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

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

COVER: Tulips, by first-time contributor, Dana Sohn, staff attorney for the U.S. Small Business Administration, Salt Lake City.

The *Utah Bar Journal* is published monthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others, $45.00; single copies, $5.00. For information on advertising rates and space reservation, call or write the Utah State Bar offices.

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April 2002

Letters Submission Guidelines:

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

Cover Art

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

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

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

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

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Submission of Articles for the Utah Bar Journal

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

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

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

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

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

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

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

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

Lionel Frankel

by Scott Daniels

The legal profession in Utah is not as rich as it was just one month ago. We have lost one of our finest teachers and exemplars of the law: Professor Lionel Frankel. Some of us spent a few hours in the classroom with him some time during Lionel's long tenure. Maybe we learned enough Criminal Law or Commercial Code to get us through the Bar Exam. But more importantly, those of us who have known Lionel through the years have learned something about how one should live.

At one time, all attorneys, upon passing the Bar took the Attorney's Oath. I'm not sure just when and why we stopped administering this Oath. Perhaps because it is impossible to enforce. But Lionel personified it.

The Oath states: "I will abstain from all offensive personalities." I saw Lionel in many different situations, some very stressful. I never saw him exhibit the least offense, even when sharply disagreeing. He was an uncommonly decent, humble, and gentle man, and yet he was effective in advocating his cause.

At a reception given by the law school to honor his retirement and to announce the new pro bono program, one speaker after another praised and eulogized him. When it was Lionel's turn to respond, he stood at the lectern and said "Thank You" and sat down. It was shortest speech I ever heard, and it was typical of Lionel Frankel humility.

The Oath states: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed..." About two years ago, Lionel called to ask me to serve on the board of a new innocence center he was founding. He explained the center was patterned after similar centers in other parts of the country, and the purpose was investigating the claims of prisoners who maintained their innocence. He said that new DNA technology, not used when these prisoners were convicted, could now be used to determine for certain whether they were truly guilty, and those who were not could be cleared and released from unjust and mistaken imprisonment. My first impression was: "that's all I need, another board to serve on" And my first question was: "just how much time do you expect this to take?"

You see, I was inclined to reject, for a consideration personal to myself, the cause of the defenseless or oppressed. Lionel, on the other hand would never have rejected the cause of the defenseless. The truth is: it would never have even crossed his mind. His nature was that he could never rest as long as there was one person in the world who was the victim of injustice. In this life, of course, that meant he could never rest at all. And that is exactly what he did. He worked and fought against injustice until he died.

Some of us spent some time in Lionel Frankel's classroom; but all Utah lawyers can say we have learned from Lionel Frankel.

President-Elect & Bar Commission Candidates

President-Elect Candidates

DENISE A. DRAGOO, ESQ.,

Denise A. Dragoo, Esq., is a partner with the law firm of Snell & Wilmer L.L.P., Salt Lake City, Utah. Ms. Dragoo received her Bachelor of Arts from the University of Colorado in 1973 with honors, is a 1976 graduate of the S.J. Quinney College of Law at the University of Utah and received a Masters of Law in Environmental Law in 1977 from the University of Washington, School of Law, in St. Louis, Missouri. Ms. Dragoo is the Utah State Bar's Trustee to the Rocky Mountain Mineral Law Foundation. Prior to joining Snell & Wilmer, Ms. Dragoo was in private practice for eighteen years and served as a Special Assistant Utah Attorney General for the Department of Natural Resources.

Ms. Dragoo was first elected to the Board of Bar Commissioners in 1991, currently serves on the Bar's Executive Committee and is completing her fourth term (10th year) with the Board. Ms. Dragoo is Past-President of the Legal Aid Society of Salt Lake and serves on the Board of Directors of the "and Justice for all" campaign. She has served as President and member of the Executive Committee of Women Lawyers of Utah, Inc., and was recognized as Woman Lawyer of the Year in 1997. She has received the Lawyer of the Year Award and the Distinguished Service Award from the Environmental and Natural Resource Section of the Utah Bar. Ms. Dragoo is past Chair and a current member of the Judicial Conduct Commission and is a Fellow of the American Bar Foundation. She is a member of the Utah Supreme Court, the U.S. District Court, the Tenth Circuit and the Federal Circuit Court of Appeals.

A Choice for President-Elect
by Denise A. Dragoo

Dear Colleagues:

Having had the privilege of advocating for and participating in the first election of President-Elect, I appreciate the forum which the campaign provides for improving communications between Bar members and the Commission. With this in mind, I ask for your vote for President-Elect.

Currently, I am serving my twenty-fourth year of practice, my tenth year on the Bar Commission and am a member of the Executive Committee. As President-Elect, I will work to:

Keep Direct Election of the President-Elect
I chaired the Elections Procedures Committee, which recommended direct election of the President-Elect by Bar members rather than the Bar Commission. Despite rejection by the Commission, the recommendation ultimately prevailed when the Utah Supreme Court mandated direct election in December, 2000. The first election was held in 2001 and it is critical to keep this election procedure in place to direct campaigns to members, rather than exclusively to the Commission.

Implement a Communications Plan
I chaired the Special Committee on Communications which developed a communications plan of direct benefit to all members of the Utah Bar. The plan conveys to members the Commission's objectives, annual calendar and long-range plans for governance. This interactive plan reflects input from members, section and committee leadership, the Supreme Court and the public at large. A leadership retreat with sections, committees and other Bar associations sets the Commission's direction for the year. The Commission collaborates with Bar leaders to develop a legislative agenda, communicated through Bar lobbyists, to the Utah State Legislature. The communications plan cycles again in spring with the campaign of the President-Elect and direct election of Bar leadership.

Partner with the Supreme Court to Improve Bar Relations with the Legislature and the Public
The selection of new Chief Justice Christine Durham provides the Commission with a tremendous opportunity to further its partnership with the Utah Supreme Court. The Court is working with the Bar and the Legislature to address unauthorized practice, the delivery of legal services, rule changes to implement multi-disciplinary practice and has formed a committee to address civility. As President-Elect, I would encourage this renewed spirit of judicial activism and work closely with the Court to improve Bar relations with the Legislature and the public.

Stay Focused on Core Regulatory Functions
The hiring of a law-trained admissions director has improved the professionalism of the admissions process. I would further streamline admissions appeal procedures by relying on the

Character and Fitness Committee to conduct those hearings subject to a narrow standard of Commission review. I support adoption of a rule to allow the Utah Bar to forge reciprocity agreements with the Oregon, Idaho and Washington state bar associations to facilitate multi-jurisdictional practice. Despite recent rule changes, the disciplinary process grinds too slowly. We need to increase the prosecutorial discretion of the Office of Professional Conduct to eliminate frivolous complaints, add two more screening panels to process complaints and recoup attorney fees when OPC prevails in disciplinary cases to reduce the fees of Bar members.

Voluntary Pro Bono Services

The Commission should continue to encourage voluntary contributions of members to support civil legal services through the "and Justice for all" campaign. This collaborative fund-raising effort by the Disability Law Center, Legal Aid Society and Utah Legal Services has provided statewide pro bono services. While these funding efforts are unaffiliated with the Bar, I support partnering between the Bar and these agencies to pair volunteer attorneys with pro bono needs and provide statewide pro bono training.

Please call me at (801) 257-1998 or send me an e-mail at ddragoo@swlaw.com with your suggestions on the policies and direction of the Utah Bar. I would consider it an honor to receive your vote and a privilege to serve as President-Elect of a strong and diverse Bar association supported by a professional quality staff.

DEBRA MOORE

Debra Moore is the Employment Section Chief in the Litigation Division of the Attorney General's Office. She is a 1983 graduate of the S.J. Quinney College of Law at the University of Utah, where she was a Leary Scholar and served as Executive Editor of the *Journal of Contemporary Law* and the *Journal of Energy Law & Policy.* Before joining the Attorney General's Office in 1991, she was a shareholder in the law firm of Watkiss & Saperstein, where she concentrated primarily on product liability litigation. Ms. Moore also taught Legal Writing at the S.J. Quinney College of Law at the University of Utah from 1993 to 1996, and served a clerkship with the Honorable Gordon R. Hall, former Chief Justice of the Utah Supreme Court.

Ms. Moore is an ex-officio member of the Bar Commission and is the Bar representative on the Utah Judicial Council. She is a member of the Council's Policy and Planning Committee, and a former member of its standing committee on Judicial Performance Evaluation. From 1994 to 2000, she served two elected three-year terms as Bar Commissioner from the Third District. As a Commissioner, she was a member of the Executive Committee for two years, a member of the Long-Range Planning Committee, co-Chair of the Commission's Equal Access to Justice Committee, Chair of the First Hundred Celebration Committee, and a member of the Review Committee for the Rules of Lawyer Discipline and Disability. She is a former Chair of the Utah State Bar Litigation Section and former member of the Executive Committee of Women Lawyers of Utah.

Dear Colleagues:

I ask you to vote for me for President-Elect of the Utah State Bar. After nineteen years of legal practice in a variety of settings and many years of active involvement in the Bar's governance, I am well-informed about the issues facing the legal profession and the administration of justice in Utah. I certainly don't pretend to have all the answers; but I'm willing to devote the time and energy to effectively advance the fundamental values and interests of the Bar and its members.

In recent years, the Bar has operated under the guidance of a comprehensive Long Range Plan. The plan spurred changes that increased our institutional continuity; improved our communication with and services to members, sections, and committees; and improved our relationships with the legislature and other external constituencies. The plan also helped to prepare the Bar and its members for many developments affecting legal practice, such as those reflected in the Multi-Disciplinary Practice recommendations, the Racial and Ethnic Fairness recommendations, the Multi-Jurisdictional Practice movement, and the Supreme Court's Study Committee on the Delivery of Legal Services (see the following bullet points for a brief report on these and other topics).

Now it's time to renew the plan, to anchor the changes, and to generate still further improvements. We must continue to identify and anticipate emerging trends in society and the legal profession to maintain our ability to respond thoughtfully rather than simply to react. By keeping our eye on the future while building upon our past, we will enhance the Bar's effectiveness and provide members the best value for their dues dollars.

Thank you for considering my candidacy for President-Elect.

Please call me at 366-0100 or send me an email at dmoore@state.ut.us with any questions or suggestions that you may have. I would be honored to receive your vote.

Sincerely,
Debra J. Moore

SOME ISSUES AFFECTING THE BAR MEMBERS

Civility and Professionalism. In response to a call by the Conference of Chief Justices, the Court recently established a committee Chaired by Justice Durrant to address concerns about a perceived decline in lawyer civility and professionalism. These issues affect the public perception of lawyers and the judicial system, the quality of legal representation, and Bar members' satisfaction with their personal and professional lives. The Court's leadership on these issues provides an essential component for meaningful change.

Multi-disciplinary practice ("MDP"). The Bar Commission adopted the report of its task force recommending that the rules of professional conduct be modified to allow lawyers to associate with non-lawyers to provide legal services that are ancillary to other services provided by the association (multi-disciplinary practice). The recommendations would extend the scope of existing duties of loyalty, confidentiality, independence, supervision of non-lawyers, and conflict of interest to MDPs. The Utah Supreme Court Committee on the Rules of Professional Conduct has opposed the recommendations, and the Court is currently considering the issue. For more information, go to www.utahbar.org and click on the hot button issue that appears at the bottom of the page.

