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Jan/Feb 2024

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Cover Photo

Frozen Bridal Veil Falls by Utah paralegal Cheri Christensen.

CHERI CHRISTENSEN is a paralegal working for Sean Nobmann, a solo attorney in Springville, Utah. She received her bachelor's degree in Paralegal Studies from Broadview University. She currently sits on the board of the Paralegal Division of the Utah State Bar. Asked about her photo, Cheri said, "My hiking buddies and I (four old ladies) have hiked all over Utah and Yellowstone. We have a yearly tradition to go somewhere close to home on New Year's Day, and this time we went to Bridal Veil Falls near Provo. As you can see in the photo, some people enjoy climbing up the frozen falls. They didn't fall, which is good. According to my boss, frozen water falls almost never carry liability insurance."

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

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Utah Bar JOURNAL

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$ 9.1 million	–	Surgical error
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$ 5 million	–	Misdiagnosis / wrongful death
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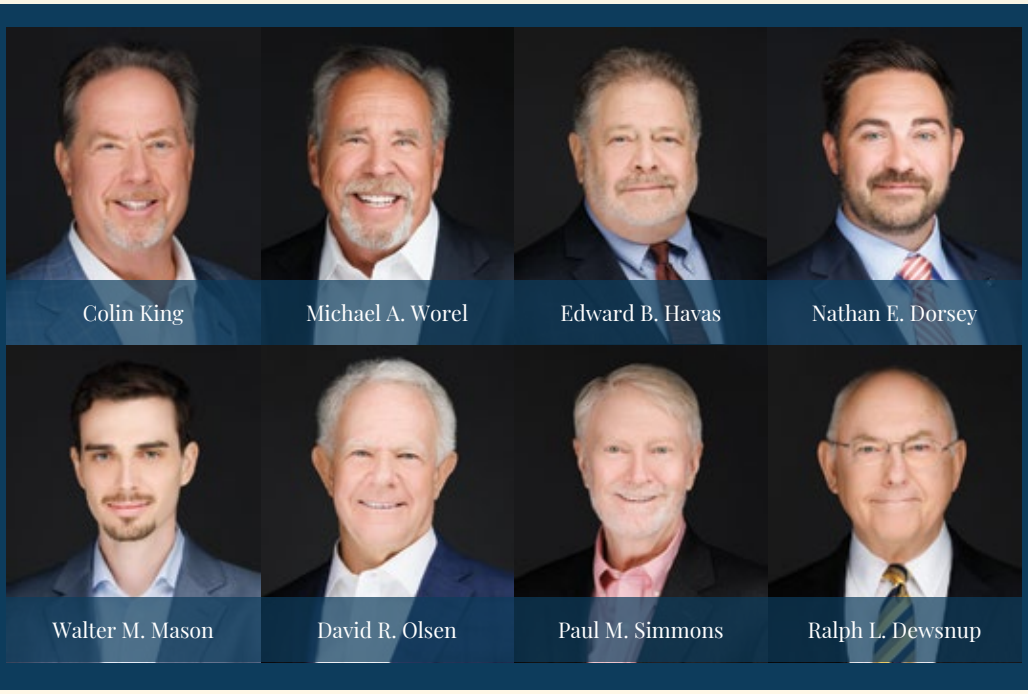
$ 2.75 million	–	Surgical error
$ 1.7 million	–	Hospital wrongful death
$ 1.5 million	–	Birth injury



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GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

CITATION FORMAT: All citations must follow *The Bluebook* format, and must be included in the body of the article. Authors may choose to use the "cleaned up" or "quotation simplified" device with citations that are otherwise *Bluebook* compliant. Any such use must be consistent with the guidance offered in *State v. Patton*, 2023 UT App 33, ¶10 n.3.

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

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

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

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

AUTHOR(S): Author(s) must include with all submissions a sentence identifying their place of employment. Unless otherwise expressly stated, the views expressed are understood to be those of the author(s) only. Author(s) are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via email, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

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

LETTER SUBMISSION GUIDELINES

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

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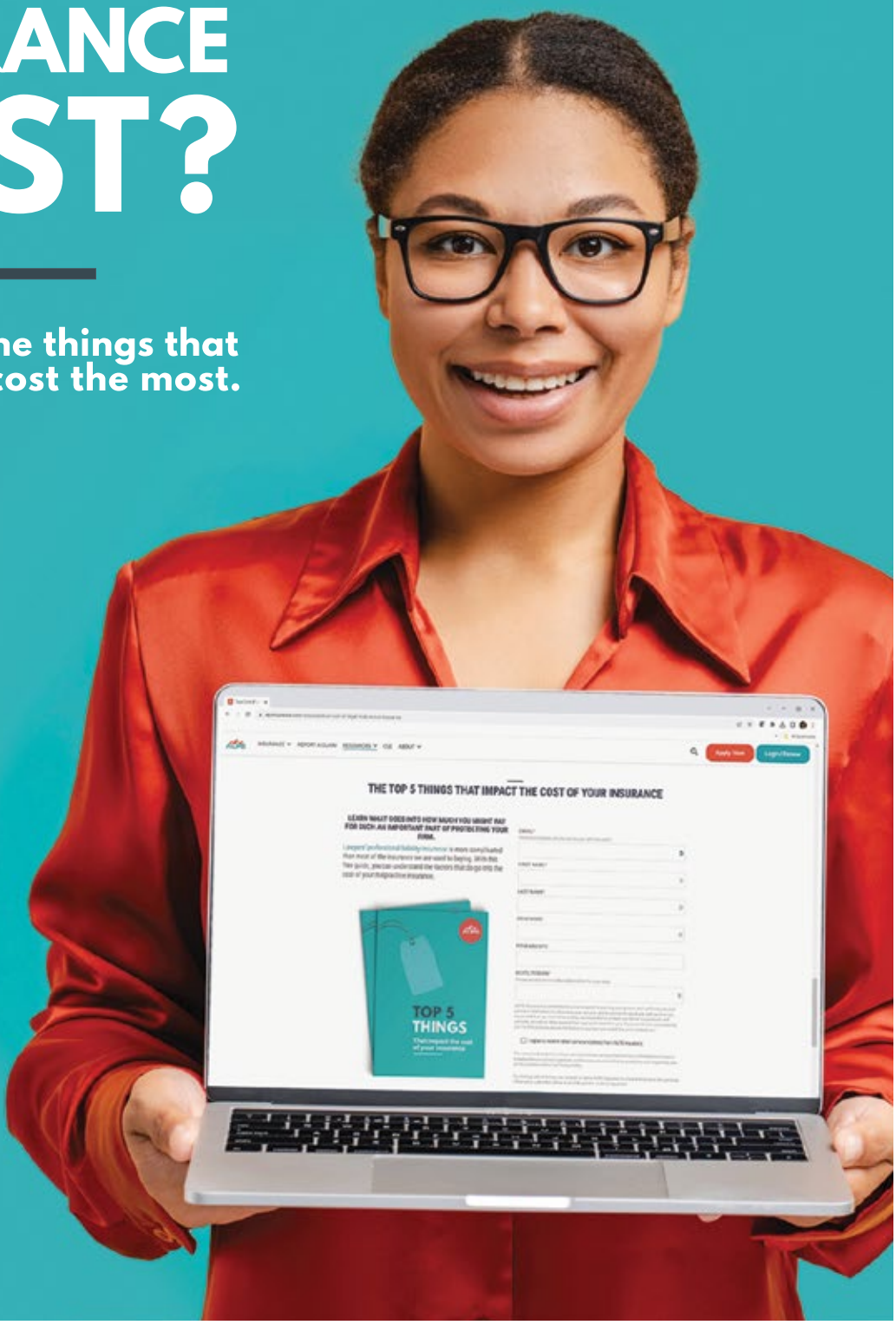

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Getting Together at the Fall Forum Was a Great Privilege

by Erik A. Christiansen

On November 17, 2023, the Utah State Bar held its annual Fall Forum at the Little America Hotel. This year, the event was sold out, with more than 350 lawyers attending the event. While the pandemic proved that the Utah State Bar could continue to offer high-quality CLE remotely, in my opinion, nothing beats the in-person CLE offered by the Utah State Bar. Not only is there the opportunity to interact with a plethora of gifted speakers, but maybe even more importantly, there is the opportunity to catch up with other lawyers and judges in the community. I personally enjoyed running into several former colleagues from my law firm who have moved in-house at various corporations, as well as the chance to interact with some retired lawyers. The integrated Utah State Bar is uniquely situated to bring lawyers, judges, and community leaders together to foster civility, create a better legal community, and improve the lives of lawyers in Utah. In states like California, where the bar has been split in pieces – a voluntary association and a mandatory regulatory agency – the number, quality, and frequency of in-person events has dramatically decreased. The integrated Bar in Utah is our secret sauce, which gives lawyers, judges, and community leaders the unique ability to dialogue, to communicate, to learn, and to enjoy time with one another as a community. It is my fervent belief that the integrated Utah State Bar is critical to maintaining civility among Utah lawyers and to helping foster camaraderie, friendship, and empathy in our Bar.

The speakers this year at the Fall Forum – the theme of which was "Professionalism & Adapting to AI: Oh, How our Practice Stays the Same, and Oh, How it Changes!" – were fantastic and served as role models of civility and professionalism. The keynote speaker in the morning, retired federal judge the Honorable Paul W. Grimm, who is the David F. Levi Professor of the Practice of Law and Director of the Bolch Judicial Institute at Duke Law School, emphasized the importance lawyers and the rule of law play in our functioning democratic republic. In a non-partisan way, Judge Grimm reminded Utah lawyers of how integral we are to the healthy functioning of our government and our judicial system. Picking up on the theme of the Fall Forum, the next panel, a Conversation for the Bench and the Bar: Ethics & Tips for Practitioners, featured retired Chief Justice (and Utah legend) the Honorable Christine Durham, Magistrate Judge Cecilia Romero, the Utah Bar Director of Wellness Martha Knudson, and Utah Bar Commissioner Mark O. Morris. The panel focused on the importance of lawyer well-being, civility, professionalism, legal reform, and the growing reality of artificial intelligence. Following the Bench & Bar panel, Utah lawyers were treated to a warm, humorous, and gracious panel of lawyer-legislators, namely Senator Kirk Cullimore, Senator Todd Weiler, Senator Daniel McCay, and Representative Brady Brammer. The Utah legislative panel provided a preview of many issues that they anticipate in the upcoming legislative session and provided great insight about how lawyers can contribute to the administration of justice by participating in the legislative process.

The lunch keynote speaker, Tami Pyfer, who is Chief of Staff and Project Director for UNITE, provided an insightful and brilliant presentation to help educate lawyers about the language we use to debate difficult subjects, and how to bring dignity and honor to our interactions with other lawyers, the judiciary, and the public. Pyfer made a strong case for treating everyone with dignity, no matter what, and avoiding the demonization of other people, which often divides people into camps of us and them. Pyfer, a non-lawyer, provided useful examples of how we can all bring civility and an open mind to our interactions and dialogue with individuals who have different opinions from our own.

After lunch, there were several breakout session tracks, including a track on the future of artificial intelligence, a track on resilience as a component of lawyer competence, a track on the Dignity Index for Utah Lawyers, and the Utah State Bar Litigation Section's Annual Trial Academy, run by the tireless CLE organizer Jon Hafen. A giant thank you to Bennett Borden, Martha Knudson,

Matthew Jackson, Cheylynn Hayman, Engels Tejeda, Tami Pyfer, Sean Morris, Jim Huffman, Bryan McCurdy, Robert Cummings, Kristen Bartels, Thomas Brunker, Jason Perry, Christopher Von Maack, Professor Christopher Peterson, Jon Hafen, Bryon Benevento, the Honorable James Gardner, the Honorable Kristine Johnson, Jenifer Tomchak, the Honorable Paul Warner, and Kristin Baughman for providing incredibly high quality afternoon breakout sessions. I know I learned a lot from all these speakers and panelists.

And while I am on the subject of saying thanks, a giant "thank you" to Michelle Oldroyd, Lydia Kane, Elizabeth Wright, Matthew Page, David Clark, and Ian Christensen for their incredible hard work in making the Fall Forum professional, polished, and insightful. The staff at the Utah State Bar works hard every day to meet the needs of Utah lawyers, to provide you the very best in high quality CLE and services, and to contribute in meaningful ways to bettering the lives of Utah lawyers and citizens. In my role as President of the Utah State Bar, I have the great privilege of working everyday with the Bar's professional staff, and I watch them work tirelessly and passionately to bring Utah lawyers the very best in service and professionalism. We are all incredibly lucky to have the Utah State Bar staff working to improve the practice of law in Utah.

Finally, a big thank you to all the judges who participated and attended the event, and to the more than 350 Utah lawyers who attended the Fall Forum. We could not provide high quality events like the Fall Forum without the active participation of the judiciary and the enthusiasm of Utah lawyers. Please put the Utah State Bar's Spring Convention on your calendar for March 14–16, 2024, in St. George, Utah. President-elect Cara Tangaro is already working incredibly hard to make the Spring Convention the very best it can be, including by bringing together a fantastic panel of judges, and focusing on her own area of practice in criminal law. I anticipate it will be another sold-out event that you will not want to miss. Again, to steal from one of my childhood heroes, Warren Miller, if you don't go this year, you'll just be another year older when you do go. See you in St. George.

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An Update on Utah's Rule Providing for Water Law Case Assignments to Judges Who Have Been Educated About Water Law

by Senior Judge Kate Appleby

Utah's Judicial Council in 2022 adopted a rule establishing district court water judges. *See* Rule 6-104, Code of Judicial Administration. The rule provides that the council will designate volunteer district court judges to serve as water judges and establishes a procedure for assigning to them certain kinds of water law cases. Parties in the initial stages of litigation may request such an assignment. A request made later in the litigation may result in the case being reassigned at the discretion of the judge who already has the case. Judges who volunteer as water judges either will have, or will cultivate, the expertise necessary to adjudicate these often complex and long-in-duration cases. This article describes developments since the rule was adopted, and since my first article on this topic. *See* Kate Appleby, *Views from the Bench*, 35 Utah B.J. 14 (Sept./Oct. 2022).[1]

Upon a party's request, actions filed under Utah Code Title 73 (Water and Irrigation), Chapters 3 and 4 (Appropriation and Determination of Water Rights), will be assigned to a water law judge. For cases initiated before the rule went into effect, the judge assigned to the case may grant a motion to reassign the case to a water judge. If a case appears to warrant reassignment because it involves complex water law issues not arising under Chapter 3 or 4, a party may request its reassignment to a water judge. If such a request is made, the supervising water judge – who is elected by the other water judges – decides whether to transfer the case. The supervising judge also has administrative responsibilities such as coordinating the water judges' schedules and assigning projects to the water law clerk, Juliana Slurzberg, who is trained in water law.

The rule provides that at least three judges will be designated as water judges, but more than three judges have volunteered for this important assignment. Judges who have or who have had water law cases, and judges interested in learning about water science and working on some of the most challenging issues of our times, have stepped forward. At present, there are nine, from districts throughout the state. They are: Judge Angela Fonnesbeck (First District); Judge Blaine Rawson (Second District); Judge Jennifer Valencia (Second District); Judge Laura Scott (Third District); Judge Patrick Corum (Third District); Judge Kent Holmberg (Third District); Judge Kraig Powell (Fourth District); Judge Ann Marie McIff Allen (Fifth District); and Judge Gregory Lamb (Eighth District). Judge Valencia is the current supervising judge.

As of the time of writing, eight cases have been assigned to water law judges, two of which were assigned at the parties' request even before the rule went into effect; none of the eight were reassigned under Rule 6-104. That may not seem like many cases, but remember that water law general adjudications involve many – sometimes thousands – of potential claimants.

Specialized training for water judges began soon after the rule went into effect. The supervising judge, working with the Standing Committee on Judicial Branch Education and the Utah Judicial Institute, has arranged for dedicated training sessions

KATE APPLEBY is a Senior Judge of the Utah Court of Appeals. Judge Appleby is also a Convener of Dividing the Waters.

as well as break-out sessions at the annual and district court conferences. Online materials and webinars have been offered through the courts' learning management system, and decisions addressing matters of first impression will be posted online.

Other resources for water judges are available through the National Judicial College (NJC) and its *Dividing the Waters* (DTW) program. For more than thirty years, *DTW* has developed and provided education, information resources, and a network of experienced water judges to all judicial officers adjudicating complex water cases. Drawing on *DTW*'s expertise, the NJC has worked with state supreme court justices from across the West to develop the emerging interstate "Western Judicial Consortium on Water Law." The consortium will offer resources to judges who have little or no experience in water law. The NJC is working with its production partner, Southern Utah University, to develop an online, on-demand course for judges, which will eliminate time, distance, and expense barriers to water law education. The course is designed in a series of modules, which judges will be able to watch either in sequence or by viewing a particular module relevant to a particular aspect of a case. The Utah Judicial Council and other western states have contributed funds to produce the first module, on hydrology, which will be available in early 2024. The NJC intends to seek funding from public and private sources to create subsequent modules.

Utah now has a mechanism for assigning certain types of water law cases to judges who have been trained in the law and science of water. In coming months, internal court data and stakeholder observations will be important to assess how well the rule is working. Meanwhile, the designation of these judges and the specialized training they receive help to improve the resolution of an important category of cases.

1. The Utah judicial water law program has received some national attention. *See, e.g.*, Zahra Hirji, *Water Fights in US West Inspire New Judge Training*, Bloomberg News (Oct. 27, 2023, 5:00 AM), https://www.bloomberg.com/news/articles/2023-10-27/water-fights-inspire-new-judge-trainings-jobs-in-us-west.

An Introduction to the Utah Appellate Courts' Pilot Pro Bono Program

by Nick Stiles

Legal Services Corporation's most recent Justice Gap Survey reported that 74% of low-income American households experienced at least one civil legal issue in the last year. The most common areas of legal needs are consumer issues, healthcare issues, and issues relating to income maintenance. Utah is not immune from this statistic, and organizations like the Legal Aid Society of Salt Lake City, Utah Legal Services, and the Utah State Bar's Access to Justice Office are working tirelessly to assist our community members facing these challenges. The assistance, however, often does not extend to issues that make their way to the appellate courts.

Recognizing an absence of services at the appellate level, a growing number of federal and state courts have created appellate pro bono programs. A full list of programs and information about the various models can be found in the ABA's *Manual for Pro Bono Appeals Programs*. Am. Bar Assoc. Jud. Div. Council of App. Laws., Manual on Pro Bono Appeals Programs for State Court Appeals (3d. ed. 2022), available at: https://www.americanbar.org/content/dam/aba/publications/judicial_division/cal-probono-manual-third-edition.pdf. Most appellate pro bono programs operate similarly to other pro bono programs, with the main exception being that the courts tend to play a larger role in their administration. Programs vary in size and model but largely follow similar processes – individuals either apply online or are invited to file a motion requesting pro bono counsel, are income qualified, and then if the case meets local standards for an eligible case, are assigned a volunteer attorney.

