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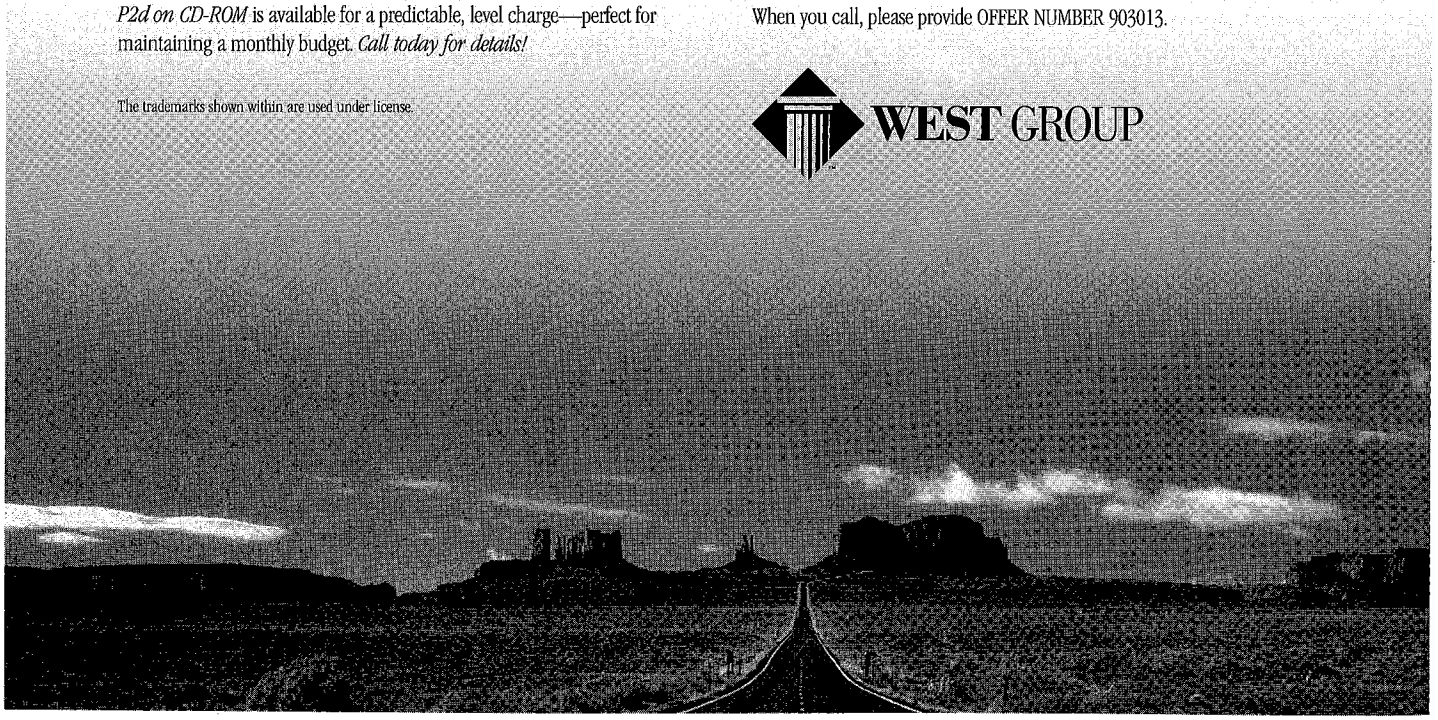

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Our Ranking Among Peers

by James C. Jenkins

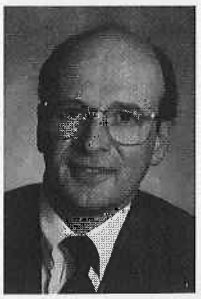
It has been long recognized that "no prophet is accepted in his own country." Over the last two years, I have had several opportunities to visit with lawyers and judges around the country. Each trip reaffirms my observation that Utah enjoys the highest caliber of legal professionals. We have some of the finest judges and lawyers found anywhere in the country. At times, however, our close proximity to our fellow professionals limits our ability to appreciate their greatness.

I just returned from Toronto, Canada, site of the 1998 Annual American Bar Convention. Utah is well represented among the many active members of the ABA. Utah is recognized among bar associations of the United States as being on the cutting edge of programming, bar activity and legal services. Our bar is known for its commitment to judicial independence, professionalism, public service and uniform justice.

When comparing bar organizations, the Utah State Bar ranks at the top of state and national organizations. This, of course, is due to the ethic and character of our membership as well as the active leadership and supervision of our Supreme Court and judiciary. We also enjoy one of the finest bar staffs in the country. These folks, led by Executive Director John Baldwin, are exceptionally skilled and care about our membership. I have always found the personnel at the Bar offices willing and anxious to be of service.

Often when I attend these national conferences, I hear disturbing complaints from other states about members of their bench and bar. I am always pleased and proud to report that in Utah, we rarely have such problems and that by constitution, court rules, state law and professional organization, we have solutions which prevent or minimize those problems. Often Utah is the model for resolving the troubles of other states.

However, we can never rest upon our accomplishments. If we are to remain great, we must always examine ways to improve. This year we hope to expand communication and activity to improve our judicial system. I look forward to visiting each local bar association throughout the State. The Board of Bar Commissioners is anxious to know of your concerns and your ideas for progress. We are starting now to plan our mid-year meeting in St. George scheduled for March, 1999. We hope it will be the best attended convention in the history of the Utah State Bar. St. George is completing a new convention center and we hope you will plan to be there to interact with the other dedicated and professional judges and lawyers of our great State. I encourage you to call or write me or your Bar Commissioner to discuss how you can contribute to a better Utah State Bar.



Cutting Edge Antitrust Issues Involving Utah Companies

by John Flynn, Mark Glick, Jonathan Hafen, James Kearl, Clark Waddoups

Several Utah Companies have recently been at the cutting edge of antitrust economics and jurisprudence. This article summarizes the presentations given at Sun Valley by Mark Glick, University of Utah; Clark Waddoups and Jonathan Hafen, Parr, Waddoups, Brown, Gee & Loveless; James Kearl, Brigham Young University; and John Flynn, University of Utah.

I. PROTECTING A PROPRIETARY AFTER-MARKET

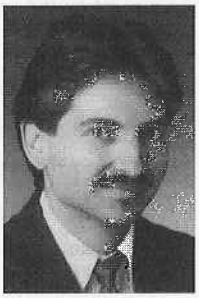
(Mark A. Glick)

Following the Supreme Court's decision in *Kodak*, a series of antitrust cases claiming "exploitation" of consumers in "after-markets" were filed. A complaint filed recently at the EC Commission involving Iomega raised several complicated questions concerning the nature of after-market exploitation. The case is now settled and the plaintiffs have conceded that Iomega's position is correct. Nevertheless, the lawsuit raised interesting and exciting issues.

By way of background, Iomega makes data storage systems. The product at issue in the case was the Iomega ZIP system. The ZIP system has two components: a ZIP drive and a ZIP disk. The disk can store up to 70 times the capacity of a conventional floppy disk when used in conjunction with the ZIP drive. The products must be used together and no other disk works in the ZIP drive. Moreover, the products are sold intertemporally. Once you purchase the ZIP drive, you can buy additional disks later in the "after-market." Finally, and of critical importance in the case, Iomega sells the drive cheap and makes the lion's share of its profits from disk sales. This pricing strategy Iomega calls the "razor/razor blade" strategy.

The razor/razor blade strategy creates powerful incentives for after-market entry by others. As expected, another company, located in France, figured out how to produce (through dubious means) an allegedly compatible disk for the ZIP drive. In fact, the disk was not a substitute, and tests conducted by independent laboratories showed that the disks actually damaged ZIP drives. Nevertheless, sales of such disks might have forced Iomega to eventually abandon its pricing strategy. Iomega took

John Flynn – Hugh B. Brown Professor of Law, University of Utah. B.S. Boston College; J.D. Georgetown University; S.J.D. The University of Michigan. In his 35 year teaching career, Professor Flynn has taught at Utah, Texas, Michigan, Georgetown, Pennsylvania and Washington University St. Louis law schools. Former Special Counsel to the United States Senate Judiciary Committee Subcommittees on Antitrust and Patents. Counsel and expert witness in numerous leading antitrust cases; author of leading casebooks in Antitrust and in Regulated Industries; author of several books and over 40 articles in law reviews and journals; consultant to FTC and state attorneys general. He is currently teaching Antitrust, Regulated Industries, Jurisprudence and Legal Process at the University of Utah College of Law and has recently published an article titled: Antitrust Policy, Innovation Efficiencies and the Suppression of Technology, 66 Antitrust L.J. *487.*



Mark A. Glick has been a Professor of Economics at the University of Utah since 1985. He received his Ph.D. in economics from the New School for Social Research, and his J.D. degree from Columbia University where he had the Olin Fellowship in Law and Economics. He is the author of over thirty published professional papers in the areas of law and economics, and is a member of both the New York and Utah bars. Mr. Glick is also Of Counsel (part-time) with the law firm of Parsons Behle & Latimer.

Jonathan Hafen practices in the areas of commercial litigation and arbitration with an emphasis in contract disputes, employment law and intellectual property. Mr. Hafen earned a Bachelor of Arts degree in English, summa cum laude, from Brigham Young University, and his Juris Doctorate, magna cum laude, from the J. Reuben Clark Law School, Brigham Young University. He served as Executive Director of the BYU Law Review, *and was a Law Clerk for the Honorable Monroe G. McKay, Chief Judge of the U.S. Tenth Circuit Court of Appeals. Following his clerkship, Mr. Hafen practiced for three years at the Chicago office of Sidley & Austin. He joined Parr Waddoups in 1995.*

steps to try to protect its intellectual property and exclude after-market entrants. The entrant brought an antitrust case in Europe, claiming that Iomega's actions were anticompetitive and harm consumers.

One key issue was whether the razor/razor blade strategy was a clever way to exploit consumers in the after-market, or whether there were substantial consumer benefits that derive from Iomega's policy. These benefits would be lost if the after-market entrant was successful. This issue has wide implications for the many companies that have chosen to employ the razor/razor blade strategy. For example:

- some companies give away cell phones in exchange for a commitment to purchase airtime;
- computer game producers price the game console cheap, but the game software is expensive;
- car makers set the price of the standard car cheap, but then charge high prices for options and parts;
- cameras can be cheap, but proprietary film can be expensive.

Thus, the case raised a cutting edge antitrust issue.

A. The Economics of the Razor/Razor Blade Strategy

The razor/razor blade strategy is a form of what is called "second degree price discrimination." Such price discrimination occurs when the same commodity is sold at different prices to different consumers based on how consumers value the product. The razor/razor blade strategy is a form of price discrimination because consumers who heavily use the ZIP system are willing to pay more because they purchase more after-market disks, while less intense users can obtain a ZIP system virtually at cost.

James Kearl is the A.O. Smoot Professor of Economics at Brigham Young University. Dr. Kearl is also a principal of LECG, Inc., a national economics and finance consulting firm. He has published numerous articles and books, including Principles of Economics (D.C. Heath, 1993) and Contemporary Economics: Markets and Public Policy (Scott Foresman, 1989). Dr. Kearl has lectured on economics throughout the United States and in many foreign countries. He has testified as an expert witness on economics and antitrust issues for many years.

Dr. Kearl graduated from Utah State University with a Bachelor of Arts in Mathematics and Economics, and received his Ph.D. in Economics from the Massachusetts Institute of Technology.

Price discrimination strategies are ubiquitous in our economy and are often mistaken for exploitative behavior. For example, movie theaters sell popcorn at high prices; not because they are exploiting patrons, but because they are price discriminating. By selling the initial movie ticket cheaply and then changing high prices for popcorn, movie-goers on a first date or with children (i.e., those who value the movie highly) pay high total prices, while elderly couples who eat before going out pay low movie prices. Stores that advertise that they "will not be undersold" are also price discriminating, because customers who place a high value on time pay more, while those that comparative shop pay less. Numerous other examples could be cited.

Economists are in agreement that price discrimination is always a more profitable strategy for a *manufacturer* then setting a single price. What is less clear, but was the foundational question in the Iomega case, is the impact of the razor/razor blade strategy on *consumers*. In general, price discrimination can either harm or benefit consumers, and therefore a case by case analysis is required. In the Iomega case, the pricing strategy had two effects. The low-margin initial drive price benefitted consumers because it *encouraged* drive sales, while the higher-margin disk prices *discouraged* intensive use once the ZIP drive was purchased. Thus, the overall effect on the consumer hinges on the size of the high intensity users compared to the size of the low intensity users.

While data could be used to resolve this question, there was a powerful reason why Iomega's razor/razor blade strategy was much more likely to benefit consumers. Iomega competes in a

Clark Waddoups is an experienced trial lawyer who specializes in complex commercial litigation, involving antitrust, securities, labor and employment, banking, construction, environmental, insurance claims and numerous other issues.

Mr. Waddoups holds a Bachelors of Arts degree, cum laude, from Brigham Young University, and received his Juris Doctorate, Order of the Coif, from the University of Utah College of Law in 1973. He served as President of the Utah Law Review, *and was a Judicial Clerk for the Honorable Judge J. Clifford Wallace of the United States Court of Appeals, Ninth Circuit.*

Mr. Waddoups practiced for a large California law firm for seven years before joining Par Waddoups in 1981. He is an active member of the Utah Supreme Court Advisory Committee on the Rules of Evidence, past President of the A. Sherman Christensen American Inn of Court I, and a member of the Board of Directors of the Family Support Center.

highly competitive system market consisting of numerous data storage alternatives. Several other data storage producers also have adopted something like a razor/razor blade strategy. Suppose a company was attempting to exploit a large group of high intensity users in the after-market. Such a strategy could be easily undermined by competitors selling a higher-margin product in the fore-market and selling a lower-margin product in the after-market, thereby channeling away the high-intensity users. In the Iomega case, this never happened because Iomega was not exploiting the after-market.

There were also other critical consumer benefits that flowed from Iomega's strategy. Essentially, Iomega's business strategy offers to share the risk with the customer that he or she will find the ZIP system useful and valuable. If the customer doesn't like the system, the initial investment is little more than Iomega's cost because the dissatisfied customer will not purchase disks in the after-market. On the other hand, if the product is found to be valuable, the customer will purchase after-market disks and Iomega will profit.

