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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: Collage of flags photographed in the days following September 11, 2002 in Salt Lake City. Taken by David B. Shapiro, sole practitioner who focuses his practice on immigration and criminal law defense.

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

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Letters Submission Guidelines:

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

Cover Art

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

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

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

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

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Submission of Articles for the Utah Bar Journal

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

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

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

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

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

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

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

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

Read this Please! (at least read some of it)

by Scott Daniels

The United States Congress has passed a law recently which could create real problems for lawyers. I'm concerned that many lawyers are unaware of this law and may inadvertently find themselves in violation.

I'm referring to Title V of the Gramm-Leach-Bliley Act. This is a banking law that requires financial institutions to send notices to customers informing them of the institution's privacy policy. Essentially it was passed to prevent credit card companies from selling customer lists without informing the customers. You probably have received a few of these from your bank or credit card company. *The problem is that the FTC has determined that lawyers and law firms in many instances may be "financial institutions" within the meaning of the Act and are, therefore required to send their clients these privacy policy notices.*

Activities which are deemed financial in nature and may require lawyers to comply with Gramm-Leach-Bliley are tax planning, tax return preparation, debt collection, financial investment and economic advisory services, and real estate settlement services. If you or your firm do any of these things, read on.

The American Bar Association requested that the FTC use its authority under the Act to exempt attorneys engaged in the practice of law from the requirements of Title V. On April 8, 2002, the FTC formally responded, declining to exempt lawyers. The FTC bases its ruling on its belief that it lacks express statutory authority to make such an exemption.

There are obvious problems with requiring lawyers to comply with the Act. Lawyers have ethical standards of confidentiality that go far beyond the requirements of Gramm-Leach-Bliley. If a client received a notice required by Gramm-Leach-Bliley that the lawyer or firm intended to comply with the requirements of the Act, and the client inferred that the lawyer did not feel bound by rules of confidentially that clients expect, there is likely to be not only confusion, but actual panic. Further, if a lawyer is now violating Gramm-Leach-Bliley by selling lists of clients without their consent, that lawyer is in real trouble with the bar of any state, whether Gramm-Leach-Bliley exists or not.

In addition, there may be ethical problems in complying with Title V. In some cases, even the fact that a client has retained the lawyer is confidential information which cannot be disclosed, even to a spouse. In these cases, sending the notice to the joint home address of a client and spouse may be an ethical violation.

Lastly, there is the expense and problem of sending the notices, which are at best redundant and useless and at worst confusing and harmful.

Congresswoman Carolyn Maloney (D-NY) is working on legislation to fix this problem. Her Bill has not, at the time of this writing, been numbered or filed. I have asked Rep.'s Cannon, Hansen and Matheson to sign on as co-sponsors. I would appreciate it if you would contact any of these Congressmen and encourage them to co-sponsor Rep. Maloney's legislation. Representative Cannon serves on the Judiciary Committee where this bill will likely be heard initially, and his support is especially important. When the Bill gets to the Senate, the support of both Utah Senators will be important. The Bill may be assigned to the Judiciary Committee where Senator Hatch has immense influence, or, it may be assigned to the Banking Committee, where Senator Bennett is very influential. Contacting these Representatives and Senators would go a long way in getting this problem fixed.

In the meantime, if you or your firm engage in any of the practices considered to be "financial" I suggest you make sure you are not violating the law by failing to send disclosure notices.

NOTE: Much of the information in this President's Message came from Ellen McBarnette, Legislative Counsel for the ABA Governmental Affairs Office. Further information can be obtained from the ABA website. Go to www.abanet.org, then search under "Gramm-Leach-Bliley."

Arbitration Advocacy: Preparing the Case

by Kent B. Scott

EDITOR'S NOTE: *The following article is intended to provide attorneys with an overview of the arbitration process from the arbitrator's point of view. This article will be published in the* Utah Bar Journal *in two installments. Part One, "Preparing the Case," will address the attorney's role in preparing the case for arbitration. The second installment, "The Arbitration Hearing," will be published in a later edition of the* Bar Journal.

Introduction

Congratulations! Your favorite paying client, Ikenbuild Construction, has just dropped by your office to pay its bill. Your client also drops off a complaint for you to review. The complaint alleges that your client, Ikenbuild, installed a defective roof on the Happy Valley Elementary School that collapsed and caused property damage to several classrooms. A jury trial has been requested in the Happy Valley District Court. A review of the local court verdicts reveals that Happy Valley School District has never lost a jury trial in the Happy Valley District Court.

What are you going to do to save the day for your client who thinks you are a savvy and crafty attorney because you passed the bar exam and got him out of a speeding ticket? A voice sounds from within: "Use the force Luke and read the contract." The contract contains the following language: *All disputes arising under or relating to the performance of this contract shall be determined by arbitration.*

You have attended all the CLE programs dealing with ADR and know immediately what to do. Get a retainer. What's next? File the appropriate responsive pleadings together with a Demand for Arbitration and a Motion to Stay the litigation. You and the opposing counsel work out a stipulation, with the court's approval, providing for a stay in the legal proceedings and agree to arbitrate the dispute. You and your fellow counsel stipulate to the following terms that are contained in a formal Stipulation which is approved by the court:

> *The parties hereby stipulate to stay these proceedings pending the outcome of arbitration. The parties further agree to submit all matters arising under or relating to this dispute to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules. Judgement on the award rendered by the arbitrator may be entered by this court in accordance with the terms and provisions of the Utah Arbitration Act.*

You and your fellow counsel have set the stage for resolving the dispute by providing for an established ADR provider to oversee the arbitration and designating a widely accepted set of rules to govern the process. As an option, you may specify the use of the AAA's Construction Industry Rules and eliminate the requirement of having an independent ADR provider administer the arbitration. You and your fellow counsel may be able to agree upon a particular arbitrator to hear the case. You may agree to use the Utah or Federal Rules of Procedure, Evidence or any rules of your own making. In addition, you have also retained the jurisdiction of the court to handle post arbitration enforcement proceedings and deal with other matters that may need attention should the arbitration process break down. You are the consummate ADR professional.

Arbitration and Baseball

It is the objective of this article to provide attorneys with some insight on preparing the case for arbitration and offering some

KENT B. SCOTT is a shareholder in the firm of Babcock Bostwick Scott Crawley & Price. He is currently serving as the chair of the ADR Section of the Utah State Bar and is a member of the American Arbitration Association's panel of arbitrators and mediators.

suggestions on how to work with the arbitrator on case management matters. Arbitration, like baseball, has four bases to touch in order to bring the client safe at home.

First: Treat the arbitrator, all deadlines and the arbitration proceedings with the care and respect you give to the court. The arbitrator does not have the sanction powers of a trial judge, but does have the power of rendering an award that will be final and subject to limited review.

Second: Arbitrators do not like to engage in extensive discovery, motion practice or arguments over what evidence is admissable. Be reasonable in fashioning your case management plan as it pertains to these items.

Third: The arbitrator will be more familiar with the technical issues, customs and standards of the industry that are relevant to the dispute. Arbitrators can, and often will, use their experience to evaluate the evidence and create a remedy for the parties.

Fourth: Arbitration awards are final. While there are provisions for overturning an arbitration, the likelihood of doing so is remote. Arbitrators are expected to be rational and apply basic principles of law, but they have the power to fashion equitable remedies that may not follow the common law or technical legal requirements. If you enter the arbitration arena, expect to try your case once.

Arbitration is an "alternate" form of dispute resolution. The rules of procedure and evidence are determined by the parties. Arbitration also gives the parties an opportunity to give their input into who will hear their case and the location of the hearing. The key to the integrity of the arbitration process is the ability of counsel to cooperate with one another in conjunction with the arbitrator in creating a system where the parties are given a fair opportunity to present their case. Arbitrators will expect and rely on counsel to be cooperative and pro-active in creating the rules and procedure that will govern the arbitration.

Preliminary Scheduling Conference

After the matter has been submitted to arbitration and the arbitrator has been appointed, you can expect the arbitrator to schedule a preliminary scheduling conference, usually over the telephone, that will result in the creation of a Preliminary Hearing Scheduling Order. The Preliminary Hearing Scheduling Order is the equivalent of a combined Stipulated Discovery Schedule and a Pre-Trial Order. It will include, among other items, (1) the date, time and place of the arbitration; (2) cutoff dates for the filing of additional claims, motions and discovery; (3) witness disclosures; (4) the handling and exchange of exhibits; (5) the filing of briefs; (6) the need for a reporter; and (7) the form of the award.

The Arbitrator will expect you, as legal counsel, to be prepared to address each of the above listed items, together with other matters that affect the management and presentation of your case. Generally, the arbitrator will honor the procedures you and your fellow counsel agree upon, particularly in matters that affect discovery. If you are not able to reach an agreement, the arbitrator will "mediate" a solution. If counsel cannot reach an agreement the arbitrator will impose a decision upon the parties.

The arbitrator has limited authority to enforce the terms of the Order or impose immediate sanctions. However, counsel should keep in mind the triple play power the arbitrator has at his or her disposal: (1) the arbitration can be held in the absence of one or both of the parties and an award will be rendered that has the legal effect of an enforceable judgement; (2) the arbitrator is the sole judge of the relevance and materiality of the evidence; and (3) the arbitrator's award is final and subject to limited review. Don't detract from the merits of your case by being unreasonable on case management matters. The attorney's credibility account with the arbitrator is a valued advocacy tool.

Discovery

The arbitrator will encourage the attorneys to design and manage a fair and efficient discovery plan. If you or your client feel the need to beat the opposing party into senseless submission by conducting a campaign of combat by discovery, arbitration may not be for you.

The Utah Uniform Arbitration Act and the Federal Arbitration Act give the arbitrator the authority to order all forms of discovery requests. Counsel may use the traditional discovery devices of depositions, written interrogatories, requests for documents, requests for admissions and requests for inspection and testing to prepare the case. However, all discovery is ultimately subject to the arbitrator's discretion to approve or restrict. The arbitrator also has the power to issue subpoenas to produce documents and third party witnesses.

The arbitrator is the final authority on all matters affecting the scope of discovery. However, unless the parties empower the arbitrator with sanction powers of the Utah and Federal Rules of Procedure, the arbitrator is left with no direct means to enforce discovery rulings and the subpoenas that are issued. You can expect that the arbitrator will work hard with counsel to resolve discovery disputes. Your efforts in taking a reasonable approach in crafting and implementing a discovery plan will develop credibility with the arbitrator.

Arbitrators generally do not favor written discovery in the form of Interrogatories and Requests for Admissions. They are less enthusiastic about permitting too many depositions, but will allow a limited number where counsel have agreed to conduct a certain number or can show a need.

You may be allowed to submit affidavits, but they are not favored. Absent a stipulation from other counsel, affidavits will not receive much consideration as to materiality or weight. Live testimony is preferred and most often will be required for important testimony.

The arbitrator will work with you and other counsel to create a joint set of exhibits that are indexed, tabbed and placed in three ring binders. You will want to prepare enough sets of exhibits for each party, the witness and the arbitrator. Take the time with other counsel to work out an efficient system for handling the exhibits. The hearing will go faster and the arbitrator will be able to better track the evidence you present.

Consider a couple of final thoughts in working with the arbitrator

in creating a discovery plan. Do you and opposing counsel want an inspection of the physical premises? Will you need to address procedures and costs for conducting any desired experiments and tests? What are the advantages in using a video taped deposition in lieu of having the witness testify at the arbitration hearing? What are the possibilities of taking testimony via telephone or video conferencing? In addition, you and your fellow counsel will also want to discuss the use of charts and other reliable summaries in connection with the presentation of extensive documentary evidence. Here is where you can be at your creative best in crafting an acceptable and reliable discovery plan.

Motions

The arbitrator has authority to hear and rule on motions. The motions may request injunctive relief, provisional remedies, dismissal or summary judgment. You and the arbitrator will want to discuss motions the parties anticipate filing, a motion cut-off date and a briefing schedule for each motion.

Arbitrators have the authority to make either a partial award, an interim award or an award involving injunctive or provisional relief. However, you and your fellow counsel should keep in mind that arbitrators are reluctant to grant dispositive motions, injunctive relief or provisional remedies that change the status quo before an arbitration hearing. Arbitrators will be inclined to want to hear live testimony and review all relevant exhibits before rendering an award whether interim, partial or final in scope.

Conclusion

Arbitration is an alternate form of dispute resolution. The arbitration process was not intended to replace the traditional method of resolving disputes through the courts. In order for a dispute to be resolved by arbitration, the parties must enter into a written agreement that specifies the use of arbitration. The arbitration agreement should also provide for a means to select the arbitrator, define the scope of the matter to be arbitrated and designate a set of rules and procedures that will govern the proceedings.

The attorneys, working together with the arbitrator, have an opportunity to determine the procedures that will be used in connection with the resolution of the dispute between their clients. Take advantage of this opportunity to create a process that is fair, efficient and reliable. The integrity of the arbitration process is everyone's responsibility.

Pro Bono Legal Services: The Bigger Picture[1]

by Steven G. Johnson

One factor that sets the traditional professions apart from other businesses is that professionals are expected to contribute their expertise at no charge to the poor and disadvantaged. From this tradition, the modern concept of pro bono legal services has been "codified" as Rule 6.1 of the Rules of Professional Conduct.

A recent survey[2] conducted by United Way of Salt Lake and funded by The George S. and Delores Doré Eccles Foundation catalogued the greatest community problems in Salt Lake, Summit, and Tooele Counties.[3] Among the most serious problems identified were family violence, alcohol and drug abuse, and gangs. Other problems identified are racial and ethnic discrimination, substandard housing, and unsafe school environments. These problems are usually accompanied by problems with the law or with legal relationships. Many of these needs require the assistance of experienced attorneys who can help those affected wade through the difficulties in which they find themselves.

Lawyers have unique experience and knowledge. Some problems can only be solved by those with this knowledge and experience. If someone with the required abilities does not step forward, many of these needs will not be met. Problems will grow in severity. The problems may be passed on to the next generation and domino throughout our society.

Rule 6.1(a) provides in part that "[a] lawyer should render public interest legal services." Much can be said about the meaning of "public interest legal service." There are many differing opinions as to what this might mean. When we speak about "pro bono legal services," we usually associate with the phrase the representation of indigents accused of crimes, or the representation of the impecunious in domestic matters. Certainly there can be no debate that the need to assist people in these matters is great.

The purpose of this discussion is not to minimize the significance of these needs, nor to divert the time and talents of attorneys from these kinds of cases. If anything, I hope to tug a little on a heart string someplace in the souls of Utah attorneys so that we will each have a greater desire to assist people in these trying circumstances. But I do hope to shine a brighter light, to open a wider door to a bigger picture of pro bono legal services.

Many attorneys do not feel comfortable representing someone in a contested divorce or in a criminal proceeding. Many do not know how to help an abused woman obtain a restraining order. Attorneys can learn how to do these things, and probably they should. But there are many things that even corporate counsel, estate planners and transactional attorneys with no litigation experience can do now to provide pro bono legal services.