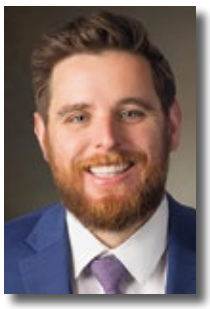
In the summer of 2023, the Utah Board of Appellate Court Judges voted to follow other jurisdictions and created a pilot appellate pro bono program to study local feasibility. For reference, there were 1,133 cases filed in the Utah Court of Appeals and Utah Supreme Court in 2022. Pro se parties initiated 291 of the 1,133 cases. These cases included civil appeals, extraordinary writs, domestic civil appeals, writs of certiorari, post-conviction relief cases, administrative agency appeals, interlocutory appeals, and criminal appeals where there was no constitutional right to counsel.

The Utah Appellate Courts Pilot Pro Bono Program mirrors programs in other states of similar size. In preparation for the Program's launch, the appellate courts worked with the Utah State Bar's Pro Bono Commission to get the program accredited as a Signature Program of the Utah State Bar. The impact of this accreditation is that volunteers for the program receive training and are covered by the Utah State Bar's secondary malpractice insurance coverage for approved pro bono programs.

The training for the program kicked off in November when the appellate courts and the Appellate Practice Section of the Utah State Bar offered the first three training sessions in a six-part CLE series created to help train attorney volunteers. The CLE series is geared toward teaching the foundations of appellate practice, and the first three sessions covered an introduction to the appellate process, appellate brief writing, and appellate oral argument. The second three sessions of the CLE Series are set in January and will cover topics related to appellate mediation, domestic cases on appeal, and standards of review. The aim of the CLE series is to provide attorney volunteers with a foundational understanding of the appellate process that they can use to assist them as they work through their pro bono cases.

Getting a roster of willing and able volunteer attorneys is only

NICK STILES has been the Appellate Court Administrator for the Utah Judiciary since February 2021.



one piece of the puzzle, and internally the appellate courts have created a committee composed of key appellate court employees to help screen cases that may be appropriate for pro bono counsel. The program does not have set guidelines for case types that should be considered. In fact, the only blanket prohibition is cases where a constitutional or statutory right to counsel exists. There are a few considerations the committee will evaluate when reviewing cases including: whether the case would benefit from clear and concise briefing, whether the case type is one that historically has escaped appellate review, and whether the case has the potential to have a positive impact on access to justice. After a case is selected, the program will confirm that the party meets the income guidelines and then the program's committee will assign the case to a willing attorney.

As an incentive for volunteer attorneys in the program, the appellate courts will strive to hold oral arguments in cases where pro bono counsel is appointed so that the attorneys participating in the program will have the benefit of that experience. The appellate courts are very excited about the new program and welcome any interested attorneys to email the Appellate Court Administrator, Nick Stiles, at Nicks@utcourts.gov.

A huge thank you to Michelle Oldroyd and Lydia Kane of the Utah State Bar's CLE Office, Pamela Beatse of the Pro Bono Commission, the leadership of the Appellate Practice Section, Kim Paulding of the Utah Bar Foundation, and CLE instructors Carol Funk, Alexa Mareschal, Julie Nelson, Emily Adams, and Freyja Johnson.

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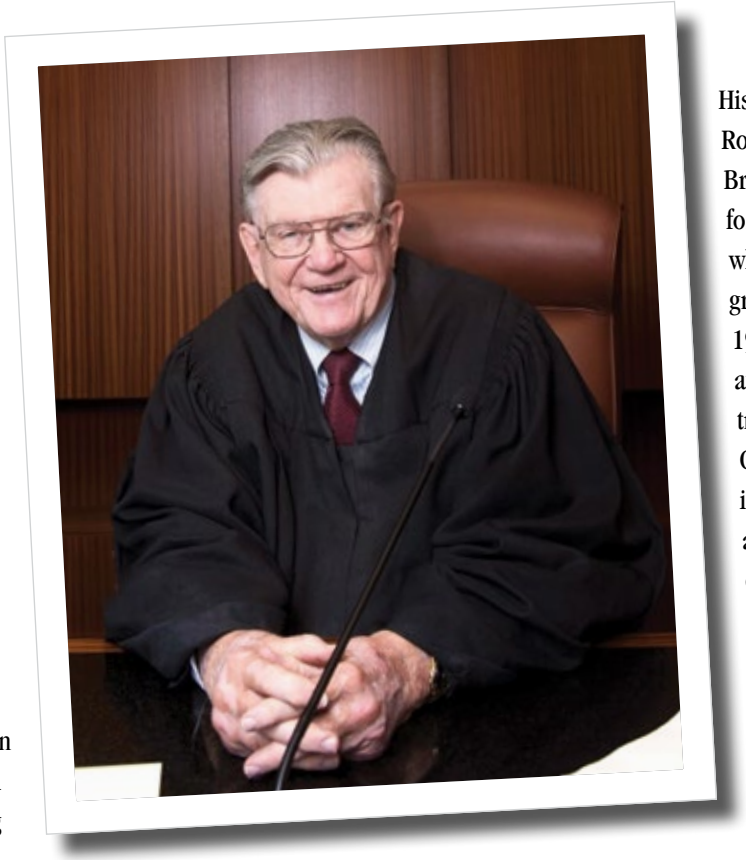
Judge Bruce Jenkins: A Tribute

by James Holbrook



I first met Bruce Jenkins in 1974 when he was the U.S. Bankruptcy Referee, and I was clerking for Judge Willis Ritter. Because we lived in the same neighborhood and worked in the federal courthouse, we often rode the bus together to work, talking about and exchanging books. In 1978, he became a U.S. District Court Judge, and I became an Assistant U.S. Attorney. I tried a half dozen civil and criminal cases in his courtroom until I became a full-time law faculty member in 2002. After that, we had lunch several times a year, including twice earlier this year.

Bruce was born on May 27, 1927. His father was a schoolteacher, and his mother, who was highly skilled in shorthand and typing, wanted to be a stay-at-home mom. During the Great Depression, his father had difficulty in finding jobs teaching, so his mother ended up going to work to support the family for a time.

Bruce grew up in a blue-collar neighborhood on the near westside of Salt Lake City. "Nice people, generally, struggling like the rest of us," as he described it years later. When he was ten years old, his father had a job teaching at Lincoln Junior High and his mother had saved enough money for a down payment on a house near the University of Utah. On his first day as a student in the 5th grade at Wasatch Elementary, he wore a new pair of bib overalls to school and discovered he was the only kid in school who wore bib overalls.

His parents were Franklin Roosevelt Democrats and Bruce campaigned with them for Roosevelt for President when he was five years old. He graduated from East High in 1944 and enlisted in the Navy at age seventeen. After basic training and service in California, the war had ended in the Pacific, and Bruce was assigned to a freighter carrying beer to the Marshall Islands. The ship stopped at Bikini, then Wake, and Kwajalein Islands, delivering beer. Later, these all were test sites of atomic bomb experiments.

Bruce left the Navy in 1946 and, with financial support from the G.I. Bill, enrolled as an undergraduate at the University of Utah. He became active in debate and was on the university's debate team, which is how he met Peggy Watkins, who grew up in New York and became his wife.

Professor G. Homer Durham was chair of the Political Science Department at the University of Utah at that time, and Bruce was a political science major, intending to get a Ph.D. in political science and teach at a university. Bruce's brother had graduated

JAMES HOLBROOK practiced as a trial lawyer for twenty-eight years. He has mediated and arbitrated over a thousand disputes dealing with a wide range of legal issues. He was a long-time friend to Judge Bruce Jenkins and has been asked by the Jenkins family to edit the Judge's voluminous speeches.

from law school at Georgetown University. He and his mother persuaded Bruce to go to law school instead of getting a Ph.D. Bruce enrolled in the College of Law at the University of Utah, took many law classes from Professor Willis Ritter, and graduated in 1952.

Bruce and Peggy were married in September 1952, and bought a small house in Glendale in Salt Lake City's central westside. Glendale was filled with small tract homes with lots of veterans and their young families. In 1959, they moved to a larger home in Rose Park, which was also a working-class neighborhood on Salt Lake City's near westside.

In 1952, Bruce started a solo law practice and was briefly in the Utah Attorney General's Office. In 1954, he worked half-days for four years in the Salt Lake County Attorney's Office prosecuting misdemeanors and preparing felony bind-over reports, first for County Attorney Ted Moss and then for County Attorney Aldon Anderson.

In 1958, the Utah Democratic Party sent Bruce's name to Governor Dewey Clyde to fill a vacant state senate seat. With a strong recommendation from G. Homer Durham, Governor Clyde appointed Bruce to represent Salt Lake City's westside Senate District 5. He ran for election in 1960 and won by a three-to-one margin. He ran successfully again in 1964 and, following the Lyndon Johnson landside, became Senate President in 1965 when Calvin Rampton was elected governor. Bruce wrote and sponsored a bill in 1965 that created the Commission on the Reorganization of the Elective Branch of Government, known as the "Little Hoover Commission."

Governor Rampton appointed Joe Rosenblatt, a prominent Utah industrialist, as chair and Bruce as vice chair of the commission, which consolidated over 200 state agencies that reported directly to the governor into departments whose heads became the governor's executive cabinet. One of the people who read about the commission's success was Bruce's former law professor Willis Ritter who had become a federal trial judge in 1950. Judge Ritter contacted Bruce in 1965 and asked him to fill a vacancy in the Bankruptcy Court. When Ritter died in March 1978, President Jimmy Carter appointed Bruce to the federal district bench to replace Judge Ritter.

Bruce handled thousands of cases as a bankruptcy referee and judge, and hundreds – if not thousands more – as a federal district court judge. He had a reputation as a very scholarly, careful, thoughtful judicial opinion writer. One case, for which Bruce is internationally known, is *Irene Allen, et al. v. United States of America*, 588 F. Supp. 247 (D. Utah 1984). It was a case that was randomly assigned to Bruce involving an action brought by 1,192 plaintiffs, later called "downwinders," against the federal government. The plaintiffs claimed they had suffered injury as the result of the fallout of low-level radiation from the atomic bomb tests conducted in the Nevada desert at Yucca Flats.

The *Allen* plaintiffs had incurred various kinds of cancer and leukemia. Bruce tried the case, sitting without a jury, using "bellwether" plaintiffs to represent the huge group of plaintiffs. The trial took thirteen weeks, and it took sixteen months to produce the opinion in the case, which was based on findings of fact and conclusions of law showing the connections between the radioactive fallout and the successful plaintiffs' cancers and leukemias. The first paragraph of the *Allen* opinion says:

> In a sense, this case began in the mind of a thoughtful resident of Greece named Democritus some 2500 years ago. In response to a question put two centuries earlier by a compatriot, Thales, concerning the fundamental nature of matter, Democritus suggested the idea of atoms. This case is concerned with atoms, with government, with people, with

legal relationships, and with social values.

Allen, 588 F. Supp. at 257.

The *Allen* case was appealed by the government to the Tenth Circuit Court of Appeals, which reversed Bruce's decision in favor of the plaintiffs, using the "discretionary function" exception in the Federal Tort Claims Act, and deciding that atomic testing is a discretionary function of the United States for which the government is not liable. *See Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987).

Soon after the *Allen* case was appealed, Bruce spoke to the Salt Lake County Bar at one of their then-regular luncheons. Referring to the appeal, Bruce said, "Well, now the Tenth Circuit has the case. And every night I say a little prayer. You can reverse me. Or you can affirm me. But for God's sake don't remand."

The Tenth Circuit Court of Appeals did not address the hundreds of pages of scientific and legal analysis in Bruce's opinion, which Bruce believed became the footing for Congress later legislatively compensating downwinders, in an amount that now exceeds a billion dollars. The reversal was not Bruce's preferred outcome, but ultimately in a sense, he was affirmed.

In 1974, Bruce wrote:

> The judge is a steward of power. He holds power from the people in trust for the use of people. The function of the courtroom lawyer is to convince the judge to use or to refuse to use such power. The mission of the courtroom lawyer is to have the power of the people, personified by the judge, stand with his client. The process by which such convincing best takes place is an educational process and it is in this sense that the lawyer is a teacher and the judge is his pupil.

Bruce S. Jenkins, *The Lawyer as an Educator*, 2 UTAH B.J. (Spring 1974). On March 13, 2006, I had the honor of interviewing Bruce for the Tenth Circuit's oral history project. Bruce summed up the interview with two things important to him:

> Well, I love what I do, and I always have, wherever I was. Quite frankly, I thoroughly enjoy what I do. I like to feel like I can contribute to assisting people in resolving problems that they've been incapable of resolving for themselves. And that's a challenging work, but that's a fascinating work and I love to do that.
>
> … I need to say here, I should right now, I've had wonderful colleagues to work with. I've had wonderful clerks who've been assistants, who themselves are gifted people. My office staff here is family. My colleagues, I couldn't say nicer things about. They've been wonderful. Those who've departed, [Aldon] Anderson and [Sherman] Christensen, even Willis, have all been kind to me.

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Prioritizing Mental Health in the Legal Field: Utah's 2023 Milestones

by The Utah Bar Well-Being Committee for the Legal Profession

The year 2023 marked a significant step forward in the quest to prioritize mental health and well-being within Utah's legal profession. Under the leadership of the Well-Being Committee for the Legal Profession (WCLP) and with strong support from the Utah Supreme Court and the Utah State Bar Commission, a series of groundbreaking initiatives were launched. These efforts aimed at decreasing stigma, improving access to mental health resources, and embedding the importance of caring for our mental, physical, and emotional health into the culture of well-being among legal practitioners. This article explores the WCLP's key achievements in 2023 and how they are beginning to make a positive difference to the legal landscape in Utah.

Working to Reduce Stigma and Remove Barriers to Seeking Help by Encouraging the Revision of the Character & Fitness Application for Utah's Bar Exam

In the context of this article, stigma refers to the adverse attitudes historically prevalent in the legal profession associated with mental health issues, substance abuse, and related challenges. Chief among its consequences, a stigma of this kind can dissuade individuals from seeking the assistance and support they require.

Both in Utah and nationally, law students report shying away from seeking therapy, entering recovery, or using other healing modalities due to fear they will have to report it on a character and fitness application for state bar admittance. In 2023, the WCLP worked closely with the Utah State Bar's Admissions Counsel Emily Lee to recommend that the Utah Supreme Court approve the removal of affirmative questions seeking information about mental health struggle. The Utah Supreme Court agreed, helping aspiring lawyers to prioritize their mental health and well-being and seek treatment free from the fear of professional backlash.

Partnering with Lawyers Helping Lawyers and Bar Sections to Share Stigma Reducing Stories

Our efforts to reduce stigma have included emphasizing that mental health is something that we all share. We all have mental health all the time, and it exists on a spectrum between thriving and surviving and everywhere in between. It's a key life and professional asset that's important for all of us to care for and nurture.

Sharing authentic and vulnerable stories can be a powerful tool in breaking down stigma. In 2023, we transformed the traditional CLE panel of experts into a platform for personal stories about how challenges can impact the practice of law. Seasoned attorneys, known more for their litigation, transactional, and leadership skills than personal revelations, stepped up to the microphone to share their journeys through the challenges of anxiety, substance use, grief, suicidal ideation, and the high-pressure demands of legal practice.

In each of these sessions, a respectful silence would fall over the room. Marked by the struggles and triumphs of our colleagues, these stories struck a chord with many in the audience and become a collective moment of vulnerability, strength, and human resilience in the face of challenge that are helping to break down the barriers of stigma and foster a sense of community and understanding.

Acknowledging Well-Being in Legal Competence: Comment 9 added to Rule 1.01 of the Utah Code of Judicial Administration

Successfully creating a culture that supports our mental health and well-being requires that it become part of the fabric of our profession. To that end, the WCLP's efforts in 2023 included working with the Supreme Court's Advisory Committee on the Rules of Professional Conduct to successfully suggest the adoption of comment 9 to our duty of competency under Rule 1.1 of the Utah Rules of Professional Conduct. This addition underscores the crucial role our mental, emotional, and physical health plays in maintaining competence.

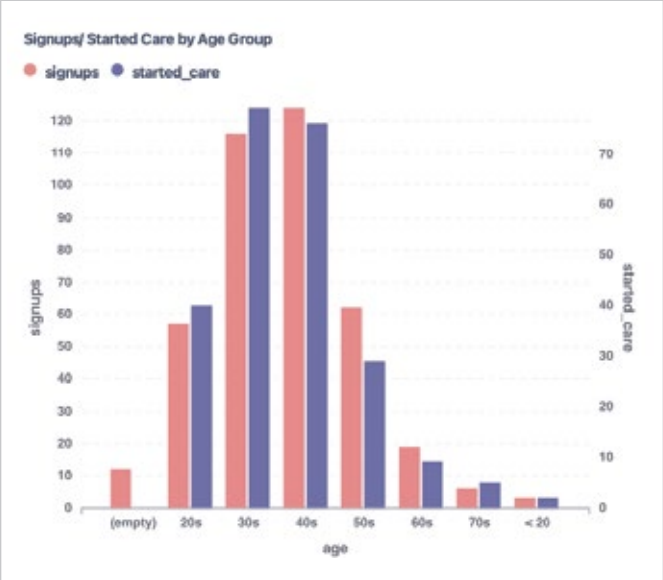
Comment 9 states:

> Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law and compliance with the standards of professionalism and civility. Resources supporting lawyer well-being are available through the Utah State Bar.

Utah R. Pro. Cond. 1.1, cmt. [9].

Providing Optional Direct Therapeutic Support Through New Partnership with Tava Health

In a significant move, the WCLP partnered with Utah-based company Tava Health to provide access to high-quality therapy to active lawyers, Licensed Paralegal Practitioners (LPPs), Paralegal Division members, and their dependents. Launching on February 1, 2023, nine months later (as of this writing) Tava has reported 1,576 therapy sessions completed and projects over 2,200 by January 31, 2024. Members of all ages are taking advantage of this resource, using it for things like anxiety, depression, stress, family/relational matters, grief, and other matters.



Therapy is a very useful modality for many lawyers. Long-time lawyer, former Bar Commissioner, and WCLP co-chair Andrew M. Morse has benefited from therapy for nearly forty years and regularly encourages all lawyers and judges to consider using Tava to help themselves through therapy.

Expanding Mental Well-Being with Unmind

The WCLP also helped the Utah Bar integrate Unmind into our member benefits. Unmind was chosen because it has something valuable to offer everyone, no matter where you are on the well-being spectrum. According to Andrew Morse, "Unmind is my steady aid and resource. It introduced me to meditation and taught me better ways to cope. Everyone should at least try it."

Unmind is an evidence-based mental well-being platform accessible by app that offers our members over 400 different tools, courses, and tracking across all domains of well-being including health, sleep, coping, fulfillment, connection, calmness, and happiness. Garnering over 1,000 regular Utah Bar Member users as of November 4, 2023, Unmind provides essential tools for mental health management, reflecting the WCLP's commitment to offering comprehensive support to Utah's legal community.

The Unmind and Tava Health benefits are world class, and we've been pleased that the Utah State Courts have followed the Bar's example and are now offering the same benefits to all Utah Court employees.

Enriching Knowledge through Continuing Legal Education (CLE)

The WCLP actively expanded CLE programs in 2023, focusing primarily on storytelling and educating legal professionals about managing burnout and how to leverage the Bar's new well-being resources. Over fifty CLE sessions were conducted in diverse settings, including all three Bar conventions, Bar section meetings, affinity Bars, private law firms, federal governmental agencies, the Office of the Attorney General, the Office of the US Attorney for the District of Utah, and local prosecutors and defense attorney populations. We intend to continue to expand our CLE reach in 2024.

