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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: LaSal Mountains above Moab, Utah, by Bret B. Hicken, Spanish Fork, Utah

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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 thank the Utah Bar Journal for publishing the recent article "enlightening" us on the need for racial and gender equity. It was good to overcome my "ignorance" and "limited vision" and learn that "ability instead of DNA predisposition and skin color" should determine one's place in the profession.

Consistent with that declaration, we are told that a goal mandated by the U.S. Constitution is that every community, vocation, and endeavor must have the same racial and gender composition as the population at large. Perhaps, though, the forefront of this battle to impose "diversity" should not be the use of quotas in the legal profession, but the use of such measurements in areas more publically visible and important to the American consciousness.

Let's start first with professional sports. White males are underrepresented in football, basketball, and boxing. Let's fix that. Then there's crime control. Women are underrepresented in prison. Let's release some men, and pull more women in from probation and diversion programs so we can achieve some equity. Fix what is most important to Americans, and the rest will follow.

As part of the legal profession's particular effort to bring about equality of result rather than equality of opportunity, we should mandate ideological reeducation through "mandatory" CLE on the virtues of reverse discrimination. Coupling this effort with the call for a national law to punish not criminal actions (which are already illegal), but improper thought, a "national Hate Crimes Act" should completely silence anyone different from us. Policing thought is the ultimate goal.

Although there will be some--including, unfortunately, minorities and women--who see that diversity is not the opposite of discrimination, our tolerant society has "no room" for such people in our effort to embrace everyone and everything. Instead, we must curtail the very liberties that make our own efforts possible. Then we can force people of color to embrace our profession even though some have other goals. We can require more women to work at desks rather than at home or elsewhere. We can meet the quotas created by the enlightened few who understand better than each individual the sort of choices we should be free to make.

Paul Wake

I would like to respond to Diane Abraham's article on "diversity in the legal profession" in the October 2002 Journal. As an Asian-American who has had offices in Maryland, Virginia, Omaha, San Francisco, Tokyo, Washington, and Idaho, in 24 years of legal practice, I have observed a large cross section of the legal profession. Yet I have not observed the kind of pervasive and "perverted" racial and gender bias that Ms. Abraham claims exists in our profession. After all, we baby boomers who came of age with the civil rights and feminist movements of the 1960s and 1970s are now getting into our 50s and are becoming the managing attorneys in law firms and corporate and government offices across the country. Even as long ago as 1975, my freshman class at the University of Utah College of Law was already one third female, and women were the majority of the Utah Law Review staff my senior year. I therefore find it incredible that anyone could seriously claim that America's legal professionals are biased against women or members of racial minorities, particularly to an extent that "mandates" that we forcibly alter the racial or gender makeup of law firms, institutional law offices, courts, or law schools. What I have observed instead is that a lot of bright people have made the free choice to enter the legal profession, while a lot of other bright people (such as my children) have decided they can get more job satisfaction with an MBA, an MD, an engineering degree, or a lot of other career alternatives. An attorney who believes she or he is being discriminated against doesn't need a lot of help in knowing how to contest unequal treatment, but such cases are rare. In the modern competitive legal environment, attorneys are measured by the quality of their work and their ability to keep old clients loyal and obtain new business. Any law firm that refuses to hire and promote talented attorneys due to prejudice will lose clients and money to those who are free of such bias. The free market is the best guarantee of equal treatment based on merit. I see that freedom operating in our profession, and not a system based on bigotry. Those like Ms. Abraham who think the Equal Protection Clause should be tempered with social engineering are attacking our freedom.

Raymond Takashi Swenson

Dialogue on Freedom – A Resounding Success!

by John A. Adams

By any measure, the Utah State Bar's Dialogue on Freedom program was a resounding success. A small number of discussions are still being scheduled in schools and therefore the final results will not be known for a few months. However, the lion's share of activity occurred during the week of September 9-13, which Governor Michael O. Leavitt declared as Dialogue on Freedom Week. During that week alone, 1,292 discussions were led in junior high and high school classrooms in more than 110 schools. More than 35,000 students participated.

Salt Lake City Mayor Rocky Anderson and Kate Toomey of the Utah State Bar's Office of Professional Conduct led a Dialogue on Freedom discussion at West High School.

The current totals show that more than 1,400 discussions have been held in 130 schools (including five private schools and 13 youth correctional facilities) involving about 40,000 students. Approximately 400 Utah lawyers led discussions (and a number more volunteered). They have been joined by more than 175 members of the three branches of government (70 state legislators, 57 state and federal judges and 51 members of the executive branch). To place the magnitude of these results in perspective, American Bar Association leaders in August at the National Conference of Bar Presidents meeting in Washington, D.C., in encouraging state and local bar presidents to become involved in this program, stated that more than 200 Dialogue on Freedom presentations had been given nationwide since the program began. In Utah, during the week of September 11th alone, we led, on average, more than 250 discussions each of the five days of the week. That is more than six-times the number of presentations given in the rest of the country combined. I cannot praise our Bar staff enough for their outstanding efforts in meeting the logistical challenges of coordinating these hundreds of presentations each day, particularly at the start of a new school year.

In seeking the participation of Utah's legislators, the Bar's leaders committed to make this truly a statewide, not just Wasatch Front, effort. We have made good on that commitment. Thirty-five of the State's 40 districts had schools participate. In addition, we sent copies of the video tape (including the Quest hypothetical scenario, the sample discussion led by Chief Justice Christine Durham and Ron Yengich, and the Civic Dialogue program with Judge Stephen Anderson and Ted Capener) to every junior high and high school in the state.

The discussions in the classroom are the center piece of Dialogue on Freedom. Our purpose was to engage students in thoughtful and lively dialogue about the rule of law, the importance of individual rights and responsible citizenship. However, a significant innovation in Utah was to create and distribute a newspaper insert/educational supplement that would inform parents and community members about the discussions in the classroom. In

addition, we wanted to provide parents with resource material that they could use to continue the dialogue that started in the classroom, in their homes. On September 5th, the supplement appeared in the state's five daily newspapers and around the same time it appeared in almost all of the weekly newspapers – with a combined circulation of about 625,000. The remainder of the 800,000 supplements were distributed to students during the discussions, in courthouses, government buildings, law firms and Smith's and Albertson's stores.

The supplement was translated into Spanish and 25,000 copies were distributed to this vital and rising segment of Utah's population. The Spanish-language version was distributed in Utah's two leading Spanish newspapers, *Mundo Hispano* and *La Prensa,* as well as other channels. The cost of creating and printing the supplement in English and Spanish was in excess of $60,000. I wish to thank the law firms, sections of the Bar and the county and specialty bar associations that stepped forward as sponsors to make the supplement possible. The supplement, together with the extensive media and print coverage, were major factors in making the citizens of our state aware of this great program.

The true measure of success of Dialogue on Freedom is the feelings of those who led the discussions and the students who were there. The feedback we have received from lawyers and representatives of government is that they genuinely enjoyed being in the classroom and interacting with the students and teachers. The flexibility and commitment shown by our presenters was incredible. One notable example is Juvenile Court Judge Larry Jones from Brigham City, who together with Rob Smith, traveled 90 miles each way to give a presentation to 37 students in Park

Dialogue on Freedom – Results at a Glance

- ***1,400 classroom discussions***
- ***Almost 1,300 discussions during week of September 11th***
- ***130 junior high and high schools involved***
  - ***13 youth correctional facilities***
  - ***5 private schools***
- ***40,000 students participated***
- ***400 attorneys led discussions***
- ***178 representatives of government led discussions***
  - ***70 State Legislators***
  - ***57 Judges***
  - ***51 Members of the Executive Branch***
- ***800,000 newspaper inserts/educational supplements distributed***
- ***25,000 Spanish-language copies of supplement distributed***
- ***7 broadcasts of Dialogue on Freedom discussion with Chief Justice Christine Durham and Ron Yengich on KUED 7 and KULC 9***
- ***Articles reporting on Dialogue on Freedom appeared in all five daily newspapers in the State.***

Utah State Bar
DIALOGUE ON FREEDOM

Valley, Utah. Park Valley is located in the Northwest corner of Box Elder County. The knowledge and commitment of the presenters was not lost on students who appreciated the experience. The following is an excerpt from a letter received by presenters from a student in an ESL (English as a second language) class at the Horizonte School:

"I appreciate your interest in teaching us what we have in this country. It was interesting to trade different points of view from students about freedom. I conclude from your explanation that it is impossible to build up a new and better civilization without people who have the willingness, the knowledge and the courage to fight for a humane and just world. It is the best way to use our freedom."

The Bar's objective all along was to make a difference in how students feel about our democratic system of government and encourage their willingness to learn and become involved. This excerpt suggests that for a number of students we did that. I am confident that we also sent a message to the public that lawyers care deeply about our young people and are willing to donate their time and abilities to remind us all about the importance of the rule of law. Thanks to all who have made Dialogue on Freedom a memorable experience and resounding success.

Dialogue on Freedom – Participant Feedback

Honorable Jim Shumate, 5th District Court

On Tuesday, September 10, 2002, I met Travis Christiansen outside the office at Hurricane High School to begin our morning working with Mrs. White's classes in the Dialogue on Freedom. The setting couldn't have been better because the classroom where we started had belonged to Travis' father from the construction of the school until he retired as the legendary football coach of Hurricane High. It also didn't hurt that Mrs. White's husband Wes is a member of the Bar and occasionally appears in my Court. The students had all seen the video presentation, so they had a reasonable background, but when school starts at 7:50 a.m. the teenage mind is a bit sluggish. Still, once Travis and I began to volley ideas and questions back and forth we began to get some response. The students were a bit startled by the Socratic method of teaching but the dialogue started to move after about ten minutes.

Our participants needed to be goaded into defending their freedoms occasionally, but the idea of teenagers only being allowed to wear jewelry approved by the "State Committee on Earrings" served as a catalyst for some searching discussion. Repeated challenges of "Why do you think that?", were sometimes needed, yet the overall impact seemed to be positive.

Much of the world of today's youth accepts our free society as a given, and this exercise was valuable as a tool to examine some of those assumptions and to point out that our Constitutional system is not universal. This was a very satisfying experience and I would encourage its continuation.

(Some might think our approach of being "Travis" and "Judge" a bit informal, but the setting demands relaxed participants.)

Nathan D. Alder, Attorney at Law

I conducted "Dialogue" discussions at two middle schools in Salt Lake County. It was a rewarding experience. It was an honor to be there with those kids.

I asked who wanted to be our mayor, or our governor, or the president of our country. A few hands went up for president, a few more for governor, and several for mayor. Then we had a lively discussion about the differences between Quest and America. The kids had great insights. I was impressed. At the end of the discussion I asked some of the kids what they wanted to be when they "grow up." There was a lot of ambition in the room. They wanted to be authors, marine biologists, lawyers, teachers, movie stars, inventors, and the like. One even said he wanted to be the next Bill Gates. I was pleased that they realized that the son or daughter of a salvage yard worker, or a cleaning maid, or a miner, or a truck driver, or anything else, could become almost anything in America. They realized that America was a special place where its many individuals could aspire to great opportunities. What interested me the most was to see the light bulb go on for these young kids as they realized that freedom and democracy were the bedrock of fulfilling their dreams. They were keenly aware that our democracy is by the people and for the people, and that it should benefit all, not just a few. They also realized that education and hard work were key factors to their individual success. I think they walked out of there with more gratitude for our democracy and freedom. It was such a positive experience that I allowed myself to think that I may have made a difference in these young people's lives. I sure hope so.

Karen Hale, Utah State Senator

Lisa Adams and I spoke to several classes of middle school students. Many of the classes we visited were composed of ESL (English as a Second Language) students. As we talked about the Constitution, we discussed the right to vote and what "representation" means. This part of the discussion was particularly interesting to me, as students were asked why they should know who represents them, why they should care and why they should participate in the political process. "Why are the decisions I make as a state senator important to you?" I asked. "How are you effected?" The class was silent. Finally, one young man looked as if a light had just gone on in his head. "Uniforms?" he asked. Suddenly the students, all wearing uniforms, realized that they truly are effected each day by the decisions made by elected officials.

We then talked about the importance and the empowerment of voting. Before we played the video, we first asked the students to describe America. If they were talking to their friends who live in other countries, we asked, how would they describe Americans? The answers were interesting, and for the most part, positive. Students used words like proud, happy, patriotic, friendly, smart, rich. Next we asked the students how their friends in other

countries would describe Americans. The answers changed. The students used words like greedy, fat, selfish, spoiled.

We then showed the video, which reflected many of the same sentiments students felt their foreign friends would express. After viewing the video, we talked about personal rights we enjoy here in the United States – rights that were not enjoyed in the Land of Quest. We, at times, allowed only certain students to comment and be a part of the discussion. We told others they could not. Students became very indignant when their right to speak was not honored. "You can't do that," they retorted. "Why not?" we asked. "Because we have freedom of speech," they cried. The discussion then focused on other rights guaranteed by the Constitution.

Thanks for giving me the opportunity to present this program in the schools.

Dave Harper, West High School Teacher

The anniversary of 9/11 took on additional meaning for most of the Social Studies students at West High this year. As part of the commemoration of the tragic events of September 11, 2001, the Utah State Bar Association sponsored guest speakers throughout the state focusing on the Dialogue on Freedom Program. The Dialogue on Freedom Program was initiated by the Justices of the United States Supreme Court.

