Utah Bar® JOURNAL

Volume 37 No. 3
May/June 2024

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Rainbow Over Red Cliffs by Utah State Bar member Tyson Hafen.

TYSON HAFEN is an attorney with the international law firm of Duane Morris LLP in Las Vegas and practices primarily in business and commercial litigation. Although Tyson practices primarily in Nevada, he also handles all Utah litigation matters for his firm and is active in the Southern Utah Bar Association. Asked about the cover photo, Tyson said he took the photo with his iPhone in his in-laws' backyard at Entrada Country Club in St. George. After posting it to social media, his cousin and fellow member of the Utah Bar, Britani Thomas, suggested he submit it to be considered as a cover photo and here we are!

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Utah Bar JOURNAL

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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.

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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.

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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.
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7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
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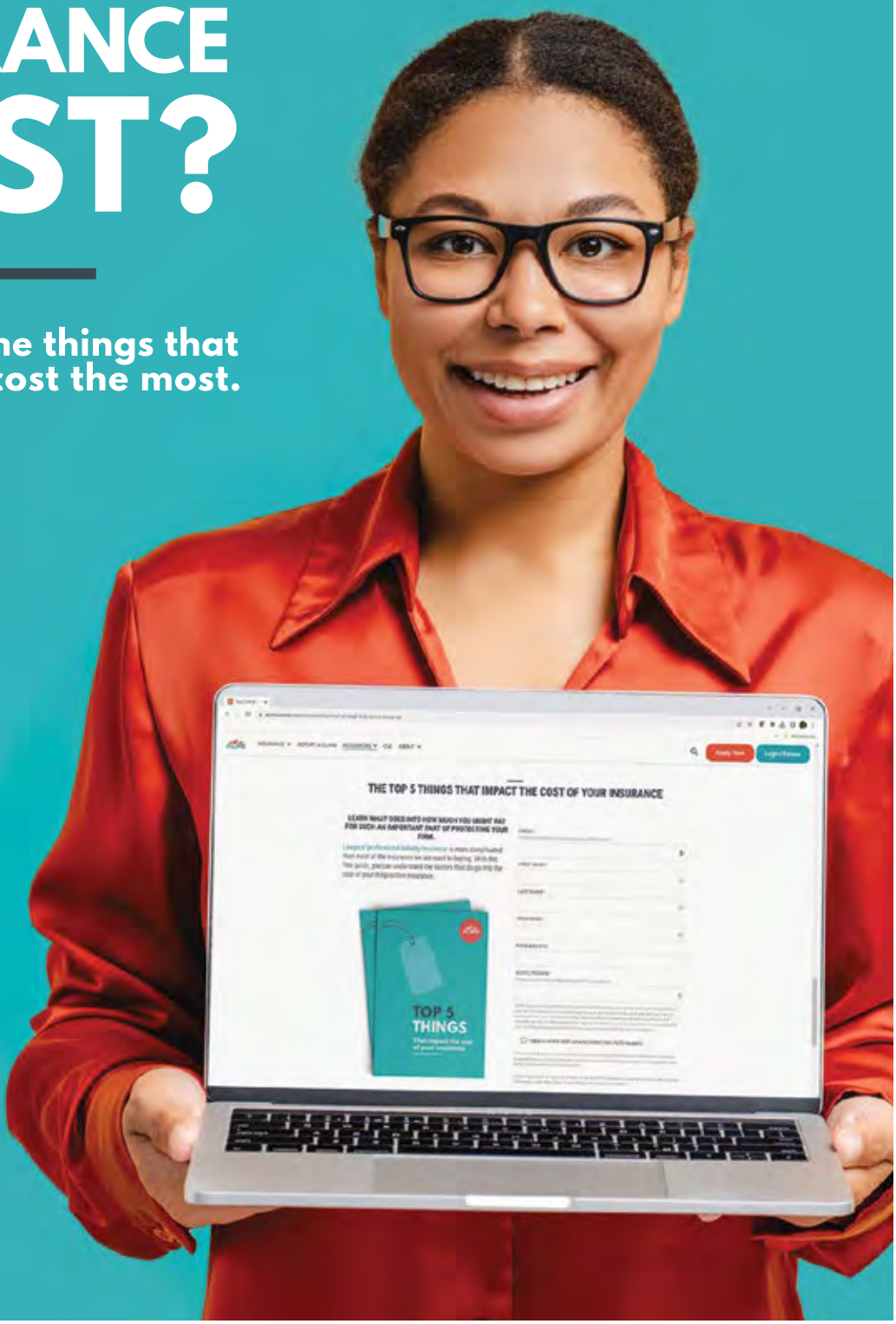

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Thank You to All The Great Mentors Who Make A Difference

by Erik A. Christiansen

On March 21, I was fortunate to attend a luncheon for the Utah Center for Legal Inclusion (UCLI), and to listen to two great keynote speakers. Dr. Christy Glass, a sociology professor at Utah State University, spoke about the importance of mentors and mentorship and the impact mentors have on those whom they mentor and on themselves. I also was privileged at the UCLI lunch to listen to John Arthur, a sixth grade teacher at Meadowlark Elementary School, talk about the lawyers in our community who show up on Zoom every Friday in his classroom and mentor young students about life, school, and perhaps what it would be like to grow up to be a lawyer. The students at Meadlowlark Elementary tend to be from low-income, minority populations, and the lawyers who mentor the students tend to come from similar backgrounds. By letting young students interact with older versions of themselves, Arthur's mentorship program helps create an opportunity for his elementary students to build confidence and self-esteem, and perhaps to realize that they too can become lawyers.

> *"I invite you to think about your own mentors and to look for opportunities to be a mentor to others."*

Attending the UCLI lunch got me thinking about my own mentors, and how I probably never thanked them for the impact they made on my life. My first mentor was my first boss, Richard (Rick) J. Stone, at Milbank, Tweed, Hadley & McCloy. Rick was a born trial lawyer, and was happiest in the heat of the battle. I learned a lot from Rick about how to try cases, how to take depositions, and maybe most importantly, how to build relationships within the legal community that later would turn into legal work. So, thank you Rick, you made a big impact on my life, and I remember often many of the things you taught me.

My next mentor was Julia B. Strickland at Stroock & Stroock & Lavan. Julia taught me how to write like a lawyer, she taught me how to build relationships with clients, and she taught me how to engage in public speaking as a method of deepening my expertise and to develop clients. Julia also taught me that women can be successful in New York law firms, without sacrificing being a mother or a spouse. As the father of four daughters, and as the husband of a gifted lawyer, Christina Jepson, I think often of how Julia managed to balance it all by being deliberate in her decisions about her career and protective of her time with her family. Julia taught me that it was essential to take time off work, to spend that time with the people you love, and that the world will not end if you make the deliberate and calculated decision to balance work and career. So, thank you Julia. You made a big impact on my career. I have made rain using many of the techniques and tools you taught me to develop clients. I admire everything you've done and still look back on my early training from you with appreciation and gratitude.

Maybe because I had a couple of truly great mentors when I was a young lawyer, I often try to mentor younger lawyers through teaching at the S.J. Quinney College of Law, in Bar activities, at work, and through programs like the American Bar Association's Judicial Intern Opportunity Program. I invite you to think about your own mentors and to look for opportunities to be a mentor to others. I hope you will find that as a mentor, the young lawyer you mentor will benefit, but you also grow and change as a lawyer from the things you learn from the younger lawyers you teach.

Speaking of younger lawyers, a big congratulations to Kim Cordova who in April was elected the new President-Elect of the Utah State Bar. Kim will serve as President-Elect of the Utah State Bar while Cara Tangaro is President of the Utah State Bar. Kim will then succeed Cara as Utah Bar President in July 2025. Kim and Cara will be sworn in as President and President-Elect on July 12, 2024, at the Utah Law & Justice Center.

I am thrilled that Kim has agreed to be of service to the Utah State Bar. Kim has an incredible record of service to the citizens of Utah, and she will be a great leader. Kim started out at the Salt Lake County District Attorney's office, representing Salt Lake County in a variety of felony cases, including homicides. She has a plethora of experience in prosecuting sex offense crimes and was assigned to the special victims team at the District Attorney's Office, where she prosecuted cases against adults and children, including cases of rape and aggravated sexual abuse. Kim also served the State of Utah as the Executive Director of the Utah Commission on Criminal & Juvenile Justice from 2018 to 2021. Following her government service, Kim joined the law firm of Brass & Cordova, where she now practices criminal defense.

Kim is a community leader, who is passionate about civil rights, and advocates daily for minority communities in Utah. She also is a lot of fun and has many friends in the legal community. I have no doubt that Kim will work hard and that she and Cara Tangaro will make an unstoppable team. I can't wait to see all of the amazing things Kim and Cara accomplish together.

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Past President of the National Court Reporters Association (and Utah reporter), Debbie Dibble, CSR, RDR, CRR, CRC, will be presenting at the iSymposium on August 22 about AI in the courtroom and transcripts. We would encourage you to come learn more about this topic. In the meantime, check out this recent article about AI and the legal system: https://www.cnbc.com/2024/03/06/ai-deepfakes-are-headed-to-court-at-time-of-low-trust-in-legal-system.html

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Jan Graham

by Patricia W. Christensen

The Members of the Board of Bar Commissioners of the Utah State Bar acknowledge, with heavy hearts, the untimely passing of Utah's former Attorney General and former Utah State Bar Commissioner, Jan Graham, who succumbed to cancer at her home in St. George, Utah, on January 29, 2024, at the age of 74.

Jan was a graduate of South High School (1967) and Clark University in Massachusetts (1971). She received a Master's Degree in Psychology from the University of Utah (1977) and her law degree from the University of Utah College of Law in 1980, where she was President of the Women's Law Caucus and a trailblazer working to create a more hospitable professional environment for women.

Just one year out of law school, as a young associate at Jones, Waldo, Holbrook & McDonough, Jan approached Utah's first and only woman district court judge (subsequently Utah's first woman Supreme Court Justice and Chief Justice), Christine Durham, for assistance organizing Utah's small community of practicing women attorneys at the time, to support women's acceptance and advancement in the legal profession; and with the help of a small cadre of colleagues, Women Lawyers of Utah (WLU) was born in 1981.

For women lawyers in Utah, the importance of WLU cannot be overstated. The 1980s were a very different time and the legal profession was a very different place than it is today. Most women lawyers worked alone or in firms in which they were the only professional women, and getting meaningful work and opportunities was a challenge. As Jan described it in the *Utah Bar Journal's 75th Anniversary Edition* in 2006:

> I had a sense of being left alone to navigate this tricky male bastion by myself. Jones Waldo was progressive for the day, but still decidedly male dominated and wary of what women could and should contribute to the grand practice of law ….
>
> Worse than the sense of being alone was the sense among my female peers that it was imperative that we just blend in, that we pretend that gender made no difference; 'after all, we're all just lawyers.' But the experience of young women was vastly different: the expectations and perceptions were planets apart.

PATRICIA W. CHRISTENSEN is Of Counsel at Parr Brown Gee & Loveless and a senior advisor to the Women Lawyers of Utah.

> The social networking was particularly treacherous. Lunch, dinners, travel, drinks, and golf outings with clients: how were women going to move comfortably into this world?
>
> There were some funny but also purely unfair events, like being dropped from a big case because it required travel and the partner 'didn't feel it was fair to his wife' to have me flying with him and staying in the same hotel.

Utah Bar Journal, Vol. 19, No. 6, pp. 28–30 (2006).

Meanwhile, many women lawyers were trying to balance equally challenging private lives – as wives, mothers, family caregivers, and church and community volunteers. Thanks in large part to Jan's vision and initiative, WLU has helped women navigate these tricky balances and be better and more successful lawyers for over four decades.

Through hard work and professional excellence, Jan thrived at Jones Waldo, becoming a successful commercial litigation partner and the first woman member of its Board of Directors. In an anecdote that captures this era in which Jan worked to promote women in the profession, she told the story of a case being litigated in federal court, in which the judge always addressed his communications to counsel beginning: "Gentlemen." At a particularly difficult stage of the case, upon receiving such a communication from the court, Jan replied: "Your Honor, unfortunately not all the attorneys appearing in this case are 'gentlemen.' I am just the most obvious example." From then on, the presiding judge addressed counsel with a more inclusive salutation.

Jan served on the Utah State Bar Commission and as Utah Solicitor General from 1990 to 1992, before being elected Utah Attorney General in 1992 – the first and only woman to serve as Utah's Attorney General and still the only woman elected to statewide office on her own ticket in Utah history. She was subsequently reelected in 1996, and served with distinction for eight years, from 1993–2001, advocating tirelessly for the victims of family violence and abuse; helping to create the Children's Justice Center, where children suffering abuse could be interviewed by police and prosecutors in a safe and non-threatening environment; prosecuting and eventually settling the State's case against the tobacco companies for undermining the health of Utah citizens; and advocating tirelessly for the State and its citizens with justice, fairness, integrity, equality, and compassion in the administration of justice.

After leaving public service, Jan returned to private practice until she was diagnosed with cancer in 2014 and retired to southern Utah. There she focused on her family, researched and wrote a family history, and helped create Utah's *Safe at Home* Program to help protect survivors of domestic violence, stalking, human trafficking, and sexual assault. To the end, Jan was breaking down barriers, creating pathways for future generations of women lawyers, and working to protect victims of violence.

Jan Graham was a remarkable woman, a true visionary, an exceptional leader, an extraordinary human being, and a devoted friend. The Utah State Bar is deeply grateful for her courage and unwavering commitment to our state and the legal profession.

This article was based on a tribute written for and published by Women Lawyers of Utah, February 12, 2024.

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The Utah Administrative Procedures Act: Thirty-Seven Years & Counting

by Brenden Catt and Bret F. Randall

Introduction

Charged with effective oversight and administration of many federal and state programs, Utah's administrative agencies play a pivotal role in modern society. In doing so, they necessarily take actions that affect important legal rights and remedies. The Utah Administrative Procedures Act (UAPA) originated in 1987 through the efforts of Attorney General David Wilkinson, Governor Scott Matheson, and the Administrative Law Committee they formed in the 1980s. Governor Matheson had three primary goals: (1) to provide optimum public access to administrative agencies; (2) to create greater uniformity among state agencies; and (3) to maintain the efficient operation of state agencies in performing their statutory functions. *See* Alvin Robert Thorup & Stephen G. Wood, Utah's Administrative Procedures Act: a 20-Year Perspective 22–24 (2009). These goals remain as valid today as they were in 1987. The Administrative Law Committee has long since been disbanded, and unfortunately, UAPA has received comparatively little attention for some time.

While UAPA establishes a uniform regulatory framework for state agency actions, the statute anticipates that agencies may promulgate agency-specific procedures. Every agency has benefited from this ability, and thus state agency procedures remain balkanized to some extent. Addressing agency-specific procedures is beyond the scope of this article. Rather, this article is intended to describe UAPA's default procedures and the framework it affords agencies to chart their preferred course of action for adjudications. Understanding UAPA's default procedures is fundamental because each agency's approach to administrative law, however customized, eventually merges into UAPA's statutory process. Moreover, UAPA sets boundaries for the customized procedures agencies may adopt by rule. Thus, state agency procedures come in many flavors but ultimately derive from the same recipe book. This article takes a brief look through that book.

An "Agency" Under UAPA

UAPA expansively defines "agency" to include "a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of [Utah], including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head." Utah Code Ann. § 63G-4-103(1)(b). The term "agency" excludes "the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state." *Id*. Subject to a list of exclusions under Utah Code Section 63G-4-102(2), UAPA presumptively applies to the adjudication, judicial enforcement, and judicial review of all agency actions. *See id*. § 63G-4-102(1).

Agency Action Initiation & Notice

A foundational concept under UAPA is that of an agency action, which occurs whenever an agency "determines the legal rights, duties, privileges, immunities, *or other legal interests* of an

BRENDEN CATT is an Assistant Attorney General with the Environment Section of the Utah Attorney General's Office.

BRET F. RANDALL joined the Utah Attorney General's office in 2017, where his practice supports various programs at the Utah Department of Environmental Quality.

identifiable person," including an action to "grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license." *Id.* § 63G-4-102(1)(a) (emphasis added). UAPA neither explicitly defines nor limits "legal interests" in scope. In this context, "legal interests" may well be broad enough to cover any legally protectable interest, whether economic, relational, or beneficial.

An agency action may be initiated by (1) the agency or (2) a third party with legal standing under the agency's rules to initiate an agency action. *Id.* § 63G-4-201(1)(a)–(b). By allowing agencies the latitude to grant third parties the right to initiate agency actions by rule, UAPA affords state agencies the ability to meet their needs without UAPA itself defining when and under what circumstances third parties have such a right. It appears that a key takeaway from the initiation step is that whatever an agency's rules may provide in a specific context, a "notice of agency action" and a "request for agency action" are both procedurally analogous to a civil complaint under Rule 3 of the Utah Rules of Civil Procedure (URCP).

