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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: Near Panguitch Lake, Garfield County, Utah, by first-time contributor Lisa-Michele Church, Blaisdell & Church, P.C., Salt Lake City.

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Letters Submission Guidelines:

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

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

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

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Submission of Articles for the Utah Bar Journal

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

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

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

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

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

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

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

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

Letters to the Editor

In regards to the Presidents message that the legal profession is suffering because of a few "arrogant buttheads" I feel he is missing the mark. There are many, many lawyers who are courteous and professional. But there are too many that ignore the suggestions set forth in the next article by Mr. Lalli. The suggestions set forth in that article are not just pertinent to avoid malpractice claims, they are the guts of a professional legal practice.

It is a sad commentary that one dares not sue for fees because his work is so shabby. In my law firm in California our lost fees amounted to less than 2% of our gross. Yet during those same years the average attorney for L.A. County California was writing off 27% of their gross. We followed the twelve rules and sued and collected without fear of malpractice claims and had none. If the lawyers of Utah would adopt and follow the first 12 rules set forth in Mr. Lalli's article they would make more money and have more fun and the profession would once again be professional. Something to be proud of.

Utah lawyers seem to hate to return phone calls. In the last month to a lawyer in Ogden, to 2 big law firms in Salt Lake City and one firm in Provo it took 3 or 4 calls to get a return call. From one firm in Salt Lake City after 4 calls I never did get a return call so referred the business to another attorney.

I suggest law firms adopt the following procedure: have a secretary, paralegal check the incoming calls. If the attorney is out of town, in trial etc. notify the caller. If they are available and fail to return a call within 24 hours, or have their paralegal or secretary return the call, fine the attorney $25 to be used for the firm Christmas party. The first year I used the foregoing program in my firm in L.A. we had a great party at the expense of the members of the firm. The next year our clients were happy, but the Senior partners had to foot the bill. It was well worth it.

Richard L. Tretheway,
49 years a lawyer, no malpractice suits

Although Timothy Lewis's article on the federal estate tax was very good, I would challenge one comment. Prof. Lewis attributes the notion of maintaining the estate tax to "a classic political opportunity for stirring up class warfare."

A differing view considers the reason for taxes. Maybe taxes should be high enough to pay for government (defense, Social Security, Medicare, public universities, etc.), and maybe right now they're not.

Bob Casey
Portland, Oregon

Response to President's Message: The Price We Pay (or, Two Fortunes for Bob)

by Robert H. Henderson

Call me Ishmael. On second thought, don't. It's not my name. I just always wanted to say it, and, you have to admit, it is a proven catchy opener. But, hear me out. It could save you a "fortune," maybe two "fortunes."

I read Scott Daniels' article "Is the Office of Professional Conduct the Grand Inquisitor? – What Lawyers Need to Know if Faced With a Bar Complaint," in the March 2002 *Utah Bar Journal,* then promptly threw it in the trash in anger. But then, I have a notoriously bad temper – have thrown a lot of things away in anger, including relationships I cherished, which I deeply regret.

In the case of Scott's article, however, the more I think about it, the more it angers me, and in a strange sort of way, it pleases me that it angers me. A Far Side "sure, it hurts, but its a good kind of hurt" sort of thing. Let me make it perfectly clear, as our 37th President liked to say, that I admire Scott Daniels. He was one of my favorite partners, twice. He is a good man. He has sound judgment – thanks to him, and others, I don't have to "volunteer" my legal services to dead beats who have chosen to spend their money on drugs, alcohol, or women, and just wasted the rest. I even give money for Scott's campaigns, irrefutable evidence for my esteem for Scott. (The story is true that when a bum asked me if I had a dollar for a sandwich, I said "I don't know – let me see the sandwich.") Let me also make it perfectly clear that, as far as I know, in 29 years I have never been the subject of a Bar complaint. A lot of complaints, but not a Bar complaint.

Scott's article was even cute and clever. Not my kind of cute and clever, but cute and clever. What, then, is my beef with Scott's article? It's the same rage I feel when anyone thinks someone's "rights" are somehow more important than anyone else's, especially mine. The same rage I feel when I'm subjected to a dragnet stop in Big Cottonwood Canyon the very day it was in the morning newspaper our Supreme Court had said don't do it anymore. The same rage I feel whenever the big money boys tell us what's good for us when it's really what's good for them and bad for us. The same rage I feel when . . . , you get my drift.

Scott notes "The process should embody full due process to both the attorney and the complainant . . . ." and "the adjudication of a Bar complaint is full due process . . . ." Terrific. Why, then, I ask, is it "that the process should bend over backward in favor of the complainant?" Why does the Commission "unanimously reject" proposals to discourage frivolous complaints? As if discouraging frivolous complaints were a bad thing, as if discouraging frivolous complaints equates to "shielding" lawyers from discipline, or perpetuating a "good ole boy" system.

Scott is correct that, as things now stand, this is "the price we pay" for being a lawyer. I represented a lawyer caught up in this process on the most frivolous of complaints. A good lawyer, a good man. The complainant complained from the Utah State penal system, where he was duly incarcerated, on a wholly inadequate sentence, based on his own guilty plea and providency inquiry, which were diametrically opposed to the substance of his Bar complaint. After obligatory jousting, the OPC decided the claim was not meritorious. The committee chair nevertheless ordered the OPC to proceed because the allegations were so serious. Now, think about this. The more serious the allegations, the less process is due the lawyer? The lawyer did, as Scott notes, "spend huge amounts of time" and a "fortune" (I was the recipient), not to mention truly anguishing over the rank injustice of it all. Fortunately, we drew a good panel and an experienced chair with a brain and a backbone. Other than the "huge amounts of time," and don't forget the "fortune," "justice" was done?

So, here is a "modest proposal" (modest, I fear, in the sense of Jonathan Swift's proposal that the solution to the great Irish potato famine was to eat surplus babies): let's do vigorously "take care of our own bad apples," but let's insist that even a lawyer is entitled to the same due process as anybody else (a radical concept, I know), and let's not "bend over backwards in

favor of the complainant," and let's adjust our attitude that proposals to discourage frivolous complaints are a good thing, rather than a bad thing, and let's categorically reject the notion that bending over backward in favor of the complainant and against the lawyer is somehow "due process" and "the price we pay" for being a lawyer.

If we sell out our own rights in a public relations scam, we cheapen and trivialize those rights for all. Not to mention, you have to ask yourself, would you hire a lawyer who won't even stand up for his own rights? Rights are not self-executing. Somewhere, sometime, somebody has to stand up. You know, Runnymeade, Valley Forge, Gettysburg, Normandy, Guadalcanal, Mount Suribachi, and so on. Eternal vigilance is still the price of liberty. (I wish I had said that.) Unless you are one of "most" (nobody polled me – I guess my vote didn't count) lawyers who "agree the process should bend over backward in favor of the complainant," don't tolerate anything less than an even shake. Be pushy. Speak out against nonsense like "bending over backward in favor" of either party is "due process." It's not – it's "favoring" one party over another, by definition. Make your views known. Will you stand up for your own rights? It's too late when you're already caught up in the machine. Then, I will stand up for you, but only if you have the aforementioned "fortune," maybe two "fortunes," if I can get it.

Chapter 13 Bankruptcy: Determining the Appropriate Fair Market Value

by Jason F. Barnes

The greatest struggle between a debtor and a secured creditor in bankruptcy is determining the appropriate fair market value of collateral. At best, this struggle is quickly remedied at the meeting of the creditors, or through stipulation, where both sides come to an agreement on the fair market value of the collateral. At worst, both sides end up before the bankruptcy court, putting forth evidence. In such cases, the debtor risks the court either granting the creditor's motion for "relief from the automatic stay" or ultimately denying the debtor's plan for reorganization. The creditor risks court costs and more attorney fees, both of which add to the loss if the judge decides in the debtor's favor.

Background

When bankruptcy is filed, § 362(a) of the Bankruptcy Code ("Code") stays most actions by creditors against the debtor or the estate, including "any act to collect, assess, or recover a claim... that arose before the commencement of the case." §362(a)(6). The creditor, however, can file a proof of claim stating what it believes are the unsecured, unsecured priority, and secured portions of the total amount owing "as of the date of the filing of the petition." Bankr. Rule ("Rule") 3002(c) and Code §§ 501(a), 502(b), 506(a), and 507. A creditor has a secured claim to the extent of the value of bankruptcy estate's interest in the collateral. Any claim amount above that value is unsecured. Code § 506.

The debtor asserts what he or she believes are the unsecured, unsecured priority, and secured portions of the creditors' claims in the plan for reorganization. Code § 1322. A conflict arises when the creditor's claim amounts do not comport with the debtor's plan amounts.

If the debtor and creditor are unable to stipulate to the secured amount and interest rate, the Code provides three avenues for resolution: the debtor may surrender the collateral, thereby satisfying the secured portion the creditor is seeking (§ 1325(a)(5)(C)); the court may deny confirmation of the debtor's plan and dismiss the case (§ 1307(c)(5)); or, the debtor can invoke the "cram down" power of Code § 1325(a)(5)(B), and thereby keep the property over the creditor's objection. This last option requires the debtor to ask the court to determine the value of the collateral (§ 502(b)) and to confirm the bankruptcy plan as it stands.

In Chapter 13 cases, when the court is asked to determine the appropriate value, some courts require the parties to appear. Other courts, however, allow a Chapter 13 debtor to file a motion to confirm the plan by consent and resolve the differences of opinion without having to attend a court hearing. The Utah Bankruptcy Court allows this procedure in Standing Order #3, ¶ 9.

To obtain confirmation by consent in Utah, the debtor files a motion entitled "Motion to Confirm Plan by Consent, Objection to Claims, and Motion for Allowance of Attorney Fees" and sends a copy to the trustee and all the creditors. The motion must list the secured claims that were filed with the court and contrast those amounts with the debtor's plan amounts. The motion must also contain a notice that written objections to confirmation must be filed with the clerk within 30 days of the confirmation hearing or the court may confirm the plan as it stands. After the 30 days, if no objections are filed, the debtor can impose his or her asserted values and interest rates on the secured creditors if the court confirms the debtor's plan. (Code § 1327(a)). However, when the debtor's and creditor's interests concerning value of the collateral are polarized, the parties usually end up before

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the court, asking it to decide which amount is right.

The debtor has many reasons to minimize the secured portion of the creditor's claim. The main reason is to reduce the debtor's payments under the plan. The debtor may not reduce the secured portion of the creditor's claim, like she can with unsecured non-priority claims. (Code § 1325(a)(5)(B))[1]. "Thus, a Chapter 13 plan can modify contract terms such as the time, method and amount of installment payments, and may modify the contract right to accelerate the debt, to repossess, and to sell the collateral...,"[2] but it must maintain the value of the secured claim. Therefore, it is in the debtor's best interest to ensure that the creditor's claim does not overstate the secured amount.

Another reason the debtor wants the creditor's secured claim lower is that once the secured portion of the debt is paid, the creditor must relinquish any title to the collateral, even though an unsecured portion of that creditor's claim remains to be paid under the plan.[3] Thus, the smaller the secured claim, the sooner the debtor is entitled to receive title to the collateral.

The creditor on the other hand would like to see a higher secured claim. First, any debt above the secured portion of the creditor's claim will be classified as unsecured and thus be subject to a "cram down." Second, the larger the secured claim, the more interest the creditor will receive – which in turn helps compensate for the length of time the debt will be tied up in bankruptcy. In addition, if the fair market value of the collateral is greater than the total amount owing (i.e. an over-secured claim), then the debtor cannot "cram down" the interest rate to the market rate, and must pay a higher rate of interest (generally the contract rate of interest) on the creditor's entire claim.[4] The creditor will also be able to seek post-petition attorney fees and costs, and post-petition interest. Code § 506(b). Thus, oversecured creditors receive more of the bankruptcy estate than do undersecured creditors.