Multi-jurisdictional practice ("MJP"). A Bar task force has requested your comments on a proposed rule that would grant reciprocal rights to practice in other states. Several states in the Northwest have already implemented reciprocal practice among themselves. For more information, please see the article published in the March 2002 *Bar Journal.*

Racial and Ethnic Fairness. The Utah Task Force on Racial and Ethnic Fairness in the Judicial System made specific recommendations to the Bar. The Bar has begun to carry out many of the recommendations, and in some cases has gone beyond them. For example, the Bar has provided the Bar staff, the Commission and other Bar leaders with training in cultural competency. CLE credit has been obtained for relevant seminars. I am a member of a committee appointed by the Bar Commission to further develop the Bar's response.

Admissions. The Bar has hired attorney Joni Seko as Deputy General Counsel in charge of Admissions and made substantial improvements in the administration of the bar exam and character and fitness review. Further refinements in the internal appeal process from decisions of the Character and Fitness Committee are under review. The Admissions Committee continues to review the bar examination itself and has made a preliminary recommendation to update the exam include a skills component.

Committee on the Delivery of Legal Services. Voicing concerns about unmet needs for legal services, the Utah Legislature amended the statute prohibiting the unauthorized practice of law and requested the Court to explore alternative means of delivery of legal services in four areas: standardized legal forms and technological innovations; charitable assistance by non-lawyers; representation of business entities by their officers; and assistance by "independent lay professionals." The Court has formed a committee, chaired by Justice Wilkins. Past Bar President David Nuffer, President-Elect John Adams, and Executive Director John Baldwin serve on the committee.

Bar Commission Candidates

First Division

N. GEORGE DAINES

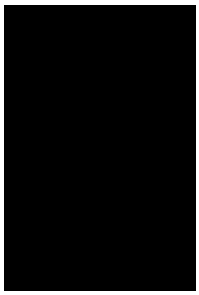
Uncontested Election . . .

According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

N. George Daines is running uncontested in the First District and will therefore be declared elected.

Third Division Candidates

Stephen Owens and E. Russell Vetter are running uncontested for two vacancies in the Third Division. According to Utah State Bar bylaws, in the event an insufficient number of nominating petitions are filed to require balloting in a division, the persons nominated shall be declared elected.



STEVEN OWENS

- Lived in Fairfax, Virginia and Montreal, Quebec prior to settling in Utah
- As an undergraduate student, one of 60 people nationwide to receive the Harry S. Truman Scholarship for leadership and public service
- Helped run his father's successful 1990 U.S. Congressional Campaign
- During law school, worked for the U.S. Department of Health & Human Services in Washington, D.C., and at the law firm of Clyde Snow & Swenson
- Graduated from the S.J. Quinney College of Law at the University of Utah in 1994
- Law clerk to current Chief Justice Richard C. Howe of the Utah Supreme Court
- Works in the four attorney firm of Epperson & Rencher, concentrating in medical malpractice defense
- Involved in the Law-Related Education Project for eight years, having taught seminars on the law and conflict mediation at Highland High, Hawthorne Elementary, Dilworth Elementary, Driggs Elementary, and many other schools
- Past President of the Young Lawyers' Division where he served as an ex-officio member of the Bar Commission
- Enjoys exploring Utah, swimming, and reading trashy lawyer novels
- Boy Scout leader and resident of Holladay
- Married to DawnAnn Owens, daughters Abigail & Lydia

Statement of Candidacy:

I would appreciate your vote for Bar Commission representative from the Third District. It is an exciting, yet intensely trying time to be a lawyer. Change is all around us: e-mail, computer research, flexible billing arrangements, lifestyle concerns, multi-district practice, multi-disciplinary practice, the need for equal pay and opportunities for women lawyers and lawyers of color, the increasing complexity of the law, entirely new areas of practice, old areas of practice that are disappearing, old ways of practicing that no longer work, non-lawyers giving legal advice on the Internet, law makers and a public who are sometimes hostile to lawyers, lawyers who are sometimes hostile to other lawyers, the need for mentors for young lawyers, low and even middle income individuals with little to no access to legal services, and the increasingly demanding client. Life as a lawyer can be a veritable pressure-cooker.

I want to help find solutions to these issues and I believe the Bar Commission is the right arena to do so. I have enjoyed my past activity in the Bar, and my association with other lawyers in a non-adversarial setting. I ask for your vote and welcome your input at sowens@erlawoffice.com or 983-9800.

E. RUSSELL VETTER

Education and Employment

Graduate, S.J. Quinney College of Law at the University of Utah

Bankruptcy Law Clerk, United States Bankruptcy Court, District of Utah

Associate, Biele, Haslam & Hatch

Senior Corporate Counsel, American Stores Company

General Counsel, First USA Paymentech

Associate General Counsel, Chase Manhattan Bank, USA

Sole Practitioner (since 2001)

Utah State Bar Membership and Service (present)
Utah State Bar Member Since 1986

Admissions Committee, Member and Co-Chair

Corporate Counsel Section, Member

Utah State Bar Service (past)
Character and Fitness Committee, Member and Co-Chair

Bar Examiner Committee, Member and Chair

Law Day Committee, Member

Bankruptcy Section, Member and Section Officer

To the Third Division Bar Members:

I need a favor. I need your vote for Bar Commission representing the Third Division. For the past twelve years I've been involved in the Bar's admissions process in various capacities. Presently, I am co-chair of the committee that oversees admissions to the Bar. Even though I've enjoyed my admissions work, I've been trying to retire from admissions without any success. I think I've found my retirement ticket by moving to a new area of Bar work. That's why I need your vote.

Seriously, I believe that my substantial admissions experience would be beneficial to the Commission as it considers several proposed reforms in the admissions process. In addition, my varied work experiences provide me with a broad perspective for the issues that affect many different members of the Bar. My work experience includes several years in private practice and as in-house counsel, which is listed in my bio.

Thanks for your support.

Sincerely,
E. Russell Vetter

Revised UCC Article 9: Utah "Filing Office" Update

by Kathy Berg

You have all dealt with the universally accepted Article 9 of the Uniform Commercial Code, which was adopted in the United States and many territories in 1972. Some subsequent changes were enacted in UCA §70A-2a-101 et seq. (leases) and UCA §70A-8-101 et seq. (investment securities). In 1998, the National Conference of Commissioners on Uniform State Laws along with the American Law Institute, approved a revised version of Article 9. The Utah Legislature passed Revised Article 9 in 2000, effective July 1, 2001. Although the revisions streamline methods of perfecting security interests and where to file, as well as other clarifications, it does not alter the basic structure established for security interests. You must still file a financing statement with the filing office.

We in the Division of Corporations and Commercial Code are charged with the responsibility of being the filing office for financing statements, which perfect certain security interests. (UCA §70A-9a-501) Section 5 of the Revised Article 9 gives the requirements for that filing. Sections 9a-501 through -511 describe what to file and §§ 9a-512 through -527 tell how to file. The filing of the financing statement merely puts third parties on notice to inquire about the existence and details of a security interest. (Russell A. Hakes, *The ABCs of UCC (Revised) Article 9 Secured Transactions,* (Amelia H. Boss ed., 2000), p. 34).

Financing statements have only 3 major parts, a debtor name, a secured party name and an indication of collateral, very simple. (UCA §70A-9a-502, *but see also* §70A-9a-516(b)). There are other indications on a financing statement to clarify the filing, if necessary. (*E.g.,* lessor/lessee designation). Subsequent filings may also be done to amend, continue or terminate the filing. The filing office is compelled to accept the filing if it meets basic statutory requirements. Utah has an online filing system that captures those basic components of filing (*see* www.utah.gov/commerce/ucc).

First – debtor name. (UCA §70A-9a-503). The debtor can be an individual or an organization. If the debtor is an individual, they must be listed with her or his whole legal name and no less than a last name. Generally, names are listed as prefix (Mr., Mrs., etc.), first name, middle name or initial, last name, and suffix (Jr., Sr., III, etc.). If the debtor is an organization, then the whole legal name must be entered along with organization type (corporation, limited liability company, limited partnership, non-registered entity, trust, etc.), jurisdiction of organization, and "organizational ID" file number. The entity file number can be found on our web site under *business name searches.* A DBA or assumed name is considered a separate name. (Be warned that the filing office will accept a filing that uses only a trade name, but that such a filing is defective under §70A-9a-503(3)). Both types of debtor must also list an address. This is the first time debtors have been distinguished between individuals and organizations.

Second – Secured party or secured party representative. (UCA §70A-9a-503). The secured party must list the legal name of the individual or organization and the full address. Each name must be listed independent of another. Alternatively, a single representative may be named for multiple secured parties.

Third – indication of collateral. (UCA §70A-9a-504). In the statute, the terminology "indicates the collateral covered" is intended to buttress the idea that the financing statement is designed simply to provoke further inquiry. (Russell A. Hakes, *The ABCs of UCC (Revised) Article 9 Secured Transactions,* (Amelia H. Boss ed., 2000), p. 37). The statute very specifically

KATHY BERG is Director of the Division of Corporations for the State of Utah.

states that only simple descriptions of collateral are needed. The security agreement creates the interest in the collateral and must independently completely identify the collateral. The collateral description in a security agreement must be much more specific than in a financing statement.

Once the financing statement is prepared, it is presented to the filing office, the Utah Division of Corporations and Commercial Code. The Division evaluates the filing on the statutory requirements for filing only. The Division does not establish the legal sufficiency of the security interest. (UAC §R154-002-111.1). The Division reviews the statutory requirements, whether the fee has been paid, and either accepts or rejects the filing. The Division only accepts filings on the national form. These forms are available in downloadable format on our web site at www.commerce.utah.gov, by clicking the "Corporations" link.

Exactly how is a filing done under Revised Article 9? UCC-I's can be filed by completing the national form and submitting it along with the filing fee to our office. We have limited resources in manpower and are diligently trying to keep current. Of great benefit to the filer is our new online filing system for UCC-I's and "In Lieu Of" filings (see www.utah.gov/commerce/ucc). The system enables you to enter your data online, edit, and submit the completed financing statement. Once the filing is submitted, the filer will be able to immediately print an official acknowledgement of the filing. Additionally, the online system is directly connected to our UCC database, so the filing immediately becomes searchable online. A UCC-III can only be filed by completing the national form and submitting it along with the proper filing fee to our office. UCC-III's must each be distinct in the transactions, *i.e.,* the program only allows one type of change per filing. File a separate UCC-III to change each debtor/secured party name or address, or to continue or to terminate. The only exception is that the collateral description may be amended along with another type of change. We plan to have online filing for UCC-III's shortly.

Correction statements were used in the early months of Revised Article 9 filing, but our interaction with other state filing offices revealed we were all using them improperly. Until the problems are sorted out, corrections are done on a UCC-III and no charge is made. Staff uses this method in-house, but these changes will not show up separately on a search. Only the correction will be shown.

All filings are indexed according to file number and debtor name. We look forward to future enhancements allowing indexing in other fields such as secured party or debtor city/state.

As you may have noticed, I have not mentioned attachments. These have been a real challenge in filings since 1 July 2001. The national forms do not provide for attachments. If additional space is needed for additional debtors or collateral description, there are addenda for each form. Because we no longer have the resources to image filings, only the information on the form is recorded. The Division will not reject a filing simply because it came in with attachments, but the data entry staff will ignore the attachments and will enter the information on the form exactly as it appears. In other words, if a filing is submitted on the national form and the collateral box says "see attached" and no other verbiage, that is what will appear as the collateral description on the filing in the database. Nothing from the attachments will be captured. Our staff will only capture 250 characters in the collateral description area per form and per addendum. Therefore, I encourage you to make a brief indication of collateral on the form and forego the lengthy descriptions many are used to providing. Better still, the online filing system allows you unlimited characters in your collateral description, in 4,000 character increments. The full description entered into the data base will be returned on a search request (*i.e.,* up to 250 characters per form or addenda for paper filings and 4,000 characters per form or addenda for electronic filings).

