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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: Coyote Natural Bridge, Grand Staircase, Escalante, Utah, by Michael S. Evans, Third District Court Commissioner. Taken with a Canon Rebel SX, using a polarizing filter.

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Letters Submission Guidelines:

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 or members of the Legal Assistants Division of the Bar who are interested in having photographs they have personally taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their print, transparency, or slide, along with a description of where the photograph was taken to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, 2890 East Cottonwood Parkway, Mail Stop 70, Salt Lake City, Utah 84121. Include a pre-addressed, stamped envelope for return of the photo and write your name and address on the back of the photo.

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.

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Submission of Articles for the Utah Bar Journal

The *Utah Bar Journal* encourages Bar members to submit articles for publication. The following are a few guidelines for preparing your submission.

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.

2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.

3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.

4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.

5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.

6. Citation Format: All citations should at least attempt to follow *The Bluebook* format.

7. Authors: Submit a sentence identifying your place of employment. Photographs are discouraged, but may be submitted and will be considered for use, depending on available space.

Show Me the Money!

by Scott Daniels

In the last month most of us have experienced one of the more painful interactions we have with the Utah State Bar – the payment of the annual licensing fees. There was a time when as a government employee or member of a large firm, I didn't really mind the fee, since I didn't pay it out of my pocket. But now as a sole practitioner, when I write the check, I feel the pain.

Each April the Bar Commission adopts a tentative budget which is made available to Bar members, or anyone else who asks. The Commission adopts a final budget in July after considering any comments or objections which may be made. Usually there are none.

Informally, however, several lawyers have asked me why the fees are so high and what the money goes for. These are certainly very legitimate questions.

In truth, our Bar fees are higher than average. At one time we were among the highest in the country. But as other states have increased their fees, and we haven't had a fee increase for ten years now, we have fallen into the "high average" category. It's a little hard to know exactly where we are in comparison to other states, because different bars have different structures and provide different services. For example, many states have voluntary bars but assess mandatory licensing fees to pay for admissions, registration and discipline. These are included in our bar fees, and comprise the majority of our expenditures.

The Bar fees are actually set by the Supreme Court, not by the Bar Association. Of course, the Court does this in response to a petition from the Bar, rather than acting sua sponte. The last fee increase occurred in 1990. In that year the Bar was in serious financial trouble. Although Bar dues had increased in small increments to offset inflation, expenditures had increased even more and expenses relating to the construction of the Law & Justice Center made it impossible to meet our obligations. As a result, the Bar Commission petitioned the Supreme Court to impose a far reaching set of management reforms and a substantial dues increase. The Bar Commission requested an increase from $225 to $350 per year to be implemented over the course of three years. The Court went even beyond the Commission's request and approved the entire dues increase in one year. Since then we have experienced a surplus of revenues over expenditures every year.

Licensing revenues amount to approximately $2,000,000 per year. These funds are not unrestricted. For example, the annual Bar Convention and the Midyear Meeting are required to be self-sustaining from registration fees and contributions. CLE is self-sustaining or slightly profitable. The *Bar Journal* is sustained in part through advertising, but requires a subsidy. Admissions is self-sustaining. Lawyer Referral is mostly self-sustaining, but requires a small subsidy. Most of the $2 million in registration fees goes to finance the Office of Professional Conduct and for personnel costs to operate the functions of the Bar.

This year we will have a surplus of approximately $200,000. This is about $90,000 larger than was projected. I expect we will have a surplus again next year. In light of these budget surpluses many Bar members believe we should petition the Court for a reduction in Bar fees. A reduction of $35 would allow the Bar to approximately break even. The Budget and Finance Committee has considered this proposal several times and has recommended against it.

According to the projections of the CPAs on our Budget and Finance Committee, the surplus will decrease every year as inflation increases costs. In several years, the surplus will disappear and we will begin to incur deficits. At that time we can use our accumulated reserves to forestall a dues increase for a few years, but eventually we will have to petition for a fee increase. Of course, by not reducing Bar fees now, the time when we will need to ask for an increase can be pushed further into the future, and the amount of the fee increase can be made smaller.

The proposal for a dues decrease has been made almost every year of the five years I have served on the Commission. So far, the Commission has agreed with the

Budget and Finance Committee, and has not petitioned the Court for a fee decrease. Simply stated, the Commission doesn't want to ask the Court to reduce fees and then have to go back in a year or two asking for an increase.

As the years have gone by, however, the projected erosion of our surplus has not materialized. The first projections I saw indicated that we would be hitting break-even in the year 2000. Now the projections indicate that the break-even point will come in 2003.

I believe this is due primarily to three factors. First is the excellent management of our Executive Director and his staff. Second is the Commission's fiscal restraint. Surplus money creates a real temptation to fund many worthy projects. For the most part the Commission has resisted this temptation. Third is the dividend from the Bar's investment in technology. For example the same two employees are doing the accounting and bookkeeping for the Bar with 7400 members as they did with a Bar of 4700 lawyers in 1990. So as our licensing revenues have increased over 50% in ten years, our cost for accounting services have increased only slightly. The reason the same two people can do twice as much work: computers. There are similar effects throughout the office. Last year our licensing revenues increased 3 1/2% but our personnel costs increased less than 1%. Whether we will be able to continue to hold down costs in this way remains to be seen.

The argument in favor of reducing fees is that it is unfair to assess costs against the present Bar members in order to postpone a dues increase for future members. What about the lawyer who is close to retirement or who may move from the jurisdiction. Is it fair to make her pay for the lawyer who will be admitted or move to Utah in a year or two?

The Bar Commission would like to hear your opinion on these or other budgetary matters. You can contact any Bar Commissioner or the Bar President. My E-mail address is: President@utahbar.org.

A copy of the budget is available from Bar staff. Let us know what you think.

New Revisions to Utah's Limited Liability Company Act – The LLC Revolution Rolls On

by Brent R. Armstrong

This is the second of a three-part series discussing the Utah Revised Limited Liability Company Act passed by the Utah Legislature on February 23, 2001. Part I, which appeared in the June/July 2001 issue, gave an overview of the Revised Act and described part of the changes made by the Revised Act. Part II discusses other changes made by the Revised Act. Part III will appear in the October issue and will discuss transition issues and tips for drafting and planning under the Revised Act.

I. Introduction

This article continues a description of the changes in Utah's prior Limited Liability Company Act (the "Old Act") made by the Utah Revised Limited Liability Company Act – 2001 (the "Revised Act"). This description was begun in an article featured in the previous issue of the *Utah Bar Journal* and should be read in conjunction with that article. The Revised Act became effective on July 1, 2001.

II. Continuation of the Discussion of Changes Made by the Revised Act

Becoming an Initial Member. The Old Act gives no guidance as to when a person becomes a member upon formation of an LLC. The Revised Act provides that, when forming an LLC, a person becomes a member at the *earliest* of signing the articles of organization, signing the operating agreement, or when the person's admission is reflected in the LLC's records or membership is otherwise acknowledged by the LLC. After LLC formation, the Revised Act retains the default rule of unanimous consent of all members for admission of a new member, but adds the default rule requiring the proposed member to sign the operating agreement or another writing that binds the person to the provisions of the operating agreement.

Meetings of Members. The Old Act contains no provisions regarding meetings of members – whether they are required or not. The Revised Act clarifies that, as a default rule, no meetings of members are required. This "no meeting" rule applies in the absence of a contrary provision in the LLC's governing documents.[1] In the event that the LLC's governing documents require meetings of members but fail to spell out how meetings are called, or the place, notice or quorum required for meetings, the Revised Act supplies default rules for such issues. The Revised Act also provides default rules for member actions taken without a meeting.

Voting. The Revised Act continues the rule of the Old Act for member voting according to percentage interests in profits. Yet, the Revised Act clearly allows the LLC's governing documents to specify voting on a per capita or other basis or by a specified class or group of members.

Classes of Members. The Old Act makes no provision for classes of members. In contrast, the Revised Act specifically allows the LLC's governing documents to provide for classes or groups of members and to allow for non-voting interests of a particular class or group.

Cessation of Membership. The Revised Act clarifies when a person ceases to be an LLC member. Specifically, the interest of a member shifts to that of an "assignee" upon the death, incapacity or voluntary withdrawal of the member, upon assignment of the member's entire interest in the LLC, upon expulsion of the member or upon the member's voluntary bankruptcy (or 120 days after an involuntary bankruptcy petition is filed). The

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cessation of membership rules also extend to members who are entities. Those rules apply when articles of dissolution are filed (for a member that is an LLC or a corporation) or upon the dissolution and commencement of winding up (for a member that is a limited partnership).

Withdrawal of a Member. The Revised Act clarifies that a member may withdraw from an LLC if withdrawal is allowed under the LLC's governing documents. Where the governing documents do not allow for member withdrawal or do not clearly specify the time or events for withdrawal, a member may not withdraw prior to dissolution and completion of winding up of the LLC – except with the consent of all other members.

Expulsion of a Member. The Old Act makes no provision for expulsion of an LLC member. The Revised Act allows a member to be expelled pursuant to provisions of the operating agreement or (a) by unanimous vote of the other members if it is unlawful to carry on the LLC's business with the member, or (b) by court decree that the member has engaged in wrongful conduct adversely affecting the LLC's business or has willfully and persistently breached the LLC's governing documents or has engaged in conduct relating to the LLC's business which makes it "not reasonably practicable" to carry on the business with the member.

Agency Authority of Members and Managers. The Revised Act clarifies the authority of members in a member-managed LLC and managers in a manager-managed LLC to bind the LLC in transactions with third parties. The Old Act vests management authority in the members in proportion to the members' interests in the profits of the LLC. Yet, under Old Act §48-2b-125(2)(a), it is unclear whether *any* member could bind the LLC or whether a member could bind the LLC only where other members holding a majority of the profits interests in the LLC had approved that action. The Revised Act clarifies rules on apparent authority. Section 48-2c-802 of the Revised Act sets forth two parallel sets of rules – one set for member-managed LLCs and one set for manager-managed LLCs.

In a *member*-managed LLC:

(a) Each member is an agent of the LLC for the purpose of the LLC's business;[2]

(b) An act of any member for apparently carrying on the LLC's business in the ordinary course binds the LLC, unless the member had no authority to act for the LLC in the particular matter and such lack of authority was expressly described in the articles of organization *or* the person with whom the member was dealing knew or otherwise had notice that the member lacked authority; and

(c) An act of a member which is not apparently for carrying on the LLC's business in the ordinary course binds the LLC only if the act was authorized by the other members.

The authority rules for a *manager*-managed LLC are parallel to the rules for a member-managed LLC except that, in a manager-managed LLC, a member is not an agent of the LLC solely by reason of being a member.

The Revised Act allows limits to be imposed on the apparent authority of those managing an LLC if express language is included in the Articles of Organization.

Conveyance of LLC Property. Notwithstanding the Old Act's vesting of management authority in the members in proportion to their interests in profits, the Old Act seems to grant unconditional authority to anyone managing an LLC, without member approval, to bind the LLC in any transaction involving the acquisition, mortgage or disposition of LLC property. The Revised Act follows the same basic rule, but with two significant exceptions: (a) the articles of organization may expressly limit the authority, and (b) the person dealing with the LLC must have no knowledge or other notice of the lack of authority of the person who signs on behalf of the LLC.

Management by Members. The Revised Act sets a 3-tier structure of default rules for member approval in a member-managed LLC:

(a) Members holding a majority of profits interests must approve any matter connected with the LLC's business;

(b) All members must consent to amendments to the LLC's governing documents and must authorize acts in contravention of the LLC's governing documents; and

(c) Members holding two-thirds of the profits interests must approve substantial events such as making current distributions to members, converting the LLC to another entity or merging the LLC with another entity, or selling, leasing or mortgaging all or substantially all of the LLC's property outside the regular course of the LLC's business.

In a manager-managed LLC, member approvals are also required for transactions referred to in (b) and (c) above.

Management by Managers. The Revised Act fills gaps left by the Old Act regarding identification and qualification of managers in a manager-managed LLC. It continues the Old Act's requirement

that the initial managers be designated in the articles of organization. Yet, the Revised Act requires that any changes in managers must be made by an amendment to the articles of organization. As a default rule, each manager is elected by members holding a majority of profits interests and continues to serve until the manager's death, withdrawal or removal – and may be removed with or without cause by members holding a majority of profits interests. Managers need not be members of the LLC.

Delegation of Authority. The Old Act is silent as to the power of managers or members to delegate authority to manage. The Revised Act fills this gap with a default rule that management authority in an LLC may *not* be delegated. It also provides that if delegation is allowed under the LLC's governing documents, any delegation must be in writing, the scope and duration of authority delegated must be specified in writing, and the power to revoke the delegation must be retained.

Reliance on Reports and Information. The Revised Act protects a member or manager who relies in good faith on the LLC's records or on information, opinions or reports presented to the LLC by others, unless the member or manager has knowledge concerning the matter in question that makes such reliance unwarranted.

Fiduciary Duties. The Old Act contains no provisions regarding the fiduciary duties of persons who manage an LLC. The Revised Act clarifies these duties by prohibiting "self-dealing" transactions. Under these rules, unless otherwise provided in the LLC operating agreement, each member of a member-managed LLC and each manager of a manager-managed LLC must account to the LLC and hold as trustee for the LLC any "profit or benefit" derived by that person from using or appropriating LLC property without the consent of members holding a majority interest in profits of the LLC.

The Revised Act also sets gross negligence/willful misconduct as the standard of care for those participating in LLC management. Yet, a member in a manager-managed LLC (who is not also a manager) owes no fiduciary duties to the LLC or to the other members solely by reason of acting in the capacity of a member. Subject to the above rules, the Revised Act allows members and managers to transact business with the LLC the same as a third party, unless otherwise limited by the LLC's governing documents.

Actions by Multiple Managers. The Revised Act adds a default rule regarding voting by multiple managers which requires unanimous written consent of all managers and prohibits managers from voting by proxy.

Removal of Managers by Judicial Proceeding. The Old Act contains no provision regarding removal of managers (or members having management authority). The Revised Act allows the LLC itself, or members holding at least 25% interest in profits of the LLC, to petition the court for removal of a manager, but the court must find that the manager engaged in fraudulent or dishonest conduct or gross abuse of authority with respect to the LLC and that removal is in the LLC's best interests. A similar court proceeding can be used for removal of a member in a member-managed company.

Assessments. The Old Act makes no provision for assessment of members for additional contributions to the LLC. The Revised Act sets a default rule that no additional contribution or assessment may be required of any member and further provides that, if an assessment obligation is provided for, such obligation does not confer any rights upon any creditor or other person not a party to the LLC's operating agreement.

Adjustments to Capital Accounts. Part I of this series described how the Revised Act installs "capital accounts" as the new measuring standard for LLC profits and losses, distributions and voting. The Revised Act also provides for revaluation adjustments to capital accounts whenever there are capital contributions to an LLC or disproportionate distributions from an LLC (and when the LLC is dissolved and wound up). On such events, the capital accounts are adjusted to reflect the net fair market value of the LLC's assets at that time.

Valuation of an LLC Interest. The Revised Act adopts the "willing buyer, willing seller" concept as the default standard for determining the fair market value of a member's interest in an LLC, but requires that any valuation procedure take *". . . into consideration all relevant facts and circumstances, including the provisions of the articles of organization and operating agreement and all relevant discounts or premiums."* Being a default rule, these provisions can be overridden by provisions in the operating agreement.

Redemption of Interest. The Old Act allows a member to demand the return of the member's "contribution" upon dissolution of the LLC or when allowed under the articles of organization or when the member's interest in the LLC is terminated. The Revised Act adopts the concept of "redemption of interest" in place of "return of contribution" and entitles a member to demand payment from the LLC of the fair market value of the member's interest in the LLC *only* upon dissolution and completion of winding up of the LLC or when otherwise provided in

the LLC's governing documents.

Allocation of Profits and Losses. The Old Act allocates profits and losses on the basis of the "value of the contributions" made by each member. The Revised Act changes the default standard to allocate profits and losses in proportion to the members' capital account balances as of the beginning of the LLC's current fiscal year.

Allocation of Current Distributions. The Old Act allocates LLC distributions to members on the basis of the *"value of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned."* The Revised Act replaces the concept of "value of the contributions" with capital account balances and also clarifies the distinction between current distributions and liquidating distributions. As a default rule, current distributions are allocated among the members in proportion to the members' capital account balances as of the beginning of the LLC's current fiscal year.

Timing of Distributions. The Old Act is silent as to the timing of current distributions. The Revised Act requires current distributions to be made to all members concurrently or at other times determined by the members in a member-managed LLC or by the managers in a manager-managed LLC.

