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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: Fall in Mueller Canyon, East of Bountiful, Utah. Taken by first-time contributor Joseph C. Rust of Kesler & Rust, Salt Lake City, Utah.

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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

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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.

The Bar, the Courts, the Legislature and the Unauthorized Practice of Law

by Scott Daniels

I am writing this article the second week of September. By the time you read it in the October Bar Journal, you may know more about this issue than I do now, since much is likely to happen between now and October 1. My hope is that I can provide background information for Bar members so if the story hits the media fan, everyone will understand how this problem developed historically and what our options as a profession are. Let me say at the outset that this is a rather convoluted story, as the legislative process is a convoluted process. This issue is important for our profession, however, because I believe what is happening in the legislature now on the issue of unauthorized practice is symptomatic of deeper legislative dissatisfaction with the way the legal profession is regulated. I tell this story from my personal perspective which is somewhat unique, since I am a member of the legislature as well as current Bar President.

The issue involves the unauthorized practice of law statute which was repealed by the legislature in the general session last winter. This is how this all came about: Prior to 1986, there were in effect a series of statutes relating to the practice of law, one of which authorized the Bar to obtain injunctions against those practicing law without a license. In 1986, the Utah Constitution was amended to assign the regulation of the practice of law to the Supreme Court. This was in recognition of the principle that lawyers are officers of the court, and as a matter of separation of powers it is appropriate for the court to regulate the practice of law. The Supreme Court, in turn, assigned the day to day regulation of lawyers to the Bar by court rule. Among the rules adopted is a rule authorizing the Bar to bring civil actions for restraining orders against non-lawyers who are engaging in the unauthorized practice of law. This court rule is identical to one of the statutes in effect prior to the constitutional amendment.

Although the old statutes are no longer effective because of the constitutional amendment, they were not repealed. About a year ago the Research and General Counsel Office of the Legislature requested that Senator Terry Spencer sponsor legislation repealing the statutes as part of a general statutory clean-up. He agreed to do so. The legislation passed and all of the regulation of law statutes were repealed, including the statute relating to the unauthorized practice of law.

Shortly after the legislative session, it came to the Bar's attention that an unauthorized practice statute may be necessary after all. In a 1997 case, *Board of Commissioners v. Petersen,* 937 P.2d 1263 (Ut 1997), the Utah Supreme Court had ruled that the unauthorized practice of law (in distinction to the practice of law by lawyers) is an area of executive branch authority rather than judicial authority. Although (with due respect to my good friend Justice Russon) the logic of this is rather questionable, there appears to be at least some question about the Bar's legal authority to proceed against the unauthorized practice of law in the absence of a statute. Since the Governor intended to call a special session of the legislature in June, this seemed a good time to take care of the problem. Governor Leavitt agreed to put the re-enactment of the statute on the Call of the special session, and Senator Spencer agreed to sponsor it.

At this point, let me digress and explain exactly how the Bar prosecutes unauthorized practice complaints. Unauthorized practice of law is not a crime, but the statute and an identical court rule authorize the Bar to proceed against unauthorized practice by civil action. We have an unauthorized practice committee, chaired by Marsha Thomas. This committee meets monthly. They will get about 5 to 8 complaints each month. Although there are various kinds, the most common recently is in the immigration area. There are a number of people who characterize themselves as *"notarios"* who take fees from people with the promise to help them get green cards or other immigration related services. Frequently, they get no services in return and sometimes the wrongdoer absconds with vital original documents. One *notario* even charged $600 for assistance in getting a driver's license, claiming that the services of a *notario* were neces-

sary to get a driver's license. Other types of complaints relate to persons who assume to provide legal services and do so in such a manner as to cause serious harm to their "clients." Among these are so-called "constitutionalists" who advise people not to pay their taxes. Other complaints relate to disbarred or suspended lawyers who continue to practice, and lawyers who are admitted in other states and practice in Utah without being admitted here.

The committee screens the complaints and assigns them to the members for investigation. Some of the complaints are dismissed as not well founded. Sometimes the problem can be solved with a phone call. In the more serious cases, the committee asks the person to sign a cease-and-desist order. In a few cases where the violation is serious and the person will not sign a cease-and-desist order, or if the person has signed a cease-and-desist order in the past and this is a subsequent violation, the committee asks the Bar Commission to authorize outside counsel to bring a civil action seeking an order from the court. One of the criteria the committee applies is that there must be a victim. In other words, if a non-lawyer performs services that are arguably within the practice of law, but the "client" is not complaining, the committee does not take the complaint further.

Most of the work is done by committee members who serve as volunteers. These committee members donate hundreds of hours each year to this service. In addition, we pay from Bar dues for administrative expenses and we pay counsel on the cases that are filed with the court. Last year we spent $50,000 on this. In my opinion this was entirely for public service. This is not a "turf-protection" issue. This is not an area where the vital interests of lawyers are at stake, except to the extent that we don't like crooks ripping people off and claiming to be lawyers. This is not an area where non-lawyers are doing good legal work and taking business from lawyers.

Now I return to the story of what happened in the special legislative session. The special session was called primarily to address governance of the Applied Technology Centers which was quite controversial. The unauthorized practice statute and the other half dozen bills on the Call were considered housekeeping issues which were not expected to generate any dispute. As of the morning of the special session there was no indication that there would be a problem with the unauthorized practice bill. The Bar's lobbyist, John T. Nielsen, was at the session and had no indication that there was going to be any problem. The bill came up in the Judiciary Committee and was passed out favorably without any real discussion or opposition. Senator Spencer introduced it in the Senate that afternoon and it passed unanimously. It was then sent to the House for action.

The procedure in the House is that bills passed in the Senate are referred to the Rules Committee. The Rules Committee meets and prepares a report, which ordinarily would be that the bills referred to Rules are sent to the House floor for final action. As the Rules Committee returned from its meeting, one of the members came to my desk with this shocking news: he said the House Republicans had voted in their caucus to hold the unauthorized practice bill in order to "send the Bar a message." I asked what exactly the message was and he said some of the House Republicans were concerned about the overly zealous prosecution of bar complaints against lawyers and this was a way to "bring the Bar to the table." I was astonished.

I naively assumed that most of the House members were unaware of the purpose of the unauthorized practice statute, and how leaving a vacuum of enforcement would punish innocent people who are ripped off by unscrupulous scam artists. Therefore, when the Rules Committee made its report, which was a recommendation that the other bills passed by the Senate be referred to the House floor, I made a substitute motion that all of the bills referred to Rules (including the unauthorized practice bill) be referred to the floor for action. In support of my motion, I explained how the bill was not anything new, but had been in

effect for many years, and how it was intended for consumer protection. My eloquent explanation, however, was not persuasive enough to overcome party discipline. My motion failed on almost straight party lines with every Republican but one (Rep. Bradshaw) voting against and all Democrats but one (Rep. Morgan) voting for.

Since I am not a Republican, I really can't say first hand what happened in the Republican caucus to motivate this startling action. In the days following the special session I spoke to several Republican legislators about this, as did John T. Nielsen and David Nuffer. In substance we were told that the concerns raised in the caucus were: 1) Lawyers can be disciplined for criticizing judges, which violates the lawyer's right to free speech; 2) The Office of Professional Conduct does not afford lawyers due process rights and is overly zealous in prosecution of bar complaints; and 3) Non lawyers should be able to do such things as represent their children in court on traffic tickets and the like.

Shortly after the special session, the Bar's unauthorized practice committee suspended its enforcement activity. Since June, complaints are answered with a polite letter explaining that we are unable to help consumers at this time.

About a week after the special session, I got a call from the Speaker of the House, Martin Stephens. He told me that he wanted to appoint a committee of House members to meet with Representatives of the Bar. I told him that I didn't want to be involved directly, since I am both a Representative and President of the Bar. I told him that I would appoint a committee to represent the Bar, which I did. It is chaired by David Nuffer. Speaker Stephens appointed a committee of legislators, which is chaired by Rep. Steve Urquhart, a lawyer from St. George.

David Nuffer and Rep. Urquhart met several times and have refined the issues. The legislative committee is apparently not interested in pursuing the concern that lawyers may be disciplined for criticizing judges, since this concern is somewhat imaginary. Also, the concern about overzealous prosecution of bar complaints, although still a concern of many legislators, is not related to the unauthorized practice issue and the legislative committee does not want to address it at this time.

On the other hand, Rep. Urquhart has expanded his inquiry into issues that relate to the question of what sorts of things should non-lawyers be allowed do which may seem to encroach on the practice of law. For example, Rep. Urquhart approached the Utah Association of Certified Public Accountants and asked them for a statement as to their position as to what the CPAs believe they should be able to do in areas that may have traditionally been considered law practice. The CPA organization sent Rep. Urquhart a very nice letter, which in essence says that the two professions have engaged in extensive dialogue in the last year in the area of multi-disciplinary practice, and that we are continuing to work together to form a common understanding as to what are legitimate roles.

The two committees met on September 11. At that meeting Marsha Thomas explained the workings of the unauthorized practice committee. David Nuffer explained the history of the unauthorized practice statute. The CPAs spoke in favor of re-enacting the statute, but expressed concern that the statute is somewhat vague and it would be better if there was a more definite definition of what non-lawyers could and could not do. Brent Manning spoke on behalf of *and Justice for All* about the efforts lawyers are making to make legal services available to those who cannot afford them. It was apparent from the questions and discussion at the meeting that the concern of the legislative committee has now become the availability of legal services, rather than any of the concerns that were expressed in the days immediately following the special session and the repeal of the unauthorized practice statute.

The outcome of the meeting was that the committee is recommending the enactment of a new unauthorized practice statute which will "sunset" in two years. The language of this new statute has not been finalized at the time of this writing. The legislature is expecting the courts to provide a plan to make legal services more available or establish mechanisms to allow people to more easily access the legal system without the help of attorneys.

A special session to consider re-apportionment is tentatively set for September 26. The committee's proposal will probably be placed on the Call for that special session. If it is not placed on the Call or it is not enacted in the special session, the Bar Commission will consider petitioning the Supreme Court to overrule or distinguish the *Petersen* decision and allow the Bar to proceed pursuant to the court rule. Depending on how the final language of the new statute is drafted, the Bar may also challenge the new statute as a violation of separation of powers and ask the Supreme Court to authorize proceeding against unauthorized practice pursuant to court rule.

As I said, I believe strongly that this is only a symptom of the deeper legislative concern with lawyers in general and regulation by the Bar under authority of the court specifically. By the time you read this, the legislature will probably have acted or failed to act. What should our next step be? Let us know your thoughts. Contact any member of the Bar Commission or me. My e-mail is: president@utahbar.org.

Affirming the Untested – Affirming a Trial Court Based on Issues Raised Sua Sponte

by D. Scott Crook[1]

The judge pushed open the door to his chambers, took off his robe, folded it around the wooden hanger, and hung it in the closet. Walking to his desk, he stretched his arms over his head and yawned. It had been another long, tiring morning of summary judgment hearings.

He pulled his chair back from his desk and sat down, noticing as he did so that he had new mail in his in box. An envelope caught his eye. It was from the Utah Supreme Court. He opened the envelope, read the caption, and turned to the last page. With a smile he noted the last sentence, "Accordingly, the trial court's order granting summary judgment to the defendant is hereby affirmed."

He returned to the first page and began skimming through the opinion. Soon, however, he began to read more slowly, his wrinkled forehead becoming clouded. At footnote number one, he paused:

> *Appellant accurately notes that the district court improperly granted the defendant's motion based on its express conclusion below. However, it is a well-established rule of appellate review that the lower court may be affirmed on any grounds, even if not relied upon below. See White v. Deseelhorst, 879 P.2d 1371, 1376 (Utah 1994); Limb v. Federated Milk Producers Ass'n, 461 P.2d 290 (Utah 1969).*

He read further. The Utah Supreme Court had disagreed with his conclusion that the statute of limitations barred the plaintiff's claim, but it had independently determined that there was no acceptance of the contract at issue. Finishing the opinion, he sat thinking about the Supreme Court's alternative basis for affirmance; he could not recall that the defendant had ever raised the acceptance issue on which the Supreme Court's decision rested. Troubled, he set aside the opinion and turned to more pressing matters: whether he had been mistaken or not, the case had been disposed of.

Across town, the appellant's lawyer nervously removed the opinion from its textured sheath. His hands shaking slightly, he opened the opinion, and turned to the last page. With a frown he read the last sentence of the opinion. "How? The judge was clearly wrong," he grumbled. As he returned to the first page, he too paused at footnote number one and then, with mounting frustration, continued on through the appellate court's acceptance-of-contract analysis. "The defendants never argued that," he roared at the office wall. As he continued reading the opinion, he began noting the affidavits and deposition testimony that he could have filed – testimony that almost certainly would have changed the appellate court's opinion. Finally, he picked up the telephone and sheepishly punched his client's telephone number.

In the next building, after opening the envelope she had just received from the Supreme Court, the appellee's attorney yelled with delight when her eyes fell on the word "affirmed" at the end of the opinion.

For many years, Utah's appellate courts have adhered to the rule that they can affirm a trial court's determination on any grounds, even if those grounds were never raised below. Although there may be good policies served by this rule of *sua sponte* affirmance on any basis, an unfettered, unbridled application of the rule in fact erodes the role of the court and seriously undermines the fairness of the adversarial process. This article suggests a model for *sua sponte* consideration of issues not raised below that

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preserves the interests of all parties involved.

I. History of Affirming on Basis of Issue Raised *Sua Sponte*

In 1969 the Utah Supreme Court noted in an opinion authored by Justice Ellett and entirely concurred in by only one other justice:

> The law is well settled that a trial court should be affirmed if on the record made it can be. . . . "The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and *this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court."*

Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 461 P.2d 290, 293 n.2 (1969) *(quoting* 5 C.J.S. *Appeal & Error* § 1464(1)) (emphasis added). In a spirited dissent, Justice Henriod argued that

> to maintain some modicum of order on appellate review, a healthy, fair and highly practical rule is that which already we have enunciated in many cases, to the effect that if error is not raised at all or is claimed for the first time on appeal, we will not entertain it, – *and particularly should this prevail where anyone on the court sua sponte and for the first time on appeal raises a point that cannot be sustained anywhere in the record by any amount of searching.*

Id. at 295 (Henriod, J., dissenting) (emphasis added). Noting that the quotation from C.J.S. upon which the majority opinion relied was "an easy generalization of principles," Justice Henriod maintained that to do as the Supreme Court had done – raising an issue *sua sponte* and affirming on that basis – was to "cast[] the appellate court in the role of advocate and counselor for one side in derogation of equal empathy for the other. Such procedure at least suggests some sort of preferential treatment." *Id.* at 295.

Although *Limb* has been consistently applied to affirm a trial court's decision when an issue raised below by a party is offered as an alternative ground for affirmance, it has been inconsistently applied when such an issue has not been raised below by any party. For instance, in *Buehner Block Co. v. UWC Associates,* 752 P.2d 892, 894-95 (Utah 1988), and *Branch v. Western Petroleum, Inc.,* 657 P.2d 267, 276 (Utah 1982), the Utah Supreme Court affirmed a lower court's decision by applying an argument raised for the first time on appeal. However, in *American Coal Co. v. Sandstrom,* 689 P.2d 1, 4 (Utah 1984), *overruled on other grounds, State v. South,* 924 P.2d 354 (Utah 1996), and *L&M Corp. v. Loader,* 688 P.2d 448, 449-50 (Utah 1984), the Utah Supreme Court refused to affirm a lower court's decision when the party did not raise the argument below.

Both Utah appellate courts have recently expressed discomfort with this inconsistency. In *State v. South,* 924 P.2d 354, 355 n.3 (Utah 1996), the Utah Supreme Court recognized the inconsistency in these prior rulings and carefully limited the scope of its decision to the narrow question before it without answering the question of "whether an appellee may raise an argument in defense of the lower court's judgment when that argument was not presented in the lower court. This same question came before the Utah Court of Appeals in *State v. Montoya,* 937 P.2d 145 (Utah Ct. App. 1997): the State raised arguments on appeal that it had not raised before the trial court, requesting that the court "utilize the judicially created doctrine of affirming . . . on other proper grounds, even if raised for the first time on appeal." *State v. Montoya,* 937 P.2d 145, 149 (Utah Ct. App. 1997). The court noted the Supreme Court's language in *South,* referring to inconsistent application of the principle, and declined to affirm on the bases asserted by the State on appeal. The court explained that, while an appellate court may affirm on any ground, two criteria must be met before the doctrine might be successfully asserted:

- the issue must be apparent on the record,
- the issue must have been properly and adequately briefed.

Id. at 149-50. Declaring that the State had failed adequately to brief the arguments it raised for the first time, the court refused to affirm on the asserted alternative grounds. *Id.* at 150.

The affirm-on-any-ground rule comes consistently under attack in Utah's appellate courts when the affirming ground is raised *sua sponte*. Most recently, Judge Davis noted his significant concerns regarding the rule.

