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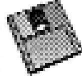

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Is the Office of Professional Conduct the Grand Inquistor? – What Lawyers Need to Know if Faced with a Bar Complaint

by Scott Daniels

Without doubt the most unpleasant interaction any lawyer may have with the State Bar occurs upon the filing of a "bar complaint." Although most lawyers will never be faced with a complaint, many will, no matter how careful or ethical they may be. Some complaints are warranted; others are not. For lawyers who practice in certain areas (notably domestic law) bar complaints are as inevitable as death or taxes.

Because any lawyer may become the object of a bar complaint, I offer the following primer on the bar disciplinary procedure.

A common misconception is that the legal profession, unlike other professions, regulates itself. This is not true. What is true is that the legal profession is regulated by the judicial branch of government, unlike other professions which are regulated by the executive branch of government, through the Department of Occupational and Professional Licensing (DOPL). This distinction is mandated by the Utah Constitution as a separation of powers issue.

In order to discharge its responsibility to regulate the practice of law, the Utah Supreme Court has adopted a procedure set forth in the Rules of Lawyer Discipline and Disability. These Rules are available on the Bar web site: http://www.utahbar.org

The Rules provide for the appointment of an Ethics and Discipline Committee consisting of 26 lawyers and 8 public members. The current Chair of the Committee is James B. Lee. The current Vice-Chair is R. Clark Arnold. The Committee is divided into four screening panels. A quorum of a screening panel is three lawyers and one public member. The panel membership rotates. It is important to note that the Bar has nothing to do with the appointment of the Committee, its chair, or the screening panels. They are appointed by and are entirely answerable to the Supreme Court.

The Bar is responsible to appoint and fund disciplinary counsel, the Office of Professional Conduct (OPC). This is essentially the prosecutorial function, although that phrase may not be quite accurate because the proceeding is civil. Its senior counsel, Billy L. Walker, supervises this office. He is responsible to the Bar's Executive Director, John Baldwin.

There are two important points here: (1) neither the Bar nor OPC have any authority to discipline lawyers. Only the courts or the screening panels have that authority. (2) Although the Bar funds and oversees the activities of OPC, the Bar's Executive Director and the Bar Commissioners do not supervise or interfere with individual cases.

As a matter of policy, OPC is given its professional independence. If OPC were to consistently fail to perform, Senior Counsel would be replaced, but the Bar Commission would not intervene in an individual case.

A Bar inquiry is usually initiated by a complaint, but this is not always so. OPC may proceed on information received from other sources, such as media reports or request for assistance to the Consumer Assistance Advocate.

Intake attorneys screen complaints and information received from other sources at weekly case status meetings. OPC may choose to dismiss, decline to prosecute, or refer to the Committee for hearing. Many complaints are groundless on their face, and are dismissed summarily. If OPC determines that the complaint may have merit, it undertakes an investigation. The attorney is given notice and is required to respond to the complaint. The complainant is given a copy of the attorney's response, and can file a response. In appropriate cases, witnesses are contacted and interviewed. At any point during the process, OPC is willing to conduct settlement discussions with the attorney. Although the attorney and the complainant may come to a settlement of their differences, OPC will continue to pursue the complaint if OPC believes the facts warrant disciplinary action.

If OPC declines to prosecute, the com-

plainant may appeal this decision to the chair of the Ethics and Discipline Committee. The chair may instruct OPC to proceed with prosecution. Although not a frequent occurrence, this happens occasionally. This differs from criminal procedures where the prosecutor has the absolute right to decline to prosecute, and provides the public an additional protection.

After the attorney has had an opportunity to respond, the case is heard by the screening panel. The panel may dismiss for lack of merit, dismiss with a letter of caution, dismiss upon conditions (CLE, restitution, etc.), recommend admonishment, or find probable cause that a formal complaint be filed with the district court. If the panel recommends admonishment, the attorney may file an exception to the recommendation.

Should the panel determine that a complaint should be filed in district court, OPC prepares the complaint for the signature of the Committee Chair. If no settlement is reached the case is set for bench trial. The trial is a bifurcated proceeding; the first portion adjudicates the charge of misconduct, the second portion relates to sanctions. The judge can order: admonition, CLE or ethics school, public reprimand, restitution, probation, suspension, disbarment, or some combination.

The disciplinary procedure consumes a large part of the Bar budget, and is by far the largest single item of expenditure of Bar license fees. Bar Commissioners receive more complaints about the disciplinary process than any other issue. The disciplinary process has been studied and restudied several times and significant changes have been made with every study.

I believe most lawyers and Bar leaders agree on several fundamental principles. First, the process should embody full due process to both the attorney and the complainant. The adjudication of a Bar complaint is full of due process. The regulation of every other profession by DOPL is shorter, cheaper and more arbitrary than the regulation of lawyers. The stakes are high here. To the lawyer, the right to practice the profession is immensely valuable. To the public, the right to be protected from unscrupulous lawyers is immensely valuable. To the profession, the ability to maintain the public's confidence is immensely valuable. This is not a place to short shrift process.

Second, most but not all lawyers agree that the process should bend over backward in favor of the complainant. This attitude is also evident in the opinions of the supreme court. If we are to maintain public confidence in the process, we cannot be perceived as a "good old boy" system that looks the other way in the face of attorney misconduct. The Bar Commission has been presented with several proposals to make the filing of a bar

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complaint more difficult to discourage frivolous complaints. These proposals include a filing fee, a bond or a shorter statute of limitations. The Commission has unanimously rejected these proposals. We just cannot be perceived as trying to shield lawyers from discipline.

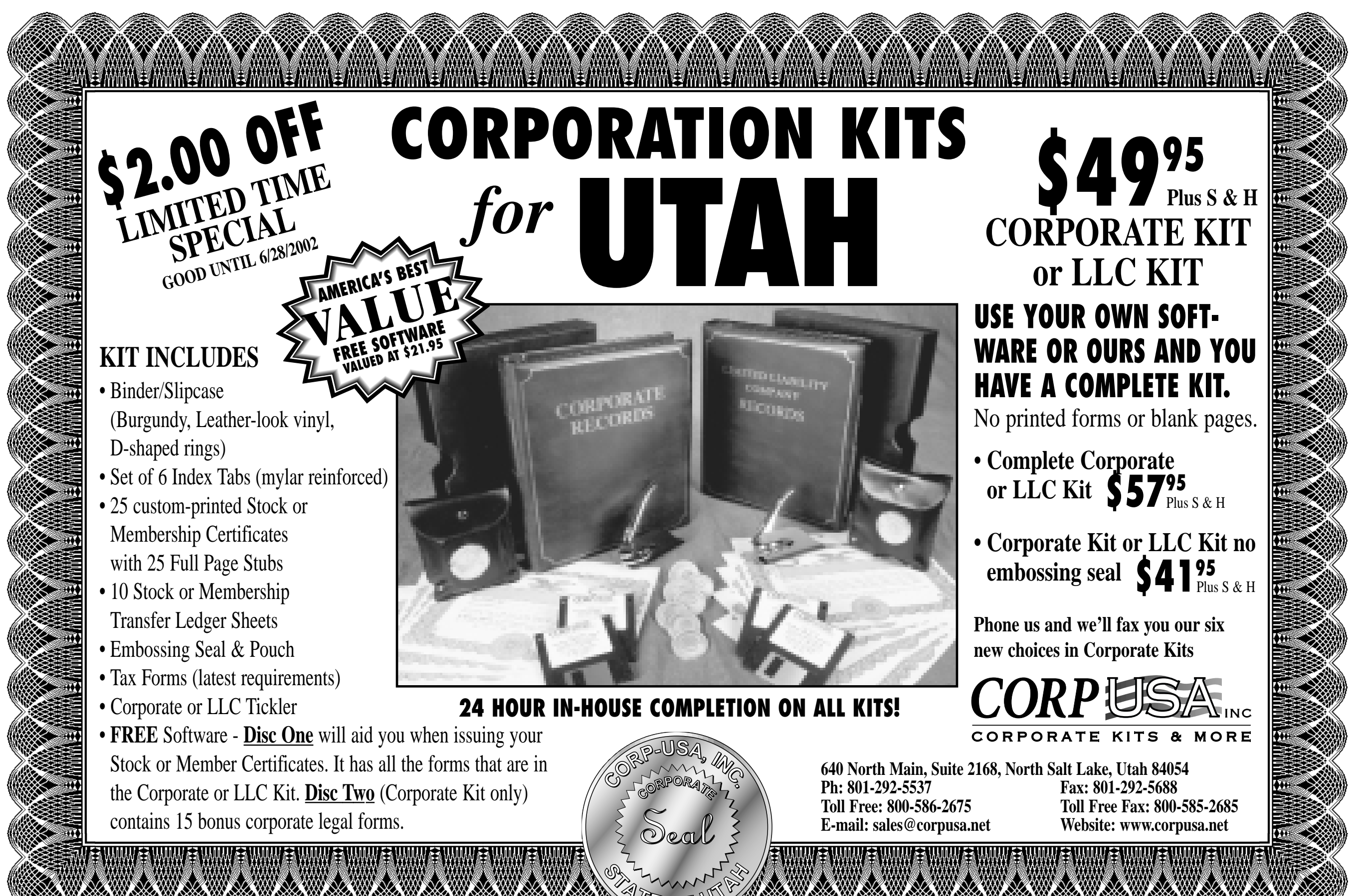
It is very awkward to have OPC, ostensibly controlled by the Bar, as the prosecutor of Bar members. Many who are accused feel, perhaps rightly, that the Bar should be their defender, not their prosecutor. The alternative – turning lawyer discipline over to DOPL – is much worse, however. The stakes are just too high to revert to a lower level of due process than we now require.

The bottom line effect of this process is that it is a real pain for lawyers who are the object of a bar complaint. In practice, any complaint, that can be read to have some possible merit, is investigated. Even when OPC decides that it would be wise not to prosecute, the Committee Chair or Vice-Chair may order OPC to proceed. The lawyer is forced to spend huge amounts of time responding to the complaint, even if eventually shown to be groundless. Especially if you don't live on the Wasatch Front, you can spend a fortune in time defending one of these claims.

If you are the object of a Bar complaint, you are entitled to not only the due process embodied in the rules, but also you have a right to be treated with courtesy, respect, and professionalism. You have a right to have phone calls taken by OPC staff or returned in a timely manner. You have a right to have your disciplinary case processed in a timely manner. Both OPC and the Bar are very committed to these principles. Although the Bar will not intervene in the merits of a case, we are very concerned that OPC exhibits the highest standards of professionalism. Both Billy Walker and John Baldwin as well as all of the lawyers in the OPC are committed to these principles. If you feel you have not been accorded these rights, Billy Walker is very interested in hearing from you. Or you may contact John Baldwin. Or, if you feel more comfortable, you may contact me or any Bar Commissioner.

I'm convinced that although our current process could be improved, it is fundamentally sound. It is good for the public, in that while there are many dissatisfied complainants, the process bends over backward to address complaints. It is good for the taxpayers, in that it is completely financed by Bar license fees with no cost to the taxpayer, direct or indirect. It is good for the profession in that it enables us to take care of our own bad apples while assuring that accused lawyers have complete due process rights.

Its down side is: It's a real pain if you are the object of a bar complaint. That's the price we pay.



Nexus & Remote Sellers: The Taxation of Electronic Commerce

by Nathaniel T. Trelease & Andrew W. Swain

Although Congress has recently renewed the Internet Tax Freedom Act ("ITFA" or the "Act"),[1] its renewal primarily serves to highlight popular misconceptions about its scope and the fundamental issues it does not address. The most significant of these issues is whether state and local jurisdictions ("taxing jurisdictions") may impose sales and use tax collection obligations on non-domiciliary Internet-based vendors ("remote vendors"). This issue is resolved by determining whether a remote vendor has a sufficient physical presence in a jurisdiction ("nexus") to constitutionally justify the imposition of tax collection responsibilities for sales made to local customers. This determination is substantially complicated because of the fundamental nature of electronic commerce ("e-commerce"), particularly the growing prevalence of "bricks-and-clicks" relationships between online and offline businesses.

The issues of nexus and tax collection obligations have never been so important because incremental growth of a remote vendor can often expose it to substantial new tax liabilities and compliance obligations just at a time when the states, under new fiscal pressures, are becoming more aggressive in trying to tax e-commerce. Failure to correctly identify the point at which tax collection obligations arise in the nation's approximately 7,500 taxing jurisdictions[2] also potentially subjects a remote vendor itself to payment of all past uncollected taxes on sales. The effect on even a robust remote vendor could be devastating.

This article will first outline the federal constitutional and statutory limitations on a taxing jurisdiction that seeks to establish nexus with a remote vendor. This will assist counsel in advising Utah-based clients on "out-bound" e-commerce transactions – that is, where a local vendor seeks to sell its goods in out-of-state markets. Finally, the article will offer several items of practical advice to legal counsel and remote vendors.

Sales and Use Taxes: A Primer

States generally impose a sales tax on the retail sale of tangible personal property and certain services in the state. Most states impose a sales tax on the vendor, though the vendor customarily collects the tax from its customers at the time of the sale.[3] To make their taxing schemes comprehensive, most states also impose a complementary "use tax" that purports to reach out-of-state sales of property to a state's residents for use, storage or consumption in the state. Through use taxes, states seek to prevent the erosion of their individual tax bases when their residents make purchases in other states. Use taxes may be imposed on individual taxpayers as well as vendors but taxing jurisdictions generally rely on individual self-assessment for collection of the tax. But as it is practically impossible for a state to audit all of its residents for use tax purposes, they must instead rely on remote vendors to collect and remit the tax, or it will generally go unpaid.

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Authors' Note: A companion version of this article is expected to be published in the Colorado Lawyer.

This highlights the necessity for taxing jurisdictions to establish nexus with remote vendors, particularly in the context of e-commerce. Without establishing nexus with remote vendors, an estimated $26 billion in sales and use taxes will go uncollected by taxing jurisdictions.[4]

The Internet Tax Freedom Act

The Act is popularly misconceived as having suspended nexus rules regarding purchases made over the Internet, thereby freeing Internet sales from sales and use tax. However, the Act is substantially narrower in scope and only reaches certain Internet-related activities. The Act provides that taxing jurisdictions may neither impose (1) taxes on Internet access unless such taxes were generally imposed and actually collected prior to October 1, 1998,[5] nor (2) multiple or discriminatory taxes on electronic commerce.[6] The moratorium's application to Internet access means that, unless the taxing jurisdictions imposed taxes on Internet access charges before October 1, 1998, a taxing jurisdiction may not tax any fees paid to an Internet Service Provider ("ISP"), such as America Online, the Microsoft Network, or Earthlink. The Act's definition of Internet access service does not include telecommunications services.[7] Therefore, the moratorium's application does not likely extend to a jurisdiction's taxation of fees paid to service providers that provide high speed (for example, digital subscriber line) or other access to an ISP, as these services are generally characterized as telecommunications services that occur in intrastate rather than in interstate commerce.

The Act's prohibition of multiple or discriminatory taxation is the portion that affects remote sellers. This prohibition prevents a taxing jurisdiction from imposing a duty to collect sales or use taxes on: (1) a remote seller that does not have nexus with the jurisdiction where the purchaser resides; or (2) an ISP as an agent providing the remote vendor a means to conduct sales.[8] Popular misconceptions aside, the Act does not modify the duty of a remote vendor with nexus in a state from collecting sales and use tax on sales made to customers in the state. Nexus is not defined in the Act[9] and resort must be made to general case law.

"Nexus" As a Constitutional Principle

The Dormant Commerce Clause[10] is the principal[11] restraint on a taxing jurisdiction's efforts to establish nexus with a remote vendor. In the seminal case of *Quill Corp. v. North Dakota,*[12] the U.S. Supreme Court reaffirmed the long-standing rule that a taxing jurisdiction may establish nexus with a remote vendor only if the vendor is *physically present* in the jurisdiction. Though it seemingly established a formal rule, *Quill* largely leaves open the crucial inquiry of what *level* of physical presence is required for a jurisdiction to establish nexus.

In *Quill,* the remote vendor was a Delaware corporation that sold approximately $1 million worth of office supplies through direct-mail advertising to approximately 3,000 customers in North Dakota. Except for the presence of software that it licensed to its customers, the taxpayer did not have any property in the state. All of its products were delivered in North Dakota by common carriers. The Court held that delivery of goods through a common carrier alone did not constitute a physical presence.

In a case that pre-dates *Quill, National Geographic Society v. California Board of Equalization,*[13] the Court held that a remote vendor's "continuous presence" in the state, in the form of two offices, was sufficient to establish nexus. Still, the Court rejected the lower court's ruling that the "slightest presence" in state was sufficient to establish nexus.

Within this spectrum from *Quill* – requiring a physical presence – to *National Geographic* – where "continuous presence" is sufficient, but the "slightest presence" is not – there is great room for factual variation, inconsistency, and confusion.

