Utah Bar JOURNAL

Volume 15 No. 6
Aug/Sept 2002

Utah State Bar
Dialogue on Freedom
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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: Zion National Park, Middle Emerald Pool, by first time contributor Marva Match, Cannon, Cleary & Match, P.S., Salt Lake City.

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Letters Submission Guidelines:

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

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.

The Utah Bar Journal

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Submission of Articles for the Utah Bar Journal

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

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

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

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

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

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

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

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

Letters to the Editor

I could hardly disagree more with Stephen Kelson's premises, perceptions, fears, and recommendations in "Judicial Independence and the Blame Game," *Utah Bar Journal* (Jan/Feb 2002). It is not the role of the Bar to defend individual judges. We do not need a new committee to evaluate or censor criticisms of Utah judges. As a member of the Utah Bar since 1979, I have seen no flood – indeed, hardly a trickle – of "baseless and vindictive attacks" on Utah judges. Not every item of judicial criticism results from a misunderstanding of the legal system or simple displeasure with a judge's ruling. Not every criticism of a judge is an "attack."

It is too easy to invoke the mantra of "judicial independence" to shield judges from legitimate public questioning of their perceived biases or incompetencies. Media stories about the conduct of the trial judge in the Weitzel criminal prosecution, Judge Kay, aired legitimate concerns. Accordingly, I found it professionally and ethically inappropriate for Bar President Scott Daniels to jump in and – based on who knows what – publically side with Judge Kay about pending complaints by the prosecution and the victims' families before they could be evaluated and resolved (ultimately, in the complainants' favor). And is it just coincidence that author Kelson is a law clerk for the Second District Court bench on which Judge Kay serves?

Utah judges are rarely criticized in public, although every practicing lawyer is well aware of several who are unfit for the bench. Moreover, the elaborate conduct rules, fancy performance evaluations, and unopposed retention elections touted by Kelson provide the illusion, but not the substance, of judicial accountability.

Ultimately the more dangerous threat to judicial independence comes from too little informed scrutiny of our judges and courts and too little accountability, not from occasional publicized questioning of their decisions.

Annina M. Mitchell
Attorney at Law
Salt Lake City

Dialogue on Freedom – An Opportunity for Utah Lawyers to Make a Difference

by John A. Adams

"You're an American teenager flying off to an exotic vacation. But your plane has engine trouble and you're forced to land in the country of Quest – a place where the average worker makes only $2 a day, where the political leadership is corrupt, and where anti-democratic sentiment is gathering strength. The people you meet challenge your beliefs. They blame America for their difficulties, and believe that authoritarian rule is their best hope. What can you say to them?"

So begins the hypothetical that Utah lawyers will be taking into social studies classrooms in Utah junior high and high schools during the week of September 9-13, 2002. This program is called Dialogue on Freedom. Its purpose is to engage Utah secondary students in thought-provoking dialogue about our democratic system of government and our civic traditions. More specifically, the presentations will focus on the following three points: First, We the People support the rule of law. Second, Americans believe in and protect individual rights. Third, every citizen is important – citizens need to be informed and involved. The goal is to get students to think, express their feelings and be motivated to carry on discussions about these three points with their families and others.

Justice Anthony Kennedy of the United States Supreme Court in the wake of the events of last September 11th encouraged the American Bar Association to develop a program whereby lawyers and judges would speak to high school students about our democratic system and associated values. The Quest hypothetical above is the vehicle designed for getting young Americans to think about our form of government in light of recent events. To help facilitate the dialogue, the presenters ask students to identify books and movies that best reflect their feelings about America. Students also are asked to identify great events of freedom and discuss/explain the significance of those events.

Lawyers will be paired with members of the three branches of government: judges, legislators or members of the executive branch. Over 70% of our state legislators have already agreed to participate. Governor Leavitt has pledged to find 100 members of the executive branch to participate. Chief Justice Durham has called upon the state judiciary to participate and most of the federal judges will be participating. We think that the opportunity for lawyers to work closely with legislators, judges and members of the executive branch will be a mutually rewarding experience. We thank the Governor, the Legislature and our judiciary for their enthusiastic response.

The Bar desires to involve parents and community members in this program as well as students. Students will be given a handout to take home to encourage further discussion with parents and other family members. On September 8, 2002 at 5:30 p.m., KUED Channel 7's "Civic Dialogue" program with host Ted Capener and the Honorable Stephen H. Anderson of the Tenth Circuit Court of Appeals will focus on Dialogue on Freedom and will alert viewers to the upcoming in-school presentations. KUED will broadcast a one-half hour, actual dialogue with students featuring Chief Justice Christine Durham and criminal defense attorney Ron Yengich as the presenters. KUED's sister channel, KULC, Channel 9, will broadcast a version of the dialogue into classrooms. We anticipate that lawyers will appear on local radio talk show programs and that local television stations and the print media will report on the school classroom presentations.

As you can see, Dialogue on Freedom is a bold undertaking for the Utah State Bar. This is a state-wide project that is aimed at reaching students in the 340 junior highs and high schools in the state as well as their parents and families. No group is better equipped to advocate the rule of law in our

society than lawyers. Therefore, we are taking the lead in this important endeavor. The logistics of coordinating hundreds of presentations in a short time period will be a monumental challenge but one that our capable Bar staff will meet. I ask for your support. Consider volunteering as a presenter. If you want to participate, call Charles Stewart of the Bar staff at (801) 297-7049 or email him at crstewart@utahbar.org. In any event, be a promoter of this effort. Tell your children about it and follow up with further discussion at home after they have seen the presentation.

Now, for a few specifics about what is expected of those who agree to be presenters. Each pair will be assigned to give one or more presentations on one day in a school. The Bar staff will make the pairings in advance and provide you the details about the school, your teacher contact and the date and times of the presentations. The ABA prepared hypothetical and related information is found on the website www.dialogueonfreedom.org. In addition, the Bar will provide each pair a videotape that contains a model presentation; tips about facilitating discussions; and other useful information to make your experience as seamless and satisfying as possible.

Your responsibility will be to review the materials, meet at least once in advance with your co-presenter to plan your presentation and divide responsibilities. Following your presentation, we ask you to send the Bar information about the books, movies and events of freedom identified by the students. That information will be compiled and made available for the students and public to see what Utah students listed.

Dialogue on Freedom presents a wonderful and timely opportunity for lawyers to make a difference in our state in promoting the rule of law and encouraging our youth to become informed and involved citizens. Please join us in working to make this vision a reality.

Commission Recommends Modification of Bar Exam by Adding MPT

by Rusty Vetter

The Bar Commission has approved the recommendation of the Admissions Committee to modify the Bar exam by adding a new component, the Multistate Performance Test (MPT). The MPT is developed by the National Conference of Bar Examiners (NCBE) and is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task which a beginning lawyer should be able to accomplish. If approved by the Utah Supreme Court, Utah will join a majority of other states (the MPT is used by 29 states and other states, like California, have their own state-prepared practical performance tests) by including a 'practical' element to the Bar exam.

Applicant materials for each MPT include a "File" and a "Library." The File consists of documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, and lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

The Library consists of cases, statutes, regulations and rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law, and problems may arise in a variety of fields. Library materials provide sufficient substantive information to complete the task.

The MPT requires applicants to: (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for relevant principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; (6) complete a lawyering task within time constraints. Requiring applicants to perform one of a variety of lawyering tasks will test these skills. Examples of tasks applicants might be instructed to complete may include drafting the following: a memorandum to a supervising attorney; a letter to a client; a persuasive memorandum or brief; a statement of facts; a contract provision; a will; a counseling plan; a proposal for settlement or agreement; a discovery plan; a witness examination plan; a closing argument.

A petition has been filed with the Utah Supreme Court to approve the use of the MPT. The following is a summary the petition:

1. The subject-matter essay questions will be reduced from twelve to eight. This will include up to six Multistate Essay Examination questions (prepared by the NCBE) and a minimum of 2 state-prepared essay questions.
2. Thirty minutes will be allocated to each of the eight subject-matter essay questions (the time allocated for each question remains unchanged).
3. Two MPT questions will be incorporated into the Bar exam. One and one half hours will be allocated to complete each MPT question, and each question will be given the same weight as two subject-matter essay questions.

RUSTY VETTER is a new member of the Bar Commission and former co-chair of the Admissions Committee.

4. One MPT and four essays will be given in each of the morning and afternoon sessions of the first day of the Bar exam. The total time for the first day of the exam will be increased by one hour.
5. The Bar exam will be modified to include the MPT for the February 2003 exam, if the Utah Supreme Court approves the proposal to use the MPT by the end of October 2002.

Additional graders will be needed to grade the MPT portion of the exam. If you know of any members of the Bar who might be interested in helping to grade the MPT, please contact the Bar's Deputy General Counsel and Admissions Administrator, Joni Seko at 257-5518. Also, please share this information about the change to the Bar exam with individuals you know who might be taking the exam in the near future. More about the MPT, including sample questions and answers, is available at the NCBE's web site: www.ncbex.org.

The Judges' Benchbook – www.utlitsec.org

by Francis J. Carney

A few clicks of your keyboard and mouse are all that stand between you and the inside information that used to take trial lawyers years to acquire. That judge before whom you are to argue that motion tomorrow has some definite thoughts on how oral argument ought to go. Here's your chance to find out what they are and avoid the embarrassment of a new lawyer's "learning experience." Go to the Utah State Bar's Litigation Section's web page, www.utlitsec.org and, once there, to the "Judges' Benchbook" and find out.

> *. . . To be quite honest, as a whole in Utah, I think we have a great group of lawyers. . . . I think lawyers – I don't know what they teach at the law school, sometimes I think they hammer home this advocacy thing so much that lawyers kind of lose sight of what their job is and this is to represent their client in a professional manner and in a dignified manner and I think as an officer of the court you have an obligation to conduct yourself in such a way that it not only makes our job as judges easier, but it makes the system work better than if you are fighting or making snide comments. I had a trial a couple of weeks ago where the two lawyers did not get along very well and so one lawyer would say something and the other one was grinning and cackling and stuff like that should not go on. Even if you don't like the lawyer on the other side, I think you have to maintain some dignity in a courtroom.*
>
> – Judge Bill Barrett

For years lawyers have been bemoaning the perceived loss of collegiality among the bench and the bar, especially in the Third District. Some of this is due to our new fortress-like courthouses with the judges monkishly cloistered away in back when not on the bench. For good or ill, no more the easy familiarity of the "lawyers entrance" into the judicial corridors. Judges, for their part, see an unending parade of new faces from the bar. The growth in the number of lawyers and the need for increased courthouse security has meant that lawyers are far less familiar with the judges and the judges with them. We have many new lawyers who do not have the advantages of practicing with mentors and of thus acquiring the intimate knowledge of judges' preferences that once was commonly passed along in that way. In short, there's a growing knowledge gap on courtroom practices between the bench and the bar.

The Litigation Section has attempted to do something about it. We decided to ask each state and federal trial judge about their courtroom preferences, their attitudes about effective advocacy, their likes and dislikes, their tips for the new lawyer. Our plan was to put all that information on a web site freely accessible to all judges and lawyers.

It has not been easy. We started by sending out nearly one hundred questionnaires to the judges and we received only a few responses.[1] We then met with the Board of District Court Judges to encourage participation, and got a few more responses. The judges of the Fourth District were kind enough to meet with us *en masse* at one of their monthly luncheons.[2]

We then undertook to interview the judges personally, every one of them. The threat of interviews prompted more questionnaires to be returned. Interviews were conducted with several dozen judges, transcribed, and put on the web page. We now have online interviews or responses from about a quarter of the sitting trial judges and are in the process of tracking down the rest.

The interviews and the responses range from the terse to the expansive, from mundane recitations of policies to wide-ranging

FRANCIS J. CARNEY is a shareholder at Anderson & Karrenberg in Salt Lake City and is a member of the Executive Committee of the Litigation Section of the Utah State Bar. Any trial judge who would like to arrange an interview should contact Mr. Carney.

discourses on effective advocacy. In our interviews we talked of many things of interest to the advocate: How does jury selection work in your court? How do you handle case management orders? Do you bother with mediation? When do you want to get proposed jury instructions? How and when do you decide on what jury instructions will be given? What rules do you have on counsel's courtroom movement? Do lawyers use the new courtroom technologies effectively? What do lawyers do that's persuasive in jury argument? What do they do that annoys jurors? What do they do that annoys you? Do you bother with requiring permission for overlength briefs? What's persuasive in written motions? What does the clerk want to tell lawyers? What do you want to tell lawyers about effective advocacy? And many others.

We've promised the judges the opportunity to edit and "clean up" the transcribed interviews and many have done so. We've also encouraged comments from the courtroom clerks. And we've told the judges that the web page is theirs to change or to add to as they see fit.

No project of the Litigation Section has generated more interest than this one.[3] Over five thousand hits a month are consistently registered on the Litigation Section's website and much positive feedback has come from the members of the bar.

The judges' contributions have been fabulous. For example, Judge Taylor of the Fourth District submitted a nine-page response describing his courtroom practices in detail. It would be foolish for an advocate to appear in that judge's courtroom without taking the time to read it. Judge Tim Hanson's wide-ranging interview gives the perspective of twenty years on the bench about effective trial lawyers. Judge Eves of the Fifth District has provided a thorough but concise guide to practice in his court in Parowan.

Ideally, we'd like each judge's portion of the web page to be an opportunity to address the bar. A judge shouldn't have to tell each new set of lawyers about his or her policies, nor should the clerk. Instead, they should be able to point counsel to the Benchbook for all the necessary information. And likewise no lawyer should be forced to go cold into an unfamiliar judge's courtroom.

We have incorporated other sources of information on the judges when available. For example, the Utah chapter of the Federal Bar Association publishes excellent "Judicial Profiles" on our local federal judge, and the FBA has generously granted us permission to republish those profiles on our web page. Take a look at Judge Dale Kimball's page in the Benchbook – it includes not only his response to our own questionnaire, but also a link to the District Court's web page and his recent "Judicial Profile" from the Federal Bar Newsletter.

Some responses were surprising; some entertaining; some predictable. But most are well worth reading.

