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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: Storm brewing over Bear Lake, taken from North Beach by first-time contributor, Marji Hanson, Salt Lake City.

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Letters Submission Guidelines:

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

Cover Art

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

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

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

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Letters to the Editor

Dear Editor,

As a member of the general public, I fail to see the non-technical cogency of Leslie Randolph's article entitled "Practice Pointer: Using '& Associates' in a Firm Name" in the April 2003 *Utah Bar Journal.*

Certainly any member of the public who selects "Wendell Wilkie & Associates" wants to be represented by Wendell Wilkie. Nobody chooses to be represented by a nameless associate. The fact that thereby the client actually secures Wendell Wilkie's personal representation hardly seems to be either a deception or a detriment. There is little of real substance here to warrant the protective intervention of the Bar or the Courts.

By comparison, consider the equally deceptive names of the powerful and proud firms. Just how many decades has it been since C.C. Parsons, Calvin Behle or George W. Latimer actually provided any legal representation at Parsons, Behle & Latimer? Supposedly so easily bedazzled by the prospect of Wilkie's nameless "associates," might not a public idiot be just as easily beguiled by the prospect of legal representation under the personal direction of these equally ghostly figures?

How is the mythic use of "Wendell Wilkie & Associates" any more misleading to the public than the mythic use of "Old Dead Luminaries PC"? Perhaps this is really more a matter of power and influence than of professional ethics; or, conversely, perhaps the professional ethics are just a guise to preserve the power of the influential.

Sincerely,
Robert W. Jensen, MD, JD, FCLM

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.

Substitute House Bill 349 and the Definition of the Practice of Law

by John A. Adams

In the recently completed session, the Utah Legislature passed Substitute House Bill 349 and Governor Leavitt signed the bill into law. H.B. 349 directly affects lawyers and the practice of law. H.B. 349 consists of two parts: (1) it extends the sunset provision on the current unauthorized practice of law statute until May of 2004; and (2) as of May of 2004, it adopts a very narrow definition of the practice of law that essentially limits law practice to appearances in court. H.B. 349 has drawn considerable attention within our Bar as well as among lawyers around the country (*e.g., ABA Journal* article and ABA/BNA article). Although we have attempted to keep the Bar membership informed by email concerning these fast-breaking developments, we have email addresses for only about 64% of the Bar – this is a pitch for the rest of you to send us email addresses.

Now that the dust has settled somewhat, I want to explain some of the background behind H.B. 349,[1] what the Bar Commission has done to address it and where we go from here. This whole area is complicated by the fact that there are two subplots occurring within the same play. On one hand is a separation of powers issue about who governs the practice (and unauthorized practice) of law. On the other hand is the question of the delivery of affordable legal services to the middle class. They are distinct issues but have become joined at the hip through a series of events that began in 2001, when the Utah Legislature inadvertently repealed the UPL statute and tied its reinstatement to a request that the Utah Supreme Court study various issues related to the provision of legal services to the middle class. The reinstatement was for only one year.

The Court formed a committee on the delivery of legal services with fourteen members that included two justices, five legislators, and representatives of the Bar and the public.[2] The committee held regular meetings and submitted its report to the Court in September of 2002. The committee addressed the study topics identified by the Legislature and made various recommendations.

In the Fall of 2002, the Court acted on a pending Bar petition to revise and update the Rules of Lawyer Discipline and Disability. These are the rules that the Office of Professional Conduct and the Committee on Ethics and Discipline follow. The Court took the opportunity to modify Rule 6, titled "Jurisdiction," to rename section (a) as "Persons practicing law" and to state that the Court's disciplinary jurisdiction would include, in addition to lawyers, "any other person not admitted in this state who practices law or who renders or offers to render any legal services in this state." The new Rule 6 in effect overturned the Court's 1997 opinion in *Utah State Bar v. Benton Petersen* in which the Court stated that it governed the practice of law and the Legislature governed the unauthorized practice of law.

The change in Rule 6 of the Rules of Lawyer Discipline and Disability spawned the introduction of H.B. 349. Under new Rule 6, a UPL statute appears to be unnecessary since the Court, under its rulemaking power, could order injunctive relief to prohibit the unauthorized practice of law.[3] The question of who governs the practice of law had been considered, but left unresolved, by the Court's committee on the delivery of legal services. The Court's clarification by rule took certain legislators by surprise and apparently was viewed as an intrusion upon power, viz. the power to govern the unauthorized practice of law, which the Court had previously stated belonged to the Legislature. The subject of separation of powers between the judiciary and the Legislature has been somewhat of a sensitive topic in recent years in other contexts such as the Judicial Conduct Commission and various initiatives.

H.B. 349 was originally filed only as a bill number whose content was not disclosed until later in the session.[4] The House held

hearings. The Bar's general counsel and the chair of the Bar's UPL committee appeared at the hearings and opposed the bill on consumer protection grounds. The bill nonetheless passed the House by a resounding margin of 57-15. The Bar then sent letters to members of the Senate explaining that it opposed the bill on both constitutional and consumer protection grounds.[5] By a smaller margin of 17-11, the Senate passed the bill.

At the Bar's recent mid-year meeting in St. George, the Bar Commission unanimously voted to seek Governor Leavitt's veto of H.B. 349 and began notifying the Bar's membership of that decision. At the same time, the Bar Commission met with Representative Steve Urquhart, R-St.George, the sponsor of H.B. 349. Rep. Urquhart and House Majority Leader Greg Curtis, R-Salt Lake, served on the Court's committee on delivery of legal services and have been key players on these two issues since 2001. As a result of these constructive discussions, the Bar Commission and the bill's sponsors struck an agreement: The Bar Commission would not seek the Governor's veto and would undertake four specific measures associated with increasing access to and affordability of legal services in exchange for the sponsors' agreement in the next legislative session to introduce legislation to repeal the narrow definition of the practice of law and seek their colleagues' support of the repeal. The specifics of the agreement were reduced to writing and signed by representatives of each side. A copy of the agreement appears on the Bar's website.

Once the Bar Commission learned that the sponsors' primary purpose of enacting the narrow definition of the practice of law was to stimulate the judiciary and the Bar to improve access to the courts for the middle class, we were persuaded that an immediate resolution was desirable. Regardless of whether one agrees with the method lawmakers employed to bring about change, it was an available option and one that has been used in other contexts.

We sent an email to our membership explaining the agreement between the Bar Commission and the bill sponsors. We appreciate the feedback from members who took time to respond. Many favor the resolution, others question whether we can rely on the bill sponsors to follow through. The Bar Commission cannot guarantee that the narrow definition of the practice of law will be repealed. We are counting on the good faith of the bill sponsors to uphold their part of the agreement, just as they are counting on us to do the same. If for whatever reason the repeal is not sought or is unsuccessful, then the option will continue to exist in the

future as it exists now to let the Utah Supreme Court decide. If the definition is not repealed, the Bar Commission (or perhaps other interested persons) could challenge the constitutionality of H.B. 349 once it becomes effective in May of 2004.

Why wasn't a constitutional challenge pursued now? Two main reasons: First, the agreement offered the prospect that the highly restrictive definition of the practice of law would be voluntarily repealed. Second, it allowed us to remove ourselves from the middle of a separation of powers dispute and concentrate on areas of common interest. The Bar has no interest in being the catalyst in a real or perceived separation of powers dispute between two co-equal branches of government. The dynamics of such a context are fraught with uncertainty and risks. In short, we don't want to go there if we don't have to.

What four things has the Bar Commission agreed to do? The Bar Commission agreed: (1) to support increasing limits in small claims courts to $10,000; (2) to formulate recommendations for appropriate circumstances in which uncompensated advice would be allowed; (3) to develop and promote the appropriate unbundling of legal services by seeking rule amendments and through our own internal policies; and (4) to explore how parties in small claims actions might be represented by uncompensated non-lawyers. We understand that the issue of raising the small claims court limit has two sides to it. We are in the process of creating a task force to study the issue and make recommendations as to how any changes in legislation may best address the needs of the middle class and the processes involved in implementing increased limits.

The Bar Commission supports efforts to assure greater access to competent and affordable legal services by the middle class. It is our obligation to the public to do so. This also presents an opportunity to our members. The middle class represents a significant, largely untapped market for legal services. In a recent President's Message about the profile of our Bar membership, I pointed out that approximately 35% of our membership consists of solo practitioners and small firms (defined as 1-3 lawyers). Many of these lawyers – particularly those in certain fields such as personal injury, bankruptcy, and family law – are under-used by and well positioned to serve a larger segment of the middle class. Our challenge is to match available lawyers with members of the public who need competent legal services. If we are successful in that endeavor, a win/win situation results.

To successfully match lawyers with potential clients, we need to help the public become more knowledgeable consumers of legal services. For the past year, a Bar task force under the direction of our President-Elect, Debra Moore, has been studying various alternatives. Debra reported the task force's work in an article in the December edition of the *Utah Bar Journal.* The task force is scheduled to make its report and recommendations to the Bar Commission at our May meeting.

The Utah State Bar will continue to be proactive, not reactionary, in shaping solutions on issues of access to and affordability of legal services. We want to work with the Court, legislators and other interested persons to improve the delivery of legal services. I urge you to familiarize yourself with these issues. As a Bar Commission we will keep you posted on developments. We welcome your input.

[1] Those desiring more information can turn to the Bar's website, www.utahbar.org, under the title H.B. 349, the Legislative Definition of the Practice of Law and Access to Justice, to see the full text of some of the materials referenced in this article.

[2] For a more detailed account of the committee's work, see the President's Message in the December *Utah Bar Journal.*

[3] Unlike the UPL statutes in some state, Utah's statute did not impose criminal penalties.

[4] Prior to a legislative session's deadline for filing bills, a legislator may open a bill file and reserve a number with only a short title and no language and thereby preserve the right to fill in language later in the session. This empty bill filing is called a "Box Car."

[5] A copy of a letter sent to senators can be found on the Bar's website.

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Practice Pointer: Fee Agreements

by Kate A. Toomey

Attorneys are sometimes surprised to learn that except for contingency fee arrangements,[1] the Rules of Professional Conduct don't require written fee agreements between attorneys and clients. What the rule requires, in some circumstances, is written notice of the rate or basis of the fee. Neither the client nor the attorney is required to sign it, and it need not be before or simultaneous with the commencement of the relationship. "Within a reasonable time after commencing the representation" will do. Nevertheless, I urge anyone with a private law practice to have a fee agreement for every representation undertaken. Here's why.

