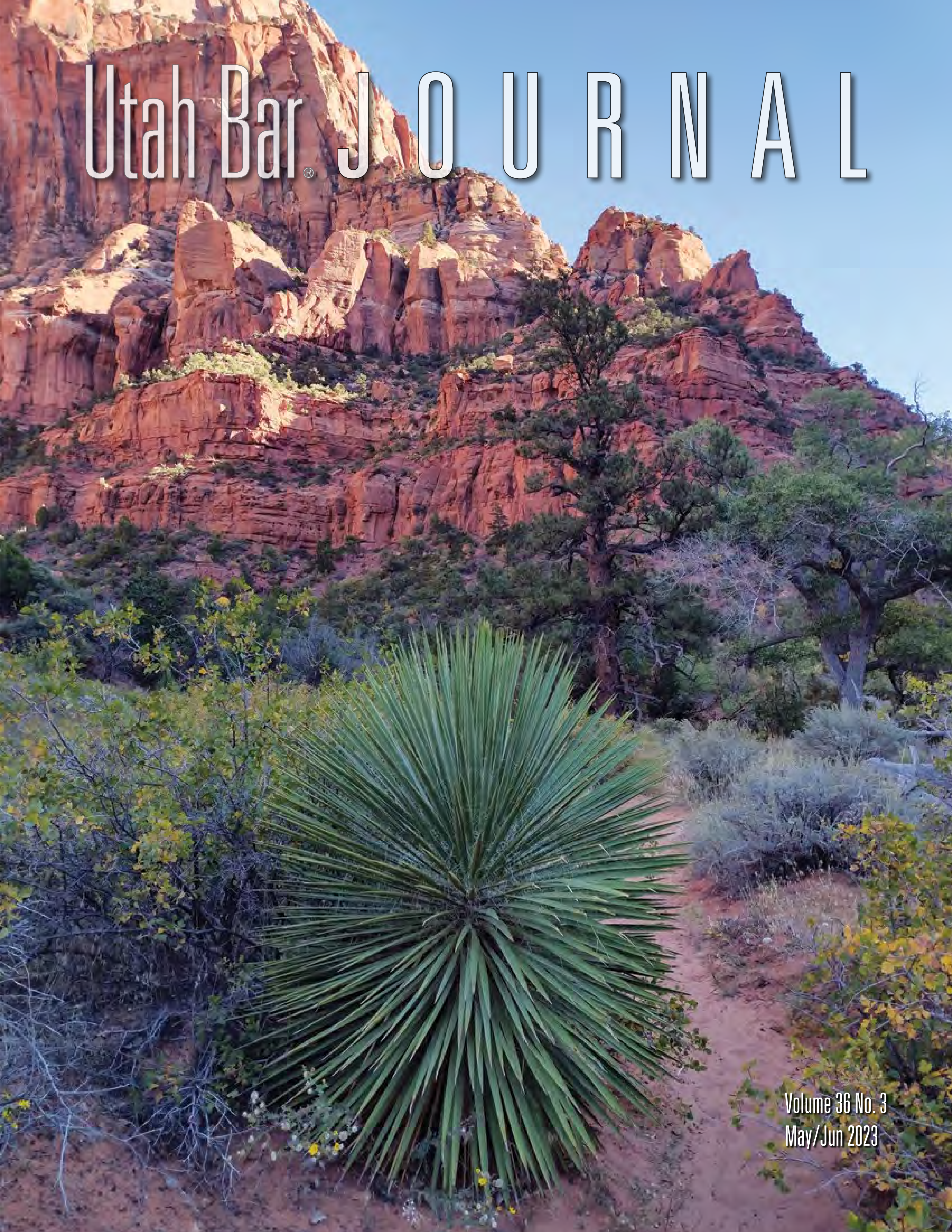
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La Verkin Creek Trail in Zion National Park, by Utah State Bar member Jackie Rosen.

JACKIE ROSEN is a litigation associate at Fabian VanCott. She grew up tagging along on family camping and canyoneering trips in southern Utah and spends her free time enjoying our beautiful state. Asked how she came to take this cover photo, Jackie said, "I stumbled upon this view on a quick backpacking trip in the Kolob Canyons area of Zion National Park this past fall."

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

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

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

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PRESIDENT-ELECT

CARA M. TANGARO

Cara Tangaro is an experienced criminal defense attorney at Tangaro Law. She has handled many felony jury trials, including capital homicide. A former prosecutor for the Salt Lake County District Attorney's office, she is a tested, trusted defense attorney; and is committed to serving her clients as they navigate challenging cases.

FIRST DIVISION

J. BRETT CHAMBERS

J. Brett Chambers is an attorney at Harris, Preston & Chambers LLP. He is the current Cache County Bar President and has served as First Division Bar Commissioner since November 2022.

THIRD DIVISION

KIM CORDOVA

Kim Cordova and her partner Edward Brass run a small criminal defense firm in Utah. Along with criminal law, she consults with lawyers on high profile, complex, and voluminous discovery cases. She contracts with the Office of Juvenile Justice and Delinquency Prevention where she trains attorneys across the state on juvenile justice and policy issues. She also serves as a Board of Trustee for Westminster College and Salt Lake Regional Medical Center. She will also teach the Criminal Process class for the SJ Quinney College of Law. Prior to her partnership in private practice, she worked as an Advisor to Governor Herbert on Criminal Justice Issues and as a prosecutor for Salt Lake County. She graduated from University of Utah Law School in 2001 and Westminster College in 1995.

MARK O. MORRIS

Mark Morris is a partner at Snell & Wilmre where he has a very diverse practice. He has over 35 years' experience in general commercial litigation, including handling cases in the areas of construction law, real estate, securities, legal malpractice, employment, professional liability, trade secrets, general business disputes and defense of class action matters. Mark has been recognized by his peers for not only his litigation skills, but also for his judgment and background in general corporate and business issues that have been informed by his many years of resolving primarily business disputes.

JOHN H. REES

John H. Rees is an intellectual property and corporate counsel lawyer at John Rees Law, PLLC. He works with clients to develop strategies and solutions for complex legal challenges and managing legal risk. Prior to opening his own firm, Mr. Rees practiced at Callister Nebeker & McCullough in Salt Lake City for over thirty years. Mr. Rees has previously served the Bar as co-chair of the innovation in law practice committee (which received the committee of the year award in 2018), as founder and initial chair of the cyberlaw section, as co-chair of one of the bar's annual meetings in Sun Valley, and as chair of the business law section.

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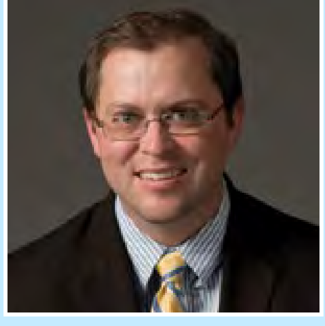
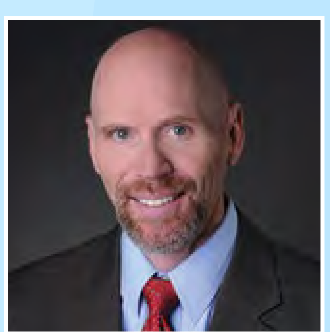

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Engineering a Better Future

by Kristin K. Woods

Notable civil rights attorney Charles Hamilton Houston once stated: "A lawyer is either a social engineer or a parasite on society." Well, for most of us, I'm sure it depends on who you ask. I, for one, think that we as lawyers have the most powerful job because we have the privilege of having both a license to practice law and a platform from which to speak our minds. What other job allows us to perceive a wrong and take immediate action to correct it? After all, because of our education we speak the language that is required to go to the courts for justice of any sort. We possess the map and the legend of the winding roads of the court system. We have an immense advantage over the typical citizen. Just like traveling to a foreign country, the person who can speak the language and navigate the streets has the most ability to succeed in any task there. The same is true in the law.

We've all had the experience of speaking with a pro se party who, although well-intentioned and extremely passionate, has created a document or filed a case that doesn't make any sense in the context of our judicial system. We have the immense ability to immediately, from day one of licensure, jump into the world and either help or hurt the people who hire us. This is why we as attorneys can do a great amount of service for our communities by way of the pro bono opportunities with which we are presented. Even myself, a family law practitioner, can be supremely helpful in a non-family law case, even if I've never handled one before. I can at least speak the language of the court and competently communicate with the other lawyers involved in the case. That's more than most non-lawyers can do.

Aside from our pro bono endeavors, we have the ultimate ability to craft a career that fulfills our personal passions and interests. I love speaking with my lawyer friends who practice criminal law. I can sense the passion they have for helping their clients as well as safeguarding the utmost sanctity of our criminal justice system and its reach. As "social engineers" of the boundaries of crime and punishment, they perform a crucial role in shaping our society. Our civil litigators hold corporations accountable to provide safe working environments for employees and safe consumer experiences for the public. I can isolate the "social engineering" in any area of law where we can practice, and it is exciting to think that my law degree and license allow me to find my passion, dive right in, and start speaking the language of reform.

"You deserve to have a career full of meaning, and the world needs to have you there with all your passions, ideas, and solutions."

Bravo to you noble practitioners. You don't get enough credit. Keep changing and molding the world. Keep helping all of us live in an equitable society, where the opportunities of life are abundant to all. There are more battles to fight and more engineering to do. Make wellness a part of your practice. After all, how can we take care of others if we don't take care of ourselves? And, most importantly, find where you belong in the law and THRIVE there. You went to law school for a reason. You deserve to have a career full of meaning, and the world needs to have you there with all your passions, ideas, and solutions. Together, as lawyers, we just may be able to engineer a nearly perfect world. I hope so. But, all I know, is that they can't do it without us.

Article

Vacating Arbitration Awards: What is the Standard?

by Craig E. Hughes

Introduction

As arbitration becomes more acceptable, it is not surprising that parties who lose in arbitration often do not easily accept awards issued by arbitrators. It is even less surprising that losing parties therefore regularly ask district courts to vacate arbitration awards.

Unfortunately, Utah's two current judicial standards for vacating arbitration awards are confusing. This is the express conclusion of the Utah Supreme Court in two important 2022 cases: *Ahhmigo, LLC v. Synergy Co. of Utah, LLC*, 2022 UT 4, ¶¶ 37–40, 506 P.3d 536, and *Taylor v. Taylor*, 2022 UT 35, ¶¶ 75–78, 517 P.3d 380.

The confusing standards for vacating arbitration awards are not helpful to litigants or the district courts. Litigants and courts are left with a lack of understandable, stable standards on which to rely. Fortunately, though, the *Ahhmigo* and *Taylor* courts recognize the problem. In dicta, the *Ahhmigo* and *Taylor* courts significantly clarify the link between the two different confusing standards for vacating arbitration awards and in the process express their firm dislike for one of the standards and approval of the other standard. But unfortunately – in the view of *Ahhmigo* and *Taylor* – the court has not yet been asked by litigants to abandon the particular standard the court has questioned and disfavored since at least 1996 in *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996).

In brief, in *Ahhmigo* and *Taylor*, the court drops all hints found in the numerous cases between 1996 and 2022, and all but begs litigants in a future arbitration case to expressly and formally request that the court abandon the disfavored "manifest disregard of the law" standard, thus allowing the court to formally adopt the favored "exceeding authority" standard as a guide to litigants and district courts in seeking and ordering vacatur of arbitration awards.

The Issues

How should litigants and judges navigate the current confusion regarding vacatur of arbitration awards? And what are the best options available to litigants who want to vacate or affirm an arbitration award?

Current Law

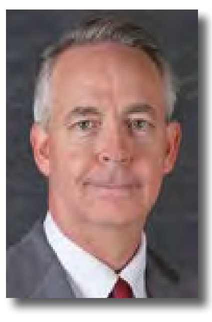
Currently, Utah litigants and courts may rely on two related but differing standards in vacating or modifying an arbitration award. The first standard is described by the appellate courts as the "manifest disregard of the law" standard. As the Utah Supreme Court clarified in *Ahhmigo* and *Taylor*, the manifest disregard standard is a "judicially created doctrine" derived from the Utah Uniform Arbitration Act (UUAA). The manifest disregard standard essentially means that if a court determines that an arbitrator, when issuing an award, manifestly disregarded generally established statutory and judicial law governing the particular conflict, then the court may vacate the arbitration award. *Ahhmigo*, 2022 UT 4, ¶ 39; *Taylor*, 2022 UT 35, ¶¶ 76–77.

So on one hand, we have a "judicially created doctrine" for vacating arbitration awards – the manifest disregard standard. On the other hand, in the words of the *Ahhmigo* and *Taylor* courts, we have a legislatively created doctrine for vacating arbitration awards.

This second, legislatively created standard is described in shorthand by the *Ahhmigo* and *Taylor* courts as the "exceeding authority" standard or is described more generally in terms of the UUAA. The "exceeding authority" term used by the courts comes from the legislatively created UUAA, which reads, "the court shall vacate an award made in the arbitration proceeding if … an arbitrator exceeded the arbitrator's authority." Utah Code Ann. § 78B-11-124(1)(d).

Subparagraph (d) is just one of several legislatively created grounds for vacating an arbitration award found in the UUAA, *id.* § 78B-11-124(1)(a)–(f), but the *Ahhmigo* and *Taylor* courts

CRAIG E. HUGHES is a partner at Hughes & Bishop Estate Attorneys, where he engages in estate and tax planning, trust administration, and probate litigation.



use subparagraph (d) as shorthand for all the grounds to make its important points regarding the distinction between the "manifest disregard" standard and the "exceeding authority" standard.

Since at least 1996, when the Utah Supreme Court issued *Buzas*, Utah district courts have relied most heavily on the judicially created manifest disregard standard in vacating arbitration awards. But the supreme court has been less than enthusiastic about affirming the validity of this standard. Further, courts' analyses of the relation between the manifest disregard and exceeding authority standards have been sometimes difficult to understand. The *Ahhmigo* court expressly admits the difficulty in understanding how the different standards relate to each other and its lack of enthusiasm for the manifest disregard standard:

> In the interest of facilitating discussion in a later case, we note two things about the manifest disregard standard. First, we have never applied the standard to vacate an arbitration award. Second, we have been less than clear when we have talked about the link between the manifest disregard standard and the UUAA.

Ahhmigo, LLC v. Synergy Co. of Utah, LLC, 2022 UT 4 , ¶¶ 37–37, 506 P.3d 536.

Thankfully, both the *Ahhmigo* and *Taylor* courts clarified this link between the two standards and have indicated in dicta their preference for the exceeding authority standard.

Analysis – Introduction

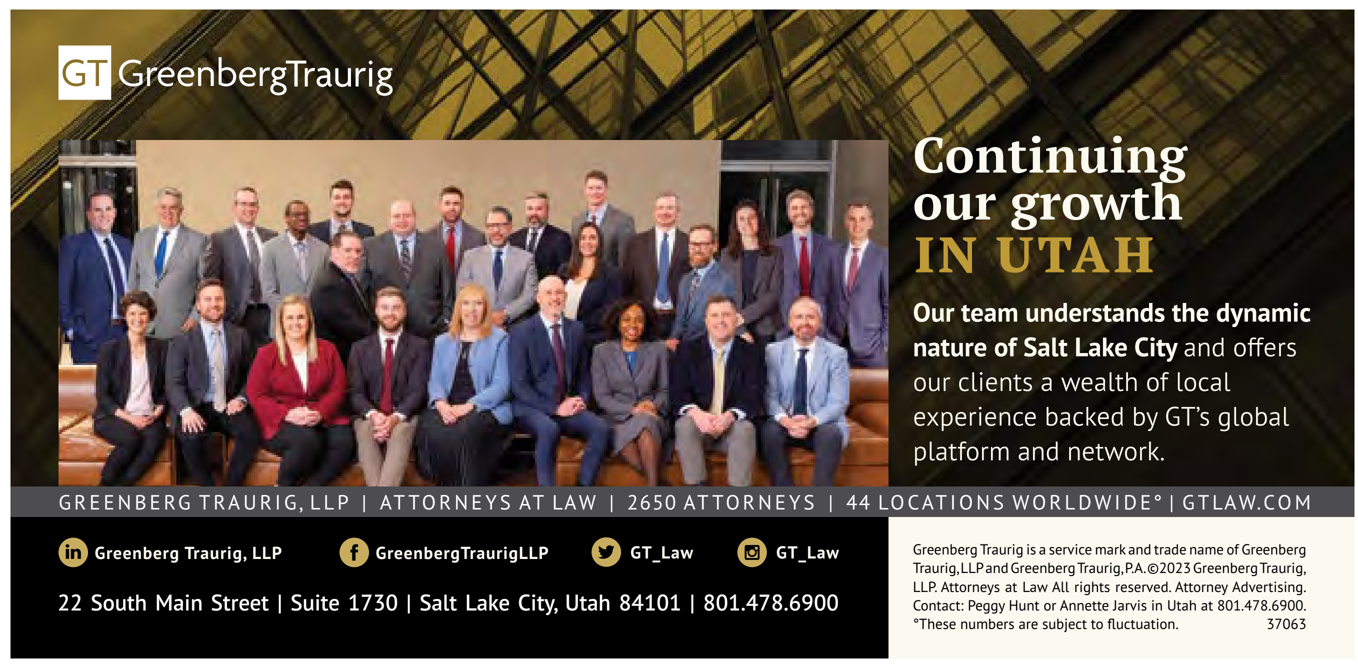
In *Ahhmigo* and *Taylor*, the Utah Supreme Court emphasizes that the traditional "manifest disregard" standard is no longer in favor (although the court states – almost woefully – that it has not yet been formally asked to abandon the manifest disregard standard). *Ahhmigo*, 2022 UT 4, ¶ 36; *Taylor v. Taylor*, 2022 UT 35, ¶ 75, 517 P.3d 380. The standard the court implicitly favors asks (summarized) whether (1) an arbitrator has manifestly disregarded the provisions in the *Arbitration Agreement* itself regarding resolution of a dispute or (2) has expressly violated the UUAA's specifically listed reasons for overturning an arbitration award.