Proactive Education with Law School Collaborations

Recognizing the importance of early intervention, the WCLP also partnered with Utah's law schools to educate new and existing students about the importance of mental health and to provide them with access to Unmind. This proactive approach ensures that future legal professionals are equipped from the start of their careers to prioritize their mental well-being.

Acknowledging Crucial Support

The WCLP's 2023 achievements were bolstered by the unwavering support of the Utah State Bar Commission, its leadership, our WCLP co-chair Andrew Morse, and the Utah Supreme Court, notably Justice Paige Petersen, our other co-chair. Their dedication to cultivating a well-being-focused legal culture has been pivotal in these progressive changes.

Conclusion

In 2023, the WCLP significantly reshaped the approach to mental health within Utah's legal practice. By removing barriers, enhancing therapy access, and broadening educational resources, the WCLP has been instrumental in creating a more supportive, understanding, and resilient legal community. The elimination of mental health inquiries from the Bar exam, acknowledgment of mental health in legal competence, and availability of therapeutic resources like Tava Health and Unmind have collectively fostered a more empathetic legal environment.

The expansion of CLE programs and collaboration with law schools ensure ongoing education and resource access for legal professionals, reinforcing the notion that mental health is a continuum requiring constant attention and care. As we move into 2024, the WCLP's initiatives are guiding legal professionals towards a culture where we prioritize our mental health and well-being, and seek help when needed.

As we reflect on the progress made, the efforts of the WCLP stand as a beacon for other jurisdictions, showcasing a future for the legal profession that is not only brighter and more compassionate but also more attuned to the mental well-being of its members. We still have a long way to go and see the strides made in 2023 as foundational steps towards a healthier, more resilient legal community in Utah and beyond.

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A Practitioner's Guide to Utah Rule of Evidence 404(b)

by Louisa M. A. Heiny & Marielle Forrest

Like most people, jurors are prone to making propensity inferences. When presented with evidence that a person has acted a particular way in the past, they might conclude that the person is more likely to have acted that way again. Utah Rule of Evidence 404(b), like its federal counterpart, anticipates this very human reaction and prohibits the admission of a "crime, wrong, or other act" when offered to "prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Despite Rule 404(b)'s protections against other acts evidence, such evidence is often admissible when proffered for a non-propensity purpose.

This article outlines evidence that triggers Rule 404(b), the three-part test used to determine the admissibility of evidence proffered under 404(b), the demise of the doctrine of chances as an ancillary route to admissibility of other acts evidence, mitigation strategies available when 404(b) evidence is admitted, and appellate challenges to the admission of 404(b) evidence.

TRIGGERING 404(b)

Although 404(b) evidence is often called "prior bad acts" evidence, that phrase is a misnomer. Rule 404(b) applies to a range of acts, whether prior or subsequent to the event at issue. However, its applicability may depend on who performed the conduct; when it occurred; whether the conduct constitutes a "crime, wrong, or other act"; and whether the conduct is sufficiently distinct from the crime charged.

"A Person's Character"

Under its plain language, Rule 404(b) restricts other acts evidence "to prove a person's character." *See* UTAH R. EVID. 404(b). Although the rule does not define "person," the Utah Supreme Court has defined it to include "an 'accused,' a 'victim,' or a 'witness.'" *State v. Vargas*, 2001 UT 5, ¶ 31, 20 P.3d 271. Whether groups, entities, or corporations are considered a "person" under 404(b) is "an unsettled area of law." *Carter v. State*, 2019 UT 12, ¶ 162, 439 P.3d 61. *But see Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶ 74, 65 P.3d 1134 (analyzing 404(b) evidence admitted against a corporation).

Prior and Future

Although evidence offered under Rule 404(b) is often referred to as *prior* bad act evidence, "the rule itself makes no reference to 'prior' acts." *State v. Main*, 2021 UT App 81, ¶ 18 n.7, 494 P.3d 1056. Accordingly, 404(b) evidence does not need to occur before the conduct at issue. *State v. Von Niederhausern*, 2018 UT App 149, ¶ 21 & n.6, 427 P.3d 1277.

Crimes, Wrongs, and Other Acts

Because Rule 404(b) applies not just to "crimes," but also to "wrongs" and "other acts," evidence of a defendant's charged conduct may trigger the rule even if the defendant was ultimately acquitted. *See, e.g., State v. Hildreth*, 2010 UT App 209, ¶ 44, 238 P.3d 444. Moreover, 404(b) evidence does not need to be criminal or even an act, *State v. Hood*, 2018 UT App 236, ¶¶ 25–28, 438 P.3d 54, and the rule is triggered by evidence of a person's character, "good or bad." *State v. Richins*, 2021 UT 50, ¶ 10 n.2, 496 P.3d 158, *abrogated on other grounds*

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by State v. Green, 2023 UT 10, 532 P.3d 930.

"Other" Acts and the Intrinsic Evidence Doctrine

By its plain language, Rule 404(b) applies only to *other* acts, that is, to "evidence that is *extrinsic* to the crime charged." *State v. Lucero*, 2014 UT 15, ¶ 14 n.7, 328 P.3d 841 (cleaned up), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. Evidence that is "part of a single criminal episode" or "inextricably intertwined" with the charged crime is considered evidence of this crime, or "intrinsic." *Main*, 2021 UT App 81, ¶ 18. Like all evidence, intrinsic evidence is subject to Rules 402 and 403, but sidesteps 404(b)'s non-propensity purpose requirement. Care should be taken to avoid interpreting the intrinsic evidence doctrine too broadly, as it could swallow Rule 404(b) and allow the admission of impermissible propensity evidence. *See id.* ¶ 23 n.9.

RULE 404(b)'S THREE-PART TEST

Other acts evidence is admissible only if it surmounts Rule 404(b)'s three-part test: the evidence must be offered for a non-propensity purpose, it must be relevant, and its risk of unfair prejudice must not substantially outweigh its probative value. As the court proceeds through this analysis, it is governed by the rule's plain language, with no presumption of admissibility or inadmissibility. *State v. Lowther*, 2017 UT 34, ¶ 30 n.40, 398 P.3d 1032.

A Non-Propensity Purpose

Assuming evidence is extrinsic and meets the other requirements to trigger 404(b), the proffering party must make a threshold showing: that there is "a plausible, avowed purpose" for the evidence beyond its propensity purpose. *Thornton*, 2017 UT 9, ¶ 58. Rule 404(b)(2) articulates nine non-propensity purposes, although that list "is not exhaustive." *State v. S.H.*, 2002 UT 118, ¶ 28, 62 P.3d 444.

Motive

Utah case law is replete with motive arguments built atop 404(b) evidence. In proffering evidence of motive, the State asks the jury to infer why a defendant would be driven to carry out a crime, rather than merely asking the jury to infer that the defendant has a propensity for bad behavior. In this sense, motive evidence is not solely a propensity inference. The State frequently proffers 404(b) evidence to demonstrate a defendant's motive in cases of murder and sexual abuse. *See, e.g., State v. Bisner*, 2001 UT 99, ¶¶ 56–57, 37 P.3d 1073 (murder); *State v. Burke*, 2011 UT App 168, ¶¶ 30–32, 256 P.3d 1102 (sexual abuse).

Opportunity

Prior bad acts may speak to a defendant's opportunity to commit a crime when those acts demonstrate that the defendant had "the resources, the skill, the experience, the organization, or [the necessary] contacts" to commit the crime in question. Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:32 (4th ed. 2021) (cleaned up). While opportunity is, in Utah, an infrequently proffered non-propensity purpose, there are some noteworthy cases. In *State v. Jamison*, the State invoked 404(b) evidence of the defendant robbing a change machine to show that he had the opportunity – the skill and experience – to do it again. 767 P.2d 134, 135–37 (Utah Ct. App. 1989), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997). And, in *Thornton*, evidence that a defendant supplied a young victim's mother "with drugs and encouraged her involvement in prostitution" tended to demonstrate the defendant's "position of power or trust in the household" and, thus, the defendant's "opportunity" to sexually abuse the victim. 2017 UT 9, ¶¶ 16–17.

Intent

Bad act evidence may be used to establish a defendant's intent to commit a crime. Where a defendant has acted a particular way before, a jury may infer that the defendant intended for the particular result to come about on this occasion. *See, e.g., State v. Northcutt*, 2008 UT App 357, ¶¶ 7–8, 195 P.3d 499; *Von Niederhausern*, 2018 UT App 149, ¶¶ 11, 19–21. However, there may be little daylight between that inference and a propensity inference. *See United States v. Beechum*, 582 F.2d 898, 920 (5th Cir. 1978) (Goldberg, J., dissenting); *accord* David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215, 217 (2011).

Plan and Preparation

Evidence may demonstrate a "plan" when it tends to show the defendant's "mental resolve to do something," and it may demonstrate "preparation" when it tends to show that the defendant had a plan and took steps toward it. Mueller & Kirkpatrick, § 4:35. Evidence that delineates how to commit a crime or establishes a pattern of conduct may be admissible for either of these purposes. *See, e.g., Northcutt*, 2006 UT App 269, ¶¶ 2, 22–23; *State v. Grant*, 2021 UT App 104, ¶¶ 16, 19, 39, 499 P.3d 176. Plan and preparation often, but not always, go hand in hand. *Compare State v. Reed*, 2000 UT 68, ¶ 26, 8 P.3d 1025, *with State v. Tibbets*, 2012 UT App 95, ¶¶ 2–6, 275 P.3d 1047.

Knowledge

Rule 404(b) evidence may be used to establish a defendant's knowledge and, in turn, state of mind. Knowledge evidence may demonstrate, for instance, that the defendant acted "knowingly, recklessly, or with criminal negligence." *State v. Gallegos*, 2020 UT App 162, ¶ 25, 479 P.3d 631 (cleaned up); *see also State v. Nielsen*, 2012 UT App 2, ¶¶ 3–4, 271 P.3d 817 (upholding admission of evidence of infant death by co-sleeping, to show defendant's "knowledge of the risks related to co-sleeping with the infant"). It may also rebut a defendant's alleged lack of knowledge. *See Gallegos*, 2020 UT App 162, ¶¶ 26–27. But it is insufficient "merely to incant the word 'knowledge'" without explaining "what type of knowledge the evidence tends to show in a particular case." *Id.* ¶ 24.

Identity

The State may proffer 404(b) evidence to establish that the defendant, and not someone else, committed the crime. This may come in the form of testimony from a witness who saw the defendant commit the crime, *see State v. Barriga*, 2019 UT App 178, ¶¶ 7–8, 454 P.3d 63, or it may require an inferential step linking the defendant to the crime, for instance through a murder weapon, *see State v. Reece*, 2015 UT 45, ¶ 58, 349 P.3d 712, crime scene, *see State v. Whitbeck*, 2018 UT App 88, ¶¶ 25–26, 427 P.3d 381, or modus operandi, *see State v. Lopez*, 2018 UT 5, ¶ 39, 417 P.3d 116. Importantly, the State may introduce evidence to establish identity only if identity is contested. *See Barriga*, 2019 UT App 178, ¶ 15. If defense counsel is concerned about what the State may introduce through this evidentiary avenue, counsel should avoid placing identity at issue.

Absence of Mistake/Lack of Accident

The State may also proffer 404(b) evidence to rebut a defendant's claim that the charged conduct occurred by mistake or accident. Allegations of mistake or accident commonly arise in cases of physical abuse and sexual assault. *See, e.g., Northcutt*, 2008 UT App 357, ¶¶ 6–8 (physical abuse); *Burke*, 2011 UT App 168, ¶ 31 (sexual assault). Another example of evidence proffered to establish lack of accident is *State v. Graham*, wherein the court of appeals concluded evidence that the defendant previously violated parole by fleeing the state was admissible to dispel defendant's claim that his flight was an accident. 2013 UT App 72, ¶¶ 19–21, 299 P.3d 644. As in the case of identity, the State may only use evidence to show lack of mistake when a

defendant claims the opposite. If the defense is concerned about what the State may introduce, counsel should not argue the issue, and the defendant should avoid alleging mistake or accident leading up to, and at every stage in, the litigation. *See State v. Fedorowicz*, 2002 UT 67, ¶ 30, 52 P.3d 1194.

Other Non-Propensity Purposes

Rule 404(b)'s list of non-propensity purposes is not exhaustive. Utah courts have upheld the admission of evidence for a host of non-listed purposes, including: to explain a victim's reluctance to report a crime, *see State v. Gonzales*, 2005 UT 72, ¶ 70, 125 P.3d 878; to demonstrate an ongoing pattern of abusing a child, *see State v. Killpack*, 2008 UT 49, ¶ 46, 191 P.3d 17; to show a lack of consent, *see State v. Nelson-Waggoner*, 2000 UT 59, ¶ 24, 6 P.3d 1120; to demonstrate a defendant's modus operandi, *see State v. Marchet*, 2012 UT App 267, ¶¶ 8–10, 287 P.3d 490; to present a narrative, *see Hood*, 2018 UT App 236, ¶¶ 40–41; to "explain the dynamics" of a relationship, *see id.*; to rebut a fabrication defense, *see State v. Balfour*, 2018 UT App 79, ¶¶ 29–31, 418 P.3d 79; to impeach, *see State v. S.H.*, 2002 UT 118, ¶ 28, 62 P.3d 444; to prove a material fact, *see State v. Tanner*, 675 P.2d 539, 546 (Utah 1983), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997); to respond to inflammatory evidence, *see State v. Mahi*, 2005 UT App 494, ¶ 17, 125 P.3d 103; to establish self-defense, *see State v. Howell*, 649 P.2d 91, 96 (Utah 1982), and to "paint a factual picture of the context in which the events in question transpired," *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah Ct. App. 1991).

When 404(b) evidence involves the same victim as the charged crime, an ongoing pattern of behavior can invite a propensity inference. The Utah Supreme Court has concluded, however, that a specific pattern of behavior toward a child victim is distinct from "a general disposition for violence or ill-will towards all children." *Reed*, 2000 UT 68, ¶ 26, (cleaned up). Additionally, evidence admitted for "context" may arguably be reframed as intrinsic evidence and skip a 404(b) analysis, although – just like intrinsic evidence – context evidence raises concerns about gutting the rule altogether. *See Morgan*, 813 P.2d at 1212 (Orme, J., concurring).

Step Two: Relevance

Evidence proffered under Rule 404(b) must clear a second evidentiary hurdle: relevance. Indeed, "[b]ad acts evidence, like all evidence, must be relevant or it is inadmissible." *Nelson-Waggoner*, 2000 UT 59, ¶ 26; *see also* UTAH R. EVID. 402. Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable than it would be without the evidence. UTAH R. EVID. 401. It "need not conclusively prove the ultimate fact in issue." *State v. Miranda*, 2017 UT App 203, ¶ 34, 407 P.3d 1033 (cleaned up). In the context of prior bad act evidence, "[t]o be admissible, other bad acts evidence must be relevant to the noncharacter purpose for which it is offered." *State v. Klenz*, 2018 UT App 201, ¶ 47, 437 P.3d 504.

Rule 402's relevance requirement is "extremely broad," *Miranda*, 2017 UT App 203, ¶ 34, presenting a "low bar" under normal circumstances, *Gallegos*, 2020 UT App 162, ¶ 16, and an even lower bar under 404(b) circumstances. In the context of 404(b), "the rule 402 relevance inquiry will generally be not much more than a formality." *State v. Fredrick*, 2019 UT App 152, ¶ 43, 450 P.3d 1154. Indeed, "propensity evidence is excluded not because it has no probative value but because it has too much." *Gallegos*, 2020 UT App 162, ¶ 22 (cleaned up).

Thus, for the most part, "[t]here is no question" propensity evidence is relevant. *Id.* That said, as applied to 404(b) evidence, Rule 402 is not toothless. Evidence that is broadly relevant but irrelevant to the purported non-propensity purpose will not be admitted. *See, e.g., State v. Rackham*, 2016 UT App 167, ¶ 17, 381 P.3d 1161; *State v. Havatone*, 2008 UT App 133, ¶¶ 10–11, 183 P.3d 257.

Step Three: More Probative than Prejudicial

The final hurdle to admitting 404(b) evidence is rule 403. Rule 403 requires the court to find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. This analysis "is essential to preserv[ing] the integrity of Rule 404(b)." *State v. Verde*, 2012 UT 60, ¶ 18, 296 P.3d 673, *abrogated on other grounds by State v. Green*, 2023 UT 10, 532 P.3d 930.

As applied here, Rule 403 requires the court to "identify the likely inferences the jury would draw from" the 404(b) evidence, "ask if the evidence's probative value (the jury drawing a permissible inference) [is] substantially outweighed by the danger of unfair prejudice (the jury drawing an impermissible inference)," and if it is, exclude the evidence. *Richins*, 2021 UT 50, ¶ 103.

In *State v. Shickles*, the Utah Supreme Court adopted six factors to assist courts in determining whether 404(b) evidence's risk of unfair prejudice substantially outweighs its probative value: "the strength of the evidence as to the commission of the other crime," "the similarities between the crimes," "the interval of time that has elapsed between the crimes," "the need for the evidence," "the efficacy of alternative proof," and "the degree to which the evidence probably will rouse the jury to overmastering hostility." *See* 760 P.2d 291, 295–96 (Utah 1988) (cleaned up), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997). The sixth factor – overmastering hostility – has since been repudiated, and the five remaining factors must not be applied formalistically. *See State v. Cuttler*, 2015 UT 95, ¶¶ 20–21, 367 P.3d 981.

Strength

When weighing the probative value of 404(b) evidence, a court may consider "the strength of the evidence as to the commission of the … crime." *See Shickles*, 760 P.2d at 295 (cleaned up). Strong evidence is testimonial evidence given in-person from a reliable and credible witness. *See, e.g., State v. Pedersen*, 2010 UT App 38, ¶ 38, 227 P.3d 1264; *State v. Denos*, 2013 UT App 192, ¶ 24, 319 P.3d 699. Although strong 404(b) evidence suggests "probative value and weighs in favor of admission," *State v. Rackham*, 2016 UT App 167, ¶ 19, 381 P.3d 1161, evidence does not need to be strong to be admitted, *see State v. Nelson-Waggoner*, 2000 UT 59, ¶ 31, 6 P.3d 1120.

Similarity

"[S]triking" similarities between the prior conduct and the conduct at issue strengthens 404(b) evidence's probative value and weighs in favor of admissibility, *Denos*, 2013 UT App 192, ¶ 25, while a lack of similarity "undermines the probative value of the Rule 404(b) evidence and weighs against admission." *Rackham*, 2016 UT App 167, ¶ 20. In *Denos*, for instance, prior evidence that the defendant assaulted three other victims "while they were unconscious or asleep" was "strikingly similar" to the assault in question – which occurred while the victim was unconscious – and this weighed in favor of the evidence's admission. 2013 UT App 192, ¶ 25. However, it may be hard to pin down whether acts are sufficiently similar. The mere fact that the 404(b) conduct and the conduct at issue are both the same type of offense is insufficient. *See, e.g., State v. Burke*, 2011 UT App 168, ¶ 36, 256 P.3d 1102. Similarities must go beyond the general nature of the offense and map onto patterns within the conduct itself. *See, e.g., State v. Northcutt*, 2008 UT App 357, ¶ 12, 195 P.3d 499.