> *I have made two observations. One is a short, clean presentation is more effective than a lengthy one.*
>
> *The second is that juries are collectively extremely erudite and observant. Counsel need not say something multiple times for the jury to understand a point. If jurors have a common criticism it is that lawyers beat a dead horse. Counsel can put on a case simply, cleanly and efficiently and be confident the jury will hear it, understand it and render a fair verdict. Hammering the same points on and on can do more harm than good*
>
> – Judge Bill Bohling

There is wide variation in how judges feel jury voir dire should be conducted. One view, exemplified by Judge Darwin Hansen of the Second District, allows some involvement of counsel in the questioning:

> *I will conduct the initial voir dire but I will allow follow-up questions by counsel. Counsel should understand*

that the purpose of voir dire is to expose potential bias and not to argue the case, gain commitments, or attempt to ingratiate counsel with the panel. Attorneys who attempt to misuse voir dire will be immediately cautioned and thereafter cut short. Generally jury questionnaires are not used in my court but if the case is unusual or the nature of the case suggests that jury questionnaires would be helpful then I will consider their use upon the request of counsel.

Others hold to the "federal" view that jury voir dire is to be conducted by the court, with suggestions of counsel:

Counsel and I do jury selection. Voir dire examination by counsel is done through the bench to give opposing counsel an opportunity to object.

– Judge Dennis Frederick

There were useful comments on the difference in approaches in jury and bench trials, for example this one from Judge Philip Eves:

Attorneys should treat bench trials like jury trials without the jury instructions. It is particularly ineffective for an attorney to present a vast collection of facts and then assume that the court will develop a legal theory for the case. The lawyer should have a theory in the case and should make that clear to the court so the court knows what it is being asked to decide. The lawyer should be prepared to cite the law supporting his or her client"s position.

– Judge Philip Eves

Some judges questioned the need for a separate interview with each judge for the reason that the remarks would soon become repetitive. There are, in fact, certain common themes that seem to resonate with each judge. Many have expressed comments along these lines:

I love a lawyer who has the courage to say "no questions" and sit down because what that tells me is that the lawyer thinks that testimony is pretty near worthless, it does not need to be attacked.

You mention impeachment, I seldom see depositions used correctly. I see people drag that deposition like a club. They try to start with the deposition instead of asking the question and getting an answer and if necessary going to the deposition but like some of the

other stuff that we have talked about, I think is much more effective if it is saved for an important issue.

If you get somebody that does not answer each question the same way they did twelve months ago in their deposition and see that dragged out question after question after question, again it becomes pointless, it aggravates the jury and aggravates the judge. Depositions should be used sparingly and when they can be used devastatingly. . . No cross at all can be very effective.

– Judge Steve Henriod

Courtroom professionalism was another issue that came up frequently:

On the issue of civility, we talk about this a lot but, the lack thereof continues. I see it in briefs. I read a brief just the other day where there were all kinds of adjectives vilifying the other side for not doing what the person writing the brief thought they ought to do. That is inappropriate. I get the message without those kinds of adjectives.

I see more than I should in oral argument where one lawyer will accuse the other of making a misrepresentation or false statement. You don't hear the word "lie" very often, but I hear the words misrepresentations and misstatements. Don't accuse another lawyer of a lie unless you can prove it and you better be able to prove it beyond your own statement. I take that seriously, if a lawyer made an intentional misrepresentation then that lawyer's credibility in front of me is history.

– Judge Tim Hanson

[A]s a lawyer, your word ought to be your bond. You ought not to have to, and I had a father-in-law that always said to me, "Bill, the best friend you have is that lawyer on the other side because win, lose or draw in a case that you have at that moment in time, you are going to run into that lawyer again and if you make an enemy out of that lawyer, you are going to make your life miserable and it is not worth it." And I have always tried to practice that way and I would hope that most lawyers would. I recognize that there are some that are just so difficult that is hard not to want to retaliate, so to speak, but I think that if you go in with the view that when I say something to a lawyer they can take it to the bank, they can rely on it, I think that is crucial in the practice of law.

– Judge Bill Barrett

In an attempt to cover the basics and avoid repetition, we have included several articles on general pointers for courtroom conduct, including "Tips from Courtroom Clerks," "Fifty Tips From the Bench," and "How Lawyers Can Write More Persuasively For Judges."

Overall we found that there were enough differences among the trial judges to justify individual interviews with each of them. Those differences range from the minor (some of the judges despise courtesy copies of motion papers; others demand them) to the significant (some conduct final pretrial conferences as mediations; others treat the pretrial as a meeting on the technical aspects of the upcoming trial.)

We expect the Judges' Benchbook to grow in usefulness as more judges sign on and more lawyers use it. We'd appreciate your comments and suggestions. If you're a lawyer, give it a try. If you're a judge, call us for an interview or a questionnaire and we'll have you online in no time.

[1]The bankruptcy judges declined to participate. Letter of William C. Stillgebauer, Clerk of Court, to Francis J. Carney, February 8, 2000.

[2]Unfortunately we have only one response to date from the Fourth District, that of Judge James Taylor.

[3]The Litigation Section is the largest voluntary section of the Utah State Bar with over a thousand members. As well as its popular web page, the Section sponsors frequent CLE sessions on civil litigation issues, puts on the popular "Trial Academy," publishes the Model Utah Jury Instructions, among its many activities. For further information, contact the Section at litigationsec@utahbar.org.

The Appointment of Special Masters in High Conflict Divorces

by Janet Griffiths Peterson

Research has shown that ongoing conflict between parents after divorce can significantly affect a child's emotional adjustment to the divorce. As many states look for ways to reduce parental conflict and its related litigation, several have turned to the use of special masters to assist these conflicted families. Special masters are court-appointed experts, appointed pursuant to Rule 53 of the rules of civil procedure, who assist judges in a quasi-judicial role to avoid frequent, continuing custody litigation. The special master's role in custody cases is to make decisions about children when the parents cannot and to assess, report, and make recommendations to the court about custody and visitation issues. The appointment of special masters in high conflict divorce cases can minimize trauma to the children of divorce by resolving custody-related disputes and reducing the court's involvement with the family.

This article addresses the legal authority to appoint special masters in high conflict divorce actions and the limits of the special masters' powers. In addition, it identifies conditions that compel the appointment of special masters and suggests practical guidelines for using special masters including what qualifies a person to act as a special master, what the order of reference should contain, and what procedural processes are available to ensure due process.

Authority to Appoint Special Masters

The statutory authority to appoint special masters derives from Utah Rule of Civil Procedure 53 which is nearly identical to the Federal Rule of Civil Procedure 53. The rule provides that any or all issues in an action may be referred to a master upon the parties' consent. Without the parties consent, the court may appoint a special master only if some "exceptional condition requires it," and reference to a master should be the exception and not the rule.[1]

Another statutory source of authority for the appointment of special masters in Utah is found in the Utah Code of Judicial Administration (2002). Rule 4-510 establishes a court-annexed alternative dispute resolution program in the Second, Third, and Fourth Judicial Districts pursuant to the Alternative Dispute Resolution Act.[2] The rule provides that civil actions filed after January 1, 1995 may be referred to the ADR program either upon the filing of a responsive pleading or on the court's own motion.[3] Utah Code §58-39a-2(1)(b) provides that alternative dispute resolution includes "arbitration, mediation, conciliation, negotiation, mini-trial, moderated settlement conference, neutral expert fact-finding, summary jury trial, and *use of special masters* and related processes in civil disputes" (emphasis added). In addition, special masters are included in the definition of a dispute resolution provider under Utah Code §58-39a-2(4).

State and federal case law clarifying Rule 53 has focused on three elements: 1) the "exceptional condition" requirement of subdivision (b); 2) the "exception and not the rule" requirement of subdivision (b) and; 3) the limitations of the special master's powers. Rule 53(a) provides that the parties may consent to the appointment of a special master but, where the parties do not consent and the court by its own determination appoints a special master, subsection (b) requires that appointment shall be made "only upon a showing that some exceptional condition requires it."

1. High Conflict Divorce Cases Involve Exceptional Conditions Justifying the Appointment of a Special Master

The Utah Supreme Court addressed the issue of what constitutes an "exceptional condition" within the meaning of Rule 53 in *Plumb v. State,* 809 P.2d 734 (Utah 1990). Here the court upheld the district court's referral of the issue of attorney fees in a class action suit to a special master because the facts underlying the issue of attorney fees constituted "exceptional conditions."[4] The case made three points important to the use of special masters:

1. Utah has taken a flexible approach to the use of judicial resources such as special masters.

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2. The facts underlying the issue determine whether an issue should be referred to a special master, not the category into which the issue falls.

3. Masters are most analogous to commissioners when acting in the performance of their duties.

The *Plumb* court turned to federal precedent and commentary for enlightenment on the issue of exceptional conditions.[5] Although federal courts have not addressed the appointment of special masters in high conflict divorce cases, they have appointed special masters under "exceptional conditions" that are analogous to conditions found in divorce and custody cases. Federal courts have appointed special masters to monitor compliance with court orders,[6] to implement settlements or court orders,[7] to resolve issues and disputes arising under court orders,[8] and to make decisions related to court orders.[9] These same conditions are found in most high conflict custody cases that involve psychologically impaired parents who become litigious because they are unable to implement and follow court orders, or are unable to find reasonable solutions to the ongoing problems of divorce.

Combative parents may delay court proceedings, fail to cooperate with each other, and violate the terms of agreements. Where repeated violations disrupt parent/child relationships, exceptional conditions arise justifying the appointment of a special master to monitor, supervise, and manage the case. Where mental or emotional pathology exits, psychologists trained as special masters can be appointed to implement orders, develop methods for achieving compliance, and manage decision-making.

2. High Conflict Divorce Cases meet the "Exception and Not the Rule" Requirement

The second requirement in Rule 53(b) is that "a reference to a master shall be the exception and not the rule." The Utah Supreme Court in *Plumb v. State* did not directly address the "exception and not the rule" requirement. In addition, most federal courts have not specifically addressed this requirement, but have merged it with the "exceptional circumstances" requirement. One federal appellate court upheld a local rule providing for across-the-board referral to full-time magistrates of employment discrimination cases under Title VII in two specified divisions of the Northern District of Georgia.[10] The appellate court held that the referrals did not violate the federal civil rule even though the rule provides that referrals to special masters under its authority would be "the exception and not the rule." The stringency of that rule was to be relaxed in Title VII context.[11]

The *Plumb* case's broad interpretation of Utah Rule 53(b) parallels this relaxed approach. The Utah Supreme Court saw "little virtue in an interpretation of rule 53(b) that unnecessarily narrows a trial judge's options in dealing efficiently with the issues presented for decision."[12] In light of the *Plumb* case, appointment of a special master in every contested custody case would not be unreasonable since, in Utah, these cases would theoretically comprise only about 5% of all divorces filed.[13] Appointment of a special master in all of these cases would likely qualify as the exception and not the rule. In addition, appointing a special master in every child custody case assigned to a guardian ad litem would probably not be unreasonable. In the Fourth District and Juvenile courts combined, a guardian ad litem was assigned in 111 cases in 1999.[14] Of the 111 cases assigned to a guardian ad litem, about 90% of the cases involved divorce, and even though most of the cases involved parents with mental health issues that would certainly qualify under the "exceptional conditions" requirement, only about 1/4 to 1/3 of those cases would require the appointment of a special master.[15] This would represent only about 1%-2% of divorce cases filed and would certainly be the "exception and not the rule."

3. Powers of the Special Master

The third element that state and federal case law has focused on in clarifying Rule 53 is the delineation and parameters of the special master's authority. Federal case law has held that a special master can micro-manage cases and resolve conflicts, but may not exercise ultimate judicial power and make decisions which significantly affect the court's orders. Although Utah case law has not directly addressed the special master's powers, the Utah Supreme Court in *Plumb v. State* found that masters are "most analogous to commissioners when acting in the performance of their duties."[16]

The Utah Court addressed the analogous powers of commissioners in *Holm v. Smilowitz,* 840 P.2d 157 (Utah. Ct. App. 1992) where it held that commissioners may assist judges in the exercise of their judicial power, but they have no ultimate judicial power.[17] Two years after the *Holms* decision, the Utah Supreme Court further clarified the issue of commissioners' authority in *Salt Lake City v. Ohms,* 881 P.2d 844 (Utah 1994) where it held that while commissioners as quasi-judicial officers "may perform many important functions in assistance to courts of record, they are not duly appointed judges and thus may not exercise core judicial functions . . . ."[18] The *Ohms* Court further clarified that "Court commissioners are employees of the judiciary, not duly appointed judges. There are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record."[19] Since, as the *Plumb* court noted, special masters are most analogous to commissioners, they are thus subject to the same limitations of power as commis-

sioners. A special master appointed in a high-conflict divorce case could not make final adjudications of custody or visitation or make decisions that significantly affect the court's orders pertaining to custody and visitation.

In a custody case, a special master's decisions about visitation would be limited only to issues of dates, times, and method of pick-up and delivery, and decisions about day-care, bedtime, diet, clothing, recreation, discipline, health care, and daily routines. The special master could also make decisions subject to adoption by the court about education, religious training, vacations and holidays, supervision of visitation, and participation in physical and psychological examinations, assessments, etc. In addition, the special master could recommend to the court that it review changes in custody or visitation or limit a parent's access to the child.

Why Appoint Special Masters?

Protecting children from continuing litigation and parental conflict is the most compelling reason to appoint a special master. "Parental conflict interrupts many of the critical tasks of psychological development. It changes the nature of the parent-child relationship, creates anxiety and distress, over stimulates and frightens children, weakens parents' protective capacity, and compromises identity formation. Most of all, it leaves children powerless to do anything about it."[20] Judith S. Wallerstein, Ph.D, a nationally recognized expert on the effect of divorce on children, says children should be protected from litigious parents.[21] She stresses that the court should not intervene in a stable post-divorce family, but "[c]hildren who are victims of high-conflict families may need a different kind of court intervention, *e.g.,* a special master who monitors the family on an ongoing basis to reduce conflict and protect the child from warring parents."[22]

Parental alienation is another compelling reason to appoint a special master. Litigation increases parental alienation and leaves the child unprotected and in the middle of combative parents.[23] Mental health experts advocate the need for early recognition of parental alienation and a comprehensive treatment approach carried out by a team of professionals including a "parenting coordinator" that functions like a special master.[24]

In addition, congested court calendars would also benefit by reducing the number of times litigious parents return to court. The rate of return to court after the initial agreement in contested custody cases is high.[25] A study by Richard E. Miller and Austin Sarat showed that divorce issues are more likely to be litigated than other types of grievances.[26] Miller and Sarat studied the legal system's role in solving grievances between parties in tort, discrimination and post-divorce problems. They found that of the 1000 disputes in each area, only 116 tort disputes and 29 discrimination disputes involved the use of an attorney and only 38 tort and 8 discrimination disputants reported taking their dispute to court. However, of the 1000 post-divorce disputes, 588 involved the use of an attorney and 451 took their dispute to court. Where only 9% of tort and discrimination grievances eventually enter the court system, nearly 50% of post-divorce grievances lead to court involvement. Miller and Sarat note that while in many divorce cases, the court's involvement may have been more administrative than adjudicative, post-divorce cases were the "most disputatious and litigious" grievance they measured.[27]

One study has shown that the appointment of special masters can dramatically reduce post-divorce litigation. In a paper presented at a Special Masters Training Conference in Palo Alto, California in 1998, T. Johnston presented a summary of research from a 1994 study on the decrease of court involvement after the appointment of a special master. The study followed 166 custody cases in the California courts. It found that during the year prior to the appointment of a special master, there were 993 total court appearances or about 6 appearances per family. In the year after the appointment of a special master, there were only 37 appearances or an average of less than one appearance per family.[28]

The use of a special master also significantly reduces the time it takes for disputes to be heard. In most districts in Utah, parties must wait two to five weeks to have visitation issues heard by a commissioner. In many cases, the commissioner may refer the parties to mediation. If mediation is unsuccessful, the parties wait an additional two to five weeks for another hearing. If the parties disagree with the commissioner's ruling, they may file an objection and wait another three to six weeks for a hearing before a judge. The entire process can take up to two months or longer. However, where a special master has been appointed, visitation issues can be heard by an expert familiar with the parties own unique situation within days and sometimes immediately.

