Samoa does not fall under any of the exceptions and its population should, therefore, be considered citizens of the United States by birth because the island chain is a territory of the United States.

Despite the decisiveness of *Wong Kim Ark*, American Samoa’s situation is fraught with complexities not deliberated by the Court. Unlike the plaintiff in *Wong Kim Ark*, American Samoans are indigenous people that the United States recognized as a political power that has more autonomy than States to govern itself. Furthermore, American Samoa’s laws protecting its cultural values are antithetical to the American property system. The American identity accompanying citizenship, which was sought by the plaintiff in *Wong Kim Ark*, is not how the American Samoans who reject citizenship see themselves. In light of this, it is not a stretch to believe that, had the current question been placed before Justice Gray, author of *Elk* and *Wong Kim Ark*, he would have concluded American Samoans were more akin to Native Americans and therefore not citizens of the United States by birth. Finally, *Wong Kim Ark* was decided prior to the earliest annexation of the unincorporated territories and, similar to the *Slaughter-House Cases* decision, did not consider territories not destined for statehood. Thus, *Wong Kim Ark*, while persuasive, is not conclusive.



## Citizenship and Sovereignty

*Fitisemanu* was not the first look at the question of American Samoa and citizenship. The issue was first tested in the D.C. Circuit where the circuit court started with the Fourteenth Amendment and found “in the United States” to be ambiguous. *Tuaua v. United States*, 788 F.3d 300, 302–03 (D.C. Cir. 2015). “The text and structure alone are insufficient to divine the Citizenship Clause’s geographic scope... because both text and structure are silent as to the precise contours of the ‘United States.’” *Id.* at 303. *Wong Kim Ark* also did not resolve the question because it was undisputed that the plaintiff in *Wong Kim Ark* was born “within the territory” of the United States, making “it unnecessary to define ‘territory’ rigorously or decide whether ‘territory’ in its broader sense meant ‘in the United States’ under the Citizenship Clause.” *Id.* at 304–05 (quoting *Rabang v. INS*, 35 F.3d 1449, 1454 (9th Cir. 1994)). Moreover,

birthright citizenship does not simply follow the flag. Since its conception *jus soli* has incorporated a requirement of allegiance to the sovereign.... [T]he concept of allegiance is manifested by the Citizenship Clause’s mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also “subject to the jurisdiction thereof.”

*Id.* at 305.

The D.C. Circuit was consequently “skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States’s sphere of sovereignty – even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government.” *Id.* at 306.

After setting aside *Wong Kim Ark*, the D.C. Circuit found any analysis of citizenship would be incomplete “absent resort to the *Insular Cases*’ analytical framework.” *Id.* The *Insular Cases* – a series of opinions issued around the turn of the 20th century – “addressed whether the Constitution, by its own force, applies in any territory that is not a State,” and held that “there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely.” *Boumediene v. Bush*, 553 U.S. 723, 756, 768 (2008). The *Insular Cases* also gave credence to the political notion of incorporated and unincorporated territories and found that only certain constitutional fundamental rights applied to unincorporated territories. *Tuaua*, 788 F.3d at 306. “[T]he designation of fundamental extends only to the narrow category of rights and ‘principles which are the basis of *all* free government.’” *Id.* at 308 (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)).

## IN MEMORIAM

The Community Association Law Section mourns the loss of one of its founding members, **JOHN D. RICHARDS, III.**

John began practicing law in Oregon in 1999 and was admitted to the Utah State Bar in 2001, where he dedicated his career to representing and advising communities across the state.

John was the quintessential example of civility and professionalism and treated everyone with respect and empathy, even in the most heated litigation. He cannot be replaced, but he will always be remembered.



In this manner the *Insular Cases* distinguish as universally fundamental those rights so basic as to be integral to free and fair society. In contrast, we consider non-fundamental those artificial, procedural, or remedial rights that – justly revered though they may be – are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence.

*Id.*

The D.C. Circuit was “unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a *sine qua non* [without which, not] for free government or otherwise fundamental under the *Insular Cases*’ constricted understanding of the term.” *Id.* (quotation marks omitted). This is so because a number of free and democratic societies follow *jus sanguinis* implying that *jus soli* is not a fundamental right. *Id.* at 308–09. Therefore, “[t]o find a natural right to *jus soli* birthright citizenship would give umbrage to the liberty of free people to govern the terms of association within the social compact underlying formation of a sovereign state.” *Id.* at 309.

Turning to American Samoa, the D.C. Circuit found it “must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove ‘impracticable and anomalous.’” *Id.* (citation omitted). The people of American Samoa, through their representatives, rejected American citizenship because of fear of what citizenship would entail for *Fa’a Samoa*. *Id.* at 309–10. Thus, “resolution of this dispute would likely require delving into the particulars of American Samoa’s present legal and cultural structures to an extent ill-suited to the limited factual record before [the court].” *Id.* at 310. Consequently, “it [is] anomalous to impose citizenship over the objections of the American Samoan people themselves.” *Id.* “To hold the contrary would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism – if not overt cultural imperialism – offensive to the shared democratic traditions of the United States and modern American Samoa.” *Id.* at 312.

The D.C. Circuit ducked *Wong Kim Ark* by finding the Supreme Court failed to define the term “territory.” *Id.* at 304–05. Thus, “territory” should be interpreted to its narrowest meaning, which in *Wong Kim Ark* meant a State, not the territories as currently situated. While it is true that the Supreme Court later redefined the term “territory” to exclude islands like American Samoa from inclusion in the United States, *Downes v. Bidwell*, 182 U.S. 244 (1901), which created the doctrine of incorporation, was a plurality decision and arguably one based on race. Kruse, *supra*, at 75; *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1157,

1192–94 (D. Utah 2019), *rev’d*, 1 F.4th 862 (10th Cir. 2021). If in fact the *Insular Cases* were based on race, then they would contradict the single constant thread in each of the Supreme Court cases on citizenship, which is that the Fourteenth Amendment eliminated citizenship based on race. Finally, the *Insular Cases* never analyzed citizenship and are persuasive, not controlling. Thus, the D.C. Circuit’s reliance on the *Insular Cases* does not justify skirting the Citizenship Clause and its precedents.

The D.C. Circuit’s use of the *Insular Cases*, however, was not about relying on their faulty logic but was instead a way to invoke sovereignty. The circuit court hinted at sovereignty when it rejected the argument that American Samoans owe permanent allegiance to the United States citing to *Elk* for support. *Tuaua v. United States*, 788 F.3d 300, 305 (D.C. Cir. 2015). The D.C. Circuit, however, did not apply *Elk* to this case and therefore never answered whether American Samoans are indeed completely subject to the political jurisdiction of the United States. Similarly, the D.C. Circuit invoked sovereignty in dicta at the end of the opinion but did not rely on this in rendering its decision. *Id.* at 311. Instead, the D.C. Circuit found it too difficult to dissect American Samoa’s “legal and cultural structures” and simply relied on ASG’s rejection of citizenship without questioning whether ASG is sovereign or whether sovereignty overrides citizenship. *Id.* at 310.

## A Fresh Challenge

In the challenge before the Tenth Circuit, the federal District Court of Utah attempted to bring the discussion back to the Citizenship Clause and its caselaw by holding “[p]ersons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment.” *Fitisemanu*, 426 F. Supp. 3d at 1197. Similar to the D.C. Circuit, the district court found the text of the Fourteenth Amendment to be ambiguous. *Id.* at 1178. The court, however, held *Wong Kim Ark* to be controlling. *Id.* at 1158. The district court concluded, “[T]he Supreme Court’s statement that our nation’s Constitution ‘must be interpreted in light of the common law,’ and its ‘conclusion’ that ‘the fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance’ was not simply dicta.” *Id.* at 1190 (emphasis omitted) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 654, 693 (1898)). Therefore, “[t]he holding of *Wong Kim Ark* was that the Fourteenth Amendment adopted the English common-law rule for citizenship” and “if American Samoa is within the ‘dominion’ of the United States under the English rule, it is ‘within the United States’ under the Fourteenth Amendment.” *Id.* “American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States – that is, American Samoa is within the ‘full possession and exercise of [the United States]’ power.” *Id.* at 1191 (alteration in original) (quoting *Wong Kim*

*Ark*, 169 U.S. at 659). “American Samoa is therefore ‘in the United States’ for purposes of the Fourteenth Amendment.” *Id.*

The district court’s holding hinges on one line in *Wonk Kim Ark* buoyed by the Supreme Court’s continual usage of English common law. *Id.* at 1190. The district court, however, failed to address the problems with *Wong Kim Ark*, analyze any other cases on the issue, or address the question of sovereignty. Like the D.C. Circuit, the district court danced around sovereignty by quickly dismissing ASG’s assertion of self-governance and holding American Samoa is under the full sovereignty of the United States. Consequently, the district court concluded that “[i]t is not this court’s role to weigh in on what effect, if any, a ruling in Plaintiffs’ favor may have on *Fa’a Samoa*.” *Id.* at 1196. The district court, however, offers no analysis of sovereignty or explanation as to why ASG’s claim of autonomy should not be recognized. ASG’s entire defense rests on its assertion of sovereignty, and the district court’s failure to discuss or recognize ASG’s sovereignty is another form of paternalism.

The district court also never addressed the D.C. Circuit’s contention that “territory” meant States. Instead, the district court implicitly attacked the D.C. Circuit opinion by rejecting

the *Insular Cases* as controlling. *Id.* at 1191. The district court pointed out that *Downes v. Bidwell*, 182 U.S. 244 (1901), the seminal case for the *Insular Cases*, grappled with the narrow issue of taxation in the territories, and the citizenship illustration was a “digression” and therefore dicta. *Fitisemanu*, 426 F. Supp. 3d at 1192–94. Accordingly, *Downes* is not controlling, and the district court saw no need to address the D.C. Circuit’s analysis of citizenship. The Tenth Circuit, however, disagreed and reversed the district court on this point.

### The Reversal

The Tenth Circuit, in a split decision, reckoned the citizenship question could be analyzed under two lines of precedent: *Wong Kim Ark* and the *Insular Cases*. *Fitisemanu v. United States*, 1 F.4th 862, 869 (10th Cir. 2021). The majority first disagreed with the district court’s assertion that English common law must be applied and found no reason to apply English common law to American Samoa because *Wong Kim Ark* addressed allegiance, not dominion. *Id.* at 871–72. The majority concluded that, since the “gravamen” of what must be considered “is whether birth in American Samoa constitutes birth within the United States for purposes of the Fourteenth Amendment,” *Wong Kim Ark* is persuasive with little to offer. *Id.* at 872–73.



Dorsey continues to expand their practices and are pleased to announce that Todd Chelius and Josh Erikson have joined the Firm.



**Todd Chelius, Partner** | 801-933-4009 | [chelius.todd@dorsey.com](mailto:chelius.todd@dorsey.com)

Todd joined the Firm as a Partner in the Tax Group in Salt Lake City on July 19, 2021. Todd joins Dorsey from Amazon in Seattle, Washington, where he practiced for the last six years as a federal tax attorney and a member of the M&A Tax/Federal Tax Planning, Tax Controversy, and International Tax Planning Teams. Todd negotiated tax and legal aspects of Amazon’s credit agreements, mergers and acquisitions, and corporate investments. He brings to Dorsey significant tax experience in M&A, Emerging Companies, Investment Funds, Tech Commerce, Private Equity, and International/Cross Border practice areas.



**Josh Erikson, Of Counsel** | 801-933-4083 | [erikson.josh@dorsey.com](mailto:erikson.josh@dorsey.com)

Josh joined the Firm as Of Counsel in the Capital Markets Group in Salt Lake City on August 2, 2021. Josh’s practice focuses on securities and capital markets. He assists issuers and underwriters with 1933 Act and 1934 Act filings, public offerings and private placements. Josh serves as an integral team member for the public companies he represents. He also advises clients in all realms of corporate law, including federal and state securities law compliance, the formation and financing of start-up businesses, and supporting mergers and acquisitions.



The *Insular Cases* decision, however, were more persuasive to the majority. *Id.* at 873. Unlike *Wong Kim Ark*, the *Insular Cases* tackled the application of the Constitution to unincorporated territories. *Id.* The majority pointed out that *Downes* was written after *Wong Kim Ark* and contained dicta, “unchallenged by any Justice, casting doubt on the constitutional extension of citizenship to the peoples of the new American territories.” *Id.* at 874. Therefore, “*Downes*’ discussion of territorial citizenship without any mention of *Wong Kim Ark* suggests *Wong Kim Ark* stood for a more limited proposition than the one assigned it by the district court.” *Id.* More importantly, the *Insular Cases* allowed the majority “to respect the wishes of the American Samoan people,” making the *Insular Cases* “not only the most relevant precedents, but also the ones that lead to the most respectful and just outcome.” *Id.* at 874–75. Therefore, the majority held the applicable analysis was “the *Insular Cases*’ ‘impracticable and anomalous’ framework.” *Id.* at 877.

The majority agreed with the D.C. Circuit and the district court that the geographic scope of the Citizenship Clause is ambiguous. *Id.* at 875. The majority was not satisfied with either side’s resolution of the ambiguity and instead chose the narrow interpretation of relying on historical practice. *Id.* at 875–77. Historically, “Congress has always wielded plenary authority over the citizenship status of unincorporated territories.” *Id.* at

877. “Moreover, Congress’ discretionary authority in this area has been upheld by every circuit court to have addressed the issue.” *Id.* Therefore, the “consistent historical interpretation would counsel a narrow reading” leaving “the citizenship status of American Samoans in the hands of Congress.” *Id.*


The Tenth Circuit majority opinion attempts to fit a square peg into a round hole. The majority claims it is relying on the *Insular Cases*’ “impracticable and anomalous” framework yet does not explain how or why citizenship would be impracticable and anomalous to the people of American Samoa. Instead, the majority relied on the historical treatment of American Samoa and then repurposed the *Insular Cases* “to preserve the dignity and autonomy of the peoples of America’s overseas territories.” *Id.* at 870. The majority’s decision, however, falls into the same trap as the D.C. Circuit’s opinion in that it is trying to use racist dicta to justify protecting American Samoa’s autonomy. This flies in the face of the *Slaughter-House Cases*, *Elk*, and *Wong Kim Ark*’s declaration that the purpose of the Citizenship Clause was to eliminate race as a basis for citizenship. Furthermore, the majority’s distinction between *Wong Kim Ark* and the *Insular Cases* is tenuous. The issue in *Downes* did not concern citizenship. The other justices in the *Downes* decision may not have addressed Justice White’s analogy to citizenship because it was not relevant to resolving the question presented. Simply put, just because the other justices did not address Justice White’s use of citizenship in a plurality decision does not mean they agreed with it. Thus, the Tenth Circuit’s opinion does an end run around the Citizenship Clause to maintain the status quo.

## Conclusion

Either Congress or the United States Supreme Court needs to step in and resolve applying citizenship to the people of American Samoa. The circuit courts appear content with maneuvering around the Citizenship Clause by repackaging the *Insular Cases* to protect American Samoa’s autonomy. While it is admirable that the federal courts now want to respect an indigenous people group instead of trampling over its wishes, the repurposing of the *Insular Cases* is a poor method. Therefore, the Supreme Court should step in and provide a new framework for analyzing this question. However, the Supreme Court likely will not take up this issue because there is not a circuit split and a decision would affect a relatively small number of Americans. Ideally, Congress will act. Congress should create a law that honors the people of American Samoa’s wish to remain as nationals while also creating an easy and free path to citizenship for American Samoans who want to be citizens. Without congressional action, those who want citizenship will have to seek redress through the courts where the likely outcome will be maintaining the status quo.