Limitations on Distributions. The Old Act prohibits distributions to members if the "fair value" of the LLC's assets is less than the LLC's liabilities. The Revised Act continues this standard but adds that, for distributions to be allowed, the LLC must be able to pay its debts as they become due in the regular and ordinary course of its business. The Revised Act specifies that the effect of a distribution is measured as of the date the distribution is authorized if payment of the distribution occurs within 30 days thereafter. Otherwise, the effect of a distribution is measured as of the date payment is made.

Duty to Return Wrongful Distributions. The Old Act imposes a constructive trust on a member who receives wrongful distributions "on account of the member's contribution." The Revised Act broadens and clarifies these rules to provide that a member who receives a distribution by mistake or in violation of law or the LLC's governing documents is obligated to return the wrongful distribution and, in addition, remains liable to the LLC for up to 5 years – if a proceeding to recover the distribution from the member is commenced within the 5-year period. This member obligation applies whether or not the member knew the distribution was wrongful.

Distributions in Kind. As a default rule, the Revised Act protects a member from being forced to receive distribution of an asset in kind from the LLC that was not contributed by the member or that is disproportionate to the member's percentage interest in the LLC. The implication remains that an LLC may force a member to take a distribution in kind, rather than in cash, of an asset previously contributed by the member or to take a percentage interest in an asset equal to the member's percentage interest in the LLC.

Charging Order – Exclusive Remedy. The Old Act allows a judgment creditor of an LLC member to obtain a charging order against the judgment debtor's LLC interest and, thereby, to obtain the rights of a "transferee" of the member's LLC interest. The Revised Act clarifies that any such judgment creditor (or receiver appointed by the court) has only the rights of an assignee as to such interest and that any purchaser at a foreclosure sale of the LLC interest acquires only the rights of an assignee. The Revised Act also makes a charging order the exclusive remedy of a judgment creditor who seeks to satisfy the judgment out of the judgment debtor's interest in an LLC.

Assignee Becoming a Member. The Old Act contains two conflicting provisions regarding the consent required for an assignee to become an LLC member. Section 48-2b-122(2) of the Old Act requires *unanimous* consent of the members for a person to become an additional member, if the operating agreement does not provide otherwise. In contrast, where a member has transferred an LLC interest to another person, Section 48-2b-131(2)(b) of the Old Act requires consent of only the *"members entitled to receive a majority of the non-transferred profits"* for a person to become a member. The Revised Act requires consent of all LLC members for an assignee to become a member in the LLC unless otherwise provided in the governing documents. The Revised Act makes clear that an assignee who has become a member becomes subject to the LLC's governing documents and the Act and becomes liable for obligations of the assignor to make contributions and to return distributions as provided in the Act, except for liabilities of the assignor unknown to the assignee at the time the assignee became a member. It also provides that the assignor of an LLC interest is not released from liability to the LLC by reason of the assignee's becoming a member.

Consent of All Members for Voluntary Dissolution. The Old Act allows members holding a majority of profits interests to approve a voluntary dissolution of an LLC. The Revised Act alters this rule and requires consent of all members for volun-

tary dissolution.

Articles of Dissolution. The Old Act requires articles of dissolution to be filed *after* the winding up of the LLC is completed. The Revised Act changes this timing and requires articles of dissolution to be filed after an event of dissolution but *before* winding up – consistent with Utah corporate law.

Breaking Management Deadlock. The Old Act contains no provision for breaking a deadlock in LLC management. For example, if a disagreement arose in a member-managed LLC with two equal members (50/50), the Old Act gives no guidance as to what to do. Also, there is no provision allowing resort to the courts to break the deadlock. The Revised Act allows a member to bring an action for judicial dissolution of an LLC whenever there is a deadlock among the managers which cannot be broken by vote of the members or where the members themselves are in a deadlock that continues for at least 6 months.

Dissolution by Judgment Creditor. The Revised Act allows a judgment creditor to file an action to dissolve an LLC if: (a) the judgment is unsatisfied and the LLC is insolvent, or (b) the LLC is insolvent and has admitted that the creditor's claim is due and owing.

Purchase of Interest of Member Petitioning for Dissolution. The Revised Act borrows from Utah corporate law to allow the LLC (or the other members) to purchase the LLC interest of a member who petitions for judicial dissolution of the LLC.

Winding Up. The Revised Act expands provisions of the Old Act regarding winding up an LLC's business and activities. In doing so, some provisions were borrowed from Utah corporate law regarding disposition of claims against the LLC.

Distribution of Assets to Members on Winding Up. The Old Act allocates distributions during winding up on the basis of the members' "claims for capital." The Revised Act changes this to allocate winding up distributions among the LLC members based on final capital account balances after allocation of all profits and losses accrued or incurred during winding up.

Conversions and Mergers. The Old Act contains no provisions for conversions of an LLC and allows an LLC to merge only with another LLC. The Revised Act allows other entities to convert to LLC form and allows LLCs to convert to other forms. Conversion is accomplished by filing "articles of conversion" along with articles of organization, in the case where another entity converts to LLC form. The Revised Act also includes amendments to the Utah Revised Uniform Limited Partnership Act to give procedures for converting a Utah limited partnership to LLC form. The Revised Act also provides that a Utah LLC may merge with any other entity if the merger is permitted by the statutes governing each entity.

Professional LLCs. Provisions relating to professional LLCs are scattered throughout the Old Act and are not consistent with provisions relating to professional corporations under the Utah Professional Corporation Act. The Revised Act collects all provisions relating to professional LLCs into one part – Part 15. In addition, the Revised Act borrows several provisions from the Utah Professional Corporation Act to make the Revised Act parallel to and consistent with the Utah Professional Corporation Act.

Foreign LLCs. The Revised Act substantially expands the provisions of the Old Act regarding foreign LLCs, making such provisions parallel to and consistent with provisions for foreign corporations under Utah corporate law.

Stay of Derivative Proceedings. The Revised Act allows a court to stay a derivative action temporarily if the LLC promptly commences an investigation of the allegations in the plaintiff's complaint.

This concludes the summary of changes made to the Old Act by the Revised Act. This summary is just that – a summary – and does not describe every change made to the Old Act.

Part III of this series, coming in the October 2001 issue, will discuss transition issues under the Revised Act and provide tips for drafting LLC governing documents and planning under the Revised Act.

[1]The term "governing documents" means an LLC's articles of organization and operating agreement.

[2]Defining the "business" of the LLC now becomes extremely important because if the purpose is broadly stated as "any lawful business," then each member in a member-managed LLC could be an agent of the LLC to the broadest extent.

Guardianships and Conservatorships

by Kent Alderman

I. Introduction

Advances in health care and in treatment of diseases in our society have resulted in longer life expectancy. Unfortunately, the gains we have made in improving our physical well-being have not been matched with longevity in our mental well-being. Our minds are not keeping up with our bodies. As a result, many people need increasing levels of support as they age. These individuals begin to rely on others to help them make more of their decisions of daily living. When their mental state reaches a stage that they can no longer manage their financial affairs or provide for their personal needs and safety, surrogate decision makers must make these decisions for them. The surrogate decision makers are usually family members or close, trusted friends. However, many people outlive family and friends necessitating the use of other resources. Those resources may include professional public and private decision-makers. All of these surrogate decision makers must have some source of legal authority for making these decisions. Often these arrangements include joint ownership of assets and the use of legal documents, such as powers of attorney. If these informal options are not available for some reason, or if third parties are requested to provide services, for example, by the placement of the individual in a care facility, some more formal authority must be obtained by the decision maker. This is usually a court appointed guardian or conservator.

II. Guardians

A guardian is a court-appointed surrogate decision-maker who is responsible for a ward's physical well-being.

Under Utah law, a guardian may be appointed for any person whose mental capacity or lack of capacity prevents them from caring for themselves, providing for shelter, food, clothing, medical care or other necessities of life. The incapacitated person is generally referred to as the "ward." The guardian has approximately the same responsibilities for and authority over the ward in a full guardianship appointment as a parent has for a small child, except a guardian does not have the duty to supply funds to support the ward. However, not all guardianships need be the same. They may be limited to just what is needed for the ward in question. Courts have a duty to try to fashion a guardianship to the least restrictive alternative based upon all the facts and circumstances.[1]

The guardian may be responsible for management of all of the ward's property or may seek the appointment of a conservator to manage the ward's financial affairs. Generally, the guardian is responsible to make decisions about the ward's care, support, health and housing.

Any competent person or suitable institution may be appointed as a guardian of an incapacitated person. The law recognizes the following order of priority: (1) a person nominated by the incapacitated person in a writing executed prior to the person's incapacity; (2) the spouse of the incapacitated person; (3) an adult child of the incapacitated person; (4) the parent of the incapacitated person, including a person nominated by will or an instrument or other writing signed by a deceased parent; (5) any relative of the incapacitated person with whom the incapacitated person has resided for more than six months prior to the filing of the petition; (6) a person nominated by the person who is caring for the incapacitated person or paying benefits to him or (7) a specialized care professional as defined by the law.[2]

The legal proceedings necessary for the appointment of a guardian in an uncontested case normally take about three weeks. An emergency temporary guardian may be appointed within a day.[3]

III. Conservators

A conservator is a court-appointed surrogate decision maker who is responsible for a ward's financial affairs. Conservators are appointed for individuals who cannot effectively manage their financial affairs and whose property may be wasted or dissipated if proper management is not provided. The ward may, or may not, have a guardian appointed for them, depending upon his or

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her capabilities. For example, the ward may still have significant capacity to manage his or her activities of daily living but just need help paying bills and managing assets. A conservator acts like a trustee of a trust, managing the ward's financial affairs, investing assets, collecting income and paying bills.

A person may have both a guardian and a conservator appointed for him or her if the circumstances warrant it—a guardian to make decisions of daily living and a conservator to make financial decisions. In appropriate circumstances, the same person may act as both a conservator and a guardian.

IV. Duties of a Guardian

A guardian is a fiduciary who owes the highest duty of care to the incapacitated person. Like a good parent, the guardian must look out for the ward's best interests while taking into account the ward's needs, wants and desires. The guardian must provide shelter, clothing, medical care, food and all other necessities of life taking into account resources available to the ward, including governmental programs. The guardian does not need to use his or her own funds for the ward's care. The guardian must protect the ward from the ward's poor judgment while allowing the ward to participate in the decision making process to the extent he or she can. If a conservator has not been appointed by the court and there is no one else with authority to manage the ward's assets, the guardian is responsible for the management of the ward's assets as a trustee. This responsibility includes preparing and filing with the court an inventory of the ward's assets and sources of income. The guardian cannot compensate himself for room and board provided to the ward by the guardian without court approval. If the guardian does not want to be responsible for management of the ward's financial affairs, the guardian can request the appointment of a conservator.

Annually, the guardian must file a report with the court describing the ward's present physical status and living arrangements. If the estate of the ward is in excess of $50,000, less the value of a personal residence, the guardian must file a full, formal accounting. For estates smaller than $50,000, the guardian must provide an informal accounting. The accounting must be in conformance with rules provided by the court, reporting the assets and income which have been managed and expended by the guardian during the year.[4] If a conservator has been appointed, the conservator will be responsible for filing the financial report. A guardian may not resign without court approval and a formal discharge.

V. Duties of a Conservator

The conservator is a fiduciary who owes the highest duty of care to the ward in the management and administration of the ward's assets. The conservator must take possession of all the property and income payable to the ward and use such assets only for the ward's benefit. Within ninety (90) days after appointment, the conservator must file an inventory with the court listing all of the assets of the ward that have come into the conservator's possession. The inventory must also be given to the ward if he or she is able to understand and comprehend it, to the ward's guardian, if one has been appointed, to the parents of the ward, if alive, or to the person with whom the ward is residing. Any interested person may also request a copy of the inventory. The term "interested person" is defined as anyone having an interest in the ward or his or her estate, such as family members and creditors.

Annually, the conservator must prepare and file an accounting with the court. For estates of $50,000 or more, excluding a residence, the conservator must file a full, formal accounting. For estates of less than $50,000, an informal accounting may be filed.[5] With respect to the management of the property of the estate, the conservator has all of the powers of ownership that the ward had. The conservator steps into the shoes of the ward.

A conservator's duties continue until a final accounting has been filed with the court and the conservator has been discharged by the court. A conservator may not resign without prior court approval and formal discharge.

VI. The Appointment Process

Guardianships. The guardianship appointment process is begun by the filing of a petition for appointment with the district court in which the ward resides. The Judicial Council has adopted standardized forms which may be used for this purpose. The petition can be filed by any interested person. The person filing the petition is usually one of the persons having priority and the person seeking appointment. However, it is not unusual for a person having an interest and a priority to nominate someone else as guardian. Once the petition has been filed, a special notice of the petition must be personally served on the proposed ward. In addition, notice must be given to the incapacitated person's spouse, parents, adult children, and any person who is serving as an informal guardian or conservator or who has care and custody of the ward. In a case where none of the above persons can be located, notice must be given to the closest adult relative, if any can be found, and any guardian appointed by a will of any parent who has died. Notice must also be given to any person requesting notice.

Since granting a guardianship is a serious deprivation of the ward's personal freedom and rights, strict formal notice and due process of law is required. The ward must have legal representation. He or she also has the right to a jury trial, to be present at all proceedings, to examine all witnesses who appear against him/her and to present witnesses in his or her own defense. These procedures are required even though it is clear that a guardian is needed, such as the case in which the proposed ward is hospitalized and is in a coma.

If the ward has an attorney of his or her own choice, that attorney may represent the proposed ward. If the ward has no attorney, the court must appoint an attorney for the ward. If the ward will not or cannot be present in court at the hearing of the petition, the court may appoint a physician to examine the ward and report to the court, or appoint a court visitor to meet with the ward and investigate the circumstances of the ward's incapacity and report to the court. Waiver of the physician's examination, or the visitor investigation, or the presence of the ward in court may only be obtained if there is clear and convincing evidence presented to the court that such presence is unnecessary or harmful to the ward. Such evidence may be a letter from the ward's attending physician indicating that the ward's presence would not be useful to the court as the ward could not participate in his own defense or such presence would be detrimental to the ward's health.

The cost of hiring an attorney to represent the ward may be paid out of the ward's estate unless the court finds that the petition is frivolous, in which case the petitioner will be charged with such fees. The court visitor must be paid by the person seeking the guardianship. However, if the guardianship is granted, the guardian can seek court approval for reimbursement of the visitor's fees.[6]

While the law requires that the court appoint an attorney for the ward and a physician or court visitor, the court does not name the attorney, the physician or the visitor. If the proposed ward does not have counsel of his or her own choice and lacks the capacity to seek or engage an attorney, then it is up to the person seeking guardianship to identify both an attorney for the ward, a physician or a visitor and make arrangements for their appointment as part of the hearing process.

The person seeking guardianship or his attorney must identify and contact appropriate legal counsel and a physician or qualified person to act as a visitor. Then, prior to the preliminary hearing of the petition for guardianship, the attorney and physician or visitor must be appointed by the court in sufficient time to allow them to meet with the proposed ward and to evaluate the proposed ward and the guardianship proceedings.

After the preliminary hearing, if it appears to the court that a guardianship is appropriate and no objections are made, the court will enter an order approving the guardianship and specifying any limitations on the guardian. If the proposed ward and his counsel object to the guardianship at the preliminary hearing, the court will refer the case to the trial calendar. At the request of the parties, the trial judge will schedule a formal hearing on the petition and a trial will take place to determine if the guardianship is warranted.

Under a pilot project of the Third District Court begun in June 2000, all contested guardianship and conservatorship cases are referred to mediation at the same time the case is referred to the trial judge.

In the vast majority of these cases, no trial will be necessary because it will be clear from the facts that the proposed ward needs a guardian and the guardianship is in his or her best interest. The petition for guardianship is usually made later than needed rather than earlier. Unfortunately, in many cases, the incapacitated individual has already suffered some form of physical or financial crisis or loss when proceedings to protect them are undertaken.

Conservatorships. While conservatorship proceedings are substantially identical to guardianship proceedings, since the appointment of a conservator is viewed as less of a deprivation of one's civil rights, there is no requirement that the proposed ward must have an attorney or be interviewed by a court visitor. The law provides that the court may appoint counsel for the ward and may appoint a court visitor if the judge deems it necessary. In any case in which the proposed ward will not be present to consent to the appointment of a conservator, the court will, at a minimum, require the appointment of an attorney to represent the ward in most cases.

VII. Alternative Decision Makers

Powers of Attorney. An individual, as part of an estate plan or in contemplation of his or her incapacity, may identify and appoint someone whom he or she trusts to make both medical and financial decisions through the use of a general durable power of attorney and a special medical power of attorney. So long as the individual had capacity at the time of the creation of the durable power of attorney or medical power of attorney, that power should be recognized and respected by persons dealing

with the holder of the power of attorney.