Such a risk-sharing strategy will only be adopted when a manufacturer has confidence in the quality of its product. The approach is akin to giving away a "free sample." No rational producer would give away free samples of an inferior product. The wager is that once customers "experience" the product, they will find it valuable. In contrast, I have noticed that health clubs typically adopt the opposite strategy. They know from experience that consumers will use the facilities much less often than they initially believe. As a result, health clubs seem to shift all of the risk of use to the customer, charging a large up front fee and a negligible per visit charge.

"If the customer doesn't like the system, the initial investment is little more than Iomega's cost because the dissatisfied customer will not purchase disks in the after-market."

Finally, by encouraging more users to purchase the initial drive, Iomega has created a large network of ZIP users. This makes the system more valuable to everyone owning a ZIP system because it increases the system's ability to be used for data transfer. For example, many law firms now use ZIP disks to transfer large databases between law firms in the discovery process. (*See* discussion by Jim Kearl below.)

B. The Antitrust Laws and Protecting Proprietary After-markets

Assume that it can be proven that a razor/razor blade strategy unambiguously benefits consumers. Can any steps be taken to protect such a strategy without violating the antitrust laws? The answer in my view is probably *yes*.

One method of protecting a proprietary system is to patent or copyright either the components or the interface. Sale by the after-market entrant of a component will then constitute direct or contributory infringement. The entrant's likely response would be to file a counterclaim based on monopolization because of a refusal to license.

Currently, the circuits are split concerning whether a refusal to provide a patented or copyrighted interface that facilitates entry is per se legal, or simply creates a rebuttable presumption of legality. The Ninth Circuit has adopted the rebuttable presumption rule for both patents and copyrights. In contrast, the First Circuit has adopted a per se legal standard for patents, but a rebuttable presumption for copyrights. The District Court in Kansas has adopted a per se legal rule for both patents and copyrights.

When firms can't use intellectual property rights to defend a razor/razor blade strategy, they may seek to establish exclusive distribution agreements or exclusionary technology innovations. Space limitations do not allow for a detailed legal analysis of how the antitrust laws have developed to handle such situations. Suffice it to say that while the law is still unsettled, it is evolving in a direction favorable to a manufacturer seeking to enforce a proprietary after-market because such a strategy benefits consumers.

II. RESURRECTING THE 1916 ANTIDUMPING ACT

(Clark Waddoups, Jonathan Hafen)

In *Geneva Steel v. Ranger Steel, et. al.*, 980 F. Supp. 1209 (D. Utah 1997), the Court construed an 80 year old statute (the Antidumping Act of 1916, 15 U.S.C. §72) in a way that may provide significant legal remedies to companies whose products compete with foreign products that are dumped into the United States. Previously, the conceived wisdom was that relief was only available for dumping from the International Trade Commission. Geneva Steel ("Geneva") may be the first beneficiary of this statute. Geneva makes, among other products, steel plate. Beginning in 1994, Geneva began to face severe competition from steel plate manufactured in Russia, Ukraine, and China. Geneva sued two US companies, Ranger Steel Supply Company and Thyssen, Inc., who act as steel traders in selling foreign plate in the same markets as Geneva. Geneva alleged that the

sales were in violation of the 1916 Antidumping Act, which prohibits sales of foreign products "at a price substantially less than the actual market value or wholesale price of such articles . . . in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported . . . ." The Act further requires that the defendant act "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of the trade and commerce in such articles in the United States."

Geneva alleged that the defendants were selling the imported plate at prices as much as $100 per ton less than the prices offered by U.S. manufacturers, that the prices were below the prices being charged for plate from 11 different countries that had been found by the International Trade Commission in 1994 to be in violation of the antidumping laws, and that the prices were well below the actual market value and costs of production in the countries of origin. Geneva also alleged that imports from Russia, Ukraine, and China had increased from an insignificant amount prior to 1994 to flooding the market by July 1995 and that, as a result, Geneva's orders had dropped as much as 65%. Moreover, after the ITC had imposed tariffs, plate imports from the 11 violating countries had dropped to almost nothing. Geneva argued that since the collapse of the Soviet Union, Russia and Ukraine had been left with large surpluses of plate and little demand with political and social reasons to manufacture and sell steel at prices below its costs of production. Geneva contended that the defendants had seized the opportunity to sell cheap plate into the U.S. market with the intent of injuring the U.S. steel industry.

The defendants moved to dismiss, arguing that the 1916 Act must be read as requiring the same elements as predatory pricing; i.e. below cost pricing and recoupment. Recoupment means that the defendant is likely to obtain a monopoly if the defendant's conduct is allowed to continue. Geneva did not even allege recoupment. Thus, the Utah court was faced squarely with interpreting the elements of the statute.

Judge Benson rejected the defendant's argument, finding that the 1916 Antidumping Act reflected both "protectionist" elements and antitrust elements. Thus, while a plaintiff may prevail by proving accepted antitrust elements, it also has a "protectionist component that prohibits dumping designed to injure the domestic steel industry." 980 F. Supp at 1215. The import of the Court's ruling is to recognize that while recent antitrust decisions appear to require injury to consumer welfare, rather than

protecting competitors, at least a part of the Antidumping Act is in fact intended to protect U.S. industry, even though cheaper foreign products may appear to be in the consumer's immediate best interest. The Court made it clear, however, that proof of the intent element will require more than proof of "normal competition or capitalism":

> Mere knowledge on the part of the importer that his sales will capture business away from his United States competitors, standing alone, will not be sufficient to demonstrate an intent to injure the entire United States steel industry and will therefore be inadequate to establish a violation of the Act.

Id. at 1224. Since the case has yet to come to trial, the opinion leaves open what proof will be required to satisfy the intent element. Geneva alleged the intent element both in general terms and in terms that the defendants had knowledge that the prices at which they were selling had been found by the ITC to be destructive of the U.S. steel industry and argued that the defendants should be charged with the intent to act with knowledge of the probable consequences of their actions. The Court found that by pleading precisely the language of the statute Geneva had satisfied the requirements of Rules 8(b) and 11.

"It is not even clear how one should measure the speed or degree of innovation should we decide that 'especially innovative industries' are outside of the reach of the antitrust laws."

In light of the *Geneva Steel* case, the 1916 Antidumping Act may provide a useful vehicle for a company facing severe and destructive competition from foreign products that are being dumped into the United States. To be successful, such a claim will likely require proof of conduct that evidences a clear intent, not just to be competitive, but to destroy a domestic industry. Economic theory is well-suited to answer this question. Industrial Organization Economists have focused recently on models that explain why behavior as displayed by the defendants is both rational and destructive of competition.

III. MICROSOFT IS NOT ABOVE THE LAW

(James Kearl)

With over 80% of the sales of operating systems, Microsoft would appear to have market power by any traditional measure. But Bill Gates disagrees. He contends that traditional antitrust analysis is not applicable to Microsoft's situation. In support of this view, Bill Gates and Microsoft supporters put forward four reasons why the software markets in which Microsoft operates should not be subject to traditional antitrust analysis: (1) rapid technological change; (2) durability; (3) network effects, and (4) low marginal costs. In my view, none of these arguments are completely persuasive.

(1) Rapid Technological Change: Microsoft's argument is that market share measures may not be a reliable measure of market power when product quality is rapidly changing. This may be true in some circumstances, but software markets may not be a good candidate. In point of fact, despite Bill Gates' focus on the innovation theme, many observers believe the innovation in software has actually lagged substantially behind innovation in hardware particularly in the 1983-1995 period. Moreover, its not clear that innovation in software has been more rapid or more dramatic than in dozens of other industries or markets. It is not even clear how one should measure the speed or degree of innovation should we decide that "especially innovative industries" are outside of the reach of the antitrust laws. Finally, if one takes the "innovation puts the market continually up for grabs argument" seriously, then Microsoft's dominant position for more than fifteen years is an extraordinary run of good luck and, quite frankly, extraordinarily unlikely. This suggests, of course, that innovation may not put the market continuously up for grabs or, alternatively, that it does put it up for grabs but that Microsoft has been able to pursue actions that have given it a substantial and sustained advantage through each innovative shock.

(2) Durable Goods: Microsoft claims that because unlike most products software doesn't wear out, consumers have nothing to fear. This is because of the so-called "Coase conjecture." The Coase conjecture states that if you have a single producer of a product that is durable, that firm will be forced to price at or near the competitive level. The reason is that each time the firm produces something, it essentially creates a "competing firm" since the purchaser can always resell the durable good in competition with the original purchaser. The problem with applying this theory in the software case is that licensing practices restrict resale. This prevents the development of a "used" market that can constrain prices for new software. The impact of existing software on new software prices is basically uncharted territory for economists. If functionality is changing over time or there are consumers who prefer "new" or "different" goods, there will be less effect on the new product prices from older software. If the market is expanding rapidly, then

there will also be substantial demand from new consumers. Since it is not clear whether the Coase conjecture implies the same market dynamics when the facts of the software market are taken into account, consumers may not be insulated from an exercise of market power by Microsoft.

(3) Network Effects: Maybe Microsoft's monopoly is just inevitable. This is the network effects argument. A network effect occurs when a good or commodity increases in value to its current user or purchaser when the number of other users or purchasers increases. A simple example is a telephone. Clearly, your telephone is more valuable to you if there are a large number of people you can call. Similarly, your credit card is more valuable if lots of other people also use the same credit card because then it will be more widely accepted by merchants. If network effects dominate, then, it is argued, "winning firms" are likely to be large. They're also likely to have market power. Indeed, it's possible that the market is dominated by a "natural" monopolist and niche players are unlikely to survive since consumers will always find the larger firm has a more valuable product.

In these kinds of markets, if one company gets ahead a little, its product will become more valuable to consumers than will the products produced by its competitors because of the network effects. This advantage can mean that consumers will move to this firm and abandon its competitors and the market share of the winning firm will increase rapidly. Such a dominant position may be particularly immune to challenge. That is, a new entrant has to figure out how to get large fast. Often this implies that products have to be introduced and even given away. Thus, Microsoft argues, these network effects make its dominant position inevitable.

Unfortunately, the "immunity to market challenge" argument cuts against the "everything is up for grabs because of innovation" argument unless one believes that the race begins anew with each innovative shock. That is, unless technological innovations are so substantial that they completely change the technology and obsolete the current dominant firm's technology, network effect arguments suggest that it will be very difficult to dislodge a dominant firm and that its market power won't be transitory, but easily sustainable through time.

In any event, I'm skeptical about the network effect argument in the case of software. Ask yourself if Windows 98 is like a telephone or a credit card in that its value to you is fundamentally dependent upon there being other users. It has been argued that the network effect comes about because if there are lots of users of a particular operating system, there will be lots of useful software written for the operating system. While this is undoubtedly so, its also true that if there are lots of cars, there will be lots of gas stations and if there is a lot of bread sold, there will be lots of jam available. So if this is a network effect, virtually any commodity that you can think of is part of a network.

In terms of antitrust law, if one really believes that network effects are very important in this market, the policy implications are a bit unsettling: Essentially, the argument suggests that these markets will be dominated by a natural monopolist. So the question isn't whether the antitrust laws can foster competition – they can't. The question is simply whether Gates or McNeely or Barksdale will be the monopolist, that is, whether the monopolist ought to be Microsoft or Sun or Netscape or some other firm. In this regard, I've always been puzzled by the position of Gary Reback, one of MS's harshest critiques and also a strong proponent of the "software markets are unique because of network effects" argument. Essentially, by tying his argument to network effects and first mover advantages, Reback is arguing that we got the wrong monopolist, not that the market shouldn't be monopolized. Or put differently, it is an implication of the Reback argument that competition isn't really possible. This implies, in turn, that antitrust laws have little relevance.

Finally, and most importantly, despite what some have argued, the existence of network effects doesn't necessarily imply that there will be a single, dominant firm."

Finally, and most importantly, despite what some have argued, the existence of network effects doesn't *necessarily* imply that there will be a single, dominant firm. Here the story becomes complex because whether it implies a single dominant firm or something more like, say, VISA or MC networks depends upon whether the standards are proprietary or not. That is, it depends upon whether a single firm "owns" the underlying thing that gives rise to network effect. Some have argued that without proprietary standards there will be less innovation, but this isn't clear at least to me. Let me pose this a different way: Is competition when both property rights and network effects are important limited to between or within system competition (i.e., MS vs Apple) or is intra-standard competition possible and efficacious?

(4) Zero Marginal Cost: Whatever one's views on the importance of network effects, there is, I think, little debate about the

fact that software is unusual in that the marginal production cost is virtually zero – everything goes into research and development and sales – almost nothing goes into actual production once the intellectual property has been developed. This does pose a problem for antitrust law because its not clear, quite frankly, what the competitive equilibrium would look like. That is, in typical markets, the competitive equilibrium is described by prices that are equal to marginal cost and by production at a level that minimizes through the dynamic of entry and exit at the average cost. This poses a number of problems for antitrust law. The first is similar to the problem noted above concerning network externalities: If marginal cost is zero, average cost must be falling and a monopoly will naturally emerge. There is a well developed legal and economic literature dealing with this kind of problem, but it's in the regulated industries, not the antitrust area. Second, if the market price has to be above marginal cost, it is not clear how to analyze issues associated with price predation. Third, entry (assuming that the cost advantages aren't so great as to create, literally, a natural monopoly) may be particularly difficult because it is clear that a firm could not survive on a competitive fringe but would have to be large at the point of entry.

In sum, the Microsoft litigation raises a number of important problems for antitrust analysis. Yet, it is unclear whether the resolution of these issues will necessarily benefit Microsoft.

"The Discon *case raised the issue of when, if ever, should a vertical agreement or conspiracy between a buyer and a seller to exclude a competing supplier be labeled a group boycott or be otherwise treated as a per se unlawful boycott."*

IV. ADDITIONAL ANTITRUST DEVELOPMENTS

(John Flynn)

In my section, I will address a few of the recent antitrust developments not touched on by the previous authors.