West High School History teachers were eager to take advantage of this program offered by the Utah Bar group. Over ten different attorneys, elected officials, and the Mayor of Salt Lake City, Rocky Anderson, visited individual classes over the week of September 9th sharing with the students valuable lessons on what freedom means to students of other countries and how our freedoms have developed in this country. Each session included an open question and answer time for students to guide their guests to topics important to them. An excellent role playing video accompanied the visits which helped establish the tone and topics for discussion.

West High teachers agreed that the class time was well spent in this endeavor causing their students to view the events of 9/11 differently as well as the kinds of freedoms they enjoy here in Utah. A deeper understanding of our own nation resulted from each visit. Every teacher who participated with the Utah State Bar expressed their hope that these kinds of visits would continue and aide them in helping their students understand and value freedom in America and differing systems in other nations.

West High School gratefully thanks the Utah State Bar Association for the Utah Dialogue on Freedom.

NOTICE

The Utah Supreme Court and the Utah Court of Appeals are initiating a pilot program to evaluate the usefulness of receiving briefs in electronic form. Beginning December 1, 2002, lawyers are encouraged to submit a CD which contains the electronic version of the brief at the same time as they file the written briefs. The electronic version of the brief must be in Word or WordPerfect format. Any questions, comments, or suggestions as to the pilot program may be directed to:

Matty Branch, Appellate Court Administrator
801-578-3834
mattyb@email.utcourts.gov

Participation in this study will be appreciated.

Contaminated Property Transactions After 2002 Superfund Brownfield Amendments

by Brad Cahoon

Earlier this year, the Small Business Liability Relief and Brownfields Revitalization Act[1] ("Brownfield amendments") amended the federal Comprehensive Environmental Response, Compensation and Liability Act[2] ("CERCLA"). This was the most significant revision to CERCLA since the 1986 Superfund Amendments and Reauthorization Act. The Brownfield amendments provide important new liability relief to buyers and developers of contaminated property.

Unfortunately, managing environmental liability risk associated with redeveloping contaminated properties under the Brownfield amendments is not a bed of roses and still resembles placing lipstick on a pig – all the snakes in the grass have not been removed. Several federal environmental statutes besides CERCLA pose environmental liability risk, including the Resource Conservation and Recovery Act (RCRA),[3] Toxic Substances Control Act (TSCA),[4] and Federal Water Pollution Control Act (FWPCA),[5] among others.

Further, Utah environmental statutes, such as the Hazardous Substances Mitigation Act[6] (HSMA) and the Underground Storage Tank Act[7] (USTA), patterned after CERCLA and RCRA, respectively, also pose significant environmental liability risk. The Brownfield amendments do not reduce the liability risk posed by these federal and state environmental statutes and extensive regulations promulgated thereunder. Moreover, there are several significant elements of the Brownfield amendments that could disrupt the "comfort level" of buyers and developers and may lead to future litigation and seriously contested rulemaking.

CERCLA and the Brownfield amendments reflect two important policies. One policy forbids saddling taxpayers with the significant cost of cleaning up contaminated properties. Another policy supports returning idled, contaminated property to productive use and revitalizing urban and industrial areas. Some have viewed as a failure the liability policy behind CERCLA of imposing cleanup costs on those who benefit or benefited from owning or operating contaminated property. Others have observed that lawyers are among the few who benefited from CERCLA's extensive litigation – a super retirement fund of sorts for environmental attorneys. Many properties, such as the Sharon Steel Midvale, Utah Superfund site, situated in ideal industrial and commercial locations near urban centers, sit idle providing no jobs, tax revenue, or public amenities for our community. Many of these stigmatized properties have become abandoned, weed-invested eyesores with ongoing operation and maintenance burdens heaped upon state and local governments.

Because CERCLA liability is potentially so massive and can be incurred unknowingly, many buyers and developers have shied away from impaired properties and focused on open spaces and greenfields. This strategy has contributed to urban sprawl, suburbanization, air and water pollution, contemporary smart growth and open space preservation movements and tremendous tension in local zoning and land use proceedings.

Contaminated property redevelopment projects, such as the Intermountain Health Care medical center presently being constructed on the former Murray Smelter Superfund site in Utah, demonstrate the tremendous potential for revitalizing the urban, industrial cores of our communities and returning these impaired properties to productive use.

BRAD CAHOON is a partner with Snell & Wilmer where he practices litigation and administrative law in the areas of environmental, water, land use and natural resources law.

Due Diligence After Brownfield Amendments

The Brownfield amendments require great care during the due diligence process prior to acquisition and in crafting environmental liability provisions in transaction documents. Prior to the Brownfield amendments, pursuant to CERCLA §107, a person who knowingly purchased property contaminated with hazardous substances was strictly, jointly and severally liable for the costs of cleaning up the contamination.[8] Moreover, an owner or operator of property that became contaminated solely by migration of hazardous substances from a neighbor's contiguous property could be liable for cleanup costs.[9]

For contaminated properties purchased after January 1, 2002 and for contiguous landowners affected by migrating pollution, the Brownfield amendments remove liability if by a preponderance of the evidence certain conditions are satisfied.[10] Hence, careful due diligence must be completed before closing a purchase in order to maintain the liability protection afforded so-called "bona fide prospective purchasers" (BFPPs) who knowingly purchase contaminated property or whose property becomes contaminated by migrating hazardous substances from contiguous property.

The Brownfield amendments modified the "all appropriate inquiry" prong of the innocent landowner defense. Pursuant to the Brownfield amendments, all appropriate inquiry begins with conducting an environmental site assessment satisfying the 1997 Standard E1527-97, Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process ("Phase I") of the American Society for Testing and Materials ("ASTM").[11] Strangely, the Brownfield amendments did not adopt ASTM's updated E 1527-00 Phase I standard adopted in 2000. Purchasers should ensure that their environmental consultants at least satisfy the 1997 Phase I standard in conducting pre-purchase assessments. The 1997 Phase I standard applies to all purchases that closed on or after May 31, 1997 and until EPA promulgates a new standard on or before January 11, 2004.[12]

Prior to the Brownfield amendments, it was unclear whether a purchaser who discovered contamination during due diligence still establish the innocent landowner defense to CERCLA liability. The Brownfield amendments extended liability protection to such BFPPs if certain additional requirements are met. In addition to satisfying the all appropriate inquiry, BFPPs also should ensure that they document several conditions prior to closing to secure liability protection. BFPPs should document that (i) all disposal of hazardous substances took place before they closed their purchase, (ii) they provided all legally required notices concerning their discovery of or any release of hazardous substances, and (iii) they are not affiliated with any person or entity who is potentially liable for any release of hazardous substances on the purchased property.[13]

Unfortunately, the Brownfield amendments impose additional post-closing requirements on BFPPs and contiguous landowners that have the potential for displacing the liability protection. BFPPs and contiguous landowners must document that they exercised appropriate care over hazardous substances found at the facility by taking "reasonable steps" (whatever that means) to (i) stop any continuing release, (ii) prevent any threatened future release, and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance. Depending on many uncertain conditions and possible interpretations, these mitigation requirements could become significant and costly. In addition, purchasers and contiguous landowners must document that they complied with institutional controls restricting land use to commercial or industrial or that limit penetrating subsurface soils or groundwater and the like. They must cooperate with and provide assistance and access (without compensation) to anyone authorized to conduct cleanup activities on the property. They also must appropriately respond to information requests and agency subpoenas.[14]

One possible approach to bringing some level of certainty to the reasonable mitigation steps and institutional controls is to include provisions in a pre-purchase agreement with the United States Environmental Protection Agency (EPA) and the Utah Department of Environmental Quality (UDEQ). For example, purchasers could consider a prospective purchaser agreement for a Superfund site listed on the National Priorities List. For a non-Superfund site, purchasers could consider a consent agreement for a RCRA site or a voluntary cleanup agreement with UDEQ. These types of agreements could specify what reasonable mitigation steps and institutional controls the regulators will require, if any, and how purchasers must satisfy them.

This approach may be wishful thinking for several reasons. Contiguous landowners usually do not have the luxury of completing an agreement before they encounter migrating pollution. Further, EPA is taking the position that prospective purchaser agreements are no longer needed after the Brownfield amendments, except in unique circumstances when important public interests are served.[15] Moreover, UDEQ has been extremely reluctant to modify its form voluntary cleanup agreement that currently provides little if any clarity for mitigation steps or institutional control compliance. Completing such agreements can take a precious long time that many purchasers cannot sustain. EPA and UDEQ should consider amending their regulatory programs to clarify reasonable mitigation steps and institutional control compliance.

The Brownfield amendments extended enhanced protection to individuals who purchase residential property. As long as they conduct a property inspection and title search, individuals who purchase residential property receive liability protection without having to comply with any other requirement such as the reasonable mitigation steps and compliance with institutional controls. They also are excused from conducting a Phase I assessment prior to their purchase.[16]

In addition, purchasers should be aware that the BFPP liability exemption includes the possibility that the federal government may impose a lien on the purchased property to compensate the government for any unrecovered cleanup costs it incurred which had the effect of increasing the fair market value of the purchased property.[17] Such liens are intended to prevent purchasers from receiving a windfall from government funded cleanups.

Utah Legislature Should Consider Amending its Environmental Laws

The Utah legislature should consider amending HSMA and USTA to protect prospective purchasers and contiguous landowners. HSMA and USTA provide no protection to residential property purchasers. Under current Utah law, persons who knowingly purchase contaminated property are strictly but not jointly and severally liable for the costs of cleaning up the contamination, with one exception. If UDEQ conducts an emergency response under HSMA, a single responsible party may be held jointly and severally liable for all cleanup costs.[18]

The Utah Legislature should consider amending HSMA and USTA to (i) provide liability exemptions to individuals who purchase residential property after conducting property and title inspections that reveal no basis for further environmental investigation, and (ii) provide liability exemptions to bona fide prospective purchasers and contiguous landowners in a manner similar to the Brownfield amendments. These amendments would create consistency with the Brownfield amendments and would further encourage redevelopment of unproductive, idled contaminated properties in many Utah communities.

The Utah Legislature also should consider clarifying the innocent landowner exemption in HSMA. Under HSMA, anyone who purchased property before March 18, 1985 without knowledge that it was contaminated is exempt from liability whether they conducted a pre-purchase investigation or not and so long as they did not cause any release of hazardous material.[19] For purchases after March 18, 1985, all appropriate inquiry before purchase is required to secure the exemption.[20] For consistency and clarity, the Legislature should establish that for purchases after May 31, 1997, a 1997 Phase I investigation will satisfy the innocent landowner exemptions under HSMA. After EPA promulgates its Phase I standard, the Utah Legislature should consider another amendment adopting EPA's standard. These amendments would create consistency with the Brownfield amendments and ratify countless purchases of Utah properties since May 31, 1997 that completed a pre-purchase 1997 Phase I assessment.

HSMA forbids taking into account ability to pay in apportioning liability for cleanup costs to responsible parties.[21] The Small Business Liability Protection Act enacted simultaneously with the Brownfield amendments allow parties who quality for de minimis settlements under existing CERCLA provisions to reduce or avoid payment obligations based on their demonstrated inability (or diminished ability) to pay.[22] As a matter of fairness and consistency with federal law, the Utah Legislature should consider amending HSMA in a similar manner.

EPA Reopeners

The Brownfield amendments should have a direct and positive impact on Utah's voluntary cleanup program. Under Utah's voluntary program anyone who satisfies the requirements of a voluntary cleanup agreement receives a certificate of completion that protects not only that party but all future owners and operators of the remediated property from liability under Utah environmental laws.[23] Prior to the Brownfield amendments, this protection did not extend to liability under federal environmental laws primarily because UDEQ and EPA could never come to terms on a memorandum of understanding (MOU) covering Utah's voluntary cleanup program. Without an MOU, EPA would not agree to exempt anyone from liability under federal environmental laws who had received a state-issued certificate of completion. Hence, for those receiving a certificate of completion, they took the risk that EPA could reopen a cleanup completed under a voluntary agreement and require more cleanup work resulting in additional costs and potential further liability.

In addition, the Brownfield amendments require states who want to receive reopener protection to maintain a published record of sites that have been cleanup up under the state's voluntary program. The list must detail whether the use of the site will be restricted after cleanup and what institutional controls, if any, will be required for a cleaned site.[24] The Utah Legislature should consider amending Utah Code Ann. § 19-9-101 to -118 to require UDEQ to maintain the required public record of sites.

The Brownfield amendments essentially limit the ability of EPA acting under CERCLA to reopen a site cleaned up under Utah's voluntary cleanup program. Unfortunately, the reopener restrictions apply only to cleanups conducted after February 15, 2001 and do not apply if EPA is acting under another law such as RCRA or TSCA.[25] Moreover, the Brownfield amendments allow EPA to reopen a site cleaned up under a voluntary agreement if EPA determines that a release or threatened release may present an imminent and substantial endangerment to public health or the environment or that additional action is necessary to prevent, limit or mitigate a release or threatened release.

Depending on how EPA and courts interpret these provisions, the exceptions could swallow the rule against reopeners. For example, there are court decisions construing the language

"imminent and substantial endangerment" under RCRA to mean something less immediate and harmful than some might expect.[26] EPA, UDEQ and the Utah Legislature should consider regulatory and legislative clarifications.

Pollution Liability Insurance

The Brownfield amendments remove much but not all environmental liability risk associated with contaminated properties. Risk averse prospective purchasers should consider pollution liability insurance which has become more readily available for covering most risks associated with contaminated properties. For example, protection against EPA reopeners, reasonable mitigation requirements, bodily injury claims, continued operation and maintenance of cleanup remedies and the like are all insurable. Numerous different endorsements are available.

