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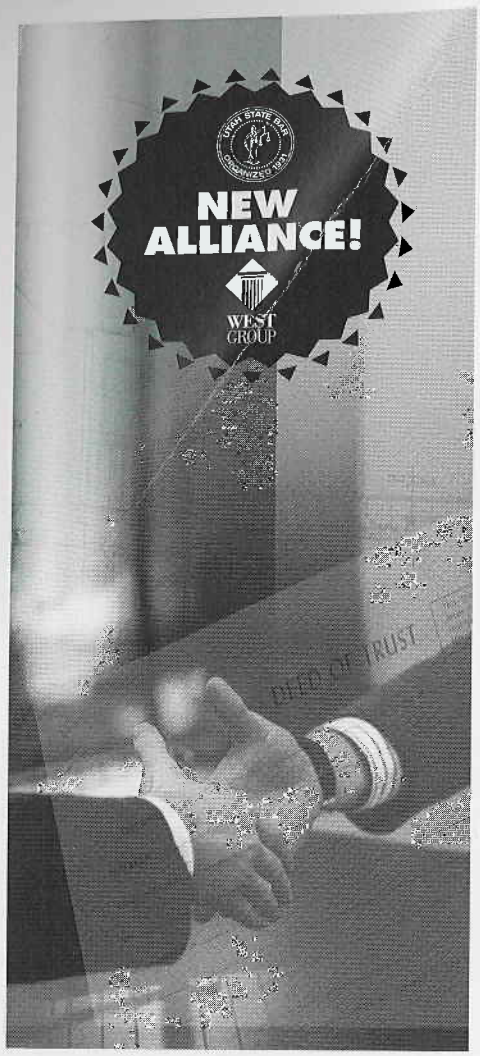

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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Snake Creek Pass, above Brighton, Utah by first time contributor, Kerry P. Eagan, Utah State Bar member, Chief Administrative Officer of Lancaster County, Nebraska.

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Letters to the Editor

Dear Editor,

About twenty-five years ago, when I was a first-year law school graduate and an associate in a small law firm, I was given an assignment to research an area of securities law. At that time, Worsley, Snow & Christensen didn't do much securities law and we didn't have any resource material in our library. One of the lawyers suggested that I might call a lawyer who officed a few floors upstairs by the name of Norm Johnson. He said that Mr. Johnson did securities work and would have some looseleaf services or other books about securities in his library. He told me that Norm was a good guy and would probably let me use his books.

Being a new lawyer, I was a little reluctant to call Mr. Johnson, but I finally did. He cheerfully told me to come on up and he would show me his books.

Mr. Johnson met me in the reception area of his office. He took me to his library and showed me the looseleaf service. He asked me the nature of the problem and helped me get started in the research. All in all, he probably took about 45 minutes of his time to help me out.

This isn't a big thing, but I've thought about it many times over the years. Three-quarters of an hour isn't a lot when viewed in context of an entire lifetime. But I now know what a precious nugget 3/4 of an hour of unbillable time can be in a busy lawyer's day.

This practice of experienced lawyers unselfishly helping and mentoring new lawyers is a fine and continuing tradition in our profession.

A few years ago, Norm became very ill and I pessimistically believed that he wasn't going to make it.

I thought at the time how sad it is that we wait until someone is almost dead to verbalize the good things about them. Norm has now recovered his health and is serving our country on the Securities and Exchange Commission.

Examples like Norm Johnson make me proud to be a lawyer.

Scott Daniels

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1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Cover Art

Members of the Utah State Bar who are interested in having their photographs of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Randle, Deamer, Zarr, McConkie & Lee, P.C., 139 East South Temple, Suite 330, Salt Lake City, UT, 84111-1169, 531-0441. Send a print, transparency, or slide of each scene you want to be considered. If you would like your photograph returned, enclose a self-addressed, stamped envelope.

Interested in writing an article for the *Bar Journal?*

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine.

If you have an article idea or would be interested in writing on a particular topic, contact the Editor at 532-1234 or write *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

Sam Walton and Bobbie Dunn

by Charles R. Brown

I recently attended a national leadership conference on the future of our profession. The "Seize the Future" conference sponsored by the A.B.A. Law Practice Management Section was an intense two-and-a-half day event that included presentations by nationally known gurus and consultants on business, management, and the legal profession. The consensus of the conference participants is that the legal profession is roughly fifteen years behind other professions when it comes to preparing for the future and the massive changes that will occur with e-commerce and other venues as we enter the 21st Century. I will be providing detailed reports on those issues over the next few months.

Since returning from the conference, I have had numerous discussions regarding the issues presented there with friends, with other attorneys, and with clients who run small businesses. One conversation was with two clients who are involved in retail businesses, automobiles and clothing, respectively. I commented that one can now buy almost anything off the Internet, including automobiles, clothing, and legal forms. I queried whether some of the predictions I heard at the conference will come true. Those include, for example, that within the next ten to twenty years there will be no automobile dealerships. This led to a very spirited discussion involving e-commerce and where it might lead, including the trends toward less personal contact in business relations.

One of the clients stated his strong belief that although there will be a movement toward more commerce on the Internet, personal contact and relationships will always be a key element in success. He gave a prime example with the question, "Why is WalMart so successful?" Is it because they are big? No, they are big because they are successful. Is it because they have better inventory controls, better marketing, better products, or better prices? No, none of the above. The reason WalMart is so successful is that Sam Walton understood from the beginning the fundamental concept that customers should be treated with dignity and respect. When customers go to WalMart they are welcomed by a greeter. There is always someone available to guide customers to and explain the products. Customers feel that WalMart personnel care for them as individuals and are truly interested in their concerns.

The same fundamental philosophy should be paramount in the legal profession. Unfortunately, that is not always, or even predominantly the case. We sometimes treat our clients as commodities, rather than as human beings. For example, do we really need complex voice mail systems that distance us and minimize personal contact? My personal pet peeve occurs when a receptionist asks me what I refer to as the "Poison Questions." Those are "May I ask who's calling?" and/or "May I ask what this is about?" After that, if I am told the person I have called is unavailable, I generally do not believe it. I assume that person decided that I or my business was not important to him. Our clients or potential clients will generally have the same impression.

At my law firm, we have a written explanation of phone procedure that we provide to every receptionist and secretary. It includes an absolute prohibition of the Poison Questions. We all receive unwanted telephone calls. Deal with it. That is a cost of successful marketing and client relations. Our clients are always to be treated with dignity and respect, by attorneys and staff, whether they are the chairman of a large corporation or an auto mechanic with an IRS problem.

Fortunately, we have a secret weapon that gives us a distinct advantage. That is Bobbie Dunn, the primary receptionist serving the firms of Clyde Snow Sessions & Swenson and Hunter & Brown on the thirteenth floor of One Utah Center. Many of you have had occasion to call one of our firms or to visit the thirteenth floor. As you have experienced, Bobbie (she does not like to be referred to as Ms. Dunn) is exemplary. When clients come to our firms they are always treated with respect and dignity. They are always made to feel comfortable. More importantly, Bobbie never forgets a name.

When clients come back a second time they are treated like a member of the family. I have had clients call me and ask why Bobbie did not answer the phone that day. They consider her a friend and become personally concerned with her well-being. She is, in my view, the Michael Jordan of receptionists. That may not sound like something important to many of you, but it certainly is to my clients and it would be to Sam Walton.

Unfortunately, I can contrast that with many other businesses, including some law firms. I recently referred a client to other attorneys in a practice area that we do not provide. I gave her a number of names and she, as a conscientious consumer, decided to interview each of them. She told me that a material factor in her final decision was the way she was treated by the staff at the various law firms. For example, at one firm the receptionist was cold and abrupt and gave the impression that she was too busy to deal with a potential new client. The receptionist handed the client a written questionnaire, sat her in the corner and ignored her. The client compared the experience to that of going to a doctor's office. No offense, but that is no way to run a law office.

As I will discuss in detail later, we need to wake up and learn more about competing and surviving in the atmosphere of the light-speed changes of technology which we will face in the 21st Century. But we should never lose sight of core principals of success. One of those must be that the client always comes first. Frankly, one of the major factors that contributes to the negative public perception of our profession is the unmitigated arrogance of many of its members, who believe and communicate that they are more important and worthy than their own clients. That needs to change, both for our own success and the future of our profession. We could all learn a lesson from Sam Walton and Bobbie Dunn.

The Risk of Paying Over the 'Net

by Brian W. Jones

The volume of online purchases by consumers via the Internet is projected to grow from $7.8 billion in 1998 to $108 billion by the year 2003.[1] Most consumers will pay for these purchases using a credit or debit card. To facilitate this growth, consumers need to trust the security and integrity of the online payment process. But many consumers remain reluctant to transmit sensitive personal and financial data over the Internet.

Retailers have responded to this reluctance in some creative ways. For example, Dell Computer Corporation, which currently processes orders for $30 million of computer equipment every day[2] stated in a press release that it is the "first major computer company to offer protection against credit card fraud with a secure shopping guarantee."[3] The press release went on to say that Dell Computer felt it needed to take additional steps to "make on-line shopping easier and more secure."[4] Such steps included establishing a policy to reimburse customers up to $50 if it is determined that fraudulent charges resulted from an online purchase from Dell. Why would a company currently selling $30 million per day over the Internet feel that the on-line shopping experience needed to be more secure?

The reason is that consumer concerns about security are often cited as one of the main reasons they hesitate to shop or otherwise spend money online. But the processes associated with the paper-based payment system (checks) are more insecure than even the current, early-generation encrypted[5] payment systems used over the Internet. Furthermore, the law currently allocates all but a small portion of any fraud losses, when they do occur, to the consumer's financial institution. This article will examine the paper-based check processing system and compare the risks associated with it to those associated with a typical Internet-based payment system available today.

Paper-Based Check Payment System

Articles 3 and 4 of the Uniform Commercial Code (U.C.C.) govern the check payment process. These articles set forth the concepts of presentment, negotiation, indorsement, holder in due course, and many others that affect the rights and responsibilities of the parties to a paper-based transaction. A full discussion of the U.C.C. is not the purpose of this article. Nevertheless, it may be helpful to discuss generally the "nuts and bolts" of processing a check and examine how Article 4 apportions liability for losses incurred on a fraudulent check.