Whenever an agency initiates an action, the agency must provide written notice that meets the minimum requirements of the statute. *Id.* § 63G-4-201(2)(a). The notice must include the elements specified by Utah Code Section 63G-4-201(2)(a)(i)–(xi). The notice must also be delivered to the person that is the subject of the action. *Id.* § 63G-4-201(2)(a)(i); *see also State v. Truman Mortensen Fam. Tr.*, 2000 UT 67, ¶ 17, 8 P.3d 266 (holding that service by certified mail is acceptable, and an agency is not required to ensure that the respondent reads or fully understands the contents of the notice). In this regard, UAPA's initiation and service steps resemble the commencement and service of a civil action under Utah Rules of Civil Procedure 3 and 4. But, unlike a civil action, UAPA affords agencies the flexibility to define the parameters of the initiation process and, more importantly, the process by which the agency will adjudicate the action if it is appealed. Thus, an agency may implement customized procedures the agency deems best fit for its programs.

Agency Adjudication

Agency adjudication follows the initiation of an agency action and notice of such action. In substance, an agency adjudication allows an agency to re-evaluate the initial decision and the supporting record to decide whether the matter is adequate to withstand judicial review. Notably, the agency adjudication process is not equivalent to judicial review. Rather, the agency adjudication process benefits both the agency and the parties by evaluating the matter in more detail, improving the administrative record, and otherwise preparing the matter for judicial review.

FIGURE 1.

UAPA's duality. The UAPA process is binary in terms of how an agency action is initiated and how it is adjudicated at the agency level. Utah Code Ann. § 63G-4-201(1), (2)(a)(v).

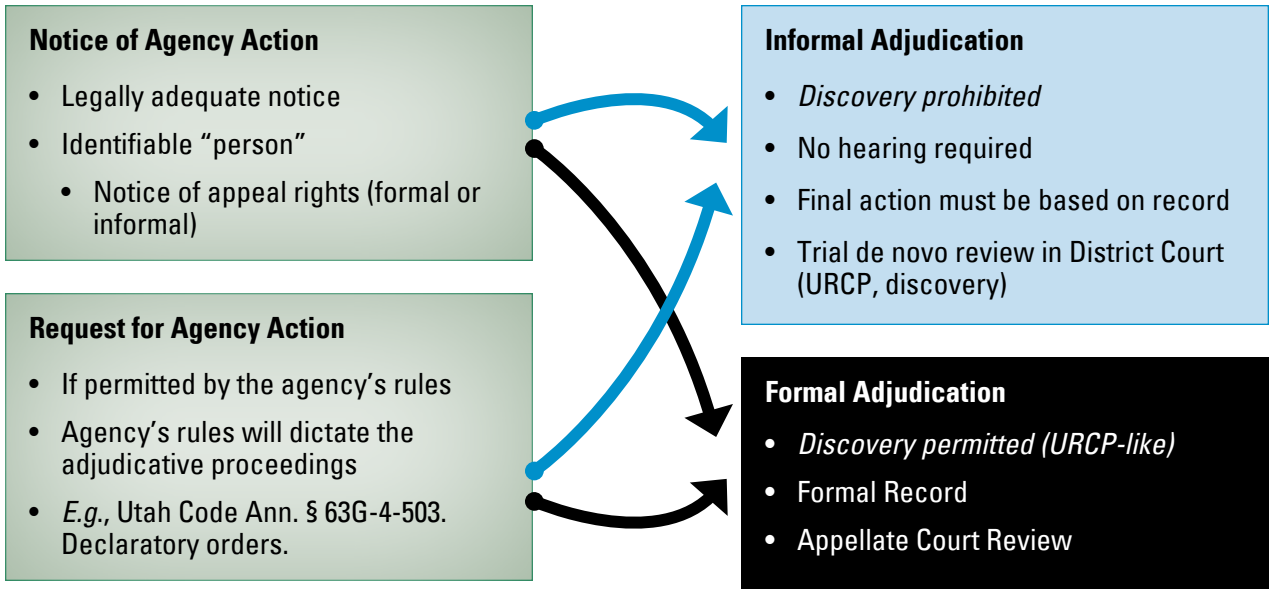
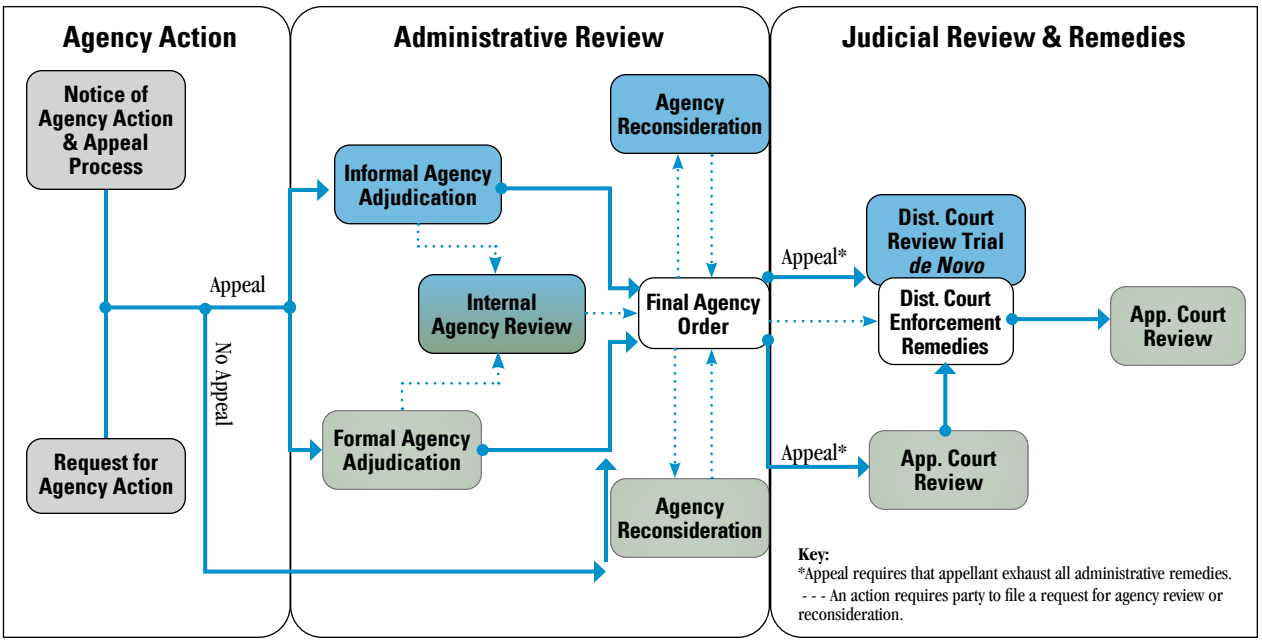


FIGURE 2

Side-by-side comparison of formal and informal adjudicative proceedings.



Regardless of what specific procedures an agency's rules may provide, the agency must decide whether to treat agency adjudications as *formal* or *informal*. It must be one or the other, and the notice of agency action must identify the adjudicative formality. Utah Code Ann. § 63G-4-201(2)(a)(v). While the formal and informal adjudication pathways are mutually exclusive, Figure 2 helps compare the two pathways. Formal and informal adjudicative proceedings are discussed separately below.

Formal Adjudicative Proceedings.

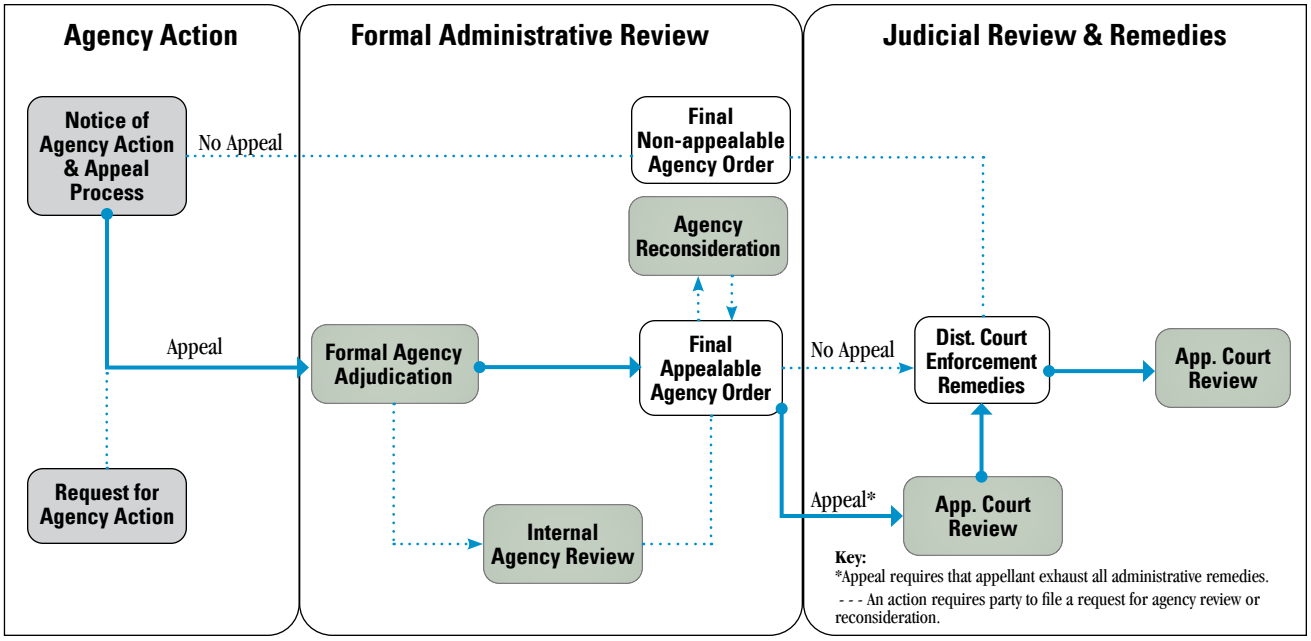
While each agency may adopt modified procedures, UAPA provides default procedures that set the parameters for formal adjudicative proceedings. Unsurprisingly, these procedures are akin to the URCP. *See id.* §§ 63G-4-204 to -208. Formal adjudicative proceedings are similar to a trial court proceeding because the agency is assuming the role and responsibility of a district court; otherwise, direct appellate review would not be appropriate. A respondent may file a written response to a notice of agency action, which must include the file number, name of the adjudicative proceeding, a statement of requested relief, a statement of facts, and a statement justifying the relief sought. *Id.* § 63G-4-204(1). This response, and any other filings required throughout the adjudicative proceeding, must be sent to each party. *Id.* § 63G-4-204(2). Formal adjudicative proceedings under UAPA also permit discovery and issuing of subpoenas. *Id.* § 63G-4-205(1)–(2).

A presiding officer is charged with regulating the course of a formal adjudicative proceeding. *Id.* § 63G-4-206(1)(a). The presiding officer may make evidentiary rulings and take notice of facts. *Id.* § 63G-4-206(1)(b). The presiding officer must afford all parties the ability to present testimony, argue, cross-examine each other, and submit rebuttal evidence. *Id.* § 63G-4-206(1)(d). Any person not a party to the formal adjudicative proceedings may petition to intervene. *See id.* § 63G-4-207. Finally, within a reasonable amount of time, the presiding officer must issue an order that includes, among other information, findings of fact and conclusions of law. *See id.* § 63G-4-208(1).

There are two clear distinctions between formal adjudicative proceedings and judicial proceedings. First, the Utah Rules of Evidence are generally inapplicable to formal adjudicative proceedings. *See* Utah R. Evid. 101(a). In fact, a presiding officer may not exclude evidence just because it is hearsay. Utah Code Ann. § 63G-4-206(1)(c). Second, the URCP do not apply to formal adjudicative proceedings unless either (1) an agency's rules expressly provide that the URCP apply or (2) an agency fails to enact rules governing an element of a formal

FIGURE 3

A summary of formal adjudicative proceedings under UAPA.



proceeding, such as discovery. *Id.* § 63G-4-205(1). Accordingly, it is difficult to overstate the importance of understanding an agency's rules before advocating on behalf of a client in formal adjudicative proceedings. Figure 3 summarizes formal adjudicative proceedings and the processes that precede and succeed them.

Informal Adjudicative Proceedings.

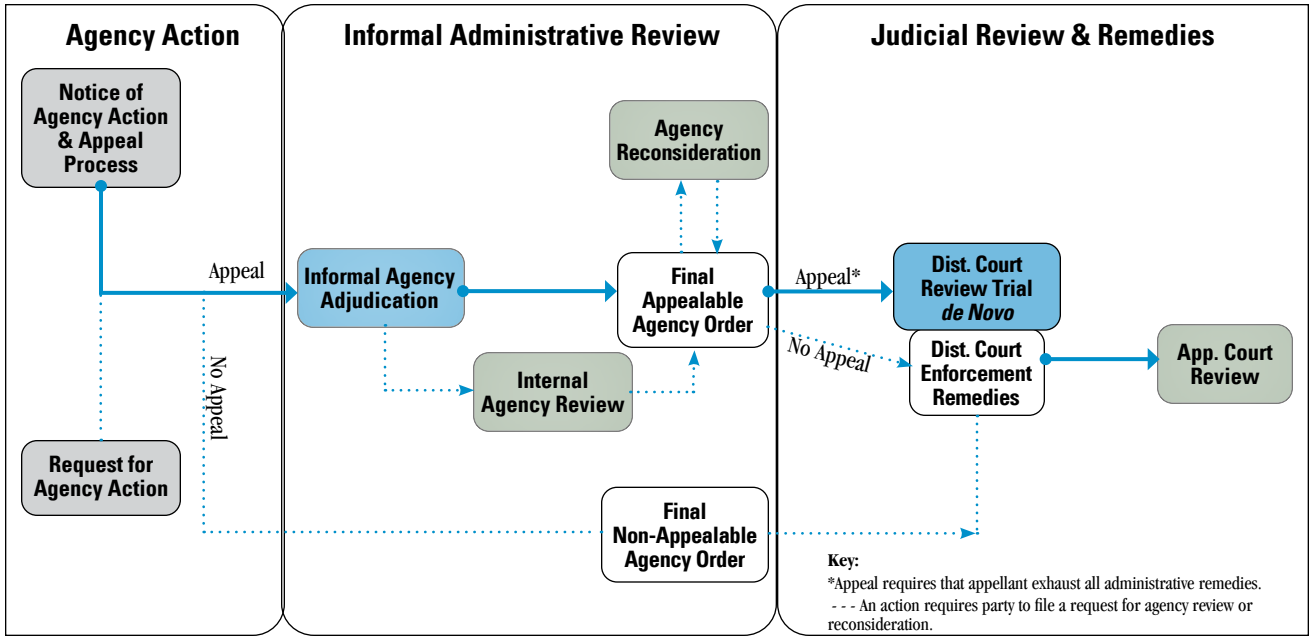
Informal adjudicative proceedings are governed by Utah Code Sections 63G-4-202 to -203. As formal adjudicative proceedings are the default proceeding under UAPA, the nature and scope of informal adjudicative proceedings are primarily a creature of agency rule. *Id.* § 63G-4-202(2). Agencies may conduct informal adjudicative proceedings so long as such proceedings preserve the due process rights of respondents. *See id.* § 63G-4-202(1)(b). In determining whether to conduct informal adjudicative proceedings, the agency may consider the enhanced administrative efficiency and the potential public benefit of informal adjudicative proceedings. *Id.* § 63G-4-202(1)(a)–(d). If an agency's rules provide for informal adjudicative proceedings, an agency must define the procedures that govern such proceedings. *Id.* § 63G-4-203. Despite this agency-specific approach, UAPA provides the foundational procedure for informal adjudicative proceedings. *See id.* UAPA's foundational procedure is outlined in Figure 4, which summarizes informal adjudicative proceedings and the processes that precede and succeed them.

Notable Distinctions Between Formal and Informal Adjudicative Proceedings.