Timing

"[P]rior bad acts must be reasonably close in time to the crime charged." *Id.* ¶ 13 (cleaned up). The probative value of an offense "committed on the same night, within hours" of the offense in question, "strongly favors admission." *Burke*, 2011 UT App 168, ¶ 37. In general, ten weeks is "brief," *Nelson-Waggoner*, 2000 UT 59, ¶ 29, and less than five months is "small." *Denos*, 2013 UT App 192, ¶ 26. That said, the question of timing is fact dependent and frequently turns on other *Shickles* factors. *Compare State v. Nielsen*, 2012 UT App 2, ¶ 19, 271 P.3d 817 (finding a three-year interval "sufficiently proximate to be highly probative" where the evidence was "reasonably strong" and similar to the crime in question), *with Hildreth*, 2010 UT App 209, ¶ 44, ¶ 44 n.12 (finding "a full three years" between the prior bad acts and the incident now in question to be "fairly lengthy" where the evidence was "relatively weak" and "not sufficiently similar"). Factor two – similarity – is especially important, as courts tolerate longer time intervals when 404(b) conduct is similar to the conduct charged, *see State v. Widdison*, 2001 UT 60, ¶ 51, 28 P.3d 1278, and "virtually guarantee[] admittance" when a short interval of time is paired with strong similarity, *see Nelson-Waggoner*, 2000 UT 59, ¶ 29 (cleaned up).

Necessity and Alternative Proof

Shickles delineates "necessity" and "alternative proof" as two distinct factors, but they function as inverse companions. In general, evidence is necessary when there is no effective alternative. *State v. Losee*, 2012 UT App 213, ¶ 25, 283 P.3d 1055. Evidence is unnecessary when there is alternative proof that is "as strong, if not stronger" than the 404(b) evidence. *State v. Bair*, 2012 UT App 106, ¶ 27, 275 P.3d 1050.

Like all *Shickles* factors, neither necessity nor alternative proof is dispositive. Where 404(b) evidence is neither necessary nor the only means of proof, a court may still find a 403 analysis to weigh in favor of the evidence's admission. *See, e.g., Northcutt*, 2008 UT App 357, ¶¶ 16–17. Conversely, where no other evidence but the 404(b) evidence is available, the court may find the "necessity" and "efficacy of alternative proof" factors to weigh against admitting the evidence. *See Bair*, 2012 UT App 106, ¶ 27.

Other Considerations

While the *Shickles* factors are useful, courts must always be governed by the plain language of Rule 403, "nothing more and nothing less." *State v. Cuttler*, 2015 UT 95, ¶ 2, 367 P.3d 981. Accordingly, courts are not required to apply all or any of the *Shickles* factors, *see id.* ¶ 19; *State v. Van Oostendorp*, 2017 UT App 85, ¶ 29, 397 P.3d 877, and courts "may consider any appropriate factor," *Shickles* or not, *Fredrick*, 2019 UT App 152, ¶ 44. A court may consider, for instance, whether steps could be taken to sanitize the evidence by "removing salacious and extraneous details," or whether a limiting instruction would be helpful. *See State v. Richins*, 2021 UT 50, ¶ 106. These curative steps help mitigate prejudice, though they do not always tip the 403 scale toward admissibility. *See id.* A court may also consider whether the evidence is of a prior conviction, which "carries with it [a] unique and inherent danger of unfair prejudice." *Robinson v. Taylor*, 2015 UT 69, ¶ 33, 356 P.3d 1230.

DOCTRINE OF CHANCES

Employed "in cases that involve rare events happening with unusual frequency," the doctrine of chances rested "on the objective improbability of the same rare misfortune befalling one individual over and over." *State v. Lane*, 2019 UT App 86, ¶ 18, 444 P.3d 553 (cleaned up). It functioned as an additional non-propensity purpose for which the proponent could ground admission of evidence, and was sometimes analyzed under 404(b) and sometimes analyzed as a related, but independent, route to admissibility.

However, the doctrine – derived from the common law and without a statutory basis in Utah – was subject to frequent attacks. Parties argued it was confusing, difficult to apply, and deviated "from the plain text of the rules of evidence." *State v. Green*, 2023 UT 10, ¶ 49, 532 P.3d 930. As a result, in 2023, the Utah Supreme Court was "persuaded that the doctrine should be abandoned in favor of a plain-text reading of rules 402, 403, and 404(b)." *Id.* ¶ 3. This repudiation of the doctrine makes clear: other acts evidence in Utah should be analyzed under the Utah Rules of Evidence, and nothing else.

MITIGATING THE DAMAGE OF 404(b) EVIDENCE

While Rule 404(b) evidence can be devastating, there are a handful of strategies that defense counsel can employ to mitigate harm:

Request Notice

When the State "intends to offer" bad act evidence at trial, Rule 404(b) requires, "[o]n request by a defendant," that the State "provide reasonable notice of the general nature of any such evidence" and that it "do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown." Utah R. Evid. 404(b)(2). This notice should trigger a motion *in limine*; help counsel avoid placing non-propensity purposes such as mistake or lack of accident at issue; craft trial strategy; and allow counsel to prepare evidence to attack the factual basis for the 404(b) evidence.

Request a Limiting Instruction

A limiting instruction will explain to the jury that it may use the evidence only for its non-propensity purpose. The instruction must be given upon request, *see* Utah R. Evid. 105, and it must be "clear and forceful," *Lane*, 2019 UT App 86, ¶ 28 (cleaned up). While a limiting instruction cannot "undo serious

prejudice," it can "reduce somewhat the danger of improper prejudice." *Miranda*, 2017 UT App 203, ¶ 49 (cleaned up).

Forego a Limiting Instruction

Jury instructions may be unclear or confusing and tend to emphasize rather than minimize a propensity inference. For those reasons, counsel may intentionally forego a limiting instruction. *See, e.g., State v. Torres-Garcia*, 2006 UT App 45, ¶ 23 n.4, 131 P.3d 292. The trial court may, however, override this tactical decision. *See id*. Where employed, this choice generally withstands an ineffective assistance of counsel challenge. *See, e.g., State v. Holbert*, 2002 UT App 426, ¶¶ 60–61, 61 P.3d 291; *State v. Mahi*, 2005 UT App 494, ¶¶ 19–21, 125 P.3d 103.

Stipulate to the Evidence's Admission or Address the Evidence in Opening Statements

This may be done as part of a broader tactic to undermine witness credibility. *See State v. Ringstad*, 2018 UT App 66, ¶¶ 43–44, 424 P.3d 1052 (stipulating); *State v. Bedell*, 2014 UT 1, ¶¶ 21, 24, 322 P.3d 697 (opening statements).

Tactically Forego a 404(b) Objection Where Evidence is Admitted for an Improper Propensity Purpose

Rather than opposing the admission of 404(b) evidence, counsel may use it to their advantage. *See, e.g., State v. Jones*, 2020 UT App 31, ¶ 41, 462 P.3d 372 (noting that there was a "strategic reason" for counsel to withhold a 404(b) objection, namely, that the 404(b) evidence portrayed the victim as a "willing participant" rather than a vulnerable adult susceptible to exploitation).

Select Witnesses Less Likely to Trigger 404(b) Evidence

Counsel may, for instance, forego calling an expert witness as "a tactic to avoid opening the door to" 404(b) evidence. *State v. Willey*, 2011 UT App 23, ¶ 10, 248 P.3d 1014. Likewise, counsel may advise the defendant not to testify to keep evidence of the defendant's prior convictions out of court. *See State v. Fleming*, 2019 UT App 181, ¶ 11, 454 P.3d 862.

APPEALING THE ADMISSION OF 404(B) EVIDENCE

If the defense believes the district court improperly admitted 404(b) evidence, counsel can challenge that decision on appeal. For the best chance of success, the defense should preserve the issue by timely lodging a clear and specific objection to the trial court, citing relevant legal authority. *See State v. Wager*, 2016 UT App 97, ¶ 24, 372 P.3d 91. A preserved 404(b) challenge will be reviewed for an abuse of discretion, which exists when the court "applies the wrong legal standard or [renders a] decision … beyond the limits of reasonability." *Met v. State*, 2016 UT 51, ¶ 96, 388 P.3d 447 (cleaned up).

In the context of 404(b), a trial court abuses its discretion by admitting 404(b) evidence without conducting a Rule 403 balancing test. *Richins*, 2021 UT 50, ¶ 103. The court may also abuse its discretion when it admits 404(b) evidence that has not been offered for a non-propensity purpose or admits evidence that is offered for a non-propensity purpose so subtle in distinction from a propensity purpose that the difference would likely "be lost on a lay jury." *Gallegos*, 2020 UT App 162, ¶¶ 40–46.

Not every abuse of discretion requires reversal. An appellant must establish "a reasonable likelihood of a more favorable result for the accused had the error not occurred," *Richins*, 2021 UT 50, ¶ 107 (cleaned up), such that the error can be said to have "materially affected the fairness or outcome of the trial," *State v. Calvert*, 2017 UT App 212, ¶ 38, 407 P.3d 1098 (cleaned up). To assess this, Utah courts "often look to the strength of the evidence supporting the jury's verdict." *Hood*, 2018 UT App 236, ¶ 54. "The more evidence supporting the verdict, the less likely there was harmful error." *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). Conversely, where evidence is "weak and the prior act evidence [takes] up a significant portion of the trial, the likelihood of a different outcome in the absence of the Rule 404(b) evidence is sufficiently high to undermine confidence in the verdict." *Lane*, 2019 UT App 86, ¶ 27 (cleaned up).

If the evidentiary challenge is not preserved, counsel must show an exception to preservation applies. *State v. Johnson*, 2017 UT 76, ¶ 19, 416 P.3d 443. This creates unnecessary hurdles because the exceptions – plain error, ineffective assistance, and exceptional circumstances – are difficult to establish. *See id*. ¶¶ 20–39. Thus, these exceptions should serve as a last resort.

CONCLUSION

Under the plain language of Rule 404(b), evidence may not be admitted to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character. While 404(b) bars some character evidence intended to prove conformity, much evidence makes its way over 404(b)'s hurdles. Still, parties can mitigate the damage done by 404(b) evidence, and the admission of 404(b) evidence may be challenged on appeal.

***AUTHOR'S NOTE**: The authors thank research assistants Aubrey Ahlstrom and Ellie Bradley, as well as University of Utah S.J. Quinney College of Law Associate Dean Teneille Brown.*

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The Lawyer's Role in Promoting Civics

by Stephen P. Dent

A few weeks ago, I ran into a Utah Tech University student at a Maverick gas station. He had taken my business law class the previous fall. We exchanged pleasantries, and I got a quick update on his academic pursuits. I then asked, "Hey, what are the three branches of government?" "Legislative, executive, judicial," he replied with a smile. I smiled back, comforted that he had retained something from my class. He even said it in the constitutionally correct order.

What happened to civics?

Fewer than half of Americans can name all three branches of government. A quarter can't name *any* branch. In this highly politicized, deeply divisive era, what gives? Why do so many people have so many strong opinions about a government they know so little about?

Much has been written about the decline of civic education and its causes. Many argue that the education system has failed to effectively teach civics and that it overly emphasizes rote memorization over critical thinking. Others point to the focus on STEM and the declining popularity of, and funding for, civic-centered curriculum. In our understandable and important quest for career readiness, we often leave civics by the wayside.

Experts posit that decline in civic education has led to lack of civic knowledge among citizens, decreased ability and preparation to participate in the civic process, and increased political polarization. It's clear that we live in a time of boiling political passion and tepid civic knowledge.

Why should lawyers care about civics?

As lawyers, we are experts in civics. We spent three years studying how our government is structured, how it makes laws, and how courts apply those laws. After graduation, we remain immersed in the law in our endless variety of legal practices.

Further, we as lawyers have committed to defending the rule of law. Few professions require its members to take a solemn oath to "support, obey, and defend" the Constitution.

In *Democracy in America*, Alexis de Tocqueville observed that lawyers gained "special information" from their studies and act as "arbiters between the citizens." He further observed: "When one visits Americans and when one studies their laws, one sees that the authority they have given to lawyers and the influence that they have allowed them to have in the government form the most powerful barrier today against the lapses of democracy."

Sometimes we lose perspective. We take a myopic view of our jobs. For example, negotiating a contract may not seem like a noble task. But zoom out and see it from a broader perspective: negotiating a contract involves parties entering into legally binding agreements, which promotes stability and commitment to mutual obligations. Maybe you spent the day counseling clients on compliance matters. Those efforts advance the rule of law by encouraging citizens to respect and follow the law. Advocating for clients in court protects the rule of law by vindicating rights and resolving disputes in an orderly fashion. I could go on and on. The upshot is that lawyers are central to the rule of law.

In this sense, the lawyer is not only the "representative of clients," but also "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Utah Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.

As defenders of the rule of law, we have a vested interest in civics. We should want our communities full of civic-minded citizens who care about how our government works and respect the rule of law. The civic minded make better informed

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decisions, care more about our form of government, and disagree in a more civil way. All this leads to a healthier democracy, which fortifies the rule of law.

How can lawyers promote civics?

With demanding schedules and competing personal and professional interests pulling us in many directions, how can lawyers play a role in promoting civics?

First, we should educate ourselves on current events.

Keeping informed helps us understand the challenges of our times. It also helps us better understand how our government works. I try to keep informed in efficient doses. I listen to a news podcast or two during the commute and read a couple local and national newspapers. I'm sure many of you have your own methods. The internet has endless news sources. My only caution is to moderate your news consumption by reading multiple outlets and seeking the least biased sources. Consuming news shouldn't devolve into an Orwellian Two Minutes Hate.

Second, we should study history.

History is significant to understanding civics. After all, our form of government is centuries in the making. The challenges of the past often mirror those of the present. By studying history, we can seek to emulate the good parts and vigilantly guard against the bad ones. As the philosopher says, "Those who do not learn history are doomed to repeat it." There are many ways to study history. My favorite is a good biography or a Ken Burns documentary.

Third, we should strive to promote civics with those around us.

The Rules of Professional Conduct encourage us to "further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Utah R. of Pro. Cond. pmbl. [6].

There are many ways we can help others understand our government. If you have the time and opportunity, teaching is a fulfilling way to educate upcoming generations about law and government. And it comes with the added benefit of keeping yourself informed and educated.

Are you a parent? Teach your kids basic civics. As Justice Sandra Day O'Connor put it, "Civic knowledge can't be handed down the gene pool. It has to be learned." At the dinner table or during the car ride, the kids could use some more civics and less iPad. I recently taught my six-year-old about the importance of putting the shopping cart away after you've loaded the groceries into the car. I explained that we have a duty to others to be nice and to try not to hurt them, and leaving the shopping cart out could hurt someone or damage another car. This was a mini civics lesson about the duty citizens owe to society. The next day, he saw someone fail to clean up after their dog at the park, and he harkened back to the grocery cart lesson.

Any interaction you have with family or friends is an opportunity to discuss civics, whether you're explaining foundational principles or complex theories. Just make sure to wield your lawyerly knowledge with self-awareness. Read the room and talk about civics when it naturally comes up and do so in a non-condescending way. Knowing the law is great, but it doesn't make you the smartest or most interesting person in any given room.

Fourth, we should promote civics by promoting civility.

Civility is the keystone of civics. The marketplace of ideas cannot function without reasoned and well-intentioned disagreement. We should be examples of civility. Every day, the public watches us perform our jobs. Whether we're in open court, or in a mediation, or on a conference call, strangers, clients, and colleagues observe how we handle disagreement.

I often assign my students the task of watching a local court proceeding and writing a summary of their thoughts. Often, students report that they were surprised at how nice the lawyers were to each other. This insight has confirmed two things for me. First, Southern Utah is a great place to practice law among skilled and collegial attorneys. Second, citizens gain confidence in the judicial branch when they see lawyers behaving professionally. We, the officers of the court, should promote trust in the judicial branch by maintaining the highest standards of professionalism and civility.

As we treat adversaries with dignity and respect, we instill trust in the judicial branch and in our profession. And we set an example on how to disagree civilly. More civil disagreement in our society will lead to better ideas, less rancor, and fewer Facebook rants from our uncles.

Postscript

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

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Appellate Highlights

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

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

Utah Supreme Court

Ashby v. State
2023 UT 19 (Sept. 14, 2023)

Defendant was convicted of two counts of aggravated sexual abuse of a child based substantially upon the child's testimony. Over a decade later, the child recanted his prior testimony. Defendant filed a post-conviction relief act petition for a determination of actual innocence, which the district court denied. The Supreme Court remanded the case. **"Where a defendant is convicted based on uncorroborated witness testimony and that witness later recants under oath, that recantation, if credible, is sufficient to prove factual innocence by clear and convincing evidence."**

State v. Barnett
2023 UT 20 (Sept. 21, 2023)

In this appeal from the district court's order setting bail for the defendant who was charged with a felony while serving probation on a felony conviction, the Utah Supreme Court evaluated whether Article I, Section 8(1) of the Utah Constitution mandates that a judge deny bail. After evaluating that provision's text and history, **the court held Article I, Section 8(1) guarantees bail to most defendants, but provides that a court *may* deny it to those who fall within the exceptions of Section 8(1)(a) through (c). A court may grant bail to those defendants who do not have a right to bail.**

Utah Court of Appeals

John v. John
2023 UT App 103 (Sept. 14, 2023)

Affirming an order requiring supervised parent time, the court of appeals concluded that **evidence of past harmful or potentially harmful circumstances could be probative of the risk of harm in the future under the analysis required by the statute.** In this case, a history of drug abuse, failure to provide a drug test, limited contact with the child, and emotional instability supported findings that the parent could still be a danger, which adequately supported an order of supervision.

C-B-K Ranch LLC v. Glenna R. Thomas Trust
2023 UT App 110 (Sept. 21, 2023)

The district court denied a dominant estate holder's request for an order requiring the servient estate holder to replace a chain lock gate with an electric gate to facilitate access to a prescriptive easement. Reversing and remanding, the court of appeals held **the district court should have begun its analysis of the easement's scope by applying a common law presumption that parties should anticipate increased future use and reasonable technological improvements.** The court of appeals also identified two other standards the lower court may have overlooked, including applying flexibility in seeking to accommodate reasonable changes to use and ensuring that weight is not given to burdens that remain purely speculative.

SRB Investment Co. v. Spencer
2023 UT App 120 (Oct. 5, 2023)

This case involves the scope of a prescriptive easement. The trial court's first decision was that the scope of the easement was limited to historical use but the location could be adjusted as had been done historically. The decision was appealed and reversed. That first appeal challenged "the scope" of the trial court's easement, but the briefing focused on limitations on use of the easement, not the ability to adjust the location of the

easement. On remand, the court described the permissible use as a "flexible" easement but also restricted the Spencers' ability to relocate it. In this second appeal, the court held that this **did not violate the mandate rule because the relocation issue was properly with the "scope" issue even though not briefed in the first appeal.**

State v. Alvarado
2023 UT App 123 (Oct. 13, 2023)

Defendant was convicted on two counts of failing to stop at the command of a police officer. During the stop, the officer failed to activate his body cam. On appeal, defendant challenged the convictions based on an ineffective assistance of counsel argument. Utah Code § 77-7a-104 requires police officers to activate body cams "as soon as reasonably possible" during encounters. In 2020, the Legislature added Section 104.1 which **provides a trial court with authority to issue an adverse jury instruction in certain situations involving a failure to activate a body cam. Trial counsel failed to seek such an adverse instruction in the trial court, and the court of appeals found that error to be prejudicial.**

10th Circuit

Waetzig v. Halliburton Energy Servs., Inc.
82 F.4th 918 (Sept. 11, 2023)

This appeal presented an open question in the Tenth Circuit: can a district court use Rule 60(b) to vacate a plaintiff's voluntary dismissal without prejudice? The Tenth Circuit held that it cannot. **A voluntary dismissal without prejudice under Rule 41(a) divests the district court of subject matter jurisdiction to consider a Rule 60(b) motion to reopen.** As a result, after having voluntarily dismissed the case the plaintiff could not seek to vacate an arbitration award in the dismissed case.

