



Kane County Attorney's Office

ROBERT VAN DYKE

Kane County Attorney

JEFF STOTT

Chief Deputy County Attorney

76 North Main, Kanab, Utah 84741

Phone: 435-644-5278 Fax: 435-644-8156

E-Mail: attorney@kane.utah.gov

April 15, 2022

Willie Greyeyes
Chairman, San Juan County Commission

Lyman Duncan
San Juan County Clerk/Auditor

Mack McDonald
San Juan County Administrator

Re: Filling Vacant San Juan County Attorney Position

Dear Mr. McDonald, Mr. Duncan, and the San Juan County Commission,

This letter outlines my legal opinion regarding the status and process for filling the vacant position for San Juan County Attorney and a draft resolution for the San Juan County Commission that would begin the process for requesting additional candidates for the vacancy.

At the outset I will state that this letter represents my legal opinion but does not represent an official legal opinion of San Juan County or the San Juan County Attorney's Office. Currently there is no interim San Juan County Attorney and both Deputy County Attorneys have a conflict because they have applied for the vacant position. This leaves San Juan County in a precarious position regarding official legal advice on this specific issue. I have been officially retained by San Juan County for the purpose of defending the county in two separate land use actions. As a courtesy I am also providing this legal opinion at the request of Mr. McDonald.

SUMMARY OF LEGAL OPINION

In summary it is my legal opinion as follows:

- 1) More than three attorneys who are residents of the county have applied for the vacant County Attorney position. Therefore the process outlined in Utah Code §20A-1-509.2(3) governs further actions in the appointment process.

- 2) As of this date, the San Juan County Democrat Party Central Committee remains obligated under Utah Code §20A-1-509.2(3)(b) to submit three nominees to the San Juan County Commission from among the four names submitted to them by the County Clerk.
- 3) If they fail to nominate three attorneys, which appears to be their current intent, then the San Juan County Commission would then be obligated to nominate one of the four original applicants as set forth under Utah Code §20A-1-509.2(3)(d).
- 4) The San Juan County Commission does not have the authority under Utah Code §20A-1-509.2(4)(a)&(b) to solicit additional applicants outside of the County nor to appoint any attorney outside of the four original applicants.
- 5) If the County Commission were to solicit additional applicants outside of the county as set forth in their proposed resolution, and if they subsequently appointed an attorney outside of the four original applicants, this appointment would be unlawful and likely void. Additionally, 120 days after the vacancy occurred, the County Clerk would be required by law to submit the names of the four original applicants to the Governor for him to consider appointment. Utah Code §20A-1-509.2(3)(e)&(f).

RELEVANT LAW

Utah Code §20A-1-509.2 sets for the process for appointing the vacant county attorney position in San Juan County which I will summarize here.

- 1) The County Clerk “shall send a letter to each attorney residing in the county...who is a licensed, active member in good standing with the Utah State Bar and a registered voter.” Utah Code §20A-1-509.2(2)
- 2) The County Clerk letter shall (a) inform the attorney of the vacancy; (b) invite the attorney to apply for the vacancy; and (c) inform the attorney to respond before 5 p.m. within 10 calendar days after the day the letter is sent. *Id.*
- 3) If more than three attorneys “have applied for the vacancy” the County Clerk shall “submit the applications” to the San Juan County Democrat Party Central Committee. Utah Code §20A-1-509.2(3)(a)(i). See number 6 below for the process if there are three or less attorneys who apply.
- 4) The Central Committee shall then nominate three of the applicants and forward the applicants’ names to the County Commission by 5p.m. within 20 days of the date the County Clerk submits the applicants’ names to the Central Committee. Utah Code §20A-1-509.2(3)(b)
- 5) The County Commission then appoints one of the nominees. Utah Code §20A-1-509.2(3)(c). If the Central Committee fails to submit three nominees by the deadline, the County Commission appoints one of the attorneys who applied to the County Clerk. Utah Code §20A-1-509.2(3)(d). If the County Commission fails to make an appointment within 120 days of the vacancy, the County Clerk sends the names of the nominees, or if there are insufficient nominees then the names of the applicants, to the Governor who makes an appointment within thirty days after receiving the letter. Utah Code §20A-1-509.2(3)(e)&(f).
- 6) If three or less attorneys have applied before the deadline, the County Commission may appoint one of the applicants or may solicit additional applicants who reside outside of the county and appoint among either the resident or non-resident applicants. Utah Code §20A-1-509.2(4)(a)&(b). If the County Commission fails to make an appointment under

this group of applicants within 120 days, the County Clerk sends the names of all the applicants to the Governor who makes an appointment within thirty days after receiving the letter. Utah Code §20A-1-509.2(4)(c)&(d).

FACTS

On March 15, 2022, Kendall Laws San Juan County Attorney resigned, effective March 28, 2022. Mr. Laws was elected and registered as a Democrat Party candidate. San Juan County has five attorneys who are San Juan County residents and registered voters who are also in good standing with the Utah State Bar. On March 17, 2022, the San Juan County Clerk sent a letter to each of these five attorneys. This letter informed each attorney of Mr. Laws resignation, invited them to apply for his vacancy, and provided a deadline to apply by 5 p.m. within 10 days by “submitting your declaration of candidacy.