Rule 6.1(b)(2)(iii) of the Rules of Professional Conduct provides in part:

> Guidelines for fulfilling the responsibility [for pro bono legal services] include:
>
> * * *
>
> (2) providing any additional services through:
>
> * * *
>
> (iii) participating in activities for improving the law, the legal system or the legal profession.
>
> Comment 8 to this Rule states:
>
> Paragraph (b)(2)(iii) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on boards of *pro bono* or legal services programs, taking part in Law Day activities, taking part in law related education activities, acting as a continuing education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that may fall within this paragraph.

What are some examples of current needs that can be met by attorneys in these areas? There is the need now for screeners on the Bar Ethics & Discipline Committee, as well as for volunteers

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to serve in twenty different Bar committees. The Better Business Bureau is looking for qualified arbitrators [you can be trained] for its dispute resolution program. There is a great need for attorneys who can teach and counsel members of the legal profession, the judiciary and others in third world countries in legal matters. It is this last subject on which I desire to concentrate my remarks.

Norbest, Inc. is a farmers' cooperative ultimately owned by the farmers who grow the turkeys marketed under the NORBEST® label. As Norbest's counsel, I have had much experience working on cooperative matters both here in Utah and nationally.

During a meeting of the National Council of Farmer Cooperatives, I became aware of ACDI/VOCA (Agricultural Cooperative Development International/Volunteers in Overseas Cooperative Assistance). ACDI/VOCA is funded through USAID, a federal government program to provide foreign aid to third world countries. ACDI/VOCA assists farmers in various third world countries to be more productive and efficient in growing and marketing their products so that they can better feed their people and increase their standard of living.

I asked whether ACDI/VOCA ever had a need for attorney volunteers. I was told that there was no need for attorneys. Unless I had experience running farms or processing plants or feed mills, I probably would not be used. But I signed up anyway, in case the opportunity to use my experiences ever came up.

Last year I received a phone call asking me to go to Ethiopia and teach a class to government cooperative promoters on how to organize and manage farmer cooperatives. "This is something I can do," I thought, and accepted the request. I flew to Addis Ababa for orientation, and then up to the northern part of the country to Mekele, the seat of government in the Tigray Region.

Before I flew to Ethiopia, I tried to imagine a very depressing situation in my mind so that when I arrived in the country I would not face too much of a culture shock. It was worse than I had imagined. I was told that the Tigray Region was the poorest section of the poorest country in the world. Whether or not that is true, I do not know. But it is clear that the region's population is suffering greatly from drought, war, disease and other problems related to poverty.

I worked with people who have no cars, no telephones, no televisions and no radios. They have no electricity in their homes. They must walk a substantial distance, even in the cities, to obtain drinking water. In the rural areas, they may need to walk as far as five miles each direction to get drinking water. The average annual income in Ethiopia is about $450.

To illustrate the poverty of these people, I'll share an experience I had in Mekele. I took several teaching materials and resources with me to help me teach my class. I did everything I could to cut back on weight so I could take these training materials. I purchased a small travel deodorant can, thinking it would last the three weeks I would be in the country. Unfortunately, after one and one-half weeks it was gone, and I was only half way through my assignment. I went to the front desk of the hotel where I stayed and asked where I could find some deodorant to buy. They did not even know what I was talking about. So I started visiting stores in a search for something we take for granted here. I went to five different stores before I was able to find a small can of deodorant. I was very relieved that I finally found what I needed.

I thought about this experience, and realized that something we take for granted in this country was a luxury to the people of Ethiopia. Their concern was not with what they smelled like, but with where their next meal would come from.

Earlier volunteers had already started the process of teaching the legal requirements for organizing farmer cooperatives. Through these cooperatives, many farmers have seen great improvements in their lifestyles. Here are a few examples:

1. Ethiopia has virtually no petroleum resources. As a result, all of the fertilizer needed by the Ethiopian farmers must be imported, usually from Syria or Jordan. By pooling their resources through cooperatives, farmers can bulk purchase the fertilizer they need at a cost which is about 50% of the amount they used to pay. The savings stays with the farmers and improves their lives tremendously.
2. Many farmers live several miles from the markets for their products. When they need money, they load their 100-kg sacks of grain on their donkeys and walk the distance to market. They sell the grain for the going price, often making very little profit. They really have no other choice. But with cooperatives, the farmers can pool their resources and build a grain storage facility where the grain can be stored for a season. The cooperative buys the grain from the farmers at a fair price at harvest time. The cooperative monitors grain prices, and knows when they are good for the farmers. The grain is stored in the facility until the market price improves. Then the cooperative takes the grain to market and sells it at the higher price. The profits are returned to the farmers.
3. In most areas of the country, there is no electricity. In the Tigray Region, there are very few trees because of several years of drought. So there is very little cooking fuel available. To solve this problem, the children go out into the fields each afternoon and gather dung from the cows, goats and donkeys. They carry the dung home, and the women stomp straw in the dung, mold it into patties, and dry the patties on their rock walls or on the straw roofs of their houses. They use these dung patties as cooking fuel. With the savings on fertilizer costs and increased profits from sales of their farm products through the cooperatives, farmers can purchase kerosene stoves, kerosene lamps and the kerosene they need for cooking and for use in the lamps.
4. Farmers still plow their fields with wooden plows and a team of cattle. Some cooperative unions (we call them "federated cooperatives" in this country; they have several local farmers' cooperatives as their members) have been able to pool sufficient resources to purchase tractors that can plow in a day as much ground as many farmers can plow in a week.
5. Cooperatives set up cooperative stores where their farmer-members can purchase needed supplies such as matches, soap, and foodstuffs instead of having to walk many miles into town to purchase them.
6. Some cooperatives have purchased grain mills run by diesel generators so the farmers can grind their grain with the mill rather than by hand on a grinding stone.
7. Most of the farmers in Ethiopia are illiterate. There are no libraries in the rural areas of Ethiopia. Some cooperative unions have established libraries so the farmers and their children can borrow books and learn to read.
8. There are no banks in most of the rural areas of Ethiopia. Farmers have organized savings and credit cooperatives (they function much like credit unions in this country) where they can accumulate their meager savings and borrow for needed items such as fertilizer.

Without cooperatives, these small changes in Ethiopia would never have taken place. The farmers would still be struggling with farming methods that date back thousands of years. Poverty and the resulting disease and famine would cause countless people to die. But people with the knowledge and experience to teach others how to establish farmer cooperatives can change this history of poverty and move the people closer to self-sufficiency and much improved lives.

My project took three weeks of time and appeared to be successful. The students were very appreciative of the information taught.

Hopefully these promoters can assist the farmers in the Tigray Region to organize cooperatives to pool their resources and allow them to advance economically.

As the first attorney to teach this class, I was the first teacher to carefully review the Ethiopian cooperative laws, and noticed that many of the established cooperatives were not following the laws as they should. There were also some gaps and inconsistencies in the laws that created confusion and uncertainties. These concerns were brought to the attention of the Ethiopian cooperative leaders. Consequently, I was asked to return to Ethiopia in February of this year on a follow-up project.

This time I was asked to meet with cooperative leaders from around the country to develop model bylaws that comply with the laws governing cooperatives. There are three kinds of cooperatives in Ethiopia, and models bylaws for each kind of cooperative were prepared. These new bylaws will be distributed to the cooperatives so they can amend their current bylaws to conform to the country's laws. The project ended up being more of a training session on the laws as it became clear early on that even the people who were supposed to enforce the laws had no clear understanding of them.

The second part of the assignment was to make recommendations to the federal cooperative leaders on how they can amend the laws to eliminate inconsistencies and to fill in crucial gaps in the law. In conjunction with Ethiopian legal counsel, suggested provisions were drafted and presented to the national leaders, and the process has now been started to change the laws through Parliament.

A third assignment arose during the meeting with the federal cooperative leaders, including representatives from the Prime Minister's office. It became apparent that a draft of regulations has been submitted to the federal cooperative office to assist in implementing the cooperative laws. I was asked to review these proposed regulations and to make suggestions for their improvement.

A few years ago, I never would have imagined that I would be using my legal experience to help poverty-stricken people half way around the world. I never imagined that I would be providing pro bono legal services to charitable, community, governmental and educational organizations which are designed primarily to address the needs of persons of limited means[4] in Ethiopia. Nor did I imagine that I would be participating in activities for improving the law, the legal system or the legal profession[5] in Ethiopia.

With advances in communication and transportation, and with increased trade with all parts of the world, our "community" is bigger than the Wasatch Front. It is more than the State of Utah. It is more than the United States. It is the entire world. As attorneys, we should be sensitive to those poor people who desperately need our legal services and experiences and wisdom no matter where they may be. I do not intend to imply that the needs of persons of limited means here in Utah are not important. We need more attorney volunteers who are willing to help our own neighbors who are desperate for help. However, we need to recognize that there are persons of limited means everywhere, and if we can help them, we should.

The experiences I had in Ethiopia are not unique. There are opportunities (and great needs) throughout the world for attorneys to use their knowledge to help the poor. Volunteers have drafted model legislation for development of the Albanian wine industry; assisted the first Albanian trade organization for agricultural inputs in member responsibilities and reviewed legal documents; assisted the Grabovo, Bulgaria municipality in including farmers in their environmental strategy and advised farmers on conflict resolution practices; advised the Czech Ministry of Agriculture on economic and legal matters related to key forestry issues; trained local cooperative banks in Poland in strategic planning, credit granting and monitoring and financial performance; assisted in developing a new structure for cooperative law that accurately reflects the requirements of private agricultural cooperatives in Romania; provided an analysis of bankruptcy legislation as it relates to agriculture in Slovakia; worked with farm managers on the basics of cooperative development and business plan writing to assist in the privatization process in Belarus; wrote sample agricultural legislation in Moldova; advised former collective farms on organizational restructuring of production and service units for privatization in Lithuania; conducted an assessment of the organizational structure and made recommendations for improvement of administration and management of the COREL-PAZ Electric Cooperative in Bolivia; provided training in the establishment of cooperative associations among farmers in Egypt; and assisted a new cooperative in implementing improved management systems in Tonga.

These are only a few of the hundreds of VOCA/ACDI projects that have been completed by volunteers who are or who should have been attorneys. There is a significant need in developing countries that are struggling to implement a free market economy after living under a socialist government for many decades. The people have no experience in writing free market legislation. They have no experience in establishing businesses that operate under free market principles. The people who are best qualified to help in these areas are attorneys. By helping on these projects, the

volunteers are blessing the lives of people of limited means through their legal experience and knowledge.

Many organizations besides ACDI/VOCA use attorneys to help people and countries of limited means. The Central and East European Law Initiative (CEELI) works with labor groups in Belarus to establish workers' rights. Attorneys teach courses on the commercial law in Bhutan. The ABA/UNDP Legal Resource Unit places lawyers in Third World countries to assist in judicial reform, strengthen the organized bar, train in human rights and in the commercial law, and in drafting legal reform statutes.[6]

Even the poorest of the poor in Salt Lake County have access to more money and goods than most of the people in this world (and would be considered rich by the standards in most countries). We should begin to see that the bigger picture of pro bono legal services to people of limited means extends far beyond the Wasatch Front and the State of Utah. We do not see many barefoot, diseased children wearing rags begging in the streets of Salt Lake City. However, there are millions of such children around the world. Attorneys can and should assist in the effort to provide legal and other assistance to these people.

In thanking the volunteers for their assistance on a volunteer project in Palos Blancos, Bolivia, a Franciscan priest said, "When you stand at the gates of heaven you can say that once you did something for the poor."[7] It would be good if attorneys from Utah could also say that they have done something for the poor.

[1] This article is adapted (and updated) from a discussion led by Mr. Johnson at the Utah State Bar's Corporate Counsel Section Seminar on October 25, 2001.

[2] "A Study of Human Needs in Salt Lake, Summit, & Tooele Counties", 2002.

[3] Although the survey only reviewed problems in Salt Lake, Summit and Tooele Counties, to one degree or another, these problems are common throughout the State of Utah and the entire country.

[4] Rules of Professional Conduct 6.1(b)(1)(ii).

[5] Rules of Professional Conduct 6.1(b)(2)(iii).

[6] Garret Ordower, "Third World for Us, New World for Them – U.S. Lawyers Take Their Expertise Abroad", *Business Law Today,* May/June 2001, p. 37.

[7] ACDI/VOCA *World Report,* Winter 2002, p. 12. Organizations such as ACDI/VOCA, CEELI, and the ABA/UNDP Legal Resource Unit and the volunteers who serve with them are able to help millions of people throughout the world, both directly and indirectly. But one cannot overlook the great blessings that come through this service to the individual volunteers in knowledge and experience gained, in an increased appreciation of other peoples and cultures, and in the lasting friendships made.

Admitting Child Hearsay Statements of Child Sexual Abuse: Can Courts Determine Reliability?

by Bruce M. Giffen and R. Lee Warthen

Provision for Admission of Child Hearsay

The purpose of Utah Criminal Code §76-5-411 is to set standards for the admission of a child's hearsay statements, including visually recorded statements (Utah Rules of Criminal Procedure 15.5) of alleged criminal sexual conduct. The court must make express findings which focus on the trustworthiness and reliability of the out-of-court statements. These findings are necessary to satisfy federal and state confrontation clause concerns.

According to Utah Code Ann. §76-5-411(2), for the court to admit any out-of-court statement into evidence, the judge must consider: "...the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child."

Constitutional requirements are met if the declarant is available for cross examination, either at trial or by closed-circuit or videotaped testimony. Otherwise, according to Utah R. Crim. P. 15.5 (1)(h), the court must determine that "the child is unavailable as a witness to testify at trial.... '[U]navailable' includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial."

In *Idaho v. Wright,* the United States Supreme Court held that before a court may admit hearsay statements of a child who is unavailable to testify, a requirement of "indicia of reliability" must be met. This requirement is met if 1) "the hearsay statement 'falls within a firmly rooted hearsay exception,'" or 2) the hearsay is "supported by 'a showing of particularized guarantees of trustworthiness.'" 497 U.S. 805, 816, quoting *Ohio v. Roberts,* 448 U.S. 56, 66 (1980).

Firmly rooted exceptions useful in sexual abuse cases include excited utterances, statements for purposes of medical diagnosis or treatment, and prompt report of sexual assault, all circumstances not capable of duplication in the courtroom.[1]

According to *Wright,* if the hearsay does not fall into one of the firmly rooted exceptions, it is presumed to be unreliable and inadmissible, but the presumption may be rebutted by "a showing of particularized guarantees of trustworthiness." These must "be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." The hearsay "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception," and "must similarly be so trustworthy that adversarial testing would add little to its reliability."

Furthermore, evidence that corroborates the truth of the statement is not to be considered as a method of demonstrating trustworthiness. *State v. Matsamas,* 808 P.2d 1048, 1054 (1991), citing *Wright.* The *Wright* Court broadly accepts that if a child's statements are so clear from the surrounding circumstances that cross-examination would be of marginal utility, then the statement may be admitted.