Rule 1.5 and Its Requirements

Rule 1.5 of the Rules of Professional Conduct[2] provides as follows:

> When the lawyer has not regularly represented the client, and it is reasonably foreseeable that total attorneys fees to the client will exceed $750.00, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Rule 1.5(b) (Fees). Note that the rule doesn't require a written agreement – it just requires a written communication – and the lawyer can provide it after the representation starts. Arguably, a bill or statement for your services would even suffice; the Comment following the rule provides that "[f]urnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth." Comment, Rule 1.5 (Fees). But I wouldn't advise you to rely on such a minimalist approach. Some attorneys even limit their fees to $750 so they can avoid the writing requirement(!),[3] but here again, I wouldn't advise it.

For one thing, it's just good client relations to let the client know at the outset if it's a flat fee, and what the rate of the fee will be if you charge on an hourly basis. Even though you probably explained it to the client orally, having it in the form of an agreement you both sign gives the client something to refer to after your meeting, and diminishes the possibility of misunderstandings and memory lapses.

For another, having a written agreement gives you an opportunity to specify what you will and won't do for the fee you charge. If you intend to limit your role,[4] the written agreement is an excellent place to establish exactly what you'll do – settlement negotiations but not trial; trial but not appeal, and so on. You can also specify the circumstances under which you may terminate the representation.

Finally, having a fee agreement protects you in the unpleasant event that the client files a Bar complaint against you. Many complaints, especially those focusing on the scope of representation, are more easily resolved when the attorney produces a copy of a fee agreement signed by both parties.

Contingent Fees

If you accept cases on a contingent fee basis,[5] the Rules *require* a written fee agreement. *See* Rule 1.5(c) (Fees). The relevant portion of the rule provides:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated.

Rule 1.5(c) (Fees).

Flat Fees, Advance Fees, and "Nonrefundable" Fees

Attorneys can charge flat fees for their services, and often do so in

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connection with a requirement that the fee be paid in advance of the commencement of the representation. This sort of fee arrangement is common in practices that focus on criminal representation, domestic relations, and some types of bankruptcies – all areas in which collecting a fee after the representation ends is problematic.

There's nothing wrong with this, so far as the Rules are concerned. As always, though, it's wise to have the terms specified in a fee agreement that you and the client both sign. *See* Rule 1.5(a) (Fees); Utah Ethics Advisory Opinion No. 136 (1994).[6] Moreover, if there are conditions under which you anticipate the need to increase the amount of the flat fee, or shift from a flat fee to an hourly fee – if an uncontested divorce becomes contested, for example – it's wise to spell these out in the agreement. The Comment provides guidance on this:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Comment, Rule 1.5 (Fees).

Keep in mind that under some circumstances, you may have to refund fees paid in advance. The Comment states that "A lawyer may require advance payment of a fee but is obligated to return any unearned portion." Comment, Rule 1.5 (Fees). This is because the Rules prohibit attorneys from charging or collecting an excessive fee. *See* Rule 1.5(a) (Fees). You might want to include a paragraph in your fee agreement explaining to the client that if the representation terminates before you've earned the entire fee, the manner in which you will determine how much of it you are entitled to keep.[7]

"Nonrefundable fees" aren't actually non-refundable. Regardless of the term you use to characterize the fee, it's still subject to the prohibition against charging a clearly excessive fee. What this means is that there are circumstances under which you may have to return an unearned portion. *See* Rule 1.5(a) (Fees); Utah Ethics Advisory Opinion No. 136 (1994). If, for example, you accept a fee from a family member of a defendant in a criminal case who meanwhile is appointed a public defender and your services are terminated before you have performed any, or only a little, work, you may have to refund all or some of the fee. The Ethics Advisory Opinion identifies other examples.

The Elements of Good Fee Agreements

Fee agreements can take many forms and there isn't just one correct approach. Still, attorneys often seek guidance on what to include to best protect the interests of their clients and at the same time reduce the possibility of conflict later. Here are my bare-bones suggestions,[8] which are intended to satisfy the basic requirements of the Rules and then some, but obviously do not address other essential elements specific to the case:

1. Title the agreement.

For example: "Attorney-Client Fixed Fee Contract;" "Attorney-Client Hourly Fee Contract;" "Attorney-Client Contingency Fee Contract."

2. Identify the scope of the representation.

An example for a fixed fee contract: "The attorney will provide all legal services in connection with criminal charges arising from the client's arrest on [date]. The representation will terminate when all proceedings in the District Court have concluded. The representation does not include appealing any adverse decisions."

An example for an hourly fee contract: "Client hires Attorney to provide legal services in connection with the client's divorce action."

An example for a contingency fee contract: "The attorney will provide all legal services in connection with the client's breach of contract action against the defendant in District Court. The representation will terminate when settlement is reached, or the District Court or arbitration proceedings have concluded. The representation does not include appealing any adverse decisions." It's smart to explicitly note that your representation is limited to the matter identified in the agreement, and does not include independent or related matters that may arise, and that any such matters may be negotiated under a separate fee agreement.[9]

3. Define the type of fee.

A fixed fee contract states that the fee is a set amount, identifies the amount, and specifies when it must be paid. The agreement must also specify the conditions under which all or a portion of the fee will be returned and how the amount returned will be assessed. An hourly fee agreement states the hourly rate and identifies the amount of any deposit required. It's wise to include a section stating that the client will pay for legal services at the rates identified in the agreement. If they differ, include the rates of associates and partners, and identify any other firm personnel who may work on the case, along with the rate you will charge for their time.

A contingency fee agreement explains that your fee depends upon recovery of a settlement or judgment. Describe the structure of the contingency fee. For example, identify the percent of the net recovery if settlement is reached before filing a lawsuit, versus the percent of the net recovery if settlement or judgment is reached after a lawsuit is filed. Identify which of you is responsible for paying for necessary expert witnesses, consultations, or investigators. If the client has the final say on whom to hire, explain this; alternatively, if you retain control of those decisions, make it clear. Explain what will happen to any future recovery if the representation is terminated. For example, "If the attorney withdraws before completing the representation, the client may be entitled to a refund of any unused deposit. The attorney is entitled to a reasonable hourly fee based upon the amount of time expended on the case." Notify the client that if an award of costs is made, this may not cover all actual costs to which you are entitled, and the client remains responsible for the difference between what was awarded by the court and what you are owed. Explain that you will not make any settlement without obtaining the client's prior approval.[10]

4. Specify who will pay costs and when.

Under an hourly fee agreement, if the client will pay costs and expenses, include that, as well. For example, "In addition to the hourly fee, the client shall reimburse the attorney for all costs and expenses incurred by the attorney, including fees fixed by law, long distance telephone calls, messenger and delivery fees, postage, photocopying, parking, mileage at $____ per mile, consultants' fees, and other similar items."

Under a contingency agreement, for example, "The attorney will advance any sums necessary for costs and expenses, but the client shall reimburse the attorney for all such costs and expenses, including fees fixed by law, long distance telephone calls, messenger and delivery fees, postage, photocopying, parking, mileage at $____ per mile, consultants' fees, and other similar items."

Consider including a provision that requires you to contact the client before incurring costs exceeding a specified amount, and another requiring the client's consent before retaining outside consultants. Doing this sometimes avoids surprises that lead to conflicts later.

5. Specify any initial deposit or retainer fee you require.

Include the client's authorization to withdraw sums under the terms specified in the agreement. Explain that you will keep the money in a trust account until you use it for costs and expenses as they arise, or until you earn it if you're charging an hourly rate. It's a good idea to regularly send your client a written statement letting them know the status of their deposit. State what will happen if the deposit is used. For example, "When your deposit has been depleted, I will require you to pay all remaining sums owing, and will expect you to advance an additional deposit in the amount of $_____." Explain that you will refund any unused portion of the advance deposit at the end of the representation. You might also consider a provision informing the client that unless the client notifies you within a specified period of disputes concerning the statement, that you will withdraw the money from the trust account.[11]

For hourly agreements, include a section stating that you will send the client periodic statements accounting for hours spent and costs incurred, and stating that such an accounting will be made promptly, say within ten days, of the client's request.[12] Statements should include the date work was performed, who performed it, what was done, and how long it took. Specify when payments are due, and if you intend to charge interest on

the unpaid balance, state what the rate of interest will be.

6. Termination of the relationship before the conclusion of the legal matter.

Describe when and how the attorney/client relationship may be terminated. For example, "The client may discharge the attorney at any time.[13] The attorney may withdraw with the client's consent or for good cause." Articulate what you mean by "good cause." *See* Rule 1.16(a), (b) (Declining or Terminating Representation).

Explain what will happen to the client's money if the representation is terminated. For example, "If the attorney withdraws before completing the attorney's duties under this agreement, the client may be entitled to a refund of some or all of the fixed fee. The attorney is entitled to a reasonable hourly fee based upon the amount of time expended on the case." Explain that unpaid charges are due and payable upon the termination of representation.

7. The file.

Identify what will happen to the client's file when the representation ends. *See* Rule 1.16(d) (Declining or Terminating Representation), and the Comment thereafter, for guidance on protecting the client's interests "to the extent reasonably practicable."

8. Liens.

If you intend to claim a lien on any of the client's claims or causes of action, add a section explaining that your lien will be for any sums owed you at the conclusion of the representation, and will attach to any recovery the client obtains.

9. Disclaimer.

Explain that attorneys cannot guarantee results in the client's matter. This is helpful in defending yourself against claims that you promised the moon and failed to deliver it.

10. Signatures and dates.

Sign and date it yourself; have the client sign and date it; give the client a copy. Keep your copy in the client file.

What Happens If Things Go South?

Unfortunately, even the most explicit, fair contract doesn't make an attorney-client agreement bullet-proof. Many attorneys deal with fee disputes by simply writing off the uncollected fee, but others either cannot afford this course or are unwilling to walk away from their fees. The Rules stop short of addressing disputes over fees, but the Comment provides that "[I]f a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it." Comment, Rule 1.5 (Fees). The Utah State Bar offers a fee arbitration program for assisting in resolving such disputes. Aside from the Comment's exhortation, you might consider arbitration as a means of swiftly and inexpensively moving beyond conflicts with your clients.