A consumer exchanges a check, which is an order to the consumer's depository institution, to pay for purchases. If one follows the check through the settlement process, one finds that many people handle the check and have easy access to the data contained on it. These people include the sales clerk and possibly other employees of the vendor, the employees at the vendor's depository institution, employees of the courier service that transports the check to the processor (generally a commercial bank or the federal reserve bank), various proof operators and other employees of the processor, possibly another set of couriers, employees of the consumer's depository institution (including proof people, film operators, and sorters), and finally, the postal employees who deliver the canceled check to the consumer with a monthly statement. In addition, there are check printers and employees of the depository institution who process orders for checks. A check presented away from the depositor's home may be seen by even more couriers and processors before it arrives back at his or her depository institution for sorting and mailing.

Notwithstanding the obvious security risks, once a check enters the processing system, losses caused by fraud are rare. Check fraud is a growing problem, however, and usually involves persons outside the processing system. Typical schemes include use of fictitious payees, unauthorized signatures, and altered checks.

Generally, if one is a victim of some form of check fraud, Article 4 imposes the loss on the victim's depository institution because the depository institution may only charge its customers' accounts for items that are "properly payable."[6] If the depository institution honors a check that is not properly payable because it contains a forged signature or is otherwise unauthorized by the depositor, the depository institution must credit the

BRIAN W. JONES is Associate General Counsel at I-Link Incorporated.

account of its depositor and seek recovery up the payment stream, which eventually leads to the forger.

There are some important exceptions to this general rule, however. If the depositor was negligent in some way that contributed to or encouraged passing of the fraudulent check, he or she is estopped from claiming the check was unauthorized.[7] In some cases an employer may be estopped from claiming an unauthorized signature made by a dishonest employee.[8] The depositor also may be liable for losses if the depositor fails to promptly report fraudulent charges against the depositor's account that appear on his or her account statement. The customer must "exercise reasonable promptness in examining the statement" and "promptly notify the bank of the relevant facts [pertaining to the unauthorized item]."[9] If the depositor fails to do so within a reasonable period of time, not to exceed thirty days after receiving the account statement showing the original fraudulent charges, and the same wrongdoer makes subsequent unauthorized signatures or alterations, the customer is estopped from asserting an unauthorized signature on the unauthorized items.[10]

Despite the security problems, and the increasing losses on fraudulent items, the check processing system has earned the trust of most people who use it. This trust has been established over many years of use and by the development of laws allocating most of the risk of fraud losses to depository institutions. Like the paper-based system, the electronic payment system also allocates most of the risk of loss to a consumer's depository institution.

"Like the paper-based system, the electronic payment system also allocates most of the risk of loss to a consumer's depository institution."

Electronic System

Although there are several types of electronic payment systems,[11] this article will only examine the more common use of credit and debit cards to make purchases online. This involves entering a credit or debit card number into a computer terminal and sending it over the Internet to the vendor of the product or service selected for purchase. The data sent over the Internet are generally encrypted and impossible to read unless decrypted. The intended recipient of the data has the necessary tools and "passwords" to decrypt the data. Others, if they are lucky and smart enough, may intercept the encrypted data *en route* to the vendor and may be able to decrypt the data. But such a decryption process would be time consuming and very difficult even for experienced computer hackers (much more difficult than opening an unsealed bag or envelope containing checks). Unlike the paper-based payment system, very few people have easy access to the data contained in the encrypted payment order transmitted over the Internet to the vendor. The consumer, someone at the vendor, someone at the processor (typically VISA or MasterCard), and someone at the consumer's depository institution may have access to the data. Other than the consumer's, human eyes may never see the data that are moved from one place to another: it is not unusual for online transactions to be handled entirely electronically. Also, if humans do have access to the data, they often only have access to certain pieces of the data, such as the last four digits of the consumer's account number. Similar to the paper-based system, losses resulting from fraud are rare once the payment order reaches the vendor. The risk of fraud generally lies with someone intercepting a consumer's card number *en route* to the vendor and using it to make charges against the consumer's account without his or her knowledge. The law and various rules implemented by the major card processors through their issuer members have allocated the majority of this risk to the depository institution that issued the card.

Credit Cards

Consumers use credit cards to make purchases on credit granted by the card issuer. To initiate a credit card transaction, the consumer must present the card (or at least the card number) and sign (or otherwise authorize) a draft that instructs the card issuer to pay the vendor. Most credit card transactions are processed through VISA or MasterCard. Fraud losses are generally considered to be high in the credit card business. Stolen credit card numbers, forged or otherwise unauthorized drafts, false credit applications, and other more creative schemes are common.

Allocating Credit Card Fraud Losses

The federal Truth in Lending Act (TILA)[12] and Federal Reserve Board Regulation Z[13] govern how credit card fraud losses are allocated. Under the TILA and Regulation Z, consumers who make purchases with credit cards are liable only for the first $50 of losses incurred by unauthorized use.[14] In other words, the card issuer cannot charge the consumer's account for unauthorized charges in excess of $50. The card issuer is faced with locating the thief and attempting to collect charges over $50 from the thief. This is a very difficult process and generally results in the card issuer absorbing the loss on the unauthorized charges.

Debit Cards

Unlike credit cards, debit cards take funds directly from the consumer's account with his or her financial institution. Debit card purchases may be processed in one of two ways: online or offline. The same card generally can be used to make purchases using either process.[15]

Online Debit Systems

An on-line transaction is one that is processed "live" and requires the user to enter his or her personal identification number (PIN) to initiate the transaction. Although this type of transaction is becoming more popular to make point-of-sale purchases, the most common online debit transaction is made through an Automatic Teller Machine (ATM) and is processed by one or more of a number of processors. Examples of these processors include the STAR System, the PLUS System, and the Cirrus Network. Transactions processed on-line result in an almost immediate debit of funds from the consumer's account. Data security is generally considered better with an online debit system than with an offline debit system because the depositor is required to enter his or her PIN in order to authorize the transaction.

Offline Debit Systems

An offline transaction is one that generally is processed through one of the major credit card networks, meaning VISA or MasterCard. The transaction is processed just as a credit card transaction, but rather than drawing on funds loaned to the consumer by the card issuer, the funds are withdrawn directly from the consumer's account with the card issuer. This type of transaction also retains the two- or three-day "float" similar to a check. The consumer need not use a PIN when initiating an offline debit transaction.

Allocating Debit Card Fraud Losses

Because no credit is extended in a debit card transaction, such transactions are not governed by the TILA. Debit card transactions are governed by the Electronic Funds Transfer Act (EFTA)[16] and Federal Reserve Board Regulation E.[17] Regulation E defines an electronic funds transfer as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account."[18] This definition includes Internet-initiated transactions.

The allocation of liability under the EFTA and Regulation E is different than under the TILA and Regulation Z. Under Regulation E, the person or institution that is ultimately liable for losses, and the extent of that liability, is contingent on when the fraud is discovered and reported and on what circumstances caused the fraud. If the card was lost or stolen, liability for most of the fraudulent charges is on the consumer if the consumer does not report the loss promptly to the card issuer after he or she discovers the loss. If the consumer notifies the card issuer within two business days of learning the card is lost, the consumer's maximum liability is $50.[19] If the consumer notifies the card issuer more than two days after discovering the loss, but before sixty days after receiving a statement showing the fraudulent charges, the consumer's maximum liability is $500.[20] If the consumer fails to notify the issuer within sixty days after receipt of a statement showing the fraudulent charges, generally the consumer is liable for all of the unauthorized charges occurring after the sixty day period has run.[21] If the fraudulent charges arise in some way other than the consumer's loss of the card, for example if a thief intercepts the debit card number over the Internet, and the consumer notifies the issuer within sixty days after receiving a statement showing the fraudulent charges, the consumer will not be liable for any of the unauthorized charges.[22]

"Although the risk of loss to the consumer is generally greater when using an offline debit card than when using either an online debit card or a credit card, such risk has been mitigated by the card processors' rules limiting the consumer's liability."

The two major off-line processors have adopted their own loss allocation rules that all member card issuers must follow. MasterCard has limited the consumer's liability to $50 on its MasterMoney cards, and VISA has eliminated liability completely to those consumers who report the lost card within two business days, and restricted liability to a maximum of $50 for losses reported thereafter.[23]

Although the risk of loss to the consumer is generally greater when using an offline debit card than when using either an online debit card or a credit card, such risk has been mitigated by the card processors' rules limiting the consumer's liability. So long as the consumer doesn't lose the card, Regulation E eliminates liability to the consumer if the consumer reports unauthorized transactions promptly. In the case of a purchase made over the Internet, the card never leaves the consumer's possession, so the risk of losing the card is small. Nevertheless, if a thief were to intercept the card's number, upon the consumer's receipt of the statement, he or she could report any unauthorized charges arising therefrom and would not suffer any liability for the unauthorized charges under either Regulation E or the VISA and MasterCard rules. Obviously, consumers

must be responsible and diligent in closely examining their monthly statements to discover any fraudulent charges. If they do so, the risk of loss arising from fraudulent transactions rests entirely on the card issuer.

Conclusion

So why does Dell Computer offer to reimburse consumers up to $50 for any fraudulent transactions resulting from a transaction with Dell? Because under the MasterCard and VISA rules, that's the maximum amount for which even the most careless consumer could be liable. Dell actually assumes very little additional risk by making its promise to reimburse consumers up to $50.

Although there has been a lot of hand wringing recently over the adequacy of security over the Internet, the risk of using one's credit card or debit card to make purchases over the Internet seems small and at least as secure as using checks to make purchases. In fact, the Treasury Department reports that benefit recipients are twenty times more likely to have fraud-related problems with a paper check than with an electronic payment.[24] Potential thieves also have fewer opportunities to discover important credit card or debit card data than they do with checking account data. Checking account data can be gained merely by looking at the check. Also, many people have the opportunity to closely examine the check, the signatures, the amounts, and other important data contained on a check. Although some important data resides on credit and debit cards, such information is not easily visible to a would-be Internet thief. Such a thief would need advanced technical skills, quite a bit of luck, and some measure of persistence and tenacity in order to "crack" the encrypted data that represents information transmitted over the Internet. Furthermore, diligent consumers who examine their monthly statements closely for possible fraudulent charges, and report any fraudulent charges promptly, will suffer no liability for unauthorized charges even if they do occur.

[1]Mohanbir and Kaplan, *Let's Get Vertical*, BUSINESS 2.0, Sept. 1999, at 60.

[2]Dell Computer Corporation press release dated Sept. 13, 1999, a copy of which is available at <http://www.dellcomputer.com/corporate/media/newsreleases/99/9909/13.htm>.

