Utah Bar JOURNAL

Volume 16 No. 7
October 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: Claret Cup Cactus near Moab, Utah by Bret B. Hicken, Hicken and Hatch, Spanish Fork, Utah.

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

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Letters Submission Guidelines:

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

Cover Art

Members of the Utah State Bar or members of the Legal Assistants Division of the Bar who are interested in having photographs they have 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

Published by The Utah State Bar
645 South 200 East • Salt Lake City, Utah 84111 • Telephone (801) 531-9077 • www.utahbar.org

Letters to the Editor

Dear Editor:

Your most recent edition of the *Utah Bar Journal* was excellent! Hopefully, practicing attorneys will learn to switch bad moods to good, to recognize and reduce stress and will be willing to help other attorneys in trouble.

I resigned from the Utah Bar three years past with discipline pending due to my inability to handle the demands of my varied practice. Fortunately, I was not afflicted with a drug problem (as was the author of one of your articles), but it would have been good if I had an understanding fellow attorney willing to talk with me when I was confronted with a missed deadline or other stress inducing event.

I am now on the hopeful road to regaining my bar license, starting with devouring the *Bar Journal* and other ethics articles and books. I truly appreciate the value of that bar license, and I thank you for helping current attorneys in retaining that sometimes unappreciated asset.

If there is any position which I could fill as a current non-lawyer willing to help lawyers, and given my 21 years of experience, I would greatly love to contribute.

Thank you,
Dean Becker

Dear Editor:

Today I received the August/September issue of the *Utah Bar Journal* from Richard Uday, the new Director of the Utah Lawyers Helping Lawyers Program. I wanted to immediately thank you for publishing this particular issue and bringing attention to the activities of Richard Uday and the Utah State Bar.

Through the efforts of Richard and people like Richard all across this country, judges, attorneys, and their family members are becoming better informed about mental health and addiction issues that effect their daily lives. It was not so long ago that the admission of a problem with addiction brought great embarrassment and shame to the addict and his or her entire family. Educational efforts spearheaded by the state bar associations have done a great deal to raise the level of understanding about these issues as well as the heightened chances of recovery.

The *Utah Bar Journal* is to be congratulated for publication of this issue and the Utah State Bar is to be congratulated for its willingness to step up to the plate and squarely address these serious issues.

Sincerely,
John W. Clark, Jr.
Commission on Lawyer Assistance Programs,
American Bar Association

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.

Utah State Bar Members Give $8.9 Million to Legal Services for the Poor

by Debra Moore

I'm proud to report to you the statistics gathered from the 2003-04 licensing forms on the pro bono work performed, and the monetary gifts to legal services agencies made by members of the Utah State Bar. A total of 1,615 attorneys – 21 % of the Bar – reported performing pro bono service or making monetary donations satisfying Rule 6.1 of the Rules of Professional Conduct. These attorneys reported performing a total of 88,125 hours of pro bono work, an average of nearly 55 hours for each attorney – well over the 36 hours per year aspirational goal of Rule 6.1. They also reported giving $111,897 in monetary contributions. Valuing the reported time at a conservative rate of $100 an hour, these numbers represent a total contribution to legal services to the poor of $8.9 million!

In addition, defying the economic downturn, Bar members substantially increased their contributions over the previous reporting year. The number of attorneys reporting their service and contributions rose by 345, the hours reported by $15,880, and the monetary contributions by $7,400. Also during the past year, another 155 attorneys were added to the Bar's pro bono referral list, which now includes 784 attorneys. We hope to see these numbers continue to rise as the two local law schools encourage pro bono service by their students as an important component of a legal education. BYU's LawHelp clinic and the University of Utah's Pro Bono Initiative serve to revitalize the pro bono tradition with each graduating class.

The reported numbers will be helpful as we address access to justice issues in the next legislative session. Demonstrating the contribution of Bar members to legal services for the poor is one of the primary reasons the Bar asks you to report your pro bono service. So, next year, if you're tempted to bypass the pro bono reporting portion of your licensing form, remember that by reporting your contributions, you're asking the state legislature to step up and do its part.[1]

More important, however, the numbers reflect the widespread experience by Utah attorneys of their profession as not just a way to make a living, but a true calling. That experience is about the best antidote around to the stress and other factors that can cause disillusionment to set in. If I were a betting person, I'd wager that the attorneys who meet or exceed the 36 hours per year aspirational goal of Rule 6.1 are among the most satisfied in the profession.

So, the next time you experience incivility from your opposition or ingratitude from a client, reach for the phone and call Charles Stewart, the Bar's Pro Bono Coordinator, at 297-7049. Tell him that you need a vaccine. He'll give you a pro bono matter that will restore your faith and perspective in your chosen profession!

1. Note that all individual reports are kept completely confidential and destroyed after the statistics are tabulated.

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Mandatory Binding Arbitration of Medical Malpractice Claims in Utah

by James R. Holbrook

With the enactment of Senate Bill 138 by the Utah Legislature this year, a health care provider now can deny care (except emergency department care) to a patient who refuses to sign an agreement to submit future medical malpractice claims to mandatory binding arbitration before a panel of three arbitrators. This article discusses issues concerning the new law.

Arbitration is an adversarial, evidentiary process (that is somewhat less formal than a bench trial) in which parties submit a dispute to decision by one arbitrator or a panel of three arbitrators. Typically parties agree in a signed, written "arbitration agreement" that a future dispute between them will be arbitrated. If the parties must submit their dispute to arbitration, the process is "mandatory." If the parties must accept the arbitrator's decision as final, the process is "binding."

Arbitration historically was designed to provide a private dispute resolution process to resolve commercial disputes between businesses (having more or less equal bargaining power) which negotiated and agreed in a signed, written transactional document to submit future disputes to a binding decision by arbitrators who have expertise in the subject matter of the parties' dispute. Another benefit to businesses is that arbitration awards are not easily overturned and tend to be final. For example, Utah Code Ann. § 78-31a-124 provides that an award can be vacated only if it was procured by corruption, fraud, or other undue means; there was evident partiality, corruption, or misconduct by an arbitrator; an arbitrator refused to properly postpone a hearing, failed to consider material evidence, or substantially prejudiced the rights of a party; an arbitrator exceeded his or her authority; or there was no agreement to arbitrate.

In recent years, arbitration has been extended to employment and consumer disputes. In many of these situations, a mandatory binding arbitration clause is contained in a standard-form, non-negotiable agreement prepared by the party with greater bargaining power. These take-it-or-leave-it agreements between parties of unequal bargaining power are "adhesion contracts" and they are generally enforceable. For example, many bank credit card agreements contain a mandatory binding arbitration clause, as do many insurance policies (e.g., the uninsured and under-insured motorist provisions of auto insurance policies). In circumstances of extreme unfairness, courts may refuse to enforce adhesion contracts, either because of procedural abuses that occurred when the contract was formed ("procedural unconscionability") or because of unduly harsh or grossly unfair terms in the contract itself ("substantive unconscionability"). In *Sosa v. Paulos,* 924 P.2d 357 (1996), the Utah Supreme Court said that arbitration agreements are favored in Utah and are enforceable if they meet standards applicable to all contracts; unconscionable agreements are not enforceable; and whether a contract is unconscionable is a question of law for a court to decide.

Mandatory binding arbitration agreements are used throughout the medical field. Professional services contracts between hospitals and physicians often contain mandatory binding arbitration clauses. Many health insurance companies require panel physicians and insured patients to submit payment and coverage disputes to binding arbitration. More and more physicians, hospitals, and HMOs are requiring patients to sign arbitration agreements to submit medical malpractice claims to binding arbitration. In California, for example, the Kaiser Permanente system has required patients for the past 20 years to submit such claims to binding arbitration.

In 1998 the Utah Medical Insurance Association (UMIA) began developing a program of binding arbitration for its insured physi-

JAMES R. HOLBROOK is a visiting clinical professor at the S.J. Quinney College of Law at the University of Utah where he teaches negotiation, mediation, and arbitration courses.

cians to use to resolve physician/patient disputes (except fee disputes). Intermountain Health Care is considering implementing a similar program for its physicians and patients. According to the Utah Medical Association, "the primary benefit of arbitration for physicians is that a panel of experts will hear and decide a dispute rather than a jury. This won't reduce legitimate claims against physicians, but it should take the emotions out of decisions of fault and the awarding of damages. This will result, we believe, in greater predictability in malpractice cases . . ."

In 1999 the Utah Legislature enacted Utah Code Ann. § 78-14-17 and specified the circumstances in which a health care provider and a patient can enter into a binding arbitration agreement. In 2003 the Utah Legislature amended this statute and authorized a health care provider to refuse care to a patient who does not agree to binding arbitration.

Utah Code Ann. § 78-14-17 requires that the patient must be given, in writing and by verbal explanation, the following information:

- patient claims must be arbitrated instead of decided by a judge or jury;
- the manner in which parties select arbitrators and an explanation of their role;
- the patient's responsibility, if any, for arbitration-related costs;
- the right of the patient to decline the agreement and still receive emergency care;
- the right of the patient to have questions answered about the arbitration agreement;
- the right of the patient to rescind the agreement within 30 days after signing it; and
- automatic renewal of the agreement each year unless it is cancelled in writing.

Utah Code Ann. § 78-14-17 also requires the written arbitration agreement to provide that:

- the patient selects one arbitrator; and the physician selects one arbitrator;
- the patient and physician jointly select the third (neutral) arbitrator;
- the neutral arbitrator must be on a list approved by the state or federal courts in Utah;
- the patient and physician must agree to waive a pre-litigation hearing;

- the patient may cancel the agreement within 30 days after signing it; and
- the agreement is for one year and will be automatically renewed each year unless the agreement is canceled in writing by the patient or physician before the renewal date.

If a physician has a practice that includes both surgical and medical patients, the physician could require only the surgical patients to sign an arbitration agreement. The arbitration agreement also may be drafted to cover not only the physician who provides care, but also the physician's group or clinic, employees, agents, partners, associates, association, corporation, or partnership.

Theoretically, arbitration of medical malpractice claims can be cheaper, faster, less stressful, and more predictable than litigation because:

- arbitration tends to discourage the filing of frivolous claims;
- arbitration is private, whereas litigation is public and open to the media;
- arbitration proceedings (from start to finish) usually take less time than litigation;
- there is less discovery (e.g., fewer depositions) in arbitration than in litigation;
- there is less motion practice (e.g., few motions for summary judgment) in arbitration;
- it is easier to bifurcate deciding liability and damages issues in arbitration;
- an arbitration hearing tends to be shorter than a jury trial of the same dispute;
- arbitration tends to be less stressful and less formal than a jury trial;
- the arbitrators tend to have experience or expertise in the subject matter of the dispute;
- arbitrators are less likely to be swayed by sympathy or prejudice than are jurors;
- arbitration avoids or restrains the "roll the dice" unpredictability of jury verdicts; and
- it is more difficult to appeal an arbitration award than it is to appeal a jury verdict.

One Utah attorney, Paul S. Felt, has served as an arbitrator on several medical malpractice arbitration panels. Mr. Felt said that in the cases in which he has served the patient selected a plaintiff's attorney as an arbitrator; the physician selected another physician in the same medical/surgical specialty as an arbitrator; and Mr. Felt was selected by the patient and physician to be the third arbitrator and to serve as the neutral chair of the panel of arbitrators. Mr. Felt said that the arbitration proceedings concluded more quickly than litigation, in part because it was not necessary to teach the arbitrators basic facts about medicine (such as what is a vertebra), which must be done in a jury trial. Mr. Felt said that in his experience all three arbitrators worked hard to understand the malpractice claims and resolve them fairly.

Another Utah attorney, Elliot J. Williams (who is UMIA's legal counsel), said that already over 50% of UMIA-insured obstetricians and plastic surgeons and nearly 50% of its insured general and orthopedic surgeons require their patients to sign arbitration agreements. Mr. Williams said that, when arbitration is properly explained, over 95% of patients agree to sign an arbitration agreement. He said the UMIA suggests that the physician's office staff should tell patients that their doctor is recommending arbitration and wants them to watch a short UMIA-prepared video about arbitration. The staff also should give patients a UMIA-prepared brochure and arbitration agreement to read, answer any questions, and ask them to sign the arbitration agreement. If a patient refuses to sign it, the UMIA recommends that the staff should attach the arbitration agreement to the outside of the patient's chart so that the physician can discuss it with the patient. If the patient still refuses to sign the arbitration agreement, the physician may refuse to provide care (except emergency department care).

Mr. Williams said that there have not yet been many medical malpractice arbitrations in Utah. He has been involved in nine arbitration proceedings that have gone all the way to an award (which was in favor of the physician in all nine cases), and seven more which were abandoned by patients after a notice of arbitration was sent to the Utah Division of Occupational and Professional Licensing to cancel the pre-litigation hearings in those matters. This experience parallels national statistics compiled by the U.S. Department of Health and Human Services: only 1.53% of patients injured by negligence ever file a claim; between 57% and 70% of filed claims result in no payment to the patient; only 8% to 13% of medical malpractice cases filed in court actually go to trial; and only 1.25% to 1.9% of these cases filed in court result in an award to the plaintiff.

Consumer rights organizations criticize mandatory binding arbitration of medical malpractice disputes for a variety of reasons. According to an article entitled "For Patients, Unpleasant Surprises

in Arbitration" written by Michelle Andrews and published in *The New York Times* on March 16, 2003, arbitrators in California often serve on repeat arbitrations on Kaiser Permanente cases, which creates the possibility or appearance of a conflict of interest. Ms. Andrews cites a 2000 report on managed care arbitration that was compiled by the California Research Bureau (a state-financed public policy research group) which found that none of the few arbitrators who awarded patients more than $1 million from April 1999 to March 2000 were selected by health care providers to serve again during that time. She also says that arbitration is not cheap. For example, in California the patient has to share the cost of the arbitrator's time, and rates often are several hundred dollars an hour or more. In addition, according to Ms. Andrews, critics are concerned about the secrecy of arbitration, which prevents the public from learning the facts about medical malpractice and also prevents the creation of public precedents.

In an article entitled "Arbitration Bias in Medical Malpractice" published in the *Medical Expert Advisor* in its Winter 2003 issue, two trial lawyers write about mandatory binding arbitration of medical malpractice claims in California. Tom Minder (who is a defense attorney in Sacramento) says, "I have found that many times arbitrators render decisions in favor of [patients] when there should have been a defense award. . . . On the other hand, in arbitration, plaintiff's awards tend more often to reflect actual damages rather than what happens sometimes in plaintiff's jury verdicts. This is because arbitrators are less likely to be swayed by sympathy and are more sophisticated about financial issues."

William Campisi (who is a malpractice attorney in Berkeley) agrees in the *Medical Expert Advisor* article that a patient is more likely to prevail in arbitration but will receive less compensation from an arbitrator than from a jury. Campisi also says, "it is my opinion that most of the alleged benefits of arbitration do not appear to be true. Arbitration of complex claims typically does not produce a faster decision, nor does the arbitration of complex claims generally save money, not when the parties are responsible for the arbitrator's fees of $200 to $400 per hour. But the principal problem with private arbitration concerns how the arbitrator is compensated. When one of the parties provides repeat business to an arbitrator, there may be a problem with bias." He also says, "arbitration protects Kaiser from being penalized for egregious behavior. . . . It is my belief that an arbitrator would never punish Kaiser with punitive damages because that would be that arbitrator's last Kaiser arbitration."