The creditor wants the secured amount to be higher because secured claims are generally paid off before unsecured claims. The more the creditor's claim is secured, the faster the creditor will receive its money.

Thus, for opposing reasons, the creditor and the debtor will frequently battle over the appropriate value of the collateral, and the appropriate method of determining that value.

Fair Market Value Analysis Determining the Value: An Example

Consider the unsecured and secured portions of a creditor's $30,000 claim in Chapter 13 if the collateral is a 3/4 ton, 2000 Ford F-250, XLT, super duty crew cab with a long bed, custom wheels, CD player, four leather captains chairs, tinted windows, having only 5,000 miles, and in excellent condition. The N.A.D.A. car guidebook may say that average retail is $25,525 and that trade-in value is $22,575. Kelly blue book may say that average retail is $27,980 and average trade-in is $23,465. Further, the same truck may be for sale at a local dealer for $31,000, and local classified ads may advertise several similar trucks for sale by private parties for $25,000 to $35,000. How is fair market value determined?

General Rules

Code § 506(a) provides the starting point for valuing collateral. It states that a claim:

> secured by a lien on property in which the estate has an interest... is a secured claim to the extent of the value of such creditor's interest ... in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

The purpose of limiting the secured claim to the value of the collateral is to place the creditor in the same position it would

have been if it had repossessed and sold the collateral at the time of bankruptcy filing. Two aspects of "value" that the Code does not expressly address are: (1) the *date* the value should be assessed, and (2) the valuation *method* that should be used.

The date of valuation is a matter of disagreement among bankruptcy courts. Moreover, the appropriate date may depend on the different legal issues being addressed. Courts generally agree that, in the *cram down* context, collateral should be valued as of the effective date of the *plan.* However, there is less agreement on the relevant time in other contexts. For example, in motions to determine *adequate protection payments,* courts are divided on whether to use the *petition date,* the *request date,* the *motion date,* or the *hearing date.* The same disagreement is found in motions for relief from the automatic stay. (*See generally* 4 Collier on Bankruptcy, ¶506.03 [10], 506-100 (15th ed. 1997)).

Even more controversy exists over method of valuing collateral when a debtor seeks to "cram down" a secured creditor's claim in a Chapter 13 plan. Code 506(a) states that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." Despite these seemingly simple requirements, several different methods of valuation have existed throughout the history of bankruptcy law.

Omnibus Bankruptcy Improvements Act of 1983

In 1983, Senate Bill 445, entitled "Omnibus Bankruptcy Improvements Act of 1983," was introduced to provide the method for valuing collateral. The Committee on the Judiciary of the Senate issued an accompanying report expressing concern:

> The Committee, after review of the testimony detailing experience with the valuation provisions of the 1978 Code, has concluded that the courts have, in too many cases, undervalued collateral property.... Problems of proof which creditors face are compounded by judicial confusion over what standard should be employed - wholesale or retail, resale or straight line depreciation. [T]he original intent of the Congress in this regard has not uniformly been carried into practice by the courts.

S. Rep. No. 98-65, 98th Cong., 1st Sess. 5-6 (1983). The Committee suggested that changes to §506 would bring about uniformity and predictability in assessing value. The suggested changes entailed a "preference... for use of a resale market standard, with the choice of wholesale [sic] or retail measurements of value to be determined by reference to the condition of the property and the debtor's proposed use or disposition thereof." *Id.* That bill was never enacted into law. A year later, however, the Committee's recommendations for changes to § 506(b) & (d) were incorporated into the Bankruptcy Amendments and Federal Judgeship Act of 1984. Yet, Congress rejected a proposed amendment to section 506(a), which would have expressly adopted a "replacement cost" standard.

Split in the Circuit Courts

Since 1984, the circuit courts have developed three different standards for valuing collateral when the debtor's plan proposes to cram-down and keep the collateral over the creditor's objection: a Replacement Value standard, a Split-the-Difference standard, and a Foreclosure Value standard.[5]

The First, Fourth, Sixth, Eighth, and Ninth Circuits[6] each adopted a variation of the "Replacement Value" standard. These courts decided that because the debtor "propose[d] to retain and use the collateral, it should not be valued as if it were being liquidated."[7] Therefore, under the "replacement value" standard, the court values of the collateral "'in light of' the debtor's proposal to retain it and ascribe to it its going-concern or fair market value with no deduction for hypothetical costs of sale."[8]

The Seventh Circuit adopted the "Split-the-Difference" standard: "in Chapter 13 cases involving automobiles and similar assets used to produce income for the debtor, the value of the secured interest is the average of the retail and the wholesale value of the collateral."[9] The Second Circuit approved a lower court's decision to use the Split-the-Difference standard, but it chose not to adopt a specific standard for every case.[10]

The Fifth Circuit adopted the "Foreclosure Value" standard: a court should first "start with what a creditor would realize if it repossessed and sold the collateral pursuant to its security agreement, taking into account the purpose of the valuation and the proposed disposition or use of the collateral."[11]

United States Supreme Court and *Rash*

On appeal in *Associates Commercial Corp. v. Rash*[12] from the Fifth Circuit, the United States Supreme Court attempted to resolve the split among the circuit courts and to settle the valuation issue. To understand the Supreme Court's analysis in *Rash,* let us first review the facts. In 1989, Mr. Rash purchased a Kenworth tractor truck for $73,700 to use in his business. The seller financed the purchase with a sixty-month installment loan and a purchase-money security interest. Associates Commercial Corporation

("ACC") purchased the loan from the seller. In 1992, Mr. and Mrs. Rash filed a joint Chapter 13 Bankruptcy. The debtors listed ACC in their schedules as a secured creditor holding a claim for $41,171. Rashes' Chapter 13 plan proposed to retain the collateral for use in the debtors' business and invoked the cram down power of Code § 1325(a)(5)(B). The plan provided pro rata payments over 58 months to ACC to equal the present value of the truck, which was listed at $28,500. ACC filed a proof of claim alleging it was fully secured for $41,171, objected to the plan, and moved to lift the automatic stay. In response, the Rashes objected to ACC's proof of claim.

At the evidentiary hearing, ACC argued the tractor should be valued at the price the debtors would have to pay for the same truck in the retail market. ACC's expert testified that amount was $41,000. The debtors argued the tractor should be valued by the net amount ACC would receive in a foreclosure sale. The debtors' expert testified that amount was $31,875. The Bankruptcy Court agreed with the debtors and confirmed the plan. The district court affirmed. The Fifth Circuit BAP reversed. The Fifth Circuit, on rehearing en banc, affirmed the district court's decision that the proper standard was the net amount the creditor would receive in foreclosure. ACC appealed to the Supreme Court, which granted certiorari.

The Supreme Court rejected the Seventh Circuit's split-the-difference approach, stating that the Code did not warrant such a complex standard since it "calls for the value the property possesses in light of the 'disposition or use' in fact 'proposed,' not the various dispositions or uses that might have been proposed."[13]

The Supreme Court also rejected the Fifth Circuit's decision that the first sentence of Code § 506(a) mandates the foreclosure standard because the first few words in that sentence ("the creditor's interest in the estate's interest in such property") did not impart a valuation method but only what a court must evaluate.[14] However, "[t]he second sentence of § 506(a) does speak to the how question." "Such value... shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." Therefore, "by deriving a foreclosure-value standard from § 506(a)'s first sentence, the Fifth Circuit rendered inconsequential the sentence that expressly address how 'value shall be determined.'" The Court went on to say that the foreclosure standard does not attribute any "significance to the different consequences of the debtor's choice to surrender the property or retain it [under § 1325(a)(5)(B) and (C)]. A replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key words 'disposition or use.'"[15]

The Supreme Court then held that the replacement value standard was the appropriate[16] standard when the debtor proposed to keep the collateral over a creditor's objection and rely upon the "cram down" power of § 1325(a)(5)(B). "In such a 'cram down' case... the value of the property (and thus the amount of the secured claim under § 506(a)) is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." Therefore, "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question." "In sum..., the 'cram down' option is the cost the debtor would incur to obtain a like asset for the same 'proposed... use[].'"[17] However, the Rash Court also said:

> That replacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning... [n]or should the creditor gain from modifications to the property — e.g., the addition of accessories to a vehicle — to which a creditor's lien would not extend under state law.[18]

Post *Rash*

After the Supreme Court's 1997 opinion in *Rash,* numerous articles[19] appeared, many of which questioned whether *Rash* actually resolved the issue of "value" and whether it had provided a "predictable and uniform rule of valuation."[20] Although *Rash* moved the debate one step closer to resolution, a continuing valuation problem stems from what the Court wrote in its second and sixth footnotes.

In the second footnote, *Rash* defined replacement value as the fair market value, *i.e.* the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition. However, in footnote six the Court wrote:

> Our recognition that the replacement-value standard... governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of **retail value, wholesale value, or some other value** will depend on the type of debtor and the nature of the prop-

erty. [Emphasis added]

Although the Supreme Court resolved the split between Circuits on what standard should apply in § 506(a) and § 1325(a)(5)(B) by adopting the replacement value standard, the Court only vaguely defined "replacement value" and consequently "created uncertainty as to how the courts [should] make specific evaluation decisions under that standard."[21] Therefore, the answer to the "question of how future courts will determine... value while serving the interests of predictability and uniformity... is" that it will be done with "great difficulty and very little uniformity...."[22]

One commentator concludes that post-*Rash* decisions on value are just as conflicting as they were before *Rash.*[23] After *Rash,* courts have used four different methods to decide "replacement value": (i) N.A.D.A. Retail Value, (ii) Not Retail, (iii) Midpoint between wholesale and retail, with adjustments, and (iv) Actual Sales Prices.[24] The courts, when adopting a method, have justified their holdings by relying upon footnotes two and six in *Rash.*

The "N.A.D.A. Retail Value" method is exemplified by *In re Russell.* The *Russell* court rejected the debtor's attempt to dispute the N.A.D.A. retail value by submitting as evidence a single newspaper advertisement placed by a used car dealer for a similar automobile. The court held that the proper way to decide "replacement value" was to start with the retail value that is listed in the N.A.D.A. (holding that this value does not include any extra value for items not retained by the debtor) and then make adjustments from there as "agreed to by the debtor, the secured creditor and the Chapter 13 trustee."[25]

The "not retail" method is illustrated by *In re Roberts.* Under this method, the court will reject evidence the debtor had submitted that entails a written appraisal without testimony by the appraiser. The court said, however, that it will accept the average of the N.A.D.A. blue book values (*i.e.* average between trade-in and retail values) as a guidepost, but those values are not conclusive (unlike *Russell* where retail value controls). The parties should bring in witnesses who can actually talk about the condition of the car.[26]

The "[m]idpoint between wholesale and retail, with adjustments" method was used by *In re Franklin* and *In re Younger.* In *Franklin,* the court held that the replacement value was properly set as the average between the vehicle's retail and wholesale bluebook values, with adjustments upward or downward as called for by special circumstances. The court adjusted downward for the vehicle's condition and cost of needed repairs. It also adjusted upward for the value of remaining extended warranty coverage purchased by the debtor.[27]

In *Younger,* the court also held that the starting point is the average of the wholesale and retail values listed in the N.A.D.A. guidebook, with adjustments for equipment, mileage and vehicle condition. The court would, however, accept other comparable reliable sources or appropriate compilations. In reference to other "reliable sources" and "compilations," the court said it would follow Rule 803(17) of the Federal Rules of Evidence in that "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (17) Market reports, commercial publications...." *Younger* also stated that the retail value in the N.A.D.A. should be adjusted downward in some amount to account for "inventory storage" and "reconditioning," two items that *Rash* specifically stated should not be included.[28]

Finally, the last post-*Rash* method, "Actual Sales Prices," is depicted in *In re McElroy* and *In re Jenkins. McElroy* held that valuation would be "based on prices paid in the market that is accessible to the debtors, which includes, without limitation, sales by dealers to the public, auctions open to the public, and sales between private parties. That 'market' is broader than the 'retail' market."[29] The court went on to say that from these prices items such as "reconditioning, warranties, and the cost of other

services or additions provided by the seller" should be deducted. The court defined "fair market value" as "the cash price that a willing buyer would pay a willing seller in an arms-length transaction, free from compulsion or duress." The court then held that the fair market value should be based on a simple cash sale, a "sale for cash (no financing provided or required as part of the transaction), without a trade-in, and without the buyer purchasing any additional products, such as disability, life or mechanical insurance, in conjunction with the sale."[30]

Jenkins is another good example of the "Actual Sales Prices" method. In addition to what *McElroy* said, *Jenkins* held that it would not consider a "risk premium" imposed on the price by the dealer because the dealer had arranged for financing.[31]

Applying Post-*Rash* Methods

Of the various methods employed to determine the true "replacement value," this author believes that each holds a bit of the truth and that several methods should be used.