[3]A copy of the full press release is available at <http://www.dellcomputer.com/corporate/media/newsreleases/98/9808/13.htm>.

[4]*Id.*

[5]Encryption is an electronic process that is largely invisible to Internet users. It is a process that uses mathematical algorithms to scramble the data a consumer sends over the Internet so as to be unreadable to someone who may intercept it.

[6]U.C.C. § 4-401; UTAH CODE ANN. § 70A-4-401 (1997).

[7]U.C.C. § 3-406; UTAH CODE ANN. § 70A-3-406 (1997).

[8]U.C.C. § 4-402; UTAH CODE ANN. § 70A-4-402 (1997).

[9]U.C.C. § 4-406(3); UTAH CODE ANN. § 70A-4-406(3) (1997).

[10]U.C.C. § 4-406(3); UTAH CODE ANN. § 70A-4-406(4) (1997).

[11]These include various types of stored value cards and "ecash." Although use of these types of systems is becoming more common, particularly in "closed" systems such as university campuses, they have not yet gained widespread acceptance with consumers.

[12]15 U.S.C. §§ 1601-1665b (1994 & Supp. 1 1996).

[13]12 C.F.R. § 226 (1999).

[14]15 U.S.C. § 1643 (1994); 12 C.F.R. § 226.12(b) (1999).

[15]For a more in-depth discussion of debit cards, *see* David A. Balto, *Can the Promise of Debit Cards Be Fulfilled?*, 53 BUS. LAW. 1093 (1998).

[16]15 U.S.C. § 1693g (1994).

[17]12 C.F.R. § 205 (1999).

[18]12 C.F.R. § 205.3(b) (1999).

[19]12 C.F.R. § 205.6(b)(1) (1999).

[20]12 C.F.R. § 205.6(b)(2) (1999).

[21]12 C.F.R. § 205.6(b)(3) (1999).

[22]12 C.F.R. pt. 205, Supp. I. cmt. § 205.6(b)(3)-2 (1999).

[23]Balto, *supra* n.13, at 1104-05, *citing* Lisa Fickenscher, *MasterCard to Cap Consumer Debit Card Liability*, AM. BANKER, July 31, 1997; *Visa Announces New Protections for Cardholders*, PR NEWSWIRE, Aug. 13, 1997.

[24]Lucinda Harper, *Americans Prefer to Write Checks Despite Ease of Electronic Banking*, The Wall Street Journal Interactive Edition, <http://www.wsj.com>, *citing* Under Secretary John D. Hawke, Jr. Testimony before the House Government Reform and Oversight Subcommittee on Government Management, Information and Technology, June 18, 1997, press release at <http://www.ustreas.gov/press/releases/pr1768.htm>.

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[20]12 C.F.R. § 205.6(b)(2) (1999).

[21]12 C.F.R. § 205.6(b)(3) (1999).

[22]12 C.F.R. pt. 205, Supp. I. cmt. § 205.6(b)(3)-2 (1999).

[23]Balto, *supra* n.13, at 1104-05, *citing* Lisa Fickenscher, *MasterCard to Cap Consumer Debit Card Liability*, Am. Banker, July 31, 1997; *Visa Announces New Protections for Cardholders*, PR Newswire, Aug. 13, 1997.

[24]Lucinda Harper, *Americans Prefer to Write Checks Despite Ease of Electronic Banking*, The Wall Street Journal Interactive Edition, <http://www.wsj.com>, *citing* Under Secretary John D. Hawke, Jr. Testimony before the House Government Reform and Oversight Subcommittee on Government Management, Information and Technology, June 18, 1997, press release at <http://www.ustreas.gov/press/releases/pr1768.htm>.

Conveyancing and Collateralizing Utah Water Rights

by R.L. Knuth

It is a truism that in Utah, water rights are an important property interest. In point of fact, they are a downright obsession given our status as the second driest state in the Union. The law of water rights in Utah finds its roots in the mining and agricultural practices of the last century. The riparian system of water law inherited from the laws of England proved untenable in the arid west. Because Nature seldom put water where people want to use it, the practice arose under which the law protected the first person to divert water from the natural system and to apply it to a beneficial use. Water was simply too valuable for any individual to own in its natural state. This paper will address the way in which this most indispensable and potentially transitory of property interests can be conveyed and used to secure an obligation.

General Background

A. The Nature of Water Rights

In Utah, all natural waters are declared to be public property.[1] Under the Statutes of 1888 and by custom and practice prior to that time, water could be appropriated as a so-called "diligence right," simply by diverting it from a natural source and applying it to a beneficial use.[2] Under the current system, an application to appropriate must be filed with the State Engineer in order to create a new water right.[3]

An appropriation right gives an individual only a usufruct in water, that is, the right to use some maximum quantity of water from a specified source, at a specified point of diversion or withdrawal, for a specified use, and at a specified time.[4] Each water right also has a particular "priority" in relation to other water rights in the same source. Priority is the order of ranking in which the owner of the right may take his or her entitlement; a senior appropriator may take his or her full measure of water before a junior appropriator may take any from the same source.[5]

B. The Classification of Water Rights

Generally, water rights are considered real property.[6] The exception, however, is that shares in a mutual water company are personalty.[7] But, all water rights–even shares in a mutual water company–can be appurtenant to land or can be severed from the land and transferred separately or reserved to the grantor.[8]

Utah water rights take a number of different forms which are transferred and encumbered variously:

Diligence Claims: Diligence claims are water rights arising from the diversion of water from a natural system and applied to a beneficial use. Surface rights were subject to appropriation by diligence prior to 1903 when filing an application for appropriation became the exclusive method of appropriating water, and groundwater rights prior to 1935.[9] Thus, surface water rights established by diversion and use prior to 1903 are recognized as valid water rights, even though the State Engineer may have no record of them. Likewise, in 1935, groundwater rights were included for the first time in the State Engineer's appropriation application system; nevertheless, groundwater rights acquired by beneficial use alone prior to 1935 are valid, even though not of record.

In 1997, the Utah Legislature stiffened the requirements for filing diligence claims, and the new version of Utah Code section 73-5-13 applies to diligence claims made of record after May 4, 1997. The new statute requires a claimant to submit verification by a registered engineer or land surveyor quantifying the water diverted, attesting to its beneficial use, and providing a map showing the points of diversion and places of historical use. The State Engineer takes this information and must perform a field inspection of the claim and prepare a report. Although the State Engineer's acceptance of the filing and his inspection do not adjudicate the existence of a diligence right, this makes the diligence right of record.

Certificated Appropriations: As stated above, in 1903, (1935 for groundwater), the Legislature codified the application procedure, mandating applications with the State Engineer

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as the *sole* procedure for acquiring a water right in Utah.[10] A certificate is granted by the State Engineer after his approval of the application and perfection of the right by actual diversion and application to a beneficial use. A certificate of appropriation is the appropriator's deed of title, good against the state and anyone else who cannot show a superior right.[11]

Simply filing an application to appropriate, however, does not give the applicant the right to use the water applied for. Approval of the application only gives the applicant the right to perfect by actual diversion of the water and beneficial use.[12] Thus, until approval by the State Engineer and perfection by construction of the diversion works, diversion and application of the water to a beneficial use and the subsequent submission of proofs, the right is "inchoate."[13]

Mutual Water Company Shares: A mutual water company is a legal personality that holds legal title to water rights. The Utah Supreme Court recently held that "stock in a mutual irrigation corporation represents an interest in real property, ..."[14] Share ownership in the water company represents the right to use a proportionate share of the water the company diverts, and carries with it the obligation to pay a share of the company's expenses. The individual shareholders hold the beneficial ownership of the water rights and have the right to use their aliquot share of the water.[15]

"The rules governing the construction of deeds generally apply to instruments conveying water rights."

Contract Rights: Many water users depend on water supply pursuant to contract. In most cases, the suppliers are public or quasi-public agencies operating pursuant to federal or state statutes. These suppliers hold appropriative rights allowing diversion of water that is subsequently supplied to users. In general terms, the terms of the contract define the users' rights. State, and even federal, law may apply in some such circumstances.

Transfer of Water Rights

A. Transfer of Diligence Claims and Certificated Rights. Utah Code section 73-1-10 provides that water rights may be transferred "by deed in substantially the same manner as real estate, ..." Water rights can be severed from the land on which they were historically used and can be transferred independently of the land, or reserved to the grantor.[16] Further, transfers of water rights are subject to the Statute of Frauds.[17]

The rules governing the construction of deeds generally apply to instruments conveying water rights.[18] Warranty deeds should not be used to convey water rights, or water rights that are appurtenant to land being conveyed by warranty deed. Unlike other property rights, water rights must be used to persist. They can be forfeited if unused for five successive years.[19] Water rights should be conveyed by separate instrument, without warranties. A deed of water rights should refer to the pertinent certificate number, diligence claim number, and change application number (if applicable). The water deed should also refer specifically to the nature and extent of use, the place of use and all diversion works and appurtenances, such as easements, wells and equipment, used in connection with the water right transferred.

Deeds of water rights must be recorded in the county where the water is used and, if different, the county where it is diverted.[20] Until this year, the law required the county recorder to send a certified copy of each such water rights deed to the State Engineer for filing;[21] this requirement, however, has been honored more in the breach than the observance. In apparent recognition of this fact, in 1999 the Legislature amended section 73-1-10(c),[22] loosening the requirement by requiring only that the county recorder forward a certified copy of a "deed or other conveyance which contains a reference to a water right number for a water right." Section 73-1-10(c)(iii) also empowers the State Engineer to "designate regional offices to receive copies of deeds or other conveyances transmitted pursuant to Subsection (1)(c)(i). A county recorder may not be required to transmit documents to more than one regional office." Obviously, this enactment has not moderated the perils of missing the recordation of a water conveyance.

Section 73-1-10(d) provides: "A recorded deed of a water right shall, from the time of its filing in the office of the county recorder constitute notice of its contents to subsequent purchasers, mortgagees, and lienholders."[23] Section 73-1-12 makes unrecorded deeds of water rights void as against subsequent purchasers only; the statute does *not* say that unrecorded deeds are void as against subsequent lienholders.