The court's critical clarification here puts arbitration back where it belongs: in the agreement between the parties and in the UUAA's narrow and expressly indicated statutory grounds for vacating an arbitration award – *not* in whether the arbitrator manifestly disregards generally established statutory and judicial law governing the particular conflict.

The *Ahhmigo* Court Analysis

Ahhmigo narrates the important judicial history behind the manifest disregard standard. That history is briefly summarized here.

Ahhmigo notes that the court first addressed the connection between the statutory UUAA grounds for vacatur and the manifest disregard standard in *Buzas*. *Ahhmigo*, 2022 UT 4, ¶ 31 (citing *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, at 946, 951 (Utah 1996)).



Ahhmigo notes though that in *Buzas* the court stated "we expressly reserve the issue of whether [the manifest disregard standard is] recognized in Utah." *Id.* ¶ 32 (quotation simplified).

Ahhmigo then states,

> we next discussed the manifest disregard standard in *Pacific Development, L.C. v. Orton*, 2001 UT 36, 23 P.3d 1035 .... We again acknowledged the connection between the manifest disregard standard and section 78B-11-124(1)(d) of the UUAA. And we explained that [a] developer's argument that the arbitrator had manifestly disregarded the law turned on whether the arbitrator had exceeded his authority.

Ahhmigo, LLC v. Synergy Co. of Utah, LLC, 2022 UT 4 , ¶ 33, 506 P.3d 536. (quotation simplified).

In other words, as far back as 2001 in *Pacific Development*, the court was clearly leaning toward the exceeding authority standard – not the manifest disregard standard. *Ahhmigo* emphasized the exceeding authority standard by noting that the *Pacific Development* court "concluded that the developer's manifest disregard argument simply amounted to a 'manifest disagreement' with the arbitrator's findings and final award. And this, ... did not entitle the developer to reversal." *Ahhmigo*, 2022 UT 4, ¶ 33 (quotation simplified).

In further unfolding the history of the manifest disregard standard, *Ahhmigo* then notes that "[t]he manifest disregard standard assumed its current form in *Westgate Resorts, Ltd. v. Adel*, 2016 UT 24, 378 P.3d 93. There, we explained that a district court may vacate an arbitrator's decision if the arbitrator exceeded [their] authority, or if [their] decision demonstrated a manifest disregard of the law." *Ahhmigo*, 2022 UT 4, ¶ 34 (quotation simplified).

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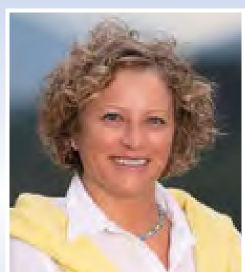

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The "or" in the preceding sentence highlights the problem. Is it the exceeding authority standard *or* the manifest disregard standard that should govern? *Westgate*'s attempt to explain the different "deferences" paid by the appellate courts to these two different standards is difficult to fully understand and more difficult to practically apply. The *Ahhmigo* court frankly admits as much: "While we applied the manifest disregard standard in *Westgate*, we also recognized there may be issues with the standard's compatibility with the UUAA. We rendered no decision on the matter, however, because the parties did not ask us to abandon the standard." *Ahhmigo*, 2022 UT 4, ¶¶ 36, 40 (quotation simplified).

The *Ahhmigo* court then further bluntly assesses the situation:

> In the interest of facilitating discussion in a later case, we note two things about the manifest disregard standard. First, we have never applied the standard to vacate an arbitration award. Second, we have been less than clear when we have talked about the link between the manifest disregard standard and the UUAA.

Id. ¶¶ 37–38 (quotation simplified).

In the *Westgate* court's defense, *Ahhmigo* notes that the manifest disregard standard is a "judicially created doctrine *stemming from* the exceeding authority statutory ground." *Id.* ¶ 39 (citing *Buzas*, 925 P.2d at 951). The court further states, "[t]he standard's murky origins lead us to wonder if perhaps manifest disregard of the law is better thought of as a way of sussing out whether the arbitrator exceeded her authority in a manner that deprived the parties of the benefit of their bargain." *Id.* ¶ 41.

Nevertheless, the *Ahhmigo* court continued its own brutal self-assessment in stating the following:

> In *Westgate*, we suggested that the manifest disregard standard and section 78B-11-124(1)(d) of the UUAA were two separate grounds on which a court might vacate an arbitration award. We then really muddied the waters, explaining that the manifest disregard standard "derives from" section 78B-11-124(1)(d) but that each "entails different

> standards of review." Under our case law, then, we cannot say whether the manifest disregard standard operates as only a gloss on section 78B-11-124(1)(d) of the UUAA, or whether it is a standalone ground on which a court may vacate an arbitration award. And if it is the latter, we have yet to come across any justification for our decision to add something to the statute that the Legislature did not.

Id. ¶ 40 (internal citations omitted).

Gratefully, the court admits the problem and has gone miles in *Ahhmigo* and *Taylor* to clarify the situation. Most importantly, the *Ahhmigo* and *Taylor* courts are going back in their dicta to fundamental contract law in clarifying the vacatur standards.

> Arbitration is a matter of contract law .... And precisely because arbitration is a bargained-for remedy, an arbitrator cannot (manifestly) disregard the boundaries the parties have set for her. To the contrary, arbitration contracts are to be enforced according to their terms, and in the manner to which the parties have agreed.

Ahhmigo, 2022 UT 4, ¶ 42 (quotation simplified).

The court's statement promises – if the court is ever formally asked – that the court will return to fundamental principles of contract and legislative arbitration law. *Ahhmigo* goes on to state,

> Fittingly, each of the grounds for vacatur the UUAA provides seems designed to ensure that the parties receive the arbitration they contracted for. For example, a district court can vacate an award if the arbitrator or the arbitration proceeding is corrupt, fraudulent, impartial, or otherwise unfairly prejudicial. *See* Utah Code § 78B-11-124(1)(a)–(f). These grounds all protect against something interfering with a party receiving the neutral arbitration they agreed to in the contract. As a general rule, awards will not be disturbed on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected.

Id. ¶ 43 (quotation simplified).

With this important statement in mind, consider the following further statement thoroughly redefining in a fundamental way the words "manifest disregard of the law":

> The manifest disregard standard might be better viewed as a tool to inquire whether the arbitrator deprived the parties of their bargained-for arbitration by disregarding the law that *the parties agreed would apply.* That is, an arbitrator might manifestly disregard the law if the parties' contract calls for Utah law, but the arbitrator prefers Colorado law and applies that instead. In that case, the parties did not get what they expected to get when they contracted – the application of Utah law to their dispute.

Id. ¶ 44 (emphasis added) (quotation simplified).

The following is one reasonable way of interpreting the *Ahhmigo* court's statements. If the parties' arbitration contract calls for application of rules found in the contract, and an arbitrator (or a reviewing court) ignores those bargained-for rules and applies instead Utah judicial or statutory law that the arbitrator or court thinks is more appropriately applicable to the conflict being arbitrated, then the parties did not get what they expected to get when they contracted for application of specific rules found in the contract – application of the rules set forth in their arbitration agreement (which could be quite

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different from traditional Utah judicial or statutory rules or procedures). This interpretation is supported by *Ahhmigo*:

> When a party voluntarily agrees to arbitrate, she agrees to forego the protections of a substantive judicial review of the merits of the arbitration decision. A party should not be able to participate in arbitration and then subject the resulting arbitration award to the review it rebuffed in the first place. After all, arbitration is, at its core supposed to be an alternative to litigation in a court of law, not a prelude to it.

Ahhmigo, LLC v. Synergy Co. of Utah, LLC, 2022 UT 4 , ¶ 41, 506 P.3d 536 (ellipses and citations omitted).

The *Taylor* Court Analysis

The court in *Taylor* comes out just as strongly as *Ahhmigo* in rejecting (in dicta) the manifest disregard standard and favoring strictly-limited grounds in vacating an arbitration award – grounds found (1) in an arbitrator's violation of the arbitration agreement itself or (2) in the arbitrator's violation of the UUAA standards mandating fair and efficient resolution of disputes.

It is particularly important to note that the *Taylor* court finds that specific Utah statutory and judicial decisions regarding divorce do not prevent divorce conflicts from being resolved pursuant to an arbitration agreement between the divorcing parties. In this regard, the significance of *Taylor* is far-reaching. It is not traditional statutory and judicial law that governs a particular area of law that is necessarily dispositive in a court's review of an arbitration award.

> As to arbitration, our law has long favored arbitration as a speedy and inexpensive method of adjudicating disputes and easing court congestion. We have held that judicial review of arbitration awards should not be pervasive in scope or susceptible to repetitive adjudications, but rather strictly limited to the statutory grounds and procedures for review. A trial court faced with a motion to vacate or modify an arbitration award is limited to determining whether any of the very limited grounds for modification or vacatur exist. A district court's review of an arbitration award should be narrowly confined to those grounds established by statute. As a general rule, therefore, an arbitration award will not be disturbed on account of irregularities or informalities in the proceeding or because the court does not agree with the award as long as the proceeding was fair and honest and the substantial rights of the parties were respected.

Taylor v. Taylor, 2022 UT 35, ¶ 44, 517 P.3d 380 (quotation simplified).

Further, "safeguards remain in place to revisit the outcome of the arbitration if the process is, among other things, tainted by fraud, corruption, or misconduct, or if the arbitrator exceeds her authority." *Id.* ¶ 48 (citations omitted).

After affirming all the strong statements found in *Ahhmigo* disfavoring the manifest disregard standard, the *Taylor* court neatly summarizes the issue: "Ultimately, while [Appellant] may disagree with the arbitrator, that does not equate to manifest disregard. After all, manifest disagreement and manifest disregard are different …. The appellant's manifest disregard argument simply amounts to a manifest disagreement with the arbitrator's findings and final award." *Id.* ¶ 87 (quotation simplified).

Conclusion

For several decades, the Utah appellate courts have called into question the "manifest disregard standard" for vacating arbitration awards. In 2022 the Utah Supreme Court in *Ahhmigo* and *Taylor* made abundantly clear that it strongly disfavors the manifest disregard standard – but unfortunately has not yet been formally asked by litigants to overturn the standard.

It makes interesting reading to hear the Utah Supreme Court in *Ahhmigo* and *Taylor* – in often humorous ways – all but beg future litigants seeking a reversal or affirmation of an arbitration award to formally request the court to overturn the manifest disregard standard. Please, is the mantra! As the *Taylor* court stated, "*Ahhmigo* notwithstanding, neither party has asked us to abandon the manifest disregard standard. And so we proceed to apply the standard under our case law as it currently sits." *Id.* ¶ 78. One can almost feel the court's slumped shoulders and resigned tone in those words, "and so we proceed" – alas, sigh – "to apply the standard" we really dislike. To read *Ahhmigo* and *Taylor* in full, and particularly the *Ahhmigo* court's history of this issue is to feel the court's pain. The court is begging the Bar to ask and allow it to improve Utah's already good arbitration laws.

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Article

Milestones in the Judicial Evolution of Ponzi Clawbacks

by Ronald W. Goss

Ponzi clawbacks are suits by bankruptcy trustees and equity receivers to recover payments to investors and others made in furtherance of a Ponzi scheme. Next year will mark the one-hundredth anniversary of *Cunningham v. Brown*, the first Ponzi clawback case. 265 U.S. 1 (1924). Since that landmark decision, through statutes, amendments to statutes, and a large body of case law, Ponzi clawbacks have become a distinct subset of fraudulent transfer and preference law. The statutes were not designed to unwind Ponzi schemes or reallocate losses from large-scale fraud, but they have given federal courts the tools to craft a body of law that enhances the recoveries of the most unfortunate victims and fairly approximates justice. This article will examine the judicial milestones in the evolution of Ponzi clawbacks and explore how courts have crafted various remedies to make the square peg facts of Ponzi schemes fit into the round holes of the avoiding powers.

From Independent Clearing House to Rust Rare Coin, Utah has spawned numerous Ponzi schemes. For lawyers who may not be versed in this species of fraud, a brief introduction to the language and concepts of Ponzi clawbacks may aid in understanding the cases discussed herein.

The Language of Ponzi Clawbacks

A Ponzi scheme is an investment fraud in which returns are paid from principal collected from other investors rather than profits or earnings of a legitimate business. *See SEC v. Mgmt. Sols., Inc.*, No. 2:11-CV-1165-BSJ, 2013 WL 4501088, *7–19 (D. Utah Aug. 22, 2013) (collecting definitions). Ponzi schemes can work for a while, but they inevitably collapse when the pool of new investors dries up or enough earlier investors ask for their money back. Since all Ponzi schemes depend upon infusions of new investor funds, positive returns whether labeled "interest," "profits," or "earnings" are commonly referred to as "fictitious profits."

Generally, all Ponzi scheme investors are both innocent victims and unwitting accomplices of the fraud. When the scheme collapses, a few will be "net winners" who managed to withdraw more money than they invested, but most are "net losers" who received only a portion of their investment (or nothing at all). A Ponzi scheme's assets are never sufficient to make the victims whole, but using fraudulent transfer and preference statutes, trustees and receivers are able to recapture certain transfers and equalize investor losses to some extent.

The Federal Bankruptcy Code contains a fraudulent transfer provision, 11 U.S.C. § 548(a), as well as a "borrowing" or "derivative standing" provision, 11 U.S.C. § 544(b), which allows a trustee to step into the shoes of a "triggering creditor" who could have avoided the transfer under state law. There are no fraudulent transfer statutes specifically designed for equity receivers, so they employ state statutes, typically the Uniform Voidable Transactions Act, Utah Code Ann. § 25-6-101 et seq, or its predecessor, the Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-1 (repealed).

There are two types of fraudulent transfers, commonly known as "actual" and "constructive" transfers. Transfers made with subjective intent to "hinder, delay or defraud" creditors are "actual fraudulent transfers." 11 U.S.C. § 548(a)(1)(A); Utah Code Ann. § 25-6-202(1)(a). The focus is on the debtor's state of mind, not the adequacy or equivalence of the consideration provided for the transfer. Except where the debtor admits fraudulent intent in a plea agreement, intent is almost always established by circumstantial evidence. Proof that the debtor operated a Ponzi scheme triggers the widely recognized "Ponzi

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scheme presumption" that all investor payments were made with intent to hinder, delay, or defraud creditors. *See, e.g., Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir.), cert. denied, 555 U.S. 1047 (2008).

The "good faith defense" allows a Ponzi investor to retain payments up to the amount of his original investment by establishing that the payments were taken in good faith. 11 U.S.C. § 548(c); Utah Code Ann. § 25-6-304(1). If the investor fails to prove good faith he must disgorge the entire transfer, including amounts that could be considered return of principal. *Jobin v. McKay* (*In re M & L Bus. Mach. Co.*), 84 F.3d 1330, 1338–39 (10th Cir.), *cert. denied*, 519 U.S. 1040 (1996).

Transfers by an insolvent debtor in which the debtor receives less than "reasonably equivalent value" in exchange are "constructive fraudulent transfers." 11 U.S.C. § 548(a)(1)(B); Utah Code Ann. § 25-6-202(1)(b). Since Ponzi schemes use investor money, not profits, to pay returns, they are inherently insolvent at all times; hence proof that the debtor operated a Ponzi scheme establishes its insolvency. *See, e.g., Hafen v. Taylor*, No. 2:19-CV-00896-TC-JCB, 2022 WL 3452819, *2–3 (D. Utah Aug. 17, 2022). "Fictitious profits" received from a Ponzi investment are considered a windfall, and nearly all courts have adopted the "principal only" rule that an investor gives "value" to a Ponzi operator in the amount of his principal investment, but not as to any profits, interest, earnings, or other positive return. *See, e.g., Donell*, 533 F.3d at 771–72.

The "reachback period" for fraudulent transfers under the Bankruptcy Code is two years. 11 U.S.C. § 548(a)(1). A trustee exercising derivative standing under 11 U.S.C. § 544(b) can reach back as far as state law would allow the triggering creditor. The Uniform Voidable Transactions Act, like its predecessor, the Uniform Fraudulent Transfer Act, has a four-year statute of limitations and a one-year discovery rule for transfers made with actual intent to defraud. Utah Code Ann. § 25-6-305. If the IRS is the triggering creditor, the ten-year collection period under IRC § 6502(a) preempts state statutes of limitation. *Gordon v. Webster* (*In re Webster*), 629 B.R. 654, 674–75 & n.18 (Bankr. N.D. Ga. 2021) (collecting cases).

Preferences are transfers by an insolvent debtor to a creditor made within ninety days of bankruptcy (or one year if the creditor is an insider) that enable the preferred creditor to receive a greater percentage of his claim than he would receive in a bankruptcy distribution. 11 U.S.C. § 547(b). From the very first Ponzi clawback case, payments received by investors within the statutory reachback period have been held to be preferences. *Cunningham*, 265 U.S. at 10–11. A statutory safe harbor, known as the "ordinary course of business defense," shields certain transfers from preference liability. 11 U.S.C. § 547(c)(2). In Ponzi cases, the great weight of authority holds that the ordinary course defense does not apply to investor payments. *See, e.g., Sender v. Nancy Elizabeth R. Heggland Family Trust* (*In re Hedged-Invs. Assocs., Inc.*), 48 F.3d 470, 476 (10th Cir. 1995).