A. *Albrecht* Overruled

Recently the Supreme Court in the case of *State Oil Company v. Kahn*, 118 S. Ct. 275 (Nov. 1997) held that vertical maximum price fixing is no longer per se unlawful and that contracts imposing vertically maximum prices should instead be judged under the Rule of Reason. The case was significant for a variety of reasons:

- The Court's decision took place in a factually-complex gasoline retailer leased station circumstance where the Lessor oil company had imposed a maximum price at which the Lessee could sell gasoline supplied by the Lessor.
- The Court took the unusual step of expressly overruling a prior precedent – *Albrecht v. The Times Herald.*
- *Albrecht* had held in the circumstance of a newspaper and its carrier that it was per se unlawful for a newspaper to set the maximum price at which a dealer with an exclusive territory could resell the product being supplied.
- After the *Kahn* decision, such agreements are no longer to be judged under a per se rule but are to be judged under a Rule of Reason analysis – presumably even in the context of monopoly newspapers dictating to delivery persons exempt from minimum wage laws the maximum price they may charge for the service.

The result of *Kahn* is not surprising given all that has been said against *Albrecht*, although it does leave open at least three questions:

1. How does one distinguish a vertical *maximum* price fixing agreement from a vertical *minimum* price fixing agreement;
2. What does the *Kahn* case mean for vertical agreements identified as minimum price fixing agreements – are they to be governed by a per se approach or a Rule of Reason analysis; and
3. What factors are to be considered in a Rule of Reason analysis of vertical price fixing let alone any antitrust practice being judged under the Rule of Reason.

We will no doubt be seeing cases under state and federal antitrust laws raising all or some of these questions. One complicating factor with vertical minimum price fixing will be that of federal and state laws repealing resale price maintenance, a repeal which clearly evidences an intent to prohibit such conduct on a per se basis.

B. What is a Boycott?

A case where the United States Supreme Court has granted certiorari for next term, *Discon v. Nynex Corp.*, 93 F.3d 1055 (2d Cir. 1996) raises the question of what label, if any, should be placed on an agreement between a buyer of services and a supplier of those services to cut off a competing supplier of the service? Should the conduct be labeled a boycott or a refusal to deal, or something else? The question of what category a factual circumstances should be designated is an important one because the standards of proving the conduct is unlawful vary considerably with the label attached to the conduct. Most courts still play

the old formalistic game of first labeling the conduct and then defining what rule applies and then applying the predetermined rule to the predetermined facts to reach the right result.

The pending *Discon* case is complicated by the fact that the favored supplier was charging a higher price than a competitor would charge and the buyer was passing through the higher price in its regulated phone rates. The regulated phone company then received a secret kickback of some of the higher prices from the seller of the service – a cute scheme costing consumers several millions of dollars in higher rates. The issue of how such conduct should be characterized can be an important one if the label is one which defines the conduct as per se unlawful or not. The *Discon* case raised the issue of when, if ever, should a vertical agreement or conspiracy between a buyer and a seller to exclude a competing supplier be labeled a group boycott or be otherwise treated as a per se unlawful boycott. For literalists, the case raises the issue of when should such conduct be considered a per se unlawful boycott as opposed to an exclusive dealing arrangement to be analyzed under the more generous Rule of Reason test.

We have a somewhat similar case in Utah – *Nuclear Fuels Services v. Envirocare, et al.* – a case, I should mention, in which I have been assisting one of the defendants, Envirocare. In that case it has been alleged that a state official was bribed for the purpose of denying necessary licenses to others to prevent competitive entry into the low level nuclear waste disposal business in Utah. It was alleged that such conduct constituted a per se unlawful boycott under the state antitrust laws in light of an earlier Utah Court of Appeals' decision finding bribery of a corporate official to rig the bidding for a contract constituted a "Group Boycott" under the Utah antitrust laws.[1]

In the *Discon* case, the Second Circuit expressed a reluctance to classify the conduct as a "Group Boycott" where it was vertical and involved favoring one supplier over another, yet acknowledged that prior cases had done so where the arrangement had no purpose other than the stifling of competition. The court held the plaintiff had stated a claim under either a per se or a Rule of Reason theory and remanded the case for trial. This is the issue for review by the Supreme Court and the case is an occasion for either clarifying several issues concerning the meaning of "Boycott" for antitrust purposes or for muddying the boycott waters even further. The potential issues to be decided include:

1. What is the meaning of the per se group boycott concept in antitrust and should the concept be defined to include:
   a. Agreements by horizontal competitors to eliminate a single buyer or seller without regard for proof of a lessening of competition generally (the *Klors* case);
   b. Agreements between a buyer and a seller to exclude a competent buyer or seller without justification or excuse; and
   c. If so, how should exclusive dealing arrangements be distinguished from per se unlawful boycotts?

A second and broader issue raised by the case is:

The extent to which per se rules ought to be viewed as evidentiary presumptions subject to defenses and justifications and to what degree should defenses or justifications be permitted for conduct defined as per se unlawful. The issues raised by the *Discon* case are significant and promise to be the focus of many law school exam questions and litigation for years to come.

"A related theory for the injunction was that Intel was using its monopoly power over chips as leverage to gain control over Intergraph's patented technology by refusing to deal with Intergraph unless it turned over its patents to Intel."

C. When Does a Monopolist's Refusal to Deal Constitute a Violation of §2 of the Sherman Act?

One case now on appeal to a Federal Court of Appeals, *Intergraph, Corp. v. Intel*, 1998-1 Trade Cases ¶71, 126 (D.N.D. Ala. 1998), involves a claim that Intel, manufacturer of microprocessors used in 95% of all high-end computers, engaged in an act of unlawful monopolization when it refused to deal with Intergraph as an Intel "preferred customer" in the market for manufacturers of computer workstations. Preferred customers are computer workstation manufacturers which are given access to Intel trade secrets, specifications, engineering and other manuals in advance of the distribution of new Intel chip designs. Such access is essential to compete effectively in the high end workstation manufacturing market by being able to design and manufacture workstations using the latest chips manufactured by Intel. Intel is the acknowledged leader in the market for computer chips and a monopolist with over 95% of that market. It is a monopolist that the *Intergraph* court found earned a 38% net profit last year – a significant indicator of monopoly power.

Intel cut off Intergraph and demanded the return of its technical information and trade secrets after Intergraph sued Intel for patent infringement in the alleged use of Intergraph-patented chip designs in Intel-manufactured chips. The basic question raised by the case is whether the holder of a lawfully-earned patent monopoly providing a basic and necessary product for the manufacture of downstream products can refuse to deal with customers seeking to enforce allegedly valid patent claims against the manufacturer? Intergraph alleged and the trial court found that the refusal to deal was premised on an Intel demand that Intergraph transfer its patent rights to Intel as the price for continuing to have the status of a preferred customer entitled to receive information necessary to compete in the market for high end computer workstations.

The trial court issued a preliminary injunction against Intel requiring it to restore Intergraph's status as a preferred customer entitled to receive advanced notice of confidential data concerning the introduction of new Intel chips. The court did so on the controversial theory that advance notice and access to data in order to use new Intel chips in manufacturing workstations was the denial of access to an "essential facility" under the control of a monopolist. As such and under the *Old Terminal Railroad* case, the court found this conduct to be unlawful conduct by a monopolist. A related theory for the injunction was that Intel was using its monopoly power over chips as leverage to gain control over Intergraph's patented technology by refusing to deal with Intergraph unless it turned over its patents to Intel.

The use of the essential facility concept to analyze the case is unique and has resulted in some criticism of the court's decision. Exercising a right to refuse to deal with others has often been claimed to be an absolute right or nearly so – despite the fact that in law there is and never has been an absolute right to refuse to deal. Many laws have been adopted regulating the claimed right from Civil Rights to Labor Law to Regulatory and other statutes. In Antitrust, particularly in the case of monopolists, the right to refuse to deal has also been limited by §3 of the Clayton Act prohibiting exclusive dealing where the effect may be to lessen competition and by §2 of the Sherman Act where the conduct is the exercise of monopoly power over a relevant market and the requisite anticompetitive effect can be shown.

The Federal Trade Commission has filed a more straightforward monopolization case against Intel alleging that Intel cut off three customers from technical information necessary to manufacture in a timely way computer workstations using the latest Intel chips. In two instances, Intel cut off manufacturers who sued Intel for infringement of patents they owned and in another instance, Intel cut off technical information to COMPAQ Computer because it had filed a patent infringement action against an Intel customer. Intel only restored access to confidential Intel information when COMPAQ agreed to cross license its patents with Intel. The FTC's action is claiming that it is a violation of §5 of the FTC Act and an act of monopolization for a monopolist to use the power conferred by its monopoly as leverage to gain control over other technologies. The FTC complaint claims it is a violation of Section 5 where such conduct will impede innovation, stifle competition and gain control over other and potentially competitive technologies. There is precedent for such an action. Cases like *United Shoe Machinery v. United States*, 110 F. Supp. 295 (D. Mass. 1953) have viewed forced or mandatory cross licensing of intellectual property rights demanded by a monopolist to be evidence of exclusionary and therefore unlawful conduct – particularly where the cross-license demanded is an exclusive license or demand to turn over ownership of the patent. One could also attack such conduct under Section 7 of the Clayton Act which prohibits the acquisition of assets which may tend to lessen competition, not just mergers which do so.

There is a similar case pending in federal court in Utah involving a patent over a material where it is alleged that the patent holder is demanding as a condition of obtaining a license to use the material that licensees agree to turn over any patents they may have or obtain on uses made of the material. Long ago, the Supreme Court held that the purpose of the grant of a patent is not the creation of private fortunes for the holder of the patent but for the public purpose of promoting the progress of science and the useful arts by securing disclosure of new ideas for the benefit of the community.[2] Reward to the inventor is secondary. The argument is now being made that requiring grant backs of patent rights to related technologies, in particular a demand for an exclusive grant back or the turning over title to a licensee's related patent rights to the licensor, raise obvious monopolization risks over the entire technology and its future development. Thus, the argument goes such conduct by a monopolist should be held to be an unlawful act of monopolization despite the fact the right being licensed is a patent right, assuming the other requirements of a §2 violation are present.[3]

[1] *State v. Thompson*, 751 P.2d 805 (Ut. App. 1988) *rev'd on other grounds*, 810 P.2d 415 (Ut. 1991).

[2] *Pennock v. Dialogue*, 2 Peters. 1 (1829)

[3] *See*, III Areeda & Turner, Antitrust Law ¶705E.

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Can State Prisoners Sue Under Federal Disabilities Law?

by D. Kyle Sampson

The United States Supreme Court recently decided a case that could have a significant impact on the manner in which States, including Utah, operate their prison systems. The case, *Pennsylvania Department of Corrections v. Yeskey,*[1] presented a simple issue: Does the Americans with Disabilities Act (ADA) apply to state prisoners?

Prior to the Supreme Court's *Yeskey* decision, federal appellate courts had split in answering that question. The Ninth, Seventh, and Third Circuits had determined that state prisoners could sue under the ADA,[2] while the Tenth and Fourth Circuits, in contrast, had concluded that the ADA did not apply to state prisoners.[3] The importance of this issue is unquestioned, especially in view of the ever-increasing number of inmates with such ADA-covered disabilities as HIV infection and AIDS, learning disabilities, mental retardation, psychological disorders, drug addiction, and alcoholism.[4] In Utah, over 1,700 inmates – more than 35 percent of the prison population – have disabilities that arguably fall within the coverage of the ADA.

A. *PENNSYLVANIA DEPARTMENT OF CORRECTIONS V. YESKEY.*

In the *Yeskey* case, Pennsylvania prison officials denied prisoner Ronald Yeskey admission into Pennsylvania's "motivational boot camp" program, which requires inmates to participate in strenuous physical activity, because of his history of hypertension. Instead, Yeskey was sentenced to 18 to 36 months in prison for drunken driving, resisting arrest, and other offenses. Yeskey sued, claiming that he was discriminated against because of his disability. A United States District Court in Harrisburg, Pennsylvania threw out the case, but Yeskey won his appeal to the United States Court of Appeals for the Third Circuit.[5]

On appeal, the Supreme Court unanimously concluded that the language of the ADA "unmistakeably includes State prisons and prisoners within its coverage."[6] The ADA prohibits "public entities" from discriminating against people with disabilities.[7] The statute broadly defines "public entities" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or local government."[8] The statute also provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[9] Finally, the statute requires that public entities make "reasonable accommodations" for disabled people.[10]

The Supreme Court in *Yeskey* interpreted this statutory language literally and determined that the Pennsylvania Department of Corrections, an agency of the Commonwealth of Pennsylvania, was covered by the ADA.[11] As a result, the Court held that under the literal language of the ADA, disabled prisoners, like Ronald Yeskey, may sue prison officials whenever they believe that officials have discriminated against them or have failed to make reasonable accommodations for their disabilities.[12] The *Yeskey* decision is troubling for several reasons.

B. PRACTICAL OBJECTIONS.

First, there are formidable practical objections to burdening prisons with having to comply with the requirements of the ADA (and its onerous implementing regulations[13]). The propensity of prisoners to sue at the drop of a hat is legendary and prison systems are already strapped for funds. Indeed, numerous outlandish ADA-based claims already have been filed by prisoners: An inmate in Nevada with an alleged mobility impairment has claimed the right to an exemption from wearing restraints,[14] an inmate in Florida with arthritis has claimed the right to a touch-sensitive typewriter,[15] an inmate in Illinois with visual problems has claimed the right to be transferred from a maximum security prison,[16] and an inmate in Iowa confined to the

D. Kyle Sampson, an attorney at the Salt Lake City law firm of Parr, Waddoups, Brown, Gee & Loveless, assisted Pennsylvania in the preparation of its Supreme Court brief in the Yeskey *case. Mr. Sampson is a graduate of Brigham Young University (B.A. 1993) and the University of Chicago Law School (J.D., with honors, 1996) where he served as an Articles Editor of* The University of Chicago Law Review.

prison infirmary has claimed the right to a personal television with cable and a remote control (he won, but the case was later reversed).[17] It is obvious that the cost of operating a prison system – over $150 million in Utah in 1997 – and the corresponding burden on taxpayers will increase significantly if the ADA is applied to state prisons. More importantly, the practical effect of granting disabled prisoners rights of access that require costly modifications of prison facilities will be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone will be worse off.

Not surprisingly, the States are uniformly opposed to the federal regulation of state prisons that application of the ADA will impose. Utah Attorney General Jan Graham joined with 35 other State Attorneys General in filing an amicus curiae brief in the *Yeskey* case. The brief, which apparently was ignored by the Supreme Court, emphasized the severe impact that applying the ADA to state prisons would have on the States, argued that application of the ADA would undermine the States' ability to manage inmates and allocate limited resources, and urged the Supreme Court to rule in Pennsylvania's favor.