In determining "replacement value" of any type of collateral that has a published book of market values, the process should start with these guidebooks to determine "book value." For example, for vehicles, a debtor or creditor would first determine the "book value" per N.A.D.A. Based upon the internal, external, and mechanical conditions of the vehicle, the creditor/debtor should first decide if it is worth the high **("N.A.D.A. Retail"),** middle **("The Midpoint between wholesale and retail, with adjustments"),** or low **("Not Retail")** book value. The creditor/debtor's value judgment will of course be subjective (*i.e.* wear, tear, and scratches) as well as objective (*i.e.* cost to repair damage or mechanical break down). Next, allowed N.A.D.A. additions (*i.e.* low mileage and accessory items such as custom wheels) and subtractions (*i.e.* high mileage and manual transmission) should be made to come up with an adjusted N.A.D.A. "book value."

Next, that "book value" should be compared with "Actual Sales Prices," *i.e.,* those "prices paid in the market[s] that [are] accessible to the debtors, which includes, without limitation, sales by dealers to the public, auctions open to the public, and sales between private parties," and if appropriate wholesale markets.[32]

Finally, expert appraisers should be used to testify to the condition and value of the collateral. The court should consider all the facts that are relevant to the determination of the value and not rely on a dogmatic rule. If both the debtor and creditor were to take on this approach, they should be closer in their evaluation of the collateral and could settle valuation issues more often than not.

Bankruptcy Reform Act of 2001

Congress has continued to consider changes to the Bankruptcy Code for a way that, in their opinion, would fairly resolve the valuation issues. In March of 2001, both the House and the Senate passed versions of the Bankruptcy Reform Act of 2001 ("Act").[33] The proposed changes are identical when it comes to valuation of security collateral. The Act, if passed, would state that "Secured claims shall be determined under § 506(a) based on the replacement value of the collateral as of the filing *without deduction for costs of sale or marketing."*[34] [Emphasis added]. Thus, the Act would codify the Rash holding but remove the Court's emphasis in footnote six that "replacement value" does not include the value of items such as "warranties, inventory storage, and reconditioning."

Each version also contains an amendment to § 1325(a)[35] that would prohibit a debtor from cramming down a claim that was incurred within three[36] years of the filing date and is secured by a purchase-money security interest in a motor vehicle acquired for personal use by a Chapter 13 debtor. All other claims that are secured by a purchase-money security interest in any other thing of value cannot be crammed down if the debt was incurred within one year preceding bankruptcy.[37] This is meant to cut down the amount of litigation surrounding "replacement value" and to protect secured creditors from (perceived) abuses at the hands of debtors.

Whether this Act will be passed is unknown. If it is, these changes will have a substantial effect on valuation battles between debtors and creditors. But for now, the courts will continue to define value based on the replacement value standard. When the issues and arguments are refined, and the Circuits are split again, the Supreme Court may finish resolving the problem it started to fix in *Rash.*

[1] The debtor's plan under Code § 1322(b)(2) may "modify the rights of holders of ... unsecured claims...." Under the "Best Interest" test of § 1325(a)(3) and (4), the two requirements of the debtor when paying unsecured claims are: 1) The plan must be "proposed in good faith and not by any means forbidden by law"; and 2) "The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7...." Thus, for example, assuming the debtor has met the "good faith" requirement, she may "cram down" the unsecured debt to 30 cents on the dollar if the liquidation analysis shows that the unsecured class would receive something less than the 30% of their debt back. However, several courts have held that the debtor must pay more to the unsecured class than just the amount they would receive under Chapter 7 liquidation, for example 6% more than the liquidation percentage. *E.g. In re Santa Maria,* 128 B.R. 32, 36 (Bankr. N.D. N.Y. 1991) and *In re Rivera,* 116 B.R. 17, 18 (Bankr. D. Puerto Rico 1990).

[2] Norton Bankruptcy Law and Practice § 122:8, 122-69, (2d ed. 1997).

[3] In 1994, Congress amended Code § 348 to state that any "valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case [*i.e.* Chapter 7] with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan." Code § 348(f)(1)(B). Therefore, a debtor may redeem the collateral upon conversion to Chapter 7 for the fair market value determined under the Chapter 13 minus all payments made on the creditor's secured claim. So, in essence, the debtor may redeem the collateral for $0.00 if the entire claim had been paid under the plan. This analysis has been carried forward to Chapter 13 cases where the majority of the courts hold that once the creditor's secured claim has been paid, the plan can provide for releasing the creditor's lien. *See e.g.,* 8 COLLIER ON BANKRUPTCY, ¶ 1325.06[3], 1325-28-30 (15th ed. 1997).

[4] "Some courts have held that an oversecured creditor is entitled to claim accrued post-petition interest at the contract rate [which is generally higher], but only through the effective date of the plan." NORTON BANKRUPTCY LAW AND PRACTICE, § 123:12, 123-55 (2d ed. 1997). Cf. 8 COLLIER ON BANKRUPTCY, ¶ 506.04[2][b][i], 506-109 (15th ed. 1997). The vast majority of the courts have held that post-petition interest should be computed using the contract rate of interest.

After the effective date of the plan, the creditor is only allowed interest at the "confirmation rate." NORTON, § 123:12, 123-56. The appropriate "confirmation rate" has been the source of much debate. Some courts have held that the rate is controlled by something other than the contract. *See Key Bank N.A. v. Milham,* 141 F.3d 420, 424 (2nd Cir. 1998).

On the other hand, other courts have held that the appropriate rate is the contract rate of interest. *See In re Younger,* 216 B.R. 649, 651, n.3 (Bankr. W.D. Okla. 1998). *See* also, *In re Terry Limited Partnership,* 27 F.3d 241, 243 (7th Cir. 1994) (There is a rebuttable presumption that the contract rate is the proper rate).

[5] *See Associates Commercial Corp. v. Rash,* 117 S.Ct. 1789, 1883 (1997).

[6] *Winthrop Old Farm Nurseries, Inc., v. New Bedford Institution for Savings, et al.,* 50 F.3d 72, 74-75 (1st Cir. 1995). *Coker v. Sovran Equity Mortgage Corp,* 973 F.2d 258, 260 (4th Cir. 992). *Huntington National Bank v. Pees (In re McCurkin),* 31 F.3d 401, 405 (6th Cir. 1994). *Taffi v. United States,* 96 F.3d 1190, 1192 (9th Cir. 1996).

[7] *Winthrop Old Farm Nurseries, Inc.,* 50 F.3d at 74 (1st Cir. 1995).

[8] *Id.*

[9] *In re Hoskins,* 102 F.3d 311, 316 (7th Cir. 1996).

[10] *In re Valenti,* 105 F.3d 55, 62 (2nd Cir. 1997).

[11] *Associates Commercial Corp. v. Rash,* 90 F.3d 1036, 1043 & 1060 (5th Cir. 1996).

[12] *Associates Commercial Corp. v. Rash,* 117 S.Ct. 1879 (1997).

[13] *Id.* at 1886.

[14] "A debtor may own only a part interest in the property pledged as collateral, in which case the court will be required to ascertain the 'estate's interest'...." *Rash,* 117 S.Ct. at 1884. The court must also determine "what" interest the creditor has in the collateral, especially where "a creditor may hold a junior or subordinate lien...." *Id.* at 1885.

[15] 117 S.Ct. at 1885.

[16] The Supreme Court did not give any "weight to the legislative history of § 506(a)" within regards to the appropriate standard that should be used, "noting that it is unedifying, offering snippets that might support either [foreclosure or replacement-value] standard of valuation." *Rash,* 117 S.Ct. at 1886 n 4.

[17] *Id.* at 1884-1886.

[18] *Id.* at 1887 n.6.

[19] As of Nov. 3, 2001, Westlaw reported 154 articles citing the Supreme Court's *Rash* decision.

[20] The Supreme Court said in *Rash* that they "agree with the Seventh Circuit that 'a simple rule of valuation is needed' to serve the interests of predictability and uniformity." *Rash,* 117 S.Ct. at 1886, citing *In re Hoskins,* 102 F.3d 311, 314 (7th Cir. 1996).

[21] *See, Supreme Court's Rash Decision Fails to Scratch the valuation itch,* 53 Buslaw at 1379.

[22] Laurie B. Williams, *Rash: Neither Final nor Right,* 1998 No. 9 NRTN-BLA 12 (Sept. 1998).

[23] *Rash: Neither Final nor Right,* 1998 No. 9 NRTN-BLA 12.

[24] *Id.*

[25] *In re Russell,* 211 B.R. 12, 13 (Bankr. E.D. N.C. 1997).

[26] *In re Roberts,* 210 B.R. 325 (Bankr. N.D. Iowa 1997).

[27] *In re Franklin,* 213 B.R. 782 (Bankr. B.D. Fla. 1997).

[28] *In re Younger,* 216 B.R. 649 (Bankr. W.D. Okl. 1998).

[29] *In re McElroy,* 210 B.R. 833, 835 (Bankr. D. Or. 1997). In footnote 1, the court said that if the debtors' trade, business, or situation were such that they had access to the wholesale market, the valuation analysis would include values from there.

[30] *Id.,* at 835.

[31] *In re Jenkins,* 215 B.R. 689, 691 (Bankr. N.D. Tex. 1997).

[32] *In re Franklin,* 213 B.R. at 835.

[33] The House's version of the Bankruptcy Reform Act of 2001, was passed on March 1, 2001 by a vote of 306-109. The Senate approved its version of the bill, S. 420, on March 15, 2001, by a vote of 83-15. *"Bankruptcy Reform Legislation of 2001, Summary of the Bankruptcy Reform Act of 2001."* 2001 WL 5333346 (Norton Bankr. Reform Act. Newsl.) (May 10, 2001). See 2001 Cong. U.S. H.R. 333, 107th Congress, 1st Session (March 1, 2001). *Also see* 2001 Cong. U.S. S. 420, 107th Congress, 1st Session (March 15, 2001).

[34] 2001 Cong. U.S. H.R. 333, § 309 & 2001 Cong. U.S. S. 420, § 309.

[35] 2001 Cong. U.S. H.R. 333, § 306(b) & 2001 Cong. U.S. S. 420, § 306(b).

[36] Five years in House Bill. 2001 Cong. U.S. H.R. 333, § 306.

[37] 2001 Cong. U.S. H.R. 333, § 306 & 2001 Cong. U.S. S. 420, § 306.