The Evolution of Ponzi Clawbacks in the Courts

Cunningham v. Brown, 265 U.S. 1 (1924)

The law of Ponzi clawbacks began, fittingly, with its namesake, Charles Ponzi. Ponzi borrowed money on notes payable in ninety days at 50% interest. He claimed to send U.S. currency to Italy, exchange it for Italian lire, purchase international postal reply coupons, bring the coupons back to America, and convert them into U.S. postage stamps, which he sold at 100% profit. The whole story was a sham. Ponzi never engaged in any business whatsoever, and the only money he ever had was from his loans. He was always insolvent and driven deeper into insolvency the more his business succeeded. Ponzi took in more than $9 million from 15,000 investors before being exposed as a fraud and put into involuntary bankruptcy.

Six investors redeemed their notes after his fraud was exposed and before his accounts were depleted. The trustee sued to recover their withdrawals as preferences under section 60 of the 1898 Bankruptcy Act. The defendants claimed that the money they received was not Ponzi's property but was impressed with a constructive trust. The specific funds they invested had been paid to other investors, and their withdrawals came from accounts in other banks that Ponzi transferred to cover the notes. The Supreme Court held that Ponzi had a property interest in the fraudulently obtained funds, and the transfers were subject to clawback as preferences, the constructive trust remedy was available only when an investor could trace his own money to an identifiable asset, and tracing fictions should not be used to elevate the defendants' claims above other victims. These principles remain cornerstones of Ponzi clawback law.

Eby v. Ashley (In re Young), 1 F.2d 971 (4th Cir. 1924), _cert. denied_, 266 U.S. 631 (1925)

Frank Young, a contemporary of Charles Ponzi, fraudulently induced 5,000 investors to give him more than $4 million to invest in securities. Young's investments were not profitable, but to perpetuate the scheme he issued phony reports showing positive gains and used other investors' money to pay clients who asked to withdraw funds. Ashley invested $3,000 and later received two payments: $1,576 labeled "profits" and another representing his original principal. The trustee sued to recover both payments under section 67e of the 1898 Bankruptcy Act, an actual fraudulent transfer statute. The court held that the first payment was not avoidable because when it was received Young owed Ashley the full $3,000 that he had invested. The court recharacterized Ashley's "profits" as partial repayment of his principal and held that Ashley's *actual* profit was a "gratuitous payment" and "entirely without consideration." *Eby*, 1 F. 2d at 973.

Eby introduced the principle that a Ponzi investor gives "value" in exchange for payments only up to the amount of his original investment. It would be sixty years before another court addressed the issue. *See Merrill v. Abbott* (*In re Indep.*

Clearing House Co. I), 41 B.R. 985, 1008–1010 (Bankr. D. Utah 1984), *aff'd in part and rev'd in part*, 77 B.R. 843 (D. Utah 1987). *Eby* also originated the principle, later known as the "netting rule," for determining when a Ponzi investor is a "net winner." Under the rule, all Ponzi payments, regardless of how they are labeled, are aggregated as return of principal, until an investor's total principal investment has been repaid. *See Donell*, 533 F.3d at 771; *Picard v. Greiff* (*In re Bernard L. Madoff Inv. Secs., LLC*), 476 B.R. 715, 729 (S.D.N.Y. 2012).

Conroy v. Shott (In re Stickler), 363 F.2d 90 (6th Cir.), _cert. denied_, 385 U.S. 969 (1966)

Leslie Stickler's Ponzi scheme involved high interest loans from individuals. Edgar Shott made numerous loans to Stickler and was repaid all his principal plus $342,900 in returns. The trustee sued to recover Shott's payments under the 1898 Bankruptcy Act's derivative standing provision and an Ohio fraudulent transfer statute that required that the transferee have knowledge of the transferor's fraudulent intent. Because the existence of the Ponzi scheme had been established, the court declared that "the question of intent to defraud is not debatable." *Conroy*, 363 F. 2d at 92. From Shott's extensive course of dealing with Stickler, the court concluded that he had "constructive knowledge" of the fraudulent intent.

The concept, first enunciated in *Conroy*, that Ponzi payouts are made with intent to defraud as a matter of law, would be refined in *Merrill v. Abbott* (*In re Indep. Clearing House II*), 77 B.R. 843, 859–61 (D.Utah 1987), twenty years later, and evolve further to become the generally recognized (and nearly irrebuttable) "Ponzi scheme presumption." *See Perkins v. Lehman Bros.* (*In re Int'l Mgmt. Assocs., LLC*), 563 B.R. 393, 404–11 (Bankr. N.D. Ga. 2017) (history of the presumption). *Conroy* also anticipated the inquiry notice test for a transferee in good faith by holding that knowledge of a Ponzi operator's fraudulent intent could be imputed from the surrounding circumstances.

Merrill v. Abbott (In re Independent Clearing House Co. I), 41 B.R. 985 (Bankr. D. Utah 1984), _aff'd in part and rev'd in part_, 77 B.R. 843 (D. Utah 1987)

Independent Clearing House was a huge Ponzi scheme operating under the guise of an accounts payable factoring program. The trustee sued some 2,100 investors under the Bankruptcy Code's fraudulent transfer and preference provisions to recover all their payments and equalize losses.

The bankruptcy court's groundbreaking decision examined more issues than any prior Ponzi clawback case. The court provided a serviceable definition of "Ponzi scheme," created the investor categories of "net winners" and "net losers," originated the concept of "fictitious profits," and was the first case to address the "ordinary course of business defense" in the Ponzi context. The court held that a Ponzi scheme is insolvent at all times; courts do not have equitable power to order turnover of all investor payments to the trustee; the evidence failed to prove that investors' payments were made with intent to defraud; investors had a complete good faith defense; the debtor did not receive reasonably equivalent value for fictitious profits paid to net winners; the ordinary course of business defense does not apply to Ponzi payouts; and preference and fraudulent transfer judgments bear prejudgment interest from commencement of the suit. All of these issues would be addressed by the Utah district court in an even more sweeping decision three years later.

Merrill v. Allen (In re Universal Clearing House Co.), 60 B.R. 985 (D. Utah 1986)

From the earliest Ponzi schemes, perpetrators have used sales agents to recruit new investors. The trustee sued 124 sales agents of the Clearing House to clawback their commissions as constructive fraudulent transfers. The issue was one of first

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impression. The bankruptcy court held that the agents' services provided no "legally cognizable value" because the services furthered the commission of the scheme and deepened the debtor's insolvency. *Merrill v. Allen* (*In re Universal Clearing House Co*.), 1985 Bankr. LEXIS 6195 (Bankr. D. Utah May 3, 1985). The district court reversed, holding that the value of services should be determined by their marketplace value, not the impact the services have on the debtor's Ponzi scheme. *Allen*, 60 B.R. at 998–1000.

Like the Utah bankruptcy and district courts, later cases also reached opposite conclusions, with the result that there is a split of authority at the court of appeals level. *Compare Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) (zero value), *with Orlick v. Kozyak* (*In re Fin. Federated Title & Trust, Inc*.), 309 F.3d 1325, 1332 (11th Cir. 2002) (market value). The schism reflects the different paradigms employed by the courts to determine the "value" of salespeople's services. The "zero value" cases focus on the impact the services have on the Ponzi scheme, while the "market value" cases focus on marketplace values. The Tenth Circuit has recognized but not weighed in on this issue. *See Georgelas v. Desert Hill Ventures, Inc*., 45 F.4th 1193 (10th Cir. 2022).

Merrill v. Abbott (In re Independent Clearing House Co. II), 77 B.R. 843 (D. Utah 1987)

The Utah district court, sitting *en banc*, affirmed in part and reversed in part the bankruptcy court's 1984 decision. The decision was written by District Judge Bruce Jenkins, a former bankruptcy judge, and contained the most comprehensive analysis of Ponzi clawback issues up to that time. The district court agreed with the bankruptcy court that money fraudulently obtained from investors and commingled with other money as to preclude tracing was property of the debtor subject to fraudulent and preferential disposition; a Ponzi scheme is insolvent at all times; and courts do not have equitable power to order turnover of all investor payments.

In reversing the bankruptcy court's blanket finding that investors took payments in good faith, *Abbott* noted that the good faith test "is whether the transaction in question bears the earmarks of an arm's length bargain." *Abbott*, 77 B.R. at 862. This test did not catch on and inquiry notice has become the prevailing standard. *See Jobin*, 84 F.3d at 1337–38.

Abbott held that Ponzi scheme investors could raise the "ordinary course of business defense" to their preference payments. *Abbott*, 77 B.R. at 875. Virtually all other courts have rejected this position and refused to allow Ponzi investors to assert the ordinary course defense. *See, e.g., Nancy Elizabeth*, 48 F.3d at 476; *Wider v. Wootton* (*In re Cohen*), 907 F.2d 570, 572 (5th Cir. 1990).

Perhaps *Merrill v. Abbott*'s most important contribution to Ponzi clawback law was its analysis of the "value" that is exchanged when a Ponzi operator pays "fictitious profits" to investors. Prior to *Abbott*, the tiny handful of cases that allowed trustees to clawback Ponzi profits contained only the barest analysis. *Abbott* carefully parsed the statutory language and presented a reasoned explanation for why Ponzi profits are constructive fraudulent transfers. When a Ponzi operator makes a payment to an investor, each party exchanges something of value. The Bankruptcy Code defines "value" in the alternative as "property" or "satisfaction of an antecedent debt." 11 U.S.C. § 548(d)(2)(A). *Abbott* characterized the "property" that investors give to Ponzi operators as "use of money to perpetuate a Ponzi scheme," and determined that this form of property has "negative value." *Abbott*, 77 B.R. at 859. The "antecedent debt" prong of "value" embraces two correlative terms: "debt," defined as "liability on a claim," and "claim," defined as a "right to payment." 11 U.S.C. § 101(5)(A), (12). *Abbott* was the first case to hold that Ponzi contracts violate public policy and therefore an investor's "right to payment" is not the contracted-for return promised by the perpetrator. 77 B.R. at 857–58. Since Ponzi contracts are unenforceable, *Abbott* reasoned that an investor's "claim" is the right to restitution of the original investment; and the perpetrator's corresponding "debt" is its liability to make restitution. *Id*. at 857. From this the court concluded that a Ponzi operator receives "no value" when it pays an investor more than his principal. *Id*. Since "no value" is a subset of "less than reasonably equivalent value," any return on a Ponzi investment is deemed a constructive fraudulent transfer. Courts embraced *Abbott*, rarely with amplification of its reasoning, and the "principal only" rule has become virtually universal. *See, e.g., Donell*, 533 F.3d at 771–72; *Sender v. Buchanan* (*In re Hedged-Invs. Assocs., Inc*.), 84 F.3d 1286, 1290 (10th Cir. 1996).

Merrill v. Abbott's second major contribution to Ponzi clawback law was the "Ponzi scheme presumption," which is routinely used by trustees and receivers as an evidentiary shortcut to prove the debtor's fraudulent intent. *Abbott* held that proof that the debtor operated a Ponzi scheme conclusively establishes that investor payments were made with intent to defraud creditors. The court reasoned that Ponzi operators know the scheme will

eventually collapse and leave investors unpaid, and knowledge to a substantial certainty constitutes intent. *Abbott*, 77 B.R. at 860–61. The Ponzi scheme presumption is followed by most federal courts in both bankruptcy and receivership cases. *See, e.g., Wing v. Dockstader*, 482 Fed. Appx. 361, 363 (10th Cir. 2012) (receivership); *Johnson v. Neilson* (*In re Slatkin*), 525 F.3d 805, 814 (9th Cir. 2008) (bankruptcy).

***Wyle v. C.H. Rider & Family (In re United Energy Corp.)*, 944 F.2d 589 (9th Cir. 1991)**

United Energy operated a Ponzi scheme using two companies and a sham solar energy program. One company sold solar energy modules to investors and the other contracted with the investors to purchase the electricity produced by their modules. The modules produced negligible electricity, but investors were given phony production reports and paid for fictitious production. The trustee sued to clawback the payments as constructive fraudulent transfers. The bankruptcy court held that the debtor did not receive *any* value in exchange for the payments. The Bankruptcy Appellate Panel reversed, reasoning that the payments partially satisfied the module owners' fraud or restitution claims. *C. H. Rider & Family v. Wyle* (*In re United Energy Corp.*), 102 B.R. 757, 763 (B.A.P. 9th Cir. 1989), *aff'd*, 944 F.2d 589 (9th Cir. 1991). The trustee appealed, and the Ninth Circuit affirmed, holding that when the investors were duped into buying modules, they acquired legal claims for rescission and restitution, which were proportionately reduced, dollar-for-dollar, by the payments. *United Energy*, 944 F. 2d at 595–96.

United Energy expanded on the principle first recognized in *Merrill v. Abbot* that a Ponzi investor's "claim" against the perpetrator is a legal claim for restitution, by adding the "proportionate reduction" concept, that Ponzi payments are an exchange of "reasonably equivalent value" to the extent that they reduce that claim.

***Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.), *cert. denied sub nom. African Enterprise, Inc. v. Scholes*, 516 U.S. 1028 (1995)**

The Securities and Exchange Commission obtained the appointment of a receiver for a Ponzi scheme operating as a commodities trading business. The perpetrator formed

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corporations which in turn created limited partnerships that sold limited-partner interests to investors. Joseph Phillips purchased a limited partnership interest for $2.5 million and when he withdrew from the partnership, he received all his principal plus a fictitious profit of $300,000. The receiver sued Phillips to recover his profit under an Illinois fraudulent transfer statute. The district court granted summary judgment for the receiver, and the Seventh Circuit, in an expansive opinion written by Judge Posner, affirmed.

Scholes is the leading Ponzi clawback case in federal equity receiverships. The court held that a receiver for corporations engaged in a Ponzi scheme has standing to clawback fictitious profits paid to investors as though the receiver were a creditor of the scheme. *Scholes*, 56 F.3d at 753–55. The court recognized that a Ponzi scheme is insolvent from its inception and that investors are tort creditors with claims based on fraud in the inducement. *Id.* at 756. The court upheld use of a Ponzi operator's plea agreement to establish fraudulent intent, foreshadowing the Ninth Circuit's in-depth analysis years later in *Johnson v. Neilson* (*In re Slatkin*), 525 F.3d 805, 811–16 (9th Cir. 2008). Although the Illinois law was an actual fraudulent transfer statute, in which avoidance turned on fraudulent intent not "reasonably equivalent value," Judge Posner found that the "requirement of full consideration [was] implicit in the old statute." *Scholes*, 56 F.3d at 756. Thus, Phillips could retain his profit only if the profit was offset by an "equivalent benefit" to the company. *Id.* at 757. Judge Posner concluded that a Ponzi entity receives "no benefit" when it pays fictitious profits since the payment only depletes its assets faster. *Id.*

Sender v. Buchanan (In re Hedged-Investments Associates, Inc.), 84 F.3d 1286 (10th Cir. 1996)

Mary Estill Buchanan invested $750,000 in a Ponzi scheme, and withdrew a total of $2,000,000 before the scheme collapsed, receiving $250,000 within one year of the debtor's bankruptcy. The trustee sued to clawback her $250,000 withdrawal as a constructive fraudulent transfer under the Bankruptcy Code.

The Tenth Circuit recognized that Ponzi investors are tort creditors, and a Ponzi operator receives "value" to the extent a transfer reduces the investor's tort claim. The court found that Colorado law allows a fraud plaintiff to affirm the contract and recover damages, but, like *Abbott*, found Ponzi investor contracts unenforceable as a matter of public policy. The court concluded that Ms. Buchanan's only "viable claim" was for restitution of her original investment, and because the $250,000 transfer exceeded her investment, the debtor received no value in exchange for the transfer. *Hedged-Investments*, 84 F. 3d at 1290.

Hedged-Investments, like *Scholes v. Lehmann*, expressly recognized that investors hold tort claims against Ponzi operators, and, like *United Energy*, recognized that Ponzi payments reduce investors' claims and the operator's corresponding debt. The case went beyond prior clawback decisions by examining, at least cursorily, Colorado fraud remedies, but found that the only available state law remedy was restitution of principal. *Hedged-Investments* would seem to leave open the possibility that if a state's substantive law allows a person who is fraudulently induced to enter into a sham investment to maintain a claim against the perpetrator for damages, or interest for the time value of money wrongfully obtained, reduction of these claims via Ponzi payments would constitute "value."

Jobin v. McKay (In re M & L Business Machine Company, Inc.), 84 F.3d 1330 (10th Cir.), *cert. denied*, 519 U.S. 1040 (1996).

M & L employed a computer sales and leasing business as a front for a Ponzi scheme. Perry McKay was a "net loser" on his investment but received $43,500 in the year preceding M & L's bankruptcy. The trustee sued McKay to clawback his payments as actual fraudulent transfers, and he asserted the "good faith defense" under Bankruptcy Code § 548(c). Since McKay received less than the amount he invested, he took the payments "for value" as a matter of law. But he failed to establish that he took in "good faith" and the bankruptcy court entered judgment against him. The Tenth Circuit affirmed, holding that if the facts surrounding a Ponzi payment would have put a reasonable person on notice of the debtor's fraud, and the fraud would have been discovered through diligent inquiry, good faith is lacking.

