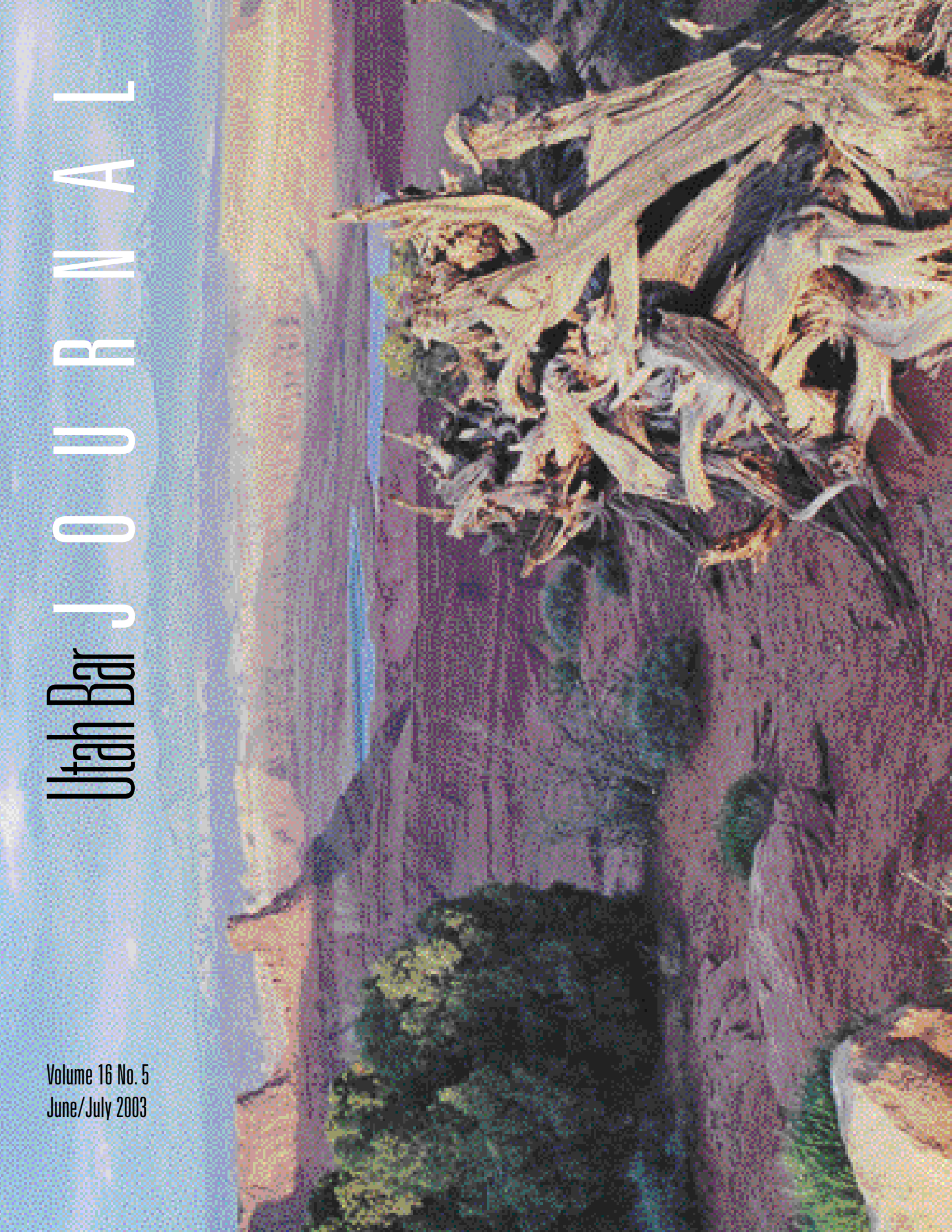
Utah Bar JOURNAL



Volume 16 No. 5
June/July 2003

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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: Day's End at Dead Horse Point, taken May 2001, by David A. Thomas, Professor of Law, Brigham Young University.

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Letters Submission Guidelines:

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

Cover Art

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

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

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

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

The Utah Bar Journal

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Letters to the Editor

Dear Editor,

I have spent a good deal of my 19 years in legal practice training and advising mostly white male managers about what is legally permissible to ask in an employment interview. Therefore, I was shocked and disappointed at the recent treatment of Utah Supreme Court Justice nominees Jill Parrish and Ron Nehring at the hands of the Utah legislature during confirmation hearings. The central inquiry made of Ms. Parrish was whether or not she could balance her family responsibilities with serving on the court. The central inquiry made of Mr. Nehring (who presumably has a family as well) was what effect his health condition would have on his performance. Neither inquiry is permissible under federal law. The Utah legislature is sending a clear message that they are above the law. When two long-time attorneys, who have reached the pinnacle of being appointed to the State Supreme Court and obviously know their rights, are unable to receive the law's protection, how does the average employee fare?

Sincerely,
Lisa-Michele Church

Dear Editor,

The members of the Utah State Bar deserve recognition for their many courtesies shown me on my mobilization in Operation Enduring Freedom. It was not easy to wind down a busy litigation and ADR practice on short notice and take off for six months of active duty; but counsel and judges were very understanding and agreed to continuances and rescheduling so I could hand off my case load. The same recognition goes to the court clerks for all of their assistance and suggestions. I give public thanks to my partners, associates and staff at Kirton & McConkie as well as to my clients for their generosity and support. I believe the quality of the people involved with the Utah legal profession is what attracts us to practice law in Utah.

Sincerely,
Col. Sam McVey
Marine Forces Atlantic

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 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.

The Year in Review

by John A. Adams

Now that my term as Bar president is drawing to a close, I see the seamless transition of Bar governance much like a track relay team. Each president has the privilege of carrying the baton and running hard for one year and then handing it off to another who is already running at full speed side-by-side when the actual hand-off occurs. On a successful relay team, each runner benefits from and then tries to increase the strides made by previous relay members. In the end, any win is a team victory achieved by all.

2002-2003 has been another lap in a great effort by members of the Utah State Bar and our Bar staff. We have seen the Utah Supreme Court adopt a multi-jurisdictional practice rule – an effort begun three years ago by Charles Brown and a hard-working task force. In just four months since adoption, approximately 25 attorneys have applied for admission under this rule. Effective this January the Court adopted revisions to the Rules of Lawyer Discipline and Disability, which make clear that the Court's disciplinary jurisdiction includes both lawyers and persons engaged in the unauthorized practice of law. Revisions to the rules were first considered under Jim Jenkins and were essentially completed during the administration of now-Magistrate Judge David Nuffer. The Bar's Admission Committee this year has implemented a new component of the bar admissions examination, a multi-state performance test, and has improved exam administration procedures and character and fitness screening – all efforts that began under the direction of Scott Daniels. Finally, the Bar Commission adopted policies and procedures dealing with the unfair criticism of courts and judges – a necessary and long-awaited effort.

A primary focus of the Bar Commission this year has been law-related education. The Utah State Bar on Law Day was presented with the Scott M. Matheson Award for its sponsorship of the Dialogue on Freedom program and the bicentennial celebration of the United Supreme Court's decision in *Marbury v. Madison.* Dialogue on Freedom involved hundreds of lawyers together with judges, legislators and members of the executive branch. More than 40,000 students from over 130 junior highs and high schools in the state participated in the classroom discussions. As part of both projects, the Bar was able to reach members of the public through the educational supplements that appeared in newspapers and through the favorable coverage from the media. Law firms, county bars and sections of the Bar stepped forward with financial assistance to make this public outreach possible. Our Bar staff is to be commended for their efforts in coordinating the logistics of these two monumental projects.

The Bar Commission's task force on the delivery of legal services arranged for focus groups in various parts of the state to gather public input about the accessibility and affordability of legal services. The task force's report will be issued shortly. The Bar this year has printed and distributed two brochures to help consumers of legal services. The first one is titled "Attorneys and Fees" and the other "Non-Legal Resources for Low Income Utahns." The latter brochure is made available in local shelters, libraries and ethnic centers. The Office of Professional Conduct has prepared and made available a document titled "Answers to Frequently Asked Questions." In addition, the Bar has nearly doubled this year its offering of group benefit services and has tried to improve communications with members through monthly e-bulletins. For those of you not receiving email communications from the Bar, please send us your email address with your next dues payment.

Perhaps the most far-reaching accomplishments this year have been achieved by "and Justice For All," supporting law firms and lawyers, charitable foundations and concerned citizens who have helped fund the capital campaign for the Community Legal Center and its ongoing operations. The Community Legal Center houses four providers of free legal services. These providers have co-located and work cooperatively in a model of efficiency. For the first time ever, the Utah Legislature has contributed $100,000 to both the capital campaign and another $100,000 to family law cases for low-income clients. The George

S. and Dolores Dore Eccles Foundation has given a $750,000 gift as well as a significant matching challenge grant. The Utah Bar Foundation made a generous endowment of $500,000. Our Utah Congressional delegation secured an appropriation of $180,000. The capital campaign is within $500,000 of reaching its four million dollar goal. Utah lawyers and law firms percentage-wise lead the nation in contributing to the annual operations of these legal providers.

The Bar Commission this year has worked to improve its relations with the State Legislature. The Bar sponsored a constitutional law class for new legislators. One might wonder with the passage of House Bill 349 that drastically altered the definition of the practice of law whether progress has been made. However, the Bar has been actively studying the delivery of legal services to make them more affordable and accessible and hopes that progress will be realized in cooperation with the Legislature.

As we look to the coming year, the delivery of legal services and the scope of the practice of law will continue to be major issues. In May of 2004 we will celebrate the 50th anniversary of the Supreme Court's decision in *Brown v. Board of Education.* A mini-convention for solo practitioners and small firm lawyers will be held in the fall. The Bar Commission is considering a major benefit to members entitled Casemaker that would offer free computer legal research to members.

Most of the satisfaction from Bar service comes from the people with whom you associate. I thank my fellow Commissioners for being such a dedicated and collegial group. Debra Moore, our next president, and other members of our executive committee, have worked tirelessly on many initiatives that will bear fruit this coming year. As usual, our Executive Director, John Baldwin, has provided a steady hand and enlisted the services of a talented cast of Bar staff. Finally, I want to acknowledge and thank those on a more personal level who have enabled me to run this lap – my partners at Ray, Quinney & Nebeker and my secretary, Cheryl Wagner. My wife and fellow bar member, Lisa Ramsey Adams, has been a wonderful emissary for the Bar. She was in the trenches during Dialogue on Freedom, leading more classroom presentations than any other lawyer, and has traveled to other states' bar meetings and ABA meetings to represent the Utah State Bar. Finally, thanks to all of you for giving me the opportunity to serve. Debra, ready for the hand-off?

Sex, Lies, and the OPC

by Kate A. Toomey

Utah has a Rule of Professional Conduct explicitly forbidding sex with a client if it "exploits the lawyer-client relationship." Rule 8.4(g), Rules of Professional Conduct. The rule even defines "sexual relations."[1] Under the rule, such relations are presumed exploitative, but the presumption may be rebutted. *See id.* at (g)(2). Complaints about attorneys having sex with their clients seldom reach the Office of Professional Conduct, and oftentimes, the sexual relationship preceded the attorney/client relationship and therefore would not constitute a prima facie violation of the rule. *See* Rule 8.4(g)(2) (spousal relationships and relationships that "existed at the commencement of the lawyer-client relationship" are not presumed to be exploitative).

What lawyers sometimes don't realize, though, is that sexually-charged conduct need not violate the sex-with-clients rule and yet it might still violate the Rules of Professional Conduct. Here is an example from Maryland: An attorney spanked a personal injury client,[2] a divorce client, and a person he was interviewing for a position as his secretary.[3] In Maryland, this constituted, among other things, a violation of Rule 8.4(d), which provides that it is professional misconduct for a lawyer to "engage in conduct prejudicial to the administration of justice."[4] Although this conduct might not have amounted to a violation of Utah's sex-with-clients rule, it certainly could have been prosecuted here. As one court has noted, conduct prejudicial to the administration of justice doesn't take a typical form; "[t]he common thread … is that … the attorney's act hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely." *Iowa Supreme Court Bd. of Professional Ethics and Conduct,* 588 N.W.2d 121, 123 (Iowa 1999); *see also State v. Oklahoma Bar Ass'n v. Sopher,* 852 P.2d 707 (Okla. 1993) (attorney looked down client's blouse, commenting "don't expose yourself," then repeated this behavior with client's mother, commenting "how's it going down there?"); *In re Bergren,* 455 N.W.2d 856 (S.D. 1990) (sexual relations with clients violated rule prohibiting conduct prejudicial to administration of justice). Verbal harassment can also constitute a violation of Rule 8.4(d). *See In re Brown,* 703 N.E.2d 1041 (attorney serving as clerk of court made numerous unwelcome sexual advances to employees, mostly involving his desire to see and kiss their feet).

A complaint involving sexual conduct also could be evaluated pursuant to one of the rules governing conflicts of interest: "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interest, unless: . . . The lawyer reasonably believes the representation will not be adversely affected; . . . ." Rule 1.7(b), Rules of Professional Conduct. A Wisconsin attorney was disciplined for conflict of interest in connection with having sexual contact with a client and providing her beer, in violation of her parole. *See In re Ridgeway,* 462 N.W.2d 671 (Wis. 1990); *see also People v. Zeilinger,* 814 P.2d 808 (Colo. 1991) (attorney disciplined for conflict of interest and conduct that reflected adversely on fitness to practice law for having sexual relationship with divorce client). This rule could even apply to a relationship that pre-existed the attorney-client relationship – such as a consensual extramarital affair that leads to a divorce, during which the client's interests could have been compromised by the attorney's personal involvement. *See e.g. In re Lewis,* 415 S.E.2d 173 (Ga. 1992); *In re Schambach,* 726 So.2d 892 (La. 1999) (consensual relationship interfered with attorney's professional responsibilities to client).

Some jurisdictions have even prosecuted verbal sexual harassment as a form of conflict of interest. For example, an Arizona attorney was disciplined for conflict of interest predicated upon asking clients inappropriate questions concerning their sexual conduct, commenting about their physical appearances, and making lewd suggestions, then indicating he would have to charge more if they didn't cooperate. *See In re Piatt,* 951 P.2d 889 (Ariz. 1997).

Attorneys who solicit the exchange of legal services for sexual services are also prosecuted for conflict of interest. *See e.g. In re Wood,* 358 N.E.2d 128 (Ind. 1976) (attorney offered discount in

KATE A. TOOMEY is Deputy Counsel of the Utah State Bar's Office of Professional Conduct. The views expressed in this article are not necessarily those of the OPC or the Utah State Bar.

exchange for nude photographs and sexual relations with client).[5] So, too, are attorneys who threaten abandonment of the representation if the relationship ends. *See In re Rudnick,* 581 N.Y.S.2d 206 (A.D. Dept. 1992) (complainant continued relationship because attorney threatened to abandon case, telling her she could lose custody of child if she terminated relationship).