However, there is nothing in the law that requires third parties to recognize a durable power of attorney. Thus, a bank or brokerage holding the incapacitated person's funds or investments may refuse to honor a durable power of attorney. This problem becomes more likely if the durable power of attorney is more than a few years old. Many financial institutions and brokerages require "fresh" durable powers of attorney. Some require that powers of attorney be on the institution's forms and refuse to recognize forms that do not meet certain criteria.

Medical powers of attorney are somewhat more likely to be recognized as they are presented to health care providers who are more inclined to accept them if they believe the individual no longer has the ability to give informed consent for medical procedures. In such cases, health care providers are looking for someone to take responsibility for the decision making process and are happy to recognize a medical power of attorney.

Trusts. Many people today, as part of their estate planning, create "living" trusts which function during the individual's lifetime. These documents have provisions for naming a successor trustee to manage the trust if the grantor/trustee becomes incapacitated. These successor trustees are similar to conservators but are not subject to court supervision or reporting unless the trust specifically provides those requirements. In most cases, the successor trustee of the trust is not given the authority to make medical care decisions even though the trustee is authorized to pay all medical bills. So, although a trust may be a substitute for a conservatorship, it is usually not a substitute for a guardianship. Just because someone has a trust that will pay the bills doesn't mean the trustee has the power to make living and health care decisions. However, a designation of a guardian in the trust will probably give the designated individual priority for appointment.

VIII. Conclusion

In Utah, guardianship and conservatorship proceedings are usually fairly simple and speedy, taking only a few weeks to complete. In an emergency, a guardianship can be established within a day. Guardianship and conservatorship proceedings should not be feared or looked upon as something to be avoided. They are effective in giving legal authority to an appropriate substitute decision maker in a relatively short period of time.

If anything, they are presently underused and undertaken too late. Too often, incapacitated individuals are in a crisis prior to the initiation of these protective proceedings.

Court oversight and annual reporting requirements are a strong incentive for care providers to provide appropriate care, and for interested persons to be informed of the care being provided.

As a final note, if a person needing a guardian has no one willing to act and no source of income or assets to pay for guardianship services or proceedings, the Utah Office of Public Guardian may be willing to act as guardian. But due to limited funding, the Office may not be able to take all cases. Several attorneys throughout the state, however, have offered to provide free representation of such impecunious individuals. The names of these attorneys may be obtained from the Utah State Bar Pro Bono Coordinator.

[1]Utah Code Ann. § 75-5-304.

[2]Utah Code Ann. ß 75-5-311.

[3]Utah Code Ann. § 75-5-310.

[4]Utah Code Ann. § 75-5-312, Rule 6-503 Rules of Judicial Administration.

[5]Utah Code Ann. § 75-5-417, Rule 6-504 Rules of Judicial Administration.

[6]Utah Code Ann. § 75-5-303.

Utah Zoning Law: Appeals

by Richard S. Dalebout

This article is the third in a series of three on Utah zoning law. The first article is entitled Utah Zoning Law: The Zoning Ordinance, and appeared in the April 2001 issue. The second is entitled Utah Zoning Law: Enforcement, and appeared in the June/July 2001 issue.

I. Appeals[1]

This article deals with the "appeals" that may be pursued in Utah when the rights of parties may have been violated in the process of regulating land uses. In Utah zoning law, there are three proceedings that may be loosely referred to as an "appeal":

Administrative Appeals. First, there is an administrative appeal; that is, an appeal within the zoning system – not an appeal to the courts. For example, a zoning administrator misinterprets the zoning ordinance and refuses to issue a building permit. The remedy of the applicant is to appeal to the zoning board of adjustment which has power to overrule the mistake and order that the building permit be issued.

Judicial Review of an Administrative Decision. Second, there is judicial review of an administrative decision. In the example above, if the board of adjustment errs and refuses to order the permit issued, that decision may be appealed to the district court which has power to review the matter and alter the administrative decision. (The decision of the district court may, of course, be appealed to the Court of Appeals and the Supreme Court as other judicial decisions are appealed.)

Judicial Challenges to Legislative Decisions. Third, there is direct resort to the courts in opposition to legislative decisions. For example, the governing body exercises its legislative (not administrative) authority to rezone property from commercial to residential. The property owner objects and files suit in the courts. (The property owner is not required to appeal to the board of adjustment because this is not an administrative act.)

II. Administrative Appeals

A Board of Adjustment. A board of adjustment is required as a condition to the exercise of zoning powers. (Like a planning commission, a board of adjustment is composed of local residents who normally serve without compensation.) According to the enabling acts, the objective of a board of adjustment is to provide an element of flexibility in zoning administration so that there will be "just and fair treatment . . . and to ensure that substantial justice is done." In an early case, the Utah Supreme Court said that the function of a board of adjustment is to make "adjustments under the zoning ordinances in order that they will not be [as inflexible] as the law of the Medes and the Persians."[2] Nevertheless, in a different case, the court cautioned that a board of adjustment is an *administrative* body and its actions are limited by the terms of the zoning ordinance enacted by the legislative body.[3]

Open Meetings. The enabling acts provide that the meetings of a board of adjustment are subject to the Open and Public Meetings law.[4] Arguably, however, the *decision-making* phase of the business of a board of adjustment is not required to be in an open meeting. In relation to public boards like the Utah Public Service Commission and the Utah Board of Pardons the Utah Supreme Court has observed that some of the business of such boards is "information gathering" in nature and some is "judicial" in nature. Proceedings which are judicial in nature are exempt from the provisions of the Open and Public Meetings statute. In *Andrews v. Utah Board of Pardons,*[5] when confronted with a claim that a meeting of the Utah Board of Pardons should have been open to the public, the Utah Supreme Court stated: "[T]he Board proceedings to date consisted not of information gathering, but of deliberations . . . If this is the case, these proceedings would be of a *judicial nature* and exempt from the provisions of the [Open and Public Meetings] statute."[6]

Historically, some boards of adjustment have held a "pre-meeting" in which the board's staff and attorney reviewed agenda and issues with board members, ostensibly so that upcoming meetings would run more smoothly. In reality these meetings often slipped into a discussion of the merits of upcoming issues and for that reason they have been condemned by the Utah Court of Appeals.[7]

Board of Adjustment Jurisdiction. A board of adjustment is commonly asked to: (1) review claims of administrative error; (2) grant variances; (3) review the approval of conditional use permits; or, (4) determine the existence of nonconforming uses. Following is a brief discussion of each of these:

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Administrative Errors. With respect to claims that an administrative error has been made, the zoning enabling acts specifically provide that a board of adjustment "*shall* hear and decide" controversies which are "appeals from zoning decisions *applying* the zoning ordinance." Zoning decisions which may be appealed include orders, requirements, decisions, or determinations made by zoning officials in administering or interpreting the zoning ordinance.

A hypothetical example is the error of a zoning administrator in refusing to issue a building permit because of a misreading of the zoning ordinance. The standard by which a board of adjustment decides if the zoning administrator made an error is a standard of "correctness," not whether there was some "rational basis" for the decision. There is a difference between these standards because the administrator's decision may have a rational basis and yet not be legally correct. *In Brown v. Sandy City Board of Adjustment,*[8] the Utah Court of Appeals stated: "it is clear to this court that a person of ordinary intelligence [the members of a board of adjustment] can easily understand the difference between the questions, 'Was the staff's interpretation correct?' and 'Was the staff's interpretation rational?'"[9]

Zoning decisions may be appealed by persons affected thereby and by officers and subdivisions of a city or county. The time within which to appeal a zoning decision to a board of adjustment is "a reasonable time," which is fixed in the zoning ordinance. Some zoning ordinances have a time limit as short as ten days (from the date of the contested decision) within which to file notice of an administrative appeal.

Variances. The enabling acts provide that a "board of adjustment *shall* hear and decide . . . variances from the terms of the zoning ordinance." A request for a variance is a request that the zoning ordinance should not be strictly applied because of some peculiarity in the characteristics of the subject property. There is a perception in the zoning community that some boards of adjustment are too liberal in granting variances; consequently, the state legislature has imposed strict limits on the ability of a board of adjustment to grant a variance. Those limitations are that a variance may be granted only if:

Unreasonable Hardship. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance.

Special Circumstances. There are special circumstances attached to the property that do not generally apply to other properties in the same district.

Absence of a Substantial Property Right. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.

Consistent with General Plan. The variance will not substantially affect the general plan and will not be contrary to the public interest.

Substantial Justice. The spirit of the zoning ordinance is observed and substantial justice done.

A Variance Example. A variance may be illustrated by a simple example in which a small stream traverses a parcel of property. The property owner is entitled to a building permit, but constructing a house in the middle of the lot (as required by the zoning ordinance) is impractical because of the stream location. Because of this peculiarity in the physical characteristics of his lot, the owner asks a board of adjustment for a variance allowing him to construct his house closer to one of the boundary lines than the zoning ordinance otherwise requires. The board reasons that: (1) refusing a variance will cause an unreasonable hardship – the applicant could not build a house; (2) the problem is caused by a special circumstance – a stream runs across the applicant's building lot; (3) without a variance the applicant will be denied a substantial property right – the right to build a residence on a residential building lot; (4) the variance will not violate the general plan – building a residence in a residential zone is consistent with the general plan; and (5) substantial justice will be done – it is fair that a person be allowed to build a residence in a residential zone. Because the statutory standards have been met, a variance is granted.

Boards of adjustment, however, sometimes find it hard to resist the temptation to grant a variance without meeting the statutory standards described above. A recent example is *Wells v. Board of Adjustment of Salt Lake City Corp.*[10] in which the board was asked for a variance from ordinance requirements regulating the location of restaurant "dumpsters." The board granted a variance relocating the dumpsters (contrary to ordinance requirements) because they believed "the neighborhood would be better served" by so doing. On appeal, the Court of Appeals stated: "Because the Board granted the variance *without making the required statutory findings,* we conclude the Board overstepped its legislatively delegated authority and, as such, its decision is illegal."[11]

Conditional Use Permits – Jurisdiction. A board of adjustment has jurisdiction to review decisions relating to conditional use permits. *The governing body may, however, designate another body to consider such appeals.* A conditional use permit is a building permit to which *ad hoc* requirements are attached as circumstances require. For example, a planning commission might authorize a conditional use permit for a convenience store, but cut off the right to sell gasoline after 8:00 p.m. because the peace and quiet of "neighbors" might be upset. The permit applicant, however, thinks an error has been made because the proposed store is surrounded by offices and not residences, and thus there are *not* any "neighbors" in the normal sense.

In Utah law, the question is *who* (the board of adjustment or some other body designated by the governing body) should hear the applicant's appeal? In 1989, this was resolved by an enabling act amendment. On this point the enabling act now reads: "The *board of adjustments* has jurisdiction to decide appeals of the approval or denial of conditional use permits *unless the legislative body has enacted an ordinance designating the legislative body or another body as the appellate body for those appeals."*

The effect of the 1989 amendment is to allow a city council to divest its board of adjustment of jurisdiction over conditional use permit appeals, if the council wishes, and to assume that jurisdiction itself.[12] If the legislative body is thus substituted by the terms of the zoning ordinance as the appellate body for purposes of conditional use permit appeals, it would seem that an appeal to that body (acting as a substitute board of adjustment) exhausts administrative remedies and enables an appeal to the district court.

Nonconforming Uses. The acts provide that "[t]he board of adjustment may make determinations regarding the existence, expansion, or modification of nonconforming uses *if that authority is delegated to them by the legislative body."* A nonconforming use is a "grandfathered" use. That is, it is a use which was lawful when it was created, but is now "nonconforming" in the sense that it is no longer allowed. Zoning ordinances normally provide that such uses may be continued but not expanded.

The burden of proving the right to a nonconforming use is on the person claiming it. In *Fillmore City v. Reeve,*[13] the evidence was that the landowners had met their burden of proof in relation to continuously keeping livestock (pigs, cattle, and horses) in what had become a residential district. Under these facts, the court held: "when the non-conforming use is established, the burden of proof is reversed. It is then on the *city* to prove that the defendant violated the zoning ordinance by exceeding his established non-conforming use."[14]

III. Judicial Review of an Administrative Decision

"Any Person" / "Any Decision." Suppose that an applicant is displeased with an administrative decision of a board of adjustment (or sometimes a city council). This raises the question of an appeal to the district court. The enabling acts provide that *"[a]ny person* adversely affected by *any decision* made in the exercise of the provisions of this chapter [the city and county enabling acts] may file a petition for review of the decision with the district court within 30 days after the local decision is rendered." The enabling acts provide that "[d]ecisions of the *board of adjustment* become effective at the meeting in which the decision is made, unless a different time is designated in the board's rules or at the time the decision is made."

Although "any decision" may be appealed to the courts, the city and county acts explicitly provide that decisions cannot be challenged in the courts "until [the appellant] has exhausted his administrative remedies." In *Hatch v. Utah County Planning Dept.*[15] the Supreme Court stated: "a party must exhaust administrative remedies before seeking judicial review."[16] This plainly means that the board of adjustment (or some other body designated by the governing body) cannot be bypassed in the appeals process.

Scope of Review. On review, the district court may "determine only whether or not the decision is arbitrary, capricious, or illegal." The acts provide that "[t]he courts shall . . . presume that land use decisions and regulations are valid." An administrative decision in which a city fails to follow procedures described in the zoning ordinance may be reversed. However, finding a procedural error in making an administrative decision "does not automatically entitle plaintiffs to the relief they request. Rather "plaintiffs must establish that they were prejudiced by the City's noncompliance with its ordinances or, in other words, how, if at all, the City's decision would have been different and what relief if any, they are entitled to as a result."[17]

Record on Appeal. As noted above, the role of a district court in a zoning appeal is not to conduct a trial *de novo,* but rather to determine whether there is "evidence in the record" to support the administrative decision below. Thus, the existence of an adequate administrative record is critical. However, the only statutory requirements with respect to the administrative record are that a board of adjustment is required to keep minutes showing the vote of its members and "records of its examinations and other official actions." In addition, the board "may, but is not required to, have its proceedings contemporaneously transcribed by a court reporter or a tape recorder [sic]." As a practice note, a good record is essential to a good appeal. A careful practitioner will bring a tape recorder and record board of adjustment proceedings. This recording may be used to prepare a transcript in the event the board staff will not or cannot provide one.

On appeal to the courts, there is no guarantee that the required administrative record will be adequate, and thus the decision in *Xanthos v. Board of Adjustment of Salt Lake City*[18] focused, *inter alia,* on the course to be followed if it is not. The *Xanthos* court was clear that the role of the district court was to review the record produced below. However, the court referred to an administrative hearing it had reviewed in *Denver & Rio Grande Western R.R. v. Central Weber Sewer Improvement District,*[19] wherein it held that where the administrative record is *inadequate,* the reviewing court must be allowed to "get at the facts."[20] The *Xanthos* court noted that in the instant case there was no record of the proceedings before the board of adjustment and

consequently permitted the following alternative:

> Since there is no record of the proceedings, due process would be denied if the district court could not get at the facts. Therefore, the court must be allowed to take its own evidence and need not necessarily be limited to the evidence presented before the Board of Adjustment. This does not mean that the hearing in the district court should be a retrial on the merits, or that the district court can substitute its judgment for that of the Board.[21]

Extraordinary Relief (Mandamus). Historically, a petition for a writ of mandamus was sometimes used to challenge administrative zoning decisions. It is now clear, however, that a *petition for review,* and not a writ of mandamus, is the proper way to take an administrative decision to the courts. In *Crist v. Mapleton City*[22] the city refused to authorize a building permit demanded by the plaintiff, and he responded by filing a petition for a writ of mandamus in the district court. On appeal, the Utah Supreme Court held that the plaintiff could not use a writ of mandamus: "By ignoring a plain, speedy, and adequate remedy at law, the plaintiffs placed themselves out of reach of the extraordinary writ of mandamus. A writ of mandamus is not a substitute for and cannot be used in civil proceedings to serve the purpose of appeal, certiorari, or writ of error."[23]

There are, however, instances where the use of mandamus is proper. In *Davis County v. Clearfield City,*[24] the procedures in the zoning ordinance were flawed and created a "dead-end" from which the applicant could not appeal in the manner contemplated by the enabling act. On those facts, the Utah Court of Appeals allowed a petition for "extraordinary relief" pursuant to Rule 65B of the Utah Rules of Civil Procedure:

> Clearfield City cannot be heard to complain about the inappropriateness of the county's choice of procedure for obtaining judicial review [Rule 65B] in light of its own, flawed conditional use permit procedures. Simply put, Clearfield City imposed on the county a procedure inconsistent with that envisioned in the enabling act. Having done so, it cannot insist on the method of district court review envisioned in that act.[25]

IV. Judicial Challenges to Legislative Decisions

The discussion above deals with the appeal of *administrative* decisions, first to the board of adjustment and then to the courts. The following discussion deals with challenges to *legislative* decisions made by the governing body.

