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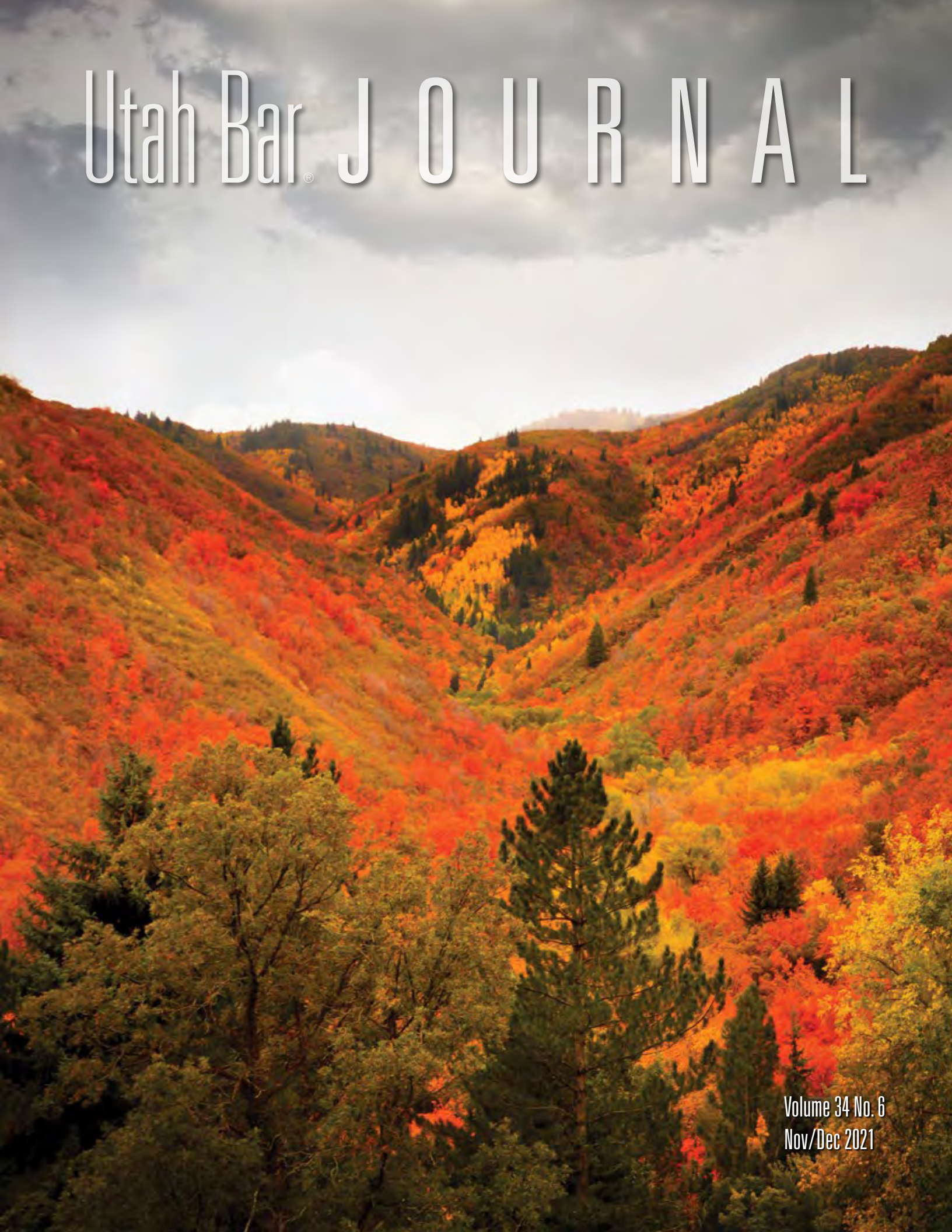

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Cover Photo

Autumn in Hobble Creek by Utah State Bar member Ross Martin.

ROSS MARTIN is a Utah-based international tax director for CLA (CliftonLarsonAllen LLP). He assists companies and individuals with the intricacies of international tax compliance and financial reporting and advises them on tax efficient legal organization and transaction structuring. Asked about how he came to take this photo, Ross said "This was one of the pictures I took on a family photo-taking drive up into Hobble Creek Canyon. I saw this landscape and thought it especially suited for a Bar Journal cover."

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 (compact disk or print), along with a description of where the photographs were taken, to Utah Bar Journal, 645 South 200 East, Salt Lake City, Utah 84111, or by e-mail .jpg attachment to barjournal@utahbar.org. 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. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.

Utah Bar JOURNAL

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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 e-mail at barjournal@utahbar.org.

GUIDELINES FOR SUBMISSION OF ARTICLES TO THE UTAH BAR JOURNAL

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

ARTICLE LENGTH

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

SUBMISSION FORMAT

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

CITATION FORMAT

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

NO FOOTNOTES

Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

ARTICLE CONTENT

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

EDITING

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

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. Authors are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

PUBLICATION

Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

Letter to the Editor

Dear Editor,

I want to correct an "inadvertent error of omission" in Judge Sheila McCleve's warm and thoroughly accurate tribute to Justice Richard C. Howe. *See* Sheila K. McCleve, *Richard C. Howe – A Law Clerk's Tribute*, 34 Utah B.J. 20, (Sep/Oct 2021).

Justice Howe spent many years as an attorney in Murray, Utah, practicing what would be described ingloriously as collections work. The practice is full of what I consider arcanum and latin mysteries such as the point at which judgment is rendered, the precise sequencing of the writ of execution, supplemental proceedings in garnishment etc. From the rather removed perch of the law professor I needed help explaining these procedures so essential to the attorney seeking results for the creditor-client or defense for the debtor-client.

Dick Howe, prior to Justice Howe, was always a great visitor to my classes. He provided experience and insight. Most important, he modeled decency and civility to a subject seen as aggressive and giving no quarter. As Justice Howe, he continued visiting my classes adding a homey aura to his oak-panelled aerie.

Very truly yours,
Richard I. Aaron
Professor of Law Emeritus
S.J. Quinney College of Law

LETTER SUBMISSION GUIDELINES

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 500 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be emailed to BarJournal@UtahBar.org or delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
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. The Editor-in-Chief, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

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Utah's Exceptional Judiciary

by Heather L. Thuet

Recently I came across a tweet from Michael Mower, the Senior Advisor of Community Outreach and Intergovernmental Affairs to Governor Spencer J. Cox.

"In 1944," Mower tweeted, "the last partisan judicial elections were held in Utah after voters chose to make judges non-partisan."

Mower's tweet included two newspaper articles. Sandwiched between stories about F6F Hellcats and TBF Avengers fighting the battle of Leyte Gulf was an article describing how Utah voters passed an amendment to the state constitution. This amendment allowed the legislature to find a way other than elections to select judges. Thus began the process that saw the creation of Utah's "Merit Selection" system for state and appellate court judges.

The 24,695 electors who voted for the amendment made a wise choice. The second article Mower tweeted noted that in the 1944 judicial election, voters selected judges based upon their political affiliation not necessarily on their competency.

Today's judiciary is a far cry from the one Utah elected in 1944. As Mower says in his tweet, "Utah has one of the best judicial selection processes in the nation thanks to this change."

As a litigator, there are many times I've disagreed with a judge's ruling. There are times when I think the judge has applied the law incorrectly. But not once have I had to wonder if a ruling was influenced by a judge's standing in an election poll.

That is a statement that cannot be made by many of our colleagues in other states. In the 2015–16 election cycle, spending on state supreme court races exceeded $69 million, with Pennsylvania judges spending a whopping $21,417,861 on three seats. Nearly $6 million of that came from outside of the state. Alicia Bannon, et al., *Who Pays for Judicial Races?*, The Politics of Judicial Elections 2015–16, *available at* https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf (last visited Oct. 12, 2021).

In the 2015–16 cycle, twenty-seven states had judicial races that exceeded $1 million in spending, and 31% of judicial election funding came from attorneys and lobbyists. A mere eleven states accounted for half the judicial elections in which campaign spending exceeded $1 million.

While these numbers deal only with state supreme courts, the numbers for trial court judges look just as bad. In 1995, Texas passed a law limiting law firms to contributing no more than $50 per lawyer to judicial campaigns, with a "voluntary" cap on trial judges of up to $350,000 depending on the size of the district. Appellate and supreme court judges face a cap of up to $500,000. *Judicial Campaigns and Elections: Texas*, Nat'l Center for State Courts, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=TX (last visited Oct. 12, 2021).

One of the great benefits of practicing in Utah is I don't have to worry about going up against an attorney whose firm made a bigger contribution to a judge's campaign than mine.

Utah's "Merit Selection" process of choosing judges, along with retention elections, ensure the population of the state gets a high-quality judiciary along with public participation in the process of retaining judges.

"By…voting in these retention elections," Chief Justice Matthew Durrant noted in a 2014 editorial in the *Salt Lake Tribune*, "Utahns contribute to a process designed to ensure a strong, independent, and impartial judiciary." Justice Matthew Durrant, *How Judges are Selected in Utah*, Salt Lake Tribune, https://archive.sltrib.com/article.php?id=57881089&itype=CMSID (Apr. 30, 2014).

Justice court judges are selected by a different process. The court advertises a vacancy, and a local nominating committee evaluates applicants and makes recommendations to the local government authority, who then makes an appointment from those recommendations. The candidate is then ratified by the full county commission or city council.

In 2008, the Utah Legislature created the Judicial Performance Evaluation Commission (JPEC) to evaluate judges and to communicate to the public their findings. The commission's findings assist voters in making informed decisions on retaining judges. The Executive Director of JPEC is Jennifer Yim, and the commission includes citizen members, attorneys, and retired judges. Members are appointed by the governor, the supreme court, the senate, and the house of representatives. You can read more about JPEC and its evaluation process by visiting judges.utah.gov.

As part of this process, judge evaluation surveys opened in October. As officers of the court, Utah lawyers can help judges and the legal profession by participating in judicial evaluation and providing honest, constructive feedback to judges.

If you have not yet completed your surveys, please complete them today. It may seem like a lot to ask, but JPEC requests lawyer participation only once every other year. Judges take the feedback seriously and can use the information you provide to help them improve performance. Your fair and unbiased evaluation of a judge's performance can have a huge impact. Fill out the survey for the judge you had a great experience with as well as for the judge that ruled against you. Be honest with yourself and the process. Consider what positive marks and constructive comments you would want to receive if you were the judge. Remember it is an honor to be part of the process. Our judges work hard and deserve your time.

Please take a moment to locate your email invitation from Jennifer Yim. The email came from utjpec@marketdecisions.com; check your spam folder if you can't locate an invitation you think you should

The attendees of the Judicial Excellence CLE & Shenanigans in Moab.

have received. Click on the link in the email and evaluate the judges before whom you have appeared. Participation is anonymous.

If you have already completed your surveys, thank you for taking the time to honestly and carefully evaluate our Utah judges.

On behalf of the Utah State Bar, I thank you for your support to help ensure a fair and thorough evaluation of Utah judges.

There have been many changes in Utah's judiciary over the years. Today's judges are more diverse, better trained, and more representative of the community than ever before. The court is continually striving to improve diversity.

Judges must complete thirty hours of approved education annually, and the court recently established an Office of Fairness and Accountability to improve trust and eliminate bias. "The goal is a fair process that produces a just result," Chief Justice Durrant recently told KSL News.

Diversity, fairness, and equity are a continuing problem in the justice system, but Utah judges are leading the way. New initiatives like the sandbox and the state's licensed paralegal practitioner program are just a few tools designed to make the system work better for judges, attorneys, and residents of the state.

In 2015, I started the "Litigation Section's Judicial Excellence Awards," which are given out as part of the Judicial Excellence CLE & Shenanigans in Moab as a way to recognize exceptional judges. This two-day event has grown each successive year. This year's recipients are:

Presiding Judge Jennifer A. Brown

Judge Samuel P. Chiara

Presiding Judge Michael A. DiReda

Presiding Judge Angela A. Fonnesbeck

Judge Ryan M. Harris

Judge Noel S. Hyde

Judge Barry G. Lawrence

Judge Ann Marie McIff Allen

Justice Paige Petersen

Judge Kara L. Pettit

Judge Derek P. Pullan

Judge Laura S. Scott

Judge Todd M. Shaughnessy

The next time you log onto or head into court, take a moment to consider how fortunate Utah attorneys are to practice before the best judiciary in the country. It is a benefit we should not take for granted.

Winners of the Litigation Section's Judicial Excellence Awards for 2021 – front row: Judge Ryan M. Harris, Judge Todd M. Shaughnessy, Judge Ann Marie McIff Allen, Judge Barry G. Lawrence, Presiding Judge Michael A. DiReda, Presiding Judge Angela A. Fonnesbeck, Judge Samuel P. Chiara. Back row: Judge Edwin S. Wall (winner of the 2021 Litigator's Cup), Presiding Judge Jennifer A. Brown, Judge Laura S. Scott, Judge Noel S. Hyde, Justice Paige Petersen. Not pictured: Judge Kara L. Pettit, Judge Derek P. Pullan.

Access to Justice and Kayak Court

by The Honorable Jeanne Robison

"Equal Justice Under the Law" is the ideal inscribed on the Supreme Court of the United States. And the Utah State Courts proclaim that the Utah judiciary is committed to "an open, fair, efficient, and independent system for the advancement of justice under the law." *See* Utah Courts, https://utcourts.gov (last viewed Oct. 12, 2021). Yet many things prevent an individual from actually accessing the justice dispensed at our courthouses nationwide. Income inequality and homelessness are just a few of the barriers individuals face in accessing our brick-and-mortar court system. One silver lining of the pandemic is that it introduced us to WebEx and increased our access to technology, resources which now allow us to hold court almost anywhere. This access also provides us with unique opportunities, like Kayak Court, to meet the needs of underserved members of our communities.

The COVID-19 pandemic has required courts to find new ways to use resources and technology to serve those needing access to our courts. While the largely virtual model we have been forced to adopt by the pandemic has been beneficial to many, there are populations for which it has made access to justice more difficult. This includes, among others, anyone who lacks access to the internet, lacks knowledge of how to use technology, and lacks the ability to commute to our court buildings to use the electronic resources provided there. Our homeless populations are among those who are most likely to experience transportation and technology issues in accessing the courts.

JUDGE JEANNE ROBISON has served the Salt Lake City Justice Court since 2005.

Kayak Court came about as a way to meet the needs of the many people sheltered in encampments along the Jordan River in Salt Lake City. I was recreationally kayaking on the river with a friend, Kim Russo, MSW, a social worker who works with the homeless community. As we would paddle past homeless encampments, many people would recognize Ms. Russo and call out to her either in greeting or to let her know of an issue they needed help with. We talked about the need (somewhat jokingly at first) to hold court on the river, and thus the idea for Kayak Court was born.

The intent of Kayak Court and our other homeless outreach efforts is not to give the unsheltered members of our community a "pass" for any criminal conduct. Rather the goal is work to remove barriers to self-sufficiency. Salt Lake City and the Salt Lake County Health Department regularly abate homeless encampments when they become a threat to public safety or public health. The city hosts resources fairs to provide services to those experiencing homelessness. However, having an active warrant or open criminal case can be a barrier to accepting many of the offered services including housing, employment, and benefits. We have worked collaboratively with prosecutors and members of the defense bar to come up with ways to hold those experiencing homelessness appropriately accountable while also helping them move toward self-sufficiency.

Connecting individuals facing criminal charges with housing, employment, treatment, and medical services helps move them toward self-sufficiency and can greatly reduce or even eliminate criminal recidivism.

Kayak Court is a collaborative model. The Salt Lake City Justice Court works in collaboration with some judges from the Third District Court; judicial assistants from multiple courts; Salt Lake Housing Sustainability; prosecutors from both the Salt Lake City Prosecutor's Office and the Salt Lake County District Attorney's Office; attorneys from the Salt Lake Legal Defender Association; a group of private attorneys who volunteer their time; Kim Russo, MSW, who also volunteers her time; outreach workers from Volunteers of America and other homeless service providers; the Jordan River Commission, which provides boats and paddlers; Green Bike, which provides bicycles for team members biking on the Jordan River Parkway; and Salt Lake City Trails and Public Lands, which assists with trash cleanup in conjunction with those encamped along the river.

During Kayak Court, two teams proceed down a section of the Jordan River, one group in canoes and kayaks on the river and one group on foot or bicycle along the adjacent Jordan River Parkway. The first members of each team are outreach workers who make contact with individuals camped along the river. If an individual believes they have one or more open criminal case and is amenable to addressing those matters through Kayak Court, names and DOBs are provided to judicial assistants who look up all open cases. Attorneys discuss resolutions and cases are resolved where appropriate, warrants recalled where appropriate, and new court dates provided where appropriate. More serious offenses such as domestic violence, DUIs and assaultive conduct, and felony conduct are not resolved at Kayak Court, although warrants may be recalled and new dates given as appropriate. All court proceedings are recorded on WebEx. Thus far we have held Kayak Court four times during which the courts served forty individuals and heard fifty-four cases.

Of Kayak Court, Ms. Russo has said,

The opportunity to participate in the Kayak Court project has made a positive impact for clients who are experiencing homelessness. With warrants recalled and some legal matters resolved, clients are able to seek employment, housing, mental health treatment, and other services offered. Because of the holistic approach of Kayak Court, my clients have felt safe accessing the courts and this model has increased my clients' ability to achieve self-sufficiency.