UCC searches can be performed online, but have only a "snapshot" of the filing and its history. We anticipate full functionality of the online search capability, including an online certified search, very soon. Currently, all certified searches must be done by completing the UCC-II form and submitting it to our office with the proper fee. There is more about searches later on.

The Division has also prepared a list of FAQs regarding filing of UCC-I's, which can be found on the web site. It gives an overview of the difficulties the Division has noticed since the advent of Revised Article 9 and will hopefully aid you in filing with our Division.

Rejection – (UCA §70A-9a-516). There are few reasons to reject a filing. See our rules, or the statute on our web site. It is not our responsibility to make sure your information is correct, only that it meet statutory requirements. We do not check spelling, legal names, correct addresses or any such activity.

There are a few more significant changes that should be mentioned. Signatures are no longer required for filing. Debtors themselves, not just secured creditors, can file termination statements. (UCA §70A-9a-513) Note that UCC-I records are only expunged one year after their scheduled lapse date, not when a termination statement is filed. Prior to lapse, the Division will report both the UCC-I and the termination statement. Therefore, it is up to other creditors to verify with the secured party that the termination statement was authorized. Electronic filings are official records. (UCA §70A-9a-519 and 9a-102(69); UAC §R154-002-110). Also, be aware that there is no longer any statutory reference to claiming purchase money lending priority; hence, no check-off box on the form. The Division has partnered with Utah Interactive, Inc. to provide a wonderful and useful UCC filing wizard and search page. Revised Article 9 does not change the need for a financing statement, but it dramatically changes how that is done. (Notice that I do not address where to file, *i.e.,* in which state, because the Division does not determine whether it is the proper filing office. Be aware, however, that the rules determining where to file changed on 1 July 2001.)

Searches. We search only what we are given: debtor names must be exact. The uncertified online search, however, allows some flexibility in that you can check several variations. Also, the online system allows you to search 24 hours a day, 7 days a week from the convenience of your home, office or any other location with Internet access. Since online filings are searchable immediately upon submission, we encourage that method of filing in order to have more complete searches. For paper financing statements delivered to the Division, we are running about one to two weeks behind in data entry. Therefore, certified searches cannot be completed until the in-house work catches up to them. The turnaround time for certified searches is directly tied to data entry to ensure a complete report. Non-certified searches are usually turned around in 24 hours.

Because we are using a data only filing system, there are no copies available. Images are not currently a part of our filing system. Again, it is imperative that the filer use the national form and use the financing statement as a notice of a secured transaction rather than a repeat of the secured transaction. When used properly, the filing becomes a notice of the debtor, secured party and an indication of collateral, *i.e.,* those elements the statute requires. Some of the legacy data which was converted to the new system (those filings submitted prior to 1 July 2001) are truncated since

that was how they were input in the old system. Also, some filings early in the new system are also truncated since there was a severe limit in the fields (55 character names and 250 character collateral descriptions). The Division is happy to help a filer correct any of these filings at no charge. Please notify us by submitting a UCC-III with a cover letter stating that it is a correction to a legacy filing. Search results will reveal the "alternative designation" fields, but not the box 10 "miscellaneous" information.

When submitting search requests, the statute requires that filers use the debtor's legal name (UCA §70A-9a-503) and the search will be done exactly as the name is submitted (UAC §R154-2-147). That is what the law intends. However, because of legacy data being indistinct and all of us trying to get used to a new way of doing this, the staff will do the search exactly as they receive it, but will also usually (and unofficially) try variations based on experience with the data being searched. Online searches allow an exact name search as well as "beginning with" searches. This allows some flexibility to the online searcher. The online search page is our main priority right now. We are trying to make it as complete a search as possible.

We continue to add new functionality online to make UCC filing and searches much easier for you. Soon, you will be able to perform a certified search and file UCC-III's online.

> *"In times of change, learners inherit the earth while the learned find themselves beautifully equipped to work in a world that no longer exists."*
> – Eric Hoffer, red-neck philosopher.

The Division is madly trying to meet the needs this new legislation has intended, but it will be impossible without input from the users and filers. We are changing even today, so anyone who is interested in helping us make useful decisions, I would love to hear from you. We were given very limited resources to implement this act, but anticipate some great strides in this new year. In the meantime, please feel free to give some much needed advice on practical ways to continue to implement Revised Article 9. We are constantly changing and updating the filing system for Utah. In fact, some things may change before this article goes to print. We encourage all our users to check the web site often and to give us feedback. There has been great progress made, and I look forward to much more progress in the future.

Trademarks 101

by Jennifer Ward

There are few, if any, business clients who will not need trademark consultation and advice at some time during the course of their representation. Trademarks[1] are the labels under which all goods and services are marketed and constitute valuable assets that can be assigned, licensed, or otherwise transferred. A business may spend substantial time and money in developing a trademark and marketing its products under the mark only to be found liable for unknowing infringement of a prior mark; or, may see the goodwill associated with its mark injured by the infringement of its mark by another. For a lawyer, the terrain of trademark issues is varied and extensive. This article serves to familiarize non-trademark lawyers with trademark law basics.

Identifying a Trademark.

A trademark is defined as any "word, name, symbol or device, or any combination thereof" used "to identify and distinguish" goods or services from those manufactured, sold or offered by others and to indicate the source of the goods or services.[2] Consequently, a trademark can take many forms, including the following:

- **words** (for example, the mark MOUNTAIN DEW VERTICAL CHALLENGE, for organizing ski and snowboarding races);
- **letters and/or numbers** (for example, the mark R4 for insulation fabric sold as a component of ski wear);
- **slogans** (for example, the mark SKI ABOVE ALL (this author's sentiments exactly) for operation of a ski resort and providing ski lessons);
- **logos and designs;**
- **color on a particular product or service** (for example, KODAK yellow background on photographic goods);
- **product and package configurations** (called "trade dress") (for example, the shape of a COCA COLA bottle; the exterior design and shape of a FERRARI; the shape of GOLDFISH crackers, and; the decor, menu and building design of a restaurant for aprés ski dining);
- **sounds** (for example, NBC tones); and
- **fragrance applied to goods.**[3]

The following are <u>not</u> considered trademarks:

An Internet domain name is not considered a trademark if it functions merely as a web site address used to locate your client on the Internet.[4] If, however, the domain name also serves as a source identifier for goods and services, then it is a trademark. For example, SKI.COM functions as a uniform resource locator but is also the name under which ski vacation packages are provided.[5]

Numbers or letters that are used only to indicate the size, style, quality, or capacity of a product are not trademarks.[6] For example, MARKER is a trademark for ski bindings, but the style number on each type of binding probably is not.

A trade name is the name used to identify the business entity and is not registrable as a trademark unless the name is also used to identify and distinguish the goods or services sold by the business.[7] For example, an on-line computer database providing ratings and review of ski equipment is offered under the mark SKI REVIEW but the tradename of the business is Consumer Review, Inc. Lawyers need to be careful, however, when advising clients on the adoption of business entity names because they may function as trademarks in addition to trade names.

The foregoing examples of trademarks and non-trademarks are very general classifications; ultimately, it is the facts and circumstances of each case and, particularly, how the mark is used on the goods or services and how consumers associate or perceive, or are likely to associate or perceive, the mark with the good and services that is determinative. A party is entitled to use as many marks as it chooses on a particular product or service so long as each mark is recognized as being an indication of source of the product or service. For example, Alta ski resort is recognized both by the word mark ALTA SKI AREA and its snowflake-type logo mark.

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Common Law, State, and Federal Trademark Rights.

Common Law.

Trademark rights are not created by state or federal registration of the mark but, instead, are created by actually using the mark in commerce to identify a product or service. Trademark rights are based on priority of use. This means that as between two users of a trademark, the senior user (first in time) is the owner of the mark. The senior user has superior rights in the trademark even if the junior user is the first to obtain state or federal registration of the mark. A common law trademark user has rights in the mark in the geographic area where the mark is being used as well as its "zone of natural expansion."[8] Although registration of a mark is not necessary, registration grants several procedural and substantive rights not available under common law.

State Registration.

The current session of the Utah Legislature has enacted the Registration and Protection of Trademarks and Service Marks Act,[9] effective May 6, 2002, to be codified at Utah Code Annotated section 70-3a-101 *et seq,* which will govern the registration and use of trademarks in Utah (and repeals Utah Code Annotated section 70-3-1 *et seq.*). This Act should be interpreted to "provide for the registration and protection of trademarks and service marks consistent with the federal system of trademark registration and protection"[10] which is discussed later in this article. A person seeking state registration must file an application with the Division of Corporations and Commercial Code and pay a regulatory fee. The application must include, among other things, a verified statement that the mark is in use and that to the best of the signatory's knowledge, no other person has registered, either federally or in the state of Utah, or has the right to use, the identical mark or a mark in such close resemblance as to be likely to cause confusion, mistake or to deceive.[11] The Division of Corporations and Commercial Code will examine the application and give the applicant an opportunity to respond to any objections or rejections.[12] Upon acceptance of the application, the Division the will issue a certificate of registration of the trademark.[13] The certificate of registration is valid for a period of five years, unless it is earlier canceled, and can be renewed for additional five year periods.[14]

The Act entitles the owner of a state registered mark to file an action to enjoin the "manufacture, use, display, or sale of any counterfeits or imitations of the mark."[15] The owner may also be awarded in some cases treble the amount of profits derived from, or damages suffered as a result of, the wrongful use of the registered mark, plus attorney fees, and the court may order that any counterfeits or imitations be destroyed.[16] Other benefits of state registration are that it puts others on notice of the registrant's use of the trademark, and is inexpensive. Although state registration is not without its benefits, and is the only option available to trademark owners who do not use the mark in interstate commerce, significantly more benefits are available to trademark owners under federal law.

Federal Registration: Benefits.

The federal trademark statute, called the Lanham Act, is found at 15 U.S.C. § 1051 *et seq.*

The benefits of federal registration (not available to state trademark registrants) include the following:

2. A Section 1(b) intent-to-use application allows an applicant to apply for registration of a trademark prior to actually using the trademark on goods or services.[17] The filing date of the application becomes the "constructive use date."[18]

3. A certificate of registration is prima facie evidence of the validity of the registered mark, registration of the mark, the registrant's ownership of the mark, and the registrant's exclusive right to use the registered mark in connection with the specified goods or services.[19] A certificate of registration may also be prima facie evidence that the mark is not confusingly similar to other registered marks, or that the mark has acquired distinctiveness.[20]

4. After five years of continuous use, the mark may become "incontestable" as conclusive evidence of the owner's right to use the mark so that the mark may be canceled only in limited circumstances.[21]

5. A federal registrant is entitled to use the ® which provides actual notice of the registrant's use of the mark.[22] This is significant because profits or damages under the Lanham Act can only be awarded if the infringer had actual notice of the registration.[23]

6. Federal courts have jurisdiction over claims of infringement of federally registered marks regardless of diversity of citizenship or amount in controversy.[24]

7. Registration is constructive notice nationwide of the registrant's use of the mark and claim of ownership.[25]

8. Federal registration confers rights upon the trademark owner nationwide which means the owner can stop infringing use of its mark anywhere in the United States,[26] whereas State registration gives the registrant, at most, statewide rights, and probably only rights in the area of use and recognition.[27] Treble damages, treble the amount of an infringer's profits, costs, and attorney fees may

be awarded in some cases for infringement of a federally registered mark.[28]

Federal Registration: Choosing a Registrable Mark.
There are two common hurdles to federally registering a trademark: (1) confusing similarity, and (2) descriptiveness.[29] With the enactment of Utah's Registration and Protection of Trademarks and Service Marks Act, these bumps may now be encountered by applicants for state registration as well.