Vetting Your Agreement

It's a good idea to have a trusted colleague review your form contracts, particularly if you're a small or solo practitioner or new to practice. If you don't feel comfortable running it by a friend, retain a qualified lawyer! The OPC lacks the resources to review individual contracts, but if you have specific questions about a provision you contemplate including, you can discuss it with an OPC attorney on the Ethics Hotline. The number is 531-9110.

[1] Contingent fees are discussed below.

[2] All references herein are to the Rules of Professional Conduct unless otherwise indicated.

[3] The idea is to avoid the expense of preparing the fee agreement.

[4] The Rules permit a lawyer to "limit the objectives of the representation if the client consents after consultation." Rule 1.2(b) (Scope of Representation).

[5] Criminal defense and divorces can't be charged on a contingent fee basis. *See* Rule 1.5(d) (Fees).

[6] The Utah Ethics Advisory Opinions are available on the Utah State Bar's website: www.utahbar.org.

[7] One method is to charge an hourly rate for your services to the point the relationship ended. This entails keeping time records, or at least being able to make a reasonable estimate concerning the time you spent on the matter. Many attorneys don't think it's worth the paperwork to keep time sheets, trading a more streamlined office practice for the potential of having to refund more of the fee.

[8] The OPC makes no express or implied representations or warranties concerning these suggestions.

[9] Bar complaints sometimes allege that the attorney represented the client in all sorts of legal matters other than the one for which the attorney was originally retained. A provision such as the one suggested goes a long way toward protecting the attorney in such a situation.

[10] Attorneys sometimes impermissibly attempt to circumvent the requirement that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter" by including a provision giving the attorney permission to make that decision. Rule 1.2(a) (Scope of Representation).

[11] This can help you avoid violating Rule 1.15(c) (Safekeeping Property).

[12] The Rules don't require billing statements at regular intervals, but in my opinion they're another useful client relations tool. In any event, the Rules do require a full accounting upon request of funds in your control belonging to a client or third party. *See* Rule 1.15(b) (Safekeeping Property).

[13] The Rules provide that "A lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged." Rule 1.16(a) (Declining or Terminating Representation). This means that a client can discharge a lawyer at any time. Lawyers sometimes attempt to circumvent this by adding language to the effect that the client can only discharge the attorney "for cause," but this will not avoid a rule violation if you keep working despite being fired without cause.

The Final Judgment Rule: Appealability and Enforceability Go Hand in Hand

by Kent O. Roche

Most practitioners readily recognize the final judgment rule as a cornerstone of appellate practice. We understand that the rule, now embodied in Rule 3(a) of our appellate rules, allows appeals to be taken as a matter of right[1] only from "final orders and judgments."[2] But the final judgment rule is more than a rule of appellate practice; it has important ramifications for lawsuits at the district court level. Specifically, the final judgment rule requires that a money judgment be final before it can be enforced through a writ of execution or one of the other post-judgment writs allowed by our civil rules. Unfortunately, as illustrated by the following example, the district court ramifications of the rule do not seem to be as well understood as the rule's appellate court ramifications.

Our firm was recently retained by an out-of-state bank to try to set aside a $5.5 million default judgment that had been entered against the bank in a state court proceeding. The default judgment against the bank was not a final judgment in that it did not adjudicate all of the claims asserted by all of the parties in the case and had not been certified as a final judgment under Rule 54(b) of the civil rules.[3] Despite this fact, while our motion to set aside the default judgment was pending before the district court, our opposing counsel proceeded with efforts to collect the default judgment by executing on the bank's assets. When we advised opposing counsel that it was improper to execute on a non-final judgment and requested that he voluntarily cease his execution efforts, he denied our request by quoting the following provision of Rule 62(a):

> Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

When preparing our motion to quash opposing counsel's execution efforts, I mistakenly believed that the rules themselves would contain language allowing us to demonstrate that opposing counsel's reliance upon Rule 62(a) was misplaced. However, the desired answer was not to be found in the rules themselves. Rule 54(a) got us frustratingly close, in that it purports to define the term "judgment" "as used in these rules [as] includ[ing] a decree and any order from which an appeal lies." From my perspective, this definition is ambiguous at best in that its use of the word "includes" rather than "means" or "includes only" would allow opposing counsel to argue that, as used in Rule 62(a), the term "judgment" includes, **but is not limited to,** final judgments.

Fortunately for our client, the desired answer had been provided by the Utah appellate courts. In *Cheves v. Williams,* 993 P.2d 191 (Utah 1999), the Utah Supreme Court unequivocally stated that a final judgment was necessary before a judgment creditor could execute on the judgment:

> Rule 62(a) provides that "[e]xecution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment." Utah R. Civ. P. 62(a). Rule 69(a) then provides that "[a] writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor." *Id.* 69(a). **The obvious implication of both these provisions is that there exists a previously issued final judgment not stayed pending appeal.** *Cf. Redding & Co. v. Russwine Constr. Corp.,* 417 F.2d 721, 727 (D.C. Cir. 1969) (noting that "[a]n execution ordinarily may issue only upon a final judgment").

Id. at 204-05 (emphasis added). Similarly, in *D'Aston v. Aston,* 844 P.2d 345 (Utah Ct. App. 1992), the Utah Court of Appeals stated that "[i]t is undisputed that a writ of execution may only be issued on a **'final'** judgment ...." *Id.* at 349 (emphasis added). These precedents thus stand for the general propositions that appealability and enforceability go hand in hand and that, consequently, a non-final money judgment is neither appealable nor

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enforceable.

Even though the foregoing case law allowed us to refute opposing counsel's arguments for continuing with his efforts to execute on the non-final default judgment, I submit that practitioners' understanding of these important legal principles would be greatly improved by enacting clarifying amendments to our rules of civil procedure. One suggestion would be to amend the first sentence of Rule 54(a) to read as follows: "'Judgment' as used in these rules **means** a decree and any order from which an appeal lies." (emphasis added) In my mind, an even better amendment would be to define "judgment" by expressly referencing the final judgment rule of Rule 3(a) of the appellate rules. My specific suggestion: "Unless otherwise clearly indicated, the term 'judgment,' as used in these rules, means a final decree, a final order, or a final judgment within the meaning of Rule 3(a) of the Utah Rules of Appellate Procedure."

Another possible approach to clarifying our rules would be to amend Rule 62(a), as well as other applicable rules,[4] so as to specifically require a final judgment or a final order. Because a practitioner reviewing our rules to decide whether she can execute on a non-final default judgment or a non-final summary judgment may locate Rule 62(a) but may well overlook Rule 54(a)'s controlling definition of "judgment," I would recommend that we take the "belt and suspenders approach" and enact clarifying amendments to both rules.

[1] Rule 5(a) of the appellate rules allows a party to petition the appellate court for permission to appeal from a non-final or interlocutory order or judgment.

[2] Rule 3(a) contains an exception to the final judgment rule that allows non-final judgments to be appealed if "otherwise provided by law." An example of a non-final judgment that is appealable as of right is an order denying a motion to compel arbitration; Section 78-31a-19 of the Utah Arbitration Act expressly makes such an order appealable. *See Pledger v. Gillespie,* 982 P.2d 572, 576 (Utah 1999). It should also be noted that neither the appellate rules nor the civil rules expressly define a final judgment. By negative implication, Rule 54(b) of the civil rules defines a final judgment as "any order or other form of decision, however designated, which adjudicates ... all the claims [and] the rights and liabilities of ... all the parties." The Utah Supreme Court has stated that "[a] judgment is final when it ends the controversy between the parties litigant." *Salt Lake City Corp. v. Layton,* 600 P.2d 538, 539 (Utah 1979).

[3] Rule 54(b) gives a district court discretion to certify a non-final or interlocutory order or judgment as a final judgment in limited circumstances. To be eligible for certification, the case must involve more than one claim for relief and/or multiple parties (i.e., more than the normal one plaintiff and one defendant), and the order or judgment in question must completely adjudicate one of the multiple claims or all of the claims involving one of the multiple parties. The court must also expressly determine that there is no just reason for delaying the entry of the requested final judgment and must expressly direct the entry of the same. *See Kennecott Corp. v. Utah State Tax Commission,* 814 P.2d 1099 (Utah 1991).

[4] These rules would include, at a minimum, Rule 69 (covering writs of execution) and Rule 64D (covering writs of garnishment).

Getting Past the Name Calling: A Framework for Analyzing Affirmative Action Plans

by John Martinez

"Racist!"

Claiming the high ground of truth, justice and the American Way, both those who defend affirmative action plans and their attackers call their opponents racists. Other invectives get thrown around, such as "Quotas!" "Reverse Discrimination!" "Elitist!" – and worse.

By the end of its current term this June, the United States Supreme Court will decide *Grutter v. Bollinger,* in which the affirmative action program of the University of Michigan Law School is challenged as violative of the federal Equal Protection Clause.[1] Once again, angry fights about affirmative action, both verbal and otherwise, will rage across the land. The purpose of this article is to propose a structure for a sensible discussion about affirmative action, and hopefully to raise the level of the debate above the acrimony and name-calling tendencies that have characterized previous Supreme Court affirmative action decisions.[2]

I. The Michigan Law School Case

The Michigan Law School has an affirmative action program in which race or ethnicity is treated as a "plus" factor in admissions decisions in order to achieve a "diverse" student body. The Federal Circuit Court of Appeals for the Sixth Circuit upheld the program against a federal Equal Protection challenge. The United States Supreme Court will review it on certiorari.

II. Equal Protection Analysis, Generally

The "bite" of the Equal Protection Clause is in court review of governmental action for conformity with that Clause. It is only when the United States Supreme Court, as the court of last resort, declares that governmental conduct is in violation that the Clause achieves lasting significance. Thus, to understand Equal Protection analysis, it is necessary to understand standards under which judicial review is conducted.

Standards of judicial review are the mechanisms used by courts to determine whether governmental conduct is in conformity with a particular principle, such as the Equal Protection Clause.[3] Such standards consist of three components: the Means used by the government, the Ends sought to be achieved thereby, and the Connection between the two. Thus, standards of judicial review have the "Means – Connection – Ends" structure.