In contrast, the Clinton administration, led by the Justice Department's Civil Rights chief Bill Lann Lee,[18] argued in favor of federal management of state prisons. In its own amicus brief, the Justice Department dismissed the wide-ranging consequences that application of the ADA to state prisons would have on the States. Instead, the Justice Department argued that a disabled prisoner should be permitted to sue state prison officials whenever he believes that officials have discriminated against him because of his disability.

C. INCONSISTENT STATUTORY INTERPRETATION.

Second, the *Yeskey* decision is troubling as a matter of statutory interpretation. Specifically, the Court's reliance on the "plain language" of the ADA in interpreting the statute is not entirely satisfactory. The stated purpose of the ADA is to mainstream disabled people into society.[19] Could Congress really have intended disabled prisoners to be "mainstreamed" into an already highly restricted prison society?[20] After all, the special conditions of a prison warrant a degree of discrimination that would not be tolerated in a free environment. Most rights of free Americans, including constitutional rights such as the right to free speech, to the free exercise of religion, and to marry, are curtailed when asserted by prisoners.[21]

At oral argument, "Justice Antonin Scalia . . . [stated] pointedly that the court was not going to limit the statute in ways that Congress itself had not chosen to do."[22] That is, the Supreme Court would not graft onto the statute an exception for state prisons. The very act of applying the statute to state prisons, however, necessitates limiting the statute in ways that Congress itself chose not to do. Irving Gornstein, an assistant solicitor general representing the Clinton administration, conceded at oral argument that if the ADA applies to state prisons, then the statute necessarily would have to be construed to require judges to "defer to the reasonable security judgments of corrections officials" in evaluating inmates' ADA complaints.[23] Similarly, Yeskey's counsel "agreed that restrictions could remain in place in prison that might be regarded as unreasonable under the disabilities law in other settings."[24] "Prison is different," he admitted.[25] But nothing in the language of the ADA supports such a deviation from the requirements of the statute.[26] Indeed, as Justice Scalia queried, why should courts limit the statute in ways that Congress itself chose not to?[27]

"The Supreme Court's inconsistent approach to interpreting the ADA, as revealed by comparing Yeskey *and* Bragdon, *will be felt severely by state and local prison systems (subject to the ADA after* Yeskey*), where thousands of asymptomatic HIV infected inmates (disabled after* Bragdon*) are imprisoned."*

While the Court's judicially conservative approach to statutory interpretation in *Yeskey* – with its strict reliance on the literal language of the statute – is admirable, the Court abandoned this approach to statutory interpretation just a few weeks after *Yeskey* was decided. In *Bragdon v. Abbott,*[28] the Court determined that asymptomatic HIV infection constitutes a disability under the ADA, notwithstanding the literal language of the ADA which defines disability to be "a physical . . . impairment that substantially limits one or more of the major life activities of such individual."[29] Asymptomatic HIV infection, precisely because it is asymptomatic, does not "substantially limit" an infected person's major life activities, whatever those life activities may be.[30] The Supreme Court's inconsistent approach to interpreting the ADA, as revealed by comparing *Yeskey* and *Bragdon,*[31] will be felt severely by state and local prison systems (subject to the ADA after *Yeskey*), where thousands of asymptomatic HIV infected inmates (disabled after *Bragdon*) are imprisoned.

D. CONSTITUTIONAL PROBLEMS.

Third, the *Yeskey* decision is troubling because the Supreme Court refused to determine "whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause . . . or § 5 of the Fourteenth Amendment."[32] Even if Congress intended for the ADA to apply to state prisons, it is far from certain that Congress has the constitutional authority to do so. State prison administration is in no sense commercial, so the Constitution's Commerce Clause does not provide Congress with the authority to regulate the States in this manner.[33] And, after last year's case striking down the Religious Freedom Restoration Act (RFRA), the 14th Amendment does not provide Congress with the necessary authority either.[34] In short, operating state prisons is a core *state* – not *federal* – function. Indeed, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."[35] Because the Supreme Court refused to address these constitutional questions, it remains uncertain whether state prisoners really can sue under the ADA.

Applying the ADA to state prisons will significantly increase the cost of state prison management; make the prison-management objectives of punishment, deterrence, and rehabilitation all the more difficult for state prison officials to achieve; and raise serious constitutional questions regarding the proper balance between the state and federal government. The question of whether Congress has the constitutional authority to apply the ADA to state prisons likely will be addressed by the Supreme Court in the next term.[36] Let's hope the Court gets it right.

[1] 118 S. Ct. 1952 (1998).

[2] *See Gates v. Rowland,* 39 F.3d 1439 (9th Cir. 1994); *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481 (7th Cir. 1997); *Pennsylvania Dep't of Corrections v. Yeskey,* 118 F.3d 168 (3rd Cir. 1997), *aff'd,* 118 S. Ct. 1952 (1998).

[3] *See White v. Colorado,* 82 F.3d 364 (10th Cir. 1996); *Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.,* 126 F.3d 589 (4th Cir. 1997), *vacated,* 118 S. Ct. 2339 (1998).

[4] The list of ADA-covered disabilities is continually expanding. Just a few weeks after deciding the *Yeskey* case, a sharply divided Supreme Court determined that *asymptomatic* HIV infection – a malady which afflicts numerous state prison inmates – constitutes a disability under the ADA. *See Abbott v. Bragdon,* 118 S. Ct. 2196 (1998).

[5] *See Pennsylvania Dep't of Corrections v. Yeskey,* 118 F.3d 168 (3rd Cir. 1997), *aff'd,* 118 S. Ct. 1952 (1998).

[6] *Yeskey,* 118 S. Ct. at 1954.

[7] *See* 42 U.S.C. § 12132.

[8] 42 U.S.C. § 12131(1).

[9] 42 U.S.C. § 12132.

[10] *See* 42 U.S.C. § 12112; *see also* 42 U.S.C. § 12111(9) (defining "reasonable accommodation").

[11] *Pennsylvania Dep't of Corrections v. Yeskey,* 118 S. Ct. 1952, 1954-55 (1998).

[12] *See id.* at 1956.

[13] The regulations promulgated under the ADA designate the Department of Justice as the agency responsible for coordinating the compliance activities of public entities that administer "programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts *and correctional institutions.*" 28 C.F.R. § 35.190(b)(6) (1996) (emphasis added). The regulations require covered entities to follow the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), *see* 28 C.F.R. § 35.151(c) (1996), which regulate in minute detail the construction or modification of facilities and consume 129 pages of the Code of Federal Regulations. *See* 36 C.F.R. pt. 1191, app. A, at 663-792. The ADAAG requirements specific to "detention and correctional facilities" address, *inter alia,* specifications for prison visiting areas, medical care facilities, and restrooms; the "dispersion" of "accessible cells" within the correctional facility; accommodations for inmates with hearing impairments; and the appropriate height of prison beds. *See id.* at 782-84.

In light of these burdensome regulations, the implications of applying the ADA to state prisons for the balance of power between the States and the federal government are enormous. Where application of a federal statute would "upset the usual constitutional balance of federal and state powers," courts should not defer to an administrative agency's interpretation of the statute. *See Gregory v. Ashcroft,* 501 U.S. 452, 460, 493 (1991).

[14] *See St. Pierre v. McDaniel,* Case No. CV-N-94-792-ECR (D. Nev.).

[15] *See Halpin v. Mathews,* Case No. GC-G94-1935 (M.D. Fla.).

[16] *See Walker v. Washington,* Case No. 96-C-469 (N.D. Ill.).

[17] *See Aswegan v. Bruhl,* 113 F.3d 109 (8th Cir. 1997).

[18] Mr. Lee was named acting assistant attorney general for civil rights by President Clinton after the United States Senate refused to confirm his nomination. *See* Jackie Calmes, "Clinton Bypasses Senate's GOP on Rights Job: President Averts Showdown By Qualifying Lee's Post At Justice as 'Acting'", *Wall St. J.,* Dec. 16, 1997, at A20; John M. Broder, "Clinton, Softening Slap at Senate, Names 'Acting' Civil Rights Chief", *N.Y. Times,* Dec. 16, 1997, at A1, A14. Lee's appointment was not without controversy. *See* John C. Yoo, "Nominee Doesn't Understand the Law", *Cleveland Plain Dealer,* Nov. 19, 1997, at 11B; George F. Will, "Senate should follow the Constitution and evict Lee", *Deseret News,* Mar. 26, 1998, at A17. Senator Orrin Hatch was especially vocal in his opposition to Lee's appointment. *See* "Many critical eyes focus on Lee", *Deseret News,* Dec. 16, 1997, at A2 ("'There is no question that Mr. Lee will be among the most congressionally scrutinized bureaucrats in history,' Senate Judiciary Chairman Orrin Hatch, R-Utah, said."); *see also* D. Kyle Sampson, "Don't enforce disabilities act at state pen", *Deseret News,* Apr. 27, 1998, at A10 ("It is small wonder, given the position of Lee's office [in the *Yeskey* case], that Sen. Orrin Hatch opposed his nomination.").

[19] The introductory language of the ADA states that Congress determined when enacting the statute that "the Nation's proper goals regarding individuals with disabilities are to assume equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Achieving these goals, Congress found, would provide "people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our *free society* is justifiably famous." 42 U.S.C. § 12101(a)(9) (emphasis added). A prison is hardly a "free society."

[20] The legislative history of the ADA is silent on the applicability of the statute to state prisons. *See Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.,* 126 F.3d 589, 602-03 (4th Cir. 1997), *vacated,* 118 S. Ct. 2339 (1998). In light of this legislative silence, the Fourth Circuit concluded "that Congress did not contemplate, let alone approve," the application of the ADA to state prisons. *Id.* at 603.

[21] *See, e.g., Turner v. Safley,* 482 U.S. 78 (1987) (establishing deferential test for judicial review of prison management decisions in the face of constitutional challenges); *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987) (deferring to warden's decision with respect to alleged infringement of inmates' First Amendment right to free exercise of religion).

[22] Linda Greenhouse, "Supreme Court Hears Case on Disabilities and Prisoners", *N.Y. Times,* Apr. 29, 1998, at A16.

[23]*Id.*

[24]*Id.*

[25]*Id.*

[26]Most of the courts that have held that the ADA applies to state prisons have declined to outline the standard under which inmate ADA claims are to be assessed. *See Pennsylvania Dep't of Corrections v. Yeskey,* 118 F.3d 168, 174-75 & n.8 (3rd Cir. 1997) (applying ADA to state prisons but declining to determine the appropriate standard for reviewing claims brought under statute), *aff'd,* 118 S. Ct. 1952 (1998); *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481, 483, 487 (7th Cir. 1997) (same). The Ninth Circuit, which has held that state prisoners are covered by the ADA, has concluded that "the applicable standard for the review of the act's statutory rights in a prison setting . . . [is] equivalent to the review of constitutional rights in a prison setting." *Gates v. Rowland,* 39 F.3d 1439, 1447 (9th Cir. 1994) (citing *Turner v. Safley,* 482 U.S. 78 (1987)). There is no basis in the statutory language of the ADA, however, for grafting the constitutional standard onto the statute. *See Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.,* 126 F.3d 589, 607 & n.11 (4th Cir. 1997) (criticizing the Ninth Circuit's determination that the constitutional standard applies to ADA claims as "entirely extratextual" and "out of whole cloth"), *vacated,* 118 S. Ct. 2339 (1998).

[27]Applying the ADA to state prisons, but then deferring to the warden's view of what constitutes a "reasonable accommodation," would effectively eviscerate the ADA in the prison context. See Ira P. Robbins, "George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison", 15 *Yale L. & Pol'y Rev.* 49, 96 & n.249 (1996) (citing William C. Collins, "Use of Turner Test Deferring to Institutions' Security Concerns May Sharply Limit Inmates' ADA Protection", *Correctional L. Rep.* at 65 (Feb. 1995)).

[28]118 S. Ct. 2196 (1998).

[29]42 U.S.C. § 12102(2)(A).

[30]*See Bragdon v. Abbott,* 118 S. Ct. 2196, 2216 (1998) (Rehnquist, C.J., dissenting) (contending that asymptomatic HIV infection does not limit reproduction, assuming reproduction is a major life activity under the ADA, because "those so infected are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity").

[31]In all fairness, Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas consistently focused on the plain statutory language in both *Yeskey* and *Bragdon.* Accordingly, these Justices would have held, under the literal language of the ADA, that (1) the statute applies to state prisons, but (2) asymptomatic HIV infection is not a disability.

[32]*Pennsylvania Dep't of Correction v. Yeskey,* 118 S. Ct. 1952, 1956 (1998).

[33]*Compare United States v. Lopez,* 115 S. Ct. 1624 (1995) (holding that Gun-Free School Zones Act exceeded Congress' Commerce Clause authority because possessing a gun in a school zone "is in no sense an economic activity" that has a substantial effect on interstate commerce), and *Printz v. United States,* 117 S. Ct. 2365 (1997) (holding that federal government may not compel the States to administer federal regulatory programs), with *Garcia v. San Antonio Metropolitan Transit Auth.,* 469 U.S. 528 (1985) (leaving primarily to political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers).

[34]*See City of Boerne v. Flores,* 117 S. Ct. 2157, 2171 (1997) (holding that RFRA is not a proper exercise of Congress' 14th Amendment enforcement power because such power is only preventive or "remedial" and because RFRA "is a considerable congressional intrusion into the States' traditional prerogatives and general authority").

[35]*Preiser v. Rodriguez,* 411 U.S. 475, 491-92 (1973).

[36]Cases raising the constitutional issue have already reached the federal appellate court level. *See, e.g., Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.,* 126 F.3d 589 (4th Cir. 1997) (holding that Congress does not have the authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to apply the ADA to state prisons), *vacated,* 118 S. Ct. 2339 (1998) (remanding in light of *Yeskey*).

NUTS & BOLTS OF GUARDIANSHIP/CONSERVATORSHIP LAW & PROCEDURE:

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Salt Lake City, Utah 84111

- Ethical Question: *"Who is the client?"*
- Alternatives to Guardianship/Conservatorship; *i.e., Joint Accounts, Representative Payees, Powers of Attorney, Living Wills, Advanced Health Care Directives, etc.*
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Registration Fee: $75.00, lunch included *(training is free for those willing to serve on the statewide Guardianship/Conservatorship Panel of Attorneys)*

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Utah State Bar Association

For information and registration call (801) 531-9095

That Thing Called Pro Bono

by Judge Judith Billings

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The article was published in *Dialogue*, Vol. 2, Spring 1998.