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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

#### ***McCloud v. State* | 2021 UT 14 (May 20, 2021)**

In this Post-Conviction Remedies Act case, the supreme court **repudiated the prior standard set forth in *Lafferty v. State*, 2007 UT 73, and held that the Strickland standard applies to ineffective assistance of counsel claims against appellate counsel.**

#### ***1600 Barberry Lane 8 LLC v. Cottonwood Residential O.P. LP* | 2021 UT 15 (May 27, 2021)**

The supreme court held, as a matter of first impression, that **for the purposes of determining choice of law, an award of contractual attorney fees is substantive, rather than procedural**, which in turn resulted in applying the choice of law provision in the contract to the underlying dispute.

#### ***Martin v. Kristensen* | 2021 UT 17 (May 27, 2021)**

A divorce court entered a temporary order granting the wife possession of a home owned by her father-in-law during the pendency of the divorce proceedings. The father-in-law filed a lawsuit to evict the wife and obtained an unlawful detainer judgment against her. On appeal, the wife argued that the father-in-law had no right to seek unlawful detainer remedies because her possession of the home was lawful under the possession order. The court affirmed the unlawful detainer judgment, holding that **the temporary possession order in the divorce functioned like a temporary possession order in an unlawful detainer proceeding, but did not affect the availability of statutory remedies for unlawful detainer.**

#### ***Williams v. Kingdom Hall* | 2021 UT 18 (June 3, 2021)**

On certiorari, the Utah Supreme Court vacated the district court's dismissal of an intentional infliction of emotional distress claim which was based on the manner in which Elders of the Kingdom Hall Jehovah's Witnesses conducted a disciplinary proceeding. The district court had applied the test established in *Lemon v. Kurtzman* to hold that the IIED claim would violate the Establishment Clause. The supreme court remanded and **instructed the district court to take into account the United States Supreme Court's recent departure from *Lemon* and application of a "more modest approach" under which courts "should eschew a rigid formula in evaluating Establishment Clause cases."**

#### ***In re G.D.* | 2021 UT 19 (June 10, 2021)**

In this case involving an appeal from a termination of parent rights based upon years of dysfunctionality, substance abuse, and criminal conduct, the appellant asserted error based upon the district court failing to apply a "beyond a reasonable doubt" standard of proof. The supreme court noted that **"[a]lthough the U.S. Supreme Court has opened the door for states to adopt an evidentiary standard higher than 'clear and convincing' for termination proceedings," the Utah court declined to adopt the heightened standard.**

#### ***Shree Ganesh, LLC v. Weston Logan, Inc.* | 2021 UT 21 (June 17, 2021)**

The Utah Supreme Court clarified the common-law duty owed by sellers of real property to "fairly and accurately" disclose "the material elements of property sold when such elements are not easily ascertainable by the buyer and materially affect the value of the property." The court explained that **"a 'material element' of property is not limited to physical defects or conditions on the land," but "encompasses any matter or information that would have been an important factor in the buyer's decision to purchase the real estate."**

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

***In re Estate of D.A. Osguthorpe*  
2021 UT 23 (July 1, 2021)**

In this estate dispute, the district court granted a motion to dismiss appellant's claim for intentional interference with inheritance finding that **Utah law did not recognize that claim. In reversing the order, the supreme court held that Utah law recognizes a claim for intentional interference with inheritance and adopted the elements in Section 19 of the Third Restatement of Torts: Liability for Economic Harm.** Such a claim, however, "is not available to a plaintiff who had the right to seek a remedy for the same claim under Utah's Probate Code."

***doTERRA Int'l, LLC v. Kruger* | 2021 UT 24 (July 1, 2021)**

In this personal injury action, the district court concluded that Utah law does not permit waiver of punitive damages prior to the injury. Affirming under a different rationale, the supreme court held that, **as a matter of first impression, even if Utah law recognized a preinjury waiver of punitive damages, such a waiver must be clear and unequivocal to be effective.** In a separate concurrence, joined by Justice Peterson, Justice Himonas expressed his conclusion that such a waiver was contrary to public policy and unenforceable.

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***Alarm Protection Technology, LLC v. Bradburn*  
2021 UT 25 (July 1, 2021)**

**and**

***Alarm Protection Technology LLC v. Crandall*  
2021 UT 26 (July 1, 2021)**

In these two related cases, former sales representatives of Alarm Protection Technology LLC appealed the denial of several motions challenging various aspects of APT's execution of their claims against APT for unpaid commissions and extinguishing those claims before they could be adjudicated. In both cases, the former sales representatives had signed confessions of judgment when they received advances against future compensation. After leaving APT, both sued for unpaid commissions. APT then filed the confessions of judgment and obtained judgments against each former sales representative. APT then moved for writs of execution, identifying the claims against it as the property it wanted to seize. The claims were sold at auction, at which APT purchased the claims for credit bids of less than the judgments owed. It then substituted itself as the plaintiffs and dismissed each of the suits against it. In both appeals, the court affirmed the district court's denials of the sales representatives' motions for return of excess proceeds as both procedurally barred and substantively meritless. And, in Crandall, the court additionally affirmed the denial of a motion to vacate the judgment and quash the writ of execution as procedurally foreclosed. **Justice Petersen issued a concurring opinion raising the question of whether the Utah Rules of Civil Procedure should permit judgment creditors to execute against claims in which they are defendants and then extinguish those claims, noting that the rules currently do allow for this practice. Justices Durrant and Himonas joined in the concurrence.** Justice Lee, authoring the majority opinion, commended Justice Peterson for her "careful consideration and analysis of an important issue" but declined to express views on the matter in advance, instead deferring to the rule amendment process. He was joined by Justice Pearce.

### UTAH COURT OF APPEALS

***Fuja v. Adams* | 2021 UT App 55 (May 27, 2021)**

This appeal arose from a property dispute between neighbors, where the plaintiff obtained a preliminary injunction halting the defendant's construction of a new home. After a bench trial, the district court held that the injunction had been improvidently granted, but it denied the defendant's post-trial application for damages caused by the injunction which were not raised in the pleadings or sought earlier in the proceeding. As a matter of first impression, the court of appeals held that **a party may seek damages for a wrongful injunction under Rule 65A(c) by motion in the same case in which the injunction was imposed, and that the claim may be stated for the first time after a court has declared the injunction wrongful.**

***Halversen v. Allstate Prop. & Cas. Ins. Co.*  
2021 UT App 59 (June 4, 2021)**

The court held that **Utah's underinsured motorist statute, Utah Code § 31A-22-305.3, allows either party, within 20 days of service of the arbitration award, to request a trial de novo for any reason.** The court rejected the insurance company's argument that a trial de novo could only be granted when an arbitration award was procured by corruption, fraud, or other undue means, which was based upon the legislature's deletion of a connecting conjunction in a revision to the statute in 2011.

***Nakkina v. Mahanthi* | 2021 UT App 63 (June 17, 2021)**

In this appeal from a divorce decree, the court of appeals held the district court abused its discretion in not awarding parent time equally between the mother and father, erred in its personal property determination, and that its attorney fee award was not supported by sufficient findings. With respect to the personal property determination, the court had awarded the wife jewelry valued at approximately \$15,000 on the basis the husband had gifted it to her during the marriage. The court of appeals held the district court applied the wrong legal standard in determining the jewelry was not marital property subject to division. **The rule that gifts to an individual spouse are treated as separate property “applies only to gifts received during the marriage from an outside source. It does not apply when one spouse uses marital funds to purchase property, regardless of whether those purchases are designated as a ‘gift’ from one spouse to another.”**

***Knight Adjustment Bureau v. Funaro*  
2021 UT App 65 (June 24, 2021)**

After the court set aside a default judgment based upon defective service, the creditor filed a notice of voluntary dismissal, and the debtor filed a motion for attorney fees. The district court denied the motion, reasoning it lacked jurisdiction. Reversing, the court of appeals clarified that deficient service went to personal jurisdiction, not subject matter jurisdiction, and held that **the absence of personal jurisdiction due to deficient service over the defendant did not deprive the district court of jurisdiction to consider an award of attorney's fees against the plaintiff.**

***Diversified Concepts LLC v. Koford*  
2021 UT App 71 (July 1, 2021)**

The plaintiffs sued a construction company for allegedly installing defective retaining walls on their property, but they hired other contractors to completely dismantle and replace the walls before

filing suit. The district court denied the construction company's motion to dismiss the lawsuit outright as a sanction for spoliation, noting that Utah law on spoliation was undeveloped. On interlocutory appeal, the court of appeals **articulated a new framework and provided a detailed outline for how district courts should analyze spoliation claims. Where there is an allegation of spoliation, the district court should first determine whether the custodial party violated its duty to preserve the evidence at issue. If the duty was not violated, then sanctions may not be imposed. But if the duty was violated, the court should then assess what type of sanction should be imposed.**

***Rain Int'l LLC v. Drockton*  
2021 UT App 68 (July 1, 2021)**

The district court entered an order requiring the appellant to pay attorney's fees as a discovery sanction, and it granted the appellant's motion to certify that order as a final judgment under Rule 54(b). The court of appeals **dismissed the appeal for lack of jurisdiction on its own motion for summary disposition, holding that the attorney's fee sanction was not a “claim” that could be certified as final under Rule 54(b).**

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## 10TH CIRCUIT

***In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*****997 F.3d 1077 (10th Cir. May 7, 2021)**

This appeal arose from multi-district class action litigation brought by consumers owning Samsung brand top-load washing machines. Class counsel and the defendants negotiated a settlement agreement which included both a “kicker” (an agreement that allowed fees not awarded to class counsel to revert to defendants) and a “clear-sailing” agreement (an agreement that the defendants would not object to an award of attorney’s fees). **As a matter of first impression, the Tenth Circuit held that the district court must apply heightened scrutiny when analyzing a class settlement containing these provisions, in order to assure that the class members receive fair and reasonable compensation.** Applying this standard, the court held that the district court applied sufficient scrutiny and that it did not abuse its discretion by granting final approval of the settlement.

***United States v. Crooks*****997 F.3d 1273 (10th Cir. May 18, 2021)**

Crooks was convicted of possessing 567 grams of crack cocaine with intent to distribute, which resulted in a 360 month-to-life prison term based, in part, on a career criminal enhancement and the offense level associated with possessing 50 grams or more of crack. The district court denied his petition under the First Step Act to reduce his sentence to time served, which was 260 months, finding that Crooks was ineligible for a reduction, and even if he was eligible, reduction was not warranted due to Crooks’ designation as a career offender. In a case of first impression in this circuit, the Tenth Circuit reversed holding that **for purposes of Section 404(a) of the First Step Act “a defendant’s federal offense of conviction, not his underlying conduct, determines First Step Act eligibility,”** which is the same outcome as every other circuit that has addressed the issue. Because “[t]he First Sentencing Act increased the threshold quantity of crack cocaine...from 50 to 280 grams or more,” Crooks was eligible for review.

***United States v. Suggs*****998 F.3d 1125 (10th Cir. June 2, 2021)**

On appeal from denial of his motion to suppress, Suggs argued that evidence linking him to road-rage shooting was obtained through unconstitutionally broad search warrants. The Tenth Circuit agreed, reversing the district court’s denial of the motion to suppress and remanding for further proceedings. The evidence at issue was obtained under the warrants’ catch-all clauses, which permitted police to look for and seize “[a]ny item identified as being involved in a crime[.]” **The Tenth Circuit concluded that**

**this expansive language lacked the particularity mandated by the Fourth Amendment to the U.S. Constitution.** Although a supporting affidavit was physically attached to the warrant, the warrant itself did not incorporate the affidavit by reference and, therefore, the information in the affidavit could not be relied upon to cure the warrant’s lack of particularity.

***Ohlsen v. United States*****998 F.3d 1143 (10th Cir. June 3, 2021)**

Under a Cooperative Funds and Deposits Act (“CFDA”) agreement with the Isleta Pueblo Indian tribe, the United States Forest Service worked to thin and masticate forestland in the Manzano Mountains of New Mexico. During these wildfire-reduction efforts, however, a substantial wildfire broke out, destroying numerous nearby homes and structures. Insurers and homeowners affected by the fire sued under the Federal Tort Claims Act (“FTCA”), claiming that the Forest Service was vicariously liable for any negligence committed by Isleta Pueblo crewmembers in the runup to the fire. On appeal from dismissal of those claims, the Tenth Circuit affirmed, holding as a matter of first impression that **parties working with the federal government pursuant to the CFDA are not necessarily federal employees for purposes of FTCA claims. Instead, courts must apply traditional principles, including the factors set out in *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989), to determine whether those parties are legally government employees or simply independent contractors.** In this case, the Isleta Pueblo crewmembers were held to be independent contractors in light of the plain language of the CFDA agreement and the Forest Service’s limited control over the manner and means of the crewmembers’ forest thinning efforts.

***Schell v. Chief Justice & Justices of the Oklahoma Supreme Court*****—F.4th—, 2021 WL 2657106 (10th Cir. June 29, 2021)**

An Oklahoma attorney brought suit against the Oklahoma Supreme Court justices and Oklahoma Bar Association officials, claiming mandatory bar dues violated his First Amendment rights to free speech and association. In particular, the attorney objected to the Bar’s use of mandatory dues to publish “political and ideological speech” and to support or oppose particular legislation. **The Tenth Circuit affirmed dismissal of his claims under established U.S. Supreme Court precedent upholding the imposition of mandatory bar dues despite the First Amendment’s prohibition on compelled speech.** Nevertheless, the Tenth Circuit also acknowledged that the Court’s recent decision in *Janus v. American Federation of State, County, & Municipal Employees Council 31*, 138 S. Ct. 2448 (2018), has made that precedent “vulnerable to reversal.”

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## The Origin and Evolution of Bad Faith

by Burke A. Christensen

With respect to an insurer fulfilling its promises to pay claims, what is required for an insurer to be acting in good faith with its insureds? Conversely, what is an act that indicates the insurer is acting in bad faith? This article will explain the origin, evolution, and current status of the concept of insurance bad faith actions in the United States.

While the idea of insurance goes back as far as the third millennia BCE, modern insurance contracts date from the early seventeenth century. In 1628, Robert Hayman, an English merchant, owned a policy insuring the safe arrival in Guyana of a ship owned by Hayman. It was maritime insurance policies like that one that initiated the principle of good faith as it applies to insurance.

### The History of Insurance Underwriting and the Obligation to Act in Good Faith

A seventeenth century shipowner located in London might have a ship and its cargo in Genoa, and he wants to spread the risk that the ship might not successfully arrive in London. To do that, the shipowner might go to Lloyd's Coffee House in London and seek wealthy investors who, for a price, would be willing to share the risk of loss. He would bring a slip of paper with him describing the ship, the nature and value of its cargo, and what he was willing to pay to those who would accept some of the risk.

For example, for every 1,000 pounds sterling of risk accepted, the shipowner (the insured) might be willing to pay ten pounds as a "premium" to the investor. Those investors who were willing to assume some of the risk would accept the premium from the insured, write on the slip the portion of the risk they were willing to accept, and sign their name under the description of the risk and so they came to be known as "underwriters." If the ship and its cargo arrived safely, the underwriters kept the premium. If it did not, the underwriters would each pay the shipowner the portion of the risk that they had agreed to accept. This practice continued into the modern era; the author has a copy of the Lloyd's underwriting slip that insured the Titanic in 1912.