South Carolina has established nexus with a remote vendor through the in-state presence of intangible property.[14] Similarly, New York interprets *Quill* as requiring only "demonstrably more than a 'slightest presence'" and has found that as few as 12 sales-related visits by personnel of a remote vendor over 3 years is sufficient to establish nexus.[15] However, other states have extended the common carrier exclusion of *Quill* and refused to find nexus where the remote vendor has only an attenuated presence in the state. In Tennessee, for instance, the presence of a credit-card issuer's direct-mail flyers and plastic credit cards are not together sufficient to establish nexus.[16]

Similarly, this principle can be extended to a vendor's transient presence in a state. In *Department of Revenue v. Share International, Inc.,*[17] for instance, the Florida Supreme Court did not find nexus with a remote vendor whose sole employee was present in-state for only 3 days a year at a sales conference. In Kansas, eleven visits, averaging four hours each, by a remote vendor's technicians to assist customers in installing equipment, was held not sufficient to establish nexus.[18] However, when a vendor's presence in a state is longer in time and greater in collateral activities, courts are more likely to find a physical presence. In *Cole Bros. Circus, Inc. v. Huddleston,*[19] for example,

a circus operator was in-state for only 29 days over two and one-half years, but extensively used the state's highways, advertised on the radio and newspapers, and applied for a business license. These factors, together, were sufficient for the Tennessee court to find nexus.

Generally, then, Internet-based remote vendors that deliver their tangible products via common carrier are exempt from sales and use tax liability and collection obligations.[20] Furthermore, it is unlikely that general nexus principles can be extended to reach the download of intangible property, such as software, over the Internet, in what is essentially the exchange of electrical charges over copper wiring,[21] though that will not preclude taxing jurisdictions from trying nonetheless. But as can be seen, there is no definitive national rule for establishing nexus, and resort must be made to each jurisdiction's statutory, regulatory and case law. As a general note, however, states have become more creative in trying to reach Internet-based remote vendors by attributing the physical presence of offline business partners to their online partners.

"Bricks-and-Clicks" Relationships

Though online vendors have great communications, marketing, processing, and some distribution efficiencies, many have begun to establish strategic marketing and distribution relationships with offline vendors. These so-called "bricks-and-clicks" relationships try to leverage the efficiencies of the online partner (the "clicks") with the established business capabilities of the offline partner (the "bricks"). The emerging problem for remote vendors is that the "bricks" portion of the relationship may be great enough to expose the remote vendor to claims of nexus with all the states in which its offline partner operates.[22] If nexus is successfully established by a taxing jurisdiction with the remote vendor, then the vendor loses its competitive advantage with offline sellers, is tax-disadvantaged in relation to its competitors that have remained online and do not have nexus, and may have to undertake vast new compliance functions.[23]

In an important but limited step, California,[24] Texas,[25] and New York[26] have each established that a web page's presence on a server of an ISP located in the state is not sufficient to establish nexus with the state. However, the larger emerging issue is the ability of the states to establish nexus with remote vendors on the basis of attributional nexus – that is, imputing the physical in-state presence of offline partners to its remote vendor partner. Two primary theories of attributional nexus – alter ego and agency – are used by taxing jurisdictions. Case law specific to e-commerce is scarce, but the general case law developed to address an earlier age's marketing innovation – catalog merchandising to supplement retail outlets – is directly analogous and instructive.

Finding Nexus in Alter Ego Theory

Alter ego theory is generally used by courts to attribute the formally separate activities of individuals and businesses that derive commercial benefits from the other's activities. In the context of a bricks-and-clicks relationship, general alter ego case law could have application where the offline partner uses its outside sales representatives to market products sold by an Internet-based remote vendor. In *Reader's Digest Assoc. v. Mahin,*[27] for instance, the remote vendor did not have employees or property in the state, but its wholly owned subsidiary sold the remote vendor's merchandise door-to-door and also sold advertising in its magazine on a contract basis. The parent-vendor also engaged in extensive in-state advertising on radio and television, and in local newspapers. In view of the extensive nature of these sales and marketing activities and the fact that all lines of the remote vendor's business benefited from them, the court attributed the in-state presence of the subsidiary's sales force to the remote vendor. Therefore, establishing the remote vendor's physical presence in the state. Although the case arose in the context of a parent-subsidiary relationship, the court focused instead on the extensive nature of the partnered marketing activities. That principle should be applicable to non-parent-subsidiary bricks-and-clicks relationships.

Co-marketing activities are typically less extensive when the Internet-based remote vendor and the offline business are not part of the same affiliated corporate group. But less extensive marketing activities may also support application of alter ego theory. In *Pearle Health Services, Inc. v. Taylor,*[28] for instance, the physical presence of franchisees in a state were attributed to a remote vendor which regularly sent representatives to the franchisees, not to solicit orders but to ensure product quality and to display the vendor's new products. The court held that the sales activities provided a basis for the vendor's exploitation of the state's consumer market. Accordingly, the principle may have application where a remote vendor seeks to use the outside sales staff of an offline business partner.

Finding Nexus in Agency and Corporate Affiliation

Separation of a businesses unit into formally separate entities has been generally respected. *Bloomingdale's By Mail, Ltd. v.*

Commonwealth,[29] illustrates the point. In this case, neither the catalog unit nor the retail unit solicited or accepted orders for the other, though in two instances the retail unit's stores accepted return merchandise from customers of the catalog unit. All other catalog orders were delivered by common carrier. Though the units were jointly owned, the court respected their formal separation as they conducted their operations separately.

Though formal separation of units may be respected, courts regularly attribute the activities of sales representatives to their employers, however the employment relationship is structured or characterized. In *Scripto, Inc. v. Carson,*[30] the Supreme Court held that there is no constitutional significance between an employee and an independent contractor for purposes of establishing the physical presence of a vendor. Lower courts have generally extended this principle to encompass more innovatively structured marketing relationships.[31] For instance, in *Scholastic Book Clubs, Inc. v. State Board of Equalization,*[32] a remote vendor of books without physical property in the state sent its catalogs to teachers who solicited orders from their students and collected payment. The teachers also received shipment of books from the taxpayer and distributed them to their students. In exchange for these services from teachers, the taxpayer established a "premiums" program that allowed teachers to build up points that could be exchanged for personal or professional merchandise. Though they were not employees of the vendor, the court attributed the activities of the teachers to the vendors, finding that they essentially acted as distribution agents of the vendor.

One worrisome development in this area would be attribution of third-party warranty work to a remote vendor that contracts with the third party, as the Multistate Tax Commission has advised.[33] California, however, has explicitly rejected this position where the remote vendor and the third party performing the repair work do not have substantially similar ownership. Also of particular importance to remote vendors, Illinois has established that the presence of a sales manager in-state is sufficient to establish nexus with his remote vendor employer.[34] If this position was widely adopted, it would threaten to expose remote vendors to nexus in every instance where an employee telecommutes from a separate jurisdiction.

Conclusion

As Internet-based vendors begin to rapidly expand, entering into new sales, marketing, supplier, and distribution relationships with businesses nationwide, often no or small consideration is given to the impact those relationships will have on the ability of the vendor to avoid sales and use tax collection obligations, or liability for those taxes, in thousands of taxing jurisdictions. There are, however, several practical steps that a remote vendor, or a local vendor that seeks to sell its goods over the Internet to other states, can take to ensure minimum disruption of their business and financial operations from a later adverse ruling that sales and use tax collection obligations were applicable but not discharged:

- **Gather Information.** At a minimum, someone within the vendor should have responsibility for systematically collecting the relevant information, including identifying all of the jurisdictions – state and local – in which the vendor sells products, identifying all of the vendor's offline and online suppliers, distributors, strategic partners, and agents, as well as the physical locations and operations of each.
- **Legal Analysis.** Counsel should analyze the state of the law in all, or at least the major, taxing jurisdictions within which his or her client operates. This analysis should center on these questions: How aggressive is the jurisdiction in establishing nexus with remote vendors? Does the jurisdiction impose collection obligations on vendors or rely on self-assessment by individual consumers? How likely are the vendor's customers to self-assess and report? If the vendor fails to collect and remit sales and use tax, what are the applicable penalties and interest charges? How likely is an audit? Does the jurisdiction allow the vendor to go back and collect sales and use tax from customers if it is later determined that the vendor should have done so in the first instance? How will an adverse determination by one or several jurisdictions affect the client's financing or future merger prospects? Should these issues be disclosed during due diligence in a major corporate transaction?

- **Competitive Analysis.** As part of its overall strategic planning, a remote vendor should factor in the issues of sales and use tax collection and liability into its competitive analysis. Among the questions that should be asked are: How central is exemption from sales and use tax to the success of the business? Does it make more sense to have closer ties to offline ("bricks") partners than to avoid a closer relationship because of tax concerns? If sales and use tax exemption are central concerns of the business, is there a way to restructure its operations – and its bricks-and-clicks relationships – to avoid establishing nexus with all or most jurisdictions outside of the vendor's home jurisdiction? If a vendor has nexus in a state, does it make sense to pull out of the state entirely and not do business there? Also, is it feasible to pull out of a state where the vendor has physical presence and then re-enter the state solely through electronic means?[35]

There are at least two major ironies in this field of law. The Supreme Court's failure to establish a single, uniform standard for establishing nexus may actually foster the economic Balkanization that the Court's jurisprudence on the Dormant Commerce Clause has long sought to thwart.[36] As thousands of taxing jurisdictions establish radically different nexus standards and collection rules, and remote vendors may recoil from interstate commerce as a result. But just as technology, primarily the Internet, added new confusion to this area of the law, there are emerging technology-based alternatives that may help remote vendors, in time, address some of their bewildering array of compliance obligations.[37] Until then, however, the world of "clicks" must struggle through the slow, paper-bound sales and use tax world of "bricks."

1 Pub. L. No. 105-277 (H.R. 4328), 122 Stat. 2681 (originally enacted Oct. 21, 1998); H.R. 1552, 107th Cong. (2001) (renewal). *See also* Associated Press, *Internet Tax Ban Extended,* Washington Post, November 16, 2001, at E02; Associated Press, *Congress Extends Internet Tax Ban,* New York Times, November 16, 2001.

2 David Hardesty, *E-Commerce Tax Commission Issues One-sided Final Report, reprinted in* eCommerce: Strategies for Success in the Digital Economy (Practicing Law Institute Intellectual Property Course Handbook Series No. G-618, New York, N.Y.), September, 2000, at 185.

3 Some states explicitly sanction passing through the tax to a vendor's customers. See, e.g., California Civil Code §1656.1.

4 *See* Associated Press, *Internet Tax Ban Extended,* Washington Post, November 16, 2001, at E02

5 ITFA, *supra* note 1, at tit. XI, §1101(a)(1).

6 *Id.* at tit. XI, §1101(a)(2).

7 *Id.* at tit. XI, § 1101(e)(3)(D).

8 *Id.* at tit. XI, §§ 1104(2)(A)(i), (ii); (2)(B)(ii)(I), (II).

9 Congress has recently considered legislation that would codify the nexus standards. E.g., in 2001, the U.S. Senate considered S. 512 (Dorgan et al.) and S. 664 (Gregg and Kohl), and the House considered H.R. 1410 (Istook). Next year, the Senate will consider S. 288 (Wyden and Leahy) and the House will consider H.R. 2526 (Goodlatte et al.). In essence, these nexus bills: (a) codify the physical presence test, (b) create a single nexus standard for all business entity taxes (e.g., business and occupational taxes as well as sales and use taxes), (c) focus on specific activities within taxing jurisdictions, and (d) deem that some activities do not create nexus (e.g., visiting a vendor, soliciting sales of services that will be performed outside the state, or attending meetings). The proposed nexus legislation before Congress does not, in every instance, codify the current case law regarding nexus. For instance, some bill's drafters do not use the word "substantial" to describe the degree of physical presence required to create nexus. Harley Duncan, Presentation, *Federal and State Tax Topics Before Congress* (Twenty-Second Annual Conference of the National Association of State Bar Tax Sections, Oct. 2001). Some bills that were introduced before Congress in 2001, although involving the Internet Tax Freedom Act or sales tax simplification, also contained provisions that: (a) required states to enter Interstate Sales and Use Tax Compacts regarding internet sales and collections, (b) authorized twenty states to collect sales and use taxes on one another's behalf, and (c) permitted states with a simplified tax system to require remote sellers to collect taxes. *See, e.g.,* S. 512 (Dorgan et al.), S. 1542 (Enzi), and S. 1567 (Enzi, Dorgan et al.).

10 U.S. Const. art. I, §8, cl. 3.

11 State taxation is also potentially subject to challenge under the Equal Protection Clause, U.S. Const. amend. XIV, §1, and the Privileges & Immunities Clause. U.S. Const. amend. XIV, §1. Most litigation, however, results from the Due Process Clause, U.S. Const. amend. XIV, §1, and the Dormant Commerce Clause. U.S. Const. art. I, §8, cl. 3. The applicable rule under the Dormant Commerce Clause in this area (i.e., physical presence of a remote vendor to establish nexus in a taxing jurisdiction) is more substantially more restrictive on states than the more flexible "purposeful direction" standard of the Due Process Clause. Although analysis under the two clauses is formally separate, as a practical matter, due process analysis is subsumed in Dormant Commerce Clause analysis. It is difficult to imagine any circumstances where nexus is successfully established under the Dormant Commerce Clause but fails under the Due Process Clause.

12 504 U.S. 298 (1992) (reaffirming *National Bellas Hess, Inc. v. Dept. of Rev. of Illinois,* 386 U.S. 753 (1967)).

13 430 U.S. 551 (1977).

14 *Geoffrey, Inc. v. South Carolina Tax Comm.,* 437 S.E.2d 13 (S.C. 1993) (finding the presence of accounts receivables and a royalty agreement sufficient to base taxing jurisdiction).

15 *Orvis Co., Inc. v. Tax Appeals Tribunal,* 612 N.Y.S.2d 503 (App. Div. 3d Dept. 1994) (12 visits by remote vendors personnel over 3 years sufficient for nexus); *Vermont Information Processing, Inc. v. Tax Appeals Tribunal,* 615 N.Y.S.2d 99 (App. Div. 3d Dept. 1994) (40 visits over 3 years sufficient).

16 *J.C. Penny Natl. Bank v. Johnson,* 19 S.W.3d. 831 (Tenn. 1999).

17 676 So.2d 1372 (1996).

18 *In re Appeal of Intercard, Inc.,* 14 P.3d 1111 (Kan. 2000).

19 No. 01-A-01-9301-CH00004, 1993 WL 190914 (Tenn. Ct. App. June 4, 1993).

20 One complication may arise form the activities of some states to require the carrier itself to either collect the tax from the seller or pay the tax itself on goods it delivers. This is known commonly as "drop-shipment nexus." *See, e.g.,* California Revenue and Taxation Code §6007. The constitutionality of this form of tax collection obligation is uncertain. The argument that it does not violate *Quill* is that the obligation is imposed on a carrier that certainly has nexus with a state (in the form of distribution centers and personnel) and not on a remote vendor that may not have nexus.

21 *See Goldberg v. Sweet,* 488 U.S. 252, 262 (1989) ("We doubt that States through which the telephone call's electronic signals merely pass have a sufficient nexus to tax that call").

22 This may be so even where not all of the activities of the offline ("bricks") partner are employed in its relationship with its online ("clicks") partner. In *National Geographic Society, supra* note 16 at 560, the Supreme Court rejected the argument that a specific activity of a remote vendor in a state had to have nexus with a state. The Court

held that it was enough that the vendor itself had nexus. In other words, it may not be possible, in the context of a bricks-and-clicks relationship, to segregate those activities of an offline partner that a remote vendor wants to associate with from those that it does not. As such, all the activities of an offline partner should be analyzed in determining whether the bricks-and-clicks relationship risks exposing the remote vendor to nexus in a jurisdiction.

23 This combination of factors is so powerful that Amazon.com, a leading online seller of books, music, video recordings and other products, has filed suit against Barnes & Noble, a leading offline seller of similar merchandise, in an effort to have the retail outlets of Barnes & Noble attributed to its online unit, BN.com. If the lawsuit is successful, BN.com would lose is effective exemption from sales and use tax collection in all the states in which Barnes & Noble operates retail units. But there is a good business argument that the loss of that effective exemption would be more than offset by more closely integrating Barnes & Noble's offline and online businesses. *See* Diane Brady, *Commentary: How Barnes & Noble Misread the Web,* BusinessWeek, February 7, 2000 This reminds Internet-based remote vendors that sales and use tax considerations should not be the exclusive consideration in structuring their business operations. Arkansas is in the forefront of states actively trying to reverse case law respecting the formal separation of offline and online units and to tax the online unit of an affiliated corporate group as if the online unit physically operated in the state. *See* Arkansas H.B. 1440 (effective January 1, 2002).

24 Title 18 California Code of Regulations §1684(a).

25 Texas Comptroller of Public Accounts, Letter Ruling No. 9802118L (February 10, 1998).

26 New York State Department of Taxation and Finance, Memorandum TSB-M-97(1)C ((January 24, 1997); TSB-M-97(1)9S (January 24, 1997).

27 255 N.E.2d 458 (Ill. 1970).

28 799 S.W.2d 655 (Tenn. 1990).