1. Confusing Similarity.
A trademark will be refused federal registration if it "so resembles" another mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive."[30] When registration of a mark is applied for, the examining attorney conducts a search of the United States Patent and Trademark Office records for any registered marks, or marks for which registration is pending, that the examining attorney considers to be confusingly similar to the applied-for mark. The applicant then has the opportunity to submit an argument as to why no likelihood of confusion exists between the marks. The marks do not need to be identical, or be used on identical goods or services, to be deemed confusingly similar. For example, the mark K2 for filter cigarettes was found confusingly similar to the mark K2 for skis.[31] The oft-cited list of thirteen factors relevant to a determination of likelihood of confusion is set forth in *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357 (C.C.P.A. 1973), and includes, by way of example: the similarity or dissimilarity of the marks in sound, sight, and meaning; the relatedness of the goods or services used in connection with the marks; the similarity or dissimilarity of established channels of trade; and any instances of actual confusion.

Whether marks are deemed confusingly similar is a fact intensive determination made on a case by case basis. The owner of a prior, potentially confusing mark may be willing to enter into a consent agreement with the trademark applicant agreeing to the applicant's use of its mark and setting forth the reasons why the parties do not believe confusion is likely. Courts have held that such consent agreements "carry great weight" because the parties "are in a much better position to know the real life situation than bureaucrats or judges."[32] If the examining attorney is unpersuaded, registration will be refused.

The test of "'likelihood of confusion" is also the crux of common law and federal statutory trademark infringement and unfair competition claims. Upon the effective date of Utah's new trademark statute, this test will apply to state statutory infringement actions as well.

Because use of a trademark that is confusingly similar to another's mark is grounds for infringement, and also considering that the non-refundable application fee for federal registration of a mark is currently $325 per class of goods or services, prior to a client's adoption of a trademark (regardless of whether the client intends to apply for federal registration), lawyers should, at minimum, conduct an on-line "knock-out" search of the records of the PTO and advise their clients of the existence of any potentially similar marks and the potential for rejection of their application on those bases.[33] More thorough searches of federal, state, and various common law databases are available through professional trademark search firms at varying prices. Lawyers should advise their clients of the availability of these services and the extent of the search conducted should be determined by your client's risk willingness and the amount of time and money to be invested in, and the intended scope of use and advertising of, the mark. The importance of due diligence in adoption of a mark has been emphasized by recent federal decisions which have suggested that an attorney who does not at least advise its client to obtain a comprehensive trademark search may be liable for negligence constituting malpractice, and a client who fails to heed such advise may be liable for "willful" infringement.[34]

Clients should be advised that even if the examining attorney approves the mark for registration, there is a 30 day opposition period prior to issuance of a Certificate of Registration during which time another trademark owner may file an opposition to registration on the basis of confusing similarity. Once the mark is registered, the registration is subject to cancellation proceedings by anyone who believes it may be damaged by the registration. Therefore, paying for trademark searches at the outset may save costs of legal battles in the future. Of course, even comprehensive trademark searches do not provide a guarantee that no prior, conflicting marks exist but such searches do provide a certain level of comfort.

2. Descriptiveness.
Under Section 2(e) of the Lanham Act, a mark which "merely describes" the goods or services with which it is used is not registrable. Trademarks are categorized along a continuum from arbitrary/fanciful marks on one end, to suggestive marks, descriptive marks, and, finally, generic marks on the opposite end of the continuum.[35] Fanciful marks are comprised of unknown, made up words (for example, DYNASTAR for skis) or words which are no longer in common usage. Arbitrary marks are comprised of common terms being used with goods or services

that are unrelated to the term (for example, SPYDER for ski coats). Fanciful and arbitrary marks are always registrable. Suggestive marks are described as "those which require imagination, thought or perception to reach a conclusion as to the nature of the goods or services" as opposed to descriptive marks which describe "an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services."[36] The line between suggestive and descriptive marks is obscure and often-litigated. The distinction is important because while suggestive marks are always registrable on the federal Principal Register, descriptive marks can be registered on the Principal Register only upon proof that the mark has "acquired distinctiveness."[37] Generic names for the goods or services are not registrable as trademarks under any circumstances.[38]

Federal Registration Process.

The federal registration process begins with filing an application with the Patent and Trademark Office (applications can now be completed and submitted electronically). The applicant may file either an actual use application which requires that the mark is at use in interstate commerce at the time the application is filed, or the applicant may file an intent-to-use application which merely requires that the applicant have a bona fide intention to use the mark in interstate commerce in the near future. When an application is submitted, the application is assigned a serial number.[39] An examining attorney will review the application and notify the applicant of any reasons why the mark cannot be registered.[40] The applicant then has six months to correct any deficiencies, or otherwise respond to any objections raised by the examining attorney.[41] This procedure may be repeated until the examining attorney issues a final refusal or the applicant fails to respond.[42] If on examination or reexamination of an application, the trademark appears to be entitled to registration, the mark will be published in the Official Gazette triggering a thirty day public comment period during which any party who believes it will be damaged by registration of the mark may file an opposition.[43] If no oppositions are filed, or all oppositions are dismissed, then in the case of an actual use application, a Certificate of Registration will issue.[44] For intent-to-use applications, a notice of allowance will issue giving the applicant six months to file a statement of use attesting to use of the mark in interstate commerce (additional six month extensions are available),[45] and a Certificate of Registration will issue after the statement of use is filed.

After registration, the trademark owner must file a declaration of continued use or excusable nonuse of the mark between the

fifth and sixth year anniversary of registration, and within the year before the tenth year anniversary, or registration will be canceled.[46] Subject to timely filing these declarations, federal trademark registrations are for valid for a period of 10 years and may be renewed for additional 10 year periods.[47] Once registration has been obtained, a client should be advised to take steps to monitor and police its mark against any infringers.

The Role of a Trademark Attorney

Trademarks are a critical component of a successful business. A lawyer's role in this aspect of a client's business is no less critical. Prior to adoption of a trademark, the lawyer is responsible for advising its client to conduct a trademark search, and will often be relied upon to analyze the search results and advise the client accordingly. Once a client determines to go forward with using a trademark, the lawyer often represents the client throughout the trademark registration process, including responding to any bases for refusing registration raised by the examining attorney. Finally, once registration has been procured, a lawyer can provide for proper transfer of trademark rights, follow up with the client in maintaining trademark registration, and aid the client in defending against and prosecuting possible infringement claims.

As this article has shown, trademarks pervade even the snowy slopes where we find respite – from stepping into your powder boards, to purchasing the all-terrain lift ticket, to relishing making rolls after a rigorous day down the backside. In this era of intensive "branding," lawyers are confronted with trademarks at every turn of their practice.

1 The term "trademark" is used broadly in this article to include service marks.

2 *See* Lanham Act § 45, 15 U.S.C. § 1127.

3 Fragrances of products which are sold primarily for their scent such as air fresheners or perfumes are not protectable trademarks. PTO Examination Guide No. 1-91, sec. B-7 (March 28, 1991) (*cited in* 1 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 7:105 (4th ed. 2001)).

4 *See* United States Dept. of Commerce, *Examination Guide No. 2-99. Marks Composed, in Whole or in Part, of Domain Names* (September 29, 1999) (*reprinted in* 1 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 7:17.1 (4th ed. 2001)).

5 *See id.*

6 *See* Trademark Manual of Examining Procedure (TMEP) § 1202.10 (3rd ed. Jan. 2002) <http://www.uspto.gov/web/offices/tac/tmep/> [*hereinafter* TMEP].

7 *See id.* § 1213.4.

8 *See* 4 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 26:20 (4th ed. 2001).

9 *See* S.B. 150, Gen. Sess. (Utah 2002).

10 Utah Code Ann. § 70-3a-102 (2002).

11 *See* § 70-3a-302.

12 *See* § 70-3a-303.

13 *See* § 70-3a-304.

14 *See* § 70-3a-305.

15 § 70-3a-404.

16 *See id.*

17 *See* Lanham Act § 15 U.S.C. § 1051.

18 *See* § 7.

19 *See id.*

20 *See* 3 McCarthy, *supra* note 8, § 19:9 (and cases cited therein).

21 *See* Lanham Act § 15, 15 U.S.C. § 1065.

22 *See* § 29.

23 *See* id.

24 *See* § 40.

25 *See* § 22.

26 *See* 4 McCarthy, *supra* note 8, § 26:32, at 26-52; *First Sav. Bank, F.S.B. v. First Bank System, Inc.,* 101 F.3d 645 (10th Cir. 1996).

27 *See* 3 McCarthy, *supra* note 8, § 22:1.

28 *See* Lanham Act § 35, 15 U.S.C. § 1117.

29 Section 2 of the Lanham Act, 15 U.S.C. § 1052, sets forth all of the bases for refusal to register a trademark on account of its nature. Refusal on the basis of confusing similarity is addressed in subsection (d) and descriptiveness is addressed in subsection (e) of section 2. Other bases for refusal to register a trademark under section 2 include that the mark consists of immoral or scandalous matter, comprises a flag or coat of arms of the U.S. or other country, is deceptively misdescriptive of the goods, is primarily geographically descriptive of the goods, is merely functional, etc.

30 § 2(d).

31 *See Philip Morris Inc. v. K2 Corp.,* 555 F. 2d 815 (C.C.P.A. 1977).

32 *See Bongrain Int'l (American) Corp. v. Delice de France Inc.,* 811 F.2d 1479, 1484-85 (Fed. Cir. 1985).

33 The web site address for accessing the Patent and Trademark Office records is http://www.uspto.gov/main/trademark.htm.

34 *See Int'l Star Class Yacht Racing v. Tommy Hilfiger U.S.A.,* 205 F.3d 1323 (2nd Cir. 2000); *Sands, Taylor & Wood Co. v. Quaker Oats Co.,* 976 F.2d 947 (7th Cir. 1992). *But see, King of the Mtn. Sports, Inc. v. Chrysler Corp.,* 185 F.3d 1084 (10th Cir. 1999) (holding that intent to take a free ride on plaintiff's good will could not be inferred merely because defendant Chrysler failed to conduct a full search before using the mark KING OF THE MOUNTAIN for downhill ski races sponsored by Chrysler).

35 *See* TMEP, *See* note 6, § 1209.01.

36 *See id.*

37 A mark acquires distinctiveness (also called secondary meaning) if the mark has come to be associated with the particular product "so that to the consuming public the word has come to mean that the product is produced by that particular manufacturer." *Id.* § 1212.

38 *See id.* § 1209.01.

39 37 C.F.R. § 2.23.

40 *See* Lanham Act § 12, 15 U.S.C. § 1062.

41 *See id.*

42 *See id.*

43 *See* §§ 12, 13.

44 *See* § 13.

45 *See id.*

46 *See* § 8.