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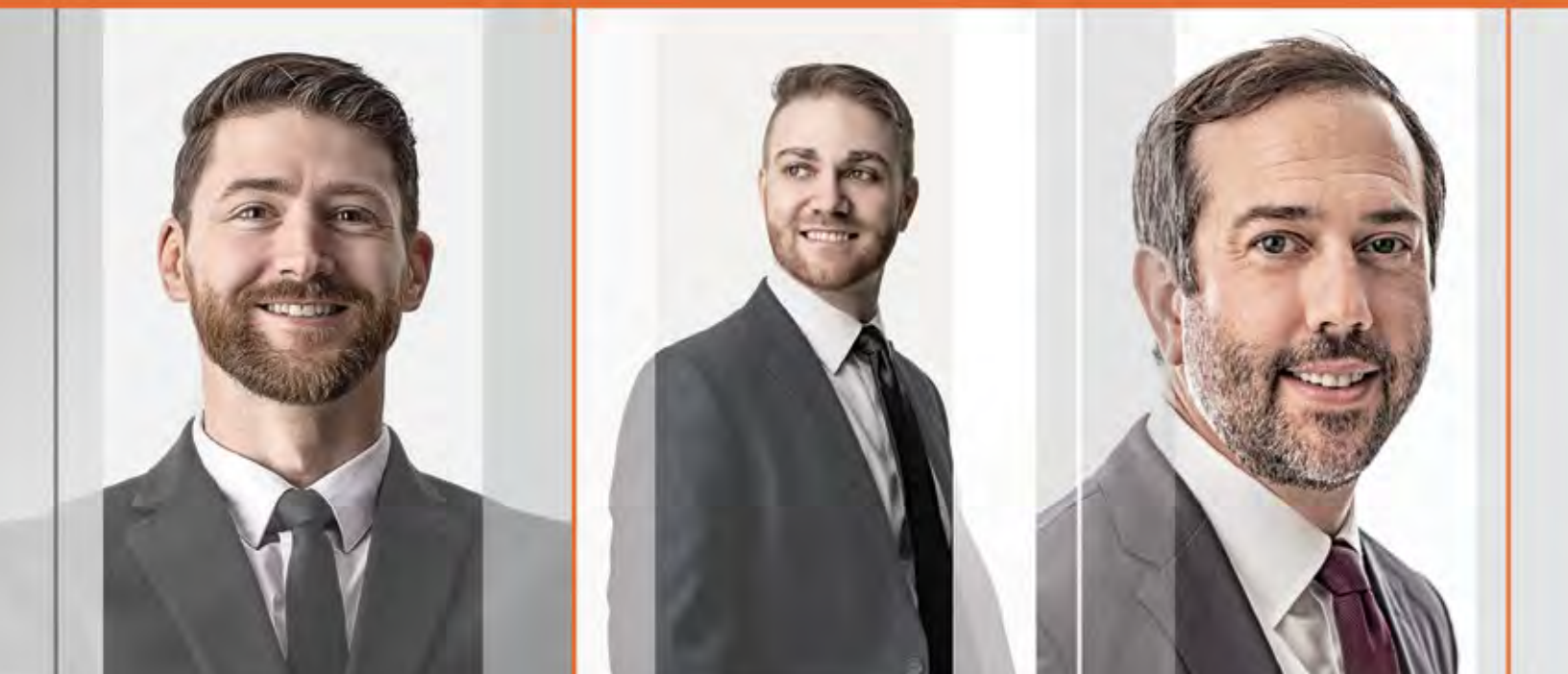


The Doctrine of Chances is Ready to Be Overturned

by Andrea J. Garland

Introduction

When a criminal defendant appears to suffer the rare misfortune of being accused of the same or similar crimes several times, Utah courts sometimes admit evidence of the prior alleged bad acts under the "doctrine of chances." Unfortunately, the doctrine of chances relies on an incorrect understanding of probability. Recently, in *State v. Richins*, 2021 UT 50, the Utah Supreme Court expressed reservations about the doctrine's continuing viability. *Id.* ¶¶ 3, 55. Our supreme court's reservations were well-founded because evidence admitted in a criminal case under the doctrine of chances often lacks relevance except as propensity evidence.

I previously wrote about this problem – and others concerning the doctrine of chances – in the Utah Journal of Criminal Law. *Beyond Probability: The Utah Supreme Court's 'Doctrine of Chances' in* State v. Verde *Encourages Admission of Irrelevant Evidence*, 3 Utah J. Crim. Law 6, 25–29 (2018). This current article analyzes the doctrine of chances' probability problem in light of recent case law, particularly *Richins*.

Background

While Rule 404(b) of the Utah Rules of Evidence forbids character evidence, it allows admission of prior acts for other purposes such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Utah R. Evid. 404(b)(2). In *State v. Verde*, 2012 UT 60, 269 P.3d 673, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016, the Utah Supreme Court added the doctrine of chances as another permissible purpose for admitting evidence of prior acts against a defendant. *Id.* ¶¶ 45–61. The "doctrine of chances" is "a theory of logical relevance that 'rests on the objective improbability of the same rare misfortune befalling one individual over and over.'" *Id.* ¶ 47 (quoting Mark Cammack, *Using the Doctrine of Chances to Prove Actus reus in Child Abuse and Acquaintance Rape*, People v. Ewoldt *Revisited*, 29 U.C. Davis L. Rev. 355, 388 (1996)).

> This reasoning starts with the low baseline probability that a man would take a horse by mistake or that an innocent person would be falsely accused of sexual assault – or, to cite additional examples from actual cases, that a child would die in her sleep or that a spouse would drown in the bathtub.

Id. ¶ 49 (citation omitted).

"The second step in the analysis considers the effect on these already low probabilities of additional, similar occurrences: As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases." *Id.* "An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar 'accidents' occur, the objective probability that the accused innocently suffered such unfortunate coincidence decreases." *Id.*

In *Verde*, our supreme court did not believe that propensity "pollute[s] this type of probability reasoning." *Id.* ¶ 50. The question for the jury "is whether it is objectively likely that so many fires or deaths could be attributable to natural cases." *Id.* (internal quotation marks omitted). Our supreme court recommended, "care and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts, and to limit the factfinder's use of the evidence to the uses allowed by rule." *Id.* ¶ 55.

To ensure such care, "evidence offered to prove *actus reus* must not be admitted absent satisfaction of four foundational

ANDREA J. GARLAND is an appellate lawyer at the Salt Lake Legal Defender Association.

requirements." *Id.* ¶ 57. Our supreme court required that the four factors be considered "within the context of a rule 403 balancing analysis." *Id.* The first factor is materiality. *Id.* This means that "[t]he issue for which the uncharged misconduct evidence is offered 'must be in bona fide dispute.'" *Id.* (quoting Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L. J. 575, 588–92 (1990)). Second, each uncharged incident must be "roughly similar" to the charged crime. *Id.* ¶ 58 (emphasis and internal quotation marks omitted). Third, each accusation must be independent. *Id.* ¶ 60. Fourth, "[t]he defendant must have been accused of the crime or suffered an unusual loss 'more frequently than the typical person endures such losses accidentally.'" *Id.* ¶ 61 (emphasis omitted) (quoting Imwinkelried, 51 Ohio St. L. J. at 590).

Subsequently, Utah courts have reviewed doctrine of chances cases with mixed results – first broadening and then narrowing when it can be used. In *State v. Lowther*, 2017 UT 34, 398 P.3d 1032, our supreme court held that the doctrine of chances was not limited to allegations of witness fabrication. *Id.* ¶ 23. Then, our appellate courts tightened the requirements for admission of doctrine of chances evidence. For example, in *State v. Lane*, 2019 UT App 86, 444 P.3d 553, our court of appeals held that doctrine of chances evidence was inadmissible where its true purpose was to show propensity. *Id.* ¶¶ 23–25. For another, in *State v. Argueta*, 2020 UT 41, 469 P.3d 938, our supreme court advised that trial courts require that "the party seeking to admit a prior bad act under the doctrine of chances…articulate the 'rare misfortune' that triggers the doctrine's application." *Id.* ¶ 34. This requires "care and precision." *Id.* The party seeking admission of doctrine of chances evidence "cannot simply rely on the similarity between the charged act and the prior bad acts." *Id.* ¶ 35. Most recently, our supreme court

> instruct[ed] courts applying the doctrine of chances to carefully define the rare occurrence, assiduously evaluate whether the foundational factors have been satisfied, conduct a rule 403 analysis that focuses on the unique unfair prejudice that can flow from the admission of prior-acts evidence, and explain their reasoning in a transparent manner.

State v. Richins, 2021 UT 50, ¶ 95.

Specifically, Utah appellate courts have required greater precision in establishing frequency. *See generally State v. Murphy*, 2019 UT App 64, ¶¶ 51–65, 441 P.3d 787 (Harris, J. concurring) (calling the doctrine "controversial" and discussing logical problems with the doctrine, including a difficulty in determining frequency); *Lane*, 2019 UT App 86, ¶ 49 (Harris, J., concurring) (opining that the trial court failed to base frequency determination on applicable evidence). "If the judge has no satisfactory basis for determining the frequency of such accidental occurrences among the general populace, the judge may not admit the uncharged misconduct evidence under the aegis of the doctrine of chances." *State v. Lopez*, 2018 UT 5, ¶ 59 n.13, 417 P.3d 116 (internal quotation marks omitted). "[T]he number of occurrences and their temporal frequency are usually not enough to establish the frequency requirement." *Argueta*, 2020 UT 41, ¶ 39. "The assessment of frequency cannot be based solely on intuition." *Id.*; *see also Richins*, 2021 UT 50, ¶¶ 71–72, 75–80 (holding that intuition is inadequate to establish frequency). "To evaluate the frequency of a rare misfortune, a court must ascertain some benchmark for the typical person['s] endurance of the crime or unusual loss through testimony or judicial notice." *Argueta*, 2020 UT 41, ¶ 39 (alteration in original) (internal quotation marks omitted). And the supreme court recently opined, "[W]e are becoming increasingly uneasy because when we ask district courts to assess frequency without the benefit of data, we are inviting them to draw on stereotypes and assumptions that may not hold true." *Richins*, 2021 UT 50, ¶ 77.

Additionally, the frequency with which a person experiences a "rare misfortune" may depend on that person's individual circumstances, thereby impacting the independence of the event. *Id.* ¶ 89. "In *Lane*, for example, evidence that the defendant frequented a high-crime area where a person will often need to defend himself against violent attack suggests that the two times [the appellant] was previously involved in a fight may not have been the product of random chance." *Id.* (citing *Lane*, 2019 UT App 86, ¶ 49 (Harris, J., concurring)). "There are undoubtedly people who will suffer certain rare losses at a greater rate than the population at large for reasons unrelated to the random probability rationale that powers the doctrine of chances." *Id.* ¶ 85. At the same time, our supreme court did not "believe that the answer to the problem is to tailor the data so it fits the subpopulation to which the defendant belongs." *Id.* ¶ 86. Therefore, our supreme court recommended that a trial court, "when assessing evidence through the lens of the doctrine of chances, be on the lookout for those factors that show that the random events a party wants to admit under the doctrine of chances aren't actually random." *Id.* ¶ 89.

> And if the party seeking admission of the evidence cannot foreclose the possibility that something other than random chance or the probability-based inference she wants the jury to draw from the evidence explains why the defendant has suffered the rare misfortune at an unusual rate, the district court should not admit the evidence under the doctrine of chances.

Id.

In *Richins*, 2021 UT 50, our supreme court expressed skepticism about the continued viability of the doctrine of chances, prefacing its opinion with the caveat that "if the doctrine of chances is to remain part of our jurisprudence, it needs to be more carefully explained and more precisely employed." *Id.* ¶ 3; *see also id.* ¶ 55 ("[I]f the doctrine is to remain part of our jurisprudence, it needs to be employed in a more disciplined fashion and district courts need to be more transparent in explaining their reasoning."). To avoid reliance on propensity or the bias that may flow from intuition, trial courts should follow directions from *Richins*. *See id.* ¶ 95.

Additionally, as explained below, parties and courts should probably abandon the doctrine of chances in criminal cases because it relies on inferences that probability does not support.

Probability

Although *State v. Verde*, 2012 UT 60, 269 P.3d 673, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016, relies on probability to underpin the doctrine of chances, probability does not support that applying the doctrine to any defendant's alleged criminal history will yield relevant evidence regarding the alleged actus reus. *See, e.g., id.* ¶¶ 50–51. Relevant evidence is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Utah R. Evid. 401(a). Additionally, this fact must be "of consequence in determining the action." *Id.* R. 401(b).

The *Encyclopedia Britanica* describes probability as "a branch of mathematics concerned with the analysis of random phenomena." David O. Siegmund, *Probability Theory*, Encyclopedia Britanica, https://www.britannica.com/science/probability-theory (last visited Oct. 12, 2021). It involves "the interpretation of probabilities of relative frequencies" of various events occurring. *Id.* Although we can collect data about large numbers of clinical trials that may display some regularity, even with data, "the outcome of a given trial cannot be predicted with certainty." *Id.*

As a matter of probability, the number of times a defendant may have suffered a "rare misfortune" cannot make any one allegation any more or less likely to have happened. *See id.*; *Verde*, 2012 UT 60, ¶ 47. The likelihood or probability (P) of an event (A) is between zero and one. Murray Spiegel, et al., Schaum's Outline of Probability and Statistics, 5 (4th Ed. 2013). We can represent this mathematically as: $0 \leq P(A) \leq 1$. *Id.* In other words, every allegation has a percentage likelihood of being true: allegation A has a probability of between zero (the impossible event) and one (proven true). Of course, allegation A also has a probability of being untrue: $P(A') = 1 - P(A)$. *Id.* at 6. In other words, if allegation A is 60% likely to be true, it is also 40% likely to be untrue.

Probability theorems show how to determine the probability of multiple independent events happening. To find the probability of three independent allegations (allegations of events A and B and C) happening, multiply the probability of each. *Id.* Symbolically, $P(A \cap B \cap C) = P(A) \times P(B) \times P(C)$. *Id.* at 7–8. Suppose "∩" means "and." *Id.*

In English, suppose a horse has a 99% probability of winning her first race (race A), an 80% probability of winning her second race (race B), and a 70% probability of winning her third race (race C). On paper, she may seem like a good bet to win all three races. But maybe not. The horse's probability (P) of winning all three races is: P(winning race A ∩ winning race B ∩ winning race C) = 99% x 80% x 70%, or only 55%. *See id.* These aren't terrible odds – she's more likely than not to win all three – but perhaps not high enough to bet one's house on the horse winning all three. This example illustrates that the likelihood of all events happening (or, in the case of criminal law, all allegations being true) is significantly lower than the likelihood of any one event.

Moreover, the number of other alleged events cannot affect the probability of any one event. We can symbolically represent the likelihood of one or some of three alleged events (A, B, and C) happening, where "U" means "and/or" as "P(A U B U C)." *Id.* at 6. A theorem governs the likelihood that out of three alleged events, one or some of the three alleged events happened: $P(A \cup B \cup C) = P(A) + P(B) + P(C) - P(A \cap B) - P(B \cap C) - P(A \cap C) + P(A \cap B \cap C)$. *Id.*

For example, we can use this theorem and the horse-racing theoretical probabilities to consider the effect of two prior independent allegations of the same crime on the likelihood of a defendant's guilt in a charged crime (A). Obviously, in real life, we cannot know the objective likelihood of any unproven-but-possible event. But assume for illustrative purposes that the above-described probabilities apply to the likelihood that a defendant committed multiple crimes (A, B, and C). We can represent this symbolically: P[(charged crime A) U (alleged event B) U (alleged event C)] = (99% + 80% + 70%) - P(99% x 80%) – P(80% x 70%) – P(99% x 70%) + P(99% x 80% x 70%). Doing the math, P[(charged crime A) U (alleged event B) U (alleged event C)] = 2.49 - .792 - .56 - .693 + .5544 = .9994. Thus, the defendant is highly likely (99.94%) likely to have committed one or some of either the charged crime or the prior alleged events. Of course, adding more allegations also shows a significant likelihood that the defendant is innocent of one or some of either the charged crime or the prior two allegations. The likelihood of an event, A *not* happening can be represented as: P(A') = 1 – P(A). The likelihood of one or some events not happening: P(A' U B' U C') = (1 - P(A)) + (1 – P(B)) + (1 – P(C)) – P(A' ∩ B') – P(B' ∩ C') – P(A' ∩ B') + P(A' ∩ B' ∩ C'). Using the same horse-race probabilities, the probabilities of one or some of the events, the charged crime plus the other allegations not being true is: 1% + 20% + 30% - P(1% x 20%) – P(20% x 30%) – P(1% x 30%) + P(1% x 20% x 30%) = .4456 or 44.56%. *See id*. Here, the defendant is 44.56% likely to have not committed one or some of the above-alleged crimes or bad acts – perhaps a reasonable doubt.

Doing the math in the above examples illustrates three points about how adding allegations affects the likelihood of a defendant's guilt or innocence of the charged crime and other allegations:

- Adding allegations raises the likelihood that one or some of the allegations are true (and that one or some of the allegations are false);
- Adding allegations actually lowers the likelihood that all the allegations – charged crime plus prior alleged events – are true;
- Adding allegations never raises the likelihood that any one specific allegation is true (or false).

See also Siegmund, *Probability Theory*, Encyclopedia Britanica, https://www.britannica.com/science/probability-theory (last visited Oct. 12, 2021); Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition By Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 437–38 (2006).