The pollution liability insurance policy forms are highly specialized requiring careful attention to tailor the policy to risks associated with a particular transaction. Purchasers should demand a manuscripted policy tailored to the risk associated with the transaction. Brokers and underwriters should be involved early in a transaction to allow time for them to investigate the property and to offer competing quotes and coverages. Purchasers should consider an underwriter's financial wherewithal to cover claims and philosophy on claims. Underwriters typically review pollution liability policies every ten years, although this can be increased for lower risk sites – an important consideration for financing arrangements. Underwriters may adjust premiums up or down after each review period depending on the level of risk remaining at the site.

There are several underwriters writing pollution liability insurance policies including, AIG Environmental, Inc., Chubb Environmental Solutions, Gulf Insurance Group, Kemper Environmental, Liberty Mutual Insurance, Seneca Insurance, XL Environmental, Inc., and Zurich North America. Brokers covering the West include AON Corporation, Marsh USA Inc., Miller & Associates, and Willis Insurance Brokerage.

Brownfield Redevelopment Grants

Finally, the Brownfield amendments provide funding for investigating contamination, remediation and redevelopment of "brownfield sites," a newly defined term that includes petroleum contaminated properties, mine-scarred lands, and other properties administered by state programs.[27] The term brownfield site is defined as "real property, the expansion, redevelopment, or

reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[28] The definition excludes nine types of sites in which cleanup is already likely to occur under a federal environmental program such as CERCLA, Superfund, RCRA, TSCA, FWPCA, and the Safe Drinking Water Act. The funds are not available directly to private developers or parties but are provided to qualifying entities such as state and local governments, tribes and public purpose organizations.[29] The grants are limited to $200,000 per site, although EPA can raise that limit up to $350,000. The grants can be used toward investigating contamination, remediation, redevelopment activities, and payment of pollution liability insurance premiums, among other restricted purposes.[30]

The brownfields funding should encourage private/public partnerships in redeveloping brownfield sites. Creative solutions could be developed under which funds are used toward defining the extent of and remediating contamination and purchasing pollution liability insurance to protect those participating in the redevelopment. The goal of such projects ought to be to apply the liability protections and funding afforded by the Brownfield amendments to turn redevelopment of brownfield sites into standard real estate transactions.

Conclusion

The Brownfields Revitalization and Environmental Restoration Act removes significant liability for purchasers of contaminated lands and for landowners experiencing migrating pollution from neighboring property. It also furnishes substantial funding for redevelopment of dormant contaminated, stigmatized real estate. Purchasers of contaminated properties must conduct careful due diligence and will need even more careful pre-purchase documentation to ensure they maintain liability protections. Federal and state agencies should amend their regulations to clarify the requirements for maintaining liability protection, and the Legislature should consider amending Utah's environmental statutes to create consistency with the Brownfield amendments. Taking these steps should encourage public/private partnerships in redeveloping contaminating property and turn redevelopment into largely standard real estate transactions.

1 Pub. L. No. 107-118, 115 Stat. 2356, 2360, 2370, 2372, 2375.

2 42 U.S.C. §§ 9601-9675.

3 42. U.S.C. §§ 6901-6992k.

4 15 U.S.C. §§ 2601-2692.

5 33 U.S.C. §§ 1251-1387.

6 Utah Code Ann. §§ 19-6-301 to -325.

7 Utah Code Ann. §§ 19-6-401 to -429.

8 *See, e.g.,* O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989), *cert. denied,* 493 U.S. 1071 (1990).

9 *See, e.g.,* Reichhold Chemicals, Inc. v. Textron Inc., 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) ("mere migration of contaminants from adjacent land constitutes,disposal for the purposes of CERCLA"); *but see* Carson Harbor Village Ltd v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001).

10 Brownfield amendments § 222, CERCLA § 101(40) (defining Bona Fide Prospective Purchasers); Brownfield amendments § 221, CERCLA 107(q) (contiguous property exclusion).

11 Brownfield amendments § 223, CERCLA § 101(35).

12 *See id.*

13 Brownfield amendments § 222, CERCLA § 101(40).

14 *See id.*

15 EPA Guidance on Prospective Purchaser Provisions of Brownfields Law, *http://es.epa.gov/oeca/osre/ppa.html.*

16 Brownfield amendments § 223, CERCLA § 101(35).

17 Brownfield amendments § 222, CERCLA § 107(r).

18 Utah Dep't of Envt'l Quality v. Wind River Petro., 881 P.2d 869 (Utah 1994).

19 Utah Code Ann. §§ 19-6-310(2)(b), -316(2)(b), -318(2)(b).

20 *See id.* §§ 19-6-310(2)(c), -316(2)(c), -318(2)(c).

21 *See id.* §§ 19-6-310(2)(f)(iii), -316(2)(f)(iii), -318(2)(f)(iii).

22 CERCLA § 122(g)(7).

23 Utah Code Ann. § 19-8-113.

24 Brownfield amendments § 231, CERCLA § 128.

25 Brownfield amendments § 231, CERCLA § 128.

26 *See, e.g.,* Cox v. City of Dallas Texas, 256 F.3d 281 (5th Cir. 2001).

27 Brownfield amendments § 211, CERCLA § 104.

28 Brownfield amendments § 211, CERCLA § 101(39).

29 CERCLA § 104(k)(1).

30 *See id.* § 104(k)(4).

Arbitration Advocacy Part Two: The Arbitration Hearing

by Kent B. Scott

Editor's Note: *The following article is intended to provide attorneys with an overview of the arbitration process from the arbitrator's point of view. This article has been published in the* Utah Bar Journal *in two installments. Part One, "Preparing the Case," appeared in the June/July, 2002 edition. This second installment is entitled "The Arbitration Hearing," and will address advocacy practice and procedure used at the arbitration hearing and the rules for the judicial enforcement of an arbitration award.*

Introduction

The first installment of this article, "Preparing the Case," discussed the procedures for setting an arbitration proceeding into motion and creating a fair and efficient case management plan. That article illustrated how the attorneys worked with the court to stay the judicial proceedings pending the outcome of the arbitration, while at the same time having the court retain jurisdiction over the case. Second, the article discussed how the attorneys and the arbitrator created a system of rules and procedures to govern the arbitration process. This article will focus on the attorney's role at the arbitration and will offer some suggestions concerning the presentation of the case. The procedures involved with the judicial enforcement of arbitration awards will also be discussed.

Arbitration and Baseball Revisited

Always keep the following mind: Arbitration, like baseball, has four bases to touch in order to bring the client safe at home.

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

Second: Arbitrators do not like to engage in extensive discovery, motion practice or arguments over what evidence is admissable.

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

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

Establishing the Ground Rules

The length, time and place of the arbitration hearing should be discussed by the attorneys as part of their preparation for the Preliminary Hearing Scheduling Conference with the arbitrator. If the arbitration will last more than one day, the arbitrator and the parties usually schedule the hearing for consecutive days so the case can be presented at one time. However, you and the arbitrator are free to create a schedule that will accommodate the needs of the parties and the witnesses. Be prepared to address what times you would like the hearing to commence and end on each day. Most arbitrators will be flexible in working longer hours in order to accommodate the schedule of the parties, their counsel and their respective witnesses.

As for the setting and the level of formality, it is best to approach the arbitration hearing with the same level of formality that you would a bench trial. However, most arbitrators prefer an informal setting. Take your cue from the arbitrator. Make arrangements for reporters and any equipment needed to present the evidence. Consider the need for easels, writing pads, projectors, screens, video equipment and computer systems.

Opening Statements

Opening statements are optional. If you have furnished pre-hearing briefs, a stipulated set of facts, or both, your opening can be

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waived or expedited by using a more summary form of presentation. Arbitrators are anxious to hear the facts from the witnesses. An opening statement should be designed to educate the arbitrator on the general framework of the case. A brief statement on your client's position on the issues and damages will most often suffice. I encourage you to refrain from the temptation of arguing your case in your opening statement. Attorneys who argue their case in the opening statement phase of the arbitration are doing a disservice to their client. An opening statement is like a well orchestrated performance by the Utah Symphony. Keep the introductions to a minimum. Be the conductor and let the musicians (witnesses and documents) do their thing.

Witness Testimony

You and your fellow counsel should discuss who should go first. The party bringing the claim will lead off and continue its presentation of the evidence until all of its witnesses have been examined. If necessary, the witnesses may be called out of order, or the testimony of one witness may be interrupted by that of another under the appropriate circumstances. Experts and third party witnesses should be given preference. The arbitrator will be able to track witness testimony that is interrupted or presented out of order.

Unless counsel require otherwise, the arbitrator will use a "relaxed" standard of the rules of procedure and rules of evidence. The American Arbitration Association's Construction Industry and Commercial Rules give the parties the right to "offer such evidence as is relevant and material to the dispute" and give the arbitrator the authority to be the "judge of the relevance and materiality of the evidence offered." Arbitrators are liberal in allowing evidence to be presented. The "relaxed" approach to the admission of evidence saves time in arguing over motions but can add time because of the amount of evidence permitted to be entered. If you want a more strict standard to apply, consider addressing that matter up front with the arbitrator in the preliminary conference.

Experts are as frequent in arbitration as they are in the courtroom – perhaps more. Arbitrators prefer a written report from each expert that is exchanged before the expert's scheduled deposition or the arbitration hearing. You and you fellow counsel will want to discuss with each other and the arbitrator whether the expert's report is to be offered into evidence, if there is a need for direct examination beyond what is contained in the expert's report and whether the expert will be at the hearing and subject to cross examination.

Exhibits

The arbitrator will be liberal in admitting documents and will expect counsel to have agreed on foundation matters in advance. Have confidence that the arbitrator has the intelligence and skill to assess the weight and materiality of documentary evidence. Although the arbitrator may admit a document, the burden is on you to establish its relevance, materiality and the importance that document should be given. There is nothing like a good witness to bring the contents of a document to life in the mind of an arbitrator.

Arbitration is designed to provide the parties with an efficient method of resolving their dispute. Arbitrators are trained to consider and implement procedures that will encourage this result. Consider using stipulations, summaries, and testimony by telephone. Written affidavits that are not subject to cross examination are given little, if any, weight by arbitrators, absent stipulation by all counsel. Anything counsel can do to streamline the arbitration process is valued. However, take care that you don't create efficiencies at the price of reliability and fairness. Reliability and fairness will be the touchstone by which the arbitrator is guided in considering expedited methods of presenting proof and accepting evidence.

Closing Arguments and Briefs

As to final argument, the same principals apply that would be pertinent to a bench trial. The arbitrator, who may be an attorney or other professional, will have a wealth of practical experience with the technical and substantive issues involved in the arbitration. Those experiences should be considered in shaping your argument. Arbitrators are also liberal in allowing rebuttal and sur-rebuttal. It is important to the arbitrator that the parties receive a fair opportunity to present the information in support of their respective positions.

At the close of the evidence the arbitrator will meet with counsel to discuss closing arguments, post hearing briefs and the form of the award. Closing arguments that re-hash the evidence may be interesting to the parties but do not help the arbitrator. Ask the arbitrator what issues should be addressed and whether those issues could be best addressed through closing argument, in written briefs or both. This is the time where counsel will want to listen carefully to the arbitrator's questions. Arbitrators prefer that post hearing briefs be submitted and exchanged simultaneously with the need for responsive briefs to be determined at the discretion of the arbitrator.

Here is one "Did You Know" point I would like to highlight. It is

one of those "unmentionables" we arbitrators hate to bring up. The arbitrator has extensive powers to determine the dispute. The arbitrator that you and your fellow counsel select sits as a judge, jury and appellate court with relaxed rules of evidence. That arbitrator is expected to apply basic legal principals but is not strictly bound by the common law of any particular forum unless you agree otherwise. However, that arbitrator may be dismissed, by stipulation of the parties, any time before the award is issued. You and your fellow counsel empower the arbitrator with jurisdiction and certain powers and, by stipulation, have the final say as to the extent those powers may be modified. All you have to do is agree.

Award

At the conclusion of closing arguments the arbitrator will set a time for the closing of the arbitration hearing. The closing of the hearing is declared when all the evidence has been presented and the closing arguments and briefs have been submitted. The due date of the award is fixed from the time the hearing is closed. That date can be fixed by the rules you have adopted to govern the arbitration or by stipulation. Prior to the rendering of the award, the arbitrator has the discretion to re-open the hearings and request additional evidence or legal authorities.

The award can take many forms: (1) summary decision which gives a bottom line holding; (2) breakout award consisting of each issue raised by the parties with a corresponding damage value or other remedy; (3) summary decision or breakout award with comments from the arbitrator; or (4) formal findings of fact and conclusions of law. Counsel and the arbitrator should agree in advance as to the timing and form the award will take. Discuss the form of the award early in the arbitration process. The preliminary conference is an excellent opportunity to work on this matter.

Arbitrators are not bound by the common law of the jurisdiction in which the hearing is held. That being said, you and your fellow counsel can agree to have the arbitration held in accordance with the law of a particular forum and further require the arbitrator to issue an award in accordance with the established law of that forum. The choice is yours.