Guidelines for the Use of Special Masters

The use of special masters in the area of divorce is an emerging tool not yet structured into local court rules in Utah. Therefore, the judges and attorneys that have used special masters in Utah divorces have relied on guidelines from other states. Many Utah judges have effectively followed California's lead in this area. In 1998, Monterey County, CA implemented detailed local court rules for the appointment of special masters in child custody and visitation cases.[29] Other California counties have also outlined specific rules governing the appointment of special masters.[30] The rules address three of the most essential guidelines needed for the successful use of special masters in divorce cases: 1) the

qualifications of the special master; 2) the Order of reference and; 3) the procedural and due process safeguards.

1. Qualifications of the Special Master

Most high-conflict divorce cases involve psychologically impaired parents that create problems such as parental alienation, child abuse, and domestic violence. Therefore, it is essential that special masters appointed to these cases be specially trained psychologists, psychiatrists, attorneys, or mediators who specialize in helping impaired parents resolve disputes about what is best for their children.[31] The special master's ultimate role is not to prepare an investigation or evaluation, nor to mediate, but rather to make decisions when the parents cannot. Therefore, the special master should be well trained to assess, report and make recommendations to the court regarding the impact of those decisions on the best interests of the children.[32]

The Monterey County Rules require special masters to be attorneys, psychologists, or psychiatrists. Psychologists and psychiatrists should have at least 3 years post-license experience in child and family therapy, 3 years in diagnostic evaluations for family court, and 3 years experience in family mediation.[33] In addition, they should have training in family systems, child development, psychology of divorce and custody, and have a working knowledge of custody law, with a minimum of six cases working with attorneys and/or court appearances.[34] Attorneys appointed as special masters should have practiced family law for 10 out of the last 12 years, carried at least 20 custody cases through judgment, and trained as a mediator.[35] In addition, they should have completed 6 units of child development and 3 units of family systems.[36]

2. The Order of Reference

The order appointing the special master can be tailored for each situation, but should be as detailed and specific as possible. The *Plumb* court held that "the order is at once the chart and limitation of the master's authority and the master should not exceed it even with the consent of the parties."[37] Some Utah judges and attorneys have successfully used an order of reference fashioned after the order found in the guidelines of the Monterey County Rules.[38] The order should specify the special master's role, powers, duties, term, fee, and other incidental matters.

In specifying the special master's duties, the order should contain a complete list of decisions that the special master has the authority to make. These could include making decisions about dates, times, and method of pick-up and delivery, sharing of parent vacations and holidays, selection of child care providers, bedtime, diet, clothing, slight alterations in the time share schedule,

extended family participation in visitation, and daily routines. Issues on which the special master could make recommendations to the court would include private school education, church attendance, large changes in vacation and holiday timeshares, supervision of visitation, appointment of counsel for the children, alteration of physical custody or legal custody, and limitations on a parent's access to the children. Issues which should be reserved for adjudication by the trial court include altering an award of physical or legal custody, altering a child's primary residence, prohibiting a party's contact with the children, and requiring or prohibiting adherence to a religion. The order should indicate that the special master's decisions are effective as orders when made and will continue in effect unless modified or set aside by the court.

The order should also include a specified length of time that the special master should be appointed. Generally the special master would be appointed for one to two years with a goal of transitioning the family to a family counselor.[39]

URCP Rule 53 allows the special master to charge a fee to be paid by the parties, and provides that the order appointing the special master should specify each party's responsibility for the fee. The order should also specify the fee arrangement and give the special master the ability to recommend a reallocation of fees as a sanction for obstructive behavior. Because of the nature of the issues involved and the almost guaranteed dissatisfaction of one or both parties, the order should specify that the fee is to paid previous to the commencement of the special master's duties in the form of a retainer.[40]

Where an impecunious party is involved, a pro bono special master could be appointed. However, caution should be used in allowing parties to access the services of a special master for free since having to pay for the services could be an effective deterrent to parties who have themselves created a litigious lifestyle and environment that is detrimental to their children.[41] The fee would conceivably be much less burdensome than attorney fees since, as noted above, the decision-making role of the special master would drastically reduce the number of court appearances by the parties.

3. Procedural and Due Process Safeguards

URCP Rule 53 provides that the parties may stipulate to the appointment of a special master, subject to the court's approval and the consent of the special master selected. Otherwise, the court may appoint a special master without stipulation subject to section (b). If the special master is appointed without a stipulation, then URCP Rule 53(f) and ((e)(2) ensure due process to the parties involved by allowing them to "object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action." The proposed special master would also have the right to accept or decline the appointment, with or without stating a reason, but should decline the appointment if he or she has a conflict of interest or any bias that would prevent impartiality. Rule 53 also provides that the parties may file a motion objecting to any of the special master's findings. However, the special master's authority and credibility are preserved by section (e)(2) which provides that the court shall accept reports by the special master unless clearly erroneous.

Special masters are a valuable judicial resource that can reduce the level and duration of parental conflict. Children exposed to this ongoing conflict are placed at risk for emotional and behavioral problems that can last a lifetime.[42] The higher the level of parental conflict and the longer it continues, the greater the harm to the children.[43] Early intervention by a special master can decrease this risk by reducing the ongoing litigation typical of high conflict divorces and can assist the court with the paramount goal of protecting the best interest of the child.

1 Utah R. Civ. P. 53 (b).

2 Utah Code Ann. §78-31b-5.

3 Utah Code of Judicial Administration, Rule 4-510.

4 *Plumb v. State,* 809 P.2d 734, 741-42 (Utah 1990).

5 *Id,* at 738 n. 38.

6 *Walker v. U.S. Dept. of Hous. and Urban Dev.,* 734 F. Supp. 1231 (N.D. Tex. 1989); *Morales Felician v. Romero Barcelo,* 672 F. Supp. 591 (P.R. 1986); *EEOC v. Local* 580, *Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers,* 669 F. Supp. 606 (S.D.N.Y. 1987), aff'd, 925 F.2d 588 (2d Cir. 1991.

7 *Lelsz v. Kavanagh,* 112 F.R.D. 367 (N.D. Tex. 1986); *Halderman v. Pennhurst State Sch. & Hosp.,* 612 F.2d 84 (3rd Cir. 1979), *rev'd on other grounds,* 451 U.S. 1 (1981).

8 *Morgan v. Kerrigan,* 530 F.2d 401 (1st Cir. 1976), *cert. denied,* 426 U.S. 935 (1976), *reh'g denied,* 429 U.S. 873 (1976); *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984), *cert. denied,* 478 U.S. 1020 (1986).

9 *Hart v. Community Sch. Bd. Of Brooklyn,* 383 F. Supp. 699 (E.D.N.Y. 1974), *appeal dismissed,* 497 F.2d 1027 (2d Cir. 1974).

10 *Parker v. Dole,* 668 F. Supp. 1563 (N.D. Ga. 1987).

11 *Id.*

12 *Plumb,* 809 P.2d at 741.

13 In 1999, 1,861 divorces were filed in the Fourth Judicial District Court, of which 839 (45%) involved children. Telephone interview with Robert Turner, Information Services Dept. for the Admin. Office of the Courts, Utah State Data Warehouse (March 2000). Only about ten to twenty percent of the 839 cases involving children would have been contested custody cases and would account for only 5% of all divorce cases. Lynne M. Kenney and Diana Virgil, *A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court,* Ariz. St. L. J. 646 (1996), citing B. Weiner, *An Overview of Child Custody Laws,* 36 Hosp. & Comm. Psychiatry 838, (1985); *The Child in Court: A Subject Review,* 104 Pediatrics 1145-48 (1999), Committee on Psychosocial Aspects of Child and Family Health (last modified 1999) <www.aap.org/policy/re9923>.

14 Telephone interview with Lori Brown, Assistant Director of the Office of Guardian ad Litem (March 2000)

15 Interview with Angela Adams, John Moody, Guardians ad Litem of the Fourth Judicial

District, Provo, Utah (April 6, 2000).

16 *Plumb,* 809 P.2d at 743

17 *See* Utah Code §78-3-31(6) and Utah Code of Judicial Administration, Rule 3-201(9) which both specifically prohibit commissioners from making final orders.

18 *Ohms* at 851.

19 *Id.*

20 Hildy Mauzerall, Patricia Young & Debra Alsaker-Burke, *Protecting Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court,* Idaho L. Rev., 303 (1997), citing Carla B. Garrity & Mitchell A. Baris, *Caught in the Middle: Protecting the Children of High-Conflict Divorce* Idaho L. Rev. 12 (1995).

21 Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce,* 30 Fam. L.Q. 305, 323 (1996).

22 *Id.*

23 Kathleen Niggemyer, *Parental Alienation is Open Heart Surgery: It Needs More Than a Band-Aid to Fix It,* 34 Cal. W. L. Rev. 567, 587-88 (1998) (citing Carla B. Garrity & Mitchell A. Baris, *Caught in the Middle: Protecting the Children of High-Conflict Divorce* (1994)).

24 *Id.* at 588.

25 *The Child in Court: A Subject Review, Pediatrics* at 1145-1148.

26 Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture,* 15 L. & Soc'y Rev. 525 (1980-81), reprinted in John S. Murray et al., *Mediation and Other Non-binding ADR Processes,* 5-7 (1996).

27 Mediation and Other Non-binding ADR Processes at 5-7.

28 Janet R. Johnston &Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce.* Free Press (August 1997).

29 Cal. Monterey Cty. Coord. Trial Ct. L.R. 11 (2002)

30 *See e.g.,* Cal. Sup. Ct. Local Rules, Sacramento County, Rule 14.09 (1999); Cal. Sup. Ct. Unif. Local Rules, San Francisco County, Rule 11.53 (2000); Cal. Sup. Ct. Local Rules, San Mateo County, Rule 2.3 (2000).

31 Interview with Dr. Jay Jensen, psychologist and leading expert on children's divorce issues, Provo, UT (June 2002).

32 Monterey County, Rule 11.01.

33 Rule 11.02

34 *Id.*

35 *Id.*

36 *Id.*

37 *Plumb,* 809 P.2d at 742.

38 Cal. Monterey Cty. Coord. Trial Ct. L.R. 11.08, Attachment I (2002).

39 Interview with Liz Dalton, Esq., family law attorney and leading expert on divorce mediation, in Provo, UT. (May 2002); *see also* Cal. Monterey Cty. Coord. Trial Ct. L.R. 11.02(e) (2002).

40 Interview with Liz Dalton and Jay Jensen (Apr. 26, 2000).

41 *Id.*

42 Janet R. Johnston & Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce.* Free Press (August 1997).

43 Valerie E. Hale, Ph.D., Annual Family Law Seminar materials, May 10, 2002

Probate Mediation in Utah: Where did it Come From, Where is it Now, Where is it Going?[1]

by Gary L. Schreiner

Introduction

> For some disputes, trials will be the only means, but for many claims, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.
>
> – Chief Justice Warren E. Burger.

The use of alternative dispute resolution (ADR) has been growing in Utah.[2] Recently, there has been a concerted effort to utilize mediation in the often-complicated area of probate conflicts. The Third District Court has adopted a pilot program aimed at utilizing mediation to resolve probate conflicts without litigation.

This article will explore the genesis, development, and future of probate mediation in Utah. The primary focus is on the Third District Court's pilot ADR program for probate disputes; however, other districts are also utilizing ADR, and the research behind this article was done with an eye towards the future spread of the probate mediation program to other judicial districts.

Where Did it Come From?

History

The use of alternative dispute resolution in inheritance matters has a surprisingly early history in the United States. For example, George Washington's will contained what was essentially an ADR clause for settling any disputes arising from the administration of his estate:

> [T]hat all disputes (if unhappily they should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chose by the disputants each having the choice of one, and the third by those two – which three men thus chose shall, unfettered by law or legal constructions, declare their sense of the Testator's intention, and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States.[3]

Despite Washington's early example, it has only been relatively recently that the use of ADR has taken hold in court systems. In Utah, the courts did not seriously begin to study the use of ADR in the court system until 1986. In December 1986, the Utah Judicial Council created an ADR task force to study the need or desirability of establishing ADR programs for the state courts.[4] The taskforce reviewed court workloads and costs, benefits to litigants, and existing court and state ADR programs. It determined that the development of an ADR program would be beneficial.[5]

Since that time, legislation and judicial rules have been enacted to promote the use of ADR through many aspects of the court system. Mediation is used widely in the area of divorce, and nine formal programs have been established by the Office of Alternative Dispute Resolution.[6]

In 1991 in the Utah Legislature enacted the Alternative Dispute Resolution Act.[7] In 1994 the Legislature repealed the act and enacted new legislation under the same name, which was amended in 1997 and 2000.[8]

Statute and rules work together to form a framework for ADR in the courts. The legislature's purpose was to:

> [O]ffer an alternative or supplement to the formal processes associated with a court trial and to promote the efficient and effective operation of the courts of this state by authorizing and encouraging the use of alternative methods of dispute resolution to secure the just, speedy, and inexpensive determination of civil actions filed in the courts of this state.[9]

The statute authorizes the Judicial Council to "establish experimental and permanent ADR programs administered by the Administrative Office of the Courts under the supervision of the director of Dispute Resolution Programs"[10] as limited by the Act,[11]

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and the Council may limit application of its rules to particular judicial districts.[12]

The Judicial Council established UT ST J Admin Rule 4-510 which applies to the Second, Third, and Fourth Judicial Districts.[13] It also enacted the Utah Rules of Court-Annexed Alternative Dispute Resolution that apply to all court-annexed ADR proceedings in the state, and which includes a code of ethics for ADR providers. However, Rule 4-510 has not been strictly adhered to, and the need was seen for further structure when the Probate ADR Pilot program was developed.[14] Therefore, Probate ADR in the Third District is further governed by rules adopted by the Third District judges who are ultimately responsible for the program.[15]

Many practitioners seem to have the mistaken impression that mediation has been made mandatory in many types of civil cases, including probate. It is true that contested probate cases are automatically referred to mediation; however, automatic referral does not equate to mandatory mediation.