These points show why probability may not support using the doctrine of chances to find relevant evidence in a criminal trial. The question for a jury or judge in a criminal trial is whether the defendant is guilty or innocent of a charged crime, not whether the defendant is guilty of one or some alleged crimes. The question is rarely "whether it is objectively unlikely that" charged crime A plus prior alleged events B and C all have innocent explanations. *See State v. Verde*, 2012 UT 60, ¶ 50, 269 P.3d 673, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. And "whether it is objectively unlikely that" all the alleged events have an innocent explanation does not, by itself, raise the likelihood of a defendant's guilt of the charged crime. *See id*.; Utah R. Evid. 401.

For example, probability does not support how the doctrine of chances was used to justify admitting evidence of the defendant's prior alleged rapes in a rape trial in *State v. Lowther*, 2017 UT 34, 398 P.3d 1092. In *Lowther*, four different women accused the defendant of either rape or object rape. *Id*. ¶ 2. The State wished to introduce the testimony of three women claiming to have suffered non-consensual intercourse with the defendant for the purpose of showing that, under the doctrine of chances, it was not objectively likely that the fourth woman consented to sexual intercourse. *Id*. ¶¶ 2, 13, 24. Our supreme court held that because the alleged victim's consent was contested, "[t]he doctrine of chances, if its requirements are properly met, is one tool the State may use to prove that K.S. [the alleged victim] did not consent to sex with Mr. Lowther." *Id*. ¶ 25. Except, as explained above, adding the other allegations could not raise the likelihood that any one alleged victim, such as K.S., did not consent. *See id*.; Spiegel et al. at 5–8; Encyclopedia Britannica, probability-theory; Imwinkelried, 40 U. Rich. L. Rev. at 437–38. Applying the above-described probability theorems to *Lowther* shows that the added rape allegations raised the likelihood that one or some of the allegations were true and that one or some were false. But the added allegations could not raise (or lower) the likelihood that any one woman did not consent. And by not increasing the likelihood that K.S. in *Lowther* consented, the prior allegations did not make consent "more or less probable than it would be without the evidence." *See* Utah R. Evid. 401(a); *Lowther*, 2017 UT 34, ¶ 25.

Lawyers often argue about facts, laws, and fairness. But the doctrine of chances as articulated in *Verde* for use in criminal

cases violates math. *See* 2012 UT 60, ¶¶ 50–51; Utah R. Evid. 401(a); Spiegel et al., at 5–8; Siegmund, *Probability Theory*, Encyclopedia Britanica, https://www.britannica.com/science/probability-theory.

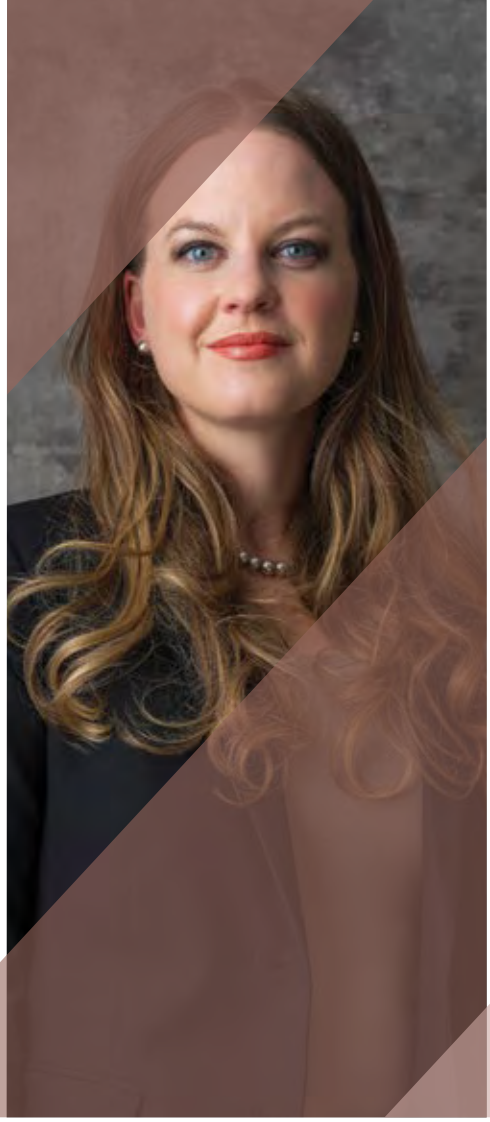
What to Do

It's time for litigants to ask courts to overturn *Verde*'s doctrine of chances in criminal cases. Our supreme court explained in *Richins* that it did not consider overturning *Verde* or abandoning the doctrine of chances because the *Richins* appellant had not asked it to. *State v. Richins*, 2021 UT 50, ¶ 38.

Considering the doctrine of chances in light of *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553, which directs when to overrule precedent, it's time to overrule *Verde*. *See Eldridge*, 2015 UT 21, ¶ 22 (explaining that the weightiness of precedent depends on "(1) the persuasiveness of the authority and reasoning on which the precedent was original based, and (2) how firmly the precedent has become established in the law since it was handed down"). As explained above, *Verde*'s doctrine of chances, conflicting with probability theorems as it does, should have little persuasiveness at this point. *See* 2012 UT 60, ¶¶ 50–51. And given our supreme court's dubious regard for the doctrine of chances, it cannot be considered firmly established. *See State v. Richins*, 2021 UT 50, ¶¶ 3, 53, 55; *accord State v. Murphy*, 2019 UT App 64, ¶¶ 51–65, 441 P.3d 787 (Harris, J., concurring); *Lane*, 2019 UT App 86, ¶ 49.

The doctrine may have some valid application in civil cases where the factfinder's question is to determine, for example, causation of one or some torts. Or, as the Vermont Supreme Court held in *State v. Vuley*, 70 A.3d 940 (Vt. 2013), where the criminal defendant claims to be the victim of an uncanny string of accidents, evidence of prior acts may show knowledge or absence of mistake. *See id.* at 949. But in those cases where mens rea rather than actus reus is at issue, the doctrine is unnecessary because the evidence might be admissible as evidence of knowledge or absence of mistake or accident under rule 404(b) – there's no need for the confusing, court-created doctrine. *See id.*; Utah R. Evid. 404(b). As a "theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over" to prove actus reus, it is untenable. *See State v. Verde*, 2012 UT 60, ¶ 47 (internal quotation marks omitted).

Emily Adams



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The Appellate Group

Appellate Highlights

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

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

UTAH SUPREME COURT

Scott v. Wingate Wilderness Therapy
2021 UT 28 (July 9, 2021)

In the context of an injury suffered during a wilderness therapy program, the supreme court held that **an injury "relat[es] to or aris[es] out of" health care under the Utah Health Care Malpractice Act, Utah Code §§ 78B-3-401 et seq. if it "originate[s] from or [is] connected to something a health care provider did or should have done in the course of providing health care to th[e] patient."** The court concluded that the claims against the wilderness therapy program were governed by the Act because the program provided "health care" in the form of wilderness therapy and the injured patient's claims originated from his participation in that therapy.

Ramon v. Nebo Sch. Dist.
2021 UT 30 (July 15, 2021)

The district court dismissed a claim for negligent supervision as superfluous, where the defendant school district had admitted it was vicariously liable for the actions of the bus driver who was involved in an accident. The supreme court reversed, declining to adopt the majority rule followed in other jurisdictions, and holding that **a claim for negligent supervision is not superfluous when vicarious liability is admitted.** The court held that concerns about double recovery and prejudice to the defendants can be addressed through other means.

Wyatt v. State
2021 UT 32 (July 15, 2021)

Rule 17(k) of the Utah Rules of Criminal Procedure does not automatically bar testimonial exhibits from going back with the jury, but instead allows the trial court to exercise its broad discretion on whether to allow the jury to have such exhibits during its deliberations. Here, the district court did not abuse its discretion when permitting a recording of a police interview to go back with the jury, where the exhibit was directed at the defendant's credibility and used to illustrate his capacity for lying.

Gillman v. Gillman
2021 UT 33 (July 22, 2021)

On interlocutory appeal from the district court's order setting aside a default certificate under Utah R. Civ. 55(c), the supreme court rejected the argument that a showing of "good cause" under Rule 55(c) demands some reason for the default beyond the defaulting party's own inaction. Emphasizing instead that "[v]acatur of a default is an equitable remedy," the court held that **a showing of "good cause" under "Rule 55(c) requires only that a movant make a showing that is sufficient to persuade the district court that the default should be set aside."**

Fitzgerald v. Spearhead Investments
2021 UT 34 (July 22, 2021)

In this interlocutory appeal, the supreme court held that **equitable estoppel may be invoked as a stand-alone basis for tolling a statute of limitations.** It explained this is a doctrine distinct from equitable tolling. "[E]quitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing suit, and equitable discovery is invoked in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment."

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

State v. Jok
2021 UT 35 (July 22, 2021)

The court affirmed the court of appeals' determination that the victim's testimony was not inherently improbable, and held that **the issue of inherent improbability is a challenge to the sufficiency of evidence which is automatically preserved on appeal in cases like this arising from a bench trial**, both under Utah R. Civ. P. 52(e), and by the nature of a bench trial, where the judge acts as the fact-finder and has a duty to examine and make a finding on the sufficiency of the evidence.

Kirk v. Anderson
2021 UT 41 (Aug. 5, 2021)

The defendant doctor performed an IME on plaintiff during a worker's compensation case. Claiming that the doctor's report delayed him from receiving his compensation he was owed, plaintiff sued the doctor alleging negligence and reckless conduct. The district court dismissed the case on the grounds that a doctor in that scenario would not owe the plaintiff a duty, and the supreme court affirmed finding that **no doctor/patient relationship existed in the IME context presented and that public policy considerations militated against finding a duty** based upon the doctor's affirmative acts and alleged injuries flowing from a delay in prior proceedings.

State v. Eyre
2021 UT 45 (Aug. 12, 2021)

The supreme court reversed the court of appeals, vacated the defendant's conviction, and remanded for a new trial because the jury instruction that was given on accomplice liability to robbery did not accurately instruct the jury on the dual mens rea requirement for that crime. **Accomplice liability requires a showing that the defendant had at least two culpable mental states – one to commit the underlying offense, and one to intentionally aid another person to commit it.**

Feasel v. Tracker Marine LLC
2021 UT 47 (Aug. 12, 2021)

In this products liability case, the supreme court modified the failure to warn factors first adopted in *House v. Amour of America, Inc.*, 929 P.2d 340 (Utah 1996), clarifying that **the adequacy of a warning turns on both its intensity and the level of specificity, both of which are determined by the magnitude of the risk.** The court also adopted section 2(c) of section 333 of the Third Restatement of Torts, which governs a supplier's duty to issue warnings for products supplied for use through intermediaries, and expanded the scope of the learned intermediary rule.

McKitrick v. Gibson
2021 UT 48 (Aug. 19, 2021)

Gibson, a former county commissioner, petitioned for judicial review of Ogden City's decision to publicly release records of an investigation into his alleged official misconduct. Though he lacked standing under GRAMA to challenge the decision, the district court permitted Gibson's petition to go forward because he had a privacy interest in the records and therefore had traditional standing to seek review of the decision. As a matter of first impression, the Utah Supreme Court reversed the district court and remanded for dismissal of Gibson's petition, holding that a "**statutory claimant must have statutory standing, and the presence of traditional or alternative standing will not cure a statutory standing deficiency.**"

Woods v. United Parcel Service, Inc.
2021 UT 49 (Aug. 19, 2021)

The plaintiff asserted a negligence claim against UPS based on an injury he suffered when a vinyl curtain at his place of employment fell and struck him. The vinyl curtain had been jarred loose when a UPS truck allegedly hit the loading dock at the warehouse. The warehouse owner (and plaintiff's employer) was aware the vinyl curtain had been jarred loose and attempted to repair it by tightening the remining bolts. The court of appeals had affirmed on the basis UPS owed no duty to the plaintiff. The supreme court instead affirmed on the alternative ground that UPS's collision with the loading dock was not the proximate cause of the plaintiff's injury; the warehouse owner's negligence in not adequately repairing the curtain was a superseding cause.

State v. Richins
2021 UT 50 (Aug. 19, 2021)

The supreme court reversed the court of appeals, vacated the defendant's conviction for lewdness, and remanded for a new trial where the state was allowed to admit evidence of prior instances of lewd behavior under the doctrine of chances, over a Rule 403(b) objection. The court held that **the doctrine of chances can potentially apply to admit evidence of prior conduct to rebut a claim of the victim fabricating an event, but in order to prevent an end run around Rule 404(b), the court must evaluate whether the other acts evidence is material to a disputed issue; must properly evaluate the frequency of the other acts based on data, not intuition; and must consider whether Rule 403 requires exclusion of the evidence.**

Patterson v. State
2021 UT 52 (Aug. 25, 2021)

Analyzing a range of issues in this appeal of a post-conviction proceeding, **the supreme court recognized that it possesses constitutional authority to issue post-conviction extraordinary writs independent of the Post-Conviction Remedies Act and clarified the relationship between the writ authority and the PCRA.** The court further clarified the standards applicable to seeking relief based upon a purported violation of constitutional rights, which the petitioner failed to meet.

OPC v. Bowen
2021 UT 53 (Sept. 2, 2021)

Attorney used upfront flat fee agreements with clients that declared the fee was "earned upon payment," and deposited the retainers directly into his operating account. OPC sued attorney claiming the agreements violated Utah Rule of Professional Conduct 1.15(c), which requires fees paid in advance to be held in a trust account until earned. Attorney argued that the Rules of Professional Conduct "provide[] a safe harbor…to lawyers whose actions are 'in compliance' with an ethics opinion that has not been 'withdrawn.'"

While a previous case had not expressly withdrawn the ethics opinion Bowen relied upon, the court explained that "it does not seem to be that big a lift to ask attorneys who have a question about a rule of professional conduct to review [the court's] case law to see if [the court] ha[s] spoken about the rule" and if the supreme court's "interpretation clashes with…an ethics advisory opinion," the court's "interpretation controls."

UTAH COURT OF APPEALS

MNV Holdings v. 200 South
2021 UT App 76 (July 9, 2021)

This case involved whether a plaintiff could use different routes across the defendant's land to prove a prescriptive easement claim. The plaintiff argued that it used three routes continuously during that time, but the district court held that the plaintiff failed to show use of any one particular route for the requisite 20 years. The court of appeals reversed, explaining: **"under Utah law, a claimant's use of multiple distinct routes over the servient estate does not, by itself, operate to defeat the claimant's ability to meet the 'continuous'**

element of the prescriptive easement test. In such a situation, the court should analyze each claimed route on its own merits, and if the claimant can establish continuous use of at least one route for the requisite prescriptive period, then the continuity element will have been met for at least that route."

Thurston v. Block United LLC
2021 UT App 80 (July 22, 2021)

The court affirmed the district court's ruling enforcing a settlement agreement and dismissing the plaintiffs' amended complaint. The plaintiff had alleged that the settlement agreement was void due to fraudulent misrepresentation, but the court held that **the plaintiff waived the right to rescind the settlement agreement because he retained the settlement payment.**

State v. Ruiz
2021 UT App 94 (Sept. 2, 2021)

Odin, a drug detection K-9, leapt through a partially open window into the car during a drug sniff of the exterior of the car. Applying the test articulated by the Tenth Circuit, the court held Odin's entry was lawful. Under that test, **K-9s' entries into cars during an exterior sniff have been held lawful where "(1) the dog's leap into the car was instinctual rather than orchestrated and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or window, used by the dog."**

Vanlaningham v. Hart
2021 UT App 95 (Sept. 2, 2021)

The district court excluded plaintiff's special damages-related evidence from trial because her initial disclosure of a "specific sum" of $130,000 in special damages failed to provide "a mathematical computation" or the "methodology" behind the amount. On an interlocutory appeal, the court of appeals affirmed, holding that **a plaintiff disclosing a specific sum, without more, does "not provide a computation as required by rule 26(a)(1)(C)."** "Defendants were left to guess at the components of and how [plaintiff] calculated her $130,000 special damages claim."

10TH CIRCUIT

North Mill Street, LLC v. City of Aspen
6 F.4th 1216 (10th Cir. July 27, 2021)

In this regulatory taking case, the Tenth Circuit clarified that **the requirement that a claimant receive a final decision regarding application of the challenged regulation is strictly prudential.** That ripeness requirement, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), does not affect a federal district court's Article III jurisdiction over the claim.

Finlayson v. State
6 F.4th 1235 (10th Cir. July 28, 2021)

Joining sister circuits, the Tenth Circuit held that **dismissal for lack of prosecution under Utah Rule of Civil Procedure 41(b) of federal claims in state court qualified as a default under an independent and adequate state procedural rule,** thereby barring habeas review in federal court.

Hetronic International v. Hetronic Germany GmbH
10 F.4th 1016 (10th Cir. Aug. 24, 2021)

This case involved a Lanham Act claim with plaintiff asserting that defendant, a former distributor in Europe, was selling plaintiff's exact radio remote controls used to operate heavy-duty construction equipment. A jury awarded plaintiff $100 million in damages and the district court entered a worldwide injunction pursuant to the Lanham Act. In a case of first impression in the circuit, the Tenth Circuit held that **when the Lanham Act claim involves an American citizen, and "defendant's conduct has a substantial effect on U.S. commerce," the Lanham Act can apply to extraterritorially conduct** if applying the Act "would [not] create a conflict with trademark rights established under the relevant foreign law."