Arbitration in the Kaiser Permanente system is overseen by the Office of Independent Administrator which administers arbitration proceedings in much the same way as does the American Arbitration Association. According to Mr. Minder, "The parties are provided with a randomly generated list from a large panel of qualified arbitrators along with comprehensive information about each of the prospective arbitrators. . . . Each party is allowed to strike four names from the list and rank the remaining names, one through 10. The lowest ranking arbitrator is selected. In addition, each arbitrator is evaluated by the parties at the conclusion of a hearing, including evaluation on the issue of bias. These evaluations are available to each party before they submit their rankings. Finally, each arbitrator must disclose a list of past cases involving the parties, including the outcome, and is subject to disqualification following this disclosure."

Although there is no independent administrator in Utah that oversees the arbitrator selection process in medical malpractice cases, Utah Code Ann. § 78-31a-113 requires arbitrators to disclose existing or past relationships with any of the parties, their counsel, representatives, witnesses, or other arbitrators. Of greater concern is an equal access to justice issue: because the patient must pay the fees of one arbitrator and half the fees of the neutral arbitrator, this substantial expense may be daunting or prohibitive to indigent patients.

Lawyers and the Rule of Law

by Thomas B. Griffith

EDITOR'S NOTE: *The following is a speech given by the author at a Law Day Banquet this year. It is reprinted here with the author's permission because of the timeliness of the subject.*

I am honored to be here on Law Day, a day in which we celebrate the rule of law. As you may know, the origins of the celebration are of fairly recent vintage, and its original purpose was to provide a foil to the communist world's celebration of May Day. For my remarks, however, I would like to go back in time past the Cold War, and even past the founding of the American Republic. I would like to take us back in time to the 16th century, the time of St. Thomas More, the patron saint of lawyers and politicians. With you, my favorite "lawyer play" is *A Man for All Seasons,* written in 1960 by Robert Bolt. Like you, my favorite passage in that play is the dramatic scene where More rebuffs his family's plea that Richard Rich be arrested because he is a "bad man" even though he has broken no law. You can probably recite from memory More's stirring rebuke of his passionate future son-in-law William Roper:

> ALICE: *(Exasperated, pointing after* RICH) While you talk, he's gone!
>
> MORE: And go he should, if he was the Devil himself, until he broke the law!
>
> ROPER: So now you'd give the Devil benefit of law!
>
> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> ROPER: I'd cut down every law in England to do that!
>
> MORE *(Roused and excited)* Oh? *(Advances on* ROPER) And when the last law was down, and the Devil turned round on you -where would you hide, Roper, the laws being flat? *(He leaves him)* This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? *(Quietly)* Yes, I'd give the Devil benefit of law, for my own safety's sake.

Robert Bolt, *A Man For All Seasons,* 37, 38 (1962).

My guess is that this colloquy is one of the most oft-cited passages in literature among lawyers. It stirs us. It explains in a powerful fashion why we do what we do. It even gives us license to represent some pretty nasty folks including the Devil himself. (By the way, I am beginning to learn that when one represents a church-affiliated entity it is not good practice to begin one's advice with the phrase, "Well, for a moment, let me be the Devil's advocate.")

For my remarks this evening, however, I will focus on the dialogue between More and Roper that immediately precedes and follows this better- known passage because I believe it contains an insight into the rule of law that is profound and important. Again, to set the stage, More's family wants Richard Rich arrested simply because he is "a bad man":

> MORE: There is no law against that.
>
> ROPER: There is! God's law!
>
> MORE: Then God can arrest him.
>
> ROPER: Sophistication upon sophistication!
>
> MORE: No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.
>
> ROPER: Then you set man's law above God's?
>
> MORE: No, far below: but let me draw your attention to a fact – I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. I doubt if there's a man alive who could follow me there, thank God …

Id. at 37.

Then comes the famous passage that I have already quoted, which is followed by this dialogue:

THOMAS B. GRIFFITH is Assistant to the President and General Counsel at Brigham Young University. From 1995-1999, he served as Senate Legal Counsel, the chief legal officer of the U. S. Senate.

ROPER: I have long suspected this; this is the golden calf; the law's your god.

MORE *(Wearily):* Oh, Roper, you're a fool, God's my god.… *(Rather bitterly)* But I find him rather too *(Very bitterly)* subtle … I don't know where he is nor what he wants.

Id. at 38.

Now, a word in defense of Thomas More the saint before an audience that might take these last words of More as a sign of a spiritual deficiency in his character. Thomas More was first and foremost a passionate churchman, a devoted servant of God. Listen to this description by his most recent biographer, Peter Ackroyd, of, quite literally, the last moments of More's life, on the scaffold immediately before he was beheaded:

> The steps of the scaffold were not firm and one of the officers present steadied him as he climbed to the block. "When I come down again," More is supposed to have said, "let me shift for myself as well as I can." His words to those assembled have been variously reported but it is known that, according to the king's will, he spoke only briefly. He asked the crowd "to bear witness with him that he should now there suffer death in and for the faith of the Holy Catholic Church", according to William Roper; but a contemporary account suggests that "Only he asked the bystanders to pray for him in this world, and he would pray for them elsewhere. He then begged them earnestly to pray for the King, that it might please God to give him good counsel, protesting that he died the King's good servant but God's first." He knelt down before the block and recited the words of the psalm which begins "Have mercy upon me, O God, according to thy loving kindness".
>
> Then he rose and, according to custom, the executioner now knelt to beg his pardon and his blessing.…More kissed him, and is reported to have said, "Thou wilt give me this day a greater benefit than ever any mortal man can be able to give me. Pluck up thy spirits, man, and be not afraid to do thine office."

Peter Ackroyd, *The Life of Thomas More* 405-406 (1998).

This is neither the conduct nor the words of a person who does not know God. How then to explain the seeming agnosticism in More's words to Roper that he loved and used the law because he had little confidence in his ability to know God's will?

I know that some of you are already nervous that someone from BYU will turn this event into a church talk. Let me assure you that I am not going to do that. (I have done that elsewhere with these materials, but I do have *some* sense of the time and the place.) What strikes me about More's view of the law that is important for us almost 500 years later is that, in his mind, the system of law that we now refer to as the rule of law was created out of a sense of humility. In More's case, he lacked the confidence that he, on his own, despite his piety and erudition, could determine God's will in any matter that would define relative rights and responsibilities among competing claims. Judge Learned Hand captured this sense of humility best by quoting Oliver Cromwell, who said, "I beseech ye in the bowels of Christ; think that ye might be mistaken." Judge Hand commented, "I should like to have that written over the portals of every church, every school, every courthouse, and, may I say, of every legislative body in the United States." Eugene C. Gerhart, *Quote It Completely!: World Reference Guide to More Than 5,500 Memorable Quotations From Law and Literature,* 739 (1998).

Elsewhere, Judge Hand wrote, "The spirit of liberty is the spirit which is not too sure it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias." Quoted in Anton Scalia's, "How Democracy Swept the World," *Wall Street Journal,* September 7, 1999, A 24.

We need the rule of law because we should lack confidence in our *own* ability to know what is right. We should recognize that we "might be mistaken." And so we turn to a process – the rule of law – that helps guide us to correct principles. We may not have confidence in our ability, but we have supreme confidence – even faith – in the collective enterprise. And now, after hundreds of years of experience with this process, we can see the fruits of that faith everywhere around us. We may not have reached what Francis Fukayama so provocatively called "the end of history," *The End of History and the Last Man* (1992), but we have enough experience to know that limited government committed to individual liberty, free markets, and governed by a written constitution that separates concentrations of power is a vehicle that creates a material wealth that can end cycles of poverty, unleashes human potential for creativity, and allows men and women to pursue, express, and achieve their innermost need for spirituality. My optimism reflects the views of Justice Scalia who has described his "belief that [in the American experience with republican government] we have finally managed to get the kinks out of the system." Scalia, *"How Democracy Swept the World."* "The principal kink" according to Justice Scalia, "is that majorities … want to have their own way and can be as tyrannical as a dictator, which is what their excesses will ultimately produce." *Id.* The American solution is a system of checks and balances informed by a fear of concentration of power that also reflects a sense of humility, a lack of confidence that any one individual or branch of government can "get it right" acting independently.

At the heart of the rule of law is this sense that somewhere beyond us and our own parochial views are true principles that best describe who we as humans are and what should be our proper relationship to others. As lawyers, that commitment to the rule of law is manifest in at least two ways. First, as we give advice to clients, we must use our skills to help identify the substantive principles expressed in the law and then counsel our clients to follow those principles. I reject the role of a lawyer attributed to one of the robber barons: "I don't hire lawyers to tell me what I can't do. I hire lawyers to tell me how I can get done that which I want to do." This view of lawyer as a tool or instrument is not benign. It is dangerous to the rule of law. In a thoughtful article that analyzes the competing views of law set forth by the characters of Thomas More and his arch-nemesis Thomas Cromwell in *A Man for All Seasons* entitled "Who's Afraid of Thomas Cromwell?", Duke University law professor H. Jefferson Powell writes,

> The political community necessarily is made up of finite, ignorant, and sinful creatures, and for its preservation it requires a medium through which the common good can be debated, social controversies articulated, and political disputes resolved, in human terms. Law provides such a language, and its efficacy depends on the ability of all of society's members to see the law as a shared enterprise that belongs to all rather than as a mechanism for the exercise of someone's (anyone's, even everyone's collective) will.… Cromwell is a bad lawyer because he thinks the law is nothing but an instrument or a weapon. He has no feel for the law as a social bond that unites us even when we invoke it to resolve our disputes.

74 Chicago-Kent L.Rev. 393, 404 (1999).

Now granted, there are times when it isn't clear which principles *should* guide the resolution of an issue. That is when we litigate. Even here, however, the rule of law demands that we submit to a process that reflects fundamental values that are true: notice and an opportunity to be heard. Submitting ourselves to the rules that

govern that process is another act of humility. And following the process is critical. We know that from our American constitutional experience. Montesquieu, Hamilton, Madison, and Jay were right. Justice Scalia referred to that experience as "the most significant development in the law over the past thousand years." Scalia, "How Democracy Swept the World." It is through the process that we can achieve justice so long as the process respects those fundamental values.

I have come to appreciate the value of the rule of law most as the result of my involvement with emerging democracies. While I was Senate Legal Counsel, the chief legal officer of the United States Senate, I had opportunities to meet with visiting foreign dignitaries who had come to the Senate to learn more about that unique and peculiar institution. On one occasion, I was able to spend the better part of the day with approximately 20 members of the then-newly created Palestinian legislative authority. Doctors, lawyers, carpenters, pharmacists, businessmen; most of them had been in prison the year before as participants in the Intafadah. They were in Washington, D.C., trying to learn what it means to be a legislature. They posed the following question. "We love Chairman Arafat. He has been our George Washington. But now, he is a tyrant. He gives the legislature no authority and no respect. From the American experience, what does our legislature need so that we can create a democracy among our people?" I could have given them a copy of *The Federalist Papers,* but that isn't what they were looking for. They wanted a succinct answer to their serious question. How would you answer them? After some reflection, I volunteered two points. First, make certain that your legislature has what is referred to as the "power of the purse" – control over the amounts of money the Executive can spend. That power comes from article I, sections 7, 8, and 9 of the U.S. Constitution. Second, make certain that your legislature has the power to subpoena the Executive on matters for which it should be held accountable to the public. Unlike the power of the purse, this power of oversight is nowhere expressly stated in the Constitution, but is implied in the broad statement of article I, section 1 that "All legislative powers herein granted shall be vested in a Congress of the United States." I served as Senate Legal Counsel during a time in which the Congress, under Republican control, exercised that power in a fulsome manner against an Executive Branch headed by William Jefferson Clinton. There are, as there should be, significant limits to this expression of legislative authority, but it must exist in some form. Both the power of the purse and the power to question are manifesta-

tions of the rule of law and serve as important checks on executive authority.

Nowhere can one gain an appreciation for the value of the rule of law quite so quickly, I believe, as working in former communist countries. For several years now, I have served on the National Advisory Board of the American Bar Association's Central European and Eurasian Legal Initiative – CEELI. Our Executive Committee is comprised of a cast of distinguished American lawyers and judges, including Justice Sandra Day O'Connor; Abner Mikva, the former chief judge of the United States Court of Appeals for the District of Columbia Circuit, White House Counsel to President Clinton, and Democratic member of Congress; and my professional mentor and former White House Counsel to President Reagan, Fred Fielding. CEELI sends volunteer American lawyers and judges to live and work in former communist countries in Eastern Europe and Eurasia on a pro bono basis. Typically, these volunteers serve abroad for one to two years. They work with ministries of justice, bar associations, and judges' groups to help promote the rule of law in former communist countries. Each summer for the past three years, I have traveled with members of the Executive Committee to visit the CEELI volunteers and to see and hear first-hand the remarkable work they are doing. I have never been more inspired than when I have been in the presence of these American lawyers who have put to one side for the time being the comforts of home and family, to say nothing of the remuneration to which they have grown accustomed in the United States, and work instead with the first generation of lawyers and judges in former communist states, reformers who are working to build democratic, market-oriented societies for the benefit of their children and grandchildren.

These experiences with newly emerging democracies give me great hope. Permit me, however, three personal stories that illustrate how difficult it is to abide by the rule of law here in the United States. The first, from my days as Senate Legal Counsel, offers some measure of hope that the rule of law can be appreciated even in a highly charged political atmosphere. The last two stories are less hopeful. I apologize in advance for the personal nature of these stories. The cynics and skeptics among you will recognize that I am the "good guy" in each of these stories. If you can, please look beyond the personal bias. I think the principles are valuable.

The position of Senate Legal Counsel is a rarity in the federal government. Created by statute as the last of the Watergate reforms, the office is meant to be comprised of non-partisan lawyers giving out non-partisan advice to individuals and entities in a body that is very partisan and growing more so every day. One of the greatest challenges of being Senate Legal Counsel is to try and help those who have a time horizon based on a daily media cycle understand that there are issues that impact the long-term institutional interests of the Senate. In short, part of our charge is to explain the rule of law and how it might work in an institution that is often driven by partisan concerns. As you can imagine, our efforts weren't always appreciated. For example, you may recall that the 1996 Louisiana Senate election was extremely close. The victory of Senator Landrieu was challenged. The defeated candidate brought a complaint before the Senate contesting the validity of the outcome declared by the governor of Louisiana. The Constitution grants to the Senate the final determination of who may be seated. U.S. Const., art. I, section 5.

The matter was referred to the Senate Rules Committee. Now, of all the partisan matters that drive the Senate, it is hard to imagine a more potentially divisive issue than determining whether a seat will be held by a Republican or a Democrat. This particular matter was the source of great controversy and acrimony. In anticipation of a key meeting of the Senate Rules Committee, my office was consulted over the meaning of a critical Committee rule. We used our most dispassionate legal analytical skills and ventured an opinion on the provision. We shared that opinion with all who asked. As we anticipated, the Committee meeting was contentious, and as we feared, there was a pitched battle over the meaning of the provision upon which we had opined. The warriors were Senator Robert Byrd for the Democrats and Senator Rick Santorum for the Republicans. That it was these two Senators who had taken up the cudgels added to the acrimony because there had been a history of difficulty between them.