In Equal Protection analysis, the Means used by government consist of the use of classifications. Thus, speeding laws classify car drivers in terms of those who speed and those who do not. The Ends sought to be achieved consist of governmental objectives, usually ones associated with the achievement of public health, safety, welfare and morals. One objective for speeding laws is to preserve public safety. In some circumstances, however, the governmental objective sought to be achieved must be of a higher level of "importance" than merely a "legitimate" public health, safety, welfare and morals objective. Thus, there is a range of objectives demanded by courts, from the comparatively *deferential* "legitimate governmental objective" sufficient to uphold speeding laws, to the comparatively activist "compelling state interest" required to uphold governmental conduct that classifies according to race.

The nature of the Connection between the Means and Ends may range from the comparatively *deferential* "reasonably likely to achieve the objective," to the comparatively *activist* "necessary to achieve the objective." Thus, speeding laws which merely affect the use of an automobile – a mere property right – may be upheld because they are "reasonably likely to achieve" the objective of public safety. By comparison, laws – or other governmental conduct, such as admissions programs in public universities –

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that classify according to race may be upheld only if they are "necessary" to achieve a compelling state interest.[4]

II. Equal Protection Analysis of the Michigan Law School's Affirmative Action Plan

The Means used by the Michigan Law School is the use of an affirmative action plan that differentiates according to race. Thus, race is a "plus" factor in the admissions process, albeit not an exclusive or decisive one. The Ends sought to be achieved by the school is the attainment of a "diverse" student body. The two pivotal issues for the United States Supreme Court therefore are: (a) Does achievement of a "diverse" student body rise to the level of a "compelling state interest?" (b) If so, does the University of Michigan Law School's affirmative action plan "necessarily" achieve that objective?

A. Is Achievement of a "Diverse" Student Body a "Compelling State Interest?"

In order to understand Diversity as an objective, it is helpful to contrast it with the other principle objective that has been advanced for affirmative action plans. That other objective has been referred to by various terms, including the "Social Justice," "Compensatory," or "Remedial" objective.[5] The difference has to do with the objects of programs: "Diversity" as an objective seeks to benefit the institution; "social justice" as an objective seeks to benefit those who are included in an affirmative action plan. Thus, Diversity qualifies as a compelling state interest only if the benefits it provides *to the institution* rise to the level of being "compelling."

Whether diversity is compelling in any case depends significantly on the extent to which a court will defer to the institutional role of the University of Michigan Law School in striking the balance between the costs and benefits involved. Contrary to what adherents to a "no discrimination based on race whatsoever" position have suggested, there are circumstances in which discrimination based on race has been upheld. *In Hunter v. The Regents of the University of California,* for example, the court upheld the use of race and ethnicity in the selection of students for participation in the "operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools."[6] The school tested different educational methodologies for possible implementation in the public educational system in

California, so the use of race and ethnicity was indispensable for the selection of a group of students that would be representative of the California student population as a whole. The use of race also was upheld in the employment setting in *Wittmer v. Peters,*[7] in which the court held that diversity, specifically promoting a correctional officer to a lieutenant position, was a compelling state interest in a correctional facility. The facility held 200 inmates (of whom 68 percent were black), whereas the security staff consisted of 48 correctional officers (of whom only 2 were black), plus 3 captains (all of whom were white) and 10 lieutenants (of whom 2, a man and a woman, were black). Judge Posner found that the State had demonstrated that the penal objectives of the camp would be advanced by having greater numbers of black lieutenant correctional officers.

The University of Michigan Law School contends that the presence of students who represent the greatest possible variety of backgrounds and viewpoints improves – in fact makes possible – the provision of an education that will prepare law students for their legal careers.[8] The school has produced studies that seek to demonstrate that effect. Since race is only one factor, and not a determinative one in the school's admissions decisions, the question is whether the Court will accept the balance the school has achieved between the costs of the use of race and the benefits derived.

B. If so, Does the University of Michigan Law School's Plan "Necessarily" Achieve Diversity?

Even if Diversity is a compelling state interest, the affirmative action plan of the University of Michigan Law School cannot be upheld unless the school demonstrates (1) the need for the plan and (2) that the plan is "narrowly tailored" to achieve its objective.

The need for the plan must be shown through evidence, such as scientifically valid studies showing that the educational experience in a non-diverse educational environment has not produced the benefits which the affirmative action plan would be meant to achieve. "Narrow tailoring" requires the University to show that the scope of the plan is sufficiently limited to address only the obstacles identified; that the duration of the plan is closed-ended; and that the use of the plan is the means that would be least restrictive of the rights of those not included within its scope.[9]

The ultimate result of these requirements is that they invalidate affirmative action plans that are either unreasonably underinclusive or unreasonably overinclusive. The charge of underinclusion is the "reverse discrimination" claim that persons who would help achieve the objectives of the plan are not included by it. Thus, a white applicant with coal mining experience may bring a distinctive dimension to the law school educational environment that a black applicant without such a distinctive background would not. The charge of overinclusion is the "Richard Rodriguez" phenomenon: he claimed that Stanford University accepted him because of his name, and that he had no connection, association or identification with Hispanic experience, culture or language.[10] A properly formulated affirmative action plan will be neither unreasonably underinclusive nor unreasonably overinclusive. Perfection, however, is not required.

III. Road Not Taken

Since the University of Michigan chose to use race as a "plus" factor in its affirmative action plan, that triggered the Equal Protection requirements that the school demonstrate that Diversity is a "compelling state interest" and that the use of the plan was "necessary" for its achievement. If the school had not used race as a factor, then it would have been almost a foregone conclusion that the plan would have been approved.

Where race is not used as a factor, then the Means used does not classify according to a suspect trait, and the typical form of judicial review is relatively undemanding: the End sought to be achieved may be merely a "legitimate governmental objective" and the Connection need only be reasonable. Moreover, in those circumstances, there is a presumption that the governmental conduct is proper, thus casting a substantial burden on the challenger to demonstrate invalidity.[11]

An institution thus may use factors other than race as the Means: education, work experience, socio-economic status, parental educational levels, family income, awards and other achievements or experiences. Such means would only have to be justified by achievement of a Legitimate Governmental Objective, and diversity certainly qualifies under that comparatively undemanding standard. Moreover, the Connection between such Means and the objective of diversity as a component of an educational curriculum surely would be upheld under the relatively undemanding "rational relationship" standard.[12]

The University of Michigan Law School contends, however, that eliminating race as a factor in their admissions process would prevent the achievement of diversity.[13] If the Supreme Court invalidates the University's current program, the University will have no choice but to seek to achieve diversity through race-neutral Means, without using race as a "plus" factor in its admissions process.

1 *Grutter v. Bollinger,* 288 F.3d 732 (6th Cir. 2002) cert. granted by 123 S. Ct. 617 (2002).

2 For my other articles on affirmative action, see *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs,* 12 Harv. Blackletter J. 49 (Spring 1995); *The Use of Transfer Policies for Achieving Diversity in Law Schools,* 14 UCLA Chicano-Latino L. Rev. 139 (1994). *See also* 9 Harv. Blackletter J. 163 (1992) (reviewing P. Williams, The Alchemy of Race and Rights (1991); 3 Sands, Libonati & Martinez, Local Government Law, §20.88 – Affirmative action plans).

3 I have suggested an approach to standards of judicial review generally in 3 Sands, Libonati & Martinez, Local Government Law, §16.29.50 (A suggested analytical approach to standards of judicial review).

4 The distinction, of course, derives from the famous "Footnote Four": *United States v. Carolene Products Co.,* 304 U.S. 144, 153 n.4 (1938) (distinguishing between activist judicial review, when fundamental rights or suspect traits are involved, and deferential review, when property rights are affected by governmental conduct).

5 I used the terms "Diversity" and "Social Justice" to identify the two principal objectives. *See Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs,* 12 Harv. Blackletter J. 49 (Spring 1995).

6 *Hunter v. The Regents of the University of California,* 190 F.3d 1061, 1063 (9th Cir. 1999) cert. denied 531 U.S. 877 (2000).

7 *Wittmer v. Peters,* 87 F.3d 916 (7th Cir. 1996).

8 *Grutter v. Bollinger,* 288 F.3d at 738-39.

9 For a discussion of these requirements, see *Hopwood v. State of Texas,* 78 F.3d 932 (5th Cir. 1996) cert. denied 116 S. Ct. 2581 (1996).

10 Richard Rodriquez, Hunger of Memory: The Education of Richard Rodriquez (1982). For a thoughtful analysis, see Richard Delgado, Book Review, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform,* 88 Cornell L. Rev. 855 (March, 2003).

11 *Hancock Industries v. Schaeffer,* 811 F. 2d 225, 237-38 (3rd Cir. 1987). Of course, challengers may always attempt to demonstrate that the use of non-race criteria is pretextual, and that such factors are merely proxies for race, triggering the higher level of review discussed above. Such showing, however, requires that the challenger meet a heavy burden of demonstrating an intent to discriminate on the basis of race. *See Village of Arlington Heights v. Metropolitan Housing Dev't Corp.,* 429 U.S. 252 (1977).

12 *See e.g., Vance v. Bradley,* 440 U.S. 93, 110-11 (1979); *United States v. Carolene Products Co.,* 304 U.S. 144 (1938).

13 *Grutter v. Bollinger,* 288 F.3d at 737-38.

Free Online Legal Research as a Bar Benefit: The CaseMaker Option

by Toby Brown

One of the most critical technology tools used by lawyers these days is computer-based legal research. This move away from printed copies of case law, statutes and other law has been of tremendous value to lawyers. It has allowed them to cut library costs and to access relevant legal information quickly and efficiently.

Recognizing this important role of computer-based research, in 1994 the Ohio State Bar Association joined in a partnership with a company called Lawriter to create an Ohio-specific library of information available on CD-ROM. Five years later they moved this concept to the Internet and CaseMaker was born. In this partnership, the Bar's role was to choose the content for the system and Lawriter provided the staffing and technology to serve the information up over the Internet.

The most unique aspect of this arrangement was that the services are provided to Ohio Bar members for *free* as a member benefit. As would be expected, the members of the Ohio Bar were very excited about this idea. And since its implementation in 1999, the members have been extremely pleased with the system and services.

With this success firmly in hand, the Ohio Bar decided to see if other state bars would be interested in joining a consortium, where each state bar would choose the library content for that state and CaseMaker would be the engine to serve it up on the web. Again the idea had a unique aspect. As each state bar joins the consortium, the new content is made available to existing users for free. This means as the consortium grows, so does its value.

And the consortium is growing. Beginning in 2000, Nebraska joined, soon followed by North Carolina. Currently 13 state bars are signed up. The most recent additions have been Idaho and Oregon.[1] The Utah State Bar is now evaluating the possibility of joining the consortium.