> Today we decide a case that was not presented to the trial court, not argued to the trial court, not decided by the trial court, and not briefed or argued to this court. The majority affirms the judgment of the trial court based on this court's power to "affirm on any ground." The genesis of the "affirm on any ground" approach in Utah is unclear, and current statements of the approach are broad enough

> to encompass a virtual retrial of the case by the appellate court. However, it is well established that parties define the parameters of their case and that, except on legal issues, it is improper for the appellate court to substitute its judgment for that of the trial court. In my view, application of the "affirm on any ground approach by the majority in this case amounts to a determination that [the petitioner] is entitled to relief as a matter of law on whatever theory the appellate court feels comfortable with, and nothing the parties may have done or omitted to do and nothing the trial court may have found would affect the outcome.

Bailey v. Bayles, 2001 UT App. 34, ∂18 (Davis, J., dissenting).

II. *Sua Sponte* Consideration of Issues Not Raised Below Should Be Prohibited

Despite the *sua sponte* affirmance rule's inconsistent application and the *Montoya* rule which permits an appellee to raise an issue not raised below, the appellate courts continue to affirm on grounds never argued, raised, or briefed by any party. *See, e.g., Bailey v. Bayles,* 2001 UT App. 34, ¶ 9 & n.3; *id.* at ¶¶ 18, 19 (Davis, J., dissenting); *Southland Corp. v. Semnani,* 1999 UT App. 300, n. 1 *(per curiam)* (memorandum decision). There are weighty and legitimate reasons for considering issues *sua sponte*. Such reasons include considering whether the court has jurisdiction, whether the cause of action is prohibited by public policy *(e.g.,* an illegal contract), and whether the trial court committed a fundamental error. Allan D. Vestal, *Sua Sponte Consideration in Appellate Review,* 27 Fordham L. Rev. 477, 499-503 (1958-59). However, constitutional principles and sound public policy demand that the appellate courts unequivocally prohibit *sua sponte* consideration of issues not raised below within the confines of these very limited exceptions.

Due Process Concerns. Both the Utah and United States Constitutions provide that no person "shall be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V; Utah Const. art. 1 § 7.[2] As the United States Supreme Court has explained:

> At its core, the right to due process reflects a fundamental value in our American constitutional system. . . .
>
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common law model. . . .

Boddie v. Connecticut, 401 U.S. 371, 374-75, 91 S. Ct. 780, 784 (1971). "'The fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) *(quoting Grannis v. Ordean,* 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914)); *accord Nelson v. Jacobsen,* 669 P.2d 1207, 1211-13 (Utah 1983).

Although this right to be heard does not always require that a Court grant a hearing to a litigant of pending action, "[i]n our judicial system, except in extraordinary circumstances that are not present here, all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision." *Plumb v. State,* 809 P.2d 734, 743 (Utah 1990). "Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness." *Id. (quoting Cronish Town v. Koller,* 798 P.2d 753, 756 (Utah 1990) *(quoting Nelson,* 669 P.2d at 1211)); Bailey, 2001 UT App. 34, ¶18 (Davis, J., dissenting).

Because of these significant constitutional concerns, the courts generally strongly disfavor *sua sponte* consideration of arguments and issues not raised by either party, without the adversely affected party receiving notice and being allowed to respond. *See Gildea v. Guardian Title Co.,* 2001 UT 75, ¶11; *Plumb,* 809 P.2d at 743 ("Regardless of whether the procedures in this

case are so extreme as to deny class counsel the due process guaranteed under article I, section 7, we find that, at a minimum, the trial court abused its discretion in adopting the findings of the special master after being informed that the parties had no notice that the special master was to review the reasonableness of attorney fees and that they had insufficient opportunity to participate in the proceedings the master conducted."); *Jenkins v. Missouri,* 205 F.3d 361, 367 (8th Cir. 2000) (ruling in case involving *sua sponte* consideration of issue and then dismissal that "procedural niceties equate with due process and must be afforded the parties"); *Jefferson Fourteenth Assocs. v. Wometco De Puerto Rico, Inc.,* 695 F.2d 524, 525 (11th Cir. 1983) ("We reverse for the reason that the district judge dismissed the case *sua sponte*, depriving Wometco of its rights to procedural due process."); *Wirth v. State Bd. Tax Comm'rs,* 613 N.E.2d 874, 879-80 (Ind. Tax Ct. 1993) ("To deny a taxpayer the opportunity to address an issue raised *sua sponte* by the State Board would be a denial of due process."); *Haynes v. Haynes,* 606 N.Y.S.2d 631, 632-33 (N.Y. App. Div. 1994) ("Even were we to adopt the dissenting position as a threshold approach, the most minimal due process would still require us to grant the guardian ad litem – who did not appear on this appeal – an opportunity to respond to this *sua sponte* challenge from the bench, which was never raised by any party.").

Public Policy. Not only are significant constitutional issues enmeshed in *sua sponte* consideration of matters not raised below, but significant public policy concerns inhere in *sua sponte* action of a court. These concerns stem from the constitutional and traditional role of the appellate courts in the American judicial system.

The Adversary System. "The common law system of jurisprudence is based upon the adversary principle. Our courts are passive instrumentalities, available to right wrong, but the initiative is never theirs. Our courts require the catalyst of a litigant who seeks relief." Allan D. Vestal, *Sua Sponte Consideration in Appellate Review,* 27 Fordham L. Rev. 477, 487 (1958-59); *accord Bailey,* 2001 UT App. 34, ¶18 (Davis, J., dissenting) ("However, it is well established that parties define the parameters of their case and that, except on legal issues, it is improper for the appellate court to substitute its judgment for that of the trial court."). By the very nature of the adversarial system, a court is an arbiter, an independent decision maker upon whom litigants rely to address their arguments.

When a court acts *sua sponte*, however, it steps outside of its passive role, and threatens the adversarial model. "Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. . . . [T]he interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would be otherwise dead. . . ." *Girard v. Appleby,* 660 P.2d 245, 247 (Utah 1983); *accord Jenkins v. Weis,* 868 P.2d 1374, 1383 (Utah Ct. App. 1994) (Bench, J., dissenting).

Although one may question the wisdom of adherence to the adversarial system, the system has long-since been adopted, and fairness dictates that courts assume their proper roles in the model. This is evident when one considers the practice, custom, and tradition of the litigation process.

> Courts allow litigants to stipulate the facts involved, to waive time limitations in connection with the filing of papers, and to decide when cases will be tried. Litigants decide whether a law suit will be started and against whom. Courts allow litigants to waive certain claims and defenses and to establish the record to be considered by an appellate court.

Vestal, *supra,* at 488 (footnotes omitted). Accordingly, "attorneys are the ones who are fully informed on the litigation of the interests of their clients. They are the only ones who are in a position to evaluate the whole picture. It follows that the attorneys have a right and duty to decide exactly what positions will be taken." *Id.* at 490. When a court acts *sua sponte*, it risks that it will undermine the positions of private litigants patiently established after careful deliberation. As the Utah Supreme Court noted in 1984, "Parties may limit the scope of the litigation if they choose and if an issue is clearly withheld, the court cannot nevertheless adjudicate it and grant corresponding relief." *Combe v. Warren's Family Drive-Inns, Inc.,* 680 P.2d 733, 736 (Utah 1984).

Appellate Courts as Courts of Review. The second public policy concern of *sua sponte* consideration is that, when reviewing a trial court's decision, an appellate court is sitting in its role as a reviewing court.

> As its name implies, a court of review does not, except in a limited number of cases, hear a case de novo. Its primary function is to decide whether the trial court erred in its disposition of the case. In doing this, the reviewing court not only determines the rights of the litigants actually involved, but also decides the rules of substantive law and procedure of the particular jurisdiction.

> . . . [I]n the event of such a review, the record of the proceedings below is of fundamental importance. . . . All questions which may have an important bearing upon a client's claim should be presented to the trial judge. This presentation may be made, in general, by a pleading, a motion, or an objection.

Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved – Part I,* 7 Wis. L. Rev. 91 (1933). In its role as a reviewing court, an appellate court "is entitled to have the issues clearly defined with pertinent authority cited." *State v. Larsen,* 828 P.2d 487, 491 (Utah Ct. App. 1992) (quoting *Williamson v. Opsahl,* 416 N.E.2d 783, 784 (Ill. App. Ct. 1981)).

When appellate courts are viewed in this light, it is clear that *sua sponte* consideration is outside of the court's appellate role. By considering an issue raised *sua sponte*, the court is not reviewing the lower court's decisions for error. Rather, it has become an overseeing court, with unlimited powers, to take a case in any direction it wishes, considering issues and facts *de novo* without factual and legal development in the proceeding below. *See Bailey,* 2001 UT App. 34, ¶ 18 (Davis, J., dissenting) ("In my view, application of the 'affirm on any ground' approach by the majority in this case amounts to a determination that the record establishes that [the petitioner] is entitled to relief as a matter of law on whatever theory the appellate court feels comfortable with, and nothing the parties may have done or omitted to do and nothing the trial court may have found would affect the outcome."). Such a role is obviously detrimental to the concept of ordered liberty and the rule of law, particularly when one considers the expectations of parties to litigation created by the history of the adversarial structure of the common-law courts. This problem is exacerbated when a party is not given notice that an issue is being considered and is not given an opportunity to respond.

Many times the courts of this state, however, have explained this rule as almost prudential, given for the benefit of the appellate courts only, and, consequently, waivable by them. *See, e.g., State v. Bishop,* 753 P.2d 439, 450 (Utah 1988) (considering issue not adequately raised or properly briefed despite statement that court should not be burdened with the majority of argument and research); *Montoya,* 937 P.2d at 150; *Larsen,* 828 P.2d at 491. Viewed in this light, the courts seem more willing to affirm trial court judgments on an issue raised *sua sponte*, because by doing so the appellate courts burden only themselves with increased research and issue development. *See, e.g., Bishop,* 753 P.2d at 450; *Larsen,* 828 P.2d at 491.

What these decisions ignore, however, is that "[f]ollowing the formal [appellate] design, the scope of review is determined by the errors properly assigned by the appellant. The appellee's sole interest is to defend his judgment against the various assignments of error, and he consequently has no interest in having the scope of review broadened beyond that defined by the appellant." J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review,* Law & Contemporary Problems, Spring 1984, at 9. Of course, an appellee is free to advance an alternative theory in support of the trial court's decision and against any arguments raised by the appellant. However, if the appellee has never raised such a theory before either the trial or the appellate courts, he or she has to that extent limited the scope of review. Having failed to argue the theory, the appellee has waived any interest it could claim in the appellate court affirming the trial court on the basis of such an argument.

By considering *sua sponte* an issue never raised, a court engages in a "scope-expanding" exercise "that calls for exactly the same weighing of conflicting values called for when formal [appellate] design is broken through in behalf of appellants[, e.g., to avoid unjust results, to declare an important legal principle, or for plain and fundamental errors]." *Id.* Accordingly, "the costs of departure from [appellate] design should be weighed before applying the ['affirm-on-any ground'] rule." *Id.* In other words, a court considering affirming on grounds raised *sua sponte* must carefully weigh the impact of such consideration.

Another facet of the *sua sponte* doctrine points up the possible inequity inherent in the practice: the fact that matters raised *sua sponte* may only be adduced to affirm error below; the doctrine cannot be applied to reversal:

> The implementation of the doctrine of *sua sponte* consideration only to affirm can lead to some very anomalous results. The ultimate outcome of the litigation can well turn on the question of the nature of the error at the trial level. If the injured party sues and wins on an incorrect theory in the lower court, the appellate court might affirm on the correct theory. On the other hand, if the trial court makes a more egregious error and rules for the defendant on the incorrect theory, the appellate court will not reverse even though the correct theory demands it. To say that litigants must allow the nature of the error commit-

> ted by the trial court to control rather than the rights of the litigants is foolish to say the least.

Vestal, *supra,* at 510 n.14.

Even more troubling is that these decisions run contrary to the policies expressed in the Utah Rules of Appellate Procedure. Rule 24(a)(9) states that a brief must "contain the contentions and reasons of the appellant with respect to the issues presented, *including the grounds for reviewing any issue not preserved in the trial court,* with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9) (emphasis added). Under the appellate court's application of this rule, when a party does not raise an issue below or in its brief, the issue is "considered waived and will not be considered by the appellate court." *Brown v. Glover,* 2000 UT 89, ¶23.

Rule 24(b) requires that the appellee's brief also "conform to the requirements of paragraph (a)." Hence, an appellee is under the same obligation to include the grounds for review of an issue not raised below. Thus, when an appellee fails to raise the issue, the waiver jurisprudence would suggest that such an issue is waived. However, when the appellate court acts *sua sponte* it ignores this rule without any explanation why the appellate court should do so in favor of an appellee who has not asserted an interest in raising the issue.

III. The Appropriate Model for *Sua Sponte* Consideration

As suggested by the above discussion, the cases and secondary authorities strongly suggest that before a court engages in *sua sponte* consideration of an issue, it should give the parties notice that it is considering the issue and request briefing on the issue prior to decision. As one commentator noted:

> If the court wants to consider a change in the law even though the parties to the appeal have not questioned the law, there is no reason why the court should not do so. What it should not do, but what courts often do, is to write the opinion changing the law without advising the parties that it is considering a change in the law and requesting briefs and oral argument on the potential change. This procedure abandons all elements of the adversary system and has the court acting as a law maker without regard to the parties. Both the interests of the parties and the public are best served if the court informs the parties of the change it is considering and requests briefs from the parties and amicus curiae.

Robert J. Martineau, *Fundamentals of Modern Appellate Advocacy* 45-46 (1985) (footnotes omitted); *see also Plumb v. State,* 809 P.2d 734, 743 (Utah 1990) ("In our judicial system, except in extraordinary circumstances . . ., all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision."). Such a procedure would permit the parties to submit to the court legal and factual arguments, and, perhaps, party stipulations. By doing so, the court would permit the parties a chance to protect their interests, while at the same time protecting the court's legitimate interest in developing and refining important points of law.

Not only does asking for supplemental briefing make sense, but it is also workable. The Utah Court of Appeals often asks for supplemental briefing on issues that it raised *sua sponte*, with no apparent problem. *See State v. Candelaria,* 2001 UT App 264 (mem. decision); *State v. Friedman,* 2001 UT App 265 (per curiam) (mem. decision); *Kelley v. Kelley,* 2000 UT App. 236, ¶ 58 (Jackson, J., dissenting) ("Even so, we gave the Kelleys the chance to address this issue in supplemental briefs."); *Sierra Club v. Dep't Environmental Quality,* 857 P.2d 982, 985 (Utah Ct. App. 1993) ("Accordingly, we requested that the parties submit supplemental briefs addressing whether Sierra Club has standing to pursue this petition for review."); s*ee also Gildea v. Guardian Title Co.,* 2001 UT 75, ¶13(stating, after discussing trial court's *sua sponte* consideration of Rule 11 sanctions, "although a hearing on the matter was not necessarily required, the district court should have given Marsh an opportunity, either orally or in writing, to show cause why he should not be sanctioned").

Further, as discussed in *Montoya,* the issue for *sua sponte* consideration should be one that is apparent in the record below.

> If, *in any way,* the ground or theory urged for the first time on appeal is not *apparent* on the record, the principle of affirming on any proper ground has no application. To hold otherwise would invite the prevailing party to selectively focus on issues below, the effect of which is holding back issues that the opposition had neither notice of nor an opportunity to address. . . . The record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.

Montoya, 937 P.2d at 149-50 (emphasis added). Support for this requirement also grows out of the party-driven litigation process. If, although a court may believe an issue that was not argued could have been argued successfully below, there is insufficient evidence on the face of the record to alert the opposing party that the other party will rely on it on appeal, it may be because the parties have stipulated not to litigate the issue or have intentionally not presented evidence as to the issue because it weakens what apparently to them is a stronger legal theory. *See* Vestal, *supra,* at 490 ("It follows that the attorneys have a right and duty to decide exactly what positions will be taken. . . . 'As an almost universal rule, this court may very justly presume that the counsel who tried the case in the court below fully comprehends the issues which were necessary to be submitted to a jury in order to protect his client's rights. . . .'" *(Quoting Nightingale v. Barnes,* 2 N.W. 767, 774 (Wis. 1879) (dissenting opinion).).

IV. Conclusion

Given the significant constitutional questions raised and the public policies implicated in *sua sponte* consideration of issues never raised by any party, the Utah appellate courts should proscribe, either as a matter of precedent or rule, *sua sponte* consideration of issues unless each party is notified that such an issue is being considered and given the opportunity to raise arguments regarding that issue. Further, the courts should require such briefing only when issues are apparent on the record. Such a rule would protect the appellate court's legitimate interests, while safeguarding each party's role in the litigation.

V. Epilogue

The ringing telephone jarred him from the report regarding the new project. "Hello," he paused. "How are you doing, John? Have you heard anything from the Supreme Court yet?" His brow furrowed as the voice on the telephone continued. "I thought you said that we had a good chance of winning." He paused again. "What? We won but lost? What do you mean?" The voice on the telephone continued for what seemed like five minutes. "I didn't think that was even an issue. Besides, didn't the manager say in his deposition that they had contracted with us?" The man stood in disbelief and shook his head. "I can't believe it," he said, his voice strained and raising.