The decision to amend a zoning ordinance (text or map) is a legislative decision which is made by the local legislative body. Because such a decision is legislative and not administrative, it is not necessary to exhaust administrative remedies. A party who is aggrieved by a legislative decision may take his or her claim directly to the courts. Thus, as examples, in *Gardner v. Perry City*[26] the plaintiff filed suit challenging a legislative decision to rezone residential property from one-acre lots to quarter-acre lots. And, in *Harmon City, Inc. v. Draper City,*[27] the plaintiff objected to a legislative refusal to rezone property from residential to commercial. In neither of these cases was the plaintiff required to appeal to the board of adjustment because these were *legislative* decisions and not administrative decisions.

In the review of a legislative decision, the courts give that decision considerable deference. Thus, in *Harmon City,* the Utah Court of Appeals stated: "When reviewing a city council's decision not to change the zoning classification of property, we presume that the decision is valid and 'determine only whether or not the decision is arbitrary, capricious, or illegal.'"[28] In the context of rezoning, it is not sufficient that a plaintiff demonstrate economic loss caused by the rezoning. As long as he or she retains some reasonable use of the subject property there is not a constitutional "taking."[29] In *Bradley v. Payson City Corp.*[30] the Utah Court of Appeals held that legislative zoning decisions are reviewed on a "reasonably debatable" standard. In light of these standards it is not surprising that the Utah courts only rarely uphold a challenge to legislative action.

[1] Because of space constraints, only cursory endnotes are used. Unless otherwise indicated, all statutes quoted or referred to are found in The Municipal Land Use Development and Management Act (Utah Code Ann. § 10-9-101) or the County Land Use Development and Management Act (Utah Code Ann. § 17-27-101). Case references are limited to identifying significant cases and identifying the source of quotations.

[2] Provo City v. Claudin, 63 P.2d 570, 574 (Utah 1936).

[3] Walton v. Tracy Loan and Trust Co., 92 P.2d 724, 728 (Utah 1939).

[4] Utah Code Ann. § 52-4-3.

[5] 836 P.2d 790 (Utah 1992).

[6] *Id.* at 792-93 (emphasis added).

[7] Davis County v. Clearfield City, 756 P.2d 704 (Utah Ct. App. 1988).

[8] 957 P.2d 207 (Utah App. 1998).

[9] *Id.* at 209.

[10] 936 P.2d 1102 (Utah App. 1997).

[11] *Id.* at 1104 (emphasis added).

[12] *See* Ralph L. Wadsworth Const. v. West Jordan, 999 P.2d 1240 (Utah App. 2000).

[13] 571 P.2d 1316 (Utah 1977).

[14] *Id.* at 1318.

[15] 685 P.2d 550 (Utah 1984).

[16] *Id.* at 551.

[17] Springville Citizens v. City of Springville, 979 P.2d 332 (Utah 1999).

[18] 685 P.2d 1032, 1035 (Utah 1984).

[19] 287 P.2d 884 (Utah 1955).

[20] *Id.*

[21] *Xantbos* at 1034.

[22] 497 P.2d 633 (Utah 1972).

[23] *Id.* at 634.

[24] 756 P.2d 704 (Utah Ct. App. 1988).

[25] *Id.* at 708.

[26] 994 P.2d 811 (Utah App. 2000).

[27] 997 P.2d 321 (Utah App. 2000).

[28] *Id.* at 323.

[29] *See* Smith Inv. Co. v. Sandy City, 958 P.2d 245 (Utah App. 1998).

[30] Bradley v. Payson City, 413 Utah Adv. Rep. 13 (Utah App. 2001).

Justice Court, Fairness and the Law

by Neil R. Sabin

With my Sword of Justice in hand, I sallied forth as a modern Sir Galahad to face the dragon in justice court.[1] I am still nursing wounds.

In July 1999, Doug and Jennifer re-licensed their automobile. The Department of Motor Vehicles issued a sticker expiring July 2000, but erred by manually stamping "1999" on the registration. Jennifer and Doug attached the sticker to the license plate and placed the registration in the car's glove compartment.

In May 2000, Jenn was stopped by a highway patrolman who became suspicious because a corner of the license plate sticker was missing. Asked for the registration, Jenn handed the trooper the registration from the glove compartment. Since the registration was marked "1999," the trooper concluded that he had found a fraudulent registration. Jenn, a seven-month pregnant school teacher, was told to exit the automobile, to stand and to face away while the trooper searched the vehicle. After considerable time, the trooper issued a fraudulent registration citation. Jenn then waited in the trooper's car until the tow truck came to haul away her automobile.[2]

Having done everything right, Doug and Jenn were determined to right the wrong. They initiated phone calls and meetings with DMV employees and State Tax Commission personnel. They missed the equivalent of several work days chasing down information and documents. They appeared before the court to enter Jenn's "not guilty" plea.[3] Finally, persuaded of the error, the DMV issued a corrected registration; and the State Tax Commission refunded the amount of the impounded-recovery payment. Doug met with the highway trooper's sergeant, who assured Doug he would have the citation dismissed. Doug forwarded all letters and documents to the city prosecutor, evidencing the error. The prosecutor, with magnanimous sensitivity to prosecutorial discretion, refused to dismiss the action. Rather, the prosecutor amended the information charging, instead, a violation of Section 41-1a-214 of the Utah Code.[4]

When Jenn told me this, I was embarrassed and incensed. For thirty years I have defended the judicial system at every party, backyard, little league game, meeting, church social, and anywhere else someone has learned I am one of "them lawyers" *("I can't figure how all you lawyers can defend a guilty man. By the way, did ya hear about the lawyer. . .? yuk, yuk!")*.

Some people, I have repeated a thousand times, don't understand and appreciate the beauty and dignity of the law. The law works well – the courts really try to do justice – the law is an honorable profession – judges really try hard – some lawyers are close to being human. I have been sincere in my comments. Judges generally afford me respect as an officer of the court, grant reasonable opportunity for hearing and recognize my clients' legitimate concerns.

Let me, I told Jenn and Doug, give the prosecutor a call because this was probably merely a misunderstanding and should be able to be resolved through communication and good will. My golden-tongued arguments to the city prosecutor, instead, resulted in a generous offer for a *"plea in abeyance for a period of 90 days during which time she need only pay $30 in costs, and violate no law. If she performs these conditions, the matter would be dismissed at the end of 90 days."* That was insulting and unjust! This couple's faith in "the system" needed to be restored. For some newly-frocked city prosecutor whose principal goal seemed to require a conviction for *something* offended my sense of professional pride and fairness and embarrassed my profession before Doug and Jenn. I wanted a judge to right the wrong, to bring some dose of reality into the prosecutor's office. With arms waiving and spittle forming at my lips, I upped my dander. This deserved my most genuine, *pro bono* efforts. It was not a matter of the $30.00. Principle demanded that Jenn's innocence be validated! I wanted to maintain pride in justice and in the legal profession! After all, traffic tickets and justice court are most people's exposure to the criminal justice system.

I entered my appearance as counsel, obtained a copy of the patrolman's video of the incident and subpoenaed a State Tax Commission representative to provide testimony of the State's error. Even though my prior experience with justice courts was not sterling[5], justice would, undoubtedly, be served. The time was long past, I said, when a judge was compensated by a percentage of fines; and even inherent resentment against an attorney being in a justice court should be offset by the blazing light of

NEIL R. SABIN is a shareholder with Nielsen & Senior in Salt Lake City. He has decided not to specialize in justice court defense.

truth we would shine into this courtroom.

The trial day arrived. I dusted off my armor. Vindication was imminent. Doug and Jenn should thereafter respect the judicial system. I walked into the justice court, surprised to find the highway patrol trooper, his sergeant and another trooper present.[6] The State Tax Commission representative arrived, as did an assistant attorney general to protect the State's interest.[7] The previous prosecutor had been replaced by a new prosecutor.[8]

The judge took the bench. I introduced myself. The judge was not impressed (neither the judge nor the prosecutor ever called me by name). Briefly hearing what the issue was, the judge sent us to try to work things out. The trooper was there. I told him I did not question his procedure, I questioned the city continuing to pursue this. The prosecutor wanted to go ahead with the case *"because all of the witnesses are here and so I want to let them be heard."*

Throughout this whole process, no dispute existed as to the facts. Even the prosecutor accepted that an error had occurred. But it was also painfully obvious that this proceeding had little to do with fairness or recognition of the bureaucratic morass Jenn and Doug had already slogged through. The prosecution was not, after all, a search for truth or justice (in the moral, not procedural, sense). This case had developed an inertia all of its own, requiring, bygosh, the full exercise of The Law and its sacred procedures.

The trooper took the stand and testified about the circumstances of the citation. I then made a real stupid, rookie-lawyer mistake – I cross-examined the trooper. I wanted to get some acknowledgment from him as to how inane this continued prosecution was – that he would not have issued a citation if he had, at that time, known the real facts. In trying to pry this out, I presented to him language transcribed from the tape.[9]

The judge iced up. I felt I should have worn my winter coat. Believing that the trooper's testimony established the basis for a "not guilty" determination,[10] I started to make a motion. The judge snapped back, in no uncertain terms, that I could make the motion but it would be denied.

So I called as a witness the State Tax Commission representative, who identified two letters she had written evidencing the process of consideration and the basis for the State's repayment of the impound money. The judge (without prosecutor objection) stated that these letters were "hearsay." When I presented DMV computer printouts proving payment of the registration, the judge (also without prosecutor objection) said they were inadmissible because they were not certified.[11] Jenn testified, then it was time for final argument.

The prosecutor argued that Jenn was guilty of the charge because she had the responsibility of reading and checking the accuracy of the registration. Rising to present my well rehearsed and articulate legal arguments,[12] I was prepared to sway everyone present with the justice of our cause. Instead of being Sir Galahad, though, I had become Don Quixote. I completed about one sentence before being summarily cut off by the judge. The judge questioned both counsel and argued this matter while, at the same time, leaving the bench to check something with the clerk, appearing to handle some other matters, and clearly wanting to get the show on the road with the other cases.

I concluded that I must be a real bozo because, after thirty years of practice, I bungled a sure thing. I not only had failed competently to admit documents in evidence, I was unable to state more than one sentence at a time to the judge without interruption and challenge. I was amazed that I had so quickly lost all legal skills and could not understand what had caused such apparent offense to the judge. At last, though, I found the clue! The judge finally growled to me that my questioning of the trooper "implied that the trooper had done something wrong."[13] Feeling very much like a fly under a swatter, I ineffectually assured the judge that this was not my intent. The judge clearly did not buy it.

The judge took the matter under advisement, asking that we deliver the registration shown to the trooper. That had been turned in at the time of the correction of the registration, so the judge wanted an "affidavit or something" which would support our position. I subsequently mailed the Court an affidavit from a DMV representative stating the process when mistakes such as this occur, which implicitly acknowledged that this occurrence happens occasionally.

Approximately a month after the trial, my client[14] received the glad tidings: *"The Court finds that all parties, including Trooper _____, properly relied on the document prepared by the DMV of the State of Utah. Therefore, defendant did not fail to provide a certificate of registration. The Court finds the defendant not guilty."*

What a relief for the reputation of the legal system. This erased any basis for Doug and Jenn to question the justice or effectiveness of the law or the protection of the courts. Thank goodness for an independent judicial branch! Any continued carping would be merely sour apples. Jenn must be thrilled. Justice prevailed. Vindication occurred. The sun is shining, the birds are flying, and all's right with the world.

I still often recall the trial. I did not get many billable hours that day. I spent most of that afternoon involved in the trial. Besides, I went home soon afterward to take a long shower.

[1] *"Prince Oryza's determined, handsome countenance was reflected in the gleaming, polished steel of his sword, Gowayoff, as he hewed valiantly at the armored sides of the dragon, which could only be pierced by gleaming, polished steel and not the regular kind of steel, which doesn't gleam as much, and isn't polished quite as well, but does a pretty good job against your smaller dragons."* J. N. Pechota, Fantasy Winner, 1997 Bulwer-Lytton Fiction Contest.

[2] Ever try getting a car from impound with dignity? *("Listen, fella, we don't take no checks, no credit cards. Only cash. We also close at six o'clock, so be back by then or you can wait 'til tomorrow and pay another day. Don't make no nevermind to me.")*

[3] How do you rationally explain to laypersons why, when circumstances are so obvious, that the judge at the plea hearing will, with a "not guilty" plea, hear no explanation at all?

[4] ". . . (1) a registration card shall be signed by the owner in ink in the space provided. (2) A registration card shall be carried at all times in the vehicle to which it was issued. (3) The person driving or in control of a vehicle shall display the registration card upon demand of a peace officer or an officer or employee of the division."

[5] I had my first meaningful experience my first year of practice in Vernal. The JP, after socking my client with the maximum, put his arm around my shoulder and said, *"Listen son, yer client prob'ly wasn't guilty. But we got to teach you big shots from the Wasatch Front not to come here and blow over our elk."* Parenthetically, I was successful later that year, in another venture into Perry Masonism, in convincing a Salt Lake City Court judge (Yes, Virginia, I am that old) to acquit on a charge of "loitering for the purpose of soliciting a sex act."

[6] Louis Nizer should have been so lucky to intimidate law enforcement this effectively!

[7] The DMV, the Tax Commission and the AG representative were, at all times, generous with their help and, indeed, with their sympathy.

[8] In checking, I learn that the prior prosecutor is now an assistant AG. That really gives me the warm fuzzies!

[9] Jenn: So this expires on 2000, right? Trooper: No, it expired in `99. There's the computer printout. Jenn: How is that possible? I'm confused.. . .we went and did this. We went down to the Sandy office and took care of this last year. . . Why should it read `99, that's my question. . .I'll just have to take care of it later. There's just an error somewhere. Trooper: If it's an error, chances are the courts will just drop it. But, with everything I've got so far, it's just fraudulent.

[10] The registration was in the car, it had been signed, and it was presented upon request.

[11] The judge was correct under the rules on this point, but I wonder if the documents would have been given such short shift if presented by a layman, rather than by an offensive attorney.

[12] *"Soft as a bubble sung Out of a linnet's lung."* – Ralph Hodgson, *Eve.*

[13] Of course, I was instantly relieved to learn that processes exist to protect sensibilities of law officers, particularly those who appear regularly before the judge, from "implications" of wrongdoing.

[14] Not me. Despite my formal entry of appearance, I have, to this date, receiving nothing directly from the court.

Commission Highlights

During its regularly scheduled meeting of June 8, 2001 which was held at the Pack Creek Ranch, Moab, Utah the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Scott Daniels reported on Mid-Year and Annual Conventions.
2. Denise Dragoo discussed the *Bar Journal* and the reduction of costs by publishing nine rather than ten issues per year.
3. George Daines reviewed the Lawyer Referral Service and noted that this service is a major contributor to some lawyers' business. It was recommended that this issue be discussed for the next budgetary year (2002-03) at the January 2002 Commission meeting.
4. Dane Nolan discussed the Pro Bono Program. It was noted that 250 low-income Utahns had obtained legal representation during 2000.
5. Debra Moore and Dane Nolan reported on the Office of Professional Conduct Review Committee.
6. David Nuffer gave an update on MDP. He reported that the petition filed with the Supreme Court in February 2001 has been referred to the Supreme Court's Rules Advisory Committee which will issue its report by October 2001. The Court will then consider the Bar's petition.
7. Debra Moore reported on the Judicial Council.
8. Nanci Snow Bockelie reported on Rules for Lawyers' Fund for Client Protection. The Commission approved reimbursement from the Client Security Fund for attorney fees but not for questionable investment losses.

During its regularly scheduled meeting of July 4, 2001 which was held in Sun Valley, Idaho, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. David Nuffer welcomed everyone to the Annual Convention, and reviewed the schedule. Denise Dragoo will be the host for President Nicholas Wallwork of the Arizona Bar.
2. Debra Moore reviewed OPC Rules. In the discussion that followed it was determined to defer this issue to the next commission meeting.
3. Nanci Snow Bockelie reviewed the Client Security Fund Rules that were discussed at the commission meeting in Moab. The Commission voted to correct a typographical error.
4. May financials were reviewed and the proposed final budget was approved.
5. The July Bar examinations applications were approved. Conditional approval of those applicants listed on the "Examinees Pending List" was given, subject to resolution of deficiencies and Character and Fitness Committee approval.
6. Charles R. Brown and Tracy Fowler, Co-Chairs of the MJP Committee discussed the Committee's current work.
7. Frank Carney reported on issues of professionalism and civility raised at a recent meeting of the National Conference of Chief Justices (of State Supreme Courts).
8. Reorganization of the Commission. Karin Hobbs, David Bird Gus Chin and Felshaw King were welcomed as new Commissioners. D'Arcy Dixon Pignanelli is the newly appointed public member. Nate Alder is the new Young Lawyer Division's representative, Mary Gordon is the new representative from Women Lawyers and Marlene Gonzalez is the new representative from the Minority Bar.