Lawyer Feedback

A number of state bars prior to signing up conducted surveys of their membership about the concept. Some of the bars, such as Nebraska, were considering dues increases to cover the cost to the bar for the service. The Nebraska survey asked members, "Would you be in favor of the NSBA providing the Nebraska CaseMaker library online to every active member if it were funded by a $20 annual charge to each active member?" A remarkable 85% of the membership responded positively. When Connecticut asked a similar question, 95% said yes. An interesting thing about these survey responses was that even when given an option to choose "Zero," members overwhelmingly selected the higher amounts. This reflects how highly lawyers value this type of service.

As the Utah State Bar is exploring this idea, a dues increase is not contemplated. However, any monies committed to such a program would impact the Bar's budget. Therefore the Bar wants its members to know it is considering the CaseMaker option. Since Utah is early in the process, an exact budget amount is not yet available. To give at least an idea of the cost of this service, of the state bars that have signed up, the cost per member has been around $15 to $20 per year. A very reasonable amount, given the current cost of similar online research tools available to members.

Next Steps

Debra Moore, President-Elect of the Utah State Bar, is heading up the effort to evaluate and potentially secure a CaseMaker deal. She has appointed a Committee to draft a set of proposed library contents for Utah. Once this list is prepared, then a bid from CaseMaker will be secured. With the specific bid in hand, the Bar Commission will then be able to weigh the cost of proceeding

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with such a deal against other Bar budgeting priorities.

The Committee has met and is in the process of finalizing a proposed library content list. The Committee includes representatives from many walks of legal life. This includes practitioners, law librarians, judges, legal IT staff and government legal department staff. This approach should give us the best possible library list. To give you an idea, this list will likely include Utah case law (since inception), the Utah Code, court rules, ethics opinions and some Utah administrative law. Some federal appellate case law is already in the system, and Utah District Court decisions might be included.

The goal of such a list is to have the library contain "90% of the content 90% of the membership needs." This quote comes from Denny Ramey, the Executive Director for the Ohio State Bar. That was his original goal when building CaseMaker and has proven to be a successful approach to building state libraries.

Timing

On the current schedule, if the Bar Commission approves proceeding with a CaseMaker service, Utah could likely be online in early 2004.

What it means for you?

As a lawyer who uses online legal research services, a CaseMaker service for Utah law could prove to be very useful in your practice. It is unlikely it will completely replace your use of other services such as Westlaw and Lexis. However, given the experience in other states, it will likely change how much and when you use other services.

The Utah State Bar is working to expand its offerings of member benefits. CaseMaker is one idea among many others for making your Bar more relevant to your practice. Watch for more member benefit offerings in the future.

Your Input

The Utah State Bar is very interested in hearing your thoughts on the CaseMaker concept. If you have questions, suggestions or any thoughts on this concept, please feel free to send them to: e-mail – casemaker@utahbar.org, call – (801) 297-7027 or write to the Bar's address – CaseMaker, Utah State Bar, 645 South 200 East, SLC, UT 84111.

[1] Recently reciprocity with Idaho and Oregon went into effect, further raising the value of the CaseMaker proposition.

The Constitutional Guarantee of an Independent Judiciary

by Justice Leonard H. Russon

A few years ago, while attending the National Judicial College, I met a judge from another state who was lamenting the fact that he was running for reelection and, upon returning home, had to raise a great deal of money. His jurisdiction covered three rural counties. I asked him how much money he needed to raise, and he replied, "Well over a hundred thousand dollars." I asked him where in the world he would get that amount of money, and he replied, "Well, principally from the local banks, farm implement dealers, and large farmers." I then asked what happens when one of those appeared in his courtroom as a party. He replied, "Well, it makes it pretty tough." I wondered at the time what kind of justice was served in that jurisdiction when the judge, obligated and sworn to uphold and apply the law, was subject to such pressure.

On May 1 of each year, our nation pauses to give recognition to the foundation stone of our political, economic, and social structure – the rule of law. Contracts are entered into with knowledge that they will be enforced as written. Residential property is purchased with the assurance that in thirty years, upon making the final payment, the buyer will receive the document finalizing ownership. A person accused of a crime has the assurance that individual constitutional rights will be protected by a judge who will apply the rule of law. Every facet of our way of life is dependent, to some degree, upon the rule of law.

Of all the lessons I have learned in my many years of legal service, none is more important than that the preservation of the rule of law is dependent upon an independent judiciary secure in its constitutional position and prerogatives. It is a convenient coincidence that at the time of my observations here we also mark the 200th anniversary of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), the United States Supreme Court's first landmark decision marking the ascendency of the judicial branch to its proper place alongside its coequal branches in our constitutional constellation, establishing that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

My observations, in addition to being sparked by the celebration of the anniversary of the United States Supreme Court's decision in *Marbury,* are a result of reflection on my many years as a trial lawyer and a jurist and, at least in some part, are motivated by what appears to be an increasing misunderstanding in regard to the judiciary by some members of the Legislature.

Perhaps the most important – and unfortunately in some quarters also the most misapprehended – concept in our constitutional system is the doctrine of the separation of powers and the necessity of an independent judiciary beholden to no other branch of government. This concept of an independent, neutral, and coequal judicial branch was one of the fundamental principles embraced by the founding fathers of our federal system. Alexander Hamilton aptly noted during the period of debate on the ratification of the federal constitution that "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Alexander Hamilton).

In fact, that judges were accountable to the king and not the rule

of law was of such great concern to the founders as to be included as a grievance in the Declaration of Independence itself: "[T]he present King of Great-Britain . . . has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." In crafting the republic's constitutional framework, the founders recognized that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

The framers of our federal constitutional system therefore designed the judicial branch "to stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 58 (1982).

The United States Supreme Court summarized and reaffirmed the significance of this feature of the framers' constitutional design when it stated:

> "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."
>
> In sum, our Constitution unambiguously enunciates a fundamental principle – that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Id. at 58-59 (quoting *United States v. Will,* 449 U.S. 200, 217-18 (1980)).

In fact, an independent judiciary was deemed so important that our federal constitution provided that federal judges be appointed for life. Without an independent judiciary, unbeholden to and unswayed by the other branches of government, the people would have no means of preserving the fundamental law laid down in the constitution that they established or of defending against legislative encroachments on the fundamental rights reserved to

the people in that constitution.

No responsibility is greater than where the judiciary is asked to review the constitutionality of a statute. The role of the judicial branch is to neutrally and impartially determine whether the legislative enactment is consistent with the most fundamental of all laws, the constitution. This is the role envisioned by the federal framers for the independent judicial branch:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not other wise to be supposed, that the Constitution could intend the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

The Federalist No. 78 (Alexander Hamilton).

These same concepts and principles have been incorporated into the Utah Constitution to accomplish the same ends. Many of the provisions of the judicial article of the Utah Constitution parallel the provisions of article III of the federal constitution. In some respects, the provisions of the Utah Constitution are more specific than its federal counterpart. In any event, despite any differences in the language employed in the two constitutions, the fundamental, foundational principle of the separation of powers, with independence of the judiciary, is held in common and in the highest esteem at all levels of our government.

In establishing the Utah State Constitution, the people of the state of Utah made it perfectly clear that they understood the principle of popular sovereignty. The preamble to the Constitution states:

> [W]e, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

Then, significantly, in article I, section 2 of the Constitution, they stated:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

In establishing our Constitution, the people of the state of Utah provided for a separation of powers between three distinct departments, the legislative, the executive, and the judicial, and prohibited persons in one department from exercising the powers of another. Article V, section 1 states:

> The powers of the government of the state of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The legislative power of the state was vested in the Legislature and in the people of the state by way of initiative. This power allows for the establishment of laws protecting and governing our society. Utah Const. art. VI, § 1.

The executive power of the state was vested in the Governor, who is obligated to see that the laws are faithfully executed. Utah Const. art. VII, § 5.

The judicial power of the state was vested in the Supreme Court, district courts, and other courts that may be established, with the clear proviso that no law could be declared unconstitutional by the Supreme Court, except by a concurrence of a majority of that court. Utah Const. art. VIII, § 2.

An independent judiciary, free from control or pressure by the executive or legislature, is essential and fundamental to our system of government inasmuch as the state, its agencies, and officers are frequently named parties in lawsuits in the courts. The state, its agencies, or its officers named in their official capacities were parties to lawsuits in which the Utah Supreme Court rendered opinions in fifteen cases in 2001 and fifteen cases in 2002. These cases involved the State Tax Commission, State Department of Health, University of Utah Medical Center, Lieutenant Governor, Governor, Board of Oil and Gas, Department of Natural Resources,

Department of Environmental Quality, Department of Transportation, and Public Service Commission. These numbers do not include the numerous criminal cases in which the state is generally a party. It is only through the courts that the people can seek redress for alleged wrongs caused by their government. The people must be able to bring legal action against their government before a judge who is independent of that government.

While the judiciary must be independent from the other branches of government, the initial selection of those who will serve as judges directly involves these branches. The executive branch is involved inasmuch as the Constitution provides that the Governor is to appoint a new judge from a number of names submitted by an independent nominating committee. The Legislature is involved inasmuch as the Constitution provides that the Governor's appointment must be approved by the State Senate.

This raises the question of how to create and preserve an independent judiciary when the very members of the judiciary are appointed by the Governor with approval of the Senate. The solution is found in the State Constitution. Article VIII, section 8 provides for the appointment of new judges by the Governor from a list of names submitted by the judicial nominating commission, a constitutional body of which no member can be a legislator nor appointed by the Legislature. The Governor's selection is subject to approval by the State Senate. The selection of a judge is to be based upon fitness for office, not upon politics, and thereafter, the judge is subject only to the people in retention elections. Article VIII, section 8 states:

> Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations.