Four of the five attorneys responded to the County Clerk’s letter by the deadline. Ms. Brittney Ivins submitted a one sentence letter to the County Clerk stating “I would like to submit my name to be considered for the position of San Juan County Attorney.” Mr. Alex Goble submitted a “Letter of Intent.” The full page letter was to “express [his] interest in filling the vacancy” and detailed his knowledge and experience relevant to the County Attorney position. Mr. Craig Halls sent an email to the County Clerk stating in part “I would like to indicated [sic] my interest in being considered as a candidate to fill the remainder of Mr. Laws term as County Attorney made available by his resignation.” The County Clerk responded to Mr. Halls email by stating “Craig, thank you for your response.” Mr. Daniel Anderson similarly sent an email to the County Clerk stating “I’m interested in the county attorney position resulting from the resignation of Kendall Laws.” The County Clerk also responded to Mr. Anderson by email on March 24th stating “thank you for your response.”

On March 28, 2022, the County Clerk sent a letter with the names of the four attorneys who applied to the leadership of the San Juan County Democrat Party along with the letters and emails the attorneys sent to the County Clerk. The March 28th letter informed the Democrat Party leadership that they had 20 days to nominate three of the four attorneys to the San Juan County Commission for consideration to appoint as the San Juan County Attorney.

On March 31, 2022, the San Juan County Democrat Party emailed the four applicants asking for them to submit a letter of interest among other items by April 4. The email indicated that the Democrat Party would reach out and schedule an interview after the application had been received. Three of the attorneys responded. Mr. Daniels and Mr. Goble submitted a letter of intent with their CV prior to the deadline. On April 5, the day after the deadline, Mr. Halls submitted a 2019 application for the position of Grand County Justice Court Judge which outlined in detail his legal career, training, and experience. It is unclear but I do not believe that any further interaction took place between the San Juan County Democrat Party and the three attorneys who responded.

On April 7th the San Juan County Democrat Party Leadership emailed the San Juan County Commission and County Clerk stating that they did not receive any “bona fide” applications from the County Clerk for the four attorneys and that they did not have sufficient “bona fide”

applicants to be able to submit three names to the County Commission for consideration. The April 7th email makes a strong recommendation that the County Commission advertise for and make a selection from additional applicants.

On April 11th, the San Juan County Clerk responded to the San Juan County Democrat Party. In this email and letter the County Clerk reiterated that there are four applicants for the vacant county attorney position and provided all the materials submitted by the applicants. The County Clerk reiterated that the San Juan County Democrat Party needed to nominate three attorneys to fill the vacant position. The letter detailed that if the Party failed to make the nomination by the deadline, the County Commission would proceed to appoint an attorney from among the four applicants.

On April 13th, the Party responded to the County Clerk by email. In this email the Party stated that they did not receive applications from more than three attorneys and therefore had “no authority to move forward with the process of filling the County Attorney vacancy under UCA 20A-1-509.2(3).” In the opinion of the Party, “The authority to fill the vacancy rests solely with the County Commission as set forth in UCA 20A-1-509.2(4).”

Currently the County Commission has a draft resolution which in relevant part would do the following if passed: 1) declare that the County Clerk “received four expressions of interest for the vacancy but did not receive more than three actual applications;” 2) declare that the County Clerk provided the names of the four attorneys to the San Juan County Democrat Party, “but did not forward more than three actual applications;” 3) declare that the County Clerk subsequently “forwarded the four attorneys’ expressions of interest to the Party;” 4) “finds it in the best interest of all San Juan County residents to exercise its option pursuant to UCA 20A-1-509.2(4)(b)(i) to solicit and accept additional applications for consideration along with the applications received from the three attorneys who are residents of San Juan County;” and 5) directs the County Administrator to solicit applications from all attorneys licensed with the Utah State Bar and to provide any full applications to the County Commission.

LEGAL ANALYSIS

It is clear from the facts that the County Clerk is proceeding under Utah Code §20A-1-509.2(3) which details the procedure for appointment after more than three attorneys who are residents of the county have applied for the vacant position. It is also clear from the draft resolution that the County Commission is contemplating moving forward under Utah Code §20A-1-509.2(4) which details the procedure for appointment after three or less attorneys who are residents of the county have applied for the vacant position. There is no question that the four attorneys discussed here are residents of the county, registered voters and in good standing with the Utah State Bar. There is no question that they responded timely to the Clerk’s original solicitation. The first issue to address and the ultimate issue in dispute is whether all four of these attorneys “applied” or submitted an “application” to be considered a candidate for the vacant county attorney position.¹

¹ There appears to be a dispute as to whether the County Clerk provided the names of the attorneys with or without the additional materials that they provided (emails and letters of intent). The Clerk claims to have provided all relevant documents with the April 28th letter that provided the names and the Democrat Party claims to have received these materials later “upon request.” Regardless of when the additional materials were provided, the

For the reasons stated below it is my legal opinion that all four have “applied” or otherwise submitted an “application.”