Even though my personal political views are closely aligned with those of Senator Santorum and I have great admiration for him, on this rather technical matter, my views on the disputed language supported the position taken by Senator Byrd, and he asked that we put those views in writing in a memorandum. Reluctantly, we did. I signed the memorandum, and immediately called the Office of Majority Leader Trent Lott to give his staff a heads up. I knew that they would be disappointed with my views, but I didn't want them to be surprised by them. They graciously thanked me for the call. The next day, however, I got a phone call from the Majority Leader's office. My friend on the line said, "Tom, this is not a happy phone call. The Leader would like to see you in his office in 10 minutes." As I arrived in Senator Lott's office, Senator Santorum was leaving. He was upset. He had in his hands a copy of my memo. I could see red marks all over it. In my mind, I began

planning how to spend the money I would soon be making upon my return to private practice. I was escorted into Senator Lott's conference room and sat midway down the long side of the table. Senator Lott came in and took his seat at the head of the table. He then began to chew me up one side and down the other. As he did so, I tried to remain calm and look at his face. I noticed that my view of him was framed by a large window behind him through which I had a spectacular view out the north front of the Capitol, down the National Mall to the Washington Monument, and beyond that the Lincoln Memorial and Arlington Cemetery. My somewhat unsophisticated thought was, "How cool is this? I am seated in the conference room of the Majority Leader of the Senate in the Capitol of the United States, looking at this marvelous view, and he's going to fire me! This is going to be a great story for my children!"

Well, he didn't fire me. In fact, although it was evident that he strongly disagreed with my view, he treated me with a great deal of respect. It was no fun being the object of the ire of the Majority Leader, but in many ways the experience increased my respect for Senator Lott. That unpleasant meeting with the Majority Leader was followed by a series of meetings and memos with his staff and others in the Senate leadership. I held firm to our view of the meaning of the provision because I honestly believed that we were right. We had dispassionately identified the neutral principle that governed the controversy and applied it to this case. The answer didn't please the client, but we held firm. The rule of law demands that.

Now, for the rest of the story. Eighteen months later, Senator Lott was facing his greatest challenge as Majority Leader to that point in time: the second impeachment trial of a President of the United States in the history of the Nation. Senator Lott's political advisers were telling him to pursue one course. The most conservative members of his caucus were telling him something quite different. And everyone involved had a sense that this was an important moment for the long-term interests of the Senate and the Nation. Senator Lott needed help. He needed an office that could advise him on how the Senate should approach this issue. Upon the advice of his staff, he called upon the Office of Senate Legal Counsel and brought us into the center of the planning for and execution of the impeachment trial of President Clinton. I like to think that part of the reason he did so was because we gained his respect by the way we handled the Louisiana contested election matter. Whatever the reason, I am grateful for his decision to bring me in to the trial in such a critical manner. It won't surprise you to hear me say that I gained a great deal of admiration for Senator Lott during the trial. I know there are those who disagree. My own congressman Chris Cannon, for whom I have much admiration, is chief among them. But I think the Senate acquitted itself well in the impeachment drama. More about that some other time.

Now, the stories that worry me. Several years ago, then Governor of Virginia Jim Gilmore asked me to serve as general counsel to the Advisory Commission on Electronic Commerce, a commission created by Congress to study and make proposals how Congress should approach the thorny issue of whether states should be allowed to tax the purchase of goods over the Internet. The Commission was comprised of 19 distinguished individuals including two governors (Governor Leavitt was an outspoken and articulate member of the Commission), the chairman of AT&T, the president of America Online, the president of MCI-WorldCom, the president of Time-Warner, the president of Charles Schwab, and the president of Gateway. (At the time, this group had the luxury of considering such important matters of public policy. Since then, many have been forced to spend their time on more immediate concerns.) The work of the Commission garnered much national attention, and its concluding meeting was contentious. As general counsel, I was called upon to offer my opinion at that final meeting on a divisive topic. The opinion I offered gave support to a position that Governor Gilmore had pursued and that was vigorously opposed by a minority on the Commission, including Governor Leavitt. I came under some heavy public criticism by some of those Commission members. The controversy was reported widely in the media, and my name was mentioned in a *New York Times* article in a way that I thought unfairly characterized what had taken place. The day the article appeared, I went and spoke with the reporter. I explained what had taken place and tried to place it in a larger context that would help him see the error of what he had written. He listened respectfully and said, "Tom, it isn't anything personal. I know what you were doing. Lawyers are hired guns, and you were doing what was necessary so that your client, Governor Gilmore, could do what he wanted to do." Without boring you with the details, you'll need to trust me that this assessment was flat-out wrong. I tried to explain to him why he was wrong, but I had the distinct impression that he was not persuaded. In his mind, I was a "hired gun" willing to do anything to help the client do what he wanted.

That is the popular perception of lawyers, and it is harmful. It breeds a cynicism about the rule of law that is dangerous. That cynicism is manifest today in the battles we see over the President's appeals court nominees. Nominees who argue that their represen-

tations of particular clients in individual matters are not insights into how they would act as judges are found by some to be unbelievable. People cannot imagine that a lawyer or a judge would act out of any motive other than personal interest and bias. The legal realists, the advocates of critical legal studies, and the deconstructionists seem to have won the battle. Unfortunately, activist judges have given them grounds to make their cynical arguments.

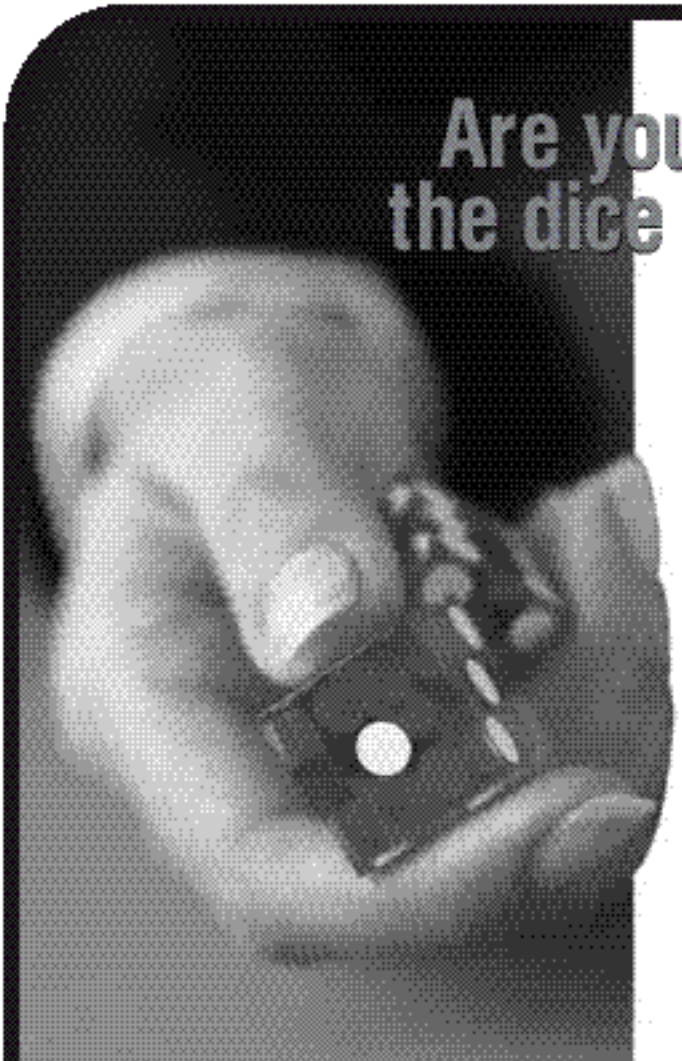
And finally, just this week, I had yet another run-in with the reality that the rule of law is not well-understood in America. Last summer, the United States Secretary of Education, Rod Paige, asked me to serve on a commission to look into the progress of men and women in intercollegiate athletics since the passage of Title IX, which mandates equality of opportunity in higher education. The commission finished its work this February and issued a report recommending modest reforms in the interpretation and enforcement of Title IX. As you may have noticed, the work of the commission was controversial. Our meetings were picketed by those who charged that we were considering dismantling Title IX and were intent on undermining the significant gains women have made in intercollegiate athletics. Since the commission has completed its work, a number of the commissioners have been invited to speak in different places about our experience. This last week, I spoke to an NCAA conference.

Now, I am a relatively careful person, and I thought that my work on the commission reflected that care. I have been conditioned long enough by my Washington experience to imagine that everything I say and do may be reviewed one day by a Senate committee. (I admit that I have fallen prey to this strange type of Judgment Day scenario familiar mostly to neurotic Washingtonians with over-inflated views of their possible future contributions to the Nation.) My concerns about the way Title IX has been enforced were related to, not surprisingly, the rule of law. When Congress enacted Title IX in 1972, one thing was clear, and it was explicitly addressed in the language of the statute. There could be no use of preferential or disparate treatment to redress gender imbalances. And yet, over time, the Department of Education has adopted policy interpretations of Title IX that do just that. Legal officers at colleges and universities will tell you – and they told this to the commission – that when enforcing Title IX the Department of Education is interested primarily in numbers. In fact, the Department has created, in its own terms, a "safe harbor" for colleges and universities if the ratios between men and women in their intercollegiate athletics programs is "substantially proportionate" to the ratios between men and women enrolled at the university. Well, I am not comfortable with this interpretation given the clear expression of congressional intent in the language of the statute.

That concern formed the basis for most of my comments during the work of the commission. To me, the development of the Department of Education's interpretation of Title IX goes beyond the authority it has been delegated by Congress. In our society, we have a process by which the federal government intervenes in our activities. We are all taught this in high school civics. It's called "How a Bill Becomes a Law." It requires bicameral passage of legislation and presentment to the Executive, who is then charged with executing the law. Over the last 70 years, the federal judiciary has recognized the right of the Congress to delegate some of its lawmaking authority to the Executive; but the Executive may not, indeed it cannot, make law on its own. It can only make law if it has been granted authority to do so by the Constitution or by an act of Congress. That is the speech I have given over and over again in connection with my work on the Commission as I have criticized the process by which the Department of Education has arrived at its enforcement policies regarding Title IX. I tried to explain that concern to the attendees at the NCAA conference just this week.

It was not well received. That doesn't trouble me. What troubles me is that no one would engage me on that topic – how we create laws in our society – and whether the appropriate process has been followed in this instance. Instead, it was assumed that because I was critical of how we got to where we are, I was also hostile to Title IX itself and to equal opportunities for women in athletics, and no amount of effort on my part to explain my concerns seemed to dislodge people from their views of what was driving my concerns. To them, it was all about whether you were for moving forward in helping women or going back to a time none of us wants to revisit. To them, my points, based, I believe, on concerns regarding the rule of law, were nothing more than, in the words of Roper to Thomas More in *A Man For All Seasons,* "Sophistication upon sophistication." Bolt, 37.

This lack of understanding of the rule of law is everywhere evident in American culture. It manifests itself in an increasingly negative view of lawyers, on the floor of the Senate in debates over judicial nominees, and in demonstrations on the steps of the Supreme Court. As lawyers, we bear some of the blame, perhaps most of the blame, for this cynicism. In response, we must model and explain to others the value of the rule of law. Near the close of his splendid biography of Thomas More, Peter Ackroyd wrote, "He embodied law all his life, and he died for it." Ackroyd, 400. That is a challenge worthy of each of us.



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Ten Traps to Avoid on the Internet

by John H. Rees

Use of the Internet by clients has become commonplace. From full e-business, such as on-line banking, to advertising real property listings by real estate sales professionals, the Internet is a useful medium for many purposes. However, many clients do not generally understand the rules of the Internet. The world of electronic delivery systems has made copying and distribution of significant and protected works of others, and the infringement of important intellectual property rights, easy, quick, and inexpensive. It is critical that clients understand some of the fundamentals of doing business on the Internet to avoid potential litigation and damages which could be devastating. The following are some of the potential traps that clients need to avoid:

Do not adopt a name, logo, or domain name without clearing it for potential trademark infringement.
A domain name adopted by a website owner may, in addition to functioning as a domain name, also function as a trademark and infringe on the trademark rights of another. A trademark is any word, name, symbol, or device, or any combination thereof used in commerce to identify the source or origin of goods and services. *See,* 15 USC Section 1127. A domain name is an address used to identify and direct others to a specific location or webpage on the Internet. A domain name is obtained by registration through one of several registrars, including the registrars approved by the Internet Corporation for Assigned Names and Numbers (ICANN). So long as the domain name selected is not exactly identical to another registered domain name, the registrar will grant registration of that domain name to the applicant. However, a domain name may also function as a trademark. For example, amazon.com® is a domain name registered to Amazon.com, Inc., but it is also a federally registered trademark for a computerized on-line ordering service featuring the wholesale and retail distribution of books, electronics, apparel and accessories, and other products, as well as other goods and services. Another example is Zionsbank.com®. Zionsbank.com® is a domain name which directs the user to a home page which provides for banking services. However, Zionsbank.com® is also a federally registered trademark and is used to identify the source of financial services, namely banking, on the Internet.

Similar to registering a trade name with the secretary of state, registering a domain name with a registrar is not sufficient to protect the user of the domain name from liability for trademark infringement. Domain name registrars do not provide any information to an applicant whether the use of a domain name will cause infringement of another's trademark. Clearing a domain name for potential trademark infringement can be done only by conducting a trademark search. Trademark rights accrue at common law. One may acquire common law trademark rights by using a word, name, logo, symbol, or device to identify the source of goods and services. No state or federal registration is necessary. Registration can enhance rights, but it is not the basis for the fundamental rights of trademark protection. Inasmuch as trademark rights accrue at common law, the use of a domain name to identify the source of goods and services, such as amazon.com®, may infringe on the common law or registered trademark rights of another. The test for whether a domain name, which is also used as a trademark, infringes on the trademark of another is whether consumers are likely to be confused by the use of both trademarks in the marketplace. This is a fact intensive test which cannot be adequately addressed in this article. Courts consider several factors when determining whether there is a likelihood of confusion, including a comparison of the two marks and their sight, sound, and meaning, the channels of distribution of the goods and services, the sophistication of consumers, and several other factors. Although it is not the purpose of this article to articulate the likelihood of confusion test, it is sufficient to state that any time a domain name is registered, there is a risk that it will infringe on the trademark rights of another. As a result, the domain name should be cleared by doing a comprehensive search to minimize, and hopefully avoid, any potential trademark infringement claims.

Do not engage a developer for your website without having a written contract which addresses key issues.

JOHN H. REES is a shareholder with the law firm of Callister Nebeker & McCullough where he is the chair of the firm's technology committee and e-commerce and intellectual property practice group. John is also a member of the American Bar Association's Cyberspace Committee.

Too frequently, the owners of websites used for advertising or conducting e-business engage the services of an independent third person to develop the website without having a written contract in place. A website is composed of several elements, which include computer software code which runs the website, the domain name, photographs and other graphics, text, databases, other computer software programs, such as a program to take and process orders for an e-business, and other components. All of these elements may be protected by intellectual property laws, including trademark, copyright, patent, and trade secrets. Unfortunately, the ownership and other protections of this valuable intellectual property are often overlooked, and the party engaging the developer fails to adequately address the intellectual property issues.