29 567 A.2d 773 (Pa. Commw. Ct. 1989). *See also SFA Folio Collections, Inc. v. Bannon,* 585 A.2d 666 (Conn. 1991)

30 362 U.S. 207 (1960).

31 *See Commissioner of Revenue v. Jafra Cosmetics, Inc.,* 742 NE2d 54 (Mass. 2001) (remote vendor's in-state sales force, with no power to bind company, is sufficient to establish nexus); *Maryland Comptroller of the Treasury v. Furnitureland South, Inc.,* (Maryland Circuit Court, C-97-37872, August 13, 1999) (remote vendor's use of delivery company that collected payment, made repairs to goods, and returned damaged goods is sufficient for nexus); New York Department of Taxation and Finance, TSB-A-01(8)S, February 27, 2001 (remote vendor's use of manufacturing representative in-state sufficient to establish nexus).

32 207 Cal.3d 734 (Cal. Ct. App. 1989).

33 Bulletin 95-1 (December 20, 1995).

34 Illinois Department of Revenue, Letter Ruling No. ST 01-0052-GIL (March 2, 2001).

35 In some instances, this may actually be feasible. *See* Florida Department of Revenue, Technical Assistance Advisement No. 00A-020 (April 25, 2000) (holding that a vendor that terminated its physical presence, but which then solicited in-state orders through a web site, did not have nexus).

36 *See Hughes v. Oklahoma,* 441 U.S. 322 (1979).

37 For instance, esalestax.com has developed an Internet-based software product that allows vendors to calculate their sales and use tax obligations and remit taxes to the appropriate agency. What it does not and cannot do is determine whether a remote vendor has nexus in the first instance, thereby giving rise to sales and use tax collection obligations.

Only Until Payday: A Primer on Utah's Growing Deferred Deposit Loan Industry

by Christopher Lewis Peterson

EDITOR'S NOTE: *The opinions in this article come from Mr. Peterson's student research project, are his alone, and in no way reflect upon the United States or the Tenth Circuit. This article is derived in part from a winning entry in the 2001 Utah State Bar Business Law Writing Competition, sponsored by the Utah State Bar Business Law Section. The original and more extensive study of consumer credit is entitled "Failed Markets, Failing Government or Both? Learning from the Unintended Consequences of Utah Consumer Credit Law on Vulnerable Debtors" and is published in the 2001 Utah Law Review.*

The term "loanshark" originated toward the end of the nineteenth century to describe lenders who sold credit secured by borrowers' future wages. Contrary to today's Hollywood imagery, these early loansharks rarely used violence to extort payment and catered to salaried workers with stable jobs and respectable home lives. Salary lenders, as they were less colloquially known, would typically lend five dollars on a Monday to be repaid six the next Friday. The contemporary outgrowth of these early American "five for six boys" are today's payday lenders. Payday lenders go by a variety of names including: post-dated check cashers, check lenders, payday advance companies, and deferred deposit lenders. Like their predecessors, payday lenders offer small loans to cash-strapped consumers under the assumption the debtor will repay the obligation on his or her next payday. Also, like their predecessors, today's payday lenders have engendered widespread controversy about their charges and business practices. This article describes the Utah payday loan industry and recent developments in the state laws which regulate it. This article also provides a brief discussion of practice tips as well as projects future trends in payday lending regulation.[1]

Background

In a typical payday loan transaction, a customer might borrow $100.00 by writing a personal check made out to the creditor for $117.50. The date written on the check reflects a day two weeks in the future when full payment of the loan is due. The lender will verify the debtor's identity by asking for documents or identification such as a drivers license, recent pay stubs, bank statements, car registration, or telephone bills. Some lenders will telephone the borrower's human resource manager or boss to verify employment. Virtually all lenders require the names, addresses, and telephone numbers of close family and friends in the event the borrower skips town. Payday lenders decide whether to issue a loan on the spot without obtaining a credit report. Both parties are aware the checking account does not have sufficient funds to cover the check when it is tendered. After the paperwork is complete, the debtor walks away with $100.00 in cash or a check drawn on the lender's account. When the two weeks are up, the debtor can redeem the check with cash or a money order, permit the check to be deposited, or attempt to "rollover" the loan by paying another fee. If the borrower cannot pay off the loan, the obligation continues to accrue $17.50 in interest every two weeks. Although the initial $17.50 fee represents only 17.5 percent of the loan amount, the annual percentage rate of the transaction is around 456 percent.[2]

Fueled by high interest rates, Utah's payday loan industry has experienced dramatic growth over the past decade. Utah government only began collecting data on payday lenders in 1999, leaving precise growth figures unknown. One method of compensating for the absence of government data is to rely on classified telephone directory listings. Because lenders are anxious to advertise their businesses, tallying these listings over time is likely to provide a fairly accurate estimate of the number of lenders in a given market. The author recently examined "Yellow Page" classified listings in the Salt Lake Metropolitan area telephone directory for the previous twenty-one years.[3] Figure 1 shows listings under the category of "check cashing services" blossomed in the late 1990s.[4] The number of listed check cashing services grew from zero to seventy-five, with the vast majority of the growth occurring after 1995. With only fourteen lenders listed in 1994, the industry appears to have since quintupled its outlets in the Salt Lake area.[5]

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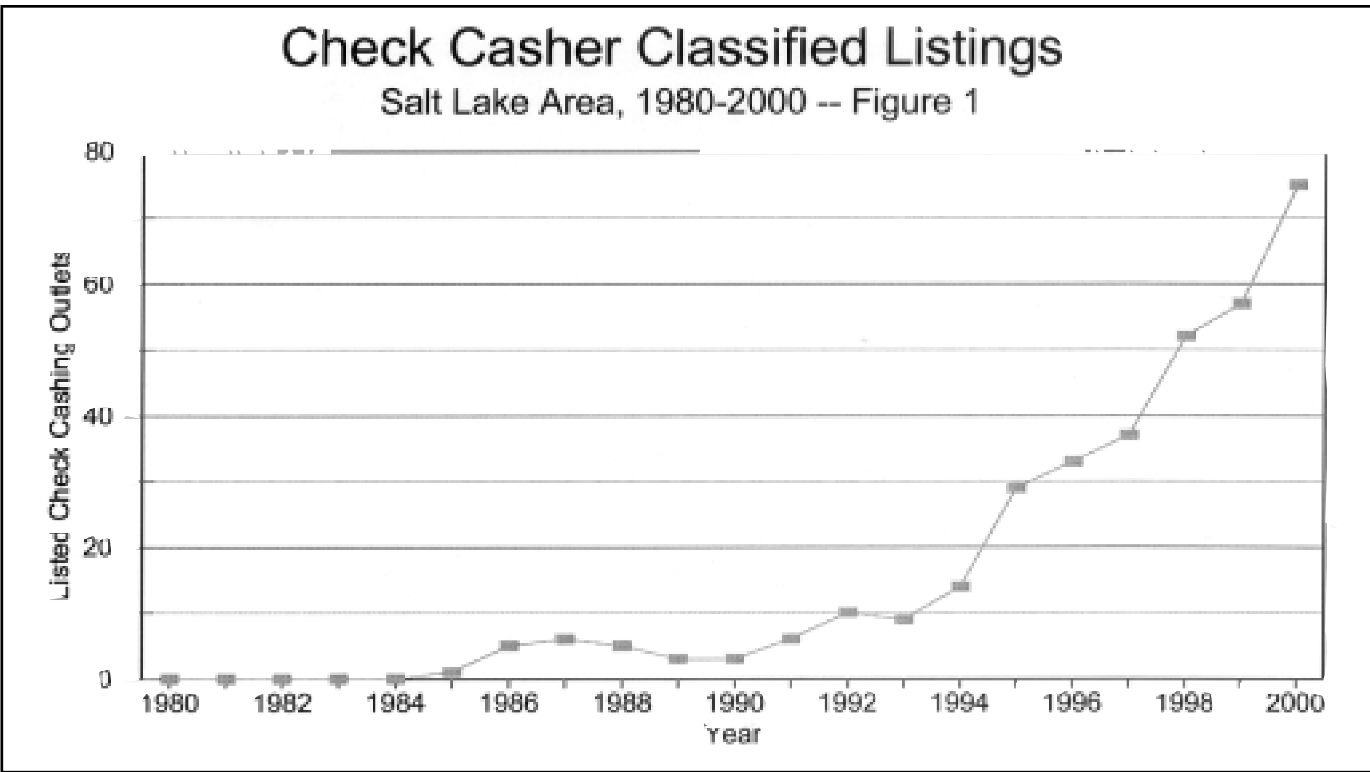


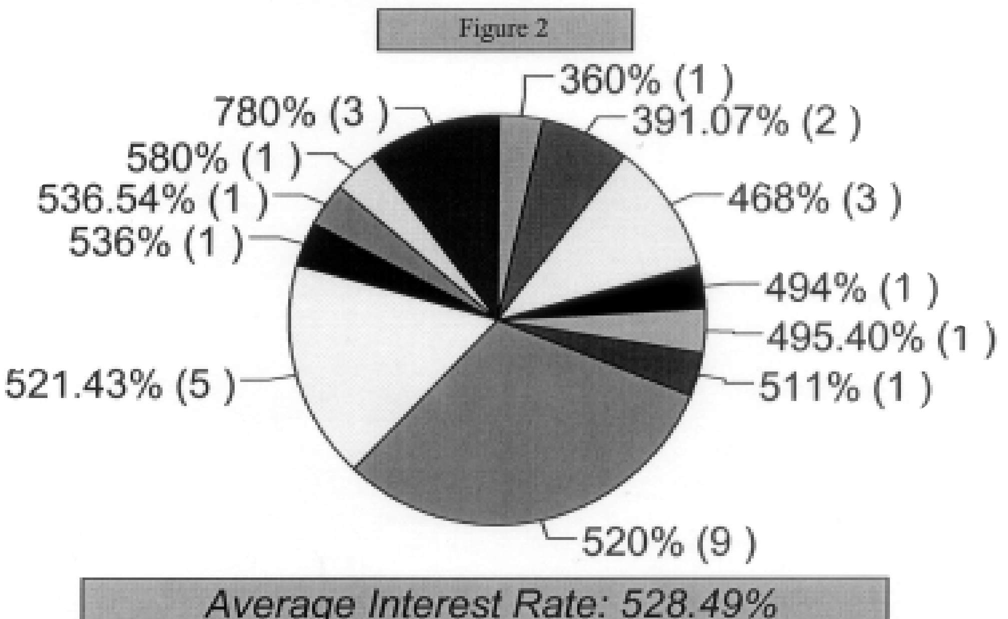
Recently collected Department of Financial Institution Data indirectly corroborates these figures. The Department lists a total of ninety-six registered lenders for the 1999-2000 year. However, the number of operating outlets in the state is much higher since many lending companies have multiple locations, not counted by the Department's report. By way of perspective, Utah currently boasts 140 state and federal chartered credit unions, only forty-four more than the number of our check lenders. Difficulties in tracking growth aside, there can be little doubt that payday lenders have become a large force in Utah's credit market.[6]

Government data also do not provide information on the current prices charged by payday lenders. In order to find a non-anecdotal estimation of credit prices, as well as to assess compliance with disclosure laws, the author conducted a second empirical study surveying payday loan outlets in the Salt Lake Metropolitan area. Twenty-six randomly selected payday loan outlets in the Salt Lake Metropolitan area were approached and presented with an outwardly reliable credit risk.[7] The sample of lenders constituted approximately one third of the lending outlets presently operating in the Salt Lake City area. The survey results concerning disclosure law compliance are presented in the section on practice tips. The annual percentage rates for surveyed loans are summarized in figure 2. The highest annual interest rate a surveyed lender offered was 780%. The lowest annual interest rate offered was 360%. Nine lenders offered post-dated check loans at 520% making this the most commonly offered rate. An average interest rate of 528.49% was calculated by adding the interest rates of each offered loan, and dividing by the number of loans offered. By way of comparison, average reported interest rates for extortionate criminal loanshark syndicates in New York City during the 1960s were a relatively inexpensive 250%.[8]

Utah Payday Lending Regulation

As is widely known, the Utah Consumer Credit Code ("UCCC") does not place an interest rate cap on Utah lenders. Creditors are free to charge whatever price a debtor might agree to.[9] However, the UCCC does include an unconscionability provision which allows courts to refuse to enforce an agreement or to enforce only the remainder of an agreement without an unconscionable clause. Moreover, the Utah Code allows debtors to recover a penalty of "not less than $100 nor more than $5,000" plus "the cost of the action together with a reasonable attorneys fee" from lenders who extract unconscionable contracts. Class action lawsuits seeking monetary damages or statutory penalties are not permitted under the unconscionability provision of the UCCC. However, class action lawsuits may seek injunctive or declaratory relief.[10]

Unlike other mainstream lenders, the Utah payday lending business evolved with no regulatory oversight. It was only in 1998 that the Utah legislature placed payday lenders under the jurisdiction of



the Utah Department of Financial institutions. The legislature passed the Utah Check Cashing Registration Act ("UCCRA") as a response to widespread reports of abusive lending practices. In particular, legislators were concerned that payday loan rollovers turned short-term cash advances into long-term debts.[11] Therefore, the UCCRA prohibits lenders from extending the duration of a payday loan beyond twelve weeks from the day on which the loan is first executed. Thus, under Utah law payday lenders are only entitled to collect a maximum of twelve weeks of interest on any payday loan transaction.[12]

The Check Cashing Registration Act also requires lenders to comply with several state disclosure provisions. Lenders must

> post in a conspicuous location on its premises that can be viewed by a person seeking a deferred deposit loan: (i) a complete schedule of any interest or fees charged for a deferred deposit loan that states the interest and fees using dollar amounts; and (ii) a number the person can call to make a complaint to the department regarding the ... loan.[13]

Also, lenders must provide debtors a written copy of the loan contract and orally review the relevant interest rates and due dates with the debtor. Violation of the UCCRA is a crime punishable as a class B misdemeanor.[14]

Practice Tips

Although Utah lacks the substantive consumer protections of many other states, counsel for both debtors and creditors should be aware of important payday lending controls provided by the UCCC and UCCRA. Counsel should look for violations of both UCCRA disclosure rules as well as the twelve-week time limitation. Data collected recently by the author and summarized in table 3 suggests many payday lenders have made only a half-hearted attempt to comply with UCCRA disclosure provisions. Of twenty-six surveyed lenders ten either failed altogether to provide any sign posting interest and fees or did so in a way that was inconspicuous. Seven lenders provided a listing which was incomplete. Ten lenders failed to post interest rates in annual percentage rate format.[15] Twenty-four of twenty-six lenders failed to provide a complete list of fees using dollar amounts.[16] Seven lenders failed to conspicuously post the telephone number of the Utah Department of Financial Institutions for customer complaints. And, when orally describing a loan, seventeen lenders failed to disclose the loan's percentage rate as an annual percentage rate, violating the federal Truth in Lending Act.[17] Accordingly counsel for payday lending businesses should carefully warn their clients about possible criminal penalties for non-compliance with the UCCRA. Debtors' counsel should present courts with evidence of non-compliance when arguing payday loan contracts uncon-

Efficacy of Federal and State Disclosure in Salt Lake Area Post-Dated Check Lenders

Figure 3

Legal Issue Tested:	"Yes"	"No"
Was there a posting in a conspicuous location which could be viewed by a person seeking a loan?	16	10
Was a complete schedule of interest rates posted?	19	7
Did the interest rate appear in APR format?	16	10
Was there a complete schedule of fees using dollar amounts?	2	24
Was the telephone number of the Department of Financial Institutions posted?	19	7
Was the interest rate orally disclosed in APR format?	9	17
Would the lender provide a disclosure statement before approving a loan application?	9	17

scionable. Moreover, although the UCCRA does not provide a private cause of action, the UCCC unconscionability provision does. Because Utah's unconscionability provision provides for costs and attorney's fees, concerned members of the Utah bar should consider bringing pro bono actions on behalf of vulnerable debtors.

No data exist indicating whether Utah lenders are complying with the UCCRA's twelve-week time limitation on the renewal of payday loans. However, industry representatives often claim payday loans are meant to be short term contracts. For responsible Utah lenders, this is undoubtedly true. However, if history provides wisdom, counsel representing debtors should treat these claims with caution. Early American salary lenders made similar claims which were widely denounced.