What is required for an attorney to apply or submit an application for a vacant county attorney position? To initiate the application process, the County Clerk “invites the attorney to apply for the vacancy” and informs the attorney that if the attorney “has not responded” by the deadline, “the attorney’s candidacy will not be considered.” Utah Code §20A-1-509.2(2). If more than three attorneys “have applied,” the County Clerk “shall submit the applications” to the Party. Utah Code §20A-1-509.2(3)(a)(i). If fewer “have applied” or “submit applications,” then the County Commission can take direct action. Utah Code §20A-1-509.2(4). Title 20A provides no definition or further guidance on what constitutes an application or the act of applying in this situation. A search of Utah Code also did not result in a specific definition of the terms apply, application, or applicant. The State Legislature could have placed specific definitions or other requirements on this application or application process but has not done so.

For further guidance we should look to ordinary definitions of these terms. Application is defined by the Oxford Dictionary as “a formal request to an authority for something.” Similarly, the word apply means “to make a formal application or request.” Formal is defined as “officially sanctioned or recognized.” With these definitions in mind, in order to apply for or make an application for the vacant position, the attorneys would need to have made a formal request, or in other words, an officially sanctioned or recognized request, to an authority for something. In this situation, the authority that the formal request must be made to is the County Clerk. The County Clerk did not establish any specific criteria for a formal request other than “to submit your declaration of candidacy.” Each of the four applicants in their response to the County Clerk declared or stated that they wanted to be considered for the vacant position. In turn, the County Clerk responded by email to the four attorneys thanking them for their response. The response email from the County Clerk is particularly important because this would further show that the request was a formal request once it was “recognized” by the County Clerk. Therefore, all four attorneys should be considered to have applied for, made application for and become an applicant for the vacant county attorney position.

It is likely that the County Commission, as the legislative body for the County possessing all the legislative authority for the county, could approve an official application for this specific situation. However, this has not happened. Also, although it may be more beneficial to the overall process to have received additional information about each of the applicants such as a resume or CV, references, a background check, example legal memorandum, or any number of other items, these were not necessary as part of the initial application and a lack of these items would not disqualify any of the applicants from consideration. The process for appointment also creates additional time for either the central committee or the County Commission to seek additional information about the applicants.

This is exactly what has occurred already with the Central Committee. After receiving the four names from the County Clerk, the San Juan County Democrat Party reached out to each of the applicants and requested that they submit an application to the Central Committee with a

deadline for submitting three nominations remains the same because the deadline is 20 days after the applicants’ names are provided. Utah Code §20A-1-509.2(3)(b).

requests for specific information. In their opinion, two of the attorneys responded satisfactorily and two did not. The failure of the two attorneys to respond satisfactorily to the Central Committee does not affect their status as applicants to the County for the position but should only effect their ability to be named as a nominee by the Central Committee.

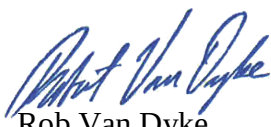
With this question answered the County should proceed with the process outlined in Utah Code §20A-1-509.2(3). The current status is that the Central Committee remains obligated under section 3(b) to nominate three of the four applicants. If they proceed to nominate three individuals before the deadline then the County Commission should proceed to appoint one of those nominees. If Central Committee fails to nominate three individuals by the deadline, then the County Commission should proceed to appoint one of the four applicants.

The County Commission has a draft resolution that if passed, would begin the process of soliciting additional applicants for the vacant attorney position under the authority of Utah Code §20A-1-509.2(4). This authority only applies if three or fewer attorneys have applied for the vacant position. *Id.* As discussed above, there are four applicants, or in other words, four attorneys have applied for the position. Therefore, the authority to solicit additional applicants does not apply. If the county were to proceed with this process and appoint an attorney outside of the four original applicants, the action would be unlawful and likely would be void. Additionally, if the County Commission did not appoint one of the four applicants within 120 days of the date of the vacancy, the County Clerk would be obligated under Utah Code §20A-1-509.2(3)(e) to forward the names of the four applicants to the Governor who would then be required to appoint one of them within thirty days. You can see that if the County Commission were to proceed with the draft resolution and nominate an attorney outside of the four original applicants, this would force a legal battle between the County Commission, the County Clerk, the four applicants, the illegally appointed attorney, and eventually the Governor.

CONCLUSION

There are four applicants for the vacant San Juan County Attorney position. The County Commission should not pass the draft resolution to solicit additional applicants but should instead wait to see what the San Juan County Democrat Party Central Committee decides to do. If they make timely nominations for three of the four applicants, or if they fail to make the nomination and the Commission is then allowed to consider all four applicants, the County Commission should carefully consider those individuals and make an appointment within 120 days.

Sincerely,



Rob Van Dyke
Kane County Attorney