M & L Business Machine was the first Ponzi clawback decided by a court of appeals to adopt inquiry notice as the test for transferee good faith under Bankruptcy Code § 548(c). The case illustrates a harsh reality of Ponzi investing, viz., being a net loser does not immunize an investor from clawback liability. Inquiry notice is now the majority rule in Ponzi clawback proceedings. *See, e.g., Picard v. Citibank, N.A.* (*In re Bernard L. Madoff Inv. Secs., LLC*), 12 F. 4th 171, 185–92 (2d Cir. 2021).

***Alexander v. Compton (In re Bonham)*, 229 F.3d 750 (9th Cir. 2000)**

Ponzi schemes often involve interrelated entities controlled by the perpetrator. RaeJean Bonham's scheme utilized two single-shareholder corporations. Investors were told that their funds were used to purchase blocks of frequent flier mileage and converted to airline tickets which she sold to the public at a substantial profit. After the scheme collapsed and creditors put her into involuntary bankruptcy, the trustee sued some 600 investors to clawback their payments. The defendants moved to dismiss the actions for failure to state a claim because their contracts and payments were from the non-debtor corporations, not Bonham.

To rescue his clawback claims from a "wrong plaintiff" defense, the trustee sought to substantively consolidate the closely held non-debtor corporations with Bonham's bankruptcy case, *nunc pro tunc*, as of the date of her bankruptcy petition. Substantive consolidation is a judge-made equitable doctrine in which the assets and liabilities of two or more entities are merged into one entity and claims are satisfied from the consolidated assets. The bankruptcy court granted the trustee's motion and the investors appealed. The Ninth Circuit affirmed, holding that substantive consolidation is appropriate if the bankruptcy court determines either that (1) creditors dealt with the consolidated entities as a single economic unit or (2) the debtor's affairs were so entangled that consolidation would benefit all creditors. *Bonham*, 229 F. 3d at 766 (adopting test from *Union Savs. Bank v. Augie/Restivo Baking Co. Ltd.* (*In re Augie/Restivo Baking Co.*), 860 F.2d 515, 518 (2d Cir.1988)). *Bonham* was the first court of appeals decision to adopt substantive consolidation of a Ponzi operator and its "evil zombies."

***Barclay v. Mackenzie (In re AFI Holding, Inc.)*, 525 F.3d 700 (9th Cir. 2008)**

Gary Eisenberg sold investors limited partnership interests in factoring businesses. The partnerships were unprofitable, but he used funds from later investors to pay fictitious gains and principal withdrawals to earlier investors. Keith Mackenzie invested $73,400, and when he withdrew from one of the partnerships he received $89,824, representing his original investment plus a fictitious gain of $16,424.

The trustee sued Mackenzie under the California fraudulent transfer statute to clawback both withdrawals. The bankruptcy court avoided the transfers and Mackenzie appealed. The district court reversed as to the principal payment and affirmed as to the fictitious gain. The trustee appealed to the Ninth Circuit arguing that he was entitled to recover both transfers. The Ninth Circuit affirmed the district court, holding that when McKenzie was duped into purchasing his partnership interest he acquired a claim for restitution, just like the *United Energy* investors when they bought their solar modules. The return of Mackenzie's principal investment satisfied his restitution claim, leaving only the fictitious gain as a constructive fraudulent transfer.

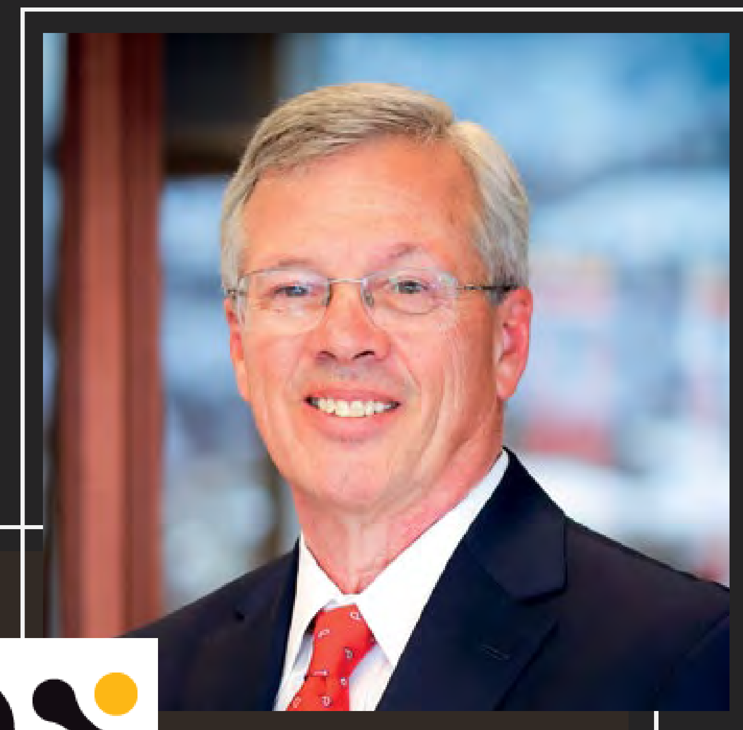
Ponzi schemes come in many forms, including fixed-income schemes evidenced by promissory notes, investment contracts, or other debt instruments; profit-based schemes purporting to trade in securities, foreign currency, precious metals, or other commodities; and equity-type schemes involving interests in limited partnerships and other business entities. *AFI Holding* found no meaningful distinction between different types of Ponzi schemes and refused to allow the form of the investment to determine clawback liability.

Final Thoughts

Chief Justice Taft, writing in the original Ponzi scheme case, declared that mass fraud cases "call strongly for the principle that equality is equity." *Cunningham*, 265 U.S. at 13. One does not have to delve deeply into clawback cases to recognize the guiding hand of equity. Equitable principles underlie the decisions which invalidate Ponzi contracts, deny investors the ordinary course of business defense, replace proof of fraudulent intent with a judge-made presumption, adopt inquiry notice as the test for good faith, disregard the form of an investment, and substantively consolidate non-debtor entities to extend avoiding powers.

Equitable considerations are most evident in the "fictitious profits" cases, which might be viewed as a kind of zero-sum game between "net winners" and "net losers." These cases rest on the oft-expressed principle that no one should profit from a Ponzi scheme at the expense of others. Judicial attitudes can shape the meaning of words in statutes, and the cases suggest that courts have been willing to strain the meaning of "value" to serve the interests of equity and distributive justice.

What has emerged from nearly a century of Ponzi clawbacks is a set of principles that emphasize equality and overall fairness, and have produced a remarkable degree of predictability and uniformity in bankruptcy and receivership cases.



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Article

My First Trip to Ukraine: Some Vacation Inspiration from a Friendly Neighborhood Prosecutor

by Nathaniel Sanders

The Ballet/Opera house is the physical and spiritual center of Lviv.

From my bed at night, through the open window, I could hear the groans of the train tracks not more than a couple hundred yards to my north. It was the slow, creaking groan of steel tracks under a heavy burden. The sound distinctly moved from west to east, the trains unlit – slowly dragging heavy armaments to a hungry front under cover of night. In the morning I would wake and walk down to the border crossing to hear the sounds of people moving from east to west – mothers directing children, bags on rollers, sacks dragged on cement. People stopping for food, for information, for a breath and a look back at a homeland they could only hope to see again soon.

Why Did I Visit Ukraine? Why Would One Vacation in a Country at War?

It could be that traveling in a war zone seemed preferable to losing all of the use-or-lose vacation I had accumulated over COVID. Does it make sense to try to fight off the encroachment of your work life into your personal life by taking some time to help fight another invasive, oppressive force? Absolutely. I'd rather do some humanitarian work in a war zone than lose a portion of my compensation package. And no, you don't have to go to that extreme, but we all need to get out of the daily grind on a more regular basis. Then there was COVID and a major case of cabin fever can spur all sorts of activity.

NATHANIEL SANDERS has served a respectable number of years as a criminal prosecutor at the Salt Lake County District Attorney's office and has recently founded an organization to help deliver aid to Ukrainians effected by the war in their country.

Another motivator may simply be the rule of law. After fifteen years as a lawyer, I just can't tear myself away from trying to build a more structured and sane way for us to resolve our differences. At the heart of it, as attorneys, we are all dedicating a huge portion of our lives to helping other people resolve their personal problems and disputes without killing each other or themselves. This is time that we would much rather be giving to our loved ones and outside interests.

Many buildings are sand-bagged, but people keep on living as usual.

Rule of law is what a good number of nations have been trying to set up internationally over many decades – systems and codes of inter-relating internationally to avoid wars rather than promote them. We've been through far too many bloodbaths across Europe, and throughout the world, to sit back idly and watch that sort of thing creep back into our world. We know that our governments aren't perfect and do some pretty screwed up things. And we know that there are wars and conflicts arising and resolving across the world all the time. But for over half a century, Europe has been an island of relative peace and prosperity, a region of multiple languages and cultures, of histories of conflicts and bitterness, that has managed to overcome these differences to establish an environment of peace and prosperity for its citizens, and possibly a model for other areas of the world working toward a similar level of peace and prosperity. Not to mention a multitude of really cool places to visit and the reliable home of the Eurovision Song Contest. Where would we be without ABBA?

I also have something of a dog in the fight. After finishing my undergrad studies, I spent a year and a half living and working in Moscow, Russia. I taught English in a public school for a year and then travelled across the country working for a Freedom Support Act program. For those who don't remember or were born after the Freedom Support Act (FSA), it was kind of like a post-Soviet Marshall Plan. If you're an American and you don't know what the Marshall Plan was, you're going to want to Google that one. As the United States did in Europe after World War II, the idea was to invest in building cultural, scientific, and economic bridges between the newly independent post-Soviet states and Europe and the United States.

After the fall of the Soviet Union in the 1991, Senator Bill Bradley brought this to fruition by creating an enormous network of scholarships, grants, and programs to encourage the exchange of people and ideas between the modern western world and the former Soviet states. The program I worked for had me traveling all over Russia interviewing and testing Russian high-school students to be selected for a full ride scholarship to live with American families and study in American high schools for a year. I worked directly with Russian educators and administrators, government officials, and, most importantly, Russian parents and high-school students. Between teaching kids in grades seven to eleven, working with kids and families across Russia, and all the friendships I made along the way, I developed a strong emotional tie to an area of the world with an enormous potential for increasing openness and development.

At the time, there were many Americans and Europeans living and working in Russia. It was a time of enormous faith in the inevitability of increasing peace and progress in the world. The general atmosphere of faith and trust was so great that the newly independent nation of Ukraine voluntarily handed over the nuclear arms in its possession to the post-Soviet Russian

Federation in exchange for pledges to respect and protect Ukraine's territorial integrity. I eventually went home to Chicago, naively believing I had done my part to help in our transition to a grand era of peace and prosperity.

Nearly thirty years on, that faith is brought into question by one leader, Vladimir Putin, who is determined to make his mark on the world by leveling decades of infrastructure and cultural heritage and peddling in threats of nuclear disaster. I had been in touch with a good Russian friend from Moscow over the years. Around 2002, he had told me how it was getting progressively worse in Russia. He feared how people were willing to trade in freedom and openness for apparent economic prosperity and increasing national pride. I dismissed his concerns. I couldn't imagine that anything could be worse than the bumbling of Boris Yeltsin.

But over the years, the anti-western propaganda mounted, the whittling of rule of law progressed, and more and more power filtered into an office that Putin refused to let pass from his grasp. In 2014, Putin sent tanks into Crimea (a portion of Ukraine), made feign of a plebiscite, and claimed the territory for Russia. In the West, we shook our heads and moved on.

I went back to Moscow to visit friends in the summer of 2017. The difference was palpable. No more friends of friends were eager to have you translate Beatles and Metallica lyrics for them

or to share their collection of Soviet stamps with you. No interest in a foreign accent, but rather disdain. There was a stronger sense of distance and foreignness than I had ever felt anywhere.

A few years later, when I heard radio broadcasts of Ukrainians dealing with the Russian invasion, my thoughts went back to the kids I had known. Who would be fighting and dying in this unnecessary war? The kids I had taught? Their kids? Their friends, relatives, or neighbors? My good friend's son was eighteen when the Russians invaded in February 2022. Another good Russian friend has daughters of the same age range. I started looking for ways I could help, to bring some measure of relief to people who had no choice in this war.

Crossing the border on foot, at night.

The Poland-Ukraine Border in 2022: A Good Place for Humanitarian Efforts.

In July 2022, I traveled to the Poland-Ukraine Border. I brought a bag full of donations from the States, picked some more donations up from friends on the drive to the border, met a friend of a friend, made a few more friends, met their friends and some others completely unconnected. I spent the next three weeks looking for more ways to help refugees and internally displaced persons. I toured makeshift housing for internally displaced persons on the Ukrainian side of the border, loaded vans with food for delivery to Ukrainian villages, drummed up donations by posting pictures and snippets of my activities on the internet, spent that money on more food and medical supplies, got myself lost in the middle of Poland looking for sources of more food and supplies, volunteered at a local refugee center a few miles into Poland from the border, drove some families to the airport in Krakow (about two–three hours away), and delivered medical supplies to a doctor in Lviv for distribution along the front. I also tried a few local beers I'd never seen before.

When I arrived at the Poland-Ukraine Border, I quickly confirmed what I had heard from others: major aid organizations lacked significant visible presence and certainly weren't reaching in to help small villages across the country. Noticeable exceptions to that were World Central Kitchen (WCK) and Orange. WCK is a group that taps into the talent of top chefs from around the world to bring food relief to crisis areas. Everywhere that refugee work was happening, WCK had a mobile unit set up to hand out hot food, sandwiches, and drinks to refugees and volunteers. Many days at the refugee center, there was no breaking for lunch – just grab a sandwich and get back to work. Orange, a European telecom provider, had set up booths at the border crossing and at train stations, where refugees could grab a SIM card and stay in touch with relatives and friends scattered across Europe – at no cost to them. There were also a good number of smaller groups who specialize in getting refugees to host countries. But there were not a lot of resources to deal with refugees stuck where they were or to help the tens of thousands of internally displaced persons scattered in villages across Western Ukraine, let alone to reach those stuck in Eastern Ukraine – too afraid to leave their basements and flee west.

Aside from those organizations, most of what I saw were regular people from around Europe and the world coming out to help the Ukrainian people. Many of the people I met in July had been there since February or at least pretty near the beginning. Working with various such people, I got a pretty consistent picture of what it was like during the first days and weeks when the war exploded in full force. I worked at the Medyka, a Polish-border crossing, one of the few places that was set up to support foot crossing of the border.

Imagine, late February to early March in Central Europe – cold, wet, rainy, and snowy. Now imagine a large, wide truck stop and tollway combo with some buildings and tall fences on the sides – this is what a central European border crossing looks like. Add to that, throngs of people, mostly women, children, and the elderly, carrying and dragging what few bags and belongings they could, fleeing the unexpected shelling of their towns,

homes, churches, and hospitals. The border slowed them down, but it could not stop them. Once they were across, most had nowhere to go. Some people had friends and connections abroad who would push through the crowds at the border to whisk them away once they found them. But most Ukrainians did not.

The initial bombings and incursions treated everyone equally – bombs do not differentiate between the haves and have nots. But in between the shelling, and farther in from the Russian border, those with connections and resources got out. Those with none did not. At that time no one knew what to expect. Many thought they were fleeing an immediate collapse of their government and take-over by a foreign country. Some thought they would be going back home in a few days. Whatever their means or reasons, tens of thousands found themselves on the Polish side of the border in the rain, in the cold, and with bags in hand and nowhere to go.

Help Arrives in Many Forms – But Needs Persist.

TESCO is a chain of European mini-mall/supermarkets similar to Walmart or Costco. About nine kilometers west of the border there was an abandoned TESCO center in the small Polish city of Przemysl. Sometime early on someone decided to get busses and start relocating people to the parking lot of the TESCO center. Not ideal, but at least it was a flat, paved area with easy access for pick-ups and drop-offs. I don't know if this is true, but the story is that after a few days of setting up make-shift tents and shelter in the TESCO parking lot, the owner of the property came out, took one look at what was going on and without consulting his attorneys or considering his liability, he simply said, "Open it up, turn the power and heat back on, and let them stay inside." By this time, random volunteers and refugee aid groups had been pouring in to find some way to help, bringing with them a wide array of clothes, blankets, tents, towels, food, and even toys and coloring books for kids. The TESCO center quickly filled with thousands of hungry and exhausted Ukrainians, and volunteers and material donations began flowing in from around Poland, Europe, and the world.

Meanwhile, at the border crossing in Medyka, the flow of refugees continues to pour over from Ukraine and a motley tent city of random volunteers from around the world starts to pop up. Within a few days, a row of tents were lined up along the walkway from the last border fence to the first vehicle road, about one hundred yards away. Friends describe the tent city as packed with barely room to walk between the sites. Where the road starts, there is a bus stop, currency exchange shacks, and an array of small convenience stores the size of your back-yard storage shed, but not quite as nice.