Me? A Collection Attorney? Hardly! I Am a Litigator With High Visibility Clients. The FDCPA is for 'Debt Collectors'!

by Richard B. Frandsen

When you think about it, nearly all attorneys are "collectors." Lawyers are hired to improve the state of their clients, usually through a transfer of funds or property. Although we might not think of ourselves as "collection attorneys," those we pursue may disagree.

The Fair Debt Collection Practices Act or "FDCPA" has become a favorite day-time talk show topic. Each show features a poor soul appearing (with his attorney) to tearfully tell his story of a collector committing unspeakable horrors in an attempt to collect a debt. The host, and of course the attorney, will invariably end each show with a discussion of that ray of hope called the FDCPA and the money waiting for a debtor if a violation can be found.

When Congress targeted collection agency abuses in the 1970's, they sought to alleviate criminal threats, harassing night time or repetitive calls, and efforts to collect debts through employer or neighbor contacts. As years passed and language was interpreted by the courts, coverage appears to have expanded. And most notably, attorneys have lost their exempt status. Now, even the most careful attorney, one claiming never to have collected a debt, may find himself in the cross hairs of that tearful debtor and his attorney.

The FDCPA attempts to bridle the collector in his efforts to collect a consumer, or retail, debt. It does so by providing specific disclosures to the debtor, by regulating contacts with the debtor, and offering substantial remedies for the violation of these provisions.

Who and What Is Covered by the Act?

The Act defines a 'debt' as:

> . . . any obligation or alleged obligations of a consumer to pay money arising out of a transaction in which Money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. (15 U.S.C. 1692a (5))

A 'debt' within the meaning of the FDCPA is a consumer debt only. It is a debt based on personal, family or household purposes. It is important to note that commercial debts are not covered by the Act. However, this distinction is not always easy to draw as reflected in the numbers of appellate cases addressing the issue. To be safe, unless the collector knows without any doubt that a debt is commercial and not consumer, the debt should be seen as a consumer or retail debt. Otherwise, the collector is taking a foolish risk.

The next threshold is the determination of who is a 'debt collector.' The Act covers:

> . . . any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Until 1986, an attorney doing collections did not need to worry about the restrictions of the FDCPA. An attorney's concerns were limited to the representation of collection agency clients who were being accused of harassment, vulgarities, or trickery. But in that year, attorneys lost their exemption through an amendment to section 1692a(6)(f) of the Act, forcing them to come to grips with the restrictions imposed by the Act.

The key word for an attorney is "regularly." Does the attorney or firm regularly collect debts for another entity? If so, the Act applies and its restrictions are imposed. What must be understood is that "regularly" does not equate with "a majority" or "substantial portion" of the practice. What will be looked at is the volume of

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collection business performed by the firm even though the collection portion of the firm's entire practice may be relatively small.

Normally a creditor's own collection efforts would not be regulated by the Act. Its provisions are exclusively reserved for the third party collector. But a creditor can become liable for violations if an employee of the creditor uses a name which would lead the debtor to think the debt is being collected by a third party. Certainly a creditor sending demands to its debtor in the guise of a "collection agency" to create the false belief that the debtor is dealing with a collection agency, attorney, or credit bureau would violate the Act. Additionally, an in-house counsel attempting to collect a debt for his employer by using letterhead designed to appear as an independent law firm would subject the creditor to the Act.

Permitted And Restricted Communications

Collectors are paid for results through commissions, bonuses, and increased benefits. But all too often a collection quota or other expectation enticed a collector to use any method possible to obtain the financial award or other recognition. Many creditors ascended the ladder of their profession by deception, threats, filthy language, and annoying calls. The FDCPA attempts to overhaul this system by specifying how far a collector can go in obtaining payment. And the overhaul truly is mammoth.

Debt collectors, including attorneys, can no longer send the office boilerplate demand letter to a consumer debtor with deadlines, demands, and the usual threat of suit. Either in the initial communications or within five days of that contact, the collector must send a written notice to the debtor. The notice must conspicuously include:

1. The creditor's name;
2. The amount owed;
3. A statement indicating that unless the debtor disputes the debt within 30 days the collector will assume the debt is valid;
4. A statement that the collector will obtain verification of the debt if disputed within the 30 day period and the verification or documentation will be provided to the debtor; and
5. A statement that if written request is made within the 30 day period the collector will provide the name of the original creditor.

The language of this notice is not to be relegated to an inconspicuous corner of the communication. Nor is it to be placed on the back of the document or in translucent gray. It must be legible

and large enough to be read easily. Nor is it to be contradicted by language which would tend to downplay or detract from the language of this notice. Certain threats and deadlines which previously defined a demand letter now bring the attorney or collector dangerously close to violating the Act. The test is whether the "least sophisticated" debtor will recognize and understand the disclosure.

Although a decision to press forward with suit or further collection activities during the 30 day period can be supported by occasional commentators and governmental opinions, it is general agreed that the cautious collector will wait patiently and silently during this period until a more definitive ruling defines what if any actions can be taken during the 30 days.

Ongoing Disclosures

As discussed, a debt collector must provide the consumer debtor with a notice in the initial contact. In addition, current law requires that the debt collect or must include a "mini-Miranda warning." The debtor must be informed that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."

Initially, all subsequent communications required the "mini-Miranda warning." But in 1996, an important amendment was signed into law which requires the "mini-Miranda warning" to be included only in the initial communication. Subsequent communications must only cite that the communication is from a debt collector. Another important clarification offered by the amendment was to remove the requirement of placing a "mini-Miranda warning" or debt collector notice on formal pleadings associated with legal action.

The FDCPA also provides restrictions as to when and where a debtor can be contacted. A debtor cannot be contacted at a time which is unusual or knowingly inconvenient. The hours of 8 a.m. to 9 p.m. (at debtor's location) are recognized as reasonable. Nor can a debt collector contact a debtor who is known to be represented by legal counsel, unless the debtor's lawyer fails to respond within a reasonable time. Of course, an attorney collector will be restricted to a stricter degree by his bar membership. Furthermore, a debtor may not be contacted at his work place if the collector knows or should know that the debtor's employer forbids such contacts.

A collector is also prohibited from using post cards, see-through envelopes, or other stationery which could place a third party on notice that the sender is a debt collector or that the addressee is the subject of debt collection.

Contacts with Third Parties

One of the major objectives of the Act is to eliminate harassing, damaging collection contacts with third parties. Unless given express authority by the debtor, or the court, or unless otherwise allowed by the Act, a collector can only contact the debtor, the debtor's attorney, the creditor, the creditor's attorney, his own attorney, and possibly a credit reporting agency, in reference to the debt. Otherwise, there can be no communications with third parties concerning the debt.

The Act recognizes that locating a debtor is an essential element of collecting a legitimate debt. But efforts to locate the debtor through third parties are severely limited.

First, the collector must identify himself and tell the third party he is trying to confirm the individual's location or address. Only if asked specifically can the collector identify his employer.

Second, no reference or inference can be made to the debt.

Third, normally only one contact can be made with the third party.

Lastly, once the collector knows that the debtor is represented by legal counsel, all location questions must be addressed to that attorney unless all such communications are ignored.

Harassment and Abuse

Several collection tactics are cited in the FDCPA as being harassment or abuse and thus violative of the Act. The following list is not all inclusive:

- Obscene or profane language.
- Threats of violence or criminal conduct against anyone.
- Repeated telephone calls or allowing a phone to ring repeatedly with the intent to annoy or harass.
- Failure to identify the telephone caller (unless restricted by third-party provisions).
- Publishing a "deadbeat list".

False Representations

The collector must be truthful with the debtor. The FDCPA defines this duty by offering the following examples of "false, deceptive, or misleading" conduct sanctioned by the Act. Again, the list is not exhaustive.

- Implying that the collector is sponsored by or affiliated with a governmental entity, a credit reporting agency, or is an attorney when such is not the case.
- Holding out documents as legal process or other governmen-

tal documents when they are not.

- Implying that documents are not legal process when they are.
- Using a false business name. (A person collecting a debt may use an alias if it is used consistently, the employer knows of the alias, and the collector can easily be identified by that name).
- Using a deceptive means to assist in the collection of a debt or to gain information on the debtor.
- In an attempt to scare or humiliate a debtor, to imply he committed a crime.
- Threatening to take legal or other action which either legally cannot be taken or which is not intended. (See Newman v. Checkrite California, Inc., 912 F. Supp. 1354 (E.D. Cal 1995))
- Communicating credit information which is inaccurate.
- Failure to use the "mini-Miranda warning" in all communications.

Unfair Practices

15 U.S.C. 1692f provides a further list of violations which are deemed "unfair" when undertaken by a debtor collector. It is made clear that this is not an exhaustive list of violations:

- Using post cards to communicate with the debtor regarding the debt.
- Corresponding with the debtor using envelopes which identify the sender as a debt collector.
- Collecting an amount which is neither expressly authorized by contract or by law.
- Causing the debtor to be charged for telephone calls or other communications incurred because the collector conceals the purpose of the communication.
- Threatening to deposit or depositing a postdated check prior to the appropriate date.
- Soliciting a postdated check with the intent to use the instrument to threaten or file a criminal action.
- Accepting a check or instrument which is postdated by more than five days unless the person offering the check is given written notice that the collector intends to deposit the check not more than ten or less than three business days prior to deposit.
- Threatening to take through "self help" any property when the collector has no present right of possession, he has no present intent to take the property, or the property has been exempted by law.

Venue

No longer can a collector force a debtor to defend a suit in a far off county or state either by whim or contract. That earlier practice was usually based on fine print hidden in paragraphs or pages of boilerplate language in a consumer contract. That leverage disappears pursuant to the FDCPA.

Under the Act, if the action is based on an interest in real property or a security interest in that property, the suit must be filed in the county (or district) in which the property is situated. Otherwise, the debtor must be sued where the contract was signed or in the county (or district) in which the debtor resides.

Penalties Afforded by the Act

A technical violation of the Act can be a tragic lesson for an unsuspecting collector, including of course an attorney collecting a debt.

15 U.S.C. 1692k (a) allows damages to be awarded in the following forms:

a) Actual damages stemming from the violation;

b) Additional damages set by the court not to exceed $1,000.00;

c) If a class action, an additional amount not to exceed $500,000.00 or 1% of the debt collector's net worth (which ever is less) may be awarded; and

d) Costs and reasonable attorney fees.

The Act has generated an explosion of claims which some would argue are filed for the sole purpose of generating attorney fees. Often, the violations may seem small and the damages even smaller. But there are still firms throughout the nation eager to provide legal representation to the injured victims even when the target is an attorney. This "boutique" specialty saturates many areas of the country and Utah attorneys have not escaped pursuit.

Defenses

The collector is not without armor in such a suit. Under 15 U.S.C. 1692k(c), if a violation is found, the collector will not be held liable if he can show that the violation was not intentional and was simple error. But in even in the presence of a bona fide error, the collector will also be required to show that the error was made despite established procedures designed to avoid such an error. Courts will also look to the frequency of the violations and whether the violation was intentional.

In 1997, sensing the growing confusion of attorneys and collection agencies, the U.S. Seventh Circuit Court of Appeals expressed a need for a "safe harbor" demand letter designed to comply with the Act and avoid further court challenges. The following is the text of that letter:

> Dear [Consumer]:
>
> I have been retained by Micard Services to collect from you the entire balance, which as of September 25, 1995, was $1,656.90, that you owe Micard Services on your MasterCard Account No. 541470117068749.
>
> If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard at 1-800-221-5920 ext. 6130 and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.
>
> Federal Law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it – by notifying me in writing to that effect – I will, as required by law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Micard Services), I will furnish you with that information too.
>
> The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.
>
> Sincerely,
>
> [Collection Attorney]

At first glance, this letter appears to be of great value to the collector, as envisioned by the Court. However, before making the letter boilerplate for the office the practitioner should consider:

- The letter infers the dispute or request must be made in writing.
- The letter does not include the "Mini-Miranda" warning.
- The letter appears to overshadow the 30 day allowance by demanding payment within a week.