Although some computer software may be subject to protection under applicable patent laws, generally computer software, graphics, and text will be the subject of protection under copyright law. A common misconception is that the owner of a website may engage the services of an independent third person to create intellectual property for the owner, and by designating the work a "work made for hire," the owner then owns all of the intellectual property. Under the Copyright Act, however, a "work made for hire" applies in limited circumstances. Under the Act, a "work made for hire" is either a "work prepared by an employee within the scope of his or her employment," or "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 USC Section 101. As a result, if the development is not made by an employee within the scope of his or her employment, particularly in the context of website development, it is not likely to be a "work made for hire."

Under copyright law, except in the case of a work made for hire, the author, developer, or creator is the owner of the work. *See,* 17 USC Section 201. The owner of the copyright has several exclusive rights, the violation of which by another may lead to a claim for infringement. These exclusive rights include the right to reproduce the copyrighted work in copies, modify or create derivate works of the original work, distribute copies of the work to the public, and publicly display the work. Each of these rights could have a significant impact on the owner of a website. For example, if the developer has the exclusive right to modify the work and the work at issue is the computer software which runs the website, conceivably the website owner, as opposed to copyright owner, cannot update and make any changes to the website without obtaining the consent of or a license from the developer. Because the developer owns the copyright, it is not sufficient for the website owner to obtain a verbal promise from the developer that the website and the other intellectual property will be owned by the owner upon completion of the development. Such a promise may create an implied license in the website owner, but the material terms of the implied license will be unknown until a court decides the terms of the license. Unless the website owner has knowingly and after full and fair negotiations made the determination that he or she will accept a license, which

should be in writing, the owner of the website should obtain a written assignment of the developer's rights to all intellectual property associated with the website. "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 USC Section 204. Without a full assignment of the developer's rights, not merely a license, the website owner will have limited control and rights regarding the website.

Another frequent problem that arises with developers is the registration of a domain name. Developers, as part of the package of services, will offer to obtain a domain name for the website owner. The agreement with the developer should include a clear understanding that the domain name will be registered in the name of the owner, not the developer. Further, the owner should confirm that the domain name is registered in his or her name and that the technical and administrative contacts are both under the direct control of the owner. Confirmation of proper registration can be done by visiting www.whois.com, www.networksolutions.com/cgi-bin/whois/whois, or another similar site. Domain name rights have been held to be contract rights, not property rights. Unless the domain name is infringing on the trademark rights of another, short of litigation to enforce a contract, there is currently no mechanism to force the transfer of a domain name to the intended registrant.

It is important for each business owner engaging the services of an independent contractor for Internet development to have a written agreement which, at a minimum and in addition to addressing the timing, scope, and compensation of the project, should include an assignment of the intellectual property rights and a clear statement of the parties' intent and the obligations of the developer with respect to any domain names.

Do not copy photographs, text, compiled data, and other information in an electronic format without a license or permission.

The electronic world has made the copying and distribution of the works of others easy and inexpensive. For example, in the music industry, Napster made electronic music files available on-line without paying a royalty or otherwise having a license to make such files available to others. Napster took the position that the Internet, as a new medium, should allow for the free distribution of otherwise protected works. Ultimately Napster was enjoined and has terminated its services.

Because of the ease of copying and distribution, there is a temptation to not take appropriate steps to understand what action, if any, should be taken before using the works of others. As indicated above, the owner of a copyrighted work has several exclusive rights. In general, if the owner of a copyrighted work is able to establish ownership of the work and that copying has occurred, there is infringement.

Photographs, text, data compilations, and other electronic information are capable of protection under United States copyright law. Given that most people will probably not sit on a witness stand and testify that they have copied the works of another, courts may find copying if the alleged infringer has access to the work, and if there is substantial similarity to the original work. There are other factors to be considered, such as the filtration of unprotected elements, but for purposes of this article, there may be infringement if there is access and substantial similarity. Before copying a photograph, text, complied data, or other protected elements, the owner of the website should obtain a written license or permission to use the work, and the license or permission should identify the scope of the permitted use, including the term of the use.

Do not link to another website or frame another website without permission from the other website and having terms of use posted on your own website.

The law with respect to framing and linking on the Internet is not yet settled. Framing is including within a frame on one website the website of another. Linking is including on one website a hypertext link to the website of another. There are cases which have addressed the issues relating to framing and linking, but no clear position has emerged. There are two fundamental intellectual property areas of law at issue. First, the framing of or linking to another's website may constitute copying and the public display of the copyrighted work of another. As described above, two of the exclusive rights of a copyright owner are the right to copy and to publicly display the work. The second intellectual property issue is trademark infringement and unfair competition. Under the federal law of unfair competition, no person may, on or in connection with any goods or services, use any trademark which is likely to cause confusion as to the affiliation, connection, or association of such person with another person. *See,* 15 USC Section 1125(a). Framing or linking may suggest an association, sponsorship, or endorsement which is not approved or intended. Another potential problem that may arise from framing and linking is breach of contract. Website owners may have contracts with advertisers which limit advertising on a website to advertising from one specific source. If a website is framed by another, and the framing website has its own advertising, the advertising for both websites will be on the same screen display at the same time.

This side-by-side advertising could trigger a breach of contract for at least one of the advertising websites. A final issue is "deep" linking. Deep linking is linking to a page behind the first or home page of a website. For example, www.utah.gov is the home page for the Utah state government. On the home page, there are several ways to access additional pages with additional information and purposes, such as the page located at www.utah.gov/serv/bes which allows searching the Division of Corporations and Commercial Code's database. Creating a link to the database, without going through www.utah.gov constitutes "deep" linking. In at least one case, Microsoft used a deep link to bypass the home page of www.ticketmaster.com. Ticketmaster.com® generated substantial advertising revenue from its home page, as well as other economic benefits. By "deep" linking past the ticketmaster.com® home page, ticketmaster.com® suffered an economic loss. The case was settled, and Microsoft agreed to link only to the home page.

Similar to the use of any other intellectual property, the safe approach is to obtain written permission to do the framing or linking. Many websites include a link to a page which sets forth the terms for framing and linking and allows such activity and use so long as there is compliance with the terms. For example, on the site www.fanniemae.com, there is a link titled "legal". By clicking on the "legal" link, the user is taken to a page which includes a link titled "Linking Agreement". The page linked to the "Linking Agreement" link sets forth the specific terms of any linking to the www.fanniemae.com site. Interestingly, the page includes a statement that "Fannie Mae welcomes links to its Internet sites."

Although the enforceability of statements of terms of use included on a website is highly suspect inasmuch as there is usually no affirmation of such terms, the current practice on the Internet is to include terms of use and disclaimers. Specifically with respect to framing and linking, the terms of use should include statements to the effect that links are provided only as a convenience and no affiliation with the linked entity should be inferred. Further, the user should be notified that the website owner does not monitor the linked sites and the use of the links is strictly at the user's own risk. It is possible that a one-time legitimate link may become a site inappropriate for review or use. There may be viruses or other illicit code downloaded to the user's computer when accessing the website, and the site may contain information which is inaccurate, misleading, or which could constitute a crime or civil violation.

The flip side of this issue is the protection of one's own website and avoiding embarrassing or legally problematic linking or framing. It would be appropriate to include a linking policy in a statement of terms of use.

Do not use metatags which are trademarks of others, especially your competitors.

This is another trademark issue. Metatags are code which is embedded in a website which gives instructions for the operation or display of the website. A visit to this author's firm's website, www.cnmlaw.com, will disclose a metatag. Metatags may be displayed in Internet Explorer by clicking on "view" on the toolbar, and then on "source" from the dropdown menu. A separate window will appear which will display any metatags. In the case of www.cnmlaw.com, there is a metatag "<meta http-equiv= "Content-Type" content="text/html; charset=iso-8859-1">." In some cases, Internet search engines use metatags to help locate sites which the user of the search engine is seeking to locate. In one case, Equitrak included a metatag of the word Copitrak® with the hope that users of Internet search engines would be directed to its site, and not its competitor Promatek, which owned the trademark Copitrak®. Courts have found that when the metatag is the trademark of another, this constitutes initial interest confusion, a form of trademark infringement. Although the trademark is never displayed to the public, unless one follows the steps above, because the trademark is used to at least initially divert the attention of the Internet user to the website of another, there is confusion as the source of goods and services. Developers may or may not disclose to a website owner that metatags have been used in the website. The owner should include in the development agreement a representation and warranty that no metatags are included which may be another's trademark, and the owner should personally review the metatags to confirm the accuracy of such representation.

Do not send spam e-mail without complying with state statutes.

Spam is unsolicited e-mail and has become an enormous problem in the business world in particular. The estimated loss of productivity is significant and, at a minimum, for most people spam is very annoying. At least half of the states have addressed spam in some fashion, and Utah has adopted its own unsolicited commercial and sexually explicit e-mail statute. *See, The Unsolicited Email Act and Anti-Spam Litigation,* Gregory M. Saylin and Spencer J. Cox, *Utah Bar Journal,* January/February, 2003. Before engaging in the practice of sending any unsolicited e-mail, the statute of each state which will be involved in the process should be reviewed. This includes the state of the sender, the recipient, and any intermediary, such as an Internet service provider.

Avoid unintentional disclosure of customer information, including information communicated by fax and e-mail.

Privacy is a hot topic. Although privacy always has or at least should have been an issue, the advent of electronic delivery systems has made the issue more relevant than ever before. The Gramm-Leach-Bliley Act addresses the privacy of certain non-public consumer information by financial institutions and their service providers, and imposes privacy obligations on such institutions. The scope of businesses included in the definition of financial institutions is very broad. In addition, the Health Insurance Portability and Accountability Act of 1996 addresses the privacy of identifiable health information. In addition, there are other potential concerns relating to the disclosure of information that is sensitive or confidential. With the heightened standards for financial institutions and health care providers, it is conceivable that there could be a claim for negligence against one who collects sensitive and confidential information and discloses that information without the consent of the affected person. A negligence claim could arise from the failure of a website owner to adequately secure the server on which data is located, both from physical intrusion as well as electronic disclosure or access. Although according to Formal Opinion 99-143 of the American Bar Association Standing committee on Ethics and Professional Responsibility "[a] lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint," the ethics opinion also provides that "[a] lawyer should consult with the client and follow her instructions . . . as to the mode of transmitting highly sensitive information relating to the client's representation."

Read your contracts and comply with them.

Owners and users of websites should read and understand the contracts that govern their relationship to intellectual property and the rights of others doing business on the Internet. The owner should begin with the development agreement. The development agreement should be drafted to address ownership, scope of the work, timing of delivery of the work to be tested and the final product, identification of the deliverables, representations and warranties as to the originality of the work and non-infringement, the use of third party software, indemnification for infringement claims, and an assignment of all intellectual property. Again, there may be a reason to allow the developer to maintain the ownership or license to some of the files involved in the website, but the issue should be negotiated and appropriately addressed in the

development agreement. The owner should be aware of any other license agreements governing the use of intellectual property, such as software license agreements.

A local business doing business on the Internet may not be able to limit jurisdiction to local courts.
The Internet is a world-wide enterprise. Doing business in one state or location may, under some circumstances relating to the Internet, be deemed to be doing business for purposes of long-arm jurisdiction in other state or jurisdiction. In *System Designs, Inc. v. New Customware Company, Inc.,* Case No. 2:01-CV-00770PGC (March 5, 2003), Judge Cassell reviewed the standard for specific long-arm jurisdiction. Under the minimum contacts prong of the test, the court distinguished three ways website owners do business on the Internet. Under the first type of website, the defendant clearly does business over the Internet, including entering into contracts and the repeated transfer of files over the Internet. The second type of website is a passive website. Information is made available, but there are no contracts or other similar characteristics of the first category. Third are interactive sites. A user of an interactive site may exchange information with the host computer, but it does not reach the level of the first category. The website in *System Designs* was owned by a virtual company with no offices, employees, or other physical assets in the state of Utah. The court found that the website was an interactive site. In order to find long-arm jurisdiction, however, according to the opinion, the court had to address the quality of the contacts and the actions of the defendant. The court refused to dismiss the case on the basis of lack of jurisdiction because the defendant actively sought to do business on the Internet with Utah companies. Utah companies doing business on the Internet need to be aware that they may be forced to defend themselves in jurisdictions not anticipated.

Protect and enforce intellectual property and other rights.
Finally, a good defense is a well executed offense. Websites naturally include multiple intellectual property and other rights. Not only should website owners seek to avoid infringing on the rights of others, they should protect their own intellectual property and other rights. For example, copyright protection is generally available to any original work of authorship fixed in a tangible medium of expression. *See,* 17 USC Section 102. Obviously there are limitations, but in general, owners should consider copyright registration. Copyright applications with detailed instructions are available at http://www.loc.gov/copyright. In addition to the substantial remedies available, a certificate of registration constitutes prima facie evidence of the validity of the copyright and of the facts stated in the certificate of registration. *See,* 17 USC Section 410. Obtaining federal trademark registration may cost several hundred to a few thousand dollars, but the benefits are significant. Like a copyright certificate of registration, a federal trademark certificate of registration is "prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate." 15 USC Section 1057. In addition to the recovery of damages and access to federal court, the owner of a federal trademark registration may enjoin the use of an infringing mark. Having a federally registered trademark can provide the leverage necessary to stop an infringer without having to file a lawsuit. Patent protection may be available for certain programs or business methods, and there may be trade secrets associated with the website and the business on the website which should be protected.

Doing business on the Internet has multiple traps and risks, but with careful evaluation and analysis of each of the elements of the website and a review of the relative rights of the elements, owners may avoid the nightmare of litigation and the devastation of an adverse damages award. Evaluating a website is similar to reviewing a title report on a parcel of real property. Each lien and other encumbrance must be reviewed and evaluated and an understanding of what action needs to be taken for each such interest must be determined. Owners of websites can be much more confident doing business on the Internet if each will take appropriate steps to avoid infringement and the other problems addressed in this article, and the time to protect the owner's interest in his or her own property.

Before the Bench: The Utah Senate and Judicial Confirmation

by Al Mansell & Jerry Howe

In "The Trial," by Franz Kafka, there is an interesting story told of a country man who is prevented access to the law by a powerful doorkeeper.[1] The doorkeeper warns that, even if the man obtains access to the law through this entrance, there are *other keepers* who stand at every door in the great halls of the law, one more powerful than the other, and that he is the least powerful of all the doorkeepers. I would like to make some observations about these "other keepers," specifically the ones who sit at the entrance to perhaps the most honorable position in the law. The keepers of whom I will speak sit at the door before the bench.

Importance of Judicial Office

Ideally, the doorkeepers who sit before the bench would work to ensure that every state judiciary is comprised solely of judges who possess a high degree of integrity, legal knowledge, and ability to interpret and apply the law in an impartial manner. Exceptional doorkeepers would ensure that all judges would be professionally experienced and that they would demonstrate an extraordinary ability and a willingness to continue cultivating qualities of compassion, humility, tact, patience, and understanding.[2] These are high expectations, of both those who are permitted access to the bench and of the doorkeepers themselves. It is remarkable how many Utah jurists meet, and in most cases even exceed, these high standards. We owe this good fortune to both the doorkeepers and the many men and women who are willing to set aside other interests and dedicate their talents to the bench. It is my opinion that most other states can only aspire to the quality we have come to expect in our judges. I am convinced that Utah's unique approach to judicial selection is the primary reason Utah is able to attract and retain so many well qualified people to the bench.