Vincent v. Garland
80 F.4th 1197 (Sept. 15, 2023)

The plaintiff, who was convicted of a nonviolent felony, challenged the constitutionality of the ban on possession of a firearm by such individuals in light of the United States Supreme Court's recent decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). **The Tenth Circuit held that *Bruen* did not expressly abrogate Tenth Circuit precedent on the constitutionality of the federal ban, and specifically *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009).** Although the test articulated in *Bruen* did not exist at the time *McCane* was decided, "the Court didn't appear to question the constitutionality of longstanding prohibitions on possession of firearms by convicted felons." Rather, "*Bruen* contains two potential signs of support for these prohibitions." Because *Bruen* did not "indisputably and pellucidly abrogate … *McCane*," and *McCane* provided "no basis to draw constitutional distinctions based on the type of felony involved," the Tenth Circuit upheld the federal ban for any convicted felon's possession of a firearm.

United States v. Coates
82 F.4th 953 (Sept. 18, 2023)

Coates appealed the district court's application of a sentencing enhancement found in the federal sentencing guidelines, arguing that the district court's deference to the Sentencing Commission's commentary on the enhancement was improper under *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). *Kisor* held that federal courts' deference to an executive agency's interpretation of its own regulation depended on whether the regulation was "genuinely ambiguous." The Tenth Circuit, however, concluded that *Kisor* did not apply to the sentencing guidelines because the decision was premised on the unique nature of *executive* rather than *judicial*

agencies like the Sentencing Commission. Accordingly, the Tenth Circuit reaffirmed that **Sentencing Commission commentary on the guidelines governs unless it runs afoul of the Constitution or a federal statute or is plainly erroneous or inconsistent with the guideline provision it interprets.**

Wyoming Gun Owners v. Gray
83 F.4th 1224 (Oct. 11, 2023)

A "provocative" non-profit gun rights advocacy group ran afoul of Wyoming's newly enacted campaign finance legislation, which required any organization that spends over $1,000 on an "electioneering communication" to disclose all contributions and expenditures related to that communication. The advocacy group sued in federal court, arguing the disclosure requirement was unconstitutional on various grounds. In holding that the disclosure requirement was unconstitutional as applied to the advocacy group, the Tenth Circuit explained that recent U.S. Supreme Court precedent has "tightened our review of [campaign finance] disclosure laws." **For such a law to survive exacting constitutional scrutiny, the government must demonstrate not only "a substantial relation between [the] disclosure scheme's burden and an important governmental interest" but also "that the regime is 'narrowly tailored to the government's asserted interest.'"** The Wyoming disclosure requirement failed this standard because the law, although substantially related to the important interest of transparency in campaign finance, was not narrowly tailored to that interest.

Obeslo v. Empower Capital
85 F.4th 991 (Oct. 31, 2023)

The district court in the underlying lawsuit, pursuant to 28 U.S.C. § 1927, sanctioned plaintiffs' counsel for "recklessly pursu[ing] their claims through trial despite the fact that they were lacking in merit." It held two law firms jointly and severally liable for $1.5 million in Empower's trial costs, expenses, and attorneys' fees. A majority **reversed the sanctions on the basis that the trial court's findings when denying defendant's motion for summary judgment were "in essence a determination that the case contained meritorious, triable issues."** Judge Tymkovich dissented.

Gerrymandering, Abortion, and Much More: Cases and Issues in the Pipeline at the Utah Supreme Court

by Carol Funk

Over the past several years, the Utah Supreme Court has painstakingly addressed questions of state constitutional law by analyzing the original public meaning of the constitutional language at issue. The court has also emphasized that provisions in the Utah Constitution do not necessarily provide the same protections as similarly worded provisions in the federal constitution. In some cases, the court has held that protections afforded under state constitutional law are broader than protections afforded under federal constitutional law. And parties are taking note.

The court's caseload has become increasingly comprised of cases raising novel questions of state constitutional law, and this year is no exception. Parties are examining binding case law and assessing whether the principles announced therein were adopted following a rigorous constitutional analysis. Where rigorous analysis appears to be lacking, parties are challenging the case law and asking the Utah Supreme Court to construe the constitutional language in accordance with its original public meaning.

The decisions to be issued by the Utah Supreme Court this year will, in many cases, prove highly consequential. This is due in part to the numerous cases raising questions of state constitutional law. But many other cases on the court's docket will also result in opinions with significant ramifications. That is particularly true with respect to criminal law, as parties to criminal proceedings frequently encounter questions of substantial import and regularly raise those questions before the Utah Supreme Court.

Providing Visibility into the Cases and Issues Under Review in the Utah Supreme Court

It is critically important for members of the Utah Bar to be informed of cases and issues under review in the Utah Supreme Court. Attorneys can more effectively raise and preserve errors, craft arguments, make decisions, and assess the strength or weakness of a claim or charge if they are aware of changes in the law that may be forthcoming. This article thus provides visibility into the cases and issues currently in the pipeline at the Utah Supreme Court.

This article was compiled based on matters listed as pending in the Utah Supreme Court in late October 2023. It therefore captures the cases and issues that will be addressed in opinions issued by the Utah Supreme Court in 2024 and into 2025.

The article does not, however, highlight every case and issue pending on the Utah Supreme Court's docket. But that information is important. For those interested in accessing it, a list of all matters pending in the Utah Supreme Court as of late October 2023 is provided at https://rqn.com/appellate-practice/utsupct-open-cases. (Judicial and attorney discipline proceedings are not included.) The cases are identified by title, case number, and subject matter (e.g., civil, criminal, capital felony, and etc.).

There are also links provided to at least one substantive document filed in each case. Accordingly, the petition, retention request, briefing, and/or other substantive document(s) filed in each case, including briefing in *League of Women Voters of Utah v. Utah State Legislature* and *State v. Planned Parenthood Association of Utah*, may be found at the above-noted address. A review of those documents will provide insight into the issues and arguments that have been or are likely to be raised in each proceeding.

This information may also be accessed via the following QR code:

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Utah Supreme Court 2024: Specific Issues

Following are summaries of many of the significant cases and issues currently on the Utah Supreme Court's docket, as well as information regarding the status of each case.

Administrative Proceedings

Effect of the COVID-19 Pandemic on Property Taxes.

Larry H. Miller Theaters, Inc. v. Utah State Tax Commission, No. 20220345, on Review of Administrative Decision.

The Utah Supreme Court retained jurisdiction over this proceeding in which Larry H. Miller Theaters, Inc., along with several other entities, challenges the Utah State Tax Commission's construction of Utah Code Section 59-2-1004.6.

Section 1004.6 addresses tax relief for a decrease in fair market value due to access interruption. Petitioners claim the COVID-19 pandemic created access interruption to their properties. The Tax Commission disagrees, construing access interruption to include only situations in which physical access to taxpayer property is impeded. Petitioners urge the Utah Supreme Court to hold the COVID-19 pandemic resulted in access interruption to their properties for purposes of section 1004.6.

Oral argument was held in September 2023. At the time this article was submitted for publication, no decision had yet been issued.

Meaning of the Utah Constitution's Exclusive Charitable Use Property Tax Exemption.

Sports Medicine Research & Testing Laboratory v. Utah State Tax Commission, No. 20220786, on Review of Administrative Decision.

The Utah Supreme Court retained jurisdiction over this proceeding, which centers on the exclusive charitable use property tax exemption in the Utah Constitution. Under Article XIII, Section 3, property is not taxable if owned by a nonprofit entity and used exclusively for charitable purposes.

In prior cases, the Utah Supreme Court has waffled a bit on what exclusive charitable use means. Sports Medicine Research & Testing Laboratory (SMRTL) has asked the Utah Supreme Court to clarify its murky case law and to conclude SMRTL qualifies for the exemption. As part of that clarification, SMRTL requests that the Utah Supreme Court recognize the federal tax concept of substantially related business activity as a guiding principle in the state constitutional analysis.

SMRTL has also asked that, if necessary, the Utah Supreme Court reconsider its case law and engage in an original public meaning analysis of the exclusive charitable use provision. SMRTL claims that when the provision was enacted, the people of Utah would have understood it to incorporate the concept of substantially related business activity.

The briefing is likely to be completed in early 2024.

Civil Proceedings

Lawmaking by Initiative and the Justiciability (or Non-Justiciability) of Partisan Gerrymandering.

League of Women Voters of Utah v. Utah State Legislature, No. 20220991, on Interlocutory Appeal.

The Utah Supreme Court granted a request by the Utah Legislature and other defendants to appeal from an order largely denying their motion to dismiss. The defendants had moved to dismiss claims relating to Senate Bill 200. The Utah Legislature promptly passed SB 200 after Utah voters approved Proposition 4, which provided for an independent redistricting commission with the purpose of limiting partisan gerrymandering.

A mix of organizational and individual plaintiffs filed suit against the Utah Legislature and others, alleging enactment of SB 200 and subsequent partisan gerrymandering violated their constitutional rights. Defendants moved to dismiss, asserting the claims present nonjusticiable political questions and, in the alternative, partisan gerrymandering does not violate the Utah Constitution. The district

court concluded the claims were justiciable and declined to dismiss claims based on the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause, and the Right to Vote Clause. The district court did, however, dismiss claims based on the Inherent Political Powers and Initiative Clauses.

The Utah Supreme Court called for supplemental briefing to aid its consideration of the issues. The court asked the parties to address questions that will arise if the court concludes the constitutional right of the people of Utah to alter or reform their government is a fundamental right and the people of Utah exercised that right when they approved Proposition 4. The request for supplemental briefing focused on what type of scrutiny, if any, might apply when assessing whether that constitutional right has been violated.

Oral argument was held in July 2023. At the time this article was submitted for publication, no decision had yet been issued.

Legality of the Utah Health Care Malpractice Act's Statute of Repose and the Meaning of the Open Courts Clause.

Bingham v. Gourley, No. 20230436, on Direct Appeal.

The Utah Supreme Court agreed to retain jurisdiction over this appeal, which challenges the constitutionality of the Utah Health Care Malpractice Act's four-year statute of repose. Bingham asserts the statute of repose violates the Utah Constitution's Open Courts and Uniform Operation of Law Clauses, as well as the federal constitution's Equal Protection Clause.

At the time this article was submitted for publication, Gourley had not yet filed their opposing brief. It is therefore unclear whether they will ask the Utah Supreme Court to reconsider its construction of the Open Courts Clause. But it is highly likely Gourley will make that request, as the Utah Supreme Court's approach to the Open Courts Clause has been a contentious topic in the court's jurisprudence.

Presently, the Open Courts Clause has been construed as providing substantive protections. Over the past three decades, however, multiple dissenting justices have asserted the clause provides only procedural protection. Most of those dissenting justices have since retired, but one – Chief Justice Durrant – is still on the bench. In addition, the last time the Utah Supreme Court addressed the Open Courts Clause, Justice Pearce indicated he was open to revisiting its construction. This case thus presents an opportunity for the court, as currently constituted, to address whether the Open Courts Clause will continue to be interpreted as having substantive application.

Briefing in this matter is likely to be completed in early 2024.

Justiciability (or Non-Justiciability) of Claims That Utah's Policy Toward Fossil Fuel Development Violates State Constitutional Rights.

Roussel v. State, No. 2023022, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this appeal, which centers on claims that the State's policy regarding fossil fuel development violates the constitutional rights of Utah's children. The suit was filed by several minors, through their guardians, against multiple defendants, including the State of Utah, Governor Cox, and various offices of the Department of Natural Resources.

The plaintiffs claim they have been and continue to be harmed by air pollution and climate changes caused and exacerbated by the defendants' statutory policy and actions furthering fossil fuel development in Utah. The plaintiffs seek a declaratory judgment that the State's policy regarding fossil fuel development and the defendants' support thereof violates the plaintiffs' substantive due process rights to life and liberty under Article 1, Sections 1 and 7, of the Utah Constitution. The district court granted the defendants' motion to dismiss, ruling the plaintiffs' claims present a nonjusticiable political question, declaratory relief would provide no redress, and Utah's due process protections do not apply to fossil fuel policy.

Briefing in this matter is likely to be completed in early 2024.

Exercising Jurisdiction Over Alleged Co-Conspirators.

Nelson v. Phillips, No. 2023025, on Interlocutory Appeal.

Nelson's wife (Wife) died in 2021. The following year Nelson filed suit against multiple defendants. He alleged Wife's death had been ruled a suicide and there was no suggestion by authorities that her death was caused by anything other than self-inflicted injuries. Nelson further alleged the defendants had nonetheless engaged in widespread efforts to convince Nelson's community that he had contributed to or caused Wife's death.

In his suit, Nelson alleged multiple claims against the defendants, including defamation, invasion of privacy, intentional infliction of emotional distress, and conspiracy. The conspiracy claim alleged a concerted effort to communicate to individuals in Nelson's community and on social media that Nelson had committed domestic violence against Wife and was responsible for her death.

The defendants moved to dismiss for lack of jurisdiction, but their motions were denied. The district court concluded the allegations provided a sufficient basis to exercise personal jurisdiction over the defendants. Nelson had alleged the defendants were each part of a conspiracy, some of the co-conspirators' conduct occurred in and was directed at the State of Utah, and

the defendants could have reasonably anticipated that their co-conspirators' actions would connect the conspiracy to Utah.

At the time this article was submitted for publication, the briefing in this matter was scheduled to be completed in December 2023.

Governmental Entities' Obligations to Allow Access to Public Records.

Gordon v. Nostrom, No. 20230187, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this appeal in which Gordon asserts he was erroneously denied access to public records. Gordon claims the City of Herriman was required to allow him to review its records in person, rather than insisting he submit a written request for records under Utah's Government Records Access and Management Act (GRAMA). The city had informed Gordon that it would charge a substantial fee to provide the records pursuant to a GRAMA request.

The district court ruled Gordon was required to submit his request under GRAMA and Gordon had failed to make such a request or had failed to exhaust his administrative remedies with respect to that request. Gordon appealed, asserting a distinction between his request to inspect records and a request to obtain copies of records. Gordon argues a governmental entity cannot categorically deny access to inspect records and require instead a written request for copies of records under GRAMA along with payment of an attendant fee. In support of his claim, Gordon asserts a constitutional right to reasonable and easy access to public records.

Oral argument was held in November 2023. At the time this article was submitted for publication, no decision had yet been issued.

Attorney Fee Awards Under GRAMA.

McKitrick v. Gibson, No. 20220738, on Direct Appeal.

A second case involving GRAMA is also on the Utah Supreme Court's docket. (A third case, which centered on the efforts governmental entities must undertake when responding to records requests under GRAMA and the scope of judicial review when reviewing those efforts, was also on the court's docket. But that case was voluntarily dismissed in November 2023.)

McKitrick made a request for records of the Ogden Police Department. Her request was initially denied. But on review, the Ogden Review Board concluded the request should be granted.

The subject of the records request (Gibson) then filed an action

to bar release of the records. Ogden City sided with Gibson. McKitrick moved to dismiss the proceeding for lack of standing. The district court denied McKitrick's motion, but the Utah Supreme Court reversed, holding Gibson did not have standing to seek judicial review of the Ogden Review Board's decision.

McKitrick then requested attorney fees. Utah Code Section 63G-2-802 provides that "[a] district court may assess … reasonable attorney fees and costs reasonably incurred in connection with a judicial appeal to determine whether a requester is entitled to access to records under a records request, if the requester substantially prevails." Utah Code Ann. § 63G-2-802(2)(a).

The district court denied McKitrick's request for fees. The court construed Section 63G-2-802 as inapplicable because the appeal at issue involved a third party's challenge of the review board's decision, rather than an appeal of the decision by McKitrick or Ogden City. McKitrick appealed, and the Utah Supreme Court agreed to retain jurisdiction over the matter.

Oral argument was held in November 2023. At the time this article was submitted for publication, no decision had yet been issued.

Inspection of Adoption Records.

In re adoption of M.A., No. 20221097, on Direct Appeal.

This appeal centers on Utah Code Section 78B-6-141, which provides a "good cause" exception to the background rule that adoption records are generally sealed. Under Section 78B-6-141, "[a]n adoption document and any other documents filed in connection" therewith "are sealed." Utah Code Ann. § 78B-6-141(2). However, those documents may be opened for inspection and copying "upon order of the court …, after good cause has been shown." *Id.* § 78B-6-141(3)(c).

M.A. petitioned for a court order allowing her access to her adoption records so she could obtain health, genetic, or social information. As good cause, M.A. stated she sought the information so she could provide her doctors with her family medical history. The district court denied the petition, writing that while the court "understands that [M.A.] has valid reasons for wanting access to this information …, the court believes that it requires something more than a desire to obtain health or genetic or social information unrelated to a specific medical condition" to satisfy the statutory "good cause" requirement. M.A. appealed, and the Utah Court of Appeals certified the case to the Utah Supreme Court.

Oral argument was held in November 2023. At the time this article was submitted for publication, no decision had yet been issued.

Electronic Deposit as Accord and Satisfaction.

Magleby v. Schnibbe, No. 20230524, on Certiorari.

This proceeding arose out a feud between lawyers. Several years ago, Magleby Cataxinos & Greenwood (MCG) obtained a massive contingency fee award. MCG subsequently deposited $1 million into the bank account of Eric Schnibbe, one of MCG's lawyers. Schnibbe did not return the money and continued to work at MCG. Years later, Schnibbe and MCG became dissatisfied with one another and each filed suit.

During the litigation, the parties disputed whether the $1 million payment Schnibbe received barred his claims that he was owed a larger share of the contingency fee. The district court ruled the $1 million payment satisfied the elements of accord and satisfaction. The Utah Court of Appeals agreed.

Schnibbe petitioned for a writ of certiorari, characterizing the issue as whether accord and satisfaction can be established solely by retention of funds. In other words, Schnibbe asked, may a debtor unilaterally effectuate an accord and satisfaction by transferring funds via direct deposit into a creditor's account? The Utah Supreme Court granted Schnibbe's petition.

The briefing in this matter is likely to be completed early in 2024.

Criminal Proceedings

Enforcement of Legislation Prohibiting Abortion Except in Limited Circumstances.

State v. Planned Parenthood Association of Utah, No. 20220696, on Interlocutory Appeal.

This appeal centers on Utah Code Sections 76-7a-101 to -301, which comprise Utah's "trigger law." The provisions prohibit abortion except under limited circumstances.

The trigger law's effective date was contingent on a change in United States Supreme Court case law. After the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), Utah's legislative general counsel certified that the requisite change in law had occurred – i.e., that a binding court ruling had been issued providing that a state may prohibit abortion consistent with the trigger law's provisions – and the law went into effect.