United States v. Koerber
10 F.4th 1083 (10th Cir. Aug. 26, 2021)

The Tenth Circuit affirmed the criminal conviction of the defendant on several charges over numerous challenges. Among other things, the court held as a matter of first impression that **when an indictment is dismissed with prejudice by the district court and the prejudice determination is reversed on appeal and remanded to the district court for a final determination, and the indictment is then dismissed without prejudice, the six-month rather than sixty-day provision of the savings statute, 18 U.S.C. § 3288, applies.** Interpreting that statute, the court held, "When the appellate court is responsible for a final dismissal of a case, the sixty-day limitation period applies; when the district court is responsible for a final dismissal of a case, the six-month provision applies."

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How Attorneys Can Help With The Legal Needs of Lower-Income Utahns

by Ben T. Welch

Valerie and Dennis live in rural Utah. They require full-time care, including specialized food that must be administered through feeding tubes. The cost of this food – approximately $700 per month – was paid for by Medicaid. Then one day, without notice, Medicaid announced that there was no "medical need" for liquid food and withdrew support. Desperate for help, the family turned to the Disability Law Center, which appointed an attorney to represent Valerie and Dennis. The attorney waded through medical records and even accompanied the family to meet with a nutritionist in order to prove that liquid food serves a "medical purpose." As a result, Medicaid eventually reversed its decision and resumed its support for Valerie and Dennis.

Jessie is a sixty-year-old woman who, after escaping a domestic violence situation, leased an apartment with her daughter. After the pandemic made life more difficult, Jessie was unable to pay rent but mistakenly thought she was automatically covered under COVID-19 eviction moratoriums. Jessie soon faced an order of restitution from her landlord. Jessie contacted Utah Legal Services, which assisted with coordinating rental assistance and filing a CDC moratorium declaration with the court. Although the landlord challenged the validity of her CDC declaration twice, the court ultimately found in Jessie's favor and Utah Legal Services subsequently negotiated with the landlord to accept rental assistance funds in exchange for a dismissal of the case. The dismissal resulted in waiving a potential judgment of late rent and treble damages of over $15,000 – an amount that would have destroyed this family who was already living far below the poverty line. More importantly, Jessie and her family were able to stay together in their apartment through the pandemic.

Mary was a young mother who had a two-year-old child and was pregnant with her second child. Her husband kept her isolated from her family and used violence and threats to control every aspect of her life, including how she dressed and ate and how often she talked to her parents. All phone calls went through him, and she was not allowed her own cell phone. Her family helped her contact Legal Aid Society of Salt Lake for help. The divorce proceeding that followed lasted almost two years, and her husband continued his threatening behavior throughout the case. Legal Aid Society successfully represented Mary in securing a protective order as well as a divorce decree granting her full custody of their children and financial support. Since then, Mary has gone back to school and now has a good job and a safe home for her family.

These are real stories of Utahns who have faced significant legal struggles. Because of social or financial limitations, however, these individuals did not have ready access to legal representation or even the means to pay for legal services. Were it not for non-profit legal services like the Disability Law Center, Utah Legal Services, or Legal Aid Society of Salt Lake – and many other non-profit organizations that provide no- or low-cost legal aid – these stories could have ended very differently, even tragically. Fortunately for Valerie, Dennis, Jessie, and Mary, they were able to find legal representation who intervened before it was too late. But many Utahns are not so lucky.

The Delta Of Legal Needs In Utah

In April 2020, the Utah Foundation, a non-profit research organization, released a report entitled *The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns.* Utah Foundation, *available at* https://utahbarfoundation.org/images/pdfs-doc/

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UBF_Justice_Gap_-_Full_Report.pdf. An executive summary of the report was included in the September/October 2020 edition of the *Utah Bar Journal*. *See The Justice Gap: Addressing the Unmet Legal Needs of Lower-Income Utahns*, 33 UTAH B.J. 36 (Sept./Oct. 2020). The *Utah Bar Journal* also has featured several excellent articles as part of an ongoing dialogue on various access-to-justice issues. However, as observed by both John Wooden ("Repetition is the key to learning") and Lil Wayne ("Repetition is the father of learning"), there is value in returning to the same well again and again whether you are thirsty or not. To that end, I would like to repeat several key findings outlined in *The Justice Gap* with an eye to truly understanding the problem before suggesting how members of the Bar can help.

The Justice Gap conducted a survey of the 26% of Utahns that live at or below 200% of the federal poverty line. Utah Foundation, *supra*, at 1. To put this in raw numbers, the federal poverty line in 2020 for a family or household of four was $26,200, in which case "lower-income Utahns" would be families whose annual collective income is 200% of that figure, or approximately $52,400. *Id*. at 1–2. According to *The Justice Gap*, 69% of the lower-income Utahns surveyed for the report indicated that they could not afford a lawyer if they needed one, and 52% said that if confronted with a legal problem they would attempt to solve that problem on their own. *Id*. at 4.

The numbers bear this out. *The Justice Gap* reported in 2019 that there were just over 100,000 civil cases in the Utah State Court system. *Id*. Of those 100,000 cases, more than 62,000 were for debt collection. *Id*. In these collection cases, nearly 100% of the plaintiffs were represented by counsel as compared with only 2% of defendants. *Id*. The same was true for the 14,000 eviction cases in 2019, in which 90% of plaintiffs were represented by counsel as compared with only 5% of defendants. *Id*. Combined, this means that for 76% of all civil cases in 2019 (comprising just the debt collection and eviction cases), virtually none of the defendants had the benefit of trained legal counsel. *See id*. These figures do not account for the hundreds, if not thousands, of other civil cases in which pro se litigants were left to fend for themselves in obtaining or defending a protective order, filing for divorce, dealing with an immigration issue, or managing a wage claim, to name but a few.

Although the price of legal services was one factor that led lower-income Utahns from seeking legal representation, it was not the only factor. According to the Futures Commission of the Utah State Bar, many people simply did not see the need to obtain legal counsel or did not understand how legal counsel would benefit them. *Id*. at 5. Some struggled with language barriers. *Id*. Others simply did not know how to connect with attorneys (this is especially true in rural parts of the state where attorneys are less common) and instead relied on whatever information they could find online to solve their legal problems. *Id*.

Regardless of the reasons, the sobering reality is that there is a substantial number of lower-income Utahns who are dealing with legal problems without the benefit of an attorney. Thanks to Herculean efforts of the Disability Law Center, Utah Legal Services, Legal Aid Society of Salt Lake, the Utah State Bar, and many other selfless organizations and individuals, just over 40,000 lower-income Utahns obtained some form of legal aid in 2019. *Id*. at 23. Those efforts and victories deserve to be recognized and celebrated. Unfortunately, *The Justice Gap* estimates that lower-income Utahns may have as many as ***240,000 legal problems*** – in which case only one in six legal problems faced by lower-income Utahns are being managed by existing organizations given their current size and staffing. *See id*. As such, there is still significant need for legal assistance among lower-income Utahns, who comprise some of our most vulnerable citizens, not to mention our friends and neighbors.

What Can I Do?

As a member of the Utah State Bar, I am very familiar with Rule 6.1 of the Utah Rules of Professional Conduct, which states that every lawyer should "aspire to render at least fifty hours of pro bono publico legal services per year." (Indeed, I am reminded of this obligation each year when I renew my license.) I, like many, have had years when these aspirations have been reached and other years when, for one reason or another, my efforts have been wanting. Early in my career, in thinking about pro bono opportunities, I fretted about my relative experience (or rather lack thereof) in certain areas of need. In short, I wanted to avoid the "blind leading the blind" scenario. Further, I was unaware – and did not educate myself – of different pro bono opportunities in the community; rather, I waited until they walked through the front door (and many did). To the extent that others share these concerns, or have at one time or another, let me offer three suggestions of how members of the Bar can take a more mindful approach to reaching our aspirational goal of performing pro bono publico legal services.

First, become more familiar with local services and organizations that are providing pro bono publico legal services in Utah. There are more than a dozen mentioned in *The Justice Gap*, along with descriptions of the type of work they do and many success stories. Utah Foundation, *supra*, at 11–17. As you become more familiar with different services and organizations, you will find issues that are meaningful to you as well as individuals and causes that inspire you. At the very least, you will become more familiar with available services, which in turn will help you make educated referrals to those in your circle who you may feel are outside of your ability to help. Indeed, in many instances the best legal work you can perform is finding the right person for the job.

Second, as you find a service or organization dealing with an issue that inspires you, or which you feel motivated to support, consider reaching out to that organization to learn what you can do to help. Although most organizations favor using their own staff attorneys to perform legal services for obvious reasons, there are opportunities to assist with cases on a limited basis (typically under the direction of a staff attorney), which in turn will help develop or refine your expertise and make it easier to assist in similar matters in the future. To find out more about volunteer pro bono opportunities, please reach out to "and Justice for all" Executive Director, Staci Duke, at (801) 924-3182.

Third – and perhaps most importantly – consider making a donation. As set forth in Rule 6.1(c), in lieu of personally rendering pro bono publico legal services, an attorney may also discharge that responsibility by making a contribution of $10 per hour (for each hour not personally performed) to an agency that provides direct services to (1) "persons of limited means" or (2) "charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means." Utah R. Pro. Conduct 6.1. These donations are vital in not only maintaining existing services but also expanding their reach. There are dozens of worthy causes that rely on the generosity of private donors to meet their annual budgetary needs. Among them is "and Justice for all," which is currently launching a new three-year, $2.5 million "Next Generation" campaign to invest in the people, resources, and technology needed to serve more clients in a post-pandemic world.

These are just a few suggestions. To those who are already diligently contributing their time and other resources to various pro bono causes, I express my gratitude and admiration. Keep up the good work. To those of us, like myself, who occasionally fall short of the mark, I express my hope that we will all do a little better so that we can notch a few more victories like the ones achieved for Valerie, Dennis, Jessie, and Mary, thereby narrowing the justice gap among those who need it most and ensuring that the credo "and Justice for all" is not merely an aspiration, but a reality.

Navigating Changes to European Union Data Privacy

by Rachel Naegeli and Robert Snyder

Over the past several years, U.S. companies that process the personal data of individuals in the European Economic Area (EEA) have faced a confusing maze of changing data privacy regulations. The EEA, which includes the twenty-seven Europeon Union (EU) countries plus Norway, Iceland, and Liechtenstein, is home to millions of consumers. If you are counsel to a client that sells products or services to individuals in the EEA, you may have helped your client jump through all the hoops or you might instead have suggested they purposely hang back, hoping some of the obstacles on the path to compliance would eventually clear. Regardless of your prior approach, recent developments in the data privacy law of the European Union illuminate a clearer path forward to data privacy law compliance, which should be welcome news to your clients. For most U.S.-based companies, compliance efforts will hinge on the implementation of new Standard Contractual Clauses (SCCs) adopted by the European Commission in June 2021. This article provides background on the SCCs and tips on helping your clients comply with the latest guidance on data transfers, including implementing the new SCCs.

Background: The Story of the SCCs

First, let's briefly review the background of the SCCs so you can understand why they have become crucial to data privacy law compliance. Like a play, this history has three acts that need to be understood.

Act 1: Europe's Data Privacy Regime.

Under EU law, privacy is a fundamental human right. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8 (1950). Because of this conviction, the EU has long set a high legal standard for data privacy. In 1995, the EU Data Protection Directive was adopted, providing the foundation for EU data privacy law for more than fifteen years. To help ensure that companies couldn't get around the EU's data privacy laws by transferring personal data to an individual or company outside of the EU, the European Commission established rules for international data transfers. For transfers to be legal, the data had to be afforded the same level of protection guaranteed in the EU. If the destination country had adequately strict laws, then the transfers could take place. Directive of the European Parliament and of the Council 95/46/EC, 23/11/1995 O.J. (L 281), 31–50.

Entities transferring EEA personal data to countries whose data protection regimes did not comply with the EU Data Protection Directive were required to take additional steps to protect the data. One acceptable step was to enter into binding contractual arrangements that met strict standards set by the European Commission. To make sure such contracts contained adequate protections, the European Commission drafted "Standard Contractual Clauses" to provide an international data transfer mechanism that complied with the requirements of the European Data Protection Directive, and on which companies could rely as a legitimate basis for their transfer of personal data. The European Commission's first SCCs were adopted in 2001. The SCCs were revised in 2002, 2004, and 2010.

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Act 2: The U.S.-EU Data Privacy Relationship.

The relationship between the U.S. and the EU on data privacy matters has been unstable. In 2000, the European Commission determined that the United States data privacy principles sufficiently complied with the EU Data Protection Directive. This "Safe Harbor" decision allowed for personal data to flow from the EEA to the U.S. Between the early 2000s and 2015, most U.S. companies transferring or receiving EEA data simply included a statement in their data transfer agreements or privacy policies providing assurances that the companies would abide by the Safe Harbor principles. All of that changed in 2015.

Following Edward Snowden's revelations suggesting U.S. intelligence agencies could access individuals' personal data stored in the U.S., an individual in Ireland named Maximillian Schrems objected to the transfer of his personal data to the U.S. by Facebook. That data transfer took place under the Safe Harbor framework. Mr. Schrems requested the Irish Data Protection Commissioner investigate his complaint. When it refused, Max Schrems challenged the refusal in court. In 2015, the Court of Justice of the European Union determined that the U.S. no longer provided adequate protection for personal data and struck down the Safe Harbor decision. Case C-362/14, *Schrems v. Data Prot. Comm'n*, ECLI:EU:C:2015:650.

The U.S. Department of Commerce scrambled to provide a solution that would allow personal data to continue to flow from the EU to the U.S. This effort led to the establishment of the EU-U.S. Privacy Shield, which allowed companies to transfer data from the EEA to the U.S. under certain conditions. Privacy Shield members had to prove that their privacy policies met certain standards, agree to be accountable to both the U.S. Department of Commerce and the European Union Data Protection Authorities, and provide an independent recourse mechanism for EEA data subjects who believed their personal data had been mishandled.

The establishment of the Privacy Shield provided brief calm in the EU-U.S. data privacy relationship. The EU General Data Protection Regulation (GDPR) came into force in 2018, replacing the old Data Protection Directive, but the SCCs remained valid, as did the Privacy Shield. While the old SCCs did not fit perfectly under GDPR (especially for data exporters outside the EU, like many Utah businesses), they were generally considered an acceptable mechanism for providing adequate protection of personal data. International Trade Admin., Privacy Shield Framework, https://www.privacyshield.gov/Program-Overview (last visited July 29, 2021).

Act 3: Schrems II and its Fallout.

The climax of this data privacy legal drama occurred last July. In July 2020, the Court of Justice of the European Union decided a case known as Schrems II, which suddenly invalidated the EU-U.S. Privacy Shield, forcing companies to look for another mechanism to legitimize their cross-border data transfers. Case C-311/18, *Data Prot. Comm'n v. Facebook Ireland Ltd*, ECLI:EU:C:2020:559, ¶ 201. To further complicate the legal environment surrounding EU-U.S. data transfers, Schrems II even called into question the adequacy of the SCCs themselves, putting many companies in the uncomfortable position of relying on an already imperfect mechanism in the face of the Court of Justice's criticism. *Id.* ¶ 129.

Many companies jumped through every hoop to keep from running afoul of EU data privacy laws during that saga. If your client was one of those companies, you likely spent the intervening months hoping the European Commission would act with haste to address the Court of Justice's concerns and provide an updated mechanism for transferring personal data out of the EEA in keeping with GDPR.

The wait was finally rewarded on June 4, 2021, when the European

Commission published its long-awaited revisions to SCCs, bringing them in line with the GDPR and providing a path forward for organizations that had relied on the Privacy Shield. Commission Implementing Decision 2021/914, 2021 O.J. (L 199/31) 1.

Two weeks later, on June 18, 2021, the European Data Protection Board (EDPB) provided essential guidance on the use of the new SCCs by adopting its final recommendations on supplemental measures. Data privacy lawyers everywhere hope the new SCCs and the EDPB guidance form the denouement of the EU-U.S. data privacy drama.

That background study finally brings us to today. Organizations had until September 27, 2021, to begin using the new SCCs in new agreements. Commission Implementing Decision 2021/914, art. 4, 2021 O.J. (L 199/31) 6. For existing agreements, organizations have a grace period until December 27, 2022, to make revisions. *Id*.

So, what does the tale of the SCCs mean for you and your clients? If your clients are transferring or receiving data from the EU, you will need to assist them with putting new SCCs in place. The new SCCs replace the previous SCCs on which your client might have relied in the past. Your clients will need to begin using the SCCs in new agreements immediately and will have to incorporate them into existing agreements by the end of 2022. If your client was a Privacy Shield member or never took any steps to comply with EU law, these SCCs are for them too. Together, the issuance of new SCCs and the publication of EDPB guidance will impact how your clients and their affiliates can transfer personal data from and outside of the EEA.

The remainder of this article explains the key changes made by the new SCCs and briefly outlines a phased approach for their implementation.

Key Changes

Adequacy

The EDPB's guidance coupled with the new SCCs establish measures that adequately protect personal data. Under the EDPB's June 2021 guidance, parties must guarantee that the data importer can fulfill its SCC obligations under the country's laws where the importation will occur. The analysis involves a risk-based approach that requires the parties to document (1) the data transfer specifics, (2) the destination country's laws and practices, and (3) additional safeguards the parties decide to implement. EDPB Recommendations 01/2020 on Measures that Supplement Transfer Tools to Ensure Compliance with the EU Level of Protection of Personal Data (June 18, 2021), 10–19, 21–23.

