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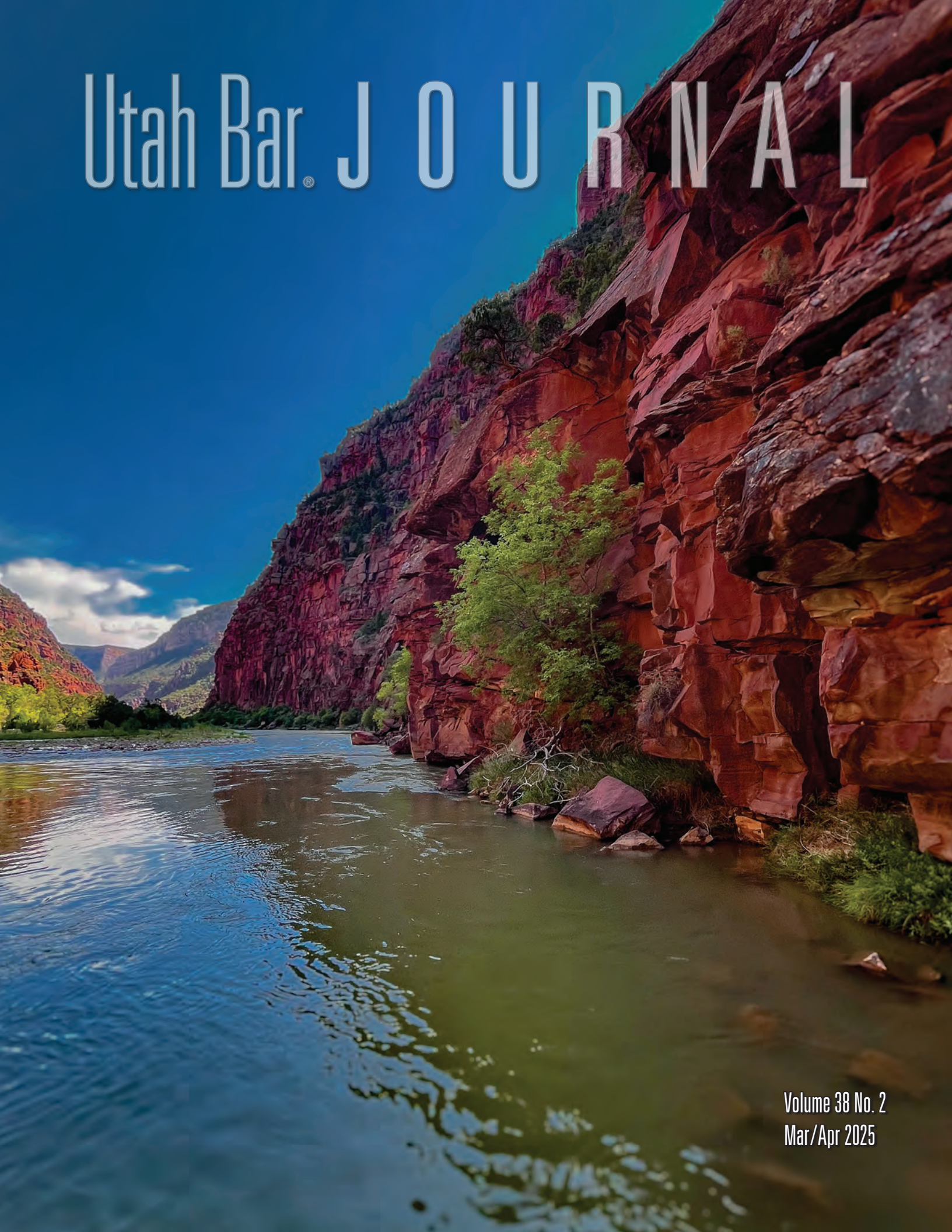

Volume 38 No. 2
Mar/Apr 2025

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MISSION & VISION OF THE BAR:

The lawyers of the Utah State Bar serve the public and legal profession with excellence, civility, and integrity.
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Cover Photo

Green River Dinosaur National Monument by Utah State Bar licensee – and first time *Utah Bar Journal* cover photographer – Anthony Kaye.

ANTHONY C. KAYE is a Fellow at the Pepper Center for Public Service. The Center meets with national and local leaders and experts to better understand unsolved problems, discuss potential solutions, and work to develop and staff public service projects to address unmet needs. This may involve pro bono legal assistance, consulting, providing a forum for the exchange of ideas, advocating for solutions in regulatory or legislative arenas, or a combination of activities. Areas of focus include public education, civics, and immigration.

Asked about how he came to take this photo, Kaye said, "I took this photo on a rafting trip with my spouse and some dear friends (including a former law partner). It was a beautiful, warm day on the river, and my eye was made more observant by a cold beer when I happened upon this wall.

HOW TO SUBMIT A POTENTIAL COVER PHOTO

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

Utah Bar JOURNAL

Table of Contents

The *Utah Bar Journal* is published bimonthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar licensing fees. Subscription price to others: $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or contact Laniece Roberts at utahbarjournal@gmail.com or 801-910-0085. For classified advertising rates and information please call Christine Critchley at 801-297-7022.

Volume 38 No. 2
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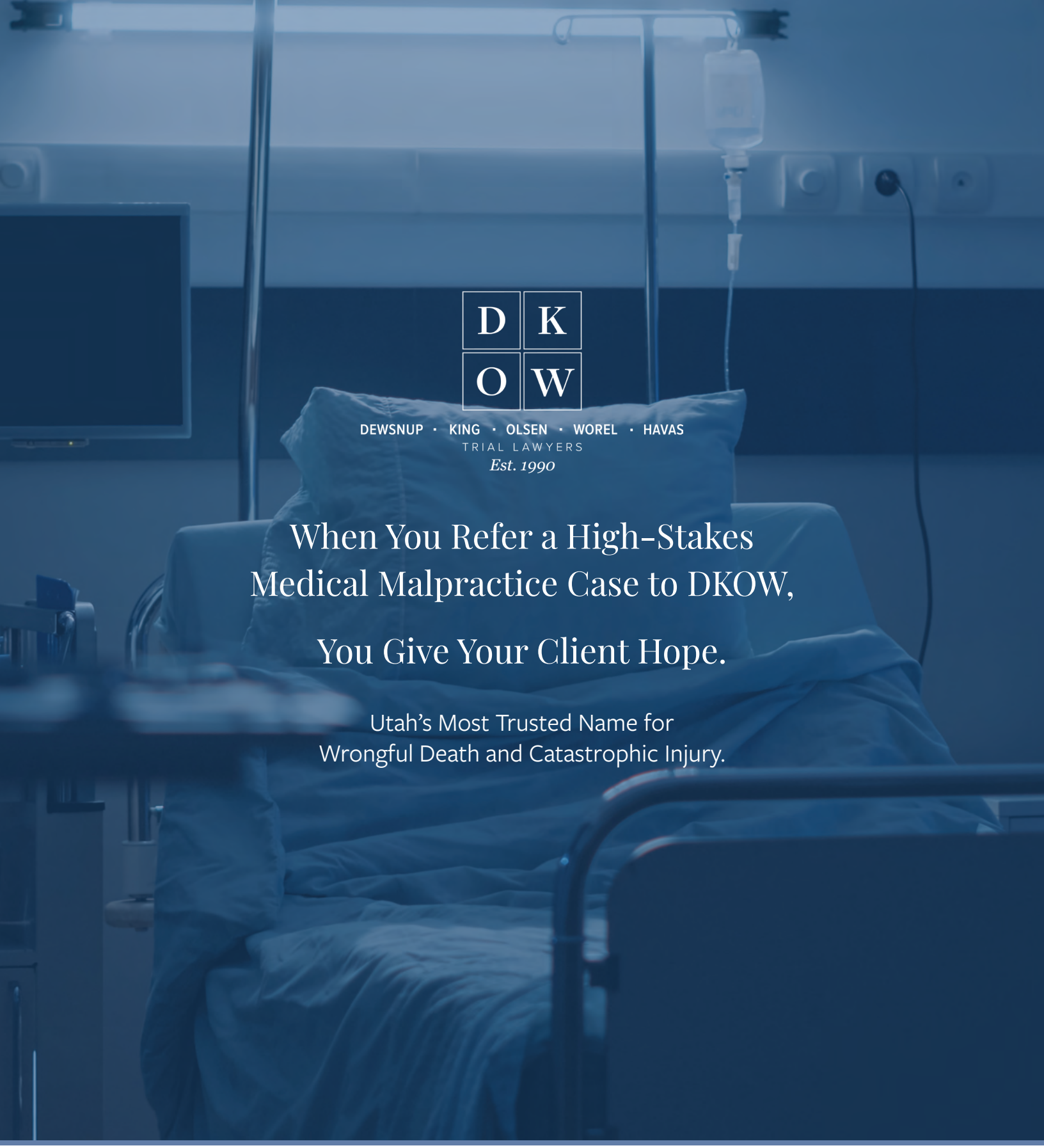

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Interested in writing an article or book review for the *Utah Bar Journal*?

The Editors of the *Utah Bar Journal* want to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea, a particular topic that interests you, or if you would like to review one of the books we have received for review in the *Bar Journal*, please contact us by calling 801-297-7022 or by emailing barjournal@utahbar.org.

GUIDELINES FOR SUBMITTING ARTICLES TO THE UTAH BAR JOURNAL

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

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

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

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

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

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

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

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

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

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

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LETTER SUBMISSION GUIDELINES

1. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org at least six weeks prior to publication.

2. Letters shall not exceed 500 words in length.

3. No one person shall have more than one letter to the editor published every six months.

4. Letters shall be published in the order they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

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

8. If and when a letter is rejected, the author will be promptly notified.

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2025 Utah State Bar Elections

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

Candidate for President-Elect

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

TYLER YOUNG

Having served as a Bar Commissioner for several years, I am honored to run for President of the Utah State Bar. During my time as a commissioner, I have had the privilege of working with some of the best attorneys, judges, and legal minds in the state to make our profession stronger.

One of the most interesting – and sometimes controversial – initiatives I have been involved in as a commissioner is the Utah Sandbox (a.k.a. Utah Office of Legal Services Innovation). In fact, I committed to address this initiative when I first ran for the Bar Commission. Through ongoing collaboration with the Utah Supreme Court and committees of attorneys from diverse practice areas, I believe the Sandbox has improved. Our collective efforts have helped shape important changes to the Sandbox that better protect clients while still allowing us to explore ways to close the access-to-justice gap.

Moving forward, I am also gearing up to work with the Utah Legislature on proposed legislation that could shake up the practice of law in big ways. Lawyers need a seat at the table in these discussions, and I will do everything in my power to make sure we are heard loud and clear.

As a lawyer outside of Salt Lake City, I know how easy it is for attorneys in rural areas to feel disconnected from Bar functions. One of my big goals is to change that by facilitating monthly events in places like Moab, Richfield, Cedar City, Vernal, Price, Logan, and beyond. If you are an attorney in one of these areas and want to help coordinate a CLE luncheon (or just want an excuse to catch up with other lawyers over lunch), please reach out to me and let's make it happen!

And now, a serious question: What would happen to your cases if you died? Do you have a plan? If not, you are not alone. Many lawyers do not have a plan, and that is a problem. Some states, like Michigan, have implemented succession planning programs to help attorneys prepare for the unexpected. My goal is to get a similar program in place for Utah lawyers by the end of my term in 2027.

At the end of the day, my focus is simple: strengthen our profession, protect the public, and ensure that the Bar supports attorneys in ways that matter. I am excited for the road ahead! I look forward to working with all of you to keep pushing things forward.

Second Division Bar Commissioner Candidate

Uncontested Election: *According to the Utah State Bar bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." Matt Hansen is running uncontested in the Second Division and will therefore be declared elected.*

MATT HANSEN

Dear Colleagues:

I appreciate the opportunity to represent the Second Division on the Utah State Bar Commission. I have had the great honor to have worked with many of you throughout my career. Currently, I am a Deputy Davis County Attorney.

I hold in high regard all of those that have volunteered their time and worked so hard to help build the Utah Bar. The Bar does have several challenges. These challenges include a membership of diverse practice areas, vast geographic separation, and generational differences. As the legal profession grows in numbers and evolves with technology, we will have additional questions to consider.

Despite these challenges, the Utah Bar also has some amazing strengths. We have exceptional judges and court staff throughout the state. Similarly, when lawyers are provided an opportunity to work in a professional and collegial atmosphere, they can be a force for good in our community and state. I am proud of what is accomplished everyday by lawyers advocating for their clients and making a difference where they work and reside. I see our upcoming challenges as a great opportunity for our Bar and lawyers generally to prosper and excel. I think the Utah Bar can be an exceptional tool for our profession going forward. I hope to be a part of that process.

I would appreciate your support.

Third Division Bar Commissioner Candidates

TYLER AYRES

With twenty-three years of experience practicing law in Utah, my career is dedicated to advocating for clients in criminal defense, civil rights, and consumer protection. I work alongside community action groups to protect individuals' rights, and now, I seek to bring this dedication to the Utah State Bar Commission.

I push for practical reforms benefitting both attorneys and the clients we serve. I support flat fee payment exceptions up to a specific amount, allowing consumers to access experienced legal representation without fear of runaway hourly fees.

I advocate greater opportunities for multi-day CLEs sponsored by the Bar. Attorneys need opportunities to earn CLE credits in immersive, multi-day programs fostering professional growth and camaraderie.

Lastly, further development and discussions about succession plans are vital to protecting clients and the integrity of their cases.

The Utah legal community deserves a strong, experienced advocate on the Bar Commission – one who understands the challenges we face and is committed to solutions that work. I ask for your support and your vote. Together, we can build a better Bar for all.

JESS COUSER

I was honored to be appointed to the Utah Bar Commission in January and am seeking your support to retain my seat in the 2025 election. As a dedicated family law attorney, I have spent my career providing ethical, competent, and compassionate legal representation to families in conflict. Serving on the Bar Commission allows me to advocate for the legal profession at large.

Over the past fifteen years, I have navigated the challenges of building and growing a small firm focused on custody, divorce, child advocacy, adoption, and more. I have contributed to the community through leadership roles in organizations such as the Utah Adoption Council and the Children's Service Society, as well as consistently providing pro bono services to underserved populations.

As Bar Commissioner, I will continue advocating for innovation, inclusivity, and enhanced member support. I am committed to addressing the evolving needs of attorneys, particularly in solo and small firms, by championing mentorship, mental health resources, and ethical adoption of AI technology. I believe in proactive leadership and fostering a diverse, accessible, and forward-thinking legal profession. I humbly ask for your support in this election.

Fifth Division Bar Commissioner Candidate

Uncontested Election: *According to the Utah State Bar bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." Tom Bayles is running uncontested in the Fifth Division and will therefore be declared elected.*

TOM BAYLES

With over two decades of legal experience, I am committed to continuing my service as your Fifth Division Bar Commissioner. As a founding attorney at ProvenLaw, PLLC, I focus on estate planning, trust administration, and complex legal matters. My career has been dedicated to upholding the highest ethical standards, advocating for clients, and mentoring fellow attorneys.

I am passionate about supporting small law firms, improving the business of law, and strengthening our ability to provide excellent client service. My vision for the Fifth Division includes fostering collaboration among attorneys, enhancing professional development opportunities, and advocating for policies that support both the legal profession and the public. I believe in equipping attorneys with the tools they need to succeed in an evolving legal landscape.

If re-elected, I will continue working to create a more connected, innovative, and effective Bar. I value open dialogue and invite your input on how we can improve our division.

I would be honored to earn your vote once again. Please reach out with your ideas or concerns at tom@provenlaw.com. Together, we can build a stronger legal community.

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Congratulations to Parsons Behle & Latimer's newly-elected shareholders! These shareholders represent the up-and-coming attorneys in the firm, and we couldn't be happier to have them join the ranks of Parsons' existing shareholders. To learn more, visit **parsonsbehle.com**.

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BYU Law School Pro Bono Program: Bridging Legal Gaps in Utah Communities

by Barbara Melendez

Utah State Bar President, Cara Tangaro, has elected to offer her "President's Message" space in this issue of the Utah Bar Journal to Barbara Melendez to highlight the BYU Law School's Pro Bono Program.

When I was in private practice, I was fortunate to volunteer with other attorneys who provided pro bono help to people in our community. I recall meeting with a single working mother who was served with an eviction notice after raising concerns about unsafe living conditions in her rented apartment. She faced homelessness and was overwhelmed with the prospect of navigating a complex legal system on her own. We were able to help her contest the eviction, assisted her in filing the required answer to the complaint. She was able to advocate for her rights and submit evidence showing the landlord's failure to maintain the property and demonstrate that this was a retaliatory eviction. The court reinstated her lease and ordered the landlord to make critical repairs. There are thousands of cases like this in Utah in which access to pro bono legal services materially improves access to justice. Pro bono volunteers can change lives.

Utah Needs More Pro Bono Legal Services

Over 80% of low-income Americans cannot afford the legal assistance they need. Vulnerable populations such as the elderly, immigrants, victims of domestic violence, people with disabilities, and the wrongfully convicted often lack representation, leaving needy individuals to navigate complex legal systems alone. This access to justice problem is particularly dire in states such as Utah with significant population growth in recent years. According to Utah Legal Services, the demand for free or low-cost legal representation has risen steadily, while the numbers of attorneys who volunteer pro bono is not keeping pace. We are not bridging the justice gap.

Our community's legal needs are serious and urgent. Victims of domestic violence may require protective orders or safe housing. Immigrants seeking asylum or green cards face a labyrinthine immigration system The elderly and disabled also face unique legal challenges, such as securing access to healthcare, addressing discrimination, and resolving financial exploitation. Pro bono attorneys help these vulnerable groups assert their rights, maintain independence, and protect their financial stability. Furthermore, individuals with disabilities often encounter barriers in accessing essential public services or accommodations and legal intervention allows them to assert their civil rights.

Parents negotiating family law disputes such as custody or child support need sound legal guidance to secure a safe and stable environment for children. Divorce, custody battles, and child welfare disputes disproportionately affect low-income families who cannot afford attorneys. Pro bono attorneys provide critical support that promotes equitable outcomes in emotionally charged cases. The homeless population in Utah's rapidly growing urban centers also relies heavily on pro bono services to address housing rights and access to social benefits. Utah's Indigenous communities, including the Navajo Nation and Ute tribes, face unique legal challenges related to land rights, water access, and preservation of cultural heritage. Finally, individuals wrongfully convicted of crimes spend years fighting to prove their innocence, often without adequate legal representation. Pro bono legal services are critical to protecting the rights of these often-marginalized members of our Utah communities and upholding the principle that justice should be accessible to all.

BYU Law School's Pro Bono Program

BYU Law's Pro Bono Program reflects the law school's mission to foster integrity and lifelong service to both God and neighbor. Recognizing the power of service in promoting justice and equality, BYU Law has backed up its commitment to producing service-minded graduates with the BYU Law Pro Bono Pledge. Newly admitted students now commit to completing at least fifty hours of pro bono legal work before graduation. Students log their hours, document their work, and submit reflections on their experiences to deepen their understanding of service and justice.

BARBARA MELENDEZ is Director of BYU Law Belonging, Achievement, and Impact.

By committing to pro bono work, students embrace their responsibility to promote justice, mercy, equality, and dignity. Each student who completes fifty hours of pro bono work receives formal recognition in BYU Law's Convocation program and graduates who complete 100 or more hours are distinguished as high honor pro bono participants. This recognition reflects BYU Law's commitment to cultivating a culture of service and inspiring students to go beyond the minimum requirements. Graduates who excel in pro bono work set a powerful example, demonstrating their readiness to uphold the highest ideals of the legal profession, while fostering a lifelong commitment to justice.