The wording of the ADR statute is silent on whether ADR proceedings can be made mandatory. However, it is implied by 78-31b-3 and 78-31b-5(1),(2),(3)(e), which state that the purpose is to provide ADR proceedings as an "alternative or supplement to formal processes associated with a court trial."[16] Further, "the Judicial Council *may* establish experimental and permanent ADR programs" with rules based upon the purposes of the act and which ensure "that no party or its attorney is prejudiced for *electing, in good faith not to participate in an optional ADR procedure."*[17]

The following judicial rules explicitly provide opt out provisions: Code of Judicial Administration Rule 4-510(6)(A), Utah Rules of Court-Annexed Alternative Dispute Resolution (URCADR) Rule 101(g), and the Probate Pilot Program rules. Within the Probate ADR Pilot Program, parties may make a motion to withdraw from mediation after watching an ADR videotape provided by the courts.

The legislature further recognized that "preservation of the confidentiality of ADR procedures will significantly aid the successful resolution of civil actions in a just, speedy, and inexpensive manner."[18] The Alternative Dispute Resolution Act provides:

1. Everything is confidential unless the parties agree otherwise.[19]
2. Evidence regarding the fact, conduct, or result of an ADR proceeding is not subject to discovery or admissible at trial.[20]
3. No information obtained during an ADR proceeding may be subject to discovery or admissible in trial unless discovered from an independent source.[21]
4. With limited exceptions, the ADR provider may not disclose information about the proceeding to anyone outside the proceeding, including judges.[22]

These statutory conditions are emphasized and elaborated upon in URCADR Rule 103. UCJA Rule 4-510 further provides that "No ADR provider may be required to testify as to any aspect of an ADR proceeding except as to any claim of violation of URCADR Rule 104[23] which raises a substantial question as to the impartiality of the ADR provider and the conduct of the ADR proceeding involved."

Vision/Genesis of the Third District Pilot Program. Having seen the success of mediation in family disputes, and understanding that probate cases are just "family cases in a nutshell,"[24] members of the court community began contemplating its use in the area of probate. The ADR office felt it was time to add another program, judges were talking to divorce commissioners, and there was discussion among the Judicial Council ADR Committee; in short, the parties just felt the time was right time to bring everyone together.[25]

District Court Judge William Bohling, chair of the Judicial Council ADR Committee is credited with being the driving force behind the establishment of the program.[26] Judge Bohling does not remember who first suggested probate as an area for mediation, but says, "It was evident to all of us [that it would be] an appropriate area for mediation."[27]

The ADR committee formed an ad hoc committee to develop a pilot program for ADR in probate.[28] Earl Tanner, Jr. and other attorneys jumped right in.[29] Mr. Tanner in particular is credited with being a very active participant in the process.[30] Other members of the committee included Judge Bohling as chair, Probate Clerk Hal Reuckert, Kathy Elton, Director of Alternative Dispute Resolution, Karin Hobbs, former Chief Appellate Mediator for the Utah Court of Appeals, and Commissioner Tom Arnett. Commissioner Arnett lent a great deal of expertise to the process and was very positive about the impact mediation had had on divorce disputes.[31]

The parties combined their expertise from research and experience in other areas to formulate a probate ADR procedure.[32] It was a collaborative effort of which the ADR Committee is proud.[33]

During the committee meetings, attorneys brought up practical concerns such as how to deal with clients, the structure of process, and time frames.[34] The committee spent a lot of time

discussing how to deal with the requirements of URCP Rule 26.[35] Everyone believed in the potential for probate cases to settle, but the question was how much to push and when.[36] There was a sharp divide over who should conduct the mediation sessions. Some lawyers were adamant that the mediator should be a lawyer. There was a discussion of co-mediation, where there would be a substantive expert and a process expert. In fact, the process itself "started to mimic a mediation."[37] Eventually, the committee decided to have a roster of trained mediators, lawyer and non-lawyer alike, and let the parties choose.[38]

Added to this mix was the expertise and experience of the mediators. Of Kathy Elton, Director of Alternative Dispute Resolution, and Karin Hobbs, Chief Appellate Mediator, Judge Bohling says:

> Well, Karin and Kathy, they have been instrumental in this program. They're terrific. They've both put effort into it and [lent] their interest and wisdom, and I have really appreciated what they've done. They're to be commended for the wonderful work in getting this put into place.[39]

Attorney Laurie Hart, another member of the committee, sums up the decision to establish a pilot program this way, "Most probate litigation does not really turn on legal arguments; they are just family squabbles."[40]

Where is it Now?

Current Process/Procedures.

The process is a simple one. All contested probate matters are referred to mediation. A packet is provided to parties to a probate dispute explaining the procedure. The basic provisions are as follows:[41]

1. All probate disputes that are not resolved by the probate judge are automatically referred to the ADR program.
2. The default form of ADR is mediation, but arbitration may be substituted.
3. ADR must commence within 30 days and be completed within 60 days of referral.
4. All other procedural timelines, including URCP Rule 26, are stayed during this 60-day period unless otherwise changed by the court.[42]
5. The parties have the responsibility for selecting the mediator or arbitrator, but a roster is maintained by the court to assist the parties in this.
6. The earliest petitioner in the matter referred to mediation reports the results.
7. Parties may opt out of ADR by filing a motion to withdraw and by viewing an ADR videotape.

Current Progress.

Perceptions of the Program

Judicial

The value of alternative dispute resolution has been recognized by the United States Supreme Court for some time. In 1985 the Los Angeles Times quoted Chief Justice Warren Burger as saying:

> We must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation and conciliation.[43]

More recently, Justice Sandra Day O'Conner, speaking at the dedication of a new community dispute resolution center said:

> In the context of cases in the courts, alternatives to full adjudication are numerous and accessible. For example, litigants have the option of seeking resolution through neutral evaluation, negotiation, arbitration, mediation, or even summary jury trials. This range of alternative dispute resolution options have benefited the legal system not only relieving some congestion in the dockets of courts, but also by providing an effective, less costly, and often more satisfying means to resolve the disputes.[44]

Third District Judge William Bohling seems to have a similar vision. He describes himself as "fairly enthusiastic about ADR" and believes that it "does all the right things."[45] Regarding the Probate Mediation Program he stated:

> Well, I think you've really captured the real benefit: it maintains the family relationships and allows a peaceful resolution. But, I guess the other side is that it is an economic benefit. The horror of a lot of these disputed estates is that by the time the parties finish the dispute, the resources of the estate, the assets, have been expended on legal fees and there is nothing left. [T]his is a way to avoid that. To a person that doesn't have any interest at all in mediation, ...economic reasons alone justif[y] it. . . .
>
> I think it is a pretty good program. I don't have any criticism at this point. It seems to be working. I'm impressed by the probate bar. They have really come through in this area. And I think by their nature they're not litigators – they're more problem solvers – and it has been in part because of their motivations and . . . their temperament

Table 1

What did you like about the mediation process?	What would you change about the mediation program?	Other comments:
Helped both sides understand [illegible] from viewpoint of a neutral third party.	Make it voluntary.	By the time a party is willing to file an action in probate, the relationship between parties has deteriorated, and in my opinion it is time to get the issues formally resolved, bindingly resolved. To this end required mediation or even strong pushes toward mediation result in torturous wastes of time. Let us get to the judges and move on.
Brought the parties together	Mediator needed to have probate experience.	
Makes clients think compromise & see possibility of resolution in significantly shorter time than litigation.	The mediator should be more firm in expressing the negatives of both sides' positions and more effective in moving both to a center position	
The case is very close to being resolved. A trained 3rd party perspective is most useful.	At this point – nothing – too soon.	While I believe in ADR, and particularly in mediation, I think it is very useful to evaluate its effectiveness in general as well as in each case. Some cases are more expediently resolved in litigation, while others can be effectively mediated.
Makes clients face realities rather than right vs. wrong.	My impression is that most of the attorneys certified at probate mediation are not very experienced in the area. We should encourage experienced probate & trust attorneys to be certified – More attorneys would use mediation if more experienced mediators.	
Informality and independent party encouraging settlement		
It allowed the parties to talk and at least feel they gave ADR a chance.		
Mediation resolved a 2-yr old probate litigation matter that was headed to trial. It helped to get the attorneys out of the way and let the clients be heard.	Sometimes a judge will refer a dispute to mediation in order to delay making a ruling, which results in increased costs to the clients. For example, if an objection can't survive a motion to dismiss, it should be dismissed. If it can survive a motion to dismiss, there are likely substantive issues that can be effectively resolved through mediation. Mediation is extremely useful in some areas, in others it does more harm and incurs more cost than just litigating.	The process worked to the point that we almost had a resolution with one point left to resolve. The mediator excused herself at that point, expressing her confidence that that point would be resolved. (She had a prior commitment!) That point was not resolved and everything fell apart. Needless to say, we were very disappointed.
Rules of evidence do not generally apply – we can get at real feelings & truth.		
Quicker resolution – reduced expense.		
Gave the parties a chance to state their positions and issues in a non-binding setting.		

that I think that this program has been so successful.[46]

Attorney

In the summer of 2001, members of the Estate Planning Section responded to a survey regarding probate mediation. Many of those who responded provided comments about mediation. The comments were both positive and negative. Those comments are summarized in Table 1.

Laurie Hart, who was a member of the ad hoc committee that established the pilot program, thought implementation of a probate mediation program was "a great idea." She felt that formal mediation some time during the process would make a case more likely to settle.[47]

Ms. Hart tells of a case that had gone through two years of litigation. She thought mediation would be a good idea. She knew that if the parties did not settle it would be a long and ugly trial. Ms. Hart felt that if they could just mediate and get the attorneys out of the way the parties could resolve it. However, the opposing counsel felt there was no way it would settle. Eventually though, with the blessing of the judge over the case, the parties went to mediation. The parties were related only by marriage, and Ms. Hart was quick to emphasize that there was "no relationship to be saved." However, much to the surprise of opposing counsel, the parties reached a settlement. Of the experience, Ms. Hart says, "Would I do it again? In a heartbeat."

Mediator

As to be expected, mediators are very enthusiastic about mediation. The pervading attitude was that people should at least try mediation. "A good mediator can get people past their attitudes," says Karin Hobbs, former Chief Appellate Mediator. Kathy Elton,

Director of Alternative Dispute Resolution, adds that parties will have "at least more of an understanding of the issues in the case."[48]

Probate mediation draws on family strength.[49] Hobbs says, "You can't put a dollar value on a relationship. ... The value of it cannot be underestimated."[50] "Family is family; you can't just quit doing business with a family member," says Elton.[51] There are emotional interests that cannot be dealt with in litigation.[52] Mediation allows parties to get to underlying, often non-legal, issues that are the key to the resolution of the case.[53]

The two mediators were quick to list the benefits, but the only weakness they could think of was that the program is new and people do not know how to utilize it to help them.[54]

Michelle Royball, ADR Administrator for the US District Court – District of Utah, who attended the subcommittee meetings, is a bit more cautious about the program. "For clients of a court system [mediation] is an unheard of concept," she says. Clients and attorneys can be uncomfortable with the lack of structure. Attorneys are used to the strict rules of court, and clients have a certain picture of how the legal process works. Clients often expect mediation to be a form of arbitration that they can win. While she believes the program is a good idea and that it will be highly beneficial to parties involved, she emphasizes that you need to be careful with something new.[55]

Statistics

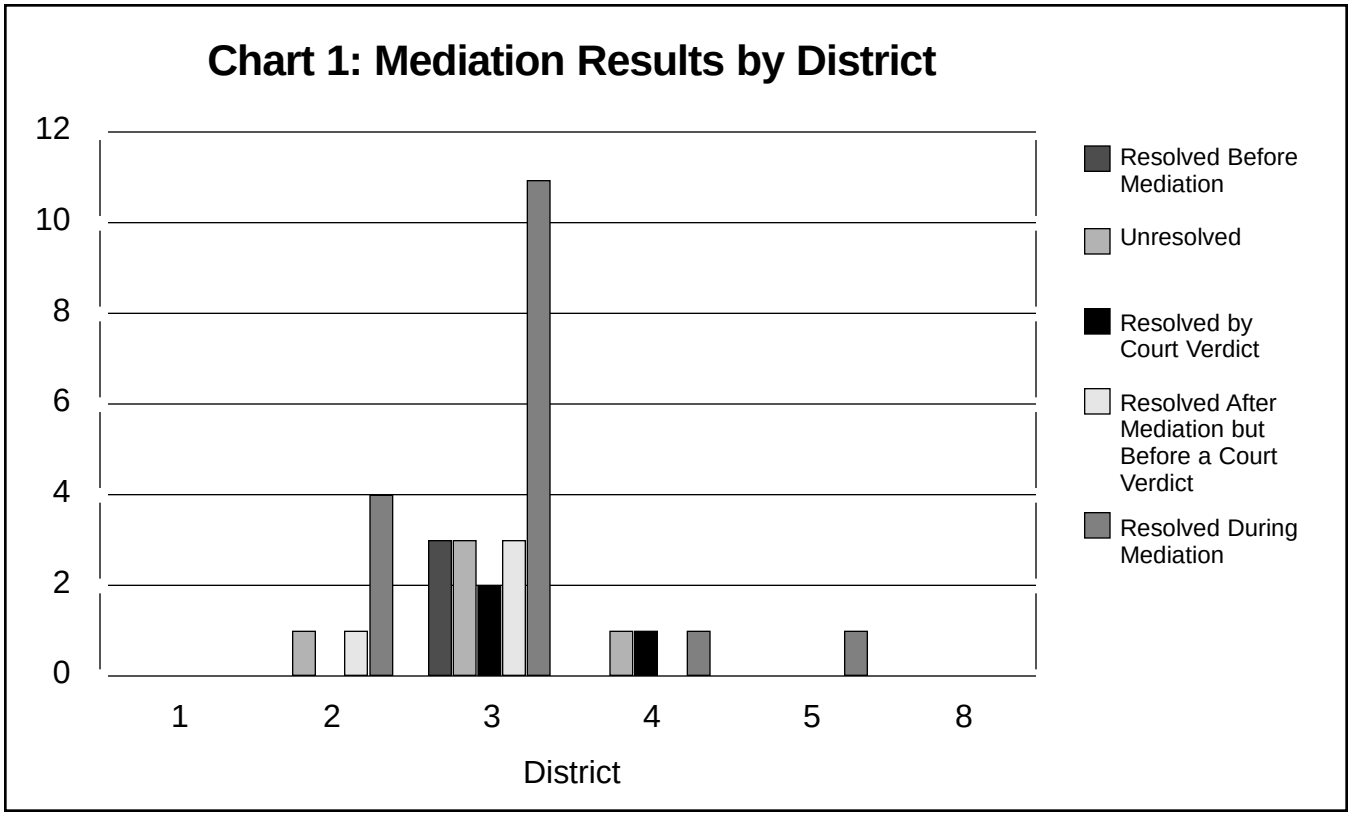
During the spring and summer of 2001, a survey was prepared with the input of Professor Charles Bennett, Kathy Elton, Karin Hobbs, and the Estate Planning Section Executive Committee. The survey was then sent to all the members of the Estate Planning section. The results of the survey are summarized in Chart 1.