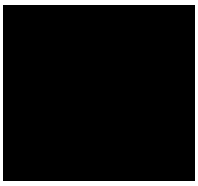
A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

2001 Annual Awards

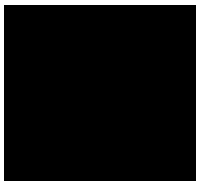
The annual awards of the Utah State Bar are presented by the Board of Bar Commissioners on behalf of the entire bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts, and the Bar; and exemplification of the highest standards of professionalism. The 2001 annual award recipients were as follows:

Judge of the Year
Hon. Raymond M. Harding, Sr.

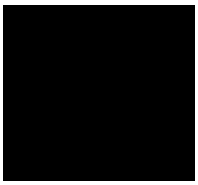
Judge of the Year
Hon. Sharon P. McCully



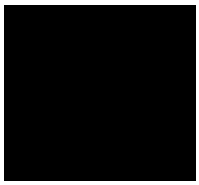
Judge of the Year
Hon. Anne M. Stirba



Distinguished Lawyer of the Year
Alan L. Sullivan



Young Lawyer of the Year
Victoria Coombs Bushnell



Pro Bono Lawyer of the Year
Mitchell R. Barker

Distinguished Section of the Year
Legal Assistant Division

Community Member of the Year
Jo Brandt

Supreme Court Seeks Attorneys to Serve on Advisory Committees

The Utah Supreme Court is seeking applicants to fill vacancies on several of its rules advisory committees. Vacancies will be filled on the following committees: Criminal Procedure, Evidence, Juvenile Procedure and Professional Conduct. Each interested attorney should submit a resume and a letter addressing qualifications and the committee of interest to Brent M. Johnson, Administrative Office of the Courts, P.O. Box 140241 Salt Lake City, Utah 84114-0241. Applications must be received no later than September 28, 2001. Questions may be directed to Mr. Johnson at (801) 578-3800.

Utah Bar Foundation

2001 IOLTA Grant Awards

The Utah Bar Foundation has awarded the 2001 IOLTA Grants. Recipients for this year are as follows:

Legal Aid Society	$105,600
Utah Legal Services	$105,600
Law Related Education	$50,000
Immigration Law Project	$30,000
DNA People's Legal Services	$28,800
Multi-Cultural Legal Center	$24,500
Disability Law Center	$24,000
Utah Dispute Resolution	$20,000
ULS Senior Lawyer Project	$6,500
Scholarships	$6,000
Total	$401,000

The Foundation Trustees would like to thank all of the organizations that submitted requests for funding.

Each year the Utah Bar Foundation provides continuing, significant support for organizations that provide legal services to low-income individuals. The Foundation also has been a long time supporter of Utah Law-Related Education. The Foundation receives its funding from Interest on Lawyer's Trust Accounts (IOLTA). The Utah Bar Foundation is governed by a seven member Board of Trustees that are elected from the Utah Bar Association's general membership. For information on how to participate in the Utah Bar Foundation IOLTA Program, please contact Kimberly Garvin at (801) 297-7046.

Joe E. Covington Prize for Scholarship in Bar Admission Topics

Call for Submissions

The National Conference of Bar Examiners ("NCBE") is sponsoring a writing contest which carries a $5,000 prize. The contest is open to everyone; judges, lawyers, law professors, and law students are all encouraged to submit articles. The panel will look for careful research, in-depth analysis, and clarity of expression in treating the following topic:

Is There a Need to Reevaluate the Standards for Determining Minimum Competence to Practice Law?

Submissions must contain completely original work and may not exceed 8,000 words, excluding endnotes. The article should conform to the conventions for the *Chicago Manual of Style,* 14th ed., or *The Bluebook: Uniform System of Citation,* 16th or 17th ed. Each author should submit two paper copies of the article, an electronic copy of the article on a 3-1/2 inch diskette, and a resume detailing the author's education and professional experience. All applications must reach NCBE or be postmarked by November 30, 2001.

Submissions and questions should be addressed to:
Annie Walljasper, Editor, *The Bar Examiner*
National Conference of Bar Examiners
402 West Wilson St. • Madison, WI 53703-3614
Telephone: (608) 280-8550 • Facsimile: (608) 280-8552
Awalljasper@ncbex.org

Attorney Recognized by AAA and Utah Bar for Dispute Resolution Service

An attorney who has made significant contributions to resolving disputes in the legal field, Hardin A. Whitney, has been awarded the Peter W. Billings, Sr. Dispute Resolution Award by the American Bar Association and the Alternative Dispute Resolution Section of the Utah State Bar at the Annual Meeting of the Utah State Bar.

The Award, given annually to a person who has made significant contributions to the field of alternative dispute resolution, was created in 1996 by the American Arbitration Association in honor of Peter W. Billings, Sr., who was a pioneer in developing methods of resolving disputes, aside from traditional litigation. Mr. Whitney, the 2001 recipient of the award and an attorney for over fifty years, has been at the forefront of dispute resolution in Utah for over 13 years. He has contributed to the field of alternative dispute resolution by educating other leaders in the judiciary, the Bar and the community regarding the benefits of alternative dispute resolution, including mediation and arbitration. He assisted in creating Utah Dispute Resolution as a non-profit corporation for the purpose of providing free mediation services to the poor and has served as the Chair of the Board of Trustees of Utah Dispute Resolution for the past 5 years. Mr. Whitney has also served as the Chair of the Alternative Dispute Resolution Committee of the Utah State Bar from 1991 to 1997, providing leadership, education, and mentoring to attorneys and others in the dispute resolution community.

Notice of Petition for Readmission to the Utah State Bar by J. Keith Henderson

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Reinstatement ("Petition") filed by J. Keith Henderson in *In re Henderson,* Third Judicial District Court, Civil No. 990910496. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Readmission to the Utah State Bar by A. Paul Schwenke

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Readmission ("Petition") filed by A. Paul Schwenke in *In re Schwenke,* Fourth Judicial District Court, Civil No. 010700085. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Discipline Corner

SUSPENSION

On April 13, 2001, the Honorable Leslie A. Lewis, Third Judicial District Court, entered an Order of Discipline: Suspension suspending George G. Ventura from the practice of law for ninety days for violation of Rules 1.6 (Confidentiality of Information) and 8.4(a) and (b) (Misconduct) of the Rules of Professional Conduct. In addition to the ninety day suspension, Ventura was placed on unsupervised probation for nine months.

Ventura provided newspaper reporters, who were doing a story about his former employer, Chiquita Brands International, with the means by which they could access the voicemail boxes of high level Chiquita lawyers and executives. Ventura provided the reporters with voicemail numbers, personal access passcodes, and instructions on how to access both new and stored voicemail messages. Ventura made these disclosures without consulting with or obtaining the consent of Chiquita Brands International. The Hamilton County Ohio Grand Jury indicted Ventura with ten felony offenses. Ventura entered a plea of no contest to four charges of attempted unauthorized access to computer systems, in violation of the Ohio Revised Code. Each of these violations is a first-degree misdemeanor.

Mitigating factors include: no prior record of discipline; cooperative attitude toward the disciplinary proceedings; good reputation; and imposition of other penalties and sanctions.

Aggravating factors include: a pattern of misconduct in that Ventura disclosed the confidential information on more than one occasion; substantial experience in the practice of law; and illegal conduct.

ADMONITION

On April 26, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 5.3(a) and (b) (Responsibilities Regarding Nonlawyer Assistants) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

The attorney employed a nonlawyer assistant who misrepresented himself as a lawyer to clients, prospective clients, and others. The nonlawyer assistant solicited by mail or by telephone new clients for the attorney. During telephone conversations with prospective clients, the nonlawyer assistant informed prospective clients that he was a lawyer. The attorney was advised of the nonlawyer assistant's conduct and the attorney continued to employ the nonlawyer assistant. The nonlawyer assistant continued to misrepresent himself as being a lawyer and continued to solicit clients on the attorney's behalf. Although the attorney did not authorize the nonlawyer assistant to misrepresent to prospective or current clients that he was a lawyer, the attorney was negligent in supervising the nonlawyer assistant.

SUSPENSION

On May 7, 2001, the Honorable Glenn Iwasaki, Third Judicial District Court, entered an Order of Discipline by Consent suspending Larry Gantenbein from the practice of law for twenty-four months; eighteen months of the suspension were stayed.

On August 20, 1999, the Idaho Supreme Court suspended Gantenbein from the practice of law in Idaho for twenty-four months; eighteen months of the suspension were stayed. Pursuant to Rule 22, Rules of Lawyer Discipline and Disability, the Office of Professional Conduct sought reciprocal discipline against Gantenbein. The conduct for which Gantenbein was disciplined in Idaho would result in at least the same level of discipline in Utah.

ADMONITION

On May 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 3.4(b) (Fairness to Opposing Party and Counsel), 4.1(a) (Truthfulness in Statements to Others), 5.3(b) and (c) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) and (c) (Misconduct) of the Rules of Professional Conduct.

The attorney directed a secretary to notarize an affidavit that was not signed in the secretary's presence. Thereafter, the attorney notarized two documents that were executed several months earlier. The attorney dated the documents with the date they were executed although this was not the date upon which the attorney notarized them.

Aggravating factors include: pattern of misconduct.

Mitigating factors include: no prior record of discipline; cooperative attitude towards disciplinary proceedings; and the circumstances under which the notarizations occurred did not alter the factual substance or accuracy of the affected documents, and did not prejudice or harm the attorney's clients or other parties.

ADMONITION

On May 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 1.15(b) (Safekeeping Property) of the Rules of Professional Conduct.

The attorney was retained to collect an out-of-state judgment on a client's behalf. During a nine month time period, seven partial settlement checks were sent to the attorney's law office. When the settlement checks arrived at the attorney's law office the attorney's secretary deposited the funds into the attorney's trust account and recorded the payments on a computer database. Although the database was designed to track payments received on clients' behalf and disbursements to clients, a malfunction in the computer system resulted in the client's funds not appearing on the attorney's monthly computer printouts. The attorney was unaware that the client's funds had been received and deposited

into the attorney's trust account; therefore, the attorney failed to promptly notify the client of receipt of the funds and failed to promptly account for and deliver the funds to the client. Upon being contacted by the client regarding the funds, and after verifying that the funds had in fact been received and deposited, the attorney made complete payment of the funds to the client, including interest. At all relevant times the client's settlement funds remained in the attorney's trust account.

Mitigating factors include: absence of prior record of discipline and cooperation with the Office of Professional Conduct.

PUBLIC REPRIMAND
On May 29, 2001, the Honorable Leslie A. Lewis, Third Judicial District Court, entered an Order of Discipline: Public Reprimand reprimanding James D. Mickelson for violation of Rules 1.2(a) (Scope of Representation) and 1.3 (Diligence) of the Rules of Professional Conduct.

Mickelson was retained to represent a client in a personal injury matter. Mickelson failed to act diligently on the client's behalf, including failing to provide requested documents to the client's insurance company. Mickelson failed to return the client's telephone calls and failed to complete the matter for which he was hired. Mickelson transferred the client's case to another attorney without the client's knowledge or consent.

Mitigating factors include: no prior record of discipline and cooperative attitude toward disciplinary proceedings.

Aggravating factors include: vulnerability of the victim and substantial experience in the practice of law.

ADMONITION
On June 4, 2001, an attorney was admonished by the Vice Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.5(a) (Fees), 1.15(b) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a divorce matter. The client paid the attorney a retainer fee. The client's divorce papers were finalized and signed by both parties to the divorce and returned to the attorney for filing, but the attorney failed to file them. The attorney failed to provide the client with billing statements or an accounting of how the retainer fee was earned. The Office of Professional Conduct received an informal complaint from the client concerning the attorney, and sent the attorney three letters requesting a written response to the complaint. The attorney failed to submit a written response.

ADMONITION
On June 20, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.7 (Conflict of Interest: General Rule) and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

The attorney engaged in inappropriate behavior with a client that limited the attorney's representation of the client. Additionally, during a legal consultation with another client, the attorney made comments of a sexual nature. The comments were inappropriate, eroded the attorney/client relationship, and were offensive to the client.

Mitigating factors include: cooperation with the Office of Professional Conduct.

ADMONITION
On June 20, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 1.5(b) (Fees) of the Rules of Professional Conduct.

The attorney received a $2500 retainer fee from clients whom the attorney had not previously regularly represented. The attorney failed to have a written fee agreement with the clients and did not communicate to the clients in writing before or within a reasonable time after commencement of the representation the basis or rate of the fee.

Mitigating factors include: the attorney submitted to binding fee arbitration and returned a portion of the retainer fee to the client.

ADMONITION
On June 20, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence), 1.4 (Communication), and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a divorce proceeding. The attorney failed to act with reasonable diligence in representing the client. The attorney did not keep the client reasonably informed about the status of the client's divorce, did not promptly comply with the client's reasonable requests for information, and did not adequately explain the client's divorce matter to the extent reasonably necessary to enable the client to make informed decisions regarding the matter. The attorney failed to timely return the client's file after the representation was terminated.

ADMONITION
On June 20, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 4.2 (Communication With Person Represented By Counsel) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney served an order compelling attendance upon a witness whom the attorney knew was represented by counsel.

Mitigating factors include: absence of prior record of discipline; absence of dishonest or selfish motive; and cooperative attitude toward proceedings.

A Life Celebrated

EDITOR'S NOTE: *In 1987, Anne Stirba was named the Utah State Bar's Outstanding Young Lawyer of the Year. This summer, the Bar honored her as Judge of the Year. In the span of years in between, she served as an administrative law judge, Assistant U.S. Attorney, and Third District Court Judge. She served terms as a Bar Commissioner and member of the Judicial Council. During most of that time, she also fought a quiet and determined battle against cancer, which could not kill her professionalism, devotion to family and friends, or keen sense of humor, but eventually took her life. The following remarks were made by Justice Christine Durham and Judge Tyrone Medley at Judge Stirba's funeral, held on July 19, 2001. Justice Durham and Judge Medley have graciously permitted them to be reprinted here.*

Judge Anne M. Stirba
July 12, 1951 – July 14, 2001

by Justice Christine M. Durham
Utah Supreme Court

Norman Cousins once wrote: "Any life, however long, is too short if the mind is bereft of splendor, the passions underworked, the memories sparse, and the imagination unlit by radiant musings." Anne Stirba's life, although far too short by any measure, was long enough for splendor, for passion, for rich memories, and for radiant musings.

Fashioning a fitting remembrance of and tribute to Anne is not, of course, a task only for our time together today, but rather an on-going labor for all of us who loved and admired her. For us all, but most especially for Peter, Emily and Melissa, the memories and the sense of her presence they bring will find places in our lives and hearts for all of our days.

My husband and I first met Anne and Peter twenty years ago at a Utah Bar Meeting in Sun Valley. She was pregnant with Emily, and she and my pediatrician husband bonded instantly; George has cared for Emily and Melissa all their lives. Another bond was identified on that occasion. Our five-year-old daughter with Down Syndrome was with us on that trip, and Anne told us about growing up with a much-loved sister who had serious developmental disabilities. I was grateful for her perspective and admired her involvement with her sister, and the tender regard she expressed for her and their parents. We also admired Anne's and Peter's quiet self-confidence about the ambitious plans they were launching – two careers, public and professional service, children. We were a few years ahead of them on that path, and I hope we were tactful enough not to tell them they were crazy. As for us, "crazy" turned out to work very well for them.

Anne's was a life of dedication and generosity. She was a loving and loved wife and mother whose family's welfare always come first. She was a caring and supportive daughter and sister, a wise and reliable friend, and a diligent, trusted colleague. She recognized and responded to others' need in her personal relationships, her professional activities, and her community service, and despite her "calling" as a judge, she was never, in the human rather than the legal sense, judgmental. Her experience with the human condition engendered kindness and patience, never withdrawal or arrogance. Her long battle with the terrible disease that has taken her now was characterized by great courage, total determination, improbable cheerfulness, and, especially towards the end, deep serenity and composure. My husband saw Anne in his office with Melissa just a few weeks ago. He spoke to me that evening about their conversation, which had deeply moved him. Anne, he said, despite all she might have had to regret, or be angry about, spoke of her profound sense of gratitude. Gratitude for the rich and full life she had been given to live. Gratitude for the experiences of love, family, friendship, and personal growth that had been hers. And, most particularly, gratitude for the decade she'd had (since her first diagnosis) to spend with her daughters in their growing years. Anyone who knows Anne knows how she felt about Emily and Melissa: they were the light of her life. Though far too short, Anne's life was full of all the essentials for human happiness, and I am convinced that she knew it, relished it, and left reluctantly, but at peace.