In addition, the new SCCs address supplemental security measures and require additional assessments for cross-border data transfers. In particular, organizations are required to conduct a transfer impact assessment to evaluate the protections for personal data in the importing countries. Commission Implementing Decision 2021/914, 2021 O.J. (L 199/31) Recital 20.

The SCCs also require the data importer to notify the data exporter of any government access requests. When the country of import bars such notifications, the data importer must make every effort to obtain a waiver of the prohibition. Data importers must assess whether they can legally challenge the government request for data. *Id*. at Recital 22.

Customization

The new SCCs allow for customization of data transfer agreements by providing four modules of clauses that can be used in various combinations as determined by the relevant data export scenario: transfer controller to controller (Module 1), transfer controller to processor (Module 2), transfer processor to processor (Module 3), and transfer processor to controller (Module 4). This breadth of transfer scenarios creates flexibility and adaptability that is appropriate for today's multi-national business relationships and data flows in three key ways. The new SCCs anticipate use by data exporters established outside the EU. The new SCCs facilitate multi-party use by including an optional docking clause, which allows additional organizations to subscribe to the clauses. Finally, the new SCCs contemplate parties' ability to choose, in some instances, the governing law and jurisdiction of any EU member state.

New Template for Data Processing Agreements to Satisfy Article 28

The new SCCs include all GDPR Article 28 processor terms and therefore comprise a template data processing agreement, sufficient to meet the requirements of GDPR Article 28. In the past, companies negotiated their own customized data processing agreements, which were subject to scrutiny. You may have drafted a standard data processing agreement template that your client has been using. While your client is not obligated to switch and use this specific form going forward, the approved form meets the GDPR Article 28 requirements and will not be subject to challenge. Thus, you and your client should discuss replacing the old data processing agreement with the SCCs to avoid future hassles.

Adopting the New SCCs and Acting on EDPB Guidance

The following is a phased approach you can take with your clients to help them comply with the new European data privacy developments.

General Steps to Undertake Now

1. Review existing contracts to determine where SCCs are currently used. The old SCCs will need to be replaced with the new set before the grace period ends in December 2022.

2. Review data mapping (or undertake new data mapping exercises) to determine the role your client plays in the various relationships (controller, processor, etc.). If your client has been using old SCCs that did not accommodate the various combinations of relationships that exist in modern data transfer scenarios, it is important that your client and your client's affiliates review their respective roles and implement more customized SCCs as appropriate. You need to help your client know whether it plays the role of data processor or data controller and when.

3. Conduct a transfer impact assessment. The new SCCs and EDPB guidance require that organizations conduct a transfer impact assessment and document the following matters:

   - the circumstances of the transfer;
   - the governing laws of the importing country;
   - the likelihood of the data being subject to such requests; and
   - the supplemental security measures that the parties will adopt to protect against unwanted disclosure of the personal data.

   Commission Implementing Decision 2021/914, 2021 O.J. (L 199/31) Recital 20.

4. Determine whether supplementary privacy and security measures are required for current activities. Because a data exporter is ultimately responsible for assessing the transfers it initiates – regardless of whether the exporter is a processor or a controller – the exporter must (a) assess and understand the laws of the importing country, and (b) determine whether (i) such laws afford the personal data a level of protection that are essentially equivalent to those that the GDPR provides or (ii) if additional technical, organizational, or contractual measures may need to be taken. In addition to the obligations placed on exporters, Clause fourteen of the new SCCs requires that all parties warrant that they have no reason to believe that the laws and practices in the country of import prevent the data importer from fulfilling its obligations under the SCCs.

5. Update and review policies and procedures. The new SCCs and EDPB guidance may require your clients or their affiliates to respond to requests from law enforcement and other government entities. Thus, existing policies and

procedures may need to be updated to provide guidance for such situations.

Steps for Entering Into New Agreements

By the publication of this article, the deadline to begin using SCCs in new agreements will have passed. On September 27, 2021, three months after the new SCCs went into effect, the old SCCs were officially considered repealed and invalid for use in new agreements. All new agreements need to incorporate the new SCCs. Don't forget to check your form exhibits and attachments!

1. Replace old SCCs. Your client should update any form data processing addenda and agreements that incorporate the old SCCs with the new SCCs. Because the structure of the SCCs has changed as discussed previously, many different permutations of the form agreements may be needed. You should help your client select the correct modules of the new SCCs and remove the modules that do not apply to the contemplated processing activities.

2. Replace old form data processing agreements. Your client should consider replacing old template/form data processing agreements with the new clauses to avoid possible legal challenges.

3. Conduct transfer impact assessment. Prior to entering into new agreements that involve the transfer of data out of the EEA, your client should conduct transfer impact assessments and determine whether supplementary privacy and security measures are required for contemplated activity (see steps three and four under General Steps to Undertake Now, above.)

Steps for Updating Existing Agreements (by December 2022)

1. Review data mapping and transfer impact assessments to determine the appropriate modules to use, adequacy of data protection provided, and whether supplementary measures should be put in place.

2. Update current data processing agreements and replace old SCCs with new SCCs (as described previously) in current agreements. Such agreements may include vendor/third party agreements, intercompany agreements, and onward transfer agreements.

In conclusion, U.S. companies that process EEA personal data finally have a clearer path to data privacy compliance than the confusing maze of changing data privacy regulations that characterized the EU-U.S. data transfer rules for the past several years. For most U.S.-based companies, compliance efforts will now hinge on implementing new SCCs that were adopted by the European Commission in June 2021. Now that you know the story of the SCCs, you understand how important they are to your clients that process EEA personal data. We trust the tips and suggestions included in this article will assist you as you lead your clients' efforts to implement the new SCCs into their data transfer agreements and comply with the latest guidance on data transfers.

* * *

SCC for data transfers between EEA and non-EEA countries are available here: Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on Standard Contractual Clauses for the Transfer of Personal Data to Third Countries Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (Text with EEA relevance), https://eur-lex.europa.eu/eli/dec_impl/2021/914/oj?uri=CELEX%3A32021D0914&locale=en.

The EDPB recommendations discussed above are available here: https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasure-stransferstools_en.pdf.

Mindhunter

by John Douglas and Mark Olshaker

Reviewed by Nicholas C. Mills

John Douglas and Mark Olshaker start their book *Mindhunter* with a prologue that immediately sucks a reader in while simultaneously setting forth sensationalized accounts of serial killers. This puzzling dichotomy continues throughout the book, leaving readers bewildered at whether to praise or condemn the book. For criminal justice scholars and practitioners, the book offers little more than a biography of one of the fathers of criminal profiling. That said, for the lay audience, the book offers a view into the violence and trauma inflicted by serial killers. Douglas is certainly qualified to write this book. He is a retired FBI special agent and former Unit Chief of the Investigative Support Unit at Quantico. He helped create the crime classification manual and helped to pioneer the concept of criminal profiling. Olshaker seems to have been brought in due to his literary skills. The back cover touts Olshaker as a novelist, nonfiction author, and award-winning filmmaker. This review will discuss the intended audience, the author's writing style, the positives and negatives of the book, some alternative books that an interested reader may consider, and finally, this author's opinion on the book.

Mindhunter:
Inside the FBI's Elite Serial Crime Unit

by John Douglas and Mark Olshaker

Publisher: Gallery Books;
Media Tie-In edition (2017)

Pages: 448

Available in paperback, ebook, and audiobook editions

Mindhunter seems clearly written to entertain a lay audience. By lay audience, I mean those that are not criminal justice scholars or practitioners. The book – resurging in popularity due to its adaptation into a recent Netflix series – is the type of book, for better or worse, that travelers would pick up in an airport bookshop and read during their travels. Assuming that Douglas and Olshaker intended this to be their audience, the book does a wonderful job of describing the horrific atrocities Douglas encountered, while keeping it tame enough for a general audience. *Mindhunter* performs admirably in giving people at cocktail parties talking points to keep the conversation "spicy"; however, the book unfortunately fell short of breaking new ground academically or engaging in any kind of thought-provoking reflection. Douglas and Olshaker regurgitate an "us versus them" mentality when it comes to serial killers. Most of the killers discussed in this book are devoid of any characteristics beyond evil and sadism. This seems to be an oversimplification of extremely complex offenders who are motivated by a variety of personal, familial, cultural, and health-related factors.

The book spends the first four chapters giving a biographical sketch of Douglas's career prior to his profiling days. Beginning in chapter five, Douglas starts discussing profiling and the behavioral science section at the FBI. Candidly, the writing is somewhat repetitive. The first four chapters repeatedly relate some particular event in Douglas's life, explain how he overcame it through sheer luck or his own superior intelligence, and typically go on to discuss some aspect of a sexual escapade. For example, at one point in the book, Douglas recounts a time his mother questioned him about his virginity while eating out and another time where he embarrassed his fiancé by implying on a crowded elevator that the fiancé, Douglas, and another FBI agent had just had sex. It changes to a slightly different formula from chapter five to chapter eighteen. There, the chapters start with a description of

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the crime and a description of how local agencies struggled to solve the crime; then Douglas is called in, he creates a profile, and a horrific crime is solved. This pattern repeats until chapter eighteen, when the book makes a dramatic switch in tone. Suddenly, in chapters eighteen and nineteen, Douglas and Olshaker put together two chapters that really end the book on a high note. The book briefly becomes much more provocative, challenging readers to confront issues of crime and mental health, raising questions of the appropriateness of extended incarceration, and dealing with the troubling fact that some offenders' diabolical schemes work. If a reader puts this book down out of boredom from the repetition before chapters eighteen and nineteen, they will have missed the real value in the book. Unfortunately, Douglas and Olshaker feel it necessary to inflict a heavy dose of the FBI's savior complex (in Douglas's account, local cops frequently appear well intentioned but clueless) and Douglas's own eternal hubris (early in chapter nine, he directly compares himself to Sherlock Holmes).

While the book was not great, it did have several excellent points. First, the book recounts the "war stories" of some of the biggest serial murder investigations of the twentieth century. A reader cannot help but learn some very interesting information as Douglas expounds on his experiences. For example, Douglas does an outstanding job of explaining the differences between modus operandi and signatures, and posing and staging victims. These are difficult terms to comprehend because of the fluid nature of offenders' behaviors. *See, e.g.*, Robert R. Hazelwood & Janet I. Warren, *Linkage Analysis: Modus Operandi, Ritual, and Signature in Serial Sexual Crime*, 8 Aggression and Violent Behav. 587, 588–98 (2003). Nevertheless, Douglas discusses and explains these concepts in a very pragmatic, understandable way. While this discussion did not elevate this book to the top of the reading list, it would certainly justify reading this book as part of a professional development course for detectives or patrol officers.

For those interested in criminological theory, Douglas compellingly argues throughout the book for the effectiveness of deterrence and rational choice theory. Deterrence and rational choice theory argue that people make informed choices in an effort to maximize their gratification while minimizing their agony. *See, e.g.*, Ross L. Matsueda, Derek A. Kreager, & David Huizinga, *Deterring Delinquents: A Rational Choice Model of Theft and Violence*, 7 Am. Soc. Rvw., 95–122 (2006) (providing an overview of rational choice criminological theory). Douglas appears to agree with these criminal justice theorists. He

persuasively explains in chapter nine that criminals rarely commit crimes when they perceive that the circumstances will not allow them to be successful. Moreover, later, in chapter eighteen, he describes how offenders may be mentally ill, but they act to satisfy their desires (abnormal as they may be).

Finally, in their concluding chapter, Douglas and Olshaker also share some powerful, pragmatic, and personal insights that were refreshingly upbeat and candid. They argue that we should not tolerate crime that we see being perpetrated by or on our family and friends. They argue that crime control is inherently a grass roots efforts most effectively averted *before* rather than sanctioned *after*. In short, they conclude that in order for there to be widespread change, the world needs more care and compassion – more love.

Unfortunately, the book suffered from some very serious – arguably unforgiveable – shortcomings. These shortcomings seemed to be the result of an effort to make the book more exciting and interesting. First, there are some factual errors that the book made. Next, there is a failure to explain how a criminal profile is generated. Finally, Douglas and Olshaker lamentably reinforce a sensationalized view of crime throughout the book.

The most troubling aspect of the book was that Douglas and Olshaker occasionally make claims that are simply untrue. For instance, they state early in the book that the murder rate has been going up (page eighteen). This is plainly inaccurate. When this book was originally published in 1995, murder rates were trending downward (and had been since 1991) and were at approximately the lowest level they had been in twenty-five years. Alfred Blumstein et al., *The Rise and Decline of Homicide – and Why*, 21 Ann. Rvw. of Pub. Health 505, 506–12 (2000). Eric W. Hickey notes that this trend has continued, leading to murder rates being at a forty-year low. Serial Murderers and Their Victims 466 (Cengage Learning 2016) (2013). Again, on page eighteen, Douglas and Olshaker state "it used to be that most crime, particularly . . . violent crime, happened between people who in some way knew each other." That strongly implies that violent crime is now largely stranger on stranger. Again, this implication is just false. Hickey notes that serial victimization is changing where fewer strangers are being targeted in favor of more family members. *Id*. at 336. These allegations early in the book taint the reliability of what follows. This is particularly troubling for a person who professes to be a modern-day Sherlock Holmes. Holmes would likely have no appetite for the hyperbolic and occasionally inaccurate methods employed by Douglas and Olshaker.

For serious students of criminal justice, these untrue statements create a conundrum that is difficult to reconcile. On the one hand, it appears that the authors' lack of adherence to facts leaves room for improvement. On the other hand, Douglas's credentials and experience make him too interesting to dismiss out of hand. Unfortunately, the reader is left wondering what facts have been altered in the rest of the book to fit the narrative that the authors want to portray. While the inaccurate statements made above are certainly fine in a fictional account, where both author and reader agree to those terms, this book purports to be largely autobiographical. Therefore, they cannot be overlooked.

Another disconcerting aspect of this book is that it spends a lot of time discussing the profiles that they came up with, but very little time explaining how this can be done. It seems that the authors did this intentionally to maintain the mystique and allure of criminal profiling. It is as though the authors have adopted the motto of the illusionist: "a magician never reveals his secrets." *Mindhunter* is written to depict Douglas as some sort of law enforcement wizard: a policeified Gandalf, quested with solving the nation's most vexing crimes. This creates two problems. First, as mentioned earlier, the book becomes repetitive, in spite of the fact that it is dealing with incredibly compelling criminal acts. Second, the reader consistently struggles to predict how or why Douglas developed the profile that he did. The reader also is given no context – no hard data – to determine why local law enforcement should believe Douglas. Granted, this book appears to have been written for a general audience. But even acknowledging that, the book's approach leaves readers focused on Douglas's accomplishments at the expense of understanding anything beyond the most rudimentary aspects of criminal profiling. Experts have noted problems with the FBI's profiling by claiming that the created profiles are more hunch than science. David Canter, *Offender Profiling and Criminal Differentiation*, 5 Legal & Criminological Psychol. 23, 25–27 (2000). In the end, this book is not really a view inside the FBI's profiling unit. Instead, it feels like a self-congratulatory narrative of Douglas's career.

The book was also disconcerting because it reinforced a sensationalized view of crime. The prologue begins with a hallucination (perhaps it's manufactured entirely out of whole cloth for dramatic effect in the book) recitation of Douglas being violently victimized. But this victimization is an amalgamated version of the worst and most vile actions that serial killers have taken. This violent fantasy continued without context for several pages before ending abruptly. This prologue set a very fancifully violent tone. Douglas and Olshaker make serial murderers seem very common, and they showcase some of these offenders' most violent acts. This is problematic for many reasons. This author will highlight two of those numerous reasons. First, this approach

leaves the reader – particularly a reader unfamiliar with crime trends – under the impression that a serial killer is lurking around every corner. In reality, serial killers are extremely rare. Scholars note that even with the FBI reducing the required number of victims from three to two to count as serial murder, the number of serial killers seems to have decreased. Enzo Yaksic et al., *Detecting a Decline in Serial Homicide: Have we Banished the Devil from the Details?* 5 Cogent Soc. Sci. 1, 4 (2019). These researchers have labeled this a "precipitous decline." *Id*. The writing style of this book seems to reinforce and exploit common misconceptions about the dangers posed by serial killers to the general population. Second, the book contributes to the problem of romanticizing serial killers. By casting Douglas as a modern day Sherlock Holmes, the authors have implicitly elevated serial killers to Moriarty status. Shedding this celebrity status on serial killers trivializes them at best, and, at worst, may lead to increased offending. Scholars have argued that mass media, like this book, allow serial killers to enjoy celebrity status and the media are incentivized to exploit this vicious cycle for their own benefit. Kevin D. Haggerty, *Modern Serial Killers*, Crime, Media, Culture: An Int'l J. 168, 173–75 (2009). While not a concern about the effects of the book, the prologue also created a disjointed feel for the book. The authors do not return to the account in the prologue until very late in the book. Even then, it feels as though returning to it was an afterthought inserted merely to justify the grisly fantasy introduced earlier.

If the reader is serious about deeply studying criminal justice, this is not the book. Those looking for a decently entertaining book would be satisfied, but they would likely be equally satisfied with a book that was entirely fiction. Unfortunately, many other crime books are far superior for the general audience. The following books paint a more accurate picture of crime or police work while still maintaining a less academic feel. This author would recommend Philip Carlo's *The Ice Man* for general readers interested in the grisly accounts of a serial killer. *Turnaround* by William Bratton is a much more interesting read for those curious about crime control and police operations. For those interested in a more academic account of crime that still maintains much of the general readability, this author suggests Jeffrey Reiman's *The Rich Get Richer and the Poor Get Prison* or Paul Cromwell's *In Their Own Words*. Cromwell's book is particularly interesting as it relates how and why criminals commit their crimes from their own accounts.