But in the seventeenth century, if the ship and its cargo are in Italy and the underwriters are in London, how could the underwriters assess the risk to determine if the shipowner was telling the

truth about the existence and value of the cargo and the seaworthiness of the ship? They could not. So the law imposed the principle of *uberrimae fidei*, translated as "utmost good faith." The principle requires that all parties to the insuring agreement (but primarily the person seeking the insurance) must act in utmost good faith. This meant that the shipowner had a duty to make a full declaration of all facts that would be material to the decision of the underwriters to accept the risk—even if the underwriters don't ask about that fact.

Except for some aspects of maritime insurance, the "utmost good faith" principle no longer applies to the person (like the shipowner) seeking insurance coverage. Over the years, the duty of both parties to act in utmost good faith has changed, so that insurance applicants now generally have only a duty to truthfully answer the questions asked. If an insurer does not ask about a condition affecting the risk, the applicant is not under a duty to disclose it. And now, with the exception of a material misrepresentation in the application permitting a rescission, only an insurer, and not an applicant or an insured, can be sanctioned for acting in bad faith.

Under standard insurance industry customs and practices today, an insurer investigates all claims, pays only the valid claims, and denies the invalid claims. Investigating and denying the invalid claims is just as important as investigating and paying valid claims. The process of collecting information is an objective one, and the insurer seeks relevant information regardless of whether it supports payment of the claim or a denial.

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An insurer must make one of three decisions when a claim for benefits is received. It must promptly investigate each claim to determine if the claim is: (1) valid and should be paid; (2) incomplete and needs further information; or (3) invalid and should be denied.

The investigation itself is an expensive part of the underwriting process. Defending against a plaintiff's allegations that an insurer was acting in bad faith when investigating a claim is similarly expensive. The FBI reports that the cost of non-health insurance fraud is estimated to be more than \$40 billion per year and costs the average U.S. family between \$400 and \$700 per year in the form of increased premiums. Data available from [insurancefraud.org](http://insurancefraud.org) indicates that property-casualty fraud costs about \$30 billion each year and total insurance fraud amounts to more than \$80 billion each year.

In addition to adding to the cost of insurance, who is the victim of wholly fraudulent or even merely exaggerated claims? It's not the insurance company; it's the honest policy owners and claimants. To simply describe a very complex and highly regulated process, insurers collect premiums to accumulate cash reserves that are intended to pay valid claims. If the insurer's reserves are reduced by the cost of paying invalid claims, the ability of the insurer to pay the valid claims of honest claimants is reduced.

### When is an Insurer's Denial or Delay Done in Bad Faith?

Experience tells us that insurers sometimes wrongly deny valid claims. When an insurer denies a valid claim, the claimant will sometimes file a lawsuit against the insurer seeking payment of the claim and also alleging that the denial of the claim was not

only wrong but was done in bad faith. When is a wrongful denial or delay in paying a claim also an act done in bad faith?

A review of the literature and cases leads to the conclusion that there is no bright line distinction clearly marking the difference between: (1) wrong decisions made or wrong acts done in good faith and (2) wrong decisions and wrong acts made or done in bad faith. As noted by Professor Stephen S. Ashley, the attempt to define the difference between good faith and bad faith "suffers from more than its share of inconsistency and irrationality." Stephen S. Ashley, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* 2-2 (2d ed. 1997). Professor Robert S. Jerry II notes that good faith and bad faith "remain elusive concepts with no universally accepted definitions." Robert S. Jerry II, *UNDERSTANDING INSURANCE LAW* 151 (2d ed. 1996).

I suggest that the lack of a clear distinction in the law and literature between good and bad faith exists for two reasons. First, there is not a clear standard in the law defining bad faith. Second, there is a space between the two where reasonable behavior exists, which is neither especially praiseworthy as being done in good faith nor sanctionable as an act done in bad faith.

This article will attempt to provide a solution to those problems by creating a clearer distinction between good and bad faith. A distinction that recognizes there is an area of behavior that is neither really good (and praiseworthy as being done in good faith) nor really bad (and sanctionable as being done in bad faith). Acts done in this middle area may have been wrong, but not intentionally nor recklessly wrong.

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The statutory and case law indicate that acting in bad faith should be something worse than merely being wrong. There must be either some intent to do the wrong thing or the record should provide evidence of a cavalier (perhaps reckless) disregard of the applicable rights of the insured and the duties of the insurer.

Utah Code Section 31A-26-303(2) in its listing of “unfair” acts uses language such as “knowingly misrepresenting” to suggest that an unfair act should be an intentional one. This is consistent with the literature and inconsistent with a claim that one can be negligently acting in bad faith. In Utah Code Section 31A-26-303(3), there is a listing of eight actions that can be an unfair claims settlement practice “if committed or performed with such frequency as to indicate a general business practice.” The term “bad faith” is not used in the statute, but Utah Code Section 31A-26-303(3)(h) states that “not attempting to act in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability is reasonably clear” is an unfair claims settlement practice if doing so has risen to the level of “a general business practice.”

With respect to motor vehicle liability coverage, a duty for an insurer to act in good faith is imposed by Utah Code Section 31A-22-303(5) that provides: “A policy containing motor vehicle liability coverage imposes on the insurer the duty to

defend, in good faith, any person insured under the policy against any claim or suit seeking damages which would be payable under the policy.”

The literature suggests that the term “bad faith” should require more than that the insurer made the wrong decision; it should define behavior that is both bad and badly done. Some examples are:

Perhaps the most vexing problem in this field is specifying the kind of behavior that triggers the [bad faith] cause of action. Bad faith is not merely the absence of good faith; something more seems to be required. Mere negligence generally is not enough; the fact that the insurer should have known that the insured’s claim was covered, or that it was careless in processing the claim, normally does not constitute bad faith....


Kenneth S. Abraham, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 382 (3d ed. 2000). “Although simple negligence in claims-handling or coverage evaluation is not sufficient to constitute bad faith, the duty of good faith requires that the insurer respond reasonably to a reasonable claim or requests by the policyholder or third parties.” Jeffery W. Stempel, Emeric Fischer, & Peter Nash Swisher, *PRINCIPLES OF INSURANCE LAW* 193 (3d ed. Supp. 2006).

First-party bad-faith cases often arise out of disagreements between the insurer and the insured concerning the coverage afforded by the policy. An egregious misinterpretation of a policy may support a first-party bad faith claim. Resolution of such cases often turns upon the application of the controlling principles of policy interpretation.


Ashley, *supra*, at 5A-18.

The U.S. law of “Bad Faith” arose as a result of “bad acts” by insurers. These bad acts caused courts and much later, legislatures, to create remedies for the parties injured by those bad acts.

The United States Supreme Court spoke tangentially on this issue in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). While the focus of the decision was with respect to the imposition of punitive damages, the Court stated that punitive damages based upon bad faith actions by the defendant could be imposed if there was evidence of “indifference to or a reckless disregard” or if “the conduct involved repeated actions,” or “the harm was the result of intentional malice, trickery, or deceit.” *Id.* at 419. The Court concluded that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not



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be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Id.*

Difficulties in reaching unanimity in the use of the terms “good faith” and “bad faith” arise sometimes from the advocacy point of view of the law review authors and the “bad faith” websites. Like plaintiff’s counsel and defense counsel, authors sometimes write to persuade rather than inform.

Some examples of the view from the plaintiff’s bar: “The insurance industry is a large and powerful industry comprised of relationships between insureds who want to protect themselves from unforeseen expenses and insurers who are able to make a profit by paying as few claims as possible.” Constance A. Anastopoulos, *Bad Faith: Building a House of Straw, Sticks, or Bricks*, 42 U. MEM. L. REV. 687, 690–91 (2012).

“Bad faith” insurance companies denial of unpaid claims are widespread, pervasive if not the norm, responsible for the greatest destruction and loss of U.S. and Americans wealth, assets, businesses, jobs and poverty, and ultimate maximum loss of human life. A ‘legal’ term, Bad Faith statutes and laws in each state are intentionally blindly overlooked and unenforced by states insurance regulatory agencies.

FIGHT BAD- FAITH INSURANCE COMPANIES, <https://badfaithinsurance.net> (last visited Mar. 26, 2021).

An example of the view from the insurance industry side is:

Over the past twenty-five years, the law of “bad faith” has grown from infancy as a compensable action in contract law into a major source of tort litigation. During this relatively short gestation period, at least in comparison to other legal actions, this new body of tort, grounded in an implied contractual or fiduciary duty not to act in bad faith in any dealing, or conversely to act in good faith, has shifted the balance of power in many transactions. As intended, plaintiffs’ ability to bring a separate tort action has helped to curb abuse and unfair practices. Unfortunately, as quickly as bad-faith law developed to come to the aid of the disadvantaged party in a contract or fiduciary relationship, it has evolved into a litigation quandary that often misses its basic purpose. With every state adopting statutes to govern certain types of bad-faith actions, litigation of such claims has gone beyond simply righting

wrongs to become a big business of its own. In some cases, enterprising plaintiffs’ attorneys seek out technical violations to bring a bad-faith action where there is no purposeful or malevolent will or even a remotely unfair act. In legitimizing such claims, bad-faith law has lost its way. Today the law may actually facilitate bad faith in the very manner in which these laws were meant to combat it.

Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U.L. REV. 1477, 1478–79 (2009).

Occupying space between the two is the following: “It has been held that the tort of bad faith cannot arise merely from the denial of a claim, without some affirmative misconduct...”

George L. Blum, *What Constitutes Bad Faith on Part of Insurer Rendering it Liable for Statutory Penalty Imposed for Bad Faith in Failure to Pay, or Delaying in Paying, Insured’s Claim – Particular Grounds for Denial of Claim: Risks, Causes, and Extent of Loss, Injury, Disability, or Death*, 123 A.L.R. 5th 259 (2004).

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It has been held that in order to prevail under a statute imposing penalties and attorney's fees upon an insurer for its arbitrary and capricious failure to pay a claim within the statutory period of the date of its receipt of a satisfactory proof of loss, the insured claimant must establish that the insurer received a satisfactory proof of loss, failed to pay the insured's claim within the applicable statutory period, and that the failure to timely tender a reasonable amount was "arbitrary and capricious."

*Id.*

"Pursuant to the law in many jurisdictions, insureds suing an insurer for a punitive damages claim for bad faith must establish that the insurer's behavior in denying the insured's claim or failing to pay the claim was 'willful or wanton.'" *Id.*

Even the American Law Report's summary does not provide a clear distinction between actions that are done in bad faith and those that are not. A determination that relies upon words like "arbitrary" and "capricious" does not give clear advance notice to insurers as to what is acceptable behavior and what is not. Similar difficulties are faced by judges and juries who are asked to apply that standard.

Merriam-Webster defines "arbitrary" as "not planned or chosen for a particular reason, not based on reason or evidence" or "done without concern for what is fair or right." Arbitrary, Merriam-Webster Online Dictionary, <http://www.merriam-webstercollegiate.com/dictionary/arbitrary> (last visited Mar. 26, 2021). It also defines "capricious" as "changing often and quickly," especially, "suddenly in mood or behavior," or "not logical or reasonable...based on an idea, desire, etc., that is not possible to predict."

*Capricious*, Merriam-Webster Online Dictionary, <http://www.merriam-webstercollegiate.com/dictionary/capricious> (last visited Mar. 26, 2021).

It seems clear that reasonable people can have a wide range of differences in how these terms are applied to the facts of a case. A major purpose of law is to provide notice of what is wrong and what is right and to clearly mark the distinction between the two. The law of bad faith does not meet that standard.

## A Two-Prong Definition of Insurance Bad Faith

The foundational elements of a bad faith claim are or should be evidence of subjective or objective unreasonableness. The plaintiff should be required to show, for example, that the

insurer acted with an intent to deny the plaintiff the benefits of the insurance contract. This is not, or should not be, satisfied if the plaintiff can only show that the insurer made a mistake.

Conversely, to avoid liability for acting in bad faith, the insurer should be able to establish that the action was not wrong. Or if it was wrong, that there was a reasonable explanation for why the action was done, which demonstrates that the wrongful action was not taken knowing that it was wrong nor was it taken with a reckless disregard for the applicable rights and duties of the parties.

To establish bad faith, there ought to be a requirement for a showing of either: (1) intentional bad behavior or (2) reckless misconduct. This might be determined by answering either of two questions:

1. Would a reasonable person having the same duties, experience and information as the insurer's employee (e.g., the adjuster) have known or should have known that the action he or she took was wrong?
2. Does the evidence indicate to a reasonable person having the same duties, experience, and information as the insurer's employee (e.g., the adjuster) that the act was done with a reckless disregard for the rights of the claimant or the duties of the insurer?

Bad faith should not be established unless the record shows that that the insurer was intentionally or recklessly wrong. I note here that, under this standard, an insurer can be found to have acted in good faith but still be liable for a wrongful denial and required to pay the underlying claim pursuant to the provisions of the insurance policy.

Under the first prong of the above standard, bad faith should be established if the record shows evidence of a subjective bad faith mental state such as a knowing intent to evade the requirements of the contract, or to improperly process the claim, or to conduct an inadequate investigation. In order to have a finding of bad faith, there ought to be evidence that the insurer's subjective mental state (meaning as it is displayed by the actions of its agents and employees) was based upon an intent to do the wrong thing.

Under the second prong, bad faith can be established if the record shows that the insurer acted not merely negligently but with a reckless disregard of whether the action was wrong.

This two-prong test is consistent with what appears to be the majority view that bad faith exists if there is evidence that the insurer took an action knowing that it was wrong or if there is evidence that the insurer's actions were arbitrarily unreasonable.

## Guardianships in the Media, Can Utah Statutes Protect Against Abuse?

by Kathie Brown Roberts and Allison Barger

The Netflix movie *I Care A Lot*, which premiered in mid-February 2021, begins with the outrageous scene of professional guardian Marla Grayson (Rosemund Pike) knocking on the door of Jennifer Peterson (Diane Wiest) and informing her that the court “has ruled that you require assistance in taking care of yourself.” Marla, with court order in hand, tells incredulous Jennifer that Marla is now Jennifer’s guardian, and Jennifer is required to leave her home immediately. Jennifer is put into a car, whisked away to an assisted living facility, and drugged while Marla and her cohorts proceed to shamelessly sift through her belongings and ready her home for sale. Aspects of this movie follow the infamous Nevada case of former professional guardian April Parks very closely.

April Parks and her guardianship company, “A Private Professional Guardian, LLC” made national news headlines beginning in 2015, when she, in concert with her husband, a lawyer, and a medical professional, utilized Nevada guardianship statutes to defraud and financially exploit over 150 elderly individuals in the Las Vegas area.

Around the same time that *I Care A Lot* debuted on Netflix, Hulu premiered *Framing Britney Spears*, one episode of a docuseries produced by the *New York Times*. *Framing Britney Spears* focuses on the guardianship/conservatorship of the famous pop star, which began in 2008, and endures to this day. The documentary questions how such a successful and famous entertainer can be, at the same time, “incapacitated” and subject to an involuntary guardianship and conservatorship. A grass roots movement, #FreeBritney, supporting the termination of the conservatorship, developed from a conspiracy theory in which followers believe

that surreptitious signs of protest can be seen on Britney’s Instagram page and other social media platforms.

Both of the movies portray the guardianship process as a way to allow criminals to legally exploit vulnerable adults.