Of the 32 reported mediations:

- 3 were resolved before mediation,
- 17 were resolved during mediation,
- 4 were resolved after mediation but before a court verdict,
- 3 were resolved by court verdict, and
- 5 remained unresolved at the time of the survey.

A full 75% of reported cases were settled without a court verdict. Would the cases have settled anyway? Because pre-program settlement rates are unavailable, it is impossible to tell. However, the attorneys' responses to the survey questions indicate that mediation has left them with a generally favorable impression. A few of the highlights:

- 84% of respondents felt the mediator was effective.
- 73% of respondents felt that mediation was useful.
- 63% of respondents felt that the time the process took was



just right.

- 68% of respondents say they are likely to use mediation if the need arises.
- 63% of respondents were satisfied with the results of mediation.

Interestingly, only 44% of the attorneys believed their clients were satisfied with the results.

Where is it Going?

Involved Parties' Views.

There is certainly talk of expansion. Both Karen Hobbs and Kathy Elton expect the probate mediation program to expand to Ogden and Provo soon.[56] As the program evolves, there will be "continual tweaking" as administrators get feedback from practitioners.[57] The program's evolution will depend on a collaborative effort between all those involved.[58]

Judge Bohling sees a broad future for probate mediation. He believes that the program's usefulness will enable the program to continue to grow in experience and acceptance.[59] The judicial education programs of the Administrative Office of the Courts often bring successful programs in one district to the attention of other districts. Judge Bohling indicates that there is a good opportunity for this with the probate mediation program.[60]

Independent Analysis and Recommendations.

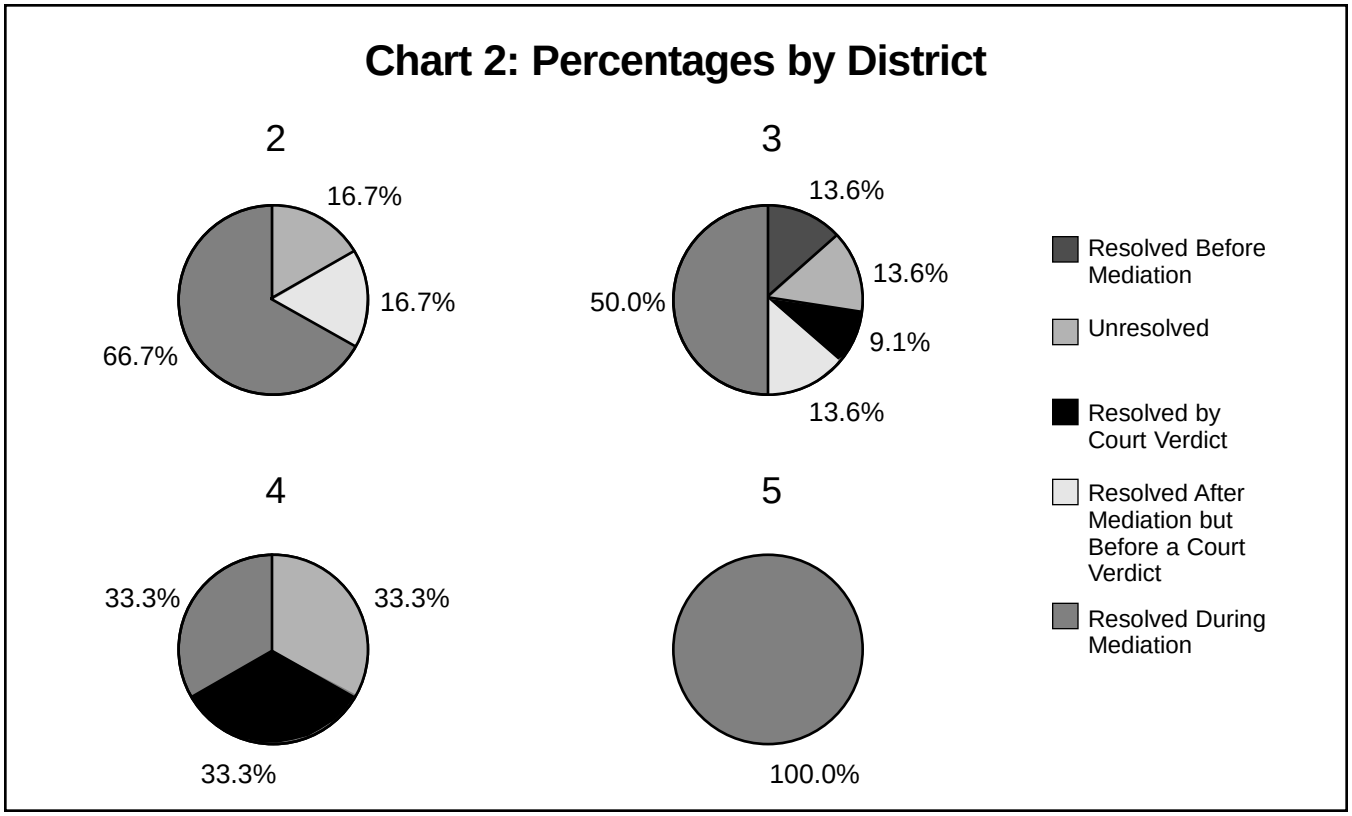
The Probate ADR Pilot Program began with high hopes for success. Those involved believed it would be beneficial to parties and to the court system. Are the benefits being realized? How "successful" has the program been to date?

Cathy A. Costantino and Christina Sickles Merchant in their book *Designing Conflict Management Systems* recommend evaluating two distinct aspects of a conflict resolution program: effectiveness (focus on outcome), and administration (focus on mechanics). Effectiveness is broken down into three elements: efficiency, effectiveness, and satisfaction. Administration is likewise broken down into three elements: functional organization, service delivery, and program quality. The Probate Mediation Program scores well in each of these categories; however, there is room for improvement.

Improvements may be made in the areas of education, mediator training, options, and party input.

Education

One thing that has been mentioned time and time again is that the program is new and that people do not know how to best utilize it to their benefit. Outside of the legal profession, people are largely unaware of what mediation or even ADR in general are.[61] Attorneys and their clients can be educated by time and trial by fire, or they can be educated by proactive efforts through the court system.



The educational outreach of the Probate ADR Pilot Program, as well as mediation programs in general may be improved by (1) providing clear, easy to understand information packets that explain the program and the mediation process to parties and attorneys, (2) offering information sessions for those referred to mediation, and (3) providing mediation advocacy training for attorneys. These educational efforts may be coordinated with organizations such as the Utah Bar Association and Utah Dispute Resolution.

Mediator Training

Research has shown that one area where the program is lacking is the regulation of mediators. The Office of Dispute Resolution and the Judicial Council ADR Committee are currently evaluating options for improving the standards regulating mediators.

For the protection of the parties, the integrity of the system, and the integrity of mediation as a profession, there should be more quality control when it comes to mediators.

Some attorney comments from the 2001 survey illustrate the need for qualified and competent mediators:

> "Mediator needed to have probate experience."
>
> "My impression is that most of the attorneys certified at probate mediation are not very experienced in the area. We should encourage experienced probate & trust attorneys to be certified – More attorneys would use mediation if more experienced mediators."
>
> "The process worked to the point that we almost had a resolution with one point left to resolve. The mediator excused herself at that point, expressing her confidence that that point would be resolved. (She had a prior commitment!) That point was not resolved and everything fell apart. Needless to say, we were very disappointed."

Most of those who design conflict management systems are devoted to the concept of empowering the parties and providing them with as much autonomy as is reasonable. Under such a concept, it is important that parties be able to choose the mediator that they want. However, there are two steps the program can take to assure the parties that they are getting a reasonably qualified mediator:

> (1) Provide stricter requirements for inclusion on the roster of probate mediators. The mediator should understand probate and tax law and should have an understanding of family mediation principles.
>
> (2) Require periodic assessment of roster mediators by Office of Alternative Dispute Resolution personnel. Such assessment could include surveys completed by parties and attorneys following mediation, as well as in-person observation by an AOC mediator.

Options

Utah law authorizes a substantial amount of flexibility in designing ADR processes. Section 78-31b-2(4),(7)-(9). If the program and those involved truly want to empower parties, they should explore allowing the parties to choose ADR options other than mediation and arbitration. This may also help address concerns that some cases are not suited for mediation.

There is a whole continuum of established ADR processes. These include mediation, settlement conferences, early neutral evaluation, mini-trials, summary jury trials, and arbitration. There are also "new" processes such as talking circles, family group conferences and "Michigan mediation" that should be explored as well. Each process gives parties different levels of autonomy and neutral intervention.

If the court system is truly trying to cut back on the amount of litigation in Utah courts by promoting alternative means of resolving disputes, then prophylactic measures should be explored as well. These measures occur at the estate planning stage. Education programs should be developed that inform attorneys and the public about ADR options both before and after a dispute arises. ADR agreements can be incorporated into estate plans, such as the provision in George Washington's will, providing case-specific means of resolving any resulting disputes.

Party Input

The design stage of the program included all stakeholders (judges, attorneys, mediators, and clerks) except those who have the most at stake – the parties. In order to be successful, the program needs to have an understanding of the needs of the parties, not just those who make their career in the law. The low level of client satisfaction indicates that there are some needs that are not being met. At this point we do not know why they are dissatisfied nor do we know what the parties would like to help them through the process. An effort must be made to obtain input from parties who have participated in mediation.

Conclusion

Overall, the Probate ADR Pilot Program has been well designed. In the short time it has been operating, it has seen significant success and shows great promise for the future. However, like

any program designed to meet the needs of society, it must be continually evolving and evaluating itself.

[1] The contents of this article are excerpted from a research paper submitted to the University of Utah College of Law and the Office of Alternative Dispute Resolution. © 2001 Gary L. Schreiner

[2] *See generally,* James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution,* 21 J. Contemp. L., 1995, at 1.

[3] Quoted in Brian C. Hewitt, *Probate Mediation: A Means to an End,* 40-AUG Res Gestae 41 (1996).

[4] James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution,* 21 J. Contemp. L., 1995, at 1, 11.

[5] Id.

[6] The following programs have been established: Court-Annexed ADR, Co-Parenting Mediation, Juvenile Victim-Offender Mediation, Adult Victim-Offender Mediation, Child Welfare Mediation, Landlord-Tenant Mediation, Truancy Mediation, Small Claims Mediation, and Probate Mediation.

[7] Utah Code Ann. § 78-31b-1 *et seq.* (repealed 1994).

[8] Utah Code Ann. § 78-31b-1 *et seq.* (2000).

[9] Utah Code Ann.§ 78-31b-3(1) (2000).

[10] Utah Code Ann. § 78-31b-5(1) (2000).

[11] Utah Code Ann. § 78-31b-5(2)-(3) (2000).

[12] Utah Code Ann. § 78-31b-5(2)-(3) (2000).

[13] UT ST J ADMIN 4-150 statement of applicability.

[14] Interview with Charles Bennett, Blackburn & Stoll, LC, Salt Lake City, Utah (July 12, 2001).

[15] *See,* <http://courtlink.utcourts.gov/mediation/adr_prob.htm> and probate mediation packet.

[16] Utah Code Ann. § 78-31b-3(1) (2000).

[17] Utah Code Ann. § 78-31b-5(1)-(3) (e) (2000) (emphasis added).

[18] Utah Code Ann. § 78-31b-3(2)(b) (2000).

[19] Utah Code Ann. § 78-31b-8 (1),(4),(5) (2000).

[20] Utah Code Ann. § 78-31b-8(2) (2000).

[21] Utah Code Ann. § 78-31b-8(3) (2000).

[22] Utah Code Ann. § 78-31b-8(5) (2000).

[23] The ADR Provider Code of Ethics.

[24] Interview with Michelle Royball, ADR Administrator for the US District Court – District of Utah, Salt Lake City, Utah (April 9, 2001).

[25] *Id.*

[26] Interview with Karin Hobbs, Chief Appellate Mediator, Utah State Court of Appeals, and Kathy Elton, Director Alternative Dispute Resolution Programs, Administrative Office of the Courts, Salt Lake City, Utah (February 7, 2001).

[27] Interview with Hon. William Bohling, Third District Court Judge, Salt Lake City, Utah (March 8, 2001).

[28] *Id;* Bennett, *supra* note 14.

[29] Judge Bohling, *supra* note 27; Hobbs and Elton, *Supra* note 26.

[30] Hobbs and Elton, *supra* note 40.

[31] Bennett, *supra* note 14.

[32] Hobbs and Elton, *supra* note 26.

[33] *Id.*

[34] Royball, *supra* note 24.

[35] Bennett, *supra* note 14.

[36] Royball, *supra* note 24.

[37] Royball, *supra* note 24.

[38] Royball, *supra* note 24.

[39] Judge Bohling, *supra* note 27.