Early on, I met one woman who got there early enough to have her tent set up about ten yards from the border fence. She was an American working in England. When Putin started his full-scale invasion, she dropped everything, came with nothing, scrounged up a tent, and got friends and connections to start

Clyde Snow Welcomes a New Associate Attorney

Nate Broadhurst - Associate Attorney

Nate earned his Juris Doctorate at the University of Utah S.J. Quinney College of Law. While in law school, Mr. Broadhurst clerked at Clyde Snow during his 2L summer and part-time during his 3L year. Nate focuses his practice on natural resources, environmental law, water rights issues, & civil litigation. In the environmental and natural resources arena, he has worked at the local, state, and federal level, allowing him to draw on his multifaceted experience to find the best solutions for his clients.

sending her everything that women and children fleeing a ridiculous bombing of their homes might need – food, clothes, toys, tampons, medicine, post-partum kits. Most women who give birth need some time to rest – before and after. But when bombs start falling on your town, you need to pick up your newborn and your other kids and get out of there. You can't count on your husband, boyfriend, father, or brother to help you because all men of fighting age have been restricted from leaving the country. They might be able to get you to the border, but from there, you need to say your goodbyes and start to take care of yourself and your kids.

A temporary med station on the UA side of the border.

This brings up another ugly truth. War is a great time to take advantage of people and make a quick buck. It's an ideal environment for sex traffickers. Many of the early day volunteers told me stories of cars or vans pulling up, children getting in, and the vehicles driving off. No way to know what just happened there. At the TESCO center, eventually systems were established to track who was going in and going out, and with whom. But those systems need to be maintained and the physical structures kept up. One of the things I did occasionally at the TESCO center was watch over an outdoor playground area for the kids and attempt to mend a makeshift fencing system for that playground. In between shifts, I'd sometimes get to kick a few soccer balls around with the kids. Playing with the kids really motivates you to keep that fence tight.

Another person I met was something of a crisis professional. He had roles in several different aid agencies and would travel to crisis points and provide on-the-ground information and perspective of the needs and possible ways to provide for those needs. We toured makeshift existing and prospective housing on the Ukrainian side of the border – abandoned schools, large tents filled with empty cots, and an old castle. Later, at the WCK picnic tables, he explained the politics and gamesmanship of international emergency aid fundraising and distribution. "They've got tons of cash and they're just sitting on it! … They want me to do studies and I just need tents and showers and clothes … now, not later … where the hell are they?!"

And in any situation, politicians are going to politik. About an hour north of Przemsyl, there was another small, unpronounceable Polish town with another refugee center. However, that refugee center was specifically designed to purpose and was fully outfitted to receive refugees and aid them on their journey. Yet, it was never opened to refugees. I heard lots of theories that revolved around political turf wars, but there was no consensus on why such a failure to use resources was taking place.

Ordinary Ukrainians aren't sitting on their thumbs at all. Doctors are setting up networks to get life-saving equipment to the front or to design and set up mobile aid stations that can be rushed to the site of the latest missile strikes or heat-up of the ground war. Builders are setting up makeshift housing. Students are setting up materials depots for donations and needed supplies, and they organize transport to the front. People across the country are cutting up green and tan clothing and fabrics of various shades into little strips to be tied onto nets as camouflage covering for various defensive posts.

One Ukrainian carpenter I met had helped his wife and kids flee from the fighting in the east and remained in western Ukraine to help convert unused schoolhouses and other buildings to useable living spaces. When I met him, he had one arm fully in a cast and was installing showers and toilets in a school converted to housing. I met a grad student who could speak excellent English, French, Russian, and Ukrainian and pretty good German as well. At the outbreak of major fighting, he had moved from the east to Lviv in the west. He was volunteering to act as an interpreter wherever he was needed and living in an attic with not much plumbing, happy to have a roof over his head. Another young Ukrainian woman volunteered with the WTK crew. Whenever I would ask her for something in Russian, she would smile sweetly and repeat what I had said in Ukrainian. So I learned a little bit of Ukrainian. Dyakuyu Lesya! "Thank you Lesya!"

There were many others. There was the German peace activist who had brought only her little car, camper, and unstoppable energy. With the help of a former sergeant in the Austrian army, she set up the outdoor playground for kids at the refugee center

I mentioned earlier. There was the Irish clown and a young French-German couple with toddlers in tow who had set up a small circus tent to put on shows for the kids. There was one group of young Canadian men who would take trips deep into Ukraine to deliver supplies, stick around to clear rubble for a few days, and then head back for more supplies. There was the nineteen-year-old Italian kid who had left his Italian military service to serve with the Ukrainian defense forces, volunteering at the TESCO while waiting for his papers to come through. I didn't have time to get all the stories, but the accents of volunteers at the TESCO center were American, English, Australian, Israeli, Ukrainian, Dutch, French, Italian, Argentinian, Polish, Japanese, Korean, Canadian (lots of Canadians!), and even Russian – there was a whole group of Russians who showed up with hats and t-shirts that clearly said "Russians for Ukraine" so no one would mistake their motivation.

And there were networks of drivers. Again, lots of people from around the world coming to help out in any way they could. They set up group chats on WhatsApp to group source rides for people from one place to another. A grandmother needs to get from Lviv to Krakow for a flight to Berlin for a surgery; a mother and her two teenage kids need to get to a train station in the Czech Republic; a guy with a rental car full of medical supplies for doctors in Ukraine can't get across the border in his rental car – they found him a ride. They were also the best source for rumors of what was happening in the war. People were driving in close to the front and coming back on a regular basis. They were always flush with stories.

Then there was the group that I did the bulk of my work with. It was a motley crew of former military professionals from around the world who had originally come over to volunteer for the Ukrainian forces, but decided they could do more good by helping refugees and running supplies to villages on the front cut off from normal supply lines. They spent their first weeks and months sleeping on cots at the back of the TESCO center, doing building maintenance, setting up security and starting to develop networks for obtaining, and distributing supplies. Eventually, they formed an official group and named themselves, "The Canada Way" – you can't beat those Canadians for gumption. After a year, they are still reaching out to small and out-of-the-way places to bring life-sustaining supplies to families and small groups cut off from most other resources. They are bringing clothing and medical supplies to the front line. They are training newly minted soldiers in the basics of combat medicine and first aid that just might keep a friend alive. This is all volunteer work, self-organized, and funded by donations from around the world.

All these people have families back home. They have houses, mortgages, jobs, and other obligations that they fly back and forth from. It's a volunteer army of human compassion and caring.

The Difference a Year Makes – The Difference We All Can Make.

A year ago, everybody was wondering whether Putin would really invade Ukraine and how long the little country could stand up against the super-power: A few days? A few weeks? What would the world look like after? A year later, the Ukrainians look a lot more like that scrappy bunch of colonists who stood up to the most powerful military force in the world a couple centuries ago. But we're still wondering how this will end and what the world will look like afterward.

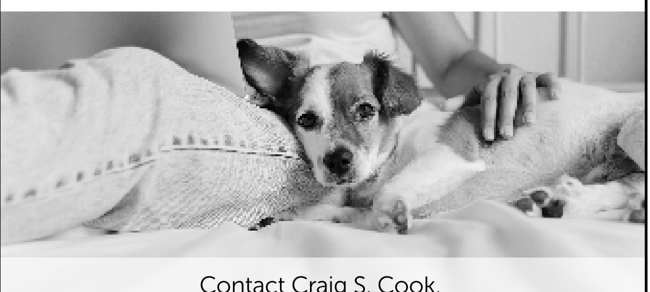
A year ago, the world was shocked by the escalation to full scale war of a conflict that had been brewing unnoticed for years. We assumed this part of the world would be perpetually free of such conflicts. Now we see the destruction: images of civilians thrown from their homes and the dead in the streets. We

Divorce Attorneys:

The Humane Society of Utah may sponsor legislation to provide standards for determining how domestic pets should be considered in contested divorces.

*See "The Unexpected New Frontier in Property Law" **Bar Journal,** March/April 2023, pp 17-23.*

To be successful we will need **actual stories of strife concerning cats and dogs or other pets**. Please share your experiences with us, without client names, so that we may fill in the present void.



Contact Craig S. Cook,
Board President and General Counsel:
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wonder how they can live through that and how long it will last. The fact that it continues unabated is baffling. If it does not stop, will it spread?

Putin can't win. In both senses: Putin will not be able to vanquish the will of the Ukrainian people and make them Russian, and the world cannot allow this to happen. Ukrainians have fought to gain their independence and now they are fighting to maintain it. Peace and stability in Ukraine are essential to the European experiment. Not allowing the fate of any nation to be determined by the military force of another is even more essential. America and Europe will continue to send heavy arms and armaments for the defense of Ukraine. When I go back to the border, the train tracks will still groan and screech at night under their burden and the trains will keep their lights out.

But the heavy arms and armaments necessary for the country's defense will not fill the bellies of ordinary Ukrainians or keep them warm at night. Those of us who have no weapons to send can still do our part. We can get needed supplies to very out-of-the-way places. We can also send a message by contacting Ukrainian refugees in your community or reaching out online to people affected by this war, which sends a ten-fold message – that we believe in you, that we value you, and that we look forward to the future our nations will build together.

My hope is that we can help sustain the people of Ukraine through this war and that they can return to their country or to their towns and homes. My hope is that they will be able to rebuild from the rubble and make their country a vital part of the experiment in peace that we have been running for decades now. You can find Ukrainian refugees in your communities and even an encouraging word can help.

In late February, I returned to Poland for another two weeks of warehouse work and delivering supplies into Ukraine. It's much colder in Central Europe in February than in July, and after a year of war, people are tired. On my last day in Ukraine on this second trip, I stopped by a market in Lviv that I had visited in the summer. When I previously visited in July, I had met Andriy. Andriy had a booth at the market. In July, he had been jovial and patient enough with my broken Russian to allow for a lengthy conversation about life and history and how we had gotten to where we were. I found him again this March at his stall. He seemed to have more grey hairs and wrinkles than I remembered, but then, I probably did too. We exchanged pleasantries and I asked him how he had been since last summer. He gave me that look that told me that he was too polite to tell me that that was a stupid question: "Well, there's a war on you know … that doesn't make life easy … ." Last summer, we had talked about his kids – a young woman and a young man. He didn't bring them up this time, and I didn't ask. But he did launch into a lengthy conversation with my Polish colleague. Andriy was in his fifties. He remembered the Soviet days when news was broadcast in Russian and in Polish, but never in Ukrainian. He preferred the Polish broadcasts and had learned the language well. He lit up in sharing stories of his parents, grandparents, and great-grandparents, where they were in past wars and of the many ties his family and people have with Poland. Andriy was tired of the war, but he was still at his stall in the middle of winter, selling traditional Ukrainian clothing and art and not at all interested in giving up, or letting himself be annexed by force into the Russian Federation.

My goal is to connect people who want to help with people who know how to help. I want to bring hope to people like Andriy and let them know that they are not alone. I want to raise funds to help individuals and small groups on the ground do the things that governments and large aid organizations can't do. I want to help those who will go where others will not. To help meet that goal, I've joined with like-minded individuals who have also been to the border to help, and we have formed a group called, Utah for Ukraine. We'll be tapping our networks of friends, associates, and acquaintances to gather skills, knowledge, connections, and resources that can be helpful to people trying to help Ukrainians. We had a clothing drive, and I took over a large amount of donated winter clothes for delivery to Ukrainians. Also, I recently received a request from a medic I had worked with in Poland. She was looking for a new, reliable source of specialized medicines. Not anything I know about, but I knew someone who had worked in disease prevention, and she gave me the name of an organization to give to my contact in Ukraine. We still need more of those specialized medicines, but at least we have something.

My personal commitment is to find ways to get relief to those who are suffering from a needless war. If you want to take this kind of vacation and you think it would give your life more meaning, you're welcome to join us or come up with a mission of your own. If this is not your cup of tea, we are more than happy to do it in your stead. We are brand new, so things are not polished and perfect, but we do have a website: https://www.utahforukraine.org. Wish us luck!

IN MEMORIAM

Jarrod H. Jennings

1967—2023

The world unexpectedly and tragically lost a gentle soul and giant unicorn of a man on Valentine's Day 2023 — fitting, given that he was a lover with a huge heart. A lover of justice, his children, friends, clients, staff, whiskey, women, his law practice and his beloved law partner.

Jarrod was a quirky and rare breed of a man whose influence, intellect, kindness, loyalty and compassion reached far and wide. The center of his world was his law practice and the family law community where he tirelessly fought for justice and good. Jarrod stood up to bullies, protected the vulnerable, spoke up for those who couldn't, and fought the good fight every day of his life — all with compassion and grace. Jarrod represented his clients with conviction and empathy, while always maintaining respect, civility and oftentimes friendship with his adversaries. No matter how hard the case, how little he was paid, how beaten down he may have felt, Jarrod never gave up on his cases and clients and when necessary, saw his case through to trial where he obtained excellent results.

Jarrod and his partner were work spouses, work soulmates, and best friends. They practiced alongside each other every day for almost thirteen years. They planned to practice together through retirement and then enjoy the fruits of their labors together after passing the firm down to their trusted and loyal associates. Jarrod and his partner supported each other tirelessly in handling difficult and complex family law cases. They had a rare bond and delighted in each other's company and successes. They always worked as a team and comforted each other whenever times got hard. They had an unmatched fondness for one another and a synergy that will never be equaled. Jarrod's partner was lucky enough to be with him at the end to send him into the next realm.

In addition to being an exceptional lawyer, Jarrod was an entrepreneur, whiskey aficionado, home-brewer and was in the process of opening his own distillery. He was developing an application for use by the family law community and was constantly exploring all types of business opportunities.

Jarrod loved sports, especially basketball, studying the sport extensively and gaining a deep understanding of every nuance of the game. Jarrod knew every NBA and college player and could quote off the top of his head stats from big games going back to his childhood. Jarrod and his nephew were huge jazz fans and often attended games. Jarrod also attended Jazz games with one of the three musketeers: his law partner's husband.

Jarrod was a font of knowledge in poetry, literature, music, wine, health and fitness, comics, gaming and so much more. His ability to converse intelligently regarding almost any topic in any circle was nothing short of magic.

Jarrod raised his two boys who were always his first priority. He also raised his nephew when his sister could not and his nephew was one of his closest family members and best friends.

Jarrod was a caretaker and safety net for dozens of people in his life. Jarrod selflessly gave his time and money to make sure his circle of family and friends were cared for financially and emotionally. No matter what the problem, issue, or crisis his friends and family were facing, Jarrod always showed up to provide support and comfort. Everyone around Jarrod leaned on him as their rock. Once Jarrod considered you a friend, he was loyal and would be there for you unconditionally for life.

Jarrod was an accomplished musician and performer. He played guitar like a professional and with unwavering passion. People wondered why Jarrod had his nails done which was so he could play his guitar every day. Like Jarrod himself, his taste in music was quirky and unconventional, his favorites including Tool and Skinny Puppy. He dragged many of us to these shows over the years to share his love of music.

Jarrod was not perfect — far from it, but he was good through and through and had an authentic, empathetic and true heart of gold. Those who knew him had the privilege to see unparalled greatness and love.

Jarrod kept those in the courtroom transfixed, those at the party laughing, those suffering comforted and everyone loved. Although his passing leaves a void no one can ever fill, his exemplary life, kind heart, gentle soul and green lantern will always shine bright for those of us who loved him.

A celebration of life will be held at a later date.

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From Surviving to Thriving: A Lawyer's Guide to Understanding, Using, and Recovering from Stress

by Martha Knudson, JD, MAPP

It's no secret that the legal profession can be demanding and stressful. With long hours, complex cases, high-stakes pressure, emotionally charged issues, and the occasional difficult personality, lawyers can easily feel overwhelmed, exhausted, and short-tempered. However, the demands of the profession aren't changing anytime soon, so it's essential to learn how to manage stress in a healthy and sustainable way. Understanding our stress response, incorporating healthy habits and stress recovery into our days, and accessing mental health resources when needed can help us to ride the wave of the profession in a sustainable way.

When speaking on the topic, I often ask people what comes to mind when I say the word "stress." Almost without exception, the responses includes the words: bad, harmful, overwhelming, tired, unhealthy, or something similar. These answers are understandable, but they don't acknowledge the full picture. Stress is neither "good" nor "bad." It's hardwired into our biology as a natural response to a perceived threat or challenge. Its function is to help us handle situations and learn from the experience. *See* Kelly McGonigal, The Upside of Stress: Why Stress is Good For You and How to Get Good at It (2015).

Chronic levels of stress can certainly have negative effects on our physical and mental health, but stress can also be healthy and adaptive. *Id*. We can all think of a time when stress helped us to perform under pressure or muster the energy to hit an important deadline. To unlock these benefits of the stress response and avoid more harmful aspects, it helps to think of stress in terms of both reframing and recovery.

Reframing stress involves changing our mindset from one of fear and avoidance to one of opportunity and growth. In the short term, viewing stress in this way helps us to harness the benefits of the stress response, including a greater ability to perform under pressure, heightened mental and physical abilities, and increased motivation and energy. It can even have protective and strengthening effects on our physical and mental health. *Id*. at 3–35.

Stress recovery is a vital companion to reframing. Once the actual challenge has passed, recovery efforts take us from a heightened stress state back to our natural baseline levels. It's important because the fundamental difference between the benefits and destructive effects of stress dependent on the critical factor of duration. *See* Richard Sutton, The Stress Code: From Surviving to Thriving 27–45 (2018). A combination of both tools can help us to manage our stress response, use stress for our benefit, and then recover from a stressed state when the challenge has passed.

Stress Reframing

Reframing stress is a change in our mindset. Stanford psychologist Alia Crum's three-step process is helpful when learning to reframe stress.