Arguably, the main contribution of the letter is to underscore the need for even further clarification and simplification of the Act.

The Seventh Circuit recently gave attorneys even more to think about in Boyd v. Wexler, 2001 U.S. App. LEXIS 27262 (7th Cir. Dec. 28, 2001). Mr. Wexler, who practiced in the consumer collection area, was sued based on an allegation that he sent out demands to consumers without personally reviewing the files. The debtor claimed Wexler created the false impression that the letter came from an attorney when it was alleged he had not been involved. Claiming in an affidavit that he indeed reviewed each file, he was granted summary judgment. The Court of Appeals disagreed finding that based on the sheer number of cases a jury could determine that no review took place. The Court noted that Wexler had dealt with approximately 100,000 collection files during a six month period and that a reasonable person could conclude that the attorney failed to conduct a meaningful review of each file based on the numbers. This case is certain to give pause to an attorney with a volume consumer debt collection practice who is faced with the task of personally reviewing a huge number of files for accuracy.

The Future of the FDCPA

Since the courts have been less than successful in alleviating the confusion and complexity associated with the Act, critics have turned to the legislative branch in seeking these clarifications and limitations. During 2002, Congress appears to have most interest in correcting the FDCPA's impact on mortgage foreclosure and servicing, as well as a loosening of restrictions on lawyers in litigation. H.R. 3533 aims to exempt from "communication" attorney contacts based on the Federal Rules of Civil Procedure or comparable state rules. Attorneys are also following H.R. 2014 which would allow collection efforts to continue during the 30 day validation period and would cap the award of attorney fee awards. But the passage of these initiatives is far from certain.

So when another attorney announces in a telephone conversation that she is a "debt collector" or if her voice mail message proclaims the same, don't shake your head at the pride in these odd individuals. Instead, take an inventory as to whether you, or someone in your firm, also qualifies for the "debt collector" moniker. A mistake could be costly. Wear the name proudly!

Commission Highlights

During its regularly scheduled meeting March 21, 2002, which was held in St. George, the Board of Commissioners received the following reports and took the actions indicated.

1. John T. Nielsen reported on the Legislative Session. He told the Commission that the Bar had recommended supporting sixteen bills in the last legislative session. Of those bills, fifteen passed and one bill failed. Of the seven bills which the Commission opposed, only two passed. John T. Nielsen thanked David Bird for his help with mitigating the severity of problems relating to the revisions in the JCC provisions. John concluded his report by informing those present that the Legislature had increased various court filing fees approximately $15-20 which will raise nearly $2.8 million in state revenues. John also updated the Commission on several recent items of interest. Alicia Suazo will not be running for election and Nisa Sisneros, a Hispanic woman lawyer at Salt Lake Legal Defenders, has been slated as Alicia's successor to run for that seat. Utah Bar member Greg Bell is seeking Senator Terry Spencer's seat and attorney Patrice Arent will be running against Steve Poulton in the Holladay area
2. D'Arcy Dixon Pignanelli reported on spearheading the Bar's lobbying efforts on S.B. 44 and identified those individuals who were instrumental in obtaining funds for the Community Legal Center. She explained that an appropriation of $100,000 in this tight budget year was a victory and that every contact made a significant difference.
3. Debra J. Moore gave the Judicial Council report. Debra reported that despite severe budget cuts in this year's legislative session, the AOC is in relatively good shape primarily because of the creation of the justice courts and ongoing reduction rather than elimination of staff positions. Debra also reported that every member of the judiciary currently eligible for retention has filed again except Judge Braithwaite. The Judicial Council has adopted several new rules, one of which is that judicial education credit has been approved for judges' participation in certain community outreach projects.
4. John A. Adams reported on the Western States Bar Conference. One of the dominant topics at the conference was MJP and toward that end, New Mexico is investigating the feasibility of a Four Corners Area MJP Consortium. Since enacting its MJP rule, Idaho has had over 200 requests for applications but only 40 actual application filings. The Northwest MJP Consortium's experience has been that state border attorney residents are the ones who typically avail themselves of MJP reciprocity opportunities. John also reported on the current status of the Utah Supreme Court's Committee on the Delivery of Legal Services.
5. John Adams asked the Commission to consider an effective way to thank the Legislature for its Community Legal Center appropriation.
6. Randy S. Kester related that U.S. Supreme Court Justice Kennedy gave a stirring speech at the National Association of Bar President's meeting held recently in Philadelphia.
7. Charles R. Brown gave a report on the ABA's mid-year convention, reminding the Commission that the ABA's mid-year convention in 2005 would be held in Salt Lake City. He noted that Scott Daniels will be meeting with Utah's Congressional leaders on the upcoming ABA Day in Washington, D.C.
8. John Baldwin reminded the Commission that the Jack Rabbit Bar will be held June 7 & 8 @ the Canyons, in Park City. John explained the Bar's Section 125(c) cafeteria flexible spending account plan documents needed updating. The Commission voted to approve the service agreement contained in the materials and adopt the proposed resolution. John directed the Commission's attention to the Bar's proposed multijurisdictional rule and public comment would be taken until April 26th. John Baldwin updated the Commission on the award recipient reimbursement policy. The Commission voted to provide mileage reimbursement for both convention chairs and award recipients at the Annual and Mid-Year Conventions, but to omit complimentary tickets to sporting events and the cost of meals for award recipients (except for an awards luncheon if one is held.) John Baldwin reviewed the Bar Program reports submitted by staff.
9. Gary Sackett reviewed Ethics Advisory Opinions 02-01, 02-02, 02-03, 02-04 and 02-05.
10. Nanci Snow Bockelie reported on "and Justice for all".
11. Nathan D. Alder reported on the Young Lawyers Division.
12. Denise Dragoo and Debra Moore were nominated for President-elect. Both were invited to speak on their respective desires to serve as President-elect.
13. Felshaw King reminded the Commission that the upcoming April 26th Commission meeting would be held at the Oakridge Country Club with the Davis County Bar. David Bird suggested that the Davis County legislators be invited to the luncheon portion of the meeting.

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

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill a vacancy on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers.

Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions.
- Includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest to:

Gary G. Sackett, Chairman
Ethics Advisory Opinion Committee
P.O. Box 45444 • Salt Lake City, Utah 84145

Supreme Court Seeks Attorneys to Serve on its Advisory Committee on the Rules of Civil Procedure

The Utah Supreme Court is seeking applicants to fill four vacancies on its Advisory Committee on the Rules of Civil Procedure. The committee researches and debates issues related to proposed rule changes and prepares written recommendations to the Supreme Court. Meetings are usually held monthly. Appointments will be for a four year term. Interested attorneys should submit a resume and letter indicating interest and qualifications to Brent M. Johnson, Administrative Office of the Courts – Legal Department, 450 South State, Third Floor, Salt Lake City, Utah 84114-0241. Applications must be received no later than June 14, 2002.

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.

Thanks to the members of the Bar Examiner, Bar Examiner Review, and Character and Fitness Committee for volunteering your time and effort to assist with the February 2002 Bar Examination. Your contributions are greatly appreciated. Congratulations also to those applicants who passed the exam. Welcome to the Utah State Bar.

Joni Dickson Seko, Deputy General Counsel/Admissions

The Utah Supreme Court's Advisory Committee on Professionalism

The Utah Supreme Court recently announced the formation of "The Utah Supreme Court's Advisory Committee on Professionalism." Chaired by Justice Matthew Durrant, the committee is charged with the responsibility to familiarize itself with the work of the American Bar Association and state committees and commissions in the areas of professionalism and civility. The committee is then expected to consider whether Utah should follow the lead of other states in adopting a code of professionalism. The committee may also make recommendations for changes to the Utah Bar's CLE requirements, the Code of Judicial Administration, other court rules, and the Rules of Professional Conduct.

"A lot of work has already been done in this area by the ABA, the American Board of Trial Advocates, and others," said Justice Durrant. "We aren't inventing anything new here. The question really is what Utah can do to enhance the sense of professionalism of lawyers and to promote greater civility in the practice of the law. It is a challenge because our adversarial system does not necessarily bring out the best in lawyers as human beings. It can be a stressful process and that stress sometimes causes good people to behave in bad ways."

The committee membership represents a broad spectrum of attorneys, judges, and law professors. Justice Durrant invites anyone interested in professionalism and civility to convey their comments to him or any other member of the committee. At its inception, the membership of the committee is as follows:

Justice Matthew B. Durrant, Chair
Utah Supreme Court
Salt Lake City

Nathan D. Alder, Esq.
Christensen & Jensen
Salt Lake City

Judge Anne Boyden
Third District Court
Salt Lake City

Matty Branch, Esq.
Appellate Courts
Salt Lake City

Francis J. Carney, Esq.
Anderson & Karrenberg
Salt Lake City

Augustus Chin, Esq.
Salt Lake City Prosecutor's Office
Salt Lake City

Robert S. Clark, Esq.
Parr Waddoups Brown Gee and Loveless
Salt Lake City

Scott Daniels, Esq.
President, Utah State Bar

Royal I. Hansen, Esq.
Moyle & Draper
Salt Lake City

Judge Jerald L. Jensen
Davis County Justice Court
Farmington

Prof. Thomas R. Lee
J. Reuben Clark School of Law
Provo

Judge Kay A. Lindsay
Second District Juvenile Court
Provo

Ruth Lybbert, Esq.
Dewsnup, King & Olsen
Salt Lake City

Suzanne Marychild, Esq.
Logan

Judge Gregory K. Orme
Utah Court of Appeals
Salt Lake City

Prof. Susan R. Poulter
S.J. Quinney College of Law
Salt Lake City

V. Lowry Snow, Esq.
Snow, Jensen & Reese
St. George

Jeffrey M. Vincent, Esq.
STSN
Salt Lake City

Billy L. Walker, Esq.
Office of Professional Conduct
Utah State Bar

Donald J. Winder, Esq.
Winder & Haslam
Salt Lake City

MDP Petition Denied by Court

Recently the Utah Supreme Court acted on the Bar's petition to allow for Multidisciplinary Practice (MDP) in Utah. The Court denied the petition, but suggested the issue may be readdressed at a later date.

In 2000, then Bar President Charles R. Brown appointed a Task Force to explore MDP issues and make recommendations to the Utah State Bar on possible courses of action. Over a period of about a year, the Task Force met, reviewed information, took input from members and produced a report with recommendations. This report recommended that the Bar petition the Court to change some rules within the Rule of Professional Conduct to allow Utah lawyers to participate in MDPs. MDPs were defined as professional service firms, where other professionals could share in ownership and therefore fees. Current rules do not allow for the sharing of fees with non-lawyers in this manner.

The report recognized that MDP-type services were already being offered in the market, and that a change to the rules could 1) allow lawyers to better compete in the market, 2) retain the core values of the profession, and 3) enable the Bar to have some regulatory position with these emerging service firms.

After the report was released a formal comment period followed. Bar members were encouraged to give their opinions on this possible change to the Rules. Of the 64 comments received, 67% favored the changes, 25% opposed and 8% were neutral. Comments favoring the changes focused on the fact that MDP is already happening, and clients will be better served if lawyers are involved. Comments against the changes generally voiced concerns over the potential harm to the independence of the legal profession and the threat of erosion of "core" values of the profession.