Inchoate water rights, that is appropriations applications that are unperfected, whether approved or unapproved, are "transferred or assigned by instruments in writing."[24]

Shares in a mutual water company are transferred "in accordance with the procedures applicable to securities set forth in Title 70A Chapter 8, Utah Uniform Commercial Code."[25] Section 70A-8-304 requires endorsement and delivery of the certificate to the purchaser in order to effect a transfer of a certificated security.

B. Water Rights as an Appurtenance to Land

Although water rights are separate from land and can be separately transferred and encumbered, they can be an appurtenance to property for which they are acquired or on which the water has historically been used, and as such they may pass with the land. By statute, water rights are presumed appurtenant so that they pass to the grantee of land, unless specifically reserved.[26]

The case law provides, generally, that water becomes appurtenant to land where it was historically used for a beneficial purpose at the time of the conveyance and previously.[27] For example, where certain water rights have historically been used to irrigate agricultural land and are necessary to its use and enjoyment, they will be considered appurtenant and, under section 73-1-11, will pass to the grantee, unless expressly reserved to the grantor.

One exception exists, however, again in the case of water shares. There is a rebuttable presumption that mutual water company shares are *not* appurtenant.[28] The presumption may be rebutted by a clear and convincing showing that the water represented by the water company share was appurtenant and that the grantor intended to convey it with the land. Unless this showing is made, however, the grant of land will not convey with it the implied grant of water rights in the form of water shares.[29] For example, in *Brimm v. Cache Valley Banking Company*,[30] the water stock in question had been used to irrigate the land for sixty years and the land was worthless without the water represented by the stock. The Utah Supreme Court found that this was sufficient to overcome the presumption that water shares did not pass to the grantee.

"[W]ater rights evidenced by shares of stock are not deemed appurtenant to the land. . . ."

The idea of appurtenance is related to the concept of beneficial use.[31] The grantee is entitled to the amount of appurtenant water actually being used on the land by the grantor at the time of the transfer and for a reasonable time thereafter.[32] Conversely, unless expressly reserved by the grantor, a vested water right is appurtenant to the land only to the extent it is used to benefit the land at the time of the conveyance.[33]

But, not all of what are commonly thought of as "water rights" pass as an appurtenance. The Utah Supreme Court's decision in *Little v. Greene & Weed Investment Company*,[34] surprised many water law practitioners. In that case, the Supreme Court held that a water right does not become appurtenant to land until the State Engineer issues a certificate of appropriation. The Court reasoned that two elements are necessary under the statute for a water right to become appurtenant to land. First, the water must be diverted and put to a beneficial use on the specific parcel of land. Second, all of the procedural steps required by the statute for appropriation must be completed, including the issuance of a certificate of appropriation. Thus, unperfected applications, that is, those that were still in the application process and not evidenced by a final certificate, could not be appurtenant to land. Accordingly, in that case the Supreme Court held that a grant of land and appurtenances was not effective to convey to the grantee an uncertificated appropriation application.[35]

In 1998, the Legislature amended Utah Code section 73-1-11 to provide that in any land conveyance document executed on or after May 4, 1998, not only certificated water rights, but also water rights in the form of court decrees, diligence claims, and approved but unperfected applications for appropriations, permit changes and exchanges, pass as appurtenances to the grantee. In other words, after May 4, 1998, such uncertificated and unperfected water rights were also passed to the grantee under a "silent" advance.

Section 73-1-11 also gives some guidance on the definition of appurtenance and clarifies a number of open questions concerning conveyance of water rights and water shares. For example, the statute provides that as to land conveyances executed before May 4, 1998:

> If the water right has been exercised in irrigating different parcels of land at different times, it shall pass to the grantee of a parcel of land on which the water right was exercised the next preceding the time the land conveyance was executed.[36]

The new version of the statute reiterates earlier law that water rights evidenced by shares of stock are not deemed appurtenant to the land, but provides that in any conveyance, the grantee assumes the obligation for any unpaid assessment on the shares.

Further, the new version of section 73-1-11 specifically defines that for purposes of land conveyances made on or after May 4, 1998, a water right evidenced by (1) a court decree; (2) a certificate of appropriation; (3) a diligence claim; (4) a water user's claim executed in a general determination of water rights; (5) an approval of an application to appropriate; (6) an approval of an application to permanently change the place of use of water; or, an approval of an exchange application issued

under section 73-3-20, *is appurtenant to land*. Accordingly, the statute implies that unperfected applications, such as unapproved applications to appropriate, change applications, or exchange applications, *do not* pass as an appurtenance to the land and must be expressly assigned to the grantee.

This new statute also clarifies, at least for conveyances executed on or after May 4, 1998, what happens when the grantor conveys only a part of a water right in a conveyance of land. In that case, the portion of the water right not conveyed is presumed to be reserved to the grantor.[37] If the land conveyed "constitutes only a portion of the authorized place of use for the water right, the amount of the appurtenant water right that passes to the grantee shall be proportionate to the conveyed portion of the authorized place of use."[38] Finally, for purposes of land conveyances only, and only for those executed on or after May 4, 1998, a water right is appurtenant to land that is the authorized place of use of the water as described in a court decree, a certificate of appropriation, a diligence claim, a water user's claim, or an approved appropriation application, change application, or exchange application.[39]

Even if appurtenant, water rights can be severed from the land and either reserved or conveyed separately by the grantor. Whether a water right is actually appurtenant is a question of fact, peculiar to the facts of each case.[40]

"It is of paramount concern that if water shares are to be transferred along with land, that the deeds so recite, and that the share certificate be endorsed and delivered when closing the transaction."

It is of paramount concern that if water shares are to be transferred along with land, that the deeds so recite, and that the share certificate be endorsed and delivered when closing the transaction.

Creating Security Interests in Water Rights

Generally, security interests in water rights are created and perfected in the same manner as mortgages in land. A mortgage of land encumbers all appurtenant water rights, as well.[41]

The exception to this general rule is with shares in a mutual water company, the ostensible reason being that water shares are not necessarily tied to specific land, but represent the right to use water within an area served by the company's distribution system. The issue of collateralization of water shares was brought into sharp focus in 1989, when the Utah Court of Appeals decided the case of *Associates Financial Services Company of Utah v. Sevy*.[42] There, the sellers sold land and water rights in the form of water stock, and took back a trust deed covering both the land and the shares. But, the stock was certificated in the buyers' name and the buyer later pledged them to a creditor who took actual possession of the stock certificates.

As between the seller (who took a trust deed on the land), and the buyers' pledgee (who took actual possession of the share certificates), the Court of Appeals held for the pledgee of the stock, reasoning that shares in a mutual water company fell within the definition of a "security" which is, in turn, an "instrument" within the meaning of section 70A-8-102(1)(a). Under Article 9, chapter 8 of the Utah Uniform Commercial Code, a "security" is an instrument

> (i) . . . issued in bearer or registered form; and (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in a medium for investment; and (iii) is either one of a class or a series or by its terms is divisible into a class or series of instruments; and (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.[43]

Since the shares were certificated securities, the only way a security interest could be perfected in them was by physical possession of the certificates themselves, and the Court of Appeals held for the pledgee of the stock.

In its 1994 decision in *Salt Lake City Corporation v. Cahoon & Maxfield Irrigation Company*,[44] the Utah Supreme Court expressly rejected the Court of Appeals's holding in *Associates Financial Services v. Sevy*,[45] and observed:

> Stock of a mutual irrigation corporation is different from, and should not be treated like, stock of other types of corporations. Instead, such stock is more akin to a contract between the shareholders for the pooling and distribution of water.
>
> * * *
>
> Accordingly, we hold that stock in a mutual irrigation corporation represents an interest in real property and is therefore not a certificated security under Section 70A-8-102(1)(a).46

The Supreme Court rejected as "faulty"[47] the notion that shares in a mutual water company qualify as a "medium for investment,"observing that such entities are organized primarily as a vehicle to allocate water contributed by the shareholders, and

[19]UTAH CODE ANN. § 73-1-4.

[20]UTAH CODE ANN. § 73-1-10(1)(b).

[21]UTAH CODE ANN. § 73-1-10(1)(c).

[22]S.B. 154, 1999 General Session.

[23]UTAH CODE ANN. § 73-1-10(1)(d).

[24]UTAH CODE ANN. § 73-3-18; *Loosle v. First Fed. Sav. & Loan Ass'n*, 858 P.2d 999, 1003 (Utah 1993).

[25]UTAH CODE ANN. § 73-1-10(2).

[26]"[W]ater appurtenant to land shall pass to the grantee of such land . . . ." UTAH CODE ANN. § 73-1-11.

[27]*Roberts v. Roberts*, 584 P.2d 378, 379-80 (Utah 1978); *Stephens v. Burton*, 546 P.2d 240 (Utah 1976); *Conant v. Deep Creek & Curlew Valley Irrigation Co.*, 66 Pac. 188, 189 (Utah 1901).

[28]UTAH CODE ANN. § 73-1-11(4).

[29]*Brimm v. Cache Valley Banking Co.*, 269 P.2d 259, 864 (Utah 1954).

[30]269 P.2d 259, 864 (Utah 1954).

[31]"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." UTAH CODE ANN. § 73-1-3.

[32]*Stephens v. Burton*, 546 P.2d 240, 242 (Utah 1976).

[33]*Little v. Greene & Weed Inv. Co.*, 839 P.2d 791, 792 (Utah 1992).

[34]839 P.2d 791 (Utah 1992).

[35]*Id.* at 796.

[36]UTAH CODE ANN. § 73-1-11(2)(a).

[37]UTAH CODE ANN. § 73-1-11(5)(d).

[38]UTAH CODE ANN. § 73-1-11(5)(e).

[39]UTAH CODE ANN. § 73-1-11(5)(c).

[40]*Cortella v. Salt Lake City*, 72 P.2d 630, 641 (Utah 1937).

[41]*Thompson v. McKinney*, 63 P.2d 1056, 1058 (Utah 1937).

[42]776 P.2d 650 (Utah Ct. App. 1989).

[43]*Id.* at 652.

[44]879 P.2d 248 (Utah 1994).

[45]776 P.2d 650 (Utah Ct. App. 1989).

[46]*Id.* at 252.

[47]*Id.* at 251.

[48]*Id.* at 252.

[49]U.S. Code, Title 11.

[50]11 U.S.C. § 544(a).

[51]*In re Richardson*, 23 BR 434, 439-40 (Bankr. D. Utah 1982).

[52]*In re First Capital Mortgage Loan Corp.*, 60 B.R. 915, 916-17 (Bankr. D. Utah 1986).