In 1996, Congress reduced federal funding for legal services from $400 million to $278 million – when adjusted for inflation, the lowest amount of federal funding since 1977. The programmatic budget cuts that followed have resulted in the closing of more than 100 main, branch or outreach legal services program offices. The number of legal services lawyers and paralegals available to provide legal representation and assistance was reduced by approximately 15 percent. In addition, new restrictions on Legal Services Corporation grantees forbid them from assisting some categories of low-income individuals that they formerly represented, barred them from giving legal assistance to poor families regarding several common legal issues, and prohibited them from giving eligible clients access to certain legal procedures.

"As judges, we have a special opportunity – and obligation – to use our positions to provide access to justice. With dramatic cuts in federal funding for legal services programs and the imposition of severe restrictions on what those programs can do, there has never been more of a need for judges to step forward and provide leadership on this critical issue."

As leaders in our community and the legal system, we can encourage lawyers to provide *pro bono* legal assistance to the poor. We must use our influence to help fill the increasing gaps in the legal service delivery system.

There are a number of specific ways in which judges can promote and expand *pro bono* legal services to the poor. We can recruit lawyers to participate in organized *pro bono* efforts and assist in their retention on the panels of *pro bono* programs. We can implement procedures in our courtrooms to facilitate *pro bono* representation. We can speak to other members of the judiciary about the role of judges in promoting *pro bono* work. I have listed a few examples of what our colleagues are doing in the hope that you will use one or two of the ideas in your jurisdiction.

RECRUITMENT AND RETENTION OF VOLUNTEERS

- Send recruitment letters to attorneys not involved with an organized *pro bono* program and periodic thank you letters to attorneys who have been serving on a program's panel of volunteers.
- Write letters, editorials and opinion pieces for newspapers, magazines and bar publications on the need for volunteer attorneys.
- Review the ethical rules concerning lawyer *pro bono* activity for your state and consider appropriate changes to strengthen the message about *pro bono* public service and to develop new strategies for encouraging pro bono service.
- Participate in continuing legal education seminars for *pro bono* attorneys.
- Sponsor and support judicial resolutions calling on lawyers to engage in *pro bono* service.
- Include references to *pro bono* in speeches to bar associations and new bar admittees.
- Lend your names and presence to *pro bono* recognition ceremonies.
- Write invitation letters to, sponsor and attend *pro bono* attorney recruitment events of bar associations, legal services offices and *pro bono* programs.
- Serve as a member of the advisory board of a *pro bono* program.

Judge Judith Billings – Utah Court of Appeals. Chair, ABA Standing Committee on Lawyer's Public Service Responsibility, Member NJC Board of Trustees

PROCEDURAL INCENTIVES TO ENCOURAGE PRO BONO SERVICE

- Have the court files marked indicating when an attorney is serving on a *pro bono* basis through an organized program, and, while avoiding the appearance of partiality, express the court's appreciation to attorneys for appearing *pro bono*.

- Provide scheduling flexibility for *pro bono* attorneys, for example, scheduling the attorney's *pro bono* case close to the time when the attorney is appearing in another matter or scheduling special *pro bono* matters on the default calendar.

- Provide calendar preference on the daily list to the attorneys with *pro bono* cases.

- In coordination with local *pro bono* programs, develop systems for providing *pro se* litigants with assistance in preparing pleadings, information about the law and the court system, and directions about where and how to apply for a *pro bono* attorney.

JUDICIAL TRAINING AND EDUCATION

- Include the role of judges in promoting *pro bono* work in judicial training sessions.

- Ensure that judges have information about the availability of legal services, including existing *pro bono* programs in their area.

The ABA can assist you with your efforts. Through the Standing Committee on Lawyers' Public Service Responsibility, and its project The Center for Pro Bono, staff is available to offer guidance and technical assistance with your judicial initiatives in support of pro bono.

If you need additional help in developing or implementing ideas in your area, contact:

Steven B. Scudder,
Committee Counsel
Standing Committee on
Lawyers' Public Service Responsibility
(312) 988-5768 • Fax (312) 988-5032

or Bonnie Allen, Staff Counsel
ABA Center for Pro Bono
(312) 988-5773 • Fax (312) 988-5032

Utah Juvenile Court Guidebook

The Children and the Law Seminar at BYU Law School under the supervision of Professor Lynn D. Wardle, has produced a practice manual describing the law and processes of Utah Juvenile Courts. It covers in detail the substance and processes of juvenile delinquency, status offenses, and abuse, neglect and dependency proceedings. This will be a helpful resource for attorneys and other juvenile court professionals.

Contents Include:
-Juvenile Delinquency from Pre-Filing to Post-Disposition (including flowcharts)
-Abuse, Neglect and Dependency from Investigation to Post-Disposition (including flowchart)
-Status Offenses from Pre-Filing to Post-Disposition (including flowchart)

Order Form-Please Print
Name _____ Firm _____
Address _____
City State Zip
# of copies ___@$40.00=total enclosed ____
Make checks payable to ***BYU Law School***
Return Form to: Professor Lynn D. Wardle
UJCG
518 JRCB
Brigham Young University
Provo, UT 84602

Pro Bono Service Encouraged But Reporting Voluntary

The Utah Supreme Court on August 19, 1998 approved amendments to Rule 6.1 of the Utah Rules of Professional Conduct. The Rule provides that lawyers have a professional responsibility and should provide pro bono legal services but they are not required to perform or report their service.

The Court also approved language establishing 36 hours as the aspirational annual goal for service, provided for a comparable financial contribution goal and set guidelines regarding the type of services which could most benefit the poor and needy. The Rule does not apply to members of the Judiciary. A full copy of the approved Rule and Order are available on the Bar's website at *www.utahbar.org*.

Commission Highlights

During its regular meeting on March 5, 1998 held in St. George, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to elect Charles R. Brown as President-Elect.
2. The Board voted to approve the minutes of the January 16, 1998 meeting. The Board voted to approve the minutes of the January 23, 1998 meeting.
3. Charlotte Miller directed the Board's attention to the various media reports and articles in the packet regarding the successful First 100 Dinner. Miller directed the Board's attention to the report from David Nuffer regarding the National Conference of Bar President's meetings.
4. John Baldwin referred to the department reports in the agenda packet.
5. Dave Nuffer directed the Board's attention to a proposal to finalize adoption of the Long Range Plan by approving Recommendation #4, #8 and #17.
6. John Baldwin reviewed the monthly financial reports.
7. The Board appointed Dennis Haslam and Clayton Huntsman as the lawyers on the Access to Justice Board of Trustees and James Torres, Dailey Oliver and Shu Cheng as public members.
8. Scott Daniels, Debra Moore, and Paul Moxley were appointed to serve as a committee to gather facts and form a draft position on malpractice insurance for the Board to discuss at its meeting.

A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Discipline Corner

SUSPENSION

On July 6, 1998, the Honorable Anne M. Stirba, Third Judicial District Court, entered an Order of Discipline suspending Bert R. Wonnacott from the practice of law for ninety days, for violation of Rules 5.5(a) (Unauthorized Practice of Law), 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(a), (c) and (d) (Misconduct) of the Rules of Professional Conduct. The suspension was stayed and Wonnacott was also ordered to attend the Utah State Bar Ethics School. The Order was based on a Stipulation entered into by Wonnacott and the Office of Professional Conduct.

Wonnacott was suspended from the practice of law in Utah for non-compliance with MCLE requirements on December 31, 1992. Thereafter, Wonnacott practiced law while on suspension on several occasions, in violation of the Rules of Professional Conduct. When the OPC learned that Wonnacott was practicing law while on suspension and questioned him about it, he made material misrepresentations to the OPC regarding his misconduct. Later, Wonnacott admitted to making the misrepresentations to the OPC, and freely admitted his misconduct relative to practicing while on suspension.

PUBLIC REPRIMAND

On June 8, 1998, the Honorable Homer F. Wilkinson, Third Judicial District Court, entered an Order of Discipline: Public Reprimand reprimanding D. Bruce Oliver for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. Oliver was also ordered to attend the Utah State Bar Ethics School. The Order was based on a Stipulation entered into by Oliver and the Office of Professional Conduct.

In July of 1992, a client retained Oliver to represent him in what was anticipated to be a contested divorce. Oliver failed to provide competent representation to the client during his divorce proceeding by misplacing or losing essential pleadings, failing to file an answer, failing to supply required financial information to the opposing party, and failing to depose or use other discovery to obtain information from an essential adverse witness prior to trial. Oliver advised the client that proper service required personal service. Oliver failed to act with reasonable diligence and promptness in representing the client when he allowed default to be entered against him.

On March 8, 1994, a client retained Oliver to represent her in a proceeding initiated by her ex-husband for child custody modification and child support. Oliver failed to provide the client with competent representation during her divorce proceeding by failing to file a response to the Petition to Modify, so that default was entered against her. Oliver also thereby failed to act with reasonable diligence and promptness in representing the client. The client was seeking joint legal custody with her ex-husband having primary care of the child. By failing to advise the client that default had been entered against her, Oliver failed to keep her reasonably informed about the status of her matter, and to explain the matter to her to the extent necessary to enable her to make informed decisions regarding her representation. Oliver failed to respond to requests by the OPC for information regarding his representation of the client, even though written requests for information were twice sent him.

ORDER OF REPRIMAND

On July 8, 1998, the Honorable Glenn K. Iwasaki, Third Judicial District Court, entered an Order of Discipline reprimanding Martin S. Tanner for violation of Rules 4.1 (Truthfulness in Statements to Others), and 8.4(a), (c) and (d) (Misconduct) of the Rules of Professional Conduct. The Order was based on a Stipulation entered into by Tanner and the Office of Professional Conduct.

Tanner misrepresented to a client and the client's Washington State attorney the true status of a matter in which Tanner had been retained. These misrepresentations included the creation of fictitious pleadings, correspondence and written discovery to convince the client and his local counsel that Tanner had completed the work for which he had been retained. These pleadings were not filed with the court. In fact, Tanner had not performed the tasks for which he was retained.

Although misconduct of this nature would normally result in a Suspension at a minimum, there were mitigating factors which warranted a public reprimand in this matter.

ORDER OF REPRIMAND

On July 14, 1998, the Honorable Glenn K. Iwasaki, Third Judicial District Court, entered an Order of Discipline reprimanding Jose Luis Trujillo for violation of Rules 1.2 (a) (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.9 (b) (Conflict of Interest), and 8.1 (b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The Order was based on a Discipline By Consent entered into by Trujillo and the Office of Professional Conduct.

Four clients retained Trujillo to represent them in various matters. The clients alleged, and Trujillo agreed, that in many of the cases he failed to diligently pursue the goals of the client's representation by failing to do the work, by failing to communicate with the clients, and by failing to timely file documents. Additionally, in one case he undertook the representation of one client against a former client regarding a case in which he had previously represented the former client.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.5(a)(1) and (a)(4) (Fees), 1.15 (Safekeeping Property), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

In February 1995, a couple employed the attorney to represent them in a civil matter and paid $500 as advance attorney fees. The attorney spent several hours to determine if there were urgent statute of limitation issues applicable to the clients' claims. Thereafter, the attorney failed to provide any meaningful legal services for which he was employed and failed to communicate with his clients. In May and June 1996, after the clients had complained to the Bar, Respondent returned the file and all attorney fees with interest to his clients.

In August 1995, the attorney represented a client in a criminal matter. The client requested that the attorney pay a criminal fine in the amount of $200 to the Salt Lake County Justice Court on his behalf. The client promised the attorney that he would bring the attorney the $200 the following day. The attorney issued a check from his client trust account to the Justice Court on his client's behalf. The client failed to repay the attorney as promised and there were no funds in his client trust account to cover this check. The attorney knowingly issued a check from his client trust account that did not contain adequate funds, thereby creating an overdraft situation. Thereafter, the attorney paid the $200 to the Justice Court and was reimbursed by his client.

ADMONITION

On July 3, 1998, two attorneys were admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 5.3(a), (b) and (c) (Responsibilities Regarding Nonlawyer Assistants), 5.5(b) (Unauthorized Practice of

Law), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorneys were also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorneys and the Office of Professional Conduct.

In the fall of 1996, the attorneys employed an assistant who was admitted to practice law in Oregon, but had not yet been admitted to practice law in Utah. The attorneys assisted that associate in the unauthorized practice of law when, in the Spring of 1997, they allowed that assistant to (1) defend a client of the firm in a deposition; (2) negotiate personal injury cases on behalf of the firm's clients; and (3) place his name on the firm letterhead without disclosing that the assistant was not yet admitted to practice law in Utah.

ADMONITION

On April 30, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 5.3(a), (b) and (c) (Responsibilities Regarding Nonlawyer Assistants), 5.5(b) (Unauthorized Practice of Law), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

The attorney is admitted to practice law in Colorado and Utah and has offices in both states. The attorney employed an associate attorney who was admitted to practice law only in Colorado. The attorney assisted that associate in the unauthorized practice of law when he allowed that associate to give legal advice in Utah to his Utah client.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

A client paid $750 in advance attorney fees to retain the attorney to represent her in dissolution in April of 1996. Initially, the attorney filed a verified complaint and pleadings to initiate the divorce and prepared for and attended an order to show cause hearing to setup temporary orders with respect to alimony and payment of marital obligations. After the hearing no significant services were performed and the attorney failed to adequately communicate with the client. The attorney has agreed to submit the fee dispute with the client to binding fee arbitration and abide by the decision of the fee arbitrator within thirty days of the fee award.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence), 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School.

In July 1997, a client paid the attorney a $2,500 retainer to represent his son in a criminal investigation. An arraignment hearing was scheduled for October 1, 1997. The attorney left the state on vacation without continuing the hearing date and without advising his client of his departure. The attorney failed to appear at the October 1, 1997 arraignment hearing on his client's behalf.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 5.3 (a), (b) and (c) (Responsibilities Regarding Nonlawyer Assistants), 5.5(b) (Unauthorized Practice of Law), and 8.4(a), (c) and (d) (Misconduct) of the Rules of Professional Conduct. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

The attorney employed a disbarred lawyer as his paralegal. During the course of the paralegal's employment, the attorney failed to properly supervise the paralegal and assisted in the unauthorized practice of law in two separate matters. In one matter, the paralegal met with clients and opposing counsel in an effort to reach a settlement. His conduct in this manner was tantamount to practicing law and was therefore improper.