After reviewing this input, in January 2001 the Bar Commission voted to accept the report and its recommendations and petition the Supreme Court for a change in the Rules. In February 2001 the petition was filed. Following this filing, the Court requested input from its own Advisory Committee on the Rules of Professional Conduct on the proposed changes to the Rules. This committee recommended to the Court that it not approve the petition because of concerns with the erosion of core values. On April 2, 2002, the Court issued an order denying the petition. "However, the Court expresses its willingness to reconsider its decision in the future in light of experience that may be gained from other jurisdictions."

If there are any further developments for MDP in Utah, the Bar will keep the membership informed. The Bar wishes to thank all the volunteers involved in this effort for their time and services.

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

Applicants Sought for Bar's Representative to American Bar Association

The Board of Bar Commissioners is seeking applicants to serve a two-year term as the Bar's representative to the American Bar Association's House of Delegates. Each State Bar is entitled to one delegate. The term would begin at the conclusion of the ABA's Annual Meeting in August, and run through the August of 2004 Annual Meeting. Charles R. Brown is currently serving as the Bar's delegate.

Please send your letter of application and resume to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East, #310, Salt Lake City, Utah 84111, no later than June 15, 2002.

United States Bankruptcy Court To Implement Electronic Filing

The United States Bankruptcy Court for the District of Utah will be implementing electronic case filing (ECF) in the near future. A new case management system (CM) was implemented at the Court in October 2001 and is the data system compatible with ECF. The CM/ECF system was developed by the Administrative Office of the US Courts and is the largest project ever undertaken by the Federal Judiciary. CM/ECF was first introduced as a prototype in 1996 and has been used by other federal district and bankruptcy courts since 1997.

ECF will allow registered attorneys access to case information and provide the ability to file new cases and subsequent pleadings via the Internet 24 hours a day. Electronic noticing will be available. The system provides benefits for remote locations; reduces travel time; allows local document printing; generates public reports; saves paper, postage and courier costs; and will have the future ability to view archived files without retrieval from records storage. Fee transactions will be performed via authorized credit cards through ECF. Electronic access to court data in CM is available through the Public Access to Court Electronic Records (PACER) program at a current rate of $.07 per page. There are no added fees for filing documents using ECF.

Local Rules of the USBC governing electronic filing are being developed and will address topics including (but not limited to) eligibility, registration, passwords, methods for filing, electronic noticing, and signatures.

System requirements include Internet access with connection speed of 56kps/minute minimum; Netscape Navigator 4.7 or Internet Explorer 5.5; Windows-based petition or word processing software; Adobe Acrobat for conversion of documents to portable document format (PDF); personal computer running a standard platform such as Windows, Windows 95 or higher; a scanner to transmit documents that are not in a word processing system.

The Bankruptcy Court Clerk's office will provide training and certify users before going live on the ECF system. CLE credit may be awarded. The court's website, www.utb.uscourts.gov, contains an on-line training module as well as additional CM/ECF information and updates.

For additional information, please contact William Stillgebauer, Clerk of Court, at 801-524-6565 or Brenda Dowler, Project Manager, at 801-524-6635.

Announcement of Judicial Vacancy

Announcing:
That applications are now being accepted for the position of supreme court justice in the Utah Supreme Court and district court judge in the Fifth District Court, Cedar City Utah.

Supreme Court position is the result of the retirement of Justice Richard C. Howe.

District Court position is the result of the retirement of Judge Robert T. Braithwaite.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., Friday, June 28, 2002.

To Obtain Application Forms and Instructions:
Copies of forms required in the application process and instructions are available from the Administrative Office of the Courts. Forms and instructions also are available in the following word processing formats: ASCII Text; WordPerfect 5.x; WordPerfect 6.x; Microsoft Word 5.x; Microsoft Word 6.x.

To obtain the forms and instructions in a word processing format, provide a return Internet E-Mail address or a 3.5" disk to Marilyn Smith at any of the following:

Internet E-Mail: marilysm@email.utcourts.gov
Courts Web Site: Courtlink.utcourts.gov/jobs
Administrative Office of the Courts • Attention: Marilyn Smith
450 S. State • P O Box 140241 • Salt Lake City, UT 84114-0241
FAX: (801) 578-3968

When requesting forms and instructions in a word processing format, indicate the requested format. The application form, waiver forms, and instructions are available in all of the above formats to subscribers of the Utah State Court Bulletin Board.

Selection Process:
Utah law requires the Judicial Nominating Commission to submit at least three and not more than five nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the governor's selection. To obtain the procedures of Judicial Nominating Commissions and the names of Commission members call (801) 578-3800.

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's courts in general, submit a written statement no later than July 29, 2002 to the Administrative Office of the Courts. Attention: Supreme Court Nominating Commission or 5th Dist. Nominating Commission.

Terms of Employment:
A. Benefits: Minimum Requirements: Under Article VIII, Section 7 of the Utah Constitution, Supreme Court justice must be at least 30 years old, and judges of other courts of records must be at least 25 years old.

Residency: All justices and judges must be United State citizens. Supreme Court justices must be Utah residents for at least five years immediately preceding selection. Judges of other courts of record must be residents of Utah for at least three years preceding selection.

Practice of Law: All justices and judges must be admitted to practice law in Utah, but need not actually engage in the practice of law.

Retirement Program: Judges are able to retire at any age with 25 years service; at age 62 with 10 years service; or at age 70 with 6 years service. Retirement amount is calculated on the basis of years of service and an average of the last 2 years of salary. Judges receive 5% of their final average salary for each of their first 10 years of service, 2.25% of their average salary for each year from 11 to 20 years of service, and 1% of their final average salary for each year beyond 20 years to a maximum of 75%.

Salary as of July 1, 2001, $114,050 is for Supreme Court Justice and $103.700 for District Court Judge annually • 20 days paid vacation per year • 11 paid holidays • $18,000 term life insurance policy (with an option to purchase $200,000 more at group rates) • Choice of five Medical and Dental Plans. Some plans paid 100% by the state, others requiring a small employee contribution.

B. Judicial Retention:
Each judge is subject to an unopposed, nonpartisan retention election at the first general election held more than 3 years after the appointment. To be retained, a judge must receive a majority of affirmative votes cast. This means that newly appointed judges will serve at least 3, but not more than 5 years prior to standing for their first retention election.

Following the first retention election, trial court and appellate judges appear on the retention ballot every 6 years. Supreme Court Justices stand for retention every 10 years.

C. Performance Evaluation:
All sitting judges undergo a performance review after the first year in office and biennially thereafter. Judges not up for retention election can use the performance review results (which are confidential) as a guide for self-improvement. Judges up for retention election are subject to Certification Review by the Judicial Council. Prior to the election, the Council publishes in the voter information pamphlet whether the judge met or failed to meet the following evaluation criteria:

- Compliance with case delay reduction standards.
- No public sanctions by the Judicial Conduct Commission during the term of office and not more than 1 private sanction during the final 2 years of the term of office.
- Completion of 30 hours of approved judicial education each year.
- Self Certification that a judge is physically and mentally able to serve, and complies with the Codes of Judicial Conduct and Administration.
- A satisfactory score on the certification portion of the Council's Survey of the Bar.
- For District Court Judges a satisfactory score on the certification portion of the Council's Survey of jurors.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Marilyn Smith in the Administrative Office of the Courts, 450 S. State St. P O Box 140241, Salt Lake City, Utah 84114-0241. (801) 578-3800. Application packets will be forwarded to prospective candidates.

Discipline Corner

DISBARMENT

On March 25, 2002, the Honorable Thomas M. Higbee, Fifth Judicial District Court, Civil No. 010501706, entered an Order of Disbarment disbarring Garry Erickson from the practice of law for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

Erickson represented a client in a wrongful death lawsuit. He failed to deliver the settlement funds or provide an accounting to his client. He failed to file the lawsuit, failed to keep the client appraised of its status and failed to advise the client of the applicable statute of limitations. Erickson relocated his office and abandoned representation of the client, failing to protect the interests of the client. He thereafter failed to respond to the OPC's requests for information.

In two other cases, Erickson represented clients in a medical malpractice lawsuit and a property recovery case. He failed to keep the clients appraised of the status and failed to advise the clients of the statute of limitations in each matter. Erickson relocated his office and abandoned representation of the clients, failing to protect the interests of the clients. He thereafter failed to respond to the OPC's requests for information.

Aggravating factors: prior record of discipline, dishonest or selfish motive, a pattern of misconduct, multiple offenses, obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority, refusal to acknowledge the wrongful nature of the misconduct involved, substantial experience in the practice of law, lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved, and illegal conduct.

SUSPENSION

On March 1, 2002, the Honorable Pamela G. Heffernan, Second Judicial District Court, Civil No. 020900608AT, entered an Order of Suspension, suspending Russell T. Doncouse from the practice of law, effective March 1, 2002, for a period of ninety days, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.8(h) (Conflict of Interest: Prohibited Transactions), 3.1 (Meritorious Claims and Contentions), 5.5 (Unauthorized Practice of Law), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

Doncouse represented a client in a personal injury claim. Although the medical evidence suggested the claim was frivolous, he continued to represent the client. He failed to timely file the Complaint and missed the applicable statute of limitations. He filed the Complaint late, but it was dismissed. Because of his negligent handling of the claim, Doncouse entered into an agreement with the client and agreed to pay the client's medical expenses. The client did not have an opportunity to seek independent legal advice prior to signing the agreement.

During his representation of this client, Doncouse was administratively suspended from the practice of law for failure to pay annual Utah State Bar licensing fees.

Mitigating factors: cooperative attitude toward the disciplinary proceedings, lack of dishonest motive, suffered some emotional problems which may have contributed to some of his misconduct.

SUSPENSION

On February 28, 2002, the Honorable Ernest W. Jones, Second Judicial District Court, Civil No. 000903564, entered an Order of Suspension suspending Frank A. Berardi from the practice of law for a period of two years for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 5.3 (Responsibilities Regarding Non-Lawyer Assistants), 5.4(a) and (b) (Professional Independence of a Lawyer), 5.5 (Unauthorized Practice of Law), and 8.1 (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct in his representation of eight clients. Berardi was ordered to wind up his law practice within ninety days of the date of the order; therefore, Berardi may not practice law beyond May 29, 2002.

Berardi employed a paralegal at his law firm. He permitted his paralegal to interview clients, provide legal advice, and accept retainers. He shared legal fees with the paralegal. He failed to ensure that all money collected from the clients by the paralegal were deposited in the law firm's trust account. He failed to attend court hearings on behalf of four clients. He failed to communicate with three of his clients or keep them appraised as to the status of their cases. In one instance, he failed to return the client's file until approximately seventy-five days after his services were terminated

and he failed to refund the unearned portion of a retainer fee. He failed to respond to the Office of Professional Conduct's requests for information in six separate matters.

Aggravating factors: dishonest or selfish motive, pattern of misconduct, multiple offenses, obstruction of disciplinary proceedings, submission of false evidence, false statements, and other deceptive practices during the disciplinary process, refusal to acknowledge the wrongful nature of the misconduct involved, vulnerability of victim, and lack of good faith effort to make restitution or rectify the consequences of the misconduct involved.

Mitigating factors: no prior record of public discipline, inexperience in the practice of law, and good character or reputation.

INTERIM SUSPENSION

On March 19, 2002, the Honorable David L. Mower, Sixth Judicial District Court, Civil No. 020600010AT, entered an Order of Interim Suspension, suspending Jeffrey P. Gleave from the practice of law on an interim basis pursuant to Rule 19, Rules of Lawyer Discipline and Disability, until the conclusion of the disciplinary action against him.