> There was, for example, the employee of a New York publishing house who supported a large family on a salary of $22.50 per week and had been paying $5 per week to a salary lender for several years, until he had paid more than ten times the original loan. Or the case of a Chicagoan who borrowed $15, paid back $1.50 per month for three years before fleeing the city to escape the debt. Or the case of a streetcar motorman who in 1912, had seventeen Chicago loan companies attempting to collect $307 on an original loan of $50 after he had already paid $360. Or the claim of another Chicago borrower that he had borrowed $15, ten years later he had repaid $2,153 and still owed the original $15.[18]

More recently, government data from several states show that, in general, it is common for payday lenders to renew debts well beyond twelve weeks. For example, North Carolina regulators counted the total number of payday loan transactions of given customers at a given company in a year. About 87 percent of borrowers would roll over their loan at least one time with any given lender. Not counting debtors who borrowed from multiple locations, 38.3% of customers renewed their payday loans more than ten times. About 14 percent of borrowers would renew their payday loans with the same lender more than 19 times per year.[19] Illinois regulators found payday loan customers "who were borrowing continuously for over a year on their original loan."[20] Indiana found that approximately 77 percent of payday loans are roll-overs of existing loans. While the average customer borrows 10.19 payday loans per year, some debtors borrow many more times.[21] Indiana regulators describe one debtor who renewed 66 times in order to pay off a single payday loan – approximately a two-and-one-half year debt – assuming a typical two week renewal cycle.[22] These results indicate payday lenders should

carefully avoid allowing debtors to rollover loans longer than twelve weeks. Moreover, when reviewing a payday loan contract it is important to discover the original date of the transaction. Practitioners representing debtors should argue courts must not allow lenders to circumvent the twelve-week limitation by subterfuge such as paying off an old loan with the proceeds of a new loan. Counsel for payday lending institutions should scrupulously advise their clients against taking any interest or fees after twelve weeks from the origination date of any payday loan.

Finally, Utah government officials should carefully enforce provisions of the UCCRA. For example, volunteer *pro tem* small claims court judges should actively review payday loan complaints for compliance with the UCCRA and award no more than twelve weeks' interest. Small claims court judges should also brush up on the common law elements of unconscionability, and exercise their authority to refuse enforcement of unconscionable contracts as well as award penalties under the UCCC. Moreover, lenders in violation the UCCRA are guilty of a class B misdemeanor. Local and state prosecutors have a duty to deter non-compliance by actively seeking out and bringing charges against violating payday lenders. Perhaps most important of all, the UCCRA gives the Department of Financial Institutions broad authority to pass administrative rules clarifying the act and to conduct administrative inspections – the cost of which is assessed to lenders rather than taxpayers. The Department should actively use this authority delegated by the Utah Legislature to ensure a fair and legal market for payday loans.

1 Mark Haller and John V. Alviti, *Loansharking in American Cities: Historical Analysis of a Marginal Enterprise,* 21 Am. J. Legal Hist. 125, 127-28 (1977); Kathleen E. Keest, *Stone Soup: Exploring the Boundaries Between Subprime Lending and Predatory Lending,* B0-00ZV Practicing L. Inst. Corp. L. & Prac. Course Handbook Series 1007, 1111 (April 16, 2001).

2 Jean Ann Fox, *What Does it Take To Be a Loanshark in 1998? A Report on the Payday Loan Industry,* B4-7226 Practicing L. Inst. Corp. L. & Prac. Course Handbook Series 987, 989-90 (April-May 1998); Deborah A. Schmedemann, *Time and Money: One State's Regulation of Check-Based Loans,* 27 Wm. Mitchell L. Rev. 973, 974-76 (2000); Scott Andrew Schaaf, *From Checks to Cash: Regulation of the Payday Lending Industry,* 5 N.C. Banking Inst. 339, 341-42 (April, 2001).

3 This simple study used Bell Telephone and U.S. West classified listings on file at the special collections department of the University of Utah Marriott Library. All data were counted and compiled solely by the author.

4 The Yellow Page classified directory for the Salt Lake Metropolitan area did not provide a "check cashing service" category until 1985. Furthermore, these data almost certainly underestimate the number of deferred deposit lenders operating in the Salt Lake Metropolitan area. The Yellow Page listing of "check cashing service" is somewhat misleading. Only around a dozen outlets in the area actually perform the simple function of cashing a check. Committee Debate, Senate Transportation & Public Safety Committee (Monday, February 22, 1999) (Committee Recording, side A) (statement of Kit Cashmore) ("There are approximately 121 businesses, outlets in the state of Utah. Probably less than a dozen of those actually cash checks. We get lumped into a category of check cashing, but the majority of us do what are called payday loans."). The vast majority of outlets only provide deferred deposit lending services, and not simple check cashing. This appears to have led many payday lenders to list their businesses only in the "loans" section of the classified directory. Unfortunately, credit unions, banks, mortgage lenders, and other businesses also advertise in the "loans" section along side of payday lenders. This makes a reliable count of deferred deposit lenders in that section unfeasible.

5 Salt Lake County population growth from 625,000 to 843,271 over roughly the same time period does little or nothing to diminish the significance of check lender outlet growth over the past two decades. *See* 2000 Econ. Rep. to the Governor at 52.

6 1999-2000 Rep. of the Commissioner of Fin. Institutions State of Utah at 148.

7 Three of the twenty-six surveyed lenders offered two different post-dated check loan options, leaving a total of twenty-nine offered loans. Lenders were approached by the author in December of 2000 and January of 2001. It was explained to each lender that I was seeking a post-dated check loan for the first time. Lenders were presented with four previous months of paycheck stubs to verify employment, a personal check book indicating the checking account had been open since 1993, and with a recent credit union statement showing a balance of $73.00. It was further explained I was hoping to shop around for the best deal and to examine the loan contract to ensure nothing out of the ordinary was included in the obligation.

8 Comment, *Syndicate Loan-Sharking Activities and New York's Usury Statute,* 66 Colum. L. Rev. 167, 197 (1966) (reporting criminal loanshark interest rates averaging 250 percent annually).

9 Utah Code Ann. § 70C-2-101 (2000)

10 *Id.* § 70C-7-106.

11 Committee Debate, Senate Transportation & Public Safety Committee (Monday, February 22, 1999) (Committee Recording, side A) (statement of Senator Mayne); Floor debate, 53rd Leg., General Sess. (February 24, 1999) (Senate recording number 38, side A) (statement of Senator Mayne).

12 Utah Code Ann. § 7-23-105(2) (2000).

13 *Id.* § 7-23-105(1)(a).

14 *Id.* § 7-23-105(1)(c) & (d), 108(1)(a).

15 It is not immediately clear whether the UCCRA requires postings be made in the annual percentage rate format established by the Federal Reserve Board, since the statute requires only that lenders post "a complete schedule of any interest." Utah Code Ann. § 7-23-105 (1)(a)(i) (2000). However, deferred deposit lenders must comply with the Truth in Lending Act. *Id.* § 7-23-105(1)(e)(i). And, the Truth in Lending Act probably requires that lenders give conspicuously posted interest rates in APR format under its advertising regulations. *See* 15 U.S.C. § 1664(c) (2000) ("If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.").

16 Several of these lenders listed one or two fees. But virtually all deferred deposit lenders have a greater arsenal of contingent collection fees which were not posted.

17 15 U.S.C. § 1665a (2000) ("In responding orally to any inquiry about the cost of credit, a creditor, regardless of the method used to compute finance charges, shall state rates only in terms of the annual percentage rates….").

18 Haller & Alviti, *supra* note 2, at 133-34.

19 Office of the Commissioner of Banks, State of North Carolina, Report to the General Assembly on Payday Lending 5-6 (February 22, 2001).

20 Sarah D. Vega, Illinois Department of Financial Institutions, Short Term Lending Final Report 30 (1999).

21 Public Interest Research Group and Consumer Federation of America, *Show Me the Money: A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures* 8 (February 2000).

22 Indiana Department of Financial Institutions, *Summary of Payday Lender Examination: 7/199 Thru 9/30/99,* available at www.dfi.state.in.us.

How the Economic Growth and Tax Relief Act of 2001 Affects Basic Estate Planning Strategy – Tax and Non-Tax Considerations

by Timothy B. Lewis

At the outset I should clarify a term. When I use the term "transfer taxes" I am collectively referring to both the federal gift and estate taxes. Originally, because of lower relative gift tax rates, it was better to give away property to the kids during life than to wait until death before transferring wealth to the next generation. Then after 1976 we unified the transfer tax structure by making the transfer tax rate schedules the same for both transfers during life and transfers at death.

But even under the unified approach, it was still beneficial to give away property during life for at least two reasons. Namely, (1) the $10,000 annual exclusion applied only to lifetime transfers and (2) gifting away appreciating property during life allowed the appreciation accruing after the date of gift to avoid all transfer taxes.

What Is Better Now – To Transfer Wealth During Life Or Later Upon Death?

Those two benefits to gifting still exist (and the amount of the annual exclusion remains the same at $10,000 per person per year[1]), but there are some countervailing benefits that now might favor transfers at death over transfers during life.

First, if everything goes according to plan, the estate taxes are in the midst of a total phase-out process whereas there will still be a potential gift tax to deal with for the foreseeable future. If too much (i.e. > $1 million of taxable gifts) is given away during life, a transfer tax will be imposed, whereas there might never be any transfer tax at all if the donor waits until death to transfer his wealth.

I use the word "might" for the following two reasons: (1) during the phase-out process, an estate may or may not incur an estate tax depending upon its size relative to the amount protectable by the constantly increasing unified credit, and (2) we do not yet know whether or not the total phase-out of estate taxes will be permanent since the law contains an automatic "sunset" provision starting after 2010. This sunset provision may or may not be repealed. I will say more about that later on.

Second, until the phase-out is completed in 2010, there will continue to be a step-up in basis to date of death values.[2] In contrast, donees of lifetime transfers take only a transferred basis from the donor and will usually have to recognize (upon later sale) any built-in gains existing on the date of the gift. Whereas before, people sacrificed the potential step-up in basis for the avoidance of transfer taxes, now more and more estates will be able to have the best of both worlds – they can get a total step-up in basis and pay no transfer taxes in the process.

Third, there are some important non-tax reasons to avoid gifting during life which I will discuss later when I talk about spoilage factors.

What Will The New Basis Rule Be In 2010 For Transfers At Death?

Even when the general step-up in basis rule expires in 2010, it will not be lost entirely because the personal representative or trustee (PR/T) will be given at least $1.3 million of added basis to spread around among the various assets being transferred at death.[3] If at death the decedent has any unrecognized loses that will expire on death, the amount of any such losses will be added to the $1.3 million figure to allocate.[4]

In addition to the foregoing, with respect to transfers to a surviving spouse, the PR/T will have an additional $3 million of step-up in basis potential.[5]

These adjustments to basis cannot exceed the fair market value (FMV) of any particular asset at death,[6] and do not apply to "income in respect of a decedent."[7] But, other than those limitations, the PR/T will be free to pick and choose how to allocate this basis.

Thus, with respect to most estates, even though the current gener-

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alized step-up in basis rule will expire in 2010, the replacement rule will still provide enough step-up in basis potential to effectively bring basis in most, if not all, assets up to their FMVs at the date of death.

How Much Can Now Be Transferred Free Of Transfer Taxes?

During 2002 and 2003, the protectable equivalence of the unified credit will be $1 million. It will stay there indefinitely for purposes of the *gift* tax[8] but will slowly rise over the years regarding the estate tax[9] in the following manner:

2004-05 . . . .$1,500,000

2006-08 . . . .$2,000,000

2009 . . . .$3,500,000

Then, in 2010 there will be no estate taxes whatsoever. In 2011, however, the changes of the 2001 Act are set to expire which means that the estate tax will come back into existence and the protectable equivalence of the unified credit from 2011 forward will match that of the gift tax, namely, $1 million.[10]

What Effect Will The New Tax Law Have On The Basic Estate Planning Strategy?

In order to make some points, we need to review basic estate planning strategy. Traditionally we have sought to manage the value of a couple's combined estate in order to have it fall within the protection of two unified credits, since each decedent is entitled to his or her own credit. It was very common for couples to maintain an annual gifting program to their children and grandchildren for the sake of keeping the value of their combined estate below that combined threshold.

Usually a couple would form a family trust containing all of their assets. When the first spouse died, the property would be divided into two parts. The decedent's part would be protected by his or her unified credit and kept in trust until the second spouse died. If the first decedent's unified credit did not effectively protect all of his or her share of the property from estate taxes, then the marital deduction could be used to avoid all estate taxes at that point. When the second spouse died, through personal consumption and/or gifting during life, hopefully the unified credit available to cover his or her portion of the trust would be sufficient to avoid all estate taxes at that point.

Then on the second death, the trust would probably terminate and the assets be distributed out to the children and/or grandchildren. While the basis of the assets passing from the second parent to die would be equal to their FMVs at that parent's death, the assets passing from the first parent to die would be equal to their FMVs at his or her *earlier* date of death. In other words, most of the assets belonging to the first spouse to die will probably appreciate in value between the two dates of death and thus, will have some built-in gains in the hands of the beneficiaries. Those assets do not get a second step-up in basis on the surviving spouse's death.

With this basic understanding, I can now explain a potential change in estate planning strategy. As the unified credit for estate tax purposes continues to rise, fewer and fewer estates will find it necessary to rely upon two unified credits in order to protect the transfer of wealth to the next generation from estate taxes. In other words, only one unified credit might be sufficient in many cases.

In such cases, rather than take pains to make sure that the share of the estate belonging to the first spouse to die remains separate and distinct from the estate of the surviving spouse, it may make sense to purposefully make sure that all of their combined estate ends up in the estate of the second spouse to die since then it will all get a step-up in basis equal to FMV at the date of that spouse's death.

In other words, whereas we previously worried about underusing the unified credit and over-using the marital deduction on the first death, now we may want to totally rely upon the marital deduction to avoid estate taxes on the first death and use none of that person's unified credit. Again, this would only apply to those combined estates that we do not expect to exceed the protectable value of the one unified credit available on the date of the death of the second spouse to die. This would allow us to get a full step-up in basis on all the assets at no transfer tax cost.

Of course, then as now, this step-up in basis rule would not apply to "income in respect of a decedent" (IRD) – income that has been earned by the decedent prior to death but which has not yet been recognized for income tax purposes because of the decedent's method of accounting. The recipients of IRD must step into the tax shoes of the decedent and recognize all associated gains as and when the decedent would have, had he not died before the recognition process was complete.

Will Family Trusts No Longer Be Needed?

Will this mean there will no longer be any need for family trusts for those estates that will be exempt from estate taxes? No, there are still several good reasons to use trusts to implement an estate plan. I will mention just three here. First, they can provide at least partial "spendthrift" protections to the beneficiaries. In other words, the assets of the first spouse to die could be protected from the improvident acts of the surviving spouse. For

example, the surviving spouse might get remarried to a scoundrel – a "gold digger" – who might weasel his way into the kids' inheritance; or she might negligently cause a multi-million dollar automobile accident; or enter into foolish business ventures resulting in bankruptcy, etc. A trust can protect the next generation from such potential problems with respect to the property belonging to the first spouse to die but probably not with respect to the property belonging to the surviving spouse.

Second, trusts are very useful at implementing delaying provisions. For example, a trust can provide that beneficiaries are not entitled to any distributions until they reach some pre-set age beyond the simple age of majority. So rather than risk giving an 18-year-old a sizeable inheritance while still relatively immature, the parents can provide for distribution at age 30, for instance. Without such delaying provisions, a beneficiary would normally be entitled to receive his inheritance as soon as he reaches eighteen years of age.

Third, trusts provide more privacy to a family and less potential for costly and time-consuming judicial oversight.

A Non-Tax Advantage of the Recent Tax Law Change

One advantage behind the recent tax law change is that it diminishes what I think used to be a perverse incentive to make premature gifts during life. As explained earlier, many couples felt compelled to make annual gifts of $10,000 per person per year to their children, in-laws, and grandchildren for the sake of managing the size of their combined estate in hopes of avoiding all transfer taxes. While this strategy worked wonderfully from a tax planning standpoint, it often times carried very heavy human costs by way of a spoilage factor.

In other words, year after year as the children received such large gifts, they tended to start viewing life in an unhealthy sort of way. They tended to think that a different set of rules applied to them, anticipating financial security as a matter of right totally unconnected from anything they might choose to do or not do themselves.

These attitudes adversely affected their judgment in many ways. For instance, they often times did not take their educational experience very seriously. They chose weak and relatively valueless majors in college. They found it difficult to develop good study habits and work ethic. Life seemed to be nothing more than a giant party to many of them – free of personal responsibility. They had a hard time "growing up" and becoming serious about life.

In addition, many developed unreasonable attitudes towards risk-taking. They tended to migrate toward one end of the risk spectrum or the other – either they became too risk averse, like the Biblical story of the man who buried his talent in the ground for fear of losing it rather than investing it in the marketplace to earn a return; or they threw caution to the wind and took extremely high risks like the Hunt brothers who tried to corner the silver market or the Haines underwear heirs who lost their respective inheritances almost as fast as they got them through excessive risk-taking ventures. The appropriate middle-ground seemed elusive to many of them.

In addition to the foregoing, many became spoiled in the traditional sense. They developed a superiority complex where they thought they were better than others simply because of their superior relative wealth. We have all known people with such attitudes – they are insufferable annoyances to everyone around them and are almost universally disliked.

One of my professors in law school told a very troubling story about one of his clients. It seems the man had a very successful business as well as other valuable assets. Pursuant to the advice of his tax planner, he and his wife began an ongoing gifting program to their children using the annual exclusion each year to shield the gifts from gifts taxes. They kept the business but gave away most everything else. After many years of doing this, unexpectedly his business failed and he was struggling financially. He approached his children and asked for some of the property back that he had given to them over the years. To his great disappointment and sorrow, they all refused his request saying that they had gotten used to their financial situations and couldn't stand to part with anything even for such a worthy cause as to help out mom and dad. I can only imagine the type of regrets dad must have felt regarding the unintended spoilage factor associated with his prior tax-motivated gifting program.