Does the OPC want to get involved in attorneys' private lives? Of course not. The thing to keep in mind is that an attorney's effectiveness can be diminished when loyalties and interests conflict. Lawyers often develop close emotional ties with their clients – a bond that sometimes arises from a client's soul-baring recounting of details and events necessary to the representation, not to mention the emotional ups and downs inherent in legal representation. Keeping perspective and emotional distance is always a good idea (medical professionals call this "clinical distance"), and arguably it's essential for avoiding burnout or worse. The sex-with-clients rule is but one manifestation of a variety of problems stemming from over-involvement, whether it be an inappropriate intimacy, or an exploitative relationship, or too much identification with your client's cause even when the relationship has nothing to do with sex, romance, family ties, or friendship.

Questions about this sort of relationship are rare on the Ethics Hotline, but you're welcome to call the OPC at 531-9910. Better yet, check those impulses (if you've got them!) until your judgment about the representation is beyond question, and tell your actual or potential friends, family, lovers, and anyone else for whom you care, that you can refer them to an excellent attorney.

1. See Rule 8.4(g)(1), Rules of Professional Conduct ("sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; . . .").
2. The client was accidentally shot by a deer hunter and the attorney became upset when the client got engaged, believing that this might make the client's injury less sympathetic to jurors. He spanked her, he claimed, as punishment.
3. The seventeen-year old accepted the job and the attorney spanked her once a week for typing errors. She testified that she took the job because "I was young and wanted to do well. I wanted, I needed a job that I could go to after school and after I graduated, and if I was going to be a good secretary, I thought this is what I guess I have got to do."
4. Utah's Rule 8.4(d) is identical.
5. Although barter exchanges are permitted, bartering for the exchange of sexual services arguably isn't.

Weapon-Free Courthouses and the Gun Locker Dilemma

by Judge K. L. McIff

A bill to require installation of gun lockers in Utah's courthouses raised important issues for judges and lawyers. Though resolved last fall, the subject was not widely understood and has continued to surface periodically. This article puts the issues in perspective and examines their historical and legal context.

Introduction

The gun locker legislation of 2002 placed Utah's courts squarely between two competing legal mandates, each having force of law. On the one hand, courts were bound by the "weapon-free" requirements of the Code of Judicial Administration ("Judicial Code") adopted pursuant to authority recognized by statute. On the other hand, courts were confronted with the newly enacted obligation to install gun lockers, the natural consequence of which would be to invite the presence of guns, especially in the older courthouses of rural Utah.

I could see the problem coming as soon as the media reported the introduction of House Bill 82 early in the 2002 legislative session. My concerns were shared with staff at the Administrative Office of the Courts (AOC) and particularly with those charged with monitoring legislation.[1] As the session progressed, I was assured that the Judicial Council (the "Council") had adopted a formal position opposing the bill, that the Council's opposition had been clearly communicated in legislative circles, and then later that a fiscal note had doomed the bill to failure.[2] Passage of the bill during the waning hours of the session came as a complete surprise; but it was done, and the focus shifted to whether we could make it work without seriously compromising court security and integrity.

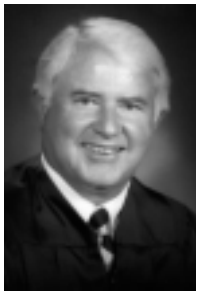
As presiding Judge in the Sixth District, I met with the trial court executive and with some of the clerks and sheriffs in the counties of Sanpete, Sevier, Wayne, Piute, Garfield and Kane. We discussed the realities of our circumstances in the face of the new requirement. In all but Sevier County, the district court sits in county courthouses that serve a wide variety of public uses through multiple entrances located on all sides of the buildings. Most were constructed during earlier times and are not equipped to deal with the presence of guns. As this court's general administrative order (the *"Order"*) later stated:

> "It is not feasible to install lockers at each of the multiple unmanned, unsecured entrances which range from four to six in the various courthouses. If lockers were installed at one location, they would become an open invitation for weapon holders to gain access from all the other locations through the very corridors that would bring them in contact with all participants in the judicial process. The net effect would be to create the very problem we are trying so hard to avoid."[3]

That was the backdrop against which I commenced a careful review of the court security statute, UCA §78-7-6, and its seemingly irreconcilable progeny. In the beginning the objective was purely practical. My colleagues on the Sixth District bench were supportive. Our circumstances put us on a collision course with the new statute. We were looking for a solution to what appeared to be an impossible dilemma. The deeper my analysis, the more apparent it became that reconciling the Judicial Code with HB 82 would not be the major challenge. The gun locker requirement was *conditional* not *mandatory.* Reconciliation would not be difficult, but would it be accepted? Would it appear circumventive? Would it simply invite the legislature to amend the statute again – close the "loop hole," as it were? If this occurred, it was likely to produce an unproductive constitutional confrontation between branches of government.

Ultimately, we concluded that reconciling the statute with the Judicial Code would not be enough. If a future unwanted confrontation with the legislature were to be averted, the case had to be made that weapon-free courthouses are extremely important to the judiciary and to its *core* and *essential* functions. Thoughtful persons both within and without the judiciary had to be persuaded and on board. This necessitated a much broader exploration and a discussion about the nature of courts and their separate role in a tripartite system of state government.

JUDGE K. L. McIFF is the Presiding Judge in Utah's Sixth District. He is a former Chair of the Board of District Court Judges and currently a member of the Judicial Council.



The Governing Statute (UCA §78-7-6)

Prior to 1996, the governing statute consisted of one simple paragraph recognizing the right of "[e]very court of record" to make rules for its own governance. The statute was amended that year to include: *"The judicial council may provide, through the rules of judicial administration, for security in or about a courthouse or courtroom."* UCA §78-7-6 (2)(a). The '96 amendment went on to add a completely new concept. The legislature provided for designation of so-called *"secure areas," id.,*[4] and imposed a felony penalty for bringing a firearm within their borders. UCA §78-7-6 (3)(a). However, it limited these areas to the private inner sanctum of court buildings where members of the public are not permitted. UCA §76-8-311.1(1)(e)(ii).[5] Notably, the main foyers, corridors and even courtrooms could not qualify.

The net effect of the '96 amendment was to provide the framework for a dual approach to courthouse security. The Council could adopt security rules for the larger area *"in or about"* courthouses, enforceable by the contempt power, while at the same time designating more narrow private "secure areas" where the legislatively imposed felony penalty would apply.

Judicial Code Amendment

Designating "secure areas" under the '96 amendment appeared to be without a downside and was readily accomplished. The gun locker requirement was years away and could not have been foreseen. The real debate came the next year with adoption of Senate Bill 132 by the 1997 legislature.[6] It exempted certain persons from the *statutory* prohibition of bringing concealed weapons into secure areas of government buildings. The bill would have little effect in the judiciary unless court rules were similarly relaxed. Council members, judges making special appearances, and spokespersons for the Utah Bar expressed great reluctance to relax any provisions relating to weapons.[7] Extensive debate focused around three questions: (1) Should there be any exceptions to the long-standing weapon-free policy; (2) who should decide on exceptions; and (3) should the policy be uniform throughout the State?

Final resolution came in the January 1998 Council meeting. Court security rules were amended to provide: *"A courthouse is presumed to be free of all weapons and firearms unless a local security plan provides otherwise in accordance with this rule."* CJA Rule 3-414 (7)(A)(i). The Council thus reaffirmed the basic statewide policy of no weapons, but recognized exceptions could be made by affirmative action on a local level. The authorized exceptions under 3-414 were limited to judges, court commissioners and other officials, along with certain law enforcement officers. CJA Rule 3-414 (7)(B)(i), (ii) and (iii).

Local Security Plans

The Council's action provided for the judges at all levels who sit in each courthouse to participate in formulating a local security plan for that facility.[8] The membership of the local security committees included the judges – district, juvenile and justice court – the trial court executive, the county sheriff, court clerk and a probation officer. In each of the counties in the Sixth District, local security committees were dutifully formed and security plans were approved.[9] Each member personally signed the plan for his/her courthouse. They prohibited all weapons except for certain judicial and law enforcement officials authorized under the rule. These plans were in force when HB 82 came on line. They were the law governing court security.

The Gun Locker Amendment

The absence of a downside in designating "secure areas" vanished with the adoption of HB 82 by the 2002 legislature. It attached a significant price if courts were to continue to maintain these narrow areas where a felony penalty could be imposed. The operative language of the bill provided: *"**If** the [judicial] council establishes a secure area…it shall provide a secure firearm storage area on site so that persons with lawfully carried firearms may store them while they are in the secure area."* UCA §78-7-6 (2)(b)(i). [Emphasis added.] The language is clear and simple. The requirement is *conditional* not *mandatory.* Equally important, the condition is subject to the sound discretion of the Council.

The Sixth District's General Order

a. suspension of secure areas

The general administrative *Order* issued by the Sixth District on May 2, 2002, and supplemented shortly thereafter, pointed out the conflict between the newly enacted HB 82 and the established Judicial Code and local security plans. Among other things, the *Order* examined the *conditional* language adopted by the legislature and concluded that the *"price . . . is too great"* for the benefit derived from the secure area designation, especially in rural courthouses which have only minimal private judicial areas that qualify for such designation, and where gun lockers would create unmanageable logistical problems.[10] The *Order* recommended that the judiciary rethink its position, stating: "Secure areas were established several years ago. The legislature has belatedly changed the rules. This warrants re-examination by the courts. Decisions must be made whether to accept the newly imposed gun locker condition or suspend establishment of so-called 'secure areas'." [11]

b. separation of powers – "core" and "essential" functions

Hoping to avert a future challenge, the *Order* does not limit itself to recommending reconciliation by suspending secure areas, but proceeds to make the case for the Council's weapon-free rule. It finds support in the constitutional doctrine of separation of powers, and the existence of inherent powers that derive therefrom. The doctrine, once thought to require complete separation of the three branches of state government,[12] has come to be viewed less like abutting circles that touch only on the edges, and more like the Olympic rings that have areas of overlap and areas of exclusivity.[13] It was most recently examined in the case of *In Re Young,* 976 P.2d 581 (Utah 1999), which upheld participation of legislators on the Judicial Conduct Commission charged with *investigating* and making *recommendations* regarding the discipline of judges. These shared functions were adjudged permissible areas of overlap. The area of exclusivity was the *imposition* of discipline which was reserved to the Supreme Court. This was the "core" or "essential" function "properly belonging to" or "appertaining to" the judicial branch. *Id.* at 586.

Whether court security implicates "core" or "essential" functions required review of the Judicial Code and consideration of the nature of courts. When the Council adopted Rule 3-414, it defined *"court security"* as including not only *"safety and protection,"* but ensuring the *"integrity of the judicial process".* CJA Rule 3-414 (1)(1)(A). As to these dual purposes, the *Order* reasons:

> No single characteristic of the judiciary is more defining of its nature nor of greater consequence to its purposes than its reliance on the power of reason and law rather than the power of the sword. The very essence of the judiciary is the antithesis of 'might makes right.' It represents one of man's most noble and complete aspirations at civilization. The gladiators in the legal arena are armed only with books and the power of reason and logic.…The right of the judiciary to maintain an arms-free environment not only relates to the protection of judge, jury, court personnel, counsel, litigants, and witnesses, but to the maintenance of an environment where even the silent influence of physical weaponry is eliminated."

Order at page 18.

As in *Young,* the *Order* identifies an appropriate area of overlap as well as an area properly reserved to the courts. It concludes:

> "The legislative and executive branches, with the powers of purse and sword, respectively, can and must assist with protection of both persons and the integrity of the judicial process, but this necessarily stops short of *defining the essential nature of the judicial environment.* That, in the view of this court, is a *core function* reserved exclusively to the judiciary."

Order at page 19. [Emphasis added.][14]

The Response Outside the Judiciary

Media and public support for weapon-free courthouses was immediate and quite remarkable. In a rare show of unanimity, the *Deseret News, Salt Lake Tribune, Standard Examiner, Provo Daily Herald* and KSL Television all ran supporting editorials, most on multiple occasions.[15] More important, rank and file citizens, (as evidenced by opinion polls, letters and personal contacts) understood the issue and sensed that it was really not about the right to bear arms, but rather about what courts do and the resolution of conflict in an atmosphere where resort to arms is not appropriate and should not be readily available. As the *Order* observed and as the media widely reported, "Handing a loaded gun to an angry and disgruntled participant leaving the courtroom after a traumatic and sometimes shattering experience is fraught with danger." *Order* at page 13.

The recommended reconciliation through suspension of secure areas did not receive any media attention until after the confrontational aspects of the issue had played out. This was, no doubt, influenced by three major factors: (1) the extent of the separation of powers discussion in the *Order,* (2) the strong initial reaction of the Attorney General and (3) the natural inclination of the media to focus on conflict. Regrettably, I did not send a copy of the *Order* to the Attorney General.[16] It was a major oversight that contributed to the debate running awry. The Attorney General was pressed by the media for a response and unfortunately made some harsh statements alleging judicial lawlessness before having read

the *Order.*[17] He and I have since cleared the air and exchanged mutual apologies.[18] We are in agreement that the gun locker requirement is *conditional* and within control of the judiciary.

The response of legislators has been mixed. The great challenge is to unwind misimpressions stemming from the initial interviews and media reports. The *Order* was never intended as an affront to the legislature. Once that becomes apparent, most contacts with legislators have been amicable and helpful. The Speaker of the House, to whom I had furnished a copy, called early on and reported that he had just read the *Order,* that it did not say what he had been led to believe and that he was open to a solution. We discussed judicial suspension of secure areas. It appeared to be a viable alternative.[19] To their credit, other legislative leaders were supportive of a practical resolution. Both branches were well served by this approach.

Judicial Action Maintaining Weapon-Free Courthouses

On May 15, less than two weeks after issuance of the administrative *Order,* the Board of District Court Judges met and unanimously endorsed its content.[20] The Board also encouraged the Council to ratify the Board's position and to take action consistent with its objectives. Within days, the Presiding Judge in each of Utah's eight judicial districts advised in writing that virtually all the judges in each district were supportive of the resolution adopted by their state-wide board.[21] At the same time this was occurring, the subject was receiving the extensive treatment in the media and on radio and television which has been discussed above.

This set the stage for the Council's meeting on May 28. On that occasion, the Council determined to eliminate the conflict by temporarily suspending the statutorily defined secure areas pending further review. Three months later the Council made the suspension permanent and issued a succinct written statement reviewing what had transpired and explaining its action. An excerpt from that statement reads:

> After carefully considering the practical and legal effects of secure areas, the Judicial Council decided to exercise the discretion previously granted by the Legislature and eliminate the secure areas, but continue to maintain weapons free courthouses. In reaching this conclusion, the Judicial Council recognized the limitations, inconsistencies and compromised security that are linked to secure areas in the courthouse setting. The Judicial Council recognized the paramount concerns of judicial integrity, and the safety and security of all court patrons. The Judicial Council also recognized the expertise and concerns of judges and law enforcement officials who are faced with these concerns on a daily basis.[22]

Thus the matter that had produced so much controversy and public commentary was brought to an unceremonious conclusion. The condition on which the gun locker requirement depended was permanently rescinded. Courthouse security, however, remained unchanged. Elimination of the discretionary secure areas did not undermine the much broader and long-standing weapon-free policy of the courts. Would this favorable result have been achieved in the absence of the extensive discussion, exposure and debate which had occurred? We can only speculate. More important, has the case for weapon-free courthouses been sufficiently made to avert a future confrontation? Hopefully the answer is yes, but only time will tell. In the meantime, this much is clear – reconciliation between the Judicial Code and HB 82 has been achieved in a remarkably simple and practical manner.