Wright supplies no specific test of reliability but, to determine "particularized guarantees of trustworthiness," a number of factors were considered: spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. The strength of the *Wright* decision has led federal and state courts to accept without question the factors suggested, despite *Wright's* assertion that the factors are "not exclusive" and its refusal to "endorse a mechanical test for determining 'particularized guarantees of

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trustworthiness.'" Many psychologists, however, take issue with these factors because they have little support from empirical research.[2]

Factors of Reliability

Even though a number of federal and state courts have upheld the use of the *Wright* factors, little empirical evidence supports their use and errors have in fact occurred.[3] In a critical analysis, the term "reliability" could be substituted with a more meaningful term: "validity." In the context of this discussion, "validity would be the degree to which the reliability factors identified by the courts predict truthfulness in children's hearsay statements."[4]

Four factors listed in *Wright* are considered by that Court most likely to be trustworthy:

A. Spontaneity and Consistent Repetition: *Wright* clearly requires that the factor of spontaneity be comparable to excited utterance statements under Federal Rule of Evidence 803(2). Two concepts must be present before the hearsay statement would be considered comparable to that "firmly-rooted" exception and therefore said to be reliable. First, the statement must be an expression of immediate perception, unaffected by any fading of memory. Second, the statement should be contemporaneous with the event, with insufficient time available for fabrication.[5] When the statement is directly from a witness or in a videotaped interview, there is little chance that the statement was contemporaneous with the event.

Young children can give accurate statements even when telling and retelling events. Even though this retelling may be inconsistent, this does not necessarily mean that the telling is inaccurate. The lack of consistent repetition alone should not be considered a determiner of reliability.

B. Mental State: Children who have been sexually abused are extremely variable in their emotional response when discussing the events. "Commentators have observed...that the childhood perspective on sexual experiences 'does not produce the shock or excitement that the law presumes to exist after such an event. Quite often, the incident is related as part of the day's activities without any indication from the child that it was traumatic or unusual.'" [6]

C. Terminology: It has been said that "young children lack the experience required to fabricate or fantasize detailed accounts of sexual acts."[7] When a child expresses knowledge which is graphic and descriptive of sodomy, erectile functioning and ejaculation there seems to be little doubt about the child's experience. But Terence W. Campbell describes a case of a non-abused nine year old female who describes how "Mark squirted sticky stuff on my face from his thing."[8] In another case not substantiated, a four-year-old female stated to a detective that her father had "put his finger in her." [9]

Before considering what may seem to be a child's graphic knowledge and explicit terminology as a reliability indicator, a complete understanding of the child's cultural and social influences should be explored.

D. Lack of Motivation to Fabricate: Courts may determine that "there was no motive to fabricate" or the "child had no motive to lie," but this is not a reliable indicator of truthfulness.[10]

The above four criteria of reliability have been applied by courts to support literally hundreds of convictions since *Wright.* With vague and ambiguous identifiers lacking any empirical scientific support, untrained and sympathetic judges are attempting to make critical decisions. Even the phrase "particularized guarantees of trustworthiness" is defined differently by courts and has no standard for measurement in the Federal Rules of Evidence.[11]

Court's as "Gate-Keepers"

When judges become "gate-keepers" responsible for the admission of evidence with questionable reliability and little guidance, errors will be made against the accused. In *State v. Lenaburg,* 781 P.2d 432, 437 (Utah 1989), introduction of a videotaped interview between a five-year-old female and an employee of the Division of Family Services was considered error because the defendant was unable "to explore contradictory or confusing portions of the victim's testimony." Actually, five states have explicitly rejected this "gate-keeper" role.[12]

Without proper cross-examination, many allegations will go unexplored. Prosecutors could use incomplete statement evidence (as in recorded interviews) where the charges are not clearly supported by the allegations.[13]

Expert Testimony: *Rimmasch and Daubert*

In most cases, expert testimony is introduced to evaluate the reliability of child hearsay. *State v. Kallin* 877 P.2d 138, 141 (Utah 1994), *cited in State v. Doporto,* 935 P.2d 484, 495 (Utah 1997), held that "an expert witness may testify that a 'victim's behavior was consistent with symptoms that might be exhibited by one who had been sexually abused,' as long as the expert does not 'testify to any kind of sexual abuse profile as such, [or that] the symptoms manifested by the victim demonstrated that [the victim] had been sexually abused.'" Such judicial limitations will have to give way

as the science in this area develops, a result anticipated in *State v. Rimmasch.*

In excluding expert testimony, the Utah Supreme Court in *Rimmasch* stated that a three-step analysis must be used to determine the reliability of the evidence. Step one requires a finding by the court that the principles and techniques underlying the testimony are inherently reliable, which may be done by judicial notice or by a sufficient foundational showing by the party seeking to admit the evidence. Step two requires a determination that the scientific principles or techniques have been "properly applied to the facts of the particular case by sufficiently qualified experts. Step three requires a determination that the evidence will be more probative than prejudicial, as Utah Rules of Evidence 403 demands.

The U. S. Supreme Court supplied a similar test in *Daubert,* applying the Federal Rules of Evidence. In a challenge of *Rimmasch* as being inconsistent with *Daubert,* the Utah Supreme Court found the two to be similar and not in conflict. Hence, Utah would apply the "detailed and vigorous outline for trial courts to follow" set forth in *Rimmasch* and explained in *State v. Crosby,* 927 P.2d 638, 641 (Utah 1996). In establishing the scientific reliability of experts' assertions, several factors could be considered under *Daubert:* 1) Is the theory or hypothesis falsifiable or testable? 2) Is the theory subject to peer review? 3) Is there a known or potential error rate? 4) Is the method generally accepted? Similarly, the Utah Supreme Court rejected the foundation presented for an expert witness because the following were lacking: 1) Presented no publications; 2) Did not show wide acceptance; 3) No verification of studies; and 4) No reference to specific authority. Relying on such factors, the courts would guarantee that no hearsay statement not cross-examined would be admitted into evidence until considered reliable.

Conclusion

The Utah Criminal Code and Code of Criminal Procedure allow hearsay statements to be introduced into evidence under defined circumstances. The court must always make a finding as to their reliability. A problem exists because factors that courts have considered indicators of reliability do not withstand scientific scrutiny. Expert testimony is often introduced to show that the victim's behavior was consistent with symptoms that might be exhibited by one who had been sexually abused, but any such testimony must meet a *Rimmasch* or *Daubert* standard. In order to determine the validity of a particular statement, a much more involved process is necessary to find "truthfulness." Only when certain criteria are applied to hearsay statements can we begin to paint a descriptive picture of actually experienced criminal events. Unfortunately, the training necessary to make these kinds of forensic evaluations goes beyond that of most court, police, and mental health professionals.[14]

[1] Carol A. Chase, *Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims,* 1993 Utah L. Rev. 407, 414-415; Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions,* 1993 U. Ill. L. Rev. 691, 706.

[2] Daniel B. Lord, Note, *Determining Reliability Factors in Child Hearsay Statements:* Wright *and Its Progeny Confront the Psychological Research,* 79 Iowa L. Rev. 1149, 1177 (1994).

[3] See, e.g., *United States v. Clarke,* 2 F.3d 81 (4th Cir.1993); *Webb v. Louis,* 44 F.3d 1387 (9th Cir.1994); *Ring v. Erickson,* 983 F.2d 818 (8th Cir.1992).

[4] Lord, at 1169, n. 131.

[5] Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause,* 66 N.C. L. Rev. 1, 29 (1987).

[6] *Doe v. United States,* 976 F.2d 1071, 1079 (1992), quoting Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 Colum. L. Rev. 1745, 1757 (1983). *See also* David P.H. Jones and J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse in Children,* 2 Journal of Interpersonal Violence 27, 39 (1987); Aldert Vrij, Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice, 139 (2000).

[7] 2 John E. B. Myers, Evidence in Child Abuse and Neglect Cases 340 (3d ed. 1997).

[8] Smoke and Mirrors: The Devastating Effect of False Sexual Abuse Claims (1998).

[9] R. Kim Oates et al., *Erroneous Concerns About Child Sexual Abuse,* 24 Child Abuse & Neglect 149, 155 (2000).

[10] Myers, at 346; *United States v. Clarke,* 2 F.3d 81, 84 (4th Cir.1993).

[11] Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute,* 32 Harvard J. on Legis. 207, 241-242 (1995); Victor I. Vieth, *When Cameras Roll: The Danger of Videotaping Child Abuse Victims Before the Legal System is Competent to Assess Children's Statements,* 7 J. of Child Sexual Abuse 113, 116 (1999); Lucy S. McGough, Child Witnesses: Fragile Voices in the American Legal System 148, 152, 154 (1994); Scott A. Smith, Comment, *When to Hear the Hearsay: A Proposal for a New Rule of Evidence Designed to Protect the Constitutional Right of the Criminally Accused to Confront the Witnesses Against Her,* 32 J. Marshall L. Rev. 1287, 1305 (1999).

[12] Sophia I. Gatowski, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World,* 25 L. & Hum. Behav. 433, 452-453 (2001); Jane Goodman-Delahunty, *Forensic Psychological Expertise in the Wake of Daubert,* 21 Law & Hum. Behav. 121, 132 (1997).

[13] Dana D. Anderson, Note, Assessing the Reliability of Child Testimony in Sexual Abuse Cases, 69 S. Cal. L. Rev. 2117, 2142 (1996); John Baldwin, *Police Interview Techniques; Establishing Truth or Proof?* 33 Brit. J. of Criminology 325, 349 (1993); Monit Cheung, *Children's Language of Sexuality in Child Abuse Investigations: A Brief Report,* 8 J. of Child Sexual Abuse 65, 79-80 (1999).

[14] Irit Hershkowitz, *The Dynamics of Interviews Involving Plausible and Implausible Allegations of Child Sexual Abuse,* 3 Applied Developmental Science 86, 88 (1999); Gunter Kohnken et al., *The Cognitive Interview and the Assessment of the Credibility of Adults' Statements* 80 J. of Applied Psychol. 671, 673 (1995); Vrij, supra note 18 at 164; Laura A. Brodie, Making Judgments Regarding Child Sexual Abuse: The Impact of Professional Background, Experience and Knowledge Base (1993) (Ph.D. dissertation, Rosemead School of Psychology, Biola University), *cited in* Marcus Choi Tye et al., *The Willingness of Children to Lie and the Assessment of Credibility in an Ecologically Relevant Laboratory Setting,* 3 Applied Developmental Science, 92, 98 (1999); Daniel W. Shuman, & Bruce D. Sales, *The Impact of Daubert and Its Progeny on the Admissibility of Behavioral and Social Science Evidence,* 5 Psychol., Pub. Pol'y, & Law 3, 14 (1999).

When Gunzilla (Federal Gun Control Act of 1968) Meets Queen Cong (Utah's Domestic Violence Statutes) Your Client Could Get Stepped On

by James D. "Mitch" Vilos

"I sleep with two guns under my pillow; one gives me a stiff neck!"

– Pancho Vilos

WARNING to Criminal Defense and Domestic Relations Attorneys!

Your advice to a client charged with domestic violence or seeking a mutual protective order in a domestic case could set the client up to be charged with a federal felony!

The Problem

I was sitting in District Court in West Valley one afternoon waiting for my client's case to be called and noticed no less than half a dozen people stand up and plead guilty to misdemeanor domestic violence (MDV). Some were represented by counsel and others weren't. Although the court informed those pleading guilty they were waiving their right to be represented by an attorney at trial, to trial by jury, to cross examine witnesses etc., neither the judge nor the attorneys told these defendants that they were giving up the right to possess a firearm. Unbeknownst to many lawyers, judges and lay persons, Congress, in September of 1996, passed the "Lautenberg Amendment" of the Gun Control Act of 1968 making it a federal felony for a person who has been convicted of MDV to possess a firearm or ammunition, 18 U.S.C. § 922(g)(9). A sister provision of "Lautenberg," 18 U.S.C. §922(g)(8), makes it a felony for anyone to possess a firearm who, as a cohabitant, has had a civil protective order granted against him or her. This article discusses some of the problems §922 (g)(8) and (9) have caused for gun owners and how to advise your clients to avoid the pitfalls.

What's the Beef?

So what's the beef? After all, should anyone who inflicts serious bodily injury on his wife or kids be trusted with a gun? Of course not. But a closer look at Utah's MDV laws reveals "domestic violence" is very broadly defined and doesn't just include "wife beaters" or child abusers. A person could be charged with MDV for breaking a plate on the floor during a domestic argument while shouting "you've had it" (*see* U.C.A. 77-36-1) or for not letting a spouse enter a workshop or sewing room. (U.C.A. 76-5-304). If the "tea cup spats" on *I Love Lucy* had taken place today in Utah, both Ricky and Lucy would have been guilty of MDV.

The Right to Possess Firearms is Important to Many Utahns

Gun ownership is extremely important to many Utahns. Brady "background check" statistics show that Utahns purchased approximately 130,000 firearms from gun dealers during the past two years. This doesn't count sales between private individuals. Numbers from the Utah Bureau of Criminal Identification (BCI) reveal there are presently over 40,000 concealed weapon permit holders in Utah, the majority of which reside in Weber, Davis, Salt Lake and Utah counties. The number of permit holders in Utah increases at a rate of over 500 per month. Last year the Utah Division of Wildlife Resources reported 102,950 big game licenses sold authorizing hunters to hunt deer and elk with a firearm. There were 85,931 small game licenses sold. A gun owner charged with MDV, whose criminal defense attorney does not advise him that he is giving up the right to possess firearms by entering into a plea bargain, will feel betrayed when he later discovers it's a felony for him to possess his favorite deer rifle. If your criminal client is a police officer, a plea to MDV could result in the loss of his or her career. The same problems arise if your client has a civil protective order granted against him or her. Unfortunately, many lawyers advise their

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clients to stipulate to mutual protective orders without assessing whether domestic abuse is really a threat or if possessing a gun is important to the client.

Traps for Those Unfamiliar With Firearms Law

With the information recited above, an attorney might assume that advising his or her client to avoid pleading to an MDV or stipulating to a protective order would suffice to protect the client. Unfortunately there are provisions in state law that can mislead attorneys, judges and clients.

Plea bargaining a MDV to disorderly conduct – The Utah Legislature attempted to create a "safe haven" for firearms owners who plea bargain a MDV to disorderly conduct. U.C.A. 77-36-1 (o) says " if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with . . . domestic violence, [then the] conviction of disorderly conduct as a domestic violence offense . . . does not constitute a misdemeanor crime of domestic violence under . . . the federal Firearms Act . . ."

Judges and attorneys should be able to rely on this, right? Wrong. Unfortunately counsel at the Bureau of Alcohol Tobacco and Firearms (ATF) have concluded that the definition of MDV under the federal statute includes any crime that has, as an element, the use or attempted use of physical force against a domestic partner, 18 U.S.C. §921(a)(33)(A)(ii). Utah's disorderly conduct statute includes the elements "engag[ing] in fighting or in violent, tumultuous, or threatening behavior." ATF concludes that a conviction of disorderly conduct, where the victim is a domestic partner, constitutes a MDV under federal law. Because federal law preempts state law, the "safe haven" intended by the Utah Legislature is not "safe." Consequently plea bargaining your client from an MDV to a disorderly to save his or her right to possess a firearm will not work. The crime the client pleads to may not have as an element the use of or attempted use of physical force. Plea bargains from a MDV to a simple assault or simple battery will cause a client to lose his or her right to bear arms. The search for a crime not involving the use or threat of force is like looking for a "non-moving violation" in the context of plea bargaining a traffic offense. A dismissal with an apology would be the safest route. Pleading your client to disrupting a meeting, U.C.A. 76-9-103 or a privacy violation under U.C.A. 76-9-402 are plausible choices for a plea bargain from an MDV if the prosecutor will agree.