As a parent, I don't want to do this to my children and I don't think most of our clients would either. In my opinion, the first decade of adulthood is very critical to one's future. I believe that healthy financial struggle during these years is necessary for most people to develop in an optimal fashion. In my opinion, using gifts to help the children get through school, and perhaps acquire the necessary down payment monies to get them into their starter-homes, can be justified. Beyond that, however, I think it is generally good for them to have to figure out the rest of their financial lives on their own. Since the new tax law diminishes the perverse incentive to prematurely gift away one's estate to the next generation for the sake of tax planning, I would consider this to be an advantage over prior law.

The foregoing illustrates a common professional "blind spot" that we need to avoid. As tax-planners, it is very easy to get so engrossed

in our quest to reduce our clients' tax bills, that we ignore what may turn out to be far more important non-tax concerns. We need to take off our tax-saving blinders and increase our non-tax peripheral vision when advising clients.

Disadvantages of the Recent Tax Law Change

One disadvantage of the recent tax law change regarding transfer taxes is the uncertainty it creates. The tax overhaul has a built-in sunset provision after ten years. Unless Congress repeals the sunset provision, the changes will terminate starting January 1, 2011. In other words, after a one year hiatus in 2010 when there will be no estate taxes whatsoever, all of a sudden we will return to the prior estate tax regime where only the first $1 million of a person's property is protected from estate taxation.

Will Congress repeal the sunset provision? In our current political environment where we are in a costly war against terrorism, our budget surpluses have evaporated, and an economic recession is at our doors, perhaps we should ask ourselves a different question: might the sunset provision actually be accelerated rather than repealed?

At this point, nobody knows the answers to these questions. But, if I were forced to guess, I would predict that the sunset provision would more likely be accelerated than repealed. After all, the matter of estate taxes represents a classic political opportunity for stirring up class warfare among the masses.

Since the protectable limit provided by the unified credit has already been raised to $1 million, I suspect that if Congress were to back-peddle on us, we would probably not be forced to retreat from that number. However, I have serious doubts that it will actually rise any higher than that.

I think it is appropriate to do some guessing here, since it will have an impact on our professional advice regarding gifts. If I fully expected the estate taxes to be repealed once and for all, then I would be inclined to advise most people to avoid substantial gifting during life for the reasons discussed earlier.

However, if I expected the unified credit to become frozen at $1 million of protectable value, then I would only seriously consider recommending some sort of gifting program regarding those estates which can be expected to exceed $2 million in value (the protectable value of two unified credits) on the date of death of the second spouse to die.

So what should we advise regarding estates that are already over this amount or are expected to be by the date of death of the

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second spouse to die? I would still be hesitant to recommend a gifting program to the next generation, again, for the reasons discussed earlier regarding spoilage. Rather, I would recommend the client consider charitable giving which brings me to the next potential disadvantage of the recent tax law change.

In my opinion, charitable giving is a wonderfully beneficial thing. It significantly helps to sustain civilization. Churches, universities, hospitals, schools, charitable foundations, various community projects, etc. rely upon charitable giving to survive. Without these civilizing institutions, we would quickly retreat into barbarism.

What effect will the discontinuance of the estate tax have on charitable giving in general? Faced with the prospect of Uncle Sam taking, for questionable purposes, a sizeable part of wealthy estates, many people could be expected to choose instead to give to the charity of their choice, expecting far greater societal good to result in the process. If we take away the tax incentive to give to charity upon death, will people still be as inclined to make such gifts and bequests?

While our first impression may be that doing away with estate taxes will significantly reduce charitable giving in general, such may not in fact turn out to be the case. After all, the same fear existed when we started reducing the top marginal tax brackets for income taxes. As the tax rates fell, the after-tax cost of charitable giving effectively went up. Nevertheless, charitable giving continued to increase year after year. Perhaps it would have increased faster than it did had the income tax rates not fallen – that is subject to debate – but at least we know that it did not actually decrease over that time period.

So, at this point, we do not know what effect the estate tax changes will actually have on charitable giving. If if it does turn out to have a negative impact, then I would call that a disadvantage.

One Last Plug For Charitable Giving Instead Of Giving The Children Too Much Inheritance

In order to support the cause of charitable giving, I would like to share part of my father's story. When my father was ten years old, his father died. My grandmother, who never remarried, had to raise her four children on very meager earnings. Consequently, my father, early on, saw education as his ticket out of poverty. He dedicated himself to his studies and skipped two grades in school. Having skipped so many grades caused him to be the perpetual runt of the class throughout his high school days at Provo High. Despite all the teasing he must have had to endure, he remained focused. He actively participated in many school activities, including the debate team. He and another student placed second in the state in the two-man competition, but he always put the blame on himself for not coming in first.

At the end of his senior year, the school had its annual awards assembly where various students were recognized for their scholastic achievements. The very last award to be presented each year was the Mangum scholarship – a four-year scholarship to BYU to the number one male student at Provo High. To my father's great surprise and delight, his name was called as the winner of this coveted scholarship. I can only imagine the exquisite feelings of exultation he must have felt as he walked up to the podium amidst a standing ovation from his fellow classmates – the class runt had won the crown. Without that scholarship, his chances for obtaining a higher education would probably have vanished on the spot.

Whoever by the name of Mangum endowed that scholarship, he or she opened up a world of opportunity to a very promising but indigent lad. My father's life was literally blessed by the generosity of that wonderful benefactor. The name Mangum will always carry a special meaning to my family as well as the families of all the other beneficiaries of that scholarship over the years.

Unfortunately, the scholarship awarded to my father was the last four-year scholarship given under the Mangum name since the earnings generated by the endowment were insufficient to maintain itself in a four-year format. Sadly, from then on, it became only a one-year scholarship.

After BYU, my father attended law school at the University of Michigan and later became a very successful tax attorney in Los Angeles. Ever-grateful to the generosity of the Mangum family for the opportunities their scholarship had given him, when he had acquired the necessary financial means, he contacted them and asked if he could contribute sufficient funding to the endowment to return the scholarship to its original four-year status. They were very delighted at the offer and gratefully accepted.

Over the years, my father would oftentimes plan a trip to Provo around the time of the annual award ceremony so that he could be in the audience and see the awarding of the scholarship. As he watched the winner's excitement, no doubt with his eyes moistened by a tear or two of gratitude, he relived that special day in his early life when he was the one walking up to the podium to accept the prize – the prize that was so critical to his future and which was only made possible by the generosity of someone he didn't even know.

When my mother died in 1986, in honor of her, he endowed a similar four-year scholarship in her name for the number one

female student from Idaho Falls High to attend Utah State University, both of which were my mother's alma maters.

He derived great joy from his participation in both of these scholarships. He inspired some of his friends to do the same thing regarding their alma maters and they too reveled in the experience.

If my father had not done what he did regarding those scholarships, where would his money have otherwise gone? Probably to me and my siblings. Do I think his money was well-spent? Unquestionably yes. He did far more good for society by spending it the way he did than by giving it to me.

So as you advise your clients about gifting, I hope you will keep this story in mind and pass it along. It is very easy to do too much for our children to their unintended detriment, but we can never do too much for society in supporting the civilizing institutions that sustain it.

Parent-Child Heart-to-Heart Talks

Those clients who decide to follow my father's lead (and even those who don't) should probably be advised to talk to their children as each enters high school and caution them against expecting large inheritances. They should stress to their children that they will have to make it through life largely on their own efforts. In discussing why the parents are taking such a position, they should explain the various spoilage factors discussed above that would probably otherwise come into play in a negative way in the lives of the children.

Consequently, the children should be advised to be very careful about how they approach their educational opportunities. Among others, the following general rules should be discussed: (1) greater scholastic effort generally produces higher grades, (2) higher grades generally mean better opportunities both from the standpoint of what university one can attend and one's ultimate career opportunities, and (3) personal choices concerning majors carry vastly different natural economic consequences upon graduation. The quicker a child can be made to see that his personal financial destiny lies in his own hands, the better.

What General Rules Should People Observe When They Make Gifts/Bequests To Their Children?

I doubt most people would be inclined to give all of their property away to charity. They are probably going to want to give something to their children but, in deciding how much, they should probably err on the side of modesty rather than extravagance lest they risk the spoilage problem discussed above being transferred down to the grandchildren's level. Also, they should take care to be equal in the treatment of their children lest they inject unnecessary family discord among siblings. Of course, special dispensations for handicapped children would be justifiable.

Parents should think twice about passing a family business down to the kids. Forcing the kids to be tied together financially is a recipe for serious family disharmony. Invariably they will perceive each others' relative contributory worth differently causing jealousies and even hatred to develop. Even if this does not occur among the children, it will probably occur among the grandchildren.

I think parents generally should plan to have their family business sold upon death and let the children go their separate ways. If one or more of the children wish to buy the business at fair market value from the estate, then that is fine so long as they recognize the potential dangers right up front.

I heard a business advisor once recommend that every business owner should seek, as one of his goals, to position his business in such a way as to be saleable at a moment's notice. Every potential business decision should be evaluated in light of its probable impact on the saleability of the business. With that mindset, business owners tend to make better overall business decisions than they otherwise would without such a goal. I think that is sound advice.

Not only would such efforts make the business more valuable along the way, it would also facilitate the problem arising at death that I just discussed-the surviving family members would have more options to go their separate ways upon the decedents' death if his or her business were immediately saleable at that point in time.

In closing, one will note that I have discussed more non-tax issues than tax issues regarding gifting. What I am trying to get across is the idea that the most important part of estate planning probably revolves around non-tax concerns. Accordingly, advisors should broaden their perspective of the role they play in the estate planning process.

[1] I.R.C. Sec. 2503(b).

[2] I.R.C. Sec. 1014(f).

[3] I.R.C. Sec. 1022 (b)(1)(B).

[4] I.R.C. Sec. 1022(b)(1)(C).

[5] I.R.C. Sec. 1022(c).

[6] I.R.C. Sec. 1022(d)(2).

[7] I.R.C. Sec. 1022(f).

[8] I.R.C. Sec. 2505(a)(1).

[9] I.R.C. Sec. 2010(c).

[10] *See* sunset provisions embedded in I.R.C. Sections 2001 & 2010.

Commission Highlights

During its regularly scheduled meeting December 7, 2001, which was held in Salt Lake City, the Board of Commissioners received the following reports and took the actions indicated.

1. Scott Daniels encouraged Commission attendance at the upcoming NCBP Midyear Meeting, Western States Bar Convention and the Jack Rabbit Bar Conference.
2. The Client Security Fund attorney cap was reviewed and the Commission voted to raise the per attorney cap to $50,000.
3. Scott Daniels reviewed the Lawyers Helping Lawyers Foundation's request to fund an ABA audit. After discussion, it was determined that an audit would be beneficial and was approved.
4. Scott Daniels reviewed the Supreme Court's request for a meeting on the Bar's MDP proposal. He reported that Chief Justice Howe asked for two representatives from the Bar to join two representatives from the Court's Rules Advisory Committee on the Rules of Professional Conduct to meet on January 30, 2002 to discuss and answer questions relating to the Bar's petition.
5. Paul Moxley gave a report on the ABA. He noted that Utah's participation in the ABA is extraordinary as compared to other states. Moxley also noted that there were a number of ABA publications such as guidelines and pamphlets to assist members in their practice of law.
6. David Hamilton appeared before the Commission and gave a short description of the Client Security Fund process, i.e., how claims are presented and the procedure and concerns employed in that process. The Commission approved the claims presented for payouts.
7. John Adams brought the Commission up to speed on the Supreme Court's Committee on Delivery of Legal Services formed in response to the Utah legislature's concerns.
8. John Adams discussed issues relating to recent changes to the Rules of Lawyer Discipline and Disability. Subsequent revisions were made.
9. John Adams also reviewed the "Respondent's Bill of Rights".
10. Bob Merrell reviewed October financials.
11. John Baldwin reviewed the Sunset Review process explaining that the Supreme Court had requested the Commission to make a rotating annual review of certain Bar programs. A sign up sheet was passed out for Commissioners in order to form groups of three to review the continuing legal education program, the consumer assistance program and the general support of bar committees program.
12. Denise Dragoo reviewed the proposed monthly Bar e-mail newsletter.
13. Katherine Fox explained that on the licensing form attorneys must designate which address they prefer to receive their mail. In order to ensure consistency and fairness, she suggested that the Bar's Policies and Procedures should be modified so that the delinquency notice for nonpayment is sent where the attorney has requested that his or her mail be sent. The revision was approved.
14. Katherine Fox lead the discussion regarding guidelines for publishing notices of discipline. The proposed new guidelines were adopted.
15. Legislative concerns and OPC litigation were discussed during the Executive session.

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 Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 02-01

Issue: Do the Utah Rules of Professional Conduct preclude a Utah lawyer from financing litigation costs through a loan from a third-party lending institution, if (a) the lawyer is obligated to repay the loan and (b) the client, by separate agreement with the lawyer, is obligated to reimburse the lawyer for such costs?

Conclusion: The Utah Rules of Professional Conduct do not preclude such litigation-financing arrangements, provided the lawyer discloses to the client the terms and conditions of the loan, the client consents, and the lawyer, but not the client, is obligor on the loan.

Opinion No. 02-02

Issue: To what extent does the recent amendment to Utah Rules of Professional Conduct 7.3(c) affect a lawyer's or law firm's newsletters and "alerts" to clients and prospective clients, brochures provided at public seminars, promotional items provided at seminars and other events, and web-site information?

Conclusion: If the newsletters, alerts or brochures are designed by the firm in such a way that they constitute a solicitation of professional employment from a prospective client with whom no attorney at the firm has any family relationship, prior or current professional relationship, or close personal friendship, they must prominently include the words "Advertising Material" on the outside envelope, if any, and at the beginning of the communication. If the newsletters and alerts are not designed in such a way that they constitute a solicitation of professional employment, then they do not need to contain the words "Advertising Material" on them. Rule 7.3(c) does not require the firm's web-site to have the words "Advertising Material" prominently displayed on it. The firm's logo items also do not have to have the words "Advertising Material" displayed on them.

Notice of Petition for Readmission to the Utah State Bar by Joseph Fox

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Readmission ("Petition") filed by Joseph Fox in *In re Fox,* Fourth Judicial District, Civil No. 010402146. 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.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has produced a compendium of ethics opinions that is available to members of the Bar in hard copy format for the cost of $20.00, or free of charge off the Bar's Website, www.utahbar.org, under "Member Benefits and Services." For an additional $10.00 ($30.00 total) members will be placed on a subscription list to receive new opinions as they become available during the current calendar year.

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Please allow 2-3 weeks for delivery.

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill ten vacancies on the Utah State Bar Ethics & Discipline Committee. The Ethics & Discipline Committee is divided into four panels which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint shall be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court upon recommendations of the Bar Commission.

Please send resume, no later than April 26, 2002, to:
John C. Baldwin
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

What About the Supreme Court's Advisory Rules Committees?

by Matty Branch

Article VI, Section 4 of the Utah Constitution provides the Supreme Court with the authority to adopt rules of procedure and evidence to be used in the state courts as well as rules governing the practice of law. To assist the Court with these responsibilities, the Court established a Supreme Court Advisory Committee in each of the following areas: civil procedure, criminal procedure, juvenile court procedure, appellate procedure, evidence, and the rules of professional practice.

Since their establishment, the Advisory Rules Committees have provided invaluable assistance to the Bench and Bar by proposing needed amendments to the various rules and by reviewing submitted petitions urging specific rule changes or additions. The Supreme Court strives to have each committee broadly representative of the legal community, and each committee roster currently includes practicing lawyers, academicians, judges, and court personnel. The Supreme Court is also interested in geographic diversity on its committees and urges lawyers who live off the Wasatch Front to apply when vacancies arise. Below are the current membership lists for each of the Advisory Rules Committees.

Vacancies on the committees are announced in the *Utah Bar Journal.* The notice specifies the committees which have vacancies, the method for submitting applications, and the application deadline. The Supreme Court reviews the applications and appoints those individuals it believes are best suited to serve on the committees. Members are appointed to serve staggered four-year terms. The Chief Justice selects a chair from among the committee's members. Chairs serve a two-year term but may be reappointed for multiple terms in the Court's discretion.

Committees meet at the direction of the chair, on an as-needed basis (usually monthly), to discuss and vote upon proposed rule changes and to prepare written recommendations to the Supreme Court. Several of the committees hold their meetings at noon, others in the late afternoon. Each committee votes upon and finalizes its rule recommendations and committee notes and then submits them to the Administration Office of the Courts. The Administrative Office of the Courts publishes the committee's final recommendations for a 45-day public comment period. At the expiration of the comment period, the Administrative Office of the Courts compiles all of the written comments received and forwards them to the appropriate committee chair. The chair convenes a meeting of the committee for the purpose of reviewing the public comments and discussing and voting upon appropriate modifications to the rules. Once the committee has reviewed the public comments and voted upon final modifications to the proposed rules, it sends a copy of the committee's final proposals, a summary of the public comments, and the committee's recommendations in response to the comments to the Supreme Court. The Supreme Court then considers the committee's proposals and adopts, modifies or rejects those proposals.