[40] Telephone Interview with Laurie Hart, Callister Nebeker & McCullough, Salt Lake City, Utah (February 21, 2001)

[41] Third District Court, Alternative Dispute Resolution in Probate: A Pilot Program of the Third District Court, Utah (Undated)

[42] *See also,* UT ST J ADMIN Rule 4-510(6)(C)

[43] Los Angeles Times, August 21, 1985

[44] Justice Sandra Day O'Connor, Address at the Dedication Ceremony for the Friends Building of the Western Justice Center Foundation (February 8, 1999).

[45] Judge Bohling, *supra* note 27.

[46] *Id.*

[47] Hart, *supra* note 40.

[48] Hobbs and Elton, *supra* note 26.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Royball, *supra* note 24.

[56] Hobbs and Elton, *supra* note 26.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Even within the legal profession there are still some who do not understand ADR in general and mediation in particular. For example, there is often great confusion about the differences between mediation and arbitration.

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

by Miriam A. Smith

I. INTRODUCTION

In the April issue of the *Utah Bar Journal* we examined the issue of "new uses" of copyright material in cyberspace. This article considers two recent cases on the international aspect of Internet law and one on the circumstances under which Internet Service Providers enjoy immunity in cases of copyright infringement.

II. JURISDICTION

Make mad the guilty, and appall the free,
Confound the ignorant, and amaze indeed
– Hamlet, Act 2, scene 2

Two cases have shaped jurisdiction as it relates to website activity: *Batzel v. Smith*[2] and *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitsme.*[3] In *Batzel* a U.S. District Court exercised jurisdiction over a Dutch web site while the court in *Yahoo!* refused to enforce a French Court's orders which did not meet U.S. constitutional standards.

Batzel v. Smith

Ellen Batzel is an entertainment lawyer who has a number of Jewish clients in California. Bob Smith painted Batzel's North Carolina home and asked her to submit his script to her clients in California. When Batzel refused the request, Smith apparently retaliated by sending an e-mail to the Dutch based museum industry website, MSN, claiming he had worked "in the home of a lawyer who claimed to be the granddaughter of Heinrich Himler and who bragged about having an art collection stolen from Jewish families by the Nazis."[4]

MSN's creator and operator, Tom Cremers, published the e-mail and related updates on five separate occasions without verifying the allegations. Batzel claimed to have been damaged by this publication in that she lost several prominent clients in California and was subjected to an investigation by the North Carolina Bar.

She sued in California. MSN and Cremers challenged the California court's jurisdiction over them.

California as most states allows the exercise of personal jurisdiction so long as due process requirements are met. Due process requires that: (1) a defendant have performed an act, completed a transaction or otherwise availed himself of the privileges of conducting activities in the forum state; (2) the claim must arise out of the forum-related activities; and, (3) the exercise of jurisdiction is reasonable.[5]

MSN and Cremers had sufficient California contacts. Cremers sent his newsletter, via Internet, to California multiple times per week; a number of California businesses and organizations subscribed to Cremers' newsletter; Cremers republished articles from various California newspapers; and Cremers had traveled to California where he solicited subscribers for the MSN newsletter, promoted the MSN website and sought corporate sponsors.[6]

The court also found that Batzel's claim arose out of forum-related activities. The newsletter was published in California and read by California residents who, due to the false statements in the newsletter, ceased doing business with Batzel.[7]

And finally, California's exercise of jurisdiction over the Dutch website and its creator and operator was held to be reasonable.

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California courts look at seven factors to determine reasonableness of the exercise of jurisdiction.[8] Key to the court's analysis on this point was the fact that Cremers had interjected himself into the Los Angeles art world. He had retained a prestigious Los Angeles firm to represent him and could communicate with counsel via the Internet without leaving Holland. The court also noted that the MSN website is written in English, not Dutch, and that no "viable, alternative" forum in which to resolve this dispute existed.[9]

Related to the question of jurisdiction is the issue of forum *non conveniens.* This issue is a discretionary matter with the court who considers the availability of an alternate forum and then weighs private and public factors. Private factors include: where the parties reside, how convenient is the forum to the litigants, access to evidence, the availability of witnesses, cost, the enforceability of a judgment and other factors to make the trial of a case "easy, expeditious and inexpensive."[10]

Public factors include: local interest in the matter, the court's familiarity with governing law; the burden on the courts and juries, court congestion and cost to the forum.[11]

Given the application of California law to the case, MSN's and Cremers' contacts with California, and the fact that much of the alleged injury took place in California, the court reasoned that California had the greatest interest in resolving the dispute and refused to dismiss on forum non conveniens grounds.[12]

Application of Utah Long-Arm Law

If *Batzel* had taken place in Utah rather than in California and Utah's long-arm statute were applied, the same finding of personal jurisdiction over the defendants would result.

Section 78-27-24 of the Utah Code grants jurisdiction where one causes "any injury within this state whether tortious or by breach of warranty." The Utah Supreme Court has held like California that "the Utah long-arm statute 'must be extended to the fullest extent allowed by due process of law.'"[13]

Though slight semantic difference exists between California and Utah courts' consideration of personal jurisdiction, both states employ the same general factors: whether defendants acted or caused injury within the state;[14] that defendants have sufficient contacts with the forum state as measured by the relationship between the forum-related activities and the harm alleged by defendants; and that the exercise of personal jurisdiction over the defendants accords with the requirements of due process in that it was reasonable.[15] Both Utah and California courts exercise personal jurisdiction to the "fullest extent allowed by due process of law."[16]

The ability of the law to reach as far as necessary, even across oceans, is bound the make the guilty very mad indeed.

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme

At issue in the *Yahoo!* case was "whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation."[17] The short answer – no, it is not.

Yahoo!, as an Internet Service Provider, offers various services and websites accessible around the world. One of the services offered is an auction site. Unfortunately for Yahoo!, parties using the Yahoo! auction site offered for sale Nazi and Third Reich related goods which violated French law. *Le Ligue Contre Le Racisme et L'Antisemitisme* (LLCRA) brought a civil complaint against Yahoo! in a French court, the Tribunal de Grande Instance de Paris. The French court ultimately entered an order directing Yahoo! to block French citizens' access to any material that violated French law.[18]

Although Yahoo! made efforts to comply with the French court order, they sought declaratory relief in the United States District Court as to the enforceability of the French court order on the ground that it is technologically impossible to prevent French citizens from accessing the Nazi-related items and that such a ban would infringe on Yahoo!'s rights under the First Amendment to the United States Constitution.[19]

While the parties did not contend that the French court order went beyond what any U.S. court would be constitutionally permitted to do the Court recognized the Constitutional problems in enforcing the French Court's Order:

> The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. [Citation omitted.] The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling

> governmental interest, such as averting a clear and present danger of imminent violence. [Citations omitted.] In addition, the French Court's mandate that Yahoo! "take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes" is far too general and imprecise to survive the strict scrutiny required by the First Amendment. The phrase, "and any other site or service that may be construed as an apology for Nazism or a contesting of Nazi crimes" fails to provide Yahoo! with a sufficiently definite warning as to what is proscribed. [Citation omitted.] Phrases such as "all necessary measures" and "render impossible" instruct Yahoo! to undertake efforts that will impermissibly chill and perhaps even censor protected speech. [Citations omitted.] "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[20]

LLCRA argued that there was no real or immediate threat to Yahoo! as the French court order could not be enforced until a penalty had been fixed by the French court. The district court noted that the French court order is valid under French law, that a penalty could be assessed retroactively and that assurances that the French court order would not be enforced did not bar its enforcement in the future.[21]

Neither the principles of abstention, an appropriate remedy for international forum-shopping, nor comity, the general recognition by the U.S. of foreign judgments and decree, could overcome the court's determination that the French court order violated First Amendment rights. "Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders."[22]

Given the fact "that the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet,"[23] the court did not consider the issue of whether it was technologically possible to comply with the French court order.

State law was not relevant in determining the enforceability of the French court order at issue in *Yahoo!.* The United States District Court for the District of Utah would have undoubtedly reached the same conclusion as the U.S. District Court for the Northern District of California.

III. LIABILITY

> *The purest treasure mortal time afford*
> *Is spotless reputation-*
> *RICHARD THE SECOND, Act 1, scene 1*

Congress enacted the Digital Millennium Copyright Act ("DMCA") in 1998 to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education."[24] Among other things, the DMCA grants copyright infringement immunity, perhaps the equivalent to Shakespearean "spotless reputation," to Internet Service Providers ("ISP") if certain requirements are met.

These conditions, set out in the Online Copyright Infringement Liability Limitation Act (now 17 U.S.C. § 512), are that the ISP not have actual or constructive knowledge of the infringement; that it not receive a direct financial benefit from the infringing activity; and, that it act promptly to remove, or prevent access to, the infringing material once it has received notice of the infringement.

The body of law interpreting this "safe harbor" of the DMCA received a major infusion from several recent decisions, one of which is discussed here.[25]

Hendrickson v. eBay, Inc.

Robert Hendrickson, the copyright owner of the documentary "Manson" sent eBay a "cease and desist" letter claiming that pirated copies of "Manson" were being offered for sale in DVD format on eBay. eBay promptly responded to Hendrickson's letter by requesting detailed information as to his claim. Hendrickson was also advised as to eBay's procedures for infringement notification and rights protection. Unfortunately for Mr. Hendrickson, he did not comply with eBay's requests or procedures. Instead he filed three different lawsuits against eBay and various other individual defendants.[26]

The actions were consolidated and eBay brought a motion for summary judgment. A key issue in the determination of the motion was the application of the safe harbor provisions of the DMCA.

Under these safe harbor provisions, proper notification to the ISP regarding the infringement is essential. The DMCA even specifies the elements of proper notification.[27]

Without substantial compliance with these elements of notice, the ISP does not have a duty to act. The court found that Hendrickson failed to substantially comply with the notice provisions. Absent from Hendrickson's communications with eBay was the necessary statement attesting to good faith of the complaining party and the accuracy of the claim made. Hendrickson also failed to adequately identify the offending material.[28]

The court went on to consider whether eBay had actual or constructive notice of the infringing activity. Again, Hendrickson's claims failed. "Under the DMCA, a notification from a copyright owner that fails to comply substantially with Sections 512(c)(3)(A)(ii), (iii) or (iv) "shall not be considered under [the first prong of the safe harbor test] in determining whether a service provider has actual knowledge or is aware of the facts or circumstances from which infringing activity is apparent."[29]

Last but not least in the court's application of the safe harbor of the DMCA was whether eBay received a direct financial benefit from the infringement and whether it had the right and ability to control the infringing activity.[30] The court did not consider whether eBay received a financial benefit in light of its determination that eBay did not have the right or ability to control the infringing activity.

The fact that an ISP has the ability to "remove or block access to materials posted on its system when it receives notice of claimed infringement" does not constitute the "right and ability to control."[31] An ISP is required to remove and block access to infringing materials. "Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA."[32]

Limited monitoring of a website likewise does not establish an ISP's "right and ability to control" the infringement. The court looked to the DMCA's legislative history which supports voluntary efforts to combat piracy.

> This legislation is not intended to discourage the service provider from monitoring its service for infringing material. Courts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program.
>
> House Report 105-796 at 73 (Oct. 8, 1998).[33]

Given the federal nature of the Digital Millennium Copyright Act, state law is not at issue.

IV. Summary and Conclusion.

Though these cases are not comprehensive of the many developments regarding jurisdiction and liability in Cyberlaw in 2001, they are illustrative. One court's decision to assert jurisdiction over defendants in the Netherlands while another court refused to enforce of a French court order were consistent – both courts aptly applied established principles of jurisdiction and constitutional law to this new medium of the Internet. The interpretation of the recently-enacted Online Copyright Infringement Liability Limitation Act of the Digital Millennium Copyright Act was a matter of first impression.

A final article in a future issue of the *Utah Bar Journal* will examine recent cases and laws affecting online music.

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

[2] 2001 U.S. Dist. LEXIS 8929 (C.D. Cal. June 5, 2001).

[3] 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

[4] *Batzel,* 2001 U.S. Dist. LEXIS at *2-3.

[5] *Id.* at *4-5.

[6] *Id.* at *5-6.

[7] *Id.* at *9-10.

[8] (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum. *Id.* at *10-11.

[9] *Id.* at *10-12.

[10] *Id.* at *13-15.

[11] *Id.* at *17.

[12] *Id.* at *17-18.

[13] *Starways v. Curry,* 980 P.2d 204, 206 (Utah 1999) quoting *Synergetics v. Marathon Ranching Co. Ltd.,* 701 P.2d 1106, 1110 (Utah 1985).

[14] California looks for "contacts with California [that] evince an intent to purposefully avail themselves of the benefits and privileges of conducting business in California" *Batzel,* 2001 U.S. Dist. LEXIS at *5. Utah has enumerated 7 acts, ranging from transacting business in the state to committing sexual intercourse, that submit one to jurisdiction in Utah. Utah Code Ann. § 78-27-24 (1996).

[15] *Starways v. Curry,* 980 P.2d 204, 207 (Utah 1999).

[16] *Id.* at 206.

[17] *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 145 F. Supp. 2d at 1186 (N.D. Cal. 2001).

[18] *Id.* at 1184-85.

[19] *Id.* at 1185-86.

[20] *Id.* at 1189.

[21] *Id.* at 1190-91.

[22] *Id.* at 1192.

[23] *Id.* at 1194.

[24] S. Rep. No. 105-190, at 1, 105th Congress, 2d Session 1998.

[25] Another case decided under the safe harbor provisions of the DMCA was *CoStar Group, Inc. v. LoopNet, Inc.,* 164 F. Supp. 2d 688, 693 (MD. 2001). CoStar Group operates a commercial real estate database and provides national commercial real estate information services. LoopNet allows users to post commercial real estate listings. CoStar sued as it claimed that many of the photographs posted on LoopNet's site were infringements of Costar's copyrighted photographs. The Maryland federal court's analysis of the DMCA safe harbor provisions in granting LoopNet immunity were in harmony with the analysis of the California federal court.

[26] *Hendrickson v. eBay, Inc.,* 165 F. Supp. 2d 1082, 1084-85, (C.D. Cal. 2001).

[27] To wit:

> (1) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
>
> (2) identification of the copyrighted work claimed to have been infringed;
>
> (3) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material;
>
> (4) information reasonably sufficient to permit the service provider to contact the complaining party;
>
> (5) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
>
> (6) a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner.

17 U.S.C. § 512(c)(3).

[28] *Hendrickson,* 165 F. Supp. 2d at 1090.

[29] *Id.* at 1092-93.

[30] *Id.* at 1093.

[31] *Id.*

[32] *Id.* at 1093-94.