47 *See id.*

Aspirational Morality: The Ideals of Professionalism – Part II

by Jeffrey M. Vincent

EDITOR'S NOTE: *The following is the second of a two-part article examining the professionalism movement, and current attitudes and efforts directed towards improvement of legal professionalism.*

In Part I of this article, I briefly discussed some basic underpinnings of the current professionalism movement. This continuation is intended to provide more discussion of the concept of professionalism, some theories on the commonly perceived decline in lawyers' professionalism, and a general outline of efforts and proposals to rectify this decline.

I. The Concept of Professionalism

As suggested in Part I, the volume of scholarship on the subject of lawyers' professionalism shows that it is a topic of substantial interest among academics, jurists, and the practicing bar, as well as the community at large. In spite of the attention devoted to the subject, however, professionalism has no uniformly accepted definition. The sociologist Steven Brint defines professionals as people who apply "a relatively complex body of knowledge . . . [and engage in] activities requiring advanced training in a field of learning and non-routine mental operations of the job."[1] While Brint's definition is suitable as a generic description of professionals, it does not describe the unique traits or ideals commonly applied by the professionalism movement to the legal profession.

Besides a knowledge of and ability to apply principles of the law, the general conception of legal professionalism includes loftier ideals – certain shared moral values – that imply a duty to act in the public good and with the purpose of obtaining justice. Dean Roscoe Pound described the profession as "a group . . . pursuing a learned art in the spirit of public service."[2]

Some commentators have endeavored to create more specific descriptions, with varying success. For example, the American Bar Association's Professionalism Committee adopts Dean Pound's phrase "in the spirit of public service," but then renders the definition circular when it defines "public service" as "zealously advocating [the client's] interests *in a professional manner* . . . ."[3]

Despite the definitional challenges, professionalism is generally understood to include civility, both among lawyers and between the bench and bar, competence, integrity, independence, respect for the rule of law, and participation in community service. Certainly, the concept of professionalism encompasses more than mere adherence to the minimal standards of ethical conduct. As one commentator has stated:

> The term encompasses much more [than the minimum ethical standard], including the ideals, traditions, and tenets associated historically with the practice of law. It means . . . competence in serving the client; character in highly principled conduct of professional and civic duty; commitment in service of the client and the public good. It means understanding and honoring the rule of law and embracing principles of moral responsibility.[4]

Because the conception of professionalism inherently entails personal moral characteristics, it is difficult to measure empirically. For the same reason, discussion of the topic can easily devolve into pious platitudes that leave "ordinary life far behind for the hazy aspirational world."[5]

However, even the casual observer is aware that reports of uncivil behavior by lawyers, both in and out of the courtroom, are real and, unfortunately, not uncommon. In addition to the anecdotal evidence, public opinion surveys conducted by the American Bar Association and others indicate that the public has a negative opinion regarding lawyers' ethics generally, and that such public opinion is mainly worsening.[6] The Conference of Chief Justices has observed that "there is the perception, and frequently the reality that some members of the bar do not consistently adhere to principles of professionalism and thereby sometimes impede the effective administration of justice."[7]

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II. Causes of Declining Professionalism

As with any shift in a community's culture, there is no single reason for the decline in professionalism. However, at least three factors are most often cited: (i) the competitive demands of increasing commercialism; (ii) reflection of corresponding movements in general societal ethics and culture; and (iii) the current structure and organization of the legal profession.

Law as a Business. Perhaps the factor most frequently cited as a cause in the decline of professionalism is "the task of making money."[8] Nearly two decades ago, Chief Justice Burger warned that commercialism had put the legal profession in crisis.[9] The increased focus on profits, it is argued, leads practitioners to "surrender professional independence" and "employ unprincipled tactics to achieve clients' ends."[10]

The recent past has seen more law schools graduating more lawyers than ever before. The challenge to professionalism arising from the increased competition for quality clients, combined with downward pressure on billing rates resulting from a generous supply of legal services, is not difficult to understand. But neither is such challenge new. For example, at the turn of the last century, one observer stated that "[t]he evil . . . is not so much a professional as an American fault. It has its source in our inordinate love for the almighty dollar."[11]

So long as the legal profession is a means for livelihood, commercialism will exist. The challenge to the professionalism movement is to seek ways to temper the financial realities with a commitment to pursue the common good.

Changing Social Norms. Lawyers and judges are members of the communities in which they work and live and as such are unavoidably influenced by the community's morals and values. It seems intuitive that a lawyer's professional activities will be informed by her own morals, which in turn will be defined, at least in part, by generally accepted moral principles.

Certainly, social mores have changed in recent decades. Sociologists and psychologists have observed that the convenience of modern life has corresponded with an expectation of instant gratification. Unabashed partisanship and argumentative dialogue have become fodder for popular media programs reliant on public conflict, many of which also portray excessively aggressive styles of lawyering. Cynicism and moral relativism have taken hold. Some observers argue that these new social norms, among others, have led to a focus on the quick win instead of a reasoned approach to conflict resolution, a popularization of the "bulldog" lawyer, and other ethically deteriorative practices.

This line of thinking has been the subject matter of certain sociologists who posit that professions are defined merely by the social functions that they serve, and as such are reflective of prevailing moral principles of the community at large. This kind of social function analysis is employed by sociologists primarily as a descriptive tool – the observation is made that lawyers' social function has shifted from advisor to functionary, and as a result the governing moral principle of the legal profession has shifted from public service to "expertness" or specialization. Whether such a shift is desirable as a normative proposition is a matter of strenuous discussion in the professionalism movement.

Structural Challenges. There are other issues that are also suggested as challenges to lawyers' professionalism. These include the increasing size of law firms, and consequently, the absence of senior lawyer mentoring and role-modeling, the growing emphasis on advertising (which is closely related to the market competition issues described above), and institutional incentives toward complexity and aggressive application of the procedural rules.

III. Proposed Solutions

As stated in Part I of this article, there is no consensus of opinion on how to improve professionalism. An early attempt to propose practical steps for the recent professionalism movement was undertaken in 1986 by the American Bar Association Commission on Professionalism (the "Commission").[12] Among other things, the Commission suggested an increase in law school ethics education and an infusion of ethics into traditional coursework, mandatory continuing legal education, reliable discipline for unprofessional behavior, and emphasis on the role of lawyers as officers of the court.[13]

Numerous initiatives have been launched by law schools, state and local bar associations, and others in an effort to address the professionalism issue. In an apparent effort to organize the disparate initiatives, in 1999 the Conference of Chief Justices published the *National Conference on Public Trust and Confidence in the Justice System, National Action Plan: A Guide for State and National Organizations*[14] (hereafter, the "National Action Plan"). The following is a description of some of the

primary recommendations included in the *National Action Plan.*

Coordination. Recognizing the diverse constituency of the legal profession, most proposals to rectify the decline in professionalism begin with a prescription of coordination.[15] Practicing lawyers are engaged in business, government, public interest organizations, and of course in traditional roles on the bench, at law firms, and in academe. Such diversity can make coordination difficult.

The *National Action Plan* "calls upon the supreme courts [in each state] to 'take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs.'"[16] In response, the highest courts in many states-including the Utah Supreme Court – have established professionalism or civility committees for such purpose.

Improving Lawyer Competence. The *National Action Plan's* recommendations regarding lawyer competence include several distinct aspects. First, each state is encouraged to develop and implement comprehensive continuing legal education (CLE) courses, including substantive programs on professionalism and competence. Many bar associations already offer a broad range of CLE opportunities. In addition to the ordinary CLE requirements, the *National Action Plan* advocates requirements that all lawyers, but particularly new lawyers, take mandatory courses on professionalism, and that ethics and professionalism components be integrated in all CLE coursework. Naturally, the effectiveness of professionalism CLE will depend in large part on the receptiveness of the individual participant.

Second, the *National Action Plan* recommends the establishment of methods, such as an "ethics hotline," to provide lawyers with assistance in compliance with ethical and professional codes. Related suggestions include the publication of advisory opinions, either on the Internet or in printed, annotated volumes.

Other recommendations concerning lawyer competence include the establishment of mentoring programs for new lawyers to counteract the increasing impersonality of the profession. In fact, programs addressing this need have been created independently of the coordinated professionalism movement. One successful example is the American Inns of Court, which was created in 1980 with the mission "to increase the excellence, professionalism, civility and awareness of judges, lawyers, law professors and students."[17]

Improved Bar Admission Practices. The *National Action Plan* suggests that the bar admission process should be reviewed to ensure that it reflects a focus on fundamental competence and good character among new lawyers. Commentators on this topic have noted the need for preparatory steps at the law school level, and have encouraged the development of law school courses specifically dealing with professionalism issues. In addition, recognizing that law school professors are often the first role-model of lawyering for inceptive lawyers, proponents of professionalism have also urged faculty to take a keener interest in the issues of professionalism.

Other Recommendations. Included in the *National Action Plan's* other recommendations are (i) prompt handling of disciplinary complaints, in accordance with meaningful, understandable rules and guidelines; (ii) public involvement and accountability in the disciplinary processes, including appointment of laypersons to hearing panels and boards; (iii) the implementation of public outreach programs, including the creation of public education materials and more active involvement with the legislative and executive branches of the government; and (iv) a review of court processes, procedural rules, and alternative methods of dispute resolution.

IV. Conclusion

Admittedly, professionalism is philosophical in nature – its subject matter is a loosely defined ethos of moral ideals and behavior. Its scope and application, and even its validity, are subjects of much discussion and debate. Moreover, the decline in professionalism has multiple causes, some of which are certainly beyond the control of the institutions tasked with maintenance of the legal profession.

The fully engaged member of the bench or bar, occupied with practical affairs, may be inclined to dismiss professionalism as a reflective and theoretical endeavor for academics and law reviews. To be sure, it is unlikely that any of the incremental efforts toward improved professionalism described above will have an immediate or readily discernable impact on the ordinary practice of law. However, the collective effect of such efforts should likely have a long-term positive effect, even if indirect, on lawyers' civility, competence and integrity. After all, as the philosopher Simon Blackburn observed: "For human beings, there is no living with-

out standards of living."[18] By extension, for lawyers and judges, there could be no fulfillment in the practice or administration of the law without standards for such fulfillment. The professionalism movement seeks to solidify such standards.

[1] Stephen Brint, In an Age of Experts 3 (1994).

[2] Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953).

[3] A.B.A. Section on Legal Educ. and Admission to the Bar, Teaching and Learning Professionalism 6 (1996) (emphasis added).

[4] Wm. Reece Smith, Jr., Teaching and Learning Professionalism, 32 Wake Forest L. Rev. 613, 615 (1997).

[5] Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 13 (1988). *See also* Smith, *supra* note 4, at 614-615.

[6] *See* Russell G. Pearce, The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. Rev. 1229, 1256 (1995) (citing polls).

[7] National Study and Action Plan Regarding Lawyer Conduct and Professionalism, adopted by the Conference of Chief Justices, Nashville, Tennessee, at the Forty-eighth Annual Meeting, August 1, 1996.

[8] John C. Buchanan, The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change, 28 VAL. U. L. REV. 563, 575 (quoting a speech by Judge Douglas W. Hillman).

[9] *See* Warren E. Burger, The State of Justice, A.B.A. J., Apr. 1984, at 62.

[10] Smith, *supra* note 4, at 613.

[11] James E. Moliterno, Lawyer Creeds and Moral Seismography, 32 Wake Forest L. Rev. 781 (1997) (quoting a 1906 report of the Association of American Law Schools).

[12] A.B.A. Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism (1996).

[13] *See* Brent E. Dickson and Julia Bunton Jackson, Renewing Lawyer Civility, 28 VAL. U. L. REV. 531, 537 (1994).