[53]*Matter of Raceway, Inc.*, 113 B.R. 527, 529 (Bankr D. Iowa 1990).

[54]UTAH CODE ANN. § 57-3-103.

Commission Meeting Highlights

During its regularly scheduled meeting of October 29, 1999, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. After review and discussion, the minutes were tabled to allow for further discussion of provisions relating to the "and Justice for all" contribution.
2. Charles R. Brown presented Judge Sam the "Judge of the Year" award.
3. John Lund, Chairman of the Courts and Judges Committee, gave a report on the Matheson Courthouse, addressing issues and concerns that people are having with the facility.
4. The Commission met with the Supreme Court Justices, to review Bar finances, Office of Professional Conduct Funding and Lawyers Helping Lawyers.
5. The Commission reviewed the status of Professionalism Initiatives.
6. Honorable Tyrone Medley, Charlotte Miller, and Jennifer Yim appeared on behalf of the Task Force on Racial and Ethnic Fairness in the Justice System, and gave a short history of the task force.
7. Gary Sackett addressed the Commission and reviewed Opinion No. 99-03R, giving background and current status. The Opinion was approved in May 1998 and had been reconsidered at the request of several groups. The Opinion was approved but stated that commentary was to come from the Commission to modify the Opinion to address 4.2A..

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

Notice of Petition for Reinstatement

On October 26, 1999, Rex B. Bushman filed a Petition for Reinstatement and Motion for Abatement of Six Months Probation, Civil Number 980910814, the Honorable Anne M. Stirba, Third Judicial District Court, presiding. Pursuant to Rule 25 (Reinstatement Following a Suspension of More Than Six Months; Readmission) of the Rules of Lawyer Discipline and Disability, the Office of Professional Conduct hereby gives notice of the Petition. Any individuals wishing to express opposition to or concurrence with the Petition should file notice of their opposition or concurrence with the District Court within thirty days of the date of this publication.

On October 28, 1998 pursuant to a Stipulation for Discipline by Consent Judge Stirba entered an Order of Discipline Suspension and Probation against Rex B. Bushman, a Salt Lake City attorney. Mr. Bushman was ordered suspended for twelve months. The suspension was stayed and Mr. Bushman was ordered to be on supervised probation for twenty-four months.

Task Force Wants Your Input

A task force appointed by the Utah Supreme Court is studying whether there should be changes in the way the Bar Commission is apportioned and how the Bar president is selected. The task force is interested in your comments and suggestions. Please send them to the task force chair, Stephen B. Nebeker, at Ray, Quinney & Nebeker, 79 South Main, Suite 500, Salt Lake City, UT 84111, before December 23, 1999.

Annual Lawyers, Employees & Court Personnel Food & Winter Clothing Drive for the Homeless

Please mark your calendars for this annual drive to assist the homeless. Once again, local shelters have indicated shortages in many food and clothing items. Your donations will be very much appreciated in alleviating these conditions. Even a small donation of $5 can provide a crate of oranges or a bushel of apples.

Drop Date: December 17, 1999–7:30a.m. to 5:30p.m.
Place: Utah Law & Justice Center–Rear Dock
645 South 200 East, Salt Lake City, UT 84111
Selected Shelters: Traveler's Aid Shelter School (Treshow School); The Rescue Mission; South Valley Sanctuary; Women & Children in Jeopardy Program

Volunteers are needed who would be willing to donate a few hours of their time to take the responsibility of reminding members of their firms of the drop date and to pass out literature at their firms regarding the drive.

For more information and details on this drive, watch for the flyer or you can call Leonard Burningham or Sheryl Ross at 363-7411 or Toby Brown at 297-7027.

When you feel you are having a tough time, just look around you; we have it pretty good when compared with so many others, especially the children.

Please share your good fortune with those who are less fortunate.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has produced a compendium of ethics opinions that is now available to members of the Bar in hard copy format for the cost of $20.00, or free of charge off the Bar's website www.utahbar.org under member benefits and services. 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 the current calendar year.

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Membership Corner

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

- **You must provide a street address for your business and a street address for your residence.**
- **The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.**
- **If your residence is your place of business it is public information as your place of business.**
- **You may designate either your business, residence, or a post office box for mailing purposes.**

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All changes must be made in writing. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834: Attention: Arnold Birrell, Fax Number (801) 531-0660.

Trial Academy 2000

Presented By:

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of the Utah State Bar

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Part I	January 19, 2000 Jury Selection
Part II	March 29, 20000 Opening Statements
Part III	May 31, 2000 Depositions & Examination
Part IV	July 26, 2000 Expert Witnesses
Part V	September 27, 2000 Exhibits, Instructions & Other Things
Part VI	November 29, 2000 Summation, Trial Motions & Special Verdicts

Trial Academy 2000

This popular biennial program is a useful introduction to the mysteries of trial practice. The focus is on practical hands-on information and to give the answers that cannot be found in the books.

Using extensive written materials, computer-generated visuals, and a combination of lecture and demonstrations, teams of experienced local practitioners and judges will show you how trial practice should be done.

Faculty for previous years has included Richard D. Burbidge, Francis J. Carney, Thomas R. Karrenberg, Ross C. Anderson, Daniel L. Berman, David J. Jordan, Alan L. Sullivan, Judge Pat B. Brian (Third District), Judge Robert K. Hilder (Third District), Judge Tena Campbell (U.S. District Court of the District of Utah), Judge Michael R. Murphy (Tenth Circuit Court of Appeals), and many others.

This six part series is a "must" event that should not be missed by any lawyer who has that "first trial" coming up or for the lawyer who just wants to hear about the latest and best litigation techniques.

Attendees describe the Trial Academy as:

- "very beneficial"
- "a useful CLE"
- "I wish I hadn't missed the other parts"
- "the presenters were FANTASTIC"
- "the best run seminar I have attended"

Part I – January 19th:
Jury Selection

A live jury panel will be seated and a trial jury selected. Learn the mechanics of jury selection; the basis for cause challenges; the tactics of peremptory challenges; the use of jury questionnaires; the limitations of court-conducted voir dire; the use of supplemental attorney voir dire; the proper use of in-chambers conferences; the differences in procedures among the state and federal courts; and other jury selection techniques.

Part II – March 29th:
Opening Statements

All aspects of the opening statement will be addressed. Some of the topics will be: The importance of the opening statement; a judicial perspective on effective openings; wasting or winning the opening; objectionable arguments; effective opening vs. overkill; dealing with the negatives of your case; courtroom positioning; do's and don'ts for openings; and power language and weasel words.

Part III – May 31st:
Depositions & Examination

The pretrial deposition process. Topics will include: Deposition strategies; effective use of depositions at trial; witness control and over-control; the evidence foundations that you must know; the "rules" of cross examination; impeachment on inconsistent statements; pretrial tactics to minimize evidence problems; cross examining the hostile witness; handling the fragile witness; why "cross" examination isn't "angry" examination; and much more.

Part IV – July 26th: *Expert Witnesses*

The issues and problems with the ubiquitous expert witness. Topics will include: Making the direct examination of experts interesting; cross examination of experts; motions in limine; effective trial notebooks; understanding *Daubert, Kohmo* and *Rimmasch;* qualifying the expert witness; federal and state civil and evidence rules on experts; using authoritative literature on examination; and more.

Part V – September 27th: *Exhibits, Instructions and Other Things*

The use of exhibits and the basics of jury instructions. Topics will include: Getting exhibits into evidence (without fumbling); the most-commonly needed foundations; use of overheads, blowups, and the like; the rules on demonstrative evidence; making it easier with pretrial stipulations; why instructions really matter; the "gotchas" on instructions that you must know; and using your instructions to build a closing argument.

Part VI – November 29th: *Summation, Trial Motions and Special Verdicts*

Closing argument and motions. Topics will include: The basics of effective closing argument; the traps in MUJI special verdict forms; the trial motions you may make and those you must make; demonstration of differing styles in summation; post-trial motions that might save your case; what to do if the jury comes in against you; and objectionable closing argument.

Registration

☐ Six Part Series – Young Lawyers	$150.00
☐ Six Part Series – Litigation Member	$200.00
☐ Six Part Series – Non Litigation Member	$250.00

Individually – $30 YLD; $40 Litigation Section and $50 Others

☐ Part I: Jury Selection	$30/40/50
☐ Part II: Opening Statements	$30/40/50
☐ Part III: Depositions & Examination	$30/40/50
☐ Part IV: Expert Witnesses	$30/40/50
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☐ Part VI: Summation, Trial Motions & Special Verdicts	$30/40/50

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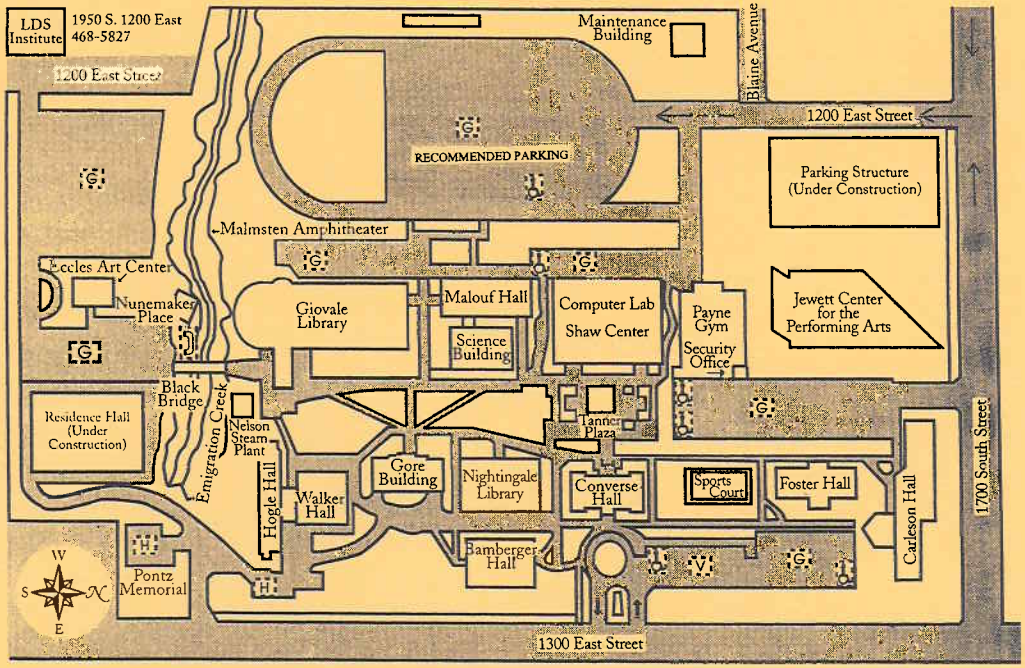

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G: General Parking
H: Reserved Parking for Hogle Hall Residents
E: Emergency Phone
H: Handicapped Only
V: Visitors Only (Northeast of Converse Hall)

1/98

New Jersey Rejects Legal Assistant Licensing Recommendations

submitted by Marilu Peterson, CLA-S

The issue of licensing legal assistants is a subject being reviewed nationwide, and has been the subject of the work of a variety of committees and organizations in Utah, including the Utah Supreme Court, the Board of Bar Commissioners, the Legal Assistants Association of Utah, and the Legal Assistant Division of the Utah State Bar. The most prominent of these was the Access to Justice Task Force created by the Utah Supreme Court. The final Task Force Report submitted in late 1997 included the recommendation that legal assistants be trained to meet the need for legal services among the low-income population. At the suggestion of the Board of Bar Commissioners, the Legal Assistant Division, with significant input from the Legal Assistants Association of Utah, developed a brief licensing model and presented it to the Commission in April 1998. (The Legal Assistants Association of Utah and the Legal Assistant Division of the Utah State Bar did not then and do not now support licensing of legal assistants.) The proposed model is still under study. The current leadership of the Board of Bar Commissioners has determined that licensing and regulating legal assistants and protection of the public interest is a complex issue requiring additional development and consideration.