Conclusion

The gun locker amendment put judges on the horns of a dilemma. Reliance upon the *fixed* legal requirements of the Judicial Code and local security plans was appropriate not only as a matter of law and judicial integrity, but also in light of the *conditional* language adopted by the legislature. The amicable resolution achieved by suspending secure areas made good sense, eliminated the legal conflict and avoided a constitutional showdown. The downside from this resolution is minimal. The felony penalty is gone, but its benefit was slight because it didn't apply in the areas of greatest risk, i.e., the areas to which the general public has access, including the courtroom. Moreover, if a serious gun incident occurs any place in a court building, finding a felony penalty that fits will likely not be the major challenge. In the end, the judicial approach to court security remains one of prevention. It is reminiscent of the instructive literary piece that suggests the best approach is to "put a fence around the edge of the cliff."[23] Finally, and perhaps most importantly, the judiciary has maintained the integrity of an environment, painstakingly developed over many centuries, where force of arms holds no sway and the scales of justice are tipped only by the weight and power of truth, reason and logic under the rule of law.

1. Rick Schwermer, Mark Jones and members of the Judicial Council Legislative Liaison Committee chaired by Justice Michael Wilkins.
2. The Council representatives on the hill claim they were assured of non-passage by the bill's sponsor.
3. General *Order* 2002-1 issued by the judges of the Sixth District Court dated May 2, 2002, at page 14. A brief supplement was issued on May 17, 2002. They are collectively referred to as the *"Order"*.
4. The legislative history reveals that the "secure area" concept arose in response to requests from government agencies other than courts.
5. As the citation reveals, the "secure area" definition is borrowed from an entirely different section which deals essentially with corrections, mental health and law enforcement facilities.
6. Senate Bill 132 enacted UCA §53-5-710 (now 711) and amended UCA §76-10-523. Minutes reveal debate over gun issues in at least the following meetings: Policy and Planning, Sept. 1996; Policy and Planning, June 1997; Council, July 1997; Policy and Planning, August 1997; Council, Dec. 1997; Policy and Planning, Jan. 1998; and Council, Jan. 1998.
7. See minutes of the Council meeting, Dec. 1997, at which President Charlotte Miller and Commissioner Fran Wikstrom set forth the position of the Utah Bar. Third District Judge Ron Nehring spoke on behalf of a group of judges. The positions of all were in accord. They strongly favored a completely weapon-free environment and gave persuasive arguments in support.
8. Council minutes, Jan. 1998.
9. Copies were attached to the *Order.* They were first adopted in October of 1998 and revised in August of 2000.
10. See the discussion on page 23, and conclusions numbered 11 through 15 of the *Order* at page 28-29.
11. *Order* at page 2 of supplement.
12. See *Kimball v. Grantsville City,* 19 Ut 368, 57 P. 1 (Utah 1899); *Young v. Salt Lake City,* 24 Ut 321, 67 P. 1066 (Utah 1902); In *re Handley's Estate,* 15 Ut 212, 49 P. 829 (Utah 1897).
13. See *Tite v. State Tax Comm.,* 89 Ut 404, 57 P. 734 (Utah 1936) and *Taylor v Lee,* 119 Ut 302, 226 P.2d 531 (1951). "[A]bsolute independence of the three branches of government . . . has not been found entirely practicable." *Tite,* 57 P. at 737.
14. While there are no Utah cases on point, other courts, including the high courts of two western neighbors, have found inherent authority within the judiciary to control court security including prohibition of weapons. See *Board of County Comm'rs. v. Nineteenth Judicial District,* 895 P.2d 545 (Colo. 1995); *State v. Wadsworth,* 991 P.2d 80 (Wash. 2000). *Wadsworth* is particularly helpful because it involved a county courthouse whose circumstances were such that prohibition of weapons necessarily extended to the entire building.
15. *Deseret News,* May 6 and May 14, 2002; *Salt Lake Tribune,* May 14 and May 28, 2002; *Ogden Standard Examiner,* May 21 and May 24, 2002; *Provo Daily Harold,* May 5 and May 31, 2002; and KSL, May 20, 2002.
16. A copy of the Order was filed in each impacted county, and courtesy copies were furnished to the Chair of the Judicial Council, the AOC, the Governor, legislative leaders and legislators whose districts were impacted.
17. The Attorney General's statements followed the initial newspaper stories that surfaced around May 10. The AG was widely quoted on television and in the major newspapers. Brent Johnson, counsel to the AOC, challenged some of the statements and a telephone conversation ensued between the three of us. In that conversation, the AG properly complained that he had not been furnished a copy and acknowledged that he had not read the *Order* when he granted the interviews and made his impassioned comments.
18. This occurred at a meeting between the two of us in the AG office on or about December 17, 2002.
19. The visit was by telephone during the work week beginning May 20, 2002.
20. Resolution of Utah Board of District Court Judges adopted May 15, 2002 following a presentation by Presiding Judges Ron Nehring and Rand Beacham of the Third and Fifth District Courts, respectively, and reflecting views widely held by their colleagues.
21. Letters or memos of support were forwarded to the Board Chair or to the AOC.
22. Judicial Council statement released to the media following a unanimous vote on Aug. 23, 2002.
23. "A Fence or an Ambulance", Joseph Malins. *The Best Loved Poems of the American People,* Doubleday, page 273.

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Community Property Issues Can Arise Where Least Expected

by Langdon T. Owen, Jr.

"What do you mean there is community property in Utah?" my friend, Clyde, asked in horror and disbelief. "Utah is a common law property jurisdiction and always has been, so how can you even talk about community property here?" His arm moved in a gesture of disgust at the very thought of community property in our midst, and as his arm came around, he knocked over the pitcher of Provo Girl beer into my lap. It was an accident – I'm sure.

We had been laughing about how Clyde had slept through some of Denny Ingram's estate planning lectures at the University of Utah College of Law some 25 years ago. Denny was a Texas lawyer for whom community property was daily fare, and Clyde slept through that part of the class. Real funny, but now things were getting serious. In the lull after the spill, I could hear "The Yellow Rose of Texas" conclude on the juke box.

I was, nevertheless, in a forgiving mood and responded with the best smile I could muster as the cold fluid chilled my hinder parts: "This is America, where property rights are taken very seriously, and where people and property move about with the greatest freedom on earth. A community property right does not simply cease to exist when persons or property cross a state line; rather, it is constitutionally protected under, among other things, the Full Faith and Credit Clause." [Citations omitted to protect the lazy.] I could almost hear the "Stars and Stripes Forever" playing in the background.

"Any property, real or personal, tangible or intangible, derived from earnings in a community property state during marriage, or property traceable to property acquired with those earnings will retain their community property character. Thus, there is community property all over the state of Utah. Yellow roses among the sego lilies, if you will."

"Yeah," said Clyde, "you just try telling that to the judges in one of our rural counties, and you'll be 'community propertied' out of town so fast it'll make your head swim!" The sneering satisfaction in Clyde's voice irked me. So did the background music which was a bland rendition of "Achy Breaky Heart" punched up by Clyde on the jukebox, not the rousing Sousa march of my imagination.

I saw no other option, so, wet pants and all, I mounted my intellectual high horse and let fire a few silver bullets of truth. My imagination began to play the "Lone Ranger" theme from the "William Tell Overture."

"Those judges in the border counties may be a lot more familiar with community property concepts than you give them credit for," I said. I was thinking "maybe they didn't sleep through Denny's lectures on the matter" but, congratulating myself on my self-restraint, took a sip from my glass and said instead, "After all, Utah is a legal isthmus surrounded on three sides by community property: Nevada through to California on the west, Idaho to the north, Arizona and New Mexico to the south. And the number of community property states and the amount of community property are actually growing. In addition to those I just named, there are the other traditional community property states with Spanish or French jurisprudential histories stretching back a couple of hundred years, such as Louisiana, Texas, and Washington. Wisconsin joined the group in the twentieth century by statute, other states did the same but later dropped the system, and, believe it or not, Alaska made community property elective within the last year or so. Huge tracts of land, fast-growing populations, and some very large economies, all on or west of the Mississippi River, and thus relatively close neighbors to Utah, are in community property jurisdictions. Also, the Hispanic population and economic influence are increasing from immigration from and business dealings with Mexico and Central and South America. Continental Europe has long had community property systems and with companies from a newly united European Community transferring officials, either temporarily or permanently to transact business in the States, Utahns will be seeing more community property brought here by this group of people, too."

"It's not all *that* much of a concern for a Utah lawyer," said Clyde skeptically as he poured me a fresh brew. Strangely, only a few drops spilled.

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"Oh, but it's very significant," I said. "Just think about some of the transactions we could have been involved in, one way or another, fairly recently – a divorce by a Utah couple who had lived in a number of European countries, and another by a German couple who moved to Utah and brought most of their financial assets with them; a prenuptial agreement involving a wealthy Salt Lake City bride and a poorer Seattle, Washington, groom (he was a lawyer) who were going to live in Washington and wanted to protect the wife's assets from the husband's potential malpractice liabilities; planning estates for couples moving to sunny St. George from snowy Coeur d'Alene, Idaho; an enforcement of a Utah judgment against property in Park City which was traceable to California community property from the Silicon Valley area; filing an estate tax return and an income tax return for a Utah estate involving community property traceable to Scottsdale, Arizona; helping arrange a computer software business transaction for a Utah company with an individual from Lima, Peru; planning estates for couples moving to Utah from such exotic locales as Cabo San Lucas, Mexico, Paris, France, Salzberg, Austria, and Boise, Idaho."

"Have you really been doing all that?" asked Clyde sounding like he was ready to be impressed.

"Well, some of it," I replied honestly, "but I *could* have been doing all of it."

"Oh, I see," said Clyde, looking at me through the corners of his eyes.

The sounds of "Achy Breaky Heart" again assailed my ears. Did Clyde have to put another quarter in the machine? Quickly recovering my composure, I went on: "And just think of all the grand stuff you can do with community property and of all the not-so-grand stuff it can do to you if you aren't careful. For example, community property is a fine income tax avoidance tool. Congress has seen fit to allow a step-up in basis on both halves of community property on the death of one of the spouses. For a common law tenancy in common or joint tenancy, only the deceased spouse's half receives the step up. The remaining community property spouse doesn't have to die to get this benefit which can *eliminate* capital gain for all time. Neat deal. But you have to know it when you see it to get this rise out of it."

Clyde seemed to be getting a little interested. "So what would you do to help plan for such a basis rise?" The beer on my pants was now almost body temperature.

"Well, you could nail down the evidence that it was community property and have the couple expressly agree to maintain it as community property. I've made questions about prior places of residence a standard part of my estate planning discussions with clients.

"But with the flower come the thorns, if there are creditor problems for a couple, the right of either member of the community to bind the entire community can mean that a creditor can seize not only the separate property of the contracting or tort-feasing spouse, and not only his community property interest, but his wife's community interest, as well. This can be disastrous in some circumstances."

"But there's nothing to be done about that," said Clyde.

"Oh, yes, there is," said I. "In a number of community property states, spouses can by express agreement *abandon* the community property system. This is what we did to protect our Utah maiden from the clutches of the potential creditors of the Washington lawyer. Remember that in some of the community property states, income or increase from separate property, as well as from community property, can be community property. It is important to consider this in doing advance planning for protection from creditors. It is also important to consider if you represent a creditor, and a little research and the right questions in a deposition or in proceedings supplemental to a judgment could greatly expand the property available to recover against."

By now, it was getting late, and as we paid for our beer, Clyde muttered, "I guess I need to check into the community property thing a little bit." He even paid for the spilt pitcher.

As we left the pub, my pants were nearly dry, and I stuck in a quarter and pushed a few buttons on the juke box. Handel's "Hallelujah Chorus," sung by my favorite local choir, began playing. "How did that ever get into the same juke box with "'Achy Breaky Heart'?" I wondered.

Law and Unity on Main Street

by Robert Peterson

Utah's citizens, of late, have been at the center of an unusual controversy. I say unusual not because of the uniqueness of the issues at play but because of the intensity of a controversy that has brought illumination to the intersection of politics, religion and law. We are all accustomed to the seemingly inexhaustible stream of Mormon/Anti-Mormon, "love it or leave"/"we don't have to do either" polemics, usually in the form of letters to the editor. Regrettably, these tend to be tedious and predictable in the extreme on both sides, utterly devoid of wit or elegance, typically having the subtlety and style of a hurled water balloon or rotten egg and adding nothing to reasoned discourse. But, they are, in addition to being an irritant, a constant reminder of the tension that is part of the fabric of our community, that for many this is very much a place of "us" and "them" of "nons" and "non-nons."

Look north up Main Street and see, as if it were a power point pictograph, a visual representation of the roots of the controversy. The Temple on the west and the Church buildings on the east, including the former Hotel Utah, cast their shadows over Main Street. It is as if Main Street is under surveillance. In this context, it is important to remember, as apparently our city government did not, that "Main Street" in this country is not so much a geographical designation as it is a symbol, a shorthand expression of an article of political and social faith. The term resonates a sort of Norman Rockwell, four freedoms ideal. Main Street is something we hold in common; it is where we stand free and equal; it is not for sale; it belongs to all of us.

Aye, there's the rub. Something was sold; but just what was it that was sold? As the background and analysis of the transaction has emerged in the print, audio and visual media one developed an impression that the transaction was above all not a "transparent" or well-illuminated deal. Clearly, the expectations of those involved directly and on the periphery were widely different. There was to be a "Main Street Plaza," owned by the Church but subject to a public easement belonging to the City and all citizens. Just what did this mean?

As the plaza was completed and the Church began to regulate activities thereon, it soon became apparent that differing expectations were causing problems. It also became quite apparent to all that peace had not come to the Valley. Protestors were hustled away; the Church was not going to allow disparaging words to be heard on that small portion of the lone prairie. Whatever the expectation of others might have been, it became clear that the Church had not contemplated, and would not allow, Main Street Plaza to be a forum for robust, ecumenical debate. There were those that felt that they had been duped and that the Church and the City government had pulled or conspired to pull a fast one on them, notwithstanding the fact that the Mayor at the time of the transaction was not affiliated with the Church, nor were all members of the City Council. Inevitably, a legal action ensued.

The Law

The United States District Court granted summary judgment to the defendants, finding that the character of that block of Main Street had been transmogrified. The Tenth Circuit reversed. Taken at face value, the legal analysis and decision of the Tenth Circuit is unremarkable, hardly a cutting edge decision. There are, however, aspects of it which are interesting. Thus, although the legal analysis clearly follows from the face and precise language of the warranty deed, there is nonetheless a suggestion that the Tenth Circuit believed that the public may well have been misled by the commentary that preceded the final deal. This is most evident on page 8 of the Opinion wherein the Court stated:

> While the Church now refers to the area as an ecclesiastical park, prior to the sale when asked how it would further the public interest, the Church variously described the proposed Main Street Plaza as a "pedestrian friendly area," "a funnel to the Crossroads and the ZCMI Center shopping malls as well as the remainder of the downtown business district," and a "downtown pedestrian plaza," and stated the plaza would "provide a public environment," "enhance the urban fabric of the downtown area," "emphasize Main Street as a primary pedestrian walkway," and "assist Main Street, which is the heart of the shopping area, to become the most pedestrian oriented street in Salt Lake City."