In a second matter, the paralegal communicated with insurance adjusters in a manner that caused them to believe he was acting as an attorney and in this regard, the attorney having direct supervisory authority over the paralegal, failed to make reasonable efforts to insure that the paralegal's conduct was compatible with his professional obligations.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.1 (Competence), 1.2 (Scope of Representation),

1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

In June 1995, a client employed the attorney to represent him in a domestic modification proceeding. Thereafter, the attorney failed to provide competent representation to the client, failed to abide by the client's wishes concerning the objectives of representation, failed to act with reasonable diligence and failed to adequately communicate with his client. Specifically, the attorney failed to advise his client of a pre-trial hearing. At the hearing, in the absence of his client, the attorney made several inaccurate concessions which were incorporated into a pre-trial order.

In June 1997, a client employed the attorney to represent him in a domestic OSC. Thereafter, the attorney failed to provide competent representation to the client, failed to abide by the client's wishes concerning the objective of representation, failed to act with reasonable diligence, failed to adequately communicate with his client and failed to promptly return the file to the client.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence), 1.4 (Communication), and 1.16 (Declining or Terminating Representation) of the Rules of Professional Conduct. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct ("OPC").

In October 1995, the attorney undertook the representation of a client in a sexual harassment and breach of contract action. The attorney filed a lawsuit on the client's behalf in February 1996. In May 1996, the attorney informed the client that he was moving out of state. Thereafter, the client had difficulty reaching the attorney, and the attorney failed to keep the client timely apprised concerning the progress and status of her case. When the court scheduled a hearing in the client's matter, the attorney requested that the client pay for his transportation and hotel as a condition of his appearance at the hearing. In November 1997, the client's lawsuit was dismissed for the attorney's failure to appear at an Order to Show Cause Hearing. In January 1998, the attorney's wife, who is an unpaid staff person working under the attorney's direction and control, telephoned the client to attempt to persuade her to withdraw her complaint against the attorney with the OPC. The attorney successfully had the dismissal vacated, and was able to file a stipulated Settlement Agreement with the court on the client's behalf.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.15 (Safekeeping Property) and 8.4 (Misconduct) of the Rules of Professional Conduct. Additionally, the attorney will attend the Utah State Bar Ethics School and participate in binding fee arbitration if the client agrees to arbitrate the matter.

The attorney undertook representation of a client to assist her in obtaining a portion of her ex-husband's profit-sharing plan and to obtain back alimony owed to her. The attorney was prompt and successful in representing the client in each of these matters. Money deducted from the client's ex-husband's paychecks was sent to the attorney, who forwarded the money to the client. The client received all such monies from the attorney except for the proceeds of a check issued on September 13, 1996 ("the check"). The attorney deposited the check into one of his accounts. The attorney failed to notify the client that he had received the check. When the client asked the attorney about the missing check, he initially stated that he had not received the check, and informed the client that she owed him money. The client subsequently discovered that the attorney had received the check and deposited it into one of his accounts. Additionally, the attorney did not provide the client with a bill for his services until after the client filed a complaint against him with the Bar. The client disputes the amount of the bill.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

The attorney represented the children of a deceased woman in a civil matter against their stepfather. The stepfather was criminally charged with sexually assaulting one or more of the clients and was represented in the criminal matter by counsel. The admonished attorney contacted defense counsel and offered to assist defense counsel's client in the criminal matter in

exchange for concessions in the civil case. Specifically, the attorney offered the "negative cooperation" of his clients in the criminal matter and further stated to defense counsel that "we could be of assistance there, because the authorities are going to need the cooperation of the family in order to do a whole lot." The admonished attorney later became aware that his offer to have his clients not cooperate in the criminal prosecution in exchange for concessions in the civil matter was improper and possibly criminal. The attorney then contacted the prosecuting attorney and informed him of his offer, retracted the offer, and assured the prosecuting attorney that his clients would cooperate fully in the criminal matter, which they apparently did.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 8.4 (b) (Misconduct) of the Rules of Professional Conduct. The attorney also agreed to attend the Utah State Bar Ethics School, to complete "after care" treatment for alcohol abuse, to abstain from the use of alcohol or illegal substances, and to participate in a twelve-step program on a weekly basis for a one year period. The Order was based on a stipulation entered into by the attorney and the OPC.

On October 6, 1995, the attorney was arrested for driving under the influence and having no insurance while operating an automobile. The attorney pleaded guilty to one count of alcohol-related recklessness (based on prescription drugs). The insurance charge was dismissed upon the attorney's providing the prosecutor with a copy of insurance papers. The attorney received a suspended thirty-day jail sentence and a $600 fine, which has been paid in full.

On May 6, 1997, the attorney was arrested for driving under the influence, having an open container of alcohol, and following too closely. This arrest resulted from an automobile accident in which the attorney was at fault. The attorney entered a plea of guilty to one count of reckless driving, alcohol related. The charges of open container and following too closely were dismissed. The attorney was sentenced to ninety days in jail and that sentence was suspended. The attorney was further put on probation for thirteen months with conditions.

Although misconduct of this nature would normally result in a public reprimand at a minimum, there were mitigating factors that warranted an admonition in this matter.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence) and 1.4 (Communication) of the Rules of Professional Conduct. The attorney must refund the complete fee of $1700 to his client within ninety days. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

On December 27, 1996, a client retained the attorney to handle a modification of a divorce decree. On the day of trial, a settlement was reached in the matter. The attorney told the client that the opposing counsel would provide the attorney with a draft of the order modifying the divorce decree which the attorney would send to the client. The attorney thereafter received the order, but did not send it to the client, which resulted in an order modifying the divorce decree being entered that was inconsistent with the settlement agreement. The failure to give the client a copy of the order further resulted in the client violating an order that the client did not know existed.

On March 6, 1997, the client faxed the attorney a letter advising the attorney that since there was no document finalizing the new agreement, he was going to abide by the old divorce decree. The attorney did not respond to the fax. On July 7, 1997, the client was served with an Order to Show Cause as to why he should not be held in contempt and be liable for attorney's fees for not paying the increased alimony from March 1997 forward. This caused embarrassment to the client, who had not missed his support payments for several years. On October 6, 1997, the client terminated the representation and asked for the return of his file.

On February 13, 1998, the attorney sent a letter to the OPC stating that he felt his professional conduct has been inadequate in this matter and agreeing that the client's recitation of the facts was correct. The attorney stated that he had failed to communicate adequately with his client. The attorney further stated that he would return his fee of $1,700 to the client and accept responsibility for any other losses sustained by the client.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct and Rule 21(e) (Duties of Attorneys and Counselors) of the Rules for Integration and Management of the Utah State Bar. The attorney was also ordered to attend the Utah State Bar

Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

On March 4, 1998, the attorney appeared with four Latino defendants at a video arraignment. As the defendants were being led out of the courtroom at the conclusion of the arraignment, the attorney commented to the court that "it occurred to me, your honor, that . . . if we had some, uh, some Spanish music or something like that, when we get four defendants we could choreograph this a little bit and it would be entertaining."

The Office of Professional Conduct does not have reason to believe that the attorney's comments were intended as a racial slur. The attorney has shown remorse and has publicly apologized for his actions. However, regardless of the attorney's intentions or remorse, the attorney's conduct before the court was improper and is prejudicial to the administration of justice in violation of Rule 8.4(d). Respondent's conduct is further in violation of Rule 21(e) of the Rules for Integration and Management of the Utah State Bar, which requires that attorneys abstain from all offensive personality.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 8.4(a) and (b) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

The attorney was criminally charged and later pleaded guilty to two counts of Gross Lewdness, a class A misdemeanor. The attorney was sentenced to one year in jail, which was suspended, ordered to serve two years probation, fined $500, ordered to serve forty-five days of home confinement, and ordered to undergo counseling. To date, according to the attorney's probation agent, the attorney has fully complied with each provision of his sentence.

Although misconduct of this nature would normally result in a Suspension at a minimum, there were extenuating mitigating factors which warranted an admonition in this matter.

ADMONITION

On July 3, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 5.3 (Responsibilities Regarding Nonlawyer Assistants); and 8.1 (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The attorney also agreed to attend the Utah State Bar Ethics School, to be placed on private probation for twelve months, and to pay restitution of attorney's fees to certain clients within ninety days.

Five clients retained the attorney to represent them in immigration and/or criminal matters. The clients alleged, and the attorney agreed, that in many of the cases he:

- failed to diligently pursue the goals of the client's representation by failing to take their direction as to the goal of the representation, by failing to do the work, by failing to timely file documents necessary to normalize a client's immigration, and by failing to appear for court hearings;
- failed to respond to the client's reasonable requests for information and keep them reasonably and truthfully informed about the status of their matters, and to explain the matters to the extent necessary to enable them to make informed decisions;
- failed to adequately supervise his staff;
- failed to keep appointments scheduled with the clients; and
- failed to return the unearned portion of the client's retainer fee.

ADMONITION

On July 7, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.7(b) (Conflict of Interest: General Rule), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School and to continue counseling for a period of not less than one year. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

The attorney represented a client as appointed counsel. During the course of that representation, the attorney entered into an improper sexual relationship with the client.

Although misconduct of this nature would normally result in a Public Reprimand at a minimum, there were extenuating mitigating factors which warranted an admonition in this matter.

Thank You!

I would like to thank all the members of the Bar Examiners Committee, Bar Examiners Review Committe and Character and Fitness Committee for a successful July Bar Examination that was given July 28 and 29th. Your voluntary time for the bar examination was very much appreciated.

Thank you again.
Darla C. Murphy,
Admissions Administrator

CLE Discussion Groups Sponsored by Solo, Small Firm & Rural Practice Section

Sept 17	Social Security & Elderly Law
Oct 15	Bankruptcy
Nov 19	Foreclosure – Judicial & Non-judicial
Dec 17	Workman's Compensation Claims & Defenses

Reservations in advance to Amy (USB) (801) 297-7033.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the bar for the cost of $20.00. Seventy opinions were approved by the Board of Bar Commissioners between January 1, 1988 and August 7, 1998. For an additional $10.00 ($30.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($20.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($30.00 both)

Please make all check payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Maud Thurman
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

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Please allow 2-3 weeks for delivery.

Membership Corner

CHANGE OF ADDRESS FORM

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All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell, Fax Number (801) 531-0660.

Utah Federal Court Senior Judge Elected President of Tenth Circuit District Judges' Association

Senior United States District Judge J. Thomas Greene was elected for a two year term as President of the Federal District Judges' Association for the Tenth Circuit at the Annual Judicial Conference of the Tenth Circuit held at Keystone, Colorado. The District Judges' Association is comprised of federal trial judges within the Tenth Circuit, which includes Oklahoma, Kansas, Wyoming, New Mexico, Colorado and Utah. Circuit, District, Bankruptcy, and Magistrate Judges, as well as lawyers from each state, participated in the Conference.

The Annual Judicial Conference featured speakers and panelists on the Constitution, Liberty and Equality, and a review of Supreme Court and Tenth Circuit opinions by legal scholars. Justice Stephen Breyer, the designated member of the Supreme Court for the Tenth Circuit, spoke to the group about cases from the Tenth Circuit which were decided by the Supreme Court during the past year. Retired Justice Byron White was also in attendance.

Social Security Numbers Not Required and Will Not Be Maintained

The Bar Commission has rescinded the requirement that licensed lawyers provide social security numbers and has deleted that information from the records of those who have provided it through the licensing process. Upon further review and lawyer input, the Commission has decided that there are other reasonable means available by which the Bar can comply with any court orders which it may receive relating to enforcement of delinquent child support payments.

Court in the Canyon Lands

by Judge Lyle R. Anderson

The geographic isolation and large areas within the Seventh District Court present unusual challenges for judges and lawyers. The largest city in the district is Price. This is where two district judges, one juvenile judge, and the trial court executive are headquartered. Price may seem far away for lawyers in Salt Lake who must travel to Provo, and then across Soldier Summit, to appear in court.

Price, however, is on one geographical edge of Southeastern Utah, and the Seventh District Court. I live at the other edge of the district, in Monticello, another 170 miles from Price and inside the triangular portion of Utah isolated from the rest of the state by the deep canyons of the Colorado River. Lawyers planning to appear in Monticello or Moab, the courtrooms I cover, should plan on about a five or six hour trip each way unless they are able to make connections with the airline that serves Moab. Only St. George is farther from Salt Lake City, but most people do not realize that St. George and Monticello are farther from each other than from Salt Lake City.

The canyon country of Southeastern Utah is unfamiliar to many Utahns. Moab, in particular, has received much attention as a tourist destination during the past decade and shows signs of growth. There appears to be a number of lawyers along the Wasatch front who dream of moving to Moab and hanging out a shingle. Some have succeeded, but I suggest that you discuss the idea with someone who has tried it before burning any bridges. The number of lawyers with full time legal practices in Moab is small and a number have tested the market and then withdrawn. Those who have succeeded have made a serious, full time commitment.

Because of the relatively small number of lawyers who live in the area, it is always refreshing to see a different face in my courtroom. If you get a chance to take a case in Grand County or San Juan County, I encourage you to do so. I offer the following suggestions to those adventurous souls:

1. Make travel arrangements early if coming here during peak tourist season. It is possible to make a one-day round trip to Moab or Monticello – I do it all the time in the other direction – but if your court appearance will be lengthy or if you want to see the sights, you will probably need a motel room. Moab has added many motel rooms in recent years, but do not assume you can get one at the last minute during peak seasons.

2. I cannot accommodate all requests for Monday and Friday appearances. Law and Motion days in Grand County (Moab) are on Wednesdays two or three times per month and on Thursdays in San Juan County (Monticello). These dates are coordinated with the Law and Motion dates in Price and Castle Dale, and with juvenile and justice courts in order to assure availability of prosecutors and defense attorneys. It may fit your idea of an ideal vacation to have a short court appearance on Monday or Friday and spend a weekend seeing the sights, but we try to save Mondays and Fridays for trials. It is not likely that your request for a special setting will be accommodated.