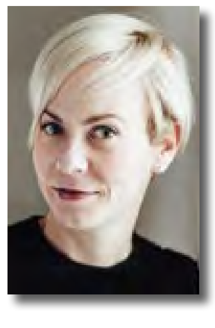
Step 1: Acknowledge stress.

This involves recognizing when stress is happening and becoming aware of what it looks and feels like. Naming stress in this way increases activity in our pre-frontal cortex and decreases activity in our limbic system. This means that we can be more deliberate and responsive rather than reactive. Acknowledging stress also shuts down stress avoidance, a tactic that doesn't work and can increase stress. Next time your stress response kicks in don't try to ignore it. Instead say to yourself, "Hey, I'm stressed!"

Step 2: Welcome stress.

Research shows that it's the things we find meaningful that usually trigger our stress response. So, after noticing your stress take a moment to connect to what you find important about the situation. Then welcome your stress as giving you energy, motivation, and the ability to focus on what you value. Remember, stress can have positive effects on our performance and motivation when we view

MARTHA KNUDSON is the Executive Director of the Utah State Bar's Well-Being Committee for the Legal Profession. In addition to her eighteen years experience as a practicing lawyer, Ms. Knudson holds a masters in applied positive psychology from The University of Pennsylvania where she also serves as a member of the graduate program's teaching team.



the situation triggering the stress response as a challenge and an opportunity for growth instead of something to fear and avoid.

Step 3: Use stress.

Stress can have a positive impact on our performance, motivation, and cognitive abilities. In this step you recognize this fact and use your stress response to meet the challenge. A.J. Crum et al., *Rethinking stress: The role of mindsets in determining the stress response*, J. PERSONALITY & SOCIAL PSYCH., Apr. 2013, at 104.

It's important to note here that reframing stress as a challenge is not about denying the difficulty of a situation, but rather about embracing the idea that we have the resources within us to handle it. McGonigal, *supra*. This simple shift of mindset can improve our ability to use, work with, and cope with stress.

Stress Recovery

Reframing how we view stress optimizes our stress response and helps us to use it to succeed in the short term. But this doesn't mean that all you need to handle stress is a mindset shift. Prioritizing stress recovery and self-care is also crucial. Remember, most of the harmful aspects of stress come when it's chronic, when we live in the heightened sense of arousal and rarely return to baseline. This can be tough in the legal profession as we can easily find ourselves in a stress cycle that becomes habitual.

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This cycle starts with something important happening, like a big motion or a tight deadline, and we feel responsible to handle it. We put in extra effort and neglect our self-care in the process. If we do well, we feel validated, and the pattern is reinforced. If we don't do well, we may put in even more extra effort and time, leading to further neglect of our own needs. To maintain our mental health and well-being, it's crucial to prioritize self-care, take breaks, set boundaries around work, and practice relaxation techniques. It may feel counterintuitive to do so when we're under pressure, but along with helping maintain our well-being, recovery can help us perform better in the long run.

So, what can we do to recover? Initially, don't sweat it if you take some time to come down. The stress recovery process isn't instantaneous. For several hours after you've had a strong stress response your brain is rewiring itself to learn from the experience so you can be better at it the next time. It's like a stress vaccine for your brain and it's a good thing. McGonigal, *supra*, at 53–55. Think about situations that used to cause you major stress when you first started your practice. I bet that many of these things no longer bother you as much. If so, this is stress inoculation at work.

Next, build stress recovery tools into your normal course of life. Everyone's experience with stress is unique, so it's essential to find the strategies that work best for you. Broadly, there are seven-evidence based strategies I suggest you consider. The Unmind app, provided to members by the Utah State Bar, can help you with most of them.

Prioritize Connection

Connecting with colleagues and friends promotes considerable physical and psychological resilience to stress. When we connect with others, it triggers the release of oxytocin, a natural stress antidote that helps speed recovery. Strong interpersonal relationships and pro-social behaviors also have a buffering effect against the negative impact stress can have on our health. McGonigal, *supra*, at 52–53; Sutton, *supra*, at 71–81. Unmind has tools to help you foster positive relationships, improve leadership abilities, build listening and communication skills, and manage workplace conflict.

Hit the "Off Button"

Relentless activation of the stress response exhausts all our bodies systems, which leads to lowered functionality and poorer health. The "off button" involves increasing the activity of our vagus nerve and strengthening our vagal tone. Sutton, *supra*, at 83–87. Modalities that can help us include controlled breathing exercises, meditation, music, and yoga. You can find all these tools on the Unmind app. Other effective strategies for stimulating our vagal nerve include massage therapy, swimming, and cold-water facial immersion. *Id*.

at 90–140. For this last one, you can dunk your head in cold water or buy a cold face pack and wear it for one to three minutes at a time.

Incorporate Healthy Lifestyle Behaviors

Long periods of chronic stress wear us down cognitively, emotionally, and physically. These effects can be counteracted with sustained lifestyle behaviors and practices. I'm talking about nutrition, daily movement, frequent exercise, getting outdoors, prioritizing sleep, and reducing alcohol consumption. *Id*. at 143–232, 238–251. Unmind has tools that can help you incorporate these and other healthy behaviors.

Set Boundaries

Establish boundaries around work. This may include delegating tasks, saying no to non-essential commitments, and disconnecting from work during off hours. The Unmind app offers helpful short courses on things like burnout prevention, perfectionism, and understanding imposter syndrome.

Learn Time-Management Skills

Develop strategies to manage time more effectively, such as goal-setting, prioritizing tasks, breaking them down into smaller steps, and setting realistic deadlines. The Unmind app has tools to help you with all of these things as well!

Talk to a Therapist

Talking to a trusted counselor or therapist can help you proactively handle stress and improve your well-being. They can provide a non-judgmental sounding board and help you develop good coping mechanisms to better manage stressful situations. The Utah State Bar offers member and their dependents confidential and convenient access to therapy through Tava Health. Access Tava Health and book sessions at https://care.tavahealth.com/signup.

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Stress is an inevitable part of the legal profession, but it doesn't have to be a negative force in our lives. By learning to manage stress effectively, we can harness its power to our advantage, improving both performance and well-being. This involves building healthy habits like prioritizing self-care, setting boundaries around work, and accessing mental health resources when needed. It also means reframing stress as an opportunity for growth and cultivating a growth mindset. By using the strategies outlined in this article, we can better mitigate stress and build resilience for a successful and fulfilling legal career.

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Appellate Highlights

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

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

Utah Supreme Court

Utah Sage, Inc. v. Pleasant Grove City
2023 UT 2 (Feb. 23, 2023)

This appeal arose out of a challenge to a municipality's transportation utility fee (TUF). The supreme court held that **the municipality acted within its authority under the General Welfare Statute in enacting a TUF to address deteriorating street conditions.** Reversing the district court's classification of the TUF as a tax, the supreme court held the TUF, as a specific charge for specific service, was characteristic of a fee and remanded for a determination of reasonableness under the *V-1 Oil* test.

Utah Court of Appeals

State v. Graydon
2023 UT App 4, 524 P.3d 1034 (Jan. 20, 2023)

Graydon was charged with aggravated assault in connection with a road rage incident. To prove aggravated assault, the prosecution was required to establish, among other things, that Graydon made "a threat" and that the threat was "accompanied by a show of immediate force or violence." At trial, the prosecution told the jury that Graydon's display of a firearm during the incident amounted to both a threat and a show of immediate force. On appeal from his conviction, Graydon argued that the prosecution could not use a single act to prove more than one element of the crime of aggravated assault. The court of appeals disagreed, **holding as a matter of first impression that "a single act or single series of acts may be used to prove more than one element of a crime."**

Mower v. Mower
2023 UT App 10, 525 P.3d 110 (Jan. 20, 2023)

After the trial court had entered a bifurcated decree of divorce, the husband died. The bifurcated decree had left all financial matters for later resolution. When husband died, the trial court believed the divorce case abated, and dismissed it. The court of appeals reversed, holding that **abatement upon death does not apply when a bifurcated divorce decree has been entered**, and that the court retained jurisdiction to resolve the reserved matters.

Mintz v. Mintz
2023 UT App 17, 525 P.3d 534 (Feb. 9, 2023)

In this appeal from a divorce decree, the trial court **erred in excluding an allowance for investment from its alimony calculation, where the evidence showed that the parties had a standard practice of annually investing marital assets and doing so contributed to the marital standard of living.** However, the court did not abuse its discretion in rejecting one party's argument that unmet needs should be reduced to reflect the other party's potential ability to earn income from awarded investment accounts.

Myers v. Myers
2023 UT App 20 (Mar. 2, 2023)

In the context of a petition to modify an alimony award, once the court finds a material change in circumstances, it is required to conduct a complete analysis of all of the statutory and *Jones* alimony factors. **Even if the change of circumstances indicates that the payor can pay more, the amount remains limited by the recipient's demonstrated need – including earning capacity – at the time of modification.**

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

10th Circuit

Bruce v. City and County of Denver
57 F.4th 738 (Jan. 10, 2023)

Affirming dismissal of section 1983 claims, the Tenth Circuit held the ***Rooker-Feldman*** **doctrine (which ordinarily bars federal courts from exercising jurisdiction over cases arising out of state-court judgments) applied, even though plaintiff was not a named defendant, because he was a claimant in the state-court receivership proceedings and possessed the right to appeal.**

Citizens for Constitutional Integrity v. United States
57 F.4th 750 (Jan. 10, 2023)

The Congressional Review Act does not violate the separation of powers, equal protection, or due process. Every CRA resolution is enacted by a majority vote of both houses of Congress and signed by the President. And, the subject at issue – regulation of surface coal mining – is not one of the Executive's exclusive powers.

In re Doll
57 F.4th 1129 (Jan. 18, 2023)

In this bankruptcy appeal, the Tenth Circuit addressed whether a Chapter 13 trustee may deduct and keep the trustee's fee for disbursing payments to creditors when a Chapter 13 plan is not confirmed. If such a plan is confirmed, the trustee receives a percentage of each disbursed payment as the trustee's fee. **If a plan is not confirmed, however, the relevant statutes "unambiguously require[] a Chapter 13 standing trustee to return pre-confirmation payments to the debtor without deducting the trustee's fee."**

United States v. Salti
59 F.4th 1050 (Feb. 6, 2023)

Salti was ordered to pay the victim of his case $35,000 in restitution, owed jointly and severally with a co-defendant. The co-defendant, in turn, was ordered to pay $72,000 to the victim, owed jointly and severally with Salti. Salti deposited $35,000 with the court, but the clerk had already split the co-defendant's first payment of $5,117.92 and applied half to Salit's account and half to the co-defendant's account. The issue on appeal was whether Salti was owed a refund of $2,487.87 because the co-defendant's payment already paid a part of Salti's restitution. Holding the district court did not err in granting the government's motion to prevent the clerk from paying Salti a refund, the court held, in line with other courts that have addressed the issue, that **the restitution obligation is not satisfied until a defendant has paid the amount apportioned to that defendant individually or the victim has been made whole for the entire harm.**

United States v. Wesley
60 F.4th 1277 (Feb. 28, 2023)

Siding with the Second, Fourth, Sixth, Seventh, Eighth, and D.C. Circuits, the Tenth Circuit held that **a challenge to a defendant's conviction or sentence is not a proper ground for compassionate release under 18 U.S.C. § 3582(c)(1)**, which provides for a discretionary sentencing reduction upon a showing of "extraordinary and compelling reasons." Instead, a challenge to a defendant's conviction or sentence may be raised solely via a motion to vacate sentence under 28 U.S.C. § 2255. Wesley's claim that prosecutorial misconduct tainted his conviction therefore was not an "extraordinary and compelling reason" for a sentencing reduction under Section 3582(c)(1) but a challenge under Section 2255.

United States v. Diaz-Menera
60 F.4th 1289 (Feb. 28, 2023)

As a matter of first impression, the Tenth Circuit held **the district court did not err in applying the base level offense for drug conspiracy, even though the defendant did not personally possess or distribute drugs and only pleaded guilty to conspiracy to launder money,** where the defendant was a member of the underlying drug conspiracy.

High Lonesome Ranch v. Board of County Commissioners
61 F.4th 1225 (Mar. 6, 2023)

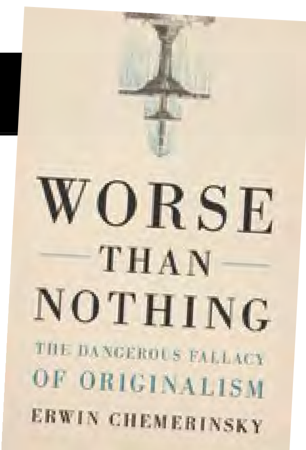
The owner of ranch property through which two intersecting roads ran brought an action in state court against the county in which the property is situated seeking declaratory and injunctive relief that the disputed portions of the roads are private. The county moved to dismiss in light of the plaintiff's failure to name the U.S. Bureau of Land Management (BLM) as a party. The state district court ordered the plaintiff to join the

BLM, which the plaintiff did. The BLM then removed the case to federal court. For the first time on appeal, the plaintiff advanced various arguments as to why the district court did not have subject matter jurisdiction, including challenging the district court's removal jurisdiction under the "derivative jurisdiction" doctrine. That doctrine "generally provides that federal courts lack jurisdiction if the state court lacked jurisdiction before removal." **As a matter of first impression, the Tenth Circuit joined six other circuits that hold derivative jurisdiction issues are waivable.** This reflects the view that derivative jurisdiction is a procedural bar and does not concern Article III subject matter jurisdiction.

United States v. Braxton
61 F.4th 830 (Mar. 7, 2023)

The Tenth Circuit reversed the district court's order denying the criminal defendant's motion to suppress a gun found in his backpack after he was arrested. The government had conceded that the warrantless search of the backpack was not a valid search incident to arrest, but invoked the inevitable-discovery doctrine, arguing that law enforcement would have validly impounded the backpack as a matter of community caretaking and searched the backpack as part of a standard inventory search. **Applying the factors identified in *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015) as relevant to whether there was a reasonable and legitimate, non-pretextual community-caretaking rationale, the Tenth Circuit held the factors "cut significantly against a community-caretaking rationale." The defendant's girlfriend, who had asked to take the backpack, was an alternative to impoundment; the backpack was not implicated in the defendant's crime; and, the defendant did not consent to the impoundment.** Under these facts, the government had not met its burden of proving that it was inevitable the officers would have impounded the backpack under a reasonable community-caretaking rationale.

Book Review



Worse Than Nothing: The Dangerous Fallacy of Originalism

by Erwin Chemerinsky

Reviewed by J. Frederic Voros, Jr.

I embraced originalism in 1978. As a third-year law student I devoured Raoul Berger's book *Government by Judiciary*. It argued that *Brown v. Board of Education* was wrongly decided – and fundamentally undemocratic – because the framers of the Fourteenth Amendment had never intended to integrate public schools.

Not everyone was persuaded. Nine years later, the Senate rejected Supreme Court nominee Robert Bork, a supremely qualified but thoroughly originalist nominee, on a bipartisan vote of 58–42.

Since then, originalism has moved from fringe to mainstream. Three of the nine sitting Supreme Court Justices are self-proclaimed originalists; three others often frame their analysis in originalist terms.

Worse Than Nothing:
The Dangerous Fallacy of Originalism

by Erwin Chemerinsky

Yale University Press (2022)

264 pages

Available in hardcover, e-book, and audiobook formats

In *Worse Than Nothing: The Dangerous Fallacy of Originalism*, Berkeley Law School Dean Erwin Chemerinsky pushes back. His stated goal is "to explain as clearly as I can why originalism is an emperor with no clothes," by which he means that it allows conservative justices "to pretend they are following a neutral theory when in reality they are imposing their own values."

He begins by describing the allure of originalism. An ideologically neutral interpretative theory that ties outcomes to fixed, determinate textual meaning adopted by a supermajority of Americans, thereby preventing Supreme Court Justices from imposing their own subjective value choices, does have considerable allure, at least in theory.

In practice, as Dean Chemerinsky's devastating critique demonstrates, originalism delivers on none of these promises.

Chemerinsky addresses five problems with originalism: the epistemological problem, the incoherence problem, the abhorrence problem, the modernity problem, and the hypocrisy problem. He closes with a defense of the living constitution approach and a warning for the future.

By "the epistemological problem" Chemerinsky means that the original understanding of a provision is often unknowable. The search for a single meaning leads to multiple possible meanings.

Take the Second Amendment. From 1791 until 2008, the Supreme Court interpreted the Second Amendment to protect the right to own guns for militia service. But in *District of Columbia v. Heller* (2008), the Court changed course. The conservative Justices (a majority) concluded that, as originally understood, the Second Amendment guaranteed an individual right to own guns, while the liberal Justices concluded that, as originally understood, it did not. "Both are equally plausible,"

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Chemerinsky concludes, "precisely because there is no clearly correct original meaning to be discovered."

But even when the original meaning is clear, originalism runs aground on "the incoherence problem," by which Chemerinsky means that "there is no evidence that the original meaning of Article III of the Constitution included the understanding that courts should interpret the Constitution based on its original meanings." Thus, he quips, following originalism "requires abandoning it."

But he offers more concrete objections as well. One is "the abhorrence problem." A theory, Chemerinsky posits, "must be judged by its real-world consequences." He then lists examples of consequences most Americans would abhor, but a consistent originalist approach would permit: racially segregated public schools; Jim Crow laws; state-sponsored churches; discrimination against women, gays, lesbians, people with disabilities, noncitizens, and nonmarital children; state restrictions on speech; criminalization of sabbath-breaking, blasphemy, and atheism; and a prohibition on women holding the office of President or Vice President.