It is critical that the award cover all the issues submitted by the parties. An oral stipulation made by counsel at the arbitration is not sufficient to empower an arbitrator with the authority to arbitrate a dispute. The agreement must be in writing and signed by the parties. The arbitrator's jurisdiction arises from the written contract of the parties. If there is any doubt about the scope of the matters to be arbitrated, the matter should be handled by written stipulation signed by the parties and counsel.

The award is private, but not confidential, unless agreed upon by the parties in advance. The ruling has no precedential value and only applies to the particular case.

Judicial Enforcement of Awards

Once the award has been published the arbitrator is discharged. Post hearing motions are rare. The arbitrator may correct clerical mistakes in the award or mistakes involving the description of a party or item which is the subject of the arbitration, but may not reconsider the merits of any of the issues decided.

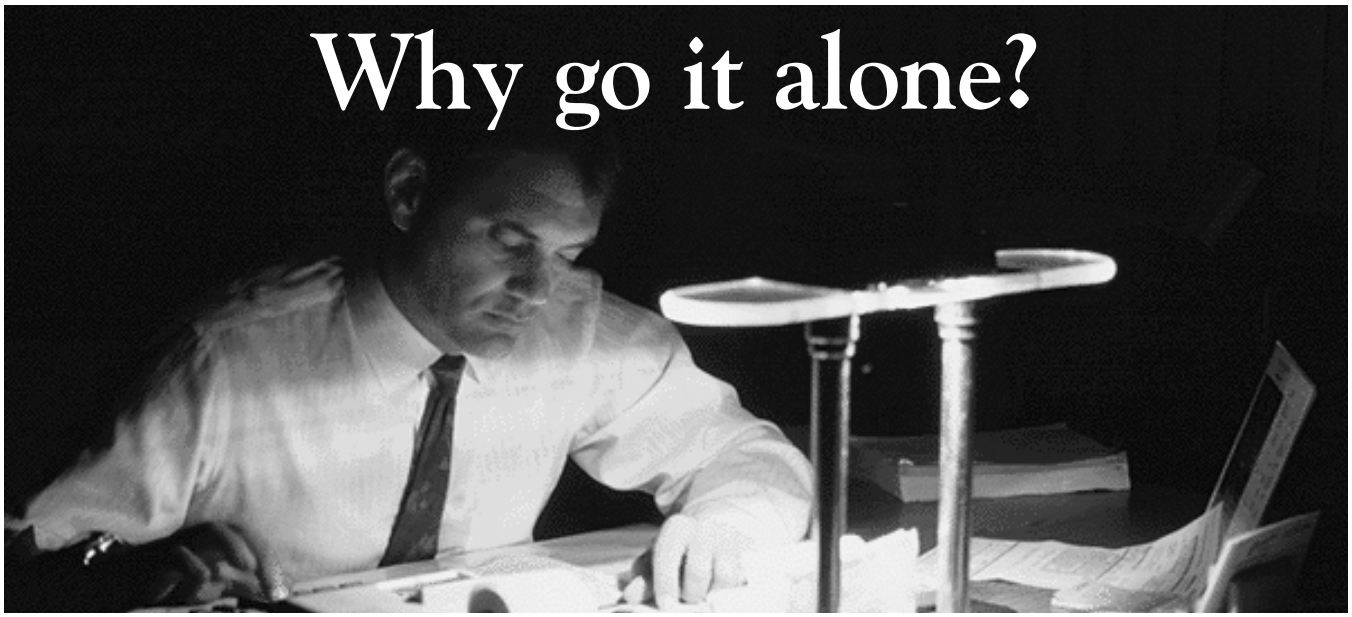
If the parties wish to modify, confirm or vacate the arbitrator's award they must apply to the appropriate court in accordance with the requirements of the Utah Uniform Arbitration Act or the Federal Arbitration Act. Arbitration awards have the same effect as a final judgment. Most awards are confirmed as final judgments and are difficult to attack on appeal.

The award can be modified or vacated where the appellant or petitioner can establish (1) the parties did not agree in writing to arbitrate the subject matter of any item addressed in the award; (2) arbitrator bias or prejudice; (3) the arbitrator exceeded the scope of his or her authority; (4) the arbitrator abused his or her discretion in refusing to admit material evidence, postpone a hearing or otherwise was unfair in conducting the arbitration; or (5) corruption or fraud.

Conclusion

Arbitration is an alternate form of dispute resolution. The arbitration process was not intended to replace the traditional method of resolving disputes through the courts. In order for a dispute to be resolved through arbitration, the parties must choose that form of resolution, select an arbitrator, define the scope of the matter to be arbitrated and agree upon a set of rules and procedures that will govern the proceedings.

I would like to express one final thought on arbitration. Operate from the assumption that arbitrators want to be fair. They are human beings. They come in all sizes and shapes and carry their own set of prejudices and biases along with their better attributes of expertise, demeanor and insight. Assume the arbitrator wants to do the right thing. Help the arbitrator help your client by being a teacher instead of a salesperson. Remember: it is everyone's job to maintain the quality and integrity of the arbitration process.



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The New New New Thing[1] Web Services on the Horizon

by Toby Brown

I coach soccer, and one of the hardest things to teach an 8 year-old is to go to where the ball is going to be, instead of where it is. Without this knowledge, all of the players bunch up around the ball. The problem really becomes apparent when a few players on the other team figure this concept out. Whichever players or team master this concept first, have tremendous advantages on the field. The games can end up with very lop-sided scores (and frustrated coaches).

Admittedly, lawyers are much more mature than 8 year-old soccer players, but the same problem currently applies. The nature of the game is going through qualitative and rapid change. And the ability to be successful lies in the ability of participants to understand the impact of change before it happens. For lawyers, technology is changing the way legal services are and will be delivered. So now is the time to figure out where the ball is going to be and arrange to be there when it arrives.

A significant part of the difficulty in anticipating change is understanding the impact of technology and staying abreast of it. Thus the title of this article: The New New New Thing. This article is an attempt to help you, as lawyers, understand some of the potential impacts of developments in e-commerce technologies and to look at an evolving approach to how these technologies are being applied in the market.

Essentially we want to understand the third 'New' in the title. But before we can understand New 3 we should first cover New 1 and New 2. As we cover these topics, we will look at them from a value proposition perspective instead of a technology perspective. One challenge all organizations face is integrating the business decisions with the technology decisions. Decision makers need to understand the value of technology, without necessarily knowing how it works. Or in other words, decision makers need someone to help translate technology from geek to business. That is how we will explore New 1 and New 2.

New 1 is the Internet. You've probably heard enough about this. But to recap its value proposition, it provides a powerful interactive connection between business, customers and government. This interconnectedness has already driven the price of information down significantly, which, by the way, is one of the things lawyers sell.

New 2 requires a bit more intensive explanation. It is the concept of providing an application or service over this connection. Whereas New 1 allows users to share information, New 2 enables these users to do something with the information.

You may have heard of the terms "Hosted Application" or Application Service Provider ("ASP"). These terms describe how New 2 is implemented. Up until now, most computer technology was bundled up in software. You decided what tasks you needed your computer to perform. Then you purchased a software program designed to perform those tasks. Many times this software is loaded in a client / server environment. This means that the main part of the software is loaded on a 'server' on a network. Then a smaller piece of the program is loaded at the work-station (or 'client' to geeks). The two pieces work in a coordinated fashion to complete your tasks. This approach allows you to centralize your data on the server for sharing between other people on your network. A great example of this technology is document management software for law firms. It allows a central repository of documents to be shared by the whole firm.

In an ASP environment, the server portion of this equation is pushed out to a server on the Internet. In this situation, the user does not need to be on a specific network, but can access the application from anywhere on the Web. In this hosted environment, there are many advantages and some cautions. At the top of the caution list is security. Where exactly are your clients' documents when you use an ASP version of document management?

Before we address the cautions, let's explore the advantages of an

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ASP approach. First and foremost, an ASP puts you on the Internet for your clients. It allows you to work in a more collaborative fashion. You can share documents and applications over the Internet with your clients. Well used, this collaborative approach can greatly enhance your ability to meet your clients' needs. It allows you to deliver services when you are not in your office. And it allows your clients to access their legal information where and when they need it.

A final reason for using an ASP is that it moves you out of the IT business. In a client / server approach, you and your firm need to be IT experts or directly employ IT experts. You spend a portion (an ever expanding portion) of your resources on IT instead of on delivering legal services. The ASP approach effectively outsources an IT function.

But can you trust your ASP? This is where the caution part comes into play. You should take steps in due diligence to qualify your ASP. Are their systems secured? Do they back up your data? What happens if their systems fail? How fast can you get your data? A good ASP can address these questions. And a good ASP will likely provide better answers to these questions than you can currently give. If your clients asked you these questions today (and I think they should), how would you answer them?

A geek friend has recently been exploring disaster recovery options for lawyers. He is coming to the conclusion that the best disaster planning a law firm can have is not to hold their clients' data. Don't put yourself in the position to need a data disaster recovery plan. Push that problem onto a partner who specializes in it.

An ASP approach may not be the best solution to all of your IT needs. But it is becoming a better and better option with each passing day. Hopefully I have at least given you a good idea of what an ASP is and why you should consider using one. Before we move on to New 3, you should think for a minute about how New 2 might impact your practice. If customers have access to ASPs that provide these functionalities directly to them, what will that mean for you? If a bank offers an online (a.k.a. ASP) solution for wills or contracts, the need for a lawyer goes down. Keep this issue in mind as we move on to New 3. Currently you have the opportunity to move to ASPs to better serve your clients. But if you don't make the move, others may move ahead of you.

So now we move on to New 3. New 3 is being referred to as Web Services. New 3 takes a bunch of New 2s and combines them into a full solution. So instead of accessing a single application over the Internet, clients will access services and solutions. Clients will go to an online service solution provider with a problem. The provider will have available all of the software applications needed to solve that problem.

To better explain this concept, let's apply it to a possible example: residential real estate transactions. A buyer has a problem – they need a house. In order to solve this problem the buyer will need: 1) a way to find homes for sale. 2) To apply for and secure a mortgage loan. 3) To secure title insurance, and 4) to record the transaction documents with the appropriate land records agency.[2] Imagine a web services provider who delivered a group of applications that could perform these functions. The buyer goes online and searches for houses in her price range.[3] Once she finds the house and negotiates a price, she submits and application online.[4] When the loan is approved, she applies an electronic signature to the loan documents.[5] Once the purchase is finalized, she files her documents with the land records clerk or county recorder.[6] Our buyer has just experienced web services.

This brings us back to my soccer analogy. As lawyers you should be looking at ways in which you might provide your clients with web services options. In my example above, most of the applications exist for providing real estate transactions services over the Web. Someone just needs to put all the pieces together and take it to market. That is where the ball is going to be. The question will be which team figures this concept out first. Will it be the legal profession or will it be someone else?[7]

Everyday progress is made for automating all kinds of services and towards the delivery those services over the Internet. This is where the game is headed. Now is the time to look at your practice and explore how you might deliver your services in a new way. Take a look around the field and do your best to figure out where the ball is going to be. You will find that the game is getting more interesting as it evolves and you will be in a better position to serve your clients.

1 With apologies to Michael Lewis, author of *The New New Thing*.

2 This example obviously simplifies the transaction. Other services will be needed, but could be included in the service system.

3 Many companies already provide this service. Most connect you with an agent for site visits. Check out www.utahrealestate.com for an example of this.

4 Ditech advertises heavily for this service (www.ditech.com).

5 In Sept. 2002, Quicken announced a new e-signature service for loan documents. *See* www.inman.com/InmanStories.asp?ID=32108&CatType=R for an article on this.

6 *See* www.pria.us for efforts to standardize e-recording filings across the US.

7 Such as real estate agents, mortgage companies, and title companies. These groups are all working feverishly to establish standards for these transactions. For an example *see* www.mismo.org. It is likely they will implement them once they are in place.

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Appendix A

by Just Learned Ham

"So you're a loyer?"

"No."

"No? But you filled this out and it says 'loyer' right here."

"No. That says 'law-yer.' I practice law, not loy."

I think that's where things went wrong. Never disagree with a doctor, especially a surgeon. Even if you disagree with people for a living. The one who holds the scalpel is always right. (Oh, I forgot, that would be the nurse. Well, don't disagree with a nurse, either. Gloves and tape can be instruments of torture in the hands of someone who has to spend all day with surgeons and has no one to take it out on except tranquilized loyers.) Anyway, arguing with a surgeon is like sending your T-bone back to be cooked a little longer. When you see it again, all you can do is pass out the hankies, say a few comforting words, and scatter it to the wind. And you probably don't want to eat the vegetables.

"Your appendix looks like a blowfish. It's gotta come out. You need to sign this, but don't worry, I know as well as you it would never hold up in court." (He really said that. With witnesses standing around. (Not that he didn't say any of the other stuff – he didn't.)) (OK, he didn't say the part about the blowfish. That was just for emphasis. Poetic license. Like a closing statement. Actually, I think it was a nurse that asked me to sign the form. The surgeon wasn't even there yet. The morphine makes it hard to remember. My capacity hasn't been that diminished since college.

"Do you have a living will?"

"Yes, but I did it myself, so that probably won't hold up in court, either."

"Do you know where it is?"

"Yes."

"Are you an organ donor?"

"Wait a minute. Don't *you* want to know where my living will is? Don't you want to know if my *wife* knows where it is? Why do you care if *I* know where it is? If we need it, it won't make a lot of difference whether I know where it is. If we need it, *I'm* not going to know where *anything* is. I hope."

"Are you an organ donor?"