The Supreme Court is indebted to the members of its Advisory Rules Committees for the time, effort, and wisdom they contribute, and it extends its sincere thanks and well wishes to all past and present committee members. Bar members who have not considered applying for membership on an Advisory Rules Committee are urged to do so the next time vacancies are announced. Questions or comments regarding the Advisory Rules Committees may be directed to Matty Branch, Appellate Court Administrator, c/o Utah Supreme Court, P. O., Box 140210, Salt Lake City, Utah 84114-0210; telephone number 801-578-3900.

MATTY BRANCH is a graduate of the University of Utah Law School and is currently the Appellate Court Administrator and the Supreme Court's liaison to its Advisory Rules Committees.

Supreme Court Advisory Board Rules Committees

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Utah Multijurisdictional Practice Rule

In October of 2000, the Multijurisdictional Practice ("MJP") Task Force was established by the Board of Bar Commissioners to examine whether or not the present practice of admitting lawyers to the Utah State Bar was serving the public, the legal profession, and the needs of clients. Another factor prompting the formation of the Task Force was the fact that Utah had been invited to join with the neighboring states of Washington, Oregon, and Idaho to participate in a "Pacific Northwest Coalition" which would cooperate on licensing issues and streamline the admission of attorneys practicing in Coalition states. The Board asked the MJP Task Force to investigate whether or not it made sense for Utah to participate in the Pacific Northwest Coalition.

In light of the fact that American society and business today are less defined by geography, and lawyers increasingly find themselves representing clients who have a presence in multiple jurisdictions, the trend has been for states to allow lawyers from other states to be licensed to practice law within their borders without having to retake a bar exam. This streamlined process of admission is referred to as "reciprocity." Of the approximately 55 U.S. lawyer licensing jurisdictions, over one-half (29 jurisdictions) allow reciprocal admissions. Currently, Utah does not offer reciprocity to attorneys from other states. Under Utah's licensing rules, even attorneys who have been practicing for five years or more are required to take the essay portion of the bar exam before they can be licensed to practice.

After reviewing the issue of reciprocity, the MJP Task Force concluded that offering reciprocal admissions would be beneficial in a number of ways. First, it simplifies the admission process for lawyers who have a reasonable level of prior experience, and allows attorneys more freedom to relocate to other areas of the country. Thirteen of the states that offer reciprocity do so under a policy of "if your state lets our attorneys in, we will let your state's attorneys in." Thus, by adopting reciprocity, Utah would not only be allowing outside attorneys an easier licensing option, but Utah attorneys would have the opportunity to move to other parts of the country and be licensed in other states that have reciprocal admission rules.

Second, with reciprocity in place, clients who do business in a number of states can ask the lawyers who represent them to get licensed in these other states. This prevents the client from incurring the expense and inconvenience of hiring a second law firm to assist them with their legal problems. Third, easing licensing requirements for practicing attorneys recognizes that with new technology, law practice is no longer restricted to "state-based" practitioners. Computerized legal research allows attorneys to easily cross boundaries and familiarize themselves with state-specific case law, codes, and administrative rules as needed.

Finally, it is possible to incorporate a number of requirements into the reciprocity rule to insure that clients and the public at large are protected. The following requirements have been incorporated into the proposed rule: (1) completion of a minimum number of years of practice as an attorney, (2) graduation from an ABA-approved law school, (3) passage of the bar examination in at least one state, (4) establishment of the applicant's good moral character, (5) attendance at a minimum of fifteen hours of continuing legal education classes in Utah within six months of licensing to ensure out-of-state attorneys are educated on the rules of practice, key substantive law differences, and the ethics rules of Utah, (6) be subject to disciplinary action in Utah, and (7) comply with all other applicable requirements of Bar membership, including payment of licensing fees.

The proposed rule, as published below, was drafted by the MJP Task Force after referencing the reciprocity rules of 20 other states and incorporates a good deal of the ABA's Model Rule on Reciprocity. The rule utilizes a two-tier system that provides for two different practice requirements, one for Pacific Northwest states and another for all other states who offer reciprocity to Utah attorneys. The two-tier system is necessary because the Coalition states have already established a three-year practice rule, while the ABA Model rule and the majority of other states utilize a five-year practice rule. In order to be part of the Pacific Northwest Coalition, it is necessary that Utah's rule establish a lower years-of-practice rule for attorneys from Oregon, Washington, and Idaho than is set for attorneys applying from other U.S. jurisdictions.

The MJP Task Force presents this proposed rule to the Utah State Bar for comment. If the majority of Bar members favor reciprocity, the rule will be presented to the Board of Bar Commissioners for approval. If approved by the Board, a petition will be filed with the Utah Supreme Court. Court approval is necessary before the rule goes into effect. **All comments regarding the proposed reciprocity rule are welcome. Remarks may be mailed to**

the Utah State Bar at 645 South 200 East, Salt Lake City, Utah 84111, or e-mailed to the Deputy General Counsel in charge of Admissions, Joni Dickson Seko. Her e-mail address is joni.seko@utahbar.org. Comments may also be sent by facsimile to (801) 531-0660. The comment period runs through April 2, 2002.

PROPOSED RULE FOR ADMISSION OF LAWYERS LICENSED IN OTHER STATES OR TERRITORIES OF THE UNITED STATES OR THE DISTRICT OF COLUMBIA TO PRACTICE LAW IN UTAH

1. An applicant may, upon motion, be admitted to the practice of law in this jurisdiction if the applicant has been admitted to another state, territory or the District of Columbia where admission by motion is authorized and the applicant meets the requirements of 1(a) through (11) of this rule.

   The applicant shall:

   (a) Have been admitted by bar examination to practice law in another state, territory, or the District of Columbia;

   (b) Hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the degree was conferred;

   (c) Have been substantially and lawfully engaged in the active practice of law in Idaho, Oregon or Washington for no less than three years, and have been substantially and lawfully engaged in the practice of law in one of the aforementioned states for any three of the four years immediately preceding the date of the filing of application for admission under this rule.

   (d) An applicant who is engaged in the active practice law in the District of Columbia or in a state or territory other than Idaho, Oregon, or Washington may file for admission under this rule if he or she has been substantially and lawfully engaged in the practice of law in such jurisdiction for five years, and has been substantially and lawfully engaged in the practice of law for any five of the seven years immediately preceding the date of the filing of application for admission under this rule;

   (e) Has received a passing score on the Multistate Professional Responsibility Examination as established by the Board of Bar Commissioners ("Board") of the Utah State Bar;

   (f) Present satisfactory proof of both admission to the practice of law and that he or she is a member in good standing in all jurisdictions where currently admitted;

   (g) File with the application a certificate from the entity having authority over professional discipline for each jurisdiction where the applicant is licensed to practice which certifies that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter;

   (h) Present satisfactory proof demonstrating that he or she have been substantially and lawfully engaged in the practice of law for the applicable period of time;

   (i) Establish that the applicant possesses the good moral character and fitness requisite to practice law in the State of Utah and evidence of his or her educational and professional qualifications;

   (j) Establish that the state, territory, or District of Columbia which licensed the applicant allows the admission of licensed Utah lawyers under terms and conditions substantially similar to those set forth in these rules, provided that if the state, territory, or District of Columbia requires Utah lawyers to complete or meet other conditions or requirements, the applicant must meet a substantially similar requirement for admission in Utah;

   (k) Pay upon the filing of the application the fee established for such admission; and

   (l) File a duly acknowledged instrument, in writing, setting forth his of her address in this State and designating the Clerk of the Utah Supreme Court as his or her agent upon whom process may be served.

2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed in advance of bar admission to the Utah State Bar be accepted toward the durational requirement:

   (a) Representation of one or more clients in the private practice of law;

   (b) Service as a lawyer with a local, state, or federal agency, including military service;

   (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judge in a federal, state, or local court of record;

(e) Service as a judicial law clerk; or

(f) Service as corporate counsel.

3. For the purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

5. All applicants admitted to practice law pursuant to this rule shall complete and certify no later than six months following the applicant's admission that he or she has attended at least fifteen hours of continuing legal education on Utah practice and procedure and ethics requirements. The Board of Bar Commissioners may by regulation specify the number of hours of the required fifteen hours that must be in particular areas of practice, procedure, and ethics. Included in this mandatory fifteen hours is attendance at Utah's Ethics School. This class is offered twice a year and provides six credit hours. The remaining nine credit hours must be made up of New Lawyer Continuing Legal Education ("NLCLE") courses. Twelve of the fifteen hours may be completed through self-study by access to Utah's on-line education system. The above fifteen hours will apply towards the twenty-seven hours required per compliance period.

6. All applicants admitted to practice law pursuant to this rule shall be subject to and shall comply with the Utah Rules of Professional Conduct, the Rules Governing Admission to the Utah State Bar, the Rules of Lawyer Discipline and Disability and all other rules and regulations applicable to members of the Utah State Bar.

7. All applicants admitted to practice law pursuant to this rule shall be subject to professional discipline in the same manner and to the same extent as members of the Utah State Bar. Every person licensed under this rule shall be subject to control by the courts of the State of Utah and to censure, suspension, removal or revocation of his or her license to practice in Utah.

8. All applicants admitted to practice law pursuant to this rule shall execute and file with the Utah State Bar a written notice of any change in such person's good standing in another licensing jurisdiction and of any final action of the professional body or public authority referred to in 1(g) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person.

9. If, in the judgment of the Utah Supreme Court, it is in the best interest of the State of Utah to discontinue reciprocity with other states, such decision may be implemented immediately by order of the Court.

10. **Form and Content of Application.**

(a) A reciprocal applicant shall file an application for admission to the practice of law with the Office of Admissions. The applicant must provide a full and direct response to questions contained in the application in the manner and time prescribed by the Rules Governing Admission to the Utah State Bar. The Board may require additional proof of any facts stated in the application. In the event of the failure or the refusal of the applicant to furnish any information or proof, or to answer any inquiry of the Board pertinent to the pending application, the Board may deny the application.

(b) An application shall include an authorization and release to enable the Board to obtain information concerning such applicant. By signing this authorization and release, an applicant waives his or her right to confidentiality of communications, records, evaluations, and any other pertinent information touching on the applicant's fitness to practice law as determined by the Board.

11. **Timing of Application and Admission.**

(1) A reciprocal application may be filed at any time.

(2) Upon approval of the application by the Board of Commissioners, the Board shall recommend to the Supreme Court the admission of the applicant to the Utah State Bar. Candidates who meet the requirements herein stated in this rule and who have paid to the Utah State Bar the membership fee for the current year, will have their name placed on a Motion for Admission to the Bar. Motions for Admission are presented to the Utah Supreme Court three times a year, October, February and May.

20th Annual Bob Miller Memorial Law Day 5K Run/Walk

April 27, 2002 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

Presented by the Utah State Bar Law-Related Education and Law Day Committee

"Pass The Torch To 'and Justice for all'"

Sign-Up On-Line, By Mail, In Person. Sign-up the easy way. Try on-line registration at **www.utahbar.org.** Deadline for preregistration is April 19, with a registration fee of $20 ($10 for the new Baby Stroller Division, see below). Or send or deliver in person the completed registration form with fee to: Law Day Run/Walk, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111. Race day registration will be held from 7:00 a.m. to 7:45 a.m. with a registration fee of $25 ($12 for the new Baby Stroller Division, see below).

Helping To Provide Legal Aid To The Disadvantaged. Your race registration fee helps provide much needed legal aid to the needy and disabled. Please consider a charitable contribution over and above the registration fee, too. Attorneys are encouraged and challenged to contribute the charge for two billable hours. Everyone, please dig deep! Funds benefit clients of Utah Legal Services, Legal Aid Society of Salt Lake, and Disability Law Center.

When? The 20th Annual Run/Walk will be held Saturday, April 27, 2002 at 8:00 a.m. Arrive early, stretch out, warm-up and renew acquaintances (or simply stare down the competition). T-Shirts, race numbers, and race packets with goodies should be picked up in front of the Law School between 7:00 a.m. and 7:45 a.m.

Where? The Run/Walk begins (and ends!) near the front of the S. J. Quinney College of Law at the University of Utah (just north of South Campus Drive on University Street (1350 East)).

Parking. With the Olympics far behind us, parking should be no problem. We urge you to park in the parking lot next to the Law Library at the University of Utah Law School. This lot (about 1400 East) is accessible on the north side of South Campus Drive, just east of University Street. (It's just a little west of the stadium.) Trax should be available from downtown Salt Lake at approx. 6:00 a.m.

The Course. Same as last year, the 5K Run/Walk course will be a scenic route through the University of Utah campus, minus everyone's favorite "heartbreak hill" on 100 South. For a course map, follow the links from **www.utahbar.org.**

Prizes For Some; Rewards For All. We'll all be rewarded and feel great for having participated in a worthy cause–- and for having exercised so early on a Saturday morning. For those who want more, the top finishers in each age group (male and female) will receive awards and accolades and a prize will be given to the firm with the fastest team. Teams consisting of five runners (with a minimum of two female racers) can register to compete for the fastest overall time. All five finishing times will be totaled, and a special trophy will go to the winning team's firm or organization. Please be sure to specify your team designation on your registration form – there's no limit to the number of teams an organization may have. Eg., Ray, Quinney Team A, RQ Team B, etc.

The Race For Sitters – And Those Without "Sitters". No one should be left out of the fun. For those non-runners, non-walkers and non-exercisers, we introduced two years ago the **Chaise Lounge Division** for your friends and family who really enjoy supporting their runners and walkers while exercising their . . . well, not their legs. Now they can register, don a spiffy T-shirt, pick up goodies, enjoy refreshments, and win prizes. So much for so little! The Chaises will have their own special start (ready, set, SIT!), moving mile markers, and a finish line that sweeps across the sitters. (Chairs not included). And we want this year's Run/Walk to be a Family Affair. So for those who can't find a babysitter for the little ones . . . run with them (better yet, bring the sitter and register the sitter, too!) Register yourself and the little ones in our new **Baby Stroller Division** (strollers are welcome, but to get a t-shirt and goodies, you must register your little ones). The pre-registration fee for the Baby Stroller Division is $10 and the Race day registration fee is $12. Special prizes will be awarded to the top participants to cross the finish line (after completing the race course, of course) pushing a baby stroller. So, there's really no excuse to not involve the whole family in this year's event . . . from baby to granny and gramps!

Charitable Competition. Once again, this year's event will have a "charitable competition." Designed to encourage camaraderie within firms or other organizations in the Utah legal community, but not limited to law firms – any organization can compete. Also designed to raise money for the "and Justice for all" campaign. The 1999, 2000 and 2001 Competition Champion was the Salt Lake City law firm of Manning Curtis Bradshaw & Bednar, which had the greatest number of individual registrants for the Race. Congratulations, once again! But there's no rule that they *have to* win. So . . . to become charitable champion this year, focus on recruiting as many registrants from your office or organization as possible. The greater the number of registrants, the more funds we can donate to "and Justice for all." The group that recruits the most paid registrants wins! Simple, huh? Recruit within your organization or outside. Recruit your astrologist, your manicurist, your podiatrist, your personal shopper . . . anyone. As long as they register, **and they fill in your group's name as the recruiter,** your organization gets credit. And remember, with the **Chaise Lounge Division** and our new **Baby Stroller Division,** there's no excuse not to enter.

The Legend of Bob Miller. Bob Miller was a partner at Richards, Brandt, Miller & Nelson. During a morning run in 1983 Bob was struck and killed by a car near his home. Bob led the way in many ways, including running, and for the past 20 years, the Run/Walk has been held in his honor. This is the **20th and last year** the Run/Walk will be held in his name (though it will continue to be run in his memory), so be there when the gavel comes down on the passing of the torch from Bob Miller to "and Justice for all"!

Registration – 20th Annual Bob Miller Memorial Law Day 5K Run/Walk

Saturday, April 27, 2002 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

One registration form per entrant, please (except Baby Stroller Division)

Please send this completed form and registration fee to Law Day Run/Walk, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. Make checks payable to "Law Day Run/Walk". If you are making a charitable contribution, you will receive a receipt for that portion of your payment directly from "and Justice for all."