BYU Law's Pro Bono Forum Series reinforces the importance of the new pledge and is a cornerstone of BYU's pro bono initiative. This year's featured panelists included Kristy Columbia, executive director of the Rocky Mountain Innocence Center; Jennifer Springer, managing attorney at the Rocky Mountain Innocence Center; J. Tayler Fox, shareholder at Dentons Durham Jones Pinegar; Anne Freeland, senior counsel at Michael Best & Friedrich; and BYU Law 3L Naomi Hilton. The event also included a video recording of a recent exoneree who shared his triumph over injustice. Attorneys and students offered insight into their experiences and the lessons learned from serving others. The forums provide a platform for dialogue and inspiration, emphasizing the importance of pro bono work in addressing systemic inequalities. They also connect students with potential mentors and foster relationships that can lead to internships and long-term collaborations.

BYU Law students have many opportunities to work with attorneys, clinics, corporations, and organizations that serve underprivileged communities. Along with the University of Utah, the Utah State Bar, and Adobe, BYU Law students participated in the Utah Free Legal Answers platform, an online service where volunteer attorneys provide legal advice to low-income individuals. As of 2025, this program has resolved over 400,000 legal inquiries nationwide, offering a lifeline to individuals who might otherwise have no legal recourse. Cooperative efforts like this expand the program's reach, ensuring that more people receive the legal assistance they need.

Partnerships with Timpanogos Legal Center, No More a Stranger Foundation, and the Utah Expungement Summit provide other avenues for student service. These clinics address a wide range of legal needs, from family law to immigration cases. Students work under the supervision of licensed attorneys, gaining hands-on experience while serving community members who cannot afford legal representation. These collaborations not only benefit clients but also enrich the educational experience, bridging the gap between theory and practice. Students also work with the Immigration Law Clinic to help refugees and asylum seekers navigate the complexities of US immigration law. Students assist with drafting applications, gathering evidence, and preparing clients for hearings. These efforts provide critical support to individuals seeking safety and a better life, underscoring the profound impact of pro bono work.

Pro Bono Work Enhances Practitioner Satisfaction and Wellness

Busy attorneys may wonder, "With my busy schedule, why should I make time for pro bono work?" The legal profession is notoriously demanding, with high levels of stress, burnout, and mental health challenges. Yet, adding one more thing – pro bono work – paradoxically promotes renewal and well-being. Studies show that engaging in altruistic activities such as pro bono service improves mental health, fosters a sense of purpose, and helps combat burnout. By stepping outside their usual practice areas and connecting with vulnerable clients, attorneys gain fresh perspectives and a new appreciation for their profession.

How do we encourage more attorneys to participate in pro bono work? It starts in law school. Studies show that law students who engage in pro bono work are more likely to carry this commitment into their professional careers. According to the American Bar Association (ABA), law students who perform pro bono work are statistically more inclined to provide free legal services as practicing attorneys. This early exposure fosters a sense of professional responsibility and provides practical skills that benefit both the attorney and their future clients. A 2019 ABA study showed that 77% of attorneys who had performed pro bono work in law school continued to do so in their careers. These attorneys reported greater job satisfaction and a stronger connection to their communities. Such findings highlight the transformative impact of pro bono work, both for the individuals served and for the legal professionals providing the services.

BYU Law's Pro Bono Program emphasizes these benefits by nudging all students to experience the satisfaction of making a tangible difference in people's lives. This connection to community and purpose will enable BYU Law graduates to alleviates stress and build professional resilience and fulfillment.

Law Schools Can Encourage Lifelong Pro Bono Work

Pro bono work during law school shapes the character and careers of future attorneys. As Utah State Bar President Cara Tangaro has emphasized, "Access to justice is a crucial end that all attorneys should pursue." As the need for legal services continues to grow, we must also increase the ranks of attorneys who join this effort, using their skills to give back and uphold the principles of fairness and equity that define the legal profession. By fostering a collaborative spirit and a shared commitment to service, the legal community can ensure that pro bono work remains a cornerstone of justice. The late US Supreme Court Justice Ruth Bader Ginsburg once said, "Real change, enduring change, happens one step at a time." Pro bono service represents those vital steps, strengthening our communities and ensuring that justice remains a right for all, not just a privilege for the few.

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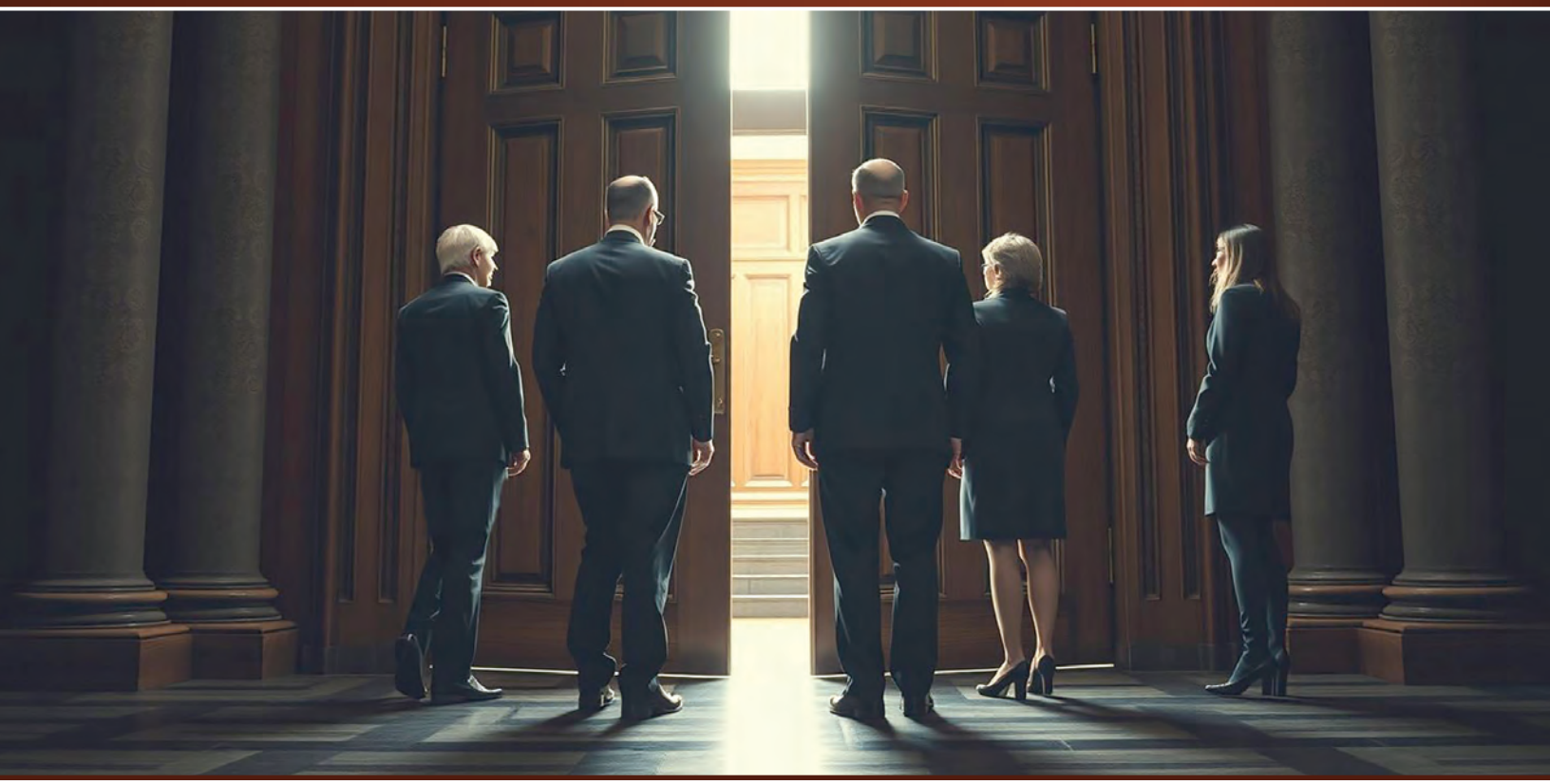

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Loper Bright and the Ebbing Tide of the Administrative State

by Jeff Teichert

Justice Scalia famously declared, "Administrative law is not for sissies" and called *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), "a highly important decision" while contending for its full and forceful application. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 511–12. *Chevron* required judges to defer to "permissible" agency interpretations of statutes. Notwithstanding Justice Scalia's early support of *Chevron*, he later doubted its compatibility with the role of the courts and the Administrative Procedure Act (APA). *See Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 109–110 (2015) (Scalia, J., concurring).

Justice Scalia's successor would bring greater attention to *Chevron* and the problems it presented. Before he was even appointed to the United States Supreme Court, Judge Neil Gorsuch wrote that *Chevron* may have been wrongly decided:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Judge Gorsuch made these statements in a case where an agency reinterpreted a statute and, by so doing, overturned an authoritative judicial interpretation. Judge Gorsuch wrote "[i]f you accept *Chevron*'s claim that legislative ambiguity represents a license to executive agencies to render authoritative judgments about what a statute means, *Brand X*'s rule requiring courts to overturn their own contrary judgments does seem to follow pretty naturally." *Id.* at 1151.

In *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), the United States Supreme Court overruled *Chevron*, fundamentally transforming the landscape of federal administrative law. Under *Loper Bright*, courts are to employ traditional judicial tools of statutory interpretation, rather than deferring to plausible interpretations rendered by the administering agency. This article will discuss: (1) *Chevron* and the problems that led to its overruling, (2) the reasoning of *Loper Bright*, including the possible influence of the concurring opinions, (3) whether *Loper Bright* will affect Utah courts' approach to administrative law cases, and (4) suggested questions to guide future developments in administrative law.

Chevron Deference: The High-Watermark of Agency Interpretation of the Law

In *Chevron*, the United States Supreme Court addressed a dispute about the meaning of "stationary source" of pollution under the Clean Air Act (Act). *Chevron* supported the Environmental Protection Agency's (EPA's) regulation allowing states to interpret the term "stationary source" to treat all pollution-emitting devices within the same industrial group as a single source for permitting purposes. *Chevron*, 467 U.S. at 840–41. The D.C. Circuit Court of Appeals had held that each device was a separate stationary source under the Act. *See Nat'l Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

Chevron established a two-step framework for reviewing agency interpretations of statutes. First, if Congressional intent was clear on the specific issue, "that is the end of the matter" and the court would follow the plain language of the statute regardless of the agency's interpretation. 467 U.S. at 842–43. Second, if the statute was silent or ambiguous on the issue, the court would determine whether the agency's interpretation was "based on a permissible construction of the statute." *Id.* This framework, commonly known as *Chevron* deference, afforded agencies latitude to make policy by filling "gap[s]" in statutes. *Id.*

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Chevron held that, where the statute granted regulatory authority, the agency's regulations were to be "given controlling weight unless they were arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843–44. Where a legislative delegation was implied by ambiguity, the courts would defer to the agency regulation if it "represent[ed] a reasonable accommodation of conflicting policies." *Id*. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). *Chevron* held that the text and legislative history of the Act did not plainly reveal the intent of Congress about whether "stationary source" referred to all devices in an industrial group as a single source. *Id*. at 861–62. Thus, *Chevron* deferred to the EPA's interpretation.

Chevron reasoned that courts should not resolve policy disputes by declaring the meaning of ambiguous statutory language. The Court said that "Judges are not experts in the field, and are not part of either political branch of the Government" and thus should not "reconcile competing political interests … on the basis of the judges' personal policy preferences." *Id*. at 865. *Chevron* concluded that "'[o]ur Constitution vests such responsibilities in the political branches.'" *Id*. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Invoking the "political branches" and "experts in the field," *Chevron* rhetorically embraced two principles in tension with each other – government by experts and government by the people. The first line of thinking is that the agencies employ experts in their fields who are more qualified to make policy. The second line of thinking is that the President is elected and therefore the executive branch is in a better position than the courts to make policy decisions reflecting the popular will. *Id*. at 865.

Restoring the Separation of Powers

Justice Kagan proclaimed in a dissent that *Chevron* was "a cornerstone of administrative law." *Loper Bright*, 603 U.S. at 448 (Kagan, J. dissenting). The federal district court noted in *Loper Bright* the APA's "narrow' standard of review," that "'a court is not to substitute its judgment for that of the agency'" and "'will defer to the [agency's] interpretation of what [a statute] requires so long as it is 'rational and supported by the record.'" *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82, 99 (D.D.C. 2021) (citations omitted). The federal district court applied *Chevron* deference and upheld the Secretary of Commerce's regulations for certain New England fisheries implementing a monitoring program which required fishermen to pay out of pocket for their own monitoring. *Loper Bright*, 544 F. Supp. 3d at 97. The First Circuit affirmed the decision, relying on a "default norm" that regulated entities must pay compliance costs, rather than referencing statutory language. *Relentless, Inc. v. United States DOC*, 62 F.4th 621, 630 (1st Cir. 2023).

The *Loper Bright* Court decisively overruled *Chevron* by a 6–2 majority. Chief Justice Roberts authored the majority opinion, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justices Thomas and Gorsuch also filed separate concurring opinions. Justice Kagan wrote a dissenting opinion, joined by Justice Sotomayor. Justice Jackson recused herself from the case.

The *Loper Bright* majority noted that Congress enacted the APA in 1946 "'as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.'" *Loper Bright*, 603 U.S. at 391 (citation omitted). The APA directs that "the reviewing court shall decide

all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA "was the culmination of a 'comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers.'" *Loper Bright*, 603 U.S. at 391 (quoting *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U. S. 667, 670–671 (1986)). Thus, a primary purpose of the APA was to check the power of the executive branch – not give it even greater deference as *Chevron* did. *Loper Bright* ultimately recognized this, stating that *Chevron* deference was "'[h]eedless of the original design' of the APA." *Id*. at 398 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U. S. 92, 109 (2015)).

Loper Bright embraces respect for agencies acting within their statutory authority (if they stay within the limits of that authority) but is also emphatic that "Courts must exercise their independent judgment" and "under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id*. at 412. While *Loper Bright* invokes the traditional role of judges under the Constitution, it is based on the language of the APA that requires judges to exercise independent judgment. While Justice Thomas joined the majority in that view, he added a concurring opinion, joined by Justice Gorsuch, to underscore the "more fundamental problem" that "*Chevron* deference also violates our Constitution's separation of powers[.]" *Id*. at 413 (Thomas, J., concurring).

Article I, Section 1, of the United States Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Yet, as of 2023, the Code of Federal Regulations was 190,260 pages long, indicating that the executive branch is responsible for more than three times the volume of legislation enacted by Congress. The George Washington University Regulatory Studies Center, *Total Pages Published in Code of Federal Regulations*, https://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Feb. 4, 2025). As of the most recent edition, published in 2018, the United States Code is approximately 60,000 pages. *See* GovInfo, *GPO Produces U.S. Code with New Digital Publishing Technology*, (Sept. 23, 2019), https://www.govinfo.gov/features/uscode-2018.

Justice Thomas wrote, "*Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits." *Loper Bright*, 603 U.S. at 414. Justice Thomas argued that *Chevron* violates the separation of powers in two important ways. First, it forces judges to defer to incorrect agency interpretations of statutes instead of exercising independent judgment. Second, it transforms the interpretation of ambiguous statutory provisions into policymaking, a function that properly belongs to the legislative branch.

In discussions about judicial activism in our time, commentators commonly lump the executive and legislative branches together as the "political branches." But the Constitution assigns them distinct roles in making and implementing policy. Under *Chevron* deference, the agency was either interpreting an ambiguous statute (judicial power) or making policy (legislative power). Justice Thomas hastened to add that *Chevron* was "not a harmless transfer of power" but "a fundamental disruption of our separation of powers," because, in safeguarding individual liberty, "[s]tructure is everything." *Id*. at 416 (quoting Antonin Scalia, *The Importance*

of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008)).

In the Declaration of Independence, the founders focused their energy on abuses of executive power by the king, complaining that he had "dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected" and had been "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever." The Declaration of Independence para. 2 (U.S. 1776). The United States was largely founded on a healthy suspicion of executive power and the need to limit it. Concerning executive branch functionaries, the Declaration indicated that the king "has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance." *Id*. Thus, the American Revolution was fought to restore legislative power and to limit the power of the executive to prevent tyranny.

The Declaration further listed various usurpations of judicial power and deprivations of due process of law such as protecting British soldiers from punishment for murders against the colonists by "mock trial," conspiring "to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws," "transporting us beyond the seas to be tried for pretended offenses," and making "[j]udges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." *Id*.

Loper Bright does not entirely cast aside the agency's interpretation but relegates it to non-binding "persuasive" authority, particularly in matters where the agency's technical expertise is implicated. *Loper Bright*, 603 U.S. at 402. *Loper Bright* also recognizes that sometimes Congress affirmatively confers discretionary authority on executive agencies and "may do so, subject to constitutional limits," and the courts' authority to "police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." *Id*. at 371.

The Court ultimately concluded that *Chevron* has proven "unworkable" because its central principle was to infer a grant of agency discretion where there was "statutory ambiguity," a term that evaded a reliable definition and was completely "'in the eye of the beholder[.]'" *Id*. at 408 (citation omitted).

Restoring Judicial Authority to Interpret the Law

Chevron placed courts in the unpalatable position of deferring to changing and inconsistent agency interpretations of the same statute over time as personnel and administrations change. *Id*. at 398. The idea that the courts should defer to the executive branch because it is "political" ignores Judge Blackstone's warning that "if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts." 3 Blackstone, Commentaries on the Laws of England 250 (Oxford University Press 1979) (1768). Blackstone thus reasoned that it was "wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them." *Id*. Justice requires a non-political judiciary giving stable and predictable interpretations of the law that apply the same to everyone and are not adapted "to times or to men." Situational justice is not justice at all.

Loper Bright recognized, as James Madison did, that the imperfection of human language inevitably creates ambiguity in statutory language. "As the Framers recognized, ambiguities will inevitably follow from 'the complexity of objects, … the imperfection of the human faculties,' and the simple fact that "'no language is so copious as to supply words and phrases for every complex idea.'" *Loper Bright*, 603 U.S. at 399–400 (*quoting* The Federalist No. 37, at 236 (James Madison)). The *Loper Bright* Court added that "the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute." *Id*. at 400.

Loper Bright rightly held that the fundamental premise of judicial power is that statutes "no matter how impenetrable, do – in fact, must – have a single, best meaning." *Id*. So it is the responsibility of a Court to find the best meaning – not merely a "permissible" one. The idea that interpreting an ambiguous statute is policymaking suggests that the interpreter may freely supply meaning based on policy preferences rather than discovering it by a principled analysis of the statute. *Id*. at 403–04. Deferring to all agency interpretations not qualifying as "arbitrary and capricious" was a massive transfer of legislative power from Congress to the executive branch.

The centuries-long struggle for liberty in England was largely a struggle to wrest legislative and judicial power from the crown and vest them in Parliament. For example, a 1641 statute abolished the infamous Court of Star Chamber. The term "star chamber" referred to the chamber where the court sat, because stars were painted on the ceiling. This was the king's Privy Council sitting as a court, comprised of ministers something like the American president's cabinet. The Court of Star Chamber exercised both executive and judicial power, deciding judicial cases involving politically powerful people – where its status and prestige were needed to deal with people that might have intimidated an ordinary court. But, in time, the Court of Star Chamber developed a reputation for abuses of power and heavy-handed judgment.

In abolishing the Court of Star Chamber and limiting the power of the Privy Council, Parliament withdrew the jurisdiction of the

king and the Privy Council to "question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any the subjects of this kingdom," other than as punishment for crimes. *The Act for the Abolition of the Court of Star Chamber* of 5th July 1641 (17 Car. 1, c. 10 § 3). Among the most important reasons for this law, by its own terms, was that the King's Privy Council had:

> [A]dventured to determine the estates and liberties of the subject contrary to the law of the land and the rights and privileges of the subject, by which great and manifold mischiefs and inconveniences have arisen and happened, and much uncertainty by means of such proceedings hath been conceived concerning men's rights and estates[.]