### April Parks Case

In March 2018, the Clark County, Nevada, Grand Jury returned indictments against court-appointed guardian April Parks and her co-defendants Mark Simmons, Gary Neil Taylor, James Melton, and Noel Palmer Simpson. The 270-count indictment alleges that April Parks, the owner of A Private Professional Guardian, LLC, her office manager Mark Simmons, her husband Gary Neil Taylor, certified guardian James Melton, and her attorney Noel Palmer Simpson collectively committed 117 counts of perjury, seventy-three counts of offering false instrument for filing or record, forty-two counts of theft, thirty-seven counts of exploitation, and one count of racketeering. The fraudulent acts were committed between December 2011 and July 2016. *See Indictment, State of Nevada v. James Melton, April Parks, Mark Simmons, and Noel Palmer Simpson*, Case No. C-18-329886-1 (8th Judicial Dist. Ct. of Nev., Feb. 14, 2018) (the Indictment); Amended Indictment, *State of Nevada v. April Parks*, Case No. C-17-321808-1 (8th Judicial Dist. Ct. of Nev., Nov. 5, 2018).

According to a 2017 article by Rachel Aviv in the *New Yorker*, “How the Elderly Lose Their Rights,” Rennie and Rudy North became victim of April Parks one morning in 2013, when, out of the blue, April knocked on their door and told them she was there to “remove” them from their home and that they needed

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to “gather their belongings,” just as in the opening scene from *Care A Lot*. Apparently, Parks previously obtained an ex parte order of temporary guardianship of the Norths in Clark County and transported them to Lakeview Terrace, an assisted living facility, which housed several other individuals over whom Parks had also obtained guardianship. The Norths’ temporary guardianship was granted without notice, without counsel appointed for them by the court, and with a vague medical certification of incapacity from a physician-assistant working closely with Parks. Rachel Aviv, *How the Elderly Lose Their Rights*, NEW YORKER (Oct. 2, 2017), available at <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

According to the article, subsequent to obtaining an ex parte temporary order, Parks’s pattern was to then petition the court for permanent guardianship and sell the home and the belongings of her wards. In the case of the Norths, their daughter, Julie Belshe, was not notified of the hearing, did not receive the petition for permanent guardianship, and had been described within Parks’s petition as an “addict” who was estranged from her parents. *Id.* Additionally, Parks had a good relationship with the Nevada probate commissioner at the time, who apparently favored professional guardians over family members to serve as guardians. After obtaining permanent guardianship, Parks proceeded to sell the Norths’ home and all their belongings. From the proceeds of the sale, she paid herself and her collaborators exorbitant fees.

The indictment also describes the case of Beverley Flaherty, an eighty-seven-year-old woman with dementia and trust assets in the neighborhood of \$700,000. In that pleading, the State of Nevada alleges that Parks, working with her lawyer Noel Palmer Simpson, filed guardianship documents and a petition for appointment as successor Trustee of Flaherty’s trust despite knowledge that Flaherty was now deceased. Indictment at 3. The indictment further alleged that certified guardian James Melton changed Flaherty’s IRA beneficiary designation to himself, purchased a pre-paid funeral plan for himself from Flaherty’s trust account, and transferred title of Flaherty’s Ford Explorer to himself and a family member. *Id.* at 8–9.

The *New Yorker* article was not the first time that Clark County, Nevada, had been in the news relating to exploitation of seniors and incapacitated persons under guardianship. In 2015, the *Las Vegas Review-Journal* highlighted the criminal exploitation by a Clark County professional guardian named Patience Bristol, who used a ward’s money to pay for personal expenses and gambling debts. Lochhead, Colton, *Clark County’s Private Guardians May Protect – Or Just Steal and Abuse*, LAS VEGAS REVIEW-JOURNAL (Apr. 13, 2015, updated Oct. 13, 2017) available at <https://www.reviewjournal.com/local/clark-countys-private-guardians-may-protect-or-just-steal-and-abuse/>. The article explained that while private guardians may

charge reasonable fees, the court would not delve into the billings unless there was a complaint by a ward or family member. *Id.* For that reason, Bristol’s financial exploitation was not discovered until the protected person complained to the court.

Following the April Parks indictments and arrest, in 2018, the Nevada Legislature made several sweeping changes to the guardianship statutes including the addition of requirements for private professional guardians in Nevada Revised Statutes 159.059. These changes include the requirement that professional guardians be certified by the Center for Guardianship Certification and also licensed in Nevada (unless exempt). Other changes to the Nevada Code after 2018 included the addition of a protected person’s right to counsel, right to notice provisions, regulation changes to professional guardians, requirement of a court order to sell real property, and codification of a “Protected Person’s Bill of Rights” in Nevada Revised Statute 159.328. A portion of Nevada’s Protected Person’s Bill of Rights follows below:

- (a) Have an attorney at any time during a guardianship to ask the court for relief.
- (b) Receive notice of all guardianship proceedings and all proceedings relating to a determination of capacity unless the court determines that the protected person lacks the capacity to comprehend such notice.
- (c) Receive a copy of all documents filed in a guardianship proceeding.
- (d) Have a family member, an interested party, a person of natural affection, an advocate for the protected person or a medical provider speak or raise any issues of concern on behalf of the protected person during a court hearing, either orally or in writing, including, without limitation, issues relating to a conflict with a guardian.
- ....
- (j) Engage in any activity that the court has not expressly reserved for a guardian, including, without limitation, voting, marrying or entering into a domestic partnership, traveling, working and having a driver’s license.
- (k) Be treated with respect and dignity.
- (l) Be treated fairly by his or her guardian.
- (m) Maintain privacy and confidentiality in personal matters.
- (n) Receive telephone calls and personal mail and



have visitors, unless his or her guardian and the court determine that particular correspondence or a particular visitor will cause harm to the protected person.

(o) Receive timely, effective and appropriate health care and medical treatment that does not violate his or her rights.

....

(s) Ask the court to:

- (1) Review the management activity of a guardian if a dispute cannot be resolved.
- (2) Continually review the need for a guardianship or modify or terminate a guardianship.
- (3) Replace the guardian.
- (4) Enter an order restoring his or her capacity at the earliest possible time.

Nevada Rev. Stat. § 159.328(1).

One of the most notable changes to Nevada Rev. Stat. 159 in 2018 included a wholesale deletion of the word “incompetents” and substitution with “persons who are incapacitated.” The definition of “incapacity” was added in Nevada Rev. Stat. 159.019:

A person is ‘incapacitated’ if he or she, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care without appropriate assistance.

## Britney Spears Case

Contemporaneously with the release of *I Care A Lot*, the docuseries episode *Framing Britney Spears* debuted on Hulu. While the details of Spears’s conservatorship are not fully public, both her person and estate are under conservatorship. (In California, the term “conservatorship of person” is synonymous with “guardianship” in other jurisdictions, and the term “conservatorship of estate” is synonymous with the term conservatorship in other jurisdictions.) According to the documentary, James Spears, the father of Britney Spears, was initially appointed both temporary conservator of her person and temporary co-conservator of her estate along with an attorney named Andrew Wallet. The California court granted the conservatorship over Spears because of a series of events in 2007 and 2008 evidencing a mental health breakdown, along with the appearance of a stranger, Sam Lutfi, who quickly befriended Britney and appeared to be exerting undue control over her. The

documentary makes it clear that although Britney is unhappy with her father serving as conservator, she (through counsel) has not petitioned for the termination of the conservatorship.

According to an online article by Allen Secretov:

James’ role as conservator of Spears’ “Person” generally meant that he was given decision-making control and responsibility over Spears’ living situation, health care, meals, clothing, transportation, social needs and recreation, with the primary goal of providing her with the best quality of life possible. Reports and court orders have indicated that Spears’ conservators have had the authority to restrict and limit her visitors, oversee her personal security and dictate her medical and psychiatric treatment.

As co-conservators of Spears’ “Estate,” James and Wallet were responsible for managing Spears’ finances, including collecting and protecting her income and assets, investing her money, paying her bills with her money, making sure her taxes are in order and keeping orderly records of her income and expenditures. As conservator of Spears’ Estate, they were also obligated to file accountings of her finances with the court at least every two years.

**Parsons Behle & Latimer** welcomes Joseph D. Watkins as a new associate in the firm’s Salt Lake City office.



Joseph D. Watkins represents and counsels clients in a variety of matters with a primary focus on defending corporate and individual clients in securities enforcement, regulatory, defense litigation, white collar crime, government and independent investigations matters. Mr. Watkins graduated from the J. Reuben Clark Law School at Brigham Young University. He holds a Master of Laws degree in Taxation from Georgetown University in Washington, D.C.

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Allen Secreto, *What “Framing Britney Spears” Doesn’t Really Answer*, HOLLYWOOD REPORTER (Feb. 17, 2021), <https://www.hollywoodreporter.com/thr-esq/what-framing-britney-spears-doesnt-really-answer-guest-column>.

## Do Utah Guardianship Statutes Provide Insulation from Abuse and Exploitation?

Like Nevada, but unlike California, in Utah, a “guardian” typically controls physical aspects of a person, such as living arrangements and medical care. A “conservator” deals with all aspects of the financial estate of a Protected Person. Both the April Parks scandal and the Britney Spears matter involved the use of “temporary guardianships,” which proceedings serve to quickly appoint a guardian or conservator of the person, usually in the event of an emergency. In the April Parks matter, the temporary guardianship statutes in place at the time allowed for ex parte petitions that would allow the court to issue an order without notice. April Parks supported her petitions with a falsified certification from a physician assistant attesting that emergency help was required. In addition, Parks also spent years building relationships with assisted living facilities and court personnel, the latter of which preferred her services as guardian over family members who may have otherwise had priority.

In Utah, Utah Code Section 75-5-310 does allow for the court to appoint an emergency guardian without notice upon a finding that the welfare of a person requires immediate action. Under this code section, the emergency guardianship may not exceed thirty days without notice or hearing. After the emergency appointment, an interested party can request a hearing within fourteen days. In Utah, the court must make a finding that an emergency exists based on the evidence presented with the petition. Prior to the sweeping changes to the guardianship statutes in Nevada in 2018, the same was required in Nevada; however, April Parks worked with a physician assistant who was allegedly complicit in April Parks’s exploitive actions by making the required certification to the court that an emergency existed.

In Utah, an emergency guardian can subsequently petition the court under Utah Code Section 75-5-310.5 to convert an emergency guardianship into a temporary guardianship. At that point, the court is required to appoint counsel for the protected person under Utah Code Section 75-5-310.5(2), unless an appointment of counsel has already been made, or the protected person has engaged counsel. This is one of the primary differences from the pre-2018 Nevada statutes. Had April Parks been operating in Utah, she could not have converted an emergency guardianship to a temporary guardianship without notice and hearing and without the protected person having counsel. In Utah, an emergency guardian may also subsequently petition for a permanent guardianship under Utah Code Section 75-5-303. Under the foregoing statute, the

protected person also has the right to counsel. If the petitioner, or the petitioner’s nominee is ultimately appointed as guardian, the petitioner may recover fees from the protected person’s estate for the prosecution and/or defense of the petition.

In the *New Yorker* article, there is a quote from a fellow ward at Lakeview Manor advising the Norths not to take the medication brought by the nurse if they wanted to be able to go to court to plead their case. A powerful mechanism to ensure due process in Utah is the requirement that the protected person attend the hearing on permanent guardianship, unless there is evidence of fourth stage Alzheimer’s disease, extended comatosis, or IQ of under 25. Utah Code Ann. § 75-5-303(5)(b). If a Utah petition requests that the protected person not attend the hearing, the court *shall order* a court visitor to determine the ability of the protected person to attend the hearing. *Id.* § 75-5-303(5)(a). The Utah Court Visitor Program is an independent arm of the court system that recruits and trains volunteers for the purpose of determining whether a person can attend a hearing but also may conduct other investigations upon request of the court.

In Nevada, a court investigator may be appointed under Nevada Revised Statutes 159.046, but it is not mandatory. However, there is a requirement that the protected person attend the guardianship hearing unless there is medical certification that the person is unable to attend, the court appointed counsel for the protected person waives attendance, or another qualified person certifies that the protected person cannot attend the hearing. In the April Parks case, the same physician’s assistant who would falsely certify incapacity would also supply the necessary certification to excuse the protected person from attending the hearing.

Utah Code Section 75-5-408(3) allows for the court to appoint a temporary conservator with all of the powers of a conservator under sections 75-5-417, 75-5-418, 75-5-419, and 75-5-424 of the Utah Code. The powers of a temporary conservator include the power to sell a home of a conservatee without a court order. However, unlike the statutes in Nevada in place at the time April Parks operated as a professional guardian, a temporary conservator may not be appointed in Utah without notice or hearing under Utah Code Section 75-5-408. In Nevada, however, after the 2018 legislative changes, all sales of real property of a protected person must be confirmed by the court. Nevada Rev. Stat. § 159.134.

In contrast, *Framing Britney Spears* focuses less on procedural abnormalities of how the conservatorship of her person and estate was obtained and instead draws attention to its continued duration. Many of her fans and proponents of the #FreeBritney movement wonder how a talented and successful pop star can, at the same time, be legally unable to handle her affairs. The use of guardianship and conservatorship to assist individuals with mental health problems

has become increasingly common. It is entirely possible for an individual to meet the legal definition of “incapacity” under the law while still maintaining various degrees of functionality.

Utah law prefers limited guardianships – meaning that the guardian’s authority should be limited to only those areas in which a protected person lacks functional abilities. Limiting a guardianship allows for protected persons to exercise their own independence to the extent that they are able. In the case of guardianships sought to assist those with mental health problems, this can be a useful tool to help the individual maintain a sense of autonomy but also ensure that someone is enabled to act on the individual’s behalf when necessary. Full guardianships are appropriate when no other alternative is appropriate. Depending on the severity of the mental health issues of the individual, a full guardianship may be necessary if sufficient evidence is presented to support the petition.

It is also possible to terminate the guardianship if the protected person is no longer incapacitated. In Utah, the protected person or other interested party may petition for the termination of the guardianship/conservatorship under Utah Code Section 75-5-303. The protected person is entitled to counsel and all of the procedure set forth in that code section. California has a

similar procedure for terminating a conservatorship. In the case of Britney Spears, she has not petitioned for the termination of her conservatorship(s), although she has petitioned for the change of conservators from her father to a professional.

In sum, many of the abuses and exploitation committed by April Parks and her cohorts were enabled by the procedure in place for guardianships in Nevada at the time. The Utah Code provides for notice and right to counsel (and the Court Visitor Program), which serve to curb the worst of such abuses. In contrast, Utah’s laws are, in many ways, like the laws in California that appear to have led to Britney Spears’ continuing conservatorship.

Utah could benefit from codification of a protected person’s Bill of Rights. However, it is important to note that the courts lack proper funding to oversee guardianship and conservatorship cases. The Utah Court Visitor Program is facilitated by volunteers and is limited in its ability to monitor all of the guardianship and conservatorship cases statewide. Additionally, Adult Protective Services also lacks sufficient funding to pursue allegations of abuse unless they are particularly egregious or obvious. Additional legislation and resources would be needed to fully guard against guardianship and conservatorship abuse.

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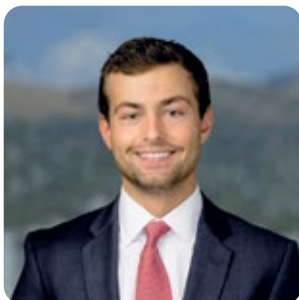
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# A View From the Other Side: From Prosecution to Defense

by Scott Garrett

**H**aving spent the first eighteen years of my career as a prosecutor, I handled a wide variety of cases. One that particularly stands out was a sexual-assault case where the suspect, barely eighteen years old, was accused of abusing a couple of neighbor children. The abuse had started while the suspect was a juvenile and finished a few days after the suspect turned eighteen and was arrested.

Because the last event occurred as an adult, charges were filed in the district court. The most serious charge was a first degree felony, punishable by five years to life in the Utah State Prison. The defendant ultimately entered a guilty plea to an attempted first degree felony and was sentenced to three years to life in prison.