It is important to clearly distinguish the procedures of formal proceedings from those of informal proceedings. Unlike formal adjudicative proceedings, their informal counterpart does not require responsive pleadings or hearings unless required by agency rule. *Id.* § 63G-4-203(1)(a)–(b). Moreover, discovery and intervention are generally prohibited in informal adjudicative proceedings. *Id.* § 63G-4-203(1)(e) & (g). Moreover, unlike orders issued following formal adjudicative proceedings, the required contents of orders following informal adjudicative proceedings are somewhat lethargic. Such orders, at a minimum, must consist of (1) the decision; (2) the reasons for the decision; (3) a notice of a right for administrative or judicial review; and (4) the deadlines for filing an appeal or requesting review. *Id.* § 63G-4-203(1)(i). Notably, agency orders following informal adjudicative proceedings neither require findings of fact nor conclusions of law. *Compare* Utah Code Ann. § 63G-4-208(1)(a)–(b) (requiring orders issued by the presiding officer following formal adjudicative proceedings to include findings of fact and conclusions of law), *with* Utah Code Ann. § 63G-4-203(1)(i) (containing no requirement that orders issued by the presiding officer following informal adjudicative proceedings include findings of fact or conclusions of law).

FIGURE 4

A summary of informal adjudicative proceedings under UAPA.



Internal Agency Review

Another flexible and potentially useful procedure offered by UAPA involves the internal review of an agency action by a superior agency. *See id.* § 63G-4-301(1)(a). This internal review step derives from the fact that the person conducting a formal adjudication is designated as the "presiding officer." *See id.* § 63G-4-208(1) (providing that the final order is to be issued by the "presiding officer"). The presiding officer may be an agency head or an individual or group of individuals designated to conduct an adjudicative proceeding. *Id.* § 63G-4-103(1)(h)(i).

Internal agency review applies only if codified in statute or agency rule. *Id.* § 63G-4-301(1)(a). If a statute or agency rule allows the parties to an adjudicative proceeding to seek agency review, it is a mandatory administrative remedy, and a party must request agency review within thirty days of the agency order. *Id.* A request for agency review must include the grounds for review and relief sought, the date on which the request was mailed, and the signature of the requestor. *Id.* § 63G-4-301(1)(b). If internal agency review is required by statute or agency rule, a superior agency must review the agency order within a reasonable amount of time. *Id.* § 63G-4-301(6)(a). If a superior agency proceeds with internal review, either by granting a request or adhering to its codified obligation, the superior agency may permit the parties to file briefs or conduct oral argument. *Id.* § 63G-4-301(4). The superior agency's final order on review must contain, among other substance, findings of fact, conclusions of law, and a decision of whether the underlying agency order is affirmed, reversed, modified, or remanded. *See id.* § 63G-4-301(6)(c).

The internal agency review provisions apply to both formal and informal adjudications. Moreover, the availability of internal agency review in the context of an informal adjudication does not render that adjudication formal. *Friends of Great Salt Lake v. Utah Dep't of Nat. Res.*, 2010 UT 20, ¶¶ 11–14, 230 P.3d 1014 (holding that formality of agency adjudication for purposes of district court or direct appellate review is governed by the formality level of the initial phase of the adjudicative proceeding before internal agency review).

Agency Reconsideration

If an agency's rules do not provide for internal agency review, the parties may file a request for reconsideration with the agency. Utah Code Ann. § 63G-4-302(1)(a). Unlike a motion for reconsideration filed in court pursuant to the URCP, a request for agency reconsideration is a statutory right. However, a request for reconsideration is not required to exhaust administrative remedies, unless otherwise provided by statute, and thus

a person may seek judicial review of an agency order without agency reconsideration. *Id.* § 63G-4-302(1)(b).

A request for reconsideration must be in writing and filed with the agency within twenty days of the agency's order. *Id.* § 63G-4-302(1). The party making such a request must mail a copy to each party to the adjudicative proceedings. *Id.* § 63G-4-302(2). The agency head or their designee must issue a written order granting or denying the request for reconsideration within twenty days. *Id.* § 63G-4-302(3). If the agency head or their designee fails to timely issue an order, the request is considered denied. *Id.*; *see also Darvish v. Labor Comm'n Appeals Bd.*, 2012 UT App 68, ¶¶ 19–20, 273 P.3d 953 (holding (1) an administrative agency may act on a request for reconsideration after the UAPA twenty-day presumptive denial period expires and (2) the thirty-day period to request judicial review begins on the date of the written denial of a request for reconsideration even if that denial is issued after the date the request is presumptively denied).

Prerequisites and Fundamentals of Judicial Review

Utah Standards of Appellate Review – Third Edition thoroughly addressed the standards, nuances, and best practices of judicial review. Norman H. Jackson & Lisa Broderick Thornton, 24 Utah B.J. 8 (Jan./Feb. 2011). Rather than rehash the principles outlined there, this article addresses the prerequisites and fundamentals of judicial review.

Prerequisites of Judicial Review

Prior to seeking judicial review, a party must exhaust all available administrative remedies. Utah Code Ann. § 63G-4-401(2). There are two circumstances in which a party is not required to exhaust all administrative remedies. First, if a provision of UAPA or another statute expressly states that exhaustion of administrative remedies is not required, a party need not exhaust such remedies before seeking judicial review. *Id.* § 63G-4-401(2)(a). For example, and as mentioned above, even though agency reconsideration may be an administrative remedy available in certain circumstances, the filing of a reconsideration request is not a prerequisite to seeking judicial review. *Id.* § 63G-4-302(1)(b). Second, a court may not require a party seeking judicial review to exhaust all administrative remedies if (1) the administrative remedies are inadequate or (2) exhausting administrative remedies would result in harm disproportional to the public benefit of requiring exhaustion. *Id.* § 63G-4-401(2)(b).

Upon exhausting all available administrative remedies, a party must petition a court for judicial review. The petition must include the name of the agency that issued the final agency action and all other parties that may have an interest in the action. *Id.* § 63G-4-401(3)(b). The petition must be filed within thirty days of the agency action becoming final. *Id.* § 63G-4-401(3)(a). If a party does not seek judicial review within thirty days, the order becomes final and subject to civil enforcement by the agency. *See id.* § 63G-4-501.

Fundamentals of Judicial Review

To adhere to the purpose of this article, we touch briefly upon four primary fundamentals of judicial review. This topic deserves much more analysis, but such is beyond the scope of this article. These fundamentals include (1) the forum; (2) the standard of review; (3) the standard of proof; and (4) the relief to be granted.

i. The Forum for Judicial Review

Except for certain agency actions relating to children, which are reviewed by juvenile courts, final agency actions resulting from informal adjudicative proceedings are reviewed in Utah State District Court. *Id.* § 63G-4-402(1)(a); *see supra* Figure 4. Final agency actions resulting from formal adjudicative proceedings are generally reviewed in the Utah Court of Appeals. Utah Code Ann. § 63G-4-403(1); *see supra* Figure 3. However, certain final agency actions promulgated through formal adjudicative proceedings may be appealed directly to the Utah Supreme Court, including orders by the Public Service Commission, State Tax Commission, and the Board of Oil, Gas and Mining. *See* Utah Code Ann. § 78A-3-102(3).

ii. The Standard of Review

Final agency actions arising from informal adjudicative proceedings are reviewed by trial de novo in Utah State District Court. Precedent has brought clarity to this seemingly contradictory standard of review. Review by trial de novo ensures that the record is fully developed before an appellate court reviews the administrative proceedings. *Cordova v. Blackstock*, 861 P.2d 449, 451–52 (Utah Ct. App. 1993). Generally, only issues raised at the administrative level may be litigated during de novo review in district court. *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶ 12, 224 P.3d 709. Yet, a strict waiver analysis may not apply to issues not raised during informal adjudicative proceedings. *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998). Instead, a court will apply a "level of consciousness" test, which requires a plaintiff to make the factfinder aware of the issue during informal adjudication so there is a possibility it could be considered. *Id.*

When the Utah Court of Appeals reviews a final agency action arising from formal adjudicative proceedings, it shall only grant relief if (1) it determines a person has been substantially prejudiced by (2) an action enumerated under Utah Code Section 63G-4-403(4). *See Furlong v. Bd. of Oil, Gas & Mining*, 2018 UT 22, 424 P.3d 858. Importantly, these inquiries are limited to the record before the court. *See id.* ¶ 25.

iii. The Standard of Proof

As a general proposition, the standard of proof for the review of formal adjudicative proceedings is substantial evidence. An agency decision is supported by substantial evidence if there is a "quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Associated Gen. Contractors v. Bd. Of Oil, Gas & Mining*, 2009 UT 76, ¶ 13, 38 P.3d 291 (quotation simplified). In reviewing an agency decision for substantial evidence, a court defers to the agency's "assessment of credibility and resolution of conflicting evidence." *Friends of Great Salt Lake*, 2023 UT App 58, ¶ 28 (quotations omitted). In other words, a court gives "great deference" to an agency's factual findings. *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 2012 UT 73, ¶ 24, 289 P.3d 558. This deference does not extend to an agency's interpretation of law. *Id.* ¶ 9 (providing that courts review an agency's interpretation of law for correctness and grant little or no deference to an agency's interpretation of law).

iv. The Relief to be Granted

Pending final disposition by a court, the parties to the action may petition an agency for a stay or other temporary remedy. Utah Code Ann. § 63G-4-405(1)–(2). Following final disposition of a court's judicial review of informal or formal adjudicative proceedings, a court may award monetary damages to the extent authorized by statute. *Id.* § 63G-4-404(1)(a). The court may also order the agency to take action, exercise its legally authorized discretion, modify its action, or stay its action. *Id.* § 63G-4-404(1)(b).

Conclusion

As we approach the fortieth anniversary of UAPA's initial enactment, now may be a good time to reflect on how well UAPA achieves Governor Matheson's goals. We have nearly forty years of administrative and judicial resources to aid in our reflection. Such resources should encourage our efforts to improve administrative law in Utah by enhancing administrative procedural rules and the URCP. These efforts should continue to be rooted in Governor Matheson's primary objectives – optimum public access to state agencies, uniformity in state agency procedures and outcomes, and efficient agency operations.

AUTHOR'S NOTE: *This article was written by Brenden Catt and Bret Randall with contributions from Braden Asper. The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of the Utah Attorney General, the Utah Attorney General's Office, or the State of Utah.*

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An Interview with Jensie Anderson: Innocence Advocate and Counsel for Caroline Ashby, who won her fight for innocence in December of 2023

by Cherise Bacalski

Background

In the spring of 2021, Jensie Anderson was legal director at a local innocence project. Anderson got a call from Elizabeth Hunt, who needed help with an innocence appeal.

Hunt explained that she was representing Caroline Ashby, who had been in prison for almost a decade. Caroline's son, Kevin, had fabricated testimony against Caroline when he was just a small child and his parents were going through a contentious divorce and custody dispute. Kevin had been acting out sexually with other children and Kevin pointed his finger at his mom, Caroline, during an interview at a Children's Justice Center. In reality, Kevin had been sexually abused by a neighborhood friend and wanted to protect him from getting in trouble.

Anderson and Freyja Johnson, an appellate attorney, agreed to represent Caroline pro bono on appeal. The team sought retention in the Utah Supreme Court, asking the court to clarify the "clear and convincing" standard as applied in post-conviction proceedings.

In September of 2023, the Utah Supreme Court reversed the district court's determination, clarifying the "clear and convincing" standard in its opinion. And eleven years after Caroline was convicted by a jury of her peers, the district court granted her factual innocence petition.

Interview

The interview that follows illuminates Anderson's involvement in Caroline Ashby's successful innocence petition and explores Anderson's background and how she became involved with innocence work.

Background and Involvement in Innocence Work

Bacalski: ***Jensie, you've worked in the innocence arena for about twenty-five years. Tell us a little bit about yourself and what drew you to innocence work.***

Anderson: While I was in law school, I worked with Utah Legal Services on a case that had the potential to make meaningful systemic change. After law school, I practiced general litigation, civil rights litigation and policy advocacy, disability benefit hearings, and indigent criminal defense. Although I was interested in all the types of law I explored, I was really searching for a deeper satisfaction. Innocence work offered me everything I was hoping for in the law.

Bacalski: ***I feel like innocence work is the type of work that is on everybody's bucket-list, but it's also the type of work that very few attorneys ever get the chance to do. How did you get involved doing this type of work?***

Anderson: I was hired to teach at the University of Utah S.J. Quinney College of Law in 1999. Professor Lionel Frankel approached me and asked if I would be the vice-president of a new innocence project that he and six students were developing. I jumped at the chance to work with Professor Frankel and to be part of the founding of a project dedicated to doing innocence work. I was really unfamiliar with what I was

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getting myself into, but I quickly realized that I had found my passion and life's work.

Bacalski: ***Running an innocence project for so long, you're probably very familiar with the process and numbers. How many innocence petitions does an innocence project have to weed through before they commit to investigate one?***

Anderson: Innocence projects around the country receive hundreds of requests for assistance each year and most take an incredibly small percentage of those cases. The project I worked with had an incredibly rigorous acceptance process. We investigated less than 5% of the cases that were brought to our attention.

Bacalski: ***That's such a small number. What is one of your biggest frustrations or headaches with the process?***

Anderson: We know that our criminal justice system is flawed and that the system regularly makes mistakes. The National Registry of Exonerations reports 3,478 exonerations since 1989 with more than 31,070 years of life lost, and I believe this represents only a fraction of those who have been wrongfully convicted and are spending time in this nation's prisons. Nonetheless, the process of proving that individuals have been wrongfully convicted is replete with hurdles that must be overcome to bring an innocent person home and can take years – if not decades. This work is rife with frustrations and headaches, but the successes are sweeter than anything most lawyers can imagine.

Bacalski: ***I bet it's a really unique experience. The lows are so low and, as you said, the highs are so high. What is the thing that you enjoy the most about doing innocence work?***

Anderson: There is so much that I love about innocence work. Probably most significant is getting to know the clients and learning from their grace, their wisdom, and their strength. A person who has been through what these folks have been through is uniquely amazing, and I have been so honored to represent some of these remarkable people. I also love the creativity involved in innocence work, the vast differences from one case to the next, the chance to work with amazing cooperating attorneys in the community, and the opportunity to teach students about how important it is to provide access to justice to those who might not otherwise get that access.

Bacalski: ***Moving into the actual work of innocence cases, can you talk a little bit about the procedural mechanisms involved? The process or lifecycle of an innocence petition?***

Anderson: Each state is different, but in Utah there are two procedural mechanisms that an innocent person can use to get their case back into court. The first is used in cases where DNA is available to prove innocence. The second is used in cases where no DNA testable evidence exists, and innocence must be proven some other way.

Regardless of whether the claim is DNA based or not, innocence cases require an enormous amount of investigation – document retrieval and review, witness interviews, search for evidence that will support an innocence claim, and reconstructing facts that may be decades old. Should the investigation be successful, the litigation involves the filing of a petition, surviving a judicial frivolousness review, responding to the State's motions to dismiss or for summary judgment, preparing and presenting proof of innocence at an evidentiary hearing, and almost always engaging in the appellate process.

Caroline Ashby's Innocence Case

Bacalski: ***Switching gears to Caroline's case, how did you meet Caroline Ashby?***

Anderson: Elizabeth Hunt introduced me to Caroline after the district court denied Caroline's innocence petition at an evidentiary hearing. Ms. Hunt had presented a compelling case of innocence for Caroline, but because of the high burden of proof for innocence claims, and because Caroline's innocence claim was founded on a victim recantation, the district court rejected Caroline's claim, and Ms. Hunt, who had done the entire case pro bono, was hoping to get some assistance with the appeal. After hearing the facts of the case, I jumped at the opportunity to be part of Caroline's case to prove her innocence.

Bacalski: ***Did you ever meet Caroline's son?***

Anderson: I have never met Caroline's son. By the time I became involved in the case, Caroline's son had provided written recantations, he had spent time with an expert who assessed whether his recantation showed any of the hallmarks of being untrue or coerced, he had been deposed, and he had

IN MEMORIAM – JUDGE RAYMOND S. UNO

On March 8, 2024, we lost a trailblazer, mentor, and friend. Our heartfelt condolences go out to Judge Uno's family and loved ones. Judge Raymond S. Uno dedicated his life to public service and was a tireless advocate for Utah's disadvantaged and underprivileged communities. Whether it was his extensive military service, his 25 years on the bench as Utah's first minority and Japanese-American judge, or his ongoing work as a civil rights advocate, Judge Uno left an unparalleled legacy, particularly in the legal profession. He cared about the individual and devoted himself to creating a more just, empathetic, and equitable community for all.

Upon retiring from the bench in 1990, Judge Uno continued his legacy of service and advocacy. In 1991, Judge Uno co-founded the Utah Minority Bar Association (UMBA), Utah's first bar organization committed to representing and addressing issues that impact racial and ethnic minorities. Judge Uno believed in the power of a diverse legal profession and founded UMBA to provide a forum by which minority attorneys and law students could collaborate and support one another in their professional pursuits. 33 years later, countless attorneys and students have benefitted from Judge Uno's leadership and commitment towards a more inclusive, representative judiciary and legal profession. It is only fitting that UMBA's lifetime achievement award bears Judge Uno's name.