Id. c. 10 § 1. Parliament claimed that the king and his council had no authority to adjudicate the property rights and liberties of the people. Why? Because using executive power to adjudicate property rights had been a method of enriching the crown and creating uncertainty to the detriment of the people's liberty since feudal times. A history of abuses such as this is why the American founders took pains to design a system based on a separation of powers and due process of law – both of which were compromised by *Chevron* deference.

Restoring Due Process to Administrative Law

In addition to creating separation of powers problems, Justice Gorsuch observed that "[i]n this country, we often boast that the Constitution's promise of due process of law means that 'no man can be a judge in his own case.'" *Loper Bright*, 603 U.S. at 433 (citations omitted). Yet *Chevron* deference allowed executive agencies to determine the limits of their own powers. *Id*. Justice Gorsuch invoked the venerable Blackstone for the idea that allowing agencies to effectively amend a statute by simply redefining its terms with no legislative action at all would render the people "'slaves to their magistrates.'" *Id*. (quoting 4 *Blackstone* 371).

One often overlooked subtext of *Chevron* is that it was a dispute between two private parties. One of the parties was a producer of oil and gas. The other was an environmental advocacy group. In that context, a federal agency like EPA might seem like a wise and neutral arbiter of a political dispute between two private parties or factions. The situation looks very different when the court is deferring to the interpretation of the agency as a party to the dispute with virtually unlimited resources. Justice Gorsuch observed that "[i]n disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about 'what the law is'

without favor to either side." *Id.* at 416 (Gorsuch, J. concurring) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). He called *Chevron* deference "a radically different approach." *Id.*

In *Loper Bright*, the government acknowledged that *Chevron* sat as a "heavy weight on the scale in favor of the government," but argued that it would be too disruptive to undo it. *Id.* at 440. In her dissent in *Corner Post, Inc. v. Board of Governors of the Federal Reserve Sys*tem, 603 U.S. 799 (2024), Justice Jackson argued that, without the *Chevron* advantage, the federal government may literally be destroyed by litigation, because a "tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government." *Id.* at 864. But Justice Gorsuch rightly contends that "agencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge." *Loper Bright*, 603 U.S. at 440–41.

The venerable Judge Blackstone explained the danger of allowing executive functionaries to administer justice because of the inherent bias favoring their own constituencies and interests.

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many.

3 Blackstone, at 250. Like private parties, regulators and agencies today have vested interests and constituencies and are often parties to disputes over the meaning of statutes they are charged with enforcing. In many cases, even the most conscientious regulators are more devoted to their agencies' regulatory power than the rights of those they are regulating. *Chevron* deference gave them substantial latitude in re-making the law to favor their own positions.

Federal agencies routinely acted as judges when they were also interested parties to disputes, with the sanction of the Supreme Court to interpret the law in their own favor. James Madison was also adamant that "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time[.]" The Federalist No. 10, at 107 (James Madison) (J.P. Lippincott & Co. 1864). For these reasons, federal agencies should not have a preferred interpretation of the law they are enforcing.

What *Loper-Bright* Means for Utah Administrative Law

For many years, Utah courts were uncertain what to do with *Chevron*. Utah "caselaw was riddled with tension on the question of the standard of review that applies to judicial review of agency action." *Ellis-Hall Consultants v. Pub. Ser. Comm'n*, 2016 UT 34, ¶ 22, 379 P.3d 1270 (citing *Murray v. Utah Lab. Comm'n*, 2013 UT 38, ¶ 11, 308 P.3d 461). But Murray "repudiated the notion that an agency's 'authority' to apply a statutory framework sustained an inference of 'discretion' leading to deference to its decisions" noting that figuring out whether the legislature had delegated discretion to an agency had "proved difficult." *Id.* ¶ 23 (citing *Murray*, 2013 UT 38, ¶ 28).

In *Hughes General Contractors, Inc. v. Utah Labor Commission*, 2014 UT 3, 322 P.3d 712, the Utah Supreme Court "openly repudiated" a "*Chevron*-like standard of administrative deference" for Utah, reasoning that a single state need not worry about maintaining "national uniformity" and avoiding splits between various circuits as federal courts do. In *Hughes Gen. Contractors*, the Utah Supreme Court embraced a textualist approach to reject *Chevron* deference, stating that "the interpretive function for us is not to divine and implement the statutory purpose, broadly defined. It is to construe its language." *Id.* ¶ 29.

The Utah Supreme Court added that a discretionary decision involves a range of acceptable answers – some better than others – and the agency may choose from this range no matter what an appellate court thinks is the legally correct answer. *Ellis-Hall*, 2016 UT 34, ¶ 27. "Statutory interpretation does not present such a discretionary decision, because 'questions of law have a single right answer.'" *Hughes Gen. Contractors*, 2014 UT 3, ¶ 7 n.4 (quoting *Murray*, 2013 UT 38, ¶ 33 (quotation simplified)). *Hughes* explained that the courts' role is "to determine the meaning of the statutory language" and, having done so, the Court is "in no position to pick sides in the policy debate[.]" *Id.* ¶ 27. Ironically, *Chevron* deferred to the agency's interpretation to avoid picking sides in the policy debate – while *Hughes* declined to defer to the agency interpretation for the same asserted reason. Several other states also refused to import *Chevron*'s approach into state administrative law adjudications. *See Loper Bright*, 603 U.S. at 444. (Gorsuch, J., concurring).

While the Utah Supreme Court repudiated the *Chevron* doctrine as to Utah law, it continued to apply *Chevron* when interpreting federal law. *Bank of Am., N.A. v. Sundquist*, 2018 UT 58, 430 P.3d 623. In *Guardian Ad Litem v. State*, 2019 UT App 134, 454 P.3d 51, the Utah Court of Appeals discussed the *Chevron* deference doctrine, explaining that courts must defer to a federal agency's interpretation of a statute if the statute is ambiguous and the agency's interpretation is reasonable. This case highlighted the application of *Chevron* deference in federal contexts but did not adopt it for state law interpretation *Guardian Ad Litem*, 2019 UT App 134. Additionally, in *Bank of Am*erica, 2018 UT 58, the Utah Supreme Court applied the *Chevron* framework to determine whether to defer to a federal agency's interpretation of a federal statute, emphasizing the need to first ascertain whether Congress had directly addressed the issue. *Id*. These cases collectively illustrate the Utah courts' approach to *Chevron* deference, often rejecting it in favor of independent judicial interpretation, while acknowledging its application in federal contexts *Ellis-Hall Consultants*, 2016 UT 34; *Guardian Ad Litem*, 2019 UT App 134; *Bank of Am*., 2018 UT 58. Thus, *Loper-Bright* is unlikely to unsettle Utah precedent in agency adjudications. But Utah courts will no longer be required to defer to agency interpretations of federal statutes.

The Present State of Administrative Law

Former Interior Secretary Bruce Babbitt openly admitted that he did not even bother trying to pass legislation.

> 'When I got to [Washington, DC], what I didn't know was that we didn't need more legislation, … But we looked around and saw we had authority to regulate grazing policies. It took 18 months to draft new grazing regulations. On mining, we have also found that we already had authority over, well, probably two-thirds of the issues in contention. We've switched the rules of the game. We're not trying to do anything legislatively.'

Carl M. Cannon, *Clinton's Cabinet: They came, they saw, they stayed*, Government Executive, May 24, 1999 (quoting Secretary of the Interior Brice Babbit), https://www.govexec.com/federal-news/1999/05/clintons-cabinet-they-came-they-saw-they-stayed/3176/.

Secretary Babbit's statement asserted that he had complete authority to regulate livestock grazing on Bureau of Land Management lands and to legislate two-thirds of the mining issues on those lands without Congressional approval. *Chevron* was controversial for many years because it violated the APA, usurped legislative and judicial authority, made a major transfer of power to unelected bureaucrats, and deprived citizens of due process of law by requiring courts to defer to the agencies' preferred interpretations. But *Chevron* deference is not the only reason for concern in the realm of administrative law.

As an illustration, the United States Forest Service regulates 191 million acres for timber harvest and other forest products, recreation, livestock grazing, environmental values, and other uses. *See e.g. Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 976 (D. Colo. 1989).

1. Under 36 C.F.R. §§ 218.3(a) 219.56(e) the next higher line officer is also the reviewing officer of an objection during pre-decision administrative review.

2. An appeal of a Forest Service decision is to the next higher officer. For example, an appeal of a District Ranger's decision is filed with the Forest Supervisor. 36 CFR § 214.7(a). Thus, the appeal of a Forest Service decision is not to a neutral decision-maker but the supervisor of the person who made the decision.

3. The Supreme Court has held that, when making factual findings, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a

court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). Similarly, the Ninth Circuit opined that the agency has discretion to rely on its own experts "where specialists express conflicting views." *Hells Canyon All. v. United States Forest Serv.*, 227 F.3d 1170, 1184 (9th Cir. 2000).

4. An administrative decision cannot be challenged in federal court until the aggrieved party has exhausted administrative remedies. *W. Watersheds Project v. United States BLM*, 76 F.4th 1286, 1294 (10th Cir. 2023).

5. Federal district court review is governed by an appellate standard of review. "A district court reviews an agency action to determine if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (quoting 5 U.S.C. § 706(2)(A)). The court will not substitute its own judgment for that of the agency and will not overturn the agency unless "there has been a clear error of judgment." *Lamb v. Thompson*, 265 F.3d 1038, 1046 (10th Cir. 2001). An agency's decision will be deemed "arbitrary and capricious" only if:

> the agency … relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lamb, 265 F.3d 1046 (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983)).

An initial appeal of a Forest Service decision is decided by a co-worker of the officer that made the decision that is being appealed. (Imagine a criminal defendant walking into court and seeing the Chief of Police sitting on the bench in a black robe.) The officer deciding the appeal has legal cover to prefer the agency's expert witnesses over the petitioner's expert witnesses, even if the petitioner's experts are more credible and persuasive. Then when the decision goes against the citizen, and an appeal is filed in federal court, the agency's factual findings are protected by an appellate standard of review and will be overturned only if the agency made a "clear error of judgment." Until *Loper Bright*, the courts were also required to defer to the opposing party's legal interpretations unless they were found to be arbitrary and capricious.

While this example is of the Forest Service appeal system, similar systems are in place throughout the federal bureaucracy. Before *Loper Bright* (and to a lesser extent after) taking an appeal against a federal agency was the legal equivalent of playing poker against a stacked deck and against an opponent with unlimited resources. Such things are not supposed to happen in this country.

Questions for the Future

Overruling *Chevron* was a strong first step in restoring the constitutional separation of powers and due process rights that protect citizens from government overreaching. However, practitioners should remember that the majority opinion in Loper-Bright was based on the Administrative Procedure Act and not explicitly on the Constitution–though it referenced constitutional principles. Only Justices Thomas and Gorsuch explicitly grounded their separate opinions in the constitution.

In the wake of *Chevron*'s demise, questions remain whether, in the coming years:

1. Courts will perpetuate the reasoning of the separate opinions as they apply *Loper-Bright* to police the constitutional limits of executive authority;

2. Administrative appeals will be moved to Article III courts to be decided by neutral decisionmakers rather than an interested regulatory agency;

3. Evidence and expert testimony will be weighed according to its credibility, without giving the agency's factual findings and experts special weight; and

4. The citizen will be afforded a fair evidentiary hearing before a neutral court prior to the first judicial appeal.

The Supreme Court appears to be moving in the direction of restoring the traditional roles of the three branches of government, providing due process of law, and reining in the expanding power of the executive branch. Attorneys have an important role in watching these developments and ensuring that citizens are treated fairly when facing adverse decisions from government agencies that retain substantial power over their property, livelihoods, and ways of life.

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The Mayhem That "Puts Out an Individual's Eye"

by Jeffrey G. Thomson, Jr.

Introduction

This article is about "mayhem." No, not about the character Dean Winters plays in some of the Allstate Insurance commercials. It is also not about the more modern and general definitional meaning of this noun, which is "needless or willful damage or violence" or "any kind of chaos or disorder." *Mayhem*, Merriam-Webster Dict. Online, https://www.merriam-webster.com/dictionary/mayhem (last visited Feb. 18, 2025). Rather, this article is about "mayhem" in its criminal, legalese sense and more specifically about what it means in Utah to say that an "actor" has committed "mayhem" by unlawfully and intentionally … putting out an individual's eye. Utah Code Ann. § 76-5-105(2)(d) ("An actor commits mayhem if the actor unlawfully and intentionally: (a) deprives an individual of a member of the individual's body; (b) disables or renders useless a member of an individual's body; (c) cuts out or disables an individual's tongue; (d) puts out an individual's eye; or (e) slits an individual's nose, ear, or lip.").

A fact scenario drawn from the probable cause statement and police reports in an actual but still pending and unadjudicated Utah case known to the author tees up the question presented by this article nicely and illustrates how this under-utilized charge, often substituted by aggravated assault, *see id.* § 76-5-103(2), has broader application and should be filed more often in Utah criminal prosecutions. Here are the alleged facts:

> Police were called out to a trailer park in response to a neighbor's report of an aggravated assault in progress. The suspect had reportedly attacked two elderly women. Police saw that one of them was "bleeding from both eyes." After taking the suspect into custody, he blurted "that he had been trying to rip [the woman's] eyes out." The woman similarly explained that the suspect "had dug his fingers into her eyes" and that she had been "rendered nearly blind due to the attack." The suspect later explained that he had been "trying to blind" her. While his intent was clear, he failed to actually remove the woman's eyes. Instead, he had only destroyed most of her sight.

Under a plain reading of the elements of the crime, would this suspect's alleged conduct constitute mayhem or only attempted mayhem? *See id.* § 76-4-101 (defining an attempt). Or was it solely an aggravated assault? *See id.* § 76-5-103(3)(b)(i) (requiring a showing of "serious bodily injury," defined at Section 76-1-101.5(17), in order to be classified as a second degree felony like mayhem). Does "puts out an individual's eye" only mean, at least as some have argued, "the physical removal of the eye," *North Carolina v. Coakley*, 767 S.E.2d 418, 423 (N.C. Ct. App. 2014), like taking something that is inside and putting it outside? Or does it also mean something more like putting something out of commission, that is, to "extinguish" or "to cause to be out," *put out*, Merriam-Webster Dict. Online, https://www.merriam-webster.com/dictionary/put%out (last visited Feb. 18, 2025); "to 'blind someone, typically in a violent way," *Coakley*, 767 S.E.2d at 423; to disable or limit the function of, to "'injure[] to such an extent it cannot be used for the ordinary and usual practical purposes of life,'" *id.*; or to "destroy its usefulness," 2 Wharton's Crim. Law § 23:24 (16th ed. 2021).

This article answers this question by looking to the origins and purpose of this criminal offense, concluding that in Utah the latter interpretation is the correct one. As such, mayhem is a crime that has broader meaning than many may have initially thought and warrants greater application in Utah criminal prosecutions.

Etymology: Mayhem is "Law-Language"

"What's in a name?" William Shakespeare, Romeo & Juliet, act II, sc. ii. While in many circumstances the answer to this question is: Not very much. "That which we call a rose by any other name," after all, "would smell as sweet." *Id.; e.g., Com. ex rel Cnty. of Wyoming v. Hakim*, 23 Pa. D. & C.3d 60, 62 (Pa. Com. Pl. 1982). In many other instances, the name given for a certain act can carry a lot of hermeneutical and hence consequential meaning, especially in the field of jurisprudence.

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Such is the case here. In fact, in the 1820's Noah Webster went so far as to describe the term "mayhem" as "written law-language" for the word "maim." *Maim*, Webster's Dictionary 1828, https://websterdictionary1828.com/Dictionary/Maim (last visited Feb. 18, 2025). After all, etymologically speaking, "mayhem," or *mayme*, *mahaime*, *mahain*, "derives via Middle English from the Anglo-French verb *maheimer* [or *mahaigner* or *mahaignier*] ('to maim') and is probably of Germanic origin; the English verb *maim* comes from the same ancestor." *Mayhem*, Merriam-Webster Dict. Online, https://www.merriam-webster.com/dictionary/mayhem (last visited Feb. 18, 2025); 53 Am. Jur. 2d *Mayhem & Related Offenses* § 1 (Aug. 2024) ("Mayhem is an older form of the word 'maim.'"). The word has carried with it the definitional concept of "disabling, mutilation, or disfigurement." *Mayhem*, Merriam-Webster Dict. Online, https://www.merriam-webster.com/dictionary/mayhem (last visited Feb. 18, 2025); *see also* 2 Wharton's Crim. Law § 23:23 (16th ed. 2021) ("As a result of an early English statute, disfigurement, as well as disablement, came to be included under mayhem.").

"The disfigurement sense of *mayhem* first appeared in English in the 15th century." *Mayhem*, Merriam-Webster Dict. Online, https://www.merriam-webster.com/dictionary/mayhem (last visited Feb. 18, 2025). It was not until "the 19th century [that] the word had come to [also] mean any kind of violent behavior."

Id. Thus, in early 19th century America, mayhem or "maim" was defined as follows: "1. The privation of the use of a limb or member of the body, so as to render the sufferer less able to defend himself or to annoy his adversary. 2. The privation of any necessary part; a crippling. 3. Injury; mischief. 4. Essential defect." *Maim*, Webster's Dictionary 1828, https://websterdictionary1828.com/Dictionary/Maim (last visited Feb. 18, 2025).

Origin of "Put Out an Eye"

Just as the word mayhem is "law-language" or judicial jargon, the phrase "put out an eye," as used to describe an act of mayhem, may be best understood as an archaic descriptor of an alternative form of mayhem rooted in the language of the common law. *See* 4 William Blackstone, Commentaries *205–07. Blackstone explained that of those "Offences Against the Persons of Individuals" that "are felonious, … the first is that of mayhem." *Id*. Specifically, "the cutting off, or disabling, or weakening a man's hand or finger, *or striking out his eye* or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems." *Id*. (emphasis added); *see also State v. Bass*, 120 S.E.2d 580, 582–84 (N.C. 1961) (discussing the common law history behind the crime of mayhem); *Goodman v. Superior Ct*., 84 Cal. App. 3d 621, 624 (Cal. Ct. App. 1978) (same).

"At different times, by Statute in England, different kinds of mayhem were made felonies – as cutting out the tongue, or putting out the eyes." *Adams v. Barrett*, 5 Ga. 404, 413 (Ga. 1848). "The last statute enacted by Parliament relative to mayhem prior to the delivery of Blackstone's commentaries," cited above, "was the Coventry Act." *Bass*, 120 S.E.2d at 584; Coventry Act, 22 & 23 Car. 2, c.1, s.7 (1670). This act "did not displace the common law of mayhem," retaining the phrase "put out an eye" in defining one of the different alternative acts that constituted the crime. *Goodman*, 84 Cal. App. 3d at 624. Instead, this Act expanded both it and the purpose behind it. *Id*.

The Purpose Behind Criminalizing Mayhem

As Webster touched upon in his 1828 definition, Blackstone explained the original common law purpose behind

> look[ing] upon [mayhem] in a criminal light by the law; [it] being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the *violently depriving another of the use of such of his members, as may render his the less able* in fighting, either to defend himself, or to annoy his adversary.