"I keep my living will hanging on the wall in my office. I figure that's where I'm most likely to be found comatose. We almost needed it during a CLE teleconference last Thursday – the finer points of title policy litigation."

"Are you an organ donor?"

I hesitated before answering. I am a donor, but I don't think I want them to know. They might not give it their best shot. If I hiccup on the table, I want them working like their very Land Rovers depended on it.

"You can have my appendix."

"Are you an organ donor?"

"No, when *I* went to school there, we were known as the Ducks."

"Are you an organ donor?"

"Yes, now I only have the piano."

"Are you an organ donor?"

"I used to be, but my monkey ran away."

Just yesterday I heard somebody on the radio say the best reason to get as much education as possible is that you get more jokes. If you substitute "morphine" for "education" that works, too.

The next thing I remember is waking up in the recovery room. Anesthesia is incredible. It really is. It's not like sleep. It's like nothing. No dreams. No passage of time. No consciousness whatsoever. You meet the anesthesiologist (who is usually 11 or 12 years old – if you get an experienced one), you breathe deeply, and then it's 2 1/2 hours later. It was like Civil Procedure as a 1L, or motion practice in bankruptcy court, or whole months of my first marriage.

Recovery from an appendectomy would be easy if it weren't for one inescapable fact of life: you can have pain medicine, or you can have a functioning colon, but you can't have both. My advice – and I know it doesn't seem like the thing to do at the time but you have to trust me – is to drop the pain meds cold turkey the first day. Otherwise, by the time you finally run out of them, well, think of your in-box when you get back from vacation. And you don't really need the narcotics. 30 minutes of daytime TV has the same effect as 900 milligrams of Percocet. (Sadly, there aren't

any studies to back that up – the rats keep switching off the TVs.)

After a while the surgeon dropped by and we watched a few minutes of Sally Jessie Raphael. We commiserated about how tough it is to find a malpractice carrier willing to overlook a few harmless blemishes. He asked how I felt. I said I'd never felt better in my life (I hadn't run out of Percocet yet). I asked how the operation went. He said it was the easiest one he'd ever done. "Usually it's so hard to find what you're looking for – there's lots of stuff packed in there and it's all kind of pink. But that's the great thing about operating on loyers – with no heart, no spine, and no guts to get in the way, you're in and out in no time."

I apologize for that last sentence. Loyer jokes are in poor taste, and that one wasn't even original. (The editors made me say that.)

Eventually the hospital staff had their fill of my whining and sent me home (I had a similar experience in law school that resulted in my graduation). Anyway, I'm doing fine and working my way up the waiting list until a suitable donor can be found. Many people are able to lead virtually normal lives for a long time without an appendix, but I don't want to take chances.

My daughter studies biomedical engineering at the U and I'm really proud of her (for lots of reasons) (that may be the only completely true statement I've written – you may have noticed these articles don't come with 10b-5 reps (neither do my shareholders agreements, which would be one of the little blemishes the malpractice carriers seem to want to make such a big deal out of)). So I suggested that she might want to give some thought to an artificial appendix program. I think there's a real gap to be filled there. She gave me the same look the nurses gave me when I asked if I could have the old appendix to take home in a jar. They said that wasn't possible. That seems unreasonable. I might need it for evidence. When I get my car fixed I always ask for the old parts just so they'll think I know what I'm talking about. (And you'd be surprised what people will buy on eBay.)

I wish I'd gone to medical school. Not because of the money or the image or the opportunity to serve humanity (that's why I became a bail bondsman, but that's another story), but because doctors get to ask the really fun questions. Cross examination, even at its best, doesn't come close to being able to ask a smart aleck loyer "Does this hurt?"

Employment Update: Recent Decisions From the Utah State Courts

by Ellen Kitzmiller

A number of significant employment cases decided recently in the Utah State courts are worth noting. This article will discuss those recent cases:

I. Employment Contracts

The "at-will" doctrine governing employment in Utah (permitting either the employer or the employee to terminate the employment relationship at any time for any or no reason) continues to be vigorously challenged. Utah plaintiffs are pursuing claims for breach of contract, both express and implied, based on written and oral representations and other conduct by their employers alleged to have created binding obligations that modify or supplant the at-will employment relationship.

In *Wood v. Utah Farm Bureau Insurance Company,* 2001 UT App 35, 19 P.3d 392, four former Farm Bureau insurance agents sued for wrongful termination, breach of contract and breach of the covenant of good faith and fair dealing (as well as unjust enrichment, tortious interference with prospective economic relations and punitive damages, which claims are unconnected to the following discussion). While there was no dispute that the contract entered into between the parties at the time of hire created an at-will employment relationship, the plaintiffs argued that the terms and conditions described in their pre-hire offer letters created implied-in-fact agreements, which agreements were subsequently revived over the course of their employment. Specifically, the plaintiffs asserted that the pre-hire letters promised a continuing working relationship so long as they met specified production goals, and that this promise was reaffirmed in the course of weekly meetings during which Farm Bureau managers referenced the goals set forth in those letters. The Court of Appeals agreed with the plaintiffs' theory that the at-will employment relationship could be modified or replaced by the employer's subsequent representations in that regard.

Interestingly, while the Court of Appeals affirmed the trial court's summary judgment on three of the plaintiffs' claims, the fourth plaintiff's claim survived. The court found insufficient evidence of modification as to three of the plaintiffs, but the fourth plaintiff established a question of fact by presenting evidence of his manager's oral statements referencing the terms contained in his pre-hire offer letter. The different outcome was the result of the fourth plaintiff's allegation in an affidavit that his Farm Bureau manager "affirmed to me that I would not be terminated unless I failed to meet the goals in the [pre-hire] letter . . ." and "told [me] 'It's going to take me nine months to twelve months to even get around to hiring anybody to replace you, so you've got plenty of time to get out there and write your business.'" The manager's comments provided sufficient evidence of Farm Bureau's intent "of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at-will," permitting the fourth plaintiff's claim to withstand the defendant employer's motion for summary judgment. In contrast, the other three plaintiffs' claims depended on their subjective understanding of the terms and conditions of their employment, unsupported by any affirmative manifestation on the part of Farm Bureau, which showing was insufficient to survive summary judgment. This case illustrates the critical importance of monitoring communications in the business setting – whether written, oral or even non-verbal-that may be later construed to create binding contractual obligations.

ELLEN KITZMILLER is an associate with Janove Baar Associates, L.C. Ellen provides preventative counseling and legal representation to employers facing claims of discrimination, wrongful discharge and other employment-related disputes.

That point was driven home in *Francisconi v. Union Pacific Railroad Company,* 2001 UT App 350, 36 P.3d 999, in which case the Court of Appeals considered a claim that the plaintiff's at-will employment was modified by his employer's implementation of a progressive discipline policy that included a formal hearing prior to termination. The defendant employer asserted that its new progressive discipline policy was directed only to unionized employees and did not apply to the plaintiff, who was employed as a non-unionized safety manager. To defeat his employer's argument, the plaintiff alleged that (1) his employer published the policy to him, despite the fact that he had no employees (unionized or otherwise) reporting to him; (2) the CEO published a letter stating that the policy would be implemented "across the entire railroad system" and would "be a benefit for all employees of the company;" (3) the plaintiff's co-workers believed that the policy applied to managers in the plaintiff's position; (4) two Union Pacific executives made reference to the progressive discipline policy in the context of a disciplinary meeting with the plaintiff; and (5) during the course of the disciplinary meeting, a Union Pacific executive told the plaintiff that he could "save his job" by filling out a statement admitting that he had abused his employer's expense reimbursement policy. The Court of Appeals held that this showing was sufficient to create a question of fact as to whether an implied-in-fact contract existed between the plaintiff and Union Pacific, then reversed the trial court's grant of summary judgment in favor of the defendant employer and remanded the case to the trial court for further proceedings.

Despite a trend toward increased recognition of enforceable contracts arising in the employment arena, Utah's appellate courts have made clear that some evidentiary showing beyond the plaintiff's subjective belief regarding the nature of his/her employment relationship is necessary to survive summary judgment, even on an implied contract theory. For example, in *Knight v. Salt Lake County,* 2002 UT App 100, 46 P.3d 247, the Court of Appeals rejected the plaintiffs' claim that an implied contract was created between Salt Lake County and a class composed of county employees. The evidence presented by the class to demonstrate the existence of an implied contract included offer letters; personnel notices; an excerpt from a Policies and Procedures manual; and Acknowledgements of Receipt of the manual. While emphasizing that the existence of an implied contract presents a question of fact, the court affirmed the trial court's dismissal of the class' contract claim. The court reasoned that because creation of such documents was required pursuant to the Personnel Management Act, the documents could not be construed to alter or amend the terms of class members' public employment. Of more general interest to private employers, the court further observed that the documents were insufficient to demonstrate an implied contract because they failed to provide any reasonable basis for inferring that the defendant employer voluntarily undertook an obligation that it would not otherwise bear.

In sum, the test of an implied-in-fact employment contract in Utah continues to be evidence of a specific, affirmative manifestation of the employer's intention to modify the at-will employment relationship. The employer's intent must be "communicated to the employee and sufficiently definite to operate as a contract provision. Furthermore, the manifestation of the employer's intent must be of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at will." *Wood, supra,* ¶ 14 (citations omitted). Such manifestations can be communicated through the employer's written policies and procedures, offer letters and other written communications with its workforce, or through the oral representations and conduct of its managerial agents.

II. Drug and Alcohol Testing

The Court of Appeals' interpretation of the Utah Drug and Alcohol Testing Act in *Autoliv ASP, Inc. v. Department of Workforce Services,* 2001 UT App 366, 38 P.3d 979, has far-reaching implications for Utah employers, including the possibility that an improperly applied drug testing policy may leave an employer vulnerable to claims of wrongful discharge. The facts were these: the defendant employer's drug and alcohol policy required that any employee directly associated with a workplace accident submit to "urinalysis or other biological specimen testing," and announced the employer's right to terminate an employee for producing an adulterated specimen. Pursuant to this policy, Marvin Mickles was required to submit to urinalysis after he towed a trailer into a forklift at the job site. Mickles' urine was so high in nitrates that the urinalysis lab concluded his specimen had been adulterated. The lab sent a test report to Mickles' employer stating "specimen adulterated: nitrate is too high."

The defendant employer immediately terminated Mickles' employment. Its human resources representative told Mickles that his drug test had come back "positive." She did not explain the reason for the lab's conclusion, or give Mickles an opportunity

to offer an explanation for this result. Later, in an administrative hearing concerning his entitlement to unemployment benefits, Mickles learned these details and offered the following explanation: his specimen must have become adulterated by nitrates contained in his employer's products. Mickles suspected that his specimen had become adulterated when his urine stream splashed first onto his hand and then into the specimen cup. Mickles maintained that any adulteration of his specimen was unintentional. In what may be a surprising decision for Utah employers, the Department of Workforce Services was persuaded by Mickles' argument and held that there was no "just cause" for his termination. Mickles established his entitlement to unemployment benefits by pointing out that his employer had failed to offer any evidence of intentional adulteration.

The Court of Appeals agreed, holding that Mickles had been terminated without just cause. The court's decision focused on the Utah Drug and Alcohol Testing Act, Utah Code Ann. §§ 34-38-1 to -15, which affords broad protection to employers who implement drug testing, so long as they strictly adhere to the statute's provisions. The court found that Mickles' employer violated the Act by terminating his employment without notifying him of the particulars of his test result or giving him an opportunity to offer an explanation therefor. Moreover, the court found that the drug testing itself fell short of the Act's requirement of "scientifically accepted analytical methods and procedures" that "include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer. . . ." This conclusion illustrates the importance of understanding the nuances of the Utah Drug and Alcohol Testing Act before adopting or implementing any drug testing workplace policy.

III. Unlawful Discrimination and Retaliation

In *Viktron/Lika Utah v. Labor Commission,* 2001 UT App 394, 38 P.3d 993, the Court of Appeals examined claims arising under the Utah Antidiscrimination Act, Utah Code Ann. §§ 34A-5-101 to -108 (which statute parallels federal antidiscrimination statutes). The plaintiff, Joyce Wright, made internal complaints of gender-based harassment by her immediate supervisor, which conduct was instead characterized by her employer as friction created by Wright's pattern of insubordination. Immediately following the last in a series of internal complaints by Wright, her employment was terminated without any of the warnings or counseling promised pursuant to Viktron's progressive discipline policy. Wright filed a discrimination charge with the Utah Labor Commission, asserting a claim for unlawful retaliation in addition to the underlying sexual harassment. While the Appeals Board rejected her harassment claim, it affirmed the Labor Commission's determination that Wright had been the victim of unlawful retaliation. Viktron appealed.

The Court of Appeals noted initially that interpretation of the Utah Antidiscrimination Act's prohibition of retaliation against an employee for engaging in protected opposition to workplace discrimination presented a question of first impression. The court chose to look for guidance to federal law applying Title VII's analogous anti-retaliation provision. The court adopted the majority rule followed in the federal courts that requires a plaintiff to demonstrate a reasonable, good faith belief that s/he engaged in protected activity to make out a prima facie case. The court remanded Wright's suit to the Appeals Board of the Utah Labor Commission to determine whether Wright had a reasonable, good faith belief that her internal complaints constituted protected activity. The court further instructed the Board to apply the "McDonnell Douglas" burden-shifting analysis that guides interpretation of federal anti-discrimination statutes to evaluate the circumstantial evidence relating to Wright's claim that her termination was motivated by discriminatory animus.