In a 1995 interview with a local news organization, Judge Uno stated, "The whole purpose of what I do is to break down the barriers of discrimination in all aspects of life that will allow everyone to reach his or her potential." Judge Uno was an advocate, activist, legal scholar, pioneer, and leader committed to helping others reach their potential. He was a man of many "firsts" and blazed the path for the judges and attorneys of color whom he preceded. UMBA and Utah's legal profession will forever be indebted to Judge Raymond S. Uno. It is our hope that we can continue to honor his life and legacy by treating others with dignity and building a fairer and more inclusive world.

UTAH MINORITY BAR ASSOCIATION

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testified at the evidentiary hearing. The evidence was already there to prove that Caroline did not commit the crime for which she was convicted and that the district court erred in denying her innocence claim.

Bacalski: ***I bet most people reading this are fairly unfamiliar with Caroline's case. Can you explain a little bit about it? What its claims were? Did the claims narrow throughout litigation, or was it always about her son's recantation?***

Anderson: It was always about the recantation. Caroline was convicted of two counts of sexual assault of a child in a jury trial in 2010. Her son was eight years old when he made the false allegations against Caroline, and he was ten years old when he testified via closed circuit television at trial. Caroline's trial counsel did amazing work but was prevented from introducing important evidence of innocence due to procedural and evidentiary rulings at trial. After she was convicted, Caroline was sentenced to life in prison, and her son was adopted into a loving family. Then when he was seventeen, he approached his adoptive mother, and out of the blue admitted that he had lied when he accused his mother of sexual assault, that nothing had ever happened, and that he felt guilty about the false allegations. Notably, he had not seen Caroline in almost ten years and had had no contact with Caroline's family. The adoptive mother immediately took Caroline's son to a professional therapist with experience in child sex abuse cases, who essentially found that Caroline's son's recantation was credible and that he had not been coerced in any way. In 2019, after becoming aware of the recantation, Caroline filed an innocence petition. Her son wrote a letter to the parole board and testified at Caroline's 2020 parole hearing. A month later, Caroline was released on parole while her innocence petition was pending. In 2021, the district court denied Caroline's innocence petition, basically finding that a recantation alone cannot meet the "clear and convincing" evidence standard required for a finding of innocence.

Bacalski: ***That is such a heartbreaking story. Did you know right away that you had a good chance of winning?***

Anderson: Honestly, I knew that winning Caroline's case was an uphill battle. When a court makes factual findings after an evidentiary hearing, the standard of review on appeal is high, and

the likelihood of a reversal is remote. The challenges on appeal were also grounded in the view of recantations in Utah law – a view that maintains that a recanting witness is fundamentally a liar and that his or her recantation simply cannot be believed. My best move was to get Freyja Johnson and Emily Adams at The Appellate Group involved with the appeal. Their experience, expertise, and passion gave Caroline the fighting chance that she needed to win the appeal. Not only did she win a remand on appeal, but the Utah Supreme Court established a new test for examining recantations, demanding that trial courts look at all of the circumstances surrounding the recantation before determining its veracity.

Bacalski: ***Can you tell us what the process of representing Caroline in the district court looked like? How many hearings did Caroline have in the district court?***

Anderson: Although from the filing of the innocence petition to the final decision on remand took almost five years, Caroline's case proceeded much more quickly than most innocence cases. In response to the initial petition, the State filed a summary judgment motion but ultimately withdrew that motion after they deposed Caroline's son. The court scheduled the evidentiary hearing quite quickly thereafter. So Caroline had fewer hearings than most, and her case moved relatively quickly through the process.

Bacalski: ***What was the most exciting moment representing Caroline? Or are there competing exciting moments?***

Anderson: The two most exciting moments in the case were the oral argument and the moment that Caroline was exonerated. First, Freyja Johnson basically gave a lesson on how to conduct the perfect appellate argument. She was remarkably prepared, she answered all the court's questions with grace and aplomb, and she did so with a deep underlying belief that Caroline was truly innocent. Second, there is never a moment like the one where you find out that all your hard work has paid off and that you get to tell a client that they are finally free from the bonds of their wrongful conviction. It is indescribable.

Bacalski: ***I remember that day. I was driving to Salt Lake City for the Utah Bar's Fall Forum – where Freyja was actually receiving an award for her work on Caroline's case – when I got the news. Even for a bystander like me, the feeling was incredible. I cried the entire drive up from Utah County. It was an incredibly moving result. Caroline's innocence case went straight to the Utah Supreme Court from the district court after you and Freyja asked for retention. Is it common for post-conviction petitioners to seek retention in the Utah Supreme Court, and will that court usually retain those cases?***

Anderson: Because innocence cases are most often cases of first impression, I find that the Utah Supreme Court often retains those cases if asked.

Bacalski: ***What were some of the biggest challenges that you had representing Caroline in the Utah Supreme Court?***

Anderson: The biggest challenge was the lack of applicable precedent. The appellate courts have issued very few opinions dealing with claims of factual innocence, so there is limited precedent to draw from on appeal.

Bacalski: ***Can you summarize the Utah Supreme Court's holding regarding the "clear and convincing" standard that we've talked about? Can you highlight any of its sentences or principles that you thought really nailed the challenge you presented it with?***

Anderson: The Utah Supreme Court held that a "recantation, if credible, is sufficient to prove . . . factual innocence by clear and convincing evidence." *Ashby v. State*, 2023 UT 19, ¶ 87, 535 P.3d 828. A district court must evaluate the credibility of a recantation, but in this evaluation, "there is no presumption that the recantation – as opposed to the trial testimony – is false." *Id*. ¶ 60. Instead, "[d]etermining which story to credit requires a careful examination of the retracting witness's credibility under oath and the circumstances surrounding the recantation." *Id*. So what they did was make clear that the recantation could be more credible than the initial trial testimony. They clarified that there was no presumption that the trial testimony was more credible than the recantation and that a trial court should look to all of the surrounding circumstances in determining which was more credible – not just compare the trial testimony to the recantation.

Bacalski: ***How did you feel when you read the opinion?***

Anderson: To win such a tough appeal is breathtaking. I think I just was so glad that I finally got to give Caroline some good news and some hope. After some reflection, I was also incredibly pleased with the general rule that the case made regarding the assessment of recantation testimony.

Bacalski: ***Caroline's case went through the normal appellate process, and the Utah Court of Appeals issued a decision affirming Caroline's conviction in***

2015. Justice Pearce – then Judge Pearce – sat on that panel before he took the bench at the Utah Supreme Court. Was Justice Pearce's presence on Caroline's post-conviction panel ever a concern of yours, Caroline's, or of anyone else's on Caroline's team?

Anderson: We were not concerned about Justice Pearce sitting on Caroline's panel, as the issues on her direct appeal and on the innocence petition were so different, and her direct appeal was so many years ago. We also trusted fully in Justice Pearce's ability to view the case fairly and objectively.

Bacalski: ***The opinion not only issued holdings, in my mind it also explained to the district court some potential issues that could come up on remand and how to navigate those issues. Can you talk about some of those?***

Anderson: Essentially, the Utah Supreme Court not only established a new test for examining the credibility of recantation testimony, but then it applied that test to Caroline's son's recantation. The Utah Supreme Court found that no evidence existed to show that Caroline's son was coerced to recant, that he had no motive to recant, that his recantation was made of his own free will, that his recantation was not inconsistent with the undisputed facts, and that, in testifying under oath, he subjected himself to a charge of perjury if he lied. Overall, the Utah Supreme Court provided the district court with a roadmap of how to view the recantation, but it also left the door open for the district court to make a contrary decision.

Bacalski: ***As any well written opinion would. Can you talk about what you anticipated on remand versus what actually happened on remand?***

Anderson: We didn't know what to anticipate on remand. On one hand, the judge had already made a finding that Caroline had not met the burden of proof to prove innocence, but on the other hand, the supreme court's test for assessing the credibility of recantations was very favorable for Caroline. So the door was wide open.

Bacalski: ***How much time did it take for the district court to make a decision after the Utah Supreme Court issued its decision?***

Anderson: The Utah Supreme Court issued its decision remanding the case on September 23, 2023, and the district court issued its decision reversing its original decision and finding Caroline factually innocent on November 14, 2023. The decision became final on December 15, 2023, after the State decided not to appeal the district court's decision on remand.

Bacalski: ***And how did you and Caroline find out that the district court granted her innocence petition?***

Anderson: I learned that the district court's remand decision would be released the day before it was released. I expected it to be released soon after the court opened at 8:00 a.m., but it wasn't released until about 90 minutes later. I had been glued to my phone waiting for the decision, and I was driving to work when it popped up. I immediately called Caroline – she and I laughed and cried together. We spoke several times that day, working to absorb and process the real significance of the district court's remand decision.

Bacalski: ***I bet. Most of the time, when you think about innocence petitions being granted, you are picturing an innocent person sitting in prison. But Caroline had already been released when her petition was granted, and even when her case was heard in the Utah Supreme Court. So here's my final question, why was getting Caroline's innocence petition granted so important for her?***

Anderson: Caroline had been released from prison, but she was still very much "in custody." She was regularly reporting to a parole officer, she was under strict conditions affecting all her life decisions, and she was on the sex offender registry. Several days after the district court's remand decision, Caroline was released from parole and her name was removed from the sex offender registry. She was also granted assistance payments for the time she spent in prison as a wrongfully convicted person and will be receiving some additional assistance payments this summer.

What is most important is that the State of Utah has finally admitted that Caroline Ashby is factually innocent of the crime for which was convicted. She is no longer under a cloud of guilt and doubt – she can finally move forward with her life.

Equally importantly, her son was finally heard and was allowed to correct the traumatic and devastating mistake he made when he was eight years old.

My hope is that as they both heal, they can reconnect, and perhaps even reconcile.

Caroline Ashby was one of 153 exonerees in 2023. There have been twenty-five exonerations so far in 2024. If you are interested in becoming involved in an innocence case, please contact a local innocence project and see how you can help.

Freyja Johnson Melissa Jo Townsend Cherise Bacalski Hannah Leavitt-Howell Jessica Holzer
Anna Grigsby Rachel Phillips Ainscough Emily Adams Sara Pfrommer (of counsel)

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Appellate Highlights

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

State v. Paule
2024 UT 2 (Feb. 1, 2024)

Paule shot and killed a "friend" who tried to force his way into Paule's apartment after verbally threatening Paule's life, leading to murder, reckless endangerment, and assault charges. Paule also allegedly threw his firearm off the balcony of the apartment before fleeing, leading to an obstruction of justice charge. At trial, Paule was acquitted of all but the obstruction of justice charge. On appeal, Paule argued that Utah Code § 76-8-306(1) criminalizes only acts done with the "intent to hinder, delay, or prevent the investigation … of any person regarding *conduct that constitutes a criminal offense*," meaning he could not have unlawfully obstructed an investigation into conduct for which he was ultimately acquitted. The Utah Supreme Court affirmed his conviction, holding, as a matter of first impression, that, **"when an obstruction of justice charge is predicated on the obstruction of an investigation, … the *mens rea* for that crime requires that a defendant have the specific intent to hinder an investigation into *what the defendant believes* is the *actus reus* of a separate crime. Whether the defendant, or any other person, had the *mens rea* to commit that separate crime is irrelevant."**

Park City v. Woodham
2024 UT 3 (Feb. 8, 2024)

Woodham was charged with and found guilty in justice court of failure to move over for a stopped emergency vehicle. Woodham argued in the district court on *de novo* review that he was not liable based upon "the due process clause limitation on all statutes," but the court did not rule upon that issue and affirmed his conviction. The court of appeals dismissed for lack of jurisdiction because the district court did not rule on the constitutionality of a statute or ordinance, as is required for appellate review under Utah Code § 78A-7-118(11). The supreme court affirmed. In doing so, however, the court held that **"a district court's implicit ruling on the constitutionality of a statute or ordinance permits appellate review of the district court's decision in a case originating from justice court."** Unfortunately, Woodham failed to adequately present his challenge to the applicable statute thereby failing to preserve that issue below.

Peng v. Meeks
2024 UT 5 (Feb. 15, 2024)

In this medical malpractice case, the Utah Supreme Court clarified that the **general or noneconomic damages recoverable in a survival action by a deceased tort victim's estate are limited to "damages incurred between the time of negligence and the time of death," and should not "compensate the deceased for the pleasure he would have taken from his life had he lived."**

In re Adoption of M.A.
2024 UT 6 (Feb. 22, 2024)

In this appeal from denial of a petition to unseal adoption records, the court held that the standard of "good cause," rather than the "best interest of the child" standard, applied. The petitioner was a woman in her 40s. The trial court also held that petitioner's "desire to obtain health or genetic or social information unrelated to a specific medical condition" did not constitute good cause. The supreme court rejected the analysis: "To impose additional requirements – such as more than a general desire to know one's medical history – is inconsistent with the statute's language."

Utah Court of Appeals

Young H2ORE LLC v. J&M Transmission LLC
2024 UT App 10 (Jan. 25, 2024)

The court of appeals addressed the question whether a party to a contract can opt for the equitable remedy of rescission any time that party can show that the other party materially breached the

contract, or only upon a showing that it has no adequate remedy at law. **The court adopted the Restatement's approach and remanded for the district court to reassess the recission claim in light of the principles set out in Sections 37 and 54 of the Restatement (Third) of Restitution and Unjust Enrichment.** Under that approach, "a party may – sometimes and under certain circumstances – be entitled to rescission as a remedy for the other party's material breach, even if that party might have an otherwise-adequate remedy at law."

Cohen Braffits Estates Development, LLC v. Shae Financial Group, LLC
2024 UT App 12 (Jan. 25, 2024)

In litigation initiated by Cohen Braffits Estates Development, LLC (CBED), a New York court found that Cohen, a member of CBED, had improperly secured loans using CBED's Utah property as collateral and therefore owed CBED monetary damages reflecting the entity's obligation under the loans. Later, when the lender tried to foreclose on the Utah property, the LLC sued in Utah state court, arguing the loans were invalid. The Utah Court of Appeals affirmed summary judgment in favor of the lender, concluding that CBED could not have its cake and eat it too: **"Because the New York judgment had ordered Cohen to pay monetary damages to CBED based on CBED's financial obligation to [the lender], the election of remedies doctrine prevented CBED from obtaining a ruling in Utah holding that CBED did not actually owe anything to [the lender] at all."**

Labor Commission v. FCS Community Management
2024 UT App 39 (Mar. 21, 2024)(Amended Opinion)

Homeowners in an HOA wanted to have "comfort chickens" to, among other things, assist their daughter with a sensory processing disorder. The other members of the HOA "didn't share the homeowners' fondness for the chickens." Beginning on April 10th, the HOA and the homeowners exchanged messages for months, and all the while the chickens remained on the property. Ultimately, the homeowners moved out of the HOA the following Fall. The homeowners sued the HOA for discriminatory housing practices. The district court agreed holding that the HOA's delay effectuated a "constructive denial." The court of appeals reversed. **"[T]he rubric of constructive denial simply does not fit the facts of this case. … The [homeowners] were allowed the benefit of their entire requested accommodation during the investigative period. And the HOA never punished – or even threatened to punish – the [homeowners] during the evaluation period."**

Lamb v. Lamb
2024 UT App 16 (Feb. 8, 2024)

In this appeal, the Utah Court of Appeals took an opportunity to "remind counsel of their responsibility to assist the judiciary in advancing jurisprudence through diligent advocacy, adherence to our rules, and competent representation." On that note, the court pointed to "significant deficiencies" in the briefing before them, highlighting "perfunctory" references to case law, "shallow" analysis, and a complete absence of citations to the record. The court further cautioned: **"We point out these deficiencies not to ridicule, disparage, or shame counsel, but to provide warning that future briefing of this nature will likely be deemed inadequate and that any arguments on the merits may not be substantively considered by this court."**

De La Cruz v. Ekstrom
2024 UT App 18 (Feb. 15, 2024)

The court affirmed the district court's exclusion of damages-related evidence that increased the plaintiff's damages from $11,000 to more than $70,000. The evidence was provided two days before an extended fact discovery period ended. Under the circumstances, the district court did not abuse its discretion in holding the damages-related evidence was not timely disclosed; that the untimely disclosure was harmful given the defendant either would not have an opportunity to conduct discovery on the added damages or would have to effectively litigate the case twice; and the plaintiff had failed to show good cause for the belated disclosure. Judge Harris issued a concurring opinion, in which he expressed the opinion that the district court's "rulings

were harsh, and lie somewhere near the outer boundary of a district court's discretion in such matters," but "were not outside the scope of its wide discretion." **Judge Harris "urge[d] bench and bar to view the[] recent [appellate disclosure] cases – which have, by and large, involved affirmances of district court rulings – simply as sustaining district court discretion in such matters, and not as an indication of any appellate-level preference for harshness."**

Sabour v. Koller
2024 UT App 26 (Feb. 29, 2024)

Here, **the court affirmed the denial of a motion to preclude the plaintiffs from testifying even though the disclosure of their expected testimony "fell short of the requirement of Rule 26" and provided only "'broad, conclusory statements.'"** Although the disclosures did not satisfy Rule 26, the court held the defendant–appellant had failed to show any harm from the inadequate disclosures. The deficiencies had been remedied by the fact the defendant–appellant had deposed each of the witnesses and was able to gain sufficient knowledge of their testimony to proceed with his defense. The court noted, "our conclusion on this point would likely have tilted the other way" had the defendant–appellant foregone deposing the witnesses. It cautioned that this conclusion "should serve as a forewarning to all litigants who are tempted to play fast and loose with our discovery rules. When the Appellees provided inadequate summaries, they risked it all, and the fact that their gambit did not result in disaster should offer no solace or refuge to future parties who undertake the same risk." (cleaned up).