3. If you need an order signed now, find out where I will be. Aside from scheduled Law and Motion days, my time is allo-

Judge Lyle R. Anderson was born and grew up in Monticello, Utah, where he graduated from Monticello High School in 1973. He graduated with high honors from Brigham Young University in 1979 with a B.S. in Chemical Engineering. In 1982, he graduated with honors from the University of Chicago Law School. He is a member of the Order of the Coif. From 1982-92, he practiced law in Monticello, Utah with Anderson & Anderson, P.C. During this time he was Monticello City Attorney. In 1990 he was deputy Grand County Attorney, following which he was Grand County Attorney for 1991-1992. In 1992, he was elected to the Utah House of Representatives. He was appointed Seventh District Judge by Governor Norman Bangerter in December, 1992, and took office on February 4, 1993. He is currently presiding judge of the Seventh District Court.

cated between Moab and Monticello according to need. Although I usually get to each courthouse at least once a week, this is not always possible. If you have documents that need to be signed immediately, consider contacting the clerk to see where I will be on the date the document should arrive.

4. Don't expect to handle everything by phone. I recognize the expense and inconvenience involved in travelling between Monticello and Salt Lake City. I probably do it more often than you. Accordingly, I will usually waive an attorney's presence for first felony appearances or misdemeanor arraignments *if you will provide information about your availability for preliminary hearing or trial.* I will often permit entry of misdemeanor guilty pleas by mail with a proper defendant's statement. In civil cases, I frequently authorize a telephone scheduling conference. However, I have no equipment to make a record of telephone conferences. I also have noticed that attorneys and clients are not as likely to focus on settlement when faced with a twenty minute phone call as they are when looking at a day of travel. For that reason, I do not grant every request for a telephone conference. If I deny your request, please try to understand. After all, you knew about the distance involved when you took the case.

5. Take advantage of efficiencies we offer. We have a one-judge system in the Seventh District, which means that one judge should handle your case from beginning to end. This offers some opportunity for efficiencies for attorneys in felony cases. It is possible, with the cooperation of the prosecutor, to make your first personal appearance at the preliminary hearing, followed immediately by arraignment, and then a decision on your motion to suppress based on the preliminary hearing testimony. Please consider taking advantage of this opportunity to reduce expense to your client and make our system more efficient.

6. Focus on settlement early. Our juries are summoned two weeks before trial. Some potential jurors in San Juan County live four to five hours from Monticello. Many live more than an hour away. These people need to make travel plans early, particularly since many rely on extended family to provide transportation. In an effort – successful so far – to reduce or eliminate false alarm summons to these people, plea bargains in criminal cases must be approved at least two weeks before trial except in extraordinary circumstances.

7. Please try to come without a chip on your shoulder. I know every lawyer living in Southeastern Utah. I also know, or have heard something about, a large portion of the people I see in my courtroom. I had to decide long ago to call the cases as I see them based on the evidence presented in court and not worry about whether people will like the decision. Most people in rural areas are very good about recognizing this and do not make any effort to influence me.

If you are worried about "hometown" lawyers getting an advantage, consider this: when the next attorney survey comes out, your opinion counts the same as that of a lawyer who appeared before me 100 times. It is very important to me that you feel that you have been fairly treated, but I cannot extend my efforts in this regard so far as to put local lawyers at a disadvantage. I also know of no way to neutralize the advantage held by any lawyer acquainted with the forum.

Lawyers in Utah might be interested in what the Utah Judicial Council has been doing to involve more American Indians in San Juan County juries. This question is the subject of litigation in Seventh District Court. I can not comment about that litigation, but I consider it important that potential practitioners in this court understand the current jury selection situation.

"When I became a judge in 1993, it had just become clear that peremptory challenges could not be exercised for racial reasons by any attorney in any case."

According to the 1990 census, about 54.4% of San Juan County residents were American Indian. Most of these were Navajos, though there are a substantial number of Utes (these are the Utah Mountain or White Mesa Utes, not Uintah Ouray Utes). Also according to the 1990 census, 51.68% of all San Juan County residents 18 years or older are American Indian. Professor Dennis Willigan from the University of Utah claims that 60% of county residents are American Indian, but I have not seen the factual basis for his claim. I do know that the 1996 Census Bureau estimate says that the percentage dropped slightly from 1990 to 1996.

When I became a judge in 1993, it had just become clear that peremptory challenges could not be exercised for racial reasons by any attorney in any case. This means that whenever a disproportionate number of potential jurors from one ethnic group (or sex) are excused with peremptory challenges, a neutral explanation will be required. I make clear to practitioners in my court that this rule will be followed and afford an opportunity for objections before announcing the final jury.

From 1993 through the first half of 1998, jury lists in San Juan County were drawn from county voter registration lists and driver's license lists, just as in the rest of the state. Every six months, the Administrative Office of the Courts gives us a list of 500 names. Though there has been some fluctuation from list to list, these lists have averaged between 40% and 45% American Indian. Because a significant portion (10-20%) of American Indians tell us they are not able to communicate in English, and because it is slightly more difficult to get responses from more remote areas on the Navajo reservation, our qualified jury lists averaged about 35%. Though the racial makeup of individual juries has varied widely, I would estimate that our juries average about 35% American Indian. It is very likely that you will see American Indians on your jury.

In 1994, at my suggestion, the Utah Judicial Council adopted a rule to permit the court to provide lodging for jurors who travel further than 100 miles to trial. Most of these jurors are Navajos. In 1995, the Council adopted a rule to permit the use of additional source lists for juries, and then decided to add such as list for San Juan County. The list eventually chosen was the Navajo voter registration list. After a long process of trying to get a more adaptable and manageable version of this list, the list was finally incorporated into the other source lists in time to be included in the jury list for the second half of 1998. Thus, as of July 1, 1998, the list of jurors to whom questionnaires are sent is composed of about 52% American Indian.

It is not likely that most Utah practitioners will have had much experience with American Indian jurors. I hesitate to suggest that there is any need to try a case differently with American Indian jurors, but do have a couple of suggestions:

1. If you have a criminal case, do not assume that American Indian jurors are less likely to convict or more likely to hold out for acquittal. During my tenure, I have presided over dozens of trials with many American Indian jurors. Nothing in my experience suggests a propensity for American Indians to vote for conviction or acquittal any differently than other jurors. Conversely, do not assume that non-Indian jurors are more likely to convict. In one of few jury trials I presided over where the prosecutor was sent home with nothing, the defendant was American Indian, the prosecution witnesses were all non-Indian, and the jurors were all non-Indians.

2. Be careful of legalese. Legalese is difficult for most jurors, but for a significant portion of American Indian jurors, English is not their first language. Jurors are qualified for jury service if they are able to communicate reasonably well in English. If your jury has members for whom English is a second language, it is especially important that your English be understandable.

Case Summaries

by Daniel M. Torrence

State v. Labrum, 342 Utah Adv. Rep. 35 (Utah App. 1998).

Facts: Labrum borrowed a friend's care to "go shoot somebody." While driving around with two friends, Mills and Behunin, about an hour and a half later, Labrum, in the front passenger seat, flashed gang hand gestures at the passengers of a nearby Mitsubishi. A few blocks later, Labrum shot five bullets into the Mitsubishi, wounding two passengers. Labrum was convicted of attempted criminal homicide. The trial court increased the minimum sentence from one to six years under U.C.A. §76-3-203, a so-called "gang enhancement," which mandates enhanced minimum sentences for persons convicted of certain offenses committed "in concert with two or more persons."

Issue on Appeal: Labrum argued the trial court erred in concluding he "acted in concert with two or more persons."

Ruling: The unambiguous language of section 76-3-203 requires the State to prove beyond a reasonable doubt that the persons acting in concert (1) had the required mental state, and (2) committed, solicited, requested, commanded, encouraged or aided the offense. Here, the mere presence of Behunin and Mills in the car, as well as their being present before and after the fact, did not prove their mental state at the time of the shooting. Nor was there any evidence that either aided or encouraged the shooting. Mere presence, and even prior knowledge, does not make one an accomplice without further participation. The Court of Appeals therefore vacated the enhanced sentence. In dicta, the Court noted that the "gang enhancement" statute is more properly characterized a "group crime enhancement" that would be constitutionally suspect if courts were to apply it to crimes committed by street gangs but not Boy Scout troops.

Hansen v. Hansen, 342 Utah Adv. Rep. 25 (Utah Ct. App. 1998).

Facts: Michael Hansen sued Laura Hansen, claiming they had a common law marriage, seeking divorce, child custody and support orders, and property distribution. The Hansens had been married and divorced previously and were recently cohabitating. The trial court determined that there was no common law marriage based on evidence including (a) the couple's closest friends did not believe them married, (b) they filed separate tax returns, (c) Ms. Hansen rejecting several requests by Mr. Hansen to formally remarry him, (d) Ms. Hansen had another intimate relationship, and (e) neither referred to each other as "husband" or "wife." The trial court dismissed the case, finding no "clear and convincing" evidence of marriage.

Issue on Appeal: Mr. Hansen appealed, arguing that (1) the trial court erred in applying a "clear and convincing" standard of proof, and (2) under a "preponderance" standard, the evidence supported finding a common law marriage.

Ruling: The common law marriage statute, U.C.A. §30-1-4.5(2) allows a marriage to be proved "under the same general rules of evidence as facts in other cases." Because the allocation of a party's burden of proof is a rule of evidence, the traditional standard for civil cases, a preponderance of the evidence, is the appropriate evidentiary standard. To prove a common law marriage, the claimant must prove all six statutory elements: (1) a contract between two consenting parties capable of giving consent, (2) legal capacity, (3) cohabitation, (4) mutual assumption of marital rights, duties, and obligations, (5) holding out as married, and (6) acquiring a uniform and general reputation as married.

To satisfy the reputation element, the couple's reputation as married must be consistent and cannot be partial, periodic, or divided. Similarly, the "holding out" element must be supported by evidence of consistent behavior. The Court of Appeals found Mr. Hansen's failure to challenge the trial court's findings of fact was fatal. Given the facts determined by the trial court, the couple had not consented to be married, had not mutually assumed the rights, duties and obligation of marriage, did not consistently hold themselves out as married, and had not acquired a consistent reputation as married.

The Court thus reversed as to the standard of proof but affirmed the finding of no common law marriage.

Utah Bar Foundation Recognizes Law Students for Ethical Standards and Commitment to Public Service

The Utah Bar Foundation has established annual Community Service Scholarships for law students who have participated in and made a significant contribution to the community in their demonstrated commitment to public service. The 1998 Utah Bar Foundation Community Service Scholarships were given to **Cindy L. Cole** (Brigham Young University) and **Edward J. Stapleton** (University of Utah). These awards ($3,000) recognize and reward students who have shown that participation in community service is an important part of the legal profession.

Cindy L. Cole – 1998 graduate from Brigham Young University Law School, was managing editor for the school's *Journal of Law and Education* and President of the Women's Law Forum. Her community service includes extensive involvement with the Utah County Rape Crisis Team, the Rural Outreach Program, the Center for Women and Children in Crisis in Provo and the Mentor Program for first-year law students.

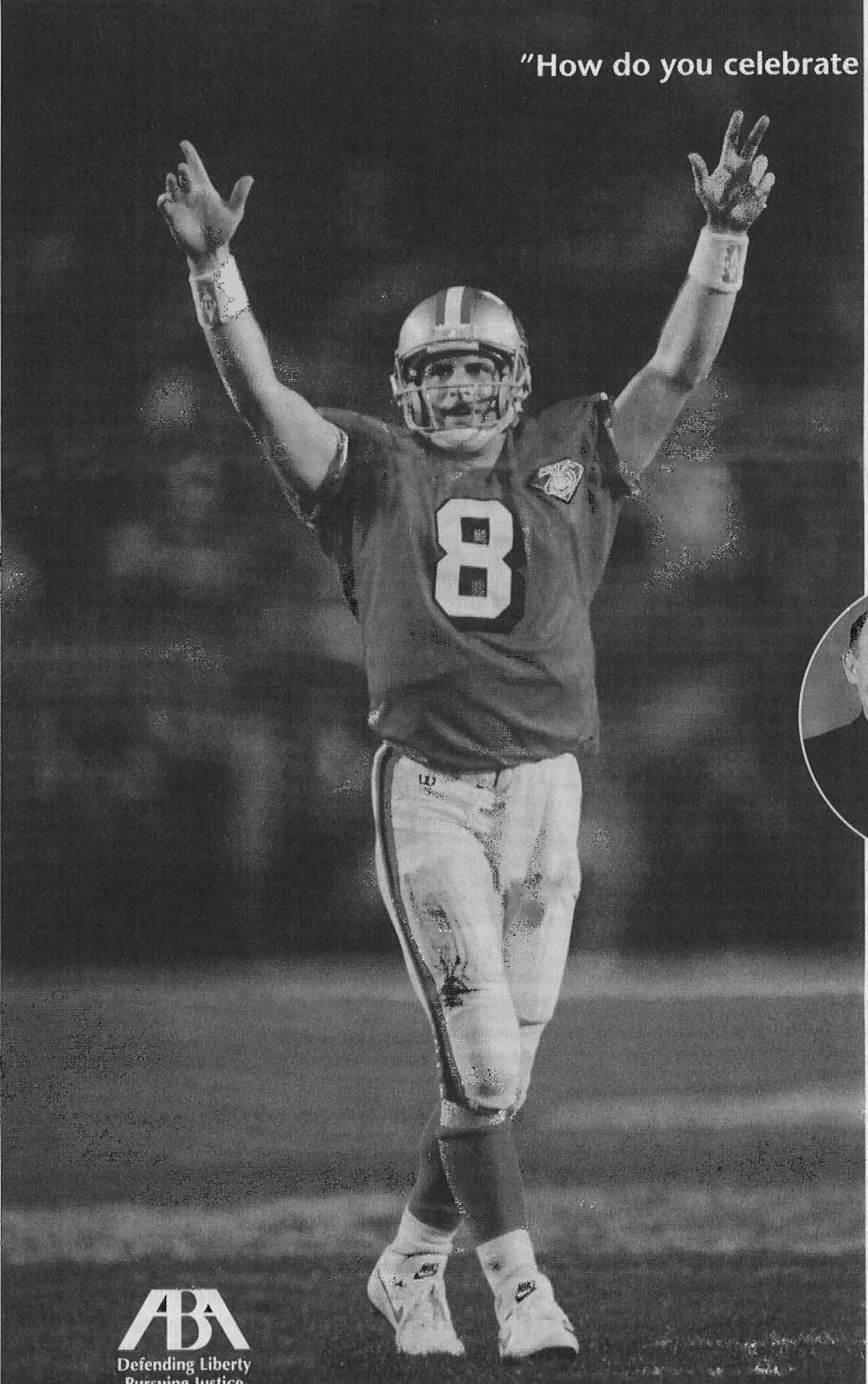
Edward J. Stapleton – second year law student at the University of Utah College of Law, made it his primary goal to provide solutions for Salt Lake's homeless population and to encourage others to volunteer in the community. He has been involved with the Lowell Bennion Community Service Center, Utah Legal Services, the Travelers Aid Shelter and the J.E.D.I. Women's Center. He has also provided legal assistance to the poor at the St. Vincent de Paul Soup Kitchen. With additional volunteer support from other law students, the "Street Law Project" was established at the law school.