This opinion strongly suggests that future claims of discrimination and retaliation arising under the Utah Antidiscrimination Act

will also be resolved by reference to the well-developed body of federal case law interpreting analogous federal statutes.

IV. Criminal History

In *Sorenson's Ranch School v. Oram,* 2001 UT App 354, 36 P.3d 528, the Court of Appeals affirmed the trial court's reversal of a determination by the State Department of Human Services that would have prohibited persons with past felony convictions from employment in licensed child-care facilities. Utah Code Ann. § 62A-4a-413(1) requires that licensed child-care providers submit a list of all employees for criminal background screening; Utah Code Ann. § 62A-4a-413(2) prohibits convicted felons from "provid[ing] child placing services, foster care, youth programs, substitute care, or institutionalized care for children in facilities of programs licensed by the [Department of Human Services]." The Department argued that net effect of these statutory mandates was to prohibit any person convicted of a felony from employment in any capacity whatsoever at a licensed child-care facility.

Sorensen's Ranch School challenged the Department's draconian interpretation of Utah Code Ann. § 62A-4a-413 after the Department threatened to revoke the School's license based on its maintenance worker's criminal history. The maintenance worker, Shaun Sorensen, was the son of the School's owner and had been convicted of two felonies in California before relocating to Utah and beginning his full-time employment at the School. The Court of Appeals agreed with the School, reasoning that Subsection (2)'s prohibition of certain enumerated services to children applied more narrowly than Subsection (1)'s screening requirement for all employees of licensed child-care facilities. The court held that so long as Sorensen did not engage in any of the enumerated activities listed in Subsection (2), he could continue his employment with the School without jeopardizing the School's licensure.

During its 2002 General Session, the Legislature repealed Utah Code Ann. § 62A-4a-413, effective May 6, 2002. However, the Utah Child Care Licensing Act (the "Act"), Utah Code Ann. §§ 26-39-101 to -110, contains a similar prohibition on the employment of convicted felons "to provide child care," as well as numerous other disqualifications from owning, operating, working with or volunteering for a licensed child care program. The Act defines "child care" as "continuous care and supervision of five of more children under 14 years of age, in lieu of care ordinarily provided by parents in their home, for less that 24 hours a day, for direct or indirect compensation," suggesting that the court's reasoning in *Sorenson's Ranch School, supra,* would apply to permit employment of a convicted felon at a licensed child care facility so long as s/he did not provide child care within the meaning of the Act.

V. Guns in the Workplace

One recent decision by the Second Judicial District Court, which is currently on appeal, is worth noting. *Hansen v. American Online, Inc.,* Civil No. 000907795 (02/04/2002), upheld the defendant employer's right to prohibit employees from bringing firearms into the workplace. In that case, former employees of the defendant employer contended that they were wrongfully terminated in violation of public policy when they were fired for bringing guns to work, contrary to their employer's established Workplace Violence Prevention Policy. Specifically, the plaintiffs asserted that the Constitution of Utah's provision regarding the right to bear arms trumped their employer's Policy.

The trial court rejected the plaintiffs' argument, reasoning that the well-established right of a private business owner to control the workplace environment and to protect against foreseeable danger created by introduction of weapons into the workplace outweighed the plaintiffs' desire to "impose their weapons rights upon [or] what they claim to be their rights upon [their employer] when it's the employer that's paying them to work. [T]o do so would strip the business[person] of his [or her] rights to reasonably conduct his [or her] business place as he [or she] sees fit." While the appellate court considers the matter, private employers may continue to lawfully enforce prohibitions on firearms in the workplace without concern that they are infringing their employees' constitutional rights.

Conclusion

These cases illustrate a continued trend in Utah courts toward viewing the employment relationship as a delicate balance of interests among the employer, the employee and the State. Employment lawyers can anticipate seeing more cases exploring these boundaries in the near future as plaintiffs seek damages for alleged violations of the statutory protections and legal rights afforded Utahns in the workplace. Given the high cost of litigation, prudent employers will review their policies for compliance with emerging law, as well as take action to ensure that managerial and supervisory agents understand that their representations to subordinates may create binding contractual obligations.

Commission Highlights

During its regularly scheduled meeting of September 27, 2002, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Don Roney of the Continental Insurance Group Malpractice Coverage distributed an underwriting and claim statistics report to the Commission. It was noted that Westport has an eight-year history with the Bar and approximately 50% of all eligible Utah attorneys buy professional liability through Westport.

2. Bryan Benevento was given the Distinguished Committee Award on behalf of the Character and Fitness Committee. John Adams acknowledged the Committee's tireless efforts and expressed the Commission's gratitude.

3. John Adams reported on the Dialogue of Freedom stating that over 800,000 4-page newspaper supplements had been printed and an additional 25,000 were printed in Spanish. To date, over 400 attorneys, 70 legislators, 57 judges, 51 executive branch members, 124 schools and 39,122 students participated in 1,392 presentations.

4. John Adams stated that the AOC has requested that the Bar Commission appoint two members to the Justice Court Standards Committee pursuant to Rule1-205 of the Code of Judicial Administration. The Commissioned moved and seconded to appoint Gus Chin to the committee. The Commission will continue to look for possible nominees in the "outlying" areas of the state for the second appointment.

5. The Commission approved a motion to hire Ilona Kase who had been a Vista volunteer, assisting with the Bar's Pro Bono project, as a part-time employee working with the Needs of the Elderly Committee.

6. The Bar's Executive Committee has chosen Dane Nolan to replace Debra Moore as the Bar's Judicial Council representative.

7. The Commission discussed the appointment to the Federal Rules Committee, stating that every state has a representative on the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and that Keith Taylor, Utah's representative, had recently tendered his resignation. The Commission will continue to gather names of nominees to fill this position.

8. Nanci Bockelie reported that she is spearheading a project to formulate a relatively brief but useful constitutional law class for legislators. She thinks the approach should be general in nature and the purpose of the class should be limited to raising an awareness of constitutional issues rather than an in depth study of a complicated area of law.

9. James Lee, Chair of the Supreme Court's Ethics and Discipline Committee, and Billy Walker, OPC Senior Disciplinary Counsel, were in attendance to discuss the current status of the attorney discipline system.

10. The Commission reviewed the appointments to Judicial Nominating Commissions. Two individuals will be appointed by the governor from lists provided by the Bar containing four nominees from the 1st district and six nominees from the 2nd, 3rd and 4th districts. The Commission voted to nominate Miles P. Jensen, Gary N. Anderson, Robert B. Funk and Marty E. Moore from the 1st. District; Daniel R. Cragun, Kristine M. Knowlton, Brad C. Smith and Trystan B. Smith from the 2nd district, where two more names from this district need to be sent to the governor. The 3rd district nominees will be Patricia S. Cassell, Douglas G. Mortensen, Peter Stirba, Steven T. Waterman, Donald J. Winder and Kenneth R. Updegrove. The 4th district nominees are Randy B. Birch, Marilyn Moody Brown, Shelden Carter, Jared W. Eldridge, Robert L. Jeffs and Thomas H. Means.

11. Rusty Vetter reported on the Bar's survey that he had composed soliciting Bar members' opinions on the Annual Convention from both those who had attended and those who did not attend. He observed that based on member response, a Jackson Lake Annual Convention site would likely meet with much success. John Baldwin said that staff would research both Jackson Lake, Anaheim, and other properties in San Diego and get back to the Commission.

12. Elaina Maragakis (from Ray Quinney & Nebeker) and staff members joined the Commission for a "thank-you" luncheon to celebrate the success with the Dialogue on Freedom project.

13. Debra Moore announced that nearly all of the members of the Commission had attended at least one focus group session related to the Delivery of Legal Services Committee project. Debra said that the focus groups' responses were illustrative of consumer perceptions relating to lawyers, the Bar, and the Bar's proposed (legal resource) website. Debra explained that a study recently completed in 2002 concluded that consumers largely believe that they can take care of their legal problems without resorting to the legal system.

14. Rusty Vetter reported that the Utah Supreme Court had approved the Bar's recently submitted MPT (Multistate Performance Testing) petition in time for the February Bar Examination and that preparations are underway to implement the new format. A meeting has been set up on October 23, 2002 pursuant to the court's request to present the MJP Admission Rule (Multijurisdictional Practice) as approved by the Commission.

15. Gary Sackett reported on the Ethics Advisory Opinion Committee and several recently issued ethics opinions.

16. Debra Moore noted that the annual Bar Leaders Workshop was scheduled for October 2, 2002.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.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
Office of the Clerk of Court

– Public Notice –

Appointment of New Magistrate Judge

The United States District Court for the District of Utah seeks applicants for the position of United States magistrate judge for the duty station in St. George. This is a part-time federal judicial officer position with an initial term of appointment for four years, subject to reappointment by the court for successive four-year terms. The appointee will be able to engage in private practice subject to the provisions of the Conflict of Interest Rules for Part-time Magistrate Judges as adopted by the Judicial Conference of the United States, copies of which are available from the Clerk of Court at the address noted below. The duties of the position anticipate a broad range of legal and judicial skills and abilities. The primary duties include administering oaths and affirmations; taking acknowledgments, affidavits, and depositions; issuing criminal complaints, warrants of arrest and summons, conduct initial appearance proceedings, arraigning defendants, accepting pleas, conducting trials, imposing sentences, and accepting forfeitures in petty offenses; and performing such other duties, not inconsistent with law, as authorized and directed by any judge of this court. The duties may entail periodic local travel for the purpose of conducting court.

APPLICATION PROCESS

Application forms and the Conflict of Interest Rules can be viewed online and downloaded from the Court's website at http://www.utd.uscourts.gov or may be obtained during normal working hours from:

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

Applications prepared and submitted as nominations by a party other than the applicant will not be considered. Completed application forms and supporting documentation must be received no later than the close of business on Friday, November 29, 2002. All applications will be kept confidential and will be reviewed only by members of the Merit Selection Panel and the district judges of the Court. The panel's deliberations will remain confidential.

For more information and general qualificaions see
http://www.utd.uscourts.gov

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 02-07

Issue: Under Rule 5.4 of the Utah Rules of Professional Responsibility, may a Utah lawyer (a) hire a paralegal, not otherwise associated with the lawyer or the lawyer's firm, as an independent contractor, or (b) compensate an employee paralegal or other firm employee based on a percentage of the lawyer's fees.

Conclusion: Utah lawyers may hire outside paralegals on an independen-contractor basis, provided the paralegal does not control the lawyer's professional judgment. In addition, if the amounts paid for services are not tied to specific cases, Utah lawyers or law firms may share fees with nonlawyer employees in a compensation plan.

Opinion No. 02-08

Issue: An attorney filed a complaint with the Judicial Conduct Commission against a judge. The complaint was eventually dismissed for insufficient evidence with no finding of misconduct. May the attorney accept new cases as counsel and appear before that judge without advising the clients of the complaint and without giving them the option of the attorney filing a motion for recusal?

Conclusion: The attorney must inform the client if the attorney thinks the judge may harbor some ill feelings toward the attorney. However, if the attorney has a reasonable good-faith belief that the judge does not harbor any ill feeling toward the lawyer, then the lawyer need not advise the client of the complaint the lawyer filed against the judge.

Opinion No. 02-09

Issue: Is it ethical for an attorney to enter into a contingency-fee agreement, under which all fees, expenses and costs of litigation are unconditionally assumed by the attorney?

Opinion: Within broad limitations, the Utah Rules of Professional Conduct permit an attorney and a client to determine the terms of the lawyer's compensation, and there is no *per se* restriction prohibiting the attorney from assuming all litigation costs and expenses under a contingency-fee agreement. Such fee agreements, however, must comply with all other applicable provisions of the Utah Rules of Professional Conduct concerning fees.

Ethics Opinions Available

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

Ethics Opinions Order Form

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

Please make all checks payable to the Utah State Bar and mail to:

Utah State Bar Ethics Opinions
ATTN: Christine Critchley
645 South 200 East, Suite 310
Salt Lake City, Utah 84111.

Name _____

Address _____

City _____

State _____ _____ Zip _____

Please allow 2-3 weeks for delivery.

Public Notice: Appointment of Chapter 13 Standing Trustee

The Office of the United States Trustee is seeking resumes from persons wishing to be considered for appointment as a standing trustee to administer cases filed under chapter 13 of the bankruptcy code. The appointment is for cases filed in the United States Bankruptcy Court for the District of Utah. Standing Trustees receive compensation and expenses pursuant to 28 U.S.C. §586. Compensation depends on disbursements. Maximum compensation including benefits is now $149,813 annually. In addition, the trustee operation receives payments for certain necessary and actual expenses.

The minimum qualifications for appointment are set forth in Title 28 of the Code of Federal Regulations at Part 58. To be eligible for appointment, an applicant must possess strong administrative, financial and interpersonal skills. Experience and/or training in management is desirable. Fiduciary experience or familiarity with the bankruptcy area is not mandatory.

A successful applicant will be required to undergo an FBI background check, and must qualify to be bonded. Although standing trustees are not federal employees, appointments are made consistent with federal Equal Opportunity policies, which prohibit discrimination in employment.

Forward resumes to the Office of the United States Trustee, Attn: S. Michele Campbell, 301 North Main, Suite 500, Wichita, Kansas 67202. All resumes should be received on or before October 31, 2002.