Professionally, Anne's life was full of accomplishments and "firsts." As the first woman in Utah's history to win election to the State Bar Commission, she negotiated the politics of what was then

still pretty much of an all-male preserve with admirable tact and good humor. She was welcoming and supportive of younger lawyers wherever she was, and mentored many young women and men in the profession. As a judge, she was always helpful to colleagues and patient with litigants: she made personal connections with people in the courtroom that assured them of her fairness, her concern, and her total commitment to doing the right thing. In fact, trying always to do the right thing was a hallmark of her behavior on and off the bench. As our small community of women judges in Utah grew, Anne could always be counted on to arrange a social event, often in her lovely home, and keep us in touch. Her commitment and accomplishments were recognized by many of the institutions she cared about. She was named Outstanding Young Lawyer of the Year by the Bar in 1987, and received the Par Excellence Award from the University of Utah Young Alumni Association in 1993. This year the Utah State Bar named her Judge of the Year on July 6th. She served ably on innumerable committees, boards and commissions dedicated to the improvement of the administration of justice and of Utah's Court system. Most recently, she represented the District Courts on the Judicial Council, the governing body of our courts, and was the Chair of its Management Committee. Her colleagues on the Council report that even the severe inroads of her illness did not prevent her from productive attendance at meetings, and remember fondly the many occasions she brightened with treats and humor.

Anne was, by the way, funny and fun-loving. Against all odds, she organized and kept alive a weekly tennis lesson (with a pro at the old Ft. Douglas Country Club) for several years, when some of us women judges were younger (and some of us thinner). The tennis pro soon learned that we were more interested in talking and laughing than improving our serves, and he occasionally threatened to expose us and our indiscretions in the press if we didn't shape up. He was, of course, generally overruled. We did notice, however, that things never got too social for Anne to tone down her killer serve in doubles. She didn't get where she was in life without a competitive instinct, but I have never seen or heard of an instance in which she used it to put down another person, betray a trust or confidence, or climb over someone else for recognition.

Her energy was well-known, and if she is resting today after the long struggle, it won't be for long. Emily Dickinson's poem reminds me of Anne:

The Goal

Each life converges to some centre
Expressed or still;
Exists in every human nature
A goal,
Admitted scarcely to itself, it may be
Too fair
For credibility's temerity
To dare.

Adored with caution, as a brittle heaven,
To reach
Were hopeless as the rainbow's raiment
To touch,

Yet persevered toward, surer for the distance;
How high
Unto the saints' slow diligence
The sky!

Ungained, it may be, by a life's low venture.
But then,
Eternity enables the endeavoring
Again.

Emily Dickinson, *The Goal,* in *Collected Poems of Emily Dickinson,* 47 (Arlington House, Inc., 1983).

Another piece of poetry, from Proverbs, also reminds me of Anne:

> Who can find a virtuous woman? for her price is far above rubies. The heart of her husband doth safely trust in her, so that he shall have no need of spoil. She will do him good and not evil all the days of her life. . . .
>
> She is like the merchants' ships; she bringeth her food from afar. She riseth also while it is yet night, and giveth meat to her household, and a portion to her maidens. She considereth a field, and buyeth it: with the fruit of her hands she planteth a vineyard. She girdeth her loins with strength, and strengtheneth her arms. . . .
>
> She stretcheth out her hand to the poor; yea, she reacheth forth her hands to the needy. She is not afraid of the snow for her household; for all her household are clothed with scarlet. . . .
>
> Strength and honour are her clothing; and she shall rejoice in time to come. She openeth her mouth with wisdom; and in her tongue is the law of kindness. . . . Her children rise up, and call her blessed; her husband also, and he praiseth her.

Proverbs 31: 10-28.

The threads of a life are too many to number, and too diverse and beautiful to properly describe. But the threads of Anne's life were woven together in a lovely, rich, and harmonious pattern that we can see, feel, and appreciate. I hope that the weaving of the threads of memory will be a warm and protective shelter for Emily and Melissa, and for Peter – her partner in everything. Anne was a strong, capable, elegant, and warm woman; she will be deeply missed.

by the Honorable Tyrone E. Medley
Third District Court

On behalf of the judiciary and in particular Anne's friends and colleagues in the Third District I wish to extend our deepest heartfelt sympathies to Anne's family as we pay tribute and celebrate her life today.

It is an honor and I feel very fortunate to have this opportunity to pay tribute to an outstanding judge, colleague, wife, mother and friend. Anne is so highly respected, cherished and loved by so many people I have wondered why I was selected to make this tribute when there are so many people close to Anne more eloquent than I who are deserving of this opportunity.

You see, approximately two months ago I called Anne at home to see how she was doing, it had been some time since I had heard from her, but in all honesty I was worried about her, I missed her, and I just wanted to hear her voice one more time. She had such a rich, soulful quality to her voice. She stunned me that day when she asked me to speak here today. And, in classic Stirba style, she had the nerve to joke with me and said, "Ah, just try to find a few nice things to say about me." We both had a good laugh on that one. I told her it could be a very short speech and we laughed again! That's one of the small things I will miss most about Anne, I loved to hear her laugh, her laugh was so infectious and abundant with joy.

Judge Greg Orme reminded me that occasionally Anne could tell a pretty good joke, however, some of her favorites cannot be retold inside a religious institution. I'm not sure I heard any of Anne's good jokes! I can remember her telling me a couple of jokes and she would break out in laughter. I would just stand there, shaking my head, she would ask what's wrong, and I would say, Anne, you're the only one laughing! It was obvious to me, like all judges, Anne had come to believe that all of her jokes were funny.

Anne was always so caring and nurturing, and constantly searching for some way to help you, some way to make life more pleasant and joyful for someone else. I wouldn't put it past her to think that maybe by asking me to speak here today that she would be helping me verbalize my own grief for her and my own mother, who I lost a few months ago, and in turn stand as an example to all of her friends and family that it is normal to grieve, but at your own speed you must move on and recapture that zest for life she so courageously fought for these past few years. So, for Anne, at her request I'm going to try and find a few nice things to say.

Anne was a judge's judge. She loved her job and took the responsibilities of her office very seriously. Anne had generous quantities of all of the attributes of an excellent jurist. The professionalism she demonstrated on the bench was second to no one in this state. She had keen intellect and it never ceased to amaze me no matter if we were discussing legal issues, or at a judges' meeting or a Judicial Council meeting, she had an uncanny ability to cut through the morass of irrelevant detail, go directly to the core of an issue, artfully articulate a well-reasoned solution or decision, with the necessary commitment and follow-through to accomplish the desired result. Anne was a master at gentle persuasion. Even if you disagreed with her position, you had to respect the thoroughness of her analysis, her intellectual honesty, and the respect and consideration she gave to opposing views. As a trial judge, Anne was hardworking, compassionate, and painstakingly fair. Anne has been described as a judge who perfectly balanced a firm, intellectual no-nonsense approach, tempered with appropriate caring and compassion. Many of us believe that Anne epitomized the best within our Utah judiciary.

Among Anne's strongest attributes was her enormous capacity for compassion and sensitivity. She took extraordinary care in meeting the needs and addressing the concerns of jurors and victims of crime. Two cases of note exemplify these attributes. The Woodland murder case, also known as "Captain Nemo", was prosecuted by current Judge Ann Boyden. As one would expect, Ann Boyden describes Judge Stirba as meticulous in detail. She made sure every appropriate hearing was scheduled, every issue fully addressed, with a complete, accurate and preserved record. Judge Stirba was relentless in making sure the attorneys dotted every "i" and crossed every "t". Judge Stirba's even-handed, delicate approach was most impressive and demonstrated her sensitivity and concern for the victims, yet appropriately protecting the rights of the defendant. These same skills were on display several years later when Judge Stirba handled the Benvenuto capital homicide case which resulted in a guilty plea. Years later people still comment upon the professionalism, compassion and care rendered by Judge Stirba in managing that case.

Many of you know that for the past few years I have been involved with the Task Force on Race and Ethnic Fairness in the Legal System. Many of you have supported this effort, however, when addressing the difficult issue of race sometimes you need leaders to step up and lead. Anne did just that! She passionately supported our efforts because the ideal of equal access to justice for everyone, to her should be mandatory reality.

In March of this year Anne was very sick. She asked me to substitute for her at the Judicial Council meeting in St. George. On the

agenda that day was the new position for a statewide coordinator to implement the recommendations in the Task Force report. Despite her illness and the fact she was spending precious time with her family, she appeared by speaker-phone to urge the Council to continue to support the work of the Task Force. I don't believe I've ever seen as much courage, commitment and leadership all wrapped into one person in all my life.

I want to conclude with what I believe is Anne's greatest legacy. The humanity, compassion, caring, love and courage with which she lived her life and generously shared with others. It didn't matter who you were, nor what your station in life was, she had a way of touching your life. She was a role model, mentor and a pure inspiration for many. This is her greatest legacy.

Many of us here today have an Anne Stirba story to tell. Anne was a role model for Jan Thompson, Media Relations Coordinator. Anne's integrity and dedication has inspired Jan Thompson to believe in the uncompromising pursuit of excellence and fairness in her service to the public. Many of us here today have received a memorable thank you note, letter or card from Anne. Judge Ann Boyden still treasures a dozen pink roses, now perfectly dried, she received from Anne when first appointed to the bench.

Diane Cowdrey, Director, Utah Judicial Institute, shared a story as follows:

One of the things I will remember about Anne is her love for our Law and Literature programs that we hold each winter. She loved to read and was thoughtful, insightful and open in her comments. The last two years, she opened her mountain cabin up to our group for our evening program. Everyone would sit around her lovely cabin, with a big fire roaring away, and discuss a piece of literature. Anne was a gracious and attentive host, and everyone felt relaxed. Most of the women in the group stayed over at the cabin, and had a sleepover. We all felt like a community there – Anne made it special. The last program was in February this year, and I know she wasn't feeling well. But she still wanted to host that dinner. It meant a lot to her to have us up there. She was sick and wasn't able to be with everyone the entire time, but her presence was always with us. During part of that program, we explored death and dying, and people shared how they felt about that. Anne participated fully – she had wanted to have this discussion. This was not a theoretical issue for her – she knew her time was limited. It was a gift to have her with us, and I know we'll always have her presence during Law and Literature programs that we hold in the future.

Judge Kimberly Hornak shared another experience with Anne, as follows:

My husband was an economist in the Department of Natural Resources when Anne represented that agency several years ago. I went to law school in the state of Washington and moved to Utah in 1984. Inasmuch as I did not know any lawyers in Utah, my husband arranged for Anne and I to have lunch when I moved here. She was the first lawyer I met in Utah. She was friendly and outgoing and offered to get me involved in several committees and organizations. She became a mentor to me in 1984 and continued to be one throughout my career. When I prosecuted cases in her court she went out of her way to tell me what a good job I did or to offer constructive criticism. Whenever she heard some news about me she called or sent a card or flowers and offered words of congratulations or encouragement. That is the kind of person she was – sincere, thoughtful, interested in others and kind. The wonderful thing about Anne was that she was respected as a professional and a jurist but perhaps more importantly she was valued and trusted as a friend. Although she will be missed greatly, she influenced many lives and I think I am a better person for having known her.

If Anne had lived another 50 years, that wouldn't be long enough for me to repay the debt of gratitude I owe for the compassion and courage she gave me over the past nine months.

In October of last year my mother was diagnosed with terminal lung cancer. We lost her on New Year's Day. The experience has been devastating and it's been very difficult to move on. Well, who do you think came to the rescue? That's right, Anne Stirba to the rescue. She was constantly leading the charge in service to others. Anne was a walking computer disk and knew everything about the disease of cancer, which she shared with me. She helped educate me so I could ask the proper questions regarding my mother's care and guided me through the health care industry maze. She helped me understand the various treatment options recommended for my mother. She helped me understand the benefits and side effects of my mother's medications. She helped me understand my mother's loss of appetite and her depression. I lost track of the number of times she called me in New Jersey, wondering if there was anything she could do. She made her doctor available to me so I could cross-check the medical care my mother was receiving. I'm not sure I should even mention this because I'm not sure the statute of limitations has run on this, but when I was having a problem obtaining anti-nausea medication for my mother, she offered to give me hers.

Above all, Anne gave me strength and courage. Judge Glenn Iwasaki and I would often look at one another in total awe of Anne's courage, grace and dignity. We often commented that if either one of us were in her position we would have crawled up under our desks in the fetal position, totally helpless, but not Anne Stirba.

My mother's last request of me before depression set in and she lost the ability to communicate, was for me to be strong for her. Witnessing Anne's courageous and graceful fight and the compassionate way she generously shared her experiences with me, allowed me to honor my mother's last request. For this I am eternally grateful.

Last, I would like to pass on to Emily and Melissa a valuable lesson that is reinforced with each passing day. With each passing day I am learning that a mother's love never dies! A mother's love is an inextricable part of us forever.

So, Anne, I hope you're pleased to know I was able to find a few nice things to say about you. God bless you.

Thank you.

Recent Amendments to the Federal Rules of Civil Procedure for Utah Practitioners

by Marcie E. Schaap

A. Overview

The FRCP were originally promulgated by the U.S. Supreme Court on December 20, 1937. Since that time, they have been amended 24 times, most recently in April 2000, with changes made effective as of December 1, 2000. The Supreme Court Order provides that the amendments "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Therefore, any case which is *active* in federal court on December 1, 2000, is subject to the amendments.

The new amendments to the Rules of Civil Procedure appear to increase judicial oversight of discovery.

B. Length of Depositions – One Day of Seven Hours Rule 30(d)(2)

The new amendments limit depositions to seven hours on a single day. Only actual deposition time counts against the seven-hour limit: reasonable lunch and other breaks do not count against the seven hours. The time limit may be extended by stipulation, if necessary, and case-specific orders directing shorter depositions or limited periods on several days are likewise permitted.[1] Otherwise, a court order is necessary to extend the time.[2]

Considerations which may necessitate additional time necessary include the following:

Whether the witness needs an interpreter;

Whether the examination covers events occurring over a long period of time;

Whether the witness will be questioned about lengthy documents;

Whether documents have been requested but not produced, further examination may be necessary once the documents *are* produced;

In multi-party cases, the need for each party to examine the witness;

Whether the witness' lawyer wants to examine the witness;

Expert witnesses may require more time than fact witnesses; and

Whether the witness or other person impedes or delays the examination. Of course, this could include anything from a medical emergency to a power outage, but it applies equally to interference by deposition participants: new Rule 30(d)(3) allows sanctions against any person who impedes or frustrates fair examination of a witness, including attorneys who make improper objections or give directions not to answer prohibited by Rule 30(d)(1).[3]

The Rule anticipates (accurately, it is to be hoped) that parties will cooperate, and the Advisory Committee recommends that "preoccupation with timing is to be avoided."

C & D. Limiting the Scope of Discovery and Impact on Initial Disclosure Requirements

Rule 26

Prior to the year 2000 amendments, Rule 26 allowed local districts to opt-out of the requirement call for the filing of initial disclosures. This option is no longer available. The new amendments are intended to establish *national uniformity.*[4] However,

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although now universally applicable, the disclosure obligation has been narrowed by the amendments. Formerly, it will be recalled, Rule 26 obliged each party to disclose witnesses and documents "relevant to disputed facts alleged with particularity in the pleadings" or information "relevant to the subject matter involved in the pending action." Under the new Amendments, however, disclosure is required only of those witnesses and documents that the disclosing party "may" use to support "claims" or "defenses" "unless solely for impeachment." This removes the former requirement that counsel disclose information harmful to their clients without a formal discovery request. A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.[5] This standard also applies to depositions.

Affirmative defense information must be disclosed; as a result, boilerplate defenses (i.e., laches, accord and satisfaction, etc.) are discouraged. If you "may" use the information to support a claim or defense (that is, if there is a chance that it will be used), it must be produced. If you do not disclose the information and you try to use it later in dispositive motions or at trial, you will be barred.[6] Conversely, by carefully drafting the pleadings to focus on the heart of the issues, you can control disclosure.