Diversion Agreement – Diversions are not allowed under domestic violence law, U.C.A.77-36-2.7(6).

Pleas in abeyance – A plea in abeyance, U.C.A. 77-2a-1 *et.seq.*, to DV is arguably not a conviction and shouldn't result in a firearm disability under Lautenberg. This argument is not "bullet proof," however, because a plea in abeyance (whether the plea is "guilty" or "nolo contendere") is considered a conviction under at least two sections of the Utah Code – (1) it is counted as a domestic violence conviction for subsequent DV offenses (U.C.A. 77-36-1.1(2)), and (2) it is considered a conviction when applying for a concealed weapon permit (U.C.A.53-5-702(1)(c)). Your client probably will not be able to buy a firearm during the period of abeyance, and will not be able to get a concealed weapon permit during or after the abeyance period, even after a dismissal. If your client is really unlucky, a federal prosecutor may take the position that because a plea in abeyance is deemed a conviction under two sections of Utah law, it is a conviction!

Other Options

Dismissal – If the case against your client is weak, you may be able to talk the prosecutor into a dismissal (Lotsa Luck!). If your client is charged with more than one crime and the prosecutor offers to dismiss the MDV in return for a plea on the other charges, be careful . . . a plea to other charges may result in the loss of the right to possess a firearm. Felons cannot possess a firearm under federal law (18 U.S.C. 922(g)). Crimes of violence or involving drugs or alcohol may result in denial, revocation or suspension of a concealed weapon permit (U.C.A. 53-5-704(2)). Attorneys who represent gun owners should be familiar with the firearms prohibitions under federal law 18 U.S.C. §922(g), and state law U.C.A. 76-10-500 *et. seq.* particularly section 503.

Try the case – The safest option, if you are convinced of your client's innocence, is to win the case at trial.

PROTECTIVE ORDERS

Like a DV conviction, a civil protective order causes a firearms "disability" under federal law, 18 U.S.C. §922(g)(8). Likewise, there are "traps" for those misled by provisions of state law. For example, U.C.A. 30-6-4.2(d) states that a domestic court may prohibit a cohabitant from purchasing or possessing a firearm. The form provided by the district court clerks contains a "check-list." One of the choices gives the petitioner the option of asking the court to prohibit the respondent from purchasing, using, or possessing a firearm. The fact that there are options gives the litigants the impression that if these options are not requested, a

person against whom a protective order has been issued may possess a firearm. This may even mislead the lawyers and judge to believe that litigants may buy and possess guns if permitted by the court (e.g. a divorce judge tells a husband he may possess a firearm to deer hunt as long as he does not possess a firearm around his estranged wife). As stated earlier, however, these state law provisions are preempted by federal law. Under federal law, any subject of a protective order who possesses a firearm commits a federal felony.

Many domestic relations attorneys stipulate to mutual restraining orders whether there is a threat of abuse or not. They do so without ascertaining if owning, possessing or buying firearms is important to their clients. As soon as BCI receives notice of a protective order against a person, that person will be prohibited from purchasing a firearm and, if he or she is a concealed weapon permit holder, his or her permit will be revoked. However, if the attorney is careful to explain in the protective order that none of the elements of 922(g)(8) apply (the client hasn't harassed, stalked or threatened his intimate partner or child and the client is not a credible threat to such persons), then the protective order may not trigger the 922(g)(8) firearms "disability." An attorney would be well advised to get BCI to approve the language of the protective order in advance. Protective orders remain in effect until the parties agree otherwise or until the respondent convinces a court that the order is no longer necessary. Domestic relations clients who are the subjects of protective orders that contain the disabling elements of 922(g)(8) should be advised to immediately dispossess themselves of all firearms or risk being charged with a federal felony.

Conclusion

Members of the "from-my-cold-dead-hands" crowd ain'ta gonna take kindly to lawyers failing to tell them of the consequences of a plea or stipulation that deprives them of what rocks their world. Perhaps some shouldn't possess a firearm, but others pose no real threat to their spouses or society. All should be fully informed so that they can make intelligent choices about whether to plead, stipulate or take their chances at a hearing or trial.

Recent Changes and Developments in the Utah Rules of Evidence: Definitive Evidence Rulings, Character Evidence, Expert Testimony, and Business Records[1]

by Keith A. Kelly

I. Introduction: Recent Amendments to Federal and State Evidence Rules.

On December 1, 2000, the Federal Rules of Evidence were significantly amended. *See* Fed. R. Evid. 103, 404, 701, 702, 703, 803(6), and 902(11) & (12) (2001). The amendments dealt with definitive evidence rulings (Rule 103), character evidence (Rule 404), expert testimony (Rules 701, 702 & 703), and authentication of business records (Rules 803(6) and 902(11) & (12)).

Before those federal amendments became effective, the Utah Supreme Court's Advisory Committee on the Rules of Evidence ("Advisory Committee") considered whether to recommend adoption of corresponding amendments to the Utah Rules of Evidence. After detailed analysis and discussion, the Advisory Committee recommended adoption of corresponding changes to Utah R. Evid. 103, 404, 701, 702, 703, 803(6), and 902(11) & (12), submitting its proposal for comment.

The proposed amendments to Utah R. Evid. 103, 404, 803(6) and 902(11) & (12) were not controversial. On August 15, 2001, the Utah Supreme Court adopted those changes, effective November 1, 2001. (*See* Order of Aug. 15, 2001, *In re: Proposed Amendments to Rules 103, 404, 701, 702, 703, 803 and 902 of the Utah Rules of Evidence,* No. 20010570-SC (hereinafter "8/15/01 S. Ct. Order").

The proposed amendments to expert witness rules, Utah R. Evid. 701, 702 & 703, would have resulted in important changes in the handling of expert testimony in Utah state courts. The Committee received a substantial number of negative comments from various trial lawyers, raising concerns that the proposed amendments were not necessary and would be unduly restrictive and costly. The Utah Supreme Court ultimately declined to adopt the December 1, 2000 amendments to Fed. R. Evid. 701, 702 & 703. (*See* 8/15/01 S. Ct. Order.) About the time the Supreme Court was considering these proposed amendments, it was in the process of issuing several important opinions on the admissibility of expert testimony under Utah law.

This article discusses each of the November 1, 2001 amendments to the Utah Rules of Evidence, as well as the amendments rejected by the Utah Supreme Court, along with recent case law pertinent to those accepted and rejected amendments. First, it discusses the amendment to Utah R. Evid. 103(a)(2), which deals with definitive evidence rulings. Second, it discusses the amendment to Utah R. Evid. 404 and recent decisions dealing with character evidence. Third, this article discusses the Utah Supreme Court's rejection of proposed amendments to Utah R. Evid. 701, 702 and 703, along with recent Utah case law indicating a growing divergence between federal and state approaches to handling expert testimony. Finally, this article discusses the amendments to Utah R. Evid. 803(6) and 902(11) & (12), which make admission of business records more simple.

II. Definitive Evidence Rulings: Utah R. Evid. 103

The Utah Supreme Court adopted a one-sentence addition to Utah R. Evid. 103(a)(2), making it consistent with the December 1, 2000 amendment to Fed. R. Evid. 103(a)(2). The federal advisory committee 2000 amendment note explains: "The amendment clarifies that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a)." Fed. R. Evid. 103 advisory committee's note (2000). The federal note adds: "The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point." *Id.* However, the

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federal note explains: "Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered." *Id.*

Effective November 1, 2001, amended Utah R. Evid. 103(a) reads:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(Underlined material reflects November 1, 2001 amendment.)

III. Character Evidence: Utah R. Evid. 404

The Utah Supreme Court also adopted an amendment conforming Utah R. Evid. 404 with its federal counterpart. In part, this amendment was designed to "provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of [Rule 404], the door is opened to an attack on the same character trait of the accused." *See* Fed. R. Evid. 404 advisory committee's note (2000). In addition, the federal amendment was "designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim." *Id.* The Utah Amendment also deleted the last sentence of Utah R. Evid. 404(b), in order to make the Utah rule consistent with its federal counterpart. The Utah Advisory Committee Note explains that "the deletion of that language is not intended to reinstate the holding of *State v. Doporto,* 935 P.2d 484 (Utah 1997)," a case which had restricted the admission of Rule 404(b) evidence. The amendment also adds a notice requirement for Rule 404(b) evidence in criminal cases.

Effective November 1, 2001, amended Utah R. Evid. 404 reads:

> **Utah R. Evid. 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**
> [Underlined and stricken material reflects November 1, 2001 amendment.]
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same~~;~~, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial. ~~In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.~~
>
> **Advisory Committee Note –** Rule 404 is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of *State v. Doporto,* 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

Discussion of Issues Related to Rule Change:

In 1997, the Utah Supreme Court created a presumption against the admissibility of evidence of other crimes, wrongs or acts

under Utah R. Evid. 404(b). *See State v. Doporto,* 935 P.2d 484, 491 (Utah 1997).

In 1998, the Court amended Utah R. Evid. 404(b) to reverse its holding in *Doporto,* as it explained in its later ruling in *State v. Decorso,* 1999 UT 57, ¶ 24, 993 P.2d 837, as follows:

> ¶ 24 [T]he [1998] advisory committee note to rule 404(b) explains that the 1998 amendment was intended "to return to the traditional application of rule 404 prior to *Doporto.*" Although our pre-*Doporto* case law recognized the danger of prejudice which may flow from the admission of other crimes evidence, we had not before stated that there was a presumption against the admission of such evidence. *See generally Featherson,* 781 P.2d at 426-27; *Shickles,* 760 P.2d at 295-96. Thus, under the traditional application of 404(b), prior to *Doporto,* there was no presumption against the admission of other crimes evidence if it was being offered for a proper, noncharacter purpose. Moreover, we see no necessity to import such a presumption into rule 404(b). Although that rule is exclusionary with respect to other crimes evidence offered only to show the defendant's propensity to commit crime, it is an inclusionary rule with regard to other crimes evidence which is offered for a proper, noncharacter purpose. *See, e.g.,* 29 Am.Jur.2d *Evidence* § 404 (1989) (stating that federal courts regard corresponding Fed. R. Evid. 404(b) as a rule of inclusion). Therefore, we hold that if other crimes evidence is offered for a proper, noncharacter purpose, there is no presumption against admissibility.

Id. ¶ 24.

As the 2001 Advisory Committee note explains, the deletion of language in Utah R. Evid. 404(b) is not designed to retreat from this position, but rather to conform Utah R. Evid. 404(b) with its corresponding federal evidence rule.

On July 13, 2001, the Utah Supreme Court reaffirmed its position that there is no presumption against evidence of prior misconduct. *See State v. Widdison,* 2001 UT 60, ¶ 41, 425 Utah Adv. Rep. 27. The *Widdison* case explains:

> [E]vidence of prior misconduct is admissible under rule 404(b) if the evidence is relevant to a proper, noncharacter purpose, unless its danger for unfair prejudice and the like substantially outweighs its probative value. *State v. Decorso,* 1999 UT 57, ¶20-23, 993 P.2d 837, *cert. denied,* 120 St. Ct. 1181 (2000).

> When reviewing a trial court's decision to admit evidence under rule 404(b), we apply an abuse of discretion standard. *Id.* at ¶18. However, in the proper exercise of that discretion, trial judges must "scrupulously" examine the evidence before it is admitted. *Id.*

2001 UT 60, ¶ 41 (affirming admission of other bad acts of defendant).

The holding in *Widdison* is consistent with several recent decisions affirming admission of prior misconduct relevant for a non-character purpose, when such evidence was admissible under Rules 402 and 403. *State v. Reed,* 2000 UT 68, ¶¶ 24-31, 8 P.3d 1025 (affirming admission of evidence of a pattern of conduct by child abuser towards victim); *Salt Lake City v. Alires,* 2000 UT App 244, ¶¶ 10-17, 9 P.3d 769 (evidence of defendant's prior disturbance of victim admissible to prove the identity of person making phone threats); *State v. Nelson-Waggoner,* 2000 UT 59, ¶¶ 17-32, 6 P.3d 1120 (affirming admission of evidence of other rapes by defendant to show absence of victim consent). *See also State v. Martin,* 2002 UT 34, ¶¶ 35-38, 44 P.3d 805 (error by exclusion of Rule 405(a) evidence about the alleged victim after the prosecution had introduced evidence of the victim's character).

However, in circumstances where the prior bad acts of the defendant do not fit into one of the Rule 404(b) non-character categories, it is error to admit such evidence. *State v. Webster,* 2001 UT App 238, ¶¶ 31-37, 32 P.3d 976 (error to admit evidence of prior arrest for similar crime, where such evidence was not probative of identity or intent). Likewise, where such evidence of prior misconduct cannot satisfy the requirements of Rule 403, it is appropriate to exclude it. *See State v. Vargas,* 2001 UT 5, ¶¶ 29-34, 20 P.3d 271 (holding that prior alleged false statements by witness are properly excluded under Rule 404(b) by application of Rule 403 standards).

IV. Expert Testimony: Rejected Fed. R. Evid. 701, 702 & 703, and Recent Utah Case Law on Expert Testimony

The December 1, 2000 amendments to Fed. R. Evid. 701, 702 and 703 responded to United States Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and to the many cases interpreting *Daubert,* including *Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167 (1999). These cases hold that all expert testimony, and not just expert testimony relying on scientific principles, is subject to the trial court's "gatekeeper" function of screening to ensure relevance and reliability. This has opened the door for significant pretrial hearings in federal court dealing with the admissibility of expert testimony. In addition, the recent amendments affect the ability of fact witnesses to offer expert opinions, and limit the ability of an expert witness to provide hearsay information to a jury.

After deliberation, the Advisory Committee voted to recommend amending Utah R. Evid. 701, 702 and 703 to conform to the December 1, 2000 amendments to the corresponding federal evidence rules. Such amendments would have imposed more rigorous "gatekeeping" duties on state trial court judges in evaluating all types of expert testimony, and not just testimony based upon scientific evidence as suggested in *State v. Rimmasch,* 775 P.2d 388 (Utah 1989). Several members of the Advisory Committee suggested that adoption of the federal rules in the Utah courts would impose more rigorous requirements on the courts to screen out inappropriate expert testimony. In addition, the amendments would have imposed additional requirements of pretrial disclosure of lay witnesses who offer expert opinions, and would have reduced a party's ability to get hearsay testimony to a jury through expert testimony.

The Utah Supreme Court rejected the proposed amendments. (*See* 8/15/01 S. Ct. Order.) Moreover, in a recent series of decisions, the Court has diverged from the federal approach in *Kumho Tire,* which requires the federal trial courts to apply the *Daubert* reliability analysis to all expert testimony. Rather, the Court has limited application of its *Rimmasch* analysis to novel scientific testimony. *See, e.g., State v. Kelley,* 2000 UT 41, 1 P.3d 546. Thus, while Utah trial courts still have the duty to assure that expert testimony meets the requirements of Utah R. Evid. 702 and 703, they have the duty to apply the *Rimmasch* analysis in limited circumstances. When the *Rimmasch* analysis does not apply, the Court states that the appropriate standard for admission of expert testimony is found in its 1982 opinion of *State v. Clayton,* 646 P.2d 723 (Utah 1982). *See Kelley,* 200 UT 41, ¶ 20.