The following is the determination made by the New Jersey Supreme Court in response to the recommendations of its Committee on Paralegal Education and Regulation. We believe it will interest lawyers and legal assistants alike.

SUPREME COURT OF NEW JERSEY
ADMINISTRATIVE DETERMINATIONS
REPORT OF THE COMMITTEE ON PARALEGAL EDUCATION AND REGULATION

As part of the decision of *In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law*, 128 NJ 114 (1992) the Supreme Court established a committee "to study the practice of paralegals and make recommendations" to the Court. 128 NJ at 135. The Committee on Paralegal Education and Regulation met for the first time in June of 1993. After extensive investigation and discussions, the Committee filed its report with the Court in June of 1998. In July, the Court released the report to the public and invited comments. Interested parties who responded included members of the public, legislators, attorneys, paralegals, and professional associations. Due to the high level of interest in the subject, the comment period was expanded from October 1998 to January 1999.

The Court has received and reviewed the Committee's report and comments it generated. Nine summary statements described the crux of the Committee's recommendations. The Court's administrative determinations follow the Committee's framework.

Preliminarily, the Court wishes to thank the Committee for its thoughtful and thorough analysis and insights. More than 100 comments to the Committee's report were received. Those commenting included bar associations, paralegal associations and organizations, educational institutions, law firms, sole practitioners, paralegals, legislators, and other professional organizations. Numerous responses were also received from students, recent graduates, and faculty of various paralegal programs. The diversity of opinions articulated in the comments demonstrated that the Committee's report had identified and addressed important and complex issues. Although the Court has elected to take a different approach than that of the Committee, the scope and detail of the Committee's work and the comments it generated have been of great value in the Court's deliberative process.

I. Goals and Direction.

[Committee] Recommendation 1. *Paralegals in New Jersey should function under the governance and direction of the Supreme Court.*

The Court remains of the view that many of the tasks conducted by paralegals involve the practice of law. Those tasks, therefore, properly come within the scope of the Court's constitutional authority over the practice of law in New Jersey.

[Committee] Recommendation 2. *The Supreme Court pursuant to its constitutional authority over the practice of law*

should establish a regulatory scheme to govern the practice of paralegals.

The Committee recommended that the Court establish a licensing system for all paralegals. Recognizing that paralegals have come to their positions through various educational and experiential routes, the Committee recommended that a multi-tiered licensing system be created. Plenary licensure would be available to those who completed an American Bar Association-approved paralegal program and restricted licensure would be available for paralegals trained in law firms. A "grandfather" clause was also included in the recommendation.

Some paralegals and paralegal associations endorsed the Committee's recommendations as enhancing the professionalism of the profession and the degree of respect accorded to paralegals. Other paralegal organizations, the American Bar Association, and the New Jersey State Bar Association viewed the regulatory proposal as unnecessary. The ABA noted that its review of paralegal educational programs was not intended to serve as a formal accreditation service. The NJSBA urged the Court to forego establishing a regulatory system within the Judiciary. In lieu thereof, the Association urged that the Court focus on the responsibility of lawyers to oversee the work of paralegals.

In reviewing the Committee's discussion of this recommendation and the concerns it generated, the Court accepted the underlying premise; that is, that its regulation of paralegals should be conducted in a form that best serves the needs of the public, the bar, and the Judiciary. Pending future evaluations of the profession, the Court has concluded that direct oversight of paralegals is best accomplished through attorney supervision rather than through a Court-directed licensing system. As noted below, the Court agrees that the obligations attorneys have as paralegal supervisors need to be set forth in greater detail.

[Committee] Recommendation 3: *Persons who seek to be practicing paralegals in New Jersey should be required to demonstrate compliance with minimum hour and course content requirements of paralegal programs offered by American Bar Association-approved paralegal educational programs.*

Although the Court would encourage those who seek to become paralegals to engage in a broad-based educational program such as that recommended by the American Bar Association, it recognizes that there are many paths available to develop the skills necessary to perform with competence as a paralegal. The paralegal community and organized bar should work together to identify and promote educational programs that will enhance the performance of current and future paralegals.

II. Standards for Paralegals.

[Committee] Recommendation 4: *The rules proposed by the Committee for licensing the practice of paralegals in New Jersey should be adopted by the Supreme Court.*

Because the Court views the supervision of paralegals as the responsibility of attorneys, it has declined to adopt this Recommendation, which proposed specific Rule amendments for a Court directed licensing system.

[Committee] Recommendation 5: *The within Code of Professional Conduct for paralegals should be adopted by the Supreme Court to be administered by the Committee and others in conjunction with the proposed regulatory scheme.*

The Court supports in principle the creation and adoption of a Code of Professional Conduct for Paralegals. The Court prefers, however, that the Code be adopted through the efforts of paralegals and attorneys and their respective associations. Such a Code would be akin to the Code of Professionalism for Attorneys. The Committee's proposed Code can be used as a starting point for the consideration of this issue. To that end, the Court is referring to the issue of a Code of Professional Conduct to the New Jersey State Bar Association with a request that the NJSBA work with paralegal associations and organizations to recast the Code. It is anticipated that the results would take form as specific guidelines for paralegals and attorneys who are responsible for their conduct.

III. Ethics and Performance Standards for Lawyers.

[Committee] Recommendation 6: *The Supreme Court should modify The Rules of Professional Conduct as recommended {by the Committee} to incorporate ethics and performance standards governing New Jersey lawyers in using the services of paralegals.*

The Court agrees that that the Rules of Professional Conduct should be modified to describe more comprehensively the obligations imposed on attorneys by their use of paralegals. The supervision attorneys must provide for both employee-paralegals and independent contractors must be detailed in the RPCs. The Committee's Standards and proposed amendments to the Rules of Professional Conduct are being referred to the Court's Professional Responsibility Rules Committee {PRRC} for its consideration and report. When preparing amendments to the RPCs that are consistent with the Court's disposition of the Committee's recommendation, the PRRC should invite the participation of representatives from the Committee on Paralegal Education and Regulation, the New Jersey State Bar Association, and paralegal associations and organizations.

IV. Organization and Management.

[Committee] Recommendation 7: *The Standing Committee on Paralegal Education and Regulation should be continued and reconstituted. The Committee should be charged with responsibility of developing and addressing standards and rules governing paralegals in conformity with this report and subject to the Supreme Court's approval.*

[Committee] Recommendation 8: *Operating standards, guidelines and rules should be developed and administered by the Committee subject to the Supreme Court's approval.*

[Committee] Recommendation 9: *An administrative office should be established and charged with the operational responsibility for licensing individuals as paralegals pursuant to the rules governing licensure and conduct of paralegals subject to the Committee's direction and the Supreme Court's oversight.*

In light of its determination not to create a Court-directed paralegal licensing and regulation system, the Court has declined to adopt the foregoing recommendations. The Court would, however, encourage the consideration of these proposals as part of the development of an appropriate credentialing system by paralegals, attorneys, and their respective professional associations. Although such a system would not include Supreme Court certification of paralegals, it would provide a means of recognizing qualified paralegals. That recognition would inure to the benefit of both the certified paralegals in the attorneys who would be seeking their services. The Court encourages the paralegal associations and organizations to work on this issue with the New Jersey State Bar Association and other interested entities.

Conclusion

The Court has concluded that paralegal oversight is best conducted by the supervising attorneys who are responsible for all legal work done by paralegals. That responsibility applies whether the paralegals are employees or independent contractors. To implement that determination, the Court is directing the Professional Responsibility Rules Committee to prepare amendments to the Rules of Professional Conduct that will denominate, in greater detail, the obligations of supervising attorneys.

Finally, the Court wishes to thank again all the members of the Committee–with particular thanks to its Chair, Appellate Division Judge Howard Kestin–for their willingness to undertake this difficult and complex assignment. The Court's consideration of the issues was significantly aided by the care with which the Committee presented its views and recommendations.

Daniel M. Torrence

FIRST AMENDMENT/CRIMINAL LAW

Salt Lake City v. Wood, Court of Appeals Case No. 981670-CA; 1999 UT App. 323.

Attorneys: W. Andrew McCullough for Jennifer Wood; Don M. Wrye for Salt Lake City.

Jennifer Wood, then eighteen, was cited for dancing on stage without a license at "Runway 69," a Salt Lake City bar. Salt Lake City Code 5.28.030 requires dancers and other performers in businesses selling alcohol to have a license and be at least twenty-one, among other requirements.

At trial, Wood moved to dismiss on the grounds that the ordinance was void for vagueness, overbroad, and violates her freedom of expression under both the federal and Utah constitutions. Third District Judge William Barrett denied the motion to dismiss, held a bench trial, and found her guilty.

On appeal, she first argued that the license requirement cannot be justified as a regulation of alcoholic beverages under the Twenty-First Amendment to the United States Constitution. The Court held that, provided the City's exercise of the Twenty-First Amendment does not unduly interfere with First Amendment rights, it will be valid. Here, citing the public's interest in regulating alcohol and preventing the employment of minors as nude dancers, the license requirement is valid.