2003 Mid-Year Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2003 Mid-Year Convention. These awards honor publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, January 17, 2003.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

July 2002 Utah State Bar Examination

Joni Dickson Seko, Deputy General Counsel/ Admissions wishes to thank the members of the Bar Examiner, Bar Examiner Review, and Character and Fitness Committees for volunteering their time and effort to assist with the July 2002 Bar Examination. With 299 examinees, it was the largest exam ever given in the Utah.

October 16, 2002 Admissions Ceremony: Congratulations to the successful applicants from the July 2002 Utah State Bar Examination. A joint admissions ceremony to the Utah Supreme Court and the U.S. District Court of Utah was held on Wednesday, October 16, 2002 at 12:00 p.m. in the Grand Ballroom South of the Salt Palace Convention Center. The names of passing applicants are listed below.

Adkins, Kara K
Andersen, Julie
Anderson, Brad L
Anderson, Fred W
Anderson, Lois M
Anderson, Robert J
Anderson, Sammi V
Anderson, Steven L
Andrews, Jana P
Arriola-Wakeham, Margaret R
Ashcraft, Nathaniel D
Ashworth, Justin T
Ball, Matthew J
Ballard, Jacee E
Barach, Micha
Barlow, Matthew A
Barnes, Jason F
Barringham, Holly M
Barry, Michael P
Bartlett, Matthew A
Bateman, Samuel G
Beckstrom, Steven W
Belliston, Gregory S
Bench, Holly A
Bernard, William L
Birkeland, Sarah M
Bodily, Nyal C
Booher, Troy L
Boyd, Scot A
Boyden, Matthew S
Bramwell, Jared L
Brar, Jesse S
Brinton, Mark A
Broom, Joseph L
Brown, Jennifer A
Browning, Summer M
Bucklin, Douglas J
Buckwalter, Bryce B
Burns, James R
Burton, Jed K
Burton, Kenneth W
Caldwell, Wayne K
Call, Jeremy K
Candell, Helen E
Cannon, David J
Christensen, C. Ryan
Christensen, Edwin W
Christiansen, Ryan E
Cima, Brock C
Clark, Carlton M
Clark, Christopher T
Clark, Jeffrey N
Coleman, Shane P
Crayk, Adam L
Crockett, Matthew L
Croxford, Nathan C
Dalton, M. Denise
Davidson, Michael J
Davis-Floyd, Amanda L
DeBoer, Gordon W
Derum, Chad R
Donaldson, Peter H
Dorland, G. Scott
Dow, Tyler R
Driessen, James L
Durham, John C
Eagar, Rex I
Edwards, Julie
Elmont, David L
Ericksen, Erik S
Eyre, Joshua D
Farnsworth, Heather M
Farnsworth, II, Briant J
Faust, John M
Fields IV, Richard R
Flater, Aaron W
Fox, Karina M
Franckowiak, James D
Fredley, Steven A
Friend, Susan E
Garriott, Daniel B
Geary, Stephen W
Gentry, Eric R
Glende, Spencer S
Grimshaw, Kyle W
Hall, Matthew R
Halterman, Glenn D
Halverson Anderson, Kelly A
Hanks, Richard M
Hanks, Robert J
Hardman, Joni O
Hare, Mary J
Harkness, Samuel S
Harris, Lou G
Hatch, Calvin M
Herbert, Brett G
Hewitt, Lisa M
Hill, Christopher C
Hill, Julie K
Horner, Michael G
Howell, Andrew L
Howell, Anthony L
Howick, Brittany
Jensen, David E
Johnson, Brandon T
Johnson, Matthew C
Johnson, Sandi
Jones, Ceri R
Keen, J. Chris
Kelly, Ryan L
Kennington, Matthew H
Kenny, Joel G
Kimball, Jr., William O
King, Craig A
King, Kristine E
Kingman, Heidi M
Knutson, Douglas K
Konold, Christopher S
Kotter, Benjamin J
Krupa, Joseph L
Kurzban, Debra L
Lambert, Jonathan C
Larsen, Brandon B
Lawrence, Amy G
Leavitt, Michael F
Lehr Lehnardt, Rana R
Leigh, David H
LeVar, Thad C
Levin, Ali
Locke, Lance H
Lowry, Jeffery J
Lund, Matthew H
Lund, Robert A
Lyon, David J
Mark, William A
Marshall, Jeffrey S
Marshall, Ryan L
McBride, David A
McConkie, Michelle E
McDowell, Terri N
McElfish, Clinton M
McGregor, Marianne M
McNeill, Stacy J
Miller, Kalina B
Miller, Mark A
Minchey, Kevin T
Miya, Stephanie K
Molloy, Matthew L
Moore, William B
Morris, Nathan S
Muir, P. Matthew
Mull, David F
Naegle, Lorelei
Nash, Adam L
Neeleman, Jennifer L
Nelsen, Jason K
Nelson, Stephen L
Nemelka, Rhett B
Noble, Cody R
Nordstrom, Dallis R
Norman, John B
Norman, Katherine
Oakes, Angela D
Oakey, Brian J
Ochoa, Bibiana
Okelberry-Arbogast, Lisa L
Oldham, J. LaVar
Olsen, Erika K
Olsen, Richard L
Olsen, Sherilyn A
Orozco, Brent A
Ortega, Cristina P
Osburn, Summer R
Oyer, Ty D
Pace, Ryan H
Parker, Christopher R
Patterson, Thomas E
Peay, Stewart O
Peel, Ryan T
Pence, Carolyn
Penrod, John A
Perry, Dawn S
Perry, IV, William O
Peters, James M
Petersen, Hollee
Petersen, Richard L
Peterson, Christie J
Plane, Margaret D
Platt, Melissa C
Poppleton, Jason M
Potestio, Tobi D
Potter, Shawn W
Pugmire, Matthew J
Quick, Bryan L
Rashkin, Amy E
Rasmussen, Benjamin C
Rasmussen, Brady L
Rawson, J. Michael
Reese, Gavin M
Regan, Thomas M
Reich, Bret W
Reynard, Robert K
Rick, Jocelyn J
Rickenbach, Lloyd D
Rippa, Anthony V
Roberts, Jennifer
Robertson, Jason K
Rodriguez Reese, Kara M
Romero, Cecilia M
Rosborough, Gianmarco
Ruble, James H
Rutan, II, Edwin P
Sabin, Cameron L
Sandgren, Matthew L
Saulls, Scott B
Saylin, Gregory M
Schofield, Peter C
Schriever, Heather J
Seawell, Jeffrey S
Seppi, Lori J
Serassio, Carey A
Shirey, Kendra L
Shoff, Carl C
Shuman, Jon D
Skinner, Jacey
Smedley, Amy K
Sneddon, Heather M
Spencer, Amber K
Stander, Angela
Steed, Brian C
Steeves, Michael R
Taylor, James R
Taylor, Mark D
Thayne, Matthew D
Thomas, Brent W
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Thomas, Michael P
Thomas, Susannah
Todd, Matthew D
Tsosie, Paul H
Turek, Douglas D
Veysey, Alexis
Waddoups, James C
Wadsworth, Andrew M
Wahlquist, Larry E
Warder, Greg T
Watson, Catherine C
Welch, Teresa L
Wheatley, Nathan E
White, Jordan A
White, Juliette P
Williams-Morgan, Mary M
Winesett, Nathan S
Wright, Spencer H
Yoder, John F
Young, Roberta A
Zenger, Jamie

Discipline Corner

SUSPENSION

On September 24, 2002, the Honorable Stephen L. Henriod, Third Judicial District Court, entered an Order of Discipline: Suspension, suspending Douglas S. Haymore II from the practice of law for three months for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), 5.3(b) (Responsibilities Regarding Non Lawyer Assistants), 8.4(a) (Misconduct). The suspension is effective beginning September 24, 2002.

In summary:
In one matter, Mr. Haymore was retained to represent a client in two small claims cases. The client could not attend the trial. Mr. Haymore agreed to continue the trial date. Mr. Haymore did not continue the trial date. A motion to set aside the default was denied because the trial notice had been sent directly to the client and no appearance of counsel was filed.

In another matter, Mr. Haymore was retained to represent a client in a personal injury matter when the client's former attorney became ill. Mr. Haymore hired the former attorney's paralegal to work on the case. Medical and insurance records pertaining to the client's case were not requested or acquired. Settlement demands or negotiations did not occur and no pleadings were prepared for almost three years. Mr. Haymore did not reasonably keep his client informed and did not enable his client to make informed decisions regarding the case or Mr. Haymore's representation. Mr. Haymore instructed the client to communicate through his paralegal. The paralegal was not supervised to a standard where the case was diligently managed. Mr. Haymore failed to ensure his client's file was delivered to her in a timely and reasonable manner.

INTERIM SUSPENSION

On September 18, 2002, the Honorable Frank G. Noel, Third Judicial District Court, entered an Order of Interim Suspension, suspending Francis Angley from the practice of law pending final disposition of the disciplinary proceeding predicated upon his alleged misconduct.

On October 1, 2002, the Honorable Frank G. Noel, entered an Order permitting Mr. Angley to represent Sandra Miller for the limited purpose of filing a Memorandum in Opposition to Summary Judgment in her employment discrimination case pending in federal court, and the oral argument, if it is set before she can obtain new counsel.

REPRIMAND

On September 10, 2002, the Honorable Roger Livingston, Third Judicial District Court, entered an Order of Discipline: Reprimand, reprimanding Michael L. Humiston for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 1.6(a) (Confidentiality of Information), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct).

In summary:
Mr. Humiston was retained to represent a client in connection with late and deficient alimony and child support payments and custody issues. The client paid Mr. Humiston $2,000. No fee agreement or basis or rate of the fee was communicated to the client. The client met with Mr. Humiston on two or three occasions, met with his assistant twice, and spoke with him by telephone two or three times. Most of the communication was by e-mail, but only on occasion did Mr. Humiston respond. Mr. Humiston did not provide any meaningful information to the client. The client's former husband filed a petition to modify custody. The client discussed the matter with Mr. Humiston. Mr. Humiston told his client that he would file a response. Thereafter Mr. Humiston did not return the client's telephone calls or respond to her e-mail. The client later learned from her new attorney that a default was entered because Mr. Humiston did not appear at the pre-trial conference or file a response to the petition. Mr. Humiston refunded $1,000 to his client, but did not account for the $1,000 he retained.

ADMONITION

On October 2, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violation of Rules 1.5(b) or (c) (Fees), 1.4(b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
A client's former attorney was retained to represent a client in a personal injury matter. The client's former attorney negotiated a settlement with the insurance company, but that attorney died before completing the settlement. Subsequently, the client retained the attorney who is the subject of this proceeding for representation in the personal injury matter. The client wished a prompt settlement, without court proceedings. The attorney requested that the settlement check be reissued to the attorney, then rejected

the settlement without consulting the client. The client and attorney agreed that the attorney would assist in managing unpaid medical bills. The attorney did not assist in managing the unpaid medical bills. The attorney did not return the client's telephone calls or keep the client reasonably informed of the status of the case. The attorney did not request that the client sign a fee agreement until eleven months after the attorney was hired. The client did not sign the fee agreement.

ADMONITION

On October 9, 2002, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was retained to represent a company against a lawsuit. The attorney failed to attend a Settlement/Pretrial Conference and a Final Pretrial Conference/Summary Judgment Hearing, which the court had ordered counsel who would try the case to attend. The attorney did not obtain court permission for either of the absences. The attorney agreed to attempt to settle the case, but did not diligently pursue settlement negotiations. The attorney obtained permission from the company to have an attorney who was assisting a co-defendant appear at the reset Final Pretrial Conference to keep costs down. The attorney did not inform the company that the court had ordered all trial counsel to be present, or that the attorney had previously missed two court appearances. The attorney asked the co-defendant's counsel to appear but failed to obtain court approval for the attorney's nonappearance at the Final Pretrial Conference. The co-defendant's counsel did not attend the hearing because of a scheduling conflict. The attorney failed to appear at the Final Pretrial Conference. The attorney's absence resulted in the entry of a default judgment against the company. The attorney filed a motion to set aside the default judgment, but did not inform the company until after the motion was denied. The attorney filed an appeal and the case and judgment was eventually settled.

The Legal Assistant's Lament and the Lawyer's Reply

Marilu Peterson, CLA-S – Legal Assistant Division Chair

"What is your biggest frustration in your work as a legal assistant?" Earlier this year, a lawyer posed this question to a number of legal assistants when preparing for a luncheon address. When I read the responses, I was struck by the common theme. While I soon realized that these responses could form the basis for an article here, I knew it was important to have input from some lawyers lest this thing take the appearance of lawyer-bashing. Their responses, too, are thought-provoking.

First, from the legal assistants:
Communicate, communicate, communicate! We can't always read their minds. Always include legal assistants in strategy conferences, etc. Team work is critical with associates, legal assistants and lead counsel.

Keep the team informed and involved. The more heads working on a case the better. There is less chance of a missed deadline, procedural error, strategy error, etc., if everyone on the "team" is kept involved and updated.

Communication. It seems the legal assistants after every telephone call or contact with a client discuss the contact with the attorney either by memo or [other] discussion. The attorneys don't usually "report" their activity in the same way or at all. Then the legal assistant is usually only half informed or unaware of a change in direction, etc.

Communicating fee expectations to clients and updating clients as fee expectations increase or change.

Be focused on the project when it's time to discuss it. In other words, value the legal assistant's time just as if it were your own. If you're too busy, too tired or too focused on something else, then arrange a different time when you can be ready. It is not only disheartening to try to discuss something with someone who isn't really paying attention, but it can be frightening if the matter at hand may have a significant impact on your case.