In conclusion, *Mindhunter* is a decent book that accomplished what its authors likely intended: making themselves money. That is not an insult to the authors or meant to be an implication that they were greedy, but it is clear that the book was written to entertain and not to inform. If you are interested in criminal profiling, sociology, or a serious study of serial murder, this should not be your top choice. Eric W. Hickey's *Serial Murderers and Their Victims* or Cullen, Agnew, and Wilcox's *Criminological Theory* are better suited for those interested in serial murder and sociological issues. But if you find yourself in an airport in, say, Omaha looking for an interesting book to read during your next business trip, perhaps pick it up. *Mindhunter* will certainly scratch that true-crime-slightly-macabre itch that has been festering. And when you finish the book, you will have something interesting to talk about at your next social gathering.

There's a Shark in the "Safe Harbor"!

by Keith A. Call

"Just when you thought it was safe to go back in the water…"

– Peter Benchly, *Jaws*

The Utah Supreme Court Rules of Practice provides an ethics safe harbor for lawyers whose conduct complies with an ethics advisory opinion. Recently, however, the Utah Supreme Court issued an opinion that puts Utah lawyers on notice that the safe harbor may not be as safe as they previously thought.

What Are Ethics Advisory Opinions?

The Ethics Advisory Opinion Committee (EAOC) is a standing committee of the Utah State Bar. It answers requests for ethics advisory opinions related to the practice of law. *See Office of Professional Conduct v. Bowen* (*In re Discipline of Bowen*), 2021 UT 53, ¶ 24 n.5, — P.3d —. *Rules Governing the Ethics Advisory Opinion Committee*, *available at* https://www.utahbar.org/rules-governing-eaoc/ (last visited Sept. 27, 2021). The EAOC is comprised of fourteen voting members, who are active Bar members. These members are appointed by the Bar President, a Bar Commissioner, and the EAOC Chair. *See Ethics Advisory Opinion Committee Rules of Procedure*, *available at* https://www.utahbar.org/eaoc-rules-procedure/ (last visited Sept. 27, 2021).

The EAOC typically issues a handful of advisory opinions each year, responding to ethical questions it receives. EAOC opinions can be viewed on the internet at https://www.utahbar.org/eaoc-opinion-archives/ (last visited Sept. 28, 2021). EAOC opinions can be useful tools in determining whether lawyer conduct complies with the Rules of Professional Conduct. Over 250 EAOC opinions are currently published on the Bar's website. Topics are wide ranging, and include opinions on such things as attorney-client relationships, conflicts of interest, fees, and trust accounts.

What Is the Safe Harbor?

There is some natural tension between the EAOC and the courts. Of course, the Utah Supreme Court has a constitutional mandate to "govern the practice of law," including "discipline of persons admitted to practice law." Utah Const. art. VIII, § 4. This begs the question of what effect an ethics opinion of fourteen members of Bar, appointed by the Bar, can really have. The supreme court has not hesitated to flex its muscles in this arena. For example, in *Sorensen v. Barbuto*, 2008 UT 8, ¶¶ 26–28, 177 P.3d 614, the supreme court expressly "vacated" EAOC Opinion No. 99-03, which had opined that it was okay for a defense lawyer to have *ex parte* contact with a personal injury litigant's treating physician.

The Supreme Court Rules of Practice address this tension by providing a "safe harbor" for conduct that complies with an EAOC opinion. Under *former* Rule 14-504(d), a lawyer's conduct fell within the safe harbor if his or her conduct was "expressly approved" by an EAOC opinion. *See* Sup. Ct. R. Pro. Prac. 14-504(d) (March 5, 2012). That rule was amended in 2012 to provide broader safe harbor protection. The current safe harbor rule states:

> The OPC may not prosecute a Utah lawyer for conduct that complies 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 Rules of Professional Conduct or Licensed Paralegal Practitioner Rules of Professional Conduct.

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Sup. Ct. R. Pro. Prac. 11-522(a). While the former rule required "express approval" for the safe harbor provisions to apply, the current rule provides safe harbor protection for "implicit approval." "Implicit approval requires only that the ethics advisory opinion could be reasonably read to endorse the lawyer's conduct." *Bowen*, 2021 UT 53, ¶ 62. If an EAOC opinion expressly or implicitly approves the conduct and has not been withdrawn, the OPC may not prosecute the lawyer for such conduct, thus providing a "safe harbor" for the lawyer.

Beware of Sharks!

Under a recent Utah Supreme Court decision, however, serious danger lurks in the harbor. In *Bowen*, a three-justice majority opinion latched onto the "has not been withdrawn" language of the safe harbor rule to hold a lawyer was subject to discipline for conduct that complied with an EAOC opinion because the EAOC's interpretation of the relevant Rule of Professional Conduct had previously been rejected by the court. The court concluded that a lawyer's reliance on EAOC Opinion 136 was unreasonable because of the supreme court's decision in *Utah State Bar v. Jardine* (*In re Discipline of Jardine*), 2012 UT 67, 289 P.3d 516. *See Bowen*, 2021 UT 53, ¶¶ 57, 63. In other words, if the court has rejected the EAOC's interpretation of a Rule of Professional Conduct, a lawyer will no longer be entitled to safe harbor protection under the EAOC opinion.

The real danger is that a lawyer may not know an EAOC opinion has been "withdrawn" or otherwise rejected, and it can be difficult to tell. For example, you can read EOAC Opinion 136 on the Bar's website and on Westlaw without seeing any indication that EOAC's opinion on when a lawyer's retainer may be considered "earned" and deposited into the lawyer's operating account has been "withdrawn" or in any way compromised. *See* Utah Eth. Op. 136, 1993 WL 755253 (1993); *id.*, https://www.utahbar.org/wp-content/uploads/2017/12/1993-136.pdf (last visited Sept. 28, 2021). There is no red flag or other indication that these opinions have been rejected by the Utah Supreme Court. The same is true for EOAC Opinion 99-03, which the supreme court expressly "vacated" in *Sorensen*, 2008 UT 8, ¶¶ 26–28. *See* Utah Ethics Op. 99-03, 1999 WL 396999 (1999); *id.* https://www.utahbar.org/wp-content/uploads/2017/12/1999-03.pdf (last visited Sept. 29, 2021). Even more alarming is the fact that you can read the *Jardine* decision and not understand that the supreme court "withdrew" or otherwise overruled Opinion 136. *See Jardine*, 2012 UT 67, ¶¶ 40–43, 52–53.

In a dissenting opinion, Chief Justice Durrant balked at the majority's conclusion. He pointed out some of the challenges for Utah lawyers in determining when an EAOC opinion has been withdrawn. With specific reference to Opinion 136 and the *Jardine* decision, he stated, "[W]e did not explicitly withdraw Opinion 136 in *Jardine*, we endorsed it, and it remains available to the public in its original form." *Office of Professional Conduct v. Bowen (In re Discipline of Bowen)*, 2021 UT 53, ¶ 90 (Durrant, C.J., concurring in part and dissenting in part). In a separate opinion, Justice Lee also noted that "*Jardine* neither contradicted nor implicitly withdrew any portion of Opinion 136. *Jardine* is fully in line with and merely reinforces Opinion 136…." *Id*., ¶ 111 (Lee, A.C.J., concurring in part and dissenting in part).

Writing for the majority, Justice Pearce rejected these concerns and made it clear that Utah lawyers have an obligation to carefully research EAOC opinions before relying on them:

> We…recognize that it would have been better if the Bar had adopted a formal process to withdraw ethics opinions that conflict with our opinions. That having been said, and at the risk of sounding a tad imperial, it does not seem to be that big a lift to ask attorneys who have a question about a rule of professional conduct to review our case law to see if we have spoken about the rule. Nor is it too much to ask that they understand that if our interpretation clashes with that in an ethics advisory opinion, our interpretation controls.

Id. ¶ 57 n.14.

In light of the *Bowen* decision, the Utah Bar and the EAOC are currently collaborating on ways to update the Bar's ethics opinion archive, potentially to flag or otherwise identify opinions that are associated with court decisions. Such improvements will greatly aid lawyers who seek safety in EAOC opinions.

Conclusion

EAOC opinions can be a valuable tool to help determine whether your conduct complies with the Rules of Professional Conduct. After *Bowen*, however, lawyers have a very high research burden to make sure no Utah court decision undermines a relevant EAOC opinion in any way. As Justice Durrant put it: "Going forward from today's opinion, attorneys will be on notice that the Safe Harbor Rule has no application to an otherwise acceptable interpretation of an ethics opinion that has been effectively foreclosed by an opinion from this court." *Id*. ¶ 95 (Durrant, C.J., concurring in part and dissenting in part).

Given the lack of clarity in the *Jardine* decision that the court was effectively withdrawing Opinion 136, this is a particularly high burden.

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.

Need Ethics Help?

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

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

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

UTAH STATE BAR®
ETHICS HOTLINE

ethicshotline@utahbar.org

Utah Bar Annual Food & Clothing Drive

Dear Members of the Bar:

We did not hold our 31st Utah Bar Annual Food & Clothing Drive last year because of the Covid-19 pandemic and our concern for our members collecting and delivering food and clothing and for those receiving these donations. We have made that same determination for this year, based upon recent information posted by the Utah Health Department; however, we would like to urge all of our members to make cash contributions to your favorite charity, and we have included the names and addresses of some of the organizations we have supported over these last 30+ years. We are hopeful that you will be generous in your donations that will help many through these organizations and others you may choose. Two organizations we have primarily supported over the years are Jennie Dudley's Eagle Ranch Ministry and The First Step House for Veterans.

Eagle Ranch Ministry has served the homeless community breakfast/lunch on Sundays and holidays under the 500 South overpass at 600 West in Salt Lake City, Utah, since the early 1980's, when Jennie, armed with a simple barbecue and whatever food donations she could gather, commenced her life's calling, feeding and caring for the less fortunate. Yearly donations of kitchen equipment and weekly donations of food from many have seen these events grow substantially and feed thousands and thousands in need. Jennie blessed my youngest son, Roman, under this very overpass at one of these meal servings in the spring of 2001, when he was about six months old, a very moving event that I will always remember.

The First Step House in Salt Lake City, Utah, provides residential and outpatient programs for Veterans, as well as ongoing support. They focus on a combination of group and individual therapy, medication management, peer support, employment coaching and placement, permanent housing assistance and case management services; and they also focus on Veterans who have substance use and/or mental health disorders, including PTSD, with goals of helping Veterans address these issues.

The following contact information is provided for the Eagle Ranch Ministry and The First Step House, along with the Utah Food Bank and the Crossroads Urban Center; or pick your own organization or family to help!

Giving will provide you with one of the best gifts you can receive, a special feeling that comes only with knowing you have helped someone in need. We have all had that feeling in the past.

We look forward to next year with hope!

Kindest regards,
Leonard W. Burningham, Chairman

Eagle Ranch Ministry
P.O. Box 26144
Salt Lake City, Utah 84126
eagleministries.net

Crossroads Urban Center*
347 South 400 East
Salt Lake City, Utah 84111
crossroadsurbancenter.org

Utah Food Bank
3150 South 900 West
South Salt Lake, Utah 84119
utahfoodbank.org

* The Crossroads Urban Center will also be very grateful for any food or clothing donations dropped off at its location at 1385 West Indiana Avenue in Salt Lake City. If you travel west on 800 South Street, you will run into Indiana Avenue at 1385 West, a few blocks before reaching Redwood Road.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the August 27, 2021 Commission Meeting held in Park City, Utah.

1. The Commission reappointed Camila Moreno as the YLD ABA Delegate. 2.

2. The Commission appointed *ex-officio* members to the Bar Commission:

    - Heather M. Farnsworth, Immediate Past-president
    - Nathan D. Alder, State Members' Delegate to the American Bar Association
    - Erik A. Christiansen, Utah State Bar Delegate to the American Bar Association
    - Kim Cordova, Utah State Bar Delegate to the American Bar Association
    - Kimberly Neville, Women Lawyers of Utah Representative
    - Ramzi Hamady, Minority Bar Association Representative
    - Brandon Mark, LGBT & Allied Lawyers of Utah Representative
    - Grant Miller, Young Lawyers Division Representative
    - Tonya Wright, Paralegal Division Representative
    - Margaret Plane, Judicial Council Representative
    - Nick Stiles, Utah Supreme Court Representative

3. The Commission appointed the 2021–22 Bar Committee Chairs and Co-chairs.

4. The Commission approved the Committee/Section/Specialty Bar liaison assignments.

5. The Commission approved replacing Zions Bank as the Bar's financial advisor. The Budget and Finance Committee will interview potential advisors in the next sixty days.

6. The Commission approved the creation of a new committee headed by Katie Woods. The committee will work on better engaging rural lawyers and making the Bar a better resource for lawyers and the public generally.

7. The Commission approved supporting judicial pay raises during the next legislative session.

8. The Commission approved the Bar's budget, which did not include PPP funds. The Commission approved a plan to have the body vote on any disbursement of PPP funds and to start the budgeting process earlier in the year.

9. The Commission approved the July 28, 2021 meeting minutes by consent.

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

A Fond Farewell to Richard Dibblee

Some names just go together. Stockton and Malone. Batman and Robin. Ruth and Gehrig. Tiger and Phil. And there's another pair to add to the list: John Baldwin and Richard Dibblee.

Richard Dibblee's retirement on September 2nd brought to an end three decades of consistent and effective Bar leadership. With John as Executive Director, and Richard as his assistant, the Bar was led by steady hands through challenges both foreseen and unforeseen.

"Many employees are missed," former Bar Executive Director John Baldwin said. "Richard will be mourned."

James Davis was president of the Utah State Bar when Richard was hired by Baldwin in 1991, and Heather Thuet was the president when Richard retired. In between were thirty other presidents that Richard served as they navigated the challenges that faced the Bar.

"I enjoyed working with all the Bar presidents," Dibblee noted before his official retirement. "I learned something from every one of them."

For Richard, no task at the Bar was too big or too small. "Richard was always taking one for the team," Baldwin remembered. "He would come in early to poof cushions on the couches; get on the floor to clean spills on the carpet; get the tall ladders to change lights on the ceilings…all this with a law degree!"

To Bar members, Richard was most visible at convention time, ensuring speakers and events moved along and stayed on schedule. But Richard's contribution went far beyond "ringing the bell" at conventions. From planning those conventions to the very last detail to maintaining the Law and Justice Center, Richard's stamp was on everything the Bar did.

What made Richard so effective was his ability to connect with everyone, regardless of their position.

"Richard is a people person," said long-time Bar Executive Assistant Christy Abad. "He will always take the time to listen and help if he can."

Recently, the Law and Justice Center has become a magnet for members of the homeless population. Repeated calls to the police produced no change, and Richard was asked to deal with the situation. His solution? He went and talked to the homeless.

Richard designated one of them the "Mayor," and when there was an issue, he'd go talk to her to get the behavior changed. "I'm going to see the mayor of the homeless," he'd say, before heading out to the street.

"I think most people would just keep calling the police and get the homeless removed," Abad said. "Richard befriended them, saw them. He learned their names and helped connect them to resources that could help. Who does that?"

Richard Dibblee is the kind of person who does things like that.

Bar Executive Director Elizabeth Wright remembers another key to Richard's success. "Richard's attention to detail is incredible," she noted.

One morning, the Bar Commission had scheduled a 7:00 a.m. meeting. It had snowed heavily the night before, so Richard showed up early to clear the snow from the sidewalk.

"I remember Richard, in his pajama bottoms and huge snow boots, shoveling the front steps," Wright remembers. "I asked him why he was doing it, instead of the snow removal company, and he said he wasn't sure they'd have it done by seven, and he wanted it clear for the commission."

After he finished, Richard went home and changed. "He returned in office attire for the 7:00 a.m. meeting – hair coiffed perfectly, of course!" Wright said.

Richard was also an integral part of key Bar personnel decisions over the years. "Richard is well-known for his upbeat personality,

always smiling and laughing," Wright noted. "But he also has a serious side, and his thoughts and insights were always very beneficial when dealing with serious things."

Everyone who worked with or for Richard has a story about his attention to detail and his ability to connect to others. "From the homeless people on the street to the Bar president," said one attorney, "everyone mattered to Richard."

And "everyone" included outside vendors who provided service to the Bar. "Richard did a lot of work after normal business hours," said Laniece Roberts, who does the graphic design work for the Bar. "Sometimes, when I foolishly thought I was done for the day, emails from Richard would start pouring in. I learned it was best to just deal with the issue. And, having a touch of OCD myself, I understood why Richard was so meticulous about the details."

Richard tempered such expectations by truly caring about those who worked with the Bar, whom he often called his "family away from home."

"Actually, Richard was more consistent at reaching out to me with birthday or holiday greetings than some of my close friends and family," Roberts said. "He always made a point of checking in with me when he knew that something difficult or important was going on in my life. That really meant a lot to me."

Richard Dibblee does things like that.

"My favorite Dr. Suess quote," Richard said during his farewell speech at this year's Summer Convention in Sun Valley "is 'Don't cry because it's over. Smile because it happened.'"

"This is not goodbye, but rather, see you later," he finished.

Thank you Richard, for thirty years of devotion to the Utah State Bar and its members.

Richard ringing the bell one last time at this year's Summer Convention in Sun Valley.