Id., Vol. IV at 1584-89.

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It is difficult to think other than that the Tenth Circuit may well have been influenced, although such influence hardly appears necessary to a decision, by the notion that the public discussion prior to the final deal being made may have been misleading. Thus, the Tenth Circuit also noted that although there was a possibility of reverter in case the public purposes of the easement were not carried forward in the warranty deed, a provision describing the intended use as rather like a "public park" or otherwise describing proposed public uses was omitted from the final form of the deed.

Apart from this bit of flavoring, the legal analysis was straightforward. The Tenth Circuit first noted that, in granting summary judgment for defendants, the district court had essentially got the case backwards. That conclusion is clearly expressed when the Tenth Circuit noted, "as we previously stated, the district court considered the religious purpose of the plaza when it should have considered the purpose of the easement" (Opinion, p. 32). That was coupled with the statement that "we hold here that the City, not the Church, has responsibility for regulating speech on the easement" (p. 38). In fact, the hallmark of this opinion is its constant reference to the fact that it is the actions of the City which are at issue here, not the actions of the Church. It was "the easement terms themselves [that] are unconstitutional" (p. 14). It was the City that either drafted or agreed to the terms of the easement, contained in Section 2.2 of the Special Warranty Deed and Reservation of Easement, that were found unconstitutional. (Whether the rights retained were characterized as "non-possessory property rights" or a "governmental burden" on otherwise private property was to the Tenth Circuit a matter of indifference.)

Also, the importance of the fact that *only* the Church would be allowed to exercise rights of free speech to the exclusion of all others on Main Street Plaza cannot be overstated. It is at the heart of this opinion. The most stark statement probably is the statement that "protecting the Church's expression from competition is not a legitimate purpose of the easement or its restrictions." (p. 29). That concept resonates elsewhere in the Opinion – "our fealty to the concept of a marketplace of ideas in religion as well as other fields has been the hallmark of our society" (p. 38); "the speech of others does not, as a matter of law, infringe on an individual's own free speech rights" (p. 39).

If we return to our initial concept of "Main Street" or for that matter "Main Street Plaza," I think it is clear what the Tenth Circuit is telling us. The Tenth Circuit is telling us that geographical Main Street, a piece of land, may be sold but symbolic Main Street, a concept symbolic of a free society, may not be sold. No public entity can give a church, a political body or anybody else a monopoly on exercise of political, religious or personal rights and freedoms on places that are "public" in character. If, in fact, there is to remain a public pedestrian walkway through and across the former "Main Street," to that extent it remains symbolic Main Street and is free and open to the opinions of all.

It is also reasonably clear from the Opinion what could have and one assumes still can be done. The citation and brief discussion of the Tenth Circuit cases in which the public character of former public property was changed indicates what the City could have and still can do. It can simply abandon the pedestrian easement by selling that to the Church. (There may be a nice question of whether or not underground easements for utility purposes could be maintained without maintaining a public purpose, but the tenor of the Opinion suggests that retaining that kind of an easement would not maintain the type of public character which traditionally allows for and sponsors first amendment expression rights.)

In the final analysis what can't be done is maintain the pretense and expression of a public thoroughfare while simultaneously granting a monopoly of free speech rights to one person or group. If the pedestrian easement is extinguished and access to the former Main Street is only by sufferance of the Church with the elimination of any pretext that what remains is "public," it is likely that the problem disappears. I say "likely" because of the unusual history of the chain of events that action would sanction and the fact that talismatic invocation by use of the term "private

property" is not necessarily sufficient to ward off all claims of right of first amendment expression.

Unity

The Tenth Circuit Opinion created, and continues to create, continual churning of public and behind-the-scenes private activity. The Church on its part has mounted an unusual and massive public relations campaign, even going to the extent of President Hinckley's direct involvement by way of a written communication generally distributed. At the City level, the response appears to be chaotic. At various times, the City Council has appeared to be pitted against the Mayor, even to the extent of hiring its own legal counsel for advice on what actions it (the Council) might take should it choose. The Mayor has been on all sides of the controversy from time to time and now appears most inclined to participate in a resolution of the matter which would allow the Church to purchase the easement and assume complete control of the plaza as private property. The plaintiffs in the litigation have indicated a willingness to press on with further litigation if the easement is abandoned and sold.

As the Church in its public relations campaign mustered testimony and presented its case, its cornerstone was the notion that an "ecclesiastic park" had been created on "private property." The Church continues its obdurate refusal to acknowledge that the "private property" was burdened by a "public easement," a bundle of property and constitutional rights that we all learned about the first year of law school. To be sure, the Special Warranty Deed and Reservation of Easements (the "Deed") quite plainly grants the Church the power to control all activity on that property, and puts the "rights" of all others, other than, one presumes, the right to walk silently through the Plaza, eyes cast downward, at sufferance to the dictates of the Church.

In retrospect, that the Church would take this position is hardly surprising. After all, would the Church spend its funds to provide an attractive forum for those who seek to criticize it? Our common experience and intuition would certainly suggest not. One of the sad truths about those who most actively exert their First Amendment rights is that a significant number are real jerks. (Lest you jump down my throat, it is also true that many are not and are measured and calm in manner, even if not in message.) My point here is simply that institutions such as the Mormon Church that are often the subject of public attack and criticism are well aware that some will be abrasive, aggressive and unpleasant. Critics and demonstrators are the most likely to show up at one's door step. Knowing this, the Church undoubtedly did *expect* that it was *not* creating a sort of Hyde-Park corner for its critics.

Although not discussed by the Tenth Circuit, the transactional

documentation apparently provided that if the restrictions imposed by the Church did not pass constitutional muster, the deal still stood and an easement would exist with such restrictions as were constitutionally permissible. (This seems a little at odds with the "reverter" provisions of the Deed.) Thus, the Church apparently did accept the risk that its assessment of constitutional issues might be wrong. The Church does not presently admit to this, or recognize the constitutional and property characteristics of a public easement.

With respect to the City of Salt Lake, it is rather more difficult to determine what it or its various representatives and spokesmen believed was the nature of the bargain. There may well have been some mis-assessment of applicable law as regards to the restrictions that could be placed upon a "public easement." There may have been some misapprehension as to how the Church would govern Main Street Plaza. But it is clear those acting on behalf of the City of Salt Lake were *willing* to allow the Church to impose such restrictions as it chose. That is clear from the deed, if not the public pronouncements surrounding the original deal.

It appears that those who were not official spokesmen of the City, but rather were involved in the process as outside observers and monitors, may have an expectation that the Church would impose "reasonable time, place and manner" restrictions. Although it is not clear, there is a suggestion in the written, *post hoc,* "evidence" that the transaction was at least impliedly justified on that basis. Certainly, the Tenth Circuit came to that conclusion. *See infra.* In sum then, it does appear that although there might have been differing expectations as to how the Church intended to govern the new Plaza, the final form of the Deed approved by the Mayor and City Council, allowed the Church to impose any limitation it chose, whether the limitation be constitutional or not.

Unless the Mayor changes his mind again, it appears that after due consideration, the easement will be "sold" by the Mayor on behalf of the City after it and its public purpose have been formally abandoned by the City Council. This will allow the Church to take complete control over the plaza, notwithstanding a report of the planning commission to the contrary and occasional statements by the Mayor that he might prefer reasonable time, place and manner restrictions. What this author takes issue with is how this transaction is being promoted. There is now an organization termed the "Alliance for Unity," a private non-elected entity of local power brokers, that is out to support a new transaction on the basis of compromise and to bring "unity" where there has been bitter divisiveness over the issue. The new transaction envisions the Church trading the easement for land on the west side of the City for a "unity" center with additional funding being added by the "Alliance."

It is not clear whether, particularly within the boundaries of Salt Lake City, there is or is not acceptance of this so-called "compromise" that is meant to lead to unity. The cynical are quick to point out that this has nothing to do with a compromise as to the fundamental issue of whether Main Street, or any portion of it, should be parochial in nature. The Church gets what it wants, no compromise. Only the price to be paid for such absolute control has been increased. On the other hand, there appear to be others who may or may not have an axe to grind but see the result of all this as far more beneficial to the City than would have been either the status quo ante or a Main Street plaza that is a magnet for anti-Mormon protest. Clearly, it is not only members of the Church who believe that the proposed solution is a good one.

What is disheartening is our public inability to come to grips with the reality that there is not and never will be unity on this issue. There are those who are of the opinion that the City should have never sold a part of Main Street to the Church. A west side unity center does nothing to solve that. This solution only gives the Church what it wanted, and maybe thought it bargained for. It will not create unity; it will probably inflare division.

Having said that, it does not mean the solution is a bad one. It just needs to be promoted on its merits, not as a faux unification. The solution can repair some of the damage, but not all the damage. Whether the initial transaction was wise or unwise is or will be debatable, and should be. If, however, we deal with the present situation, selling the easement is not that bad under the right conditions. The Church should build formidable barriers and proclaim the former easement "private property." The new square should not be called "Main Street Plaza." "Temple Rectangle" might be nice.

We need to unhook the private physical property from the public symbol of a "Main Street" open to all. Make it clear that what is being sold is merely asphalt, not a symbol of patriotic freedom and open debate available to all. Those who wish to exercise first amendment rights can move a few hundred feet south or north. Their audience will not be diminished. The Church already owns everything surrounding that piece of property. If we can rid ourselves of the symbolic problem that this part of "Main Street" is no longer "Main Street," the result is palatable.

As for unity, forget it. There always will be a substantial number who believe the Church has too much power. They may be right. But, so what, so long as that power is subject to the rule of law? As is often the case, there is not going to be an answer to the Main Street issue that is acceptable and "unifying." The citizens of Salt Lake City do not all share a common, monolithic body of history, culture and religion. Religiously and politically we are fragmented, diverse and complex. We sing in different voices, not always in harmony. But we all must commit to living by a rule of law interpreted by an independent judiciary else our differences so fracture the community that we can no longer live with each other.

Specific and discrete controversies need resolution whether that resolution is acceptable to all or not. Pervasive disagreements at the conceptual level are often not susceptible of resolution nor should they be. The best we can hope for is a common commitment to abide by the referee's decision once it is made final.

If the transition of Main Street from public to completely private had been transparent, and had the public been told that the Church was going to be vested with complete control of residual "Main Street," that would have been a different matter. It would be a controversial decision, which it should be. There would not be unanimity. Perhaps the deal would not have been consummated; perhaps it would have. There is nothing at all wrong with either result if the process is transparent.

What is unacceptable are elected public officials who are willing to promote the notion that an important new "public" place is being created that will be part of the fabric of a revitalized Main Street – open to the public like any other public place or right of way – and simultaneously sign off on a document that gives the Church the exclusive right to determine what is said and who says it on the "public" easement. As citizens, our quarrel is with the public officials perpetrating such a charade, not with the Church.

M&A Transactions Under Utah's New "Fairness Hearing" Statute

by Thomas R. Taylor and Bradley R. Jacobsen

One of the more difficult hurdles to overcome in many M&A transactions in which securities are being issued by the acquirer as part or all of the consideration is compliance with applicable federal and state securities laws in connection with the issuance of those securities. Under prevailing state and federal securities laws, such securities must either qualify for a registration exemption or be registered with the Securities and Exchange Commission (the "SEC") and all applicable state securities regulatory agencies. Utah's recently enacted "fairness hearing" statute will dramatically simplify issuing securities in connection with M&A transactions, and will save Utah companies substantial amounts of time and money, while increasing the available structuring alternatives for proposed M&A transactions.

The Problem

In M&A transactions where securities are being issued by the acquirer as part or all of the consideration, those securities must either qualify for a registration exemption or be registered with the SEC. The problem is that in many M&A transactions the securities being issued do not qualify for a federal registration exemption, necessitating the filing of a Form S-4 registration statement. However, the cost to prepare a Form S-4 can often exceed $250,000 and take up to four months to navigate through the SEC review process. Moreover, another cost of filing a Form S-4 that should not be overlooked is the SEC filing fee, which is based on the value of the securities being registered and can be several thousand additional dollars.

The "Fairness Hearing" Statute

Thanks to a recently enacted Utah statute, many of the problems that are presented when issuing securities in connection with an M&A transaction have been alleviated, making M&A transactions easier, less expensive and quicker to complete, while at the same time increasing the available structuring alternatives for such transactions. House Bill 290 was signed into law by Governor Leavitt on March 19, 2003 and has been codified as Utah Code Annotated Section 61-1-11.1, which became effective on May 5, 2003 (the "Fairness Hearing Statute"). With the adoption of the Fairness Hearing Statute, Utah now joins a handful of states in providing an exemption from federal registration for securities issued in connection with M&A transactions.[1]

The Fairness Hearing Statute allows Utah companies[2] to request a "fairness hearing" with the Utah Division of Securities (the "Utah Securities Division"). If the Utah Securities Division determines that the securities (and any other consideration) proposed to be issued in a transaction are "fair",[3] the transaction will be allowed to proceed and the securities that are issued in connection with the transaction will generally be freely transferable (unless such securities are issued to an affiliate of the acquirer/insurer).[4] The Fairness Hearing Statute was specifically drafted to satisfy the exemption requirements provided by Section 3(a)(10) of the Securities Act of 1933, as amended (the "1933 Act").[5]

Section 3(a)(10) of the 1933 Act

Section 3(a)(10) exempts from the registration requirements of the 1933 Act:

> any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a *hearing upon the fair-*

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ness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by … any State … or other governmental authority expressly authorized by law to grant such approval. (Emphasis added.)

As noted, prior to the adoption of the Fairness Hearing Statute, Utah companies undertaking M&A transactions in which securities were being issued were required to either find a registration exemption for those securities or register them with the SEC. However, the registration exemptions available to acquirers/issuers in M&A transactions are very limited, and generally consist of the following:

- **Regulation D –** In certain M&A transactions the "safe harbor" exemptions under Regulation D of the 1933 Act will provide an exemption for the securities being issued but such securities will generally be restricted and not be freely transferable. However, because of the restrictions imposed by Regulation D on the number and type of investors, the prohibitions against general solicitation and advertising, the disclosure requirements imposed, and the requirement to comply with applicable state securities or "blue sky" requirements, Regulation D often is not available to many acquirers/issuers for securities issued in M&A transactions, especially when the target has several unsophisticated shareholders.
- **Section 4(2) –** Section 4(2) of the 1933 Act, the so-called "private placement exemption," provides an exemption for securities offerings that do not involve a public offering. However, because of the restrictions imposed on the number of offerees and the requirement that they be sophisticated, as a practical matter Section 4(2) is not available for most M&A transactions. Furthermore, securities issued under Section (4)(2) are restricted securities and, therefore, are not freely transferable.