Immediately thereafter, Planned Parenthood Association of Utah (PPAU) filed a complaint challenging the trigger law as unconstitutional under several provisions of the Utah Constitution. The district court granted a preliminary injunction, which bars enforcement of the legislation pending resolution of the litigation.

The State petitioned the Utah Supreme Court for relief, requesting (1) permission to immediately appeal the preliminary injunction and (2) a stay of the preliminary injunction pending resolution of the appeal. The Utah Supreme Court granted permission to immediately appeal the injunction but denied the motion to stay.

On appeal, the State raises three arguments. The State argues, first, that PPAU lacks standing to bring these constitutional challenges. Second, the State claims the Utah Constitution does not contain a right to abortion and therefore PPAU's claims do not raise serious issues warranting entry of a preliminary injunction. Third, the State asserts there was no showing of harm sufficient to warrant entry of a preliminary injunction.

Oral argument was held in August 2023. At the time this article was submitted for publication, no decision had yet been issued.

Scope/Application of the Jury Unanimity Requirement.
Several cases on the Utah Supreme Court's docket raise challenges based on the requirement of jury unanimity.

State v. Paule, No. 20220039, on Certiorari. Paule was charged with obstruction of justice and murder. The jury acquitted Paule of murder but convicted him of obstruction of justice. Paule appealed, raising challenges based on the legally impossible verdicts doctrine and the requirement of jury unanimity. The Utah Court of Appeals affirmed, and the Utah Supreme Court granted Paule's petition for a writ of certiorari.

Paule makes two claims. First, he asserts the Utah Court of Appeals misapplied the legally impossible verdicts doctrine. He argues that his conviction for obstruction of justice is legally incompatible with the verdict acquitting him of murder. Second, Paule asserts the Utah Court of Appeals erred in its analysis regarding jury unanimity. Paule claims the evidence supported multiple theories for commission of obstruction of justice. On that basis, Paule argues the jury should have been instructed that the jurors must agree on the factual conduct that satisfied the elements of the offense.

Oral argument was held in March 2023. At the time this article was submitted for publication, no decision had yet been issued.

State v. Baugh, No. 20220272, on Certiorari. Baugh was charged with two counts of aggravated sexual abuse of a child. The jury acquitted Baugh of one offense but convicted him of the other. On appeal, Baugh contended his counsel was constitutionally deficient. Baugh pointed to the absence of an instruction informing the jury that it must agree on the specific

acts that satisfied the elements of each offense. Baugh also asserted the lack of such an instruction was prejudicial to him. The Utah Court of Appeals agreed, and the Utah Supreme Court granted the State's petition for a writ of certiorari.

The State challenges the Utah Court of Appeals' opinion on two grounds. First, the State contends the need for a specific unanimity instruction would not have been clear to Baugh's counsel. Second, the State argues the lack of a specific unanimity instruction generally causes only a slight risk of confusion.

At the time this article was submitted for publication, oral argument in this matter was scheduled for December 2023.

State v. Chadwick, No. 20190818, on Direct Appeal. Chadwick was charged with four counts of sexual abuse of a child. The jury returned a guilty verdict on one count and acquitted Chadwick of the remaining three counts. Chadwick appealed his conviction, and the Utah Court of Appeals certified the case to the Utah Supreme Court.

On appeal, Chadwick asserts the jury was not instructed that the verdict on each count must be unanimous or that the jurors must agree on the conduct that constitutes the offense. Instead, Chadwick argues, the instructions suggested no unanimity on those matters was required. Chadwick also raises challenges regarding the confidential therapy records of the person who testified Chadwick had sexually abused her. Chadwick argues the district court did not adequately perform an *in camera* inspection of those records to identify information relevant to Chadwick's defense.

The briefing in this matter is likely to be completed in early 2024.

Constitutionality of the Plea Withdrawal Statute.

State v. Rippey, No. 20200917, on Direct Appeal.

The Utah Supreme Court recalled this appeal from the Utah Court of Appeals. The appeal presents a challenge to the constitutionality of Utah Code Section 77-13-6 (the Plea Withdrawal Statute).

Rippey asserts the Plea Withdrawal Statute is facially unconstitutional and unconstitutional as applied to him. Rippey focuses on the interplay between the Plea Withdrawal Statute and the Post-Conviction Remedies Act, Utah Code Sections 78B-9-101 to -503. According to Rippey, read in combination, those statutes require many criminal defendants to pursue challenges to their guilty pleas through the postconviction process rather than through traditional appellate review. On that basis, Rippey argues the Plea Withdrawal Statute violates the right to appeal with the effective assistance of counsel. In addition, Rippey asserts the Plea Withdrawal Statute is an unconstitutional legislative exercise of the Utah Supreme Court's rulemaking authority.

Oral argument was held in September 2023. At the time this article was submitted for publication, no decision had yet been issued.

Due Process Constraints on the Refiling of Criminal Charges.

State v. Labrum, No. 20220889, on Direct Appeal.

The Utah Supreme Court retained this appeal, which challenges the manner in which the Utah Constitution's Due Process provision has been applied to preliminary hearings.

In 1986, in *State v. Brickey*, the Utah Supreme Court ruled that when charges are dismissed at a preliminary hearing for insufficient evidence, refiling those charges violates the Utah Constitution's Due Process provision unless the state can point to new or previously unavailable evidence or otherwise establish good cause. 714 P.2d 644, 647 (Utah 1986). The Utah Supreme Court later added a gloss to its holding in *Brickey*. In 2001, in *State v. Morgan*, the court wrote that the due process inquiry focuses on whether "potential abusive practices are involved." 2001 UT 87, ¶ 15, 34 P.3d 767. When they are not, there is "no presumptive bar to refiling" because a defendant's due process rights are not implicated. *Id*.

Labrum takes on both *Brickey* and *Morgan*. Labrum claims the Utah Constitution's due process protections do not bar a prosecutor from refiling charges to correct mistakes made in an earlier hearing or to assert a different theory of misconduct. To the extent *Brickey* and *Morgan* preclude refiling in such circumstances, Labrum asks the Utah Supreme Court to revise its case law and rule that at least one refiling is permissible under most, if not all, circumstances. Labrum also claims *Brickey* was adopted without a sufficient constitutional analysis and asks the Utah Supreme Court to construe the provision in accordance with its original public meaning.

The briefing in this matter is likely to be completed early in 2024.

Constitutionality of Life Without Parole for a Juvenile Offender.

State v. Mullins, No. 20200149, on Direct Appeal.

The Utah Supreme Court retained jurisdiction over this appeal, which addresses the constitutionality of a sentence of life without the possibility of parole when the underlying offense was committed by an intellectually disabled teenager.

Mullins was sentenced to life without the possibility of parole before the United States Supreme Court issued its decision in

Miller v. Alabama, 567 U.S. 460 (2012). In *Miller*, the court held that the Eighth Amendment's prohibition on cruel and unusual punishment precludes a mandatory sentence of life without parole for those under the age of eighteen at the time of the offense. *Id*. at 465. The court also indicated that it will be the uncommon case in which such a severe sentence would be appropriate. *Id*. at 479.

Following *Miller*, Mullins moved under Utah Rule of Criminal Procedure 22(e) to withdraw his guilty plea and/or correct an illegal sentence, arguing in part that the district court had not taken into account the circumstances pertaining to his life, age, and possibility for rehabilitation. The motion was denied.

On appeal, Mullins argues his sentence is unconstitutional and should be corrected under Rule 22(e). He raises challenges under the Sixth and Eighth Amendments of the federal constitution, but also argues his sentence violates Article I, Section 9 of the Utah Constitution. Mullins also asserts, among other things, that Utah Code Section 76-3-207 is unconstitutionally vague for lack of guidance on when a sentence of life without parole is appropriate.

Oral argument was held in October 2023. At the time this article was submitted for publication, no decision had yet been issued.

Existence/Scope of an Emergency-Aid Exception Under the Utah Constitution.

State v. Tran, No. 20225060, on Interlocutory Appeal.

The Utah Supreme Court granted Tran permission to appeal the denial of his motion to suppress. Tran asserts the warrantless search of his home violated state and federal constitutional prohibitions against unreasonable searches and seizures.

Tran asks the Utah Supreme Court to analyze the issue first under state constitutional law. Tran claims the Utah Constitution contains more protection against unreasonable searches and seizures than the Fourth Amendment. Tran argues that, under state constitutional law, there is no emergency-aid exception permitting a warrantless search of a person's home. Moreover, Tran asserts, if state constitutional law did contain an emergency-aid exception, the state-law exception would be narrower than the federal one and it would not apply here. Tran also asserts the search violated the Fourth Amendment.

The State counters each of Tran's claims, including Tran's suggestion that the Utah Supreme Court should first analyze the issue under state constitutional law. The State claims the Utah Supreme Court should allow federal law to do most of the work when assessing whether a constitutional prohibition against unreasonable searches and seizures has been violated.

Oral argument was held in September 2023. At the time this article was submitted for publication, no decision had yet been issued.

Use of Hearsay Evidence in Preliminary Hearings.

State v. Nielsen, No. 20230803, on Direct Appeal.

The Utah Supreme Court agreed to retain jurisdiction over this appeal, which addresses a recent change to the Utah Rules of Criminal Procedure. Rule 7B was amended in May 2023 and now provides that a finding of probable cause "may be based on hearsay, but may not be based *solely* on hearsay evidence admitted under Rule 1102(b)(8) of the Utah Rules of Evidence." Utah R. Crim. P. 7B(b) (emphasis added).

The State asserts the rule is not being interpreted uniformly. The State reports that some magistrate judges are requiring alleged victims to testify to establish probable cause, while other magistrate judges are not. The State asked the Utah Supreme Court to retain the case to address whether and/or when alleged victims are required to testify to establish probable cause.

The briefing in this matter is likely to be completed in mid- to late 2024.

Substantial Step/Entrapment in Attempt Offenses.

State v. Smith, No. 20220768, on Certiorari.

The Utah Supreme Court granted Smith's petition for a writ of certiorari, which asserts that his convictions for attempt crimes involving a minor should be overturned.

Smith was on a dating application when he encountered a profile of someone who appeared to be an adult woman. The profile was, however, a pretense, and the person behind it was a law enforcement officer. Smith engaged in an online chat with the officer, in which the officer stated he was a minor, talked about engaging in sexual activity with Smith, and arranged to meet Smith. When Smith arrived at the specified location, he was arrested.

Smith was subsequently convicted of attempted child kidnapping and other offenses involving attempted sexual activity with a minor. The Utah Court of Appeals affirmed.

On certiorari, Smith argues that arriving at the specified locale did not constitute a "substantial step" for purposes of the attempt offenses. According to Smith, a substantial step requires physical proximity. Moreover, Smith contends, physical proximity coupled with solicitation is insufficient to establish a substantial step.

Smith also challenges the Utah Court of Appeals' application of

Utah Code Section 76-2-303, which addresses entrapment. Smith argues the Utah Court of Appeals should have concluded he was induced into the activity at issue by the law enforcement officer.

Oral argument was held in September 2023. At the time this article was submitted for publication, no decision had yet been issued.

Weighing Affirmative Defenses at Bail Hearings.

State v. Jennings, No. 20230720, on Certiorari.

In this proceeding Jennings argues that his right to bail was erroneously denied. Jennings claims he presented sufficient evidence that he acted in self-defense to entitle him to bail. But, according to Jennings, Utah law is not clear on how evidence pertaining to an affirmative defense should be weighed during bail hearings. The district court ordered that Jennings be held without bail. The Utah Court of Appeals affirmed, and the Utah Supreme Court granted Jennings' petition for a writ of certiorari.

Jennings argues the Utah Court of Appeals engaged in an improper analysis of his right to bail. He asserts the Utah Court of Appeals erroneously asked whether the State had presented substantial evidence that Jennings did not act in self-defense, rather than considering Jennings' evidence that he did act in self-defense. In viewing the evidence in the light most favorable to the State, Jennings argues, the Utah Court of Appeals failed to properly consider the evidence supporting his claim to self-defense.

The briefing in this matter is likely to be completed in mid- to late 2024.

Restrictions on Defense Decisions in Capital Felony Proceedings.

State v. Lovell, No. 20150632, on Direct Appeal.

In this appeal, which falls within the Utah Supreme Court's exclusive jurisdiction, Lovell raises several challenges to his conviction for aggravated murder, a capital offense.

One of Lovell's challenges focuses on funding pertaining to his mitigation defense. Lovell argues the district court improperly allowed Weber County to interfere in decisions regarding the funding of that defense. Lovell also asserts that a study by the Sixth Amendment Center concluded that Utah's indigent defense system, which requires local governments to fund and administer indigent defense services, results in a constructive denial of counsel. In addition, Lovell asserted Weber County's cap on the funds available for a mitigation investigation is a small fraction of the funds typically spent by Utah counties on mitigation investigations in capital cases. As a result, Lovell contends, Weber County prevented him from conducting a comprehensive mitigation investigation.

At the time this article was submitted for publication, the briefing in this matter was scheduled to be completed in December 2023.

Refusal to Provide Phone Passcode to Law Enforcement Officers.

State v. Valdez, No. 20210175, on Certiorari.

This proceeding focuses on a defendant's refusal to provide the passcode to his phone to law enforcement officers. The Utah Supreme Court granted certiorari to address whether the Court of Appeals erred in concluding the State's elicitation and use of testimony about Valdez's refusal to provide a passcode for his phone constituted an impermissible commentary on an exercise of the right to remain silent.

The parties focused their briefing on whether Valdez had a Fifth Amendment right to refuse to provide the passcode to his phone. The Utah Supreme Court called for supplemental briefing focused more specifically on the question on which certiorari was granted, whether elicitation and use of testimony about Valdez's refusal to provide the passcode constituted impermissible commentary. The parties were also asked to address how analysis of that issue is affected, if at all, by Valdez's presentation of evidence at trial about text messages that may have been located on his phone.

Oral argument was held in March 2023. At the time this article was submitted for publication, no decision had yet been issued.

Child Welfare Proceedings

Application of the Strictly Necessary Standard.

In re A.H., No. 20221029, on certiorari.

The Utah Supreme Court granted certiorari in this case involving gut-wrenching decisions regarding the placement of two young children. The juvenile court ruled that multiple statutory grounds existed for terminating the parents' parental rights. The parents did not contest that ruling on appeal. Instead, the parents asserted the district court erred in concluding termination of their parental rights was "strictly necessary," as statutorily required.

The parents' arguments focus on the separation of the children from their five older siblings. All five older siblings had been placed in the permanent custody and guardianship of the oldest sibling's biological paternal grandparents. The grandparents had also offered to serve as permanent custodians and guardians of the two youngest children. But, while proceedings regarding the parents' rights had been underway, the two youngest children – who were only eight months and two-and-a-half years old when first removed from the family home – had become tightly bonded to their foster parents. Moreover, the two youngest

children had spent relatively little time with their older siblings since being removed from the family home and were not closely bonded to them.

Considering all the circumstances, the district court ruled it was strictly necessary to terminate the parents' rights, in order to facilitate adoption of the two youngest children by their foster family. The Utah Court of Appeals reversed, in an opinion that raises important questions regarding the meaning and application of the strictly necessary standard and appellate review of a strictly necessary determination.

Oral argument was held in November 2023. At the time this article was submitted for publication, no decision had yet been issued.

Applicability of the Plain Error Doctrine in Child Welfare Proceedings.

In re A.M., No.20220507, on Direct Appeal.

In the underlying proceeding, the juvenile court entered an order placing four children in the permanent custody and guardianship of their respective fathers, without holding an evidentiary hearing on whether that action was in the best interests of the children. The mother appealed.

The Utah Court of Appeals asked the parties to provide supplemental briefing on three issues: (1) whether the plain error doctrine applies in child welfare proceedings; (2) whether the juvenile court committed plain error in awarding permanent custody without holding an evidentiary hearing; and (3) whether trial counsel provided ineffective assistance of counsel in not requesting an evidentiary hearing. Following receipt of the supplemental briefing, the Utah Court of Appeals certified the case to the Utah Supreme Court.

The Utah Court of Appeals has ruled the plain error doctrine has limited application in civil cases. But the Utah Supreme Court has not yet addressed that issue. This proceeding may thus shed light not only on whether parties may assert plain error in child welfare cases, but also on when or whether parties may assert plain error in civil cases more generally.

Oral argument was held in November 2023. At the time this article was submitted for publication, no decision had yet been issued.

Postconviction Proceedings

Constitutionality of the PCRA.

Kell v. Benzon, No. 20180788, on Direct Appeal.

The Utah Supreme Court has exclusive jurisdiction over this appeal, which involves a challenge to the legality of a death sentence. The petitioner argues that his petition for postconviction relief was wrongly dismissed.

The district court dismissed the petition on procedural grounds. On appeal, the petitioner requested that his procedural noncompliance be excused under an "egregious injustice" exception to the Post-Conviction Remedies Act (PCRA). He also asked that the court exercise its traditional authority over collateral proceedings to grant the relief he sought.

But while the appeal was pending, the Utah Supreme Court issued its decision in *Patterson v. State*, 2021 UT 52, 504 P.3d 92. In *Patterson*, the court explained that it has not included an egregious injustice exception in its rules governing the exercise of the court's writ power; and as a result, the court may only hear a case otherwise barred by the PCRA when failure to do so would violate the petitioner's constitutional rights. *Id.* ¶¶ 170–94.

The court thus asked the parties to provide supplemental briefing addressing whether violation of constitutional rights is at issue here. The parties were asked to address: (1) whether the procedural bar at issue is unconstitutional under the Utah Constitution and, if so, whether that challenge was preserved; and (2) whether the timing of the petition (which was not filed until several years after the petitioner discovered the facts upon which it is based) adversely affects the petitioner's ability to obtain relief under the court's constitutional writ power.

The supplemental briefing was completed in February 2023. At the time this article was submitted for publication, no decision had yet been issued.

PCRA Public Defenders: Access to Justice in Postconviction Cases and Utah's New Postconviction Division

by Ian L. Quiel

"[I]t is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES 352. Known as Blackstone's Ratio, this 250-year-old idea is a cornerstone of our criminal justice system. In an imperfect system, prone to human error and bias, we should err on the side of freedom, not punishment. A noble concept, but – as any criminal defense lawyer will tell you – easier in theory than in practice.

Blackstone's Ratio might be better understood as: mistakes happen. This is why Utah's Post-Conviction Remedies Act exists. Utah Code Ann. §§ 78B-9-101 to -503. Known by its acronym "PCRA," this statutory scheme is the embodiment of habeas corpus in Utah and allows wrongfully convicted individuals to petition the court to fix problems with their criminal convictions. While newly discovered evidence and factual innocence are grounds for PCRA relief, one's conviction may also be vacated if it was the result of constitutional violations, ineffective assistance of counsel, or a change in the law that impacts the integrity of the outcome. In theory, the PCRA exists to right the injustices that may slip through the cracks in the trial court and on direct appeal.

The PCRA means well but presents a procedural minefield for petitioners to navigate, who are often indigent, incarcerated, and with no access to legal counsel or meaningful resources. Unlike at trial and on appeal, Utahns do not have a right to counsel in PCRA cases. Until recently, petitioners had to rely on a patchwork network of willing pro bono lawyers or come up with thousands of dollars to hire private counsel. Ultimately, many petitioners were forced to go it alone. Meanwhile the State is always represented by the Attorney General.