The defendant had family members that were incensed over the potential life sentence, believing it to be unduly harsh and overly punitive for one who had just barely reached the age of majority. They argued that had the case been brought in juvenile court, there would have been a small fine, treatment, and no jail time. They were not wrong.

The victims and their families were appalled by the defendant's conduct and believed that the imposition of a potential life sentence was barely sufficient to even scratch the surface of serving justice.

## Justice and Mercy

In the middle of this, the attorneys were trying their best to find solutions to the issues, serve justice, and respond. One side arguing for justice and the other side arguing for mercy. What is the appropriate outcome in these types of cases? Arguments can be made both ways.

Over the years, I have learned that justice and mercy mean different things to different people and can even change within a person depending on the circumstances. It is usually tied to how well we know and like the suspect. The better we know and care for the suspect the more likely we are to advocate for mercy. This is a universal principle, and it is present in all of us.

Victims in the criminal justice system often find some level of healing and closure when they believe that justice has been served. That concept and phenomenon intrigued me as a prosecutor as the legal system is ill-equipped to restore victims to the position

they were in prior to victimization. But the concept of serving justice is powerful and real. I observed it firsthand in many of the more serious cases I prosecuted, particularly the murder and sexual-assault cases. I watched as profound relief and a sense of peace poured over victims and family members as guilty pleas were read and prison sentences imposed. Victims and their close circle were devastated when they perceived that justice had not been served, and it made their healing process more difficult, and in some instances, perhaps unattainable.

As a prosecutor, I became somewhat of a champion and a voice for victims who were seeking healing and justice. That was an easy concept to get behind and proved to be very rewarding. The "tent of justice" seemed to be a large tent, full of community members, law enforcement, and concerned citizens, all wanting justice.

I recall attending prosecutor trainings and being told that prosecutors were true ministers of justice, who wore the white hat, and were it not for prosecutors, civilization as we know it would end. I was proud to be a part of such an important group and to be on the right side of the law.

Prior to trying any substantial case, I would review jury questionnaires. One of the frequently asked questions was, "[H]ow do you feel about prosecutors," and the follow-up, "[H]ow do you feel about defense attorneys?" When I first started reviewing the responses, I was certain that they would favor prosecutors. Not true. The consistent theme throughout those responses was that "they are both necessary" and "they are just doing their job," in addition to other more colorful responses. I was surprised. How could that be? How could we be on equal footing? These proposed jurors must be trying to avoid the appearance of favoring the prosecution — at least that is what I told myself.

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## Change of Position

After eighteen years as a prosecutor, I attended my first training as a defense attorney, and the last speaker launched into the motivational message that defense attorneys are the true ministers of justice and that were it not for them, civilization as we know it would come to an end. I did a double take to make sure I had not accidentally stepped into a prosecutor training. I had heard that speech many times before, I just did not realize that it was being shared in both venues.

On one hand, I was intrigued that defense attorneys shared that same view that they were the true ministers of justice, but on the other hand, I was somewhat relieved to know that I really had not “gone to the dark side” as a few people had quipped when I made the transition from prosecution to defense.

Though the transition was a little strange at first (I recall my first preliminary hearing as a defense attorney and continually referring to my evidence as the State’s exhibit), it did not take long to get comfortable in my new role.

One of the biggest discoveries I have made is that defendants are more than criminals dressed in orange and restrained with handcuffs. They are not just individuals facing charges for poor decisions. They are real people with real problems – problems that frequently contribute to those poor decisions. The humanization of any individual starts the process of shifting one’s perspective from justice to mercy.

As a prosecutor, I often did not want to interact with the defendants because it became much harder to seek justice. Upon learning their story, or considering their family circumstances, it became more difficult to hold them accountable. Not all defendants were as successful in gaining sympathy, and a few actually hurt themselves. It did not take long to identify the defense attorney’s strategy of introducing their client to the prosecutor in hopes of improving the offer and finding a more favorable plea agreement.

As a defense attorney, I utilize this strategy in certain situations. For example, I represented a defendant charged with drug distribution. This particular client was affable and had a knack for getting people to like him. Knowing that, I began working on setting up opportunities for my client to meet with the prosecutor and the law enforcement agent handling the case. It did not take long until both were advocating for my client. The charges were not dismissed, and my client was still held accountable, but there were some concessions made that would not have been, but for the prosecutor getting to know my client.

Law enforcement and prosecutors generally do not get to see the warmer side of the defendants in the system. They often see people at their worst and deal with difficult and sometimes incomprehensible circumstances. They are exposed to the raw emotion of the events

that lead to criminal charges and the devastation that is sure to follow. They deal with the ugly consequences of addiction, rage, family problems, and greed. Consequently, their sense of justice and accountability is strong, and they advocate accordingly.

That position is understandable, but it is also important to remember the long game. I recall watching a young woman’s life spiral down because of addiction. Her life was a mess. It was hard to imagine that she could ever fix what was broken. Due to the efforts of many, including both prosecution and defense, and her own self-determination, she turned her life around. She recently graduated from nursing school (graduate program) with honors. She has a full-time job, a family, and a home. She attributes her success to the people around her that believed in her and supported her in the journey. Not everybody in the system has that outcome, but it is nice when it happens, and you cannot help but feel some satisfaction that the system worked.

## Enforcing Policy

While serving as the elected prosecutor, I viewed one of my roles as “holding the line.” My definition of that is consistency in the application of justice. It was important to treat people equally and have uniformity in the disposition of cases. If the defense bar was able to get us to reduce a charge in a certain type of case beyond what we normally did, then they would expect that type of resolution in all similar types of cases moving forward, thus causing that line to move or shift.

Holding the line was a way to ensure fairness and allow both prosecution and defense to know what to expect. In addition, it gave law enforcement, the victims, and others in the criminal justice system an idea of how cases would be resolved. In criminal

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cases there are exceptions to every rule depending upon the strengths and weaknesses of the evidence. But, consistently, we sought uniformity and equal application of the law.

Drawing that line was a constant battle between prosecution and defense. This demonstrates the need and importance of opposing forces. Now, as a defense attorney, I can more fully appreciate and understand the constant push from the defense as to where the line should be. As a defense attorney, I want to argue that each case should be looked at individually and the unique circumstances and characteristics of a defendant should be considered. What may be the right thing for one defendant may not be appropriate for another. Not all cases nor defendants are the same, and a rigid line may not best serve the ends of justice. A rigid line tends to create a myopic view and foreclose creativity and alternatives that might best serve a particular defendant.

I have represented many clients who have lost future opportunities because a current conviction eliminates them from consideration. That includes the loss of a job or other privileges enjoyed by the majority, such as hunting and fishing, or the rights to vote or bear arms, among others. In some cases a specific conviction may be appropriate; in others it can be overly punitive and harsh.

An example of this is when I represented a client who worked at a group home and had to conduct a restraint of one of the patients. As a result of the restraint, my client was referred to the Division of Child and Family Services where a supported finding was entered against him. My client was then referred for criminal prosecution and charges filed. The employer reluctantly terminated my client because the employer felt it had no other option.

My client loved his job and wanted to remain in that line of work. Because he could no longer pass a background check, he was not employable in the industry.

In reviewing the case, I was certain my client had not committed a crime. Working with the prosecutor, we were able to get the case dismissed. Hopefully, the rest can be unwound as well. Unfortunately for him, the damage may already be done.

There are many cases on the spectrum that could be discussed to show problems with the system, favoring both the prosecution and the defense. While our system is not perfect, I truly believe it is the best in the world. It takes both the prosecution and the defense working with judges to solve the problems and find the proper solutions.

As I transitioned from prosecution to defense, I was often asked, “How can you defend someone that you know is guilty?” As lawyers, we all know that everyone is entitled to a defense, and a zealous one at that. Sometimes the defense is proving their innocence and sometimes the defense is protecting their rights

and getting a fair resolution. Either way, it is important to have opposition to the prosecution. Without it, our system could never be held accountable and would cease to be equitable.

## Resource Differences

As mentioned earlier the “tent of justice” is substantial and affords things not necessarily available under the “tent of mercy.” As a prosecutor, I knew that I had significant resources to investigate and prosecute. That is not the case on the defense side. The “tent of mercy” is much smaller. It usually consists of your client, family members, the attorney, and a few friends. The resources are finite. It is often difficult to afford an investigator or an expert. When compared to the vast and seemingly unlimited resources of the State, it can seem daunting.

Another question that I was frequently asked during my transition from prosecution to defense is, “How will you handle not winning all the time?” I found that to be a very curious question because the question assumed that winning meant getting convictions. I would like to think that the system is above defining a conviction as a win and an acquittal as a loss for prosecutors and vice-versa for defense attorneys. Winning should be defined as the pursuit of justice, and we all win when that goal is achieved. For a prosecutor, justice is served just as much when an innocent person is set free as when a guilty person is convicted or when charges are reduced to more accurately reflect the conduct of the defendant.

## Conclusion

Winning is doing the right thing for the right reason. Winning is when lives are changed for the better. I have seen lives change for the better as both a prosecutor and a defense attorney. It has been a fascinating journey and one for which I am grateful. Through this process my perspective has broadened and evolved and I believe it has made me a better attorney and person. I understand both sides of the system and the necessity of each. Both prosecutors and defense attorneys are necessary, and they are doing their jobs, just like the jury questionnaires stated, both on equal footing in terms of pursuing justice and importance to the system. I have great relationships with both prosecutors and the defense bar. I love that we can do battle in court and then go to lunch. There are great people on both sides of the aisle, and I have tremendous respect for the system.

As a final thought, I return to the opening story about the eighteen-year-old sentenced to prison for sexual abuse. Having transitioned to the defense and viewing things from this side, would my decision regarding that case be any different now? I cannot say that my decision would be different, but I think I would focus more on the history and characteristics of the defendant when considering the optimal outcome. I would more closely assess the viability of treatment options, especially for the non-violent offenders. I would look for the appropriate times to apply mercy just as I ask the prosecutors to do now.



# Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union

by Ruth Bader Ginsburg & Amanda L. Tyler

Reviewed by Kristen Olsen



In late 2019, I remember standing among a crowd of lawyers at the federal courthouse as the Utah Bar President declared that 2020 would be the Utah Bar's "Year of the Woman" to commemorate the 100th anniversary of women's suffrage in the United States. Other organizations around the state and country were making similar pronouncements, *see, e.g., Year of the Woman*, UTAH STATE UNIVERSITY, <https://www.usu.edu/year-of-the-woman/> (last visited Aug. 8, 2021); Akira Kyles, *Mount Airy to declare 2020 Year of the Woman, celebrate 100th anniversary of 19th Amendment*, CARROLL COUNTY TIMES (Jan. 18, 2020), <https://www.baltimoresun.com/maryland/carroll/news/cc-year-of-the-woman-20200118-rortlfvidndqfmp6fd7ocpgfwy-story.html>, and the potential for this historic year for women seemed strong: several well-qualified women were actively campaigning for the U.S. presidency, various state legislatures were debating whether to ratify the Equal Rights Amendment (ERA), and Justice Ruth Bader Ginsburg, who had recently undergone treatment for her fourth bout of cancer, announced, "I am on my way to being very well." Adam Liptak, *'I am on My Way to Being Very Well,' Justice Ginsburg Tells Thousands of Fans*, N.Y. TIMES (Aug. 31, 2019), <https://www.nytimes.com/2019/08/31/us/politics/ruth-bader-ginsburg.html>.

Enter 2020. Violence against women increased globally as society attempted to shelter-in-place during a worldwide pandemic, and women's retention and advancement in the workplace were disproportionately and negatively affected by the disruption. *See The Shadow Pandemic: Violence against women during COVID-19*, UN WOMEN, <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> (last visited Aug. 8, 2021); Julie Kashen, Sarah Jane Glynn, & Amanda Novello, *How COVID-19 Sent Women's Workforce Progress Backward*, CENTER FOR AMERICAN PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/issues/women/reports/2020/10/>

[30/492582/covid-19-sent-womens-workforce-progress-backward/](https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/). As per usual, two men battled it out for the presidency and the ERA remained unratified. As a final blow, on September 18, 2020, Justice Ginsburg lost her battle with cancer. Arguably, the Year of the Woman turned out to be a bad year for women.

### *Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union*

by Ruth Bader Ginsburg &  
Amanda L. Tyler

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Pages: 288

Available in hardcover and digital formats.

Among the silver linings of a difficult year is the fact that Justice Ginsburg, a month before her death, submitted her final book for publication titled *Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union*. The book is co-authored by Justice Ginsburg's former law clerk, Amanda L. Tyler, and it offers a one-stop-shop of Justice Ginsburg's greatest hits – her favorite opinions and influential briefs, as well as transcripts from oral arguments and previously unpublished speeches. Tyler chose the title because in Justice Ginsburg's chambers hung the Deuteronomy excerpt, "Justice, justice thou shalt pursue." According to Tyler, this scriptural directive "drove Justice Ginsburg in all she did." Ruth Bader Ginsburg &

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Amanda L. Tyler, *JUSTICE, JUSTICE THOU SHALT PURSUE: A LIFE'S WORK FIGHTING FOR A MORE PERFECT UNION* 263 (2021).

While Tyler and Justice Ginsburg submitted the draft for publication together, Tyler was left to finalize the book alone following Justice Ginsburg's death. She notes in the Afterword that "[t]his part of the book was not supposed to exist." *Id.* She expresses how devastating Justice Ginsburg's death was for her personally and for our nation: "Justice Ginsburg was a national treasure – someone who through her life and work made ours a better, more just society." *Id.* By compiling these works with Justice Ginsburg, Tyler hoped to "give readers a glimpse into how as a lawyer and federal judge [Justice Ginsburg] has worked tirelessly for gender equality and, more generally, achievement of our Constitution's most fundamental aspiration – to build 'a more perfect union.'" *Id.* at 1.

When I was approached about reviewing this book, my first thought was that it was too soon. Many are still grieving her passing on some level, and others have confessed to me that they have experienced a type of Ginsburg-fatigue as a result of her rise to celebrity status with the advent of the "Notorious RBG," the film *On the Basis of Sex*, and the publicity following her death. On either extreme, people do not seem terribly interested in delving into the Justice's legal writings and oral transcripts quite yet. In addition, for the RBG enthusiast, this book does not offer much in the way of bombshells nor does it provide an autobiographical narrative of Justice Ginsburg's life like Justice Sonia Sotomayor's *My Beloved World*.

As I read Justice Ginsburg's final publication, however, I was pleased to find that revisiting her legal writings and discovering new transcripts of prior interviews and speeches left me with an increased

appreciation for her life, legacy, and her unyielding patience with the glacial-paced process of pursuing justice. Born Joan Ruth Bader to immigrant parents in 1933 – just thirteen years after women won the right to vote – Justice Ginsburg entered a world in which the United States Supreme Court had felt comfortable reasoning that even if the law treated women equally, a woman is "so constituted that she will rest upon and look to [a man] for protection." *Justice* at 2 (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908)). Decades prior, the Court upheld a state's refusal to grant a married woman a license to practice law on the basis that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

Not surprisingly given this backdrop, Justice Ginsburg said she did not even consider becoming a lawyer as a young girl simply because "women were not there." *Id.* at 30. By contrast, a half-century later, teenagers like myself watched on analog televisions as then-Judge Ginsburg of the D.C. Circuit answered questions from senators during her 1993 Supreme Court confirmation hearing. Despite working at my dad's law office most of my childhood cleaning toilets and alphabetizing invoices, I had never actually met a female lawyer in person. Thanks, in part, to Justice Ginsburg's nomination, however, I at least knew they were "there."