In the next building, the appellee's lawyer sat in her chair, a little subdued after reading the opinion. "Hollow victory," she thought. "I sure am glad that deposition hadn't been submitted."

[1] The author gratefully acknowledges the valuable assistance of Scott M. Ellsworth in stimulating thoughts and ideas through countless hours of debate regarding the role of the appellate court. His further assistance in editing and preparing the piece was invaluable.

[2] The Utah Supreme Court has ruled that "[t]he due process clause of the state constitution is substantially the same as the Fifth and Fourteenth amendments to the Federal Constitution," and that "[d]ecisions of the Supreme Court of the United States on the due process clauses of the Federal Constitution are 'highly persuasive' as to the application of that clause of our state constitution." *Untermyer v. State Tax Comm'n,* 129 P.2d 881, 102 Utah 214 (Utah 1942). Accordingly, this article will not differentiate the analysis of the constitutional questions between the United States and Utah state constitutions.

LDS and Judicial Perspectives on Stories from Jewish Tradition

by Jathan W. Janove, Ralph R. Mabey and Hon. Dale A. Kimball[1]

On January 26, 2001, at the Joseph Smith Memorial Building, a panel discussion was sponsored by the J. Reuben Clark Law Society, Salt Lake Chapter, in which religious and legal scholars from the Church of Jesus Christ of Latter-day Saints responded to stories from Jewish religious tradition. The panelists were Dallin H. Oaks,[2] who in addition to serving in the Quorum of the Twelve Apostles, was a justice of the Utah Supreme Court from 1980 to 1984; Dale A. Kimball, who in addition to serving as a U.S. District Judge for the District of Utah, has also served as a bishop and stake president; and Ralph R. Mabey, who formerly was a U.S. Bankruptcy Judge for the District of Utah and currently serves as a bishop. The stories were selected by and the panel discussion was moderated by Jathan W. Janove, who practices employment law but has a degree in Jewish studies and has served different synagogues in the capacities of religious schoolteacher, youth director and congregational president.

Janove began the session with background on the Jewish stories and their sources. Amidst this vast, millennia-old corpus of material, there is the centerpiece of Judaism, the Five Books of Moses or Pentateuch (referred to by Jews as the "Torah" or "Chumash" from the Hebrew word for five). The Chumash is part of the "Tanach," which is a Hebrew acronym for "Torah," "Nevi'im" (the Prophets) and "Chetubim" (the Writings – which include such canonical works as the Book of Psalms and Book of Proverbs). There is also the "Oral Law," a set of commandments that traditionally observant Jews believe were given by God at Mount Sinai along with the Torah. These oral laws were codified in the early part of the Christian era by scholars in Palestine and Babylonia and form the central part of the "Talmud" which sets forth a comprehensive set of rules and teachings for traditionally observant Jews. In addition, there are libraries full of commentaries on Jewish law that have been compiled over the centuries. On another path, there is a body of material on Jewish mysticism referred to as the "Kabbalah" and stories and legends told throughout the millennia to illustrate points from Jewish law and tradition, generally referred to as "Midrash."

In presenting this background, Janove offered a possible contrast between Jewish and Mormon tradition. He explained the long-standing Jewish tradition of debate and contention among rabbis striving to determine the meaning of God's Word. Some rabbis have even taught that when it is for God's sake, a debate over the meaning of God's Word is more divine than the Word itself. Janove illustrated this point with a story from the Talmud in which God essentially concedes an argument to Jewish scholars debating the meaning of His Word. This point is also represented by an old joke told among Jews:

> Four learned rabbis were debating a passage in the Torah. Three of them lined up on one side of the argument but could not persuade the fourth to join them. The fourth rabbi insisted that the majority was wrong and declared: "I know that God agrees with me. I ask that He cause a dark storm cloud to appear in this blue sky as a sign that I am correct." Almost before the rabbi finished speaking, a dark thundercloud materialized over the heads of the

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JUDGE DALE A. KIMBALL (photo not available) is a Federal Judge in the United States District Court for the District of Utah.

four rabbis and then just as suddenly disappeared. "See," proclaimed the rabbi, "I told you I was right." Nevertheless, the other rabbis were unpersuaded and said that while unusual, the cloud could be explained by natural phenomena. The dissenting rabbi, now becoming agitated, exclaimed, "If I am right, I ask God to cause a storm cloud to appear and pour rain upon that yonder grove!" Again, almost before he had finished speaking, a storm cloud appeared in the otherwise cloudless sky, moved rapidly over to the grove, poured rain upon it, and then disappeared. "Now you see," asserted the rabbi, "your position is wrong and should be conceded!" Yet the three rabbis again demurred and opined that while highly unusual, the event could still be explained by natural causes. Before the dissenting rabbi could even cry out for another sign, the sunny blue sky turned completely dark. Lightning flashed, thunder crashed, and then complete stillness ensued. Suddenly, a giant resonating voice called out from the heavens: "Heeeeee's Riiiiight!!!" Then, in an instant, the sky became clear and bright. The fourth rabbi looked upon his colleagues with a broad, triumphant smile. However, his triumph was short-lived as one of the three faced him and said, "So? It's still three to two."

Janove then invited his panelists to comment on whether any similar such tradition exists in Mormonism.

Mabey – Since the Church of Jesus Christ is founded on continuing revelation, the voice from heaven should trump mortal opinion. On the other hand, under the rule of common consent in the church, significant decisions are voted upon. Almost invariably, the decision proposed by church leaders entitled to revelation from heaven has been sustained by the vote of the people – but not always.

Kimball – Most of the time, before important proposals are presented, input is sought and vigorous discussion has occurred. The rabbis' debate reminds me of a story told by Leonard J. Arrington about Bishop Edwin Woolley, Brigham Young's business agent. Although he remained loyal and faithful, Bishop Woolley often exasperated Brigham with his stubborn nature and outspokenness. On one occasion, an irritated Brigham remarked caustically to the bishop: "Well, I suppose now you are going to go off and apostatize." "No, I won't," retorted Edwin. "If this were your church I might, but it's just as much mine as it is yours." On another occasion, Brigham remarked that if Bishop Woolley should fall off his horse while crossing the Jordan River, searchers should not expect him to be floating downstream; rather, they should look for him swimming upstream, obstinately contending against the current. *Brigham Young: American Moses,* at 200.

The panelists then turned to the stories and provided their observations.

Story Number 1:

The first story comes from the Talmud and addresses the occasional friction between the rule of law and notions of morality and compassion. It also deals with the concept that although there is only one God, He has more than one aspect. Indeed, the Torah gives God different names, such as one name when God acts in the capacity of justice and a different name when He acts in the capacity of mercy.

A landowner employed a group of itinerant day laborers to move barrels of wine. The laborers carelessly handled one of the barrels and it fell and broke, spilling all of its contents. The landowner refused to pay them their wages and seized their knapsacks containing all of their worldly possessions. He then went before the Sanhedrin (the high Jewish court) seeking a ruling that his actions were legal in light of the fact that his damages exceeded the value of both their wages and possessions. The judges agreed with the owner's position as a matter of law. However, they reminded him that the God of Justice is also the God of Mercy. They then asked the owner which aspect of God he wished to encounter when it became his time to be judged. Acknowledging their point, the owner accepted the court's ruling that the laborers were entitled to return of their possessions and to their full wages.

Panelist Observations

Mabey – This reminds me of the parable found at Matthew 18:23-34: The Lord forgives his servant 10,000 talents, but the servant refuses to forgive his fellow ser-

vant 100 pence. The Lord asks the unforgiving servant, in verse 33, "Shouldest not thou also have had compassion on thy fellow servant, even as I had pity on thee?"

Kimball – Were all of the workers negligent or just one? Did one or more act recklessly or intentionally? Should that make a difference? Would you sue a homeless person you hired to work for you when that person broke something valuable? The owner's actions here just seem wrong. What were the working conditions? Today this would be covered by insurance. Some see a distinction between the God of the Old Testament (Justice) and the God of the New Testament (Mercy).

Janove – As the only non-Mormon on the dais, I have to confess my surprise that I am the one to provide the obvious moral of the story – you get into trouble when you handle alcoholic beverages!

Story Number 2:

This next story centers on humility and was taught by Rebbe Menachem Mendel Schneerson who led the Lubavich Hasidic movement until his death in 1993. Rebbe Schneerson placed great emphasis on the quality of humility and held: "Immodesty is the root of all inappropriate behavior." The importance of humility goes back to the Torah or Chumash which centers on the great hero of Jewish history, "Mosheh Rabbennu" (or Moses the teacher, leader and prophet). The Five Books of Moses end with the statement that never again in the land of Israel arose a leader such as Moses. Yet the Book of Numbers states, "Now Moses was the humblest man on the face of the earth." There is a Midrash or legend that an awe-struck Israelite approached Moses and expressed wonderment at Moses' extraordinary political, social, military and ecclesiastical leadership and his intimate relationship with God. Moses, however, would not accept this glowing assessment and explained: "perhaps if God had blessed you with the same gifts He has bestowed upon me, you would have accomplished more."

This story comes from Eastern Europe of the 1800s:

A businessman planned to file a lawsuit and had a choice of two jurisdictions. He sought advice from his rabbi as to which jurisdiction would be better. He explained that the judge in one town was renowned for his legal brilliance and copious scholarship. By contrast, the other judge was known for his humility. The businessman suggested the former should be preferred but his rabbi disagreed. The rabbi explained that the brilliant judge would be tempted to use the case as a means to demonstrate his own brilliance whereas the humble judge would be concerned only with discovering and applying what the law truly was.

Panelist Observations

Mabey – The Rabbi is right. Just as Felix Frankfurter described the qualities essential to a Justice's functioning on the Court and concluded, "The attitudes and qualities which I am groping to characterize are ingredients of what compendiously might be called dominating humility." (Felix Frankfurter: Foreword, *Columbia Law Review,* April 1955; quoted in *The Quotable Lawyer,* edited by Shrager and Frost and published by Facts on File, 1986.) President David O. McKay named humility the solid foundation of all virtues. Indeed, all virtues flow from humility: "Be thou humble; and the Lord thy God shall lead thee by the hand and give thee answer to thy prayers." Doctrine & Covenants 112:10.

Humility is crucial for the judge because the judge must be willing to be educated by the evidence and the argument. If the judge does not exercise humility, he or she is uneducable.

Humility is also the essential virtue of lawyers. Unless they learn from their adversaries, learn from their clients, and learn from their weaknesses, they remain mediocre. Even a Michael Jordan, who has the confidence to want the ball at the end of the game, gained that confidence through the humility to learn from every opponent and to conquer weakness by recognizing it and practicing to eliminate it.

The paradox that humility builds strength is a basic tenet of The Book of Mormon: "...If they humble themselves before me, and have faith in me, then will I make weak things become strong unto them." Ether 12:27. "...They did fast and pray oft, and did wax stronger and stronger in their humility." Helaman 3:35.

Kimball – Forum shopping is all right if it's legal. Humility is a marvelous attribute. A cause-oriented judge is a dangerous judge and one cause may be a judge's own brilliance. Is the humble judge also intelligent? Or is he humble and stupid? A stupid judge is dangerous also. If the matter is complex you may want to take your chances with the brilliant unhumble judge.

Janove – This reminds me of Mark Twain's saying: "I was born modest, but it wore off."

Story Number 3

Two renowned Jewish legal scholars from around Jesus' time, Hillel and Shammai, had famous debates on points of Jewish law. Hillel's views have predominated over the centuries, not, according to tradition, because of his superior scholarship, but because of his humility. The Talmud records that Hillel and Shammai were presented with the following issue:

> A man steals a beam of wood and uses it in the construction of his house. The man later voluntarily admits his guilt. According to Shammai, the stolen beam must be removed even if it means the destruction of the man's house. Hillel, however, holds that the man should only be required to pay the monetary value of the wooden beam, citing the concept of "takkanat hashavim" – the extension of the law for the sake of encouraging those who would repent. According to Hillel, one should not place obstacles before the penitent; the goal is not to punish but to change the penitent's future actions.

Panelist Observations

Mabey – Hillel is right. The first purpose of church discipline is to save the souls of transgressors by helping them repent.

On the other hand, one must recognize that while the purpose of contract law is simply compensation, the legitimate purpose of criminal law may well be punishment, not just rehabilitation.

Kimball – We need to exercise common sense and judgment. It makes no sense to destroy the house to recover the stolen beam. We should not put obstacles in the path of reform. We should not be married to the concept of the "last" farthing. There may need to be some appropriate criminal penalty. The goal of reformation should inform our attitudes about sentencing and punishment, punitive damages, etc.

Story Number 4

The following is a real-life tale of a rabbi who lived in Eastern Europe. As many clergymen of many faiths would acknowledge, sometimes one still has to have a day job to make ends meet. This particular rabbi owned a tanner business.

> A businessman approached a tanner who also happened to be a revered rabbi. He offered the rabbi a certain price for a quantity of hides. However, the rabbi said the price was too low and quoted him a higher price. The businessman declined. After the businessman left, the rabbi reflected on the matter and decided that given the quantity involved, he could still make a fair profit at the price the businessman offered. The rabbi thus resolved to do the deal at that price if the opportunity arose again. A short while later, the businessman returned. He explained that the other tanners in town had quoted even higher prices and he was therefore willing to make the purchase at the rabbi's price. "No" replied the rabbi, "we will use your price. You see, we already have a contract." The rabbi then quoted Psalms (15:1-2): "Who shall live in Your Tent? Who shall dwell on Your Holy Mountain? He who walks with integrity, does righteousness, *and speaks the truth in his heart."*

Panel Observations

Mabey – This story no doubt arose before theories of free market, profit and competition were prevalent. In the context of these modern principles, diligence in business is important. "Seest thou a man diligent in his business, he shall stand before kings; he shall not stand before mean men." Proverbs 22:29. Moreover, in Matthew, Chapter 25, the servant who hid his lord's money instead of putting it at interest with the money exchangers was

deemed slothful and wicked and forfeited his share.

In the story, the market fixed the price of the goods, and if those dealing in the market established that price honestly, without fraud or concealment, the price was fair and the Rabbi was entitled to sell at it. As Elder Ezra Taft Benson said of private enterprise and free competition, "Everyone has a chance to cast his vote in the election which will decide what is a fair price, fair wage, and profit, and what should be produced and in what quantities. To contradict the justice of that decision is to contradict the whole concept of justice by the democratic process." (Remarks given in 1948 and quoted in *Prophets, Principles and National Survival* at 165-66).

As President Hinckley said in his *Teachings* at page 268, "Clean competition is wholesome; but immoral, dishonest, or unfair practices are reprehensible, and particularly on the part of a Latter-Day Saint." He further emphasized that, "Integrity is the heart of commerce in the world in which we live. Honesty and integrity comprise the very underpinnings of society." *(Standing for Something,* at 18.)

On the other hand, while the Rabbi would have been justified in selling at the market price, he may be sanctified for having sold at the compassionate price.

Kimball – There was no legal contract, no meeting of the minds. It would be a wonderful world, however, if everyone behaved as did the rabbi in this story. The rabbi's standard is too high to impose on everyone. It is rare and wonderful to be able to see another's point of view, to get beyond one's self interest.

Story Number 5

This story is a Midrash from Eastern Europe. It stems from the Book of Leviticus' injunction to protect the widow and orphan.

A penniless orphan had been taken in by a prominent rabbi and his wife and given lodging and wages in exchange for services as a maid. Unbeknownst to the rabbi, the young woman had broken a precious household candlestick and the rabbi's wife was taking her before the Beit Din (the local ecclesiastical court), seeking monetary damages. On the morning of the hearing, the rabbi observed that his wife was putting on her formal clothes and inquired why. She explained, whereupon the rabbi began putting on his formal attire and said he would accompany her to the Beit Din. "Good!" exclaimed his wife, noticeably pleased with her husband's apparent support. "You don't understand", explained the rabbi, " "I go to testify on the maid's behalf." "Why?" asked his stunned spouse. "Is not my claim just according to the law?" "It is," replied the rabbi. "However, the Torah commands us to protect the widow and the orphan – I go to fulfill God's commandment."

Panel Observations

Mabey – The widows and fatherless are entitled to special consideration justifying the rabbi's action. "Let each... bear an equal proportion... in taking the poor, the widows, the fatherless... that the cries of the widows and fatherless come not up into the ears of the Lord against this people." Doctrine & Covenants 136:8. Moreover, there are numerous examples in the history of Church Courts (now Disciplinary Councils) in which the verdict was one of compassion. In a case very similar to story #5, the church-owned Salt Lake streetcar hit and maimed an innocent 4-year-old boy. President Brigham Young, president of the company, appeared in the court and acknowledged that the civil law imposed no liability (tort law was in its infancy), but committed as a matter of religious principle and compassion to care for the victim. There are many other examples where Church Courts reduced the interest rate or the balance owing on a lawful debt; in most instances, both parties agreed to the result.

Kimball – This is somewhat similar to Story No. 1 and some of the same comments should apply. Should one's status give one a different or unique standing before the law – the modern concern over protected classes? Clearly, widows and orphans should be protected. We have here a good rabbi who needs more communication in his marriage.