To address this inequity, the Utah Legislature in 2022 amended the PCRA to allow petitioners access to state-funded postconviction public defenders. Now, a court may appoint lawyers from the Utah Indigent Appellate Defense Division (IADD) to represent qualifying petitioners in their PCRA cases, at both the district court level and on appeal. The Postconviction Division was then formed within IADD to take on this important duty.

This article gives a brief overview of the PCRA and the right, or lack thereof, to appointed counsel. It further discusses recent legislative amendments that resulted in IADD's newly formed Postconviction Division and highlights the Division's new and unique availability to accept court-appointments to represent indigent Utahns in postconviction proceedings throughout the state.

What is the PCRA – a Brief Overview

The PCRA is the only way a person may challenge their conviction in state court after being convicted and exhausting all direct appeals. Traditionally, such postconviction challenges were brought through the common law writ of habeas corpus.

The writ of habeas corpus dates to the beginning of English common law. Originally a check on the kings' ability to indiscriminately jail their subjects, habeas corpus was enshrined in numerous colonial statutes and, later, in the United States Constitution. Likewise, Utah's own constitution recognizes the writ of habeas corpus and historically vested the courts with the sole power to issue such writs.

Enter the Utah Legislature and the PCRA. Passed in 1996, the PCRA prescribes the grounds and procedures for challenging one's criminal convictions. Since an amendment in 2008, the legislature has further dictated that the PCRA is the "sole remedy" for postconviction relief. Utah Code Ann. § 78B-9-102(1)(a). Our supreme court has also functionally adopted the PCRA through the Utah Rules of Civil Procedure. Rule 65C "governs

IAN L. QUIEL serves as the head of the Postconviction Division, with the Utah Indigent Appellate Defense Division.

proceedings in all petitions for post-conviction relief filed under the [PCRA]." Utah R. Civ. P. 65C(a). Thus, as the sole remedy for habeas relief, the PCRA occupies a unique space in Utah's legal landscape as a quasi-criminal civil action: a proceeding governed by the rules of civil procedure, dealing with criminal convictions and substantive constitutional rights.

The PCRA identifies various grounds that entitle a person to relief. These include innocence-type claims, such as DNA or biological evidence or the discovery of new evidence that negates guilt. Utah Code Ann. §§ 78B-9-104(1)(e)–(f), -402(2)(a). But the PCRA is not limited to just factual innocence. Grounds also include constitutional defects in the conviction, changes in the law, illegal sentences, and ineffective assistance of counsel – both trial and appellate. *Id.* § 78B-9-104(1)(a)–(d).

A PCRA petition is often a convicted person's last chance in state court to resolve issues or reverse improper convictions. The PCRA may also impact a convicted person's eligibility for federal habeas corpus relief. One may seek relief from a state conviction in federal court, through a federal habeas corpus petition. But one must exhaust all state remedies before the federal court will hear such a claim. This means a convicted person must first seek relief through the PCRA, including appeal of any denial all the way to the Utah Supreme Court. Otherwise, the claim is not ripe for federal habeas.

The Right to PCRA Counsel, or the Lack Thereof

PCRA proceedings are, by their own terms, civil in nature. Petitioners have no constitutional right to state-funded counsel. In fact, prior to the 2022 amendments, a court could only appoint pro bono counsel for a PCRA petitioner. Even then, appointment was at the court's discretion and only if the petitioner managed – while incarcerated and indigent with no access to transcripts and most records – to submit a petition that survived an initial court review. Understandably, courts had few options for appointing counsel, forcing people to either give up or choose to go it alone, instead of waiting sometimes years for available pro bono counsel.

The lack of effective and available counsel further discouraged or frustrated otherwise viable claims. Data from Utah courts showed that in the five years prior to the 2022 change in the statute, over 60% of all petitions were submitted by people without counsel, requests for counsel were denied or not fulfilled nearly 90% of the time, and ultimately petitions that started as pro se were denied or dismissed 98.9% of the time. Stated otherwise, without counsel at the start, self-representation proved to be

fatal to nearly all PCRA petitioners' chances of righting a wrong at postconviction. In comparison, people who could afford counsel at the start saw their petitions granted 40% of the time.

2022 Legislative Amendments and IADD's Postconviction Division

For these reasons, the legislature overwhelmingly passed an amendment to the PCRA in 2022 to allow a court to appoint IADD to represent people in postconviction. S.B. 210, 2022 Leg., Gen. Sess. (Utah 2022). IADD itself was created in 2020 as a state agency within Utah's Commission on Criminal and Juvenile Justice and the Utah Indigent Defense Commission. In its brief history, IADD attorneys have represented indigent people throughout the state and appeared in the Utah Supreme Court, the Utah Court of Appeals, and numerous district courts. Started with just an eye towards criminal appeals, IADD consists of three subdivisions: adult criminal appeals, child welfare, and now postconviction.

While a move in the right direction, PCRA petitioners must still do some heavy lifting before receiving counsel. Incarcerated, indigent people still must prepare and file their petition for relief on their own, and a court still may only appoint counsel (including IADD) once the court completes a process called summary review. Utah R. Civ. P. 65C(h), (j).

Summary review allows courts to screen petitions and dismiss certain claims for being "frivolous on [their] face" or previously adjudicated. *Id.* R. 65C(h). Only if the petition survives this initial scrutiny may the court appoint an attorney. *Id.* R. 65C(j). When it comes to appointing counsel, a court's decision remains discretionary, subject to factors found in Section 78B-9-109 of the PCRA:

(a) whether the petitioner is incarcerated;

(b) the likelihood that an evidentiary hearing will be necessary;

(c) the likelihood that an investigation will be necessary;

(d) the complexity of the factual and legal issues; and

(e) any other factor relevant to the particular case.

Utah Code Ann. § 78B-9-109(2). Considering the mountain a person must scale to get past summary review and that the person is almost always incarcerated and indigent, these factors will likely be satisfied in any case, and counsel should most likely be appointed.

Contact Us

The criminal legal system is full of well-intentioned lawyers, judges, and stakeholders who make a positive difference every day in our community. But mistakes happen. The PCRA serves a vital function in our justice system, as a safety valve for catching wrong and unreliable convictions that may otherwise go unnoticed. IADD is excited to help fulfill this function and to improve access to justice for all Utahns.

If you are a lawyer and have a past client who may be left to postconviction to seek any relief, please encourage them both to do so and to request the court appoint IADD. For judges, who like us are trying to navigate the new postconviction landscape, we ask you to consider appointing IADD when these petitions land in your court and to never lose sight of the fact that all pro se filings should be liberally construed – in particular, when it could ultimately be the difference in someone's life.

We are always here to help and can be contacted with questions, comments, or concerns at (385) 270-1650 or iadd@utah.gov.

UMBA Scholarship & Awards Banquet

The Utah Minority Bar Association ("UMBA") recently held its annual Scholarship and Awards Banquet ("Banquet") on November 9th. UMBA had the privilege of honoring attorneys, judges, firms, and community leaders for their contributions to the legal community and awarding scholarships to diverse law students at the S.J. Quinney College of Law and J. Reuben Clark Law School. UMBA was pleased to honor the following individuals:

1) Distinguished Lawyer of the Year: Kim Cordova
2) Law Firm of the Year: Strong & Hanni
3) Jimi Mitsunaga Excellence in the Law Award: Judge Vernice Trease
4) Pete Suazo Community Service Award: Shawn Newell
5) Corporate Counsel of the Year: Roy Montclair, SeekWell
6) Judge Raymond Uno Lifetime Achievement Award: Judge Augustus Chin
7) Friend of UMBA Award: Judge Monica Diaz

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

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

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

UMBA Executive Board

UTAH MINORITY BAR ASSOCIATION
PROMOTING DIVERSITY IN THE LAW

Lawyers Must Lead Out on Civility

by Keith A. Call

In May 2021, a Granite School Board meeting erupted into utter chaos when dozens of people angrily protested the state's school mask policy in the wake of the COVID-19 pandemic. Eleven people were arrested for disorderly conduct after the meeting was disrupted with shouting and chants. A state senator was even booed when she stood up to talk about teacher appreciation. Amidst the shouting, one board member yelled out a motion to adjourn, which was quickly seconded. The business of the board was stopped in its tracks. *See* Caitlin O'Kane, *11 People Charged for Interrupting School Board Meeting,* CBS NEWS (July 7, 2021, 11:33 AM) https://www.cbsnews.com/news/mask-policy-protest-utah-school-board/.

In Washington, a wave of lawmakers across parties are announcing they intend to leave Congress, many of them citing utter dysfunction and an inability to make a difference. "Right now, Washington, D.C. is broken; it is hard to get anything done," said Debbie Lesko, a Republican member of Congress from Arizona. Kayla Guo, *Members of Congress Head for the Exits, Many Citing Dysfunction,* NY TIMES (Nov. 26, 2023), https://www.nytimes.com/2023/11/26/us/politics/congress-retirement-republicans-democrats.html.

We've got to do something about incivility. It's a problem in the workplace, city halls, and Congress. A 2021 report published by the National League of Cities and Towns states:

> American culture has coarsened in the last few years, with people increasingly resorting to anger, vitriol and violence rather than dialogue to share their problems and express differences. The deep entrenchment of political ideologies into the core of who we are as a nation has taken us to a place in society where, rather than viewing those with opposing viewpoints as our friends, neighbors and fellow Americans, a growing segment of society views one another as enemies. ***This is dangerous for democracy,*** and it creates a powder keg environment where the smallest spark can suddenly explode.

Clarence E. Anthony et al., *On the Frontlines of Today's Cities: Trauma, Challenges and Solutions*, NATIONAL LEAGUE OF CITIES, 6 (2021), https://www.nlc.org/wp-content/uploads/2021/11/On-the-Frontlines-of-Todays-Cities-1.pdf (emphasis added). The NLC report refers to this problem as "an existential challenge to our communities, our society and our democracy." *Id.* at 7.

Lawyers have an important role to play here. Disagreement is our business, the fuel that drives our legal economy. Lawyers also have a disproportionate influence on society outside of the law. It is time for us to embrace a leadership role in championing civility. In doing so, we have the power to help bridge divides, restore public trust, and preserve the rule of law.

Six Skills for Dignified Disagreement

This is not about "going along to get along." Our job as lawyers is to advocate for our clients' positions. It is about healthy debate and discussion that are necessary for democracy to thrive. Lawyers are on the front lines where healthy disagreement, debate, and advocacy are essential.

The Bar did an excellent job of addressing these issues at the 2023 Fall Forum. There were several presentations about civility that went beyond mere platitudes. For example, we learned about The Dignity Index, a bi-partisan, Utah-based organization that has developed an objective, eight-point scale that measures how we talk to each other when we disagree.

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

Tami Pyfer, Chief of Staff at The Dignity Index also gave us six practical steps to promote civil dialogue in heated situations.

1. **Be curious, not furious.** When there is disagreement, approach it with curiosity, using language that invites dialogue.

2. **Regulate then debate.** When you start to get upset, pause and take a breath before speaking.

3. **Listen to hear, not to respond.** Really listen to the other person and consider summarizing briefly what you heard.

4. **Challenge ideas; don't attack people.** Speak your truth but do it with dignity.

5. **Acknowledge knowledge.** When someone else makes a logical or interesting point, acknowledge their point.

6. **Build up rather than tear down.** Advocate, explain, and build up your idea rather than just attacking others' ideas and/or dehumanizing people.

The Dignity Index has developed numerous other practical resources to help us advocate with dignity and civility. Check them out at https://www.dignityindex.us/resources.

Governor Cox to Address the Bar

As you may know, Utah's own Governor Spencer Cox has launched a "Disagree Better" campaign to help foster healthy disagreement and debate without hate. He is leading out on a national level as Chair of the National Governors Association.

As of the date of this writing, Governor Cox is scheduled to speak about his Disagree Better initiative to the Bar in a historic event on January 5, 2024, in which he will address the important role lawyers have to play on this critical issue. His speech will be made available to all members of the Bar for free. I hope you will take time to watch it.

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

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

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

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

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2024 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2024 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2024 Spring Convention Award no later than Friday, January 22, 2024. Use the Award Form located at https://www.utahbar.org/awards/ to propose your candidate in the following categories:

Dorathy Merrill Brothers Award – For the Advancement of Women in the Legal Profession.

Raymond S. Uno Award – For the Advancement of Minorities in the Legal Profession.

The Utah State Bar strives to recognize those who have had singular impact on the profession and the public. We appreciate your thoughtful nominations.

Notice of Bar Commission Election

Third and Fourth Divisions

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

- three members from the Third Division (Salt Lake, Summit, and Tooele Counties) and
- one member from the Fourth Division (Wasatch, Utah, Juab and Millard Counties).

Bar Commissioners serve a three-year term. Terms will begin in July 2024.

To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held.

Nominating petitions are available at https://www.utahbar.org/bar-operations/election-information/. Completed petitions must be submitted to Christy Abad (cabad@utahbar.org), Executive Assistant, no later than February 1, 2024, by 5:00 p.m.

Bar Appoints New Access to Justice Director

Megan Connelly, Utah State Bar Access to Justice Director

The Bar is pleased to announce that Megan Connelly is the New Director of the Utah State Bar's Access to Justice Office. Megan is a 2009 graduate of SUNY Buffalo Law School and has thirteen years of public service legal and policy work. Megan will continue the important work of the Bar in connecting lawyer, LPP, and law student volunteers with pro bono opportunities throughout the State of Utah. To sign up for pro bono opportunities, visit the Bar's pro bono site at https://app.joinpaladin.com/utahprobono/ or contact Megan at probono@utahbar.org.

IN MEMORIAM

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

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

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In Memory of Aric M. Cramer

March 29, 1959 – December 9, 2023

With great sadness, I am announcing the untimely passing of my former law partner Aric M. Cramer. Aric specialized in criminal defense. Aric had offices in Bountiful and St. George, Utah. He represented his clients with passion and skill. He was always available to respond to a request, to help a friend, or to help a fellow professional. He is greatly missed by his life partner, children, grandchildren, colleagues, friends, the TKD, and the hiking community. Aric held a J.D. and an LLM in Tax Law and was certified to handle death penalty cases.

Utah State Bar®

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2024 "Spring Convention in St. George" Accommodations

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

Hotel	Nightly Rate (Does NOT include tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Clarion Suites St. George 1239 S. Main St., St. George (435) 673-7000, request "Utah State Bar"	$129	10–King 10–2 Queen	2/14/24	1
Comfort Inn & Suites 138 E. Riverside Dr., St. George (435) 628-8544, request "Utah State Bar" or ask for Yolanda	$200	10–King 10–2 Queen	2/14/24	0.5
Courtyard St. George 185 S. 1470 E., St. George (435) 986-0555	$269	10–King 10–2 Queen	1/29/24	4
Fairfield Inn 1660 S. Convention Center Dr., St. George (435) 673-6066	$185 $199	10–King 10–2 Queen	2/14/24	0.3
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Holiday Inn 1808 S. Crosby Way, St. George (435) 628-8007	$185 $205	10–King 10– 2 Queen	2/14/24	0.5
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My Place Hotel, St. George 1644 S. 270 E., St. George (435) 674-4997	25% off daily rate	22 rooms (any available)	no closing date	6
Red Lion Hotel 850 S. Bluff St., St. George (435) 628-4235	$129	10–King 10–2 Queen	2/01/24	2
Tru by Hilton 1251 S. Sunland Dr., St. George (435) 634-7768	$189	10–King 5–2 Queen	2/14/24	1

Visit utahbar.org/springconvention to book your reservation today!

2024 Utah State Lawyer Legislative Directory

The Utah State House of Representatives

Nelson Abbott (R) – District 60
nelson@nelsonabbott.com

Education: B.A., Brigham Young University; J.D. and M.B.A., Brigham Young University

Practice Areas: Auto Accidents and Personal Injury.

Brady Brammer (R) – District 27
bbrammer@le.utah.gov

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

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

Jay Cobb (R) – District 48
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The Utah State Senate

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Practice Areas: Civil Litigation and Business Law.

Utah Law Related Education's Kathy Dryer to Retire

It was 1983. "Return of the Jedi" was the year's top-grossing movie, and "Every Breath You Take" by the Police was at the top of the charts. And in Utah, Kathy Dryer began her career at Utah Law Related education.

"I had taken a couple of years off from practicing law, and Judge Judith Billings came to me and said, 'you took some time off, now it's time to get going.' She wanted me to co-teach a class with her."

The class, which was directed from what is now the S.J. Quinney College of Law at the University of Utah, involved going into Utah's high schools and teaching students about the law. "Judith said I had to work for Utah Law Related Education (LRE) to do it, so that's how I got started," Kathy remembered.

The fact that Kathy was in the legal profession at all was a change of course for her. "I wanted to go to medical school," Kathy said. "I was a medical technologist, had a masters in immunology, and was getting ready to apply. But I was 30, and I realized by the time I finished residency – well, that didn't make much sense, so I went to law school instead."

Kathy had her first child just before finals during her second year of law school. "Going to law school with a baby is a challenge," she said.

After graduation, Kathy worked for a law firm for a couple of years and then took a couple of years off. When Judith Billings came calling, Kathy was a bit reluctant at first. "I wasn't sure I wanted to do it," she said. "But Judy was very convincing."

When the Executive Director position came open in 1988, the Law Related Education Board asked Kathy to apply for the position and she was hired, beginning a period of unprecedented growth for LRE.

"Kathy has been, and is, a 'tour de force' in the Law Related Education program," said Judge Augustus Chin, chair of the LRE Board.

Kathy notes there have been many changes in LRE over the past thirty years. "When I first started, Janet Hilliard and I ran all the programs by ourselves," she said. "I loved being with the students and watching them grow."

Eventually, LRE grew to the point where coordinators were hired for the individual programs. "The coordinators we've had are really the ones who make everything work," Kathy said. "They spend hundreds of hours preparing for mock trials, running peer court, and doing all the things that make a difference."

The Law Related Education programs include a mock trial program, which is a competition between students at the middle and high school levels; the "We the People: The Citizen and The Constitution" program, which focuses on promoting civic competence and responsibility in elementary and secondary schools; the "Project Citizen" program that promotes participation in local government; and the Salt Lake Peer Court, which provides an alternative approach to juvenile justice by allowing youth referred for minor offenses to be sentenced by their peers.

"All of our programs are designed to help students become engaged citizens," Kathy said. "Participating can be a life-changing experience for these kids."

The success of the Salt Lake Peer Court is one of Kathy's favorite memories of the program. "It's just incredible to watch students develop. They learn self-confidence, self-esteem, and their understanding of the legal system and society just grows and grows."

Kathy is quick to point out that none of this happens in a vacuum. "We couldn't do this without the support of the LRE board," she noted. The board, chaired by Judge Augustus Chin, works to provide the resources the programs need to be successful.

"LRE is celebrating fifty years in 2024," said Judge Chin, "and the success and longevity of Law Related Education are due in large part to Kathy's tireless efforts to fulfil the goals of LRE."

"Grant writing is my least favorite part of the job," said Kathy. "We need more books. We need to pay for mock trials. And as the program continues to reach more and more students, it just gets really expensive. Finding resources is the biggest challenge."

But all of it is worth it, she says, when she sees lives change. "I see people from the program out in the community, the success they've had in their lives, and I know the experience they had in LRE helped them get to where they are today," she noted.