Partisan politics, therefore, is not to be given consideration. In other words, it does not matter what political party or philosophy an applicant may embrace, or what his or her opinion is about political issues, including abortion, guns in schools, or nuclear waste storage. The constitution clearly states that such is to be disregarded in selecting judges. One might wonder why the Constitution would have such a prohibition. The answer is quite simple. What makes the office of judge unique is that it requires

a judge to be able and willing to set aside personal opinions and beliefs, political, social, or otherwise, in interpreting and applying the law. It requires legal decisions to be based upon the law as it is, not upon the law as the judge believes it ought to be. The Code of Judicial Conduct requires a judge to "apply the law" and "not be swayed by partisan interests, public clamor, or fear of criticism." Canon 3B. It also prohibits a candidate for selection to a judicial office from "making promises or pledges of conduct in office other than faithful, impartial, and diligent performance of judicial duties," or "taking a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system." Like most people, judges may have strong political opinions on every subject, but they must put such opinions aside and apply the law. These are the qualities that make a person fit for the office of judge. These are the qualities that should be meticulously examined by the Governor in selecting a new judge, and by the Senate in its confirmation proceedings.

When nominees abide by the Code of Judicial Conduct and refuse to answer pointedly political questions during the confirmation process, they are not doing so to spite or circumvent their legislative inquisitors. The rules of judicial ethics regarding answering such questions or taking such political stands are designed to preserve the impartiality of the judges and the courts.

It is vitally important to realize and remain cognizant of the fact that the restraint imposed upon sitting judges and judicial nominees by the rules of judicial ethics is aimed not at stymying the confirmation process or the Legislature's constitutional role, but at preserving the independence and impartiality of the judicial branch by maintaining a focus on the rule of law instead of the whim of politics.

By demanding that judicial nominees answer specific questions about their political views and by conditioning their confirmation to the bench on their passing such political litmus tests, politics is unduly injected into the judicial branch, which was designed to be nonpolitical. It erodes the separation between the two branches, rendering the judicial branch the mere handmaiden of the Legislature, as judicial nominees are judged not for their capabilities as scholars and jurists or their willingness to follow the law regardless of personal political, religious, or social views, but instead by adherence to party platform.

The intended purpose and goal of the confirmation process is to ensure that the executive's appointments to the bench are fit for the office. Fitness for office certainly includes legal knowledge, ability, experience, integrity, judicial temperament, and the ability and willingness to apply the law regardless of personal political philosophy. It is the Legislature's constitutional prerogative through the confirmation process to make its own assessment as to whether the executive's appointment meets these criteria.

Once the confirmation process has been completed and the new judge has taken office, the roles of the Legislature and the Governor end. Any future evaluation will be done by the electorate in nonpartisan retention elections. Article VIII, section 9 states: "[E]ach supreme court justice every tenth year, and each judge of other courts of record every sixth year, shall be subject to an unopposed retention election . . . on a nonpartisan ballot . . . ." It should be kept in mind, however, that while the judiciary is independent, it is not free to interpret and apply law in any manner it wishes. It, too, is subject to the rule of law. It should also be noted that judges are subject to disciplinary measures involving specified misconduct as set forth in article VIII, section 13 and article VI, section 19.

The message is clear. Our State Constitution, which mandates that judges be selected solely upon the basis of fitness for office without regard to any partisan political considerations, is consistent with the basic message of the founding fathers of this country and the words of Alexander Hamilton that "there is no liberty if the power of judging be not separated from the legislative and executive powers." To state again the words of the United States Supreme Court: "A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by the other branches of government."

If we are to maintain the autonomous, independent, and impartial judicial branch that is so essential to our system of government, we, as members of the bar and bench, must be ready to diligently and consistently invoke these fundamental principles and defend our judicial institutions and prerogatives. It would be a sad day, indeed, if a Utah judge, when asked the question "what happens when the state, its agencies, or officers appear as a party in your courtroom?" had to reply, "Well, it makes it pretty tough."

EDITOR'S NOTE: *Justice Leonard H. Russon retires from the Utah Supreme Court this month, following many years of service to the citizens of this state. The* Utah Bar Journal *congratulates Justice Russon on his long and distinguished career and wishes him good health and contentment in his retirement. We are pleased that he was willing to share these parting observations with our readers, and take this opportunity to highlight some of his accomplishments.*

Justice Russon is the only Utahn who has been a member of the District Court, the Court of Appeals, and the Supreme Court. Each appointment was made by a different governor. He was appointed to the Third District Court in 1984 by Governor Scott M. Matheson, to the Utah Court of Appeals in 1991 by Governor Norman H. Bangerter, and to the Utah Supreme Court in 1994 by Governor Michael O. Leavitt. At the time of his appointment to the Third District Court, he was the senior partner of the law firm of Hanson, Russon & Dunn.

Justice Russon has served in numerous positions within the state court system, including Associate Chief Justice of the Supreme Court, Associate Presiding Judge of the Utah Court of Appeals, Chairman of the Board of District Court Judges, Chairman of the Judicial Conduct Commission, member of the Supreme Court Advisory Committee on the Code of Professional Conduct, member of the Judicial Performance Evaluation Committee, and member of the Utah Judicial Council.

Justice Russon was raised and educated in Salt Lake City. He served in the United States Navy during the Korean War (1952-54), as a radioman on a destroyer, the USS Cassin Young. He was a church representative in Great Britain from 1956 to 1958. He graduated from the University of Utah, with a Bachelor of Science Degree in 1959, and from the University's College of Law, with a Juris Doctor in 1962. Between 1962 and 1984, he practiced law as a trial lawyer in California and Utah. He is a member of the bar associations of both states. He was admitted to practice before the United States Supreme Court in 1977. He was inducted as a Fellow into the American College of Trial Lawyers at Chicago, Illinois, in 1984.

Commission Highlights

During its regularly scheduled meeting of March 13, 2003, which was held in St. George, Utah, the Board of Commissioners received the following reports and took the actions indicated.

1. John T. Nielsen, the Bar's long time lobbyist, reported on H.B. 349 and other bills relating to courts, judges and lawyers. He also outlined the Governor's veto process, stating that the Governor has 20 days after the General Session ends to sign or veto a bill. If the veto is exercised, it can be overridden by a 2/3's majority of the Senate.
2. John Adams reported on the *Marbury v. Madison* project.
3. Karin Hobbs announced that the judges school presentation was being scheduled for April 18th. Panels consisting of federal and state court judges are in the process of being finalized, and MCLE credit is being sought.
4. John Adams announced that Carol Clawson has been asked to serve as a co-chair for the September "Mini" Convention.
5. John Adams reported that there was broad support for the Bar's proposed judicial criticism program and that revisions had been made to the written policy to address concerns over the mechanics such as timing and whom should be consulted. He said that the program had been presented to the Judicial Council which expressed its appreciation.
6. John Adams reported that the committee to review the resolution on the OPC ombudsman will need some more time.
7. Debra Moore distributed a draft copy of the Commission's Task Force on Delivery of Legal Services Report for informational purposes. She advised that the report will be finalized in the near future.
8. Charles R. Brown reported on the ABA mid-year meeting in Seattle. Leading topics at the meeting included the Sarbanes-Oxley Act, federal judges'salaries, and the Gramm-Leach-Bliley Act's [lawyers'] public notice requirements.
9. Dane Nolan reported on the Judicial Council meeting. He noted that Chief Justice Durham was very complimentary of the Bar's *Marbury v. Madison* program. Chief Justice Durham also said she would like to link the Court's and Bar's web sites. Mr. Nolan also said that there was great interest in the Bar's proposed criticism of judges and courts policy. The West Jordan Court facility was finally approved and funded. It is slated for opening in June 2005 and will accommodate four juvenile and four district court judges with the ability to double in size. Dane continued his report by noting that Justice Durham reported to the Council that the Court expects Jill Parrish to join them on May 17th, that Ronald Nehring takes office sometime in May, and that Justice Russon's farewell is slated for May 16th at 4:00 p.m. She also said that the Court believes H.B. 349 infringes upon the Court's jurisdiction to govern the practice of law.
10. Rep. Stephen Urquhart appeared at the Commission's invitation to talk about H.B. 349. There was extensive discussion on the subject of delivery of legal services to the middle class. Mr. Adams advised Mr. Urquhart of the Commission's decision to seek the Governor's veto.
11. Pursuant to the pertinent bylaw provisions and current Bar policies, Commissioners determined by vote that Randy Kester and George Daines are the President-Elect nominees.

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.

2003 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2003 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, May 30, 2003. The award categories include:

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2003 and ends June 30, 2004. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 6, 2003 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law & Justice Center. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar office with your questions or comments.

Please Help Us Assist Pro Se Litigants

We need attorneys with domestic experience to review divorce pleadings created by low-income users of Utah's Online Court Assistance Program. No other help to the petitioner is expected. All reviews are done on a secure website at your convenience. Communication with the petitioner occurs by embedded e-mail; lawyers' contact info. is hidden. You only need an internet connection.

Send e-mail to:
PROBONO@AndJusticeForAll.Org
for automated reply explaining the Assisted Pro Se Project.

Utah Legal Services, Inc.

Notice of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

May is National Elder Law Month
A Report by the Needs of the Elderly Committee

The Needs of the Elderly Committee (NOE) is dedicated to the mission of ensuring the delivery of quality legal services for the elderly and of advocating for their rights. As part of that mission, we join NAELA, the National Academy of Elder Law Attorneys, in recognizing May as National Elder Law Month.

Headquartered in Tucson, Arizona, NAELA was formed in 1988 in response to the growing needs of older adults and their families in coping with the legal problems of aging. Unlike traditional lawyers, elder law attorneys deal with their clients "holistically" – dealing with issues that affect a particular segment of the population rather than a narrow area of law. When clients visit an elder law attorney, they generally present problems beyond the need for a will or a power of attorney. Elder law attorneys are familiar with the network of services and providers to assist clients effectively.

While several of our committee members are also members of NAELA, we are not only elder law attorneys. Our driving goal is to help meet the legal needs of older persons in Utah. One of the main ways in which we accomplish that goal is through our senior center legal consultation pro bono program.

The purpose of this program is to help seniors evaluate whether they need legal assistance and help them access legal services and other appropriate resources to solve their problems. Every month volunteer lawyers meet one-on-one with clients for twenty-minute consultations over a two-hour period. Clinics are held in all of Salt Lake County's seventeen senior centers. The Bar's Pro Bono Office coordinates with Salt Lake County Aging Services to arrange scheduling with the senior centers. The committee recruits and supports the over 50 lawyers who volunteer their time and services with the program. Each month volunteers provide from twenty to thirty individual consultations. The legal issues discussed usually include powers of attorney, advance directives, consumer and debt problems, property questions, bankruptcy, telemarketing, public benefits, and small claims court matters. Many seniors just need someone to talk to who can help them figure out what to do next.