Janove – This Midrash seems to run contrary to another age-old Jewish tradition – "Shalom Ha-Bayit", which literally means peace in the home but which has been construed to require affirmative duties (particularly on the husband) to maintain loving and supportive relations with one's spouse. One thing is for certain – if I were to behave as the rabbi in this story did, there would be no "Shalom" in the Janove household!

[1] Mr. Janove wishes to thank his good friend and Jewish scholar Michael Walton for his able assistance and instruction.

[2] While Elder Oaks' comments were a compelling part of the live presentation, he was unable to participate in the preparation of this article.

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

by Brent R. Armstrong

This is the third 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 appeared in the August/September issue and discussed other changes made by the Revised Act.

PART III

This is Part III of a three-part series that describes 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"**). The Revised Act became effective on July 1, 2001. In this Part, we discuss transition issues and provide some tips for drafting LLC governing documents and planning under the Revised Act.

I. Transition Issues

As of July 1, 2001, the Revised Act replaced the Old Act. On that date, the Old Act ceased to apply and all existing Utah LLCs ". . . *shall have all the rights and privileges and shall be subject to all the requirements, restrictions, duties, liabilities and remedies" prescribed in the Revised Act.*[1]

Each foreign LLC authorized to transact business in Utah on July 1, 2001, became subject to the Revised Act on that date but is not required to obtain a new certificate of authority to transact business in Utah by reason of the Revised Act coming into effect.[2]

There are several other transition issues that existing LLCs should consider:

1. Importance of File at Division of Corporations.

Each Utah LLC has a file at the Utah Division of Corporations. That file contains the Articles of Organization, any filed amendments to the Articles, each annual report filed with the Division, and Division correspondence regarding the LLC. Since certain information in such file now gives constructive notice, per the Revised Act, the file should be reviewed to see if information in it is accurate – i.e., are the managers correctly identified? Are the members (of a member-managed LLC) correctly identified? Is the LLC in good standing? Is corrective action needed – via amendment to the Articles, or written notice – to bring current the information in the LLC file at the Division.

If the LLC's file shows former managers or former members as still being "on board", those persons could file a written statement with the Division to indicate their disassociation from the LLC. Also, an amendment to the Articles of Organization will need to be filed to reflect changes in management.

2. Written Operating Agreement.

Oral operating agreements have no effect. If an LLC has no written operating agreement, that document should be prepared and adopted by the LLC members – unless the members want to live by all of the default rules under the Revised Act. Or, if the LLC has a "bare bones" form of operating agreement, the members may want to expand that document to override the statutory default rules under the Revised Act. Thus, even where an LLC has no written operating agreement, it really does have one – in the Revised Act.

3. Designated Office.

Now, each Utah LLC must identify in its Articles of Organization a "designated office" – which must be a geographical address in Utah. For existing LLCs, the Articles need not be amended to include that address if that address is indicated on the next annual report (and all subsequent annual reports) the LLC files with the Division of Corporations.[3] The LLC's basic records must be kept at its designated office. The designated office also controls the venue for court actions for several key events under the Revised Act, such as an action to remove a manager, to compel inspection of LLC records, to compel the Division of Corporations to accept a document for filing, to interpret the LLC's

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Articles of Organization or Operation Agreement or to dissolve the LLC.

4. Keep Records at Designated Office.
The Revised Act continues the requirement of the Old Act that specified LLC records be available for inspection and review by LLC members and managers (and their representatives). The Revised Act requires that such LLC records be kept at the LLC's designated office. Lawyers should counsel their clients to assemble such records in a file or binder that is kept at the LLC's designated office.

5. Consider Limits on Management Authority.
If the LLC members desire to place any limits on the authority of LLC management in dealing with third parties on behalf of the LLC, the Articles of Organization should be amended to include those express limits. In doing so, no "incorporation by reference" or cross-reference to other documents is permitted. Instead, any limits on authority must be expressly stated in the Articles. Corresponding provisions could also be added to the LLC's operating agreement, if desired.

If an LLC's existing operating agreement includes limits on authority of members or managers, such provisions now need to be shifted to the LLC's Articles of Organization if notice to third parties is desired.

6. Fiduciary Duties of Management.
The fiduciary duties imposed on LLC management by the Revised Act are minimum standards – not maximum standards. Thus, if the members of an LLC desire to have higher duties placed on LLC management, those higher duties should be included in a written document signed by the LLC managers.

7. Clarify Scope of "Business".
LLC managers have apparent authority to bind the LLC in transactions with third parties based on the scope of the LLC's business as described in the Articles of Organization. Therefore, consideration should be given to clarifying or restricting the definition of the LLC's "business" as stated in the Articles of Organization. Any such clarification or restriction will require an amendment to the Articles of Organization.

8. Lapsed Voting Rights of Assignees.
Where an LLC member assigns his/her LLC interest to a person who is not admitted as a member of the LLC – thus becoming a mere "assignee", the voting rights pertaining to such LLC interest lapse. This situation could alter the power structure in an LLC. Consideration should be given as to how such lapsed voting rights are to be treated – are they to be ignored, or are they to be re-allocated among the remaining members or is the voting structure to be altered in some other way as a result of such lapse?

9. Standard for Valuing LLC Interests.
The Revised Act now provides a statutory default standard for valuation of an LLC interest. In response, consideration should be given to whether such standard should be adopted for the LLC (by default) or whether such standard should be overridden by an alternative valuation standard or formula in the LLC's operating agreement, buy-sell agreement or other applicable document.

10. Professional LLCs.
There are several changes which apply to professional service LLCs under the Revised Act. First, the name must include a "P", thereby being a "PLLC". Second, a Utah PLLC cannot practice multiple professions or become a "multi-disciplinary practice". That issue is left for other legislation or rule-making. Third, the Revised Act borrows the buy-out provisions from the Utah Professional Corporation Act (which deals with the death, incapacity or disqualification of a professional LLC member) and allows the estate of a deceased LLC member to force the LLC to purchase the interest if such interest is not purchased within 90 days – unless

other buy-out provisions are contained in the LLC's governing documents or in a separate agreement.

11. Review LLC's Accounting Methods.
The Revised Act imposes the new "capital account" standard for allocating profits and losses, distributions and voting. However, since that standard is merely a default rule, an LLC's governing documents may use any other standard, including the "contributions" measuring standard under the Old Act. Thus, if an existing LLC has an operating agreement that does not refer to the "contributions" measuring standard, and is silent as to any other standard, then the new "capital account" standard began to apply on July 1, 2001. To deal with these and other accounting-type issues, which are critical to any LLC, the operating agreement needs to be amended to reflect the intentions of the LLC members.

12. Breaking Deadlocks.
If a management deadlock exists in an LLC, the Revised Act contains a procedure for breaking the deadlock. This could be especially beneficial for LLCs that are owned 50/50 by two members who cannot agree on basic issues affecting the LLC or its property. The ultimate remedy for deadlock is the dissolution and winding up of the LLC, which would either require a sale of LLC assets (and distribution of the proceeds) or distribution of the LLC assets in kind, after satisfaction of LLC liabilities.

13. Changes in Management.
A change in those who manage an LLC – either the managers in a manager-managed LLC or the members in a member-managed LLC – is a critical structural event. Since the identity of those managing an LLC is reflected in the LLC's file at the Division of Corporations, any change in management must be reflected in an amendment to the Articles of Organization. A mere notation on the annual report for the LLC is insufficient to make a change in LLC management, since annual reports are merely informational filings.

Also, where an LLC is manager-managed and has only one manager, the death, withdrawal or removal of the sole remaining manager (or if the sole manager transfers or assigns his entire interest in the LLC or is expelled as a member or files bankruptcy), the management structure of the LLC changes from being a manager-managed LLC to a member-managed LLC, unless another manager is appointed by the members within 90 days after such event. Thus, provisions for succession of managers within a manager-managed LLC become critical since an abrupt shift in structure to a member-managed LLC could possibly give each member in the LLC power to bind the LLC in transactions with third parties, similar to the authority the LLC manager had enjoyed.

Accordingly, consideration should be given to adding a "back-up manager" for an LLC that has only one manager to cover such events affecting the sole manager.

14. Remove Unwanted Managers.
There may be existing LLCs where the members desire to have a new manager but, under the Old Act, did not have a clear procedure for how to change the manager. The Revised Act contains a default rule that allows the members holding a majority of profits interests to remove a manager without cause – unless the LLC governing documents require some other procedure for removal. Accordingly, the LLC members can now remove an unwanted manager subject, of course, to any contractual rights which the manager may have.

15. Expel Unwanted Members.
There may be some existing LLCs that have a member who is unwanted by the other members. Although the standards for expelling a member are quite high, consideration might be given to using those procedures in order to re-align the membership of an LLC and rid it of unwanted members.

16. Convert Partnerships to LLCs.
Since the Revised Act allows for a seamless conversion of limited partnerships and general partnerships to LLC form, consideration should be given to converting those entities to LLCs in order to obtain limited liability for all owners of the enterprise – at least as to future liabilities.

17. Use of Organizer to Form LLC.
The Revised Act now allows an organizer who is not a member or a manager to organize an LLC. This will be convenient for lawyers and others organizing LLCs on behalf of clients. However, a caution is needed here. Lawyers should still require clients to review the governing documents and obtain the client's signature approving the governing documents before filing to ensure that the clients understand and have consented to provisions in such documents. Otherwise, misunderstandings could later arise where the lawyer, in good faith, prepared Articles of Organization and included some provisions which the clients later contend were not approved. This could arise, especially, with provisions relating to limitations on authority of LLC managers.

18. Attraction of LLCs for Estate Planning Purposes.
Under the Revised Act, there are several default rules which

make the LLC attractive for estate planning purposes. First, a member cannot withdraw from an LLC until the end of the term of the LLC or until dissolution and winding-up of the LLC. Second, the default valuation standard is the "willing buyer, willing seller" standard, taking into account all applicable discounts. Third, an assignee of an LLC interest has no voting rights. Fourth, an LLC member can obtain payment in redemption of the LLC interest (a return of capital, so to speak) only upon dissolution and completion of winding-up of the LLC. As with other default rules, these can all be overridden by more liberal provisions put into the LLC operating agreement.

II. Drafting Considerations

1. Hierarchy.
There is now a statutory hierarchy of documents pertaining to LLCs with the highest power given to the Revised Act, then to the Articles of Organization and then to the operating agreement, in that order. For any conflict between the Articles of Organization and the Revised Act, the provisions of the Revised Act will prevail – unless the provisions of the Revised Act are merely default provisions. And, if there is any conflict between the Articles of Organization and operating agreement, the provisions of the Articles of Organization prevail.

2. Statutory Default Rules Apply.
Where an LLC's own governing documents – the Articles of Organization and the operating agreement – are silent as to a particular issue and there is a statutory default rule on point, the statutory default rule will apply. Due to the large number of statutory default rules that now apply to LLCs, it behooves all lawyers who draft LLC documents to familiarize themselves with the default rules to determine if the default rules should be retained or overridden.

3. Bring Articles of Organization into Compliance.
To bring an existing LLC's Articles of Organization into compliance with the Revised Act, the following concepts should be considered:

1) make all conforming changes effective as of July 1, 2001;

2) restrict the scope of the LLC's business to the actual activities planned for the LLC – not just to "any lawful purpose" – in order to limit the apparent authority of LLC managers and members to bind the LLC;

3) include the address of the designated office for the LLC; and

4) insert limits on the authority of managers to bind the LLC, and particularize those limits.

4. Bring Operating Agreement into Compliance.
If an existing LLC already has a written operating agreement, consider reviewing and comparing that operating agreement to the non-waivable provisions of the Revised Act [4] to determine whether the operating agreement should override the default rules under the Revised Act.

5. Move Provisions From Operating Agreement to Articles of Organization.
The Revised Act allows certain provisions in an LLC's Article of Organization to give constructive notice – provisions required to be included in the Articles of Organization as well as provi-

sions relating to limitations on authority of managers and limitations on the scope of business of the LLC. Under the Old Act, limitations on manager authority were typically included in the operating agreement. Now, those limiting provisions should be shifted to the Articles of Organization if they are to have effect on third parties. Merely leaving such provisions in the operating agreement alone will not provide the protection allowed under the Revised Act.

6. Determine Who Can Amend LLC Documents.
The Revised Act includes default rules for amending the LLC's governing documents, i.e., the Articles of Organization and operating agreement can be amended only with the consent of all members or, in some cases, with consent of the members holding 2/3 of the profits interests in the LLC. Consideration should be given as to who should hold the power to amend the LLC's governing documents and whether the consent requirements should change based on the importance of the issues subject to amendment. For example, if the governing documents provide that members holding 2/3 interests in profits may amend the Articles of Organization or the operating agreement, would it be permissible for such members to add, for the first time, provisions allowing for assessment of all LLC members for additional capital contributions?

7. Separate Management Agreement.
For an LLC that is manager-managed, provisions spelling out the duties and responsibilities of the manager could be contained either in the LLC operating agreement or in a separate management agreement. If the LLC members expect the LLC manager to be bound by the provisions of the operating agreement, the manager should sign the operating agreement, since it will be difficult to enforce provisions against an LLC manager where the manager has never consented in writing to be bound by such provisions. One caution here might be relevant: if a separate management agreement is used and the corresponding provisions are not included in the LLC's operating agreement, then, if the LLC ever shifts from being a manager-managed LLC to a member-managed LLC, the management agreement would probably cease to apply and there would be no corresponding provisions in the operating agreement.

8. Expanded Indemnification.
With the Revised Act allowing for expanded indemnification for an LLC, it may be advisable to draft more detailed indemnification provisions to cover issues such as who is covered by indemnification, whether indemnification is mandatory or permissive, which actions are covered by indemnification and whether the indemnified party is entitled to select legal counsel in defending (or pursuing) a claim subject to indemnification.

9. Need to Override Capital Account Default Rule.
There could be numerous situations where the default rules for capital accounts would not be advisable. One of those would be a 3-member LLC where one LLC member puts up services, another LLC member puts up land and another LLC member puts up cash as their contributions to the LLC. Under the capital account concept, the service member would have a zero capital account, initially, while the other two would have capital accounts based on the value of what was contributed. Under the default rules in that scenario, the service member would have no share of profits or losses and would not share in distributions or voting. Over time, as the profits from the enterprise are retained in the LLC and not distributed, the service member could gradually build up a capital account balance. If there is no modification of the default rule of capital accounts as the standard for allocation of profits, losses, distributions and voting, the service member would be totally left out – at least in the early years of the LLC's activities.

10. Action Without a Meeting.
The Revised Act borrows a concept from the Utah Revised Business Corporation Act regarding actions by members without a meeting. Under that default rule, if less than all of the members (the number sufficient to meet the minimum percentage that would be necessary to authorize the action) consent to an action to be taken, notice must be sent to the other members who did not consent at least five days before consummation of the transaction. In some situations, members may not want to have the five day notice and wait period apply. Provisions to address such desires should be added to the LLC operating agreement.

III. Conclusion
The Utah Revised LLC Act recodifies and substantially expands the prior Utah LLC law. In doing so, it relies on the contract model to enable the drafter to adapt provisions to liking of the LLC members. Although there are still non-waivable provisions which apply, considerable latitude is given to the drafter.

All Utah lawyers dealing with limited liability companies should become familiar with the provisions of the Utah Revised LLC Act.

[1] Utah Code § 48-2c-1902(2)
[2] Utah Code § 48-2c-1902(3)
[3] Utah Code § 48-2c-1902(1)(b)
[4] Utah Code § 48-2c-120(1)

Office of Public Guardian

by S. Travis Wall

I. Introduction

The Office of Public Guardian (OPG) is the Utah State agency responsible for providing public guardianship and conservatorship services to incapacitated adults.

OPG was established and placed within the Utah State Department of Human Services in 1999, after the Utah Legislature passed Senate Bill 39, sponsored by Senator Lyle Hillyard. This legislation, codified as the Office of Public Guardian (OPG) Act[1], was prompted by longstanding concerns about lack of guardianship arrangements for incapacitated adults who have no family members or friends to serve as their guardians. A 1997 study found that as many as 1400 incapacitated Utahans could benefit from a public guardianship system[2].

As a new agency, OPG is a work in progress. In 1999, OPG developed and published a comprehensive plan for implementing public guardianship services in Utah *(Implementation Plan for the Office of Public Guardian* or OPG Implementation Plan)[3]. This article describes OPG's services and summarizes key issues related to developing a public guardianship system in Utah.

Services. The Office of Public Guardian provides a number of services, including: information, referral, and education about guardianship and the rights of incapacitated persons; assessment for guardianship; petitioning the court for guardianship; alternatives to guardianship; guardianships and conservatorships; and protection and advocacy of the rights and interests of incapacitated persons.

OPG provides services directly and contractually. Through a small staff, which includes three deputy guardians, OPG currently serves as guardian to approximately 40 adults, most of whom are elders living in long-term care facilities. In addition, the Department of Human Services provides guardianship services to approximately 200 adults with developmental disabilities through contracts that the Division of Services for People with Disabilities and OPG have with Guardianship Associates of Utah and Advocacy Providers, two private guardianship agencies.