On February 7, 2001, Gleave was convicted of Damage to or Interruption of a Communication Device in violation of Utah Code § 76-6-108, Assault, Domestic Violence in violation of Utah Code §§ 76-5-102 and 77-36-1, Child Abuse in violation of Utah Code § 76-5-109.1(2)(c), Aggravated Assault Against a Peace Officer in violation of Utah Code §§ 76-5-103 and 76-5-102.4, and Possession of a Controlled Substance in violation of Utah Code § 58-37-8(2)(a). The interim suspension is based upon these convictions.

PUBLIC REPRIMAND

On March 8, 2002, the Honorable J. Dennis Frederick, Third Judicial District Court, Civil No. 020901910, entered an Order of Public Reprimand on behalf of the Supreme Court of the State of Utah, reprimanding Charles F. Loyd for his misconduct before the Tenth Circuit Court of Appeals which was the subject of reciprocal discipline in the United States District Court for the District of Utah. Specifically, Mr. Loyd's public reprimand is for violations of Rule 1.3 (Diligence), Rule 3.2 (Expediting Litigation), and 8.4 (Misconduct) of the Rules of Professional Conduct.

ADMONITION

On March 13, 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(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The Office of Professional Conduct received two overdraft notices regarding a law firm's trust account. At all relevant times, the attorney was a signatory on the law firm's trust account, and was responsible for it. In one instance, the attorney's law clerk wrote a check against funds deposited in the law firm's trust account, without confirming whether there were sufficient funds in the account to cover the check. The bank honored the check, leaving an overdraft against the attorney's trust account.

In another instance, the attorney expected two wires to be credited to the law firm's trust account. The attorney issued checks against them before both wires had been credited to the account. The bank honored the checks, leaving an overdraft against the attorney's trust account.

Legislative Update: 2002 General Legislative Session

by John T. Nielsen, Utah State Bar Legislative Representative

I. INTRODUCTION

During the course of the 2002 General Legislative Session, the Legislative Affairs Committee was active in reviewing legislation pertinent to the interests of the Bar. This was a different session in that it began two weeks early and broke for two weeks for the Winter Olympic Games. As a result, few bills were presented and we had an opportunity for a bit more deliberation than has been usual. Many bills that concerned us were substantially amended to make them more palatable.

This year 382 bills and resolutions were passed by the State Legislature. This was less than previous years. The Legislative Affairs Committee carefully reviewed all legislation we deemed pertinent and recommended several positions to the Bar Commission, all of which the Commission adopted. The bills on which the Commission took a position are listed in Section II with the final disposition.

The process that has been initiated by the Legislative Affairs Committee in cooperation with Bar staff and the Bar Commission has proved workable and productive. The Bar's legislative representatives have been able to take positions immediately and legislators who care to access the Bar's website have real time knowledge of the actions of the Legislative Affairs Committee and the Bar Commission.

The Bar's legislative representative, John T. Nielsen, closely monitored all the bills on which the Bar Commission took a position and actively worked with sponsors and committees to effectuate the Bar's position. Other members of the Legislative Affairs Committee were of significant help in educating legislators with respect to the Bar's position.

Particular thanks to our new co-chairs of the Legislative Affairs Committee, Lorrie Nelson and Scott Sabey. Both of these individuals were particularly responsive and actively involved with legislators in amending and formulating legislation. Special thanks go to the past chair of the Legislative Affairs Committee, David Bird, now a Bar Commissioner, for his valuable advice and assistance during the legislative session.

II. LEGISLATION SUPPORTED BY THE BAR COMMISSION

H.B. 35 – Expungement of Juvenile Records. S. Daniels. Passed both houses. Modifies the Juvenile Court Act by clarifying the steps necessary to expunge a record in Juvenile Court.

H.B. 39 – Statute of Limitations Amendments. K. Bryson. Passed both houses. Modifies the Criminal Code by specifying additional crimes that are not subject to statute of limitations for prosecution.

H.B. 44 – Trust Deeds Amendment. D. Clark. Passed both houses. Modifies the real estate title to address provisions relating to trust deeds by modifying qualifications and duties of a trustee of a trust deed and prohibiting certain actions by a trustee.

H.B. 47 – Extension of Sunset Dates of Court Administrator and Alternative Dispute Resolution. G. Way. Passed both houses. Modifies the Sunset Act by extending the Sunset dates on the Office of Court Administrator and the Alternative Dispute Resolution Act.

H.B. 69 – Payment for Bailiff and Other Services in Courts of Record. J. Seitz. Bill failed. This bill modified the county code by requiring the State Court of Administrator to contract with County Sheriffs for providing bailiffs and building security. The Bar Commission supported the bill if in fact there was a funding source. The bill was amended to address the funding issue but did so in an inadequate fashion according to the Court Administrator Office.

H.B. 101 – Substitute Racial Profiling. D. Bordeaux. Passed. This act modified the Uniform Drivers License Act by requiring race information be provided on drivers license applications in state identifications. The Bar Commission deemed this bill to be an important public policy position upon which the Bar should take a position.

H.B. 190 – Criminal Restitution Amendments. S. Allen. Passed. Modified the provisions dealing with criminal restitution by repealing provisions that were duplicated with the enactment of the Crime Victims Restitution Act in 2001.

H.B. 202 – Reconveyance of Trust Deeds or Release of Mortgage. T. Hatch. Passed. This act made changes to Title 57, Real Estate, by adding a definition of "delivery". The act, among other things,

eliminates the requirement that a title insurer or title agent wait thirty days after payment in full of an obligation secured by a trust deed or mortgage to give to the beneficiary, mortgagee, or loan servicer a notice of intent to release or reconvey.

H.B. 234 – Mechanic's Lien Amendments. K. Garn. Passed. This act modified the Mechanic's Lien Act by making technical conforming amendments to legislation enacted in the 2001 General Legislative Session.

S.B. 44 – Funding a Community Legal Center. L. Hillyard. Failed. This act intended a one-time appropriation from the General Fund to the Department of Community and Economic Development to help fund a community legal center for citizens of the state. This bill had very good support, but had fiscal impact, culminating in a $100,000 appropriation which is less than the bill requested.

S.B. 74 – Criminal Action – Defense to Civil Action for Damages. P. Hellewell. Passed. This act modifies the Judicial Code by providing that the next of kin or heirs of a person who is prohibited from bringing a civil action for damages resulting from the commission of a crime are also prohibited from bringing such a civil action under the same circumstances.

S.B. 103 – Termination of Joint Tenancy in Real Property. L. Hillyard. Passed. Modifies the Real Estate Code to clarify that a joint tenancy in real estate is converted to a tenancy in common by a joint tenant making a conveyance of the joint tenant's interest in the property to himself or another.

S.B. 1046 – Business Entity Amendments. J. Valentine. Passed. This act modifies the Partnership and Corporations titles and makes technical changes. The act also addresses issues related to registered agents and business addresses.

S.B. 150 – Registration and Protection of Trademarks and Service Marks. L. Hillyard. Passed. This act modifies the Trademarks and Trade Names title to recodify provisions relating to the registration and protection of trademarks and service marks and makes technical changes.

S.B. 171 – Uniform Arbitration Act. L. Hillyard. Passed. This legislation enacts the Utah Uniform Arbitration Act. This legislation has an effective date of July 1, 2003, to give time to study its more controversial provisions.

S.B. 176 – Utah Revised Non-profit Corporation Act Amendments. L. Hillyard. Passed. This act makes some technical changes to the current act by amending some definitions and addressing provisions related to private foundations.

III. LEGISLATION OPPOSED BY THE BAR COMMISSION

H.B. 82 – Second Substitute Storage of Concealed Fire Arms on Facilities with Secure Areas. J. Swallow. Passed. This act requires that a courthouse or courtroom established as a secure area shall have fire arms storage areas for persons with permits to carry concealed fire arms.

H.B. 136 – Judicial Conduct Commission Amendments. K. Bryson. Passed by both houses but subsequently vetoed by the Governor. This act modifies provisions relating to the Judicial Conduct Commission and Election Code. The Bar Commission was particularly concerned that the sponsor desired to eliminate the attorneys from the Judicial Conduct Commission. We were able to reinstate two attorneys on the Board to be appointed by the Supreme Court.

H.B. 170 – Rights of a Defendant in a Criminal Trial. G. Donnelson. Failed. This bill attempted to modify the Utah Code of Criminal Procedure by requiring that juries be informed of their right and responsibility to judge the law as well as the conduct of the defendant. This bill is a variant of jury nullification legislation.

H.B. 191 – Mortgage Lending Disclosures. P. Ray. Failed. This act attempted to amend code provisions dealing with residential mortgage loans.

S.B. 111 – Division of Home in a Divorce. T. Spencer. Failed . This act modified provisions relating to divorce regarding the disposition of the family home. The bill was opposed by the Bar Commission in its original form but was subsequently modified to restore judicial discretion which removed the main objection by the Commission.

S.B. 177 – Jury Trial for Termination of Parental Right Cases. B. Wright. Failed. This act would have modified the Judicial Code giving a parent the right to a jury trial in a termination of parental rights proceedings.

S.B. 199 – Privacy Protections in Divorce Proceedings. G. Davis. Failed. This act required that personal information be removed from divorce documents being made available to the public.

IV. OTHER ACTIONS RELEVANT TO PREVIOUS BAR COMMISSION ACTIONS

H.B. 246 – Sunset Act Reauthorizations. S. Mascaro. Passed. This bill extended the Sunset date for the amendments to the Unauthorized Practice of Law sections to May 1, 2003.

V. HOUSE BILL 305 - JUDGEMENT LIEN AMENDMENTS HELD OVER FROM THE 2001 GENERAL SESSION

In addition to the numerous real estate and real property issues debated in the 2002 General Session, the Legislative Affairs Committee confronted the H.B. 305 issue which grew out of years of frustration regarding the standardizing of filings and record keeping issues created by the consolidated court system. As many who followed these issues will recall, in 1997 the title companies sponsored, and the Utah Legislature passed, S.B. 121 which created for the first time a registry of judgments. That bill was later amended in 1998 and is now codified as Section 78-22-1.5 of the Utah Code. Because S.B. 121 did not resolve the issues, another bill, S.B. 80 in the 1998 session, added extensive information requirements to the Registry of Judgments. As many predicted, the Registry of Judgments has not achieved the desired result and in an attempt to once again "fix" the problem, H.B. 305 – Judgment Lien Amendments was enacted in the 2001 Legislature with an effective date of July 1, 2002. The importance of that legislation is that a judgment does not result in an automatic lien. It must be recorded with the county recorder for a lien against real property to be created.

The proponents of H.B. 305 represented that they would seek repeal during the 2002 General Session if, in fact, efforts by the Administrative Office of the Courts to devise a program to resolve the issues electronically were successful. Discussions held with the title companies, the sponsor of HB 305 and members of the Utah Bar and the Court Administrators Office failed to reach a consensus that the issues were resolved and, hence, 305 was not repealed and will become the law on July 1, 2002.

All attorneys must be aware of the implications of that legislation. There will now be a requirement that a judgment be recorded with the county recorder in order to create a lien against the judgment debtor's real property.

VI. LEGISLATORS CONTINUE TO EXPRESS CONCERN ABOUT LAWYERS, THE PRACTICE OF LAW AND THE JUDICIARY

The unauthorized practice of law statute which was inadvertently repealed has now been reenacted although in an amended, and most believe improved, fashion. Nevertheless, there is still an expectation as required by the reenactment that lawyers and the judiciary examine several issues concerning the practice of law and who may engage in lawyering. The Unauthorized Practice of Law Statute has been extended for another year to give time to resolve these issues or face additional examination by the Legislature.

Additionally, some legislators, particularly in the House of Representatives, continue to be concerned about the proceedings of the Judicial Conduct Commission. Although HB 136 was subsequently vetoed by the Governor, it still does not put to rest what will likely be a continuing dialogue regarding the way judges are selected and disciplined.