[14] National Conference on Public Trust and Confidence in the Justice System, National Action Plan: A Guide for State and National Organizations, Feb. 1999.

[15] *See* A National Action Plan on Lawyer Conduct and Professionalism, adopted by the Conference of Chief Justices, January 21, 1999, Nashville, Tennessee.

[16] Implementation Plan, Conference of Chief Justices' 'A National Action Plan on Lawyer Conduct and Professionalism, issued August 2001, p. 3 (quoting the National Action Plan).

[17] Dickson and Jackson, *supra* note 13, at 538-539 (quoting American Inns of Court organizational information).

[18] Simon Blackburn, Being Good 23 (2001).

A TRIBUTE TO THE LIFE OF WILLIAM S. RICHARDS "Bill"

April 6, 1929 – February 27, 2002

William S. Richards, a founding member of the law firm of Richards, Brandt, Miller & Nelson, died at home on February 17, 2002. "Bill" was Of Counsel with the Firm and still practicing law full time until a couple weeks before his death. Bill showed up at the office daily to engage in the profession he loved, setting a high standard of expertise and professionalism for not only young associates, but also senior partners.

Someone once defined courage as "grace under pressure." That encomium certainly applies to Bill. He combated great physical challenges associated with MS for much of his adult life. His doctors gave him 10 years to live after they diagnosed his MS in 1961. He beat their projections by decades. For all of his afflictions, he never gave in, he was never bitter or defeated – a sterling example of how to deal with adversity in our own lives. Bill will always be one of our great heroes.

Commission Highlights

During its regularly scheduled meeting January 25, 2002, which was held in Salt Lake City, the Board of Commissioners received the following reports and took the actions indicated.

1. Scott Daniels asked the Commission to pay close attention to the calendar and to get their RSVP's in early for the Park City Commission meeting and retreat to be held May 30, 31 & June 1. Scott also encouraged the Commissioners to attend the Western States Bar March 13 - 16, in Las Vegas. Felshaw King said he would attend the National Conference of Bar Examiners held in Chicago, April 11 - 13. John Adams said he was attending the ABA Bar Leadership, and V. Lowry Snow and Randy Kester attended the ABA Mid year.
2. Scott Daniels reviewed the president-elect procedure. Scott noted that the Commission must nominate two candidates for president-elect at the next regularly scheduled board meeting. That meeting is scheduled for the March midyear convention meeting in St. George, March 21, 2002 at 1:30 pm.
3. Scott Daniels reported on the meeting held with the Executive Committee and the Character & Fitness chairs. A lengthy discussion followed. The motion passed to reaffirm the Commission's rules as one of narrow review of character and fitness decision under the applicable Admission Rules. The motion also included the idea of not to permit personal appearance by applicants except under extraordinary circumstances and that the applicant's appeal be limited to ten pages of written submission. Katherine Fox is to report back to the Commission on the legal parameters of expungement including when or when not it could be reportable including whether the expungement occurred before application to the Bar or during the application process or afterwards and to include both juvenile and adult expungement.
4. Scott Daniels reviewed "and Justice for all" correspondence.
5. John Adams presented a short history of the continuing work of the Racial and Ethnic Fairness Task Force. He concluded the presentation by noting that the Task Force report contains several recommendations for both the judiciary and the Bar to improve racial and ethnic fairness in the judicial process. Adams reported that a community advisory council had been established and he had been selected as a representative. He requested two or three volunteers to meet with him to come up with more concrete proposals. Debra Moore, Mary Gordon and Marlene Gonzalez were selected as volunteers.
6. Katherine Fox gave an update on the Unauthorized Practice of Law Committee.
7. Judge Pamela Greenwood has been selected for the Dorathy Merrill Brothers Award given to the person who has contributed toward the advancement of women in the legal profession in Utah. Professor Robert Flores had been selected for the Raymond Uno Award, which recognizes contributions to the advancement of minorities in the legal profession in Utah. These awards will be given at the Mid Year Convention.
8. Scott Daniels reviewed the Bar's legislative lobbying process.
9. Denise Dragoo reviewed the status of the Judicial Conduct Commission.

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.

Nominations for the Peter W. Billings Sr. Outstanding Dispute Resolution Service Award

The ADR Section of the Utah State Bar annually awards the Peter W. Billings, Sr. Award to the person or organization that has done the most to promote alternative dispute resolution. The award is not restricted to an attorney or judge.

Please submit nominations by **May 24, 2002** to Peter W. Billings, Jr., P.O. Box 510210, Salt Lake City, Utah 84151.

2002 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2002 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Wednesday, May 29, 2002.** The award categories include:

1. Judge of the Year
2. Lawyer of the Year
3. Young Lawyer of the Year
4. Section/Committee of the Year
5. Community Member of the Year

Mailing of Licensing Forms

The licensing forms for 2002-2003 will be mailed during the last week of May and the first week of June. Fees are due July 1, 2002, however fees received or postmarked on or before August 1, 2002 will be processed without penalty.

It is the responsibility of each attorney to provide the Bar with current address information. This information must be submitted in writing. Failure to notify the Bar of an address change does not relieve an attorney from paying licensing fees, late fees, or possible suspension for non-payment of fees. You may check the Bar's website to see what information is on file. The site is updated weekly and is located at www.utahbar.org.

If you need to update your address please submit the information to Arnold Birrell, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834. You may also fax the information to (801) 531-9537.

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill two 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 May 1, 2002, to:
James B. Lee
201 South Main Street
Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898

NOTICE:

The period for comments to be submitted on the proposed Utah Multijurisdictional Practice Rule has been extended from April 2 to April 25, 2002. The text of the rule was published in the March *Bar Journal.* Comments should be directed to Joni Dickson Seko, Deputy General Counsel for the Utah State Bar. She can be reached by telephone at (801) 257-5518 or by e-mail at joni.seko@utahbar.org.

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 02-03

Issue: What are the ethical obligations of an insurance defense lawyer with respect to insurance company guidelines and flat-fee arrangements?

Opinion: An insurance defense lawyer's agreement to abide by insurance company guidelines or to perform insurance defense work for a flat fee is not per se unethical. The ethical implications of insurance company guidelines must be evaluated on a case by case basis. An insurance defense lawyer must not permit compliance with guidelines and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. If compliance with the guidelines will be inconsistent with the lawyer's professional obligations, and if the insurer is unwilling to modify the guidelines, the lawyer must not undertake the representation. Flat-fee arrangements for insurance defense cases are unethical if they would induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interests. Obligations of lawyers under the Utah Rules of Professional Conduct, including the duty zealously to represent the insured, cannot be diminished or modified by agreement.

Opinion No. 02-04

Issue: May a lawyer, who is also a certified public accountant employed by an accounting firm, contemporaneously conduct from an office at the accounting firm public accounting services as an employee of the accounting firm and a law practice independent from the accounting firm without violating the Utah Rules of Professional Conduct?

Opinion: A lawyer who is a certified public accountant and employed by an accounting firm may not contemporaneously practice law and accounting from the offices of the accounting firm without violating Rule 5.4(b) of the Utah Rules of Professional Conduct. Accounting is a "law-related service," and, when accounting services are provided by an active lawyer, the lawyer is subject to the Utah Rules of Professional Conduct while engaged in either profession. The lawyer is, therefore, prohibited by Rule 5.4(b) from forming a business association with a non-lawyer to provide the accounting services when the lawyer is contemporaneously engaged in the practice of law.

Opinion No. 02-05

Issue: What are the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit?

Conclusion: A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.

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.

Ethics Opinions Order Form

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

Please make all checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Christine Critchley
645 South 200 East, Suite 310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Utah State Bar Request for 2002-2003 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 20 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone _____

Committee Request

1st Choice _____ 2nd Choice _____

Please describe your interests and list additional qualifications or past committee work.

_____

_____

_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Annual Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
3. **Bar Examiner.** Drafts, reviews and grades questions and model answers for the Bar Examination.
4. **Bar Exam Administration.** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking, security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
5. **Bar Journal.** Annually publishes editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.
6. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
7. **Client Security Fund.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
8. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
9. **Fee Arbitration.** Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.
10. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
11. **Governmental Relations.** Monitors proposed legislation which falls within the Bar's legislative policy and makes recommendations to Bar Commission for appropriate action.
12. **Related Education and Law Day.** Organizes and promote events for the annual Law Day celebration.
13. **Law & Technology.** Creates a network for the exchange of information and acts as a resource for new and emerging technologies and the implementation of these technologies.
14. **Lawyer Benefits.** Review requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, insurance and other group activities.
15. **Lawyers Helping Lawyers.** Provides assistance to lawyers with substance abuse or other various impairments and makes appropriate referral for rehabilitation or dependency help.
16. **Mid-Year Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes social and sporting events.
17. **Needs of Children.** Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.
18. **Needs of the Elderly.** Assists in formulating positions on issues involving the elderly and recommending legislation.
19. **New Lawyer CLE.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New lawyer CLE.
20. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

Detach & Mail by May 31, 2002 to:
John A. Adams, President-Elect • 645 South 200 East • Salt Lake City, UT 84111-3834

United States Bankruptcy Court, District of Utah Position Announcement

Position: Law Clerk to the Honorable Judith A. Boulden, United States Bankruptcy Judge

Starting Salary: $45,285 (JSP 11) to $54,275+ (JSP 12) or JSP 13, depending on qualifications

Starting Date: Open until filled

Application Deadline: April 19, 2002

Qualifications: One year of experience in the practice of law, legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation; or

A recent law school graduate may apply, but the applicant must have: a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or b) served on the editorial board of the law review of a school or other comparable academic achievement.

Appointment: The selection and appointment will be made by the United States Bankruptcy Judge.

Preference may be given to the applicants who have excellent writing skills and have experience in the practice of law.

Applicants should send resume and transcript only. Do not provide writing sample and references until requested.

Applications should be made to:
Judge Judith A. Boulden
United States Bankruptcy Court
350 South Main Street, Room 330
Salt Lake City, Utah 84101

Benefits Summary: Employees under the Judicial Salary Plan are entitled to:

- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Subsidized medical coverage with employee premiums paid from pre-tax salary.
- Flexible Benefits Program (pre-tax flexible spending plan for medical and dependent care)
- Subsidized life insurance options.
- Long term care insurance for employee and eligible family members.
- Paid sick leave – 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

Equal Employment Opportunity: The court provides equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age or handicap.

About the Court: The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah, Judge Boulden also serves on the United States Bankruptcy Appellate Panel of the Tenth Circuit. The Clerk's office provides clerical and administrative support for the court, which conducts hearings daily in Salt Lake City and monthly in Ogden. You can visit us on the web at www.utb.uscourts.gov.

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 Bar Foundation

A nominating committee will forward a slate of proposed names for vote by the Utah Bar Foundation Board of Trustees. In addition to the nominated slate, individual attorneys may seek election for a three year Utah Bar Foundation term by filing a petition containing the signatures of at least 25 attorneys in good standing with the Utah Bar Association by May 3, 2002. Petitions may be obtained at the Utah Bar Foundation, 645 South 200 East, Salt Lake City, Utah 84111. For questions, please contact Kimberly Garvin at (801)297-7046.

The Utah Bar Foundation is currently accepting applications for funding for 2002-2003. The Utah Bar Foundation funds organizations that promote legal education; provide legal services to the disadvantaged; improve administration of justice; and serve other worthwhile law-related public purposes. Interested organizations can contact Kimberly Garvin, Executive Director, at (801)297-7046 for application guidelines.