Clear Creek Development, LLC v. Peterson Pipeline Association, Inc.
2024 UT App 22 (Feb. 23, 2024)

In this case, the court of appeals addressed certain contours of Utah R. Civ. P. 13. It held that Rule 13 provides an independent basis for barring the subsequent litigation of compulsory counterclaims that were unpled in prior litigation; Rule 13(a) independently provides a remedy for when a party fails to bring a compulsory counterclaim. In addition, the court held "that claim preclusion principles undergird the application of rule 13(a) and, therefore, that when a previous lawsuit has concluded without a final judgment on the merits, rule 13(a) does not prevent the later assertion of what otherwise would have been compulsory counterclaims in the prior action."

10th Circuit

United States v. Simpkins
90 F.4th 1312 (Jan. 24, 2024)

A jury convicted Simpkins of two counts of sex abuse crimes against a minor in Indian Country pursuant to the Indian Country Crimes Act, 18 U.S.C. § 1152. On appeal, he argued that the government failed to present sufficient evidence that he is not an Indian – an essential element for the crimes charged. The government admitted its failure but argued that Simpkins invited the error by failing to include the necessary element in his proposed jury instruction. In reversing, the Tenth Circuit held that courts **"must assess a sufficiency challenge against the legal elements of the crime, not against the elements listed in the jury instructions … . So any error in the jury instructions d[id] not affect [the court's] sufficiency review – even if Simpkins invited the instructional error."**

United States v. Swan
91 F.4th 1052 (Jan. 26, 2024)

The Tenth Circuit evaluated whether plea counsel's representation to the defendant that his jury would be "culled of any minorities" – which the United States did not dispute fundamentally and materially misrepresented the constitutional guarantees of being tried by a jury of one's peers that is selected without racial discrimination – rendered the defendant's guilty plea not knowing and voluntary. **The court held that the appropriate inquiry was whether the material misrepresentation impacted the defendant's decision to plead guilty, not whether defendant had established an ineffective assistance of counsel claim.** The court held that plea counsel's testimony established that the defendant had relied on his misrepresentation when deciding to plead guilty.

Logsdon v. United States Marshal Service
91 F.4th 1352 (Feb. 5, 2024)

This case involved an excessive force claim against three U.S. Marshalls. The appeal centered on whether a *Bivens* action was recognized in that context. Discussing the erosion of *Bivens* and characterizing it as relic, as well as a 2022 SCOTUS decision, the Tenth Circuit **held there was no *Bivens* claim, because it presented a new context, and Congress was better positioned to authorize a monetary claim.** It summarily rejected the argument that district court should not have dismissed on a reconsideration motion.

Speech First, Inc. v. Shrum
92 F.4th 947 (Feb. 9, 2024)

Oklahoma State University instituted three polices that Speech First, Inc. claimed violated the First Amendment. Speech First submitted three declarations signed by students under pseudonyms to establish the alleged violations. The district court dismissed Speech First's claims holding that plaintiffs operating under pseudonyms could not establish standing based on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). The Tenth Circuit reversed. "Although one might read language in [*Summers*] to require that only persons identified by their legal names can have standing, that was clearly not the intent of the Court." ***"Longstanding and well-established doctrine in the federal courts establishes that anonymous persons may have standing to bring claims."***

United States v. Pemberton
94 F.4th 1130 (Mar. 4, 2024)

This appeal involved one of the ongoing ramifications of the United States Supreme Court's decision in *McGirt v. Oklahoma*. In 2004, the defendant had been convicted of a murder committed in McIntosh County, which, under *McGirt* and related decisions, has been determined to straddle the Creek Nation and the Cherokee Nation reservations. Following *McGirt*, a federal grand jury indicted the defendant, a member of the Creek Nation, for the murder under the Major Crimes Act. The defendant moved to suppress all evidence gathered during the 2004 state investigation, arguing that neither the County nor the State, which had performed the investigation, had jurisdiction to investigate, arrest, or interrogate him in Indian Country. **The Tenth Circuit affirmed the district court's denial of the motion, holding that, even though the investigators acted outside of their jurisdiction, the good faith exception to the exclusionary rule applied to evidence discovered pursuant to the search warrant and obtained from the defendant's warrantless arrest.**

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The Child Witness

by Hon. Fred D. Howard and Carolyn E. Howard

As a mother of five children, Christy Roma, the daughter of Fred D. Howard and sister of Carolyn E. Howard, reported to them the following experience of her son, Dallin. Dallin, who was fourteen years old, attended school where for security purposes the parents had to check their child "in" and check them "'out" of school each day. For reasons of convenience, the school officials sometimes let the child do the checkout by filling in the computer-prompted information fields. One afternoon, Dallin did so as follows:

The computer field prompted "student name."

Dallin typed in his name, "Dallin Roma."

It then prompted "student code number."

Dallin typed in his student number.

It then asked for the name of the person checking him out.

Dallin typed in "Christy Roma."

The computer then asked "relationship."

Dallin typed: "good."

The above experience illustrates the problem with young people as potential witnesses. They sometimes miss the point and meaning of even common language. As witnesses, in most cases it is not so much that they are unable to communicate what they observed from an incident, as it is that their relative lack of experience may affect their ability to draw proper conclusions of the event and may color their testimony. There are a host of concerns and questions to be considered with a child witness, including their competency and whether their testimony is accurate or if it is exaggerated by coaching, fears, self-interests, or other reasons. The issues regarding examination of child witnesses are large and underscore the wisdom that examination of a child witness should be approached with care.

With the proliferation of litigation, the presentation of a child witness is occurring with greater frequency. For example, it has become more and more routine for children to testify in child custody cases regarding their desires concerning a custodian and Utah law has provided for such under Utah Code Section 30-3-34(3), which states that a court may consider "the preference of the child if the court determines the child is of sufficient maturity" when ordering a parent-time schedule.

Another example is the child witness in criminal child abuse cases. In the child abuse case, the child is not only an indispensable witness but is often the "star" witness and the quality of the child's testimony may be the deciding factor in the trial outcome.

While the law permits a child to testify in such cases, the elicitation of the child's testimony can often be difficult because of the child's immaturity and fears. After presiding over cases for more than two decades, including cases involving child witnesses, it is the opinion of the authors that regarding the

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CAROLYN E. HOWARD a former Justice Court Judge from Saratoga Springs and a practicing attorney.

examination of a child witness, there is no magic tool or set of rules that can be employed for such witnesses. Cases involving a child witness simply present unique challenges to fact-sensitive cases. However, a fair solicitation of evidence leading to a just trial is promoted where the court takes care to remain neutral and is alert to the challenges the child witness presents. The child witness is a different kind of witness and will always require additional thought and preparation for trial. Some things to be considered include the following.

Establish a Competency Presumption

While it may not be uncommon for judges and lawyers to hold an opinion that a child, particularly one of tender age, is unable to testify at trial regarding an incident, a child is not considered an incompetent witness per se under the law merely because of their age. They may be called to testify if they meet the competency standards as set forth under the Utah Rules of Evidence. Rule 601(a) of the Utah Rules of Evidence provides, "Every person is competent to be a witness unless these rules provide otherwise." The rule makes no exception based on a witness' age. Adult witnesses are presumed to be competent. *Cf. State v. Adams*, 955 P.2d 781, 783 (Utah Ct. App. 1998); Nora A. Uehlein, *Witnesses: Child Competency Statutes*, 60 A.L.R. 369 (1988).

With a child, however, competency must first be established with a preliminary examination of the child and a showing of their ability to perceive, remember, and accurately relate facts. *See* Utah R. Evid. 602. Absent such foundation, the witness is to be excluded under the judges' gatekeeping responsibilities. Failure of the court to examine the child as to their competency is reversible error. *See State v. Cooley*, 603 P.2d 800, 802 (Utah 1979). Questions regarding the credibility of the testimony of the child witness are matters of impeachment as provided under Rule 607 of the Utah Rules of Evidence. In cases where the child is the victim of sexual abuse, the question of competency has been definitively resolved by statute. Under Utah Code Section 76-5-410, a child is presumed competent to testify, stating that "[a] child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony."

Managing the Examination

While there are many concerns that come to mind relating to the interview of a child or examination of a child witness at trial, the predominate concerns are: (1) the child's ability to accurately recall their memory; and (2) concerns of suggestibility that can occur and influence the child's testimony with multiple examinations and the examination process itself. The subject of managing a child witness is a large one. *See, e.g.*, John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L. J. 3 (1996); John E.B. Myers & Jean Mercer, *Parental Alienation in Family Court: Attacking Expert Testimony*, Child & Fam. L. J., Vol. 10, Iss. 1, Art. 3 (2022). As observed by most of us, and supported by research studies, young children generally have good memory from which they can provide accurate and meaningful report of their observations and experiences. Exceptions may include children who are victims of violent crimes where their memories are obscured while they struggle to cope with the stress incident to a traumatic experience. With respect to memory recall, however, what children generally lack is the life experiences held by adults that provide memory paths and strategies for recall of information. Young children are often in need of cues to help them retrieve information, provide context, and narrate a past event. The rub, therefore, may often be a "fair cue" that provides a practical assist to the memory recall, as opposed to an "unfair cue" that suggests a factual narration beneficial to the party's case. The approach is even more complicated by the presence of additional issues arising out of the case. The child may be handicapped, suffer fear of their assailant, resent or prefer a particular parent, have a personal agenda, or entertain some other motivation to shape their testimony.

In-Chambers Discussion

Before the child testifies, the court might conduct an in-chamber discussion with counsel regarding the expected testimony. Under Utah Code Section 78B-1-136, any witness is to be afforded a dignified examination – one free from harsh and insulting demeanor. Such protection is especially to be given a child. Utah Code Section 77-37-4 has codified the child victim's right of protection from emotional abuse. An in-camera discussion with counsel regarding the expected testimony (taking care not

to prejudge the matter) would alert the court of pivotal areas of the intended examination. The court could then direct counsel of its expectations. Other direction might also be given – it may restrict counsel to stay at the lectern, use a mild tone, decide what questions would be asked to establish the child's understanding of telling the truth and whether counsel or the court should ask such questions, and what to do if the child cries or remains silent. Most young children have a short attention span and planning to recess after forty-five minutes of questioning might be advised. The child should be put at ease by initial examination questions that they can answer easily. Discussion might also include whether counsel will be permitted to use leading questions on direct examination – a determination under the sound discretion of the trial court as supported by a plethora of case authorities. *See* Utah R. Evid. 403, 611; *State v. Jerousek*, 590 P.2d 1366 (Ariz. 1979); Meyers, *supra* at 814. The tailoring of the trial proceeding has its limits. While the court has a duty to protect the child from a frightening examination, that duty is balanced against the defendant's right of confrontation and a valiant defense.

Court Interview of a Child

When can the court interview a child? Perhaps the most common case, outside of the juvenile court, is in a civil child custody case. The right to conduct a child interview by the court is governed by Utah Code Section 30-3-10(5), which states:

> (a) A child may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the child be heard and there is no other reasonable method to present the child's testimony.
>
> (b) (i) The court may inquire of the child's and take into consideration the child's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the child's custody or parent-time otherwise.
>
> (ii) The desires of a child 14 years of age or older shall be given added weight, but is not the single controlling factor.

> (c) (i) If an interview with a child is conducted by the court pursuant to Subsection (5)(b), the interview shall be conducted by the judge in camera.
>
> (ii) The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with a child is the only method to ascertain the child's desires regarding custody.

It is discretionary for a court to conduct an interview of a child, not mandatory. For such an interview to occur, a litigant should motion for it and advise the court that the child has a preference regarding custody. For some, allowing a private, ex-parte expression of such preference may seem to give one litigant an unfair advantage over the other – even so, the value of a child interview to the factfinder cannot be overstated. The interview, though private, is still one in which the child could be said to be "testifying." Many judges are disinclined to interview a child in a custody case because of the belief that the interview will only serve to protract the litigation with duplicative information. Nonetheless, it is hard to articulate why such an interview would not be helpful. In most cases, the interview will reveal telling and important insight into the child's character and personality, something that is often masked by conclusory observations of the child from other witnesses, including custody evaluators.

While generally a good idea, the interview of a child by the court can be a tricky business and may warrant consideration of the following:

The Child is Intimidated.

Whether the child is eight years old or almost eighteen years old, they do not want to be there. You are a stranger, and they are anxious about talking to you. One should attempt to reduce the anxiety level by making the interview less formal. This may include not sitting behind the desk, removing your tie, and arranging chairs for a less formal position. Take a moment to tell the child about yourself with the clerk to follow, and then give the child time to tell something about themself. If you have advance notice, one quick way to engage in dialogue is to have the child bring a few family photos to share with you. Attempt to learn of the child's interests, hobbies, and activities.

Assess the Child's Development Level.

Quickly evaluate how the child presents and their level of development. Your language should be simplified and reduced to the age level of the child, avoiding lawyer talk such as: "alleged," "document," "case," "prior to," "on or about," and etc. Before the interview, always inquire as to limitations, impairments, handicaps, or medical problems the child has to cope with.

Build a Rapport.

Begin your questioning with vague, general questions and lead to more direct questions. In custody cases, children are often on "high alert" that they are to communicate their preference for a parent. They may feel pressured by one parent over another to voice such a preference. Instead of beginning directly with what the child's preference is, ask other questions about the parents and their involvement. Such questions might include: "Who helps you with your homework?"; "Who usually does the cooking and cleaning?"; "Which of your parents attend school activities with you?"; "If you don't do your work assignment at home, who gets after you?"

Look for Signs of Coaching.

While coaching is often difficult to determine, it is often manifest where the child's story is tailored and beyond the child's level of development. Does the child use "big words?" Do the statements seem rehearsed? Does the child seem to be parroting? Does the child's story seem far-fetched and fabricated? To minimize the potential of the child cultivating a scripted testimony, in child victim cases, Utah Code Section 77-37-4(3) provides that, "[c]hild victims and witnesses have the right to have interviews relating to a criminal prosecution kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children."

Listen.

Children of all ages can tell if you are really listening to them or if you are just going through the motions.

In conclusion, attorneys know full well how it is that their entire case can often rise or fall from the lips of a single witness and how vital it is to marshal the predictable testimonies of witnesses in support of their claims or defenses. However, adding the testimony of a child witness is not merely adding another witness – a child witness is different. To successfully learn the truth from them is the same thing as getting a pass into their club house. It will take additional time and attention for the attorney to learn to speak their language and the rules they live by. Hopefully, some of the suggestions here will aid in that quest. Like a good parent, we should be prepared to spend a little more time with the child witness, go a little slower, and really listen.

Parsons Behle & Latimer is pleased to welcome attorneys Adam D. Ott and Matthew J. Van Wagoner

Adam D. Ott
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Adam D. Ott has returned to Parsons as an of counsel attorney and will continue his practice as a member of the firm's corporate team.

Adam is an experienced and trusted advisor to a diverse group of clients ranging from multinational corporations to closely held private businesses on a myriad of issues ranging from general/outside counsel matters to complex dealmaking.

Matthew J. Van Wagoner
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Matthew J. Van Wagoner has rejoined Parsons as an of counsel attorney with the firm's corporate team.

Matthew is an experienced corporate attorney providing tailored legal and business solutions to his wide range of clients. His experience from representing private equity sponsors to closely-held companies provides his clients with a trusted strategic partner in each of their unique business endeavors.

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Taylor and the Impact of Arbitration in Divorce Proceedings

by Julie J. Nelson and Bryant J. McConkie

EDITORIAL NOTE: The following presents a conversation between two divorce lawyers about the history of arbitration in Utah divorce proceedings.