Eligibility. By law, OPG's direct guardianship services are limited to incapacitated persons who have no one else to serve as their guardians.[4] Priority is given to persons who are in life threatening situations, or who are experiencing abuse, neglect, self-neglect, exploitation, or who are at significant risk of experiencing such problems.[5]

Referral. Anyone may make a referral to OPG. Referrals may be made by contacting the office directly.[6]

Board. The Board of Public Guardian Services is a citizen-based board that oversees OPG. The Board is comprised of nine members, including: an attorney; a physician; and representatives of: senior citizens, people with disabilities, The Board of Aging and Adult Services, The Board of Services for People with Disabilities, The Board of Mental Health, the hospital industry and the long-term care industry.

Staff. OPG's staff presently includes a director, three deputy guardians, and a secretary. OPG's director and guardianship staff are certified as registered guardians by the National Guardianship Association (NGA) or are working to obtain NGA certification. OPG guardians include persons knowledgeable and experienced in geriatric, habilitative and mental health care and treatment, and guardianship law.

Fees. OPG may assess fees for services but does not presently do so.

II. Key Guardianship Issues

In developing the OPG Implementation Plan and in subsequent discussions over the past year, the Board of Public Guardian Services and OPG have identified a number of issues that need to be considered and addressed in developing Utah's public guardianship system.

Need for Public Guardianship Services. The need for public and private guardianship arrangements is not new. Forty-three other states have public guardianship systems.[7] Some systems have existed for over twenty-five years.

The need for public guardianship services in Utah is significant and is likely to grow in coming years. A Department of Human Services needs assessment survey completed in 1997 found that

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the number of Utahans needing public guardianship is somewhere between 700 and 1400 persons. The survey estimated that this group includes: 800 elderly incapacitated individuals who reside in long-term care facilities; 225 incapacitated persons with developmental disabilities living in the state developmental center and the community; and 130 incapacitated persons with psychiatric disabilities.

Discussions with guardianship professionals in other states suggest that the total number of incapacitated adults in need of public guardianship services may be higher than the above estimates. In addition, information gathered over the past year suggests that there are at least two other groups of adults in need of guardianship: incapacitated adults living in the community, unserved and unknown by human service agencies; and incapacitated adults in medical hospitals facing significant medical decisions, including emergency and end-of-life care.

Moreover, as is widely known, an increasing percentage of Americans will become 65 years of age and older over the next 25 years, and as individuals age they are more likely to become incapacitated.[8] What is less widely known is that Utah's senior population is growing faster than that in most other states.[9] On a related basis, Utah has and is projected to continue to have the fourth highest rate of Alzheimer's disease in the nation.[10]

Eligibility and Priorities. There is a significant need for public guardianship services in Utah. However, OPG's present capacity to provide services is very limited. In creating OPG, the Legislature did not provide the Department of Human Services with a budgetary allocation. Instead, the expectation was that OPG would initially be funded from the small amount of departmental resources then being spent on guardianships and any additional funding that the Department could identify. And, at some later point, the Department could return to the Legislature with a proposal for more fully funding OPG.

In determining who may be eligible for OPG's services, the Board of Public Guardian Services has agreed that any individual who is incapacitated and does not have a willing and responsible third party who can serve as his or her guardian is eligible for OPG's services. However, in recognition of OPG's limited staff and resources, the Board has determined that unless and until OPG grows, the office's services will target: incapacitated persons in life-threatening situations; and incapacitated persons who are experiencing or at risk of experiencing abuse, neglect, self-neglect or exploitation.

The Board is continuing to consider when and how OPG should serve individuals who can afford to pay for services. The availability of private guardianship services is limited in Utah, particularly outside of the Wasatch Front. Under the Office of Public Guardian Act, OPG may assess fees, although it does not presently charge fees. (The Legislature and Board must approve OPG's fees).

The Board has also considered what groups should be served and the appropriate size of staff caseloads. OPG's primary focus is presently on: incapacitated elders with progressively debilitating conditions such as Alzheimer's disease; incapacitated adults with developmental disabilities, such as moderate or severe mental retardation; incapacitated adults with serious and persistent mental illnesses, such as schizophrenia and affective disorders; and other incapacitated adults in need of surrogate decision makers for critical medical decisions.

These groups correspond to the five groups of Utahns previously identified as needing public guardianship services and they generally correspond to the groups served by public guardianship systems in other states.

Also eligible for guardianship under Utah law are adults who are incapacitated as the result of alcoholism or substance abuse. The Board is undecided about when OPG should provide services to persons who are incapacitated because of a lifestyle that they have voluntarily chosen, particularly given OPG's limited capacity to provide services. On a related basis, there has been discussion about whether OPG should serve individuals who are likely to resist or undermine efforts to assist them. These discussions continue.

Caseload Standards. Guardianship experts, the media and other sources have raised serious concerns about guardianship caseloads. Some public guardianship programs have undertaken excessive and unmanageable caseloads and resulting horror stories have been reported. Consequently, a number of states now regulate, by statute or program standards, the size of their caseloads. In anticipation of this issue, the Office of Public Guardian Act states that OPG may only be appointed as guardian if OPG itself files for appointment or if it agrees in advance to appointment.

After reviewing the literature on guardianship and discussing these issues with officials in other states, OPG tentatively decided to limit caseloads to about 40 persons per OPG guardian. Given this limit and current staffing levels, OPG has worked to increase

its overall caseload but significant caseload growth will depend on the availability of additional funding. Moreover, OPG's experience over the past year suggests that guardianship work is more staff-intensive than was originally anticipated and that the caseloads of individual guardians may need to be more modest.

Systems Structure. Another important issue in developing Utah's public guardianship system is determining how it should be structured. The Board of Public Guardian Services and OPG staff have examined other state public guardianship systems and talked with guardianship officials and experts about how best to construct OPG. The Board and staff have found that structures of other state public guardianship systems vary from state to state but generally fall into one of three categories. Some are part of a larger government social service agency, others are independent state agencies, and yet others are privatized agencies with statutory authority. The trend in recent years has been towards establishing or re-structuring public guardianship systems so that they are more independent. This movement is consistent with the views of many guardianship experts and the National Guardianship Association that both guardianship programs and individual guardians should be free from conflicts of interest, including organizational conflicts, that might compromise their ability to protect and advocate the welfare, interests and rights of their wards.

OPG is presently housed within the Executive Director's Office of the Utah State Department of Human Services in order to assure that it is independent of other state social service agencies that serve OPG wards. A decision about how OPG will be structured in the long-term has yet to be made.

Type and Range of Services. In considering what services OPG should provide, the Board of Public Guardian Services and OPG have examined the type and range of services provided by other state public guardianship systems. Virtually all systems provide full guardianships and conservatorships. (Under a full guardianship, a guardian has authority for making virtually all decisions for a ward. Under a limited guardianship, a guardian only has the authority specifically granted to the guardian by the court). Under both full and limited guardianships, a guardian has two primary functions: surrogate decisionmaking; and guardianship case management.

In addition, other state public guardianship systems provide some or all of the following services: information, referral and education about guardianship; investigation and assessment of the need for guardianship and conservatorship; petitioning of the court for appointment of guardianship and conservatorship; money management services (including direct deposit of income and direct payment of bills) and public benefit payeeships; limited guardianships and conservatorships; and oversight of private guardianships.

OPG presently provides all of the above services, except for money management services an3d oversight of private guardianships. OPG is committed to further developing and utilizing alternatives to guardianship, including increasing its use of limited guardianships, establishing a money management program, and fostering the use of advance directives for health care. However, further development and implementation of alternatives will depend on the availability of additional funding and staff.

Guardianship Standards and Decision Making. Thirteen years ago, the U.S. House of Representatives' Committee on Aging published a comprehensive report on guardianship, which noted that guardianship is necessary, important and can be of great benefit to vulnerable and incapacitated adults. But the House Committee on Aging also noted that guardianship is restrictive and intrusive:

> The consequences of guardianship upon the civil rights and liberties of [wards] are many and drastic.... [Persons placed under guardianship] may lose many of their legal and civil rights as adult citizens and be reduced to the legal status of a child [and be] deprived of the right to control almost every aspect of life, including the right to manage finances, to write checks, to contract, to sue and be sued, to travel, and to choose what medical treatment to accept and refuse, where to live, and with whom to associate.[11]

As a result of the House Committee's findings and recommendations, formal standards for guardians were developed and adopted by the National Guardianship Association (NGA). A process for certifying guardians followed several years later.

The Board of Public Guardian Services has adopted the NGA's guardianship decision-making guidelines. Under these guidelines, a guardian has a responsibility to determine what a ward would want if the ward were capable of making decisions, and then to try and carry out the ward's wishes. Guardians have a legal duty to make decisions that protect the rights, interests and well being of their wards. Guardians should not substitute their own opinions about what is best for wards unless a guardian cannot determine what a ward would want, or unless the ward's choice cannot be honored under the law or poses

unacceptable risks for the ward.

In addition, the Board and OPG are committed to developing a guardianship system which reflects the programmatic standards recommended in the House Committee report and set forth by the NGA. Perhaps the most significant of these standards are those pertaining to the use of alternatives to full guardianship and conservatorship.

Alternatives to Guardianship and the Rights of Incapacitated Persons. Because guardianship is restrictive and intrusive, it is important that it be used only when absolutely necessary and in the least restrictive manner possible. The House Committee on Aging's report on guardianship and the standards of the National Guardianship Association stress the importance of the use of alternatives to guardianship, including limited guardianships and conservatorships, as well as advance directives for health care, payeeships and money management services.[12] Under limited guardianships and conservatorships, a guardian or conservator only has the authority specifically granted him or her by the court. Advance directives provide a means for a competent adult to specify in advance of becoming incapacitated how and by whom he or she wants certain decisions made. Payeeships and money management services also provide alternative mechanisms for managing income and bill paying.

Utah law directs that the court is to give preference to limited guardianship and conservatorship whenever possible. In addition, the OPG Act directs OPG to pursue guardianships and conservatorships in the least intrusive manner possible. OPG is committed to providing guardianship services consistent with the spirit and letter of the law. OPG is utilizing limited guardianships whenever possible, and has sought time-limited guardianships in a number of instances, although guardianship is indeterminate under Utah law. OPG is working with lawyers and judges to ensure that due process is afforded all persons facing guardianship and has engaged in an aggressive and ongoing educational campaign to raise knowledge and understanding of guardianship with professionals, families, and the public.

OPG recognizes that a guardian's responsibilities include protecting and advocating the rights of the incapacitated person he or she serves. Even when a full guardianship is granted, the incapacitated person retains certain rights, such as the right to make personal choices, the right to challenge a guardianship and the right not to be sterilized. These rights may not be denied except in very limited circumstances.

III. Conclusion

The Board of Public Guardian Services and OPG have made considerable progress over the course of 20 months in developing a statewide public guardianship system. But many challenges remain. With the necessary resources and support, and the constructive input of concerned and interested citizens, OPG will become the strong and effective public guardianship systems that Utah deserves.

IV. Additional Information

For more information about OPG, contact the office directly.[13] A number of brochures, handbooks and other materials about OPG and guardianship are available through the office, including: *Guardianship in Utah: Answers to Questions About Guardianship; A Guide to Guardianship Services and Resources in Utah; The Guardian as Surrogate Decisionmaker; Implementation Plan for the Office of Public Guardian;* and *Choosing a Nursing Home.*

1 Utah Code Ann., § 62A-14-101 to § 62A-14-112.

2 Storrs, J.; *Key Informant Needs Assessment Survey,* Utah Department of Human Services, 1997. The results of this survey are discussed in more detail below.

3 Copies of the OPG Implementation Plan are available from OPG. For more information, contact Office of Public Guardian, 120 West 200 North, Room 329, Salt Lake City, Utah, 84103, (801) 538-8255.

4 Utah Code Ann., § 62A-14-105 (1) (a) (ii).

5 Abuse, neglect, self neglect, and exploitation are defined in Utah Code Ann., § 62A-3-301.

6 OPG's direct telephone number is (801) 538-8255.

7 For more information on public guardianship efforts, see: Hume, S.B. (1991). *Steps to Enhance Guardianship Monitoring,* Washington D.C., American Bar Association, and Siemon, D. and Hume, S.B., and Sabatino, C., "Public Guardianship: Where is It and What does It need?" *Clearinghouse Review,* October 1993, pp. 588-599.

8 Recent data from the Governor's Office indicate that the Utah 65 plus population was 201,993 in 1990; 241,878 in 2000; is projected to be 327,277 in 2010 and will continue to grow exponentially over the ensuing 20 years. Demographic and Economic Analysis Section, UPED Model System. Utah Governor's Office of Planning and Budget, 1999.

9 Ibid.

10 Utah's Alzheimer's population is projected to increase 141%, from 27,815 individuals, as of 2000, to 66,932, by 2025. "Alzheimer's tidal wave feared," *USA Today* (Alzheimer's Association cited as source), March 22, 2000.

11 See: U.S. Congress, House Select Committee on Aging, Subcommittee on Housing and Consumer Interests, (1987). *Model Standards to Ensure Quality Guardianship and Representative Payee Services,* Washington D.C., U.S. Government Printing Office (Committee Pubs. No. 100-705).

12 *Standards for Guardians, Model Code of Ethics for Guardians,* National Guardianship Association, Inc. For more information about the National Guardianship Association and its standards, contact the NGA at: 1604 North Country Club Road, Tucson, Arizona, 85716, (520) 881-6561, www.guardianship.org.

13 Office of Public Guardian, 120 West 200 North, Room 329, Salt Lake City, Utah, 84103, (801) 538-8255.

Commission Highlights

During its regularly scheduled meeting August 24, 2001 which was held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Scott Daniels reported that he along with Lowry Snow, Frank Carney and Billy Walker had recently visited with Justices Durrant and Howe on the issue of improving professionalism in the Bar.
2. Scott Daniels gave a summary of the unauthorized practice of law status. He noted that there would be a meeting of the Special ad hoc Bar Committee and Legislators on September 11.
3. Mary Gordon, President of Women Lawyers of Utah, has been appointed to the Admissions Committee.
4. The next Bar Commission meeting will be held on Thursday, September 27th , 2001, 9:00 a.m., at the BYU Law School, Rex B. Lee Reading Room.
5. Nate Alder, Utah Young Lawyers President, reported that March 7-10, 2002 the Utah Young Lawyers will be hosting ABA's Young Lawyer's Leadership Committee at the Grand America Hotel.
6. Nanci Snow Bockelie gave a synopsis of several Western States Bar's formats for handling bar complaints, costs and statutes of limitations on filing a bar complaint.
7. Karin Hobbs reported on the Ethics Advisory Opinion process and enforcement.
8. John Adams gave a report on OPC Rules.
9. Charles R. Brown updated the Commission on current developments with MDP. Charles also reported on the ABA study group ethics 2000 on the rules of Professional Conduct.
10. Marlene Gonzalez announced the upcoming Annual Minority Bar Dinner that will be held at the Law & Justice Center on Friday, September 21st from 6:00 until 9:00 p.m.
11. Denise Dragoo reviewed the agenda for the leadership conference, to be held September 20, 2001 at the Law & Justice Center.

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.

Notice of Petition for Reinstatement to the Utah State Bar

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 Thomas Rasmussen in *In re Rasmussen,* Third Judicial District Court, Civil No. 000906369. Rasmussen was placed on supervised probation for a period of one year. 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.

Increase in pro hac vice Filing Fee

Effective November 1, 2001 the Utah Supreme Court approved a $100.00 increase in the pro hac vice fee. Under Rule 11-302 the filing fee which is administered by the Bar will be $175.00 per out-of-state attorney appearance per case. Please contact Phyllis Yardley at 297-7057 if you have questions or visit the Bar's web site at *www.utahbar.org* for copies of the rule, application and instructions.

Discipline Corner

RESIGNATION PENDING DISCIPLINE

On March 29, 2001, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of D. John Musselman.

On October 2, 1997, the Fourth Judicial District Court entered an Order of Suspension and Probation suspending Musselman from the practice of law for two years. All but four months of the suspension were stayed and Musselman was placed on probation for a period of twenty months. The Order of Suspension and Probation provided that if Musselman's probation were revoked, he would be required to serve the entire two years of the suspension.

Musselman violated a term of his probation and the Office of Professional Conduct ("OPC") filed a motion to revoke his probation. A hearing was held on the OPC's motion and on May 14, 1999, the Court signed an Order suspending Musselman from the practice of law for two years and ordering Musselman to comply with Rule 26, Rules of Lawyer Discipline and Disability ("RLDD"). Pursuant to Rule 26(a), RLDD, Musselman was given a thirty-day period to wind up his law practice.

Musselman failed to comply with the requirements of Rule 26(b), RLDD, and continued to practice law following his thirty-day wind-up period.

In addition, three informal complaints against Musselman were reviewed by Screening Panels of the Ethics and Discipline Committee of the Utah Supreme Court, and in each case the Panel found that probable cause existed for public discipline against Musselman.

While suspended from the practice of law, Musselman received a settlement check on behalf of a client for a personal injury matter settled after the thirty-day wind-up period. Musselman deposited the check into his personal bank account and disbursed the settlement funds to the client by personal check. The bank did not initially honor the check, but when presented a second time for payment, the funds were paid to the client.