Registration Information

Last Name ______________________ First Name______________________

Address ____

City, State, Zip ____

Daytime Phone ______________________ E-mail Address ______________________

Age on April 27, 2002 ______________________ Birth Date (MM/DD/YR)________/________/________

Recruiting Organization **Speed Competition Team**

______________________ ______________________

(must be filled in for charitable competition credit) (team name)

Shirt Size

❑ Child S ❑ Child M ❑ Child L ❑ Adult S ❑ Adult M ❑ Adult L ❑ Adult XL ❑ Adult XXL

Both long-sleeved t-shirts and tank tops are available this year, through pre-registration only. If you'd like one, please specify and add $5 to your payment total. ❑ Long-sleeved t-shirt ❑ Tank top

Division Selection

Division	Male	Female	Division	Male	Female	Division	Male	Female
Baby Stroller	A ❑							
14 & under	B ❑	Q ❑	35-39	G ❑	V ❑	60-64	L ❑	AA ❑
15-17	C ❑	R ❑	40-44	H ❑	W ❑	65-69	M ❑	BB ❑
18-24	D ❑	S ❑	45-49	I ❑	X ❑	70-74	N ❑	CC ❑
25-29	E ❑	T ❑	50-54	J ❑	Y ❑	75 & over	O ❑	DD ❑
30-34	F ❑	U ❑	55-59	K ❑	Z ❑	Chaise Lounge	P ❑	EE ❑

Payment Amount

Preregistration (must be received by April 19, 2002)	$ 20.00
Long-sleeved t-shirt or tank top ($5.00 extra if chosen)	$ 5.00
Baby Stroller Division Registration (please indicate shirt size) ❑ 12m ❑ 18m ❑ 24m ❑ Child XS	$ 10.00
Charitable Contribution to "and Justice for all" (you will receive a receipt for tax purposes)	$ __________
Total Payment	**$** __________

❑ Check to "Law Day Run/Walk"

Charge my ❑ Visa or ❑ MasterCard

Name on Card ______________________________

Account Number ______________________________

Expiration Date month _____ year _______

Waiver and Agreement

In consideration of the privilege of participating in the Law Day Run/Walk, I waive and release from all liability the sponsors and organizers of the Run/Walk, the USATF and USATF-Utah, and all volunteers and support people associated with the Run/Walk for any injury, accident, illness, or mishap that may result from participation in the Run/Walk. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that the entry fees are not refundable.

Date: ____________ Signature/Adult Entrant ______________________________

Signature/Guardian ______________________________

Print name of Guardian for minor entrant ______________________________

for more info and rules, look for link at www.utahbar.org

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Discipline Corner

DISBARMENT

On December 4, 2001, the Honorable Lee Dever, Third Judicial District Court, entered Findings of Fact and Conclusions of Law disbarring Stephen G. Bennett from the practice of law for violation of Rules 1.2(a) (Scope of Representation), 1.4(a) (Communication), 1.15(a), (b), and (c) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

Bennett represented the defendants in a small claims action. A default judgment was entered against them and Bennett said he would move to have this set aside. Bennett informed his clients that he had had the default judgment set aside and settled the case in their favor. Bennett failed to obtain authorization from his clients to settle the case and misrepresented the actual amount of settlement. His clients repeatedly requested a copy of the settlement agreement and the settlement check, but Bennett failed to respond.

The Office of Professional Conduct received an informal complaint from Bennett's clients and repeatedly requested that he respond to the allegations, but Bennett failed to respond. Bennett continued to fail to cooperate when the matter was brought in District Court.

ADMONITION

On January 10, 2002, 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 was administratively suspended from the practice of law for failure to pay annual Utah State Bar licensing fees. During the period of administrative suspension, the attorney represented a client in court. The court was later made aware of the administrative suspension and required to continue the one-day trial.

ADMONITION

On December 17, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.7(b) (Conflict of Interest: General Rule) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired by a social worker who was acting as an adoption agency in arranging an adoption. The attorney later learned that the social worker was not licensed as an adoption agency with the State of Utah and could not charge adoption fees. The attorney then undertook representing the birth mother in the same adoption. There was no evidence that the birth mother consented to the representation, after consultation about the conflict of interest.

Mitigating factors include: no prior disciplinary record and cooperation with the Office of Professional Conduct.

ADMONITION

On January 7, 2002, 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), 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to collect a debt. The debtor filed bankruptcy. The attorney agreed to file a proof of claim, but the bankruptcy court never received it. The attorney moved offices without communicating with the client. The client filed another proof of claim, but it was disallowed as a late filing. Subsequently, the attorney was able to rectify the situation so that the client could file a proof of claim.

ADMONITION

On December 6, 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) and (b) (Communication), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to represent a client in a criminal matter and a related civil matter. The client made a check payable to the paralegal who worked in the attorney's office. The attorney failed to make reasonable efforts to ensure the paralegal's conduct was compatible with the attorney's professional obligations. The attorney failed to keep the client reasonably aware of the status of the cases and failed to explain matters so that the client could make informed decisions regarding representation. The attorney failed to promptly respond to the Office of Professional Conduct's requests for information.

ADMONITION

On December 12, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 3.5(c) (Impartiality and Decorum of the Tribunal), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a defendant in a civil matter. The attorney filed a Notice to Submit for Decision and Request for Hearing. The court telephoned the attorney informing the attorney that it did not have jurisdiction. Without reviewing the judge's ruling, the attorney prepared orders in two cases, and sent them for approval to opposing counsel. The opposing counsel refused to sign the proposed orders because they did not accurately reflect the judge's ruling. The attorney filed the proposed orders at court, conducted ex parte conversations with a visiting judge, and obtained the temporary judge's signature on the orders.

ADMONITION

On December 7, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 5.5 (Unauthorized Practice of Law), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was administratively suspended for failure to pay annual Bar licensing dues. During the period of the suspension, the attorney continued to practice law. The attorney failed to timely provide the OPC with responses to its requests for information, and failed to attend a Screening Panel hearing.

Mitigating factors include: depression during the period of suspension, for which the attorney sought medical treatment.

ADMONITION

On December 6, 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 was administratively suspended for failure to comply with mandatory legal education requirements. During this period of suspension, the attorney continued to practice law.

ADMONITION

On December 17, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.15(b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a personal injury case. The attorney and the client agreed that a portion of the settlement proceeds would be withheld to clear an outstanding debt to a doctor. The attorney negligently failed to pay the debt to the doctor from the settlement proceeds and instead sent a settlement check directly to the client. The client understood that the medical bill had been settled.

STAYED SUSPENSION

On December 17, 2001, the Honorable Donald J. Eyre, Fourth Judicial District Court, suspended attorney Karen Allen from the practice of law for a period of three months for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The entire period of suspension is stayed.

Allen was retained to assist a client in a child support matter. Allen prepared and filed a Petition to Modify Existing Order on her client's behalf, but failed to have it served upon the client's ex-wife. Allen failed to keep her client informed about the status of his matter and failed to return his telephone calls. Allen failed to respond to the Office of Professional Conduct's ("OPC") requests for information concerning her client's complaint against her. In December 1999, the OPC received a second complaint concerning Allen, and Allen failed to respond to the OPC's requests for information.

Mitigating factors include: absence of prior record of discipline, absence of dishonest or selfish motive, and remorse.

ADMONITION

On January 16, 2002, 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), 1.15(b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to collect debts owed to a company. The company requested a full accounting of the collections from the attorney. The attorney provided a partial accounting but failed to provide a full accounting of the remaining accounts, despite repeated requests from the company and its new attorney.

15th Anniversary of the Utah Court of Appeals[1]

by Judge Norman H. Jackson

Introduction

The seven founding judges of the new Utah Court of Appeals took their oaths of office on January 17, 1987. Utah became the thirty-seventh state to organize a court of appeals. The first was Ohio in 1851 and the last was Mississippi in 1995.[2] In 2004, Nevadans will vote on the formation of a state appellate court.[3] Our initial judges and limited staff were required to expend enormous effort to simultaneously set up the court, begin processing one-half of the Supreme Court's one-thousand case backlog and take on new filings. In order to survive and succeed, the judges adopted the motto, "We Are Driven."

To date, the judges of the Utah Court of Appeals have disposed of 11,000 appeals. During 2001, 753 appeals were filed. The flow of cases in the pipeline has produced constant pressure on judges and staff. It has been said that "necessity is the mother of invention." Indeed, the court has been required to be innovative to meet Utahns' demands for justice on appeal. The court was designed to absorb all increases in appellate filings by the appointment of additional judges while the number of Supreme Court justices would remain at five.[4] However, due to creative solutions, the court's caseload continues to be managed with seven judges. Still, the court maintains a reputation for high quality opinions and the expeditious disposition of cases.[5] Recently, Utah Supreme Court Justice Michael J. Wilkins echoed this appraisal:

> The Court of Appeals has established itself as an able and efficient supplier of appellate finality in all but the most unique cases. The Supreme Court backlog has evaporated, with the Court informally restricting itself to between 100 and 120 opinions each year. Cases at issue (ready to be calendared for argument and decision by the court) in both the Supreme Court and the Court of Appeals wait little more than 30 days to be scheduled for decision.[6]

Utah's Appellate Court System

At the end of the tenth anniversary article, *see* Endnote 1, I stated that collocation at the Matheson Courthouse at 450 S. State Street would present new opportunities to fine-tune Utah's appellate system. In the spring of 1998, the Supreme Court came down from the State Capitol Building and the Court of Appeals moved over from the Mid-town Plaza. The fifth floor of the new courthouse was designed to accommodate both courts. The Supreme Court occupies the south wing and the Court of Appeals occupies the north wing. In between, administrative staff is housed and courtrooms are located. Filings for both courts are received at the same counter.

In anticipation of the move, the new position of Appellate Courts Administrator was created on January 1, 1997. Marilyn (Matty) Branch was appointed and continues in that position to the present. She supervises operations of Utah's appellate courts with the assistance of Pat H. Bartholomew, clerk of the Supreme Court, and Paulette Stagg, clerk of the Court of Appeals.

At the Matheson Courthouse, the Board of Appellate Judges can quickly and conveniently convene as needed. The Board consists of all twelve appellate judges and justices. Further, when justices need to recuse themselves from Supreme Court cases, Court of Appeals judges rotate to fill most of those slots. Since moving to the Matheson courthouse, Court of Appeals judges have sat for justices ninety-eight times. Currently, two former Court of Appeals judges, Justice Leonard H. Russon and Justice Michael J. Wilkins, sit on the Supreme Court, enhancing the cooperative working relationship between the two courts.

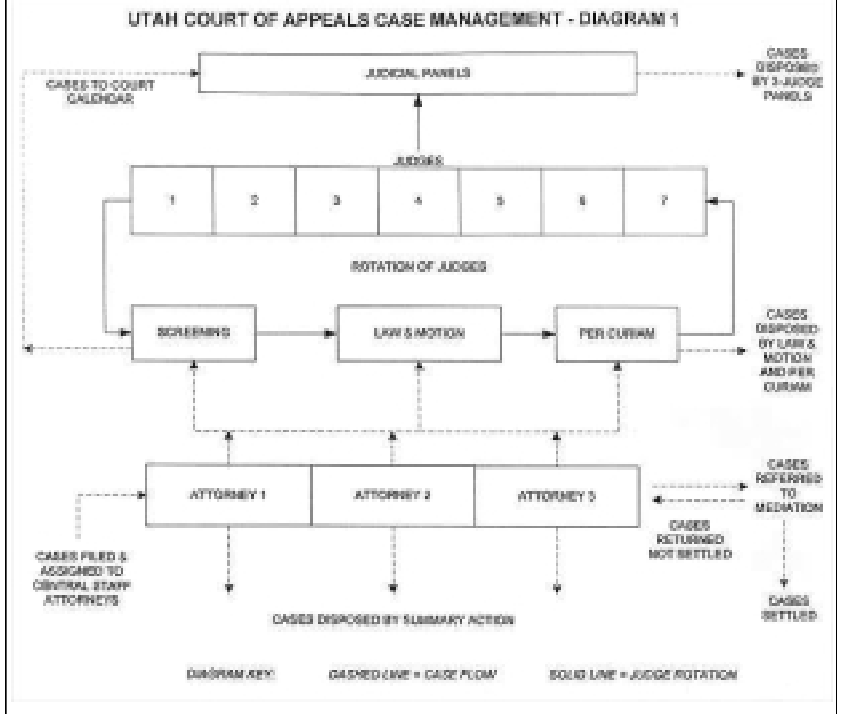
From the inception of the court, annual workshops have been held to examine court operations, do long-range planning, and encourage collegiality. Later, both courts began conferencing together annually for the same purposes.

JUDGE NORMAN H. JACKSON was appointed to the Utah Court of Appeals in 1987 by Governor Norman H. Bangerter. He is presently serving as the court's Presiding Judge.

Often, after rigorous debate, the judges on a Court of Appeals panel agree to write opposing opinions for consideration by the Supreme Court and to invite review of first impression issues. Thus, substantial groundwork is laid for the Supreme Court to build upon. The statute that created the system anticipated that interplay of this kind would take place.[7]

Outreach

Prior to interviews with Governor Norman H. Bangerter in 1986, each Court of Appeals judge applicant received a stack of papers regarding proposed court operations. One task force recommendation was entitled "Oral Argument in Remote Areas." "Remote" was defined in a way that excluded only Salt Lake County. When I interviewed with Governor Bangerter, I said that in my mind Escalante and Enterprise were remote locations, not Odgen and Provo. He said some people think West Valley (his residence) is remote. In any event, because the court has statewide jurisdiction, the judges agreed with the concept of taking the court to the people who live outside Salt Lake County.



Each year we have three "travel calendars." Oral arguments are calendared away from our Salt Lake City courtroom. Our first "circuit" was in Richfield on June 26, 1987. We have conducted sessions in the following cities, some more than once: Brigham City, Cedar City, Coalville, Fillmore, Logan, Manti, Monticello, Ogden, Price, Provo, Richfield, and St. George. Our next session is scheduled at St. George on March 21, 2002. Typically, we arrange a luncheon meeting with the local bar association, including open discussion of the appellate courts. Further, an invitation is extended to local criminal justice students and others to attend court. Afterward, a question and answer session is held in the courtroom or on local campuses.

Creation of Appellate Mediation Office

Before the 1998 move to the Matheson Courthouse, the Appellate Board approved creation of a mediation office at the Utah Court of Appeals. In the 1980's, mediation was viewed narrowly as an acceptable tool to reduce appellate case backlog. However, the judges of the court agreed early on that mediation was an effective means of disposing of cases in the regular course of business.

We surveyed state and federal mediation programs and found different but successful models nearby at the Idaho Supreme Court and the Tenth Circuit Court of Appeals. Robert E. Bakes, former Chief Justice of the Idaho Supreme Court and David Aemmer, Chief Circuit Mediator for the Tenth Circuit Court of Appeals, were invited to meet with us in 1994. After their presentations, we adopted the Tenth Circuit model as better suited to Utah's needs. Moreover, some Utah lawyers were familiar with that program, having participated in it, and they were supportive of appellate mediation. Further, legislators encouraged us and provided funding to proceed.

In January 1998,[8] we converted one of our vacant judge's chambers into the appellate mediation office, and the court began referring cases to mediation.[9] While it is an official arm of the Utah Court of Appeals, the mediation office operates independently of the court. This is done to preserve confidentiality of the process. Karin S. Hobbs, then a central staff attorney, was appointed as the Chief Appellate Mediator. Michele Mattsson, also a central staff attorney, succeeded her in August, 2001. Presently, Jan Muir serves as administrative assistant.

After docketing statements are filed, some appeals are randomly selected for mediation. Most mediations are conducted at the Appellate Mediation Office; others by phone or at outlying locations. Participation in the first mediation conference is mandatory, but settlement is voluntary. The mediator acts as a neutral in assisting the parties to design their own mutually agreeable solutions. Parties are encouraged to work "outside the box," to mend relationships, to vent, to reduce tension, to come to an

understanding and to set a future course of action.

Our statistical analysis reveals that our mediators have enjoyed unqualified success. Each year of operation, they have received about a hundred appeals and settled over fifty percent.[10] Accordingly, when compared to judge-authored dispositions, our mediator disposes of about the same number of cases at about half the cost.

Caseload Management and Statistics

Diagram 1, Utah Court of Appeals Case Management, illustrates how cases flow through the Court of Appeals on different tracks to final disposition. Cases can be (1) concluded by summary action, (2) settled through mediation, (3) decided by the law and motion panel, (4) decided by the per curiam panel or (5) decided by a regular judicial panel. Each panel consists of three judges. Judges continuously rotate on and off of all of the panels. However, the screening function – selection of cases for the court's oral argument calendar – is performed by a single judge in concert with our central staff attorneys. This process enables every judge to be involved in every function on a regular schedule, thus providing consistency and continuity in treatment of cases.

The court's caseload continues to be maintained in "current" status. Current means that when appellate counsel have filed their briefs, thus placing the appeal "at issue," their case will be placed on the court's calendar for final action in about two months. Backlog is defined as those cases that wait longer than this to appear on our calendar. Accordingly, we have no backlog at present.

In 2001, attorneys used 270 days (median number of days) between filing their notices of appeal and completion of briefing. In 2001, the average days used by judges between submission for decision and issuance of decision was seventy-two days for published opinions and twenty-eight days for memorandum decisions.

A few cases will, at any time, be waiting for the calendared argument/conference date or under advisement waiting for decisions to be written and issued. However, there is no accumulation of cases awaiting disposition by judge-authored opinion or memorandum decision. Occasionally, disposition time will exceed normal limits. This most often occurs when judges on a panel disagree. Then, a variety of scenarios can develop that require additional time, including change in authorship of the main opinion and preparation of separate opinions.