Wood also made First Amendment arguments. The Court held that because the ordinance in this case is not aimed at the content of the expression, the intermediate scrutiny test, found in *United States v. O'Brien*, is used. Under *O'Brien*, a regulation is valid (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if it is unrelated to the suppression of free expression; and (4) if the restriction on First Amendment freedoms is no greater than is essential.

The Court of Appeals found the *O'Brien* factors satisfied, ruling that (a) "protecting societal order and morality" is a substantial governmental interest, (b) the license requirement does not prohibit expression, nor does it dictate or interfere with the content of the dance, and (c) the requirement is neither difficult to comply with nor unduly restrictive of expression. In short, it is "the bare minimum" necessary to achieve the City's avowed purpose of combating "prostitution, bar fights, and public intoxication."

Judge Billings, although concurring, was troubled by the law's broad grant of discretion and lack of specific standards. For example, the ordinance requires that the City license supervisor pass the application along to the police department which in turn investigates the applicant's "character and background" and give the City its opinion whether a license should be granted. These provisions make the ordinance an unconstitutional "prior restraint," but the issue was not raised by appellant.

In dissent, Judge Orme argues that Woods raised all appropriate constitutional arguments in her appeal and "was convicted under an ordinance that is obviously unconstitutional, no matter how you slice and dice it." He argues that for people under twenty-one, the ordinance goes far beyond establishing a simple licensing requirement and instead prohibits any expression that constitutes "entertainment" in restaurants and other venues serving alcohol where minors are otherwise permitted to enter. This includes all restaurants and sports stadiums where beer is sold.

Thus, it is illegal for junior drill team members to perform at half-time shows at the Delta Center during a Jazz or Starzz game. Similarly, twenty year old ballerinas from Ballet West cannot legally perform Swan Lake at the Salt Lake Country Club, high school students from Holy Trinity Greek Orthodox Church may not perform traditional Greek dances at the Grecian Garden Restaurant, and nineteen year old student folk dancers from BYU may not perform a square dance at Diamond Lil's Steakhouse. The law is thus obviously unconstitutional on its face.

EXTRADITION/CRIMINAL LAW

Boudreaux v. State, Court of Appeals Case No. 981787-CA 1999 UT App 310.

Attorneys: Andrew B. Berry, Jr. for Boudreaux; Jan Graham and Mark E. Burns for State of Utah.

This was Kentucky's third attempt to extradite Larry Joe Boudreaux for failing to pay child support for his daughter, a Kentucky

resident. Sixth District Judge David Mower denied Boudreaux's petition for a writ of habeas corpus and Boudreaux appealed.

Boudreaux argued (1) he should have been allowed to present evidence of his alleged innocence of the Kentucky charges at the hearing on his habeas corpus petition; (2) the two prior habeas proceedings, which were dismissed with prejudice, are *res judicata* and thus bar this extradition attempt; (3) that he paid child support, and that Utah–not Kentucky–has jurisdiction over the dispute about child support; (4) his due process rights have been violated by the proceedings in Kentucky and Utah; (5) the trial court erred in not releasing him from jail or permitting him to bail.

The United States Constitution does not explicitly authorize interstate extradition of nonfugitives. Instead, Utah has codified the Uniform Criminal Extradition Act (UCEA), which establishes uniform procedures for handling such extraditions and allows the governor to surrender a non-fugitive upon proper demand. In an issue of first impression, the Court of Appeals ruled that the case law which had developed in fugitive extradition law should also be applied to non-fugitives extradition cases.

First, the trial court was correct in refusing to allow Boudreaux to present his desired evidence at his habeas hearing. The scope of inquiry in a habeas corpus proceeding brought by a non-fugitive is limited to that allowed in fugitive extradition cases. The only properly considered facts in such a hearing (pursuant to *Michigan v. Doran*) are (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These were not in dispute.

Second, Boudreaux's *res judicata* argument fails because a different issue was decided in the two prior extradition hearings. Previously, the issue was whether Boudreaux should be extradited as a fugitive, whereas in this case, Kentucky sought Boudreaux's extradition as a non-fugitive.

Third, Boudreaux argued that Utah, not Kentucky, has jurisdiction over the civil collection of child support. Because Boudreaux was charged with criminal nonsupport under Kentucky law, however, the civil collection of child support is not at issue. The Court of Appeals thus rejected Boudreaux's jurisdiction argument.

Fourth, because Boudreaux does not contend that the state failed to comply with any of UCEA's procedural requirements, his due process rights were observed by Utah.

Fifth, Boudreaux was not entitled to bail. Because he was arrested pursuant to a governor's warrant, the trial court had discretion to deny bail if the demanding state had not provided for bail. Here, the Kentucky warrant had a no-bail provision. Although mindful that Boudreaux spent more than a year in jail pursuing his habeas petition, the Court noted that Boudreaux could have allowed himself to be extradited to Kentucky and there sought bail.

Accordingly, the Court affirmed the denial of Boudreaux's petition for writ of habeas corpus and ordered Boudreaux's immediate extradition to Kentucky.

DISCRIMINATION/LABOR

Hobbs v. Labor Commission, Labor Commission Appeals Board, and Delta Airlines, Inc., Court of Appeals Case No. 981742-CA; 1999 UT App 308.

Attorneys: Steven W. Dougherty and Shayne R. Kohler, for Hobbs; Alan Hennebold, for Labor Commission; Frederick R. Thaler and Janet Hugie Smith and Benjamin A. Stone (Atlanta) for Delta Airlines.

Max Hobbs was a baggage handler for Delta. His duties included operating "tugs," small tractors that pull baggage carts. He was diagnosed with bipolar disorder and had been accommodated shortly after being diagnosed. Later, on two different occasions when he was not on medication, he had two accidents while driving a tug. After being suspended, Hobbs reminded Delta of his disorder and again requested accommodation, such as being relieved of the duty to operate tugs until he could stabilize his condition with medication. Delta refused Hobbs's request for accommodation and fired him. Hobbs asserted that he was discriminated against based on his disability in violation of the Utah Antidiscrimination Act (UADA), found at Utah Code section 34A-5-101 *et seq.* Hobbs filed a charge of discrimination with the Utah Labor Commission (Commission). The Commission's Anti-Discrimination Division (UADD) found that Hobbs had established a prima facie case of discrimination, and ordered reinstatement.

Delta obtained review by an Administrative Law Judge (ALJ), arguing Hobbs's claim was preempted under the federal Airline Deregulation Act (ADA). After a hearing, the ALJ concluded 1) Hobbs had committed safety violations, 2) safety was related to services under the ADA, and 3) Hobbs's claim was therefore preempted under the ADA. The Appeals Board affirmed the dismissal.

The Court of Appeals noted that in employment discrimination matters, there is a specific multi-step process to establish and

defend a claim. The employee must first establish a prima facie case of discrimination. Then the burden shifts to the employer to put forth a legitimate, nondiscriminatory reason for the action taken. Finally, the burden shifts back to the employee to prove, by a preponderance of evidence, that the legitimate reasons offered were a pretext for discrimination.

Here, Hobbs established a prima facie case; Delta then put forth a legitimate reason for its action, asserting safety reasons. Under usual circumstances, Hobbs would have the opportunity to show this stated reason was a pretext. However, the ALJ accepted Delta's characterization of the facts and premised her decision on Delta's safety rationale; thus she based her legal conclusion of pre-emption on an impermissible foundation. Because the ALJ reached a pre-emption conclusion prematurely, the Appeals Board likewise erred in affirming.

The Court of Appeals therefore reversed and remanded to allow Hobbs an opportunity to prove his claim.

ADOPTION/VISITATION

L.S.C., v. Utah, Court of Appeals Case No. 981283-CA; 1999 UT App 315.

Attorneys: Kendall Peterson, Michael A. Stout, and Darwin H. Bingham for L.S.C., Jan Graham, John Peterson, and Carol L. Verdoia, for State of Utah; Martha Pierce and Kristin L. Fadel, Guardians Ad Litem for A.B., D.B., and S.S.

This case involves the adoption of three small children, A.B., D.B., and S.S. (the children). L.S.C. is their grandmother. The State sought to terminate the rights of the children's natural parents because of a long history of substance abuse. The juvenile court first awarded temporary custody and guardianship to the Division of Child and Family Services (DCFS). Later, the court awarded temporary custody and guardianship of the two older girls to L.S.C., and placed the newborn with the adoptive parents, who were cousins of the children. Later, the juvenile court terminated all rights of the natural parents.

The adoptive parents filed a petition to adopt all three children to which L.S.C. filed an objection, and responded with her own petition for adoption. The juvenile court held a combined hearing and (1) awarded custody to the adoptive parents; and (2) terminated L.S.C.'s visitation rights. L.S.C. appealed.

First , L.S.C. argued that she was entitled to a separate, full evidentiary hearing on her adoption petition. The Court of Appeals ruled that, in a consolidated adoption proceeding, the court may determine that one petition is the primary matter to be decided and hear that petition first. If that petition is granted, the adoption placement is concluded and there is no need to consider the second petition.

Second, L.S.C. argued that by giving her only fourteen days notice of the final adoption hearing, rather than thirty days notice, she was denied her right to due process. But pursuant to the Utah Code, L.S.C. does not fall within the class of persons who are entitled to receive thirty days notice under the statute.

Next, L.S.C. argued that the juvenile court erred in denying her visitation rights. The Court of Appeals affirmed the Juvenile Court's decision that termination of the natural parents' rights terminated the grandmother's rights as well. Utah law only allows for a petition for grandparent visitation in cases where the parent has died, divorced, or legally separated from his or her spouse. Because these circumstances are absent in this case, L.S.C. cannot bring a petition for grandparent visitation.

Thus, the Court of Appeals ruled that the juvenile court properly denied L.S.C.'s objection to the adoptive parents' adoption petition and her petition for grandparent visitation rights, and that visitation between L.S.C. and the children is now at the discretion of the adoptive parents.

The Court noted that Utah Code section 30-5-2 was amended in 1998, and now specifically provides that the termination of parental rights also terminates all rights of biological grandparents to petition for visitation.

CRIMINAL/ACCOMPLICE LIABILITY

Utah v. Chaney, Court of Appeals Case No. 981063-CA; 1999 UT App 309;

Attorneys: Randall K. Spencer and Margaret P. Lindsay for Chaney; Jan Graham, Laura B. Dupaix, and Craig L. Barlow for State of Utah.