A Primer on *Taylor v. Taylor*

Bryant McConkie: Julie, how and when did arbitration become a viable option in Utah when dealing with divorce cases?

Julie Nelson: Well, Bryant, as you know, I'm an appellate attorney and I specialize in family law appeals. In 2022, I lost a case, *Taylor v. Taylor*, 2022 UT 35, 517 P.3d 380, at the Utah Supreme Court (well done Beau Olsen). *Taylor* was a divorce case where the parties were anxious to get the divorce over with. The parties mediated and resolved custody and parent-time issues, and then agreed to submit their financial issues to an arbitrator. When the arbitrator issued the final award, alimony and child support (or specifically, mom's income) were so outside Mr. Taylor's expectation that he contacted me to find out what options he had for an appeal. In resolving the appeal, the supreme court in *Taylor* answered a bunch of previously unknown questions about whether you could arbitrate divorces in Utah, what issues you could arbitrate in Utah, and what appellate review was available for arbitrated divorces in Utah.

You can arbitrate divorces in Utah, and you are entitled to appellate review under very few circumstances (more on this later). Arbitrating divorces has not been a common practice in Utah, although *Taylor* may change that.

McConkie: Interesting. What tensions exist when looking at arbitration and divorce – or what was your theory in *Taylor*?

Nelson: In my mind, there were some difficult tensions that should be considered when arbitrating a divorce. On the one hand, an arbitrator's decision is typically final, binding, and non-appealable; on the other hand, Utah law is adamant and clear that the trial judge in any given divorce case maintains the ability to make any decision. It is a bit like a mediated agreement between litigants, where the judge is *not* obligated to accept a stipulation entered at mediation. There are cases that indicate that a judge can, and in some cases must, reject a stipulation entered by the parties. *See Taylor*, 2022 UT 35, ¶ 46 (citing *Callister v. Callister*, 261 P.2d 944, 948–49 (Utah 1953)).

My position in *Taylor* was that an arbitrated divorce determination should be treated like a recommendation and have limited binding effect – something akin to a custody evaluator's conclusion or special master's decision. In other words, I took the position that an arbitrated divorce determination was something for the judge to consider and perhaps adopt, but not something that was conclusive or binding. And, as I saw it, the arbitrator in *Taylor* failed to follow Utah law concerning mom's income (which affected the alimony and child support calculation) and that should have been reviewable by the trial court judge.

JULIE J. NELSON is an appellate lawyer specializing in family law. She is an AAA certified arbitrator, a member of the AAML, and as of June 2024, an AAML certified family law arbitrator.

BRYANT J. MCCONKIE is an attorney practicing in Salt Lake City at McConkie Hales & Jones. His practice deals exclusively with family issues and divorce. As of June, he will be an AAML certified family law arbitrator.

When we appealed *Taylor*, the supreme court ruled unanimously that you could, in fact, arbitrate divorce cases and provided guidance about how they would be reviewed and how binding they would be – and that the court's imputation analysis was not the sort of legal error that the court saw as erroneous in the arbitration context.

McConkie: Well done, Julie. You may have "lost," but the loss provides clarity for trial attorneys like me. I, for one, appreciate the insight and guidance *Taylor* provides.

So, what does *Taylor* say about the reviewability of arbitrated divorces?

Nelson: In short, *Taylor* says that you can arbitrate divorces and they rejected my argument that an arbitrated decision was akin to a recommendation. After indicating that the Utah Uniform Arbitration Act (UUAA) and divorce codes don't "speak to each other," and after identifying that the legislature didn't spell out in either the UUAA or the Utah Code how they work (or don't work) together, the court helpfully laid out what the rule in Utah is, including which aspects of divorce can be arbitrated and binding and which cannot.

Issues in Arbitration that Are Binding in a Divorce

McConkie: Okay, I am on the edge of my seat. Which aspects of a divorce can be arbitrated to binding and non-reviewable conclusion and which can't?

Nelson: You can arbitrate all issues in divorce. But as your question portends, the question is which are binding, and which are reviewable by the trial court.

You can arbitrate all or part of property distribution, business value, alimony/spousal support, imputation of income, cohabitation, and interpretation and enforcement of premarital agreements, and those issues are binding and non-reviewable.

As it relates to child support, custody, and parent-time, you can arbitrate them, *but they cannot be binding and are subject to the same reviewability that a stipulation between the parties after mediation would be.* I believe most arbitrated child support, custody, and parent-time awards will be unchanged and honored by a trial court (and the appellate court if the law is applied correctly), but just like a stipulation, the trial court

will not give up authority to decide if an arbitrator's decision furthers the child's best interests. *Taylor*, 2022 UT 35, ¶ 53.

McConkie: Well, okay, so those are the "issues," but what about procedure? When can these issues be arbitrated?

Nelson: At any stage: temporary orders, final orders, and petitions to modify.

When Does Arbitration Make Sense?

Nelson: Okay, Bryant, I have a few questions for you. You're the trial lawyer here. Why would you even be interested in arbitrating a divorce?

McConkie: It feels like I can only responsibly answer like I used to in law school and say, well Julie, "it depends." All joking aside though, to the extent there are benefits associated with arbitration broadly and in other legal settings, they also exist in divorce. For instance, depending on what the parties agree to (like what timeframe and rules the parties agree to), it can be fast, confidential, and cheaper than its more traditional trial alternative.

Nelson: Can you be more specific?

McConkie: I can try. Here are a few thoughts…

Nelson: As it relates to speed, so often when a client comes into my office and wants a divorce, they are interested in moving along, and fast. Fast can be a few months (four is reasonable if we exchange information and can get into mediation fairly quickly). However, if there is a disagreement of almost any kind that needs a commissioner or judge to decide, getting to a judge can quickly turn into many months and even years. Said another way, you may just need the court's determination on a small issue, but to get in front of a judge for a trial inside of eighteen months would be quite remarkable. It may be slightly faster outside the Second, Third, and Fourth Districts where there are domestic relations commissioners, but my experience is that getting to the point you can schedule a divorce trial takes time that many clients just don't want to take.

It's also worth pointing out that not everyone loves the commissioner system. It has some benefits and drawbacks. But arbitration narrows the field to one decisionmaker who is skilled in divorce law. By itself, that saves time and money because people don't have to go through the commissioner-objection-judge process.

Nelson: Commercial arbitrations are often sealed. Is privacy an issue here?

McConkie: Absolutely. Arbitration can also be beneficial if you are trying to keep something private. To be clear, divorce files are private on Xchange – meaning only parties, their lawyers, and the court have access to most of the file. But decrees are not private and can be downloaded by anyone with a subscription to Xchange. And, it is pretty common for decrees to mimic, or look a lot like, the parties' signed stipulations. In arbitration, nobody has access to the file and so you can carefully determine what, if anything, could be known to the public. And, you could essentially put a non-disclosure clause right into the Arbitration Agreement, committing both parties to keeping quiet.

Julie, is there ever a circumstance where appeals are private?

Nelson: Nope. All appeals are public, and you can't control how an appellate court characterizes you, your lawyer, and the events they are writing about. In fact, when the appellate court sends you the first letter with the case number assigned, they literally warn parties that their case will be public. That can scare people off.

What other potential benefits might entice you to arbitrate a divorce?

McConkie: Well, in the law saving time is saving money, so if you move the case along in arbitration, the potential financial savings around litigation can be huge.

Perhaps the biggest benefit to arbitration is one that *Taylor* deals with and you mentioned earlier, and that is that depending on what rule and procedures the parties agree to, an arbitrated divorce is binding and non-appealable except in extraordinarily limited circumstances. The parties are almost guaranteed that no appeal will follow. And as you know so well, that can save a ton of time, energy, effort, and money. Every ordinary trial decision can be appealed, even where there are not strong appealable issues. And, recently, in *Rothwell v. Rothwell*, 2023 UT App 51, 530 P.3d 955, the court of appeals permitted a stay of property distribution pending appeal – so that even though the parties were divorced, the wife still didn't have access to her share of the estate. That has concerned me because the party holding the money could file a weak appeal but still strangle the property distribution for years – a set up that can horrify recipients. Divorce arbitration can truly be final.

Nelson: Okay, I hear you, but those are pretty known and expected answers about benefits. Are there any benefits you think are less obvious?

McConkie: Sure. We have a great bench in Utah and our judges are solid. I am generally not disappointed or too shocked by outcomes when I try cases, but I would be lying to you if I said I have not seen some results that are outside, and inconsistent with, the law. I suppose that is why your practice is thriving, right?

Nelson: I get it.

McConkie: All I mean is that depending on your arbitrator(s), you can hire expertise in divorce. Even the best judges deal with a variety of issues in their courtroom that have nothing to do with divorce and have no meaningful background in divorce. I have tremendous respect for our bench, but I would also suggest that there are divorce lawyers who may have a better understanding of the most current law and how it can and should be applied in any given case.

One other benefit that may not be obvious is that you can (and arguably should) hire two or even three arbitrators to resolve a divorce. That makes it seem more like an appellate case, where you might dilute any particular judge's proclivities. For instance, you could hire a panel that has very detailed and specific knowledge of the most recent cases, and someone that skillfully mediates and tries cases to a litigated conclusion and has a detailed sense for how the law is applied in a variety of circumstances.

Nelson: You mean you when you say, "someone that skillfully mediates and tries cases to a litigated conclusion" don't you?

McConkie: You said it, not me. I've had good days in trial and bad. It can be hard to know when you will have one versus the other. I'm sure some would read that statement and NOT think of me. You know the old saying, "[N]o lawyer looks over the shoulder of another lawyer and likes what they see." What I do know is that in times when we marry (ha) your skills with mine we have a pretty powerful and broad perspective on divorce issues. That has become clear to me over the years. It is one of the reasons I am calling you all the time for perspective.

Nelson: Any more benefits?

McConkie: I suppose one that could have been mentioned with speed, and that is, divorce arbitrations don't have to start at 9:00 a.m. and be done by 5:00 p.m.; they can be done on the weekends; they can be done when your client is not working or traveling for work; they don't have to be done in person; and/or they don't have to be organized around a criminal calendar. In other words, if you need the arbitration to be held on a Friday evening, it can be. All that matters is the willingness and availability of the arbitrator, parties, and counsel.

Additional Resources on Arbitration in Divorce Cases

McConkie: Where should people look for information on arbitration and divorce?

Nelson: I would suggest people check out *Taylor* (of course), but they should also review and get familiar with:

- The Utah Uniform Arbitration Act, Utah Code Ann. §§ 78B-11-101 et seq.
- The Uniform Family Law Arbitration Act, which is *not* binding, but has some excellent tools.
- The American Academy of Matrimonial Lawyers recently unanimously adopted a Resolution in Support of Divorce and Family Law Arbitration. This will have some excellent tools.
- The Rules of Civil Procedure, to determine what they want to keep, and what they want to do that is different.
- The Rules of Evidence, again to determine what they want to keep, and what they want to do that is different.

Parting Thoughts

McConkie: My last question for you, Julie, would be, what happens after an arbitrator reaches a decision? Does the arbitrator have authority to divorce people?

Nelson: Nope. The arbitrator does not have authority to "divorce" people. Only judges can divorce people. After the arbitrator(s) enters an arbitrated decision, the parties must move to confirm it pursuant to the Utah Uniform Arbitration Act, Utah Code Sections 78B-11-101 et seq. "Confirmation" means that the parties ask a court to enter a Decree of Divorce based on the arbitrated decision and the court enters an order "confirming" the terms and divorcing the parties.

Bryant, my last question for you is, do you think more people will arbitrate divorces after *Taylor*?

McConkie: The short answer is yes. How much more, only time can tell. But I personally think it's going to be a huge asset to our community.


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What is the Fund for Client Protection?

by David E. Leta

Have you heard the joke that "99% of lawyers give the other 1% a bad name?" Well, the truth is just the opposite. Every *Utah Bar Journal* has a section entitled "Attorney Discipline" under the category of "State Bar News." This section reports on recent disciplinary actions taken by the Office of Professional Discipline (OPC) against licensed Utah attorneys. It is disturbing reading. But have you ever asked yourself what happens to the clients who are the victims of attorney misconduct? Well, the Fund for Client Protection of the Utah State Bar exists to help many of these client-victims.

Article 9 of the Rules Governing the Utah State Bar creates the Lawyers' Fund for Client Protection (the Fund). The Fund exists "to reimburse clients for losses caused by the dishonest conduct committed by lawyers admitted to practice in Utah." Rule 14-902(a). The purpose of the Fund "is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in Utah, occurring in the course of the lawyer/client or fiduciary relationship between the lawyer and the claimants." Rule 14-902(b). Importantly, Rule 14-902(c) provides that "[e]very lawyer has an obligation to the public to participate in the collective effort of the Bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer" and that "[c]ontributions to the Fund is an acceptable method of meeting this obligation."

The Utah Supreme Court allocates the Fund with amounts "adequate for the proper payment of claims and costs of administering the Fund," but the Bar has discretion, subject to approval of the supreme court, to make all determinations regarding funding and has the authority to assess bar members at sufficient levels to pay eligible claims. Rule 14-904(a)–(c). A lawyer's failure to pay any fee so assessed is cause for administrative suspension from practice until payment has been made. Rule 14-904(d). On the other hand,

> [a]ny lawyer whose actions have caused payment of funds to a claimant … shall reimburse the Fund for all monies paid out as a result of [the lawyer's] conduct with interest at [the] legal rate, in addition to payment of the attorney fees incurred by the [OPC] or any other attorney or investigator engaged by the Committee [On Lawyers' Fund for Client Protection (the Committee)] to investigate and process the claim as a condition of continuing to practice.

Id.

And, in a disciplinary case where a claim is paid from the Fund, the lawyer's license to practice "shall be administratively suspended for non-payment until reimbursement to the Fund has been made by the lawyer."

Furthermore, a lawyer whose dishonest conduct results in reimbursement to a claimant is liable to the Fund for restitution, and the Bar may bring such action as it deems advisable to enforce this obligation. Rule 14-915(a). As a condition of reimbursement, claimants must provide the Fund with a pro tanto transfer of their rights against the lawyer and the lawyer's legal representative, estate, or assigns and of the claimant's rights against any third party or entity who may be liable for the claimant's loss. In any recovery action initiated by the Bar, the claimant may join in the action to recover any unreimbursed losses and must cooperate fully with the Bar to achieve restitution. Finally, if the claimant commences an action to recover unreimbursed losses, he or she must notify the Bar of such action. Rule 14-915.

Two aspects of the Fund's operations are noteworthy. First, not all client losses resulting from attorney misconduct are reimbursable.

DAVID E. LETA is a member of the Committee on Lawyers' Fund for Client Protection. Now retired after over forty-six years in private practice, he occasionally mediates financial disputes and serves on several other boards, committees, and commissions.

Only losses that are "caused by . . . dishonest conduct" and "occurring in the course of the lawyer/client or fiduciary relationship" can be reimbursed from the Fund. Rule 14-902(b). Second, "[n]o person shall have a legal right to reimbursement from the Fund, whether as claimant, beneficiary or otherwise, and any payment is a matter of grace." Rule 14-914.

Note that losses resulting from attorney negligence or mistake are not covered. Note too that losses to third parties who are outside of the lawyer/client or fiduciary relationship are not entitled to a recovery from the Fund. Rule 14-901(d) defines "dishonest conduct" as,

> either wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking of or conversion of money, property or other things of value, or refusal to refund unearned fees received in advance where the lawyer performed no service or such an insignificant service that the refusal to return the unearned fees constitutes a wrongful taking or conversion of money.

This latter category includes circumstances where a practitioner dies or becomes disabled before completing services for which the client has prepaid, even though no dishonesty was involved.

These are not always black and white questions. For example, was the conduct dishonest or negligent? What portion of the prepaid services were "earned" before the attorney died or stopped responding to the client? Moreover, if the claim arises out of a loss occasioned by "a loan or an investment transaction with a lawyer," the loss will not be considered reimbursable unless it arose out of and during the attorney/client relationship and, "but for the fact that the dishonest lawyer enjoyed an attorney/client relationship with the client, such loss could not have occurred." Rule 14-910(c). The rules set forth several factors to be considered in evaluating such claims. Rule 14-910(c)(1)–(5). The rules also specify several "exceptions" to losses that shall not be reimbursed, such as losses incurred by spouses, children, parents, siblings, partners, insurance or bonding companies, investment losses, pyramid or Ponzi schemes, among many others. Rule 14-910(d). In cases of "extreme hardship or special and unusual circumstances," however, the committee may, in its discretion, recognize a claim which would otherwise be excluded. Rule 910(e).