A. Foundation for Admissibility of Expert Testimony

1. Fed. R. Evid. 702. [Underlined material reflects December 1, 2000 amendment.]

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, <u>if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case</u>.

2. Utah R. Evid. 702. [Proposed changes to this rule were rejected by the Utah Supreme Court].

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

B. Lay Opinion Testimony

1. Fed. R. Evid. 701. [Underlined material reflects December 1, 2000 amendment.]

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Utah R. Evid. 701. [Proposed changes to this rule were rejected by the Utah Supreme Court.]

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

C. Bases of Opinion Testimony by Experts

1. Fed. R. Evid. 703. [Underlined material reflects December 1, 2000 amendment.]

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

2. Utah R. Evid. 703. [Proposed changes to this rule were rejected by the Utah Supreme Court.]

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of

> a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Discussion of Issues Related to the Rejected Rule Changes: Federal Approach: Amended Fed. R. Evid 702 reflects the United States Supreme Court rulings in *Daubert* and subsequent cases. In *Daubert,* the Court required the trial court to ensure that scientific testimony or evidence is reliable and relevant, establishing a non-exclusive list of four factors. *See* 509 U.S. at 592-94. Later, in *General Electric Co. v. Joiner,* 522 U.S. 136 (1997), the Court held that the trial court is subject to an abuse of discretion standard in its *Daubert* analysis.

Then, in contrast to the Utah Supreme Court's analysis in recent cases, discussed below, the United States Supreme Court held in *Kumho Tire* that the *Daubert* reliability analysis should be applied to *all* types of expert testimony, not just expert testimony based upon scientific analysis. *Kumho Tire,* 119 S.Ct. at 1174-76. The *Kumho Tire* decision reasoned that "the evidentiary rationale that underlay the Court's basic *Daubert* 'gatekeeping' determination" was not "limited to 'scientific' knowledge." 119 S. Ct. at 1174. The Court explained that the language of Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. . . . Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Id.* The *Kumho Tire* Court then opined:

> Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases. . . .

Id.

Utah Approach: Diverging from *Kumho Tire,* Utah decisions on the admissibility of expert testimony apply two different standards, depending on the type of expert analysis involved. Thus the Utah decisions are wrestling with the difficult distinctions between scientific, technical and other specialized knowledge that the *Kumho Tire* decision expressly avoided.

Two general standards have emerged. The first standard requires the trial court to ensure reliability before admission of the scientific expert testimony. *See, e.g., State v. Rimmasch,* 775 P.2d 388 (Utah 1989); *State v. Crosby,* 927 P.2d 638, 641 (Utah 1996). The second standard requires the trial court to ensure the expertise of the witness, but applies a Rule 703 reliability analysis, and then provides that once this basic foundation is laid, reliability goes to weight, not admissibility. *State v. Clayton,* 646 P.2d 723 (Utah 1982); *State v. Kelley,* 2000 UT 41, 1 P.3d 546.

The first standard, applying *Rimmasch/Crosby,* is generally applied to novel or newly discovered scientific principles or techniques. The second standard, applying *Clayton/Kelley,* generally applies to non-scientific testimony, and to non-novel scientific testimony. However, as discussed below, whether the *Rimmasch/Crosby* or the *Clayton/Kelley* approaches apply to scientific expert testimony is not always clear under the evolving caselaw.

In 1980, the Utah Supreme Court adopted an "inherent reliability" test for admission of expert testimony under Utah R. Evid. 702. *See Phillips v. Jackson,* 615 P.2d 1228 (Utah 1980).

Then in *State v. Rimmasch,* 775 P.2d 388 (Utah 1989), the Court established a three-part analysis to determine whether scientific evidence is admissible: (1) determination whether the scientific principles and techniques underlying the expert's testimony are inherently reliable; (2) determination that scientific principles or techniques have been properly applied; and (3) determination whether the scientific evidence will be more probative than prejudicial under Utah R. Evid. 403.

Later, in *State v. Crosby,* 927 P.2d 638 (Utah 1996), the Court held that the more restrictive *Rimmasch* test applies to scientific evidence in Utah courts, rather than the more general *Daubert* test. 927 P.2d at 640-42.

When faced with a similar question to that raised before the United States Supreme Court in *Kumho Tire,* the Utah Supreme Court diverged from the federal position, holding that the expert reliability analysis of *Rimmasch* applies only to novel scientific evidence. *See State v. Kelley,* 2000 UT 41, ¶ 19, 1 P.3d 546 (*Rimmasch* test is inapplicable when there is no plausible claim that expert testimony is based upon novel scientific principles or techniques); *State v. Adams,* 2000 UT 42, ¶ 16, 5 P.3d 642 (following *Kelley*).

On the issue of whether a trial court should apply a reliability analysis to all (not just scientific) expert testimony, contrast the following analysis by the Utah Supreme Court in *Kelley* and *Adams* with the analysis by the United States Supreme Court, quoted above, from *Kumho Tire.* The Utah Supreme Court explained in *Kelley:*

> ¶ 19 We held in *Rimmasch* that while rule 703 is the general rule for the admission of all expert testimony, where expert testimony is based upon *novel* scientific principles

or techniques, courts should apply the inherent reliability standard. *See Rimmasch,* 775 P.2d at 396. Here, there is no plausible claim that the type of expert testimony offered by the prosecution was based on novel scientific principles or techniques. . . . Thus, reliance on *Rimmasch* is misplaced.

¶ 20 The appropriate standard is set forth in *State v. Clayton,* 646 P.2d 723 (Utah 1982):

> [O]nce the expert is qualified by the court, the witness may base his opinion on reports, writings or observations not in evidence which were made or compiled by others, so long as they are *of a type reasonably relied upon by experts in that particular field.* The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility.

Id. at 726 (emphasis added); *see also Barson v. E.R. Squibb & Sons, Inc.,* 682 P.2d 832, 839 (Utah 1984). The inquiry, then, is whether there was evidence supporting the trial court's ruling that these types of tests are of the sort experts in Wright's field reasonably and regularly rely upon.

State v. Kelley, 2000 UT 41, ¶¶ 19-20 (emphasis in original).

Likewise, in *Adams,* the Utah Supreme Court rejected a broad-based application of *Rimmasch,* explaining that *"Rimmasch* is implicated only when the expert testimony is 'based on *newly discovered principles.'" State v. Adams,* 2000 UT 42, ¶ 16 (emphasis in original).

Thus, in cases involving non-novel or non-newly-discovered scientific expert testimony, the Utah Supreme Court has focused the reliability analysis on Utah R. Evid. 703, and away from the type of gatekeeping analysis found in *Rimmasch* and *Daubert.*

On July 10, 2001, the Utah Supreme Court applied the *Rimmasch* analysis, further explaining its standards for admitting scientific evidence and making clear that trial court decisions on admission of expert testimony are subject to an abuse of discretion standard. *State v. Butterfield,* 2001 UT 59, 425 Utah Adv. Rep 8. In *Butterfield,* the Court held that the first prong of the *Rimmasch* analysis, which requires a threshold showing of the reliability of the scientific principles and techniques, can be subject to judicial notice. Determining that the reliability of PCR STR DNA testing is subject to judicial notice, the *Butterfield* decision explains:

> ¶ 29 *Rimmasch* sets forth a three-part standard for admitting scientific or technical evidence under Utah Rule of Evidence 702. First, *Rimmasch* requires a threshold

showing that the scientific principles and techniques are "inherently reliable." 775 P.2d at 398. The court may take judicial notice of the inherent reliability of the scientific principles and techniques at issue if they have been generally accepted by the "relevant scientific community." *Brown,* 948 P.2d at 340 (citing *Rimmasch,* 775 P.2d at 400). However, if judicial notice is inappropriate, "the court must determine whether the party seeking to have the evidence admitted has sufficiently demonstrated the inherent reliability of the underlying principles and techniques." *State v. Crosby,* 927 P.2d 638, 641 (Utah 1996) (citing *Rimmasch,* 775 P.2d at 400). This foundational showing must explore

> such questions as the correctness of the scientific principles underlying the testimony, the accuracy and reliability of the techniques utilized in applying the principles to the subject matter before the court and in reaching the conclusion expressed in the opinion, and the qualifications of those actually gathering the data and analyzing it. . . . In the absence of such a showing by the proponent of the evidence and a determination by the [trial] court as to its threshold reliability, the evidence is inadmissible.

Rimmasch, 775 P.2d at 403 (citation omitted).

¶ 30 If the proponent of the scientific evidence can demonstrate inherent reliability – by judicial notice or through a foundational showing - the trial court must then consider *Rimmasch's* second and third requirements. *Brown,* 948 P.2d at 341; *Crosby,* 927 P.2d at 641. *"Rimmasch's* second requirement is a 'determination that there is an adequate foundation for the proposed testimony, i.e., that the scientific principles or techniques have been properly applied to the facts of the particular case by qualified persons and that the testimony is founded on that work.'" *Brown,* 948 P.2d at 341 (quoting *Rimmasch,* 775 P.2d at 398 n. 7). Finally, *Rimmasch's* third requirement is a determination that the scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence. *See Rimmasch,* 775 P.2d at 398 n.8.

State v. Butterfield, 2001 UT 59, ¶¶ 28-30.

Thus *Butterfield* raises questions about the Court's prior analysis in *Kelley* and *Adams:* If a scientific principle or technique can be subject to judicial notice because it is "generally accepted," then is that principle or technique "novel" or "newly discovered"? In *Kelley* and *Adams,* the Court held that the *Rimmasch* analysis would not apply because the principles and techniques were not "novel" or "newly discovered." In *Butterfield,* however, the Court applied second and third prongs of the *Rimmasch* test even though it determined that PCR STR DNA testing was so inherently reliable that the trial court could take judicial notice of its reliability.

On July 10, 2001, the same day it issued *Butterfield,* the Utah Supreme Court issued another opinion discussing Utah R. Evid. 702. *See State v. Mead,* 2001 UT 58, ¶¶ 39-41, 425 Utah Adv. Rep. 16. The *Mead* decision quotes the *Rimmasch* test as discussed in *Crosby,* even clarifying the third prong of *Rimmasch.* Id. ¶ 40 & n.6. However, *Mead* applied the *Rimmasch/Crosby* analysis to medical examiner's testimony, which was arguably a non-novel context.

On August 24, 2001, the Utah Supreme Court issued another decision applying the three-pronged *Rimmasch* analysis. *See Brewer v. Denver & Rio Grand Western Railroad,* 2001 UT 77, ¶¶ 15-31, 427 Utah Adv. Rep. 11 (August 28, 2001). In *Brewer,* the Court analyzed in detail the expert's *application* of scientific principles and techniques under *Rimmasch* for an expert opinion about the cause of the plaintiff's carpal tunnel syndrome. *Id.* The *Brewer* opinion did not expressly discuss whether the testimony was "novel" or "non-novel," or whether the scientific principles were "newly discovered." Rather the parties apparently assumed that *Rimmasch/Crosby* test would apply. The *Brewer* opinion simply discussed *Rimmasch/Crosby* as applying generally to "scientific" testimony. *Id.*

Further raising questions about which test to apply is the July 27, 2001 opinion in *Green v. Louder,* 2001 UT 62, 29 P.3d 638. In *Green,* the Utah Supreme Court held that a trial court erred in not permitting an accident reconstructionist to testify about the results produced "by an accident reconstruction computer program called Winslam." 2001 UT 62, ¶ 24. Even though the expert testified that "he was unfamiliar with the principles and mathematical equations used by Winslam to estimate speed," the Supreme Court in *Green* held that it was in error for the trial court to exclude the results of that computer's calculations, based upon a Rule 703 test. The Court explained that *Rimmasch* dealt with expert testimony "based upon novel scientific principles or techniques." *Id.* ¶ 27. Because "use of computer software to perform complex mathematical calculations is certainly not based on novel scientific principles or techniques," the Court held that *Rimmasch* did not apply, but that the *Clayton* test should be used. *Id.* ¶¶ 27-28. The opponent of the testimony did not challenge "evidence that computer programs are generally used in the field of accident reconstruction," and thus "the *Clayton* standard was met," and the trial court committed error by excluding the results produced by the Winslam computer program. *Id.* ¶ 29.

Against this background are 2001 decisions determining whether non-scientific expert testimony was properly admitted under Utah

R. Evid. 702. On July 27, 2001, the Utah Court of Appeals affirmed admission of expert testimony of a roofing expert without conducting a detailed reliability analysis, basing its decision in admitting testimony from this non-scientific expert on his experience, and based upon the usefulness of his testimony for the jury. *See Pack v. Case,* 2001 UT App 232, ¶¶ 33-35, 425 Utah Adv. Rep 20.

Further examining this issue of admitting non-scientific expert testimony is *Campbell v. State Farm Mut. Auto Ins. Co.,* 2001 UT 89, ¶¶ 84-92, 840 P.3d 130. In *Campbell,* the Supreme Court affirmed admission of non-scientific expert testimony under Utah R. Evid. 702 because it "must have greatly aided the jury's understanding of the issues." *Id.* ¶ 87. Then the *Campbell* Court affirmed the expert's reliance on documents under *Clayton* standard, explaining that the policy behind Rule 703 "is aimed at broadening the permissible bases of expert opinion." *Id.* ¶ 89.

Overall, the recent Utah scientific-expert cases raise issues about when the *Rimmasch/Crosby* or *Clayton/Kelley* analyses should apply to the following types of scientific expert testimony:

- Testimony based on novel scientific principles and techniques?
- Testimony based on newly discovered scientific principles and techniques?
- Testimony based on accepted/traditional scientific principles and or techniques, but applied in a novel way?
- Testimony based upon principles that are subject to judicial notice under *Butterfield*?

As a practical matter in litigation, counsel can address the issues raised by the 2000-2001 Utah scientific expert cases by doing the following:

- Focusing on how expert testimony should be analyzed: scientific v. non-scientific; novel v. non-novel scientific.
- Addressing categorization of expert testimony in pretrial conferences.
- Addressing whether *Rimmasch/Crosby* or *Clayton/Kelley* should apply to the particular testimony.
- Considering whether the testimony of a particular expert witness may fit in both categories.

In sum, the Utah Supreme Court's rejection of the federal approach to evidence Rules 702 and 703, combined with the preceding scientific-expert cases it decided in 2000 and 2001, raise uncertainties about which standard to apply to the admission of scientific expert testimony in the Utah state courts. These issues will undoubtedly be further refined in future case law.

V. Easier Admission of Business Records: Amended Utah R. Evid. 803(6) and 902(11) & (12)

The Utah Supreme Court adopted changes to Utah R. Evid. 803(6) and 902(11) & (12) that correspond to changes in the federal counterparts to those rules. As explained by the Federal Advisory Committee in discussing the amendment to Fed. R. Evid. 803(6): "The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses." Fed. R. Evid. 803(6) advisory committee's note (2000). In short, these amendments make it easier to admit records of regularly conducted activity under Utah R. Evid. 803(6).