I think attorneys need to have a little better communication and plan a little better. For instance, if something needs to be done quickly, please give us a little notice so we're not rushing and getting frustrated. Or if you've taken care of something, please inform us so we don't spend our time doing the same thing.

Make sure instructions are complete – mind-reading is not an option; better communication skills; don't eat while dictating; treat your legal assistants in a courteous and professional manner: don't shoot the messenger! keep all team members appraised of status on files: who's doing what, so that duplicate work isn't done; if an attorney is handling something himself, let others know; if you are out, let team members know –"hide & seek" is not an office game.

These legal assistants are frustrated by basically the same thing. Although they mention the lack of clear and complete instructions and little or no input into advance planning, underlying all of them is inadequate communication. Indeed, communication is the single most important criterion for a successful lawyer/legal assistant relationship, yet it presents the biggest challenge. While some of these responses may elicit a chuckle or two, particularly from legal assistants, they do offer some sound suggestions for lawyers to assist legal assistants in doing a better job:

- Include the legal assistant (and other team members) in strategy conferences, and keep everyone apprised of who has been assigned what, particularly if later on the lawyer decides to handle a particular phase of the project himself.
- Be prepared to listen when the time comes to discuss the work assignments and/or answer questions.
- Let the legal assistant know of significant client contacts, tactical changes, deadline changes, etc.
- Work with the legal assistant when setting deadlines and other priorities.

- Take a moment to think through instructions to make sure they are complete so that the work received is what was actually wanted.
- Keep the legal assistant (and the rest of the team) apprised of everyone's schedules ahead of time as much as possible.

And the Lawyers' Reply:

- Be *prepared* and on time for a scheduled meeting.
- When in doubt, ask for clarification or further direction.
- If an impromptu discussion is necessary, inquire first whether the time is appropriate and indicate how much time the legal assistant needs (is it a quick question, a detailed discussion, a status meeting?).
- Remind the lawyer of conflicting deadlines as it is just possible that one or more may have changed. If not, let the lawyer determine the priority.
- Be realistic in deciding what needs the lawyer's immediate attention.
- If you don't know, say so. Don't guess and present it as fact. Never be afraid to say, "I don't know, but I will find out." And then do so.

Something for us all to consider. And as for eating while dictating. . .

Preparing for Mediation in Family Law Cases

by Frances B. Terrill

There seems to be truth in the old saying "You can't sell something to an uneducated buyer." Even though every individual entering into mediation wants to make the "right" decision, sometimes more information is needed for this to happen. To prepare for mediation, it is important for the legal assistant to ask questions, review all documents and stay current on the developments of the case. Keeping the case organized is critical. In a mediation, all individuals are key players and should voice their ideas and concerns.

Selecting the Mediator, Time and Place: Before attending a mediation session, there is a great deal of preparation and organization that must take place. This can be done by the legal assistant as part of the legal team. Many attorneys have a mediator they prefer or a mediator who has the expertise needed to conduct the mediation for a particular case. After the attorney, the client and opposing attorney have selected a mediator, the legal assistant can begin in scheduling the mediation.

The date, time and place is important to make sure all individuals can be in attendance and are comfortable and open to the mediation. It is important to always check with the clients to make sure they do not have a conflict with the mediator, place and time of the mediation. Even though the mediation may be scheduled for a designated amount of time, be sure to allow time before and after. Clients may have questions and concerns prior to and after a mediation which need to be addressed. Often clients are apprehensive before mediation, because most of the time it is their first experience with the mediation process.

Identifying the Issues: It is important to identify the issues for mediation. At times there are several issues in a case which can be resolved between the parties. In some instances, only particular issues in a case are taken to trial. These are the issues that are addressed in the mediation in an attempt to avoid the trial time and cost of litigation.

Preparation for issues may vary. For example, custody and parenting time issues may be resolved without additional information. Even though the parties have a genuine interest in doing what is best for their children, suggestions as to various forms of parenting time may be needed. The court provides the parenting time guidelines on their website (http:\\courtlink.utcourts.gov) giving information as to the minimum parenting time, divorce education classes and many other topics of concern for parents. It may be a good idea to provide a copy of the minimum parenting time to the parties for a "starting place." Several parenting time options suggested by one party can be summarized in separate exhibits and provided to the opposing counsel (if in attendance) or to the opposing party. In this way, the options to which one party is in agreement is presented as a "starting place" from which to either expand or detract.

In determining custody, it is difficult for this to be resolved if the parties are not in agreement. A custody evaluation is usually done and with the additional information provided in the custody evaluation, the parties may want to return to mediation to discuss alternatives to determine what is the best interest of their children. Again, the custody evaluation would be the "starting place" for the parties.

The division of marital assets and debts seems to be the topic of mediation which may need more information and documentation to resolve. Each party may know more about a particular asset and debt and will need to share this information with the opposing party. Once both parties are "educated" the decision and options may be easier to recognize, define and resolve.

Many times there are several individual issues which may need to be addressed in mediation and cannot be resolved between the parties and their counsel. For example, retirement plans, stock options, bonuses, investment income, business evaluations and tax options may need to be discussed at length in order to be resolved. Once the parties and their counsel are presented with the information in a mediation setting and all are in agreement as to the facts submitted, the options to resolve the issue may be more clearly defined and may be resolved. At times there may need to be another mediation session scheduled to continue with the issue after additional information and documentation has been determined to be needed.

FRANCES B. TERRILL is a legal assistant and mediator. She is currently employed at the law firm of Cohne, Rappaport & Segal practicing in Family Law. She is a member of Utah State Bar Legal Assistant Division and Legal Assistants Association of Utah.

Documentation/Education: As discussed above, it is always a good idea to have a "starting place" in a written form or document. Even in the issue of visitation and custody, a plan should be presented from which to find new options and ideas for resolution. There is always a beginning to every road and mediation is hopefully the resolution.

When a mediation is scheduled to determine and resolve the division of marital assets and debts, a notebook is recommended. This notebook is similar to a trial notebook. A schedule is printed identifying the assets and debts in one column, the Petitioner's column, the Respondent's column and a final column for notes and information regarding that particular asset or debt. The assets and debts should be numbered. Once the schedule is completed, documentation should be indexed behind the particular asset or debt number verifying the value or debt as to the latest document or available information. The schedule again becomes the "starting place" for the distribution of the assets and debts and the indexed documents provides the "education" necessary.

Prior to the mediation, it may be advisable to print one schedule with the division as outlined by one party and print another schedule without the assignment of any asset or debt to a party. In this way there is a "starting place" but also a blank schedule to use as a working draft. The notes and information column may be used to note additional information is needed or the date of the document verifying the information presented. The schedule can be updated and produced as discussed with the use of a laptop computer. In this regard all parties can be a part of producing the final product.

Participation: Mediators welcome the participation of everyone involved. Remember the mediator is the driver but the "starting place" and information and documentation must come from that "educated buyer." If a case is to be settled during mediation, all facts and information as well as options and alternatives must be known, discussed, and applied by the client and his/her attorney.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/13/02	**Law & Technology – Building a Mote Around Your Castle.** 9:00 am – 3:00 pm. $75 before November 8, $125 after. Keeping your client data, documents and entire office secure from disaster, software and hardware demonstrations, economical business solutions and new online research possibilities.	5.5 (includes 1 hr ethics)
11/13/02	**ADR Academy Part II: Strategy in Mediation.** 5:30 – 6:45 pm. Series $150 YLD, $200 ADR Section, $250 others. Individual pricing $40/$50/$60.	1.5 CLE/NLCLE
11/15/02	**Where Medicine and Law Intersect in Aging and End-of-Life Care.** 9:00 am – 4:00 pm. $100 before November 8th, $120 after. Medical and legal experts discuss current thoughts and trends in informed consent and decision making issues and current issues in pain management, elder abuse, and end of life.	6
11/15/02	**South Utah Bar Assoc. First Annual Seminar –** Hampton Inn, St. George, Utah. $95 before November 7, $105 after. $50 1/2 day without lunch, $60 1/2 day with lunch. Mechanics liens, pre-trial issues, automatic stay, transferring water rights 101, ethics, estate planning pitfalls, insured buy sell agreements, business valuations.	8 (includes 1 hr ethics 2 NLCLE)
11/21/02	**NLCLE: Practicing in the Juvenile Courts.** 5:30–8:30 pm, $45 YLD, $60 others. Major differences between adult and juvenile justice system. Research of actual practice and policy of juvenile legal representation in Utah. Panel Discussion: The role of the prosecutor and the public defender, working together for fair juvenile representation.	3 CLE/NLCLE
11/22/02	**How to Build and Maintain a Successful Law Practice.** Broadcast International Studios, 6952 S. High Tech Drive, Midvale, UT (just behind Costco on 7200 S. 100 West). Business planning: model and structure. Marketing: client acquisition and development, marketing you and your practice, designing an effective web site. Financial Planning: building a relationship with the bank. Law Practice Management: technology streamlining for your office and office security.	8 (includes 1 hr ethics
12/11/02	**ADR Academy Part III: Ethics in Mediation.** 5:30 – 6:45 pm. Series $150 YLD, $200 ADR Section, $250 others. Individual pricing $40/$50/$60.	1.5 CLE/NLCLE
12/12/02	**Powerful Communication Skills: Winning Strategies for Lawyers (NPI)** 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. $215 advance registration, $225 at the door. To register call: 1-800-328-4444, or on-line at: www.npilaw.com/communication_overview.html	7
12/13/02	**Ethics: Lawyers Helping Lawyers.** Where does professionalism begin and end? How to insure you are amongst the respected legal professionals. $75	3 ethics
12/18/02	**Technology for Attorneys.** 8:30 am – 5:00 pm. $175. $25 discount for on-line registration before December 13. Firm web pages, ethical issues in web page design, internet legal research, analysis of internet, on-line security issues, on-line documents, case management software, new courtroom technology, document assembly software, new technology options for law firms, internet ethics, wireless technology, ethics in internet advertising, ethical issues relating to software, improving the bottom line.	9.5 (includes 1.5 ethics)
12/18/02	**Last Chance CLE: Search and Seizure.** 11:00 am – 1:30 pm. $40 YLD.	2 NLCLE
12/19/02	**Effective Appellate Advocacy: Litigating Beyond the Trial Court.** 9:00 am – noon. $25 YLD, $40 Lit. and App. section, $60 others. CLE designed to help litigators with any level of experience become more effective appellate advocates. Understand key rules in the federal and state appellate courts, learn how to better identify key appellate issues, and discover what judges from the Tenth Circuit and the Utah Court of Appeals and the Utah Supreme Court find effective in briefing and oral argument.	3 CLE/NLCLE

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3.375" x 4"	3.375" x 3.375"	3.5" x 2"
$250	**$200**	**$150**

For more information, or to reserve a classified display ad, contact Laniece Roberts at:
Phone: (801) 538-0526 • Fax: (801) 363-0219 • e-mail: www.UBJads@aol.com

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah Law and Justice Center
645 South 200 East, Salt Lake City, UT 84111-3834
Telephone (801) 531-9077 Fax (801) 531-0660

For Years _____ and _____

Name:			**Utah State Bar Number:**			
Address:			**Telephone Number:**			
Date of Activity	**Program Sponsor**	**Program Title**	**Type of Activity (see back of form)**	**Ethics Hours (minimum 3 hrs. required)**	**Other CLE (minimum 24 hrs. required)**	**Total Hours**
			Total Hours			

Explanation of Type of Activity

A. Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study

No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line cle programs. Regulation 4(d)-101(a)

B. Writing and Publishing an Article, Self-Study

Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Regulation 4(d)-101(b)

C. Lecturing, Self-Study

Lecturers in an accredited continuing legal education program and part-time teaching by a practitioner in an ABA approved law school may receive three hours of credit for each hour spent lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing or part time teaching. No lecturing or teaching credit is available for participation in a panel discussion. Regulation 4(d)-101(c)

D. Live CLE Program

There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. However, a minimum of fifteen (15) hours must be obtained through attendance at live continuing legal education programs. Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b) and (c) above of this Regulation 4(d)-101 may not exceed twelve (12) hours during a reporting period.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-101 – Each licensed attorney subject to these continuing legal education requirements shall file with the Board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

Regulation 5-102 – In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. **Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a $50.00 late fee. In addition, attorneys who fail to file within a reasonable time after the late fee has been assessed may be subject to suspension and $100.00 reinstatement fee.**

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulation 5-103(1)

Date: _____ Signature: _____

Regulation 5-103(1) – Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. The attorney shall retain this proof for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the Board upon written request.

Membership Corner

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

- **You must provide a street address for your business and a street address for your residence.**
- **The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.**
- **If your residence is your place of business it is public information as your place of business.**
- **You may designate either your business, residence, or a post office box for mailing purposes.**

***PLEASE PRINT**

1. Name _____ **Bar No.** _____ **Effective Date of Change** _____
Note: If you do not provide a date the effective date of the change will be deemed to be the date this form is received.

2. Business Address – <u>Public Information</u>

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

3. Residence Address – <u>Private Information</u>

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

4. Mailing Address – Which address do you want used for mailings? (Check one) (If P.O. Box, please fill out)

_____ Business _____ Residence

_____ P.O. Box Number _____ City _____ State _____ Zip _____

Signature _____

All changes must be made in writing. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834: Attention: Arnold Birrell, fax number (801) 531-9537.

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