Judicial Selection

According to the U.S. Department of Justice, judicial selection occurs for three purposes in the state courts: 1) to fill an unexpired term upon the retirement, resignation, or death of an incumbent judge; 2) to select for a full term (often referred to as the initial selection); and 3) at the end of a term (often referred to as a subsequent term).[3] In the majority of states, the doorkeepers before the bench are the electorate. Although once considered to be a wise selection process, Utah no longer permits the electorate to guard the doors to the bench for either initial selection or for unexpired terms of office. Utah changed its selection process not because Utah's electorate was necessarily a poor doorkeeper, but more so because of the unavoidable consequences contested elections had on the judicial system.

As Chief Justice Gordon Hall explained to the legislature in 1984 just prior to its vote on the revised judicial article, which changed the judicial selection process: "there is no harm in turning a politician into a judge, he may become a good judge. The curse of the elective system is that it turns every judge into a politician. Judges selected through contested elections are obliged to engage in political activities in ways that prejudice their judicial independence."[4] May I reiterate the wisdom in these words: judges who engage in political activities can prejudice judicial independence. Consequently, Utah replaced contested judicial elections with a new selection process to increase the independence of the Utah judiciary.

With the elimination of contested elections, Utah now fills both initial term and unexpired term vacancies through an appointment process which includes a judicial nominating commission, gubernatorial appointment, and Senate confirmation; subsequent terms

AL MANSELL is President of the Utah State Senate and serves on the Senate Judiciary, Law Enforcement and Criminal Justice Committee, Economic Development and Human Resources Appropriations Subcommittee, and Executive Appropriations Committee.

JERRY HOWE is a Policy Analyst in the Office of Legislative Research and General Counsel where he staffs the Constitutional Revision Commission, Judiciary Interim Committee, Judiciary Standing Committee, Judiical Rules Review Committee, and the Senate Confirmation Committee.

of office are filled by an uncontested retention election.[5] This merit-based system is a good system. It is a model supported by both the American Judicature Society and the American Bar Association.

Despite the problems of contested judicial elections, many other states continue to cling to this method. To mitigate some concerns with contested judicial elections, the National Center for State Courts recently published a *Call to Action* which provides twenty recommendations for consideration by states that elect some or all of their judges.[6] Upon review, few of these recommendations apply to Utah since this is the only state that uses a merit-based judicial selection process as the sole method for selecting all of its state judges. The wisdom of Utah's system is not only evident in the quality of its judges, but it is also lays to rest all of the previous controversies Utah has experienced with respect to judicial selection. As noted by former Utah Supreme Court Justice Dallin Oaks, "we have already had two epic constitutional battles in this state which have been very unpleasant for every branch of government. Those controversies can be put to rest in the provisions of the constitution. They are put to rest by a compromise that recognizes the interest of the legislative branch, the people in their elective process, the judicial branch, and the governor, and the interest of the people of this state in qualified applicants."[7]

Utah's method of judicial selection provides a process by which the interests of all three branches of state government may be recognized. The nominating commissions ensure that the pool of candidates from which the governor must make his or her selections are chosen based on legal qualifications and experience, and not political connections. For additional terms of office, judges in Utah are not required to face the appointing authority, the legislature, or a contested election for each additional term in office, as is the case in more than forty other states.[8] Additionally, relatively long terms of office, ten years for Justices of the Supreme Court, and six years for judges of other courts of record, also promote increased judicial independence. All of these factors contribute to an independent judiciary.

Utah Senate Confirmations

A. Beyond A Perfunctory Review

Because of recent events involving a small subset of judges who have apparently failed to maintain the high standards expected of them, the Senate underwent an evaluation of its constitutional role in the judicial selection process to determine what, if anything, it could do to reduce the likelihood of confirmation of unqualified candidates. Upon review, the Senate discovered that compared to the eight other states that provide for senate confir-

mation, Utah's process relied on the least amount of information and was the most informal. The confirmation process was perfunctory.[9] The Senate seldom interviewed candidates and requested only a candidate's resume. In comparison with the other eight states, it appeared as though the Utah Senate had neglected its constitutional duty.

The Senate is now committed to making an independent assessment of each judicial candidate. Beginning with the two recent appointments to the Utah Supreme Court, the precedent has been established for a dignified, professional, and respectful Senate confirmation process. The assessment will include a review of the appointee's professional experience, integrity, judicial temperament, legal knowledge, and ability to interpret and apply the law in an impartial manner. I believe this is not only the Senate's prerogative, but it is the Senate's duty.

B. Purpose for Senate Confirmation

Senate confirmation serves two primary purposes. First, it allows the Senate to conduct an independent assessment of the qualifications of judicial candidates. Second, Senate confirmation is a public process, whereas the procedures of the nominating commissions and the governor are not. As the final review prior to taking office, a Senate check on the executive's authority will make it less likely that a judge will be selected who will damage the public's confidence in the judiciary. Increased Senate scrutiny will cause the nominating commissions and the governor to be more thorough when evaluating who will be commended to the bench and why.

C. Possible Downside

Whatever improvement increased Senate scrutiny may provide to the judicial selection process, there is also a potential downside. It is possible, for instance, that increased Senate scrutiny may result in the denial of a confirmation. If this happens, it will be public, and it will be painful, not only for the appointee and the governor, but also for the Senate and the judiciary. Critics of Senate confirmation contend that any rejection of an appointee will discourage other qualified individuals from applying for future judicial positions.

The Senate acknowledged this risk, but our options were limited:

- continue with a perfunctory Senate confirmation process and risk allowing some inadequately qualified judicial candidates to take office; or
- exercise the duty of Senate confirmation in a manner that provides a useful review of the qualifications, background, and temperament of judicial candidates and risk producing a chilling effect on future applicants.

A constitutional duty should not be neglected on the basis that someone might not apply for a future judicial position. In fact, the very purpose of Senate confirmation is to prevent an unfit candidate from taking office, even if that candidate has the support of a nominating commission and the governor. The system would be even better served if such candidates simply did not apply. If Senate review results in someone who appears to be qualified deciding not to seek judicial office because of drug or alcohol abuse, for example, for conduct that demonstrates a lack of honesty or integrity, or because the candidate has demonstrated a lack of a judicial temperament in their professional dealings, then the Senate would consider its process successful.

At the same time, however, it is understood that an overzealous confirmation process that is either inconsistent or arbitrary in its decisions would likely produce the undesired result of chilling applications of those who are actually qualified. Herein lies the dilemma: can the Senate make an independent assessment of all judicial candidates without having a chilling effect on the *actually qualified* applicant pool? The Senate thinks it can make such an assessment without the negative effects. Its critics apparently think it cannot, or at a minimum that an increased review is unnecessary, considering that the nominating commissions and the governor provide a substantial review already.

D. Only the Finest Candidates Should be Judges

While it is true that judicial candidates face substantial scrutiny, it seems that in a few isolated cases, the review was apparently not rigorous enough. While merit selection clearly establishes a more independent judiciary than a contested elected judiciary, no selection process is likely to produce a judiciary entirely free of judicial misconduct. This is one reason the system has judicial performance standards, regular judicial evaluations, certification, and retention elections. Additionally, the Judicial Conduct Commission is required to investigate complaints and discipline errant judges under Supreme Court review; and ultimately, in the unlikely event that all of this fails, the legislature holds the power of impeachment.

Still, the more reasoned strategy to create an independent judiciary is to select as judges only the very finest judicial candidates. By commending our best lawyers to the bench, a merit-based selection process can reduce the need for judicial discipline, under the correct assumption that the finest candidates will know, understand, and be capable of living under the Code of Judicial Conduct. Better judges naturally increase confidence in the judiciary. Conversely, however, nothing is more corrosive to an independent

judiciary than a corrupt or unethical judge, or to a lesser degree, but critical nonetheless, a judge with a poor judicial temperament. One's legal knowledge or professional experience is of little consolation when public confidence is shaken by poor judicial behavior. In these situations, the corrosion can be minimized nonetheless with a disciplinary system that provides a level of judicial accountability that engenders public trust and confidence.

E. Confirmations Must be Consistent and Fair

To ensure that the Senate confirmation process is predicated on principles of fairness, Senate Rule 24.04.1, governing the procedures of the Senate confirmation committee, was modified by unanimous vote in February, 2003 to provide that every judicial candidate is to be interviewed prior to a confirmation vote by the full Senate.[10] Formerly, the Senate had only occasionally interviewed judicial candidates.

The modified rule now provides that upon receipt of the governor's appointee, each Senator is to receive the appointee's resume. A press release is also sent to the news media which contains a brief description of the position which is being filled, the name of the appointee, and a request that members of the public who want to comment on the appointee contact the Office of Legislative Research and General Counsel by the established deadline. Along with the press release, the appointee's resume is also to be provided to the news media.

i. Information Is Key

To facilitate an interview with each judicial candidate, the Senate felt it needed more than the appointee's basic resume if it were to effectively evaluate the appointee's credentials. To properly evaluate each appointee, the Senate requires identical information on the candidate as is received by both the Judicial Nominating Commission and the Governor. Additionally, the Senate looks at any legal publications authored by the candidate, and the written judicial opinions of a candidate who holds or previously has held judicial office. This information not only reveals the candidate's writing ability and provides insight into the candidate's legal analysis, but in the case of candidates who have authored legal opinions, it provides insight into the candidate's willingness to rely on legal precedent and reveals a tendency toward judicial activism.

To ensure access to a candidate's application materials, the Legislature passed S.B. 165, "Gubernatorial Nominee Amendments," which detailed the following information the Senate needed from the Governor so that it could evaluate the appointee's credentials:

- the appointee's complete file of application materials;
- all reference letters;
- the results of any investigations into the character, ability, health, fitness, temperament, or experience of the candidate; and
- comments submitted by the public either in support or opposition to the candidate.

Although Governor Leavitt was willing to forward the information he received about the candidate from the Judicial Nominating

Commission, he was reluctant to provide the Senate with the results of the information he may have obtained independently. On that basis, the Governor vetoed S.B. 165, "Gubernatorial Nominee Amendments."[11] Notwithstanding the veto, the Senate Confirmation Committee currently receives an appointee's judicial application, along with reference letters, the results of any investigations conducted by the nominating commission, and comments received by the nominating commission and the governor (unless, in the case of comments directed to the Governor, the author has requested that the comments not be distributed beyond the Governor's office).

ii. Additional Investigations

The modified rule also permits the chair of the Confirmation Committee to direct legislative staff to investigate the background, qualifications, and fitness for office beyond what is contained in the application materials. The chair of the Senate Confirmation Committee used this authority during the appointments of the two Supreme Court Justices to have staff summarize former legal opinions and conduct a confidential interview with both state and federal judges as well as other respected professionals in the business and legal community who were in a position to evaluate the candidates.

iii. Privacy Policy

The application materials and other related documents, including written comments from the public and the results of any internal investigations, are only provided to the President of the Senate and the members of the Senate Confirmation Committee, who are required by rule to ensure that the information they receive has been properly classified under the Title 63, Chapter 2, Government Records Access and Management Act, and that information may not be released except as provided by statute.

Moreover, the Chair of the Confirmation Committee is required to classify all the documents in the committee's possession as either "public" or "private," using the standards contained in Utah Code Ann. § 63-2-302(1)(e)(i). Only letters received by the Senate in response to its press release are within the discretion of the chair to classify as "public" and then, only if the author of the letter has not requested the information to be confidential. Approximately six judges have been confirmed under these rules and only one letter has been released beyond the President of the Senate and the members of the Confirmation Committee, and that was done at the request of the author who had asked that the letter be delivered to the full Senate.

Potential judicial candidates need to understand that, as President of the Senate, I am committed to a dignified and professional investigation into each judicial candidate's background so that the Senate may come to an independent conclusion as to whether or not the candidate meets the criteria for becoming a judge. Those criteria include: legal knowledge and ability, judicial temperament, experience, integrity, health, financial responsibility, and history of public service. Candidates who possess these qualities and who are honest and candid during the confirmation process have no reason to fear the Senate confirmation process.

Senate Confirmation is designed as a means to scrutinize judicial candidates in a manner that promotes public confidence in the judicial selection process without creating an unreasonable fear of unfair or politically motivated confirmation decisions. The best way for the Senate to accomplish this objective is to meet its constitutional duty in a manner that even its critics will agree is consistent, objective, and fair.

F. Recent Confirmation of Supreme Court Justices

During the 2003 Legislative General Session the Governor appointed two new members to the Utah Supreme Court: one appointee was an Assistant United States Attorney, and the other the Presiding Judge of Utah's Third Judicial District. The newly reconstituted Senate Confirmation Committee received for the first time detailed information on each candidate, which included the application materials, criminal background check, credit report, standardized reference letters, a writing sample, dozens of letters from people who responded to the press release seeking public comment, and summaries of internal staff investigations.

As part of the investigations, legislative staff was instructed to provide a summary of every judicial opinion written by the judge and a search was conducted to obtain published articles written by either of the candidates. Staff was instructed to conduct a confidential interview with individuals who were deemed to be in a position to evaluate the candidates.

All of the documents along with summary information obtained from the confidential investigations were classified as private documents under Utah's Government Records Access and Management Act. Under this classification, the documents could be reviewed only by members of the Senate Confirmation Committee and the President of the Senate. Other Senators were denied access to the information and the results of the investigations were distributed to the committee in summary form, void of any identifying information of those who were interviewed.

Shortly after the distribution of these materials, the candidates were interviewed under oath in a meeting open to the public.

The interview started with an opening statement from the appointee, which included an explanation of the appointee's motives for seeking judicial office.

Members of the Senate Confirmation Committee questioned each of the appointees for a total of approximately three and one half hours during two separate interviews on topics which included judicial philosophy, their individual approach to legal analysis, separation of powers, and judicial activism. One of the candidates had health concerns which the committee explored with the candidate's physician, and there were some questions regarding the candidate's legal opinions and published articles.

i. Ethics and Political Interview Questions

In the May 2003 *Bar Journal,* former Justice Russon wrote: "[w]hen nominees abide by the Code of Judicial Conduct and refuse to answer pointedly political questions during the confirmation process, they are not doing so to spite or circumvent their legislative inquisitors. The rules of judicial ethics regarding answering such questions or taking such political stands are designed to preserve the impartiality of the judges and the courts."[12] Justice Russon's observation is correct when the questions placed to judicial candidates are purely political questions. But Senator D. Chris Buttars contends questions on the death penalty and abortion are not purely political questions.