Thus the foundation for admitting records of regularly conducted activity under Utah R. Evid. 803(6) can be laid "by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Utah R. Evid. 803(6) (underlined material reflects November 1, 2001 amendment).

The November 1, 2001 amendment to Utah R. Evid. 902(11) & (12) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required" for certified Rule 803(6) records of domestic activity. Subparts (11) & (12) contain the factual foundation that must be included in the certification. The certification may be made by affidavit or written declaration. Under federal law, a witness can submit unsworn declarations under penalty of perjury, which have the effect of a sworn statement. *See* 28 U.S.C. § 1746. The comment to Utah R. Evid. 902 explains: "Utah has no comparable statute, so the requirements for declarations used under the rule are included within the rule itself."

In conclusion, the Advisory Committee meets on an ongoing basis to consider new evidence issues. The Committee's experience with the preceding November 1, 2001 amendments illustrates how members of the bar can have an impact on proposed rule changes by submitting their opinions. The Committee encourages input and suggestions. *See* Utah R. Evid. 102 (evidence rules should be construed to secure fairness and justice).

[1] This article is adapted from materials presented on September 20, 2001 at the annual meeting of the Utah Judicial Council.

The History and Contemporary Content of Constitutional Mandates for Public Education: Obligations of the Judicial Branch

by Chief Justice Christine M. Durham

EDITOR'S NOTE: *The following was originally delivered by Chief Justice Durham as the keynote address at the annual Law Day luncheon in Salt Lake City on May 3, 2002.*

Section 147 of the constitution of the state of North Dakota contains the following language:

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools. . . .[1]

This language reflects a long and deeply-held American value: the notion that education for citizenship is a necessary and critical obligation of democratic government – necessary to its survival and critical for its success. The constitutions of all fifty states contain some sort of affirmative guarantee of the right to a free public education provided by the government.

The theoretical underpinnings of these state constitutional provisions derive from the fundamental idea, made explicit in North Dakota, that the cornerstone of our polity is a literate, informed, politically functional citizenry. The idea has deep roots, having played a significant role in our founding and our history.

Increasingly we are learning from historical treatments of the colonial, revolutionary and post-revolutionary periods that "the Founding Fathers recognized that to secure the liberties and republican form of government proclaimed in the Declaration of Independence and institutionalized in the Constitution and Bill of Rights would require a widespread reorientation of public attitudes and beliefs."[2] Men like Thomas Jefferson and Benjamin Franklin, drawing on the classical sources that were part of their own education, believed that the paradigms for educating rulers – princes – must be extended in the new republic to the children who were themselves the future rulers. Franklin advocated the institution of a school in his home town of Philadelphia, arguing that it should "supply the succeeding Age with Men qualified to serve the Public with Honour to themselves, and to their Country . . .[and who would learn] the Advantages of Civil Orders and Constitutions . . .[,] the Advantages of Liberty, Mischiefs of Licentiousness, Benefits arising from good Laws and a due Execution of Justice. . . ."[3] Richard Brown in his 1996 book *The Strength of a People: The Idea of an Informed Citizenry in America 1650-1870,* writes that "[t]he idea that an informed citizenry was critical to the success of the republic served as a guiding principle when [the Founders] designed American institutions," and points out that the specific purpose of public education was to prepare "a politically informed citizenry that knew its rights and jealously defended them."[4] In fact, for Samuel Adams and Thomas Jefferson, the idea of access to education for all was a persistent theme. "Adams spoke with a sense of urgency, both for the present and for perpetuity: 'No People will tamely surrender their Liberties, nor can they be easily subdued, when Knowledge is diffused and Virtue preserved.'"[5]

Jefferson, in 1779, drafted a Bill for the More General Diffusion of Knowledge for the Commonwealth of Virginia, which asserted that the only effective barrier to the rise of tyranny was ultimately an informed citizenry. Not long after Jefferson's proposal, the new Massachusetts constitution, drafted by John Adams, reframed "the mission of government in broad republican rather than Puritan terms" and "proclaimed a comprehensive public responsibility not merely for education at all levels but also for creating an advanced, enlightened, knowledgeable, and progressive society."[6] Noah Webster, the influential educator and lexicographer, advocated the idea that in the new United States, "every class of people should know and love the laws . . . by means of schools and newspapers."[7]

Nor did the preoccupations of the founding generation with the centrality of public education in the life of the nation abate during the second half of the nineteenth century. Joseph Story, well known to legal scholars as a distinguished judge, published in 1883 a book for the use of schoolchildren entitled *Familiar*

Exposition of the Constitution of the United States. It was a re-worked version of his 1834 book *The Constitutional Classbook,* also intended for the teaching of children. One legal historian has observed:

> The desire of Jefferson and Webster's generation to inculcate republican principles into the hearts and minds of American youth through early and thorough instruction in public law particularly took on a wholly new complexion for the school textbook authors of Story's generation. By the 1830s, the period which began to see the flowering of this genre of legal school literature, the ominous signs of political disruption and the possibility of the breakup of the Union over the slavery issue were already clear to most intelligent Americans. Story saw that one possible means of holding the Union together was to create in the minds of the nation's youth not only a veneration for the republican ideals taught by Webster and his generation of authors, but also a veneration for the very idea of a national Union, predicated upon an adherence to the national constitution. Thus, Story's book, and others of the post 1830 period had a new purpose in teaching public law: preservation of the Union.[8]

Expressive of the comprehensive view of the relationship between public education and the future of the nation is the preface to one of the most popular and best known school texts of the antebellum period, written by Andrew Young and first published in 1843:

> To secure the blessings of liberty to themselves and their posterity, was the leading object of the people of the United States in ordaining and establishing the Constitution. . . . In a few years, the destinies of this great and growing republic will be committed to those who are now receiving instruction in our public schools. . . . A thorough knowledge of our constitutional and civil jurisprudence cannot well be too highly appreciated. Without it, we may hope in vain to perpetuate our free institutions. . . . Children should grow up in the knowledge of our political institutions. . . . If ever the great body of the people are to be qualified for the business of self-government, our common schools must be relied on as the principal means. . . . Not the least important object of the author has been, to inspire our youth with a love of their country and its free institutions. . . . An intelligent patriotism is deemed indispensable to the health and vigor of the body politic.[9]

Young was so passionate about this notion that he included a proposal that was pretty radical in 1845: "The author would earnestly recommend, that the female scholars also study the work. Although they are to take no part, directly, they may exert a political influence which, though silent, shall not be the less powerful and salutary."[10]

Extensive and dramatic changes in the philosophy and methods of public education have taken place in the more than a century and a half since the materials I have been describing were in common use. I am not an educational historian, and it is not my intention here to trace those changes in any detail, except to note the extent to which elements of the original vision of civic education have increasingly been marginalized in the public debates. Historian Diane Ravitch, in her 1974 book *The Great School Wars: New York City, 1805-1973* describes two of the persistent, and competing, themes of this period. First, there is a vision of public education in which schools belong to the community, and the majority have the power and the right to determine the purpose and content of education, including religious sectarianism. This view was embraced by the Catholic Church during the common school struggle in New York City. Then there is the vision propounded by Horace Mann and the common school reformers, that the public schools belong to the state, and their role is to "encourage inquiry, not to impose interpretations," requiring them to teach only commonly held values and to avoid promoting specific religious or political views.[11] More recently, after the turn of the century and through the mid-1900s, under the influence of the American pragmatists led by John Dewey, the public schools became more genuinely secular and, as one historian describes it, "the religious function shaded into the patriotic and the achievement of a broad objective of moral goodness into the nurturing of good citizens."[12] Described as "progressive," this vision of public education contemplated schools as places to promote community awareness and further community progress. This idea of "community" incorporated a recognition of cultural differences such as language, literature, ideals, moral and spiritual outlook, and religion, although Dewey disagreed with efforts to incorporate religion per se into the public school.[13]

Since the mid-1900s, American public educational theory and practice has seen wide swings between Dewey's progressivism and more traditional approaches. In an excellent article in the 1996 Yale Law and Policy Review, law professor Rosemary Salomone summarizes fifty years of recent history:

> [B]y the mid-1900s, progressive education began to fall into cyclical disfavor alternating with more traditional approaches to education. The first shift took place in the late 1950s with the launching of Sputnik by the U.S.S.R. and

> the race to compete on every front with the Soviet Union. Here educators moved from teaching the whole child to a decided emphasis on excellence. Economists began to talk about education as investment in human capital for the good of society. By the mid-1960s, the pendulum swung back again to progressivism with the civil rights and anti-war movements and the War on Poverty which challenged both traditional assumptions of life and society and the apparent competitiveness and achievement orientation that had crept into schooling. By the mid-1970s, however, declining scores on standardized achievement tests, increasing dropout rates, and student violence – all the perceived ills of American education – were laid again at Dewey's door, blaming his theories for the permissiveness, valuelessness, and lack of academic standards in the public schools. Progressive teaching methods such as the New Math and the New Social Studies together with the open classroom and unconventional elective courses generated a backlash and ushered in the Back to Basics movements. By the late-1970s, the influence of that movement, supported by a rising tide of religious fundamentalism, became manifest in textbooks and curricula across the country. Thus began the present era in which, on an academic level, school officials combine the best lessons learned from the two competing philosophies. However, on a philosophical and political level, they must constantly readjust to the cultural dissonance in the larger society and to the shifting political and constitutional views on the purposes, governance structure, and substance of education.[14]

Salomone goes on to observe that, for Mann and Dewey, and certainly for the generations proceeding theirs, there was such a relatively narrow range of socially and politically accepted values that consensus was viewed as possible. "In recent decades, as the United States has become more diverse in composition, controversy has developed over the values reflected in the curriculum and permitted to be voiced in the public school context. At no other time in our history have we witnessed such a direct challenge to the very premise underlying what has been called the 'myth of the common school,' that is, that the values promoted through public education are in fact 'neutral, nonsectarian, and indeed obvious to any reasonable person.'"[15]

The scope and complexity of this debate over "values" is more than I can hope to treat here. At the core of the debate, of course, is the "indoctrinative function of schooling,"[16] the idea that both the obvious and the hidden parts of the school curriculum affect the transmission of culture along with the formation of student beliefs and their view of the world. No aspect of education is entirely value-free: not the choice of textbooks or their content, not the structures for school governance, not the extra-curricular activities offered or forbidden, not the role models provided by teachers, or the rules about behavior and dress, not the importance, substance and use of exams, or the pedagogical methods in the classroom, not even the physical design of the school and its classrooms. The larger debate encompasses irreconcilable world views and issues of cultural identity that, whether tied to religion or based in moral or philosophical beliefs, generate conflicts about which people "feel profoundly and disagree sharply."[17]

I do not, therefore, propose to enter the thicket. I would like instead to offer a modest proposal, by no means original but I think timely, that I believe would permit some degree of consensus about public education's core mission, despite our diversity, our pluralism, and our profound differences in this country. I think of this as the "Back to the Future" part of this talk, or perhaps rather "Forward to the Past," because I believe that an important vision for our future lies in our past.

Numerous studies, opinion polls, and editorials, not to mention large quantities of academic and popular literature, bemoan the current state of our young (and the not-so-young) when it comes to knowledge of the constitutional system we live under, and to levels of individual "civic engagement," by which I mean a sense of personal responsibility for the condition of the republic at any level of government – local, state or national. You have heard the "horror" stories. Public confidence in most governmental institutions has declined dramatically in the past fifty years. A 1997 survey by the National Constitution Center revealed:

> More than 90% of Americans agreed that "the U.S. Constitution is important to them" and that it "makes them proud." Paradoxically, the Center's surveys have shown that people have an appalling lack of knowledge of a document that impacts their daily lives. Eighty-three percent of respondents admit that they know only "some" or "very little" about the specifics of the Constitution. For example, only 6% can name four rights guaranteed by the First Amendment; 62% cannot name all three branches of the federal government; 35% believe the Constitution mandates English as the official language; and more than half of Americans do not know the number of senators.[18]

Four out of five surveyed did not know the number of amendments to the federal Constitution, and one out of every six believed that the Constitution established America as a "Christian nation." No

one seems to have asked whether Americans understand the state constitutional sources of the basic right to a free, public education, but I would be surprised if a significant number of Americans on the street even know their states have constitutions. If the federal Constitution and the Bill of Rights were put to a vote today, pollsters tell us that they would not be adopted. One survey found that "many people not only did not recognize the Bill of Rights, but, without benefit of its title, described it as 'Communist propaganda.'"[19]

In an article last fall in the *Chronicle of Higher Education,* the director of the University of Maryland's Center for Information and Research on Civic Learning and Engagement noted that since 1960, every significant indicator of political engagement by matriculating college freshman has fallen by at least half.[20] He explains the reasons why the "civic detachment of today's youth should not be regarded with equanimity," beginning with what he calls the "truism about representative democracy" that "[p]olitical engagement is not sufficient for political effectiveness, but it is necessary." [21]

> [First] the withdrawal of a cohort of citizens from public affairs disturbs the balance of public deliberation – to the detriment of those who withdraw, but of the rest of us as well.
>
> Second, political scientists have found that civic attitudes and patterns of behavior formed when young tend to persist throughout adult life. . . . If today's young Americans continue to regard civic affairs as irrelevant, they are likely to abstain from political involvement throughout their lives.
>
> Third, the relationship between citizenship and self-development, although much debated of late among political theorists, should at least be considered. . . . There is something to the proposition that under appropriate circumstances, political engagement helps develop important human capacities, . . . [such as] enlarged interests, a wider human sympathy, a sense of active responsibility for oneself, the skills needed to work with others toward goods that can only be obtained through collective action, and the powers of sympathetic understanding needed to build bridges of persuasive words to those with whom we must act.[22]

The *Chronicle* essay goes on to observe that "the evidence of [our failure to transmit basic civil knowledge and skills to the next generation of citizens] is now incontrovertible."[23]

> In our decentralized system of public education, the closest thing we have to a national examination is the National Assessment of Educational Progress. The results of the most recent NAEP of civic knowledge administered in 1998 were discouraging. About three quarters of all students scored below the level of proficiency. Thirty-five percent of high-school seniors tested below basic, indicating near-total civic ignorance. Another 39 percent were only at the basic level, a level below what they need to function competently as citizens. . . .
>
> It is easy to dismiss these findings as irrelevant. Who cares whether young people master the boring content of civics courses? . . . [S]urprisingly, recent research . . . analyzed by Michael X. Delli Carpini and Scott Keeter in *What Americans Know About Politics and Why It Matters* documents important links between basic civic information and civic attitudes that we have good reason to care about. Other things being equal, civic knowledge enhances support for democratic values, promotes political participation, helps citizens to understand better the impact of public policy on their interests, gives citizens the framework they need to learn more about civic affairs, and reduces generalized mistrust and fear of public life.[24]

I am convinced that we must restore the civic mission of our educational institutions in the United States. Furthermore, I believe that the judicial branch of state government has an obligation to contribute to the restoration. Thus far, the major involvement of state judiciaries with public education has coincided only with their role as constitutional interpreters. State constitutional education provisions have served as the basis for considerable litigation in the past two to three decades concerning the quality, adequacy and funding of public education.[25] In the context of that litigation, however, the courts exercise only their traditional adjudicative function, addressing competing claims about the scope of constitutional rights. I believe there is a larger context in which state courts can and should function as educators, albeit in a limited sense.