In a 2019 interview with Tyler, a transcript of which is included in *Justice*, Justice Ginsburg expressed that she is "overjoyed" by the fact that women are now "welcomed in law schools, at the bar, and on the bench." *Id.* at 33. When she began law school in 1956 with a young child and a 2L husband, she was one of only nine women in a class of over 550. Her resounding success



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allowed future mothers, like myself, to feel comfortable applying to law school with a 2L husband and young children at my side, even though many questioned my commitment to my young family. I was able to personally express my appreciation to Justice Ginsburg for her trailblazing example at the 2017 Utah Summer Bar Convention when I was eight months pregnant with my third child. To my delight, we had a moment to discuss our children and she shared parenting advice with me as she demonstrated her enduring commitment to her own family.

While reading *Justice*, I was impressed by Justice Ginsburg's evolving legal arguments throughout the societal shift from blatant statutory inequalities to more nuanced discriminatory conduct. This progression is evident in the artifacts of her legal career compiled in the book. In her first appellate brief, which she co-authored with her husband Martin Ginsburg, she acknowledges the novelty of her now widely accepted sex-based discrimination arguments: "It is only within the last half-dozen years that the light of constitutional inquiry has focused upon sex discrimination." *Id.* at 66.

Decades later, as a new Supreme Court Justice, she was chosen to write the Court's majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996), in which the Court finally settled on the heightened "exceedingly persuasive justification" level of constitutional scrutiny for gender-based legal distinctions. In that opinion, which she described as one of her favorites, she reasoned that admission of women in the traditionally all-male Virginia Military Institute would "enhance its capacity to serve the 'more perfect Union.'" *Id.* at 141 (quoting *Virginia*).

*Justice* also includes another of her favorite opinions – her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S.

618 (2007). In that case, Justice Ginsburg failed to persuade a majority of her colleagues that "each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice." *Id.* at 152 (Ginsburg, R., dissenting) (quoting *Ledbetter*). She was very proud of the fact that her dissent ultimately persuaded Congress – both Democrats and Republicans – to change the law at issue and that it was the first law President Obama signed when he took office.

Nearing the end of her life, Justice Ginsburg acknowledged that important work remains. At the age of eighty-five, she addressed a group of new U.S. citizens at their naturalization ceremony. She cautioned, "[T]he work of perfection is scarcely done. Many stains remain. In this rich land, nearly a quarter of our children live in poverty, nearly half of our citizens do not vote, and we still struggle to achieve greater understanding and appreciation of each other across racial, religious, and socioeconomic lines. Yet, we strive to realize the ideal – to become a more perfect union." *Id.* at 260.

I suspect that in Justice Ginsburg's version of a more perfect union, there would be no need to declare any year the "Year of the Woman." The concept would be antiquated and obsolete. Unfortunately, we are not there yet, but *Justice* provides a sort of framework to help us get there. The book concludes with Justice Ginsburg's final directive to the newest citizens of this country – and by proxy to all of us: "[H]ave the conscience and courage to act in accord with that high ideal as you play your part in helping achieve a more perfect Union." *Id.* at 261. As we emerge from our respective 2020 bunkers and return to our brick-and-mortar offices and courtrooms (Delta variant permitting), I recommend picking up a copy of *Justice* and contemplating how we each might play our small or large parts in continuing to build this more perfect union.



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## Duties of an Attorney in Cases of Mental Impairment

by Kenneth Lougee

The Utah Rules of Professional Conduct provide guidance on the duties of a lawyer representing a person whose capacity is diminished, whether because of minority, mental impairment, or some other reason. This article focuses on the duties owed a client whose capacity is diminished due to mental impairment. Utah Rule of Professional Conduct 1.14 provides the structure for a lawyer's representation of a client who appears to be mentally impaired.

The lawyer must recognize that there are a number of reasons that a person may experience mental impairment, including a traumatic brain injury, schizophrenia, bipolar disorder, autism, or other genetic disorders. A lawyer's representation must recognize the cause and effect of the mental impairment so as to judge whether the client needs immediate legal protection.

A number of factors may influence this assessment. Importantly, a person may have impairment at one time but not at another. Accidental brain injury may resolve; a person with bipolar disorder might have long periods of time with full cognizance. Thus, a lawyer cannot assume that legal protection from mental impairment continues indefinitely. A lawyer's assessment must be continuing, and recognition of improvement in mental impairment must be measured at every substantive step in the representation. Further, even if the person with mental impairment is not fully cognizant of her rights, she may otherwise be competent with respect to other aspects of the representation.

### Utah Rule of Professional Conduct 1.14 Provides Guidance as to Persons with Mental Impairment

There are a number of questions that a lawyer must answer before assuming any responsibility to act for a client who is presumably mentally impaired. Fortunately, Rule 1.14 gives guidance as to the lawyer's duty.

Specifically, Rule 1.14 requires that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action." See Utah R. Pro. Conduct 1.14. Utah Rule of Professional Conduct 1.0(q) defines substantial as "a material matter of clear and weighty importance."

Utah Rule of Professional Conduct 1.0(m) defines reasonable belief to mean that the lawyer "believes the matter in question and that the circumstances are such that the belief is reasonable." Utah Rule of Professional Conduct 1.0(a) defines belief: "'Belief' or 'believes' denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances."

The lawyer is bound by confidentiality with respect to the client's impairment under Rule 1.6(a) and may reveal information about the client's condition "only to the extent *reasonably necessary* to protect the client's interests." *Id.* R. 1.14(c). The duty to act reasonably is objective. It "denotes the conduct of a reasonably prudent and competent lawyer." *Id.* R. 1.0(l).

The rule is a rule of reasonableness. The lawyer may form a belief that the client has a mental impairment, but the lawyer's beliefs and actions must be reasonable. "The term 'reasonable' connotes the idea of a range of permissible conduct: on the one hand perfection is not required." Geoffrey C. Hazard, Jr., W. William Hodes, and Peter R. Jarvis, *THE LAW OF LAWYERING*, 2013 Supplement at 2A-6.

All of these terms constrain the lawyer when working with a client who is presumably mentally impaired. The attorney may not assume that the impairment will continue indefinitely but must act reasonably to protect the client's interests.

### How May an Attorney Determine that a Person is Mentally Impaired?

Rule 1.14's basic requirement is that a client be "unable to make adequately considered decisions in connection with a representation." The client's capacity is presumed. Comment 1

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to Rule 1.14 provides, “The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.” Thus, before the other provisions of Rule 1.14 apply, the client must be found to have a mental impairment.

A common example of when a person is capable of making reasonable decisions on the person’s behalf is when a parent begins a relationship with a person thirty years the parent’s junior and spends money on that person. The children may believe that the parent is wasting what they consider to be their inheritance. Based on those facts, a lawyer would not be justified in assuming the parent is unable to make adequately considered decisions when preparing wills or trusts.

We have two Utah Ethics Advisory Opinions that give guidance in the criminal context. Ethics Advisory Opinion 2013-1 considered an attorney’s action where a client with an apparent mental impairment wished to appeal a decision of parental unfitness but refused to sign the notice of appeal as required by statute. The committee concluded that in that instance, the lawyer was justified in acting to protect the client’s interests. A key distinction is that the client had expressed her objective desires but was incapacitated with respect to executing the necessary documents.

In Advisory Opinion 2017-3, a criminal defense lawyer questioned the competence of her client to enter a guilty plea. The committee’s guidance was:

When there is risk of substantial harm and the client cannot act in his own interest, the attorney is permitted to take protective action, such as involving family and professionals serving the client to assist. If the attorney needs guidance from a mental health expert, the attorney should generally seek a confidential psychological evaluation protected by attorney-client privilege before asking for a competency evaluation.

Therefore, the lawyer’s duty is to act reasonably with respect to the client’s competence and make that determination only in a substantially important decision. The lawyer must have objectively reasonable grounds for believing both the impairment and necessity to protect the client’s interest. Here, the desire to plead guilty to a crime when there is a reasonable basis to suspect mental impairment required the protection of the client.

Reasonable grounds for believing the client to be incompetent with respect to substantial interest in representation most likely requires a medical evaluation to support the lawyer’s suspicions of incapacity. This would be true in many representations.

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For example, in a probate case, where the testator disinherited her children, psychiatric testimony was the primary determinant of incapacity. *In re Estate of Kesler*, 702 P.2d 86, 92–93 (Utah 1985). Further, medical testimony is required in civil commitments – “the physician or designated examiner examined the proposed patient and is of the opinion that the proposed patient has a mental illness and should be involuntarily committed.” Utah Code Ann. § 62A-15-631(b)(i). *Kesler* and section 62A-15-631(b)(i) would indicate that mental impairment may not be presumed but must be shown by reasonable objective evidence.

### The Lawyer's Duties to a Client under Mental Impairment

Rule 1.14 constrains the lawyer's actions with respect to a client who is mentally impaired. Rule 1.14(a) requires the lawyer to, as far as reasonably possible, maintain a normal lawyer-client relationship with the client. Thus, the lawyer may consider the client's wishes with respect to the ultimate objective of the representation. For example, in a personal injury case, the client's wishes with respect to the representation may be to obtain sufficient funds to maintain an autonomous life. This direction must be respected even if the client is unable to give day-to-day instructions to the lawyer. The lawyer must make a reasonable inquiry into what the client really desires. Those directions must be followed even if the lawyer thinks them unwise.

When representing a client who is mentally impaired, the lawyer may make procedural decisions just as in any other case. Rule 1.2 still applies in a diminished capacity case. That rule allows the lawyer to take such actions on behalf of the client as impliedly authorized to carry out the representation as in the representation of client who is not mentally impaired.

Other Rules of Professional Conduct apply in a mental impairment case just as in any other case. Rule 1.3 requires that the lawyer act with diligence. Especially when the client is mentally impaired, the lawyer still has the duty to act with diligence. A client who is mentally impaired may not be aware of lack of diligence in the lawyer's pursuing the object of the representation. This Rule does not allow a lawyer to let the case slip merely because of mental impairment. Likewise, mental impairment does not relieve the lawyer from providing competent representation. *See* Utah R. Pro. Conduct 1.1.

Lawyers are not allowed to ignore the desires of a person who is mentally impaired. Lawyers must explain to the client, as clearly as possible, the mechanisms through which the representation will occur. Lawyers may not assume that the client cannot assist in the representation even under impairment. Lawyers are not relieved from the duty of communication with the client under Rule 1.4, which requires a lawyer to make the client aware, as far as possible, of

information that would allow the client to assist in the representation.

If there is a reasonable belief that the client's mental impairment poses a risk of substantial physical, financial, or other harm, the lawyer may take reasonable measures to protect the client's interest. R. 1.14(b). This could include consulting with any individual appointed by the court with responsibilities to the client, such as a guardian. *Id.* In an appropriate case, reasonable measures to protect a substantial interest may be a petition to the court for appointment of a guardian or conservator. *Id.* R. 1.14.

The requirement that the lawyer act reasonably and that the harm be substantial would indicate that the lawyer may not request protection for the client beyond that which is necessary to protect the client. For example, the client may require protection of funds received in a personal injury settlement but may not require further protection. In that case, the lawyer cannot seek protection of any measures beyond protection of the funds. This is because any further protection would not implicate a substantial interest.

Finally, Rule 1.14(c) provides that the confidentiality provisions of Rule 1.6 apply to representation of clients who are mentally impaired. Rule 1.6 requires that a lawyer not reveal information regarding the representation unless the client consents or the disclosure is essential to the representation. Client confidence must be presumptively maintained as any other client communications. The lawyer must consider whether the client has the capacity to consent to disclosure. If the impaired person does not have capacity to consent, then the lawyer may not disclose unless disclosure is essential to the prosecution of the case. In many instances, the client does not want to disclose the details of the representation to particular individuals, even family members. In these cases, the client's direction must be followed.

Contact with medical personnel may be necessary both to define the degree of impairment and to allow the lawyer to assess damages sought in the case. To protect the client, it would be advisable for the lawyer to seek medical advice in order to assert the work product protections of Utah Rule of Civil Procedure 26.

### Conclusion

In representation of a person who is mentally impaired, the lawyer's primary duty is to assess the extent of the impairment. The lawyer must maintain the lawyer-client relationship as far as possible. The lawyer cannot treat impairment as a class; every client is unique and what may be appropriate protection of material interests for one client is not necessarily the protection needed for another client.

Rule 1.14 places specific emphasis on reasonable representation of persons who are mentally impaired. Together with the requirement that the risk of harm be substantial, the lawyer's objective reasonable activities must conform to the objects of the representation as far as the client is able to give direction.



# Horse-Shedding Witnesses

by Benjamin Cilwick and Keith A. Call

*“[The lawyer’s] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.”*

— *In re Eldridge*, 82 N.Y. 161, 171 (1880).

In his 1850 novel, *The Ways of the Hour*, James Fenimore Cooper wrote one of the first mystery novels that revolved almost entirely around a courtroom murder trial. Cooper used the novel to, among other things, express his discontent with corruption among New York’s courts and juries. He is believed to be the originator of the phrase “horse-shedding,” a reference to the practice of attorneys who lingered in carriage sheds near the courthouse in White Plains, New York, to rehearse their witnesses. See James W. McElhaney, *McELHANEY’S TRIAL NOTEBOOK*, 100 (4th ed. 2005). Today, of course, the term “horse-shedding” can still carry negative connotations, suggesting that the lawyer is trying to manipulate a witness’s testimony before the witness actually testifies.

Conscientious lawyers aim to advocate zealously for their client within the bounds of ethical and professional duties. But vigorous representation can tempt the unscrupulous to betray those duties. Witness preparation in particular harbors a tension between duties to the client and duties not to advocate falsehoods or to mislead the tribunal. The over-zealous might seek to improperly influence testimony through coaching. Yet legitimate witness preparation is indispensable for effective advocacy. It would be foolish, and likely a dereliction of duties to the client, if a lawyer failed to prepare witnesses in some

fashion. The “failure to prepare witnesses for depositions is a genuine professional disservice.” *Id.* So, it is important to distinguish permissible preparation from improper coaching. That is no small task.

## The Good and the Bad

Lawyers’ obligations to be truthful and honest extend beyond their own statements and omissions. In the context of witness preparation, lawyers must not attempt to lie or dishonestly advocate via witnesses. Lawyers are barred from “counsel[ing] or assist[ing] a witness to testify falsely.” Utah R. Pro. Conduct 3.4(b). Likewise, “[t]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.” Utah R. Pro. Conduct 3.3, cmt. [2]. So, lawyers must seek to ensure that witnesses provide honest, independent testimony. Respecting prohibitions against improperly influencing testimony helps to ensure “[f]air competition in the adversary system.” Utah R. Pro. Conduct 3.4, cmt. [1].

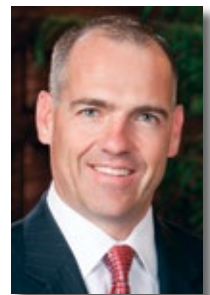
Fair competition, though, does not always excite those bent on winning at all costs. On the far end of the spectrum, such acts as requesting, convincing, encouraging, or enabling a witness to lie are improper coaching. To note an egregious example, the Eighth Circuit Court of Appeals once affirmed a district court’s disbarment order against an attorney who advised a client to lie about the details and extent of an extramarital affair. *In re Attorney Discipline Matter*, 98 F.3d 1082, 1088 (8th Cir. 1996).