To resolve these questions, rule 14-903 creates the "Committee on Lawyers' Fund for Client Protection." This committee consists of lawyers who serve for a period of five years or for subsequent three-year terms, subject to approval of the Board of the Utah State Bar. The committee meets as frequently as necessary to conduct business and process claims, usually about once each quarter. It is the duty of the committee to "receive, evaluate, determine and make recommendations to the Board relative to the individual claims." Rule 14-907(a). It also has duties to promulgate rules of procedure, conduct hearings on claims, provide reports to the Board, engage in studies and evaluations of programs for client protection and the prevention of dishonest conduct by lawyers, and perform other acts necessary or proper for the fulfillment of the purposes of the Fund. Rule 14-907.

To receive a recovery from the Fund, and eligible claim must be submitted to the committee within one year after "the date of the final order or discipline," "the lawyer's death," or "the date of the order of disability." Rule 14-910(b). Typically, once a final order is entered the OPC not only notifies the client of the order but also advises the client about the Fund and about how the client can submit a claim to the committee. The claim form asks the client to outline the nature of the claim and provide documentary information needed by the committee to evaluate the claim. Once the committee receives the claim and the underlying evidence, it conducts a hearing, upon appropriate notice to both the claimant and the subject attorney. The committee usually schedules several claims for consideration on the same day. Hearings are conducted both in-person and virtually, with very relaxed rules of evidence. At the conclusion of each hearing, the committee deliberates, makes written findings, and sends a recommendation to the Board of the Utah State Bar about the claim. Only the board has authority to make a financial award to the claimant.

Year	Number of Claims Filed	Total Amount of Claims Filed	Number of Claims Awarded	Total Amount Awarded
2013–14	19	$126,141.47	14	$92,891.47
2014–15	13	$55,115.00	10	$40,270.13
2015–16	10	$47,725.50	9	$31,140.00
2016–17	10	$92,025.00	9	$26,026.00
2017–18	15	$91,320.50	11	$43,315.50
2018–19	15	$108,565.00	13	$51,965.00
2019–20	17	$54,840.00	15	$30,705.00
2020–21	8	$40,601.22	6	$18,107.22
2021–22	15	$131,232.00	13	$85,650.00
2022–23	30	$108,139.00	29	$91,450.00
TOTALS	**152**	**$855,704.69**	**129**	**$511,520.32**

Claimants may be reimbursed up to a maximum amount of $20,000 per claim, and up to $75,000 in total dollars, within any given fiscal year, regarding an individual lawyer. A recovery is limited to the client's actual out-of-pocket monetary losses. There also is a lifetime claim limit of $425,000 per lawyer. Reimbursements do not include interest, consequential damages, and other incidental expenses. If the committee determines that there is a substantial likelihood that claims against the lawyer may exceed either the annual or lifetime claim limits, claims may be paid on a pro rata basis or otherwise as the board and the committee determine is equitable under the circumstances. Rule 14-915. Claims, proceedings, and reports involving claims are confidential until a final determination is made by the board authorizing reimbursement to the claimant. After payment, the amount of the reimbursement and the name of the lawyer may be published by the Bar. The name and address of the claimant

may not be publicized without the client's express permission. Rule 14-916.

The Fund was first established in 1977, and both the committee and the board have considered claims and made awards in every subsequent year. In 2019, Licensed Paralegal Practitioners were included in the Fund. In the last ten years, the claims in the chart on the previous page have been submitted, heard, and awarded.

At this time the Fund has $259,000 to be used exclusively for the purpose of reimbursing client-victims.

What do these claims look like? They are quite varied and, often, quite sad. Here are just a few examples:

a. Client hires an attorney to perform legal services. In a series of payments, the client remits over $15,000 to the attorney to pay for these expected services. For unexplained reasons the attorney does not perform any of the services and stops communicating with the client. The OPC prosecutes the attorney for various ethical violations and obtains an order of disbarment. Meanwhile, the client is forced to retain another attorney at additional expense. Fund for Client Protection (FCP) recommends an award of $15,000 to the client for the amount the client paid to the first attorney and for which the client did not receive any meaningful services.

b. Client hires an attorney to defend the client in a DUI criminal case and pays the attorney a fixed fee of $2,100 for the defense. After performing some services related to the defense, the attorney, who was a solo practitioner, unexpectedly dies. The OPC takes control of the attorney's files and trust accounts. The client is required to hire another attorney to finish the criminal defense. After evaluating the nature and amount of service provided by the deceased attorney, the FCP recommends an award of $1,500 to the client.

c. Client hires an attorney to negotiate and settle a debt collection action where the client is liable to the creditor on a $66,000 default judgment. The client pays the attorney over $21,000 for these services, but there is no evidence that the attorney ever conducted any meaningful services or negotiations on the client's behalf. The attorney also refuses to refund any of the retainer payments to the client. After an Order of Delicensure is entered against the attorney, the attorney resigns from the Bar. The client then retains another attorney, at additional expense, to defend the collection action. The FCP recommends the maximum award of $20,000 to the client.

d. Client hires an attorney to pursue a civil claim of embezzlement against a third party and pays the attorney a retainer of $3,000. After preparing and filing the complaint for the client, the attorney stops communicating with the client and fails to further prosecute the suit. Subsequently, the attorney resigns from the Bar with disciplinary proceedings pending. FCP recommends an award of $1,500 to the client.

Practicing law is a privilege, not a right. As with all privileges, it comes with benefits and burdens. Licensed attorneys not only must comply with the Rules of Professional Conduct and the Standards of Professionalism and Civility in their relationships with clients and with each other, but they also must self-regulate the conduct of their fellow members. This is a shared duty. When, on occasion, the 1% among us stumble, and clients are hurt, the Fund for Client Protection steps in to help put some of the pieces back together and restore confidence in our profession. But, if we all walk arm-in-arm and watch each other's backs, fewer of us are likely to stumble.

Best Practices for WFH

by Keith A. Call

Some hate it. Some love it. All of you do it. I'm talking about working from home.

According to a 2022 ABA survey, 87% of legal employers allow their lawyers to work remotely. Approximately two-thirds of the responding lawyers report that they work from home between 25%–100% of the time. And 44% of young lawyers reported that they would leave their current jobs for one that offers greater ability to work remotely. Roberta D. Liebenberg & Stephanie A. Scharf, Where Does the Legal Profession Go From Here? 10–11, 16 (2022), https://www.americanbar.org/content/dam/aba/administrative/law-practice-division/practice-forward/2022-practice-forward-report.pdf.

From my observation, working from home is here to stay. So, I thought it would be useful to lay out some best practice guidelines for keeping your home office an ethical one. These suggestions come from the ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 498.

Hardware and Software Systems

Hopefully, your employer has secure IT practices. Your home computer may not be so secure.

> To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

ABA Formal Ethics Op. 498 at 4 (2021). If you do not feel competent in these areas, it would be wise to get the help of someone who is.

Accessing Client Files and Data

To work from home competently and efficiently, you will need to have ready access to client files and information. If access to such files is provided by a cloud service, you should choose a reputable company and take reasonable steps to ensure the confidentiality of client information is preserved. You should make sure the information is backed up and have a data breach policy in place, including a plan to communicate losses or breaches to impacted clients. *Id*. at 5.

Videoconferencing

In order to protect client confidentiality when using video-conferencing platforms, the ABA Opinion recommends that you read and understand the terms of service, including updates, of any virtual meeting provider you use. (Yikes!) You should use strong passwords for access to the meeting and consider using the higher tiers of security if available. If the platform will be recording your conversations with clients, you should make sure you have client consent. Importantly, "client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation." *Id*.

Virtual Document and Data Exchange Platforms

Again, the ABA recommends that you read and understand the terms of services and privacy policies of any document and data exchange platforms you use. To maintain client confidentiality, you should make sure you are using a secure platform. When transmitting information by email or similar means, you should consider whether the information is and needs to be encrypted, both in transit and in storage. *Id*. at 5–6.

KEITH A. CALL is a partner at Spencer Fane. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

If you don't know if your email is encrypted, try searching "how do I know if my email is encrypted" on your favorite search engine. You will find several resources to help you figure out if you are as secure as you need to be.

Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting you in your law practice, you should disable the listening capability of devices such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. "Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking." *Id*. at 6.

Supervision

If you supervise others, you should tailor your policies and procedures to ensure that those you supervise are acting consistent with your ethical obligations. *Id*. Comment [2] to Utah Rule of Professional Conduct 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced legal professionals are properly supervised." Among other things, this includes assuring that those you supervise are following appropriate work from home practices in *their* work. When mentoring and training others, keep in mind the importance of being present to witness and assist in their progress.

Possible Limitations of Virtual Practice

Recognize that virtual practice and technology have their limits. Even in a virtual practice, you need to make and maintain a plan to address such things as proper accounting; receiving, writing, and depositing checks; processing paper mail and other deliveries; docketing deadlines; and directing or re-directing clients and others who might attempt to contact you.

One thing the 2020 pandemic taught us is that we *can* work from home effectively. Consider what you can do to improve your home office to make sure you are practicing with competence, protecting client communications, and providing adequate supervision to those you supervise.

Now go see what's in the fridge!

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.

Commission Highlights

The Utah State Bar Commissioners received the following reports during the March 14, 2024, meeting held at the Dixie Convention Center in St. George and took the actions indicated by vote.

- The Commission approved the purchase of a table at the Law Day Lunch.
- The Commission approved the minutes of the February 9, 2024, Commission Meeting.
- The Commission approved changes to the Paralegal Division Bylaws.

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

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 3, 2024, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and will then be prompted to pay all fees.

The Bar accepts all major credit cards or payment may also be made via ACH/E-check. NO PAPER CHECKS WILL BE ACCEPTED.

Upon completion of the renewal process, you will receive a licensing confirmation email.

2024 Summer Convention Awards Notice

The Board of Bar Commissioners is seeking nominations for the 2024 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession.

Please submit your nomination for a 2024 Summer Convention Award no later than Friday, May 24, 2024. Visit https://www.utahbar.org/awards to view a list of past award recipients and use the form to submit your nomination in the following Summer Convention Award categories:

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

Pro Bono Honor Roll

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

Family Justice Center

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Ashton Ruff
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Jessica Smith
Marianne Sorensen
Bree Spaulding
George Sutton
Amanda Todd
Alex Vandiver
Angela Willoughby
Zach Zollinger

Pro Se Family Law Calendar

Jacob Arijanto
Brent Chipman
Emy Cordano
Scott Cottingham
John Kunkler
Allison Librett
Joshua Lucherini
Sydney Mateus
Bryant McConkie
Stuart Ralphs
Michael Reed
Linda Smith
Sheri Throop
Jonathan Winn

Timpanogos Legal Center

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Angela Cothran
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McKenna Melander
Keil Meyers
Alexandra Paschal
Ashley Pincock
Stephen Salmon
Rachel Slade
Nancy Van Slooten
Eliza Smith
Kricia Tauiliili
Clayton Varvel

SUBA Talk to a Lawyer Legal Clinic

Thomas Crofts
Rebekah-Anne Duncan
Jedediah Harr
Shawn McGinnis
Maureen Minson
Mathew Richards

Utah Bar's Virtual Legal Clinic

Ryan Anderson
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Mike Black
Anna Christiansen
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Nathan Nelson
Steven Park
Stanford Purser
Karthik Sonty
Christian Vanderhooft

Thank You!

The Utah State Bar would like to thank the following attorneys for their assistance with grading the most recent Bar exam.

Miriam Allred	Stephen Geary	Scott Sabey
Rachel Anderson	Clark Harms	Angie Shewan
Trumbo Axel	Dave Hirschi	Leslie Slaugh
Justin Baer	Tony Kaye	Michael Squires
David Billings	Beth Kennedy	Alan Stewart
Kelly Ann Booth	David Knowles	Michael Swensen
Clinton Brimhall	Maribeth LeHoux	Mark Thornton
Katherine Bushman	Colleen Magee	Emily Wegener
Kent Davis	Lewis Miller	Jason Wilcox
Brody Flint	Andres Morelli	Matthew Wilson
Brandon Fuller	Richard Pehrson	Jennifer Zeleny
Nathaniel Gallegos	John Rogers	

A Fond Farewell

Edith DeCow, long-time Utah Law & Justice Center receptionist, retires.

After twenty-two years, the Utah Law and Justice Center's receptionist, Edith DeCow, is retiring. Her cheerful, calm demeanor has filled requests ranging from callers searching for attorneys, or new Bar cards, or to discover where they are in terms of CLE compliance, or get details on upcoming conventions – and so much more.

Prior to working at the Bar, Edith worked as a receptionist for a medical non-profit, and then private doctors and attorneys. Her sister informed her of an opening at the Bar, and she applied.

"When Richard Dibblee interviewed me, he asked me how punctual I was," Edith said. "He said that was the most important thing. And I was late once in twenty-two years – the bus I was on got stuck in the snow for three hours!" Edith said.

Edith's friendly disposition is the first contact many people have in their quest to find legal resources, and she makes it easy for them. "I'm a people person," Edith said. "I've always enjoyed helping people, and this job has given me an opportunity to do that."

Edith and her husband will begin serving a mission in July for the LDS Church in Mexico City. "I never really thought I'd retire, but I wanted to do some things before I get too old," she said.

After her mission, Edith hopes to spend time volunteering in elementary schools in her community. "There's always opportunities to help others," she noted.

Happy retirement Edith. Thanks for helping attorneys and the people of Utah find the help they need!

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Utah Bar Commission Leadership Academy

The Utah State Bar Leadership Academy is a prestigious program aimed at nurturing the next generation of legal leaders within Utah. The class is chosen from a competitive process, selecting twelve lawyers from diverse backgrounds and practice areas from all over the State with demonstrated leadership skills.

"My favorite feature of the Leadership Academy is a weekend long intensive retreat that's similar to a corporate team building retreat", said Nick Stiles, currently the administrator for the Utah State appellate courts and a 2019 graduate of the Academy. "Except here, everyone comes from different firms, government agencies, or businesses. It's very much a crosscut example of all the ways one can be a lawyer in Utah."

Leadership Academy, class of 2024. Members of the 2024 Leadership Academy are: Katie Ellis (Second); Todd Sheeran (Third); Cassandra Dawn (Third); Meg Glasmann (Third); Sarah Jenkins Dewey (Third); Jordan Westgate (Third); Aspen Jensen (Fourth); Carl Hollan (Fourth); Benjamin Perkins (Fourth); Steven Gray (Fifth); and Riley Williams (Eighth). The Academy is co-chaired by Jenifer Tomchak and Judge Clemens Landau.

The Leadership Academy was the brainchild of Angelina Tsu, the President of the Bar in 2016. She formed the Academy to help young lawyers become leaders and influencers of the legal profession in Utah and encourage leaders with a broad perspective of the practice of law.

Over the course of a year, the Academy's curriculum is meticulously crafted to broaden participants' perspectives and fortify their leadership acumen. Through a blend of intensive seminars, insightful discussions with local and national luminaries, and engaging social activities, participants delve into an array of topics designed to deepen their connection with the legal community and sharpen their leadership toolkit.

The cornerstone of the program lies in its intimate mentorship approach. Each participant receives personalized guidance from attorneys and community leaders, fostering a close-knit environment conducive to growth and collaboration. This mentorship not only bolsters participants' professional development, but also cultivates enduring bonds within the class.

From navigating ethical dilemmas to honing negotiation tactics, the Academy equips participants with practical skills vital for effective leadership in today's legal landscape.

"Whether you're in-house counsel or a prosecutor, or the law firm partner working with the brand new associate – everyone is facing their own battles every day," said Stiles.

Upon graduating from the program, each participant agrees to a one-year placement on a Bar committee of their choosing. Often times, this experience is so enjoyable, the attorney continues to participate on the committee for years. Leadership Academy participants have gone on to Chair those committees, to be judges, and to lead many of the Bar's sections and divisions.

Jen Tomchak, a co-chair of the Academy, notes that her "favorite part of Leadership Academy is seeing how these twelve strangers form lasting friendships and watching them go on to make a real difference in our legal community. It is such an honor and privilege to be part of this program."

As the culmination of the program approaches, participants emerge not only as more adept legal practitioners but as poised and confident leaders ready to steer the profession forward. The Utah State Bar Leadership Academy stands as a testament to the Bar's commitment to cultivating excellence and innovation in legal leadership.

The ABA's Free Legal Answers

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Volunteers Needed

for Utah State Bar Committees

The Utah Bar Commission seeks volunteers willing to commit their time and talent to one or more Bar committees. Please consider sharing your time in the service of your profession and the public through meaningful involvement with a committee that fits your interests. Utah State Bar Committees include:

Admissions: Recommends standards and procedures for admission to the Bar and the administration of the Bar Exam.

Bar Examiner: Grades examinee answers from the Bar Examination.