The Law Related Education movement in this country is approximately 25 years old. It has had phenomenal success in developing educational materials and programs to foster in elementary and secondary students a practical understanding of the law, the legal system, and their rights and responsibilities as citizens. In my own state, however, and in most of the states, the use of those materials and programs in the schools is entirely dependent on the energy, competence, and interest of individual classroom teachers or school administrators with responsibility for curriculum decisions.

An American Bar Association report on "Law Related Education in America: Guidelines for the Future" (1975) estimated that "less than one percent of America's elementary and secondary students are currently exposed to systematic curricula in law-related studies."[26]

This state of affairs coincides with a growing sense that courts need to be more concerned about public outreach and community perceptions. Known as the "Public Trust and Confidence in the Courts" phenomenon, state courts all over the country are responding to research showing that courts must actively address public service and public access issues, and that they must also look for ways to explain themselves to their communities if they are to regain and maintain the legitimacy and respect necessary for their functional role in a representative democracy.

I believe that the needs of public education and the mission and expertise of the state courts are remarkably coincident at this time in history, and that there are opportunities for leadership and support that state courts should mark and respond to. I would like to describe a work in progress here in Utah as one model. Two years ago, a small group of judges, court administrators, lawyers and administrators from the organized bar, and leaders of the private, non-profit Law Related Education Project in our state started talking about some of the problems detailed in these remarks. We identified three significant, and inter-related, barriers to the incorporation of systematic, comprehensive civic education in our state's public schools. First, there is no systematic inclusion of law as a fundamental part of the core curriculum, which drives everything done in the classroom. Second, and of course the reason for the first problem, law-related or civics education is not one of the "BIG THREE" subject matter areas that occupy the center of the curricular universe (reading and language arts, math and science, and social studies); it has been for a number of years, when it was considered at all, viewed as an optional sub-set of social studies, along with history, geography, environmental studies, and life skills. Thus, there are no minimum requirements, no inclusion mandates, and no testing standards associated with civic education. Finally, the burden for the individual classroom teacher to develop or acquire lesson plans, materials, and expertise is extreme; only the most interested and enterprising teachers can successfully incorporate them into classroom programs.

Our small group determined that, within the judicial branch broadly defined, we had resources that could have some impact on the problem, namely: (1) a large collection of programs and educational materials developed in Utah and all over the country by lawyers, courts and law-related education projects. Many of these materials were "going begging" for opportunities to be used; (2) a cadre of law students, lawyers and judges who would be willing to help with the development of age-appropriate lesson materials and to volunteer in the schools themselves, both in the training of teachers and counselors and in the classroom; (3) the administrative capacity either within the courts or the state bar to train and supervise large numbers of volunteers; (4) courthouse facilities themselves, with judges and staff willing to facilitate their use as learning venues for local schools on a regular and on-going basis; and (5) the public relations and impact opportunities resulting from the interest of judges and the state court system in facilitating cooperation and partnership with the state Department of Education, run by our State Board.

When we began to have conversations with curriculum specialists and supervisors within the education system, we discovered that we were, generally, preaching to the choir. The phenomena illustrated by the public research were very much on the minds of many, and our concerns about the level of constitutional, civic, and legal "literacy" among our citizens and our students were shared by educators. Calling ourselves the "Education for Justice Project," we eventually came to the Board of Education with a proposal for a cooperative effort. Once they found out that we weren't asking for any up-front money, they signed off on a resolution endorsing our efforts to restore civic education to a central and systematic place in the public school curriculum. This process, of course, will be an arduous and probably very political one that we, from our position outside the educational bureaucracy, cannot control. However, we have been given to understand that our support, as the "third branch," for such a move, is having a positive effect. Meanwhile, we have launched the following efforts, which are of course on top of everything else that our Law Related Education Project people, our courts (especially the juvenile courts), and numerous other volunteers have been doing all along:

1. Working on pilot programs in several school districts to introduce teachers and guidance counselors to available videos and lesson plan materials, train them in use, and connect them with volunteers who can help in the classroom.
2. Working with trial court executives throughout the state to get them to organize "court-school" partnerships with local schools, conduct regular tours and "open houses" and keep their judges in regular contact with school groups.
3. Developing a "clearinghouse" of materials and staff to match requests for education related assistance with volunteers.

4. Placing a member of our "Education for Justice Project" on the core curriculum revision commission currently revising the Core Curriculum for grades 7-12.

5. Identifying this project as one of the major priorities of the state court system through its Public Outreach Committee.

6. Working on publicizing the extensive programs and materials generated by the Juvenile Courts in our state with relevance to school-age children.

All of the foregoing kinds of activities, of course, are not new or unique to our state. What is unusual about our effort, I believe, is the partnership we are working toward between the governing authority for our public education system, which controls the content and future of public education, and the Supreme Court and Judicial Council, which govern the judicial branch of state government. We are a small state, and therefore can capitalize on relatively straightforward lines of authority and, at least for now, some mutual trust and respect. The availability of such currency in other systems will vary, and in some states it may not exist at all, but I am convinced that it is a legitimate use of the credibility and expertise of the judicial branch of government. When I talked to the state Board of Education, I told them some of the things about the history of education for citizenship that I have detailed here. It was clear to me that, although old history, many of them saw it in a new light; it was also clear that they found it a cogent argument for examining our history to discover ideas for our future.

A former law clerk, who volunteers as a Court Appointed Special Advocate (CASA) volunteer in juvenile court, recently sent me a note with this statement from Neil Postman: "Children are the living messages we send to a time we will never see." The tragic events of last September have generated an outpouring of patriotic sentiments and gestures from many Americans. I hope that we can find ways to turn patriotism into civic engagement by helping our children prepare to carry the fundamental values of this nation into that time we will never see.

I would like to close with John Adams' words in the first, and now the oldest functioning, written constitution in the world: the Constitution of the Commonwealth of Massachusetts:

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates in all future periods of this commonwealth to cherish the interests of literature and the sciences, and all seminaries of them, especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections, and generous sentiments among the people.[27]

[1] N. D. Const. Art. VIII, ' 147.

[2] M. H. Hoeflich, Law in the Republican Classroom, 43 U. Kan. L. Rev. 711, (1995).

[3] *Id.* at 714, n.13.

[4] Ryan Blaine Bennett, Note, Safeguards of the Republic: The Responsibility of the American Lawyer to Preserve the Republic Through Law-Related Education, 4 ND J. L. Ethics & Pub. Pol'y 651, notes 16 and 17, (citing Richard D. Brown, *The Strength of a People: The Idea of an Informed Citizenry in America 1650-1870* xv (1996)).

[5] *Id.* at n.18.

[6] *Id.* at notes 22 and 23.

[7] *Id.* at n. 20.

[8] Hoeflich, *supra* at 2.

[9] *Id.* at 726, n.66.

[10] *Id.* at n.67.

[11] Rosemary C. Salomone, Common Schools, Uncommon Values: Listening to the Voices of Dissent, 14 Yale L. Pol'y Rev. 169, 178 (1996).

[12] *Id.* at 178, n.42 (citing Robert Michaelson, *Piety in the Public School,* p. 87 (1970).

[13] *Id.* at n.45.

[14] *Id.*

[15] *Id.* at 179-80.

[16] *Id.* at 183.

[17] *Id.* at 185.

[18] Bennett, *supra,* 4 at 7.

[19] *Id.* at n.35.

[20] William A. Galston, Can Patriotism Be Turned Into Civic Engagement?, The Chronicle of Higher Education, B16 (November 16, 2001).

[21] *Id.*

[22] *Id.*

[23] *Id.* at B17.

[24] *Id.*

[25] *See, e.g.,* Michael Heise, State Constitutions, School Finance Litigation and the 'Third Wave': From Equity to Adequacy, 68 Temple L. Rev. 1151 (1995); Paul L. Trashtenburg, The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947, 29 Rutgers L. J. 827 (1998).

[26] Bennett, *supra,* at 4, n.35.

[27] David McCullough, *John Adams,* p. 223 (Simon & Shuster, 2001).

President-Elect and Bar Commission Election Results

Debra J. Moore

Debra J. Moore was elected President-Elect of the Utah State Bar. Debra received 1,346 votes to Denise A. Dragoo's 987 votes. N. George Daines in the Second Division joins new Third Division Commissioners Stephen W. Owens and E. Russell Vetter, who all ran unopposed.

N. George Daines

pick-up photo from November 2000 page 23

Stephen W. Owens

E. Russell Vetter

A Tribute to Norman Johnson

by Scott Daniels

Norman Johnson, a former president of the Utah State Bar died on May 4, 2002 at the age of 71. The following is reprinted from the December 1999 issue of the *Utah Bar Journal.*

About 25 years ago, when I was a first-year law school graduate and an associate in a small law firm, I was given an assignment to research an area of securities law. At that time, Worsley, Snow & Christensen didn't do much securities law and we didn't have any resource material in our library. One of the lawyers suggested that I might call a lawyer who officed a few floors upstairs by the name of Norm Johnson. He said that mr. Johnson did securities work and would have some looseleaf services or other books about securities in his library. he told me that Norm was a good guy and would probably let me use his books.

Being a new lawyer, I was a little reluctant to call Mr. Johnson, but I finally did. He cheerfully told me to come on up and he would show me his books.

Mr. Johnson met me in the reception area of his office. He took me to his library and showed me the looseleaf service. He asked me the nature of the problem and helped me get started in the research. All in all, he probably took about 45 minutes of his time to help me out.

This isn't a big thing, but I've thought about it many times over the years. Three-quarters of an hour isn't a lot when viewed in context of an entire lifetime. But I now know what a precious nugget 3/4 of an hour of unbillable time can be in a busy lawyer's day.

This practice of experienced lawyers unselfishly helping and mentoring new lawyers is a fine and continuing tradition in our profession.

A few years ago, Norm became very ill and I pessimistically believed that he wasn't going to make it. I thought at the time how sad it is that we wait until someone is almost dead to verbalize the good things about them. Norm has now recovered his health and is serving our country on the Securities and Exchange Commission.

Examples like Norm Johnson make me proud to be a lawyer.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
PUBLIC NOTICE
APPOINTMENT OF NEW MAGISTRATE JUDGE

The United States District Court for the District of Utah, under the authority of the Judicial Conference of the United States, has been authorized a new full-time United States magistrate judge position in Salt Lake City subject to funding by the Congress in Fiscal Year 2003. The position's duties include conducting preliminary proceedings in criminal cases; authorizing search warrants; trying and disposing of certain misdemeanor cases, conducting jury trials where authorized by the Court and with the parties' consent; conducting scheduling, discovery, and settlement conferences; handling referred civil matters; and, in general, conducting a variety of pretrial matters as directed by the Court. Position may entail periodic travel.

The jurisdiction of United States magistrate judges is set forth in 28 U.S.C. §636. To be qualified for appointment an applicant must:

1. Be a member in good standing of the Bar of the State of Utah or the Bar of the highest court of another state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least 5 years (with some substitutions authorized) at the time of appointment.
2. Be competent to perform all duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness;
3. Be under 70 years of age; and
4. Not be related to any district judge of the court.

A Merit Selection Panel appointed by the Court of attorneys and citizens in the community will review all applications, conduct interviews, and recommend to the Court's active district judges in confidence up to five persons whom it considers best qualified for the position. Subject to funding of the position by the Congress on or after October 1, 2002, the Court will make the appointment, following an FBI background investigation and IRS tax check of the finalist who is selected as the prospective appointee. The selection panel and the Court will give due consideration to all qualified candidates. The current salary of the position is $138,000 per annum. The term of office is eight years.

Application forms for the magistrate judge position may be downloaded from the Court's website at www.utd.uscourts.gov or obtained from:

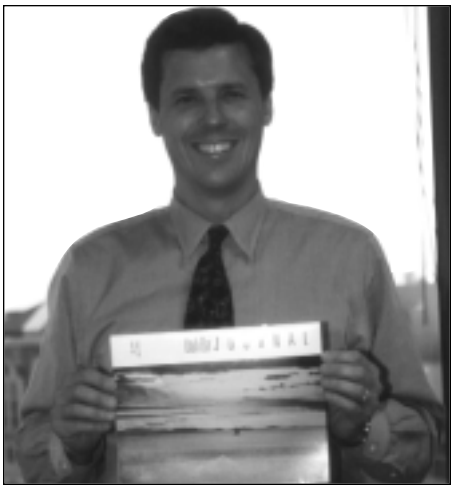
Markus B. Zimmer
Clerk of Court
United States District Court
Suite 150
Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Applications prepared and submitted as nominations by a party other than the applicant will not be considered. Completed application forms and supporting documentation must be received in the Office of the Clerk of Court no later than 4:30 p.m., the close of business, on Friday, July 19, 2002. All applications submitted in advance of the deadline will be considered in confidence by members of the Merit Selection Panel and the active district judges of the Court. The panel's deliberations will remain confidential.

Cover of the Year

The winner of the Cover of the Year Award for 2001 is the March issue, featuring a beautiful photograph taken by Ronald G. Russell of Parr Waddoups Brown Gee & Loveless, Salt Lake City. The photograph is of a sunset over the Great Salt Lake taken from Antelope Island. This is the first photograph by Mr. Russell to appear on a Bar Journal cover.

Mr. Russell is one of 48 members of the Utah Bar or its legal assistants division, whose photographs of Utah scenes have appeared on at least one cover since August 1988. Covers of the Year are framed and displayed on the upper level of the Law and Justice Center. Congratulations to Mr. Russell, and thanks to all who have participated in this program.



UNITED STATES COURT OF APPEALS
Tenth Circuit

In re:

Tenth Circuit Rule 33
Confidentiality Requirements.

F I L E D
United States Court of Appeals
Tenth Circuit

APR 17 2002

PATRICK FISHER, Clerk

EMERGENCY GENERAL ORDER

Before **TACHA,** Chief Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY** and **HARTZ,** Circuit Judges.

It is the consensus of the court that the confidentiality requirements of Tenth Circuit Rule 33.1(D) must be strengthened immediately. The confidentiality requirements of Rule 33 are broadened to forbid disclosure of statements made during a conference and in related discussions, and any records of them, to anyone outside the mediation process. Mediation proceedings under Rule 33 may not be recorded by counsel or the parties. These requirements take effect immediately upon filing of this General Order.

As soon as practicable, the court will adopt amendments to Rule 33.1(D) in compliance with 28 U.S.C. § 2071.

ENTERED FOR THE COURT
Patrick Fisher, Clerk

Announcing the new Utah State Bar Member Benefits Program

The Utah State Bar is proud to announce a new program focused on helping you, the member, remain current on all of your practice tools. We have created the new Member Benefits Program to help you do just that.

Perhaps one of the most difficult aspects of the practice to stay up on, legal technology is critical to your practice, yet more difficult to do, every day. And that is where the Member Benefits Program will focus extensive effort as your Chief Technology Office. In this role, we will search out new, innovative technology for you. We're talking about technology that will give you a competitive edge in the market as well as important upgrades in your existing technology tool set.