4 William Blackstone, Commentaries *205–06. This offense was thus aimed at conduct that deprived the victim of the "use" of a

body part, making him "less able" or disabled from being able to "defend himself" or another. *Id.*

The enactment of the Coventry Act, however, "broadened the concept of mayhem to include mere disfigurement without an attendant reduction in fighting ability. The move to recognize mere disfigurement as mayhem stemmed from an injury inflicted on Sir John Coventry, an Englishman, who was assaulted on the streets of London by enemies who slit his nose in revenge for insults uttered against them in Parliament." *Goodman*, 84 Cal. App. 3d at 624. Thus, the Coventry Act provided "that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose or lip, or cut off or disable any limb or member of any other person, with intent to maim or to disfigure him; such person, his counselors, aiders, and abettors, shall be guilty of felony without benefit of clergy." *Id.* at 207.

Origin in the United States

"At the time of the passage of the Coventry Act the colonization of what is now North Carolina" and the other States "was underway." *Bass*, 120 S.E.2d at 584. The American colonies had "[c]ases decided under the Coventry Act, and statutes like our own [that is, like California's,]" were "derive[d] from it." *Goodman*, 84 Cal. App. at 624; *e.g., Foster v. People*, 50 N.Y. 598, 607 (NY Ct. App. 1872) ("The statute of Car. II [Coventry Act] has been followed, also, in the legislation by congress and of many of the States of the Union."). Indeed, the Coventry Act "formed the basis of all subsequent colonial disfigurement statutes" in the United States. Emily Cock, Proportionate Maiming: The Origins of Thomas Jefferson's Provisions for Facial Disfigurement in Bill 64 127–51 (2019).

For just a few examples, one can see references to the Coventry Act in mayhem prosecutions in the early 1800's in Pennsylvania, North Carolina, Virginia, Alabama, and Tennessee. *E.g., Respublica v. Reiker*, 1801 WL 781, at *1 (Pa. 1801) ("pull or put out an eye"); *Commonwealth v. Lester*, 4 Va. 198, 199 (Va. Gen. Ct. 1820) ("put out an eye"); *North Carolina v. Crawford*, 13 N.C. 425, 430 (N.C. 1830) ("put out an eye"); *Alabama v. Briley*, 8 Port. 472, 474 (Ala. 1839) ("put out an eye"); *Chick v. Tennessee*, 26 Tenn. 161, 162 (1846) ("put out an eye").

Origin in Utah

"When Utah first enacted its criminal statutes, most of them consisted simply of a codification of the common law of crimes as it then existed." *State v. Tuttle*, 730 P.2d 630, 632 (Utah 1986). "Many of these statutes were amended over the years, but still retained their basic common law character." *Id.* Many "common law definitions of crimes," however, had become "archaic," resulting in "the legislature in 1973 repeal[ing] wholesale all the prior substantive criminal statutes … and enact[ing] a sweeping new penal code that departed sharply from the old common law concepts." *Id.*; Utah Code Ann. § 76-1-105 (1974) (abolishing common law crimes). *But see* § 68-3-1 (1953) (adopting the common law).

The crime of mayhem, however, appears to be an exception to this drastic departure. From Utah's beginning, conduct constituting mayhem has been criminalized and that conduct, whether by common law or statute, has always been "defined" to include the "put[ting] out an eye." *Compare* Richard W. Young et al., Utah Revised Statutes § 4171 (1898) ("Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, slits the nose, ear, or lip, is guilty of mayhem."); *with* 1973 Laws of Utah ch. 196, at 606, codified at Utah Code Ann. § 76-5-105 (1973) ("Every person who unlawfully and intentionally deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye or slits the nose, ear, or lip, is guilty of mayhem."); *and* Utah Code Ann. § 76-5-105(2) (2022) (quoted at the beginning of this article in its entirety). In fact, the only material change to the language of the mayhem statute since its 1898 adoption has been the substitution of the *mens rea* "maliciously" for "intentionally." *Id.*

Utah, moreover, in compiling and drafting its first statutory criminal code, relied heavily on the 1872 Penal Code of California and the definition for mayhem found at section 203 of that code. *See* Utah Revised Statutes at v & 894; James H. Deering, *et al.*, The Penal Code of California § 203 (1872) ("Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."). And the only material difference between California's and Utah's versions were Utah's omission of "disfigures" and Utah's punishing mayhem "by imprisonment in the state prison not exceeding ten years," Utah Revised Statutes § 4172, instead of California's "imprisonment in the state prison not exceeding fourteen years," The Penal Code of California § 204. According to California courts, this Section's origins trace back to the common law and the Coventry Act. *Goodman*, 84 Cal. App. at 624.

Meaning in California

And in construing the meaning of mayhem in general and "put out an eye" in particular, California courts have held that "[w]hat the statute obviously means by the expression or phrase, 'put out the eye' is that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life." *People v. Nunes*, 47 Cal. App. 346, 350 (Cal. Ct. App. 1920); *accord People v. Green*, 59 Cal. App. 3d 1, 3 (Cal. Ct. App. 1976); *People v. Dennis*, 169 Cal. App. 3d 1135, 1138 (Cal. Ct. App. 1985). Such an interpretation is consistent with the common law understanding of this phrase. 2 Wharton's Crim. Law § 23:24 (16th ed. 2021) ("It was mayhem at common law … to remove an eye *or destroy its usefulness*.") (emphasis added).

Meaning in Utah

In Utah, ordinarily, "when the new criminal code differs substantially from the old statutorily enacted common law and the reason for the difference is discernible," courts do "not resort to common law precedents." *Tuttle*, 760 P.2d at 633. "However, where the differences appear to be largely technical and [courts] can discern no purpose for the diversion from the prior law, [they] should be free to refer to it for such interpretive assistance as it may offer." *Id.* In doing so, a Utah statute is "read and construed in the light of the common law in force at the time of its enactment." *Cont'l Nat'l Bank & Tr. Co. v. John H. Seely & Sons Co.*, 77 P.2d 355, 359 Utah (1938).

Furthermore, "[w]hen the legislature 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.' *** In other words, when a word or phrase is 'transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Maxfield v. Gary Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647 (internal citations omitted); *accord* Utah Code Ann. § 68-3-11 ("Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.")

The language describing conduct constituting mayhem in Utah has remained essentially unchanged since it was first adopted in the 1890's. It was borrowed from the California Penal Code, which itself was derived from the common law and Coventry Act. There being no discernible difference between the 2022 version and the original one, its meaning and purpose are the same, carrying its common law understanding and its California construction with it. To "put out an individual's eye," therefore, applies to unlawful and intentional conduct that disables, limits, or extinguishes the ordinary function or usefulness of the eye.

Conclusion

Is what the suspect allegedly did to the woman in the scenario taken from the probable cause statement and police reports summarized at the beginning of this article – reportedly nearly blinding her – mayhem or is it only attempted mayhem? Or is it solely aggravated assault? While her eyes were not completely "gouged out" like that "of the [very unfortunate] prosecutor" in *Alabama v. Simmons*, 3 Ala. 497, 497–98 (Ala. 1842), the focus of mayhem has always been "the disabling effect on the victim, rather than the physical acts that took place," including "the physical removal of the eye" itself, *Coakley*, 767 S.E.2d at 423.

What was once the woman's ability to see may have now become her disability not to see. Even prior to the Coventry Act, moreover, the facility to defend herself or another appears to have been severely handicapped by what the suspect did to her. Her capacity to see normally – the usefulness of her eyes – was reportedly destroyed or extinguished or, in other words, "put out." So, what the suspect allegedly did to her was not an attempt. Nor was it only an aggravated assault; if the description of the suspect's conduct and its results remain accurate and are either admitted to a judge or proven to a fact finder, it was mayhem, both at common law and today. This illustrates how the crime of mayhem in Utah can have a broader meaning and wider application than some may have initially supposed. And it demonstrates why, in this author's view, mayhem can and ought to be filed more frequently in Utah criminal cases.

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How We Lawyer May Just Make the World a Better Place: A Management-Side Employment Lawyer's Perspective

by Rob Coursey

I was talking with a fellow management-side employment lawyer/friend recently and I made an offhand comment encouraging her to go out and continue doing the good work of protecting our nation's employers.

She corrected me: "Actually, I feel like most of the time when I'm counseling my clients, I'm protecting *employees* . . . ."

She was 100% right.

I told her I was glad she "corrected" my comment about our job being all about protecting employers. I further told her I felt a little silly that we were even having this exchange, because this is one of *my* pet issues: I believe there is a common misconception among many (including some of my close friends and family) that, as an employment lawyer who counsels and represents management, my job is somehow anti-employee. That is so far from the truth.

We management-side employment lawyers (MSEL), if we're doing our jobs right, should absolutely be protecting employees. In fact, we may be in the best position to do the most good for the most employees – if we're intentional about how we do our jobs.

The workplace doesn't have to be, and usually shouldn't be, us-versus-them.

Let me be clear: Nothing I'm saying here should be interpreted as suggesting we MSEL violate, or even flirt with violating, our ethical duties to our clients. Our counsel to our clients should never put their interests or legal compliance subservient to their employees' interests. What I am suggesting is that for MSEL to ignore the well-being of our clients' employees is often to do a disservice not only to those employees, but to our clients too.

It's easy for MSEL to fall into the trap of thinking of the workplace as an us-versus-them environment. We rarely hear from our clients when things are rosy in management-employee-relations land. The American workplace can sound like a pretty troublesome place when every call you take, every email you read, is about workplace troubles. For those MSEL who spend a significant part of their time defending their clients in employment law litigation (like I did for the first ten years of my career), it may be even harder to avoid falling into this us-versus-them trap.

But after twenty-six years of defending and counseling countless clients on employment law issues, I feel like I'm in a position where I know some things about how the workplace should work. I've spent thousands of hours counseling clients to:

- protect employees from harassers/bullies/jerks;
- accommodate employees with health, pregnancy, family, religious, or other needs;
- coach employees instead of disciplining them;
- give a second (or third, etc.) chance to employees;
- communicate expectations clearly to employees;
- promote deserving employees;
- refer struggling employees to an EAP;
- listen to employees' complaints, concerns, and ventings;
- believe employees who say they were victimized;
- console hurting employees;
- offer to call the police for employees who are in dangerous personal situations;
- pay employees even when not legally required to;
- train employees adequately;
- redraft or eliminate overly restrictive non-compete agreements;

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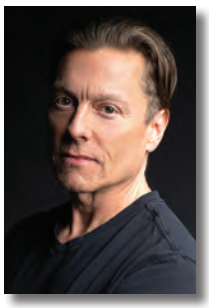

- issue a written warning instead of firing;
- classify a worker as an employee rather than an independent contractor;
- allow employees to work from home for health or other personal reasons;
- pay out money to settle meritorious claims; and
- etc.

I offer this type of counsel when I believe it's in the best interest of my client. Which is almost 100% of the time.

It's exceedingly rare that good legal counsel in a workplace situation calls for taking an aggressively antagonistic, anti-employee approach. When those unfortunate situations present themselves, we MSEL should counsel our clients accordingly. But the best MSEL know that treating employees with humanity, dignity, and fairness should always be the default.

Some of the most meaningful compliments I've ever received have been from clients who told me that they'll never forget how I helped them see an employee as a human first, not as an HR issue or legal liability.

This philosophy for practicing employment law works. How do I know? Clients tell me. Also, I see the careers that aren't ended prematurely. I see workplace relationships salvaged. I hear about workplaces where trust exists between employees and management. I could tell you about countless situations that had lawsuit written all over them, but because I worked with my client to take an intentionally employee-focused approach to handling the situation, litigation was avoided.

This is in our clients' self-interest.

Look at workplaces around the U.S. Watch or read the news. Listen to the politicians (if you can stand to). Hell, visit your local *unionized* Starbucks!

I believe we are witnessing a watershed moment in the American workplace. Employers who treat their employees like crap are paying the price, through mass resignations, voters pushing for greater regulation of the workplace, and successful union efforts across the country (including in "it-could-never-happen-here" states like Utah) that should send a shiver down every employer's spine.

I'm not as *laissez faire* as I once was about regulating the workplace, but I still believe the most direct, most efficient, and overall best way to improve the lives of employees is for good employers to take action in their own workplaces.

If we MSEL do our jobs well perhaps the union wave that many are predicting won't happen. Perhaps the workplace won't become ultra-regulated. And perhaps we can feel good that we helped position our clients for success in the modern labor market, while making our clients' workplaces and communities just a little bit kinder.

I haven't forgotten about all of you lawyers who are not management-side employment lawyers.

My entire lawyer life has been as a management-side employment lawyer. It's all I know as far as law goes. So I don't feel qualified to say much about how lawyers who practice other types of law can impact the world for good through the counsel they give their clients. But I know that every time a lawyer counsels a client and influences that client to act a certain way, the lawyer has dipped a finger into the Universe's pool, and the ripples begin.

Take time to think about those ripples. That applies to all of us no matter what type of law you practice.

Conclusion

The world can look like a very dark place in 2025. Mental health struggles, substance abuse and addiction, hate, distrust, violence, war, all the "-isms" (racism, sexism, etc.), all the phobias (homophobia, xenophobia, etc.), economic inequality, etc. And the workplace often reflects – or perhaps more accurately – intensifies – all of this darkness.

Are employers and their employment lawyers going to solve all of these problems? Of course not. But with the workplace occupying such a huge part of our lives, I have no doubt that my clients and other companies like them have a major role to play, and therefore, those of us who advise employers are in a position to do good. And the world needs every single bit of good it can get.

So, to my fellow lawyers (MSEL and the rest of you), I take this opportunity to remind you of the position we're in. Our jobs give us the privilege of having a part to play in the lives of many people – including our clients and beyond. It's up to us what we do with that privilege.


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Do We Need to "Reform" Utah's Judicial Selection System?

by Linda Smith

Recently, suggestions have surfaced that Utah should consider "reforming" our judicial selection system. Here I describe the current system we use for selecting, reviewing, and retaining judges. I then turn to share my research about and unique professional experiences with our judiciary. Both the success of our existing system and my observations strongly support retaining the excellent merit-based appointment and retention system we have.

Utah adopted a variant of "the Missouri Plan" – a merit-based system for judicial selection – in 1985, "the culmination of a long process that started with the 1945 constitutional amendment calling for a system of judicial selection and retention that was devoid of partisan influence." Herbert M. Kritzer, Judicial Selection in the States: Politics and the Struggle for Reform 182 (2020). The Bar had been a primary backer of 1949 legislation calling for this approach to judicial appointments. *Id*. at 177 & n.54.

Nationally, a "merit selection" system involves a two-stage process – first a nominating commission "winnows applications" and forwards a short list to the governor, then the governor selects a candidate from this list. Greg Goelzhauser, Judicial Merit Selection: Institutional Design and Performance for State Courts 2 (2019). The Missouri Plan, which Utah adopted, adds the requirement of retention elections after an initial term in office. *See id*. In Utah we added a third check, state Senate confirmation of the governor's selection. Kritzer, *supra*, at 165.

Proponents of merit selection systems contend that "it de-emphasizes politics while stressing qualifications." Goelzhauser, *supra*, at 2. Utah State University Professor Greg Goelzhauser explains:

> Nominating commissions are the key institutional innovation .... These bodies, which typically include lawyers and nonlawyers appointed by actors such as governors and state bar associations, are thought to be sufficiently removed from the political process ... to ensure a focus on qualifications. In turn, this nonpartisan environment encourages meritorious individuals ... to apply for consideration.

Id. at 2–3.

More recently, retired Justice Sandra Day O'Connor and the Institute for the Advancement of the American Legal System (IAALS) identified a model for judicial selection that "best balances the dual goals of impartiality and accountability" and that includes nominating commissions, gubernatorial appointment, robust evaluation, and retention elections. The O'Connor Judicial Selection Plan 1 (2014), https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf.

Nomination, Appointment, and Confirmation in Utah

The Utah Constitution requires that "[s]election of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration." Utah Const. art. VIII, § 8(4). "[T]he governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy." *Id*. art. VIII, § 8(1). While the legislature may provide for the nominating commissions' composition and procedures, a legislator may not serve on a commission and the legislature may not appoint members. *Id*. art. VIII, § 8(2). The constitution further requires that the governor's appointee for any judgeship be approved by a majority of all members of the senate. *Id*. art. VIII, § 8(1), (3).

Separate nominating commissions were created for each district court and for the appellate courts. Kritzer, *supra*, at 177. Initially Utah's nominating commissions were chaired by justices, and the six other members were selected by the governor (four) and by the Utah State Bar (two) with a requirement for a mix of political parties and a mix of lawyers and nonlawyers. *Id*. at 177–78. The legislature altered that structure in 1994, allowing the governor to appoint the chairs and the additional six

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members, but retaining the requirement for a mix of parties and lawyer/lay membership. *Id.* (No more than four members could come from a single party and at least two, but not more than four, members could belong to the Bar. *Id.* at 178.)

In 2023, the legislature again changed the nominating commissions, permitting the governor to appoint members with no party or lawyer/lay requirements except that the governor "shall consider whether the individual's appointment would ensure that the commission selects applicants without any regard to partisan political consideration." Utah Code Ann. §§ 78A-10a-303, -403, -503. The legislation also provided that the State Commission on Criminal and Juvenile Justice (CCJJ) would enact administrative rules to govern the nominating commissions. *Id.* § 78A-10a-201; *see also Judicial Nominating Commission*, Utah Comm'n on Crim. & Juv. Just., https://justice.utah.gov/judicial-nominating-commission/ (last visited Jan.12, 2025).

The application process itself is robust. Applicants must not only give their education and work history but must provide judicial and attorney references – including lawyers who have been adverse to the applicant in litigation or negotiations, and for applicants who are judges, attorneys who have appeared before them. Utah Admin. Code R356-2-4, R356-2-5. After screening, the commission interviews applicants. Before certifying the list of nominees to the governor, the commission publishes the names for public comment and may remove a name if the commission receives new information that the applicant is unfit to serve as a judge. *Id.* R356-2-7.

Statute requires the nominating commissions to forward the seven most qualified names for an appellate court vacancy and the five most qualified names for a trial court vacancy. Utah Code Ann. § 78A-10a-203(3)(a). "In determining which of the applicants are the most qualified" the commission must look to "which of the applicants best possess the ability, temperament, training, and experience that qualifies an applicant for the office." *Id.* § 78A-10a-203(2). The regulations outline additional criteria that must be considered, including integrity, legal knowledge and ability, professional experience, judicial temperament, work ethic, financial responsibility, public service, ability to perform the work of a judge, and impartiality. Utah Admin. Code R356-2-10(1).

Over the years the nominees who have gone through this nomination process and been put forward by the governor have been very well

received by the Utah Senate. In 2003 the Senate systematized the review of appointees by the Judicial Confirmation Committee. This committee has almost always given a positive recommendation. Almost all of the nominees have been approved by the Senate, most with unanimous favorable votes. Kritzer, *supra*, at 178–79.

My inquiry of four attorney members from three nomination commissions this month confirms that their commissions continue to operate without any partisan considerations, with a focus on interviewing the most qualified applicants after considering the application according to the regulations, and with both attorney and lay members serving on the commissions.

Judicial Performance Evaluations and Retention Elections in Utah

The Missouri Plan requires retention elections, and the O'Connor Judicial Selection Plan provides for both retention elections and for judicial performance evaluations to precede those elections. The O'Connor Judicial Selection Plan requires that data about judicial performance "be broad and deep and the inquiries must be about procedural fairness, demeanor, and knowledge – not about particular outcomes in individual cases." O'Connor Judicial Selection Plan, *supra*, at 7. In 1985 the American Bar Association endorsed judicial performance evaluation (JPE) and issued its first set of recommended JPE standards and criteria. Jordan M. Singer, Judicial Performance Evaluation in the States: the IAALS JPE 2.0 Pre-Convening White Paper 4 (2022), https://iaals.du.edu/sites/default/files/documents/publications/jpe_20_whitepaper.pdf.