In the fiscal year ending June 30, 2001, attorneys filed ninety-two petitions for writs of certiorari. During the same year, the Supreme Court granted eighteen petitions. These figures are consistent with past practice. Further, statistics for the last five years reveal that the Supreme Court has reversed the Court of Appeals in twenty-four cases. This reversal rate is consistent with the Supreme Court's fifteen-year average of 5.5 reversals per year. Thus, Court of Appeals decisions stand as final about ninety-five percent of the time. Accordingly, the Court of Appeals is the court of last resort in the vast majority of cases.

Court Personnel

I would like to include the names and terms of service for all judges, clerks of court, and central staff attorneys and mediators who have served on the court. Each has made a unique and positive contribution to the court's mission.

Judges of the Court of Appeals and Terms of Service

Russell W. Bench: 1987- present; Judith M. Billings: 1987 - present; Richard C. Davidson: 1987 - 1990; Regnal W. Garff: 1987 - 1993; Pamela T. Greenwood: 1987 - present; Norman H. Jackson: 1987 - present; Gregory K. Orme: 1987 - present; Leonard H. Russon: 1990 - 1994; James Z. Davis: 1993 - present; Michael J. Wilkins: 1994 - 2000; William A. Thorne, Jr.: 2000 - present.

Each of the judges has had the opportunity to serve as associate presiding judge and as presiding judge, except our newest member, Judge Thorne.

Clerks of the Court and Their Terms

Former Court of Appeals clerks include: Tim Shea 1987 - 1988; Mary Noonan 1988 - 1994; Marilyn Branch 1994 - 1997; Julia D'alesandro 1997 - 1999. Current clerk of the court, Paulette Stagg, has served since 1999.

Central Staff Attorneys and Their Terms

Karen S. Thompson: 1987 - present; Clark R. Nielsen: 1987 - 1995; Karin S. Hobbs: 1989 - 1994, 1995 - 1999; Julia C. Attwood: 1992 - 1997; Michele Mattsson: 1995 - 2001; Kristin Clayton: 1997 - 1998; Michele Engle-Boyd: 1998 - 2000; Catherine Johnson: 2000 - 2001; Lori Lewis: 2001 - present; Susan Denhardt: 2001 - present.

Further, I note the valued service of Lead Legal Secretary, Kathy Vass, who joined our staff in August 1987 and remains on board. At present, our staff also includes Legal Secretaries Cathie Montes and Deborah Hernandez; and Deputy Clerks Holly Martak, Tashaw Haws, Janet Alexander and Jennifer Walker.

Looking to the Future

As we anticipate the future of Utah's appellate system, various refinements will continue to be considered. Perhaps, at some point,

it may be prudent to adopt a pure certiorari system patterned after the federal system.[11] As population burgeons statewide, it may be advisable to divide the state geographically into court of appeals divisions as has been done in many states. A nearly comparable example of this is Arizona, with north and south divisions located in Phoenix and Tuscon, respectively. Nearer at hand could be restoration of the ability of panels of the Court of Appeals to render a decision in conflict with a decision of another panel of the court, as provided in Rule 46 of the Utah Rules of Appellate Procedure. The rationale for this provision was that robust debate and conflict between panels would provide the Supreme Court with superior analysis to consider on certiorari review. However, *State v. Thurman*[12] and its progeny placed a prohibition on this practice that could be reconsidered. This restraint on Court of Appeals panels placed development of our appellate system in an unnecessary box. As Pieter Deyl has said: "History is a drama without a denouement; every decision glides over into a resumption of the plot."[13]

1 *See also* Norman H. Jackson, *The Fifth Anniversary of the Utah Court of Appeals,* 5 Utah Bar J. 18, 18-19 (1992); Norman H. Jackson, *Tenth Anniversary of the Utah Court of Appeals,* 10 Utah Bar J. 19, 19-22 (1997). I acknowledge the able assistance of my law clerks, Mark Lehnardt and Kelly Peterson, and BYU Law School extern, Ryan Tenney. This article is my own product and should not be viewed as expressing any position of the Court of Appeals.

2 *See* The Council of Chief Judges of the Courts of Appeal, *Directory of Judges of State Courts of Appeal* 150, 209 (West 2001).

3 *Courting Disaster?,* Las Vegas Review-Journal, Dec. 27, 2001, at 6B.

4 In 1984, an appellate courts task force recommended the addition of two judges to the Court of Appeals. The Matheson Courthouse was designed with chambers for ten Court of Appeals judges and their clerks.

5 Brian Maffly, *Appellate Courts: Second Chances at Justice for Utah Citizens,* The Salt Lake Tribune, Oct. 25, 1998, at J7.

6 Justice Michael J. Wilkins, Strengthening the Utah Judiciary: The 1984 Revision of Article VIII of the Utah Constitution (May 22, 2001) (unpulished manuscript, on file with author).

7 *See* Utah Code Ann. §§ 78-2a-1 to 78-2a-5 (1986).

8 Justice Michael J. Wilkins and Karin S. Hobbs, *Utah's Appellate Mediation Office Opens January, 1998-A New Option for Case Resolution at the Utah Court of Appeals,* 10 Utah Bar J. 25 (1997).

9 *See* Utah R. App. P. 28A.

10 In the start up year the settlement rate was about 40%. Last year, the mediator position was vacant from April to August, due to a hiring freeze. Thus, the number of appeals referred was lower but the settlement rate remained constant.

11 A substantial step could be taken by simply amending the jurisdiction of the two appellate courts. Currently, the Supreme Court receives and sifts all civil appeals, except domestic and juvenile. A small number are retained and the rest transferred ("poured over") to the Court of Appeals. This process results in some duplication of work and delay in final dispositions.

12 846 P.2d 1256, 1268-70 (Utah 1993).

13 As quoted in *The Oxford Book of Aphorisms* 325 (John Gross ed., Oxford University Press, 1983).

Utah State Bar

At the suggestion of the Bar Commission, a group of "Golden Years" lawyers met recently to consider the formation of a Bar section for senior lawyers. The response to a preliminary mailing, sent out by the organizing committee, was positive and enthusiastic.

The organizing committee felt a Senior Lawyer Section would provide a great opportunity to share thoughts with and enjoy the good fellowship of the more mature Utah lawyers, to plan social and sporting outings, and to consider worthwhile public service projects.

All Utah State Bar members, active or inactive, who have reached age 65 would qualify. **We invite you to join in moving this project to completion and becoming a charter member.** Please send your name, address and $25 to Senior Lawyers Section at the Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

Call any officer with your questions, comments, suggestions, or for further information:
Richard C. Dibblee: 521-2552 • D. Frank Wilkins: 328-2200 • Frank J. Gustin: 531-7444

The original organizing committee includes: Sidney G. Baucom, Harold G. Christensen, Ray R. Christensen, Glenn C. Hanni, Donald B. Holbrook, Carman E. Kipp, James B. Lee

The Legal Assistant Division Needs You!

The Legal Assistant Division ("LAD") needs you! The LAD and our profession are facing significant challenges in the areas of licensing, independent practice, the unauthorized practice of law, compensation, liability insurance, benefits, and the like. This is your profession, and these challenges and the changes wrought thereby will affect you and your career. I urge your participation in the business and leadership of the LAD. There are numerous director positions open this year. There is a lot of work to be done on both new and on-going projects. Perhaps the position as Chair of the LAD is not something you envision for yourself; however, there are many other opportunities to serve on the Board of the LAD and, as a member of the Board, to actively participate in the development of plans to deal with the various projects and challenges of the LAD and our profession. Not only that, it is an excellent opportunity to meet other members of our profession.

You will shortly receive in the mail nomination forms for the upcoming elections. The voting will take place at the LAD annual meeting that is tentatively set for June 7, 2002. There are six director positions open including: Region II Director (SLC area), Region III Director (Central Utah area), and Region IV Director (Southern Utah area), plus three "at-large" positions.

Nominations must be in writing, signed by three active members of the LAD, and in the case of a regional director, the nominating members and the nominee must be from the region for which the nomination is being made. All candidates must meet the qualifications for membership in the LAD and must be a LAD member in good standing. The nomination form requires the signatures of three active members of the LAD. If you don't have three members close at hand, feel free to contact one of the current officers or directors. Any of them will be pleased to aid in securing a nomination.

Leadership qualities include: vision, an open mind, sound judgment, knowledge, enthusiasm, creative thinking, a thick skin, good interpersonal relations, empathy, etc. Different types of leaders are needed for different situations. The charismatic leader, for example, will be vital when the industry or profession is facing a crisis and strong and influential leadership is needed to build a unified voice for the association. The peacemaker may serve the organization better when it is healing from internal wounds among members. The diplomat may be the answer when the primary mission is to achieve a goal in concert with other groups.

All of these qualities and attributes should be kept in mind when looking for future leaders. No one person will have all of the qualities. That is why a good mixture of various forms of leadership is critical for maintaining a well balanced board of directors.

Under strong leadership, the LAD will remain a respected presence at the Bar. The leadership of an organization cannot be stagnant. There must be a constant flow of new blood into the leadership ranks. I have no doubt there are many LAD members who have the qualities, background, education and experience to make great leaders. I strongly encourage you to nominate somebody (yourself included) as a director.

And, while we're on the subject of participation, by now you will have received your invitation/information from the Utah State Bar for the mid-year meetings to be held March 21-23, 2002, in St. George. LAD is again sponsoring a full-track of CLE that will be beneficial for both legal assistants and attorneys alike. The LAD sponsored CLE will include Kathy Berg, Director of the Utah Department of Commerce, Division of Corporations, regarding recent statutory changes that affect filings with that department; Attorney Brian Florence, who will discuss Collaborative Lawyering; and Lane Swainston of Swainston Consulting Group, who will discuss Laying the Foundation of a Construction Law Case.

This year, too, we will again have our annual legal assistants' luncheon on Friday afternoon, March 22. If you register for the entire Bar meeting, the cost is only $10; otherwise, it is $15 for only the luncheon or at the door. Our panel topic will concern licensing and the unauthorized practice of law. Our lunch is an excellent opportunity to participate in this very important dialogue and get some additional CLE credit. I hope to see you there.

NOMINATION FORM
Board of Directors – Legal Assistant Division, Utah State Bar

NOMINATIONS MUST BE RECEIVED BY 5:00 P.M. ON APRIL 6, 2002, BY ONE OF THE FOLLOWING:

FAX FORM TO: Elections Committee
Legal Assistant Division
(801) 531-0660

MAIL FORM TO: Elections Committee
Legal Assistant Division
645 South 200 East
Salt Lake City, Utah 84111

In accordance with Article V, §4 of the Bylaws, nomination forms must be signed by three active members of the LAD. Any candidate for a director position must meet the qualifications for LAD membership and must be a LAD members in good standing at the time of the nomination and election. No candidate may seek election to more than one director position

We, the undersigned, hereby nominate the following person(s) for the position(s) indicated:

For **Region II Director** (Salt Lake City area – Salt Lake, Tooele, Summit Counties) (1 open position):*

Name: ______________________ Name: ______________________

Address: ______________________ Address: ______________________

______________________ ______________________

For **Region III Director** (Central Utah area – Juab, Millard, Utah, Daggett, Wasatch, Duchesne, Uintah Counties) (1 open position):*

Name: ______________________ Name: ______________________

Address: ______________________ Address: ______________________

______________________ ______________________

Region IV Director (Southern Utah area – Beaver, Iron, Piute, Kane, Washington, San Juan, Grand, Emery, Wayne, Garfield, Sanpete, Emery, Carbon Counties) (1 open position):*

Name: ______________________ Name: ______________________

Address: ______________________ Address: ______________________

______________________ ______________________

For **Director at Large** (3 open positions):

Name: ______________________ Name: ______________________

Address: ______________________ Address: ______________________

______________________ ______________________

Each position is a two-year term commencing June 8, 2002.

______________________ ______________________ ______________________
Signature of Nominating Member | Signature of Nominating Member | Signature of Nominating Member

______________________ ______________________ ______________________
Printed Name | Printed Name | Printed Name
Bar No. ____________ | Bar No. ____________ | Bar No. ____________

*Both the nominee and the nominating member must be from the region for which the nomination is being made.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/06/02	**ADR Academy: Lawyering in ADR Processes – Part V Advocacy in Private Caucuses and Facilitating Resolution.** 5:30 – 6:45 pm $30 Young Lawyers, $40 ADR Section members, $50 all others.	1.5
03/21, 22, & 23/02	**Utah State Bar Mid-Year Convention.** Keynotes for the 2002 Convention: Justice Michael J. Wilkins and Wisconsin Chief Justice Shirley S. Abrahamson. $180 early registration, $90 for Legal Assistant Division members, $140 for Legal Assistants, $210 for all after 2/21/02.	10 (up to 6 NLCLE, 1 ethics, and the Salt Lake Co. Bar Film)
03/28/02	**NLCLE Workshop: Criminal Law Basics.** 5:30 – 8:30 pm. $45 young lawyers, $60 all others.	3 CLE/NLCLE
03/28/02	**Land Use.** Craig Call, State of Utah Ombudsman. 8:30 am – 4:30 pm. Price: TBA.	7
03/29/02	**Native America Law Symposium: Taxation on Reservations, Civil Jurisdiction Over State Officers on Reservations and Civil Jurisdiction of Tribal Courts Over Business Activities.** Sponsored by Government Law Section, Federal Bar Association, ENREL Section, Utah State Bar. S. J. Quinney College of Law Moot Court Room. 8:30 am – 4:30 pm. Price: $125 section member, $150 non-section member, call for student pricing.	Approx. 7
04/18/02	**Annual Real Property Section Seminar, Case Updates, Legislative Report.** 8:30 am – 12:00 pm. Price: TBA.	3
04/18/02	**NLCLE Workshop: Law Practice Management, Rainmaking and Technology.** 5:30 – 8:30 pm. $45 new lawyer, $60 others.	3 CLE/NLCLE
04/19/02	**Annual Collection Law Seminar**	
05/02/02	**Annual Corporate Counsel Spring Seminar.** Agenda pending. 9:00 am – 1:30 pm	4

Unless otherwise indicated, register for these seminars by: calling in your name and Bar number to 297-7033 or 297-7032 OR faxing your name and bar number to 531-0660, OR on-line at www.utahbar.org/cle

REGISTRATION FORM

Pre-registration recommended for all seminars. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis.

Registration for (Seminar Title(s)):

(1) ____________________ (2) ____________________

(3) ____________________ (4) ____________________

Name: ____________________ Bar No.: ____________________

Phone No.: ____________________ Total $ ____________________

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard ☐ AMEX Card No. ____________________

Exp. Date ____________________

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.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

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

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

POSITIONS AVAILABLE

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

Executive Director, Utah Judicial Conduct Commission – Career Service Exempt Position. $80,000–$90,000 yearly depending on experience. The Utah Judicial Conduct commission is currently recruiting for an Executive Director. Responsible for reviewing complaints filed against judges. Directs preliminary and full investigations of complaints. Prepares the notices of formal proceedings charging judges of misconduct. Notifies complainants and judges regarding deposition of complaint. Represents the Commission before the Utah Supreme Court. Oversees the daily operations of the Commissions office and supervise staff. Coordinate tasks force for review of questions being presented by Commission. Prepares the Commission's yearly budget, drafts legislation and presents to legislative committees. Interact with public and media regarding issues concerning Judicial Conduct Committee. Meets monthly with Commission to present case status reports. **Job Requirement/Skills:** Must be an active member of the Utah State Bar, excellent legal skills, an understanding of the Utah Rules of Evidence. Excellent oral and written communication skills; excellent organizational and planning skills. The successful applicant will commence work June 1, 2002. To apply submit a current resume and letter of interest to the Sharon Reynolds at 3120 State Office Building, Salt Lake City, UT 84114. Opening Date: 1-18-02. Closing Date: 4-1-02.

Paralegal – Regional law firm seeks full time Paralegal for Wealth Management practice group in its Salt Lake City office. Ideal candidate is highly organized, self-motivated with strong writing skills, ability to work with only general supervision. Experience with probate and trust administration, real property transfers, maintaining and preparing accountings, estate, gift and fiduciary income tax returns preferred. Excellent work environment and benefits. Send salary history and resume to Office Manager, Stoel Rives LLP, 201 South Main Street, Suite 1100, Salt Lake City, UT 84111. email:llguzy@stoel.com

OFFICE SPACE/SHARING

Law firm in historical Salt Lake Stock and Mining Building at 39 Exchange Place has two office spaces available, $500 to $850. Amenities include family law referrals from yellow page picture ad, receptionist, conference room, fax, copier, law library, parking, kitchen and optional DSL connection. Contact Joanne or Richard at 534-0909.

South Valley Office Space for Rent. Eliminate daily commute downtown and hassles. Build your practice in a pleasant/relaxed atmosphere. Minutes to Sandy District Court. Experienced legal secretary, new copy machine, fax machine, phones available, easy parking. Sole practitioner has immediate space available. Phone 979-4242.

Downtown Office Space Available: Attorney office in existing law office suite. Work area for secretary, large reception area, work room with kitchen facilities, conference room/library etc. 19 East 200 South, Penni Schumann 521-3464.

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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.

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Estate Planning: Online estate planning and business planning information is now available at www.utahestateplanners.com. Services provided for individuals, businesses and attorneys. Fixed fee and independent contractor relationships available. For more information, contact pchristensen@utahestateplanners.com

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