Attorneys must be vigilant with respect to legislative initiatives which may undermine the independence of the judiciary and the ability of lawyers to professionally serve those needing legal expertise.

VII. OTHER BILLS OF INTEREST TO LAWYERS – BY SUBJECT

Criminal Law

H.B. 16	Blood and Breath Alcohol Testing
H.B. 17	Multiple Driving Under the Influence Offenses
H.B. 18	Court Records of Driving Under the Influence Cases
H.B. 45	Prisoner Escape Amendments
H.B. 55	Underage Possession of Tobacco Amendments
H.B. 72	Penalty for Misuse of Lawful Substances
H.B. 73	Capital Felony Sentencing Procedures
H.B. 77	Criminal Sentencing – Mitigation Amendments
H.B. 99S1	Consecutive Sentencing
H.B. 100	Criminal Code Definition Amendment
H.B. 128	Controlled Substance Act Amendements
H.B. 125	Endangerment of Child or Elder Person with Controlled Substance or Precursor
H.B. 154S2	Expansion of DNA Database
H.B. 224	Giving False Information to Police Officer
H.B. 245	Amendment to Sex Offender Registry
H.B. 290	Affidavit of Impecuniousity
H.B. 303	Expungement of Driving Under the Influence Convictions
H.B. 336S1	Use of Force, Including Deadlly Force, in Defense of Property
S.B. 9	Amendments to Driving Under the Influence
S.B. 11	Attempted Murder Amendments
S.B. 26	Serious Youth Offender Amendments
S.B. 27	Amendments to Guilty and Mentally Ill
S.B. 130	Youth Court Amendments

S.B. 164S3 Secure Facility Amendments

Corporations

S.B. 146 Business Entity Amendments

Courts and Judiciary

H.B. 66S1 Judiciary Amendments

HJR 17 Resolution Closing Court Facility

S.B. 140 Reallocation of Judges

Domestic

H.B. 25S1 Adult Protective Services Amendments

H.B. 196S1 Divorce and Parent Time Revisions

H.B. 226S3 Termination of Parental Rights Amendments

H.B. 237 Spouse Abuse Amendments

S.B. 24 Release of Custodial or Non-Custodial Parent's Address

S.B. 76 Domestic Violence in Presence of Child Amendments

S.B. 87S1 Visitation Rights of Grandparents

S.B. 110 Child Placement Determination

Natural Resources

H.B. 57 Forfeited Water Right Allocation

H.B. 58 Water Forfeiture Amendments

S.B. 37 Mutual Water Company Change Applications

Real Estate

H.B. 23 Mortgage Practice Act Revisions

H.B. 233 Mitigation of Damages in Condemnation Proceedings

Torts

H.B. 28 Governmental Immunity Amendments

S.B. 141S1 Punitive Damage Awards

Trusts and Estates

H.B. 138S1 Rights of Creditors Against Trust Property

S.B. 117S1 Trust Amendments

Workers Compensation

S.B. 119S1 Workers' Compensation Insurance Related Amendments

Miscellaneous

H.B. 124S1 Debt Collection Amendments.

H.B. 173S1 Amendments to Settlement Agreement Requirements

H.B. 300 Amendments to Guardian Ad Litem Statutes

S.B. 49 Utah Exemption Act Amendments

Letters to a Young Contrarian

by Christopher Hitchens

Reviewed by Betsy Ross

It was in the early years of the twentieth century that Rainer Maria Rilke wrote "Letters to a Young Poet." In essence an epistolary treatise on poetry, it is the progenitor of Hitchens' twenty-first century epistolary treatise on dissent. Though poetry and dissent may certainly have common ground (after all, didn't Bertolt Brecht write that "Art is not a mirror held up to reality, but a hammer with which to shape it?"), the genealogy of the two has more to do with form than content.

Perhaps most interesting about this book, and about Hitchens, is that although he is a regular contributor to "the Nation," a periodical noted for its liberal leanings, he espouses neither a liberal nor a conservative agenda, and approaches each with equal disdain and suspicion; witness this excerpt addressing the conflicting religious bases for the redress of wrong: "The Old Testament injunction is the one to exact an eye for an eye and a tooth for a tooth . . . . The . . . Gospels . . . says that only those without sin should cast the first stone. The first is the moral basis for capital punishment and other barbarities: the second is so relativist and "non judgmental" that it would not allow the prosecution of Charles Manson." Thus, he maligns both traditional conservative and liberal positions. Nothing is sacred to Hitchens.

This collection of letters is really an attempt to raise up a generation of engaged and informed "young contrarians." (Hitchens discarded many appellations before finally settling on "contrarian" to describe the attitude of opposition he intended, e.g., he considered and discarded "dissident," "maverick," "loose cannon," "angry young man," "gadfly," "radical," and "iconoclast," etc., etc.) By "contrarian," Hitchens means individuals committed to developing, expressing and acting upon their own opinions, particularly when those are in opposition to the mainstream. He warns against adopting willy-nilly the opinions of others (in the guise of the "solidarity of belonging") and elevating loyalty above all else ("the worst crimes are still committed in the name of the old traditional rubbish: of loyalty to nation or 'order' or leadership or tribe or faith"). He counsels to revel in disputation, for to assume there is no argument contrary to your own is to abandon debate and embrace an absolute. And finally, he argues to listen to the highest motivating instinct: dignity for oneself and others. (He wisely makes a distinction between compassion and dignity, suggesting the traditional liberal preoccupation with compassion may focus on paternalism rather than individual self-worth.)

Applying this primer of dissent to current events, we should be lead to question those who would encourage us to adopt an "us versus them" mentality as contrary to dignity; in the name of attaining dignity for all, can we succumb to indiscriminate name-calling and demonizing? Is it a simplification to talk of an ""axis of evil," hearkening back to the days of the "evil empire?" Those who champion the "demonizing" usually argue that opposition to this position aligns one with the opponent (just as criticism of the death penalty aligns one with the killer): e.g. "So, you don't think what the terrorists/killer did was wrong?" A crafty rhetorical trick that misses the point entirely. Certainly, we can judge *an act* to be evil. It is wholesale extrapolating from that act that results in the "tyranny and tribalism" Hitchens warns against.

More locally, I cannot write about this topic of the importance of dissent without noting two bills from our most recent legislative session. The first, Senate Bill 183, a bill for which the original intent was to penalize opponents of the Legacy Highway for their opposition to the project. The project, which is to build a highway from Davis County to Salt Lake City has been suspended by an injunction imposed by the federal district court. Each day of work suspension has a financial impact on the state. The bill would impose a penalty upon opposition to a state construction project if the opposition ultimately loses in court. Although the bill passed the legislature, the governor vetoed it for the reason that the bill would allow the state to run over the small guy. The governor was quoted as saying "The government is not always right." This laudable admission allows dignity to thrive. To preclude dissent[1],

as Senate Bill 183 intended, is to retreat into the "tyranny and tribalism" Hitchens refers to.

The second bill, Senate Bill 147, proposed an internal mechanism by which the legislative branch could sanction members of the executive branch for violating laws or rules. The assumption made by proponents of this bill is that all rules and laws are sacrosanct and should be obeyed. What is lost again is the democratic bedrock of challenge and debate.[2] There is a sense of "how dare they," as proponents fall into a trap we are all prone to, that of attaching ego to our arguments. (Hitchens describes this tendency as follows: "If you have ever argued with a religious devotee, for example, you will have noticed that his self-esteem and pride are involved in the dispute, and that you are asking him to give up something more than a point in an argument.") The fact is, as the governor recognized in his veto of the bill previously discussed, that not every law passed by the legislature is right or constitutional. Nor, of course, is every agency above violating just laws and rules. A court action, however, can always be brought to enjoin an agency from acting illegally. (Just as a Rule 11 sanction would remedy the just concerns addressed in the previously discussed bill.) The economics of this may not be attractive, but the alternative of stifling debate is no more attractive, as Hitchens argues: "[I]n life we make progress by conflict and in mental life [and civic life] by argument and disputation."

I have in my office a poster with a quote from Dante: "The hottest places in hell are reserved for those who, in time of great moral crisis, maintain their neutrality." This is the essence of Hitchens' letters. He is annoying, arrogant and often obtuse (to all of which accusations he would agree and say "thank you"), but he is also a clarion for pointed thought, debate and action. As he writes: "Most people, most of the time, prefer to seek approval or security. This shouldn't surprise us. Nonetheless, there are in all periods people who feel themselves in some fashion to be *apart.* And it is not so much to say that humanity is very much in debt to such people, whether it chooses to acknowledge the debt or not." Accommodating dissent is the foundation for a society that acknowledges, accepts, and indeed accredits the inherent dignity of the individual.

[1]URCP 11 already requires a lawsuit to be filed in good faith, and provides a sanction if it is not.

[2]Though proponents would probably argue that there is a mechanism in the bill to allow the agency charged to come before a legislative committee and explain why it violated the statute or rule at issue. As noted in the house floor debate, this mechanism may run afoul of constitutional separation of powers provisions.

Message from the Chair

by Deborah Calegory

Don't forget that the third Thursday in May of each year is Legal Assistants Day, as proclaimed by Governor Leavitt. In connection with Legal Assistants Day the LAD is sponsoring events in St. George, Provo and Salt Lake City. Watch for your invitations and plan to attend these events and show your support of Legal Assistants.

All members of the Legal Assistant Division (LAD) should mark their calendars for Friday, June 7, 2002, for the LAD Annual Meeting and Seminar. It will be held at the Law and Justice Center in Salt Lake City.

In addition to a great lineup of CLE topics and speakers, members will be participating in the LAD Annual Meeting and voting on new Directors. There are many positions open. Hopefully many LAD Members will choose to become involved by running for a Director position. At the Annual Meeting Members will be voting on amendments to the LAD Bylaws. This will also be an opportunity to volunteer for various committees for the coming year.

Registration forms and a detailed agenda will be mailed in May for this very important, annual event. Hope to see you there.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/02/02	**Annual Collection Law Seminar.** 9:00 am – 1:00 pm. $45 section members, $65 all others. Lunch provided.	3
05/02/02	**Annual Corporate Counsel Spring Seminar.** 9:00 am – 1:30 pm. $45 section members, $80 others.	4 (incl. 1 ethics credit)
05/09/02	**Annual Business Law Section Seminar.** 9:00 am – 12:00 pm. $45 non-section members, free to members.	3
05/10/02	**Annual Family Law Section Seminar.** Custody Disputes: Who Really Cares About the Children? 8:00 am – 3:55 pm. $120 section members, $150 all others.	7 (incl. 1 ethics credit
05/15/02	**Annual Labor & Employment Law Section Seminar.** 9:00 am – 12:00 pm (lunch from 12:00 – 1:00). 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. $60 section members, $75 others.	3
05/23/02	**NLCLE: Sharp Practices, a Discussion on Professionalism.** 5:30 – 8:30 pm. Justice Matthew Durrant, Robert Henderson, Francis Carney.	3 NLCLE/ Ethics
06/07/02	**Annual Legal Assistant Division Seminar.** 8:30 am – 5:00 pm. $65 division members, $75 non-division members.	7
06/14/02	**New Lawyer Mandatory.** 8:30 am – 12:00 pm. Justice Matthew Durrant, Robert Henderson, Lee Rudd and Billy Walker	Fulfills New Lawyer Requirement
06/20/02	**NLCLE: Nuts & Bolts of Personal Injury**	3 NLCLE/CLE
06/26-29/02	**Annual Convention**	13 hrs. (incl. up to 5 hr Ethics & 7 hr NLCLE)

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

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