Character & Fitness: Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

CLE Advisory: Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.

Fee Dispute Resolution: Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.

Fund for Client Protection: Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.

For more information or to volunteer for a Utah State Bar Committee, please visit:

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Lawyer Discipline and Disability

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

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

DISABILITY

On February 1, 2024, the Honorable Adam T. Mow, Third Judicial District Court, entered an Order Transferring Joseph C. Poulton's License to Practice to Disability Status, pursuant to Rule 11-568(b)(1) of the Rules of Lawyer Discipline, Disability and Sanctions staying the disciplinary matter in front of Judge Mow against him.

PUBLIC REPRIMAND

On January 29, 2024, the Honorable Adam T. Mow, Third District Court entered an Order of Discipline: Public Reprimand against Brian C. Hills for violating Rules 1.2(a) (Scope of Representation) and 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Hills to represent them in regard to injuries they sustained in a vehicle accident. The client and Mr. Hills entered into a contingency agreement. During the representation, the client received treatment from a chiropractor who recommended that they receive an MRI and referred them to a neurosurgeon due to ongoing medical issues. The neurosurgeon informed the client that they had a disc herniation and that surgery was an option. The client objected to surgery and requested an itemized list of costs from Mr. Hills. Mr. Hills' office emailed the client the current case costs.

Mr. Hills sent a policy limits demand letter to the insurance company on behalf of the client that included an estimate for surgery as an item of damages that the client did not authorize and to which his client had previously objected. Mr. Hills did not inform the client about the demand letter, nor did he send them a copy.

The client terminated Mr. Hills' representation. A few days later, Mr. Hills sent a letter to the insurance company asserting an attorney's lien for 1/3 of the policy limit that Mr. Hills believed the

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

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insurance company would pay under the insurance company policy and for costs incurred. Mr. Hills charged unreasonable fees and costs in the attorney's lien he asserted. As part of the costs, Mr. Hills included a fee to the neurosurgeon. Mr. Hills obtained a refund of the fee after he told the neurosurgeon that the client was not going to have surgery. The attorney's lien also included an amount contrary to the contingency fee agreement he had with the client. In this regard, the contingency agreement provided that in lieu of a trial the reasonable value of his services would be no less than 1/3 of an existing settlement offer. There was no existing settlement offer at the time of Mr. Hills' representation. Mr. Hills' attorney's lien was based on a value Mr. Hills put on his client's case and not on the actual legal work done or the results obtained or any other criteria under the rule.

INTERIM SUSPENSION

On January 31, 2024, the Honorable Laura S. Scott, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against Aaron Kinikini, pending resolution of the disciplinary matter against him.

In summary:
Mr. Kinikini was placed on interim suspension based upon conviction for the following criminal offense: Felony Discharge of a Firearm.

SUSPENSION

On January 4, 2024, the Honorable Laura S. Scott, Third Judicial District, entered an Order of Suspension against Rick Daniel Adams suspending his license to practice law for a period of six months and one day. The court determined that Mr. Adams violated Rules 5.4(c) (Professional Independence of a Lawyer) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Adams entered into a confidential agreement (Agreement) for joint ownership of a law firm with a non-lawyer (Non-lawyer). Mr. Adams was aware that, at the time of the Agreement, Rule 5.4 of the Rules of Professional Conduct prohibited non-lawyer ownership of a law firm, but he entered into the Agreement which stated that certain assets of the firm and partial control of the law firm were to be retained by Non-lawyer. Mr. Adams made misrepresentations to Non-lawyer about the Agreement.

The law firm formed pursuant to the Agreement engaged in the practice of law in Arizona and Colorado. After a dispute arose, Mr. Adams filed a Complaint in Arizona naming Non-lawyer as a defendant. Mr. Adams made misrepresentations in his Complaint and failed to include any mention of the signed Agreement.

During its investigation of this matter, the OPC requested responses from Mr. Adams. Mr. Adams provided responses to the OPC but made and/or approved misrepresentations in his response letters.

DELICENSURE

On January 17, 2024, the Honorable Kraig Powell, Fourth Judicial District Court, entered an Order of Delicensure, against Gary L. Bell, delicensing him from the practice of law. The court determined that Mr. Bell violated Rule 8.4(b) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Bell was convicted of 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.

ANNUAL MCLE COMPLIANCE

MCLE Reporting Period is July 1, 2023 – June 30, 2024

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

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

At least six hours of the CLE must be Verified CLE (live), which may include any combination of In-person CLE, Remote Group CLE, or Verified E-CLE. The remaining six hours of CLE may include Elective CLE (self-study) or Verified CLE (live). Each lawyer or paralegal practitioner shall pay a filing fee in the amount of $10 at the time of filing the Certificate of Compliance.

For a copy of the new MCLE rules, please visit https://www.mcleutah.org. For questions, please contact the MCLE office at staff@mcleutah.org or by phone at (801) 746-5230.

With online MCLE compliance we now accept all major credit cards (American Express, Discover, Mastercard, and Visa). Payments can also be made by e-check/ACH. **NO PAPER CHECKS WILL BE ACCEPTED.**

2024 Salary Survey

by Greg Wayment

Once again, the Paralegal Division has completed a salary survey. The first one was conducted in 2008, followed up in 2012, 2015, 2017, and 2020. The goal of the paralegal salary survey is to first answer the question, "What salary can a paralegal in Utah expect to make?" The survey also helps to track trends in education, skills, CLE opportunities, membership in professional organizations, and benefits for paralegals in Utah. By conducting these surveys, the Paralegal Division hopes to provide a baseline when negotiating salaries, benefits, and bonuses.

To dive right into it, every time the Paralegal Division has done a survey there have been a few takeaways. This year, the takeaway is obvious: salaries are up, but they are not keeping pace with inflation. Here is just a sampling of the comments:

- I cannot afford the same standard of living, despite a recent raise.
- I just received my first raise after six years. Although the raise is better than I was earning, you have to keep pushing as a paralegal to keep up with the costs.
- Raises not keeping up with inflation.
- I feel I work way too hard to have my income only cover 65% of my housing payment.
- 4% merit increases don't keep up with the inflation rate over the last few years.
- While I acknowledge that I get paid average to well, especially given my practice in public service, I still barely manage to make ends meet most months.
- Cost of housing has exponentially increased to a point where about 40% of my net monthly income goes to rent.

This year eleven out 100 respondents indicated that their gross annual salary (excluding bonuses) was over $100,000. In 2020, there was just one. There were also many respondents reporting salaries in the $70,000s, $80,000s, and $90,000s, which indicates a trend towards higher salaries.

Some of the other takeaways included: many respondents being at their places of employment for a short time (less than five years) or many being at them for quite a while (over twenty years). Membership in professional paralegal organizations and CLE attendance is down. And lastly, raises and bonuses are up since the last survey.

The survey was open to Paralegal Division members and non-members alike. For the sake of full disclosure, there was no eligibility screening, meaning anyone that had access to the link was welcome to answer the questions. By and large, most of the respondents (at least 86%) reported their job title as paralegal. 5% reported as being legal assistants and the other 9% reported titles such as office/billing manager and Licensed Paralegal Practitioner.

The 2024 survey contained sixty-one questions and was taken by a total of 100 individuals, which is twenty-two less than those who took it in 2020. This participation rate is down from an all-time high of the 173 that responded in 2015. We would like to thank the 100 professionals that took the time this year to take the survey! The following is a reporting and analysis of the results:

As has been the trend, most of the respondents are employed in Salt Lake County (78%), with just 9% reporting from Utah County, and 2% in Weber and 3% in Washington Counties respectively. At 88% of the respondents, women still account for most of the paralegals working in Utah.

Just over 25% of respondents have held their job title for over

GREG WAYMENT is a paralegal at Magleby Cataxinos & Greenwood. Greg is currently the Paralegal Division liaison to the Utah Bar Journal.

twenty years, with 28% reporting in the one to five-year category. As for current employment, almost 32% have been with the same employer for over ten years, and roughly 13% more (or almost 45%) have held their current positions for between one and five years, indicating some growth in the profession.

Membership in paralegal organizations has dropped, with 77% of respondents belonging to the Paralegal Division (down 16% from the last survey), and approximately 8% participating in the Utah Paralegal Association (down 5% from the last survey). Roughly 15% of the respondents are members of the National Association of Legal Assistants (NALA) (also down 11% from the last survey).

Most respondents, about 91%, are not required to have passed a national paralegal certification exam prior to being hired. Of the respondents, 16% answered affirmative to obtaining a C.P. (Certified Paralegal) designation and 7% answered to having obtained an A.C.P. (Advanced Certified Paralegal) designation, while 71% of the respondents currently working have no professional designations.

This year's survey revealed that 47% of Utah paralegals report having earned a bachelor's degree (up 16%), while 5% have a paralegal certificate (down 7%). According to our survey, most paralegals in Utah have a bachelor's degree (in 2020, the majority had an associate degree). As for employers, 47% require their paralegals to have met a minimum education level; of these, 31% require a certificate from an American Bar Association-approved paralegal program (up 2%). Education is not often directly tied to compensation, however, as 19% of respondents indicated that their employers do not consider education levels as a factor in setting compensation. Currently, approximately 24% of law firms require paralegals to have a bachelor's degree.

The second part of our survey addressed employment environment, duties, and responsibilities. Of respondents, nearly 57% work in private law firms, with approximately 14% working in corporations, and 26% work in the government sector. As for practice areas, we found that 51% of respondents practice in litigation. The other biggest areas of employment are family, criminal, and personal injury.

A clear majority of respondents, 52%, work in organizations that employ no more than five paralegals. As for organization size, the vast majority are either quite small or quite large, with nearly 45% employing between one and ten attorneys and 33% employing over forty attorneys.

Following up on the third time we've asked (my favorite) question "What software does your firm/you currently use to manage large formal document productions?" The overwhelming majority (sixty-four respondents) use Adobe, followed closely with Everlaw and iPro. There were additional programs listed by the respondents such as Karpel, Kofax, and Logikull, however seven people skipped this question. Given the number of people who answered PDF or skipped the question, the takeaway is that the Utah legal community is still behind when it comes to using industry leading e-discovery platforms, although the perception is that the best solution is still evasive.

Overtime appears to be up with only 38% reporting no overtime and 29% reporting working one to five hours per month and 16% at six to ten hours per month and 9% working over twenty hours a month. The question of whether respondents bill time to clients was nearly evenly split in earlier surveys but has changed to 61% billing their time and 39% not. Most respondents spend over 88% doing substantive work, with under 12% of their time spent on non-substantive/administrative work.

This year 33% of respondents reported that their average hourly billing rate was not applicable, 17% were in the $150 to $200 an hour, 12% were in the $100 to $125, and 10% were in the $75 to $100 category.

In this survey, we found that about 42% of employers are providing in-house CLE, and over 80% of employers pay for outside CLE (down 8%). Of those who pay for outside CLE, 58% of respondents receive payment of registration fees, with about 42% receiving hotel accommodations and 41% receiving mileage as well; a smaller number provide reimbursement for airfare and per diem. Nearly 21% of paralegals have annual CLE budgets.

We are also pleased to report that most of the respondents report attending the Paralegal Division's annual Paralegal Day Luncheon and the Annual Meeting, but the biggest category of attendance was the Brown Bag Lunch CLE events, and CLE's presented by other Bar sections. This is most likely due to the fact that these events have been widely hosted online (and at no cost) since COVID.

Turning to paralegal salary, benefits, and other compensation, the largest category of respondents, at 18%, report making between $70,000 and $74,999. The next largest categories (in a three-way tie at 11%) make between $75,000 and $79,999, $80,000 and $84,999, and $100,000 or more. The lowest reported salary was under $25,000 with one respondent. There were eleven respondents who reported being in the $100,000 and higher category.

About 55% of the respondents report that their employers do have a bonus structure in place. Of those who do, about 23% tie bonuses directly to billable hours and fees collected (down 2%). Overwhelmingly 57% of bonuses are based on personal performance, with 35% based on company success.

A large percentage, 83% (up 15%), reported receiving a raise in the last twelve months, this time with the majority (40%) reporting the percentage of the raise being 4–6% of their annual salary. This was down in 2020, most likely due to economic uncertainty around COVID.

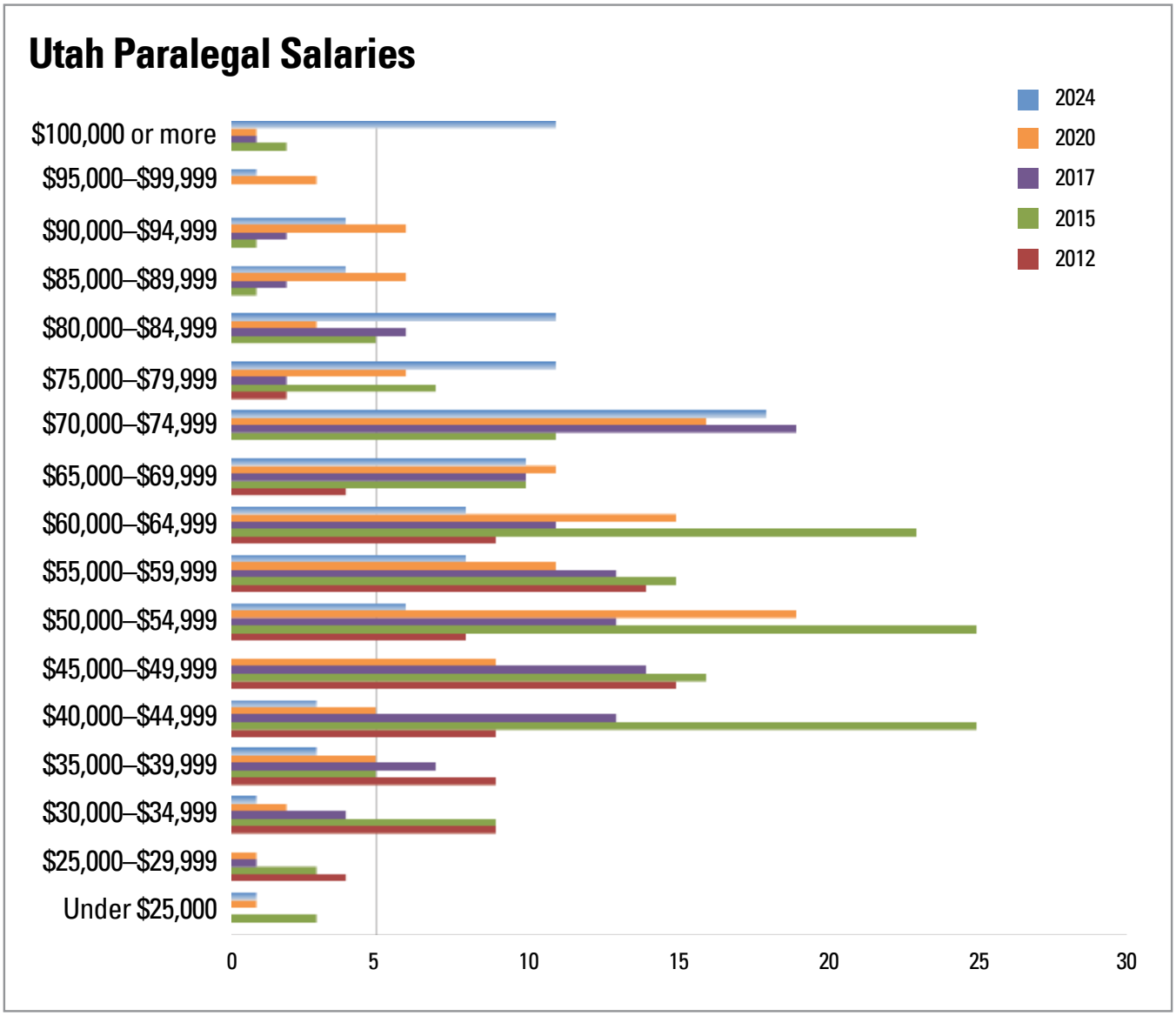
More respondents indicated being paid hourly vs. salary (59% and 37% respectively). As for benefits provided, 76% of respondents have access to health insurance for themselves (down 3%) and roughly 68% have access to dental insurance.

Over 76% have a 401(k) plan with their employer, and just over 17% have profit sharing plan in place.

A majority at 93% of respondents answered that they feel secure in their position with 57% reporting that if they needed to find new employment, they are optimistic they could do so.

Because of the current state of inflation, we wanted to ask Utah paralegals, "Do you feel that your salary keeps up with the current economic demands? As a response to this question, 53% answered yes, 47% answered no.

We greatly appreciate the participation we received in conducting this survey and hope that this information is valuable to both paralegals and their employers during salary negotiations, raise contemplation, and employee satisfaction.



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