While securities may be issued pursuant to Regulation D or Section 4(2) in an M&A transaction, they will be restricted securities and, therefore, will not be able to be resold except in accordance with Rule 144 under the 1933 Act. In order to remove the resale restriction a shelf registration statement on Form S-3 will need to be filed with the SEC, thus allowing the target's shareholders to resell their securities. However, a Form S-3 has many of the same problems as a Form S-4 (*i.e.* substantial legal and accounting fees, printing costs and filing fees, and possibly several months of SEC review). Moreover, because a Form S-3 registration statement will generally need to remain effective for at least the Rule 144 holding period,[6] additional costs will be incurred and heightened disclosure obligations presented while the Form S-3 remains

effective. As a result, acquirers in M&A transactions are often faced with the expensive and time consuming task of filing a Form S-4 registration statement with the SEC to register the securities being issued to the target company's shareholders. However, the cost for legal and accounting fees, printing costs and filing fees for a Form S-4 can often exceed $250,000 and take up to four months to process through the SEC.

Section 3(a)(10) provides a *transactional* exemption for securities issued in connection with an M&A transaction. If the requirements of Section 3(a)(10) are met, the securities issued to the target's shareholders in the transaction will be exempt from the registration requirements of the 1933 Act.[7] Generally to comply with the requirements of Section 3(a)(10), an M&A transaction must be submitted to a hearing upon the fairness thereof before a governmental authority expressly authorized by law to conduct such a hearing.

This exemption is available regardless of the number of persons being issued securities in the transaction or their level of sophistication. More importantly, upon the successful completion of a fairness hearing, the securities issued in connection with the M&A transaction will generally be freely tradable (unless such securities are issued to an affiliate of the acquirer/issuer). It should be emphasized, however, that while the issuance of securities under Section 3(a)(10) are exempt from the registration requirements of the 1933 Act, that exemption does not exempt the issuer from the antifraud provisions of applicable state and federal securities laws. Additionally, if the securities being issued in the transaction are not nationally traded securities under Section 18(b)(1) of the 1933 Act, the issuer will need to comply with applicable state securities or "blue-sky" laws if the recipient of such securities resides outside of the jurisdiction of the state conducting the fairness hearing.[8]

Adoption of Utah Rules

The Utah Securities Division is currently drafting rules for the implementation of the Fairness Hearing Statute and to provide for the administrative procedures to be followed in conducting fairness hearings. No time frame for the adoption of final rules has been set, but the Utah Securities Division is working diligently to adopt final rules. Once adopted, those rules will be subject to a 60-day public hearing requirement. The Fairness Hearing Statute, as well as the requirements of Section 3(a)(10) of the 1933 Act, do provide, however, some general guidance regarding the administrative procedures for fairness hearings that are expected to be adopted. In that regard, a fairness hearing must involve (a) an application to the Utah Securities Division, (b) a hearing on the fairness of the terms and conditions of the transaction (at which all persons to whom it is proposed to issue securities or other consideration may appear), (c) adequate notice of the hearing to all such persons,[9] and (d) a determination by the Utah Securities Division regarding the fairness of the terms and conditions of the exchange. Finally, while the amount of the filing fee for a fairness hearing will be established by the Utah Securities Division in the rules, that fee is expected to be nominal in amount, and probably in the $1,000 – $3,000 range.[10]

California Fairness Hearing Provisions

Because the Fairness Hearing Statute is so new (having become effective on May 5, 2003) and because no implementing rules have yet been adopted by the Utah Securities Division, the exact mechanics and procedures for conducting a fairness hearing in Utah are unclear. However, because California has one of the most established administrative procedures for conducting fairness hearings, and furthermore because the California Corporation Commissioner has conducted over 300 fairness hearings since 1998,[11] the Utah Securities Division will likely look closely at the California fairness hearing provisions in adopting the rules for the Fairness Hearing Statute. It is anticipated that many of the administrative procedures that will be adopted by the Utah Securities Division will be designed, at least in part, after the corresponding California provision. Therefore, much can be learned from a review of the California fairness hearing provisions. Accordingly, a brief summary of the California fairness hearing provisions follows.

The California fairness hearing statute has been codified at Section 25142 of the California Corporations Code. California has established a relatively low nexus requirement in order for an acquirer/issuer to take advantage of its fairness hearing statute.[12] If the nexus requirements are met, a company must complete an application that describes the proposed transaction in detail. Companies must then give their shareholders written notice of the hearing. The hearing is somewhat similar to an administrative proceeding, with the California Corporation Commissioner being required to make a determination whether the proposed transaction is "fair, just and equitable."[13] In making that determination, the California Commissioner considers the evidence presented by the acquirer/issuer and the target, as well as any fairness opinion evidence that may have been presented, in addition to hearing testimony from each of the parties and any of the target's shareholders who may have attended the hearing. The California Commissioner has significant discretion in its ruling. A proposed transaction that is found to be "fair, just and equitable" will be

allowed to go forward, while a transaction that is not found to be "fair, just and equitable" may be delayed or prevented. Alternatively, the California Commissioner can order that the proposed transaction be restructured before it will be deemed to be fair. In addition, it's not uncommon for the California Commissioner to impose additional conditions[14] on a transaction before it will be deemed to be fair and allowed to go forward or to place restrictions on the transferability of the securities being issued in the transaction.

Conclusion

While it is too early to determine the exact nature of the administrative procedures the Utah Securities Division will ultimately adopt to determine the "fairness" of an M&A transaction, the relative ease, cost savings and speed, in comparison with a federal registration, will be dramatic. It is clear, however, that the adoption of the Fairness Hearing Statute will offer Utah companies a valuable tool in undertaking M&A transactions. Utah companies conducting an M&A transaction should explore with experienced counsel the applicability of the Fairness Hearing Statute and the advisability of conducting a fairness hearing.

1. California, Idaho, Ohio, Oregon and North Carolina are among the states that have adopted fairness hearing statutes for M&A transactions conducted in accordance with Section 3(a)(10) of the Securities Act of 1933, as amended. While each of those statutes is designed to qualify for the exemption provided by Section 3(a)(10), the provisions of each of those states' statutes differ in certain respects and require that varying standards and procedures be applied by the hearing officer.

2. What will constitute a "Utah company" authorized to file an application with the Securities Division for a fairness hearing remains to be determined by the Securities Division and will be provided for in the rules being drafted to implement the Fairness Hearing Statute. However, at a minimum we believe that a "Utah company" for purposes of the Fairness Hearing Statute will include companies incorporated in Utah and companies having their principal place of business in Utah. The rules may also allow companies with a significant percentage of their shareholders residing in Utah to qualify for fairness hearings. Furthermore, the definition of "Utah company" will likely not be limited to corporations. California, for instance, holds fairness hearings for exchanges involving limited liability company membership interests and partnership interests, as well as for exchanges involving shares of stock in corporations.

3. What constitutes "fair" is not set forth in the Fairness Hearing Statute. The criteria for what constitutes "fairness" will be set forth in the rules governing the Fairness Hearing Statute, which rules are currently being drafted by the Securities Division.

4. Securities issued to an affiliate of the acquirer/insurer will not be freely tradable and can only be transferred in compliance with Rule 144 under the Securities Act of 1933, as amended. Securities issued to an affiliate of the target (who does not become an affiliate of the acquirer/issuer) are also restricted to a certain extent and can only be transferred in compliance with Rule 145(d) under the Securities Act of 1933. Additionally, because the Section 3(a)(10) exemption is a *transactional* exemption and not a securities exemption, there may be resale restrictions that must be met under state law when the surviving company is not a publicly reporting company.

5. In this regard, Section 61-1-11.1(10) of the Fairness Hearing Statute specifically provides that it "is intended to provide for a fairness hearing that satisfies the requirements of Section 3(a)(10) of the [1933 Act]."

6. Rule 144(d)(1) under the 1933 Act imposes a minimum one year holding period before restructured securities acquired from the issuer or an affiliate of the issuer can be resold.

7. The general requirements of the SEC to perfect an exemption under Section 3(a)(10) are:

   (a) Exchange Requirement – The securities must be issued in exchange for securities, claims or property interests (and not solely for cash);

   (b) Approving Entity – An authorized governmental entity must approve the fairness of the terms and conditions of the exchange;

   (c) Fairness Determination – The approving entity must find, before approving the transaction, that the terms and conditions of the exchange are "fair" to the target shareholders to whom the securities will be issued;

   (d) Reliance on Section 3(a)(10) – The approving entity must be advised before the hearing that the acquirer/issuer will be relying on the Section 3(a)(10) exemption;

   (e) Hearing – The approving entity must hold a hearing before approving the fairness of the transaction;

   (f) Authorized Governmental Entity – A governmental entity must be expressly authorized by law to hold the hearing (although it is not necessary that the law require such a hearing);

   (g) Open Hearing – The hearing must be open to anyone to whom securities will be issued in the proposed transaction;

   (h) Notice – Adequate notice must be given to all such persons; and

   (i) Procedural Due Process – There cannot be any improper procedural impediments to the appearance by such persons at the hearing.

8. Issuers should also conduct a "blue sky" survey even if the consideration being issued consists of nationally traded securities. While states are preempted by federal law from requiring registration of a covered security, there is no such preemption of licensing requirements for issuer agents that offer or sell covered securities. In March 2000 Utah adopted Rule R164-14-26s under its Uniform Securities Act to create a self-executing exemption in such an instance so issuers that participate in an M&A transaction whose securities are, or will be upon completion of the transaction, covered securities pursuant to Section 18(b)(1) of the 1933 Act, will not be required to license agents who meet the exclusion requirements of Subsection 61-1-13(2) of the Utah Uniform Securities Act.

9. While the length of the notice period will be set forth in the rules, the notice period is expected to be a minimum of 10 days but not more than 30 days.

10. The filing fee in California, for example, is a maximum of $2,500 plus certain administrative expenses.

11. The fairness hearings conducted by the California Corporation Commissioner since 1998 represent securities transactions valued in excess of $33.7 billion.

12. The scope of the nexus requirement is perhaps the most difficult issue facing the Securities Division in adopting the Utah rules. Because the Utah Legislature has not appropriated additional funds to the Securities Division with which to conduct fairness hearings, the Securities Division will likely set a relatively high nexus requirement in order to administratively limit the number of fairness hearings that can be conducted under the Fairness Hearing Statute.

13. Under the Fairness Hearing Statute the standard to be applied by the Securities Division is simply that the transaction be "fair." Other states have variations on this standard. Idaho and Oregon, for example, also require that the M&A transaction be "free from fraud" in order to be approved.

14. Such as imposing a greater shareholder approval requirement for the transaction than is otherwise required by the target's bylaws or other governing documents.

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Freedom and Independent Courts

by Judge Dale A. Kimball, United States District Court

EDITOR'S NOTE: *The following remarks were made by Judge Kimball on May 1, 2003, at the annual Law Day Luncheon sponsored by the Utah State Bar's Young Lawyers Division. Judge Kimball has graciously permitted his remarks to be reprinted here.*

My main hope today is to be able to convey a few coherent thoughts and to utter a couple of complete sentences. I took a jury verdict just before midnight last night after a difficult trial that took a week and a half. I may not be at my best today.

I am delighted on this Law Day to speak to you. I am discussing the topic "Celebrate Your Freedom: Independent Courts Protect Our Liberties." I did not select this topic; it was assigned to me. Not surprisingly, however, it is a topic in which I have a keen interest. I should also state at the outset that I believe the assertion contained in the second half of the topic's title. Independent courts do – or should – protect our liberties.

Let me briefly trace the history of the development of the notion of an "independent" judiciary. The Roman Law created a form of judicial independence in a system set up by Justinian between about 528 and 534 A.D. With the fall of the Roman Empire and what we call the Dark Ages that followed, the independent courts were basically suspended. In England, the Romans held power during the early centuries A.D., but the Roman judges left England, probably in the 5th century. A variety of legal systems followed. They included trials by ordeal and laws made by successive kings. For the last week and a half, I have been in a trial by ordeal. Not until the 17th century in England was there something like a system of law somewhat independent of government.

With this English history in mind, the educated colonists seemed to be sensitive to the necessity, in a free society, of an independent judiciary. Among the grievances leveled at the King of Great Britain in the 1776 Declaration of Independence were these: "He has obstructed the administration of Justice, by refusing his assent to laws for establishing judiciary powers. He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." As Thomas Jefferson recognized, if judges are at the complete will of another branch of government for tenure and pay, their decisions will be improperly influenced. Questions will not be "What does the Constitution mandate?," "What do the statutes mean?," and "What do the case precedents require?," but rather, maybe instead, "Will I be fired?," "Will my pay be abolished or diminished?," or "Will this decision be unpopular?"

In 1780, in Massachusetts, now a Commonwealth, then a colony in rebellion, the citizens decided that they should have a written constitution. A constitutional convention was held. As stated by Benjamin Kaplan, a former justice of the Supreme Judicial Court of Massachusetts, "by a prodigy of good fortune, John Adams was the chief convention draftsman." The draft went to towns and villages throughout the Commonwealth. Nearly 200 communities sent comments in. The constitution was approved by a two-thirds vote of the public.

The Massachusetts constitution established a Supreme Judicial Court and other courts whose judges were to be appointed by the governor, with the consent of his council, to serve as long as they maintained good behavior. The constitution stated that the purpose was that judges should be "as free, impartial and independent as the lot of humanity will admit."

Prior ideas about judicial independence influenced Adams and others, but as Justice Kaplan said, "their particular combination and expression in the [Massachusetts] constitution were a mighty invention." Professor Samuel Eliot Morison called the idea of judicial independence as expressed in the Massachusetts constitution "one of John Adams's profoundest conceptions."

By the time of the debates and adoption of the federal constitution the principle of judicial independence was almost a given. In *The Federalist No. 78* Alexander Hamilton spends most of his time and energy discussing judicial review, a related principle to judicial independence which I will address momentarily. Hamilton does

offer the following in *The Federalist No. 78* regarding judicial independence:

> According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior;* which is conformable to the most approved of the state constitutions, and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

The Federal Constitution was, of course, adopted with Article III thereof providing for an independent judiciary, with judges to hold their office during good behavior. All states have set up a form of an independent judiciary in their constitutional framework. Most have not followed the federal model of judges serving during good behavior. The worst, such as Texas, have contested political elections for judges. Many have some form of retention procedure which does provide, in my view, for a healthy dose of judicial independence. Utah is in this category. Article VIII of the Utah Constitution establishes a separate, independent judicial branch of government. Since 1780, Massachusetts judges have been appointed for life by the Governor with the consent of the Governor's Council. John Adams still holds sway there. However, in 1972 in Massachusetts, a mandatory retirement age of 70 was imposed by constitutional amendment.