[33] *Id.* at 1094.

Commission Highlights

During its regularly scheduled meeting of April 26, 2002, which was held in Farmington, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Randy Dryer reported to the Commission on the Utah Bar Foundation's involvement with the "and Justice for All" Foundation and the recent acquisition of a new building. He requested an additional $40,000 donation towards payment for the new facility. The Commission approved the donation with a mechanism for members to "opt-out" from their pro-rata share of Bar dues.
2. Scott Daniels reported that the Utah Supreme Court had denied the Bar's petition to authorize multidisciplinary practice ("MDP") by modifying the Rules of Professional Conduct.
3. John Adams introduced the "Dialogue On Freedom" program. This project is an ABA generated activity endorsed by Justice Kennedy of the U.S. Supreme Court. It encourages local lawyers, civic leaders, judges, legislators and others to join together and visit junior and senior high schools to discuss aspects of our democratic system of government. Plans are in the works so that the program can be conducted the week of September 11th.
4. Rusty Vetter, Co-chair of the Admissions Committee explained the Committee's proposal to adopt a Multistate Performance Test ("MTP") component for the Bar examination. He also gave an update report on Multi-Jurisdictional Practice (MJP).
5. John Baldwin reviewed Casemaker, an internet-based legal resource engine which purports to be effective and useful approximately 90% of the time for approximately 90% of the routine legal research lawyers need. The Commission voted to set up a study committee on this issue.
6. John Adams and D'Arcy Dixon Pignanelli reviewed the Bar's lobbying initiative with a focus on strengthening the Bar's relationship with the Utah Legislature. It was suggested that Richard Dibblee and John Baldwin make increased and concerted efforts to become more involved with legislators. The advantage of having John and Richard register as lobbyists is that in their roles of staff, they will provide more long-term consistency.

* * *

During its regularly scheduled meeting of May 31, 2002, which was held in Park City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. After review of applications and discussion, the Commission reappointed Charles R. Brown to a second term as the Bar's representative to the American Bar Association House of Delegates.
2. Scott Daniels reviewed appointments to the Judicial Nomination Commissions. Terms will expire in July for the first, second, third and fourth districts.
3. Scott Daniels indicated that the Executive Committee would make an appointment to a group study of the ABA Model Rules of Professional Conduct at the request of the Oregon State Bar.
4. The Commission engaged in lengthy discussion of the issue where the Board of District Court Judges declined to implement legislation requiring gun lockers to be placed in the various courthouses throughout the state as well as the Judicial Council's actions to permit the actions by rule. The Commission decided to appoint a committee to draft a more specific position and that the position would be approved by the Commission and then presented at the Annual Convention meeting for further discussion. Nanci Bockelie was appointed to head the group and to provide a written statement within 14 days.
5. John Baldwin reviewed the April financials and the 2002-03 budget. The Commission approved the budget as discussed.
6. The Commission reviewed Utah Dispute Resolution's request for $20,000. After discussion, the Commission voted to approve a grant of $20,000.
7. John Adams reviewed the status of the Dialogue On Freedom program, indicating that he, John Baldwin, Scott Daniels, Richard Dibblee and Elaina Maragakis had visited with the Senate and House Democratic and Republican caucuses, that he and John Baldwin and Scott Daniels had visited with Governor Leavitt and that he and John Baldwin had visited with the Board of Education social studies specialist. All of those groups had indicated their very strong interest in participating in the program, providing volunteers and facilitating classsroom opportunities.
8. Scott Daniels reviewed the "Casemaker" legal research consortium and suggested appointments for the study committee.
9. The Commission reviewed nominations for various Bar awards to be presented at the Annual Convention. The Commission

selected Brent Hogan as Lawyer of The Year; the Honorable Stephen H. Anderson and Honorable Jeril B. Wilson as Judges of the Year; the Character and Fitness Committee as the Committee of the Year; the Young Lawyers Division as the Section of the Year; Waine Riches as the Pro Bono Lawyer of the Year; and Sylvia Bennion as the Community Member of the Year. The Commission selected Kent B. Scott to receive the Distinguished Service Award and Representatives Afton B. Bradshaw and A. Lamont Tyler to receive Distinguished Public Service Awards.

10. David Hamilton reviewed disbursements requests from the Client Security Fund. After discussion, the Commission voted to approve recommendations to pay out $8,260.00 to claimants.

11. Chief Justice Christine M. Durham indicated that regular meetings between the Bar's Executive Director and President would be helpful to the Court.

12. Rusty Vetter proposed a timetable for implementation of the Multi-State Performance Test ("MPT"). The Commission voted to authorize the Admissions staff to proceed immediately with notification of all possible February Bar Exam applicants. The Commission also approved the immediate filing of a petition with the Supreme Court for authorization to substitute two MPT questions for four state essay questions and if approved by the Supreme Court by October 31, 2002, to implement the change for the February 2003 exam.

13. The Commission voted to organize focus groups with appropriate representatives of special interest groups who might be considered to represent the middle class in determining what the need for legal services might be and how those services might be better provided.

* * *

During its regularly scheduled meeting of June 26, 2002 which was held in Sun Valley, Idaho, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Scott Daniels reviewed the times and dates for various scheduled events during the Annual Convention.

2. In light of observations about the recent gun-related developments between the Utah Legislature and the Judiciary, and the recent discussion at the Judicial Council's Management Committee meeting, the Commission decided to first consult Chief Justice Durham before taking any action relating to gun safety on courthouse premises.

3. The Commission can submit names of lawyers to the Utah Supreme Court to be considerated for appointment to the Judicial Conduct Commission. The Bar Commission voted to submit the names of Dane Nolan, David Bird and Nate Alder.

4. The Commission voted to approve appointment of Stephen E.W. Hale, Catherine F. Lundgren and Michael D. Zimmerman to the Utah Legal Services Board.

5. It was noted that the *Deseret News* had published a recent article stating that the $100,000 legislative grant to the "and Justice for All" foundation was in jeopardy.

6. The Commission passed a motion requesting a petition be filed with the Utah Supreme Court to allow the President as well as the President-elect of the Bar to have the right to vote generally even if they are no longer an elected Commissioner at the time of assuming office.

7. Charles R. Brown and Rusty Vetter discussed the proposed Multijurisdictional Practice Admission Rule (MJP). The Commission voted to approve the rule and a petition will be filed with the court.

8. Gus Chin led the discussion on the AOC's recent request that the Bar contribute approximately $1,700 to cover programming and printing costs related to the notices on the availability of court interpreters. After discussion, the Commission voted to contribute the $1,700 for the program.

9. Debra Moore led the discussion on the Delivery of Legal Services Ad Hoc committee report. The Commission passed a number of preliminary proposals to move forward on this worthwhile project.

10. John Adams gave an update on the "Dialogue on Freedom" project to take place the week of September 11th. Highlights so far include (a) over 70% of legislators have agreed to participate; (b) Governor Leavitt has committed 100 people from the executive branch of government to participate; and (c) the judiciary, including Chief Justice Christine Durham and Presiding Judge Dee Benson, have pledged their enthusiastic support.

11. The Commission approved appointments to the Executive Committee as follows: Debra More (as President-elect), Dane Nolan, George Daines and Randy Kester.

12. Rusty Vetter and Steve Owen were welcomed as new Commissioners. Charles Brown will serve as the Bar Commission's ABA representative, Paul Moxley as the ABA elected representative, Clayton Sims will represent the Utah Minority Bar, Vicky Fitlow will represent the Young Lawyers Division, Lauren Barros will represent Women Lawyers of Utah, Marilu Peterson will represent the Legal Assistants Division and Scott Daniels will serve as past President.

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

Judicial Nominating Commission Applicants Sought

The Bar Commission is seeking applications from Bar members to serve on the trial court judicial nominating commissions for the 1st, 2nd, 3rd and 4th judicial districts. Two commissioners on each trial court judicial nominating commission will be appointed by the governor from lists provided by the Bar, with the Bar submitting four nominees from the 1st district and six nominees from the 2nd, 3rd and 4th districts.

Commissioners appointed to the trial court nominating commissions shall be residents of the judicial district to be served by the commission to which they are appointed. Not more than four commissioners on each judicial nominating commission may be of the same political party. The trial court nominating commissions nominate judges to the various districts and juvenile courts. Commissioners are appointed for terms of four years.

Mail applications to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail to john.baldwin@utahbar.org. Applications must include political party affiliation or independence. Applications must be received by September 15, 2002.

Notice of Petition for Readmission to the Utah State Bar by David R. Maddox

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Readmission ("Petition") filed by David R. Maddox in *In re Maddox,* Third Judicial District Court, Civil No. 950906967BD. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Proposed Changes to Bar's Bylaws and Rules for Integration and Management

The Utah State Bar Board of Commissioners voted June 26, 2002 to modify the Bar's Bylaws for approval by the Utah Supreme Court. The change would allow a President or President-elect who is no longer serving a term to vote on all matters before the Commission. The current Bylaws allow a President who is not an elected Commissioner or a President-elect who is not an elected Commissioner and who is acting in the President's absence to vote only if necessary to break a tie. The intent of the proposed amendment is to allow broader representation of the total lawyer population by these two individuals who have undergone a popular election pursuant to the Court's February 2001 order to modify the Commission election procedures.

If you have comments about the proposed change within the next 30 days, please contact the Bar by e-mail sent to: comments@utahbar.org or by fax (801-531-0660) or by mail (645 South 200 East, Salt Lake City, UT 84111) to the attention of General Counsel. Thank you.

Bar Sharks for Justice

Pool Tournament
October 10th, 17th & 24th, 2002
Thursdays from 5:30 – 7:30 pm

Dead Goat Saloon
119 South West Temple (back), SLC
A Private Club for Members

Prizes for top-placing teams,
as well as for best cheering section.

Food provided by Blue Iguana.

All proceeds benefit
"and Justice for all"

For further information:
(801) 257-5519

www.utahbar.org/news/index

ANNOUNCEMENT

Grants available for nonprofit providers of direct civil legal services to disadvantaged individuals & families in Utah. For further information, contact: "and Justice for all" (801) 257-5519.

BRIGHAM YOUNG UNIVERSITY
J. REUBEN CLARK LAW SCHOOL

is pleased to present

Rex E. Lee Conference on the Office of the Solicitor General of the United States

On SEPTEMBER 12 and 13, 2002, on the campus of Brigham Young University,
The Honorable Theodore B. Olsen, Solicitor General of the United States,
will be joined by past Solicitors General:

Seth Waxman • Walter Dellinger • Drew Days • Kenneth Starr • Charles Fried

In addition, a number of distinguished attorneys who once worked in the office of the Solicitor General will participate, including: Andrew Frey, John Garvey, Michael McConnell, Maureen Mahoney, John Roberts, and Richard Wilkins.

You are invited to join us for a series of panel discussions on key cases and major issues they confronted during their terms, and the history and purposes of the Office of the Solicitor General.

The Honorable Theodore M. Olson, Solicitor General of the United States, will speak at the Conference Dinner at 7:00 pm, Thursday, September 12, 2002.

View the full conference schedule at: www.law2.byu.edu/SolicitorConference.htm.

Registration Information:

• CLE credit for Utah and California Bars – 8 hours
• Registration Fee: $100
• Registration Deadline: September 3, 2002 *(Limited Space Available)*
• Phone: 801.422.5677
• Fax: 801.422.0401
• Email: befusj@lawgate.byu.edu
• Download a registration form at: www.law2.byu.edu/SolicitorConference.htm

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 01-06A, – amending Opinion No. 01-06, previously issued on July 2, 2001

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

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

Opinion No. 02-06

Issue: May an attorney represent a client in a criminal matter where the attorney will have to cross-examine as an adverse witness a former client whom the attorney previously represented in an unrelated matter?

Opinion: In general, an attorney may represent a client in a criminal case where the attorney will have to cross-examine a former client whose interests are adverse to the defendant as long as the representations of the present and former clients are not substantially factually related and the attorney does not disclose or use any confidential information gained in the course of the former client's representation to his disadvantage, as provided by Rule 1.9.

Ethics Opinions Available

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

Ethics Opinions Order Form

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

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Please allow 2-3 weeks for delivery.

Discipline Corner

DISBARMENT

On May 24, 2002, the Honorable Douglas Cornaby, Eighth Judicial District Court, entered Findings of Fact, Conclusions of Law and Judgment of Disbarment disbarring Alan Williams from the practice of law for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 3.3(a) (Candor Toward the Tribunal), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a), (c) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, Williams represented a client in the Utah Court of Appeals. Williams failed to file a brief by the deadline, despite being given an extension. The Utah Court of Appeals ordered Williams to file a brief or motion for extension. Williams failed to do so and his inaction was treated as a contempt of court. Williams later misrepresented to the Utah Court of Appeals that he had completed and mailed a brief to the court and opposing counsel. The Utah Court of Appeals also found that Williams had been discharged for rendering ineffective assistance in various other matters.

In another matter, Williams represented a client in a civil rights matter. Williams failed to communicate with his client, did not perform any meaningful legal services on the client's behalf, and allowed the statute of limitations to run on the case. Williams thereafter failed to cooperate with the Office of Professional Conduct in its investigation of the complaint.

Aggravating factors include: obstruction of the disciplinary proceedings.

DISBARMENT

On May 9, 2002, the Honorable Roger A. Livingston, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Judgment of Disbarment disbarring Jose Luis Trujillo from the practice of law for violation of Rule 1.1 (Competence), 1.4(a) (Communication), 1.5(a) (Fees), 1.7(b) (Conflict of Interest: General Rule), 1.15(b) and (c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a), (b), (c) and (d) (Misconduct).

In summary:
In representing four clients, Trujillo filed incorrect papers, failed to communicate with clients, charged nonrefundable fees, failed to return unearned fees, represented a client with whom he had a business interest, comingled trust funds with general funds to avoid an Internal Revenue Service levy, misappropriated client funds, failed to understand the posture of a case involving bail money, failed to return bail money, initiated an immigration proceeding although it was without merit, and failed to respond, or delayed responding, to the Office of Professional Conduct's requests for information.

SUSPENSION

On February 28, 2002, the Honorable Ernest W. Jones, Second Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Suspension suspending Frank A. Berardi from the practice of law for two years for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 5.4(a) and (b) (Professional Independence of a Lawyer), 5.5 (Unauthorized Practice of Law), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct while representing seven different clients. The Order of Suspension effective date is May 29, 2002.