New rule 26 also exempts eight categories of cases from the disclosure requirement, estimated to be about 1/3 of all civil cases.[7]

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

This list was developed after a review of the categories excluded by local rules in various districts. The descriptions are generic and are intended to be administered by the parties - and, when needed, the courts – with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general examples. Cases which are excluded are also exempt from Rule 26(f) conferences and the subdivision (d) moratorium on discovery prior to the conference. Discovery may begin immediately for exempted cases.

SUMMARY OF FRCP DISCLOSURE TIMETABLE

Rule	Description	When
26(f)	Conference of parties[8]	21 days before the Rule 16 Scheduling Conference
26(f)	File Planning Report	At least 14 days after the Rule 26(f) conference of parties
16(b)	Scheduling Conference	Held at discretion of court, sometime after receiving copy of 26(f) report
26(a)(1)	Initial Disclosures	14 days after 26(f) conference of parties
16(b)	Scheduling Order	As soon as practicable, but within 90 days of appearance of Defendant and 120 days after complaint served on Defendant.
26(a)(2)	Disclosure of Expert Witnesses	Set by court or stipulated by parties; in absence of order or stipulation, 90 days before trial date
26(a)(3)	PreTrial Disclosures	Typically set by court; in absence of order, 30 days before trial date
26(a)(3)	Objections to Use of Evidence	14 days after disclosure of intent to use deposition or exhibit
26(e)	Supplementation of Disclosures	Throughout entire case

Parties may also agree to forego disclosure. If they cannot agree to forego disclosure, they may present the matter to the judge by objecting to disclosure. If a party is served or joined after the 26(f) conference, no new conference is required, but disclosures must be made within 30 days of joinder or service of a claim on a party in a defensive posture. Objection during a 26(f) conference stays disclosure until the court can rule.

Rule 26(b)(2) was amended to remove the previous permission for local rules that establish different presumptive limits on discovery activities covered by Rules 30, 31, and 33. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

Rule 26(d) was amended to remove the prior authority to exempt cases by local rule from the moratorium on discovery before the 26(f) conference, but the eight exempted categories under 26(a)(1)(E) are excluded from 26(d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but 'standing" orders altering the moratorium are not authorized.

Local rules may also not opt out of the Rule 26(f) requirement. This was found to be one of the most successful changes made in the 1993 amendments.

E. Broadening Sanctions for Failure to Amend Prior Discovery Responses - Rule 37

The amendment to Rule (c)(1) explicitly adds failure to comply with Rule 26(e)(2) to supplement discovery responses as information becomes available as a ground for exclusion sanctions. This only applies when the failure to supplement was "without substantial justification." The Advisory Committee indicates that even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless. The 10th Circuit has been hesitant to pull the trigger on Rule 37. Interestingly, the 2nd Circuit has reversed in 7 of 8 cases where sanctions were imposed.

F. Changes to Rule 5(d) Filing of Discovery Material

Rule 5(d) was amended to provide that Rule 26(a)(1) and (2) disclosures, as well as discovery requests and responses under Rules 30 (depositions upon oral examination), 31 (depositions upon written questions), 33 (interrogatories), 34 (production of documents and things and entry upon land for inspection and other purposes), and 36 (requests for admission) must not be filed with the court until they are used in the action. Discovery requests include deposition notices, and discovery responses include objections. This rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in an action. Rule 26(a)(3) disclosures, however, must be promptly filed as provided by the Rule.

[1]*Note from Magistrate Judge Ronald Boyce* A recent survey indicated that the average (mean) deposition time is 5 hours. Less than 20% of attorneys surveyed had ever had depositions lasting greater than 7 hours. You can no longer use the "Old Navy Rule" – You can't build the officers' club first, then build the air strip – you've got to get right to it!

[2]For Rule 30(b)(6) depositions, the deposition of each designated person is considered a separate deposition.

[3]Only three circumstances warrant a direction that the witness not answer: 1) to claim a privilege or protection against disclosure (i.e. work product); 2) to enforce a court directive limiting scope or length of permissible discovery; or 3) to suspend a deposition to enable presentation of a motion under Rule 30(d)(3) for sanctions.

[4]Prior to the amendment 1/3 of the Districts required initial disclosures; 1/3 did not; and 1/3 went both ways. Now all Districts must comply. It cannot be altered by local rule. Many lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. T. Willging, J. Shapard, D. Stienstra & D. Miletich. Discovery and Disclosure Practice, Problems, and Proposals for Change (Federal Judicial Center, 1997), 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§2072-2077. Results of the survey are published in 39 Boston Col. L. Rev. 517-840 (1998).

[5]This also raises some questions: What about third-person Rule 45 Subpoenas? These are not governed by the Rule. What about background information? There is not much guidance given in the Rule itself.

[6]*See* exclusion sanction of Rule 37(c)(1).

[7]Rule 16, F.R.C.P. allows a court to order disclosure by a party. Does this include exempt parties? An inconsistency?

[8]The parties may now participate by phone, but most were ignoring the face-to-face requirement anyway, so this is no big change. The court may require a face-to-face meeting.

New Young Lawyers Division Officers Elected

by Stephen W. Owens, Immediate Past President, Young Lawyers' Division

Allow me to introduce to you the newly-elected officers of the Bar's Young Lawyers' Division. These five talented individuals will continue the YLD tradition of service to its members, the Bar, and the Community.

President Nathan D. Alder: Nate has served as YLD President-Elect this past year and took office as President in July at the Annual Meeting in Sun Valley. He practices with the Salt Lake City law firm of Christensen & Jensen, focusing on personal injury cases, both plaintiff and defense. He also practices in the areas of commercial litigation, products liability, fiduciary liability, and insurance bad faith. Nate is a 1995 JD/MPA joint degree graduate of Indiana University-Bloomington. He clerked for the Hon. J. Thomas Greene, U.S. District Court of Utah, before joining the firm. He helped form the Utah Bar's ADR Section and currently serves in leadership roles in the ABA's Tort and Insurance Practice Section. For the past 4-1/2 years, he has served as pro bono general counsel for the Utah Nonprofits Association. He also serves on the boards of the Children's Campaign of Utah, the Bonneville Resource Conservation & Development Council, and the Emma Lou Thayne Community Service Center at Salt Lake Community College. Nate and his wife, Laurel, are the parents of three children.

President-Elect Victoria Coombs Bushnell: Vicky received her law degree from the University of Utah College of Law in 1996. Upon graduation, Vicky clerked for Michael D. Zimmerman, then-Chief Justice of the Utah Supreme Court. In November 1997, she joined the Salt Lake City law firm of Anderson & Karrenberg, where she worked as a commercial litigation associate. In May 2000, Vicky left Anderson & Karrenberg to form the Park City law firm that is now known as Wrona, Bushnell & Kozak. Her practice focuses on real estate and commercial litigation. Vicky has been involved with the Young Lawyers' Division of the Utah State Bar since 1998, primarily in volunteering for and then chairing the Tuesday Night Bar program. In May 2001, Vicky was named 2001 Young Lawyer of the Year for her work with the Tuesday Night Bar.

Secretary Scott Petersen: Scott is a shareholder with the Salt Lake law firm of Fabian & Clendenin. He represents employers and insurers in all aspects of employment and ERISA law, in state and federal court and before state and federal agencies. He previously worked for the law firm of Strong & Hanni. He graduated from the J. Reuben Clark Law School in 1996. He has authored several published articles and has acted as chair of the YLD's CLE committee.

Treasurer Christian W. Clinger: Christian W. Clinger has been elected as the Treasurer for the Utah State Bar Young Lawyer Division. Christian is an attorney with the law firm of Callister, Nebeker, and McCullough where his practice focuses on civil and commercial litigation. Prior to joining Callister, Nebeker, and McCullough, Christian served as a law clerk to Presiding Judge Frank G. Noel, Judge David S. Young, and Judge Roger A. Livingston of the Third District Court, State of Utah. Christian is also a member of the Nebraska State Bar. Before moving to Utah, Christian practiced securities law in Nebraska.

ABA Representative Amy Allred Dolce: Amy is a graduate of the University of Utah College of Law, where she served as a Note and Comment Editor of the Utah Law Review, and as a teaching assistant in the legal writing program. She was admitted to the Utah Bar in 1998, and currently practices in Salt Lake City with her father, Joel M. Allred, in civil litigation, concentrating on medical malpractice, aviation litigation, products liability, and personal injury. Amy is the ABA YLD District Representative for Utah and Nevada.

A Tribute to the Law

by Honorable Dee Benson

EDITOR'S NOTE: *Judge Dee Benson is Chief Judge of the United States District Court for the District of Utah. This article was originally delivered as the keynote address at the Law Day luncheon on May 1, 2001, sponsored by the Young Lawyers Division of the Utah State Bar.*

In the Soviet Union, and in Russia today, the first of May is celebrated as May Day – a celebration that has its origin in 1914 during the Bolshevik Revolution. Then it was a symbol of the workers of the world uniting in throwing off their shackles. Later, during the heyday of the Soviet Union, the May Day celebration became a showcase of military power, in Moscow's Red Square and throughout the Eastern Bloc.

On this side of the Atlantic, we Americans finally got a little tired of watching these displays of tanks and mortar launchers and came up with our own May Day celebration. In 1957, President Dwight Eisenhower signed a Proclamation making May 1st Law Day. He almost didn't sign it because his Chief of Staff, Sherman Adams, thought it praised lawyers. But after reading it, the President had this to say:

Sherm, this Proclamation does not contain one word praising lawyers. It praises our constitutional law system of government, our great law heritage under the Rule of Law, and asks our people to stand up and praise what they have created. I like it and I am going to sign it. . . . I have a strong feeling there will be many who will say this Proclamation is one of the best ideas I ever had.

And, actually, it was one of his better ideas. Certainly a lot better in Eisenhower's own opinion, than his placing William Brennan on the Supreme Court.

And ever since 1957, on the 1st of May, we've been going head to head with the Soviet Union and other communist countries. They would march out the military with all its power, showcasing intercontinental missile systems. We would march out our law, beginning with a 16 page document called the Constitution. At present glance, by comparison, we're looking pretty good.

At the present time, I'm in the middle of preparing my final exam for my Evidence class at the University of Utah law school, so I'm a little fixated on multiple choice questions. So, I want to ask all of you a multiple choice question about the law – this thing we're celebrating. Being young lawyers, it wasn't all that long ago that you were taking these kinds of tests on a regular basis. This will give you a chance to relive your glory years – complete with complaining about the unfairness of the question. Here's the question:

Law is best described as:

A. A Lear jet
B. McDonald's
C. The U.S. Military
D. A cemetery plot
E. A life insurance policy
F. The heartbeat of America

Before I grade this question, I'd like to tell you just a story or two that breathe a little life into this thing we call the law. First, consider this one:

Several years ago, when I was the U.S. Attorney, I filed a criminal prosecution against a man for drug dealing. He showed up at Denny's Restaurant on 45th South, right there next to the I-15 freeway, to sell some drugs to an undercover police officer. In an effort to look tougher, this guy brought a gun with him to the drug deal. He made sure it was in plain view in his duffel bag next to the drugs. To look even tougher – with maybe just a hint of organized crime – he had attached to the barrel of the gun a long pipe that looked like a silencer. The man had actually made the silencer in his garage, put grooves in it for screwing and everything. So, after the undercover officer arrested this man we charged him with distribution of ecstasy and with using or carrying a firearm in connection with a drug deal. We also charged him with the illegal use of a silencer. For some reason, back in 1984 when it passed the Omnibus Crime Act, Congress got really upset about guns and silencers. Carrying a gun during a drug deal carries a minimum five-year sentence, no matter what, and carrying a silencer on the end of that gun gets you thirty more years of mandatory time. Thirty years, just for the silencer.

When I mentioned this to the defendant and his lawyer, it didn't go over well.

So, we shipped off the silencer to have it tested at the ATF laboratory. And then I discovered an interesting thing in our federal law. A gun is defined as basically anything that the person on the other side of it thinks is a gun. You can rob a bank with a squirt gun and still be guilty of armed robbery even thought the gun is a toy. It just has to look like a gun.

Not so with a silencer. With a silencer, it turns out the law requires that the device actually must lessen sound.

When the test came back on this man's silencer, the ATF report read: "Although the device looks like a silencer, and screws rather nicely into the barrel, it does not actually diminish sound; in fact it enhances it."

So we dismissed the silencer count, just like that, and that defendant dodged a 30-year bullet.

This law of ours does not always make sense.

A few months ago I sentenced a young man to 10 years in a federal prison for committing a hate-crime, one motivated by racial animus. The sentence was required under present federal law. His plea bargain offer from the government before trial was 18 months. I thought he should have taken it, but he didn't. He thought he could win at trial; his lawyer probably thought he could win at trial. He didn't, and now he has plenty of time to second-guess his decision.

The law has harsh consequences.

Last week the United States Supreme Court ruled as constitutional an arrest and jailing of a woman in Texas for not wearing her seatbelt. I was mulling that over on the way to give a Law Day speech at Hill Air Force Base last Friday, and, there in my rear view mirror, two cars behind me was a highway patrol car with its overhead lights on. I thought how unfortunate it was for the car behind me, who was obviously being pulled over. I want it known, I was not speeding. So the car behind me pulled over to the right-hand lane, and the patrol car didn't; he was after me. So, I pulled over. I was driving my son's car which is most prominent as a tribute to Bob Marley. In fact, right where there should be a front license plate there is instead a pretty good likeness of Mr. Marley himself. So anyway, the trooper approached my vehicle; I asked what I'd done wrong and all he said was "driver's license and registration, please!" Then, after he checked me out – probably ran an NCIC on me to see if I was wanted in Jamaica – he told me he pulled me over because I was one month behind on my registration sticker. Then he asked me if I was wearing my seatbelt when he pulled me over. I thought briefly about mentioning the Fifth Amendment, but he didn't seem to be in a particularly talkative mood, so I heard myself say "No." So just like that, he had me. And I happened to know I could get thrown in jail for this. The Supreme Court said so just last week. So, after about 15 minutes on the side of I-215, I left with a ticket for no registration and failing to wear my seatbelt. At least I didn't have a silencer.

The law does not always appear merciful – or even fair sometimes.

Just a few weeks ago I presided over a boundary dispute case. People who had been peaceful neighbors for 50 years were making claims over the same four acres of land that had been condemned by the federal government, asserting legal doctrines such as boundary by acquiescence, adverse possession, and first-in-time, first-in-right recording priorities. A simple boundary dispute became, as most litigation does, a highly-charged, emotionally draining, expensive experience. I encouraged them to settle, and they wouldn't. I begged them to settle, knowing the law would make some of them ecstatically happy and the others painfully sad. But they insisted on their legal rights. Now, some of them are extremely disappointed. That's the way the law works when pushed to a conclusion. And I know those people aren't speaking to each other any more.

The other day I had this young Hispanic boy before me on an illegal reentry charge. He said at sentencing that he was only 16, and therefore couldn't be prosecuted as an adult. His lawyer accordingly moved for dismissal. I asked for some verification of his age. The defendant produced a birth certificate from Sinaloa, Mexico. It looked pretty official. Still, I thought he was lying. He had previously served a year in an adult jail in Los Angeles; his priest from his hometown in Mexico had written to me asking for leniency and had stated in the letter that the defendant was 20-years-old. And the defendant himself had earlier told our federal probation officer that he was an adult when he returned to the United States after his deportation. About the only thing he had going for him was that he really did look young. This was Mexico's answer to Dick Clark.

I urged him to tell me the truth. I took out a felt-tip pen and did the math for him on an easel in the courtroom. I showed him that if he was lying to me about his age that he would receive about five extra years in prison for obstructing justice and other reasons such as not having a chance at getting any time off for acceptance of responsibility – and that I would have no choice but to do that because that is the law. I told him I was going to

check out this birth certificate, even if it meant sending someone to Mexico, and that he shouldn't, he really shouldn't, lie to the Court. He looked me right in the eye and said he was 16 and the birth certificate was real. I knew he wasn't telling the truth, and I, a federal judge, begged him to reconsider, because this law of ours, it isn't so bendable sometimes. But he persisted, and so I sent Lorenzo Archuleta, a court-appointed investigator, to Sinaloa, Mexico, to check out this birth certificate, hoping, honestly, I was, that it was accurate.

But it wasn't. A complete forgery. Even the hospital was made up. His lawyer asked for mercy, he's still just a kid - maybe not 16, but still 19 or 20 at the most, and kids make mistakes. I gave him the five extra years.

The law can be tough.

A few weeks ago, I was asked to speak to a group of young people incarcerated at the Youth Correction Center in South Salt Lake. The leaders of the facility asked me to give these troubled youths some advice. And I did. But I think what I told them surprised them a little bit. I told them I was going to explain to them a very good reason for not committing crimes. And that reason, I said, is because the criminal justice system isn't fair.