Yet even when lawyers do not counsel dishonesty, if a witness gives testimony a lawyer knows to be false, the lawyer must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Utah R. Pro. Conduct 3.3(b). If the

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lawyer only reasonably believes, but does not know, the testimony to be false, the lawyer may permit or refuse its presentation. Utah R. Pro. Conduct 3.3 cmt. [8].

One guiding mantra derives from the epigraph with which we began: *“The lawyer must not try to pour favorable testimony into the witness, but instead must extract from the witness honest testimony favorable to the client and must prepare the witnesses to present that testimony compellingly.”*

*In re Eldridge*, 82 N.Y. 161, 171 (1880).

This standard can help to ensure that witness preparation – a “uniformly followed” practice in the United States – proceeds within the bounds of ethical and professional rules. Restatement (Third) of the Law Governing Lawyers § 116, cmt. b. Prudent lawyers will further hone their tactics and develop additional guiding rules. The Restatement (Third) of the Law Governing Lawyers provides a non-exclusive list of legitimate tactics:

- Discussing the role of the witness and effective courtroom demeanor;
- Discussing the witness’s recollection and probable testimony;
- Revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness’s recollection or recounting of events in that light;
- Discussing the applicability of law to the events in issue;
- Reviewing the factual context into which the witness’s observations or opinions will fit;
- Reviewing documents or other physical evidence that may be introduced;
- Discussing probable lines of hostile cross-examination that the witness should be prepared to meet; and
- Rehearsing testimony and making suggestions to make the witness’s meaning clear.

*Id.*

These tactics prepare the witness with respect to the form, veracity, value, import, effectiveness, scope, and manner of presentation of their testimony. The lawyer may even offer advice concerning the *content* of their testimony (e.g., by discussing the witness’s recollection and probable testimony), just so long as the lawyer’s advice does not undermine the witness’s honesty or the testimony’s veracity.

## Strategies for Tricky Cases

What constitutes “improperly influencing witnesses” can be murky. To clarify the boundary between prudent prepping and bad coaching, a lawyer might ask themselves several questions as they prepare a witness:

1. Have I unambiguously expressed to the witness the importance of honest and truthful testimony?

Stress to the witness at the beginning, middle, and end of the session that they are to provide only honest testimony. Simple reminders may help: “Only honest testimony helps our case,” or “Don’t embellish or stretch the truth because you think it will help my client.”

2. What strategies have I offered the witness to testify compellingly, but honestly?

Counsel only strategies (i.e., word choice, demeanor, scope of testimony, and so on) that do not invite the witness to play fast and loose with the truth. Doing so reinforces to the witness that misleading or dishonest testimony is not permitted.

3. What is the witness likely to take away from my preparation session?

Avoid conduct that might indicate you condone, expect, hope, or otherwise want the witness to falsify testimony. While you may not intend or wish the witness to be dishonest, they may do so of their own initiative. You cannot always control that. However, once you know false evidence has been presented, remedial measures are required. Prevent such circumstances by not giving the witness reason to think that you want or approve of dishonesty.

## Conclusion

Lawyers’ ethical and professional duties constrain the scope of permitted witness preparation tactics. Yet the effective advocate must prepare witnesses as they build the client’s case. To avoid unethical and unfair conduct, it is important to consider strategies that ensure witness truthfulness. The duty of zealous advocacy, while perhaps foremost in many lawyers’ minds, must not eclipse the lawyer’s professional and ethical duties of honest and fair witness preparation.

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

## Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 28, 2021 Commission Meeting held at the Summer Convention in Sun Valley, Idaho.

1. **5th Division.** Voted to have **Katie Woods** continue as the 5th Division Representative for the next year.
2. **Judicial Council.** Voted to have **Margaret Plane** replace Rob Rice as the Judicial Council Bar representative.
3. **Courts' Innovation Committee.** Voted to establish a tradition of the past-president sitting on the Executive Committee and a Bar Commissioner or a person of the Commission's choosing sitting on the main Innovation Committee.
4. **Repeal of Rule 14-209.** Voted to recommend repeal of Rule 14-209 to the Utah Supreme Court.
5. **Utah State Elected Official and Judicial Compensation Commission.** Voted to keep **Sam Alba** on the commission.
6. **Executive Committee.** Voted to have **Heather Thuet, Heather Farnsworth, Katie Woods, Chrystal Mancuso-Smith, Mark Morris, Marty Moore, and Shawn Newell** comprise the Bar Commission's Executive Committee.
7. **Bank Signatures.** Voted to give authority to Executive Committee members to sign checks over \$1000.
8. **Recognition of Service.** Recognized **Tom Seiler, Mark Pugsley, Heather Farnsworth, and Richard Dibblee** for their service.
9. **Introductions.** Introduced new Bar Commissioners **Greg Hoole** (3rd) and **Tyler Young** (4th). Also introduced **Elizabeth Wright** as new Executive Director and **Nancy Sylvester** as new General Counsel.
10. **Minutes.** Approved the June 4, 2021 Commission meeting minutes by consent.

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

## Utah State Bar Names New President, Commissioners, Executive Director, and General Counsel

The Utah Supreme Court swore in a new president and commissioners of the Utah State Bar at its Summer Convention in Sun Valley, Idaho.

Heather Thuet, a shareholder in the firm Christensen & Jensen, is the Bar's new president. Greg Hoole and Tyler Young were elected Commissioners from the Bar's Third and Fourth Divisions, respectively. Commission members serve three-year terms, while presidents serve for one year.

The Bar also welcomed Elizabeth Wright as the new Executive Director and Nancy Sylvester as the new General Counsel.

### Notice of Petition for Reinstatement to the Utah State Bar by John Mark Edwards

Pursuant to Rule 11-591(d), Rules of Discipline, Disability, and Sanctions, the Office of Professional Conduct hereby publishes notice of the Petition for Reinstatement (Petition) filed by John Mark Edwards, in *In the Matter of the Discipline of John Mark Edwards*, Third Judicial District Court, Civil No. 180903193. Any individuals wishing to oppose or concur with the Petition are requested to do so within twenty-eight days of the date of this publication by filing notice with the District Court.

## Ethics Issue?

Any member of the Bar in good standing or other person with a significant interest in obtaining an advisory opinion on legal ethics can submit a request in writing to the Utah State Bar Ethics Advisory Opinion Committee. Request shall include a brief description of the facts, a concise statement of the issues presented, and reference to relevant Rules of Professional Conduct, ethics opinions, judicial decisions, and statutes.

To request an opinion, email Committee Chair John Snow at: [JSnow@parsonsbehle.com](mailto:JSnow@parsonsbehle.com).



# 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 April and May. To volunteer, call the Utah State Bar Access to Justice Department at (801) 297-7049.

## Family Justice Center

Steven Averett  
Jim Backman  
Paige Benjamin  
Chuck Carlston  
Dave Duncan  
Michael Harrison  
Brandon Merrill  
Sandi Ness  
Linda F. Smith  
Babata Sonnenberg  
Nancy Van Slooten  
Rachel Whipple  
Cristina Wood

## Private Guardian ad Litem

Bryce Froerer  
Nadine Hansen  
Allison Librett  
Orson West

## Pro Se Debt Collection Calendar

Hilary Adkins  
Geena Arata  
Mark Baer  
Pamela Beatse  
Anna Christiansen  
Ted Cundick  
Jeff Daybell  
Blake Faulkner  
John Francis  
Leslie Francis  
Greg Gunn  
Aro Han  
Jarom Harrison  
Britten Hepworth  
Nathan Jackson  
Zach Lindley  
Lauren Malner  
Amy McDonald  
Chase Nielsen  
Christopher Sanders  
George Sutton  
Natalie White

\*Special thanks to Kirton  
McConkie and Parsons  
Behle & Latimer for their  
efforts on the Pro Se Debt  
Collection Calendar.

## Pro Se Family Law Calendar

Camille Buhman  
Brent Chipman  
Kim Hansen  
Danielle Hawkes  
Robin Kirkham  
Virginia Sudbury  
Diana Telfer  
Orson West

## Pro Se Immediate Occupancy Calendar

Pamela Beatse  
Daniel Boyer  
Jeff Daybell  
Marcus Degen  
Leslie Francis  
Aro Han  
Brent Huff  
Keil Myers  
Matthew Nepute (3rd-Year  
Practice Intern)  
Lauren Scholnick

## SUBA Talk to a Lawyer Legal Clinic

K. Jake Graff  
Jenny Jones  
Maureen Minson  
Aaron Randall  
Lewis Reece  
Robert Winsor

## Timpanogos Legal Center

Geidy Achecar  
McKenzie Armstrong  
Byron Baron  
Dave Duncan

## Utah Legal Services Pro Bono Case

Amirali Barker  
Brian Burn  
Victoria Cramer  
Carolina Duvanced  
Katie Ellis  
Adam Forsyth  
Aaron Garrett  
Jonathan Good  
M. Darin Hammond  
Ryan James  
Jenni Jones  
Megan Kelly Sybor  
Orlando Luna  
Malone Molgard  
Andres Morelli  
Keli R. Myers  
Brian J. Porter  
Katrina Redd  
Lillian Meredith Reedy  
Jaime Richards  
Jacolby Roemer  
Madison Roemer  
Jason Schow  
Ryan Simpson  
Marca Tanner Brewington  
Scott Thorpe  
Sherri Throop  
John Webster

## Utah Bar's Virtual Legal Clinic

Nathan Anderson  
Ryan Anderson  
Josh Bates  
Jonathan Bench  
Jonathan Benson  
Dan Black  
Mike Black  
Adam Clark  
Jill Coil  
Kimberly Coleman  
John Cooper  
Robert Coursey  
Jessica Couser

Matthew Earl  
Craig Ebert  
Jonathan Ence  
Rebecca Evans  
Thom Gover  
Robert Harrison  
Aaron Hart  
Rosemary Hollinger  
Tyson Horrocks  
Robert Hughes  
Michael Hutchings  
Bethany Jennings  
Gabrielle Jones  
Suzanne Marelius  
Travis Marker  
Gabriela Mena  
Tyler Needham  
Sterling Olander  
Chase Olsen  
Jacob Ong  
Ellen Ostrow  
McKay Ozuna  
Steven Park  
Clifford Parkinson  
Katherine Pepin  
Cecilee Price-Huish  
Jessica Read  
Brian Rothschild  
Chris Sanders  
Alison Satterlee  
Kent Scott  
Thomas Seiler  
Luke Shaw  
Kimberly Sherwin  
Peter Shiozawa  
Farrah Spencer  
Liana Spendlove  
Brandon Stone  
Charles Stormont  
Mike Studebaker  
George Sutton  
Jeff Tuttle  
Alex Vandiver  
Jason Velez  
Kregg Wallace

## 2021 Fall Forum Awards

Nominations will be accepted until Friday, September 24 for awards to be presented at the 2021 Fall Forum. We invite you to nominate a peer who epitomizes excellence in the work they do and sets a higher standard, making the Utah legal community and our society a better place.

“No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude.”

The Fall Forum Awards include:

### **The James Lee, Charlotte Miller, and Paul Moxley Outstanding Mentor Awards**

These awards are designed in the fashion of their namesakes, honoring special individuals who care enough to share their wisdom and guide attorneys along their

personal and professional journeys. Nominate your mentor and thank them for what they have given you.

### **The Distinguished Community Member Award**

This award celebrates outstanding service provided by a member of our community toward the creation of a better public understanding of the legal profession and the administration of justice, the judiciary, or the legislative process.

### **The Professionalism Award**

The Professionalism Award recognizes a lawyer or judge whose deportment in the practice of law represents the highest standards of fairness, integrity, and civility.

Please use the Award Nomination Form at <https://www.utahbar.org/award-nominations> to submit your entry.

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## Attorney Discipline

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

Effective December 15, 2020, the Utah Supreme Court re-numbered and made changes to the Rules of Lawyer and LPP Discipline and Disability and the Standards for Imposing Sanctions. The new rules will be in Chapter 11, Article 5 of the Supreme Court Rules of Professional Practice. The final rule changes reflect the recommended reforms to lawyer discipline and disability proceedings and sanctions contained in the American Bar Association/Office of Professional Conduct Committee's Summary of Recommendations (October 2018).

### ADMONITION

On June 9, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule 1.1 (Competence) of the Rules of Professional Conduct.

#### *In summary:*

The attorney represented a client in an appeal before the Tenth Circuit Court of Appeals. The court sent an opening letter to the attorney with deadlines for filing preliminary documents. The attorney did not file any preliminary documents. The attorney then filed a deficient docketing statement and was notified three times by the court, until they filed a compliant docketing statement. The attorney asked for two extensions of time before filing the opening brief and appendix. The opening brief and appendix were deficient. After requesting an extension of time to refile the brief, the attorney filed another deficient brief. The attorney requested two extensions of time and eventually filed a brief that was compliant and was accepted by the court. The court filed an order to show cause regarding the attorney's conduct in the case. The attorney failed to adequately respond to the order to show cause and a monetary sanction was ordered.

#### *The following mitigating factors warranted a downward departure in discipline:*

Absence of a prior record of discipline; personal or emotional problems; timely good faith effort to rectify the consequences of the misconduct involved; good character or reputation; interim reform in circumstances not involving mental disability or impairment; imposition of other penalties or sanctions.

### ADMONITION

On June 16, 2021, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violating Rule

5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Rules of Professional Conduct.

#### *In summary:*

An attorney entered an appearance in a civil case. A telephonic hearing was scheduled and the attorney participated in the hearing. During the hearing, the attorney's para-professional, who is an attorney licensed in another state but not licensed to practice law in Utah, presented information regarding the client's case to a court commissioner. At the time of the hearing, the para-professional's license to practice in the other state was suspended for non-payment. The attorney did not make the commissioner aware of the para-professional's status in Utah or in the other state. At the conclusion of the hearing, opposing counsel was instructed to prepare the order. Opposing counsel contacted the attorney because they could not find the para-professional's information in order to prepare the order as instructed. The attorney informed opposing counsel that the para-professional was not licensed to practice law in Utah and the commissioner was not aware that the para-professional was not a licensed attorney at the time of the hearing.



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

**801-257-5518 • [DisciplineInfo@UtahBar.org](mailto:DisciplineInfo@UtahBar.org)**

## PUBLIC REPRIMAND

On June 9, 2021, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Public Reprimand against Tineke E. Van Dijk for violating Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

A client retained Ms. Van Dijk to complete an uncontested divorce and qualified domestic relations order (QDRO). Ms. Van Dijk explained to the client that the stipulation would not be signed until ninety days after the petition for divorce was filed. Ms. Van Dijk indicated that this would give her time to prepare the QDRO and pre-submit it to the company so that she could submit it right after the decree was entered.

About a month after the decree was entered, the client contacted Ms. Van Dijk to ask how the QDRO was progressing because the client was not receiving a monthly payout. Ms. Van Dijk responded that she would get right on the QDRO to finish it up. A few weeks later, Ms. Van Dijk contacted the client and indicated she was ready to submit the documents but had some questions and the company would not speak with her. Ms. Van Dijk asked to make arrangements with the client's ex-husband to call the company together. The ex-husband received an email from the human resources provider for the company regarding their QDRO procedures and he forwarded it to Ms. Van Dijk.

Throughout the next few months, the client contacted Ms. Van Dijk several times to ascertain the status of the QDRO because both she and her ex-husband had confirmed with the company that nothing had been submitted. Ms. Van Dijk either did not respond or offered excuses as to why she could not speak with the client. She also failed to follow through with telephone calls she had scheduled with the client.