The OPC filed a motion for order to show cause why Musselman should not be held in contempt for violating the Court's order of May 14, 1999. Musselman then filed his petition for resignation with discipline pending, which the Supreme Court accepted.

Aggravating factors include: prior discipline.

SUSPENSION

On June 1, 2001, the Honorable Anthony M. Schofield, Fourth Judicial District Court, entered an Order of Discipline by Consent suspending Earl B. Taylor from the practice of law for three months for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 5.5 (Unauthorized Practice of Law), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) and (d) (Misconduct), of the Rules of Professional Conduct.

While administratively suspended from the practice of law for failure to pay his annual Bar licensing fees, Taylor filed a Complaint and Summons on a client's behalf. The client's case was later dismissed because Taylor was not authorized to practice law at the time he filed the case. Taylor failed to respond to the Office of Professional Conduct's lawful requests for information.

While administratively suspended from the practice of law for failure to pay his annual Bar licensing fees, Taylor represented a client in a bankruptcy matter. Taylor was present for the client's first bankruptcy hearing, but failed to appear at a second hearing. Taylor misinformed the client concerning the second hearing date as a result of which, the client failed to appear and the bankruptcy was dismissed. Taylor told the client that he would refile the bankruptcy, but failed to do so. Taylor charged the client an excessive fee for the amount of work performed.

Mitigating factors include: personal or emotional problems and remorse.

Aggravating factors include: prior record of discipline.

SUSPENSION

On June 26, 2001, the Honorable Roger S. Dutson, Second Judicial District Court, entered an Order of Suspension (Stayed) Based on Discipline by Consent suspending Geoffrey L. Clark from the practice of law for six months for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.7(b) (Conflict of Interest: General Rule), 7.3 (Direct Contact with Prospective Clients), and 8.4(a) and (d) (Misconduct), of the Rules of Professional Conduct. The entire six month suspension was stayed.

In representing five clients, Clark failed to act with reasonable diligence and promptness, did not keep the clients reasonably informed about their matters, and did not promptly comply with reasonable requests for information.

Clark directly contacted in person or by telephone potential clients for the purpose of soliciting them to become his clients.

While representing a criminal defendant against rape charges, Clark negligently referred before the jury to other sexual behavior by the alleged victim. Clark had not filed a written motion prior to trial pursuant to Rule 412(c), Utah Rules of Evidence. The State was granted a mistrial based on Clark's references before the jury.

Clark was retained to represent a female client. During the course of the representation, Clark engaged in inappropriate

behavior which may have limited his representation of the client.

Mitigating factors include: inexperience in the practice of law and remorse.

ADMONITION

On June 28, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 5.5 (Unauthorized Practice of Law) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney participated in a telephone conference with the court and filed a pleading on an individual's behalf while administratively suspended for failure to comply with mandatory continuing legal education requirements.

ADMONITION

On July 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

The attorney failed to respond to the Office of Professional Conduct's lawful requests for information concerning an informal complaint filed against the attorney.

ADMONITION

On July 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(b) (Fees), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a criminal matter. Although the client paid the attorney a retainer fee in excess of $750, the attorney did not have a written fee agreement with the client. The attorney advised the client that the State had insufficient evidence to proceed with the criminal case and that the attorney would file a Motion to Dismiss on the client's behalf. Thereafter, the attorney failed to file the Motion to Dismiss and failed to perform any additional work on the client's behalf. The attorney failed to keep the client reasonably informed about the status of the criminal matter. The attorney failed to respond to the Office of Professional Conduct's lawful requests for information.

ADMONITION

On July 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

The attorney failed to respond to the Office of Professional Conduct's lawful requests for information concerning an informal complaint filed against the attorney.

ADMONITION

On July 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(a) and (b)and 5.3(b) (Responsibilities Regarding Nonlawyer Assistants) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a workers' compensation matter. Ultimately, the client's case was on appeal and the Court of Appeals set an extended deadline for filing the client's brief. The court had granted two previous extensions of time in which to file the brief and had advised the client that no further extension of time would be granted. The deadline passed without a brief being filed on the client's behalf and as a result, the client's appeal was dismissed. During the course of the representation, the attorney failed to keep the client reasonably informed about the status of the matter and failed to inform the client of the deadline for filing the appellate brief. The attorney also failed to inform the client that the deadline for filing the appellate brief had been missed. The attorney failed to explain the client's matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation. The attorney hired a nonlawyer to prepare the brief on the client's behalf. Thereafter, the attorney failed to make reasonable efforts to ensure that the nonlawyer's conduct in drafting the brief for the client was compatible with the attorney's professional obligations.

ADMONITION

On July 18, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 3.1 (Meritorious Claims and Contentions), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a bankruptcy matter and prematurely filed the action without conducting a reasonable investigation as to whether the client was permitted by law to file at that time. The early bankruptcy filing stopped a court-ordered constable's sale, and the client was able to sell many of the assets to which one of the client's creditors had a claim.

ADMONITION

On July 18, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4(a) (Communication), 1.5(b) (Fees), 1.16(d) (Declining or Terminating Representation), Rule 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a divorce action. Although it was reasonably foreseeable that total attorney's fees in the client's divorce would exceed $750, the attorney did not have a written fee agreement with the client. During the course of the representation, the attorney was difficult to contact and failed to keep the client reasonably informed about the status of the client's divorce, and failed to notify the client of a court hearing. Upon termination of the representation, the attorney failed to return the client's file as requested. The attorney failed to timely respond to the Office of Professional Conduct's lawful requests for information.

ADMONITION

On August 9, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 1.3 (Diligence) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a claim against the State of Utah. The attorney failed to send legally sufficient notice of claim to the State of Utah on the client's behalf. The attorney failed to file a civil complaint on the client's behalf.

Mitigating circumstances include: effort to make restitution; inexperience in the practice of law; and imposition of other penalties or sanctions.

ADMONITION

On August 14, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a medical malpractice matter. The attorney failed to meet a court-ordered deadline for filing the client's expert witness designation. Although the court granted the attorney's motion for leave to designate expert witnesses, the court ordered the attorney to pay attorney's fees related to the motion and to pay the other party's expenses in deposing the designated experts.

Mitigating factors include: imposition of other penalties and sanctions in that the attorney was sanctioned by the trial court and paid those monetary sanctions.

ADMONITION

On August 20, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.8(e) (Conflict of Interest: Prohibited Transactions) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in connection with a personal injury matter and a wrongful death lawsuit. During the course of the representation, the attorney advanced to the client funds to cover non-litigation expenses.

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 01-05

Issue: What are the ethical implications for a real estate broker who includes in his promotional material that he is also a lawyer?

Opinion: A lawyer functioning in a law-related profession, such as real estate brokerage, who holds out as either an active or inactive lawyer will be subject to the Utah Rules of Professional Conduct while engaged in that law-related profession.

Opinion No. 01-06

Issue: May a private practitioner who serves as a part-time county attorney represent private clients in connection with protective-order hearings?

Opinion: The private representation by a part-time county attorney of individuals at protective-order hearings is not a per se violation of the Utah Rules of Professional Conduct. However, the county attorney must fully inform the client that he will not be able to continue the representation if the client later becomes a criminal defendant in his county, and that he will have to withdraw as counsel. The county attorney must also determine, on a case-by-case basis, the likelihood that this potential conflict of interest between his prosecutorial duties and the interest of his private client will actually arise. If the likelihood that this will occur is relatively high, the attorney must obtain both the county's and the client's informed consent to the representation.

Update on Environmental Law

by Richard K. Rathbun[1]

With the advent of the new Bush administration and the end of the U.S. Supreme Court term, there is much to report in environmental law. The President has already faced such difficult issues as carbon dioxide emissions, arsenic levels in drinking water, global warming and the Kyoto Protocol. His administration is also reviewing EPA's enforcement initiative against utilities under the Clean Air Act's new source review program, and has proposed the devolution of some of EPA's science and enforcement functions to the states, to be assisted by new federal grants.

The Supreme Court decided two Clean Water Act cases, in one case rejecting an attempt to extend regulatory jurisdiction to waters whose sole interstate connection was the occasional presence of migratory birds, and in the other holding that a developer's "takings" claim was not barred by virtue of the fact that he bought the property after restrictive wetlands regulations were enacted. Under the Clean Air Act, the court also found no improper delegation of legislative power in EPA's establishment of federal air standards for ozone and particulate matter, and rejected a claim that costs to the regulated community should have been considered by EPA in setting those standards. Astounding court-watchers, the latter opinion by Justice Scalia was a unanimous decision, an alignment some insisted would never happen in these fractious days.

Air Quality

In *Whitman v. American Trucking Associations,* 121 S. Ct. 903 (2001), the court held that the Clean Air Act's requirements for EPA to establish federal air standards at levels "requisite to protect public health" were within the constitutional scope of discretion that Congress can delegate to a federal agency, rejecting the Court of Appeals' finding of unconstitutional delegation because the statute had provided "no intelligible principle" to guide the agency. The court also ruled that the Act "unambiguously bars" EPA from considering the potential costs to regulated entities when setting national ambient air quality standards.

Since the Clean Air Act requires that challenges to emission or performance standards be filed in the U.S. Court of Appeals for the District of Columbia, that court has been busy as well. *National Lime Association v. EPA,* 233 F.3d 625 (D.C. Cir. 2000) involved a challenge to a rule covering hazardous air pollutant ("HAP") emissions from Portland cement manufacturers. The court held that EPA's failure to set maximum achievable control technology ("MACT") standards for mercury, hydrogen chloride and total hydrocarbons was contrary to the Clean Air Act, and remanded to the agency for further proceedings. In *Arizona Public Service Co. v. EPA,* 211 F.3d 1280 (D.C. Cir. 2000), the court upheld EPA regulations under the Clean Air Act concerning tribal authority, specifically those which: (1) asserted jurisdiction over fee lands owned by non-members within a reservation's boundary; (2) included tribal trust lands within the definition of "reservation;" and (3) allowed tribes to issue Tribal Implementation Plans and redesignations under the prevention of significant deterioration program to both lands within the reservations and to non-reservation areas over which a tribe has demonstrated inherent jurisdiction (e.g., allotted lands and dependent Indian communities). And in *American Petroleum Institute v. EPA,* 198 F.3d 275 (D.C. Cir. 2000), the court held that it was improper for EPA to allow certain areas of the country (ozone standard sub-marginal non-attainment and non-attainment because of inadequate data) to opt-in to the reformulated gasoline program.

Two other recent cases raise an issue best introduced here by illustration. A statute is passed with general language, followed by regulations of broad language, interpreted by a guidance document with expansive language, enforced under directive of a policy memo with firm, assertive language, followed by a second policy memo of cautionary language, carried then through a series of enforcement actions, judicial and administrative, each with an agency "official position," creating in turn a body of letters, pleadings, administrative and judicial orders and appellate opinions, all constituting a minefield of contradictory language

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which compels us back, once again, to the original statute, where each of us, we insist – as befits our client's interests – finds clarity and comfort.

Such use of guidance or policy documents as the basis for enforcement actions is a sore subject with the regulated community, which finds itself asking the question: what language is authoritative? Thus, in *Appalachian Power Co. v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000), the court held invalid EPA's "Periodic Monitoring Guidance" document because it effectively changed existing monitoring rules without complying with rule-making procedures. The court rejected EPA's boilerplate disclaimer that the guidance was not intended to create legal rights, noting that the guidance gave states their "marching orders" and that "EPA expects the states to fall in line." And closer to home, in *Public Service Co. of Colorado v. EPA,* 225 F.3d 1144 (10th Cir. 2000), a power company brought an appeal to challenge two EPA letters opining that a proposed new power plant and an existing plant would together constitute a single major source of air emissions for permitting purposes. The appeal was dismissed because the letters did not constitute final agency action from which an appeal could be taken (they were written by EPA and not the ultimate state permitting authority). Still, given the complex nature of environmental regulatory schemes – not limited to air quality, of course – the attempted enforcement of policy or guidance documents is an issue which all practitioners, on either side of the enforcement "aisle," should be wary of.[2]

Bankruptcy

Several recent bankruptcy cases involved environmental issues worth noting. In *Southern Pacific Transportation Co. v. Voluntary Purchasing Groups, Inc.,* 252 B.R. 373 (E.D. Tex. 2000), the proposed reorganization plan provided that the bankruptcy court would have authority to approve any settlements, between debtor and State, of CERCLA liability issues for several contaminated sites. Upon objection by Southern Pacific, the district court ordered withdrawal of the case to district court under 28 U.S.C. § 157(d). The court held that CERCLA was the type of law covered by the mandatory withdrawal language in the statute, i.e., that determining the nature of the remedies to be imposed under any settlement, and the complex allocation of fault issues between the potentially responsible parties (PRPs) under CERCLA, was the sort of issue that Congress intended to be left to an Article III judge.

Olin Corporation v. Riverwood International Corporation, 209 F.3d. 125 (2nd Cir. 2000) involved contractual indemnification claims relating to the sale of a former wood preserving plant. The court held that the claims arose pre-petition and were thus discharged upon approval of the confirmation plan, despite the party's argument that its claims didn't actually arise until years later, when the state of Louisiana passed its environmental quality act. In the case *In re 229 Main Street Limited Partnership v. Commonwealth of Massachusetts, Dept. of Environmental Protection,* 2000 WL 1059359 (D. Mass. 7/26/00), state law provided for a super-priority lien for state monies spent on cleanup of contaminated properties. The debtor sought to have a lien hearing stayed, but the bankruptcy court and district court on appeal both held that the State's actions to perfect its lien were exempt from the automatic stay under Code § 362(b)(3).

Contaminated Properties: Superfund and Transactions

Contaminated properties or "brown fields" continued to generate cases. In *Geraghty and Miller, Inc. v. Conoco Inc.,* 234 F.3d 917 (5th Cir. 2000), cert. denied 2001 WL 410175 (U.S. 2001), the court followed the Tenth Circuit's reasoning in *Sun Co. v. Browning-Ferris, Inc.,* 124 F.3d 1187 (10th Cir. 1997) that a CERCLA § 113(f)[3] claim for contribution is not a new cause of action, but instead is a mechanism for apportioning costs recoverable under § 107.[4] Factual review of an environmental consultant's work led the court to conclude that monitoring wells, though capable of ultimately being used in a permanent remedy, were part of removal, rather than remedial, activities and Conoco's claims were thus not time-barred because they were filed "within three years after completion of the removal action" under § 113(g)(2)'s limitations period. In *United States, et al. v. Southeastern Pennsylvania Transportation Authority, et al.,* 235 F.3d 817 (3rd Cir. 2000), the court approved a CERCLA consent decree, including section 113(f)(2) contribution protection for the settling parties, over the objection of another party subjected to an EPA administrative order to perform part of the requirements of the record of decision. In *Boeing Co. v. Cascade Corp.,* 207 F.3d 1177 (9th Cir. 2000), the Ninth Circuit upheld the trial court's apportionment of liability between owners of adjacent properties based on volumetric or mass contribution to groundwater, rejecting an argument that each party should pay the expenses associated with its own land.

In *Schuylkill County Industrial Development Authority v. Tonolli Co. of Canada,* 51 ERC (BNA) 2025 (3rd Cir. 2001), a party exempt from CERCLA liability under the secured lender exemption could not pursue a § 107[5] cost recovery action to recoup payments it made to a PRP, as those payments were not "necessary to the cleanup," a requisite characteristic for recovery under the section. *NutraSweet Co. v. X-L Engineering Co.,* 227 F.3d 776 (7th Cir. 2000) affirmed liability for CERCLA contribution (and 100% apportionment) against the operator of a machine shop which contaminated adjacent property, and also held that the company had waived the right to challenge the amount of cleanup costs when it failed to claim at summary judgment stage that the claimant's costs were inconsistent with

the National Contingency Plan. *Gould v. A & M Battery & Tire Service,* 232 F.3d 162 (3rd Cir. 2000) held that the CERCLA recycler exemption applied retroactively, i.e., to a contribution action pending when the exemption was enacted. And in *Carson Harbor Village Ltd. v. Unocal Corp.,* 227 F. 3d 1196 (9th Cir. 2000), the Ninth Circuit found that "disposal" under CERCLA included passive migration of hazardous substances, thereby opening the door to liability for a former site owner for passive migration which occurred during its ownership of the site. As of this writing, however, the Ninth Circuit has granted rehearing, so it remains to be seen whether it will continue to join the Fourth Circuit in embracing a passive migration theory. The Second, Third and Sixth Circuits have instead ruled that liability for "disposal" requires active human conduct.

Recent legislative activity has included U.S. House Resolution 3194, exempting scrap metal recyclers from Superfund liability, and several attempts at brownfields restoration assistance bills. While none is yet final, the most notable of the latter is U.S. Senate Bill 350, which would provide grants for planning and remediation relating to brown field sites.