Discipline Corner

ADMONITION

On January 24, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence); 1.4 (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to represent the client in a divorce action. The attorney tried to have the client's husband served, but could not because he was out of state. When the attorney failed to serve the client's husband in a timely manner, the client's divorce action was dismissed. The attorney assumed that the client did not wish to proceed with the divorce and lost contact with the client because of address and telephone changes over a period of time. When the client did contact the attorney, the attorney did not return the call or any further calls. Thereafter, the attorney did respond to the client, and completed the divorce at no additional charge.

ADMONITION

On February 8, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence); 1.4(a) (Communication); and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to file a Chapter 11 bankruptcy action. The attorney failed to file the necessary financial reports to support the clients' Chapter 11 bankruptcy, resulting in the bankruptcy being converted to a Chapter 7 bankruptcy. The attorney failed to keep his clients reasonably informed about the status of their case.

ADMONITION

On February 6, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.16(d) (Declining or Terminating Representation) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to pursue a medical malpractice claim resulting from an automobile accident. The client provided documentation to the attorney, including a journal that had been kept since the accident. The attorney withdrew as counsel and failed to return the file to the client. When the client requested the file, the client was informed that it had been lost when the attorney moved offices. New copies of the documentation were eventually provided to the client, but, the journal and other property belonging to the client were never recovered.

ADMONITION

On January 30, 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); 5.3(b) (Responsibilities Regarding Nonlawyer Assistants); and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to file a Chapter 7 bankruptcy action. The client wanted to reaffirm the debt owed on the client's car. The client repeatedly contacted the attorney's office to find out whether the reaffirmation agreements had been received and was told they had not. The client made numerous attempts to contact the attorney but the attorney failed to return the client's phone calls. One week after the deadline to file the reaffirmation papers, the client received the papers from the attorney. The papers had been received by the attorney approximately two months earlier, but were not forwarded in a timely fashion to the client. The client immediately signed and filed the reaffirmation papers but, because the client had missed the deadline, the car was repossessed.

ADMONITION

On February 6, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney was hired to represent the client in a divorce action. At the pre-trial hearing, the court admonished the client for failing to file a financial declaration and warned that it would enter a default judgment if the financial declaration was not filed. At the continuation of the pre-trial hearing, the court told the client that a declaration must be filed within five days. Before the final pre-trial hearing, the client reminded the attorney that a financial declaration must be filed. The attorney did not attend the final pre-trial hearing. Ultimately, a default judgment was entered against the client for failing to file a financial declaration.

ADMONITION

On January 30, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.15 (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney advanced funds from the attorney's trust account to a client without making sure that there were sufficient funds to cover the check. Because there were insufficient funds in the trust account, this resulted in an overdraft on the attorney's trust account. At the time, the trust account held no other funds of any client or other third party.

Mitigating factors include: cooperation with the Office of Profes-

sional Conduct during its investigation of this matter.

Aggravating factors include: the attorney received a previous letter of caution from the Office of Professional Conduct advising the attorney to verify that funds were in the trust account before issuing checks to clients or third parties against those funds.

DISBARMENT

On February 8, 2002, the Honorable Stephen Henriod, Third Judicial District Court, entered Findings of Fact and Conclusions of Law disbarring Peter Ennenga from the practice of law effective February 8, 2002. Ennenga was allowed a wind-down period of thirty days.

The disbarment is a result of the Office of Professional Conduct's appeal of the judgment of the District Court suspending Ennenga from the practice of law for six months and placing him on probation for three years for violations of Rules 1.4 (Communication), 1.15 (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(b) and 8.4(c) (Misconduct) of the Rules of Professional Conduct. The Utah Supreme Court issued an opinion on December 18, 2001, holding that Ennenga should have been disbarred for his misconduct.

DISBARMENT

On January 25, 2002, the Honorable William B. Bohling, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order re Disbarment, disbarring John Alex from the practice of law effective November 26, 2001.

On January 10, 2002, the court held a review hearing regarding the court's order disbarring the Respondent, but staying that disbarment. The purpose of the hearing was to allow Alex to show good cause why the stay of his disbarment should not be lifted. The court found that Alex presented no evidence of good cause and accordingly the stay was lifted.

Alex previously violated the court's Order of Suspension by failing to meet with and respond to his court-appointed supervising attorney, by failing to timely respond to informal complaints filed against him with the Office of Professional Conduct, by failing to timely respond to a client's request for binding fee arbitration, and by failing to timely pay his Utah State Bar annual licensing fee.

Seven Cases That Shaped the Internet in 2001, or The First Thing We Do, Let's Kill All the Lawyers[1] *– Part I*

by Miriam Smith

I. Introduction

The advent of the printing press in 1455 by Johannes Gutenberg heralded a new era for the world. Some have said that Gutenberg, thanks to his invention, was the most significant person of the past millennium.

Four authors, Agnes Hooper Gottlieb, Henry Gottlieb, Barbara Bowers, and Brent Bowers, ranked people of the previous millennium in accordance with a BioGraph system, which scored people according to: 1) lasting influence; 2) effect on the sum total of wisdom and beauty in the world; 3) influence on contemporaries; 4) singularity of contribution; and, 5) charisma.[2] Each category was weighted from 10,000 to 2,000 points.[3]

Gutenberg, despite earning a measly 210 points out of 2,000 for charisma, beat out everyone from Christopher Columbus to Andy Warhol to top the list.[4] While some may disagree with the Gottlieb/Bowers ranking, the Encyclopedia Britannica classes Gutenberg's printing press as "the most important technological advance" of the Renaissance era.[5]

For Gutenberg personally, his invention brought him a multitude of legal problems. Much of what we now know about Gutenberg comes from the numerous lawsuits filed against him by former partners and creditors who either wanted in on the invention or a quick repayment of their investment.[6]

Though it is impossible to predict what will be the most important invention of the next millennium, the Internet has clearly earned its place in history. It is now the fastest growing electronic technology in world history. While it took 46 years before 30 percent of the United States population adopted electricity; 38 years for 30 percent to adopt the telephone and 17 years for television – the Internet hit the 30 percent adoption rate in only 7 years![7]

Two-thirds of Americans have already logged on with over 40 percent of non-users at least somewhat likely to log on in the next year. The Internet's capacity to carry information doubles every 100 days.[8] This new medium is unprecedented for connecting people – to each other, to information resources and to commerce. The United States Supreme Court has likened the Internet to "a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[9]

Law and the Internet

The Internet, likewise, has brought sufficient legal problems to foster the development of an entirely new body of law, cyberlaw. Practitioners of cyberlaw must be conversant in areas ranging from contract to trademark law. This development is, of course, good news for lawyers, but may frustrate some and prompt them to want to dispatch with lawyers as suggested in the title of this article.

One reason these Internet purists may be frustrated with lawyers is that "[t]he world wide web has progressed far faster than the law and, as a result, courts are struggling, to catch up."[10]

The year 2001 found the courts issuing a myriad of cyberlaw decisions. While *A&M Records v. Napster*[11] may have stolen the headlines, courts were busy on numerous other issues. Among these cases are two clarifying issues as to "new uses" for written works under copyright law; two cases considering issues of jurisdiction; one ruling limiting liability under the "safe harbor" provisions of the Digital Millennium Copyright Act; and two cases

MIRIAM A. SMITH is an assistant professor in the Broadcast and Electronic Communication Arts Department at San Francisco State University. She is a member of the Utah State Bar and the State Bar of California.

affecting online music. These seven cases give a sense of the overall development of cyberlaw and of the Internet.

In this article, I examine whether a grant of rights includes the new uses of electronic databases and e-books. A subsequent article will consider recent cases on the long-arm of Internet law and the circumstances under which Internet Service Providers enjoy immunity in cases of copyright infringement. The final article in this series analyzes recent developments in Internet music distribution and Internet radio.

II. New Use

What's in a name? That which we call a rose
By any other word would smell as sweet . . .
ROMEO AND JULIET, Act 2, scene 2

And that which we call a book or a newspaper or magazine article, if it shows up in another form will smell very sweet to the author who is now entitled to an additional payment for the "new use." While that conclusion is not new, two cases consider what constitutes a "new use" and the specific contractual language used in transferring rights from author to publisher to determine the extent of rights granted. In both cases, *New York Times v. Tasini,* 533 U.S. 483 (2001), and *Random House v. Rosetta Books,* 150 F. Supp. 2d 613 (S.D.N.Y. 2001), the courts found that the authors had only made a limited transfer of rights precluding the publishers from any "new use." Key to the holdings is the determination that online databases and e-books are a "new use" and not an exempted revision of the original work under the Copyright Act.

New York Times v. Tasini.[12] Between 1990 and 1993, six freelance authors wrote articles for the *New York Times, Newsday, Time,* and *Sports Illustrated.* These articles were included in an online database owned and operated by LEXIS/NEXIS and in CD-Rom databases published by University Microsfilms International, "New York Times OnDisc" and "General Periodicals OnDisc."[13]

The database publishers were licensed in their endeavors by the appropriate publisher(s). At issue in the case was whether the newspaper and magazine publishers had the rights to the relevant articles necessary for their inclusion in the databases.[14]

The publishers' argument was that they had the right to publish the articles in their newspapers and magazines in which were collective works and the inclusion of these articles in the databases was authorized by § 201(c) of the Copyright Act. Section 201(c) provides that "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The publishers had prevailed on a motion for summary judgment in the trial court. In that proceeding, the United States District Court for the Southern District of New York held that to be a "revision" for the purposes of § 201(c), the revised work only needed to "preserve some significant original aspect of [the collective work] – whether an original selection or an original arrangement."[15] The district court reasoned that copying all of the articles of the newspaper or magazine into the database preserved the publishers "selection of articles."[16]

On appeal, the Second Circuit Court of Appeals disagreed. The court found that the articles were not a collective work covered by § 201(c).[17] The databases did not qualify as a "revision" of the original periodical. The court reasoned that § 201(c) did not "permit a publisher to sell a hard copy of an author's article directly to the public even if the publisher also offered for individual sale all of the other articles from the particular edition." So that same section could not be used to allow a publisher to "achieve the same goal indirectly" through computer databases.[18]

The U.S. Supreme Court took up the issue and sided with the Second Circuit and the authors. Of import to the Supreme Court was the fact that the individual articles were presented by the databases "clear of the context provided either by the original periodical editions or by any revision of those editions."[19] The Court rejected the publisher's analogy that the databases were simply an electronic form of microfilm and microfiche. "Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."[20]

In the Court's view, the databases are more like a compendium with each article comprising a part of that compendium. "In that compendium, each edition of each periodical represents only a miniscule fraction of the ever-expanding database."[21] The Court went on to say that "[t]he database no more constitutes a "revision" of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a 'revision' of that poem."[22]

One concern raised by the publishers was that a finding in favor of the authors could "punch gaping holes in the electronic record of history."[23] This argument was joined by various historians including famed documentary producer Ken Burns. Burns filed an Amicus Curiae Brief with the Court in which he claimed that

"the omission of these materials from electronic collections, for any reason on a large scale or even an occasional basis, undermines the principal benefits that electronic archives offer historians – efficiency, accuracy and comprehensiveness."[24]

The majority acknowledged this concern but noted that several other historians and the Author's Guild did not have the same foreboding as Mr. Burns and the publishers.[25] However, the Court stopped short of issuing an injunction on including such freelance articles in electronic databases. Instead, the parties could enter into agreements allowing for such electronic publication and "if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."[26] The remedial issues were remanded to the District Court.[27]

The *Tasini* issues were all matters of federal law. A similar case in Utah, therefore, would obtain the same result.