There was some talk during this past session of the Utah Legislature of creating a committee of senators that would rule on the fitness of every judge who is up for a retention election. The theory was, as I understand it, that the committee would have had authority to keep a state judge off the retention ballot, effectively removing him or her from office. In commenting on this possible development, a *Deseret News* editorial of February 18, 2003 stated: "Obviously, this committee would be tempted to eliminate judges who had issued unpopular rulings, regardless of how sound those rulings may be. They would also be tempted to use a judge's political leanings as a guide." The editorial went on to suggest that "perhaps all new lawmakers should be given mandatory training on the role of an independent judiciary in a free society. Banana republics and dictatorships allow politics to dominate their courts. Utah . . . should tread around that ground very carefully." An editorial in *The Salt Lake Tribune* on March 11, 2003 pointed out that "the legislature and the courts are co-equal branches of government, with offsetting powers." The legislature did not, to its credit, adopt the proposal. I am not even sure it was seriously considered.

Speaking of banana republics and independent judiciaries brings to mind some experiences of my older son. He is a lawyer for Nokia with responsibilities in Mexico, Central and South America. There are a few places where he travels where there are no independent courts and no rights and processes associated therewith. If the executive wants someone removed (a potentially broad term) it is done. The courts are the political tools of the dictator or what passes for Parliaments. These are not good or free systems of government. He tells me constantly that most Americans are unaware of the blessings of their independent judiciaries. As Utah Supreme Court Chief Justice Christine Durham said on February 24th of this year, "The system would break down without independent judges." She also contrasted our system to countries where judges are sometimes assassinated: "In this country we protect and try to insulate our judiciaries." I want to go on record as being against the assassination of judges.

I stated earlier that the concept of judicial review was a principle related to judicial independence. On February 24, 2003, we (or many of us) celebrated the 200th anniversary of the case of *Marbury v. Madison.* This case has been called by Chief Justice William Rehnquist "the most famous case ever decided by the United States Supreme Court." The Court in that case, speaking through the great Chief Justice John Marshall, recognized the power of judicial review to determine a law's compliance with the constitution. The Marbury Court did not create judicial review out of whole cloth. It is clear that this concept was implicit in the separation of powers doctrine.

For example, George Wythe, scholar, teacher and patriot (and law mentor and teacher to John Marshall and Thomas Jefferson, among others) had spoken about and taught the concept. Further, judicial review had been adopted under the Virginia constitution six years before Virginia ratified the federal constitution. Wythe led both the successful effort to create Virginia's constitution and the successful effort to ratify the federal constitution in Virginia. It is clear that Wythe and others expected a judicial check on

the other branches of the federal government.

In addition, *The Federalist No. 78* explained the principle of judicial review in some detail. Hamilton explained that with the existence of a written constitution which prohibits legislative authority from doing certain things such as passing *ex-post facto* laws, bills of attainder, or abridging freedom of speech or press (and many other things), such prohibitions and limitations can be preserved in practice no other way than through courts. It is the court's duty "to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

There are written constitutions all over the world, many of which have little practical meaning in protecting freedom when independent courts lack the power to protect the stated fundamental rights from the exercise of unfettered legislative or executive power. How else can the fundamental constitutional rights of the people, particularly minorities, be protected? To again quote *The Federalist No. 78:* "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."

In *Marbury,* then, Chief Justice John Marshall was expounding well-known contemporary principles when he stated that "it is emphatically the province and duty of the judicial department to say what the law is." It is no overstatement to proclaim, as have both Chief Justice William Rehnquist and Associate Justice Ruth Bader Ginsburg, that independent courts and the power of judges to pronounce on the constitutionality of government action constitute the jewel in our Constitution's crown.

Later state constitutions explicitly recognized and adopted judicial review. The Utah constitution, Article VIII, Section 2, for instance, says, "The court shall not declare any law unconstitutional under

this constitution or the constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court." That seems to me a very reasonable proposition and a reasonable limitation on judicial review. Of course, if the requisite procedures are followed and sufficient majorities obtained, the federal constitution or any state constitution can be amended and even theretofore fundamental rights altered or adjusted.

It should be noted, in passing, that almost all courts, most of the time, affirm the constitutionality of the acts of the other branches of government and of other governments as when, for instance, a federal court holds in a particular case that a branch of a state or municipal government did act constitutionally. This generally affirming role of the courts, I believe, provides confidence in all levels of government. And when occasionally acts are held invalid and unconstitutional, there is underscored the meaning and life of written and protected freedoms that can be celebrated and need protection by an independent judiciary.

I have heard and read of federal and state legislative leaders stating several times that on occasion the freedom of the people has been safeguarded by judges doing their duty and giving meaning and life to those rights reserved in the constitution. In that sense, judicial review gives meaning to the rule of law. The idea of an independent judiciary coupled with the role of the judiciary to enforce constitutional rights truly makes real the protection of liberties. It is easier to accept the concept of independent courts when they deal with and pass on only private disputes relating to property, torts or contracts. When the independent courts occasionally check what other branches of governments do, the principle of an independent judiciary becomes problematic for some.

So why do we permit (even encourage) this anti-majoritarian branch of government? Are there potential abuses in such a system? What are the potential problems? What are the competing realities that cure and manage and restrict the difficulties?

There are, of course, potential abuses in a system of judicial independence and judicial review. The *Dred Scott* decision in 1857, by the Supreme Court, held that the Missouri Compromise of 1820 was unconstitutional. That compromise had prohibited slavery in the territories north of Missouri. The court basically said that Congress could not eliminate slavery. The Thirteenth Amendment overruled *Dred Scott.* Constitutional amendment, difficult as it may be, is a way to work and correct judicial abuse.

Judges may, and occasionally do no doubt, decide cases based on their preferences rather than on what is their good faith understanding of the constitution, governing statutes and precedents. When this happens, some dislocation and difficulty can occur. It still is true, though, that usually the courts affirm and give deference to the actions of the legislative and executive branches of government.

Consider how judges and courts are constrained and restrained. In the first instance, judges are nominated by the executive and confirmed by one branch of the legislature. There has to be a real case or controversy before a court can hear a case. Judges do not decide things out of thin air. With the exception of supreme courts exercising discretionary appellate jurisdiction, judges do not decide what cases to decide. Parties bring specific and concrete cases before them. They must have standing. This means they must have a personal stake in the outcome in order to assure a concrete adverseness which sharpens and shapes the issues. An injury must be shown, there must be a causal connection between the injury and the conduct complained of and it must be likely that the injury will be redressed by a favorable decision. These requirements limit the cases a court can hear.

To some extent, also, legislatures are empowered, within constitutional limits to determine the jurisdiction of courts – what cases a court can hear. Further, there is an elaborate system of appellate jurisdiction and rights of appeal. All of the foregoing limit and circumscribe what courts can hear and do. There truly are ample safeguards built into the system.

Consider the alternatives. If judges' tenure and pay could be altered as punishment for a decision considered unwise by the executive or legislative branches of government, then as *The Federalist No. 78* pointed out, there is absolutely no reason to have an independent judiciary. You should then have courts subservient to the other branches of government, unable to check in any meaningful way the occasional unconstitutional excesses of the other branches, which is the reason to have an independent judiciary in the first instance.

In short and in sum, the founders knew what they were about.

Judicial review and judicial independence have had a large hand in making us what we are. Because of judicial independence and judicial review, ABA President Alfred P. Carlton, Jr. recently stated that our third branch of government was the envy of the world. We can and will continue to be able to enjoy our liberties and celebrate our freedoms in large part because of our belief and reliance on the principles and rationale underlying judicial independence.

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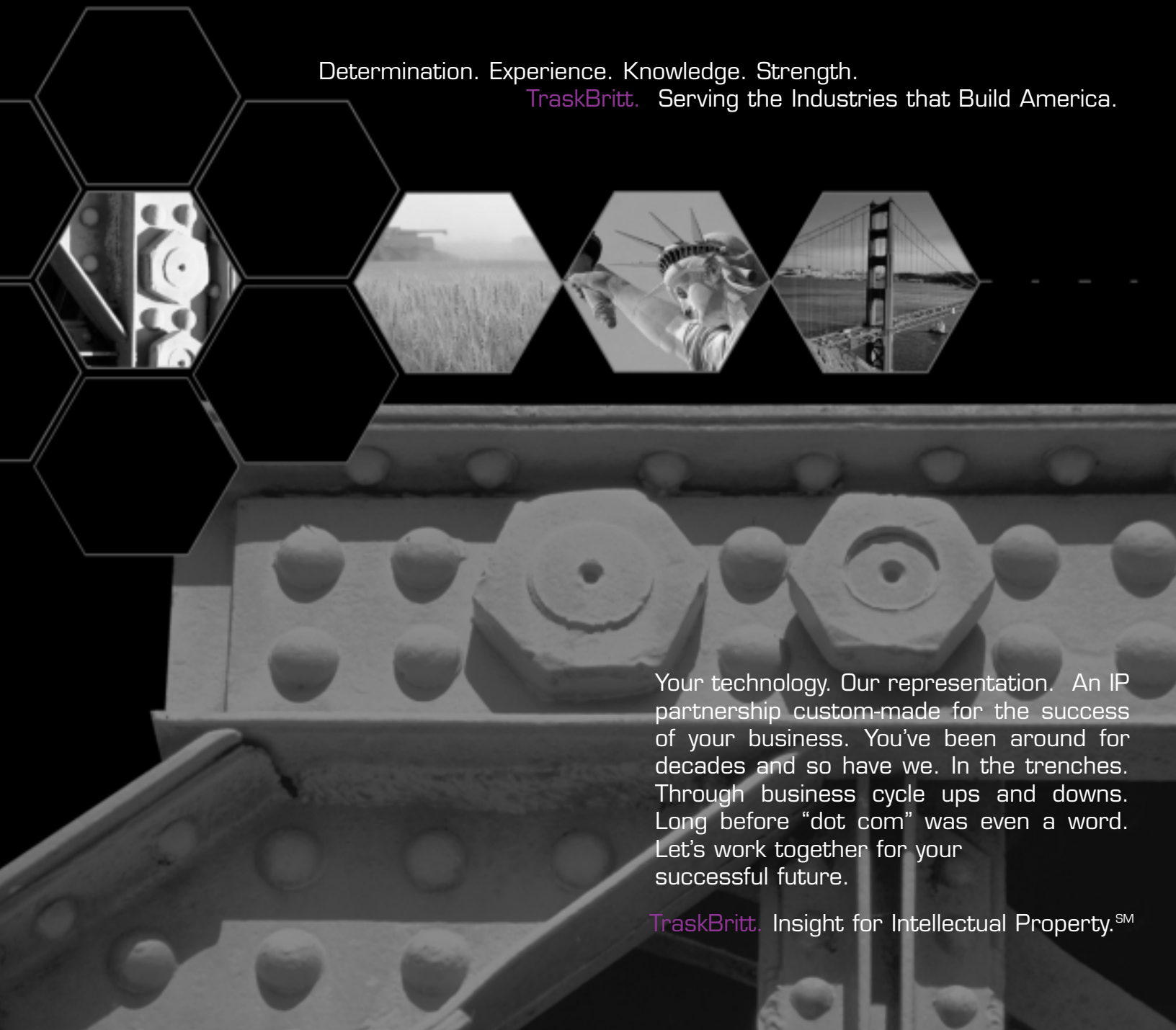

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N. George Daines
President-Elect

N. George Daines was elected President-Elect of the Utah State Bar. George received 1,089 votes to Randy S. Kester's 1,033. Nathan D. Alder and Yvette D. Diaz were elected to the Commission in the Third Division. Nate received 908 votes, Yvette received 787, to Brian Burnett's 611 votes and Nanci Snow Bockelie's 557. In the Fourth Division, Robert L. Jeffs was elected to the Commission. Robert received 102 votes to Thomas W. Seiler's 78 and Brent H. Bartholomew's 75. In the Fifth Division, V. Lowry Snow ran unopposed.

Nathan D. Alder
Third Division

Yvette D. Diaz
Third Division

Robert L. Jeffs
Fourth Division

V. Lowry Snow
Fifth Division

Commission Highlights

During its regularly scheduled meeting of April 25, 2003, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. John Adams reported on lobbying on federal bankruptcy reform and stated that in March the U.S. House of Representatives approved bankruptcy reform legislation (H.R. 975) which would dramatically increase the liability and administrative burdens of bankruptcy attorneys. The new measure would require a debtor's attorney to: (1) certify the accuracy of the debtor's bankruptcy schedules under penalty of court sanctions; (2) certify the debtor's ability to make payments under a reaffirmation agreement; (3) identify and advertise themselves as "debt relief agencies" subject to new intrusive regulations. The motion passed to oppose the proposed legislation's provision to require lawyers to certify the debtor's ability to make payments under a reaffirmation agreement.
2. John Adams reported that Congress has appropriated $180,000 to the Community Legal Center and that Rep. Cannon chairs a subcommittee that was instrumental in helping to secure the appropriation.
3. John Adams announced that Bob Merrell will be leaving the Commission due to other commitments and the Court has requested nominations for his replacement. The Court will conduct interviews in May and the new member will be appointed in time for the Bar's annual convention.
4. Ken Wallentine and Brent Bullock are being nominated for the appointment to the Deception Detection Examiners Board. Their resumes have been sent to the Detection Board.
5. The Chair of the State Advisory Board on Children's Justice sent a letter asking the Commission for the reappointment of Robert A. Alsop to that Board. Utah law mandates that the Bar appoint a criminal defense attorney to serve. The motion to reappoint Robert Alsop for a second three-year term passed unanimously.
6. John Baldwin discussed the statistical report relating to admissions. Out of 129 applicants, 99 passed and 30 failed the February exam for a pass rate of 76.7%. The swearing in ceremony will be held May 19th in the Salt Palace.
7. John Adams recapped the St. George events relating to H.B. 349 and a lengthy discussion followed. The motion passed and was unopposed to form a task force to be charged with: (1) support increasing limits in small claims court to $10,000 and; (2) explore how parties in small claims actions might be represented by uncompensated non-lawyers and that the remaining two items (uncompensated legal advice by non-lawyers generally and unbundling of legal services by lawyers, be tabled until after the DLS report was made. The motion to

allow the Commission's Executive Committee to make the task force appointments, with George Daines as the chair passed unopposed.

8. Lauren Barros announced that the Judges' School seminar would be held on May 22, with an opening address by John Adams. Lauren said that the first session will consist of a federal panel with Paul Warner and Brooke Wells in attendance and the second session would be moderated by Chief Justice Christine Durham. The second session addressing state court appointment panelists will include Justice Jill Parrish.

9. John Baldwin discussed the most recent financial statements and noted that we are projecting a deficit for the coming year. He said that we would probably come in at approximately a zero balance. The motion to publish the notice of the proposed budget to members passed without dissent.

10. Toby Brown appeared at the meeting to discuss the CaseMaker proposal. Casemaker is an online legal research system and the proposal is to enter into a five-year agreement to provide this service as a free member benefit. The library for this service contains Utah law including case law, statutes, and regulations, as well as selected federal law but only as it pertains to Utah. Although the Bar can select the library content, any increase in content drives a price increase. The cost is approximately $65,000 a year on a pay-as-you-go charge.

11. Scott Daniels discussed a recent meeting of the Utah Supreme Court's Professionalism Task Force. The Task Force has requested an $10,000 contribution to help fund a part-time discovery commissioner.