Utah provides for evaluation of judges prior to their standing for retention election. Kritzer, *supra*, at 179. From 1990 to 2010 the Utah Judicial Council conducted these reviews, reporting in the Voter Information Pamphlets whether the judge was certified for retention and sometimes including attorney survey results. *Id*.

In 2008 the legislature created the Judicial Performance Evaluation Commission (JPEC), which designed a new evaluation process. The Commission consists of thirteen members (including the CCJJ's executive director), appointed by the Utah Supreme Court (four), the Governor (four), the President of the Senate (two), and the Speaker of the House of Representatives (two), and has an executive team of four staff persons. No more than seven JPEC members may be attorneys and no more than half of the members appointed by each branch of government may be of the same political party. *About Us*, Utah Jud. Performance Evaluation Comm'n, https://judges.utah.gov/s/about-us (last visited Jan. 12, 2025).

Today JPEC conducts a robust process in which it surveys lawyers, court staff, and jurors; gathers data regarding judicial education, time standards and discipline; accepts public comments; and conducts courtroom observations. *Judicial Evaluation Process*, Utah Jud. Performance Evaluation Comm'n, https://judges.utah.gov/s/evaluation-process (last visited Jan. 12, 2025). Judges are rated on a five-point scale regarding legal ability, integrity and temperament, administrative skills, and procedural fairness, and a ranking of 3.6 or higher is required to meet the standards for retention. Commissioners use a "blind" evaluation process in reviewing materials and voting on whether each judge has met the standards for retention. *Id*. JPEC recommendations and evaluations are available to the public prior to a retention election. But for judges who decide not to stand for retention election after they have reviewed their performance evaluations and JPEC's recommendation, these materials do not become public.

Perhaps as importantly, Utah's judges "receive confidential midterm evaluations from JPEC, which provide feedback to aid their professional development." *Id*.

Utah has been proactive in using and studying performance evaluations. In 2018 and 2020 JPEC surveyed our judges on their experiences with judicial performance evaluations and found that most expressed satisfaction. Singer, *supra*, at 18. More recently Utah judges participated in IAALS's national survey of judges regarding judicial performance evaluations. IAALS, National Perspectives on Judicial Performance Evaluation (2024), https://iaals.du.edu/sites/default/files/documents/publications/jpe_national_perspectives.pdf. Utah was one of eight states where judges were surveyed, and our judges responded at the highest rate (49.2%). *Id*. at 4. Across all study states over two-thirds of the judges reported they were satisfied with the judicial performance evaluation in their states and 72.1% felt it benefitted their judicial professional development. *Id*. at 6. A substantial majority (72%) thought that their final report "provided an accurate assessment of their performance." *Id*. at 15.

Indeed, Utah has been a national leader in judicial performance evaluations. In 2016 the IAALS announced "Joanne C. Slotnik, Former Executive Director of the Utah Judicial Performance Evaluation Commission, as the inaugural recipient of IAALS' Quality Judges Award in recognition of her contributions to preserving judicial accountability and impartiality." Carolyn A. Tyler, *Quality Judges Award Honors Best of Judicial Performance Evaluations Process*, IAALS (June 6, 2016), https://iaals.du.edu/blog/quality-judges-award-honors-best-judicial-performance-evaluations-process. The next Executive Director, Jennifer Yim, reports being asked to consult with other states, including Maryland, New Mexico, and Montana, regarding Utah's excellent judicial evaluation system. She also shares this email correspondence from Professor Jordan Singer, longtime consultant for IAALS:

> [T]he Utah legislature wisely committed to a comprehensive judicial performance evaluation program. That program is a national leader today, helping Utah's judges improve on the bench and helping Utah's citizens maintain the accountability of their judiciary. The JPEC is an outstanding model of thoughtfulness, balance, and vigilance in the service of the broader public.
>
> Utah has a remarkably effective and trustworthy system for selecting, training, and maintaining the accountability of its judges. This was no accident. While other states choose their judges through heavily politicized elections stained with dark money, or leave the fate of their citizens' life, liberty, and property in the hands of inexperienced or unprofessional jurists, Utah selects judges from among the most qualified candidates, gives them focused feedback to improve their performance, and gives citizens the ultimate authority to retain a judge on the bench.

Email from Jordan M. Singer, Professor of L., New England L. Bos., to Jennifer Yim (on file with Jennifer Yim).

The benefits of this evaluation system are borne out as voters use JPEC in our retention elections. This year the news media reported a record number of voters – 30,515, a 58% increase from 2022 – accessing JPEC's revamped website to learn about their judges. Becky Bruce & Candy Zillale, *Utah voters flock to website evaluating judge performance*, KSL NewsRadio (Oct. 23, 2024), https://kslnewsradio.com/2147471/utah-voters-flock-to-website-evaluating-judge-performance/. The result of careful selection and thorough evaluation is that over time almost all sitting judges are retained – 490 out of 492, or 99%, from 1988 to 2018. Kritzer, *supra*, at 180. This year all judges were retained, with "yes" votes ranging from 72% to 85% favorable. *2024 General Election Official Results*, State of Utah, https://electionresults.utah.gov/results/public/utah/elections/general11052024 (Jan. 2, 2025).

My Professional Relationship with the Judiciary

Forty years ago, I moved to Utah to oversee the University of Utah College of Law clinical internship program, which I did for over three decades. My responsibilities involved periodic meetings with judges and justices regarding the work our students did with the courts and the supervision and instruction the courts provided. It was pedagogically important that the students be directly involved in the inner workings of the courts and learn how the judges went about making their decisions. I was grateful that all of our judicial supervisors generously agreed to this access.

Each semester I received multiple reports from our students about their experiences and what they were learning. The students were uniformly impressed that their judges were intelligent, hardworking, thoughtful, and ethical. The students universally came away from their internship experiences with high respect for the jurists who supervised them.

Many of our supervising judges made presentations to the Judicial Process class the interns took. Judges also spoke to the students in the required Legal Profession class I taught.

Through my clinical program oversight and other teaching responsibilities, I was able to observe our judiciary from a unique perspective. I was consistently favorably impressed by the high quality of our Utah judiciary.

As a faculty researcher I also completed a study of attorney-client interviews in a brief advice family law clinic. One article arising out of this study compared how Utah lawyers talked to their clients about the judiciary with the way Massachusetts and California lawyers had spoken of judges, as reported in a groundbreaking ethnographic study, Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 Yale L. J. 1663, 1665, 1669 (1989). Where Sarat and Felstiner's attorneys portrayed "a chaotic 'anti-system' in which [clients] cannot rely on the technical proficiency, or good faith, of judges" but need to rely on their own lawyers' insider status to achieve reasonable outcomes, *id*. at 1665, 1686, the "Utah attorneys spoke differently – positively, respectfully, encouragingly – about the courts and the legal process," Linda F. Smith, *Law Talk in a Brief Advice Clinic*, 45 So. Ill. U. L. J. 249, 295 (2021). One possible reason for this disparity is the judicial selection system. The judges our Utah attorneys were talking about had all been appointed and retained through our robust merit processes. The Massachusetts and California judges had often been appointed by governors free to base selection on politics, and prior to a merit-selection system having been established. *Id*. at 298–99. This article, my recordings of attorneys speaking positively about the judiciary, and my many students' high praise of their supervising judges are just other small data points in favor of retaining our merit-based system.

Conclusion

Utah's judicial selection, evaluation, and retention system is doing an excellent job of ensuring our courts are staffed with outstanding jurists. While the recent changes to the nominating process – removing almost all requirements regarding composition of the nominating commissions – could make the process more "political," initial reports from attorneys serving on those commissions rebut this notion. The nominating commissions have reportedly remained nonpartisan and nonpolitical, focused conscientiously on competence. The oversight and rules provided by the CCJJ should guarantee consistency and fairness in the nominating process.

Recent suggestions have been made that Utah should consider moving to elect its judges. In my view that would be a mistake.

Moving to an elected system would jettison all the merit-focused work of nonpartisan nominating commissions. It might mean fewer excellent people would be able to mount a campaign. It would surely require that funds be raised and time be spent campaigning, taking judges away from their central job. It would create ethical challenges, as judges could be asked to hear cases brought by companies or law firms who had contributed to their campaigns. Judges would have little incentive to participate in the judicial performance evaluation process, since their retention would be based in politics, not an objective assessment of their performance. Presumably judges would campaign on political positions thought to appeal to the public. But since the vast bulk of a judge's or a justice's work is not "political" in the traditional sense, such a system would risk reducing the quality of the judiciary for the possibility that more judges would have the "right" political views. This would be a step in the wrong direction.

Our constitution wisely requires that "[s]election of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration." Utah Const. art. VIII, § 8(4). The system we have now with nominating commissions, gubernatorial appointment and senate confirmation, judicial evaluations by JPEC, and retention elections is nationally respected and has yielded excellent jurists. Utahns should not try to fix a problem that doesn't exist.

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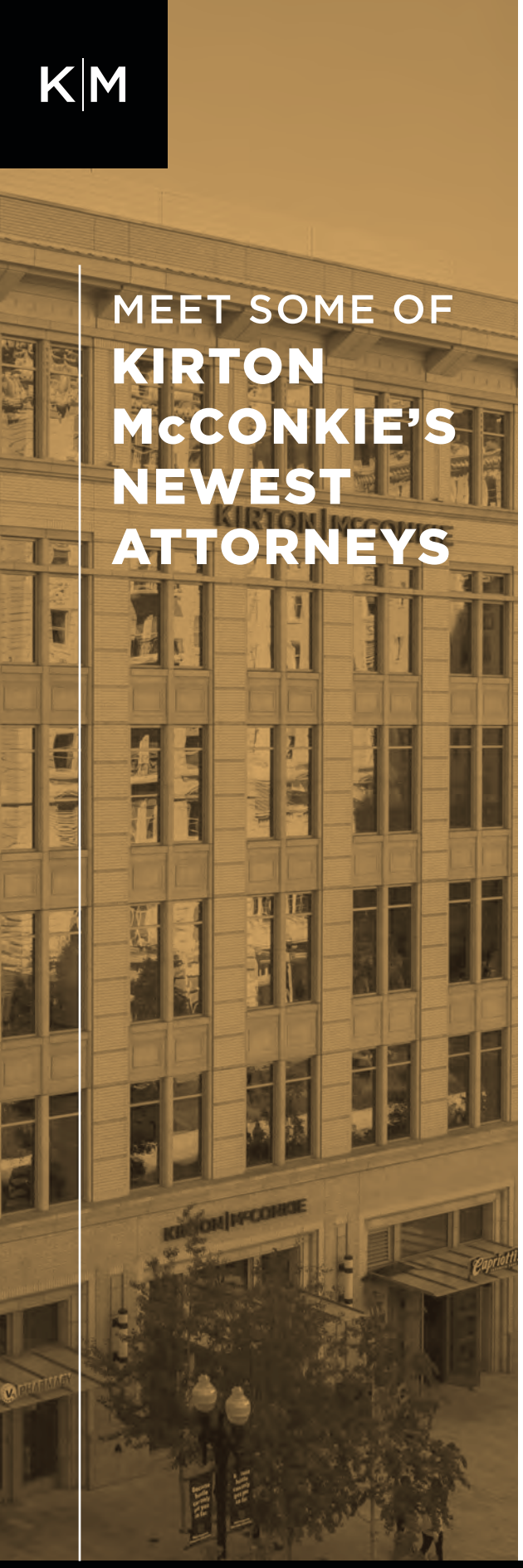

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Live Within Your Means

by Andrew M. Morse

A fundamental key to overall wellness is financial health. Poor financial health leads to stress, anxiety, poor sleep, probable depression, and a flurry of potential professional problems. This note describes how poor financial health can damage your legal career, and it suggests methods to establish reliable financial discipline and health.

Poor finances may cause professional calamity.

When you are spending more than you make, you may try to make more. To do that, you must work more hours, take on work that you do not know how to do or work that you do not like, or all the above. Working hours beyond your reasonable capacity can put you into a miserable state of mind, negatively affecting you and your relationships. Doing so also negatively affects your physical health, because you will omit exercise and recreation breaks to bill more time. None of that is healthy.

When you take on work you do not know how to do, you may make mistakes and likely breach the standard of care. This may result in a malpractice claim against you and your firm, none of which is career-enhancing. Even a thin malpractice claim will likely cost your firm its self-insured retention, oftentimes in the low six figures. Claims also cost untold hours by firm management in depositions and in claim management tasks. A claim may lead the firm's malpractice insurer to drop the firm or increase its self-insured retention and premiums. Under these circumstances, firm management may think it is only prudent to let you go.

Financial stress may also prompt you to take on work that you do not like, even if you are competent to handle it. You may ignore those cases leading, again, to a breach of the standard of care, a malpractice claim, and all attendant negative consequences.

Taking on too much work of any kind may cause you to be less responsive to clients, counsel, and the court. If such neglect does not cause a claim, it may nonetheless trigger a complaint to the Office of Professional Conduct under Rule 1.1 (Competency), 1.3 (Diligence), or 1.4 (Communication). At the very least the client will not be happy.

To get money, you may be tempted to pad time entries and client billings. Not only would this violate federal wire fraud statutes, it breaches several Rules of Professional Conduct and every firm's policies and culture. If the client suspects padding, it will never hire you again, leading to more financial stress.

What is more, financial stress has led lawyers to steal from clients and from their employers. It has led lawyers to not pay income taxes, to not make employer withholding payments, and to commit other financial crimes. Aside from the criminal exposure, the conduct violates Rule 8.4 (Dishonesty, Deceit, Fraud, and Misrepresentation). None of this is career-enhancing.

Live within your means.

Most lawyers do not get rich. Successful, financially responsible private lawyers will be able to provide a home for their family, a decent environment for their children, and a reasonable retirement. But even the most successful private lawyers at the end of a forty-year career do not consider themselves rich. True, a few lawyers hit a grand slam plaintiff's case, think they are rich, and quit, but 99% of us hack it out by the tenth of an hour for thirty-five or forty years and, if we are lucky, retire with a home, nest egg, and our health. But that is not possible without first living within your means from the start.

I am not a financial planner. My foundation for this sermon is that I began my legal career in 1984 with a negative net worth of $50,000 in education debt, and I could have retired a while ago. Not a dollar of family money or inheritance has come my way. Rather, I succeeded by adhering to the following rules.

Living within your means requires three steps:

1. Understand what you make.
2. Save and invest for retirement.
3. Live within a reasonable budget that includes a three- to six-month cash reserve.

ANDREW M. MORSE retired from trial practice in 2023. He remains an active Fellow in the ACTL and serves as Co-Chair of the Wellness Committee of the Utah State Bar. When he isn't golfing he mediates and arbitrates tort and commercial cases.

Retirement.

No matter what your income, you must save and invest 15% of your gross income either through a profit-sharing plan, a 401K, or the rare pension plan. If you do not look out for your retirement, no one else will. Pay yourself first. If you do not save and invest, you will never be able to afford to quit. Far too many lawyers in their sixties and seventies have not lived within their means and their only option is to work into their seventies or eighties or until the end. Practicing into those decades features fatigue, competency slips, ill health and attendant problems. This is no way to end a work life.

To efficiently and effectively save for your retirement either educate yourself about prudent ways to invest or use a fiduciary financial planner on an hourly basis. Most financial planners charge a percentage of the funds they manage. You do not need that. Many of them are not fiduciaries and are trying to sell you something. A good hourly fiduciary financial planner will recommend stock and bond allocations that you can manage yourself through Vanguard, Fidelity, Schwab, or another house.

After you understand your income, bonus structure, and retirement benefits, create and stick to a realistic detailed budget. It must provide for retirement savings. Your budget should include building and maintaining a three- to six-month cash reserve for foreseen and unforeseen gaps in income caused by moving firms, a firm blow up, illness, a child's or a spouse's disability, or some other calamity.

Budgeting.

Accurate realistic budgeting is critical. You cannot control what you do not measure. Get help if need be, but tackle this first. Stick within the budget.

Avoid debt.

Unnecessary debt wastes money in interest payments, decreases your net worth, and causes poor credit ratings. Only use debt to buy a primary residence and do not overdo it. Buy only the house you need and can reasonably afford. Do not consider a mortgage that will erode your retirement savings or blow your budget.

Get out of debt as soon as possible. Use bonuses and extra cash to pay down your mortgage. Try to resist the urge to use this money on things you do not need.

Do not use debt to buy cars. Use the minimal amount necessary to acquire a reliable used car and drive it into the ground. Never lease a car.

Do not use debt to educate children.

Show your children how they can get a college education by choosing a financially-prudent path, working, and student loan debt. Do not take on that debt yourself.

Credit cards are to be avoided at all costs.

The only responsible use of a credit card is to earn paybacks with banks and airlines. If you cannot afford to completely pay off your credit card debt monthly, you cannot afford to use a credit card.

Some would find these lessons all but impossible. If so, get financial counseling. Do not put it off. Every year that you live beyond your means, you are not saving sufficiently for retirement, you are damaging your credit rating, and you are inviting the personal and professional problems discussed above.

Maintain an excellent credit rating.

From time to time you may need to use a credit line to get you through various gaps in your earnings. A credit line will not be possible without very good credit ratings.

To live within your means as described above, you need to resist keeping up appearances or keeping up with the Joneses. Above all, recognize the stark difference between a financial need and a financial want. Financial needs are reflected in your monthly budget. If you give into financial wants, you will blow the budget, acquire unneeded debt, use credit cards irresponsibly, and your financial health will suffer. Avoid the wants with rigorous discipline.

If your financial needs outstrip your earning capacity, increase your earning capacity prudently. Develop skill sets and clienteles that pay more. Increase your realization rate by avoiding the unworthy client: those that will not pay and those likely to turn on you. All of this comes around to developing your reputation and your relationships. Guard your exemplary reputation jealously and develop solid relationships wherever you go. Over time, higher paying work will come your way, but not without your efforts.

Finally, it may not be feasible to follow these rules. Student debt may prohibit saving a cash reserve and for retirement, at least until the debt is paid. Many public service attorneys and those earning lower incomes with few benefits may not be able to save at these recommended levels. Do what you can to maximize any 401K matching opportunities your employer offers and avoid unnecessary debt. Save and invest what you can.

Note that these methods worked for me. You may wish to follow different financial models and advice to reach the same end.

Conclusion.

To be successful long-term in this business you must live within your means. This will lower your stress and anxiety and will decrease the chances of debilitating depression. It will improve your relationships with your partner, children, parents, co-workers, and the community in general. With hard work and discipline living within you means is achievable.

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Dan Bezdjian is an accomplished patent attorney with a focus on patent prosecution and patent portfolio strategy. He counsels clients in diverse industries including agriculture, aerospace, chemistry and chemical process, oil and gas, rare earth metal recovery, nanotechnology, additive manufacturing, nuclear, microelectromechanical products, and semiconductor products. With his extensive knowledge and expertise in intellectual property law, Mr. Bezdjian is adept at navigating the complexities of the field to protect and optimize his clients' innovations.

J. Ramzi Hamady

J. Ramzi Hamady's practice focuses primarily on family law. His practice involves representing individuals in divorce with a focus on large marital estates, complex business and property divisions, complex custody issues and all other areas of family law. Ramzi holds a J.D. from the University of Utah and a B.A. in Economics from UC Irvine. Ramzi previously worked as a Trial Attorney and Associate at prominent firms and has served in various legal leadership roles, including Past President of the Utah Minority Bar Association. He currently serves on the Board for the Family Law Executive Committee and the Utah Center for Legal Inclusion.