In response to a text from the ex-husband, Ms. Van Dijk stated that she had submitted the documents and had a question which the company should respond to directly. One month later, she texted the client and stated she would have the final approvable QDRO to the company by a certain day. The client followed up with an email to Ms. Van Dijk expressing her frustration that Ms. Van Dijk

had become unavailable and not called her as she texted that she would. Although the company would not necessarily have call notes indicating Ms. Van Dijk had contacted them by telephone, they did not find any reference to Ms. Van Dijk in any of the correspondence regarding the matter or in any notes they did have.

### *Mitigating Factors:*

Personal or emotional problems; cooperative attitude towards proceedings; interim reform in circumstances not involving mental disability or impairment; remorse; remoteness of prior offences.

## RESIGNATION WITH DISCIPLINE PENDING

On June 16, 2021, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Amanda L. Ulland, for violation of Rule 8.4(b) (Misconduct) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

### *In summary:*

Ms. Ulland pleaded no contest to one count of providing False Information to a Law Enforcement Officer, Government Agencies or Specified Professionals, Utah Code Section 76-8-506, and one count of Emergency Reporting Abuse, Utah Code Section 76-9-202(2)(c).

Ms. Ulland's no contest plea to Utah Code Section 76-8-506 was based on her admission that she knowingly gave to a police officer information concerning the commission of an offense, knowing that the offense did not occur and knowing that she had no information relating to the offense or danger. Ms. Ulland knowingly reported to the police that she had been assaulted by an individual she named. On another occasion, she knowingly reported to police and medical personnel that she had been raped by the same individual. The information was fabricated by Ms. Ulland.

Ms. Ulland's no contest plea to Utah Code Section 76-9-202(2)(c) was based on her admission that she reported an emergency to police, when she knew the reported emergency did not exist.

## DISBARMENT

On June 15, 2021, the Honorable Roger W. Griffin Fourth Judicial District, entered an Order of Disbarment against Tate W. Bennett, disbarring him from the practice of law. The court determined

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that Mr. Bennett violated Rule 1.1 (Competence), Rule 1.3 (Diligence) (Two Counts), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15(c) (Safekeeping Property), Rule 1.16(d) (Declining and Terminating Representation), Rule 3.2 (Expediting Litigation) (Two Counts), Rule 8.1(b) (Bar Admission and Disciplinary Matters) (Five Counts), Rule 8.4(c) (Misconduct) (Two Counts), and Rule 8.4(d) (Misconduct) (Three Counts) of the Rules of Professional Conduct.

*In summary:*

This case involves five matters. In the first matter, Mr. Bennett was appointed to represent a client during criminal proceedings. The client was convicted by a jury. Following the conviction, the client retained appellate counsel who argued that Mr. Bennett was deficient in providing counsel because he failed to seek a directed verdict, failed to seek a jury instruction regarding a key element in the case and failed to request a provision on the verdict form of a lesser included offense. After appellate counsel filed the brief raising these issues, the assistant Utah Attorney General handling the appeal on behalf of the State agreed to a joint motion to reverse the client's conviction. Appellate counsel also pursued a malpractice action against Mr. Bennett for his deficient representation of the client. In the malpractice action, the trial court was required to address Mr. Bennett's failure to timely respond to discovery obligations and ultimately sanctioned him by deeming the client's requests for admissions admitted and ordered him to pay attorneys' fees. The court found that Mr. Bennett had been persistently dilatory. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Bennett. Mr. Bennett did not timely respond to the NOIC. Mr. Bennett received a Notice of Screening Panel Hearing. Mr. Bennett did not attend the hearing before the Screening Panel.

In the second matter, a client retained Mr. Bennett to file a stipulated annulment petition on her behalf. The client's spouse had previously been a criminal client of Mr. Bennett's. The client paid Mr. Bennett a retainer and filing fee. Mr. Bennett directed the client to deposit the funds into his personal bank account. At the time that the funds were deposited, there was no evidence provided to the client that Mr. Bennett had completed any work on her behalf. Mr. Bennett commingled the client's funds with his own personal funds. Mr. Bennett did not file an annulment on behalf of the client. Mr. Bennett

actively deceived the client by telling her he had filed the annulment petition and that he had served the petition on her husband. The client requested a refund of her filing fee but Mr. Bennett did not respond. Mr. Bennett ceased communicating with the client while her case was yet unresolved. The OPC sent a NOIC to Mr. Bennett. Mr. Bennett did not timely respond to the NOIC. Mr. Bennett received a Notice of Screening Panel Hearing. Mr. Bennett did not attend the hearing before the Screening Panel.

In the third matter, the OPC received information from a former client alleging that Mr. Bennett was deficient in his representation. The OPC sent a NOIC to Mr. Bennett. Mr. Bennett did not timely respond to the NOIC. Mr. Bennett received a Notice of Screening Panel Hearing. Mr. Bennett did not attend the hearing before the Screening Panel.

In the fourth matter, Mr. Bennett sent a letter to officials where he expressed interest in applying for a vacant county attorney position. Included in his application was a copy of his resume. In the resume, Mr. Bennett claimed he was a member of his law school's law review. During an interview with some of the county commissioners, Mr. Bennett represented that he had been on law review. One of the commissioners asked that Mr. Bennett provide documentation of this honor. In response to the request, Mr. Bennett falsified various documents to make it appear that he was a member of the law review, including altering a masthead to replace one author's name with his own. Mr. Bennett then provided these documents to the commissioner. The OPC sent a NOIC to Mr. Bennett. Mr. Bennett did not timely respond to the NOIC.

In the fifth matter, Mr. Bennett was appointed to represent a client during appeal proceedings where he was trial counsel. Mr. Bennett failed to timely file a docketing statement. Over the course of two years, the court of appeals had problems with Mr. Bennett's noncompliance regarding a variety of deadlines and court orders. Eventually, the court of appeals issued an order to show cause to appear and explain his actions. Mr. Bennett failed to appear. The court of appeals issued an order disqualifying Mr. Bennett from appearing before the Utah Court of Appeals and the Utah Supreme Court for a period of three years. The OPC sent a NOIC to Mr. Bennett. Mr. Bennett did not timely respond to the NOIC.

### Join us for the OPC Ethics School

**September 15, 2021**

**6 hrs. CLE Credit,**

**including at least 5 hrs. Ethics**

(The remaining hour will be either Prof/Civ or Lawyer Wellness.)

Cost: \$100 on or before September 6, \$120 thereafter.

Sign up at: [opcutah.org](http://opcutah.org)

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# Need Ethics Help?



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

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

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



[ethicshotline@utahbar.org](mailto:ethicshotline@utahbar.org)

## President's Message: Hindsight is 2020

by Grant Miller

Last year presented extraordinary circumstances for everyone. In many ways, we are still reeling from the impacts of the pandemic. While navigating the waters of 2020 was a special kind of difficult, I could not be any prouder of Utah's young lawyers. Despite an environment that prohibited the efforts of just about anyone to accomplish anything, the leadership and resolve of our young lawyers allowed for YLD's signature programs not only to endure, but to evolve to meet modern technological demands.

I wish I could outline all the accomplishments we made last year, but I am hoping a highlight reel will suffice. For example, our High School Debate Committee sponsored a completely virtual debate tournament, which was judged by volunteer young lawyers. The tournament included numerous high schools from across the Wasatch Front. The High School Debate Committee showed enduring support for these students by awarding thirteen scholarships for summer debate camp.

The young lawyers in the public service arm of YLD found innovative ways to help the community in areas where it mattered most. The Wills For Heroes Committee adapted to the difficult environment by teaming up with Utah's law schools to provide estate plans for first responders in a virtual setting. On September 8th, during the windstorm, Wills For Heroes and the J. Reuben Clark Law School hosted a statewide event with eighty volunteer attorneys who served 111 first responders and their spouses. In early spring of this year, Wills For Heroes and the Pro Bono Initiative at the S.J. Quinney College of Law provided estate plans to first responders in Cache County and rural areas across northern Utah. The team hosted two virtual events, which were staffed by a combined total of fifteen volunteers who served approximately eighty first responders and their spouses. These extraordinary partnerships allowed Wills For Heroes to break the geographic tether to physical locations and expand our reach.

The other branches of YLD still thrived despite 2020's

tribulations. Social distancing made YLD's social events tricky, but it did not stop our various committees from innovating new ways for young lawyers to stay in touch. Our Social Activities Committee hosted a virtual trivia night in October and a virtual restaurant night in March. In November, our Fit2Practice Committee held a virtual yoga event. In December, the YLD Board even figured out how to make Secret Santa happen online. In April, our Seat at the Table Committee hosted a well-attended CLE on running for office, with a panel of young lawyers in politics who outlined what it takes to juggle legal practice with political campaigning.

Moving forward, YLD is focused on rebuilding and reengaging. The pandemic took a toll on all legal organizations, and social involvement in the legal community plummeted. Our goal is to fully reengage Utah's young lawyers, so that our new generation of attorneys will have access to Bar resources, service opportunities, and each other. The digital and remote methodology we built out last year must be integrated into our classic infrastructure. If we can accomplish this by the end of the coming year, YLD will no longer be hindered by the vast geographic distances of the state. With hybrid interfacing, utilizing both remote and in-person events, YLD will have a new capacity and ability that we have never had before.

I am grateful that we have endured the sharp vicissitudes of last year and are well poised to confront the challenges of the year to come.

*GRANT MILLER is President of the Young Lawyer Division and is a trial attorney at the Salt Lake Legal Defender Association.*





## Message from the Paralegal Division

by Greg Wayment

**I**ntroducing the 2021–2022 Board of Directors of the Paralegal Division:

**Chair, UPL Liaison – Shalise McKinlay** has worked in the legal field for over twenty-five years. She is currently a paralegal at Dominion Energy Questar Corporation. Shalise also works as an adjudication officer for Park City Municipal. She attended Weber State University and obtained her paralegal certification through the University of Phoenix.

**Chair-Elect, CLE Committee – Katie Lawyer** works in the Civil Litigation Division of the Utah Attorney General specializing in personal injury. Katie earned her Paralegal Studies degree from LDS Business College (now Ensign College) and earned a Bachelor's degree in History and Political Science from Colorado State University. She currently advises the Paralegal Studies program at Ensign College.

**Region I Director, Parliamentarian – Rheané Swenson, LPP, CP** has been a paralegal at Peck Hadfield Baxter & Moore since July 2015. Rheané is a Licensed Paralegal Practitioner (LPP) with licensure in Family Law, Debt Collection, and Landlord/Tenant disputes. She is a Certified Paralegal (CP) through the National Association of Legal Assistants (NALA) and recently earned her Associates Degree in Legal Studies from Southern Utah University.

**Region II Director, Secretary – Peter Vanderhooft, LPP, CP** is a Licensed Paralegal Practitioner in the state of Utah, with licensure in Family Law, Debt Collections, and Landlord/Tenant disputes. Peter is a Certified Paralegal through NALA and is a current member of the Utah Paralegal Association (UPA). He currently works as a paralegal at Parsons Behle & Latimer.

**Region III Director, Membership Chair – Cheri Christensen** has been a paralegal at Sean Nobmann PC law firm since 2017. She obtained her Bachelor of Science degree in Paralegal Studies in 2016 from Broadview University.

**Region IV Director, Ethics & Professional Service Chair – Suzanne Potts** is a paralegal at Injury Smart Law. Suzanne is a mediator having completed basic Mediation Training through the Utah State Bar, Alternative Dispute Resolution in 2001. She is a past member of LAAU, having served as the Southern Regional Director.

**Director at Large, Finance Officer – Tally Burke** is currently a paralegal at Merit Medical Systems. She received her Legal Assistant Certificate in 1996, Associate of Applied Science with a Major in Paralegal Studies in 1997, and her Associate of Science in 2005; all from Salt Lake Community College where she has also been an adjunct professor. In 2006 she received her Bachelor's degree in Criminal Justice from Weber State University.

**Director at Large, CLE Committee – Lexi Balling, ACP** started her paralegal career in 2012 working in insurance defense and construction defect litigation and now works for eXp Realty. She graduated with her paralegal certificate from LDS Business College (now Ensign College) and obtained her Certified Paralegal and ACP from NALA soon after. Her career came full circle when she was asked to teach the Paralegal Procedures course at Ensign College three years ago.

**Director at Large, Education Co-Chair – Kathryn Shelton** assists attorneys at Dorsey & Whitney in the Corporate Governance & Compliance, Mergers & Acquisitions, Investment Funds, Investment Management, and Capital Markets groups. Kathryn has previously served as Chair of the Paralegal Division.

**Director at Large, Education Co-Chair – Julie Eriksson** has been a long-standing member of the Paralegal Division, serving as the division's chair in 2008–2009 and in various other positions on the board. She recently joined the Salt Lake City Attorney's Office.

**Director at Large, Community Service Chair – Jennifer Hunter** is currently employed at Workman Nydegger. She received her Bachelor's degree in Sociology and Criminology from the University of Utah in 2011 and has a Master's degree in Professional and Paralegal Studies from George Washington University.

**Director at Large, Marketing Chair – Shari Dirksen** is currently employed as a paralegal at Parr Brown Gee & Loveless. Shari graduated from the University of Utah with a Bachelor of Science degree in Sociology and Political Science.

**Immediate Past-Chair, Communications – Tonya Wright, LPP, ACP** is a litigation paralegal at Peck Hadfield Baxter & Moore. She is currently studying to take Part II of the Certified Paralegal exam through NALA.





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

**September 8, 2021 | 12:00–1:00 pm**

**1 hr. Self-Study CLE Credit**

**Charitable Planning with Real Estate Webinar.**

Presented by The Community Foundation of Utah & The Utah State Bar. Understanding what legal and practical issues exist with respect to donations of real estate. FREE.

**September 15, 2021**

**6 hrs. CLE Credit, including 5 hrs. Ethics**

**OPC Ethics School.**

Cost: \$100 before September 6, \$120 thereafter. Sign up at: [opc.utah.org](http://opc.utah.org).

**October 15 & 16, 2021 | 1:00–4:00 pm**

**Litigation Section CLE & Off-Road Shenanigans.**

**October 19, 2021 | Full Day Conference**

UTAH STATE BAR.



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**All content is subject to change. For the most current CLE information and offerings, please visit:**  
**<https://www.utahbar.org/cle/#calendar>**

**TO ACCESS ONLINE CLE EVENTS:**

Go to [utahbar.org](http://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](mailto:cle@utahbar.org).**

# Classified Ads

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## NOTICE

### **ISO of a will or trust for Melvin Leon Redmond, Sr.**

Believed to have been created in early 2000s in Salt Lake County. Please contact Brad C. Smith, Stevenson Smith Hood Knudson, 4605 Harrison Blvd, Suite 301, Ogden, Utah 84403, 801.394.4573, [brad@sshklawyers.com](mailto:brad@sshklawyers.com).

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Charles M. Bennett, PO Box 6, Draper, Utah 84020. Fellow, the American College of Trust & Estate Counsel; former Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar. Email: [cmb@cmblawyer.com](mailto:cmb@cmblawyer.com).

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### **GRAPHIC DESIGN & COPYWRITING SERVICES.**

Laniece Roberts has been the graphic designer for the Utah State Bar and the *Utah Bar Journal* for 20+ years, as well as the layout editor for the *Utah Trial Journal* for 12+ years. She can assist you with: logo design and rebranding, print or online advertisements, invitations, announcements, brochures, books, newsletters, magazines, etc. Professional or personal projects are welcome. For quick examples of her work, see the ads on pages 8, 10, 11, 13, 23, 27, 39, 40, 64, and 66 of this *Bar Journal*. You can reach Laniece at: [LanieceRoberts@gmail.com](mailto:LanieceRoberts@gmail.com) or 801-910-0085.



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