The Foundation presented Ethics Awards to **Bill Heder** and to **Terry and Melinda Silk.** Each law school selects a graduating senior annually who embodies high ethical standards. The Rules of Professional Conduct adopted by the Utah State Bar establish ethical standards for Utah lawyers, but encourage them to strive for even higher ethical and professional excellence. The students received either an engraved desk set or plaque and a $500 cash award.

Bill Heder – Brigham Young University Law School recipient, was presented his award by the Hon. Norman H. Jackson, former Bar Foundation President and Trustee, at a dinner/dance awards celebration in Provo in March. He was involved in the Moot Court Program as well as several student advisory committees. His paper on search and seizure in public schools has been accepted for publication in the Brigham Young University *Education and Law Journal.*

Terry and Melinda Silk – 1998 graduates of the University of Utah College of Law, received the Ethics Award from Utah Bar Foundation President Hon. Pamela T. Greenwood in May. The Silks received the award primarily for a class project related to access to justice issues and for their leadership in the Native American Law Students Association at the law school. The class project was a survey of pro bono lawyers to determine the extent to which pro bono legal services could address unmet legal needs of low and moderate income clients. Terry Silk is currently employed by the Fort Mojave Indian Tribe and Melinda Silk is an attorney for the Colorado River Indian Tribe.

The Utah Bar Foundation was organized in 1963 as the charitable extension of the Utah State Bar Association. The Foundation receives funds from I.O.L.T.A. (interest on lawyer trust accounts) and from member contributions. A seven-member Board of Trustees administers these funds and awards grants to community agencies and programs that provide legal education, legal aid to the disadvantaged, and other law-related services. Since 1985 the Foundation has awarded a total of over $2.5 million.

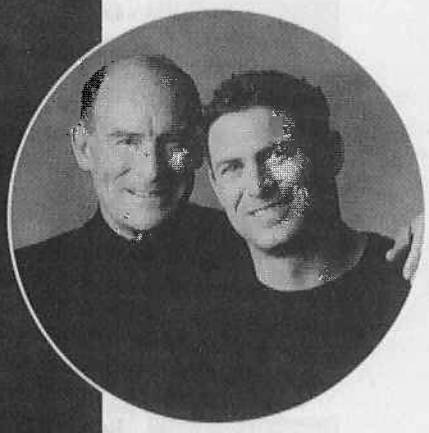


"How do you celebrate your freedom?"

—American Bar Association

"Our nation is committed to the rule of law—and so is my dad, who lives and teaches the principles of the Constitution. Like my father, and his forefathers, I celebrate the right to have a dream and the opportunity to achieve it."

—Steve Young, lawyer, Super Bowl champion and MVP



"The Constitution is the foundation for our nation, but it's people who put it into action. The opportunity to prove ourselves is the greatest freedom we have."—*LeGrande Young, lawyer, Steve's father and biggest fan*

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CLE Calendar

ALI-ABA SATELLITE SEMINAR: "PLAIN ENGLISH" IN PLAIN ENGLISH – HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS

Date: Tuesday, September 15, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 Regular Registration
$85.00 for Government Employees
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 HOURS

NLCLE: DOMESTIC LAW

Date: Thursday, September 17, 1998
Time: 5:30 p.m. to 8:30 p.m.
(Registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyers Division Members
$60.00 for all others
(Add $10.00 for door registration.)
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR: DRAFTING CORPORATE AGREEMENTS – CONVERTING THE DEAL INTO AN EFFECTIVE CONTRACT

Date: Thursday, September 17, 1998
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: WORKPLACE HARASSMENT LITIGATION – SEX, RACE, AND OTHER CURRENT ISSUES FROM PLAINTIFF, DEFENDANT, AND JUDICIAL PERSPECTIVES

Date: Wednesday, September 23, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

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Bar Number American Express/MasterCard/VISA Exp. Date

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Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee,* will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

ALI-ABA SATELLITE SEMINAR: ANNUAL FALL ESTATE PLANNING PRACTICE UPDATE

Date: Thursday, October 1, 1998
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $155.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 3 HOURS

NLCLE WORKSHOP: MOTION PRACTICE

Date: Thursday, October 15, 1998
Time: 5:30 p.m. to 8:30 p.m.
(Registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for Members of the Young Lawyers Division
$60.00 for All Others
(Add $10.00 for door registration)
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR: HOW TO TRY A PERSONAL INJURY CASE

Date: Thursday, October 15, 1998
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: ERISA BASICS – A TWO-PART PRIMER ON ERISA ISSUES

Date: Part 1 – Thursday, October 22, 1998
Part 2 – Thursday, October 29, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: Both Parts – $295.00 Standard;
$165 Government Employee
Part 1 Only – $165.00 Standard;
$85.00 Government Employee
Part 2 Only – $165.00 Standard;
$85.00 Government Employee
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 HOURS FOR EACH PART, (8 HOURS TOTAL)

Classified Ads

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Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

Utah Bar Journal and the Utah State Bar Association 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: May 1 deadline for June publication). 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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Major Salt Lake City Law Firm is seeking highly qualified patent attorneys at the associate and shareholder level to expand its Intellectual Property and Technology Law Group. Individuals with electrical engineering, computer science, mechanical engineering, chemical engineering or chemistry backgrounds and at least three years of patent prosecution experience are preferred. This firm provides excellent career opportunities for self-motivated individuals. Please send resume in confidence to Recruitment Specialist, Box 45898, Salt Lake City, Utah 84145-0898.

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If you are an experienced lawyer (or two) with existing caseload, tired of downtown chaos, large firms or otherwise looking for a small, but diverse and established firm dedicated to high quality of life and legal work, we need to talk. Our firm has great space, excellent support staff and slightly more work than three partners and two asociates need. Fed/state court experience pref. Open to partner/associate poss. All responses confidential. Call Stephen Hutchinson, (801) 486-1112.

POSITIONS SOUGHT

ENTERTAINMENT LAW: Denver-based attorney licensed in Colorado and California available for consultant or of-counsel services. All aspects of entertainment law, including contracts, copyright and trademark law. Call Ira C. Selkowitz @ (800) 550-0058.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

BAR COMPLAINT DEFENSE ATTORNEY: Representation in all Bar disciplinary proceedings. Let me assist you in preparing your response to that Bar Complaint. Five years as Assistant Disciplinary Counsel, Utah State Bar. Wendell K. Smith, 275 East 850 South, Richmond, UT 84333, (435) 258-0011.

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Get To Know Your Bar Staff

RICHARD M. DIBBLEE

Richard was appointed Assistant Executive Director of the Utah State Bar on November 21, 1991. Richard received his Bachelor of Science Degree in Political Science from the University of Utah in 1978 and his Juris Doctorate degree from Washburn University School of Law, Topeka, Kansas in 1983. Prior to his employment with the Bar, Richard associated with the law firm of Gustin, Adams, Kasting & Liapis. He also worked as an investigator with the Utah Securities Division.

At the time of Richard's appointment, an important project of the Bar was the marketing of the Utah Law and Justice Center. To meet this goal, Richard initiated a program in which members of the Bar and organizations associated with the legal profession were urged to use the Center for their legal and business meetings. His effort has been very successful and today the Utah Law and Justice Center is widely used by, not only members of the Bar, but also business and civic organizations throughout the community.

As Assistant Executive Director, Richard's duties and assignments also include management of the day-to-day operations of the Center, supervision of the staff and assisting members of the Bar with their committee and section assignments.

An assignment Richard has willingly accepted is to coordinate the Mid-Year and Annual Convention golf tournaments. His years on the links, knowledge of the game and willingness to cooperate have made these tournaments very successful and well received by those who have participated.

Richard endeavors to perform his duties in a manner that is consistent with the high standards of the legal profession and with the goal of strengthening and maintaining the integrity of the Utah State Bar.

Richard and his wife Kristy live in Holladay and are the parents of three children.

GINA GUYMON

Gina was born and raised in Blanding, Utah. She is the youngest of four children. She graduated from San Juan High School in 1993. She attended Utah Valley State College and graduated in 1995 with an associates of applied science, legal assistant degree.

Gina worked for the Utah County Attorney's Office for nearly two years before relocating to Salt Lake City. She currently works in the Office of Professional Conduct where she assists two attorneys and coordinates the monthly Screening Panels for the Ethics and Discipline Committee.

In her spare time, Gina enjoys crafts, reading, going to movies, and watching Jazz games with her fiancé. She also loves boating, camping, hiking, and spending time with her family. She has one niece and one nephew whom she adores.

Gina is currently attending the University of Utah working towards a bachelor's degree in business.

The Environmental Science Deskbook

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Practicing environmental law was just made easier thanks to the release of James W. Conrad, Jr.'s the *Environmental Science Deskbook*. This one-stop resource book provides attorneys with plain-English explanations of scientific jargon and comprehensive coverage of technical terms, acronyms, concepts, methods and applications that relate to environmental legal issues.

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Tel: 363-7500

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UTAH STATE BAR STAFF

Tel: 531-9077 • Fax: 531-0660
E-mail: info@utahbar.org

Executive Offices
John C. Baldwin
Executive Director
Tel: 297-7028

Richard M. Dibblee
Assistant Executive Director
Tel: 297-7029

Mary A. Munzert
Executive Secretary
Tel: 297-7031

Katherine A. Fox
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Tel: 297-7047

Access to Justice & CLE Department
Tobin J. Brown
Access to Justice Coordinator
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Amy Jacobs
Marie Gochnour
CLE Assistants
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Pro Bono Project
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Admissions Administrator
Tel: 297-7026

Sadie Eyre
Admissions Assistant
Tel: 297-7025

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Tel: 297-7030

Consumer Assistance Coordinator
Jeannine Timothy
Tel: 297-7056

Receptionist
Bree Strong (Mon., Tues. & Thurs.)
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Tel: 531-9077

Web Site Coordinator
Summer Shumway
Tel: 297-7051

Other Telephone Numbers & E-mail Addresses Not Listed Above
Bar Information Line: 297-7055

Mandatory CLE Board:
Sydnie W. Kuhre
MCLE Administrator
297-7035

Member Benefits: 297-7025
E-mail: ben@utahbar.org

Web Site: www.utahbar.org

Office of Professional Conduct
Tel: 531-9110 • Fax: 531-9912
E-mail: oad@utahbar.org

Billy L. Walker
Senior Counsel
Tel: 297-7039

Carol A. Stewart
Deputy Counsel
Tel: 297-7038

Charles A. Gruber
Assistant Counsel
Tel: 297-7040

David A. Peña
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Date of Activity CLE Hours Type of Activity**

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IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through self-study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

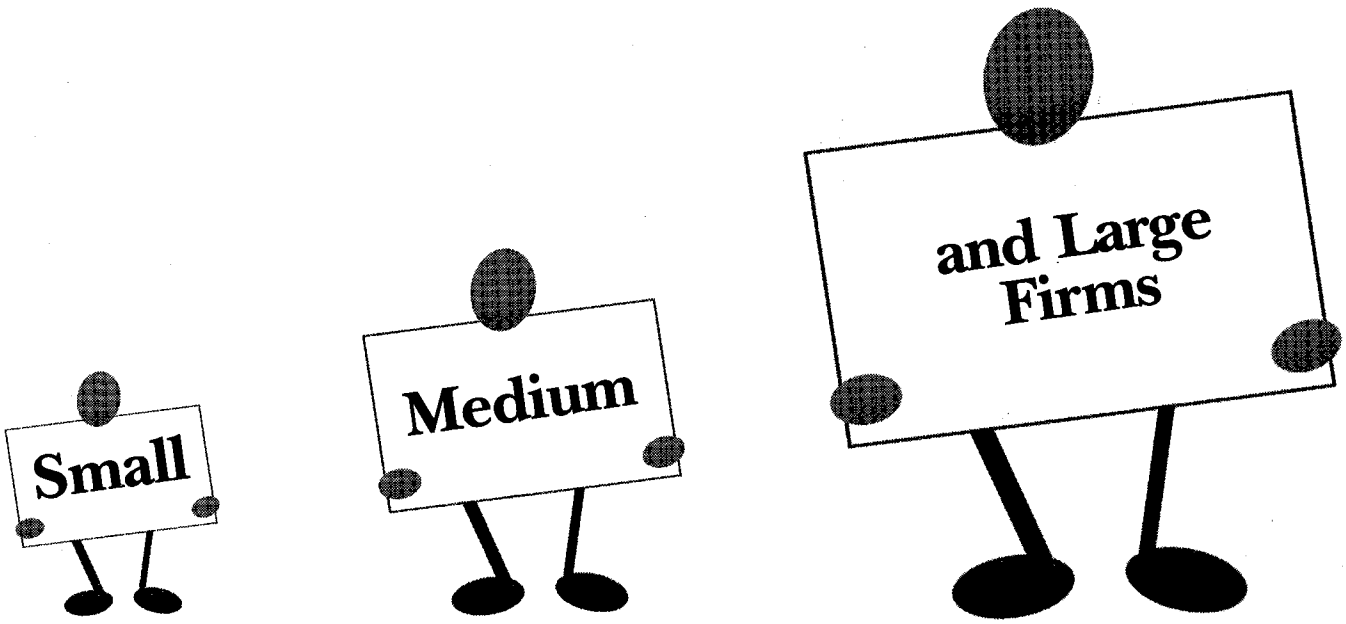
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a **$50.00** late fee.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:**_____

Regulation 5-103(1) — Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.



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