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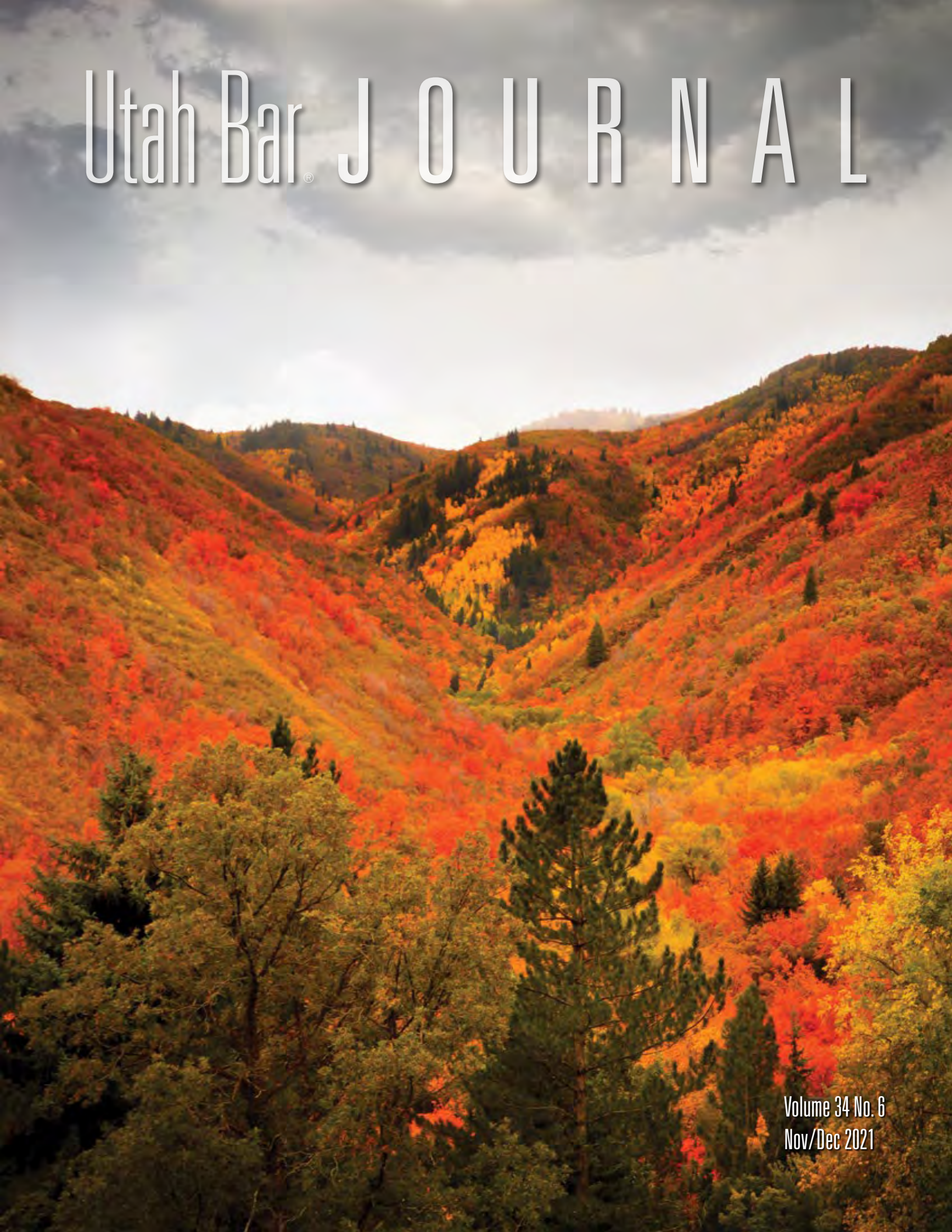

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There's a Shark in the "Safe Harbor"!

by Keith A. Call

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

– Peter Benchly, *Jaws*

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

What Are Ethics Advisory Opinions?

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

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

What Is the Safe Harbor?

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

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

> The OPC may not prosecute a Utah lawyer for conduct that complies with an ethics advisory opinion that has not been withdrawn at the time of the conduct in question. No court is bound by an ethics opinion's interpretation of the Rules of Professional Conduct or Licensed Paralegal Practitioner Rules of Professional Conduct.

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

Beware of Sharks!

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

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

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

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

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

Id. ¶ 57 n.14.

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

Conclusion

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

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

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