The committee's pro bono program in Salt Lake County has been successful for over a decade. We are trying to expand the program now to include senior subsidized housing units and to reach seniors beyond Salt Lake County lines. We learned recently that we have been awarded a Partnership in Law and Aging Program grant to support our work. The program, sponsored by The American Bar Association Commission on Law and Aging and the Albert and Elaine Borchard Foundation Center on Law and Aging, awards up to ten $7,500 grants annually to bar associations, legal services providers, and other organizations to encourage the development of collaborative, law-related projects designed to enhance the legal knowledge and awareness of older adults and improve their access to the justice system. We received a grant to train volunteer lawyers on elder law basics and aging network resources; conduct legal consultations with seniors at senior centers and senior housing units, and publish a print and Internet elder law manual for advocates and consumers.

We welcome any lawyer interested in participating in our pro bono efforts to either serve as a volunteer or to join our committee. During National Elder Law Month, we want to acknowledge the dedicated efforts of the following attorneys. They have all met with older adults at senior centers and provided counsel, legal advice, and understanding. Many thanks to all of them. For more information, please contact the NOE chair, Mary Jane Ciccarello, at mciccarello@utah.gov, or 801-538-4641.

Professor Richard Aaron
Kent Alderman
Rick Armstrong
James Baker
Marty Banks
Margaret Billings
Richard L. Bird, Jr.
John Borsos
Douglas Cannon
David Castleton
Mary Jane Ciccarello
TantaLisa Clayton
Cindy Crass
Bill Crawford
Marlin G. Criddle
Carl Erickson
Nicole Evans
Phillip Ferguson
Joseph Goodman, Jr
Laurie Hart
Dawn Hibl
Craig Hughes
Dwight Janerich
Michael A. Jensen
Kristen Johnson
Kevin Jones
Ken Margetts
Joyce Maughan
Harry McCoy, II
Edward McDonough
James A. McIntosh
Thomas Mecham
Mark Morrise
John Neville
Kerry Owens
David Pace
Kami Peterson
Kara Pettit
Deanna Sabey
Scott Sabey
Steve Sargent
Jane Semmel
R. P. Stevens
Kendall R. Surfass
Barbara W. Richman
Jeannine Timothy
Julie Valdes
Sherinne M. Walker
Todd Weiler
Troy Wilson

Mailing of Licensing Forms

The licensing forms for 2003-2004 will be mailed during the last week of May and the first week of June. Fees are due July 1, 2003, however fees received or postmarked on or before August 1, 2003 will be processed without penalty.

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

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

Congratulations…

The ABA Standing Committee on Public Education recognized the Uintah County Justice Court for its first-ever Law Day celebration by presenting the "Outstanding 2002 Law Day Activity" Award to the Honorable G. H. Petry. Judge Petry accepted the award during the ABA's Midyear Meeting in Seattle, Washington.

Thank You!

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

Cache County Bar Association

Government Law & Military Law Sections, Utah State Bar
Office of the Staff Judge Advocate, Hill Air Force Base
Fort Douglas Army Legal Office and
Utah Air and Army National Guard

Law Day 5K Run/Walk
Lon Jenkins – Chair, Law Day Run/Walk Committee
and its members, and all those who participated.

Law Day Luncheon/Awards
Young Lawyer Division – Victoria Fitlow, President
Mickell Jiminez Rowe & Kelly Williams, Co-Chairs
and the following
Clyde Snow Sessions & Swenson
Community Legal Center
Dart, Adamson & Donovan
Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker, Nichols & Perkins
Holland & Hart
Manning, Curtis, Bradshaw & Bednar
Olson & Hoggan
Parr Waddoups Brown Gee Loveless
Parsons Behle & Latimer
Ray, Quinney & Nebeker
Suitter Axland
TraskBritt

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

Salt Lake County Bar Association
Art & the Law Project

Thank you for your participation!

Bar Commission
Law Related Education
and Law Day Committee

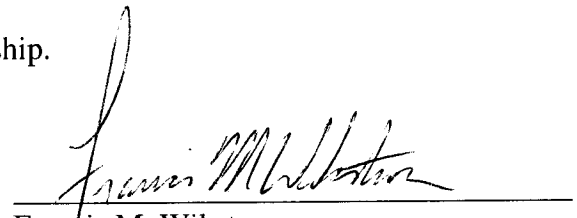
The Utah Fellows of the American College of Trial Lawyers are proud to announce that L. Rich Humpherys, Francis J. Carney, and Ellen Maycock have been inducted into the College.

The American College of Trial Lawyers strives to improve the standards of trial practice, the administration of justice and the ethics, civility, and collegiality of the trial profession.

Invitation to Fellowship is extended only after careful investigation to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.

Lawyers must have a minimum of fifteen years' trial experience before they can be considered for Fellowship and membership in the College cannot exceed 1% of the total lawyer population of any state or province.

The Utah Fellows of the College congratulate Rich Humpherys, Frank Carney, and Ellen Maycock, and welcome them to the Fellowship.



Francis M. Wikstrom
Utah State Chair
American College of Trial Lawyers

State Committee
Alan Sullivan
Elliott Williams
David Greenwood
David Eckersley
Janet Hugie Smith
Gordon Campbell

Discipline Corner

ADMONITION

On March 10, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violation of Rules 1.1 (Competence), 5.5 (Unauthorized Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in a divorce matter. The divorce complaint was filed first by the client's spouse in another state. The attorney filed a Notice of Appearance, Memorandum in Support of Special Appearance, and Motion to Dismiss in the other state. The attorney was not licensed to practice law in that state, and did not file a motion to appear pro hac vice. The attorney's Motion to Dismiss was dismissed.

RESIGNATION WITH DISCIPLINE PENDING

On March 16, 2003, the Honorable Christine Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation Pending Discipline concerning Walter Thomas Harris.

In summary:

The Office of Professional Conduct ("OPC") received eight complaints against Mr. Harris which were the basis of a Complaint filed against him in District Court. Mr. Harris submitted a Petition for Resignation with Discipline Pending to the Utah Supreme Court on February 26, 2003 in which he admitted "many of the facts upon which the allegations of misconduct set forth in the Complaint filed against him." Although the facts were not adjudicated, Mr. Harris's default was entered and the matter set for a sanctions hearing because of Mr. Harris's failure to cooperate with discovery

in violation of a court order compelling his cooperation. Mr. Harris's petition admits that these facts constitute grounds for discipline. The facts established by default are that Mr. Harris failed to communicate with clients, and in some cases, an opposing party and creditors; failed to diligently pursue his clients' cases; accepted fees from clients without performing legal work; failed to refund unearned fees; failed to keep retainers separate from his own funds, and failed to respond to the OPC's requests for information.

ADMONITION

On March 27, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violation of Rules 1.16(d) (Declining or Terminating Representation) and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was retained to represent a company in a collection matter. The attorney withdrew from representation a little over a week before a hearing on a summary judgment motion that the attorney had filed for the company. The attorney did not seek a continuance of the hearing. The attorney did not justify the late date of withdrawal.

ADMONITION

On March 27, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violation of Rules 1.5(b) (Fees) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in a divorce matter. The attorney failed to communicate the basis for calculating fees when fees exceeded $750. The attorney recalculated fees to bill retroactively on an hourly basis without explaining this in advance to the client.

PUBLIC REPRIMAND

On March 31, 2003, Ned P. Siegfried was publicly reprimanded by the Chair of the Ethics and Discipline Committee for violation of Rules 1.7(b) (Conflict of Interest-General Rule), 1.8(e) (Conflict of Interest-Prohibited Transactions), 1.8(j) (Conflict of Interest-Prohibited Transactions), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

While representing four clients, Mr. Siegfried provided financial assistance in the form of cash advances and paying personal and family expenses, in anticipation of recovering damages in personal injury claims or lawsuits. In one of the cases Mr. Siegfried provided an amount of financial assistance so great as to create a proprietary interest in the matter of the litigation and so great as to materially limit the representation of the client by his own interests.

PUBLIC REPRIMAND

On March 25, 2003, the Honorable J. Dennis Frederick, Third Judicial District Court, entered an Order of Discipline: Reprimand, reprimanding Timothy Miguel Willardson, for violation of Rules 3.3(a)(1) (Candor Toward the Tribunal) and 8.4(a) and (d) (Misconduct), Rules of Professional Conduct.

In summary:

Mr. Willardson was retained to represent a client in a lawsuit alleging slander and intentional interference with business relations. During representation of his client, Mr. Willardson made three misrepresentations of fact before the District Court although he had access to information which refuted his representations before he instituted an action. The Supreme Court further found that his actions had violated Rule 11 of the Utah Rules of Civil Procedure.

Aggravating factors include: substantial experience in the practice of law.

Mitigating factors include: absence of prior record of discipline and restitution.

Legal Assistant Division Update

Marilu Peterson, CLA-S – Legal Assistant Division Chair

The Legal Assistant Division's series of articles on utilization of legal assistants is well underway. Hopefully you had a chance to read Robyn Dotterer's overview of utilization issues in the April *Bar Journal.* As discussed in the LAD's *Bar Journal* messages these past few months, the Legal Assistant Division will be submitting articles by LAD members focusing on utilization of legal assistants in various practice areas. On the following pages is an article by LAD member Lucy Knorr discussing ideas for utilization of legal assistants in family law practice. Future articles will focus on utilization of legal assistants in litigation, estate planning, probate and other practice areas.

Be sure to mark your calendars for Legal Assistants' Day Luncheon, to be held at the Grand America Hotel on Thursday, May 15, 2003. All legal assistants and their supervising attorneys are invited to attend. Our speaker will be Utah State Bar President-Elect Debra Moore, who will address the future role of legal assistants in the delivery of legal services. The luncheon will be held from 11:45 a.m. to 1:00 p.m. Invitations with registration information will be mailed out to LAD and LAAU members in approximately two weeks, so watch your mail and register for this wonderful yearly event.