Notice of Utah Bar Foundation Special Meeting

The Utah Bar Foundation will be holding a special meeting of its members on Friday, December 17th at 9:00 a.m. at the Utah Law & Justice Center located at 645 South 200 East, SLC, Utah, for a vote to amend the Articles of Incorporation and Bylaws that govern the organization. In accordance with the current Bylaws, any active, licensed attorney in good-standing with the Utah State Bar is eligible to attend the meeting and vote. The current Bylaws require the meeting and the vote to be held in person. This notice is being given both in the Utah Bar Journal and to all Utah Bar Foundation members that have provided an email address as part of their attorney record with the Utah State Bar. For a summary of the proposed changes and a copy of the Restated and Amended Articles of Incorporation and Bylaws for the Utah Bar Foundation, please see the Foundation's website main page at https://www.utahbarfoundation.org.

As you may know, the Utah Bar Foundation is a non-profit organization that provides funding for law-related education and civil legal aid for lower income Utahns. The primary source of this funding comes from interest earned on the Utah Supreme Court's IOLTA (Interest on Lawyers Trust Accounts) Program, which is administered by the Foundation.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

For questions or additional information on the Foundation or these proposed changes please email kim@utahbarfoundation.org or call the Foundation offices at 801-297-7046.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the July 2021 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Megan K. Baker	John J. Diamond	Justin Hitt	Branden B. Miles
Ray Barrios	Abigail Dizon-Maughan	Blake W. Johnson	Lori W. Nelson
Ariana G. Barusch	Nicholas E. Dudoich	Lloyd R. Jones	Richard J. Pehrson
Melissa Bean	Anthony Ferdon	Amy Jonkhart	Robroy Platt
Wayne Z. Bennett	Mark Ferre	Mark R. LaRocco	John Sheaffer, Jr.
Russell M. Blood	Melissa Flores	Erika Larsen	Leslie W. Slaugh
Sara E. Bouley	Michael L. Ford	Janet Lawrence	Scarlet R. Smith
Matthew S. Brahana	Michael K. Garrett	Skye E. Lazaro	Marissa Sowards
Clinton Brimhall	Stephen W. Geary	Tanya N. Lewis	Michael A. Stahler
Kim Buhler-Thomas	Alisha M. Giles	Michael D. Lichfield	Alan R. Stewart
Christian Burridge	Sarah E. Goldberg	Gregory E. Lindley	W. Kevin Tanner
Jared R. Casper	Tony F. Graf	Patrick V. Lindsay	Diana L. Telfer
Gary Chrystler	Ashley Gregson	Colleen K. Magee	David B. Thomas
Kim Colton	Michele Halstenrud	Scott H. Martin	Kelly Walker
Nicholas W. Cutler	Clark Harms	Leonard E. Mcgee	David S. Walsh
Tiffany De Gala	Bryant Hendriksen	Alicia M. Memmott	Samantha Wilcox

Utah Bar Foundation Welcomes New Board Members

The Utah Bar Foundation is pleased to welcome Marji Hanson and V. Lowry Snow to the Board of Directors. They join the Utah Bar Foundation Board to replace outgoing members Peggy Hunt and Rob Jeffs.

Marji Hanson has enjoyed a long and successful career focused exclusively on consumer bankruptcy law. Through her work at The Law Offices of Marji Hanson, Marji has restricted her law practice to the representation of debtors in bankruptcy proceedings. Ms. Hanson is the former Vice President of the Utah Bankruptcy Lawyers Forum, former President of Women Lawyers of Utah and has served on numerous Utah State Bar and Bankruptcy related Sections and Committees.

V. Lowry Snow is one of the founding partners of Snow, Jensen & Reece in St. George, Utah, where he has established himself as a leading real estate, civil litigation, business and land use planning attorney. Mr. Snow currently serves in the Utah House of Representatives and is a member of the House Judiciary Standing Committee. He is a past President of the Utah State Bar and was recently recognized with the Utah State Bar's Lifetime Service Award. Mr. Snow was a Founding Board Member that helped to create the Southern Utah Community Legal Center, a nonprofit organized and dedicated to the delivery of pro-bono legal services to lower income Utahns in Southern Utah.

Ms. Hanson and Mr. Snow will bring vast community knowledge and involvement to the Board of the Utah Bar Foundation. Please join us in welcoming them.

Notice of Bar Commission Election: Second, Third, & Fifth Divisions

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

- one member from the Second Division (Davis, Morgan, and Weber Counties),
- two members from the Third Division (Salt Lake, Summit, and Tooele Counties), and
- one member from the Fifth Division (Beaver, Iron, and Washington Counties).

Each to serve a three-year term. Terms will begin in July 2022.

To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/bar-operations/leadership/. Completed petitions must be submitted to Christy Abad, Executive Assistant, no later than February 1, 2022 ,by 5:00 p.m.

IN MEMORIAM

The Jan/Feb 2022 issue of the *Utah Bar Journal* will include an in memoriam list of Utah legal professionals who passed away during 2021. If you are aware of any current or former members of the Utah State Bar, including paralegals and judges, whose deaths occurred during 2021, please let us know. Email their name(s) and, if possible, a link to their obituary to: BarJournal@utahbar.org. To be included in the list, names must be received by December 15, 2021.

Call for Nominations

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2022 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession.

Please submit your nomination for a 2022 Spring Convention Award no later than Friday, January 21, 2022. Use the Award Form located at utahbar.org/nomination-for-utah-state-bar-awards/ to propose your candidate in the following categories:

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

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

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

Utah State Bar®

Spring Convention in St. George

March 10–12

Dixie Center at St. George

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Ethics Advisory Opinion Committee Opinion No. 21-01

Issued April 13, 2021

ISSUES

1. May a lawyer ethically disclose the name of her client?

2. When is a lawyer prohibited from revealing the source of her fee and/or the terms of her fee agreement when representing a client?

OPINION

Under Rule 1.6(a) of the Utah Rules of Professional Conduct, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Thus, the default answer is that a lawyer may not reveal the identity of her client except to the extent allowed by Rule 1.6(a) or Rule 1.6(b).

Likewise, the identity of the person or entity paying attorney's fees is subject to the same confidentiality requirements of Rule 1.6. Further, unless the provisions of Rule 1.6 are met, the terms of the fee agreement are confidential.

A further exception to confidentiality required under Rule 1.6 is the prohibition on a client using the lawyer's services to commit a crime or a fraud. Utah R. Pro. Cond. 1.6(b)(2).

BACKGROUND

This request was posed to the Ethics Advisory Opinion Committee (EAOC) without any background. The EAOC is charged with responding to non-hypothetical questions.

The EAOC chose to answer these questions because it perceived that such questions may reoccur in both civil and criminal settings.[1]

DISCUSSION

The default rule under Rule 1.6(a) of the Utah Rules of Professional Conduct is that all information relating to the representation of a client is confidential.[2] This conclusion is based upon the language of Rule 1.6(a) which provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Utah R. Pro. Cond. 1.6(a).

Wrongful disclosure of Confidential Information by an attorney is serious. "Shall" is an imperative. It defines "proper conduct for purposes of professional discipline." Utah R. Pro. Cond., Preamble: A Lawyer's Responsibilities, ¶ 14.

There are three exceptions to the rule forbidding a lawyer's disclosure of Confidential Information. First, a lawyer may disclose Confidential Information if the client gives informed consent. Utah R. Pro. Cond. 1.6(a). Second, the lawyer may disclose Confidential Information if that information is impliedly authorized to carry out the representation. Utah R. Pro. Cond. 1.6(a). Otherwise, the lawyer may not disclose Confidential Information unless the disclosure is permitted under Rule 1.6(b).

With respect to the informed consent of the client, the lawyer must evaluate the risks and benefits of disclosure. This information must be communicated to the client. The client must thereafter give informed consent. "Informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Utah R. Pro. Cond. 1.0(f). Informed consent should be confirmed in writing at the time the client gives informed consent or within a reasonable time thereafter. Utah R. Pro. Cond. 1.0 cmt. [1].

The lawyer should never assume that the client has given informed consent. Further, if a lawyer does not personally communicate the risks and benefits of disclosure of Confidential Information, then the lawyer assumes the risks that the client is inadequately informed and that the consent is invalid. Utah R. Pro. Cond. 1.0 cmt. [6].

The second exception to the prohibition of disclosure of Confidential Information is when the disclosure is impliedly authorized in order to carry out the representation. Common examples include a lawyer who enters an appearance in litigation or who represents someone in settlement negotiations.

The third exception allows disclosure in limited circumstances under Rule 1.6(b) of the Utah Rules of Professional Conduct to the extent the lawyer reasonably believes necessary.[3] Rule 1.6(b) contemplates circumstances where the lawyer's duty to

protect the public and other interests outweigh the client's expectation of confidentiality. Those circumstances include the prevention of reasonably certain death or substantial bodily harm. Utah R. Pro. Cond. 1.6(b)(1).

The lawyer may disclose information to prevent the client from "committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Utah R. Pro. Cond. 1.6(b)(2). The lawyer may also disclose Confidential Information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." Utah R. Pro. Cond. 1.6(b)(3).

In this context "reasonable" "denotes the conduct of a reasonably prudent and competent lawyer." Utah R. Pro. Cond. 1.0(k). Further, "reasonable belief" means that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Utah R. Pro. Cond. 1.0(l). "Substantial" denotes a "material matter of clear and weighty importance." Utah R. Pro. Cond. 1.0(p).

Rule 1.6(b), together with the definitions of "reasonable," "reasonable belief," and "substantial," indicate that these exceptions require more than ordinary suspicion that the client will misbehave. Rule 1.6(b) contemplates that such exceptions would be relatively rare and that the lawyer should not disclose Confidential Information unless doing so is

> necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services.

Utah R. Pro. Cond. 1.6 cmt. [7].

The lawyer may disclose Confidential Information needed to protect herself. Thus, she may seek advice as to her compliance with the Utah Rules of Professional Conduct. Utah R. Pro. Cond. 1.6(b)(4). The lawyer may disclose Confidential Information related to a dispute between the client and herself. The lawyer is also authorized to disclose Confidential Information to defend herself against criminal charges against her arising out of the representation. Utah R. Pro. Cond. 1.6(b)(5). The lawyer may disclose Confidential Information "to comply with other law or a court order." Rule 1.6(b)(6). Finally, the lawyer may disclose Confidential Information to resolve conflicts arising from the lawyer's change of employment. Utah R. Pro. Cond. 1.6(b)(7).

If a lawyer is served with a subpoena seeking to compel disclosure of Confidential Information related to the representation of a client, the lawyer must determine whether the information compelled is protected by any privilege or rule. If it is, the lawyer must inform the client about the subpoena and discuss what privileges or objections could be asserted in response to the subpoena and the consequences of waiving any privileges or objections. The lawyer should also consider whether there are grounds for entry of a protective order limiting the information sought or its use or disclosure. The lawyer must assert nonfrivolous privileges and raise nonfrivolous objections to the subpoena unless the client gives informed consent to waive them. If the court orders the lawyer to comply with the subpoena, then "the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order." Utah R. Pro. Cond. 1.6 cmt. [15]. The lawyer's duty is to maintain client confidentiality unless and until compelled to do so by proper order of a tribunal.

CONCLUSION

Rule 1.6 of the Utah Rules of Professional Conduct establishes the default position that the identity of a client, the source of funding for the attorney's fees, and the fee agreement are confidential, unless an express exception is found in either Rule 1.6(a) or Rule 1.6(b).

1. The EOAC's undertaking this Opinion should not be construed as a license to request ethics advisory opinions without adequate factual background. Here, the EAOC is convinced that the answers to the questions would be helpful to the general bar, as the EAOC perceives that there is a substantive question posed in the short request.
2. The term "Confidential Information" as used in this Opinion means information related to the representation of a client that is protected under Rule 1.6(a) of the Utah Rules of Professional Conduct.
3. The EAOC notes that the duty of confidentiality under Rule 1.6 of the Utah Rules of Professional Conduct is broader that the attorney-client privilege found in Rule 504 of the Utah Rules of Evidence.

The full text of all Ethics Advisory Opinions are available at: https://www.utahbar.org/eaoc-opinion-archives/.

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Attorney Discipline

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

PUBLIC REPRIMAND

On July 12, 2021, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Public Reprimand against Roy D. Cole for violating Rule 1.5(a) (Fees) of the Rules of Professional Conduct.

In summary:
A client retained Mr. Cole for representation in a divorce action. The client contacted the Utah State Bar's Consumer Assistance Program requesting assistance. The administrator of the program sent a letter to Mr. Cole and he responded to the letter regarding the client. Mr. Cole billed the client for his time to review the letter and dictate his response. Mr. Cole's paralegal billed the client for her time to draft a response to the letter.

Aggravating factor:
Prior record of discipline.

SUSPENSION

On July 9, 2021, the Honorable Matthew D. Bates, Third Judicial District, entered an Order of Suspension, against John C. Cooper, suspending his license to practice law for a period of three years. The court determined that Mr. Cooper violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.5(a) (Fees), Rule 1.15(a) (Safekeeping Property), Rule 1.15(d) (Safekeeping Property), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
Mr. Cooper's violations arise out of conduct in two matters:

In the first matter, a client retained Mr. Cooper to prepare and file divorce documents. The client paid an advanced fee to Mr. Cooper for the representation. Mr. Cooper did not place the money in a trust account and did not hold the unearned fees he received in a trust account separate from his own funds until they were earned. The client agreed to an uncontested divorce in which Mr. Cooper would represent both parties. Mr. Cooper drafted documents to pursue the divorce including a property settlement stipulation signed by both parties but Mr. Cooper did not draft a summons and complaint and did not serve the client's husband. Sometime later, the husband filed a verified

petition for divorce listing Mr. Cooper as a defendant. The client paid Mr. Cooper additional money for legal fees. Again, Mr. Cooper did not place the money in a trust account and did not hold the unearned fees he received in a trust account separate from his own funds until they were earned. Mr. Cooper filed an answer on behalf of the client. Two weeks later, the client retained new counsel to represent her. Through counsel, the client requested a detailed accounting of retainer funds, attorneys fees and costs and the original contents of her file. Mr. Cooper responded with a listing of the dates of telephone calls and text messages but no time or expense amounts associated with the work. New counsel again requested a detailed accounting. Mr. Cooper's paralegal responded with a bill showing some additional times but it showed paralegal time was billed at the same rate as attorney time and it indicated the client had a balance owed to her. The OPC sent a Notice of Informal Complaint (NOIC) to Mr. Cooper. Mr. Cooper did not timely respond to the NOIC.

In the second matter, a client retained Mr. Cooper to file a complaint against the client's employer alleging a violation of her civil rights and an appeal with the Labor Commission. The client paid a sum to Mr. Cooper to file a federal complaint and another sum to appeal her case with the Labor Commission. The client paid an additional sum to serve her employer and an additional fee for legal services during the representation. Mr. Cooper did not keep the client informed about her case and when she attempted to contact him, his phone was disconnected. Mr. Cooper did not provide the client with any copies of any documents regarding her case. Mr. Cooper filed a complaint on the client's behalf in US District Court. Mr. Cooper did not inform the client of hearing dates in her case. The court held a status conference and Mr. Cooper did not appear nor did he notify the client that a hearing was to be held. The court ordered the case dismissed for failure to prosecute. The client filed a pro se motion to reopen the case and the court held a hearing on the motion. Mr. Cooper did not appear at the hearing. Mr. Cooper was ordered by the court to refund a portion of fees paid by the client.

Based on these cases and other matters, the court found the following aggravating and mitigating factors:

Aggravating factors:
Dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority, lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved including no refund of any unearned fees and costs for the first client.

Mitigating factors:
Absence of a prior record of discipline, inexperience in the practice.

SUSPENSION

On November 19, 2019, the Honorable William K. Kendall, Third Judicial District, entered an Order of Suspension, against Maria C. Santana, suspending her license to practice law for a period of one year. The court determined that Ms. Santana violated Rule 1.3 (Diligence), Rule 1.4(a) (Communication), Rule 1.16(d) (Declining or Terminating Representation), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The Utah Supreme Court affirmed the District Court's Order of Suspension on July 29, 2021.

In summary:
A client retained Ms. Santana to represent her in a personal injury case. Shortly after initial disclosures were due in the case, Ms. Santana sent her client an email indicating that she needed work information from the client and gave a deadline to provide the information or she would withdraw from the case. Ms. Santana filed a withdrawal of counsel but one day later she agreed to represent her client again and she filed a notice of appearance in the case. Ms. Santana requested and received from opposing counsel an extension of time to provide initial

disclosures. However, Ms. Santana never provided opposing counsel with any initial disclosures.

Opposing counsel contacted Ms. Santana twice about the initial disclosures to request the information and notify her of his intent to request the case be dismissed if the initial disclosures were not received. Ms. Santana believed the client was refusing to provide some information but she did not consult with the client about lowering the settlement offer or other options. Ms. Santana decided that she would not respond to opposing counsel or take any further steps until her client provided her additional information. For more than four months, Ms. Santana did not inform and consult with her client about the specific dates for initial disclosures and her decision to take no further action and the possibility of dismissal of the case unless the client provided her information.

Ms. Santana did not file an objection or otherwise respond to opposing counsel's motion to dismiss for failure to prosecute nor did she adequately attempt to communicate to the client her options once the motion was filed. The court dismissed the case with prejudice. The client did not understand that her case had been dismissed and that she could no longer pursue her claims. After the dismissal, the client asked various attorneys or paralegals to contact Ms. Santana to explain what happened to her claims and to request her file. The client left voicemail messages for Ms. Santana to request information about the case and for the return of her file. Ms. Santana did not respond to the client's messages nor did she provide the client's file until the Screening Panel hearing for the informal complaint in the discipline matter.