Emergency Planning and Community Right-to-Know

In a new rule, the Toxic Release Inventory (TRI) reporting threshold for lead was reduced to 100 pounds per year. In *National Mining Association v. EPA,* 51 ERC (BNA) 2104 (D.Colo. 2001), the coal and metal mining industries challenged the EPCRTKA § 313[6] chemical release reporting requirements. The Court held that reporting was not required for naturally-occurring substances released from waste rock through the extraction and beneficiation of ore, as these activities were not properly included in the statute's triggering events of "manufacturing" or "processing." In a similar challenge, the D.C. Circuit in *Barrick Goldstrike Mines, Inc. v. EPA,* 215 F.3d 45 (D.C. Cir. 2000) held that EPA's revisions to the TRI, made through guidance and an enforcement letter applying the program to mining, were final agency action subject to judicial review, but remanded to district court for further proceedings. The company had challenged EPA's positions that (1) waste rock was not eligible for the *de minimis* exception; and (2) that the conversion of trace amounts of metal compounds from oxides to sulfides in the course of extraction constituted reportable "manufacturing."

Endangered Species

In *Coalition for Sustainable Resources v. U. S. Forest Service,* (10th Cir. Aug. 7, 2001), available at http://laws.findlaw.com/10th/998060.html, the court held that the Coalition's challenge to U. S. Forest Service inaction in implementing forest management practices (with alleged consequences on water supplies, and thus endangered species, in the Platte River) was not ripe for review. In *Charles Gilbert Gibbs v. Bruce Babbitt,* 214 F.3d 483 (4th Cir. 2000) the Court upheld, under a commerce clause challenge, regulations placing restrictions on "taking" red wolves, reintroduced into North Carolina as an experimental population of a threatened species. Tourism, scientific research and potential markets for pelts all added up to considerable impacts upon interstate commerce, according to the court.

Litigation and Attorneys' Fees

A recent Supreme Court case dealt a blow to the use of Title VI of the 1964 Civil Rights Act in "environmental justice" cases. *Alexander v. Sandoval,* 121 U.S. 1511 (2001), dealing with an Alabama law requiring that drivers' license tests be administered in English, restricted the Act's applicability to only those cases alleging intentional discrimination by states. It effectively gutted the recent district court ruling in *South Camden Citizens in Action, et al. v. New Jersey Department of Environmental Protection,* 145 F. Supp.2d 505 (D.N.J. 2001), which found that New Jersey environmental officials had violated the civil rights law when they issued an air emissions permit to a cement facility in the largely minority community of Camden, New Jersey.

The Americans with Disabilities Act (ADA) has also been invoked by environmental plaintiffs, although so far to little avail. In an action filed in Washington under both the Clean Air Act and the ADA in an attempt to force the state to regulate the practice of wheat stubble burning, *Save Our Summers v. Washington Department of Ecology* (E.D. Wash., No. CS-99-269-RHW), the court granted the state's motion for summary judgment, holding that the ADA did not create a substantive right in disabled persons to protection from air pollution. And in a similar case filed in Idaho, the court granted the state's motion to dismiss the ADA claims for money damages. *Save Our Summers v. State of Idaho* (D. Idaho, No. CV00p-430-N-ELJ).

There have been several notable awards of attorneys fees. *Environmental Technology Council v. South Carolina,* 215 F.3d 1318 (4th Cir. 2000) confirmed an award of over $400,000 in attorneys' fees and costs to a trade association that successfully challenged South Carolina's regulation of waste imports under the commerce clause of the U.S. Constitution. The fee award was based on 42 U.S.C. § 1988. *Community Association for Restoration of the Environment v. Henry Bosma Dairy,* 65 F. Supp. 2d 1129 (E.D. Wash. 1999) was a Clean Water Act citizen suit resulting in the district court's assessment of civil penalties of $171,500 and attorneys' fees of approximately $428,000.

In a citizens suit for missing reporting deadlines under EPCRTKA, the targeted company was a "prevailing party" in the case by successfully arguing before the Supreme Court that there was no justiciable controversy because any civil penalty would be paid to

the government. Upon remand, both the trial court and the Seventh Circuit nevertheless denied attorneys's fees to the defendant company. In its opinion, *Citizens for a Better Environment v. Steel Company,* 230 F. 3d 923 (7th Cir. 2000), the Seventh Circuit held that while Steel Company was the prevailing party, it could not get a fees award because the suit was not frivolous, unreasonable or pursued in bad faith, as required by the rule of *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978).

And in *United States v. James M. Knott and Riverdale Mills Corporation,* 106 F. Supp.2d 174 (E.D. Mass. 2000), a Clean Water Act prosecution, a federal district court held, for the first time in the country, that an EPA criminal enforcement action was "vexatious" and that United States must pay defendant $68,726 in attorneys fees and expenses, as authorized by the "Hyde Amendment" to a 1997 appropriations act. Codified at 18 U.S.C. § 3006A and patterned after the Equal Access to Justice Act, the Hyde Amendment provides for an award of attorneys fees in a criminal prosecution "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." *Harmon Industries v. Browner* revisited: The infamous case dealing with "overfiling" by EPA after (in addition to) a state enforcement action was distinguished, if not rejected, by several courts, including: *United States v. Power Engineering Co.,* No. 97-B-1654 (D.Colo. 2000) (appeal pending before 10th Cir.), *United States v. City of Youngstown,* 109 F.Supp. 2d 739 (N.D. Ohio 2000) *United States v. LTV Steel Co., Inc.,* 118 F.Supp.2d 827 (N.D. Ohio 2000), *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc.,* 2000 U.S. Dist. LEXIS 1990 (W.D. Mo. 2000), and *United States v. Flanagan,* No. 99-423 (C.D. Cal. 2000).

NEPA

Anne Cantrell et al. v. City of Long Beach et al, 241 F.3d 674 (9th Cir. 2001) held that birdwatchers had standing to challenge an EIS on Long Beach Naval Station property containing habitat for endangered bird species and planned for sale and commercial development. Citing *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167 (2000), the Court found that the plaintiffs had demonstrated sufficient concrete injury by virtue of the fact that each had visited the area on numerous occasions for birdwatching, and planned to do so in the future.

Policies and Guidance

EPA's Office of Policy, Economics and Innovation recently released a set of cost-benefit guidelines, which some hope will lead to more consistency in the application of economic methods to EPA rules. EPA's *Audit Policy* was revised: (1) lengthening the allowed disclosure time from 10 to 21 days after discovery, (2) allowing a facility to qualify for policy benefits even though another facility owned by same organization is already the subject of an inspection, investigation or information request, (3) providing for the 21-day disclosure period for violations discovered at newly-acquired facilities, and (4) clarifying that repeat violations will not disqualify newly-acquired facilities if the prior violations were not by the acquiring company. See www.epa.gov.oeca/polguid/enfdock.html. EPA's *Improving Air Quality Through Land-Use Activities* guidance, designed to help states develop strategies for air quality in growing urban areas, was issued by EPA January 11, 2001. See http://www.epa.gov/otaq/traq.

EPA has produced a new document entitled *Public Involvement in Environmental Permits: A Reference Guide,* available via the RCRA / Superfund hotline, 1-800-424-9346, document number 500-R-00-007. EPA's Office of Wastewater Management has produced draft guidelines for septic systems, entitled *Guidelines for Management of Onsite/Decentralized Wastewater Systems. See* www.epa.gov/owm/decent.html EPA's *Small Business Compliance Policy* was revised: (1) lengthening the allowed disclosure time from 10 to 21 days after discovery, and (2) expanding the number of ways that violations can be discovered and still qualify for policy benefits. It applies to businesses with 100 or fewer employees. *See* www.epa.gov/oeca/smbusi.html. EPA has published Audit Protocols providing technical guidance for conducting environmental audits under RCRA, CERCLA, EPCRTKA and portions of TSCA and SDWA. Obtain copies through www.epa.gov/oeca/ccsmd/profile.html. The *Optional Form for Disclosure Submittal* is found at www.epa.gov/oeca/ore/checklist.pdf.

Solid and Hazardous Waste

American Petroleum Institute et al. v. EPA, 216 F.3d 50 (D.C. Cir. 2000) vacated EPA's regulation declining to exclude oil-bearing waste waters from the definition of "solid waste," and remanded to the agency for further proceedings. In *Association of Battery Recyclers, Inc. v. EPA,* 208 F.3d 1047 (D.C. Cir. 2000), the Court rejected EPA's definition of "solid waste" in the Phase IV Land Disposal Restrictions dealing with residual or secondary materials generated in mining and mineral processing operations, and also struck down the rule's application of the Toxicity Characteristic Leaching Procedure to manufactured gas plant waste. The RCRA Hazardous Waste Identification Rule was not among the several rules withdrawn by the Bush administration in mid-February and remains under review and on pace for finalization.

Statistics and Trends

Audit Policy Disclosures: In FY 2000, 425 companies disclosed to EPA potential violations at 2,200 facilities (up from 1000 facilities in FY 1999); 215 companies corrected and received penalty relief for violations at 435 facilities. Enforcement Actions by EPA:

During FY 2000, EPA issued a record 1,763 administrative complaints and 3,660 administrative compliance orders and field citations (almost double the FY 1999 figures); EPA brought 32 enforcement actions against federal agencies for violations of CAA, CWA, RCRA and SDWA. Fines and Penalties: During EPA's FY 2000, criminal sentences imposed in federal courts for environmental violations included $122 million in fines (almost double the FY 1999 number) and prison terms totaling 146 years (down from 208 years in FY 1999); civil penalties attained by EPA totaled $102 million (a decrease from $166 million in FY 1999).

Toxic Substances

In *Utility Solid Waste Activity Group v. EPA,* 236 F.3d 749 (D.C. Cir. 2001), the court rejected EPA's technical amendment to a 1999 rule setting cleanup standards for certain PCB spills, because the amendment made substantial changes without providing for public notice and comment.

Water Quality and Wetlands

Friends of the Earth, Inc., et al v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 120 S.Ct. 693 (2000) was a citizen suit under Clean Water Act § 505, alleging noncompliance with the Laidlaw facility permit's mercury discharge limits and reporting requirements, and seeking civil penalties, declaratory and injunctive relief. The district court imposed civil penalties but denied injunctive relief because, after the lawsuit began, Laidlaw achieved substantial compliance with the permit. The Fourth Circuit vacated and remanded with instructions to dismiss the action, holding that the case had become moot once Laidlaw complied with the permit and Friends of the Earth ("FOE") failed to appeal the denial of equitable relief. The Fourth Circuit reasoned that the only remedy then available to FOE, civil penalties payable to the government, would not redress any injury FOE had suffered.

The Supreme Court reversed and remanded, holding that (1) FOE had standing to sue because (a) the injury-in-fact requirement was satisfied by plaintiffs' "concerns" about the discharges' potential impacts upon the environment and upon FOE members' recreational, aesthetic and economic interests and (b) the redressability requirement was satisfied because civil penalties sought by FOE would carry deterrent effects and would redress injuries by abating current violations and preventing future ones; and (2) the case was not rendered moot by Laidlaw's voluntary compliance with the permit, absent a showing that violations could not reasonably be expected to recur.

Two other Supreme Court cases are of note. The first, *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers,* 531 U.S. 159 (2001), held that Clean Water Act section 404(a), which regulates the discharge of dredge and fill material into "navigable waters" (defined as "the waters of the United States, including the territorial seas"), could not by regulation be extended to cover an *intrastate* wetland where the only jurisdictional connection was the presence of migratory birds. And the other was a wetlands "takings" case testing the boundaries of private property rights, *Palazzolo v. Rhode Island,* 121 S.Ct. 2448 (2001). There, the court held that the landowner's acquisition of title after the wetlands regulations' effective date did not bar (as the Rhode Island Supreme Court had ruled) a takings claim, and that because the property still retained significant economic value (for construction of a residence on a non-wetlands portion of the property) the case should be remanded for further valuation of the takings claim under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

In *American Wildlands v. Browner,* No. 00-1224 (10th Cir. Aug. 8, 2001), the court upheld EPA's approval of Montana's statutory exemption from antidegradation review of nonpoint sources of pollution and the state's mixing zone policies and procedures, according due deference to EPA's interpretation under the directives of *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 842 (1984). In *United States v . Deaton,* 209 F.3d 331 (4th Cir. 2000), the court held that dredging wetlands and "sidecasting" the materials in the same wetlands was subject to a Clean Water Act § 404 permit, as redeposit of dredged soil may harm the environment by releasing pollutants or increasing the amount of suspended sediments. And in a rare, perhaps unique, complement to *Harmon Industries Inc. v. Browner,* 191 F3d 894 (8th Cir. 1999), the Virginia Supreme Court in *State Water Control Board v. Smithfield Foods, Inc.,* 542 SE 2nd 766, ruled that the doctrine of *res judicata* barred the state's action against Smithfield Foods for discharge of pollutants into the Pagan River where EPA had brought a prior federal action for similar violations. The court found the state and EPA to be "in privity" in enforcing the terms of the facility's discharge permit under the Clean Water Act, and to share an identity of interests through "the permits issued by the Board pursuant to this joint program."

In addition to court activity, the water quality regulations are in flux. Pollutant limits for impaired water bodies set by the Total Maximum Daily Load (TMDL) rule issued on July 13, 2000 are on hold until further action by the Bush administration or the expiration of a legislative stranglehold set by H.R. 4425 (through October 1, 2001). *Tulloch* rule revisited: The use of mechanized earth-moving equipment to conduct land-clearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. is a "discharge of dredged material," unless project-specific evidence shows that the activity results only in incidental fallback. The new regulation also defines "incidental fallback" as "the redeposit of small volumes of dredged material

that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal." A Concentrated Animal Feeding Operation (CAFO) rule revision has been proposed, with changes including two alternative definitions of CAFOs, extended applicability of the rule to new animal types, and additional permit requirements such as demonstration that groundwater beneath the site is not linked to surface water.

Conclusion

Should we venture a look towards the future, topics of EPA actions to watch for would include: national air toxics assessment; the air toxics program's full implementation of the maximum achievable control technology (MACT) program by the statutory deadline of May, 2002, followed by development of a framework for considering risks not addressed by MACT standards; the draft cancer risk assessment; pollution caps on water bodies, or total maximum daily loads (TMDLs); "ecoregional" water quality nutrient criteria; the toxics office's compilation of hazard data on High Production Volume (HPV) chemicals; the pesticides program's assessment of cumulative exposure risks as mandated by the Food Quality Protection Act; sanitary sewer overflows; publicly-owned treatment works bypass/blending practices; and continued consideration by EPA regional offices of risk-based approaches for RCRA corrective action decisions.

Devolution of enforcement activities from federal to state governments may accelerate, by virtue of anticipated budget cuts for EPA and other federal agencies. Expect continuance of the last decade's shift away from command-and-control regulation to newer models such as "stakeholder processes," including consensus-based regulatory approaches and formal negotiated rulemaking, and "market-based regulation," as appears in such areas as acid rain and trading-based regulation of ozone-depleting substances and lead in gasoline. EPA has also presented a draft five-year "sector-based" environmental protection plan, which would transition from experimental into mainstream use the regulation of environmental performance by industrial sectors, rather than by environmental media.

[1] This installment of Utah Law Developments was adapted by the author from his presentation to the Energy, Natural Resources and Environmental Law Section of the Utah State Bar. The views expressed in this article are those of the author and not official positions of the Attorney General's Office of the State of Utah.

[2] On the administrative and legislative fronts, air quality issues continue to rage. Standards for ozone in ambient air, corporate average fuel economy, reformulated fuels and MTBE (methyl tertiary butyl ether, a gasoline additive), new source review and power plant emissions all currently bear the scrutiny of Congress and various administrative agencies. A specialist in this area of law could fill the rest of this *Utah Bar Journal* on these topics; the rest of us can instead refer to an excellent web site for further details. Produced by EPA's Office of Air Quality Planning and Standards, the site provides quick access to recent regulations and guidance documents issued for the previous six-month period: http://www.epa.gov/ttn/oarpg.ramain.html.

[3] 42 USC § 9613(c).

[4] 42 USC § 9607.

[5] *Id.*

[6] Emergency Planning Community Right to Know Act of 1986, 42 UCS § 11001-11050.

The Genesis of Justice

by Alan M. Dershowitz

Reviewed by Betsy Ross

Judaism is a religion of laws and of debate. In the article in this month's *Journal* titled "LDS and Judicial Perspectives on Stories from Jewish Tradition" ("Perspectives"), the authors discuss concepts of justice in stories from the collected works of Judaism: the Torah, or Pentateuch, codified oral laws, commentaries and interpretations of text through stories, or midrash. Alan Dershowitz, in *The Genesis of Justice,* takes just one text as his focus – the first of the Five Books of Moses, or Pentateuch – and discusses what he calls the beginnings of justice for western civilization.

Why is Genesis so central to the development of a concept of Justice? Dershowitz would argue it is because the Pentateuch, and Genesis as its first book, contains no concept of afterlife. Accepting the concept of life after this life, later religious works are not forced to deal as directly with Justice as they are able to argue that injustice will be rectified in the afterlife. And so it is in Genesis in particular that today's sense of Justice has its origins. Later midrash introduce the concept of afterlife, but the Pentateuch itself still serves as a primer on Justice Here and Now. (Dershowitz ultimately admits "I don't know whether or not there is a hereafter – no one does." But, he coyly offers, "I must commend its creator – divine or human – for solving the puzzle of how a just and intervening God can permit so much injustice in this world.")