The First Example – EnterVault

Lawyers have a unique duty to protect the client information they create, transmit and store. EnterVault, through their product Private Vault, provides a highly secure, online storage solution to help meet this ethical requirement.

The Bar has secured a free 10 Megabyte vault for each member for three years. This vault will enable you, as a member, to experiment with and explore the uses of this valuable technology to you, your clients and your practice. Information to access your free vault will be mailed to you in May.

PrivateVault – a Client Care Tool

Today, the most common methods of communicating quickly with a client are via fax or overnight express mail. Both methods can expose sensitive client information to unintended audiences. For example, there is the situation where sensitive information is sent to a shared fax machine at the client's office. The pages may sit on the fax machine or the counter top for 30 minutes or several days. Office colleagues may casually skim the contents, or worse a night janitor may pocket the items for later delivery to an identity theft ring. Or imagine this: your client is traveling, so you send items via overnight express mail. Something happens in transit and your client leaves the hotel before the items make it into your client's hands. Again, sensitive information is at the mercy of low-paid office workers.

In an age when identity theft is one of the fastest growing, yet less likely crimes to be prosecuted, isn't it up to the trusted advisors to offer new methods of communicating that improve your firm's standard of client care? PrivateVault is such a tool. Send sensitive information via email, to the client's secure, online vault - clientname@vaultinbox.com. Most firms charge in the range of $5 to fax an item. A single $5 fee per month would more than cover the cost of the client vault.

Items placed in the client's vault are stored encrypted on an EnterVault server. Only the vault owner has the decrypt key, meaning only the person who knows the login name and password can actually read the contents stored in a vault account.

Consider this: traditional corporate email systems are not confidential systems. Incoming emails are stored on a managed server. Employers have the legal right to review their employees email. Bored network administrators have been known to rummage through stored emails. With the PrivateVault service, not even EnterVault engineers have enough information to decrypt the items stored on the EnterVault servers. Retrieving information stored in a PrivateVault is very similar to the process one must go through to retrieve physical documents stored in a bank safe deposit box.

Unlike most Internet service providers, EnterVault is a federally audited business. Their systems and business practices were reviewed for security and privacy prior to going into business. Their systems were hacker tested prior to the service going live.

In addition to improving the privacy of sensitive client correspondence, PrivateVault can expand the level of service you are able to offer your high net worth, trust and estate planning clients. Imagine, in addition to producing the usual printed set of trust documents, your firm offers to scan those documents and email them to your client's private vault. Now, those trust documents are available to your client, at a moment's notice, from anywhere in the world, if they have a computer, a browser and an Internet connection.

This is just the beginning on how the Utah State Bar is striving to locate solutions for your practice. Look for more exciting technologies and practice tools in the upcoming months!

Discipline Corner

ADMONITION

On April 1, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 1.7 (Conflict of Interest: General Rule) of the Rules of Professional Conduct.

The attorney represented a client in preparing estate planning documents. The attorney later filed a lawsuit on behalf of the client's son and others (one of whom was the original client) against the client's daughter, which representation was directly adverse to the original client, and was without the original client's consent.

ADMONITION

On April 2, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney signed a Durable Power of Attorney on the line intended for the attorney's client's signature. The attorney also notarized the attorney's own signature.

ADMONITION

On April 5, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a Chapter 11 bankruptcy matter. The attorney failed to file necessary financial reports, which resulted in the bankruptcy being converted to a Chapter 7 bankruptcy. The attorney failed to keep the client reasonably informed of the status of the case.

ADMONITION

On April 10, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.16(d) (Declining or Terminating Representation) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney failed to return a client's file upon termination by the client of representation. The attorney refused to return the file alleging that the client owed attorney fees.

ADMONITION

On April 10, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.5 (Fees) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney traded with a client for legal services in a domestic matter in return for the client constructing a driveway. The attorney continued to charge the client in excess of the work performed on the client's case. The attorney also charged the client duplicate fees and for bills already paid.

ADMONITION

On April 10, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.5 (Fees) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney represented the client's sons in criminal matters. The attorney agreed to a fee with the client, but charged the client excessive fees for the work performed in the cases.

Thank You!

We wish to acknowledge the efforts and contributions of all those who made this year's Law Day celebrations a success. We extend a special thank you to:

Bob Miller Memorial Law Day 5K Run/Walk
Lon Jenkins, Chair of the Law Day Run/Walk Committee and its members, and all those who participated.

Law Day Luncheon/Awards:
Young Lawyers Division
Nathan Alder, President
Martha Knudson and Mickell Jiminez Rowe
Co-Chairs

and the following firms:
Clyde Snow Sessions & Swenson,
Manning Curtis Bradshaw & Bednar,
Richards Brandt Miller & Nelson,
Snell & Wilmer

Minority Bar Association
Essay Contest

Mock Trial Competition
Utah Law Related Education Project and all volunteer coaches, judges, teachers and students.

Salt Lake County Bar Association
Art & the Law Project

Thank you for your participation!

Bar Commission and Staff
Law Related Education and Law Day Committee

Utilization of Legal Assistants

by Deborah Calegory, Chair

The issue of delivery of legal services at an affordable rate is a current hotbed of discussion, not only in the State of Utah, but across the nation. A committee formed by the Utah Supreme Court is currently looking into a myriad of options to help meet the need of affordable legal services. Proper utilization of legal assistants is one way to help meet this need. The Bar has even established guidelines for utilization of legal assistants that can be found on the Bar's website at http://www.utahbar.org/rules/html/legal_assistant_utilization_gu.html.

Why use legal assistants? There are many reasons to use legal assistants that are beneficial to the client and to the firm.

- reduction of overall fees
- specialization of legal practice
- increase in technical details in legal work
- associate "demands" and turnover
- Client service
  - contact and communications readily available
  - lower hourly rate
  - able to serve more clients

There is no question that some things must be done by an attorney such as:

- Accepting a case
- Evaluating the case and charting its course
- Performing legal analysis
- Giving legal advice
- Formal judicial process (i.e. depositions, hearing, trials, etc.)
- Supervising legal assistants

However, there is a multitude of work that can be performed by a trained, competent legal assistant, including but not limited to:

- Obtaining facts from the client
- Communicating information to and from the client
- Interviewing witnesses
- Performing limited legal research to assist the lawyer with legal analysis
- Obtaining documents (i.e. public records, police reports, medical records, employment records, deeds, photographs, plans, probate records, weather records, etc.)
- Preparing summaries, chronologies, itemization of claims, drafts of pleadings, interrogatories and production requests and responses
- Preparing outlines for lawyer to use in deposing witnesses and in argument
- Indexing deposition transcripts and preparing summaries of the evidence
- Preparing exhibits and lists
- Assisting at trial with witness and exhibit coordination

In order to be effective in performing these functions legal assistants must have some essential skills such as:

- Analytical abilities
- Communication skills
- Maturity
- Judgment
- Common Sense
- Initiative
- Dedication
- Professional attitude
- Cooperative nature
- English skills
- Research skills (book and computer)
- Understand general legal concepts

Members of the Legal Assistant Division must meet strict standards to qualify for membership, and by reason of those standards would possess these essential skills.

Both the lawyer and legal assistant must overcome barriers to be effective in their performance.

Legal assistant barriers to effective performance would include:

- Lack of basic skills
- Lack of legal training
- Lack of involvement

Lawyer barriers to effective performance would include:

- Desire for control
- Lack of understanding and analysis of legal information
- Communication skills
- Delegation skills
- Scheduling
- Respect for Others

It takes teamwork between the lawyer and legal assistant to make it all work. Successful teamwork involves:

- Discuss issues in the case
- Engender team attitude
- Allow everyone to express opinions
- Communicate effectively
- Don't nitpick
- Assume responsibility
- Delegate responsibility
- Give clear instructions – make decisions
- Ask questions
- Legal assistant is not a gofer
- Praise for good work; frank evaluation of errors
- Show confidence
- Overlook minor personality problems

Keys to successful utilization of legal assistant:

- The lawyer and client have confidence in the legal assistant
- The lawyer assigns the proper work
- The legal assistant has full involvement in the file
  - first interview
  - e mail messages
  - all meetings
  - copies of all correspondence especially that which explains and discusses strategy and the big picture
  - point others (counsel and clients) to the legal assistant
- The lawyer properly prices the legal assistant's work
- Attorneys should do what they do best.
- Attorneys should do what they alone can do.
- Attorneys should move work to the least expensive competent level.

You can start now by:

- Hiring legal assistants that have the essential skills
- Providing proper training and continuing education for legal assistants
- Involving the legal assistant fully in the file

On May 13th the Community Service Committee of The Young Lawyer's Division of the Bar held its annual Spring Beautification Project at two Children's Justice Centers. Weeds and Shrubs were pulled and flowers planted in their place.

We would like to thank the following companies whose generous donations made the event possible:
Bendinger Crockett Peterson & Casey, PC
Fabian & Clendenin, PC
Home Depot
Manning Curtis Bradshaw & Bednar LLC, and
Wal-Mart

We would also like to thank the volunteers whose tireless efforts resulted in a beautiful yard for the children and families who visit the Children's Justice Centers each day.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
06/20/02	**NLCLE: A Road Map Through Discovery Ins and Outs of Rule 26.** 5:30 pm – 8:30 pm. $45. 5:30 Attorney Planning Meeting – Ruth Lybert and Lauren Skolnick. 6:30 Written Discovery: Strategies to Responding to and Propounding Interrogatories – Susan Black. 7:30 Tips for Taking and Defending a Deposition – David Pearce.	3 NLCLE/CLE
06/26-29/02	**Annual Convention – Sun Valley, Idaho.** $290.	13 hrs. (incl. 3 hr Ethics & up to 7 hr NLCLE)
7/19/02	**LIVE WEBCAST: Ambushes and Minefields in the Courtroom.** Sponsored by CLE Options and NITA. If you would like to attend this CLE seminar at the Law & Justice Center please register with Connie Howard at 297-7033 at $100. To access this seminar via the internet register on-line at: http://www.utahbar.org/cle/html/cle_event_4.html	4
7/20/02	**NLCLE: Wills and Trusts Part II:** postponed	
8/15/02	NLCLE: Real Property. 5:30 pm – 8:30 pm. $45.	3 NLCLE/CLE
8/16 & 17/02	**25th Annual Securities Law Workshop.** Sun Valley, Idaho. Call for hotel reservations at 1-800-786-8259. Agenda Pending. Friday night dinner speaker: William S. Lerach.	

See the August/September *Bar Journal* for a full Fall CLE Calendar.
Upcoming events include:
How to Start and Succeed in a Solo Practice • *Powerful Communication Skills*
Trial Academy 2002 • *Law & Technology*
Private Property for the Public Good • *Elder Law* • and more!

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

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard Card No. _____

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

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

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

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

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

FOR SALE

For Sale: Lucent Partner II phone system, includes large Casper control, expansion module 206EC, 5-slot carrier, 8 phones (6 display) $2,500; T.I.E. Phone System, 6 line capable, includes master plus 3 satellites, $500; wooden secretary desk w/return, and credenza – $250; gray laminate L-shape secretary station with hutch, plus two matching lateral files, $250; gray metal secretary desk w/return, $200, two desk chairs, $25 each. 801 298-7200.

WANTED

Wanted – Pacific Reporter Editions: St. George attorneys desire to purchase remaining volumes of the Pacific Reporter 2d and 3d series. Current set is complete to volume 947 P.2d. Any leads for any subset of the remaining editions would be appreciated. Call Greg Saunders (435) 986-9600 or Anthony Woolf at (435) 986-9339.

POSITIONS AVAILABLE

Legal Recruiting – What can it do for you? • Employers find experienced professionals and support staff • Jobseekers find the right positions. Contact Rusty Vetter at (801) 582-3545 or rusty.vetter@queuelaw.com. All contacts will be kept confidential.

Ogden Firm seeking to fill two attorney positions as follows: (1) Experienced in Real Estate and other Transaction work, (2) Experienced in Civil Litigation with Business Litigation experience. Please send resume to: Christine Critchley, Confidential Box #20, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

POSITIONS WANTED

Attorney-CPA licensed in Utah and California seeks association with retirement minded practitioner or small firm with near term partnership potential. Substantial experience in bankruptcy, estate, probate, tax and general litigation matters. Superior client skills and credentials. PO Box 1625, La Quinta, CA 92253-1625 or by email to jhglaw@ix.netcom.com

OFFICE SPACE/SHARING

Convenient South Jordan office suite (3 offices) available for immediate occupancy. Long term, short term, or month to month negotiable. Within minutes to I-15, Sandy Court, and retaurant amenities. Bright, cheery, pleasant surroundings with convenient parking. Call 254-9209 or 979-4242.

Deluxe office space for one attorney. Share with two other attorney's. Includes large private office, reception area, parking adjacent to building, computer networking capability, law on disc, fax, copier, telephone system. Easy client access in the heart of Holladay. Must see to appreciate. 4212 Highland Drive. Call 272-1013.

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

Exchange Place historical building, located half block from court complex. Has office space with separate secretarial area located within a law firm. Also includes receptionist, conference room, fax, copier, law library, and parking for $750. Optional DSL line available. Contact Joanne or Richard @ 534-0909.

Prime Office Space in Historic Building on 3rd South & Main Street in downtown SLC. Approximately 2500 s.f. corner offices with great views. Conference room, reception and private office layout. Below market lease rate. Please call (801) 521-3463 for more information.

Holladay Office – Share Receptionist/Secretary, machines and expenses. Lots of open and covered parking, convenient for clients. 15-20 minutes to courts. Approximately $1,000 a month. Nice area near the Cottonwood Mall. Call Will or Jana at 277-4292.

Ogden Law Building for Sale or Lease. Approximately 1500 sq. ft. Tastefully decorated offices for two or three attorneys; secretary/receptionist; conference room and library; kitchen. Full basement for storage. Off-street parking. Close to court house. Available immediately, below appraisal. Attorney retiring. (801) 621-2630.

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Fiduciary Litigation: Will and Trust Contests; Estate Planning; Malpractice; and Ethics: Consultant and expert witness. Charles M. Bennett, 77 W. 200 South, Suite 400, Salt Lake City, UT 84101; (801) 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar, Med-mal Experts, Inc. We're fast, easy, safe. Referral to board-certified medical expert witnesses; money back satisfaction GUARANTEE. Powerful medical malpractice case merit analysis by veteran MD specialists, $500 flat rate. Shop around – you won't find a better deal. (888) 521-3601.

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

Hearing and Trial Support – I will help you (1) Computer index depositions and documents; (2) Organize and find evidence fast; (3) Present testimony and exhibits in court using the latest multimedia technology. Bar Member. WestLaw employee during law school. Ten years as a legal secretary and paralegal to managing partners. Another ten years in computers. Halston Davis, (801) 942-6113.

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

Adult Rape – Child Sexual Abuse Defense Consultant Forensic analysis of allegations. Determine reliability of recorded statements and validity of charges. Assess court's criteria for admission of statement evidence. Identify investigative bias, error and contamination. Detect false allegations of rape. Meet Fry and Daubert standards. Bruce Giffen, D. Psych. Evidence Specialist. (801) 485-4011.

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