Aaron C. Hinton

Aaron Hinton is a shareholder, practicing in the firm's Litigation and Employment Sections. His practice involves a broad range of commercial litigation, including contract disputes, non-competition and non-solicitation enforcement, trade secret misappropriation, shareholder/member disputes, and other complex business matters. Mr. Hinton also regularly defends employers in all aspects of employment litigation, including claims of discrimination, harassment, wrongful termination, and retaliation. Mr. Hinton has successfully represented clients at all stages of litigation, from proceedings for injunctive relief to jury and bench trials in both state and federal court.

Nate Jepson

Nate practices with the firm's litigation section, representing individuals and businesses of all sizes. He regularly represents clients in matters involving contracts, business torts, business divorces, securities, and real property. Nate has represented clients in state and federal court as well as alternative dispute resolution proceedings.

Thomas L. Lingard

Thomas L. Lingard practices patent law, focusing on preparing and prosecuting domestic and foreign patent applications in industries such as oil and gas, medical devices, metallurgy, and additive manufacturing. He also provides patentability and infringement opinions. Before law school, Thomas gained four years of engineering experience at DMC Mining Services, working across various U.S. and Canadian mines, giving him valuable insights into protecting clients' intellectual property.

Jason Tholen

Jason Tholen practices estate planning, trust administration, business formation, and taxation. His estate planning practice includes the drafting of basic wills and revocable trusts, as well as the utilization of more sophisticated estate planning techniques such as dynasty/legacy trusts, irrevocable life insurance trusts, defective grantor trusts, and asset protection trusts and handles estate and gift tax returns. He has extensive experience in business formation and restructuring focused on multi-generational ownership and management. Mr. Tholen is skilled in drafting prenuptial agreements, handling trust litigation, and preparing settlement agreements as alternatives to litigation.

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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

Montes v. National Buick GMC, Inc.
2024 UT 42 (December 12, 2024)

While buying a used car, Montes signed two documents – an arbitration agreement and a sales contract containing an integration clause. In a subsequent lawsuit, the district court declined to enforce the arbitration agreement. Citing *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326, the district court reasoned that the integration clause in the sales contract triggered the parol evidence rule and nullified any other contemporaneous agreement. On interlocutory appeal, the court of appeals agreed and affirmed. But the Utah Supreme Court reversed, holding that, **"[w]here multiple instruments are executed at the same time and are intertwined by the same subject matter, the parol evidence rule does not" preclude consideration of "both or all agreements together, notwithstanding the presence of an integration clause."** The court further clarified that *Tangren*'s application of the parol evidence rule applies solely to an "oral side agreement," not a contemporaneous written instrument.

Magleby Cataxinos & Greenwood, PC v. Schnibbe
2024 UT 43 (December 12, 2024)

"[W]here the other elements of accord and satisfaction are present and the debtor pays the creditor by direct deposit, the creditor is deemed to have accepted the payment as full satisfaction of the debt if the creditor's conduct, under the circumstances, shows that the creditor intended to keep the money, knowing that the debtor tendered it as full satisfaction of the disputed debt. This is so even if the creditor takes issue with the amount of the payment made." Schnibbe had asserted that there was no acceptance of the proposed accord and satisfaction because there was no affirmative act, like negotiating a check.

Mariani v. Driver License Division
2024 UT 44 (December 19, 2024)

On certiorari from the Utah Court of Appeals' decision affirming the district court's grant of summary judgment to the defendant Driver License Division based on governmental immunity, the Utah Supreme Court reversed. **The court held that the plaintiff's injury, sustained when she crashed her scooter during a driver's license test, did not bear a sufficient causal relationship to the denial of her application for a motorcycle endorsement, and so the Driver License Division was not immune from suit.** First, the court noted the relevant conduct under Utah Code § 63G-7-201(4)(c)'s retention of immunity for injuries arising out of or connection with, or resulting from "the issuance, denial, suspension, or revocation of … any permit, license, certificate, approval, order, or similar authorization" is the denial of the plaintiff's application rather than the licensing approval process. Second, the court interpreted § 63G-7-102(1), which defines the phrase "arises out of or in connection with, or results from," as requiring that "the conduct or condition" for which immunity has been retained "led to the injury complained of." In this case, the denial of the plaintiff's application did not cause her injury, such that immunity did not apply.

State v. Rippey
2024 UT 45 (December 27, 2024)

The Utah Supreme Court held the plea withdrawal statute, Utah Code § 77-13-6, unconstitutional on two grounds. Previously, under section 2(b), the statute required a motion to withdraw a plea be filed "before sentence is announced." Any motion thereafter, pursuant to section 2(c), was required to be filed pursuant to the Postconviction Remedies Act. The supreme court held that **subsection (2)(b)'s preservation rule and the corresponding waiver in subsection (2)(c) violated the separation of powers under the Utah Constitution. These provisions were deemed procedural, not substantive, and thus beyond the legislature's authority to enact.**

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

State v. Torres-Orellana
2024 UT 46 (December 27, 2024)

In this criminal appeal, the Utah Supreme Court clarified that **the standard of review for ineffective-assistance-of-counsel rulings is correctness, even if the ruling arises in the context of a motion for a new trial.** Although the ultimate decision to grant or deny a new trial is discretionary, the "embedded" legal question of ineffective assistance of counsel must be reviewed for correctness.

Utah Court of Appeals

Chlarson v. Chlarson
2024 UT App 160 (November 7, 2024)

When a military service member is eligible for both disability compensation under 38 U.S.C. § 1110 and disability retirement pay under 10 U.S.C. § 1201, the service member must waive the amount by which the disability retirement pay exceeds the amount the member would have received as ordinary retirement pay. The marital portion of a military retiree's pay can only include funds state courts are authorized to divide under federal law, which in this case means "disposable retired pay" under 10 U.S.C. § 1408(c). **Because the statutory scheme characterized the final amount of husband's pay as disability retirement pay, it did not meet the statutory definition of disposable retired pay and so was not subject to division as marital property in the divorce.** This was true even though the waiver requirement meant that husband was receiving exactly the same amount he would have received as ordinary retirement pay.

State v. Allred
2024 UT App 163 (November 7, 2024)

In this per curium opinion issued in three criminal appeals, the Utah Court of Appeals discussed requests for extension of time in criminal appeals. The court had entered an order in each of the three cases granting the State's motion for extension of time, but set a final deadline accompanied by language that provided, generally, the State should anticipate no further extensions. Prior to those orders, the court had granted the equivalent of five thirty-day extensions in one case, eight thirty-day extensions in a second, and sixteen thirty-day extensions in the third. In this opinion, **the court denied the State's consolidated motion to reconsider, noting its purpose in publishing the opinion is to "provide some insight and clarity regarding our processes for the benefit of those involved in the criminal appeals system, and … to settle some of the recurring issues that have been repeatedly raised (and without published precedent, will likely continue to be raised) in extension disputes in criminal appeals."**

State v. Molina
2024 UT App 172 (November 21, 2024)

In *State v. Francis*, 2017 UT 49, the supreme court held that "[t]he State may withdraw from a plea bargain agreement at any time prior to[, but not after,] the actual entry of defendant's guilty plea or other action by defendant constituting detrimental reliance on the agreement." In *Francis*, however, "the supreme court did not set forth a specific test for establishing detrimental reliance on a plea agreement." *Molina* provides additional context regarding what is *not* detrimental reliance. The State offered Molina a plea agreement, which the district court approved pursuant to Utah R. Crim. P. 11(i)(2). The State then revoked the offer prior to entry of the plea. The district court granted Molina's motion to enforce the plea, but the court of appeals reversed. **The court of appeals held that admitting facts during a Rule 11 colloquy in which the district court accepts the proposed plea terms along with calling off witnesses for a potential self-defense justification hearing were insufficient to prove detrimental reliance.** Rule 11 colloquy discussions are inadmissible pursuant to Utah R. Evid. 410(a), and Molina calling "off his witnesses was [insufficient because, among other reasons, that was] not the result of detrimental reliance on representations by the State, [thus] any consequences flowing from that decision are not attributable to the State."

Small v. Small
2024 UT App 173 (October 10, 2024)

Before this divorce case was filed, the parties met to attempt to settle the divorce. Husband secretly recorded the meeting and later sought to use the recording of their negotiations to prove that an enforceable agreement had been reached. The court of appeals reversed the trial court's exclusion of the recording under **Rule 408, holding that Rule 408 does not apply to efforts to prove the existence and terms of an enforceable agreement.** The court also held that the statute of frauds doesn't apply to agreements merely touching on real estate.

10th Circuit

Brock v. Flowers Foods
121 F.4th 753 (November 12, 2024)

The issue in this appeal was whether a distributor agreement containing a mandatory and exclusive arbitration provision between a flower supplier and a flower deliverer in a Fair Labor Standards Act case was enforceable "under § 1 of the Federal Arbitration Act ("FAA"), which exempts transportation workers engaged in interstate commerce from arbitration." The district court denied Flowers Foods' motion to compel arbitration, finding that Brock, a contracted flower delivery driver delivering flowers

in Colorado provided from outside Colorado, fell within the ambit of the FAA's § 1 exemption. The Tenth Circuit reviewed two lines of cases: (1) the "Last-Mile Delivery Driver" cases from the First and Ninth Circuits holding "that last-mile delivery drivers – drivers who make the last intrastate leg of an interstate delivery route – are directly engaged in interstate commerce; and (2) the "Rideshare and Food-Delivery Cases," which were also from the First and Ninth Circuits, along with the First, Second, and Seventh. The Tenth Circuit affirmed the district court and held the "Last-Mile Delivery Driver" cases more compelling. **In determining whether the FAA's § 1 exemption from arbitration applies courts "should consider the following factors to determine if [one's] intrastate route formed a constituent part of the goods' interstate journey or an entirely separate local transaction: (1) the buyer-seller relationship between [the two entities], (2) the buyer-seller relationship between [the deliverer and its customers], and (3) the buyer-seller relationship, if any, between [the distributor and the deliverer's] customers."**

United States v. Martinez
122 F.4th 389 (November 19, 2024)

A suspect adequately advised of his *Miranda* rights may validly waive those rights and continue to speak with police. But does that waiver extend indefinitely to any subsequent interrogation? The Tenth Circuit reaffirmed that even a valid waiver of *Miranda* rights may grow "stale" and, as a matter of first impression, outlined the factors to be considered in determining whether a suspect must be "re-*Mirandized*" before a subsequent interrogation. **Those factors include the interval of time between the initial waiver and the subsequent interrogation; material changes in location, environment, or subject matter of interrogation during that interval; and whether the suspect understood another interrogation might occur at the time of the initial waiver.**

United States v. Hohn
123 F.4th 1084 (December 16, 2024)

In this criminal appeal arising from prosecutors' illicit recording of attorney-client communications, an *en banc* panel of the Tenth Circuit addressed whether governmental intrusion into an accused's attorney-client relationship in violation of the Sixth Amendment is a "structural error." Joining the majority of other federal circuit courts, the majority of the panel overruled prior precedent and **concluded that such intrusions – even if deliberate and lacking justification – are not structural and do not carry a presumption of prejudice.** Now, to obtain relief, the accused must demonstrate tangible prejudice from any unconstitutional intrusion into the attorney-client relationship by prosecutors or police.

Emily Adams

Freyja Johnson

Sara Pfrommer

Hannah Leavitt-Howell

MJ Townsend

Rachel Phillips Ainscough

Anna Grigsby

Jessica Holzer

Mikayla Irvin

THE APPELLATE GROUP

Volunteers Support Access to Justice at January 2025 Family Law Pro Se Calendar CLE Event

by Kimberly Farnsworth

On January 28, 2025, Utah lawyers had a unique opportunity to engage in both professional development and public service at a Continuing Legal Education (CLE) event hosted by the Utah State Courts' Access to Justice Office. The event, held at the Matheson Courthouse in Salt Lake City, featured a professionalism CLE presentation followed by an optional pro bono volunteering opportunity with the Family Law Pro Se Calendar. For the twenty-two attendees, it was an opportunity to gain critical insights into pro bono legal services while providing essential support to self-represented litigants in family law cases.

CLE Presentation: Pro Bono Opportunities with the Family Law Pro Se Calendar

The day began with a comprehensive CLE session designed to familiarize attorneys with pro bono opportunities available through the Utah Courts' Family Law Pro Se Calendar. The Access to Justice Office, in partnership with Commissioner Sagers of the Utah Courts, led the session, which focused on the ways lawyers can get involved in assisting individuals navigating family law matters without legal representation.

The Family Law Pro Se Calendar is a critical resource for self-represented individuals – those who cannot afford legal representation and thus face significant challenges in navigating the complexities of family law. The Pro Se Calendar is specifically designed to assist clients who are dealing with matters such as divorce and custody. These individuals often lack the guidance they need to effectively represent themselves in court, making pro bono volunteer attorneys a vital resource.

Commissioner Joanna Sagers addressed the practical aspects of volunteering, explaining how attorneys could provide free legal assistance by drafting legal documents, offering legal advice, and representing clients in hearings. These activities help alleviate the burden on the court system by allowing cases to proceed more smoothly and efficiently, while also providing the litigants with the representation they desperately need.

Rules Governing Pro Bono Legal Service in Utah

One of the key topics discussed during the CLE presentation was the Utah Code of Judicial Administration (UCJA) rules that govern pro bono work and the ethical responsibilities of attorneys volunteering their time. UCJA Rule 11-619 encourages attorneys to engage in pro bono service, recognizing the importance of providing access to justice for individuals who cannot afford legal representation. This rule allows attorneys to earn CLE credit for their pro bono efforts. Under Rule 11-619, attorneys can receive up to two hours of CLE credit for the pro bono service they provide, making it easier for lawyers to fulfill their CLE requirements while giving back to the community.

UCJA Rule 14-807 establishes procedures for attorneys, law students, and law graduates to participate in pro bono programs. Notably, it allows law students and law graduates, who have not yet been licensed to practice law in Utah, to volunteer under the supervision of a licensed attorney. This provides valuable hands-on legal experience for aspiring lawyers, while also expanding the pool of available pro bono assistance.

Furthermore, UCJA Rule 14-803 facilitates the involvement of attorneys who may not be actively practicing in Utah. Attorneys who hold a bar license in another state or those who are on inactive status with the Utah Bar can still volunteer their time and expertise for pro bono work. These provisions help to ensure that a wide range of legal professionals can contribute to providing access to justice, regardless of their current licensure status in Utah. Together, these rules create an inclusive framework that encourages a broad spectrum of legal professionals to support Utah's pro bono programs,

KIMBERLY FARNSWORTH is the Utah State Bar's Access to Justice Training & Special Projects Manager.

making it easier for attorneys and law students alike to contribute to the legal community while maintaining high professional standards.

Volunteering After the CLE: Hands-on Impact

Following the CLE presentation, participating attorneys had the option to volunteer their time at the Family Law Pro Se Calendar. This segment of the event allowed attorneys to apply the knowledge they had gained during the presentation and make a direct impact on the lives of self-represented individuals in the family law system.

Volunteers helped clients by preparing and filing documents related to their family law matters. Some of the tasks included drafting divorce petitions, child custody agreements, child support calculations, and temporary protective orders. In addition, attorneys had the opportunity to represent clients in court hearings, where they provided support, guidance, and, in some cases, advocacy in front of a commissioner.

For many of the clients served at the event, the opportunity to receive free legal assistance was life-changing. Most of the individuals participating in the Pro Se Calendar were unable to afford private legal representation and would otherwise have faced significant difficulty in managing their cases. These clients often struggled to navigate complex legal processes without the help of an attorney, leading to delayed proceedings, unclear outcomes, and increased frustration.

By volunteering on the Pro Se Calendar, attorneys were able to directly address these challenges, helping clients reach fair and just outcomes in their cases. Volunteers made a significant difference in easing the burden on the court system, ensuring that cases could proceed more efficiently and that litigants were given a better chance to achieve a favorable resolution.

CLE Credit for Pro Bono Service

One of the unique aspects of the January 28th event was that attorneys who volunteered their time at the Pro Se Calendar were able to receive CLE credit not only for attending the presentation but also for their pro bono service. Under UCJA Rule 11-619, five hours of pro bono work can earn volunteers one CLE credit, and they are allowed to earn a total of two credits per licensing cycle.

This new provision serves as both an incentive and a recognition of the importance of pro bono work in the legal profession. It allows attorneys to fulfill their professional development requirements while simultaneously contributing to a vital community service. It also acknowledges that pro bono work is not only beneficial for clients but serves as an enriching experience for attorneys themselves. Many attorneys find that volunteering enhances their legal skills, provides meaningful professional growth, and offers opportunities to network and collaborate with other legal professionals.

For those who attended the CLE and volunteered afterward, the event offered the dual benefits of fulfilling CLE obligations while providing an invaluable service to individuals who might otherwise have faced significant barriers to justice.

A Special Message from the Family Law Pro Se Calendar Team

We are extremely grateful to all of those that attended the *Pro Bono Ethics CLE with the Family Law Pro Se Calendars* event at the Matheson Courthouse held on January 28th. This event combined an educational session on pro bono ethics with a workshop component involving family law cases in our district. Thanks to all of those that attended, it was a huge success.

It was great to see entire firms contribute to this event. We would especially like to thank McConkie Hales & Jones, Dolowitz Hunnicutt & Gibbs, JR Law Group, Brown Family Law, and Morandy Law for their contributions to the event. Volunteers are a crucial part of our efforts, and we truly appreciate everyone who contributed their time! Volunteer support makes a significant difference in our ability to serve the community and carry out our mission.

Well-Being in Law Week

The Well-Being Committee in the Legal Profession (WCLP) joins the Institute for Well-Being in Law (IWIL) to celebrate Well-Being Week in Law, May 5–9, 2025, as part of Mental Health Awareness Month in May.

We invite you to participate in the IWIL activities, whether you're an individual, law firm, corporate legal department, government entity, bar association, law school, or other organization at lawyerwellbeing.net/well-being-week-in-law/.

In addition, the Utah State Bar WCLP will be hosting Well-Being Week materials and hosting a local CLE. Stay tuned for updates through UtahBar.org and our social media.

We host several pro bono calendars, and we are always in need of volunteers. While we do our best to ensure that we have an adequate number of volunteers for each calendar, we often fall short. Paladin is our primary means of volunteer recruitment. We ask that anyone willing to volunteer please sign up to assist with one of our calendars so that we can continue to offer the best for those that need it the most!

The Third District Commissioners host pro bono calendars weekly. We try to recruit at least two volunteers for each of these calendars and always have at least one attorney from the Legal Aid Society in attendance. Our district has also recently partnered with Utah Dispute Resolution to offer a pro bono mediation calendar. Hosted by Commissioner Kim Luhn, this calendar is held monthly and offers a volunteer mediator from Utah Dispute Resolution. We recruit additional volunteers to help the parties during mediation. Our latest addition is the pro bono document preparation calendar. Commissioner Joanna Sagers and Commissioner Michelle Blomquist host these calendars, which are held twice monthly. The Self-Help Center and the Legal Aid Society each offer an attorney or paralegal in support of this calendar. Several LPPs also volunteer to assist with this calendar. These calendars have been extremely successful and offer those that are having difficulty drafting final documents the chance to work one on one with a volunteer to finalize their case.

A Call to Action: Continuing the Tradition of Pro Bono Service

The January 28th event underscored the essential role that pro bono service plays in Utah's legal system. By volunteering at the Family Law Pro Se Calendar, Utah lawyers not only helped resolve individual cases but also contributed to the broader mission of providing access to justice for all. The event showcased the powerful impact that attorneys can have when they dedicate their time and expertise to those who cannot afford legal services.

For those who missed the January event, there will be future opportunities to participate in similar pro bono initiatives. The Access to Justice Office and the Utah Courts continue to encourage lawyers to engage in pro bono work and to consider volunteering at the Family Law Pro Se Calendar or other pro bono programs. The Access to Justice Office maintains a website, the Utah Pro Bono Portal (https://app.joinpaladin.com/utahprobono/), that lists CLE-approved pro bono opportunities across the state. On that site, attorneys can find descriptions of what the opportunities entail, filter by practice area, time commitment and other important factors, and sign up for any opportunity that interests them.