It's not that it's always unfair. But I told them even though the system is designed to be fair, it doesn't always work out that way, and even if it is fair, you're probably not going to think it was. The judge may misapply the law; your lawyer may not know the law; the law itself may be unfair; and on and on. So, my advice to them was, don't go near the line. Stay as far away from the legal system as you possibly can. After all, it is run by human beings, which reminds me of another anecdote, one I found sort of funny, although it wasn't so funny to everyone at the time.

Just a short time ago, a criminal fraud case was tried in my court. The jury returned a verdict after 7 or 8 hours of deliberation. The defendant and his wife anxiously waited in the courthouse. When everyone reassembled for the rendering of the verdict, there was a lot of tension in the air, as there always is in a criminal case. I received the verdict form from the jury foreperson, and I checked to see it was properly filled out. As to Count I, it was marked "Not Guilty." I then handed it to my courtroom deputy for reading. The defendant and his attorney stood. The defendant's wife sat nervously on the edge of her seat. The deputy read: "We, the jury, in the above-entitled action find the defendant guilty . . . oh, no, I mean . . . not guilty." After the initial announcement of guilty, the wife broke into tears and the defendant's knees buckled.

As I said, it's not a perfect system.

Now, with these brief stories in mind, and based on your own experiences, what do you think is the correct answer to this question? In my view, the correct answer is "c," the U.S. Military. And I would also accept "d" or "e," a cemetery plot or a life insurance policy. Because it seems to me as I've viewed the law from so many different angles its true worth lies in having it there, ready, willing and able, and at the same time, in using it sparingly. There is a correlation between how much we use the law and how well we're doing as a society, as a country. The more the law can resemble an insurance policy or a grave site – there if we need it, but we hope we never do – the better off we are. Ironically, in light of Russia's May Day theme, law is like a good army; it keeps the peace just by existing. But if we use it too much, we find somebody in Quality Assurance forgot to make sure the wheels were on right.

Letter (A), a Lear jet, isn't the correct answer. It's costly, everyone can't afford one, and if you had one you would want to use it all the time. It's the same with McDonald's, 20 billion served, or whatever. McDonald's is made for the masses, for everyday consumption. And a warning sign for any country is how many people go to court to sue each other, or their government. We do not want a sign on our courthouse announcing the number of verdicts rendered.

This is not to say I am not as big a fan of the law as exists today. I am. I actually love the law. I like legal issues. Paul Warner calls me a legal idiot savant, or is it an idiot legal savant? I watch "Law and Order" reruns for fun. I think the Bill of Rights is a wonderful document. I just don't think everyday usage of the law in contested lawsuits has ever been healthy. Hard cases make bad law; and most laws, if pressed to their outer edges, don't improve with overuse. And look at the law's excesses. Look at the O.J. Simpson case – a good example that the system has problems. And no one can genuinely disagree with the proposition that money makes a big difference in litigation. Even though our legal framework is so vital to our society, its use isn't what is most important to our continued vitality as a people. Other things that the law allows to exist in all their vigor fill those more important everyday roles: things like family and community and churches and volunteerism and freedom.

When I was appointed U.S. Attorney, we were in the heart of the war on drugs. I thought tougher laws could fix that problem. I

was mostly wrong, although tougher laws can provide some important help. But we learned the only time-honored tried and proven approach to winning the war on drugs – and this is still true – is a change in public demand, and that change in attitude is not and will not be driven by the law, but rather by all of these other aspects of society.

I have always thought it interesting that this legal framework our Founding Fathers so wisely constructed and blessed us with mainly got out of the way, and the first 150 years or so of our history under the Constitution was devoted to large masses of different segments of American society working hard and putting together the strongest country on earth, without a lot of attention being given to the exact boundaries of these broad and quite simple legal doctrines contained in the Constitution. I think it's most interesting that when two of the most important of the Founding Fathers got into a major disagreement – with Aaron Burr accusing Alexander Hamilton of defamation of character – these two men who had devoted decades to creating a system of law, settled the matter with a duel, which was itself against the law – that's why they called it an "interview." They even rowed over to New Jersey from New York, because dueling was clearly against the law in New York. Think of it. The sitting Vice President of the United States (Burr) stepping off ten paces and firing a pistol at, and killing, the author of the Federalist Papers, not to mention the man whose face would later grace the ten dollar bill.

My most satisfying experience from a humanitarian, feel-good-about-myself standpoint during almost 13 years of non-judge legal work, during which I was involved most of the time in litigation with a large law firm, came from a settlement. It wasn't a big jury verdict that made me feel the most proud of my work with the law. Not even the $5 million the jury awarded my client, Merrill Cook, back in 1981, that helped pay for all those political campaigns. No, the best ending I ever had was a settlement. It was helping find an end to a decade of hard feelings and contention between two former friends and partners.

I find it interesting what Alexis de Tocqueville said back in the mid-1800's. He was the French scholar who spent a lot of time traveling throughout America, trying to see what it was that was working so well. At the conclusion of his travels, he had this to say:

I sought for the greatness and genius of America in her commodious harbors and her ample rivers, and it was not there; in her fertile fields and boundless prairie, and it was not there; in her rich mines and vast commerce, and it was not there. Not until I went to the churches of America and heard her pulpits aflame with righteousness did I understand the secret of her genius and power.

He didn't focus on our system of laws. He focused on our goodness. On that subject he stated: "America is great because she is good, and if America ever ceases to be good, America will cease to be great."

In closing, let me pay my own tribute to the law – for being there. And at the same time to encourage all of us to honor the laws by forgetting about them most of the time, and encouraging clients to do that whenever it makes sense, and it makes sense more often than you might think. Answer "F," "the heartbeat of America" isn't the right answer. You're always aware of and checking on a heartbeat. Freedom and opportunity are the better comparisons to a heartbeat. The law is like a good missile system. Let's make sure it's in good working order, but we don't want to use it too often. I applaud all of your dedication to the law; employed with wisdom, it truly is the basis for the freedom we enjoy.

I very much appreciate the opportunity to say a few words to you today. Thank you.

Message From the Chair

by Deborah Calegory

On Friday, June 8, 2001, the Legal Assistant Division ("LAD") held its annual members meeting at the Utah Law and Justice Center. In addition to the meeting, 6.0 hours of CLE were provided. Between the meeting and CLE, over 50 people attended. Robyn Dotterer, Sanda Kirkham and Cynthia Mendenhall were elected as new Directors.

The following are members of the LAD Board of Directors for 2001-2001:

Bette Boscareno	Sanda Kirkham	GeorgeAnn Probert
Robyn Dotterer	Cynthia Mendenhall	Thora Searle
Kay Hanson	Suzanne Potts	

(Director II position to be filled by appointment)

The following LAD Committees will be active during the year 2001-2002.

Bylaws Revision	Membership
Education	Professional Standards
Elections/Parliamentarian	Retreat
Long Range Plan	Utilization
Marketing & Publications	Website

Please volunteer your time to these committees. The more you participate, the more direct impact you can have on the direction of your career.

You should have received and returned your membership renewal applications by now. If you did not get a renewal form, or if you know of individuals in need of membership forms, please contact me. Forms and information about the Legal Assistant Division, the Board of Directors, and Committee Chairs are available on the Legal Assistant Division website at http://www.utahbar.org/sites/lad/, or by contacting me at 435-674-0400.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
9/07/01	**Annual Government Law Section Seminar. Snowbird Utah.** 9:00 am–3:20 pm; Cliff Lodge Snowbird, Utah. $55 section members, $70 all others. Topics include: Public Employee Protection, Land and Water Matters, Special District, Attorney/Client confidentiality.	6 – includes 1 hr Ethics
9/11/01	**The FDCPA as Interpreted by the Courts.** Presenter: Jesse Riddle, Riddle & Associates. 9:00 am–1:00 pm (lunch provided). $75 Collection Section members, $85 all others. Case law update and question and answer period.	4 – includes 1 hr Ethics
9/20/01	**Bankruptcy Workshop: Starting Over. Introduction to the practice of bankruptcy.** 5:30–8:30 pm. $40 for YLD, $55 all others.	3 NLCE/CLE
9/28/01	**Nuts and Bolts for Beginners Employment Discrimination Seminar.** 8:30 am–4:00 pm. Overview of Employment Law Clinic, basics of employment discrimination law, evaluating a good discrimination case, administrative process panel, the litigation process, preparing your client for mediation. Free to attorneys willing to sign up for pro bono, otherwise $150.	7.5 NLCLE/CLE
10/01/01	**2001 an Estate Planning Odyssey:** Sattellite broadcast. Huntsman Cancer Institute Auditorium. Presenter Roy Adams. 9:00 am–3:30 pm. Free.	6 – includes 1 hr Ethics
10/03/01	**Private Property for the Public Good.** South Town Expo Center. 8:30 am–4:30 pm. $70 add $10.50 if you need CLE credit. Bonus seminar: Land Use 101 on October 2, 1:30–4:30 pm, free with Oct 3rd registration, otherwise $30 (3 hrs NLCLE credit).	11 includes 3 hr bonus seminar
10/18/01	**Family Law Workshop: "Breaking Up is Hard to Do".** Commissioner David Dillon. 5:30–8:30 pm. $40 for YLD, $55 all others.	3 NLCE/CLE
10/24/01	**Evening with the Third District Court.** The Winter Olympics and the Court; A Winning Motions Practice, Feedback from the Bar. 6:00–8:00 pm. $20 YLD, $30 litigation section, $40 all others, $50 day of seminar.	2 NLCE/CLE
10/25/01	**Fall Corporate Counsel Seminar.** Topics to be discussed: discrimination, hiring, firing and other employment law. 9:00 am–1:30pm. Price TBA.	4
10/26/01	**The 1/2 Year 1/2 Day CLE.** 9:00 am–12:00 pm. $60 atty., $40 LAD members. Presenters and Topics: Michael Mohrman – Family Law, Kelly Hill – Grammar 101, Brent Ashworth – Fraud and Forgery: a Personal Perspective on the Mark Hofmann Story. All attendees will receive Strunk and White "The Elements of Style".	3
11/02/01	**Paul Lisnek: Understanding Jurors: A Unique Approach to Court Room Advocacy.** 9:00 am– 4:30 pm. $180 early registration (before October 19th) $200 after.	7
11/07/01	**Law & Technology: When Does the Use or Misuse of Technology Amount to Malpractice?** 9:00 am–2:00 pm. Lunch provided. Topics include: protecting your electronic files, new gadgets that protect your assets, the newest on-line uses, electronic filings. $80 before 10/31, after $100.	5 – includes 1 hr Ethics
11/09/01	**New Lawyer Mandatory Seminar: U of U Moot Courtroom.** 8:30 am–12:00 pm.	NLCLE Requirement
11/09/01	**Advanced Guardianship CLE.** (Sponsored by Needs of the Elderly Committee) 8:30 am– 3:30 pm. $95 for early registration before 11/02/01, after $120. Topics: who is the client, alternatives to guardianship, how to protect your client, measuring decisional capacity or competency.	6 – includes 1.5 hrs Ethics
12/05/01	**"Best of" Series – Financial Statement Fraud: How They Do It,** Gil Miller. **The Harvard Model to Mediation,** Karin Hobbs & Jim Holbrook. **The Fundamentals of Software Licensing,** Scott F. Young. Afternoon sessions TBA.	Six 1 hour segments
12/12/01	**Intellectual Property in Cyberspace.** Professor William W. Fisher, Harvard Law School; Professor David G. Post, Temple University Beasley School of Law.	6
12/13/01	**Litigation Deposition Workshop: Defending Your Life.** 5:30–8:30 pm, $40 for YLD, $55 all others.	3 NLCE/CLE

Full agendas can be found for each of these programs on our web site. Need CLE? Try an on-line course for self-study credit. www.utahbar.org/cle

Classified Ads

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Bar Member Rates: 1-50 words – $35.00 / 51-100 words – $45.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801)297-7022.

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

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

NOTICE

Administration of the Estate of Julian Leighton "Jack" Stallard, who died March 30, 2001, in Santa Clara, Utah, while a domiciliary of Blaine County, Idaho, is presently being administered intestate in Blaine County, Idaho. Anyone who has information concerning a Will which Mr. Stallard may have executed is asked to contact the attorney for the Estate, Ann Legg, P.O. Box 249, Ketchum, Idaho, 83340, (208) 726-9311.

WE ARE LOOKING FOR A TRUST DOCUMENT or trust agreement which was prepared for one Pauline Lucille Derry who passed away on July 21, 2001. We are informed that she may have had a trust that she may have been trustor or settlor of. It may have been created on July 10, 1990. If you have any knowledge concerning the whereabouts of the trust, or if you participated in the preparation of that trust, please contact Randall J Holmgren, Attorney at Law, (801) 366-9966.

POSITIONS AVAILABLE

ST.GEORGE BUSINESS, REAL ESTATE AND ESTATE PLANNING FIRM seeking litigation associate with 1-4 years litigation experience. Admission in Utah, Nevada and Arizona desirable. (www.barney-mckenny.com) Forward cover letter and resume to Jill E. Jones, Barney & McKenna, P.C., 63 South 300 East, Suite 202, St. George, UT 84770. jjones@barney-mckenna.com

Established Grand Junction, Colorado firm seeking an Associate Attorney. Interest and experience in Estate Planning, Business and Trasactional Law are preferred. Excellent academic credentials and writing skills are required. Send resume to: **Williams, Turner & Holmes, P.C.; P.O. Box 338; Grand Junction, CO 81502.**

Tort Litigation Attorney – The Salt Lake City Branch Legal Office of Farmers Insurance Exchange is seeking a tort litigation attorney with three to six years experience. Salary commensurate with experience. Excellent benefit package including a company car. EOE. Send confidential inquiries to Petersen & Hansen, c/o Debbie Rasmussen, 230 South 500 East, Suite 400, SLC, UT 84102. (801) 524-0998 - fax.

ATTORNEY POSITIONS AVAILABLE – Thirteen lawyer, AV rated firm in western Colorado seeks two associates, one atty with 0-4 years' general civil experience, another atty with minimum three years health law experience. Excellent academic credentials, writing and analytical skills required. Sophisticated practice in a small town setting with year-round outdoor recreational opportunities. Send resume and writing sample to: Firm Administrator, Hoskin, Farina, Aldrich & Kampf, P.C., P.O. Box 40, Grand Junction, Colorado 81502.

ATTORNEY: Salt Lake City tax, business and estate planning firm seeks attorney with 5 years experience in business and financial transactions, real estate and contract law. Experience in employment law and tax planning helpful. Excellent growth opportunity and performance incentives available. Please e-mail resume to: lguthrie@bowenlaw.com, or mail to P.O. Box 11637, Salt Lake City, Utah 84147-0637.

Seeking Attorneys. Medium sized AV rated Salt Lake firm seeks experienced associate primarily to work in real estate and litigation areas. Applicant must have good academic credentials, research and writing skills. Competitive compensation and benefits. Inquiries kept confidential. Please send resume or inquiry with cover letter to Confidential Box #14, Attention: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

ASSOCIATE: Stowell Jones, LLC, a general litigation firm with offices in Salt Lake City and Price seeks an entry level associate to begin immediately. Litigation and estate planning experience preferred. Send resume and references to Lloyd R. Jones, 307 E. Stanton Ave., Salt Lake City, Utah 84111 or academylgl@aol.com, fax (801) 483-0705.

Salt Lake Legal Defender Association is currently updating its trial and appellate attorney roster. If you are interested in submitting an application, please contact F. John Hill, Director, for an appt at (801) 532-5444.

OFFICE SPACE/SHARING

Creekside Office Plaza, located on NW corner of 900 East and Vanwinkle Expressway (4764 South) has several executive offices located within a small firm, rents range from $600-$1200 per month, includes all amenities. Contact: Michelle Turpin @ 685-0552.

OFFICE SPACE – 7200 South State area. Very nice – all amenities. Clients love convenient location. 10-15 minutes to all courts in Salt Lake. Two offices available – one or both, very reasonable rent. 562-5050.

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Historic building on Exchange Place leasing office suite with large main office and two additional offices. Also available within a law firm are two offices, one with secretary space. The amenities with the law firm include receptionist, conference room, copier, fax and library. Parking stalls available. Contact Joanne Brooks @ 534-0909.

Office Sharing: Attorney/Professional 200-900 sq. ft. available. Downtown location near IRS. Receptionist, use of fax and phone available. Rent negotiable. Call John or Jana 533-8883.

SERVICES

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FIDUCIARY LITIGATION: WILL AND TRUST CONTESTS; ESTATE PLANNING MALPRACTICE AND ETHICS: Consultant and expert witness. Charles M. Bennett, 77 W. 200 South, Suite 400, Salt Lake City, UT 84101; 801 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.