The OPC sent a Notice of Informal Complaint (NOIC) to Ms. Santana. Ms. Santana did not timely respond to the NOIC.

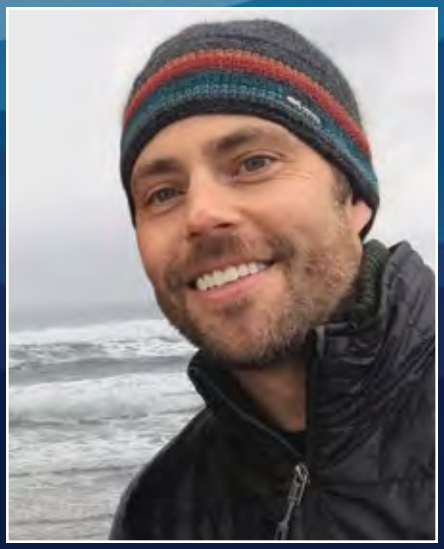
Aggravating Circumstances:
Prior record of discipline; dishonest or selfish motive; pattern of misconduct; multiple offences; refusal to acknowledge the

IN MEMORIAM

Our friend and long-time colleague, Adam C. Bevis, died on September 8, 2021, from a rare form of appendiceal cancer. After graduating from the University of Utah S.J. Quinney College of Law in 2003, Adam joined the Office of Professional Conduct. In 2017, Adam was promoted to Deputy Chief Disciplinary Counsel and served in that capacity until the time of his death. Adam was decisive, cool under pressure and had exceptional public speaking and writing abilities. Adam was known and loved for his dry, self-deprecating wit, always executed flawlessly without ever cracking a smile.

Adam loved music, the outdoors, resolving disagreements with rock-paper-scissors (he almost always lost), traveling, office practical jokes (that usually backfired), and good food and drinks. Most of all, though, Adam loved his family. He was a dedicated son, brother, husband, and father. He worked hard to foster relationships with all the people he loved and went out of his way to spend individual time with each of his kids.

Adam is survived by his wife Emily McMillan; children Mya, Gretchen and Charlotte; mother, Marilyn Bevis; brother Jeff Bevis (Lisa Winn); and canine best friend Luke. Adam was preceded in death by his father John Bevis.



ADAM C. BEVIS

wrongful nature of the misconduct involved; substantial experience in the practice of law; lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.

Mitigating Circumstances:
Remoteness of prior discipline.

RESIGNATION WITH DISCIPLINE PENDING

On June 16, 2021, the Utah Supreme Court entered an Order Accepting the Resignation with Discipline Pending of Shawn J. Foster for violation of Rule 1.1 (Competence), Rule 1.3 (Diligence) (Two Counts), Rule 1.4(a) (Communication) (Three Counts), Rule 1.5(a) (Fees) (Three Counts), Rule 1.16(d) (Declining or Terminating Representation), and Rule 8.1(b) (Bar Admission and Disciplinary Matters) (Three Counts) of the Rules of Professional Conduct.

In summary:
This matter involves three cases. In the first matter, Mr. Foster was employed at a law firm. While at the firm, he entered into an agreement with a client to represent her during immigration proceedings. The client paid a retainer to Mr. Foster for the representation. At some point after the representation began, Mr. Foster left the law firm. The client's husband contacted Mr. Foster by text message and sent a letter indicating he had been unable to get in contact with Mr. Foster since he had left the law firm and he needed to respond so he could either continue with the representation or arrange for a refund. Mr. Foster responded the same day by text that he was now working out of his own office but he would be out of town for a few days. The client provided Mr. Foster all the documents he requested and signed the U-Visa application. Further, the client obtained a money order for the filing fee. The client and her husband met with Mr. Foster and he said he would let them know when he sent in the paperwork and that they should receive confirmation that their packet had been received within six weeks. The client did not receive confirmation. The client's husband texted Mr. Foster regarding the status of the case but Mr. Foster did not respond. The client's husband requested a refund of the retainer and filing fees. The OPC sent a Notice of Informal Complaint (NOIC). Mr. Foster did not respond to the NOIC.

In the second matter, a client retained a law firm to represent him during immigration proceedings. The case was assigned to Mr. Foster and they signed an attorney-client agreement. Mr. Foster did not adequately explain the client's options to him throughout the course of the representation nor did he provide the client with updates about the case. Throughout the course of the representation, Mr. Foster continually changed law firms without notifying the client. At a master hearing, the judge stated on the record that he had earlier admitted and conceded that the client was ordered removed. Neither Mr. Foster nor the client were present at the hearing. Later, the client attempted to contact Mr. Foster at the law firm and was informed that Mr. Foster was no longer with their office and that Mr. Foster took the client's case with him when he left. The client had not previously consented to this. The client contacted Mr. Foster but was not given an explanation and was given the impression that the client had no choice but to stay with Mr. Foster for the representation. The client and Mr. Foster signed a new representation agreement with Mr. Foster's new law firm. The day before a cancellation hearing in immigration court, Mr. Foster demanded an additional sum of money for representation at the hearing. The client had no choice but to pay the fees so Mr. Foster would appear at the hearing. At the conclusion of the hearing, the client was ordered removed but was allowed voluntary removal if the client posted bond and was given instruction by the court regarding the appeal period. Mr. Foster did not explain the results to the client but only informed him that he needed to pay a sum to immigration. The client did so the next day and delivered the proof of payment to Mr. Foster. The client was unable to ever locate Mr. Foster again. Mr. Foster failed to provide the client with his file before ceasing communications with him. After retaining a new attorney, the client learned that Mr. Foster had filed an appeal but had not forwarded proof of the bond payment to the appropriate entity. The OPC sent Mr. Foster a NOIC. Mr. Foster did not respond to the NOIC.

In the third matter, a client contacted the OPC stating that she had given Mr. Foster a sum of money to help her renew her Green Card. The client provided receipts showing several payments over several years indicating she paid for legal representation. Mr. Foster performed no work and stopped communicating with the client. The OPC sent Mr. Foster a NOIC. Mr. Foster did not respond to the NOIC.

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Evictions in Utah and How Volunteer Attorneys Can Help

by Aro Han

Landlord/tenant law is not what attorneys would call a "sexy" body of law; in an occupancy hearing, there is no cross-examining an expert witness to flex one's trial advocacy skills, and it certainly will not result in a million-dollar judgment. For tenants, however, the consequences of an eviction proceeding are even more significant.

Evictions can send families into a downward financial spiral that may take years to extricate themselves from, particularly under Utah law, which allows landlords to receive treble damages for the period of occupancy after an eviction notice expires, without a requirement to prove actual damages. Utah Code Ann. § 78B-6-811. With an eviction on one's record, it can be nearly impossible to find new housing. People can end up living in cars, motels (if they can afford it), homeless shelters, or on the street. During the pandemic, and especially now given the rise of the Delta variant, there are significant dangers to living on the street or in congregated living environments like a homeless shelter.

Due to the pandemic's devastating economic impact, particularly on households that relied on income from service work, evictions have become a contentious political issue. Nearly five million Americans are displaced every year due to foreclosure or eviction. Tim Robustelli, et al., *Displaced In America*, New America (Sept. 9, 2020), https://www.newamerica.org/future-land-housing/reports/displaced-america/executive-summary. Since the pandemic began, nearly seven million American households self-report as being behind on rent. Chris Arnold, *Millions of Tenants Will Be at Risk of Eviction When the Moratorium Ends This Weekend*," Nat'l Pub. Radio (July 30, 2021), https://www.npr.org/2021/07/30/1022909525/millions-of-tenants-will-be-at-risk-of-eviction-when-the-moratorium-ends-this-we. According to Peter Hepburn, a researcher with Princeton University's Eviction Lab, this is twice the normal number of Americans unable to pay rent. *Id*. Hepburn further estimates that over the eleven months while the CDC eviction moratorium was in place, at least 1.5 million fewer eviction cases were filed nationally. *Id*.

A Short Historia of Moratoria

As part of the CARES Act, Congress originally imposed a limited, temporary eviction moratorium in 2020. It applied only to federal-related properties, including properties covered by federally backed mortgages, estimated to cover somewhere between 28% and 46% of occupied rental properties nationally. *Federal Eviction Moratoriums in Response to the COVID-19 Pandemic*, Cong. Research Serv., IN11516 (Mar. 30, 2021). When this federal moratorium expired, then-President Donald Trump ordered the CDC to impose one, which was extended several times since it was first issued on September 4, 2020. Centers for Disease Control, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 83 Fed.Reg. 55292 (Sept. 4, 2020). Both federal moratoria were limited to evictions only to cases based on the failure to pay rent and fees.

A group of real estate agents and landlords in Alabama challenged the moratorium in federal court. The legal issue at the heart of the case involved the Public Health Service Act. The act gives the agency authority to "make and enforce such regulations… necessary to prevent the introduction, transmission, or spread of communicable diseases." *See* 58 Stat. 703, as amended, 42 U.S.C. § 264(a). *See also* 42 CFR § 70.2 (2020) (delegating this authority to the CDC). Lower courts that reviewed the issue agreed with the challengers that this power is limited by another provision contained within the act that lists measures such as "fumigation, disinfection, sanitation, pest extermination." *Id*. Despite the ruling however, a federal judge in the district court imposed a stay on the ruling after the Biden administration decided to renew a modified version of the order. *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, 2021 WL 1779282 (D.D.C. May 5, 2021).

By the time that moratorium expired at the end of July 2021, it was clear that any similar moratorium on evictions would have to come from Congress. A month prior, Justice Brett Kavanaugh

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wrote as much in his concurring opinion when the CDC moratorium was challenged before the Supreme Court. *Alabama Ass'n Realtors v. U.S. Dep't of Health & Human Servs.*, 141 S.Ct. 2320 (2021) (Kavanaugh, J., concurring). He ultimately voted to uphold the moratorium but also stated that in his view Congress would have to pass new and clearer legislation to extend the moratorium past July 31. Justice Kavanaugh also noted that his vote not to end the eviction program was primarily because it was set to expire in a matter of weeks "and because those few weeks will allow for additional and more orderly distribution" of the funds that Congress appropriated to provide rental assistance. *Id.*

Congress did not pass such legislation however, and the moratorium expired on July 31, 2021. The White House first stated that its hands were tied, and it would not be issuing a new order. Associated Press, "Biden Calls on Congress to Extend Expiring Eviction Moratorium, Saying Administration's Hands are Tied" (Jul. 29, 2021), available at https://www.oregonlive.com/business/2021/07/biden-calls-on-congress-to-extend-expiring-eviction-moratorium-saying-administrations-hands-are-tied.html. Housing advocates and the public raised a significant national outcry however, and not long after, the Biden administration announced a new CDC order on August 3.

With this order, the CDC aimed to temporarily halt evictions in areas experiencing an increase in coronavirus cases, citing significant transmission of the Delta variant. The agency said at the time that more than 80% of U.S. counties were classified as experiencing substantial or high levels of community transmission. The CDC said its ban applies to renters who "otherwise would likely need to move to congregate [or shared-living] settings where COVID spreads quickly and easily, or would be rendered homeless and forced into shelters or other settings that would increase their susceptibility to COVID." *CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission*, Centers for Disease Control (Aug. 3, 2021) https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html.

The new order was doomed, and even the administration seemed to know it. "I went ahead and did it," Biden told reporters. "But here's the deal: I can't guarantee you the court won't rule [that] we don't have that authority. But at least we'll have the ability, if we have to appeal, to keep this going for a month at least – I hope longer than that." President Joseph Biden, *Remarks on Strengthening American Leadership on Clean Cars and Trucks*, (Aug. 5, 2021), transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/05/remarks-by-president-biden-on-strengthening-american-leadership-on-clean-cars-and-trucks/.

The challengers in their brief to the court used the president's own words to argue that the administration knew it was on unstable legal ground. "The only plausible explanation for the extended moratorium is that it was issued in response to

political pressure from Capitol Hill for the express purpose of using litigation delays to distribute more rental assistance," their brief says. "Nearly a year of overreach is enough." Reply in Support of Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia, *Alabama Ass'n Realtors v. U.S. Dep't of Health & Human Servs.*, 141 S.Ct. 2485 (2021).

The Supreme Court majority agreed in its *per curiam* opinion. "It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts," the opinion said. *Alabama Ass'n Realtors*, 141 S. Ct. at 2486. And with that, the eviction moratorium came to an end on August 26, 2021.

It is worthwhile to note that the decision under the so-called "shadow docket" was made without full briefing or argument. Justice Breyer wrote in his dissent that the majority's summary disposal of the case was unwarranted. Breyer believes the case raises "contested legal questions about an important federal statute on which the lower courts are split and on which this Court has never actually spoken." *Alabama Ass'n Realtors v. U.S. Dep't of Health & Human Servs.*, 141 S.Ct. 2485 (2021) (Breyer, J., dissenting).

Evictions in Utah

In Utah, eviction filings were down to about 2,000 in the first six months of 2021, a 44% decrease from the same period in 2019. Mark Richardson, *End of Federal Eviction Moratorium Puts Pressure on Utah Renters*, Utah Public Radio (Sept. 9, 2021), https://www.upr.org/post/end-federal-eviction-moratorium-puts-pressure-utah-renters#stream/0.

While eviction filings certainly are lower during the pandemic than before, those working in housing, including at People's Legal Aid, do not expect to see a "wave" of evictions in Utah. *Id.* *See also* Daniel Woodruff, *Group Representing Utah Landlords Doesn't Expect Evictions to Rise Anytime Soon*, KUTV (Sept. 6, 2021), https://kutv.com/news/local/group-representing-utah-landlords-doesnt-expect-evictions-to-rise-anytime-soon (detailing a landlord association executive director's opinion that there will not be a flood of litigation). As mentioned above, all versions of eviction moratoria, whether state or federal, were limited to cases of failure to pay rent. Evictions based on lease violations, terminations of tenancy, nuisance, or any other basis for unlawful detainer could still be filed and executed. Utah Code Ann. § 78B-6-802.

While the CDC moratorium has ended, there are still millions of dollars allocated for rental assistance available, and some landlords are choosing to delay filing to allow tenants to catch up. The state rental relief coffers are still quite full; only about 25% of the millions allocated for emergency rental assistance have been disbursed to tenants. Without the moratorium to force such willingness however, a landlord is free to choose to evict and even to refuse payment after the statutory cure period ends.

How People's Legal Aid Helps

People's Legal Aid (PLA) was founded in May 2020, largely in response to the looming eviction crisis. People's Legal Aid provides Utahns free education and legal advice for housing issues and pro bono eviction defense. Its vision is for all Utahns to understand and be able to exercise their rights as tenants and have fair access to legal representation in eviction proceedings. With adequate legal counsel in eviction proceedings, families are better able to secure equitable outcomes and make informed financial decisions that will improve their post-eviction outlook.

As part of its mission, PLA manages consolidated eviction calendars in Third District Salt Lake, Third District Tooele, Second District Farmington, and Second District Bountiful. PLA's own attorneys handle many of these pro se cases, and the organization also works with many volunteer attorneys across the state.

So far in the year 2021, PLA and the volunteer attorneys it oversees have negotiated an 80% increase in the number of days clients were allowed to remain in their places of residence before being required to vacate. In cases dealing with money damages, PLA's clients enjoyed settlements that were on average 50% less than requested in plaintiff's pleadings. These successes equate to families having more time in their current residence, an opportunity to find alternative accommodations, and a chance to plan for their short-term future with less of a financial burden. More financial resources and time in residence also mean that those families are less susceptible to homelessness immediately following an eviction.

Volunteering on an eviction calendar presents an excellent opportunity for newer attorneys to gain experience appearing in court, negotiating on behalf of clients, and making arguments. Landlord/tenant law may be unfamiliar to most attorneys, but it is a relatively distinct body of law that volunteers would find surprisingly accessible with some training.

All the judges who preside over a PLA-consolidated calendar have standing orders that allow volunteer attorneys to appear on behalf of defendants on a limited basis, limited only to that day's hearing unless the volunteer attorney wishes to continue providing representation. Court hearings currently remain virtual, so volunteer attorneys are only expected to join via WebEx.

CLE Calendar

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

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Sustainability: Pre-Planning for Lawyers Regarding Their Own Illness or Injury. 2021 Fall Forum Special Session.

November 12, 2021

Pet Peeves: Insight from Your Bench. Family Law Section of the Utah State Bar.

November 17, 2021

What Every Entrepreneur Should Know About Utah Divorce Law – Part 2. Business Law Section of the Utah State Bar.

November 18, 2021

2021 Fall Forum – Social Media Use for Lawyers. 2021 Fall Forum – Session One.

December 2, 2021

2021 Fall Forum – Legal Writing: A Judge's Perspective on the Written Word. 2021 Fall Forum – Session Two.

December 7, 2021

Litigation Section Trial Academy. 2021 Fall Forum – Special Session.

December 9, 2021

2021 Fall Forum – Upcoming 2022 Legislative Session: What Practitioners Should Watch For. 2021 Fall Forum – Session Three.

December 9 & 10, 2021

Professor Mangrum on Utah Evidence. The Utah State Bar.

December 14, 2021

Litigation Section Trial Academy. 2021 Fall Forum – Special Session.

December 16, 2021

2021 Fall Forum – Cybersecurity, Part III of Ongoing Series: Lessons for Utah Lawyers. 2021 Fall Forum – Session Four.

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