The value of pro bono service extends far beyond fulfilling CLE requirements. It is a chance for attorneys to make a meaningful difference in the lives of individuals and to contribute to a more just and equitable society. By answering the call to volunteer, Utah lawyers continue the proud tradition of supporting access to justice for all.

The Ethics Advisory Opinion Committee: Responding to Your Ethical Dilemma

by Keith A. Call and Sara E. Bouley

Since 1965, the Utah State Bar Ethics Advisory Opinion Committee (EAOC) has played a vital role in guiding Utah's legal community through ethical dilemmas. With its extensive collection of opinions – approximately 250 published over the years – and countless letter responses, the EAOC helps attorneys navigate the complexities of the Rules of Professional Conduct. By offering clarity on specific ethical questions, the EAOC supports legal professionals in upholding the highest standards of integrity and public trust.

Governing Rules and Responsibility of the EAOC

The EAOC operates under two sets of rules: the Rules Governing the Ethics Advisory Opinion Committee (Enabling Rules) and the Ethics Advisory Opinion Committee Rules of Procedure (Rules of Procedure). Both sets of rules are currently available at https://www.utahbar.org/eao_committee/.

Together, these rules outline the EAOC's authority and the procedures for issuing opinions. The EAOC is charged with giving you *free* advice on how to handle your ethical dilemmas.

Not every request is guaranteed a substantive response, however. The EAOC generally lacks authority to opine on past conduct, conduct of specific lawyers that is already the subject of formal dispute resolution proceedings, and requests for legal (as opposed to ethics) matters. The EAOC has *discretion* to refuse to respond to the request if it does not involve a "significant subject," involves a question of "isolated conduct," or involves a question that is clearly resolved by prior EAOC opinions, statutes, case law, or the Rules of Professional Conduct. Rule of Procedure I(b).

The EAOC is likely to decline to address questions that involve political, judicial, and legal considerations outside the narrow ambit of the Utah Rules of Professional Conduct, questions that are intensely fact dependent, questions that include too many variables and unknown facts, and questions involving pending litigation.

EAOC Procedures

Any member of the Utah State Bar in good standing, the Board of Bar Commissioners (the Board), or any other person with a "significant interest" in obtaining an advisory opinion on legal ethics (whether a member of the Bar or not) may request an opinion from the EAOC. Requests must be in writing, must include a short description of the specific facts or hypothetical facts on which the ethics question is based, a concise statement of the issue presented, a reference to the relevant Rules of Professional Conduct, and citations to other relevant ethics authorities, judicial decisions, and statutes. Rule of Procedure III. If the names of people or entities involved in a request for an opinion are disclosed as part of the request, their identities will be kept confidential and will not be disclosed in the opinion without their consent. Rule of Procedure VI. In the alternative, requests may set forth hypothetical facts to protect the confidentiality of the parties involved. The EAOC will likely decline to address your question if it fails to meet these guidelines. To increase the likelihood of receiving a meaningful response to your question:

- Include a short, specific description of the facts on which the ethics question is based.
- Make your question as clear, concise, and specific as possible.
- Make sure you are asking for an interpretation or application of the Rules of Professional Conduct, and that you are not asking for a legal interpretation of some other statute or body of law.
- Cite the specific Rule of Professional Conduct you believe is applicable.

KEITH A. CALL is a shareholder at Spencer Fane LLP. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation. After a hiatus from the early 2000s, he is now serving his third term as a member of the EAOC.

SARA E. BOULEY is the owner of Action Law LLC. Her practice focuses on real property litigation, and especially title, priority, and access issues. She has served as a member of the EAOC since 2014.

Requests can be addressed to the EAOC Chair. The current Chair is Sara Bouley. You can also submit a request through the Bar's website at https://www.utahbar.org/eao_committee/.

The EAOC's advice is usually not immediate. Since it is a deliberative body comprised of several members, responses to ethics questions can take weeks or months. Once received, a request is considered by a committee of up to fourteen voting members. The President of the Bar selects the EAOC Chair and one EAOC member who is also a judge. The remaining members are selected by a selection panel comprised of the Bar President, one Bar Commissioner, and the EAOC Chair. Members serve for three-year terms. Rule of Procedure II.

The EAOC typically meets once every month except July. Rule of Procedure IV. During those meetings, EAOC members discuss pending requests and debate proposed outcomes. One or more EAOC members may be assigned to conduct further research on issues presented and to prepare a proposed opinion. Two members can be (and sometimes are) assigned to take opposing views when conducting research and drafting proposed outcomes.

In addition to conducting independent research on ethical issues, the EAOC is authorized to seek and receive input from Bar members through appropriate Bar sections and committees. The EAOC can also: (A) seek the views of Bar members through a "Request for Comment on Pending Ethics Issue," published in the *Utah Bar Journal* or posted on the Bar's website, (B) invite or approve requests for oral or written presentations on particular issues, or (C) consult with the Bar's Office of Professional Conduct. Rule of Procedure III(c)(3).

In responding to requests, the EAOC has two options. First, it can issue a private "Letter Response" declining the request for an opinion on the ground it is outside the EAOC's authority or based on the EAOC's discretion not to address it. Rule of Procedure III(b)(2). Historically, many private Letter Responses have included substantive, informative responses, but have not been deemed worthy of public dissemination by the EAOC. Often, however, a Letter Response simply refuses to address the issue, such as when the request exceeds the EAOC's authority.

The EAOC's second option is to issue a "formal Ethics Opinion." Rule of Procedure III(b)(1). The full text of these Opinions can be viewed online at https://www.utahbar.org/ethicsopinions/. A summary of any new Ethics Opinion is also published in the *Utah Bar Journal* shortly after the Opinion is issued. Rule of Procedure III(d).

Effect of EAOC Opinions

EAOC Opinions provide a limited "safe harbor" from disciplinary action when a lawyer's conduct aligns with a current opinion that has not been superseded by rule, statute, or case law. The Enabling Rules provide:

> The Office of Professional Conduct shall not prosecute a Utah lawyer for conduct that is in compliance with an ethics advisory opinion that has not been withdrawn at the time of the conduct in question. No court is bound by an ethics opinion's interpretation of the Utah Rules of Professional Conduct.

Enabling Rule V.

This protection is not absolute because the EAOC obviously cannot tell the Utah Supreme Court or its subordinate courts how to interpret the Utah Rules of Professional Conduct. The Utah Supreme Court has not hesitated to flex its muscles in this arena. *See, e.g., Sorensen v. Barbuto*, 2008 UT 8, 177 P.3d 614 (vacating EAOC Opinion No. 99-03 and prohibiting *ex parte* communications between defense counsel and a tort plaintiff's treating physician); *Office of Prof'l Conduct v. Bowen*, 2021 UT 53, 500 P.3d 788 (lawyer not entitled to safe harbor treatment under EAOC opinion that Supreme Court had discredited); *see also* Keith A. Call, *There's a Shark in the "Safe Harbor"!*, Vol. 34 No. 6 Utah Bar J. 42 (Nov./Dec. 2021).

Appeals from the EAOC

Ethics Opinions and Letter Responses can be appealed to the Board. Any member of the Bar can appeal any opinion. Strict timeliness and procedural requirements apply, so anyone considering an appeal should carefully consult the applicable rules. *See* Enabling Rule VI; Rule of Procedure III(e).

Conclusion

The EAOC plays a vital role in shaping the ethical landscape of the legal profession in Utah. By providing thoughtful, well-researched opinions, the EAOC helps lawyers navigate complex ethical issues with confidence. While its opinions are advisory and not legally binding on the courts, they offer valuable guidance and a limited safe harbor for attorneys striving to uphold the integrity of the legal system. Whether you're seeking clarity on a specific issue or simply looking to stay informed about evolving ethical standards, the EAOC stands as a valuable, vital resource, fostering trust and professionalism within the legal community.

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.

2025 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2025 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 2025 Summer Convention Award no later than Monday, June 2, 2025. 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

Call for Nominations for Pro Bono Publico Awards

The deadline for nominations is Friday, March 28, 2025

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 2, 2025:

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

To access and submit the online nomination form please go to: https://www.utahbar.org/awards/. If you have questions please contact the Access to Justice Director at: probono@utahbar.org or 801-297-7027.

Thank You to Our Spring Convention Sponsors!

The Utah State Bar thanks the following sponsors for helping to make the Spring Convention in St. George possible!

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DENTONS

IN MEMORIAM

After the publication deadline for our last issue, we received the following names to add to our list of attorneys, paralegals, judges, and other members of the Utah legal community who passed away in 2024.

JUDGE

Richard C. Davidson

ATTORNEYS

L. David Burningham
Geoffrey J. Butler
Robert C. Delahunty
Jeffrey S. Harrison
Mary S. Langley
Brant H Wall

LEGAL COMMUNITY MEMBER

Albert J. Roberts

Law Day 5K Run & Walk

Run for Justice – May 17, 2025

REGISTRATION FEES

Before May 6: $36 | May 6–15: $41 | Day of: $46
All proceeds will go to support free and low cost civil legal aid programs in Utah.

TIME

Day of race registration from 7:00 a.m. to 7:45 a.m. Race starts at 8:00 with a gavel start.

LOCATION

Race begins and ends in front of the S.J. Quinney College of Law at the University of Utah, 383 South University Street, Salt Lake City, Utah.

PARKING

Parking available in Rice Eccles Stadium (451 S.1400 E.). Or take TRAX!

TIMING

Timing will be provided by Brooksee Timing. Each runner will be given a bib with a timing chip to measure their exact start and finish time. Results will be posted on our website following the race.

RACE AWARDS

Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division.

COMPETITIONS

- Recruiter Competition
- Speed Team Competition
- Speed Individual Attorney Competition

SPECIALTY DIVISIONS

- Baby Stroller Division
- Wheelchair Division
- "In Absentia" Runner Division
- Chaise Lounge Division

JOIN AS A SPONSOR

Want to participate in the run as a firm? This is a fun activity for your employees and their families. Reach out to Staci Duke at staci@andjusticeforall.org for more information.

"and Justice for all"

SCAN ME

For registration & more information visit:
andjusticeforall.redpodium.com/2025-law-day-run

THE CONSTITUTION'S PROMISE:
OUT OF MANY, ONE

LAW DAY 2025

Annual Law Day Luncheon – Friday, May 2, 2025

Grand America, Imperial Ballroom

This year's event will celebrate 50 years of the Utah Law Related Education program and honor the winners of the Mock Trial Competition and the 60th anniversary of the 1964 U.S. Civil Rights Act.

Awards scheduled to be presented include:

- Liberty Bell Award (Young Lawyers Division),
- Pro Bono Publico Awards (Pro Bono Commission),
- Scott M. Matheson Award honoring Utah's Graduating Seniors who Volunteered for Salt Lake Peer Court, (LRE),
- Young Lawyer of the Year (Young Lawyers Division), and
- Pioneer Award (LALU).

Registration and table sponsorship available via email to CLE@utahbar.org.

Watch for more details at www.utahbar.org and on social media.

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.

Domestic Family Law Pro Se Calendar

Jessica Alsop
Alex Andrews
Susan Astle
Lauren Barros
Melissa Bean
Alyssa Beard
Amanda Beers
Mary Bevan
Sarah Box
Josh Brandt
Taylor Broadhead
Brad Carr
David Corbett
Kent Cottam
Jess Couser
McKaela Dangerfield
Hayli Dickey
Regan Duckworth
Kit Erickson
Jennifer Falk
Riley Farnsworth
Joel Ferre
Seth Floyd
Thomas Greenwald
Ryan Gregerson
Laura Hansen
Ashley Harrison
Victoria Higginbotham
Jim Hunnicutt
Kristin Jordan
Michele Kaufman
Asa Kelly
Damon King
Robin Kirkham
John Kunkler
Mark Larocco
Allison Librett
Joanie Low
Rachel Low
Christopher Martinez
Sydney Mateus
Alex Maynez
Amber McFee
David Mckenzie
Bryant McKonkie
Cassie Medura
Aaron Millar
Susan Morandy
TR Morgan
Dena Mosely
Frank Mylar
Holly Nelson
Laura Nelson
Bhumi Patel
Jennifer Percy
Sarah Potter
Kurt Quackenbush
Kayla Quam
Stewart Ralphs
Clay Randle
Lillian Reedy
Spencer Ricks
Jeff Riffleman
Velvet Rodriguez
Emily Safarian
Richard Sanders
Megan Sanford
Alison Satterlee
Linda Smith
Emily Smoak
Kris Snow
Leslie Staples
Virgina Sudbury
Michael Thornock
Ayran Torres
Sade Turner
Paul Waldron
Chase Walker
Ted Weckel
Orson West
Nathaniel Woodward
Annie Yi

Family Justice Center

Hannah Barnes
Carlee Cannon
Jon Chalmers
Jason Collyer
Taylor Crofts
Daimion Davis
Craig Day
Charlotte Halterman
Michael Harrison
Alyssa Hunzeker
Abby Hall Jafek
Steven Johnson
Garret Lee
Sarah Martin
Victor Moxley
Sterling Puffer
Dylan Thomas
Hannah Uffens
David Wilding

Private Guardian ad Litem

Mindi Hansen
Rachel Maxwell Booker
Celia Ockey
Victoria Smith
A. Leilani Whitmer

Pro Bono Initiative

Jessica Arthurs
Amanda Bloxham Beers
Lauren Cormany
McKaela Dangerfield
Ana Flores
Karin Fojtik
Jennie Garner
Jeffry Gittins
Samantha Hawe
Adam Long
Maxwell Milavetz
Andy Miller
Grant Miller
Susan Morandy
John Morrison
Matt Nepute
Tracy Olson
Leonor Perretta
Clayton Preece
Stewart Ralphs
Brian Rothschild
Galen Shimoda
Ethan Smith
Jake Smith
Andrew Somers
Grace Sponaugle
Stephen Surman
Anthony Tenney
Nicholle Pitt White

Pro Se Debt Collection Calendar

Miriam Allred
Ben Allred
John Bagley
Rachel Cannon
Alexander Chang
Jack Darrington
KC Decker
Denise George
Chuck Goodwin
Steven Gray
Gregory Gunn
Erik Hamblin
Hong Her
Vaugh Pedersen
Brian Rothchild
Shubi Shah
Jessica Smith
Ryan Stanley
George Sutton
Adam Weinecker
Austin Westerberg
Angela Willoughby

Talk to a Lawyer Legal Clinic

Greg Walker

Timpanogos Legal Center

Hayden Ballard
Ali Barker
Ashlee Burton
Nathan Butters
Taj Carson
Sophia Chima
Danielle Dallas
Dave Duncan
Chad Funk
Eli Kukharuk
Madison Kurrus
Allie Larmouth
Sallie McGuire
Maureen Minson
Grace Nielsen
Chase Robinson
Dylan Thomas
Glen Thurston
Anne-Marie Waddell

Utah Bar's Virtual Legal Clinic

Jessika Allsop
Jacob Bandas
Jonathan Bench
Mike Black
Anna Christiansen
Adam Clark
Riley Coggins
Yuchen Cook
Robert Coursey
Matthew Earl
Jonathan Ence
Tyson Horrocks
Justin Jones
Travis Marker
Tyler Needham
Clifford Parkinson
Stanford Purser
Brian Rothschild
Alison Satterlee
Chad West

Wills for Heroes

Joseph Castro
Nicole Johnston
Emily McKay
Andy Miller

Tax Notice

Pursuant to Internal Revenue Code 6033(e)(1), no income tax deduction shall be allowed for that portion of the annual license fees allocable to lobbying or legislative-related expenditures. For the tax year 2024, that amount is 1.60% of the mandatory license fee.

Notice of Legislative Positions Taken by Bar and Availability of Rebate

Positions taken by the Bar during the 2025 Utah Legislative Session and funds expended on public policy issues related to the regulation of the practice of law and the administration of justice are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative and public policies activities related to the regulation of the practice of law and the administration of justice by Supreme Court Rule 14-106, which may be found at https://www.utcourts.gov/rules/view.php?type=UCJA&rule=14-106. Lawyers and LPPs may receive a rebate of the proportion of their annual Bar license fee expended for such activities during April 1, 2024, through March 31, 2025, by notifying Director of Finance, Nathan Severin at NSeverin@utahbar.org.

The proportional amount of fees provided in the rebate include funds spent for lobbyists, staff time spent on legislative matters, and expenses for Bar delegates to travel to the American Bar Association House of Delegates. Prior year rebates have averaged approximately $6.99. The rebate amount will be calculated April 1, 2025, and we expect the amount to be consistent with prior years.

Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 2, 2025, 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.

License renewal and fees are due July 1 and will be late August 1. If renewal is not complete and payment received by September 1, your license will be suspended.

Enhancing Lawyer Well-being: Welcoming Liz Silvestrini

The Utah State Bar is pleased to announce that Liz Silvestrini is the new consultant for the Well-Being Committee for the Legal Profession. In this crucial role, Silvestrini will provide guidance and support to the Well-Being Committee, focusing on initiatives that enhance the mental and emotional health of Utah's legal professionals.

To learn more about building your well-being, thriving in the practice of law, resources for lawyer assistance, and news about upcoming events and the Well-Being Committee's current work, download the guide to *Living Well in Law* (available at wellbeing.utahbar.org), created in collaboration with the Utah Community Builders Foundation.

Upcoming CLE Options

June 2025 – The Procrastinators' CLE series

- Four parts, including one hour of professionalism/civility credit and one hour of ethics credit
- All sessions held via Zoom (will count as Live, Verified MCLE hours)

July 2025 – The Summertime CLE series

- Five parts, including one hour of professionalism/civility credit and one hour of ethics credit
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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.

ADMONITION

On November 20, 2024, the Honorable Adam T. Mow, Third Judicial District Court, entered an Order of Discipline: Admonition against a lawyer for violating Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. The order was based upon a consent to discipline agreement.

In summary:
A lawyer (Lawyer) represented a defendant in a criminal matter and negotiated a plea agreement with the prosecutor. The prosecutor emailed the plea agreement to the Lawyer on the day of the change of plea hearing. Twenty minutes later, the Lawyer or their staff emailed the fully signed plea agreement back to the prosecutor. The Lawyer and their client attended the hearing remotely from separate locations. During the hearing, questions arose about whether the defendant had signed the plea agreement and was willing to enter into the plea agreement. The court did not accept the plea.

After the hearing, the prosecutor contacted the Lawyer asking whether the defendant had signed the plea agreement because they were concerned they may have been involved in submitting a plea agreement to the court that the client had not signed. During a phone call with the prosecutor, the Lawyer made contradictory statements, which misled the prosecutor about who had signed the plea agreement on behalf of the defendant.

Mitigating circumstances:
Personal or emotional problems and memory issues due to the COVID-19 pandemic.

ADMONITION

On December 12, 2024, the chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Private Admonition against a lawyer for violating Rules 1.1 (Competence) and 1.6(a) (Confidentiality of Information) of the Rules of Professional Conduct.

In summary:
A lawyer (Lawyer) represented a client in a divorce proceeding and a criminal matter. After the divorce proceeding had been resolved, and after the Lawyer had already withdrawn from the matter, the Lawyer re-entered an appearance in the divorce case without the client's permission. When confronted by the client, the Lawyer stated that it was to retrieve the docket. However, the Lawyer then filed an affidavit of reasonable attorney's fees and motion for reasonable attorney's fees from their own client. The motion referred to personal information about the client, including their mental and physical health, disclosed the extent and value of the Lawyer's legal services in the Divorce matter, and identified the amount of attorney's fees the Lawyer would accept to settle the fee dispute with the client. The motion was inconsistent with custom and practice and legal process in divorce proceedings.