Judge Chin agrees. "There are many, including myself, whose lives have been enriched by Kathy's commitment to Law Related Education," he said. "Over three decades, Kathy has proven herself a selfless, dedicated advocate for civic and legal education for the next generation."

Kathy will stay on until March, training LRE's new executive director, and then plans on spending time with her children and grandchildren. "Everyone I know who has retired says they're as busy now as when they were working, so I guess I'll find out!" she said.

Thanks, Kathy, for all you've given to Utah Law Related Education! And if you'd like to make a donation to LRE, visit https://www.lawrelatededucation.org/get-involved/donate.

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INTERIM SUSPENSION

On October 6, 2023, the Honorable Kraig Powell, Fourth Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against Gary L. Bell, pending resolution of the disciplinary matter against him.

In summary:
Mr. Bell was placed on interim suspension based upon convictions for the following criminal offenses:

Sexual Exploitation of a Minor, Voyeurism, Sodomy Upon A Child, Aggravated Sexual Abuse of a Child, and Aggravated Sexual Exploitation of A Minor.

SUSPENSION

On July 14, 2023, the Honorable Adam T. Mow, Third Judicial District, entered an Order of Suspension against Melodie J. Summers suspending her license to practice law for a period of three years. The court determined that Ms. Summers violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), and Rule 1.15(d) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
This matter involves two cases. In the first case, a client retained Ms. Summers for a personal injury matter. Because the client was a minor at the time, the client's father (Father) signed the initial fee agreement for the client. Thereafter, the client signed a Release of All Claims in consideration of a settlement amount

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

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and the insurance company issued a check to Ms. Summers and the client. Ms. Summers was last in direct contact with client and Father a few months later. After that time, their only contact was with Ms. Summers' office staff and they were unable to learn where the settlement money was or the status of the case.

Client retained another attorney (Second Attorney) to represent them in a continuing claim for underinsured motorist benefits from another insurance company (Second Insurance Company). Second Insurance Company issued a check to Ms. Summers and client. Although the cleared check appeared to be endorsed by client, neither client nor Father were aware that a settlement check had been issued by Second Insurance Company. An attorney for Second Insurance Company confirmed the check was negotiated.

Second Attorney notified Ms. Summers that he had been retained by client. Second Attorney requested verification that all the settlement proceeds were currently in Ms. Summers' trust account as client had no record of any distribution of settlement funds, including payment for medical liens. Ms. Summers did not respond to emails and Second Attorney was unable to reach her by telephone.

In the second case, a client retained Ms. Summers for a personal injury matter. The client executed a Release of All Claims with an insurance company in consideration of a settlement amount. The insurance company issued a check. The check was signed by Ms. Summers and client and was presented for payment. A second insurance company sent a letter to Ms. Summers confirming their settlement offer to client. Ms. Summers declined the offer and demanded a higher amount. A few months later, Ms. Summers sent an email to client wherein she stated she would file for arbitration if the insurance adjustor would not agree to an increase in the settlement amount. The client emailed and called Ms. Summers many times in an attempt to discuss their case with Ms. Summers. Ms. Summers' paralegal assured client that they had forwarded all of client's messages to Ms. Summers.

Client informed Ms. Summers' paralegal they were terminating Ms. Summers' representation and requested she enter her withdrawal of counsel in the matter. Later, client contacted the Utah State Bar's Consumer Assistance Program (CAP) because Ms. Summers had not withdrawn her representation as requested. The CAP attorney copied Ms. Summers on a letter to client for the purpose of informing her of client's concerns and requesting that Ms. Summers contact client. Ms. Summers withdrew her representation.

Client retained another attorney (Second Attorney). Second Attorney notified Ms. Summers by mail, email and facsimile that they had been retained by client and requested that arrangements be made to transfer the settlements to Second Attorney's trust account so they would have the funds available in order to negotiate provider liens. When they did not receive a response, Second Attorney's office attempted to follow up with Ms. Summers. Second Attorney emailed Ms. Summers a draft complaint against Ms. Summers he intended to file on client's behalf if the settlement funds were not received by a certain date. When Second Attorney did not receive a response, the complaint was filed in district court. Second Attorney also filed a complaint with the OPC. After the OPC notified Ms. Summers of the complaint, Second Attorney received a call from Ms. Summers. Ms. Summers met a member of Second Attorney's staff at Ms. Summer's bank and provided them with a cashier's check.

The court did find aggravating and mitigating factors.

Young Lawyers Division: Onwards and Upwards

by Ashley Biehl

The pandemic created a difficult time for the legal profession as a whole – especially for Young Lawyers, who entered the field in an entirely unprecedented and rapidly changing style of practice. The Young Lawyers Division (YLD) has taken some time to bounce back, but it is finally reflecting on that time from a completely new vantage point, with new insights on coming together as a community, and creating better in the world.

Where we've been:

Despite the challenges brought on by the pandemic, over the few years, the YLD has quietly continued to be active within our community:

- Joe Rupp organized the Veteran's Clinic by securing the space and volunteers for veterans to receive pro bono legal advice. This year, he is joined by co-chair Mary Manly.
- We supported the state mock trial program as judges and coaches.
- Gordo Rowe and the Continuing Legal Education team created CLEs that specifically addressed issues that affect young lawyers.
- Utah's young lawyers kept the Wills for Heroes program alive, despite the national program collapsing, and continues to provides pro bono estate planning for first responders. Thanks to the hard work of our co-chairs – Candace Water, Jessica Arthurs, and Rebekah-Anne Duncan – Wills for Heroes continues to be our most requested and successful volunteer program.
- In 2022, Scotti Hill and Sam Dugan were able to assist in reviving the Unsheltered Youth Prom at the VOA youth center, and YLD continued to support the VOA prom in 2023.
- The YLD contributed to the Utah Minority Bar Association and Utah Center for Legal Inclusion through their annual banquets and fundraising.
- Alex Vandiver and Nicole Johnston have helped reignite the YLD's social events. At our Spring Social (aka our Closing Social), the YLD saw more than fifty young lawyers and their families join us at the Tracy Aviary!

The YLD would like to thank its members for continuing to show up despite the unprecedented times.

Where we're going:

YLD is back, bigger and better than ever! Keeping in mind that the YLD operates on a July 1 to June 30 basis, this year, the YLD has already hosted a couple of amazing events:

- The Salt Lake Bees' Game in July. This was a fun, family-friendly picnic-style event. We had about thirty-five young lawyers and their family members come out to the ball game.
- The Winter Gala (aka our Opening Social) at the Loveland Aquarium in November. This was a raging success! We had over 150 young lawyers and their partners in attendance. It was the largest event that the YLD has held since before the pandemic, and we could not be more excited to have so many people coming out to connect with their peers.
- For the first time, the YLD has created a DEI Chair position, to better support ALL of our young lawyers. Aro Han is filling the position this year.
- CLE co-chairs, Gordo Rowe, Chase Wilde, and MJ Townsend have dedicated themselves to providing more CLE speaking and presenting opportunities to young lawyers.
- Our Fit2Practice co-chairs Amanda Simmons and Hilary Adkins are planning some fantastic wellness-based events, such as skiing / snowboarding, meditation, and yoga classes.
- Our new American Bar Association representative, Ezzy

ASHLEY BIEHL is an Assistant Attorney General, in the Education Division, and is the current President of YLD.

Khaosanga, is starting a two year term as the Utah Representative for the Young Lawyers section of the ABA and will be attending national conferences to vote on important referendums.

From a personal perspective, the three goals I have for my rapidly passing Presidency are:

1. **Creating better reach state-wide:** As a former rural attorney, I understand the feeling that rural attorneys are often not included. We have four rural attorneys on our YLD board and are working to bring a social to Northern Utah, and two Wills for Heroes events in the coming months to Beaver and St. George.

2. **Addressing young lawyer mental health:** In 2020, Cigna released their Loneliness and the Workplace 2020 U.S. Report, in which they conducted an interview of approximately 10,400 adults.[1] They found that 55% of Gen Z respondents reported feeling disconnected from others at work, and 73% reported feeling sometimes or always alone at work. These figures decreased with each generation. Another study of 13,000 lawyers found that 28% experienced depression, 19% reported anxiety, and 21% experienced alcohol use problems.[2] I'm hoping to facilitate a state-wide survey regarding the mental well-being of young lawyers, so we can better tailor our events and programming to meeting the true needs of our population.

3. **Connecting law students to young lawyers:** For many law students, young lawyers feel so far away and unapproachable, while young lawyers feel like they remember being in law school so clearly. I am hoping to find ways to connect law students to young lawyers through wellness and social events.

In sum, I am very proud of all that YLD has accomplished in the past year, and I am eager to see the new leadership of YLD continue our tradition of service and taking our community involvement and public interest work to new heights. Our board is full of intelligent, driven, altruistic people, who are here to serve the young lawyer population in Utah, and we welcome all feedback you have for us.

1. Cigna, Loneliness and the Workplace: 2020 U.S. Report (2020), https://www.cigna.com/static/www-cigna-com/docs/about-us/newsroom/studies-and-reports/combatting-loneliness/cigna-2020-loneliness-report.pdf.
2. Paula Davis, *Stress, Loneliness, & Overcommitment Predict Lawyer Suicide Risk*, Forbes (Feb. 15, 2023, 12:00 PM), https://www.forbes.com/sites/pauladavis/2023/02/15/stress-loneliness--overcommitment-predict-lawyer-suicide-risk/?sh=369a9e30621e.

Licensed Paralegal Practitioners—Real World Experience

by Greg Wayment

This conversation was taken from a panel discussion moderated by Tonya Wright at the annual all-day Paralegal Division CLE held on June 16, 2023.

How did you first hear about the LPP program?

Peter Vanderhooft: I heard about it when I was taking courses at Salt Lake Community College. Sharee Laidlaw is a professor there and was talking about it, so this was back in 2017, right before I transitioned from librarianship to paralegal work. I didn't think much of the LPP program at the time. I was like "okay, that sounds cool," but I didn't know how any of the court procedures worked or the practical application of the law; I had to learn that on the job.

Susan Astle: I actually heard about it from a family member. At the time I was considering going to law school. When I learned about the LPP program, I was immediately interested. I thought, "that's exactly what I'd like to do," because I believe we need more legal accessibility. I want more people to be able to get counsel, and so it felt like a perfect fit.

Laura Pennock: I was working here at the Bar in the OPC, and we had a staff meeting, and they said there's a task force that has been formed that they are going to start licensing paralegals in certain practice areas, and it'll probably be up and running within a year. Four years later, I would read the minutes to the steering committee because I was dying for them to do this. I realize that four years is a very short time in which to get this done, start to finish. Kudos to all those who worked on these committees and to the Bar and the supreme court for being willing to just launch without every question answered or contingency covered. I'm one of the first four, so I knew about it very early on and I was like, yes sir! sign me up right this minute.

What has surprised you the most about being an LPP?

Laura Pennock: The first thing that really surprised me was when I walked up to the door to meet my first client, how terrified I was. I had done family law for five years. I kind of figured I had some idea of what I was doing… and I realized I really didn't know anything. Why would anyone even talk to me? It was really, really different from being in the back office. It was terrifying.

Tonya Wright: Yeah, I remember my first case too. I was so excited and then I was like, "I know what to do but what should I do?" It was a little intimidating.

Peter Vanderhooft: My first client was a case that I couldn't technically handle on my own. Since I was at a firm, I had one of the partners help me and then I had to kick it to an associate because we had a hearing and the partner was unavailable. Very complicated, very messy, but it was resolved and ever since then I've gotten a little bit more confident. And I found that being an LPP, the benefit isn't necessarily knowing the law and filling out the forms, but it's really knowing what you can do without getting the court involved. And that's been super valuable.

Susan Astle: Yeah, I was just surprised with how much good we can do. At first, I felt like I was so limited, but then I realized,

Susan Astle

Laura Pennock

Peter Vanderhooft

Tonya Wright

there's so many people who are just kind of stuck at one little point or another. They just need a little navigation and some orientation to be able to move forward. It's great --- I love that part of it. I love helping people and connecting them to the resources they need. So, that's surprised me. I think my mind can immediately want to over-complicate things, but sometimes it doesn't need to be that complicated.

Without violating any kind of client confidentiality, share an example of how you helped a client out with something that they would have never been able to navigate themselves.

Susan Astle: A client I had was in a relationship, but they were never married and she wasn't sure if she could receive any child support. She was worried about what would happen if she attempted to ask for support and try to get the court involved. She had been sharing parent-time with the other parent over the years but had not received any child support. They didn't have any sort of parentage decree. She just thought it would be hopeless to ask and did not think she could do it or that the person would ever respond. She was intimidated by the system.

She had not sought out legal help previously because she didn't have the money for an attorney. Somebody had introduced her to me and then I helped encourage her and walked her through the process, and we got it all done. At the end she was just like, "I can't believe it. I'm getting child support; I can't believe it. We have a schedule … I can't believe it." It felt great to help her.

Laura Pennock: I had a client who, it was a pretty short engagement, but it was a parentage petition. She was disabled. She had a seizure disorder that rendered her unable to work, and they had a little girl. And the child's father had a lot of money, and he had an attorney and he went after her, essentially to take custody from her. She still has custody. Nothing has changed. She's still getting the same amount of child support.

Essentially, he got nothing and I stood in the way of him taking away that kid from her. And one of the things that the attorney kept bringing was, "well, she's disabled. Well, she's disabled. Well, she's disabled." And so I went to the statute and I said, you cannot discriminate against a parent because of the disability.

Tonya Wright: A woman contacted me who had been married for fourteen years to a man that she hadn't seen for twelve years. He had moved out of the state. At the time of their separation, there was an abuse situation. She was terrified of him and didn't know how to fill out the documents. She had no clue how to navigate the system at all. She told me that she didn't want him to know where she lived. I mean, we all know that you can fill those out and put your addresses as protected. But she didn't even realize that, she just she just wanted me to handle it, because then he wouldn't know where she was.

They didn't have any children or assets. She had a retirement account that she just wanted to make sure that she could cash out when she wanted to and not have to mess with him. So, I located him in another state. I had him served with papers. And he had long since moved on with his life. He called right up and said he'd sign whatever and a week later we had a stipulation. I had to file a motion to waive the thirty-day period, but she was divorced in two weeks. So, a woman who waited for twelve years because she didn't know how to do it, got it done in less than two weeks for very little money.

How do you advertise or get the word out about what you do?

Peter Vanderhooft: I don't advertise. I've considered it a few times. One of my clients was a referral from one of my other clients on Facebook. I have an office in West Valley now that I don't ever really go to, but it's there, so it's not at my house. I have a website. I have a Facebook page, but often it's people that come from Licensed Lawyer or people that are referred to me by the Bar or Modest Means or other LPPs. I'm also working on collaborating with Salt Lake County Library Services to do legal clinics.

Laura Pennock: I don't advertise. I do finally have a website that is very, very simple, and I am on some Facebook pages. I'm on a couple of divorce pages. I get referrals from Licensed Lawyer, I get referrals from other LPPs you know, if somebody throws up a thing, we've got a Facebook page for LPPs and they will say, "I have a client I can't take. I can't fit this into my practice right now. Can anybody take this person?" I'm as busy as I want to be. My practice is really quite small, and I've kept it that way and I just practice out of my house. I often meet clients at the library.

Susan Astle: I haven't paid for advertising either. I also have a website that I get some clients from. Something I have found is a little tricky is that we're a new kind of legal product, right? We're a new product people don't quite understand.

What are the benefits of having a solo practice?

Laura Pennock: I love being on my own. I love it. I love it. I will wander up to my little office at whatever o'clock and work until I'm done. I'm not chained to anybody's desk, and I'm not chained to anybody else's schedule.

Susan Astle: Years ago, I remember being in a class that was an entrepreneurship class, and I remember the teacher saying that when you work for someone else, you are working at a wholesale price. A business purchases products (or time) at a wholesale price and then they charge the customer the retail price, for a profit. So when I became an LPP, I remember thinking, I really was working for a wholesale price, but now I keep all the money I earn and that's a wonderful feeling. When I bill my time, I'm like, that's mine, I keep the whole pie.

Peter Vanderhooft: It was difficult when I initially transitioned from working at a law firm to my own solo practice. Because I started off as a librarian, my initial inclination was to give everything away for free. You can't do that in the law firm, and I still have trouble with some of my clients. I'm like, "It's OK. I'll write off a little bit for you because I like you."

I do like being in charge of my own work. I had a lot of trouble in 2021, finding a balance for my LPP work and working in a law firm. I switched through a number of law firms and I realized, I just need to do this on my own because I enjoy the people helping aspect of it, I enjoy the areas of practice that I'm licensed in, and this is how I can be most effective.

What has been the hardest thing about being an LPP?

Peter Vanderhooft: Because of the way the court forms are drafted, the forms can be really hard to use and sometimes they don't have accurate information or they're not up to date. I often have to explain to my clients information that isn't on the forms. For example, in eviction cases, I tell them, "You're not going to be locked out of your place if you overstay, you are going to be on the hook for these costs" and explain the steps they have to take to protect themselves. That is really satisfying to me.

Additionally, conversations with other attorneys can be really difficult. I've found that divorce attorneys are a lot more aggressive than the debt collection and eviction attorneys. With family law I've found that there are a lot of emotions when it come to custody, and value, and your salary and all of that.

Laura Pennock: Yeah, I'm going to speak to that as well. One of my fellow LPPs told me one time that an attorney said to her, my resume will always trump yours. My response was, I don't think the Commissioner is going to be looking at our resumes and deciding the case on the basis of that. I've had mixed experiences with attorneys. I've had some attorneys who are great. I had an attorney on the other side who after I left the case, wrote me the nicest e-mail saying it was really nice working with you.

Susan Astle: I always try to be very honest with clients of what they can expect. And sometimes it is kind of hard when you go through the facts in the case and you understand that you can't change the cards that you are dealt. I always try to tell my clients what a reasonable outcome is, based on the facts of their case. Even though it can be hard to have those conversations, I have found it helps me every day of the week.

Tonya Wright: Yeah, I found client expectation to be the hardest part as well. I've kind of figured out that the way to get them to come down a little off their expectations is to help them realize the value in the help that they're receiving is at a serious discount, because it is a limited license. And if you want to fight about this one thing, it's going to cost you four times the money. So, we do a cost-benefit analysis quite often. But I do think that client expectations have been my hardest thing and then secondly would be the lawyers. But that said, I think I've had, like Laura, many great experiences with attorneys. Many, many. I would say that probably 90% of them have been positive.

Any advice for people who might be interested in becoming LPPs?

Laura Pennock: You know, we need people in the profession and really our biggest, I think our biggest challenge right now is to reach critical mass where it's, you know, just ubiquitous. And that's really just going to be a matter of numbers. That will create the environment where people know they have choices and can make them according to their needs and budgets.

Peter Vanderhooft: I think the biggest thing would be to review the forms, but be very careful in using them because they're in a legacy format. Court forms or orders have to be filed in RTF format. That's not how the forms are online. There's information in there that the judges don't want and so just being very careful. It is also helpful to be familiar with the case law and the statutes. So go the extra mile and research, it's very valuable.

Susan Astle: Yeah, if you're thinking about it, I would suggest reading through the Utah Court of Appeals cases. I love reading those and look for them every single week. I feel like it kind of gives you an idea of what you should be thinking about. Just talk to more people, think about it, and go forward.

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