Consider, for example, Justice Jill N. Parrish's response to Senator Buttars' question on abortion: "On the 30th Anniversary of *Roe v. Wade,* what is your view of that U.S. Supreme Court decision?" Response: "It is my understanding that *Roe v. Wade,* as modified by the *Casey* decision, is decided and established law. Whether or not I personally agree with the law is not the issue. If confirmed I would have no choice but to apply and enforce the law. Again, my personal views would not come into play. Given this proceeding, Canon 5 of the Code of Judicial Conduct would prohibit me from taking a *political* stand on the issue."[13]

Likewise, consider Justice Ronald E. Nehring's response to Senator Buttars' question regarding the death penalty: "Utah has a death penalty law. Talk to me about your philosophy on that." Response: "It is absolutely constitutional and I will tell you there has been no more solemn a day in my judicial life than the day I signed a death warrant. It is not a happy experience, but it is one I did then and would do again if the law requires it. There is nothing in our law or in our constitution that suggests that there should be some deviation from the settled law considering the constitutionality of the death penalty."[14]

It would have been a clear violation of the Code of Judicial Conduct for either candidate to make a pledge or promise of future conduct in office by indicating how they would rule in future cases.[15] This is not to say, however, that the only appropriate response is to refuse to answer the question on the grounds that any response would be a violation of judicial ethics. Even seemingly pointed political questions can be answered with a legal analysis of existing case law, with an emphasis on how the candidate will execute the duties of judicial office in a faithful, impartial, and diligent manner, notwithstanding whatever personal views the candidate may have.

Some readers may incorrectly assume that since these questions were asked by a politician, the clear expectation is that the answers must provide insight into the candidate's political view. An even broader assumption would be that a candidate's confirmation will be conditioned on one's ability to align oneself with the political views of those who pose such questions. Both of these assumptions are unwarranted.

During a recent panel discussion sponsored by the Utah State Bar titled, "The Judicial Selection Process: Dispelling the Myths – Discussing the Facts," Sen. Buttars publicly indicated that the questions he asked on the death penalty and abortion have both a political and a legal component. Although he acknowledged the political answer to both of these questions would be of interest to him personally, the question is asked, he said, to determine

whether the candidate has taken a position on these issues.

As noted earlier, neither candidate provided a political response to the questions asked of them, yet Sen. Buttars voted in favor of each candidate. In no sense, therefore, can Sen. Buttars specifically, or the full Senate generally, legitimately be accused of requiring judicial candidates to pass a political litmus test. It is simply unnecessary for a candidate to invoke the shield of the judicial canons by refusing to answer seemingly pointed political questions, since a legal analysis of the question, whether it be abortion or the death penalty, with an explanation of the current state of the law, combined with a promise to faithfully execute the duties of judicial office, notwithstanding one's personal views, has proven sufficient.

On a separate issue, since the Code of Judicial Conduct applies equally at all stages of the selection process, not just at the Senate Confirmation level, members of the Senate Confirmation Committee are likely to follow-up on questions in which a candidate invokes the judicial canons with an additional question relating to whether or not the candidate had been asked a similar question by the governor, and if so, whether the Code of Judicial Conduct was invoked during those interviews.

Certainly a candidate for judicial office should expect some difficult questions, but even seemingly pointed political questions can be appropriately answered if the candidate tailors the response with candor and care. After the interviews, both the appointee and senators seem genuinely impressed with one another's diligent efforts to perform their respective constitutional roles.

After the Senate had confirmed both Justices Nehring and Parrish, each addressed the Senate. In his comments, Justice Nehring told the Senate that the confirmation committee had conducted a "uniquely rigorous inquiry into the qualifications of both candidates." He explained that he stood before the Senate "as someone with no complaints." "It was fair, it was even fun," he said. Moreover, he noted that the "senators were gracious and the questions were appropriate."[16]

Justice Parrish noted that after she had heard that she would be asked questions "over the course of a series of hearings" that she was "more than a little nervous." In an attempt to relieve her anxiety, Justice Parrish explained that she obtained and read transcripts from the Senate Confirmation Committee on the federal level. While reading those transcripts did not necessarily relieve her anxiety, that exercise did enable her to conclude that the State Senators were "no less prepared, in fact, better prepared and asked more thoughtful questions than the majority of their federal counterparts." Justice Parrish also reported that the Senate's process was not only fair, but that it gave her an "appreciation for the magnitude of the responsibility" that she was undertaking.[17]

Tension Between the Branches

Certainly a natural tension among the three branches of state government exists by design. For those with experience on the front lines of state government, these tensions can often become quite taut. What is most interesting about the Utah Senate's attempt to enhance its confirmation procedures is that the additional scrutiny of judicial candidates may actually serve to release tensions between the judiciary and the legislature through a measure of mutual respect.

As judicial candidates progress through Utah's confirmation process, there is opportunity for them to gain a better appreciation for the legislative perspective on issues of general interest to the legislature. Undoubtedly, judicial candidates will come to a greater appreciation of the difficulty of answering tough questions under oath. Legislators are also in a position to gain a better understanding of the responsibilities of judges, the inherent ambiguities in the law, and the need for judicial interpretation, which may help legislators become more understanding, and less critical of the judiciary generally.

There is clearly room in Utah for both the legislative and judicial branches to grow in respect for each other's roles in the overall scheme of state government. Over time, honest differences of opinion may arise between the branches regarding the selection process. For a merit-based selection process to work most effectively, it is incumbent on the nominating commissions, the governor, and the Senate to resist the temptation to allow partisan politics to enter into its selection decisions.

Since the Senate decided to provide more scrutiny to judicial nominees, the Governor has been under greater pressure to select candidates that will withstand Senate inquiry into their background, character, and general fitness for office. This situation has created some additional tensions between the Senate and the executive branch, but both the Senate and the Governor are attempting to work through the situation in a thoughtful manner.

Conclusion

The doorkeepers in Utah's judicial selection system include the judicial nominating commissions, the governor, the Senate, and the electorate when voting in retention elections. A legitimate Senate process will cause candidates to reflect upon their motives for seeking judicial office. Upon this reflection, it is my desire that judicial candidates will have the same experience as Justice

Parrish, who told the Senate after her confirmation that she thought that she will "be a better Justice for having gone through the Senate confirmation process."[18] I am of the opinion that the self-introspection required by the Senate confirmation process will assist in making great judicial candidates exceptional judges.

In my opinion, Utah's merit-based system promotes judicial independence to a much greater degree than any other judicial selection system. As each component of this merit selection process focuses on its duty to the system, the people of Utah will continue to have their legal matters heard and resolved by bright, capable individuals who are serving as judges not only because of their exceptional legal and professional abilities but also out of a personal desire for public service.

1. FRANZ KAFKA, THE TRIAL (William & Edwin Muir trans., Shocken Books 1995) (1925).
2. *Standards on State Judicial Selection, Report of the Commission on State Judicial Selection Standards, American Bar Association Standing Committee on Judicial Independence,* 7 (July 2002).
3. *State Court Organization 1998, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice* (June 2000).
4. Utah Senate Floor Debate, 1984 2nd Spec. Sess. (March 27, 1984) (statement of Chief Justice Hall).
5. UTAH CONST. art. VIII, §§ 8, 9, 13.
6. *Call to Action, Statement of the National Summit on Improving Judicial Selection, National Center for State Courts* (2002).
7. Utah Senate Floor Debate, 1984 2nd Spec. Sess. (March 27, 1984) (statement of Associate Justice Dallin Oaks).
8. *State Court Organization 1998, Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice* (June 2000).
9. *Senate Confirmation of Judicial Appointments, Office of Legislative Research and General Counsel, Utah Legislature 2* (November 2002).
10. S.R. 6, 55th Leg., Gen. Sess. (Utah 2003).
11. Veto Letter from Governor Michael O. Leavitt, to President L. Alma Mansell and Speaker Martin R. Stephens (March 24, 2003), *available at:* http://www.utah.gov/governor/newsrels/2003/newsrel_0324a03.html#2.
12. Justice Leonard H. Russon, *The Constitutional Guarantee of an Independent Judiciary,* UTAH BAR J., May, 2003, at 22, 26.
13. Utah Code of Judicial Admin., ch. 12, Code of Judicial Conduct, Canon 5 (2003).
14. Utah Senate Judicial Confirmation Committee (Feb. 12, 2003) (statement of judicial nominee Jill N. Parrish in response to question by Senator D. Chris Butters) (emphasis added).
15. Utah Senate Judicial Confirmation Committee (Feb. 12, 2003) (statement of Judicial nominee Judge Ronald E. Nehring in response to question by Senator D. Chris Buttars).
16. Utah Senate, Committee of the Whole (Feb. 26, 2003) (statement of Justice Ronold E. Nehring to the Utah Senate).
17. Utah Senate, Committee of the Whole (Feb. 26, 2003) (statement of Justice Jill N. Parrish to the Utah Senate).
18. Utah Senate, Committee of the Whole (Feb. 26, 2003) (statement of Justice Jill N. Parrish to the Utah Senate).

Practice Pointer: Things to Consider in Drafting a Yellow Pages Ad

by Kate A. Toomey

If you ever want a few minutes' diversion and nothing else is handy, take a look at the Yellow Pages listings for attorneys.[1] Although the Office of Professional Conduct ("OPC") seldom receives notarized and attested informal complaints about attorney advertising, people sometimes submit information (anonymously) about attorney advertising, and the OPC's Ethics Hotline regularly receives calls about what's permissible. The rules governing advertising are simple but not always scrupulously followed, and given the number of hotline calls, it's clear that attorneys aren't always familiar with them. This article is a primer on the rules governing mass media advertising, with suggestions about what to avoid.[2]

An initial prohibition against attorney advertising was lifted some years ago. *See Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) (affirming constitutional right to advertise legal services). In the quarter century since then, all state professional conduct rules explicitly permit advertisement.[3] Nevertheless, the subject remains acrimoniously controversial: is lawyer advertising simply a useful source of information for the public, or does it contribute to the degradation of the profession by transforming the practice of law into a commercial enterprise? *See* Laws. Man. on Prof. Conduct (ABA/BNA) § 81:101. The OPC does not, of course, take a position on this, but it's an interesting debate.

With the advent of lawyer advertising came the evolution of various Rules of Professional Conduct governing in some measure the content of the ads, and making attorneys accountable for them. *See e.g.* Rules 7.2 & 7.1, Utah R. Civ. Pro. States can impose such regulations "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse. . . ." *In re R.M.J.,* 455 U.S. 191, 203 (1982).[4]

In Utah, Media Advertisements Are Subject to Several Simple Administrative Requirements

Any public media ad must identify the name of "at least one lawyer responsible for its content." Rule 7.2(d), Utah R. Civ. Pro. This is readily complied with by including the name of the attorney who drafted or reviewed the ad before its placement.

Also, you must keep a copy or recording of any public media advertisement for two years after its dissemination, along with a record of when and where it was used. *See* Rule 7.2(b), Utah R. Civ. Pro. The Comment following the rule observes that the function of this record-keeping is "to facilitate enforcement." Thus, if an ad were the subject of a disciplinary complaint and investigation, the OPC might request that you supply a copy, along with a list of dates and places in which it ran.

Advertisements May Not Be Misleading

In addition to the foregoing, the important thing to keep in mind is that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Rule 7.1, Utah R. Pro. Con. In turn, "[a] communication is false or misleading if it: (a) contains a material misrepresentation of fact or law,. . . (b) is likely to create an unjustified expectation about results the lawyer can achieve. . . ; or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." *Id.*

The Comment following the rule explains that ordinarily an attorney can't advertise the results of a client's case, or use client endorsements, because "[s]uch information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances." Rule 7.1, Comment, Utah R. Pro. Con. These are simple, easily followed guidelines.

But what else is misleading? Remember that this is a fact-intensive inquiry and that jurisdictions differ in what is and is not misleading. Nevertheless, here are some examples from reported cases and

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.

ethics advisory opinions in other jurisdictions:

- listing a series of "offices near you," when these were only available meeting spaces, not the attorney's offices;[5]
- "if there is no recovery, no legal fees are owed by our clients;"[6]
- using a tag line such as "The Everything Lawyers;"[7]
- climactic scene of television ad showing attorney making closing argument to jury when none of the firm's lawyers had ever tried a personal injury case to conclusion and the firm policy was to avoid trials by referring to outside counsel any matters that couldn't be settled;[8]
- printing bogus newspaper article with headline "Biker Awarded $250,000 for Accident;"[9]
- using words such as "business lawyer," "revolutionary Business Plan;"[10]
- stating "DIVORCE, QUICKIE, Dominican Republic. From $275.00 – 'One Day' Qualified Attorney;"[11]
- stating "Tip the scales in **your** favor!"[12]
- stating the lawyer "can help you when others can't;"[13]
- stating "We are a team of fourteen lawyers with nearly 200 years combined experience," and "Licensed in Massachusetts and Connecticut" when the attorney whose photograph was featured in the ad wasn't licensed in both states, and at the time he placed the ad, only four of his colleagues were admitted in both the jurisdictions identified;[14]
- stating "WE HELP YOU CREATE AND PRESERVE WEALTH;"[15]
- stating "DIVORCE… $65.00;"[16]
- showing actor portraying police officer calling the attorney to come to the scene of an accident to determine fault;[17]
- stating "Practice limited to representing the Injured across the Country and around the World" but attorney did work in other areas of the law, and international experience was related to having some clients from foreign countries and being admitted once pro hac vice in the British Virgin Islands.[18]

Examples of advertisements from other jurisdictions that were deemed not misleading:

- offering uncontested divorce at "very reasonable price" provided the charge is within the low range of prices charged in that area;[19]
- listing areas of practice;[20]
- stating "We Will Investigate and Push Your Claims;"[21]
- stating that the law firm is the "largest" if this can be verified.[22]

Here are some suggestions for using mass media advertising without violating the Rules of Professional Conduct. Avoid using your "track record." Even if your statements are scrupulously accurate, they may create unjustified expectations in prospective clients. Every case being unique, it's virtually impossible to predict with precision what you'll be able to accomplish for a particular client even if you've been successful in the past. As one commentator put it, "Since the result of a case depends upon the case's merit and the counsel's ability, there is no way to determine if the results obtained were exceptional, adequate, or poor, or whether the lawyer was instrumental in the case's outcome." New York State Ethics Op. 539 (1982).

Likewise, and for similar reasons, avoid client testimonials and endorsements. Here's an example from Ohio: testimonials from former clients stating that "If you have the right attorneys, you can fight City Hall," and "Take my word for it, they're the best."[23]

Some jurisdictions explicitly forbid such statements altogether, and whereas Utah's rules are less restrictive,[24] because client endorsements may create unjustified expectations, the prudent course is to eschew them.

Also, don't include comparisons of lawyers' services, unless these can be substantiated. Even something so mild as the claim "We Do It Well" has been deemed unverifiable and misleading.[25] So has the seemingly innocuous "Big city experience, small town service."[26] In this context, even if you can substantiate the comparison at the time you place the ad (such as "biggest jury award in the history of the State," or "firm with the largest number of attorneys in town,") it seems wise to consider whether you can be certain the claim will be true for the duration of the ad. What's reasonable for a newspaper ad might not be the same as what's reasonable for an annual publication.

A final suggestion is to check out the ABA's Aspirational Goals for Lawyer Advertising,[27] which were first published in August 1988. As the title suggests, these are goals, rather than a list of explicit dos and don'ts, but the document serves as a useful tool for lawyers considering the appropriate content of an ad.