Legal Assistants' Day was established in 1994 by declaration of Governor Michael O. Leavitt. The third Thursday in May each year has been set aside to recognize and promote the legal assistant profession. Governor Leavitt's Declaration reads as follows:

"*Whereas,* the Legal Assistant profession fulfills the need for the availability of high-quality legal services at lowest possible cost within the team of lawyer, paraprofessional, and clerical employee, who share the responsibility for providing competent, ethical, and cost-effective legal services; and

Whereas, Legal Assistants are skilled and qualified through extensive education, training or work experience and perform complex, responsible paraprofessional legal services of a substantive nature, rendering legal assistance to members of the Utah State Bar, performing functions the lawyer would otherwise provide, and acting under his/her direction, but not engaging in the unauthorized practice of law; and

Whereas, Legal Assistants have substantive knowledge of legal concepts and procedures, together with the ability to analyze facts and evidence; and

Whereas, Legal Assistants strive at all times to maintain the integrity of the legal profession and are subject to the Rules of Professional Conduct of the Utah State Bar governing lawyers licensed to practice in the State of Utah; and

Whereas, Legal Assistants promote the legal profession by maintaining a high level of skill, by adhering to ethical standards and general rules and principals of conduct, by participating in continuing legal education, and by supporting the legal profession's ideal of public service; and

Whereas, the utilization of Legal Assistants by lawyers has been recognized and promulgated by the American Bar Association and other professional societies;

Now, Therefore, I, Michael O. Leavitt, Governor of the State of Utah, do hereby declare Thursday, May 19, 1994, and each third Thursday of May henceforth, as Legal Assistants' Day in Utah, and encourage the citizens of our state to actively participate in this declaration."

Quite an achievement of recognition for our profession. Your attendance at the Legal Assistants' Day Luncheon is encouraged.

Utilizing Legal Assistants in Your Family Law Practice

by Lucy A. Knorr

Can your family law practice function in your absence? If you find yourself scoffing at the idea of taking time off during the middle of the week to attend a seminar, volunteer at your child's school or ski in the middle of the week, you may find the ideas about utilizing legal assistants in this article especially helpful. The last time the lawyer I work for was gone for a few days, both her secretary and I remained extremely busy, and I billed as many hours as when she was present. Working at that level is very fulfilling because it feels like you are an essential part of a team. Granted, if there was an emergency where a client required immediate legal advice we had another family law attorney who could help. However, the point is, when you utilize your legal assistants effectively, they are happier in their jobs; and it allows you the ability to manage your time and to choose whether you want to service more clients, attend a seminar or take that ski day. In preparation for this article, I spoke with several family law legal assistants to gain additional perspective on legal assistant utilization. Our conversations about utilization fell primarily into the three categories of work delegation, communication and relationship style.

Work delegation is the first area that will make an immediate impact in your practice. The legal assistants I spoke with said they all do a significant amount of interfacing with clients and drafting documents such as affidavits, petitions, findings of fact and order to show cause pleadings. In addition, some draft client correspondence and others attend hearings. It is a continuing dilemma for many lawyers whether to bill more hours themselves, or turn some of that work over to their legal assistant. The problem with not turning over work is that in the long run, you are not as productive. On the other hand, what happens when work is turned over to the legal assistant? It allows you, as the attorney, the opportunity to increase the amount of substantive legal work you do. For example, while you work on the legal issues of a case andadvise clients, your legal assistant may draft an order to show cause and prepare interrogatories for your review. Rather than spend an hour drafting or dictating both of those documents yourself, you instead spend a few minutes making changes to the drafts and return them to the legal assistant. Now you have the time to work with another client. As legal assistant Jody Jensen mentioned, "The more you give us, the more substantive work you can do, and the more completely we understand the case, the more we are able to help."

It can also help your legal assistant's production levels if you have a uniform system for the types of pleadings that are done frequently in family law such as petitions, certain stipulation clauses and the documents involved in default divorces. For example, on most petitions my lawyer can give me the basic criteria without dictating the entire document because she has developed preferred formats. I know I can use the format as a frame and provide the draft for her to review and revise as necessary. Not only do I prefer being trusted to know what to draft, but I can produce the document much faster than I can by listening and typing word for word from a dictation tape. Several of the legal assistants I spoke with suggested that each time a lawyer begins to draft a document, he or she should consider if it isn't something the legal assistant is capable of doing. Certainly, if it is non-billable, pass it along. If it is something new, you might need to teach your legal assistant the principles behind the type of pleading. However, the next time, she will be prepared to work on the pleading with less direction. Furthermore, family law clients often need to simply provide information, hear the attorney's direction repeated or talk to someone who understands their frustration with the legal system and the divorce process. These are the types of calls that are optimal for legal assistants. Again, this leaves you free to concentrate on items that go beyond the scope of a legal assistant's qualifications; plus, the legal assistant has challenging and rewarding work to do. Or, then again, it leaves you free to take that powder day.

It is important to remember that most legal assistants who work in family law do so because they enjoy the field and believe that their unique abilities contribute to a lawyer's practice. Those who have degrees and extensive training may be capable of more than

LUCY A. KNORR is a legal assistant at Kruse, Landa, Maycock & Ricks and a member of the Legal Assistants Division of the Utah State Bar.

you realize. I sometimes find that a lawyer is not aware of the types of classes legal assistant programs require for graduation. If it has been some time since you had that initial job interview with your legal assistant, it may help you determine what kinds of work she can do by discussing her legal education and experience again. Furthermore, encouraging your legal assistant to attend family law CLE broadens the scope of the issues she is familiar with so she can provide better support to you and your practice.

Of course, neither the legal assistant nor the attorney are robots and in order to share this work load, effective communication is vital both from the lawyer to the legal assistant and from the legal assistant to the lawyer. It is much like the real estate mantra; location, location, location. However, in our situation, as one legal assistant noted, it is communication, communication, communication. In part, the reason this is so important is because legal assistants are usually not as involved with a case as the attorney is and may only receive bits and pieces of information. Yet, they are counted on to produce work, such as affidavits, and keep track of documents that require knowledge of the case. Legal assistants are not just typists. Unless the legal assistant knows what goes on between those bits and pieces, she can't be as effective in drafting pleadings or communicating with either the client or opposing counsel, or worse, she can make mistakes.

Communication styles that help in the utilization of legal assistants vary from practice to practice. Some lawyers send frequent notes to their legal assistant to let them know the results of conversations, hearings, etc. and request that their legal assistant do the same. Others prefer to add notes in client files maintained in software programs such as *Amicus.* Using this method as an example, the legal assistant can open a client file maintained on the computer while on the phone and have a quick synopsis of the case status without having to wait for more information from the lawyer. Other legal assistants attend depositions, client meetings and hearings frequently enough that less formal communication is needed to inform them about a case. One legal assistant I spoke with said that being involved in the initial client meeting as well as having extensive client contact provides her with a good understanding of the case so that she "can take the ball and run with it" when assigned. Another mentioned that undertaking a full case review on a regular basis with her lawyer is a way she has kept up to date as well as helped to ensure that nothing was overlooked.

While communication is vital to utilization, the relationship between the lawyer and legal assistant is interconnected with and frames the communication process. Thus, for utilization to work well, the relationship must be recognized and worked on as in any other relationship using good communication practices. I am not suggesting that it is necessary for you take your legal assistant to lunch or know the name of her first goldfish, etc. Rather, the same skills we talk to clients about for their co-parenting issues, skills from that dust covered *Getting to Yes* book, or any other relationship/communication enhancing material you have read can aptly apply to your relationship with your legal assistant. Ideally, mutual trust and respect are the outcome of a good working relationship. Because of this mutual trust and respect, many legal assistants feel that they have a partnership with the lawyer they work for and are increasingly dedicated to the practice as the years multiply. Specifically, the legal assistants I spoke with mentioned several communication patterns that added to their ability to contribute because of what these patterns do for the relationship. For example, they are able to ask questions without being criticized because their lawyers have respect for their professionalism and desire to be certain of what they are working on. In addition, they receive frequent praise for work well done and are able to let their lawyer know when they are overwhelmed with work or have made a mistake without it turning into a blame scenario. When a good relationship is firmly in place between the lawyer and legal assistant, it can take a few knocks such as during trial preparation when tension tends to exceed good communication practices. Rather than allow a situation such as this to begin a degenerative communication spiral, good communication skills will assure that it remains an isolated incident and the relationship will bounce back. When these spirals are allowed to go unchecked however, either the legal assistant quits and the lawyer wonders if the problems were really that bad, or the lawyer fires the legal assistant and the legal assistant is the one left wondering.

As one legal assistant noted, if you can find a legal assistant with similar work styles and you can work well together, she will be worth her weight in gold, or rather, her billables.

Many thanks to legal assistants; Cynthia Mendenhall of Cohne, Rappaport & Segal; Leslie Staples of Miller, Vance & Thompson; Tracy Ahlstrom of Corporon & Williams; Jody Jensen of Kruse, Landa, Maycock & Ricks, and Brigid Carney of Skordas & Caston for their contributions to this article. Note: While the legal assistant profession is not exclusive to women I have chosen to use the word she *because at present the majority of legal assistants are women.*

CLE Calendar

Annual Spring Seminars

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/09/03	**Annual Family Law Section Seminar:** 8:30 am – 4:20 pm. Ethical Conduct in a ProSe World. $125 section members, $155 non-section.	7 (including 2 hrs. Ethics)
05/21/03	**Annual Labor & Employment:** Agenda Pending	
05/22/03	**Annual Business Law Seminar:** 8:30 am – 12:00 pm. Various aspects of business financing. $30.	3
06/27/03	**Annual Legal Assistant Division Seminar:** 8:30 am – 4:15 pm. Preservation issues, internet research, time keeping, public record searches, corporate record keeping. $90 LAD members, $100 all others.	6

Additional Seminars Offered This Spring

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/22/03	**What You Need to Know to Practice Securities Law in Utah.** 5:30 – 8:30 pm. $50 Young Lawyer, $60 others.	3 CLE/NLCLE
05/22/03	**The Judicial Selection Process.** 8:30 am – 1:00 pm. $40 registration fee with lunch; federal and state panels.	5
06/13/03	**Mandatory New Lawyer CLE.** 8:30 am – 12:00 pm. $45. Justice Matthew B. Durrant, John A. Adams, Williams Downs, Jon Rogers.	Satisfies New Lawyer Requirement
06/19/03	**Practicing Personal Injury Law in Utah.** Co-Sponsor: Utah Trial Lawyers Association. $50 YLD, $60 all others. Learn the necessary processes in starting and maintaining a successful plaintiff's personal injury practice in Utah. This seminar is taught by the best resource for Plaintiff's personal injury in the state – Utah Trial Lawyers.	3 CLE/NLCLE
06/26/03	**Practicing Social Security Administrative Law.** Mike Bulson, Legal Services has written the book on practicing in this administrative area.	

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