DISCIPLINE PROCESS INFORMATION OFFICE

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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Save the Date! January 28, 2026
5 hrs. CLE Credit, with 3 hrs. Ethics
To register, email: CLE@utahbar.org.

Aggravating circumstances:
Substantial experience in the practice of law, prior discipline.

Mitigating circumstances:
Personal health issues, absence of selfish or dishonest motives, cooperative attitude towards the proceedings, and remorse.

PUBLIC REPRIMAND

On November 26, 2024, the Honorable Linda M. Jones, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Russell S. Walker for violating Rule 3.3(a) (Candor Toward the Tribunal) and Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. The order was based upon a consent to discipline agreement.

In summary:
Mr. Walker became involved in a dispute with one of his neighbors when he learned that the neighbor and his company wanted to subdivide their lot. Mr. Walker filed a lawsuit against his neighbor on behalf of himself, his wife, and neighbors in the subdivision. He named twelve neighbors as plaintiffs in the lawsuit without having obtained their permission. The court entered judgment and an order in favor of the defendants. Mr. Walker filed a notice of appeal on behalf of himself, his wife, and the other plaintiffs. The Utah Court of Appeals affirmed the district court's orders and judgment in favor of the defendants. Mr. Walker filed a Petition for Writ of Certiorari with the Utah Supreme Court on behalf of himself, his wife, and the other Plaintiffs. The Utah Supreme Court denied the petition.

The defendant filed a complaint against Mr. Walker, Mr. Walker's wife, and the other plaintiffs. When the plaintiffs in the first lawsuit were served, they learned for the first time that they had been included as plaintiffs in Mr. Walker's lawsuit, and that Mr. Walker had represented to the District Court, the Court of Appeals, and the Utah Supreme Court that he was representing them in those actions. The neighbors retained another attorney to help them secure dismissals.

Mr. Walker reimbursed legal fees incurred by the neighbors. This was considered a mitigating factor.

CLARIFICATION

The OPC would like to clarify that there are two lawyers named Christopher J. Rogers licensed in Utah. As reported in the last edition, Christopher J. Rogers, Bar #15248, was recently delicensed/disbarred for violating the Rules of Professional Conduct. Christopher J. Rogers, Bar #10104, has NOT been delicensed and remains licensed to practice in Utah.

ANNUAL MCLE COMPLIANCE

MCLE Reporting Period is July 1, 2024 – June 30, 2025

All active status lawyers and licensed paralegal practitioners admitted to practice in Utah are required to comply annually with the Mandatory CLE requirements.

The annual CLE requirement for lawyers, 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 to be completed by June 30. Filing and payment must be done by July 31. At least six hours of the CLE must be Verified CLE (live), which may include any combination of In-person CLE or Verified E-CLE. The remaining six hours of CLE may include Elective CLE (self-study) or Verified CLE (live).

The annual CLE requirement for licensed paralegal practitioners, is six hours of accredited CLE. The six hours of CLE must include a minimum of one hour of Ethics CLE and one hour of Professionalism and Civility CLE to be completed by June 30. Filing and payment must be done by July 31. At least three hours of the CLE must be Verified CLE (live), which may include any combination of In-person CLE or Verified E-CLE. The remaining three hours of CLE may include Elective CLE (self-study) or Verified CLE (live).

Each lawyer or licensed paralegal practitioner shall pay a filing fee in the amount of $10 at the time of filing the Certificate of Compliance or completing the minimum required CLE.

For more information, please visit https://www.mcleutah.org. For questions, please contact the Utah Supreme Court Board of Continuing Legal Education office at staff@mcleutah.org or by phone at (801) 746-5230.

Overcoming Loneliness as Young Lawyers:
The Power of Being Involved and Reverting to Genuine Human Connection

by Ashley Biehl

Everyone has heard the adage "It's not what you know, it's who you know," but I never fully appreciated how true those words are until I graduated law school. While earning my undergraduate degree in business, I had a professor who required every person in the class to collect thirty business cards throughout the semester. At the time it seemed like a silly exercise. Most of the class just picked up spare business cards here and there at businesses they were already visiting: car repair shops, hotels, hair salons, etc. The exercise was, of course, supposed to demonstrate the importance of networking, but what it failed to acknowledge was the value of making an actual, honest connection with the person whose card you were taking.

In 2020, Cigna released their Loneliness and the Workplace Report. *See* Cigna, *Loneliness and the Workplace* (Jan. 2020) https://legacy.cigna.com/static/www-cigna-com/docs/about-us/newsroom/studies-and-reports/combatting-loneliness/cigna-2020-loneliness-report.pdf. In this study, Cigna conducted an interview of approximately 10,400 adults. They found that 55% of Gen Z respondents reported feeling disconnected from others at work, and 73% reported feeling sometimes or always alone at work. These figures decreased with each generation. The report also noted that 61% of all respondents reported getting less than two hours per day of face-to-face interaction. For a vast majority of us, jobs are becoming more reliant on technology: we e-file pleadings, we can attend court hearings from our living rooms, and we do depositions via Zoom. While this creates certain undeniable advantages, what we lose is the human element. This is why connection is so important. It paves a pathway for us to meet other people with commonalities. It makes our experiences feel shared and gives us a place to go when we need advice, or just a sympathetic ear.

These nationwide trends seem to line up in Utah as well. In 2024, Utah's Young Lawyers Division submitted a survey to its populace. That survey found that 36.7% of respondents did not have a mentor and only 16.43% were working in office full-time. Further, on a scale of 1–5 with one being 'not important at all' and five being 'very important', young lawyers ranked employer's commitment to well-being a 3.95 on average.

A study completed in 2023 looked at forty-nine different studies from January 2000 through February 2023 that assessed loneliness in the workplace. *See* BT Bryan et al., *Loneliness in the workplace: A mixed-method systematic review and meta-analysis*, 73(9) Occup. Med. (Lond), 557 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC10824263/. This cumulative study found that workplace loneliness was consistently associated with lower productivity and a lower-quality relationship between management and employees. Finally, there was a significant correlation between burnout and workplace loneliness.

Utah has recently recognized the importance that mental well-being plays in our overall competence as lawyers. The Utah Rules of Professional Conduct recently added a comment to Rule 1.1 Competence, which states: [9] "Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law and compliance with the standards of professionalism and civility." Feeling lonely or isolated at work has the potential to negatively impact our mental health and, therefore, our ability to represent our clients at the highest level of competency.

In Utah, young lawyers are fortunate that we get added to the Young Lawyers Division automatically when we register with the Bar, so long as we have been practicing in any jurisdiction for less than ten years, or are younger than thirty-six years old, whichever comes last. The opportunities provided by the Young Lawyers' Division are invaluable. It hosts socials where you can meet

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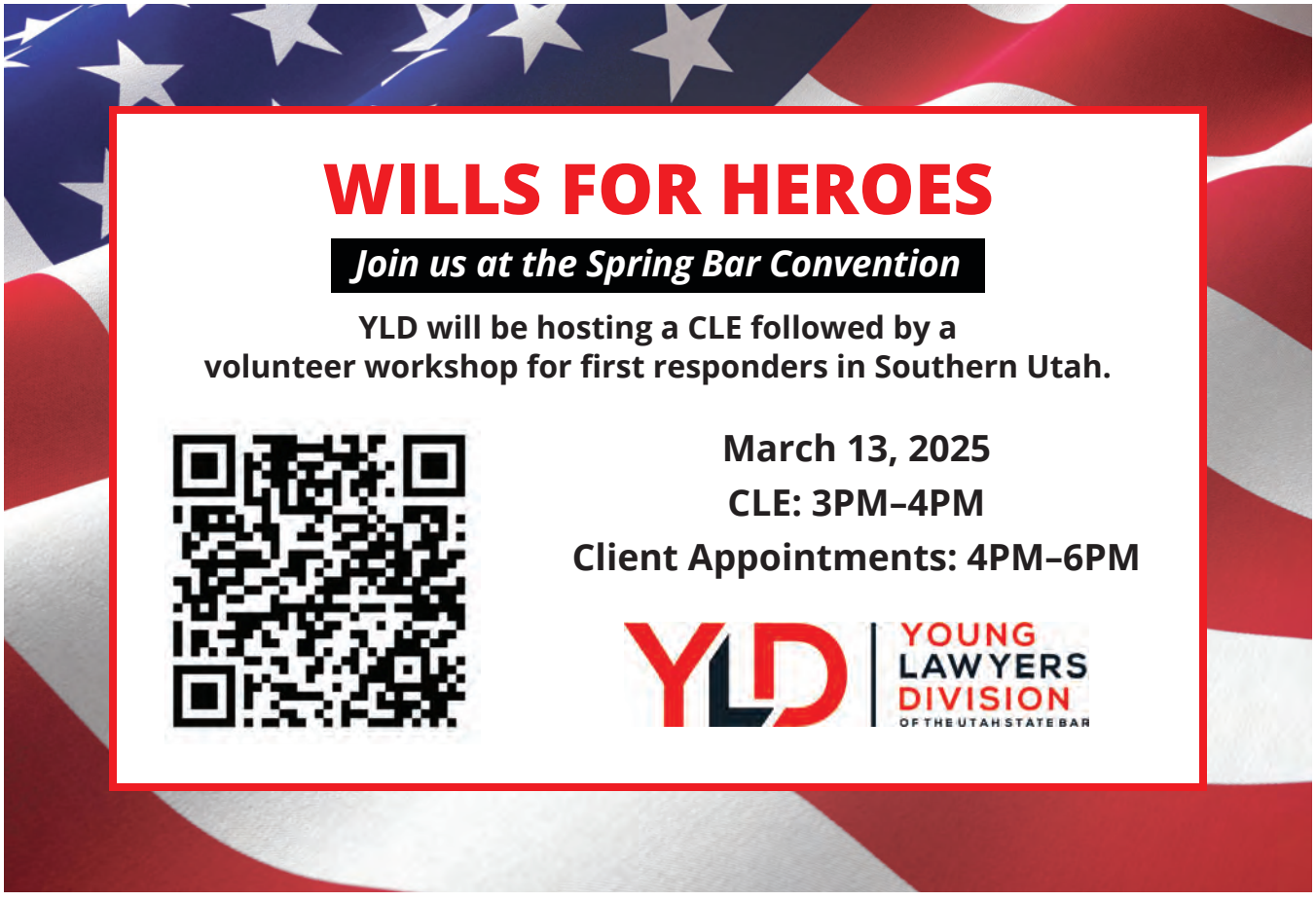
other young lawyers. It provides opportunities to volunteer at events, and to earn CLE credits. Most importantly, it enables you to connect and engage with others who are likely experiencing the same frustrations and victories that you are. Making connections with those who are going through similar life experiences brings that human element back into the practice of law, that seems to have been disappearing for the past few years.

And thankfully, it's not just the YLD that can provide these opportunities to connect. The Utah Bar has thirty-eight practice sections, to bring together attorneys from just about every field you can imagine, from the Cannabis Law Section, the CyberLaw Section, the Litigation Section, and the Solo and Small Firm Section. There are also twenty-five regional and specialty Bar organizations, such as the Cache County Bar Association, the Women Lawyers of Utah, Utah Employment Lawyers, and the Hispanic Bar Association. There are also nation-wide associations, such as the American Bar Association. The opportunities to get involved are endless. Each and every one of these organizations provides the ability to meet and connect with people who have similar passions and interests as you do; people who will likely be able to answer questions you have as a new attorney or are happy to provide guidance and mentorship as you enter the field. Many of these organizations offer scholarships to attend state and national conferences, and some announce annual awards that recognize emerging leaders in their respective fields.

So, while Cigna's study said that 55% of Gen Z respondents reported feeling disconnected from others at work, that disconnect can be minimized by finding a group that fits your specific needs and interests. Maybe it leads to a new job, or maybe it simply gives you new friends to call when you're feeling overwhelmed and frustrated, but getting involved in a bar organization is always worth the risk it takes to put yourself out there initially. After an isolated few years away from our peers and the interactions we are used to as lawyers, joining a bar section or other organization provides an easy way to reenter the world of human interaction, and helps us find solace in knowing that we are not alone in our experiences. Creating and maintaining genuine connections also make us more competent lawyers, capable of providing the best representation we can, because we know we have people to rely on through the hard days.



What Does the Chicken Case Tell Us About Emotional Support Animals and HOAs?

by Greg Wayment

Recently my home owners' association (HOA) was approached by a property manager who had potentially rented a condo in the building to a tenant with an emotional support animal (ESA). The HOA's rule on pets is that an *owner* may have one dog or cat under twenty pounds, but *renters* are not allowed to have animals. The property manager let us know the ESA in this case was a dog, most likely around fifty pounds.

The conflict that the HOA and I grappled with (I'm the HOA president) was on one hand, we felt we needed to consistently enforce the CC&R's. And the pet rule makes sense; the condos are small, and don't have any kind of personal outdoor space, and residents share many halls and walls.

On the other hand, I think most everyone in the HOA appreciates animals and understands the health benefits that come with pet ownership. I spend a lot of time with Alfie and Fitz (pictured above), and they add an immeasurable amount of joy to my life. It seems more than reasonable for someone to claim that an ESA improves their health. Should their housing choices be limited to just a single-family home, or maybe one of the limited rentals that allow pets? And what is the correct response from an association when someone makes an ESA request that is contrary to their rules?

As we were researching the best way to respond, I realized that it wasn't immediately clear what our response should be. I was curious about the history of support animals, going beyond what I'd seen the last few years on YouTube or Facebook. What differentiates a service animal from a support animal, and do support animals have the same protections?

History of ESA's

I started my research by asking AI to write an article on the history of support animals. (It did a pretty good job.) AI suggested that a big breakthrough in the concept of animals as a source of emotional support came from a psychologist named Boris Levinson. In 1953, Levinson was providing therapy to a withdrawn child and noted that the child was able to speak and open up to his dog, Jingles. Following up on that accidental discovery, he began to introduce Jingles to other children during therapy sessions, and in 1961 he wrote an article titled "The Dog as a Co-Therapist."

In the article Boris postulates "The importance of the house pet to man is psychological rather than practical." He also found in his therapy sessions that "the dog serves as a catalytic agent, helping the child to regress, accept himself and progress tentatively, and the more surely, on the road to self-discovery and acceptance." In conclusion he suggested, "Maybe someday we shall advance so far in our understanding of animals and their meaning to human beings that we shall be able to prescribe pets of a certain kind for different emotional disorders."

Even though Levinson's article was written over sixty years ago, it seems that ESAs have only recently become a popular idea. As we've seen people expanding the public spaces they want to take ESAs (such as work and airplanes), controversies have arisen. Some pet owners began taking advantage of the system by acquiring fraudulent ESA certifications (which are readily available online). In 2019, Utah State Representatives James Dunnigan and Curtis Bramble sponsored a bill (HB 43) that would make it a misdemeanor offense to lie about an animal being a support animal.

It is important to know the key difference between service animals (which have long been recognized as being acceptable in public spaces) and emotional support animals: Service animals (which are typically dogs) are trained to assist individuals with disabilities, have a more specific role, and require specialized training. Emotional support animals, on the other hand, offer comfort simply through their presence and have not been trained to perform specific tasks.

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

Utah Statutes and Code

What do Utah statutes say about how "housing providers" should respond to ESA requests?

The Utah Fair Housing Act, Utah Code section 57-21-5(4)(b) provides that "A discriminatory housing practice includes: a refusal to make a reasonable accommodation in a rule, policy, practice, or service when the accommodation may be necessary to afford the person equal opportunity to use and enjoy a dwelling."

The Utah Administrative Code gets more specific, defining what an assistance animal is and instructing housing providers on what kind of documentation they can request:

> The term "assistance animals" as used in this rule means animals that assist, support, or provide service to persons with disabilities and may include or otherwise be referred to as service animals, emotional support animals, assistive animals, or therapy animals.
>
> Housing providers are entitled to verify the existence of the individual's disability as well as the need for the assistance animal as an accommodation for that disability if either is not readily apparent. Accordingly, an individual proposing an assistance animal as a reasonable accommodation for a disability may be required to provide documentation from a physician, psychiatrist, or other qualified healthcare professional that the animal provides support that alleviates a symptom or effect of the disability.

Utah Admin. Code R608-1-17(1) & R608-1-17(2)(a).

The Chicken Case

A recent Utah Court of Appeals case considered the question of whether an HOA constructively denied an accommodation request for comfort chickens when keeping chickens was expressly prohibited by the HOA. *See Labor Comm'n v. FCS Cmty. Mgmt.*, 2024 UT App 14. The underlying district court case and Utah Antidiscrimination and Labor Division (UALD) investigation provides insight into how the UALD would instruct a homeowners' association on responding to a request for a support animal.

In the "Chicken Case," a couple built a house in Herriman that was part of an HOA. They asked the home builders if they could have chickens, reviewed Herriman's laws around having chickens (a homeowner with their lot size could have up to ten hens, but no roosters), and ultimately chose a lot that would accommodate chickens. They didn't, however, read the CC&Rs of the HOA, which specifically forbade keeping "chickens or other poultry."

A couple of years after moving into the home, they purchased eight chickens. Shortly thereafter, a few of the neighbors complained to the HOA management about the chickens, citing rodent concerns and requesting that the HOA notify the homeowners that they could not keep chickens per the HOA's rules.

A representative of the HOA e-mailed the homeowners informing them of the language in the CC&R's prohibiting chickens and asked them to remove the chickens immediately or risk being fined.

The homeowners responded and told the HOA that they had originally purchased the chickens so they could have fresh eggs (for health reasons) but that their daughter had formed an emotional bond with the chickens, and they intended to keep all eight of them.

The HOA engaged an attorney who spoke with the homeowners and the homeowners' therapist and doctor. The HOA ultimately decided that it was a reasonable accommodation to allow the homeowners to keep two chickens on the condition that they "restrict the chickens to the property and coop when not under the direct control of a responsible person, maintain the coop to avoid odor, unsightliness and rodents, and prohibit any noise or nuisances created beyond what would be expected from other pets in the community."

The homeowners rejected that "reasonable accommodation," saying that their daughter was bonded to all eight of the chickens. They ultimately sold the home and moved to a different home that didn't have restrictions. The homeowners then filed a complaint with the UALD alleging that the HOA had violated the Utah Fair Housing Act by discriminating against them due to disability, and that it was a reasonable request to keep all eight chickens.

The UALD's determination found that to prove denial of reasonable accommodation five conditions must be met: (1) the seeker of the accommodation must suffer from a disability as defined by the Utah Fair Housing Act, (2) the housing provider (HOA) knows about the disability, (3) the seeker needs the accommodation to have an equal opportunity to "use and enjoy the dwelling," (4) the accommodation is reasonable, and (5) the housing provider failed to make such accommodation.

The UALD also considered whether the HOA's delays in processing the homeowners' accommodation request resulted in constructive denial of that request. The UALD found the HOA's delay in processing the homeowners' accommodation request, and failure to substantially engage in the process did constitute a constructive denial (which was later reversed by the Utah Court of Appeals).

The UALD decision also found the homeowners had the burden to establish a distinct disability-related need for each chicken, and therefore the HOA contacting the therapist and doctor was reasonable, as a housing provider should be able to verify that the source of the documentation is reliable and the documentation itself is reliable.

However, the UALD decision also found that the homeowners' insistence that the accommodation include all eight chickens was not reasonable and that they needed to provide a separate and distinct disability-related reason for each animal in order to prevail.

Conclusion

Ultimately, the issue of the potential ESA became moot in the case of my HOA. We let the property manager know we were not going to object to the tenant moving in with their support animal. A few days later, the property manager let us know that the tenant had decided not to rent the condo in our building.

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

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