12. Debra Moore reported that the ABA had completed its recent audit of the proposed Lawyers Helping Lawyers program and that the report's emphasis was on converting the current ad hoc program to a stable, consistent, and fundable project. Debra noted that the program would need an initial $120,000 in start-up costs, ongoing financial support and statutory enactments to maintain confidences and to enact immunity for those directing the program. Debra concluded by stating that the program would be a clear benefit to Utah lawyers and a possible savings in disciplinary costs due to early intervention.

13. John Adams discussed the most recent developments with the Racial and Ethic Task Force. He said the Task Force is interested in participating in the Bar's *Brown v Board of Education* project slated for next May.

14. Debra Moore reviewed the upcoming retreat schedule. She would like the Commission to arrive at a set of goals and then determine how each Commissioner would like to contribute toward progress on those goals. Emphasis will be placed on budget review and planning.

15. Felshaw King reported on the OPC Ombudsman and said that the committee was still in the process of evaluating what they wanted to propose, if anything, in this area. This item will be deferred to the June meeting.

16. John Adams congratulated Dane Nolan on his appointment as a Third District Juvenile Court Judge, and said that Dane's absence will leave a vacancy for a member on the Judicial Council. Although not mandated, this vacancy is typically filled by a Commissioner. John said that if any present were interested and have the time to attend and actively participate in a monthly Judicial Council meeting, that those Commissioners should contact John Baldwin, Debra Moore, or himself.

17. The Commission reviewed the written report on the Client Security Fund submitted by Christine Critchley. Those present noted that it was an important program and that it was especially important as it impacted public perception on dishonest attorneys. The motion to continue this program for another three years passed unopposed.

18. Felshaw King discussed the sunset review materials related to member benefits and the motion to continue the program passed unopposed.

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 FALL FORUM

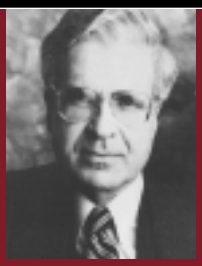
September 26, 2003

University Park Marriott • Salt Lake City, Utah

6.5 hrs. CLE • Cost: $75 before September 12 or $100 thereafter

Will September 11 change the American Constitution?

Join Harvard Law School **Professor Arthur Miller** for an entertaining, informative, and educational discussion.



Forrest Mosten
Unbundling legal services and mediation.

Jay Foonberg
The guru on practice management.

Other distinguished panelists will include:

Hon. Michael W. McConnell, U.S. 10th Circuit Court of Appeals

Chief Justice Christine M. Durham, Utah Supreme Court

Michael D. Zimmerman, Snell & Wilmer

Nadine Strossen, President, ACLU

Prof. Wayne McCormack, S.J. Quinney College of Law

Brooke C. Wells, Assistant U.S. Attorney

Gil Athay, Criminal Defense Attorney

Roger A. Livingston, counsel to Senator Orrin Hatch

2003 Fall Forum Schedule of Events*

8:00–9:00	Registration / Networking / Exhibit Time					
9:00–11:15	**Will September 11 change the American Constitution?** Featuring special guest Professor Arthur Miller and distinguished panel.					2.5 CLE
11:30–12:30	Lunch: Jay Foonberg – Effective Law Practice Management					1 CLE/NLCLE
Session 1 12:45–1:15	**Track #1** Communication Technology	**Track #2** Multi-Jurisdictional Practice	**Track #3** Law Practice Management and Bar Benefits	**Track #4** Trial Advocacy	**Track #5** Jay Foonberg cont.	.5 CLE/NLCLE
Session 2 1:30–2:00	How to Keep Your Competent Staff/ Staff Competent	Lawyers Helping Lawyers	Marketing Your Practice and Yourself	Court Technology	Jay Foonberg cont.	.5 CLE/NLCLE
Gen. Session 2:15–3:15	Challenging Times – Challenging Issues. Forrest "Woody" Mosten, Mosten Mediation					1 CLE Ethics
Session 3 3:30–4:00	**Track #1** Taking Technology out of your Hands	**Track #2** Getting Paid	**Track #3** Security in the Workplace	**Track #4** Mosten cont.		.5 CLE/NLCLE
Session 4 4:15–4:45	Software you can Afford	Front & Back Office Management		Mosten cont.		.5 CLE/NLCLE
4:45–6:00	Networking / Exhibit Time / Prize Drawings					

2003 Fall Forum Sponsors & Exhibitors

ALA ASSOCIATION OF LEGAL ADMINISTRATORS

Canyon Connections
Auto Outlet, Inc.
XO Communications
Pro Tel
Scansoft
T-Mobile

*Agenda tentative.

THOMSON WEST

Discipline Corner

ADMONITION

On March 27, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.6 (Confidentiality of Information), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent a client in a personal injury matter. The attorney intended to offer a settlement demand but failed to follow through. The client did not receive any written communication about the status of the case. The attorney asked another attorney to take over the case. The other attorney shared office space with the attorney, but was not associated with the attorney's law firm. The attorney telephoned the client concerning withdrawal of representation from the case, but did not send written communication to the client. The attorney did not consult with the client before referring the case to another attorney.

Mitigating factors include: absence of prior record of discipline, absence of dishonest or selfish motive, and personal or emotional problems.

ADMONITION

On April 9, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent clients regarding a debt collection matter. The clients provided the attorney with a Summons and Complaint that had been served upon the clients. The attorney failed to answer the Complaint. The court entered a default judgment against the clients. The clients became aware of the default judgment when the plaintiff tried to collect on a garnishment. The attorney assisted the clients with their request to have the default judgment set aside and continued to represent the clients in the matter.

PUBLIC REPRIMAND

On April 9, 2003, Brenda L. Flanders was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.15 (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Flanders was retained to represent a company in a debt collection matter. Ms. Flanders was paid a retainer by check and deposited it into her trust account. Ms. Flanders erred on her billing statement to the company in the debt collection matter by stating that she had earned the retainer fee and withdrew the remainder of the retainer from her trust account for legal work she did for another client. Thus, she paid herself for legal work from the wrong client. Ms. Flanders took several months to correct the error.

ADMONITION

On April 14, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4 (Communication), 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 action. The client paid a retainer to the attorney. The attorney did not provide a bill or written explanation of the attorney's hourly rate. The attorney failed to keep the client reasonably informed of the status of the case; the attorney failed to inform the client that a pretrial conference had been scheduled. The attorney failed to comply with the Office of Professional Conduct's requests for information.

ADMONITION

On April 14, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.5(a) (Fees), 3.2 (Expediting Litigation), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney represented a client in an immigration matter. The attorney was late for a hearing and failed to timely file documents with the immigration court. The attorney accepted a fee and thereafter failed to timely and effectively perform the necessary legal services. The attorney requested continuances, thereby failing to expedite the case. The attorney eventually refunded to the client all fees received.

Mitigating factors include: absence of prior record of discipline; absence of dishonest or selfish motive; timely good faith effort to make restitution or to rectify the consequences of the misconduct involved; cooperative attitude toward the Office of Professional Conduct's proceedings; and remorse.

SUSPENSION

On April 16, 2003, the Honorable William W. Barrett, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Suspension, suspending Robert L. Booker for a period of eighteen months. Mr. Booker's suspension is effective May 21, 2003.

In summary:

Mr. Booker represented a client in a criminal matter before the Federal District Court. Mr. Booker failed to appear for trial. Mr. Booker failed to accede to the Court's verbal order to be at a pre-trial conference. At another pre-trial conference, Mr. Booker made repeated arguments to the Court for continuance of the trial, and repeatedly spoke after the judge told him to be quiet. The Court issued a finding of contempt because of Mr. Booker's conduct and placed him in jail. Mr. Booker was subsequently disqualified and removed because of his conduct. In another case, Mr. Booker was retained to represent a client in a criminal matter. Mr. Booker communicated with his client's co-accused without the consent of the co-accused's attorney. This communication with Mr. Booker caused the co-accused to stop cooperating with his counsel. Mr. Booker was unprepared to go forward at his client's sentencing hearing.

RESIGNATION PENDING DISCIPLINE

On April 17, 2003, the Honorable Chief Justice Christine Durham, Utah Supreme Court, entered an Order Accepting Resignation Pending Discipline concerning Randall D. Lund.

In summary:

From January 1999 through May 1999 Mr. Lund obtained prescriptions from several doctors without disclosing to the doctors that he had received prescriptions from others. Mr. Lund was charged with nine counts of Obtaining a Controlled Substance by Fraud. Mr. Lund entered a guilty plea in abeyance to three counts of Falsely Obtaining/Dispensing Prescriptions and was convicted of Falsely Obtaining/Dispensing Prescriptions, a Third Degree Felony. Mr. Lund was placed on supervised probation and failed to stay in contact with his probation case manager. Additionally, Mr. Lund failed to comply with the Office of Professional Conduct's requests for information in this matter.

RECIPROCAL DISCIPLINE

On April 22, 2003, the Honorable Robin W. Reese, Third Judicial District Court, entered an Order of Reciprocal Discipline, suspending H. Delbert Welker from the practice of law for a period of eighteen months. Mr. Welker's suspension is effective as of March 28, 2003.

In summary:

On May 31, 2002, the Supreme Court of California entered an order suspending Mr. Welker from the practice of law for a period of three years, placed on probation for four years, on the condition that he be actually suspended for 18 months. In a personal injury/workers' compensation matter, Mr. Welker failed to conduct formal discovery or arrange for a qualified medical exam, and allowed mediation to proceed before medical information was available. Mr. Welker misrepresented the client's authorization to settle a claim in a sworn declaration filed with the court. In another matter, Mr. Welker failed to pay medical service provider liens as directed by his client, the funds for which having been deposited in his client trust account for this purpose. In a third matter, Mr. Welker issued checks out of his clients trust account for personal and family expenses. In a fourth matter, Mr. Welker failed to inform the State Bar of California of a January 29, 2001 order entered by the Third Judicial District Court, Salt Lake County, Utah, suspending Mr. Welker from the practice of law in Utah.

ADMONITION

On April 28, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4(a) (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to finalize a Qualified Domestic Relations Order and to collect money pursuant to the client's Decree of Divorce. The attorney failed to keep the client informed of the status of the case, either by returning telephone calls or written correspondence. The attorney's billing records reflected that no work was done during many months in which the client waited, without word of the progress in the case. The client requested assistance from the Utah State Bar and the attorney withdrew from the client's case.

ADMONITION

On May 8, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.15 (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The Office of Professional Conduct received an overdraft notice from a bank concerning an attorney's trust account. The overdraft was caused by accounting errors the attorney made in the management of the trust account. The attorney mistakenly made an overpayment to a client. The attorney returned sufficient funds to cover only part of the full amount paid to the client. The deficit was not discovered until the overdraft occurred, at which time the attorney returned sufficient funds to cover the deficit. Attorneys fees were also withdrawn from the trust account for services performed by the attorney for clients who had agreed to pay retainers, but failed to do so. The attorney mistakenly added the anticipated retainers to the accounting on the trust account ledgers. The attorney negligently forgot to withdraw earned attorney fees from the trust account in several cases. The funds that were mistakenly withdrawn against the anticipated retainers were offset by the attorney fees mistakenly left in the trust account. The attorney corrected the accounting errors once the errors were discovered.

Mitigating factors include: absence of a prior record of discipline; cooperation with the Office of Professional Conduct.

PUBLIC REPRIMAND

On May 8, 2003, Thomas R. Blonquist was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4(b) (Communication), 1.8(a) and (b) (Conflict of Interest: Prohibited Transactions), 1.15(a) and (b) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Blonquist was retained to represent a client in a divorce matter. The client received a cash settlement at the conclusion of the divorce. At, or shortly after settlement, Mr. Blonquist solicited the client's investment in a company in which he acted as counsel and had a financial interest. Mr. Blonquist personally guaranteed the investment. The client had limited knowledge concerning the transaction. Mr. Blonquist failed to explain the risks of his client's decision to invest, and to make the client fully aware of other options. Mr. Blonquist comingled his client's money with his own or that of his business funds. Mr. Blonquist failed to comply with the Office of Professional Conduct's requests for information.

Mailing of Licensing Forms

The licensing forms for 2003-2004 have been mailed. 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

An Accidental Soldier Memoirs of a Mestizo in Vietnam

by Manny Garcia

Reviewed by Betsy Ross

"An Accidental Soldier" is a hard book to read. It will challenge your ideas about race, identity, war, and the human condition. It will anger you at times, it may cause you to become defensive, and you may ultimately dismiss it as "unpatriotic" and the ramblings of a cynic and malcontent. I don't know Manny Garcia, a Utah criminal defense attorney, but I sense that this memoir is above all else, honest, and is worth reading just for that.

The memoir begins with Garcia's youth in Colorado and Utah. Of Mexican and Spanish descent, his family joined the Mormon church in Utah, Garcia graduated from the Mormon high school seminary program, and became an Eagle Scout. There is a sense early on that Garcia is, if confused about his identity, at least malleable. He graduated from high school, got busted for drunk driving, got a job as a janitor, and joined the Army at the height of the Vietnam conflict.

Here, for me, the really gripping story begins – Garcia's experiences as an Army Ranger. It reads like an adventure story, but we know the outcome: the war is at best a stalemate, and our hero comes home alive. We learn a lot about Garcia, about war and about the human condition in the meantime.

There are images I can't get out of my head – cruelties perpetrated by both sides. "Evil" – whatever that is – is not just inflicted on Americans; we have the propensity to be the inflictors, too:

"On this occasion our squad had waited in ambush for most of the day. It had been uncommonly quiet with no action at the tables. It was getting late. We were getting hungry. There was nothing like a can of food to cap off a full day. Our night perimeter location was more than half an hour away. We didn't want to arrive back home too late. We called in and advised that we were going to dismantle our ambush and come in. Just then we got a signal from the right flank. Someone was coming. What bad luck! This was a bad time to set off an ambush. . . . I decided not to expose our position, nor neglect our duty, nor miss our supper. . . . From my silent detached observation position just behind and slightly above my head, I saw my body straighten and slide around the tree. Everything happened in slow motion. . . . He stood five and a half feet tall. My right hand came up over his right shoulder and wrapped itself over his mouth. I jerked his head back forcefully. At the same time, the razor-sharp knife in my left hand came up and deftly sliced open his throat, from right ear to left ear. He dropped his rifle. His hands came up and grabbed his throat and my arm. His life gushed from the gaping wound in streams of crimson. He jerked violently and kicked his right leg out. I let go of his face. Spluttering noises came from his severed throat. He began to turn around to see what happened but then he slumped and crumbled to the ground. I picked up his carbine and placed our business card in his mouth."

Garcia's is a reflective memoir. He is not simply telling stories of the cruelty of war, he is asking questions about it: "Where does gratuitous cruelty originate. Do we learn it as children? Is it inherent in our nature? As a young teen, I remember laughing as frogs exploded from the firecrackers we shoved down their throats. We tried to catch lizards just to pull their tails off. I shot jackrabbits and speared carp knowing I wasn't going to eat them. I knew there was something wrong with that, though I never articulated it."