A consistently originalist Court would also leave unprotected rights Americans now assume, such as the rights to marry, to procreate, to purchase and use contraceptives, to engage in private adult consensual sexual activity, to refuse medical treatment, and to control the upbringing of one's children.

The originalist answer to the problem of abhorrence is simple: amend the Constitution. Amendment is in theory a solution but in reality a mirage. Constitutional amendment is a practical impossibility today. Even Justice Antonin Scalia has criticized the amendment process on the ground that the thirteen least populous states – the number needed to block an amendment – account for less than 5% of the population. We should not be surprised that the Constitution hasn't been amended for the last half century.

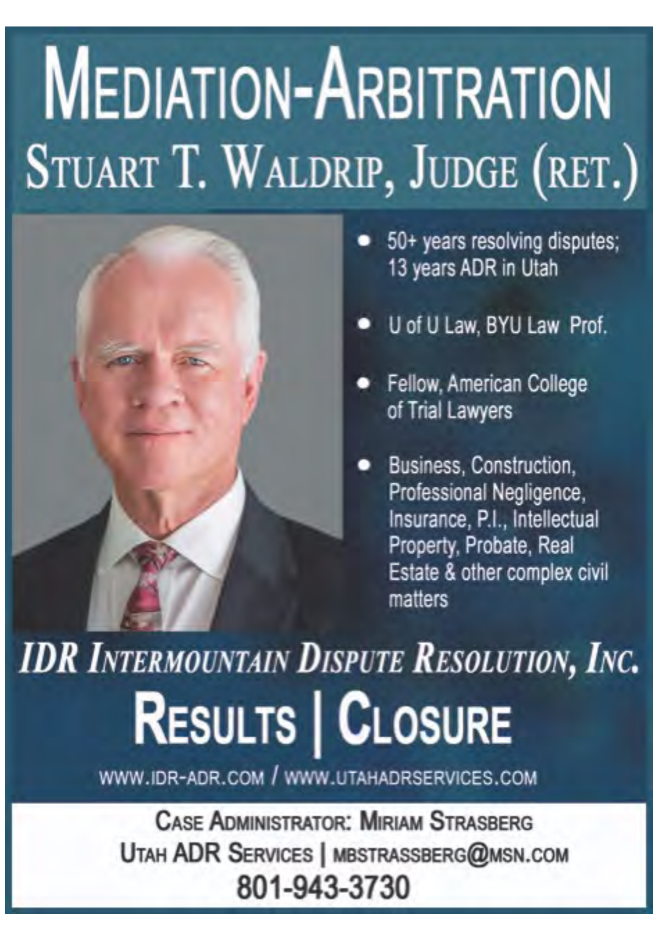
A way around the abhorrence problem does exist, though: just ignore the original understanding. Chemerinsky calls this "the hypocrisy problem." Examples abound.

In *Bush v. Gore* (2000), the Court stopped Florida from counting disputed ballots, ensuring that George Bush would become president. The self-proclaimed originalists on the Court did not purport to rely on the original understanding of anything. Justice Scalia later offered this defense of his vote: "We did the right thing. So there!"

But Dean Chemerinsky highlights a different example of originalist hypocrisy, *Shelby County v. Holder* (2013). By a 5–4 vote, the Court struck down the preclearance requirement of the Voting Rights Act of 1965. That provision required states with a history of voting discrimination to obtain federal preclearance before amending their voting laws.

Three years earlier, Congress had reauthorized the preclearance provision by overwhelming margins – 98 to 0 in the Senate, 390 to 33 in the House. And of course, the Constitution itself grants Congress the authority to ensure that the right to vote "shall not be denied or abridged … by any State on account of race, color, or previous condition of servitude."

But the Court, in an opinion authored by Chief Justice John Roberts, concluded that the preclearance requirement offended the Constitution. Why? Which provision of the Constitution, as originally understood, did it offend?



None. The majority identified no text, no provision, not even a penumbra of a provision that the requirement offended. Instead, the majority relied on the judge-made doctrine of "equal state sovereignty."

Chemerinsky notes, "The five most conservative justices, who regularly espouse the need for adherence to the text and to original meaning, invented a constitutional right for state governments that appears nowhere in the text and is contrary to the original understanding of the Fourteenth Amendment."

Bush v. Gore and *Shelby County* demonstrate that, when it comes to preventing justices from imposing their personal policy preferences, originalism is as useful as a seatbelt that works until you are in an accident.

But originalist justices who, unlike Justices Scalia and Thomas, remain faithful to their theory will face what Chemerinsky calls "the modernity problem." Many twenty-first-century issues could not have been foreseen two or three centuries earlier. Chemerinsky writes, "the Framers could not have imagined a country as large physically, as populated, or as complex as the United States in 2021." Did the men who voted to ratify the Fourth Amendment understand it to allow police to track the movement of a suspect's cell phone for 127 days, as happened in *Carpenter v. U.S.* (2018)?

But what Chemerinsky seems to regard as originalism's least credible claim – one non-lawyers see through intuitively – is that originalism is value-neutral.

Many issues confronting today's Supreme Court implicate race, gender, voting, and corporate power. The most efficient way to guarantee these issues are routinely resolved against women, minorities, and government regulation is to insist that they be viewed through the eyes of those who lived when "we the People" included only the 5% of Americans who were landed white men, when nearly half the nation saw Black people as property, when being gay was a criminal offense, and when huge multinational corporations were unimaginable.

Far from being value-neutral, originalism is value-laden. Justices who embrace originalism have not chosen an interpretive theory that will deliver results without regard to their policy preferences, but one that will deliver results in line with their policy preferences.

And, as Chemerinsky notes, hiding behind the views of seventeenth- and eighteenth-century Americans means justices can chose their preferred result, yet "never defend that value choice."

Perhaps this feature of originalism caused the Dean to name this book as he did. Originalism's most famous proponent often crowed that his interpretive method was "the only game in town." Chemerinsky's title seems to say that, even if Justice Scalia was right, an interpretive method this dangerous is worse than none at all.

Of course, Justice Scalia was wrong. Chemerinsky unapologetically defends the traditional, living-Constitution interpretive approach. Its adherents rely on various interpretive tools, including (like originalists) the original understanding and (unlike originalists) the framers' intent, the structure of the Constitution, historical practices, precedent, tradition, and real-world consequences.

By contrast, he writes, "Originalists, if they are true to their theory, would reject all the wisdom and experience gained since a constitutional provision was adopted. It is hard to fathom why one would prefer such ignorance."

He concludes with a warning. The book's final chapter is titled, "We Should Be Afraid." Chemerinsky expects the current Court to roll back protections on privacy and autonomy, narrowly interpret the Commerce Clause to restrict business regulation and environmental protection, and expand the Free Exercise Clause beyond anything contemplated by the Founders.

Assessing the Dean's predictive powers won't take long. In late 2022, the Court heard arguments in *Students for Fair Admissions v. University of North Carolina*, a case testing whether the Fourteenth Amendment permits race-conscious university admissions policies. Historical evidence demonstrates that the Fourteenth Amendment was originally understood to permit race-conscious government action. Consequently, in a reversal of the usual alignment, the government relies more heavily than the challengers on the original understanding of the provision.

Where will the originalists on the Court land? Will they follow their interpretive model to a result they reject? Or will they, in Justice Scalia's words, simply "do the right thing"?

What You Need to Know About China's Personal Information Protection Law

by Julie Crane and Rachel Naegeli

Recent years have brought a flood of new privacy laws from multiple jurisdictions. The European Union, the United Kingdom, other countries, and multiple states, including Utah and California, have passed data privacy laws that impose requirements on how companies process consumer data. These laws apply to many Utah companies, so it is important for attorneys to become familiar with these laws to effectively counsel their clients.

Our past articles have covered various developments in data privacy laws. This article discusses a Chinese data privacy law that could apply to Utah companies. In August 2021, the People's Republic of China (the PRC) passed a comprehensive data privacy law, the Personal Information Protection Law (PIPL), which became effective on November 1, 2021. The PIPL together with various other PRC laws governs the collection, processing, publishing, and transfer of the personal data of Chinese residents. We provide a high-level overview of what you need to know about the PIPL if your Utah-based client operates in the PRC.

Does the PIPL Apply to My Client?

If your client has a presence within the PRC or is registered outside of the PRC but collects and processes personal information of persons living within the PRC, the PIPL will apply. The PIPL also purports to apply extraterritorially to any processing that relates to the personal data of natural persons living within the territory of PRC and is done: (i) for the purpose of providing products or services to natural persons in the PRC; (ii) for the purpose of analyzing and evaluating the behavior of natural persons in the PRC; or (iii) for other purposes specified by law or regulation. Thus, if your client collects or processes personal information of persons living in the PRC, it likely will be subject to the PIPL.

What Does the PIPL Require?

Registration & Data Protection Officers

PIPL refers to persons or entities who process personal information that is subject to PIPL as personal information handlers (PIHs). A common question is whether PIPL requires PIHs to register with the PRC Cyberspace Administration of China (CAC), China's data protection authority. The answer is generally no. However, organizations that meet certain data processing volume thresholds, which have not yet been specified, will be required to appoint a data protection officer (DPO), and register the name and contact details of the DPO with CAC. Although the PIPL volume threshold has not yet been released, the National Standard of Information Security Technology – Personal Information Security Specification already requires an organization to appoint a DPO and a data protection office if it: (i) has more than 200 employees and its main business line involves data processing; (ii) processes (or is estimated to process) the personal information of more than 1,000,000 individuals; or (iii) processes sensitive personal

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information of more than 100,000 individuals. Finally, organizations based outside of the PRC that process PRC personal information also must appoint a specific representative or organization within the PRC. Details as to how and when the DPO should be appointed and reported to CAC, especially where the PIH is an offshore entity, have not yet been released.

In addition to appointing a DPO, your client may be required to prepare and file personal information protection assessments (i.e., security assessments), particularly when data will be transferred outside of the PRC, as discussed below.

Consent

The PIPL generally requires PIHs to obtain express, informed consent from data subjects before their personal information can be collected, used, transferred, or otherwise processed. Personal information can only be processed without consent in the following circumstances:

1. Entering into or fulfilling a contract with the data subject;
2. Carrying out human resources management under an employment policy or a collective contract;
3. Fulfilling legal obligations;
4. In response to public health incidents;
5. For public security and public interest reasons; and
6. As required by PRC law.

In practice, consent is the primary basis relied upon for lawful data processing.

PIPL also requires PIHs to obtain "separate consent" from data subjects to: (i) transfer their personal information to third parties; (ii) publicly disclose their personal information; (iii) transfer their personal information abroad; and (iv) process sensitive personal information. While PIPL does not explain the difference between "consent" and "separate consent," it is generally assumed that separate consent means that the data subject must specifically agree to that particular action, rather than providing consent to a general privacy policy.

Notice

In addition to obtaining consent, PIHs are required to notify data subjects about the following: (i) name and contact information of the PIH; (ii) purpose and method of processing; (iii) type of personal information processed; (iv) retention period; and (iv) methods and procedures to exercise their rights under PIPL. This notification can be made using an online privacy policy, so long as it is presented in a way that is prominent and easy for users to understand.

Transfer and Cross-Border Transfer

If your client discloses personal data to any third party other than the data subject, this disclosure constitutes a data "transfer" under PIPL. If a PIH transfers personal information to another PIH, it is required to notify data subjects of the name of the other entity, its contact information, the purpose of processing, the processing method, and type of personal information shared. No additional guidance has been issued on how to notify data subjects of a transfer, but presenting the required information on a website in a way that is prominent and easy for users to understand (such as in a privacy policy containing a list of entities that personal information is shared with) should meet the notice requirement.

PIHs are also required to obtain separate consent from data subjects to transfer their personal information abroad. In addition to obtaining consent, PIHs exporting the data are also required to do the following to transfer it outside of the PRC: (i) carry out a personal information protection impact assessment

in advance (as described below) and (ii) meet one of the lawful transfer mechanisms. The lawful transfer mechanisms that are permitted depend on the type of PIH and their processing activities.

Some PIHs must undergo a security assessment administered by CAC. Among others, this requirement applies to PIHs that process a "large" volume of personal information. According to CAC regulations issued in June 2022, "large" volume means PIHs who process the personal information of one million or more data subjects or who have cumulatively transferred the personal data of 100,000 or more data subjects abroad in the last fiscal year or the sensitive personal data of 10,000 or more data subjects abroad in the last fiscal year. For those PIHs processing large volume of personal information (and others who are subject to this requirement) undergoing a security assessment requires the PIH to first conduct a cross-border transfer self-assessment and file it with the provincial CAC, who will then administer the CAC security assessment. If the PIH fails to pass the security assessment, then the PIH cannot carry out any cross-border transfers until it remediates the issues identified by CAC.

For all other PIHs (i.e., small volume PIHs), a security assessment is not mandatory. Instead, one of the following alternative lawful transfer mechanisms can be relied upon: (i) obtaining certification from a "professional institution" in accordance with the rules of CAC; (ii) entering into a transfer agreement with the overseas recipient based on the "standard contractual clauses" published by CAC (CAC SCCs); or (iii) relying on any other mechanism that has been provided by regulation. To rely on CAC SCCs, the PIH must file an executed copy of the CAC SCCs with the Cyberspace Administration ten days before the agreement's effective date. The PIH also must file a personal information impact assessment for the cross-border transfer with the executed CAC SCCs. If the purpose and means of the cross-border transfer changes, the PIHs must execute and re-file new CAC SCCs.

Data Security

PIHs also are required under PIPL to implement security measures to protect personal information and prevent unauthorized access, as well as personal information leaks, distortion, or loss. Specifically, PIHs must: (i) formulate

internal management structures and operating rules; (ii) implement categorized management of personal information; (iii) adopt corresponding technical security measures (e.g., encryption, de-identification); (iv) reasonably determine operational limits for personal information handling; (v) regularly conduct security education and training for employees; (vi) formulate and implement personal information security incident response plans; and (vii) other measures required by regulation.

The foregoing requirements may vary based on the purpose of processing, the handling methods, the type of personal information being processed, the effect on rights and interests of data subjects, and possible security risks. In addition, PIHs must regularly conduct audits of their personal information handling and compliance with law.

If the PIH handles sensitive personal information, uses personal information to conduct automated decision-making, discloses personal information to other PIHs, or transfers personal information abroad then the PIH must conduct a personal information protection impact assessment in advance. This personal information protection impact assessment must include: (i) whether the purpose for processing, processing method, etc., are lawful, legitimate, and necessary; (ii) the influence on data subjects' rights and interests and the security risks; and (iii) whether protective measures undertaken are legal, effective, and suitable to the degree of risk. These assessment reports must be preserved for at least three years.

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- divorce, parentage, and modifications
- personal injury/medical malpractice
- commercial and business disputes
- attorney-client conflicts and complaints
- any other need for dispute resolution

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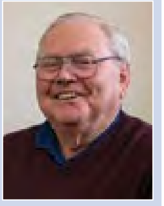

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Data Retention and Deletion

An important component of data security under PIPL is timely deletion of personal information that is no longer needed. PIHs must proactively delete personal information where: (i) the handling purpose has been achieved, is impossible to achieve, or the information is no longer necessary to achieve the purpose; (ii) the PIH stops providing the product or service or the retention period required by law has expired; (iii) the data subject rescinds consent; or (iv) the personal information was handled in violation of law or agreements.

Data Breach Notification

Regardless of how careful your client may be, there is always the possibility that a data breach (leak, distortion, or loss) may occur. If your PIH client experiences a data breach, it must "immediately" adopt remedial measures and notify departments in the organization that oversee data protection. If the departments can take action and void the harm created by the breach, then the PIH is not required to notify the data subjects. However, if the departments believe harm may have occurred, they may require the PIH to notify the data subjects.

How is PIPL Enforced?

If your client is found to have violated the PIPL, regulators may order your client to take corrective actions. In addition, regulators may issue warnings, confiscate illegal income, suspend services, or issue a fine. Fines may be imposed up to 50 million RMB (currently, about USD 7 million) or 5% of an organization's annual revenue for the prior year. Violations also may be recorded in the "credit files" of the PIH under the PRC's national social credit framework. PIHs also may be liable for tort damages if they infringe the rights and interests of data subjects, and, if they infringe the rights and interests of a large number of data subjects, the People's Procuratorate may file lawsuits.

Summary

In summary, the PIPL imposes several requirements that may apply if your client collects or processes any personal information from persons living in the PRC. While this article is not intended to be comprehensive, we hope this overview provides you with a high-level understanding of the basic requirements that may be relevant to your Utah-based client.

Stop CC-ing Your Clients on Emails to Opposing Counsel

by Keith A. Call

What Does "CC" Mean in an Email?

(If you were born before 1975 and don't like love stories, you can skip this section.)

You may have wondered what the "cc" field on your email means. "CC" refers to "carbon copy," a method of making copies of letters and other papers before the proliferation of copy machines and personal computers. In order to make multiple copies of a document, a writer could insert a thin paper coated with a mixture of wax and pigment between two sheets of paper. Then, using a pen or typewriter on the top sheet of paper, the carbon paper would make an imprint of the original writing on the second sheet of paper – a "carbon copy." With a strong hand or typewriter, more than one sheet of carbon paper could be used between more than two sheets of paper to make more than one copy.