Dershowitz looks first at ten stories from Genesis, and discusses how those stories fit into the development of Justice. Some of the themes he presents are similar to those presented in "Perspectives." Story 1 in "Perspectives," for example, concerns the friction between enforcement of laws and compassion. Dershowitz discusses God's enforcement of laws in the first two of his presented stories. The first, titled "God Threatens – and Backs Down," tells of God's warning to Adam and Eve not to eat of the fruit from the Tree of Life. Dershowitz states: "It is quite remarkable that a holy book, which purports to be a guide to conduct, begins with a clear rule that is immediately disobeyed, and a specific threat of punishment which is not imposed." The second, titled "Cain Murders – And Walks," is the story of the murder of Abel by his brother, Cain, and the subsequent punishment of banishment. Dershowitz notes of this punishment: "But at least there was a chance of survival . . . . It was not capital punishment." And, in fact, "God further softens his punishment by setting a sign on him, warning all that Cain is in God's witness protection program, and if anyone kills him, 'vengeance shall be taken on him sevenfold.'"

Dershowitz presents these stories as "injustices," not as the compassion suggested in Story 1 of "Perspectives." But, as Judge Kimball noted in "Perspectives," the concept of compassion and mercy is a New Testament concept, and Genesis is an Old Testament book. Indeed, Dershowitz would argue, these two stories are not about compassion at all, but about the beginnings of a system of justice, exploring injustice and learning from it, in order to develop a robust concept of Justice.

One of the major themes developed by Dershowitz throughout these ten stories, is the need to insert proportionality into the evolving concept of Justice. The first two stories, he suggests, are certainly examples of punishment that is too lenient. In later stories he suggests God rides the pendulum swing to its opposite end. The third story, titled "God Overreacts – And Floods the World," is the story of the great forty-day flood unleashed by God upon the world in a reaction to the evils of humankind. This, too, is a story of disproportional justice.

Proportional justice in this world, however, is a conundrum; Dershowitz wrote about the human desire for it in his earlier work, *Just Revenge.* In that novel, a character seeks justice for the Nazi murderer of much of his family – never brought to

justice by human tribunals. In *Just Revenge,* Dershowitz explores whether "revenge" can be accommodated within the term "justice" as a solution to disproportional justice. This is the Dershowitz focusing on Justice Here and Now, and eschewing the remedies of an afterlife.

A related concept to proportional justice, also discussed in depth by Dershowitz the Jewish scholar and criminal defense lawyer, is balanced justice. Story Four, titled "Abraham Defends the Guilty – and Loses," is the story of the punishment of the cities Sodom and Gomorrah for the wickedness of their inhabitants. In this story, Abraham argues with God (not unlike the four rabbis in "Perspectives" who count God's vote as equal to each of theirs; Dershowitz posits it is the story of Sodom and Gomorrah that initiates the argumentative tradition of Judaism). God wants to kill all the people in the two wicked cities. Abraham argues that it would be wrong to kill the innocent along with the guilty. God then agrees to save the cities if a certain number of innocent could be found. Abraham begins the bargaining over the number of innocent who must be found to save the guilty. As Dershowitz puts it, "Abraham engages in a typical lawyer's argument. Having convinced his adversary to accept the *principle,* Abraham nudges Him down the slippery slope." The message of this story, according to Dershowitz, is not that Abraham should be considered the father of lawyers (as well as of the chosen people), but that any system of law must struggle with somehow balancing the innocent convicted with the guilty freed. (Thus, the concept of "balanced" justice.) Dershowitz writes: "In the end, every system of justice must decide which is worse: convicting some innocents or acquitting some guilty. Tyrannical regimes always opt for the former: It is far better that many innocents be convicted than that *any* guilty be acquitted. Most just regimes tend to opt for the latter: It is far better that some guilty go free than that innocents be wrongfully convicted. This is the approach ultimately accepted in the Bible with its generally rigorous safeguards for the accused of wrongdoing." (An interesting question is where do we, today, fall in this spectrum of Dershowitz's? Where, for example, do efforts to overturn the Miranda warning, or increasing the emotional role of victims in sentencing, place us?)

Finally, Dershowitz presents a very basic question that perhaps should have been asked at the beginning. Before molding the clay of Justice with human hands, shouldn't we first tackle the question of whether it is appropriate to do so at all? In this discussion of the evolution of Justice, can God's justice really be judged at all? Or, put another way, is Justice defined by whatever God does, or do we have room at all for interpretive nuance? Perhaps Justice is whatever God does, however unjust it may appear to us. It is obvious that neither the Jewish tradition of the stories presented in "Perspectives," nor Dershowitz himself believes this. In fact, Dershowitz warns that such an argument "is the first step on the road to fundamentalism."

Nuance, interpretation and argument are concepts that cannot, in Jewish tradition, be torn from the law. And so is the genesis of the hermeneutic tradition we employ as lawyers in the western world.

Message From the Chair

by Deborah Calegory

Another year of the Legal Assistant Division ("LAD") is in full swing. A lot has been going on behind the scenes. This will update you on forthcoming events and goals that the LAD hopes to accomplish this year.

Be sure to mark your calendars for Friday, October 26, 2001, for a full day seminar that the LAD is sponsoring. This is an opportunity that includes a great lineup of CLE topics and speakers. The CLE credit will count towards the annual 10 hour CLE requirement of the LAD.

Among the goals of the Board of Directors for this year are:

- Issuance of a current membership directory.
- Put a new long range plan in place.
- Revise the structure and content of the current LAD By-laws.
- Provide educational opportunities including
  a. a full day CLE seminar in October.
  b. a full CLE track at the mid-year Bar meetings in St. George in March 2002,
  c. the annual Legal Assistant Division meeting in June, 2002, and
  d. the Bar's annual meeting in June 2002.
- Update and maintain the LAD website.
- Networking and communication between LAD members.
- Keeping members advised on the unauthorized practice of law.
- Keeping members updated on trends relating to multi-disciplinary practice.

We have had many new faces join the Board of Directors and a lot of new committee volunteers. It is with this sort of volunteering and support that the LAD remains strong and continues its recognized presence in the legal community.

Please support the LAD by attending events it sponsors, volunteering for committee work, and introducing new members to the LAD. If you have comments, questions, ideas, or suggestions please let me or another Board or committee member know. We are always looking for new ideas and appreciate member input.

AND JUSTICE FOR ALL

The "AND JUSTICE FOR ALL" 2001 Campaign is very glad to announce that Utah's legal community has successfully met the challenge of contributing $300,000 to "AND JUSTICE FOR ALL" this year, triggering a generous $100,000 matching grant from the R. Harold Burton Foundation. Including the Burton Foundation grant, the 2001 "AND JUSTICE FOR ALL" Campaign has raised over $430,000 this year to support civil legal services to the disadvantaged. "AND JUSTICE FOR ALL" is grateful to the supporters of the 2001 Campaign who made this remarkable achievement possible with their commitment to creating access to justice for all Utahns.

The mission of the "AND JUSTICE FOR ALL" campaign is to facilitate access to the justice system for all Utahns regardless of their ability to pay for legal assistance, and for those otherwise disenfranchised by reason of disability, migrant status, race, ethnicity, or age. Since the Campaign's inception three years ago, "AND JUSTICE FOR ALL" funds have helped Utah's non-profit civil legal services providers to serve thousands of additional needy individuals and families across the state, who without this support would have gone without representation in matters such as child advocacy, disability rights, public benefits law, domestic abuse, and fair housing issues.

An attorney's contribution to "AND JUSTICE FOR ALL" will meet all or a portion of his or her obligation under Rule 6.1 of the Utah Rules of Professional Conduct. The suggested contribution is the dollar equivalent of two billable hours. Donations are tax deductible. Contributions can be made by VISA, MasterCard or by check made payable to "AND JUSTICE FOR ALL," and remitted to 225 South, 200 East, Suite 200, Salt Lake City, Utah, 84111.

"AND JUSTICE FOR ALL" THANKS THE GENEROUS SUPPORTERS OF THE 2001 CAMPAIGN. These lists include donations and pledges to the 2001 Campaign received through September 7, 2001. If the information below is incorrect in any way, please contact the Campaign at (801) 257-5519. We value our partners and wish to accurately reflect your contributions.

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CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
10/10/01	**ADR Academy Part I: Negotiations for Lawyers.** Michael J. Wilkins, Judge James Z. Davis, 5:30–6:45 pm. $30 YLD, $40 ADR Section, $50 others each session. $150 YLD, $200 ADR Section, $250 others for six part series.	2 NLCE/CLE
10/18/01	**Family Law Workshop: "Breaking Up is Hard to Do" Handling domestic violence within a divorce. Tips from practitioners, protective orders and restraining orders.** Presenters: Commissioner David Dillon, Second District Court; Joanna Sagers, Legal Aid Society of Utah. 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.** 5:30 pm reception, 6:00–8:00 pm seminar. $20 YLD, $30 Litigation Section, $40 all others, $50 day of seminar.	2 NLCE/CLE
10/25/01	**Fall Corporate Counsel Seminar.** Public v. Private – Regulation FD and other disclosure issues. Are you secured? Changes in UCC Article 9, Alternative Funding – Industrial Revenue Bond Financing, Ethics. 9:00 am–1:30pm. $40 Corporate Counsel Section members; $80 others.	4 – includes 1 hr Ethics
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 NLCE/CLE
11/02/01	**Paul Lisnek: Understanding Jurors: A Unique Approach to Court Room Advocacy.** Dr. Lisnek is a respected trial consultant who served as a jury analyst/expert for NBC CNBC MSNBC News and Court TV during the O.J. Simpson case. He is formerly the assistant dean of Loyola Law School in Chicago and is currently the chairperson of the inquiry panel of the Illinois Attorney Disciplinary Commission. 9:00 am– 4:30 pm. $180 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–3:30 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
11/14/01	**ADR Academy Part II: Preparing to Mediate.** 5:30–6:45 pm. $30 YLD, $40 ADR Section, $50 others each session. $150 YLD, $200 ADR Section, $250 others for six part series.	2 NLCLE/CLE
12/05/01	**"Best of" Series –** Financial Statement Fraud: How They Do It – Gil Miller, 10:00 am. The Harvard Model to Mediation – Karin Hobbs & Jim Holbrook, 11:00 am. (NLCLE). The Fundamentals of Software Licensing – Scott F. Young, 12:00 am. (NLCLE). Practicing before DOPL – Jennifer Lee, 1:00 pm. Re-employment after Active Military Service – Presenter TBA, 2:00 pm. Technology, Security and the Law Office – Lincoln Mead, Utah State Bar IT Director, $20 per session or $100 for all six.	Six 1 hour segments
12/12/01	**Intellectual Property in Cyberspace: Internet Law 2001.** Professor William W. Fisher, Harvard Law School; Professor David G. Post, Temple University Beasley School of Law. 9:00 am–5:00 pm. $199 before December 1, after $230. Register on-line.	7
11/14/01	**ADR Academy Part III: Ethical Issues in Mediation.** 5:30–6:45 pm. $30 YLD, $40 ADR Section, $50 others each session. $150 YLD, $200 ADR Section, $250 others for six part series.	2 NLCLE/CLE
12/13/01	**Litigation Deposition Workshop: Defending Your Life.** 5:30–8:30 pm, $40 for YLD, $55 all others.	3 NLCE/CLE
12/14/01	**Last Chance CLE: Wills and Trusts.** 9:00 am–12:00 pm. $40 YLD members, $60 others.	3
12/14/01	**Ethics: Jeopardy** (sponsored by Lawyers Helping Lawyers) 1:00–4:00 pm. $60	3 Ethics

Classified Ads

RATES & DEADLINES

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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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.

FOR SALE

Bookcases for sale. Three beautiful, 7 ft. high **solid black walnut bookcases** with glass coverings. Very valuable and unique – solid black walnut – can't find this quality anywhere. $1,500 each. Credenza $500. Call 435-884-0524.

NOTICE

Request Info on Will for Kenneth Jeffrey (Jeff) Taft. If you prepared a will or other legal documents for Kenneth Jeffrey (Jeff) Taft could you please contact either Ken Taft (Father) 1-509-292-0992, or Kim Cook (Taft) (Sister) 1-509-446-3056. email wldflowr_kc@hotmail.com. Jeff passed away July 10, 2001.

POSITIONS AVAILABLE

Established Grand Junction firm with active insurance defense and general litigation practice seeks associate w/2-3 yrs. litigation experience, admitted in Colorado. Workers Comp experience helpful. Grand Junction is the commercial, financial and professional hub for the Western Slope, and offers an exceptional lifestyle for people oriented to outdoor recreation. Competitive salary and comprehensive benefit package, including 401(k). Resume, writing sample, and transcripts to: Younge & Hockensmith, P.C., 743 Horizon Court, #200, Grand Junction, CO 81506.

Attorney Position Available: Twenty attorney firm with principal offices in Phoenix, Arizona seeks experienced supervising attorney for Salt Lake City Branch Office. Candidate should have 10-15+ years experience in Plaintiff's personal injury, insurance defense or coverage. Excellent compensation package available. Send Resume to Box #13, c/o Utah State Bar. All responses are confidential.

Full-time Legal Assistant / Paralegal. Must type at least 60 wpm. Must have an Associates Degree in Paralegal Studies and at least one year legal experience or a Paralegal Certificate and at least two years legal experience. Please send resume to Robert B. Funk, Olson & Hoggan, P.C., 88 West Center, P.O. Box 525, Logan Utah, 84323-0525. rbf@oh-pc.com

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 available prime downtown location, in the historic Crandall Building at 10 West 100 South, Suite 425. Receptionist, conference room, high speed Internet, fax machine included, copy machine available. Please call (801) 539-1900 and ask for Heather.

Law Firm in Historical Salt Lake Stock and Mining Building at 39 Exchange Place has two office spaces available, $750–$1,000. Receptionist, conference room, fax, copier, law library, parking, and kitchen included. DSL connection is optional. Also available is 844 square ft. suite, includes small conference room and reception area, $800. Contact Joanne or Marcy at 534-0909.

Crossroads Mall – Key Bank Tower, existing firm complete with receptionist, two conference rooms, copier, fax, break room, computer network, and library has an office for rent with room for a secretary. Rent $1,200 for attorney, $1,500 with secretary. Everything included. Parking available, but not included. Client parking validations included. 531-7733

OGDEN LAW BUILDING FOR SALE OR LEASE. Tastefully decorated offices for two or three attorneys; secretary/receptionist; conference room and library; kitchen. Full basement for storage, off street parking. Close to court house. Available immediately, attorney retiring. 801-621-2630

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PRIVATE INVESTIGATOR Bill Essex. Twenty years' experience investigating criminal, civil, adminstrative, and employee misconduct cases. Masters Degree in Criminal Justice Administration and graduate of the FBI National Academy. Adjunct Faculty B.Y.U., Weber State, Salt Lake Community College, and Utah P.O.S.T. Academy. Phone: (801) 244-8252 – FAX (801) 679-0987 – email: wildbilsx@yahoo.com

ADULT RAPE – CHILD ABUSE EVIDENCE Forensic Analysis of allegations and video recorded statements. Determine consent issues. Detect false allegations of rate. Forensic interviewing. Identify investigative bias and errors. Assess criteria for court's admission of recorded statement evidence. Bruce Giffen, D. Psych. Evidence Specialist. American Psych-Law Society. 801-485-4011.

CHILD SEXUAL ABUSE/DEFENSE: Case analysis of all issues surrounding child's statements of abuse – Identify investigative errors and objective reliability in video recorded testimony – Assess criteria for court's admission of recorded statement evidence (RCP 76-5-411 and RE 15.5, 1102) – Determine origin of allegations and alternative sources – Evaluate for Sixth Amendment violations. Bruce Giffen, D.Psych., Evidence Specialist, American Psychology-Law Society. (801) 485-4011.

LANGUAGE – CTC CHINESE TRANSLATIONS & CONSULTING – Mandarin and Cantonese. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 942-0961, Fax: (801) 942-0961. E-mail: eyctrans@hotmail.com.

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.

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Address:			**Telephone Number:**			
Date of Activity	**Program Sponsor**	**Program Title**	**Type of Activity (see back of form)**	**Ethics Hours (minimum 3 hrs. required)**	**Other CLE (minimum 24 hrs. required)**	**Total Hours**
			Total Hours			

Explanation of Type of Activity

A. Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study

No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line cle programs. Regulation 4(d)-101(a)

B. Writing and Publishing an Article, Self-Study

Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Regulation 4(d)-101(b)

C. Lecturing, Self-Study

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

D. Live CLE Program

There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. However, a minimum of fifteen (15) hours must be obtained through attendance at live continuing legal education programs. Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b) and (c) above of this Regulation 4(d)-101 may not exceed twelve (12) hours during a reporting period.

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

Regulation 5-101 – Each licensed attorney subject to these continuing legal education requirements shall file with the Board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

Regulation 5-102 – In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. **Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a $50.00 late fee. In addition, attorneys who fail to file within a reasonable time after the late fee has been assessed may be subject to suspension and $100.00 reinstatement fee.**

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

Date: _____ Signature: _____

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