When John Perry Chaney's daughter, A.C., was thirteen years old, he told her she was going to marry Donald Beaver, their landlord, as punishment for her "rebellious" behavior. After a week of instruction on "wifely duties," Chaney gave A.C. to Beaver in a "Patriarchal Marriage Contract." About a month later, Beaver began having intercourse with thirteen-year-old A.C. A few months later, A.C. left Beaver and visited Chaney, who had moved to Idaho. Despite learning that Beaver and A.C. were having sex, Chaney told A.C. that she needed to reconcile with Beaver. Chaney again gave A.C. to Beaver. Later, A.C. ran away again and returned to Chaney. Later, while in Louisiana, Chaney gave A.C. to another man, Wayne Brasda, as his "concubine." This was her punishment for stealing food. Brasda had sex once with A.C.

Soon after this, A.C. ran away again. In 1996, a hearing to extradite Chaney to Utah was held in Michigan. Chaney defended his actions, stating that he was A.C.'s "patriarch," and claimed that he had extracted a promise from both Beaver and A.C. before the marriage that they would not have sex before A.C. turned sixteen. At trial, the jury convicted Chaney on three counts of rape of a child as an accomplice; he appealed.

Chaney first argued that A.C. and Beaver were married at the time they had sexual intercourse and therefore he could not be an accomplice to rape. The Court of Appeals held that Utah Code section 30-1-2 reveals a legislative intent that marriages to children under the age of fourteen are void at the outset. Thus, the marriage was a legal nullity, and Chaney could be held liable as an accomplice to that act.

Chaney next argued that the evidence was insufficient to show he knew that Beaver intended to have sex with A.C. Reviewing the evidence in the light most favorable to the verdict of the jury, the Court found Chaney's acts were sufficient for the verdict. These included encouraging A.C. to reconcile with Beaver after learning they had sex and giving her a vibrator and copies of *The Kama Sutra* and *The Sensuous Woman*.

Chaney also argued that accomplice liability cannot attach because he was neither physically nor constructively present when Beaver raped A.C. The Court held that the accomplice liability statute, Utah Code section 76-2-202, does not require actual or constructive presence during the commission of the offense.

He also argued that his conduct was more specifically covered by the Utah statute criminalizing solemnization of illegal marriages. Because his conduct falls squarely under the crime of rape of a child as a party, however, he was not entitled to be charged merely with performing an illegal marriage. Instead, Chaney might have been charged under both statutes.

Chaney further argued that accomplice liability can attach only where the accomplice acts with specific intent and that the trial court improperly instructed the jury regarding this mens rea requirement. Regarding this, the Court concluded that criminal liability attaches to an accomplice who acts with the mental state required for commission of the offense. Thus, the jury could have found Chaney guilty of child rape if he: (1) with the mental state required for the commission of rape of a child, (2) solicited, requested, commanded, encouraged, or intentionally aided Beaver to rape a child. Because the child rape law, Utah Code section 76-5-402.1(1) specifies no mens rea for the sexual intercourse element, the mens rea is provided by section 76-2-102, which provides that intent, knowledge, or recklessness shall suffice when the definition of the offense does not specify a culpable mental state.

The Court of Appeals agreed with Chaney that the trial court erred in giving a jury instruction that failed to specify the culpable mental state required for soliciting, requesting, commanding, or encouraging. But this followed Chaney's rejection of the trial court's correct proposed instruction. Thus, Chaney invited the error complained of and cannot take advantage of the trial court's error in the instruction given.

Finally, the Court rejected Chaney's argument that the trial court erred in not admitting a certain affidavit by Beaver. The affidavit was undated, unpaginated, lacked a typical attestation at the end, did not say whether Beaver was making the statement from personal knowledge, and did not state that he had even read the document. Citing theses serious foundational problems, the Court concluded the document was properly excluded. The conviction was affirmed.

Utah Bar Foundation Elects Trustees and Officers

Randy L. Dryer, shareholder in the law firm of Parsons Behle & Latimer, was recently elected President of the Utah Bar Foundation Board of Trustees. Brian R. Florence, Ogden attorney, was elected Vice President, and the Honorable Pamela T. Greenwood, Utah Court of Appeals, was elected Secretary/Treasurer.

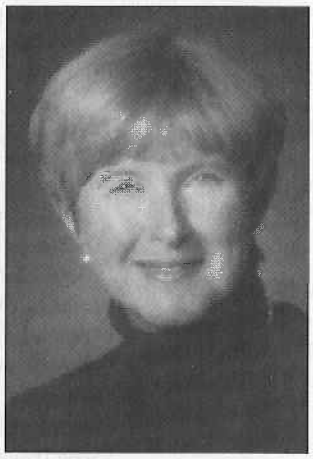
Three Utah State Bar members were elected to three-year terms as trustees of the Utah Bar Foundation by the Bar membership in May–Dennis V. Haslam, attorney for Larry H. Miller Sports & Entertainment, Charlotte L. Miller, attorney for IOMEGA Corporation, and Patricia M. Leith, attorney for the Huntsman Corporation.

The IOLTA program not only provides critical funding to agencies that provide legal services and education to those in need and lacking their own resources, but provides lawyers with a painless way to support that effort. Utah's Bar can be proud of its high level of participation in the IOLTA program.

Since 1985, the Utah Bar Foundation has distributed nearly $3 million to law-related programs that provide free or low cost legal aid, legal education, mediation, and other law-related services to the Utah community. The Foundation also provides annual ethics and community service scholarship awards to University of Utah and Brigham Young University law students.

Randy L. Dryer

Brian R. Florence



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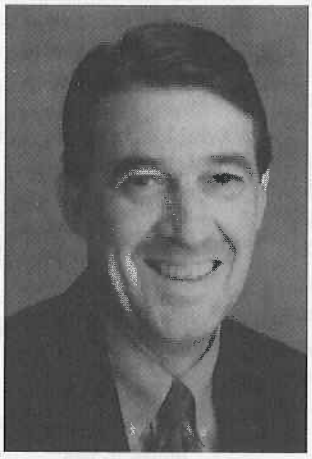

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This list reflects contributions received up to October 29, 1999. We apologize for any omissions or incorrect spellings.

CLE Calendar

DATES	TITLE	PLACE, TIME, CLE CREDIT, PRICE
12-7-99 thru 12-8-99	**"BEST OF" SERIES** **LIVE CREDIT**	Law & Justice Center **TUESDAY – 12-7-99** **Block "A" –** $40 Litigation Support 8:20 a.m. (2 hrs); Law & Technology: 10:00 a.m. (1 hr); Art of Cross Examination: 11:00 a.m. (1 hr NLCLE/CLE) **Block "B" –** $30 ADR Disclosure (ethics): 1:00 p.m. (1 hr); Interlocutory Appeals: 2:00 p.m. (1 hr) **WEDNESDAY – 12-8-99** **Block "C" –** $30 Contracts: 10:00 am. (1 hr); Y2K Litigation: 11:00 a.m. (1 hr) **Block "D" –** $30 Current Probate & Guardianship Update: 1:00 p.m. (1 hr); Utah State Bar Web Site as a Resource: 2:00 p.m. (1 hr) *NEW
12-10-99	**The Changing Face of Prison Litigation: Private Prisons & the Prison Litigation Reform Act**	Law & Justice Center; 8:30 a.m.-noon; 4 hrs. CLE; $50
12-10-99	**The Disciplinary Process: How It Works and How to Avoid It**	Law & Justice Center; 1:00-4:00 p.m.; 3 hrs Ethics; $40 ($30 for Litigation Section)
12-16-99	**Litigation Primer: Discovery**	Law & Justice Center; 5:30-8:30 p.m.; 3 hrs CLE/NLCLE; $30 YLD, $60 others
12-17-99	**Loan Documentation for Lawyers and Their Financial Institution Clients**	Law & Justice Center; 8:30 a.m.-4:15 p.m.; 7 hrs CLE; $130 before 12-10-99, $175 after

For current seminar information and registration, access our website at *www.utahbar.org/cle.*

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12-28-99	**Procrastinator Videos** **Professionally produced videos** **SELF-STUDY CREDIT (you ccan view up to 12 hours on video of the required 27 for CLE credit)**	**TUESDAY – 12-28-99; Law & Justice Center** **Block "A"** – $40 (4hrs) 8:00 a.m.-12:00 p.m. • Hot Tips from the Expert • Leases, Breaches & Damages: What you Don't Know and Were Afraid to Ask • Litigating the Small Case: How to Resolve a $100,000 Case . . . . **Block "B"** – $30 (3hrs ETHICS) 12:00 p.m.-3:00 p.m. • High Road v. Low Road: Professionalism on Trial **WEDNESDAY – 12-29-99** **Block "C"** – $45 (4.5 hrs) 8:30 a.m.-12:40 p.m. • Choice of the Entity Primer: Maximizing the Benefits of LLCs, LLP's • Corporation and Other "Pass Through" Entities • Scientific Fundamentals for Lawyers **Block "D"** – $40.00 (4 hrs) 1:00 p.m.-4:45 p.m. • 50 Ways to Improve Your Law Firm • What Every Lawyer Should Know About Business Valuations
12-29-99	**Young Lawyers Division Last Minute CLE**	Law & Justice Center; 5:00 - Introduction to Estate Planning (1 hr CLE/NLCLE); 6:00 - Estate Planning, Taxes and Beyond (1 hr CLE/NLCLE); 7:00 - TBA (1 hr CLE/NLCLE); $30 total
1-13-00	**Collections: You CAN Get Blood From a Turnip!**	Law & Justice Center: 5:30-8:30 p.m.; 3 hrs CLE/NLCLE; $40 YLD, $55 all others
1-19-00	**Trial Academy 2000: Part I Jury Selection**	Gore Auditorium, Westminster College: 6:00-8:00 p.m.; 2 hrs CLE/NLCLE; $40 Litigation Section Member, $30 YLD, $50 nonmember per seminar. **For six part series:** $200 Litigation Section Members, $150 YLD, $250 non member. (See insert in *Bar Journal)*
1-19-00	Legal Malpractice	Law & Justice Center: 9:00 a.m.-12:00 p.m.; 3 hrs ETHICS; $60

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**EXPLANATION OF TYPE OF ACTIVITY

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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).

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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.

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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).

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