In summary:
While representing some of the clients, Berardi failed to act with reasonable diligence and promptness, failed to keep clients reasonably informed about their matters, failed to attend court hearings, and failed to promptly comply with reasonable requests for information. In six of the matters, Berardi permitted his paralegal to solicit and advise clients, allowed the paralegal to accept money for the paralegal's legal services, failed to ensure that the money collected by the paralegal was kept in accordance with Rule 1.15 of the Rules of Professional Conduct, and entered into a partnership and shared legal fees with the paralegal. Berardi also failed to respond to the Office of Professional Conduct's requests for information in most of the matters, did not return a client's file for some time after his services were terminated, and failed to refund the unused portion of a retainer fee.

Mitigating factors include: inexperience in the practice of law and good character or reputation.

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

rectify the consequences of the misconduct involved.

The matter is on appeal to the Utah Supreme Court.

ADMONITION

On April 24, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney's firm represented a client in a wrongful termination matter. The client worked with one of the attorney's associates. The associate terminated employment with the firm and communication from the firm to the client ceased. The client requested an itemized bill from the firm. The firm failed to send the client an itemized bill or return the client's telephone calls. The attorney failed to respond in writing to the Office of Professional Conduct's requests for information.

ADMONITION

On April 24, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The Office of Professional Conduct ("OPC") notified the attorney of its investigation of allegations against the attorney and requested that the attorney provide a written response. The attorney failed to respond in writing to the OPC's requests for information.

ADMONITION

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

In summary:
The attorney's firm represented the client in a sexual harassment matter. The client worked with one of the firm's associates. The associate terminated employment with the firm and the client elected to move her case with the associate. The client terminated the firm's representation and requested a refund of the unearned portion of the retainer. The attorney failed to respond to the client's requests for a refund.

ADMONITION

On May 1, 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(b) (Fees), 1.15(a) and (b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to represent the client's brother in an immigration matter. The attorney failed to enter into a written fee agreement with the client. The attorney also failed to keep a complete accounting of the retainer and failed to render a full accounting upon the client's request.

ADMONITION

On May 6, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15 (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney failed to maintain regular office hours, failed to perform work outside of the courtroom, failed to keep two appointments, and failed to attend two court hearings. The attorney failed to keep clients informed of the status of their cases and failed to return telephone calls. The attorney also failed to hold a law firm trust account.

ADMONITION

On May 6, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3(a) and (b) (Diligence), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented a client in a divorce action. The attorney failed to file a timely response to a Motion for Summary Judgment; the attorney filed it on the day of the hearing. The attorney also failed to obtain necessary accounting documents for trial, and failed to enter into a written fee agreement with the client.

ADMONITION

On May 7, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.8 (Conflict of Interest: Prohibited Transactions) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented a client in a personal injury auto accident case. The attorney filed an attorney fees lien against the client. The attorney contracted with the client agreeing to release the

attorney lien in exchange for withdrawal of the client's Bar complaint. The attorney did not advise the client to seek the advice of independent counsel in the transaction.

ADMONITION

On May 7, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence), 1.8(a)(2) (Conflict of Interest: Prohibited Transactions), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to represent the complainants' adult child in a criminal matter. The attorney failed to protect the adult child's interests by failing to attend a hearing and failing to request the adult child's release on bail. The attorney contracted with the complainants agreeing to pay money in exchange for withdrawal of their Bar complaint and did not advise the complainants to seek the advice of independent counsel in the transaction.

ADMONITION

On May 7, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented the client in a personal injury case. The attorney did not return the client's telephone calls or otherwise keep the client informed about the case for a period of time. The attorney failed to timely respond in writing to the Office of Professional Conduct's requests for information.

ADMONITION

On May 7, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented the client in an immigration matter. The attorney was instructed to file an appeal to the Board of Immigration Appeals, but failed to timely file it. The Board of Immigration

Appeals granted the client's motion to reopen the matter based upon the attorney's ineffective assistance of counsel.

Mitigating factors include: absence of prior record of discipline; disclosure to client and cooperation with the Office of Professional Conduct during its investigation of this matter.

ADMONITION

On May 20, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violations of Rules 1.3 (Diligence), 1.4 (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to represent the complainant's adult children in a child custody case, a divorce case, and a criminal matter. The attorney was also hired to represent the complainant's other adult child in a child custody matter. The attorney failed to attend a juvenile court review hearing and failed to timely attend another juvenile court review hearing to represent one adult child. The attorney failed to send the other adult child a copy of the divorce decree and failed to inform that Christmas visitation had not been included in the decree, although it had been previously stipulated to by the parties.

Mitigating factors include: absence of prior record of discipline and timely good faith effort to rectify the consequences of the misconduct involved.

ADMONITION

On May 20, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented a client in an alimony matter. The client's ex-spouse listed the alimony on a Chapter 13 bankruptcy; the client instructed the attorney to file a proof of claim. The attorney did not file a proof of claim. The attorney sent the client a billing statement, although no work had been done. When the client did not pay the bill, the attorney discontinued representation without informing the client.

ADMONITION

On June 3, 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(b) (Fees) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented the client in a child visitation matter in which it was reasonably foreseeable that the total attorney's fees would exceed $750. The attorney failed to enter into a written fee agreement with the client and failed to communicate the basis or rate of the fee in writing before or within a reasonable time.

Mitigating factors include: cooperation with the Office of Professional Conduct.

ADMONITION

On June 3, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented the client in a debt collection matter. The attorney told the client not to appear at the court hearing and that the attorney would appear on behalf of the client. The attorney did not appear at the court hearing.

ADMONITION

On July 3, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney represented the client in a criminal matter. The court sent the attorney a notice of pretrial hearing. The prosecutor filed a motion to continue the trial but the court did not issue a ruling prior to the pretrial hearing. The prosecutor and client were present for pretrial, but the attorney failed to attend. The attorney had not contacted the court to inform it of the attorney's absence. The court reset the hearing and telephoned the attorney and sent the attorney written notice of the new pretrial date. The prosecutor and client were present for the new pretrial hearing, but the attorney failed to attend and failed to inform the court of a conflict in the attorney's schedule or file a motion to continue it.

Notice of Disbarment

The Utah Supreme Court on December 18, 2001, affirmed a Judgment of Disbarment entered by the Third Judicial District Court against Jamis M. Johnson. Johnson's wind-down period has concluded, and the disbarment is now in effect.

New Directors for the Legal Assistant Division

by Marilu Peterson, Chair

At its annual meeting on June 7, 2002, the Legal Assistant Division elected and installed its new officers for 2002-2003. As I considered the topic for my first article here, I realized the importance of introducing you to the leadership of the Division. Then, as I contacted each of them to gather the information for this article, I was amazed at the extent of their experience, professionalism and dedication. These are our leaders for the coming year.

Denise Adkins (Region I Director) – Serving her first term as the Division's first director for Region I (Box Elder, Cache, Rich, Morgan, Davis and Weber Counties), Denise is from Ogden where she has worked for 8-1/2 years for Ted Godfrey, Esq., whose practice area is collections. Denise will be working to develop CLE opportunities for our members in her Region.

Bonnie Hamp, CLA (Region II Director) – Bonnie began her legal career in 1978 and works with Fred Silvester, Dennis Conroy and Spence Siebers at the law firm of Silvester & Conroy which specializes in civil litigation involving corporate, business and employment matters, and personal injury as a result of medical malpractice, auto and mining accidents, oil field disasters, explosions and fires. Bonnie achieved her CLA credential in 2001 and currently serves as the NALA Liaison for the Legal Assistants Association of Utah. Bonnie will represent Region II (Salt Lake, Tooele and Summit Counties) and will be the Division's Secretary. In addition, she also serves as a member of the Unauthorized Practice of Law Committee for the Utah State Bar.

Suzanne Potts – Suzanne will represent the membership of Region IV (Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron and Washington Counties). With a total of 16 years of legal experience, Suzanne has been with Jones, Waldo, Holbrook & McDonough in its St. George office for five years where she works with Michael Shaw in family law. Suzanne is also the Southern Region Director for LAAU, and serves as a family law mediator and as a volunteer mediator for the Fifth District Juvenile Court Restorative Justice Program. Suzanne will coordinate our Ethics Committee.

Ann (Streadbeck) Bubert – Ann will be serving a second term as Director at Large for the Division. Ann has 8-1/2 years of experience in the legal field and is employed by Armstrong Law Offices (Brent Armstrong, Steven Paul and Matthew Hess) whose practice emphasis is corporate work, probate, tax and estate planning. Ann was previously the Chair of the Division for 2000-2001, is the immediate Past Bar Commission Liaison, and has been the Division's Secretary and Education Chair. In addition, Ann has served as a member of the Bar Journal and Unauthorized Practice of Law Committees for the Bar. Ann will coordinate our Brown Bag CLE.

Tally Burke – Newly elected as Director at Large, Tally works with Jim Kruse, Kevin Timken and Theodore Grannatt at Kruse, Landa & Maycock in corporate and securities law. Tally currently serves as Second Vice President (Education) for LAAU and was formerly the Education Chair and Secretary of that organization. Tally will chair the Long-range Planning Committee.

Deb Calegory – Deb served as Chair of the Division for 2001-2002 and represented Region IV as a Director of the Division from 1998-2001. She brings over 20 years of legal experience to her newly elected position as Director at Large. She is employed at Snow Nuffer in St. George where she works in the areas of real property, litigation and business. Deb also served as Education Chair and Southern Region Director for LAAU. Deb will serve as our Parliamentarian.

Shawnah Dennett – Our third Director from the St. George area, Shawnah is employed by Clifford V. Dunn in the areas of tax and estate planning, business structuring and litigation. With a total of 15 years in the legal profession, Shawnah is beginning her first term as a Director of the Division and will coordinate the outreach activities and work on developing CLE opportunities for our members in her Region.

J. Robyn Dotterer, CLA – Returning to complete her unexpired term this year, Robyn worked with Dunn & Dunn for 11 years prior to her present position at Strong & Hanni where she works with Paul Belnap in the areas of insurance defense and bad faith litigation. Robyn achieved CLA status in 1994 and is a Past President of LAAU. She will chair our Utilization Committee.

Sanda Kirkham, CLA – The Division's first Bar Commission Liaison, Sanda achieved her CLA credential in 1998. Sanda has been in the legal field for 15 years with the last two at Strong & Hanni where she works with Bob Janicki and Stewart Schultz in the areas of insurance defense and construction law litigation. Sanda also served as the Bar Liaison for LAAU, and, most recently was a member of the Bar's annual and mid-year meeting committees. Also completing her unexpired term, Sanda will serve as our Professional Standards Chair.

Thora Searle – Recently elected to a second term as Director at Large, Thora is secretary to U.S. Bankruptcy Court Judge William Thurman. Prior to that, Thora was Mr. Thurman's paralegal for over 20 years while they were with McKay, Burton & Thurman. Thora has served the Division as its Parliamentarian, Elections Chair and Secretary. This year, Thora will coordinate an ad hoc Policies and Benefits Committee.

Marilu Peterson, CLA-S – Prior to assuming my current position as Chair of the Division, I served both the Division and LAAU in a variety of positions including NALA Liaison, Treasurer, Education Chair and President (LAAU), and Marketing, Membership and Professional Standards (LAD). I have served on the Bar's annual and mid-year meeting committees and as a member of the Unauthorized Practice of Law Committee. In addition, I have been a member of the National Certifying Board for Legal Assistants and I am currently a member of the CLA Specialty Task Force for the National Association of Legal Assistants. I achieved the CLA credential in 1987 and CLA-S status in 1992. As for legal experience, let's just say I have worked with Kay Lewis for a long, long time in the areas of civil litigation, commercial, business and corporate structure and planning, and real estate transactions and foreclosures.

These are the people who will lead the Division for the coming year. All of the contact information for any of us may be found on the website. It's promising to be a great year.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
9/19/02	**NLCLE: Family Law – The Nuts and Bolts of Paternity Testing.** 5:30 pm – 8:30 pm, $45 YLD, $60 others.	3 CLE/NLCLE
10/4 & 5/02	**Trial Academy 2002.** TBA	12 CLE/NLCLE
10/9/02	**Private Property for the Public Good.** Ogden, Eccles Center.	*
10/17/02	**NLCLE: Real Property.** 5:30 pm – 8:30 pm. $45 YLD, $60 others.	3 CLE/NLCLE
10/25/02	**Annual Government Law Seminar:** The Canyons, Park City, Utah	CLE
11/1/02	**New Lawyer Mandatory.** 8:30 am – noon. $45 per person, pre-registration recommended.	Satisfies New Lawyer Requirement
11/8/02	**CLE'n Golf.** St George, Utah – Sunbrook Golf Course. Litigation related issues from the Enron / WorldCom fallout. Document perservation, document retention policy issues, financial statement fraud and officer and director malfeasance.	4
11/13/02	**Law & Technology.** 9:00 am – 2:00 pm. Document management, security and production, web site development, new products that can make technology look easy.	5
11/15/02	**Elder Law.** TBA	6
11/15/02	**1st Annual Southern Utah Bar Assoc. CLE:** Morning topic TBA. Afternoon program – Utah Estate Planning Councel, co-sponsor.	8*
11/21/02	**NLCLE: ENREL: Water Law.** 5:30–8:30 pm, $45 YLD, $60 others.	3 CLE/NLCLE
11/22/02	**Nuts & Bolts to Build and Maintain a Successful Law Practice.** Broadcast International Studios, Midvale, UT. Business plans and structure, client acquisition and development, building a relationship with the bank, streamlining technology for your office, office security.	8
12/10/02	**Best of Series**	6 (1 hr ethics)
12/12/02	**Powerful Communication Skill: Winning Strategies for Lawyers (NPI)** You will learn: how to establish immediate credibility, how to communicate with difficult people, how to say "no" and gain respect, how to become an effective presenter, how to evaluate and improve verbal and non-verbal communication so you can convey your message. Price TBA.	7
12/13/02	**Ethics**	3
12/18/02	**Last Chance CLE: Wills & Trusts Part II –** tentative date	3
12/19/02	**Appellate Practice.** 9:00 am – noon. $45 YLD, $50 section members, $60 others.	3 CLE/NLCLE

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

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Title Insurance Underwriter seeking in-house counsel. Salary commensurate with experience. E-mail resume to Christine Critchley at ccritchley@utahbar.org.

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

Attorney with 17 years experience, admitted to the Utah Bar in 1997, interested in doing part-time contract legal work. I can provide assistance in the practice areas of real estate, commercial, land use, environmental and civil litigation support. P.O. Box 980806, Park City, Utah 84098, 435-658-0642.

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