Carbon paper was originally invented to help blind people write through the use of a metal stylus or machine instead of a quill. In the early 1800s, an Italian by the name of Pellegrino Turri fell in love with a young woman, the Countess Carolina Fantoni. The Countess had become blind "in the flower of her youth and beauty." To help his lover correspond in private, Turri invented a typewriting machine that used a form of carbon paper. These lovers' use of a typewriter and carbon paper did not become prevalent for another sixty-five years. *See* Kevin Laurence, "The Exciting History of Carbon Paper!," http://www.kevinlaurence.net/essays/cc.php.

Though carbon paper is no longer prevalent, it has left its mark in our modern world with the use of "cc" on most email platforms.

ABA Formal Ethics Opinion 503

Late last year, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion about the use of "cc" on emails and other electronic communications. ABA Comm. on Ethics & Pro. Resp., Formal Op. 503 (2022). This opinion provides a warning to any lawyer who includes their client as a "cc" recipient of electronic communications (such as email). The ABA's key opinion is: "[L]awyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's 'reply all' to the communication."

In other words, if you send an email or other electronic communication to your opposing counsel and include your client as a "cc" recipient of the email, you consent to opposing counsel communicating directly with your client using the "reply all" function.

The opinion is based on Model Rule of Professional Conduct 4.2, "Communication with Person Represented by Counsel." Utah's version of Rule 4.2 substantially differs from the ABA Model Rule, but not as it relates to Opinion 503. Utah's version of Rule 4.2(a) states, in relevant part: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the matter, *unless the lawyer has the consent of the legal professional*."

The ABA opinion reasons that a lawyer may consent to direct communications by opposing counsel, that such consent may be implied, and that implied consent is provided when the lawyer copies the client on a group message.

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

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

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

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

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> This conclusion…flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context, and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response.

Op. 503 at 3.

The opinion offers a couple of workarounds. First, the presumption of implied consent does not apply if the sending lawyer communicates to the opposing lawyer that they do not consent to direct communications with the client. This communication should be prominent, preferably in writing, such as at the beginning of the email or in a separate email. Op. 503 at 4.

A far better approach, in my opinion, is to simply not "cc" your client in the first place. As Opinion 503 points out (perhaps obviously), the sending lawyer can easily choose to exclude their client from the original email. "Thus, the better practice is not to copy the client on an email or text to [opposing] counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client." Op. 503, at 3–4. It is also a best practice to separately forward electronic communications to your client to minimize the risk that your client will mistakenly "reply to all," and thereby disclose information to "all" that was only intended for their lawyer.

ABA opinions may not be binding on lawyers practicing in Utah, but they are at least persuasive. If you have a practice of copying your client on electronic communications to opposing counsel, now is a good time to change that practice!

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

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the March 16, 2023 meeting held at the Dixie Convention Center in St. George, Utah.

- The Commission approved removing the credit card surcharge on licensing renewals.
- The Commission approved assessing $7.00 to each licensee for the Fund for Client Protection to maintain the Fund balance as required by Rule 14-904.
- The Commission voted to purchase a table for the UCLI Fundraising Luncheon.
- The Commission voted to purchase a table at the Law Day Luncheon.

The minute text of this and other meetings of the Bar Commission are available on the Bar's website.

2023 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2023 Summer Convention Awards. These awards have a long history of publicly honoring those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession.

Please submit your nomination for a 2023 Summer Convention Award no later than Monday, May 22, 2023. Visit https://www.utahbar.org/award-nominations to view a list of past award recipients and use the form to submit your nomination in the following Summer Convention Award categories:

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

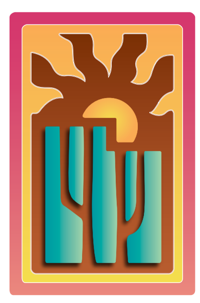
Mandatory Online Licensing

The annual online licensing renewal process will begin the week of June 5, 2023, at which time you will receive an email outlining renewal instructions. This email will be sent to your email address of record. Utah Supreme Court Rule 14-107 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.

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

The Bar accepts all major credit cards and has eliminated the 2% surcharge. Payment can also be made by ACH/E-check. **NO PAPER CHECKS WILL BE ACCEPTED.**

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



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The Utah State Bar is excited to announce that in addition to Visa and Mastercard, the Bar will now accept American Express, Discover and e-check/ACH as payment for all services including:

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With the addition of the new payment options, paper checks are no longer accepted for any payments, including the upcoming license renewals. The 2% credit card surcharge has also been eliminated!

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Pro Bono Honor Roll

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

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Launching a New Bar Signature Program: The Pro Se Community Clinic

by Pamela Beatse, Access to Justice Director

A new service for people facing an eviction or debt collection lawsuit is launching April 2023. The Pro Bono Commission authorized the Utah State Bar's Access to Justice Office (ATJ) and People's Legal Aid (PLA) to offer a new signature program, the Pro Se Community Clinic. This eviction and debt collection clinic is designed to provide legal information, community resources, and brief advice to assist people without lawyers who have a hearing scheduled on a pro se consolidated calendar.

The Pro Se Community Clinic will help reach pro se people upstream, before their day in court, to give hope. It will help people deal with the devastation and financial damage they are facing. Evictions displace people from their communities. Money judgments and garnishments are crushing. People's lives are dramatically altered after being sued for these types of matters. Access to legal and community services are essential tools to help people obtain better outcomes.

This clinic will function as a diversion program with the goal of resolving the issue before the scheduled hearing. If it is not possible to divert people from court, then they will have access to information and be equipped with the tools they need for their hearing.

People with a hearing on the consolidated pro se debt collection or immediate occupancy calendar in the Third Judicial District will be told about this clinic directly with their notice of the court hearing. They will also receive an email with a tenant-, landlord-, or debt defendant-specific packet giving them a checklist of action steps to take. They will receive a link to detailed videos created by ATJ and PLA about what to expect at the hearing, how the virtual process works, and specific information about their type of lawsuit. Additional resources, and commonly needed forms, are included in the packet.

Volunteer lawyers, Licensed Paralegal Practitioners (LPPs), and students will help people prepare for their hearing. Volunteers will evaluate the person's case. They will review documents and evidence, help prepare exhibits, start negotiations, and discuss next steps. Community partners like Utah Community Action, Utah Legal Services, and Disability Law Center will participate by having representatives available to give information and services.

We invite you to join this new program as a volunteer. The weekly, virtual clinic takes place every Thursday from 11 a.m. to 1 p.m. over Zoom. Volunteers can choose to come just for the clinic, or they can opt to work with the person from the time of the clinic until the hearing scheduled the next week by responding to follow-up questions. Advice and counsel provided through the clinic does not constitute representation. Attorneys, LPPs, students, and clinic participants are all advised that assistance provided by the signature program does not constitute the establishment of an ongoing attorney-client relationship.

To get more information or express interest in volunteering, visit the Utah Pro Bono Opportunity Portal. If you cannot serve and would like to financially support the clinic instead, consider a gift to People's Legal Aid for this project, https://mtyc.co/1ic3ff.

Bar Thank You

Many attorneys volunteered their time to grade essay answers from the February 2023 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Mark H. Anderson
Blake R. Bauman
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Russ M. Blood
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Clinton Brimhall
Kim H. Buhler-Thomas
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Jeffrey D. Enquist
Nathan J. Evershed
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Steve C. Tingey
James K. Walker
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Joshua Woodbury

Notice of Legislative Positions Taken by Bar and Availability of Rebate

Positions taken by the Bar during the 2023 Utah Legislative Session and funds expended on public policy issues related to the regulation of the practice of law and the administration of justice are available at www.utahbar.org/legislative. The Bar is authorized by the Utah Supreme Court to engage in legislative and public policies activities related to the regulation of the practice of law and the administration of justice by Supreme Court Rule 14-106, which may be found at https://www.utcourts.gov/rules/view.php?type=UCJA&rule=14-106. Lawyers and LPPs may receive a rebate of the proportion of their annual Bar license fee expended for such activities during April 1, 2022, through March 31, 2023, by notifying Financial Director Lauren Stout at lauren.stout@utahbar.org.

The proportional amount of fees provided in the rebate include funds spent for lobbyists, staff time spent on legislative matters, and expenses for Bar delegates to travel to the American Bar Association House of Delegates. Prior year rebates have averaged approximately $7.38. The rebate amount will be calculated April 1, 2023, and we expect the amount to be consistent with prior years.

Annual CLE Compliance

CLE Reporting Period is July 1, 2022 – June 30, 2023

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

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

At least six hours of the CLE must be Live CLE, which may include any combination of In-person CLE, Remote Group CLE, or Verified E-CLE. The remaining six hours of CLE may include Self-study CLE or Live CLE.

For a copy of the new MCLE rules, please visit https://www.mcleutah.org. For questions, please email staff@mcleutah.org, or call 801-746-5250.

Utah State Bar Request for 2023–2024 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more Bar committees which participate in regulating admissions and discipline and in fostering competency, public service, and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name ______________________________ Bar No. ______________

Office Address ____

Phone # ______________ Email ______________________ Fax # ______________

Committee Request:

1st Choice ______________________ 2nd Choice ______________________

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

____

____

____

Please list any Utah State Bar sections of which you are a member:

____

____

____

Please list pro bono activities, including organizations and approximate pro bono hours:

____

____

____

Please list the fields in which you practice law:

____

____

____

Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

____

____

____

____

____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date ______________ Signature ______________________________

Utah State Bar Committees

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

Bar Examiner
Drafts, reviews, and grades questions and model answers for the Bar Examination.

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

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

Disaster Legal Response
The Utah State Bar Disaster Legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.

Ethics Advisory Opinion
Prepares formal written opinions concerning the ethical issues that face Utah lawyers.

Fall Forum
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

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

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

Spring Convention
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Summer Convention
Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

Unauthorized Practice of Law
Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

Fill out and return by June 2, 2023 to: christy.abad@utahbar.org

Utah State Bar Licensee Benefits
Put Law Practice Tools at Your Fingertips

Your Utah State Bar license comes with a wide range of special offers and discounts on products and services that make running your law practice easier, more efficient, and affordable. Our benefit partners include:

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Attorney Discipline

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

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

ADMONITION

On December 20, 2022, the Honorable Andrew H. Stone entered an Order of Discipline: Admonition against an attorney for violating Rules 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Underlying claims concerning the attorney were dismissed by the court. However, it was determined that the attorney should receive an admonition for failing to timely respond to the OPC.

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

Mitigating circumstances: lack of dishonest or selfish motive, extensive personal problems.

INTERIM SUSPENSION

On January 26, 2023, the Honorable Keith A. Kelly, Third Judicial District Court, entered an Order of Interim Suspension, pursuant to Rule 11-564 of the Rules of Lawyer Discipline, Disability and Sanctions against Aaron Tarin, pending resolution of the disciplinary matter against him.

In summary:

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

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

801-257-5518

DisciplineInfo@UtahBar.org

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

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$100 on or before September 9 or March 12,
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Aggravated Assault, a felony, Sexual Battery, a misdemeanor, and Stalking (DV), a felony.

SUSPENSION

On December 23, 2022, the Honorable Michael Westfall, Fifth Judicial District, entered an Order of Suspension against Cason M. Leavitt suspending his license to practice law for a period of three years. The court determined that Mr. Leavitt violated Rule 1.1 (Competence), Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), Rule 7.1 (Communications Concerning a Lawyer's Services) and Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. Leavitt has never been licensed to practice law in the State of Arizona. Mr. Leavitt's license to practice law in Utah was administratively suspended for failure to comply with Mandatory Continuing Legal Education requirements. Mr. Leavitt maintained an online presence that omitted pertinent information regarding his law license with the intent to mislead clients into assuming that he was licensed to practice law in Arizona.

An Arizona resident hired Mr. Leavitt to prepare a will, powers-of-attorney, a living will, advanced directives and a trust. Mr. Leavitt met with the client in their home to gather information from them in order to prepare the documents. Mr. Leavitt did not inform the client that he was not licensed to practice law in Arizona. The client paid Mr. Leavitt for the estate planning work but the work Mr. Leavitt performed was incomplete and did not satisfy the requirements of what the client needed.

The client later discovered Mr. Leavitt was not licensed to practice law in Arizona and reported his conduct to the State Bar of Arizona. Mr. Leavitt was directed to submit a written response to the State Bar of Arizona Bar Counsel to address the client's allegations. Mr. Leavitt did not respond. A Probable Cause Order was filed before the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona. Mr. Leavitt did not respond and his default was entered.

The OPC sent a Notice to Mr. Leavitt. Mr. Leavitt did not timely respond to the Notice.

Registration is open now – watch your inbox!

Featured Topics Include:

- Ethics
- Professionalism & Civility
- Diversity & Inclusion
- De-escalation of Conflict
- Judicial Independence
- Law Practice Innovations

An Important Note:

MCLE hours earned in June (**up to 5 hours** available*) will count toward this year's compliance cycle.

Hours accumulated in July and August (**up to 9 hours** available*) will count toward next year's compliance cycle.

*Approval pending.

utahbar.org/summerconvention

YLD's Traditions Continue at the Utah State Bar Spring Convention

by Scotti Hill

Once upon a time, one talented lawyer among many became the coveted recipient of the "Richard Dibblee Award," the prize conferred upon the individual who wins the most games of giant Jenga in St. George's illustrious Snow Canyon. Named after the Utah State Bar's iconic former Associate Director, the award denotes its namesake's strength, humor, and goodwill.

The Jenga competition is part of the Young Lawyers Division's (YLD) longstanding tradition of a Spring Convention barbeque – a fete of food, friends, and picnic tables decorated by sets of the famously anxiety inducing, yet skillful block game – enveloped by the gorgeous red rocks of the canyon's Lower Galoot picnic area.

After a long hiatus, YLD hosted the "BAR"Beque on Friday, March 18th as part of the Utah State Bar's Spring Convention. Joined by young and seasoned lawyers alike, the event united regular Bar enthusiasts and St. George-based lawyers as well as special guests Gus and Jack, the friendly greyhounds of Bar President Katie Woods.

Zachary Lindley, Scotti Hill, and the Honorable Augustus Chin playing Jenga in Snow Canyon as part of the YLD barbeque.

In addition to the triumphant return of the YLD barbeque, we hosted a breakout session on how young lawyers can navigate marketing legal services and branding their professional identity. I was honored to moderate this session which included two St. George-based young lawyers – Lindsay Bayles, who specializes in estate planning and who is slated to receive her LLM in taxation from New York University later this year, and Zachary Lindley, a litigation and family law attorney working for Kirton McConkie. Joining them was Jacen Condie, a digital marketing expert who works for "Law Firm Sites," a company that assists lawyers get more cases through search engine optimization, website design, social media marketing, and Google Ads. The panelists shared their views on the importance of comradery within the legal profession as crucial not just for generating business but for fulfilling one's duties to comport oneself with professionalism and civility. They also spoke about the benefits and pitfalls of social media, making contacts within your community, and crafting inclusive language about one's qualifications to attract a diverse array of potential clients.

SCOTTI HILL (she/her) is Ethics Counsel and Director of Professional Development at the Utah State Bar. She is currently serving as the President of the Young Lawyers Division.

YLD President and panel moderator Scotti Hill with panelists Jacen Condie, Lindsay Bayles, and Zachary Lindley (left to right) who spoke in a breakout session about marketing for young lawyers.

I enjoyed wearing dual hats as moderator for this panel – as both the Young Lawyers Division President and Ethics Counsel for the Utah State Bar. While wearing my ethics hat, I imparted targeted information about the ethical considerations of legal marketing under Rule 7.1 of the Utah Rules of Professional Conduct, which was amended in 2020 along with the redaction of Rules 7.2–7.5. Rule 7.1 is currently under review once again, as amendments to clarify the issue of direct solicitation, including prohibited forms of direct communication to prospective clients, is open for public comment until early April. Additionally, ABA Formal Opinion 496 (2021), discusses the issue of responding to online criticism, a particularly hot topic with the rise of various sites that make it easier than ever for lawyers to connect with current and potential clients. The opinion emphasizes the need for extreme caution when contemplating responses on sites such as Avvo and Google, as a lawyer's ethical duties under Rule 1.6 (confidentiality) are broad and protect any information the lawyer obtains through the representation.

Allison Navar and LaShel Shaw attend the YLD barbeque in Snow Canyon on March 18, 2023.

In sponsoring our breakout session and reviving the Snow Canyon barbeque tradition, YLD was fortunate to converse with young lawyers outside of the Salt Lake Valley as well as bring experienced lawyers into the fold to see the great initiatives YLD works on year round. As registration for next year's Spring Convention draws near, we hope you will consider joining us for another roster of events and in the meantime, keep in touch with us on Instagram at @utahyld.

Classified Ads

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Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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

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Established AV-rated Business & Estate Planning Law Firm with offices in St. George, UT and Mesquite, NV is seeking a Utah-licensed attorney with 3–5+ years' of experience in business, real estate, construction, or transactional law. An active bar license in Nevada and tax experience are also preferred, but not necessary. Ideal candidates will have a distinguished academic background and relevant experience. We offer a great working environment and competitive compensation package. St. George and Mesquite are great places to live and work. Please send resume and cover letter to Barney McKenna & Olmstead, P.C., Attn: Daren Barney at daren@bmo.law.

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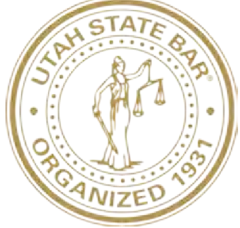

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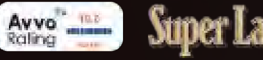

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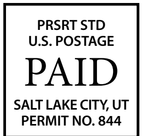

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