Note that the rules governing media advertising don't require prior review. *See* Comment, UTAH R. CIV. PRO. Nevertheless, some Bars have committees that assist attorneys by reviewing proposed advertisements; the committees also determine whether existing ads violate the Rules of Professional Conduct. If you would like to have such a committee in this jurisdiction, please e-mail me a note to that effect at opc@utahbar.org. Although the OPC lacks the resources to review actual proposed advertisements, and any such review of necessity would have to consider the broader factual context of an ad, its attorneys are available through the Ethics Hotline (531-9110) to assist you with specific questions about appropriate content.

1. This article does not describe or refer to specific local Yellow Pages advertisements, and any resemblance between these and the examples cited here is coincidental.
2. Targeted mail solicitation is a topic for another day.
3. The relevant Utah Rule of Professional Conduct makes explicit that "a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication." Rule 7.2(a), UTAH R. PRO. CON. You may use many types of media, including broadcast media, print media, billboards, signs on benches, and transit vehicle signs. Web sites are also permitted. *See* Utah Ethics Advisory Op. Comm., Op. 97-10 (1997).
4. *See also Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 644 ("A prophylactic rule is . . . essential if the state is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.").
5. *In re 95-30,* 550 N.W.2d 616 (Minn. 1996).
6. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 652 (1985) (State's position that it is deceptive advertising to refer to contingent fee arrangements without mentioning client's liability for costs supports requirement that it be disclosed).
7. Philadelphia Bar Ass'n Professional Guidance Comm., Op. 98-11 (June 1998) (use of tag line would require that firm absolutely handles all types of cases).
8. *In re Zang,* 741 P.2d 267, 275-278 (Ariz. 1987). The decision also includes helpful dicta concerning guidance for determining what is misleading. *See id.* at 278-279.
9. Connecticut Informal Ethics Op. 88-3 (1988) (appearance of newspaper report implies neutral source whereas it was composed solely to advertise; creates expectation of results).
10. Philadelphia Ethics Op. 87-27 (1987) (subjective terms such as "expert" not permissible).
11. *Attorney Grievance Comm'n of Md. v. McCloskey,* 511 A.2d 56, 58 (Md. 1986).
12. Philadelphia Ethics Op. 87-28 (1987) (implies guarantee).
13. District of Columbia Bar Comm. on Legal Ethics, Op. 249 (1994).
14. *Haymond v. Statewide Grievance Comm.,* 723 A.2d 808 (Conn. 1998).
15. *In re Schnieder,* 710 N.E.2d 178 (Ind. 1999) (phrase misleading because it predicted outcome).
16. You're right, this is an old case; but the reasoning is still sound. *See People v. Roehl,* 655 P.2d 1381 (Colo. 1983) (misleading because it implied that the representation would be provided for that amount regardless of the case's particular circumstances; instead, the lawyer provided clients a packet of forms to fill out and file pro se).
17. *In re Pavilack,* 488 S.E.2d 309 (S.C. 1997).
18. *Medina County Bar Ass'n v. Grieselhuber,* 678 N.E.2d 535 (Ohio 1997).
19. *Bates v. State Bar of Arizona,* 433 U.S. 350, 382 (1977).
20. *In re R.M.J.,* 455 U.S. 191, 203-205 (1982).
21. Connecticut Ethics Op. 88-6 (1988) (whether lawyer investigates and pushes client's claim is verifiable).
22. District of Columbia Bar Ethics Op. 142 (1984).
23. *Office of Disciplinary Counsel v. Shane,* 692 N.E.2d 571 (Ohio 1998).
24. As noted earlier, the Comment following the rule discourages using client endorsements, but the rule itself doesn't forbid them.
25. *Medina County Bar Ass'n v. Grieselhuber,* 678 N.E.2d 535 (Ohio 1997).
26. Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 94-12 (1995).
27. These are available through the ABA's web site; the address is: abanet.org/legs;services/clientdevelopment/abaasirationalgoals.html. I haven't reviewed the ABA Commission on Advertising's *How-To Manual,* published in 1979, or the ABA Commission on Advertising's publication titled *Effective Marketing of Legal Services Through Advertising: A Practical Guide for Lawyers* (1985), but these also might offer some practical guidance in drafting advertisements.

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10 Changes to the Law Every Lawyer Should Know From the 2003 Utah Legislative Session

by Jennifer Beatty

Earlier this year the Utah Legislature held its general session and did what lawmakers do, pass new and amend existing laws. This article will provide Bar Journal readers with ten of the most important changes to the Utah Code.

HB349 Practice of Law Amendment

This amendment repeals and reenacts Utah Code Annotated §78-9-101, which defines "practicing law." This is an effort by the Legislature to define what it " means" to be a lawyer. It is also a gauge of obvious discord between the Bar and the Legislature. As of right now, the Bar reports that insofar as the Bar's efforts to stop the unauthorized practice of law it is business as usual.

However, since Utah Code Ann. §78-9-101 now defines practicing law solely as appearing in court, it arguably opens the door to what traditionally would have been considered the unauthorized practice of law, i.e. all activities by a lawyer except court appearances. It is hoped that cooperation between the Bar and the Legislature can readdress this issue in 2004, if not sooner.

SB138 Medical Malpractice Amendment

This bill amends the Utah Health Care Malpractice Act and the Health Care Providers Immunity Liability Act. It specifically amends §58-13-3, §63-55-278, and §78-14-17 of the Utah Code. You might recall that Utah made national news when doctors, nurses and medical students held a rally at the Utah Capital during the legislative session in protest to the crisis in medical malpractice insurance premiums. This bill amends provisions related to arbitration agreements between a health care provider and a patient. The Act now allows a provider and patient to negotiate an arbitration agreement in non-emergency situations. In addition, this Act provides immunity from liability for some charity care by doctors helping those without insurance, and sunsets the medical malpractice arbitration agreements section.

SB 48 Forced Entry to Make an Arrest

This bill amends §77-7-8 of the Utah Code. In order to bring statutory law into harmony with recent court decisions, the Legislature modified the Code of Criminal Conduct regarding forced entry. Formerly, the police could only enter a residence by force. This bill allows for forced entry for non-felony crime arrest.

HB 274 Rights of Way Across Federal Land

R.S. 2477 is a federal law that provides for a right-of-way over public lands for roads which existed prior to 1976. During the last several years there has been a highly publicized debate over what constitutes a road on federal lands. The bill amends §72-5-301 and §72-5-302 of the Utah and gives the Governor authority to grant right-of-way access across public lands for the construction of highways. This act amends the definition of highway to recognize that a highway does not need distinguishable endpoints. It also authorizes the governor or the governor's designee to assess whether an R.S. 2477 has been accepted and requires the governor or a designee to provide a notice of acknowledgment to the owner of the servient estate in land over which the right-of-way runs. The act authorizes an owner of the servient estate to file an action with the district court for a decision regarding the correctness of a notice of acknowledgment issued by the governor and requires that the district court make a determination without deference to the notice of acknowledgment.

This act creates a presumption of acceptance of an R.S. 2477 grant if a highway existed as of the cut-off date and currently exists in a condition suitable for public use. SB 274 provides that a proponent of the R.S. 2477 status of a road that is not presumed bears the burden of proving acceptance by a preponderance of the evidence. So, the Governor will make decisions, rather than counties which have traditionally asserted the existence of the pre-1976 roads across public lands .

JENNIFER BEATTY is an assistant to J. Craig Smith of Smith, Hartvigsen law firm.

SB 225 Limitation of Judgments Against Government Entities
This act modifies the Judicial Code and amends §63-55b-178 and enacts §78-60-101 & 102 addressing limits on judgments that may be awarded against government entities. This act establishes a mechanism for adjusting the amount of those limitations for inflation. In addition this act provides a sunset date on December 31, 2004. Thereafter, the Limitation of Judgments Against Governmental Entities Act, is repealed. Keep a close watch because as of now there is no replacement for when this Act expires. However, the Legislature will likely draft new legislation that puts limitations on lawsuits against government entities.

HB201S1 Judiciary Amendments
If you are a lawyer who receives a telephone call from the local jail in the middle of the night please note, this new law makes it possible to bail one out of jail with a debit or credit card. It amends §77-20-4 of the Utah Code.

SB207S1 Identity Fraud Amendments
The Act modifies the criminal code, by amending §76-6-1102 of the Utah Code. In the past, local law enforcement agencies had the primary responsibility to investigate identity theft with the help of the Division of Consumer Protection investigating the offenses. However, now the Attorney General will both investigate and prosecute the perpetrators of identity theft. Giving the Attorney General authority should help in tracking down offenders and streamline the investigation and prosecution.

SB 103 Concealed Weapon Holder Amendments
The bill amends §76-10-523 of the Utah Code. The act eliminates the 60-day waiting period for concealed weapons permits issued by another state of foreign jurisdiction to be valid. In the past, a sixty-day time period was necessary before the concealed weapons permit was valid in Utah. This bill eliminates the waiting for sixty days so now the permit issued by another state is immediately valid when arriving in Utah.

HB 247 Power of Attorney in Relation to a Trust
This bill amended §75-5-501 and enacted §75-5-503, and §75-5-504 of the Utah Code. This amends the Probate Code. Specifically, the bill prohibits holders of "powers of attorney" without specific authorization in the power of attorney from creating, modifying, or revoking trusts. Also prohibited without specific authorization in the "power of attorney" are changing interests in the principal's property; or making loans to the holders of the power of attorney. So, in other words, exact instructions will be needed for the "power of attorney" holder or the agent of the trust to take certain actions without precise permission related to the trust.

SB128 (First Substitute) Protective Order Amendments
This bill repeals §30-6-4.8 and amends §30-6-1,2,3,4.2, §62A-4a-412, §76-5-108, §77-36-2.1,2.4,2.5 and 2.6 as well as §77-36-5, §78-3a-104, 105, 118, 305 and §78-3h-101-107. Utah is well-known for its younger population demographics. The Juvenile Code was modified in regard to child protective orders. Most importantly, a protective order will now be entered into the statewide domestic violence network. This will ultimately provide more protection for children in the state of Utah because of the necessity of protective orders being entered into a database.

Conclusion
This list by no means covers all the developments in the law made by the Utah legislature this session, but the list offers an array of different practice areas where new bills impact the law. The latest developments by the Legislature try to improve and facilitate the practice of law in the state of Utah. More importantly, the new bills and Amendments hope to improve the Utah law and government to better serve the needs of Utah citizens. Watch for more updates and be sure to check the Utah Legislature at http://www.le.state.ut.us for more bills passed in the 2003 session. Governmental Relations Committee http://www.utahbar.org/committees/governmentrelations.

Commission Highlights

During its regularly scheduled meeting of July 13, 2003, which was held in Sun Valley, Idaho the Board of Bar Commissioners received the following reports and took the actions indicated.

1. John Adams welcomed the commissioners and commissioners-elect and reviewed the schedule of events for the convention.
2. The motion to approve the applicants to sit for the July Bar examination passed unanimously.
3. John Adams indicated that he had requested Rusty Vetter to work with Toby Brown of the Bar staff to formalize internal and external Bar communications.
4. Discussion was held on H. B. 349 and the need for the Bar to have a consistent message and a formalized process to get the message out.
5. After discussion of the budget and the grant requests, the Board moved to adopt the proposed budget and to contribute from surplus cash $20,000 to Utah Dispute Resolution, $120,000 to Lawyers Helping Lawyers and $5,000 to the Needs of the Elderly Committee.
6. David Bird reviewed the agenda for the June 23, 2003 Judicial Council meeting.
7. John Adams welcomed the three new commissioners Rob Jeffs, Yvette Diaz and Nate Alder. The Women Lawyers of Utah, Young Lawyers Division, Minority Bar Association, Legal Assistants Division, the Deans of the J. Reuben Clark and S.J.Quinney Law Schools, the Past President of the Bar, the Bar's representative to the ABA House of Delegates and the Utah ABA Members' Delegate to the ABA House of Delegates were appointed to positions as ex-officio members of the Bar Commission.
8. Debra Moore announced that the new Executive Committee would consist of herself, Lowry Snow, George Daines, David Bird, Rusty Vetter and John Baldwin. The Executive Committee members were approved as bank signatories for the Bar.
9. The Commission recognized retiring commissioners and John Adams with plaques and other mementos.
10. The Commission renewed the contract of Executive Director John Baldwin.

* * * *

During its regularly scheduled meeting of August 22, 2003, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. A plaque was presented to newly appointed Judge Nolan to acknowledge his many years of valuable service on the Commission.
2. On behalf of the Bar Commission, Debra Moore presented the Bar's 2003 Community Member Award to Fraser Nelson. The award is designed to recognize a non-lawyer for his or her legally-related community service.
3. Debra Moore noted that she and John Baldwin had recently met with Governor Leavitt and his Chief of Staff, Rich McKeown, to discuss the Bar's legislative relations, particularly as applied to H.B. 349.
4. Debra Moore reported on the National Conference of Bar Presidents. One of the topics of great interest was a presentation on the ABA program "Brown v. Board of Education" which is similar in format to last year's "Dialogue on Freedom". We are scheduled to present the new program next spring in Utah under the direction of past president John Adams.
5. Debra Moore announced that the Utah Minority Bar Association had adopted a "Pledge to Racial and Ethnic Diversity in Utah Law Firms" and had asked the Bar to be among the first signatories on the pledge. Yvette Diaz explained that the pledge was designed to increase diversity efforts for minorities in the legal employment field. She noted that the pledge is a philosophical statement to raise awareness of minority status. Nationwide, minorities constitute approximately 10% of lawyers but in Utah it is about 3%. The motion that the Bar was adopting the policy in its role as an employer, but that it was supportive of the concept for all legal employers in the State of Utah passed without dissent.
6. Fred Metos was re-appointed to the Utah Sentencing Commission.
7. A discussion was held on the creation of a "Cyberspace Law Section". It was determined that a better basis on which to make a decision was needed, therefore, additional information will be gathered and John Rees and Art Berger will be invited for further discussion.
8. Discussion was held on sponsorship of the Fordham Forum on Delivery of Legal Service. Linda Smith, a professor at the U of U, along with a professor at BYU, are interested in collab-

orating with the Bar to present a symposium on the issues concerning delivery of legal services to the poor and the middle class.

9. Steve Waterman reviewed the Admissions Committee recommendations to increase the Bar exam passing threshold. Dean Scott Matheson and Dean Reese Hansen gave their presentation which opposed raising the passing score. A lengthy discussion followed. The motion to adopt the current passing score of 130 to 133 to be effective for the July 2004 examination and then a year later to 135 to be effective for the July 2005 examination passed.

10. George Daines reported on developments relating to H.B. 349, including legislative relations. Some of the action items related to H.B. 349 may have certain costs associated with implementation which need to be reviewed. George will continue to update the Commission on future details.

11. Felshaw King and Steve Owens reviewed the OPC Ombudsman sub-committee report. A lengthy discussion followed. A vote to adopt items #1 through 4 passed with George Daines abstaining and Rusty Vetter voting nay.

12. Rusty Vetter gave a report on the Bar Communication project. The scope of the report is so broad, Rusty recommended that a sub-committee be appointed to review it and make recommendations to the Commission by December. Debra Moore said she would supervise formalizing the sub-committee membership list so that the work could proceed.