These were questions postponed, of necessity, during the war. You cannot question the cruelty, he suggests, and survive it. He writes:

"My soul was dispatched into exile. My higher self went underground. I disconnected myself from all feelings and higher thoughts. I was determined to protect my spirit. . . . I acquired and freely exercised the ability to suspend all judgment and just act upon my environment. I found I was able to kill without

conscience, without hesitation, without question. My senses were never turned inward. I simply responded to what was happening all around me . . . .War was not conducive to growth and flowering of the mind and spirit, nor was it a road to enlightenment. War was pure waste, devastation, and death."

If someone asked me one of my favorite movies of all time, I would pick "Apocalypse Now," for the truth about war that it expressed so forcefully. There are no rules, though those of us outside war try to impose them; there is only, as Colonel Kurtz says: "The horror . . . the horror." Garcia captures the insanity, the horror, and the contradictions:

"It felt like the planet had spun off its axis. I saw contradictions co-exist. I saw men at their very best and at their very worst at the same time. I saw men risk their lives and kill other men in order to save the life of a wounded comrade, just another man. That was man at his very best. How much more can a man sacrifice or risk than to give his own life to save the life of another? Man at his very worst – what is worse than killing another man, for any reason? I saw small men with enormous power and large men with very little. I saw wise, strong men cry and dumb addled men laugh. I saw fear paralyze bodies and minds. I saw anger kill compassion. I saw mistakes bury innocent people. I saw rage destroy faith. I got a good look at the failing, perhaps even the downfall, of men."

Ultimately, Garcia has to come to terms with the war, and does so in an act that may disturb many of us. He has accumulated various medals during the war (something akin to the badges he accumulated in becoming an Eagle scout). He drives to Washington, D.C., and "in a graceful left-handed motion I tossed the tangled handful of medals, citations, wings and patches over the tall wrought iron fence. They landed on the immaculate White House lawn but in my mind they had landed at the feet of the nation. It was done. I made my protest and with a kiss of eloquence. My last mission was accomplished."

It almost feels, throughout this memoir, as if Garcia is challenging us to judge him at the same time that he is saying, "how dare you judge me." And, indeed, how dare we? He more than paid his dues for his opinions (just read the book). He challenges *our* unearned self-righteousness – and at a time in our nation's history when self-righteousness is perhaps our greatest weakness.

Legal Assistant Utilization May Optimize Client Services in Litigation Practice

by Peggi Lowden, CLA-S

To get the most from an experienced and trained legal assistant[1] in litigation practice, an attorney may need to open their practice to the pain of change. This will however lead to the benefits of change. The benefits are many. The most prevalent is an optimization of two valuable resources in litigation law practice – Cost-Savings and Efficiency. Cost-saving and efficient task delegation to accomplish the law firm's goals are for the benefit of client services. While cost-savings and efficiency are improved, economic and service benefits are realized by your clients.[2] Incidental to the process of improving client services is an increase in the law firm's bottom line of potential earnings.

For the attorney-legal assistant team, the evolution to figure out what tasks may be delegated to the legal assistant is a path to professional achievement and personal growth. The team can take the path slowly or can expedite it. I recommend a middle-of-the-road rate that leaves ample opportunity to reflect about the positive or negative result of each change that is worked on. Adjustments will need to be made as part of the process.

It is most important to work to prevent any adverse compromise of client service in the process of delegation. It is unusual for negative results to occur, however and preventing it must be foremost in the minds of each team member – attorney and legal assistant.

The delegation may consist of tasks that are known to be the responsibility of the legal assistant in all of the cases that are handled. Some may be on a case-by-case basis. It is typical to have a combination of both. This shouldn't be difficult. With no two cases being exactly alike, we are already accustomed to dealing in both styles (common tasks and case-specific tasks). Those in litigation practice are already adept "skilled multitaskers."

Let's start with what may or may not be delegated. To emphasize the importance of not aiding in the unauthorized practice of law, I will first provide authority for those areas that you "may not" delegate to a non lawyer assistant:

> A lawyer may not delegate to a legal assistant:
>
> (a) Responsibility for establishing an attorney-client relationship.
>
> (b) Responsibility for establishing the amount of a fee to be charged for a legal service.
>
> (c) Responsibility for a legal opinion rendered to a client.

ABA Model Guidelines for the Utilization of Legal Assistant Services Guideline 3 (1991)[3]

Legal work that *may* be delegated consists of any task that is performed by the lawyer, so long as it is not otherwise prohibited by law:

> Provided the lawyer maintains the responsibility for the work product, a lawyer may delegate to the legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, the ABA Model Rules of Professional Conduct, or these Guidelines.

See id. Guideline 2.

Specific legal work that is generally unlawful to delegate according to the ABA, consist of: Court Appearances, Appearing as the Client Representative at Depositions, Signing Pleadings, Rendering Legal Advice to Clients, and Negotiating Settlements on behalf of Clients.[4]

With all of this said about what may be delegated and what may be prohibited from delegation, let's move onto specific areas that are commonly known to be delegated to legal assistants in the immediate community. The categories for delegation of litigation tasks that will be used for purposes of organization in this writing are: (1) Case Intake, (2) Investigation, (3) Initial Discovery, (4) Fact Discovery, (5) Expert Discovery, (6) Depo-

PEGGI LOWDEN, CLA-S is a litigation legal assistant with the Law Offices of Strong & Hanni in Salt Lake City, Utah.

sition Practice, (7) Motion Practice, (8) Pre-Trial Preparation, (9) Trial Work, and (10) Alternative Dispute Resolution.[5]

1. Case Intake

Gathering of case facts and immediate concerns of the client in a meeting after the attorney has accepted the case.

Fact determination through review and analysis of case documents.

Procedural legal research.

Substantive legal research depending upon the training and experience of the legal assistant, firm policy with regard to law clerks, and the level of comfort (or discomfort) regarding a non lawyer performing such research. Formal legal assistant training prepares a legal assistant to perform such research, but the training it is not as comprehensive as a lawyer receives in law school.

Draft the Settlement Brochure/Demand Package.

Draft the Complaint.

Draft the Answer.

Draft special appearance pleadings, such as motion for change of venue.

2. Investigation

Gather facts from witnesses through interviews.

Analyze facts and information to determine witnesses and areas of investigation to be conducted.

Identify/gather records and documents from witnesses, governmental agencies, etc.

Identify, gather and preserve tangible items that may be evidentiary in nature.

Analyze whether expert consultation or opinion may become necessary to fully establish facts.

3. Initial Discovery

Assist to assure Attorney Planning Meeting (ATP Meeting) is conducted.

Meet with the attorney in preparation for the ATP Meeting to analyze results of investigation conducted, the potential for settlement, and fact/expert discovery to be accomplished.

Participate in the ATP Meeting to know the position and posture of all parties, potential for settlement, and fact/expert discovery that all parties anticipate will be conducted.

Where required, draft the Stipulation and Order RE: ATP Meeting.

Supervise calendaring of all dates set in the ATP Meeting.

Timely draft Initial Disclosures. If it is the practice of the attorney to produce documents identified in the Initial Disclosures at the time of the disclosure, then prepare the production.

Draft Interrogatories and Requests for Production of Documents.

Identify documents and records to be gathered through subpoena duces tecum and release authorizations.

Identify the possessor of the documents and records sought.

Assure that the Subpoena duces tecum and release authorizations are prepared in compliance with prevailing law and procedure for the particular type of document sought.

Assure the above are served or sent in compliance with prevailing law and procedure regulating the particular type of document sought.

Where necessary, work with providers of the above information to fulfill their individual requirements for release of the documents and records sought.

4. Fact Discovery

Review and summarize Interrogatory Answers and Responses to Requests for Production of Documents.

Request additional documents and records per discovery answers.

Conduct additional fact gathering interviews of witnesses per discovery answers.

Analyze and make recommendations of fact witnesses to depose.

Review, analyze, and summarize factual documents and records.

Meet with client regarding answering discovery served.

Draft Answers to Interrogatories and Responses to Requests for Production of Documents, identifying and preparing documents that are responsive to the Requests.

Recommend additional formal discovery requests to be served, and draft the same where applicable.

Be prepared to accomplish fact discovery deadlines per ATP Meeting stipulation and order. Where not possible, make recommendations regarding extending deadlines. Where applicable, communicate with other counsel regarding extensions of deadlines and draft correspondence or pleadings reflecting the same.

5. Expert Discovery

Analyze case facts and legal issues to make recommendations regarding retention of expert witnesses.

Locate appropriate expert witnesses.

Collect background information regarding expert witnesses pursuant to court rules regarding the same.

Make initial contact with expert witnesses to determine their availability and share brief facts regarding the case.

Where required, identify and prepare documents and records for expert review.

See that any inspections, evaluations, or examinations by experts are scheduled.

In preparation for inspections, evaluations, or examinations identify and prepare documents and records required to be reviewed by experts.

Preserve tangible items in a non altered state. Where required that alteration of any item need take place, work with other counsel to arrange opportunity of all parties to be present.

Analyze and make recommendations regarding depositions to be taken of experts of other parties.

Analyze and make recommendations regarding Requests for Admissions for service on adverse parties.

Draft Responses to Requests for Admissions when they have been served on your client.

6. Deposition Practice

Communicate with all parties and witnesses to arrange depositions of parties, fact witnesses, and expert witnesses.

Prepare notices of depositions, subpoenas, and notice of acceptance of service of witness depositions, where required. (Assure that there is a system in place with secretarial staff to arrange for a conference room and court reporter, etc.)

Attend and participate with the attorney in the client pre deposition meetings.

Identify and prepare documents and records required for the attorney's review in preparation for depositions.

Identify and prepare exhibits to depositions.

Where preferred by the attorney, the management of many documents is necessary, or the legal assistant has particular information regarding the case, attend the depositions.

Read the deposition transcript. Be prepared to summarize, outline, or index where necessary.

7. Motion Practice

Analyze case issues and facts and make recommendations regarding potential motions to be made during discovery (motion to compel, etc.) and in preparation for trial (motion in limine, etc.).

Draft the fact section of memorandum in support of motion, citing to authority for each fact.

If conducting substantive legal research for the memorandum, then draft the argument and analysis sections.

Identify, work with potential witnesses, and draft affidavits required to support the memorandum.

Identify and prepare exhibits to the memorandum.

Calendar due dates for objections to motion (and reply when appropriate).

Where objecting to motion, any or all of the same steps identified for the memorandum may be delegated to a legal assistant.

Draft notice to submit for decision.

Prior to the hearing, make contact with the court regarding the procedure pertaining to courtesy copies for the judge.

Prepare the courtesy copies for the judge pursuant to their procedure and policy.

Identify and prepare all motion pleadings, additional documents and information required in order to prepare for a hearing.

8. Pre-Trial Preparation

Review and analyze the case materials to identify potential admissible evidence that is relevant to the remaining issues.

Make recommendations regarding potential motions in limine.

Make recommendations regarding potential fact witnesses to testify at trial.

Make recommendations regarding potential expert witnesses to testify at trial.

Communicate with the witnesses identified to discuss trial procedure, pre-trial preparation, and to arrange for the trial appearance of each.

Subpoena the trial witnesses, where required.

Attend to deadlines regarding motions in limine, jury instructions (whether to be agreed and if so how objections are to be handled), exhibits exchange, etc.

Draft the jury instructions.

Prepare the trial exhibit list.

Prepare the trial exhibits and supervise the arrangements for demonstrative exhibits.

Determine the presentation materials that are required for the court room (video tape or audio player, easels, enlarged documents, etc.) and supervise the arrangements for the same.

Participate in any pre-trial meetings.

9. Trial Work

Assist with the jury selection process.

Assist with the pre testimony fact witnesses.

Assist with the pre testimony expert witnesses.

Assist to track the exhibits of all parties.

Assist with the exhibit handling for your case.

Assist with making recommendations for areas of cross-examination of witnesses.

Assist with special equipment to be utilized.

10. Alternative Dispute Resolution

Arbitration:

Any of the above tasks may be delegated to a legal assistant in a case that is to be resolved through arbitration.

Be responsive to the deadlines for submitting arbitration position papers or briefs.

Be responsive to any other deadlines that are set by the arbitrator.

Draft the arbitration position paper or brief.

Identify and prepare the exhibits to the arbitration position paper or brief.

Prepare the exhibits to be used during the arbitration hearing.

Attend and assist the attorney at the arbitration hearing with the witnesses and exhibits.

Mediation:

Track deadlines set by the mediator for submitting position paper or brief.

Be responsive to any other deadlines set by the mediator.

Draft the mediation position paper or brief.

Identify and prepare the exhibits to the mediation position paper or brief.

Prepare the exhibits to be used during the mediation.

Attend the mediation where assistance is required.

Conclusion

Necessary elements to attain optimized utilization includes creativity of the attorney-legal assistant team in analysis of your litigation practice goals, a "recrafting" of your practice to better serve your clients, and a high level of confidence in the experience, education and training of the legal assistant. The arrangement is most beneficial when you can meet the goals of cost-saving and efficient methods to accomplish client work to ensure that your clients reap economic benefit. Increased delegation should free you (at least more free than you are now) to accomplish the goals that you may wish to set to allow you to increase your client base or range of services.

1. The term "Legal Assistant" as used in this article refers also to those known as a "Paralegal." Although there is no distinction between the two in our community, others may make a distinction.
2. J. Robyn Dotterer, *The Dollars and Sense of Utilization of Legal Assistants,* 16 Utah Bar Journal No. 3 (2003).
3. Determined by The Standing Committee on Legal Assistants of the American Bar Association, *Guidelines for the Utilization of Legal Assistant Services* (1991).
4. Except for statutory authority to the contrary within certain administrative agency proceedings.
5. All delegated tasks listed are to be supervised by the attorney. See also Utah Rules of Professional Conduct Rule 5.3, *Responsibilities regarding nonlawyer assistants.* Tasks identified are discretionary and are not delegated to legal assistants in all law firms nor in all of the cases that are accepted by the attorney. There are tasks that may delegated by attorneys to legal assistants that are not listed here.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
06/13/03	**Mandatory New Lawyer CLE.** 8:30 am – 12:00 pm. $45. Justice Matthew B. Durrant, John A. Adams, Richard Uday, Kate Toomey.	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	**Administrative Law: Social Security Disability – Part I.** Mike Bulson, Legal Services has written the book on practicing in this administrative area. $80 new lawyer, $100 others. **Part II:** 06/30/03, 5:30–7:30	5 CLE/NLCLE
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
06/27/03	**ONLINE – Live Interactive Web Cast – Master Advocate Institute Series: Effective Handling of a Federal Tax Case.**	4 hrs. of participatory CLE credit
06/27/03	**ONLINE – Live Interactive Web Cast – Litigators Edge: US v. Arthur Anderson**	2 hrs. of participatory CLE credit
07/09/03	**Ethics School: What They Didn't Teach You in Law School.** 9:30 am – 3:30 pm. $125 before 7/02/03, $150 thereafter.	6 Ethics
07/16/03 – 07/19/03	**ANNUAL CONVENTION 2003 – Sun Valley, Idaho.** $260 before July 6, $130 LAD Members, $295 thereafter.	14 includes 4 Ethics up to 7 NLCLE
08/15&16/03	**Annual Securities Law Workshop.** Snow King Resort, Jackson Hole Wyoming.	pending

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Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

☐ AMEX Exp. Date _____

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