Random House v. Rosetta Books. One month after the Supreme Court ruled in *Tasini,* the U.S. District Court for the Southern District of New York issued a decision in *Random House v. Rosetta Books,* 150 F. Supp. 2d 613 (S.D.N.Y. 2001), holding that a grant of rights to "print, publish and sell the work[s] in book form" did not include the right to print, publish and sell in e-book form.[28]

Rosetta Books publishes digital books on the Internet (e-books). In 2000 and 2001, Rosetta contracted with William Styron, Kurt Vonnegut, and Robert B. Parker to publish certain of their works in e-book form. Random House, who published the authors works in printed form took exception to the deal and sued for copyright infringement.

Guiding the District Court in its determination of this matter was the specific contract language of Random House's contracts with the authors and Second Circuit case law "about whether licensees may exploit licensed works through new marketing channels made possible by technologies developed after the licensing contract—often called 'new use' problems."[29]

The two leading cases on "new use" problems are the 1968 case of *Boosey and Bartsch v. Metro-Goldwyn-Mayer, Inc.,*[30] and the 1998 decision in *Boosey and Hawkes.*[31]

Boosey and Bartsch concerned the grant of rights the author of the play "Maytime" made to Harry Bartsch in 1930. In addition to licensing the motion picture rights throughout the world, the contract with Bartsch (who transferred the rights to Warner Brothers Pictures which transferred them to MGM) also included the right to "copyright, vend, license and exhibit such motion picture photoplays throughout the world; together with the further sole and exclusive rights by mechanical and/or electrical means to record, reproduce and transmit sound, including spoken words. . . ."[32] In 1958, "Maytime" was licensed for television broadcast. Ten years later, the Court found that the grant of rights language was broad enough to cover the new use.

A similar result was reached in *Boosey and Hawkes* in 1998. In this case, the rights holder to the musical composition, "The Rite of Spring" by Igor Stravinksy claimed that the 1939 license to include the music in the Disney movie "Fantasia" did not cover the video rights.[33] Disney, the licensee, had been granted the right "to record in any manner, medium or form, and to license the performance of, the musical composition [for use] in a motion picture."[34] Once again, the court found that the grant of rights was broad – broad enough to cover the video release.

So how did Random House do in claiming that its right to publish in "book form" included e-books? Not as well as MGM or Disney. The first problem for Random House was that the court found that neither *Boosey* nor *Bartsch* was controlling in the instant case. Those cases dealt with new uses within the same medium.[35] The digital books[36] contracted for by Rosetta Books were deemed to be a separate medium from the original books.[37]

An even greater problem for Random House, however, was the fact that its contract with each author was not for the broad right to "publish, print and sell" in "book form" without elaboration. The Random House contracts were much more specific in obtaining "rights to publish book club editions, reprint editions, abridged forms, and editions in Braille."[38] To make matters worse for Random House "each of the authors specifically reserved certain rights for themselves by striking out phrases, sentences, and paragraphs of the publisher's form contract.

Critical to the outcome of this case was the district court's application of New York contract law to determine that the authors, in striking out phrases, sentences, and paragraphs, evidenced an intent not to grant the publisher the broadest rights in their works."[39]

In New York, as in Utah, "a written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the contract's language."[40] The contract must be considered in its entirety and all parts reconciled. Utah law is consonant with these principles of contract interpretation.[41]

The determination of whether an ambiguity exists is a question of law in both New York and Utah.[42]

There is a very slight difference in New York's and Utah's approaches to determining whether ambiguity exists. New York requires that a contract be capable of more than one meaning when read "by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[43] Utah law allows for an ambiguity "where the language is reasonably capable of being understood in more than one sense."[44] "However, a contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does. [citations omitted] To demonstrate ambiguity, the contrary positions of the parties must each be tenable."[45] Both New York and Utah law allow for extrinsic evidence were there is an ambiguity.[46]

This different approach in determining whether a contract is ambiguous is not a factor in the case at hand. The authors clearly did not grant all rights to Random House.

III. Summary and conclusion.

The common thread in the *Tasini* cases and *Random House* was that none of the authors in question had made a broad grant of rights to the publishers. These cases clearly demonstrate the need for attorneys who prepare agreements on behalf of authors or publishers to remember that technology changes. While no one has a crystal ball, everyone should be able to specify exactly what rights are affected in a license agreement, whether it is a broad grant of rights or something more limited.

The legal problems faced by Gutenberg had more to do with rights to his invention and paying his creditors, not with whether authors could collect an additional royalty for the printing of their works. But Gutenberg would undoubtedly be sympathetic to those who find themselves in court sorting out the legal issues fomented by new technology.

1 William Shakespeare, The Second Part of King Henry the Sixth, act 2, sc. 2.

2 Agnes Hooper Gottlieb, et al., 1,000 Years, 1,000 People: Ranking the Men and Women Who Shaped the Millennium, ix, (1998).

3 Lasting influence – 10,000 points; Effect on the sum total of wisdom and beauty in the world – 5,000 points; Influence on contemporaries – 4,000 points; Singularity of contribution – 3,000 points; Charisma – 2,000 points. Id.

4 *Id.*

5 "Europe, history of" EncyclopÊdia Britannica Online, *available at* http://search.eb.com/bol/topic?eu=108599&sctn=15&pm=1 (last visited January 12, 2002).

6 Gottlieb, et al. *supra* and "Gutenberg, Johannes" EncyclopÊdia Britannica Online *available at* http://search.eb.com/bol/topic?eu=39381&sctn=3 (last visited January 12, 2002).

7 UCLA Center for Communication Policy, UCLA Internet Report: Surveying the Digital Future, 5 (2000)

8 *Id.* at 4, 10.

9 *Reno v. ACLU,* 521 U.S. 844, 863 (1997).

10 *CoStar Group Inc. v. LoopNet Inc.,* 164 F. Supp. 2d 688, 693 (MD. 2001)

11 239 F.3d 1004 (9th Cir. 2001)

12 The *Tasini* line of cases includes the U.S. District Court case, *Tasini v. New York Times,* 972 F. Supp. 804 (2d Cir. 1997); the Second Circuit reversal of the District Court judgment, *Tasini v. New York Times,* 206 F.3d 161 (2d Cir. 1999) and the U.S. Supreme Court's affirmation of the Second Circuit Court's ruling, 533 U.S. 483 (2001). These cases will be referred to as *Tasini I, Tasini II and Tasini III,* respectively.

13 *New York Times v. Tasini (Tasini III),* 533 U.S. 483, 509-10 (2001).

14 *Id.* at 508.

15 *Tasini v. New York Times (Tasini I),* 972 F. Supp. 804, 821 (S.D.N.Y. 1997).

16 *Id.* at 823.

17 *Tasini v. New York Times (Tasini II)* 206 F.3d 161, 167-170 (2nd Cir. 1999).

18 *Id.* at 168.

19 *Tasini III,* 533 U.S. at 516.

20 *Id.* at 516-17.

21 *Id.* at 516.

22 *Id.*

23 *Id.* at 519.

24 *Id.* at 528-29, quoting Brief for Ken Burns et al. as Amici Curiae 13.

25 *Id.* at 519.

26 *Tasini III,* 533 U.S. at 519.

27 *Id.* at 519-520.

28 *Random House v. Rosetta Books,* 150 F. Supp. 2d 613, 614 (S.D.N.Y. 2001).

29 *Id.* at 618 (quoting *Boosey & Hawkes Music Publishers, Ltd v. Walt Disney Co.* 145 F.3d 481, 486 (2d Cir. 1998)).

30 391 F.2d 150 (2d Cir. 1968).

31 145 F.3d 481 (2d Cir. 1998)

32 *Boosey and Bartsch v. Metro-Goldwyn-Mayer, Inc.,* 391 F. 2d 150.

33 Disney released "Fantasia" on video in 1991.

34 *Boosey and Hawkes,* 145 F.3d at 484.

35 *Random House,* 150 F. Supp. 2d at 623.

36 Defined as "electronic digital signals sent over the internet." *Id.* at 622.

37 *Id.* at 622.

38 *Id.* at 620.

39 *Id.*

40 *Id.* at 618. See *Dixon v. Pro Image, Inc.,* 987 P.2d 48 (1999). "'In interpreting a contract, the intentions of the parties are controlling.' *Winegar v. Froerer Corp.,* 813 P.2d 104, 108 (Utah 1991). If the contract is written and the language employed is not ambiguous, the parties' intentions are determined from the plain meaning of the language."

41 *Plateau Mining Co. v. Utah Division of State Lands and Forestry,* 802 P.2d 720, 725 (Utah 1990).

42 *Random House,* 150 F. Supp. 2d at 618; *Dixon,* 987 P.2d at 52.

43 *Random House,* 150 F. Supp. 2d at 618.

44 *Dixon,* 987 P.2d at 52.

45 *Plateau Mining Co.,* 802 P.2d at 726.

46 *Random House,* 150 F. Supp. 2d at 618; *Dixon,* 987 P.2d at 52.

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In honor of "Legal Assistants Day", the Legal Assistant Division of the Utah State Bar and the Legal Assistants Association of Utah are pleased to sponsor three Legal Assistant Day luncheons, listed below. All three luncheons will qualify for one hour CLE credit. Invitations will be sent in April to all members of the Legal Assistant Division and the Legal Assistants Association of Utah based on geographic location. However, all legal assistants, legal secretaries and their supervising attorneys are invited to attend any of the luncheons.

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Date: Thursday, May 16, 2002
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Cost: $22 per person

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04/18/02	**Annual Real Property Section Seminar, Case Updates, Legislative Report.** Chief Justice Richard C. Howe, Utah Supreme Court, Case Law Update; Hon. Gregory K. Orme, Utah Court of Appeals, Case Law Update; Scott R. Sabey, Legislative Report; Rick Knuth, "Conveyancing and Collateralizing Utah Water Rights"; Billy Walker, Ethics. Election of Officers. 8:30 am – 12:00 pm. Price: $60 section members, $75 non-section members.	4
04/18/02	**NLCLE Workshop: Law Practice Management, Rainmaking and Technology.** 5:30 – 8:30 pm. $45 new lawyer, $60 others.	3 CLE/NLCLE
05/02/02	**Annual Collection Law Seminar.** 9:00 am – 1:00 pm. Price: $45 section members, $65 non-section members.	4
05/02/02	**Annual Corporate Counsel Spring Seminar.** 8:00 am – 12:00 pm. Price: $45 section members, $80 non-section members.	4
05/09/02	**Annual Business Law Section Seminar.** 8:00 am – 12:00 pm. Price: $55 section members, $150 non-section members.	3
05/10/02	**Annual Family Law Section Seminar.** 8:00 am – 5:00 pm. Price: $120 section members, $80 non-section members.	7*
05/15/02	**Annual Labor & Employment Law Section Seminar.** Ellen Kitzmiller, An Overview of Employment Law; Karin S. Hobbs, Alternative Dispute Resolution of Employment Disputes; Lincoln W. Hobbs and Michael P. O'Brien, Handling Employment Cases: Viewed from the Plaintiff's and Defendant's Perspectives. 9:00 am – 12:00 pm (lunch from 12:00 – 1:00). $60 section members, $75 non-section members.	3
06/07/02	**Annual Legal Assistant Division Seminar.** 8:30 am – 5:00 pm. Price: $65 section members, $75 non-section members.	7*
06/14/02	**New Lawyer Mandatory.** 8:30 am – 12:00 pm. Fulfills new lawyer requirement.	

*Tentative.

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