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

2003 Annual Awards

The Annual Awards of the Utah State Bar are presented by the Board of Bar Commissioners on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts, and the Bar; and exemplification of the highest standards of professionalism to which all judges and lawyers aspire. Congratulations to the following 2003 award recipients who received their awards on July 18, 2003 at the Utah State Bar's Annual Convention in Sun Valley, Idaho.

- Jay E. Jensen – Distinguished Lawyer of the Year
- Rodney G. Snow – Distinguished Lawyer of the Year
- Hon. Ronald N. Boyce – Judge of the Year
- Mark C. Alvarez – Pro Bono Lawyer of the Year
- Amy E. Hayes – Young Lawyer of the Year
- Patrick Tan – Young Lawyer of the Year
- Elaina M. Maragakis – Distinguished Service Award
- Justice Leonard H. Russon – Distinguished Service Award
- Gary G. Sackett – Distinguished Service Award
- Needs of the Elderly Committee, Mary Jane Ciccarello, Chair – Distinguished Committee of the Year
- Family Law Section, Stewart P. Ralphs, Chair – Distinguished Section of the Year
- Fraser Nelson – Community Member of the Year

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill a vacancy on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers.

Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions.
- Includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest to:

Steven J. McCardell, Chairman
Ethics Advisory Opinion Committee
LeBoeuf, Lamb, Greene & MacRae
136 South Main Street, #1000
Salt Lake City, Utah 84101

Theater Techniques for the Courtroom
with David Ball, Ph.D

By popular demand, the star of the 2002 Annual Meeting in Sun Valley is coming back. Hear David Ball on the core skills of audience persuasion common to drama and to the courtroom. Learn how the techniques of the master playwrights will make you a far better courtroom advocate. You don't have to be an actor, a playwright, or a director to know and learn to use these tools – you just have to be a lawyer who wants to win cases.

David Ball is a drama teacher, a student of jury trials, and a nationally-acclaimed jury and trial consultant and trial techniques speaker. He is the author of *Theater Tips and Strategies for Jury Trials, David Ball on Damages, and How to Do Your Own Focus Groups,* all published by NITA.

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Friday, October 17, 2003
9:00 am – 4:00 pm
Utah Law & Justice Center

Appointments

The Bar appoints or nominates for appointments to various state boards and commissions each year. The following is a listing of positions which will become vacant in the next twelve months. If you are interested in being considered for one or more of these positions, please send a letter of interest and resume to John C. Baldwin, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail john.baldwin@utahbar.org.

	Term Ends
Technology Standing Committee	
Barbara Polich	Jan. 1, 2004
Executive & Judicial Compensation Commission	
John T. Nielsen	April 1. 2004
Ethics Advisory Committee	
Nelson T. Abbott	July 1, 2004
Mary C. Corporon	July 1, 2004
Hon. Denise P. Lindberg	July 1, 2004
Maxwell A. Miller	July 1, 2004
Toni M. Sutliff	July 1, 2004
Michael D. Wims	July 1, 2004
Online Court Assistance Programs	
Eric A. Mittelstadt	July 1, 2004
Utah Legal Services Board of Directors	
Stephen E.W. Hale	August 1, 2004
Catherine F. Labatte	August 1, 2004
A. Howard Lundgren	August 1, 2004
Michael D. Zimmerman	August 1, 2004
5th District Trial Court Judicial Nominating Commission	
Curtis M. Jensen	Sept. 15, 2004
Clifford V. Dunn	Sept. 15, 2004

Utah Minority Bar Association Annual Scholarship Banquet

The Utah Minority Bar Association Annual Scholarship Banquet will be held the evening of Friday, November 21, 2003, at the Law and Justice Center. Cost will be $30 per person and a discount will be provided for groups purchasing tables. Speaker to be announced.

Proposed Amendments to Utah Court Rules

The Supreme Court and Judicial Council have published for comment proposed amendments to several Utah court rules. The full text of the rules and amendments can be found at http://www.utcourts.gov/resources/rules/. The comment period expires November 17, 2003. Comments cannot be acknowledged but all will be considered.

Submit written comments to:
Tim Shea, Senior Staff Attorney
Administrative Office of the Courts
P.O. Box 140241 • Salt Lake City, Utah 84114-0241
Fax: (801) 578-3843 • e-mail: tims@email.utcourts.gov

Comments by e-mail are preferred. Please include the comment in the message text, not in an attachment.

A summary of these amendments and a link to the full text was e-mailed to all lawyers with an e-mail address registered with the Utah State Bar. If you did not receive this notice, please contact webmaster@utahbar.org to ensure that your e-mail address is entered into the Utah Bar News e-mail service.

Discipline Corner

INTERIM SUSPENSION

On July 14, 2003, the Honorable Gary D. Stott, Fourth Judicial District Court, entered a Ruling on Motion for Interim Suspension Pursuant to Rule 19, placing Dean N. Zabriskie on interim suspension.

In summary:
Mr. Zabriskie was convicted of two federal offenses that directly reflect on his honesty and fitness as a lawyer.

ADMONITION

On July 23, 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 a client in a personal injury claim. The attorney failed to file a complaint or resolve the client's complaint before the expiration of the statute of limitations. When the attorney discovered the statute of limitations for the client's claim had run, the attorney informed the client and provided contact information for the attorney's malpractice insurance carrier.

ADMONITION

On July 31, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.5(a) (Fees) and 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent a client in a criminal case. The client paid a retainer to the attorney. The attorney sent a fee agreement, but the client did not return the fee agreement to the attorney. The attorney did not return the unearned portion of the retainer within a reasonable time after terminating the representation.

Mitigating factors include: no prior record of discipline, no dishonest or selfish motive, promptly rectified the consequences of the misconduct, and cooperated with the OPC.

ADMONITION

On August 4, 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), 8.4(a) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent a client to seek a temporary restraining order and a child custody order. The attorney was directed by the court to prepare an order. The attorney did not prepare the order and did not keep the client reasonably informed of the status of the case. The court issued an order to show cause why the case should not be dismissed for lack of prosecution.

Mitigating factors include: no prior record of discipline, lacked dishonest or selfish motive, cooperative attitude toward proceedings, inexperience in the practice of law at the time of misconduct, and mental disability or impairment.

ADMONITION

On August 7, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 5.5(a) (Unauthorized Practice of Law) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
As an inactive member of the Utah State Bar, the attorney was asked by a family member to send a letter to a debtor. The attorney represented to the debtor that the attorney was licensed to practice law in the State of Utah, despite being an inactive member of the Utah State Bar.

Mitigating factors include: absence of prior record of discipline, cooperative attitude toward proceedings, remorse, and inexperience in the practice of law.

ADMONITION

On August 25, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 1.15(b) (Safekeeping Property) of the Rules of Professional Conduct.

In summary:
The attorney withdrew from representing a company. The company was a plaintiff in a lawsuit. The defendant in the lawsuit sent a check to the attorney. The attorney did not promptly notify the company upon receiving the check in which the company had

an interest. The attorney's failure to properly manage the client's payment was based on inattention and was not knowingly or intentional. Further, the attorney's action caused little or no injury to the client.

Mitigating factors include: inexperience, no record of discipline, no dishonest or selfish motive, promptly rectified the consequences of the misconduct, cooperated with the OPC.

SUSPENSION

On August 20, 2003, the Honorable Frank G. Noel, Third Judicial District Court, entered a Judgment and Order of Suspension, suspending Daniel R. Boone for a period of ninety days. Mr. Boone's suspension is effective September 19, 2003.

In summary:

Mr. Boone was retained to assist a client in recouping a judgment against an ex-spouse who had filed bankruptcy. Mr. Boone thereafter failed to respond to his client's requests for information, failed to communicate with the client, and failed to provide the file to the client. Mr. Boone failed to comply with the Office of Professional Conduct's requests for information.

Mitigating factors include: Mr. Boone asserted physical disability and the Court agreed that this may have accounted for some of the delay in responding to his client. However, the physical disability did not show a causal relationship in Mr. Boone's failure to cooperate with the disciplinary investigation.

Aggravating factors include: prior discipline, multiple offenses, substantial experience as a lawyer, and injury to the legal system.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
10/07-08/03	**Utah Land Use:** Tuesday, Oct. 7, 1:30–4:30 pm. "Citizens Guide to Utah Land Use Regulation. Wednesday, Oct. 8, 8:30 am–4:30 pm. "Utah Land Use Institute. Salt Palace. Tuesday only: $30. Wednesday $75 before 09/25/03, $84 after (includes Tuesday free).	Up to 8
10/15/03	**Ethics School:** "What They Didn't Teach You in Law School" 9:00 am – 4:00 pm. $125 before 10/08/03, $150 thereafter.	7 hrs. Ethics
10/17/03	**Theater Techniques for the Courtroom** with David Ball. 9:00 am – 4:00 pm. $125 Litigation Section member, $175 others.	7 (NLCLE pending)
10/23/03	**Basics on Real Property Law:** "Mechanics Liens" 5:30 – 8:30 pm. $50 Young Lawyers, $60 others.	3 CLE/NLCLE
10/30/03	**Securities Law Practice in Utah.** 5:30 – 8:30 pm. $50 Young Lawyers, $60 others.	3 CLE/NLCLE
11/06/03	**Fall Corporate Counsel:** 9:00 am – 1:00 pm. $40 Corporate Counsel Section, $80 others.	4 includes 1 hr. Ethics
11/07/03	**Professionalism Seminar:** 9:00 am – 12:00 noon. Watch for postcard describing this affordable CLE opportunity.	3 hrs. Ethics
11/14/03	**New Lawyer Mandatory:** 8:30 am – 12:30 pm. $45.	Satisfies New Lawyer Requirement
11/19/03	**Evening with the Third District Court:** Agenda pending – p.m. seminar.	
12/03/03	Basics on Criminal Law: 5:30 – 8:30 pm. $50 Young Lawyer, $60 others.	3

To register for any of these seminars: Call 297-7033, 297-7032 or 257-5515, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE/SHARING

Looking for will of Ruth Alice (Newman) Calamia – If you have or know of an original or copy of a will of Ruth Alice (Newman) Calamia, born June 24, 1910, and died in Utah March 1, 2003, please contact Julianna Carlson, 1717 Halibut Point Road, #11, Sitka, Alaska 99835, telephone (907) 747-8614 / 747-8575.

POSITIONS AVAILABLE

ASS'T COUNSEL UTAH STATE BAR – Full-time entry-level attorney position available in Utah State Bar, Office of Professional Conduct. New Utah Bar admittee candidates welcome. Ideal candidate must have strong writing and research skills. Position involves investigation and review of attorney misconduct cases. Background in the area of attorney ethics is a plus. Salary 30K. Excellent benefits. Submit or fax resume, writing sample, and cover letter by Friday, October 31st at 5:00 p.m. to: Billy L. Walker, Senior Counsel, Office of Professional Conduct, 645 South 200 East, Salt Lake City, Utah 84111. Fax: (801) 531-9912

Major So. S.L. Valley Plaintiff's P.I. firm needs associate with 8-12+ years experience in PI. The more trial and arbitration experience the better. Will immediately manage full case load with full time paralegal. Excellent salary package, benefits, excellent holiday and vacation plan, cogenial working atmosphere. Good opportunity for growth and salary advancement. Send resume with salary requirements in strictest confidence to: Christine Critchley, Confidential Box #20, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail to ccritchley@utahbar.org.

The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2004. To qualify, each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association, 801 532-5444

PROGRESSIVE OGDEN FIRM with an emphasis in the areas of Real Estate, Construction, Business, Foreclosure and Title seeking to fill positions for transaction and litigation attorneys with 0-5 years experience. Excellent research and writing skills required. Please send resume to: Christine Critchley, Confidential Box #21, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail to ccritchley@utahbar.org.

Immigration Attorney: a four attorney law firm needs Immigration Attorney. Some experience is a must. Send resumes to fax 801-298-5161.

Bankruptcy Attorney: A four attorney law firm needs Bankruptcy Attorney. Experience is a must. Send resumes to fax 801-298-5161.

Position available in the Provo City Attorney's Office, up to 20 hours per week (Monday through Thursday), mostly criminal, some civil, some flexibility on hours, up to $20 per hour depending on experience. Send resume, Attention: Legal, P.O. Box 1849, Provo, Utah 84603, or call (801) 852-6141.

The Millard County Attorney's Office is accepting applications for a full-time Deputy County Attorney starting October 15, 2003. Would be expected to live in the Fillmore or East Millard County area and work at the Fillmore office. Duties would include criminal prosecutions in the District, Justice and Juvenile Courts and handling limited civil matters for Millard County by assignment. Salary is $40,000 to $50,000 per year (depending on experience) plus the benefit package available to all county employees. If interested, send a resume to LeRay G. Jackson, Millard County Attorney, P.O. Box 545, Delta, Utah 84624, or fax to (435) 864-2717, or email lerayj@xmission.com by 5:00 pm, Friday, September 19, 2003. Inquiries may be made by phone at (435) 864-2716.

OFFICE SPACE/SHARING

Office Space – 4764 South 900 East. Newly remodeled, two large offices, one small office and reception area. $1,400/mo. Call Michelle at 685-0552.

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

Do you need Legal Research, or an appearance in California or the District of Columbia? Former Federal Agent with licenses in California and the District of Columbia is available to contract for research needs in Utah, and will travel to California or D.C. for court appearances. Research rate is $50/hr and appearances in California and/or D.C. are negotiable. Contact Kelly Pexton at 801-794-0985, 787-587-2057, or at kpexton@quik.com.

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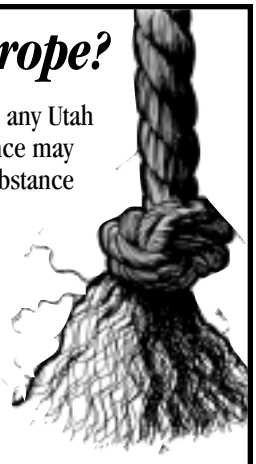
At the end of your rope?

Confidential* assistance is available for any Utah attorney whose professional performance may be impaired because of depression, substance abuse or other problems.

If you need a helping hand, please call the numbers listed below:



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*See Rule 8.3(d), Utah Code of Professional Conduct.

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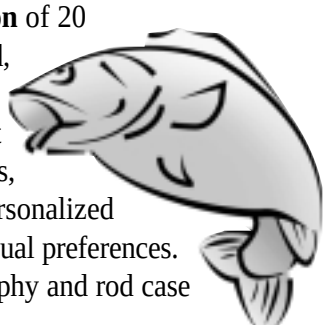

Contact:
F. John Hill (801) 943-8262 (evenings)

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Tel: 531-9077 • Fax: 531-0660
E-mail: info@utahbar.org

Executive Offices
John C. Baldwin
Executive Director
Tel: 297-7028

Richard M. Dibblee
Assistant Executive Director
Tel: 297-7029

Maud C. Thurman
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

Diana Gough
Assistant to General Counsel
Tel: 297-7057

Ronna Leyba
Utah Law & Justice Center Coordinator
Tel: 297-7030

Admissions
Joni Dickson Seko
Deputy General Counsel
in charge of Admissions
Tel: 257-5518

Christie Abad
Admissions Assistant
Tel: 297-7025

Bar Programs
Christine Critchley
Bar Programs Coordinator
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CLE
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Section Support
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E-mail: benefits@utahbar.org

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E-mail: opc@utahbar.org

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