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COVER: Fall scene in East Canyon in Salt Lake County, by first time contributor Susan C. Bradford, Commissioner, Third Judicial District Court.

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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.

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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.
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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.
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Adopt the Diversity Pledge

by Debra Moore

> "Good intentions aside, many law firms do not treat diversity as a strategic factor that contributes to the bottom line. That lack of understanding, nonetheless, impacts their bottom line in missed opportunities, wasted resources, and costly turnover."

– *Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms* (2003), a report of the Minority Corporate Counsel Association

As a legal employer, the Utah State Bar recently adopted the Pledge to Racial and Ethnic Diversity proposed by the Utah Minority Bar Association ("UMBA"). In doing so, the Bar encourages other legal employers also to take the pledge. The goals of the pledge are, simply, to increase the hiring, retention, and promotion of attorneys of color. To achieve those goals, the pledge includes specific actions that serve to level the playing field for attorneys of color. The pledge is not an affirmative action plan, and none of the actions included in the pledge involves the use of racial or ethnic status as a selection criterion or any other form of preferential treatment. The pledge is posted on the Bar's website at www.utahbar.org.

Although the pledge focuses on attorneys of color, its adoption will benefit the entire organization and all of its employees, not just minority lawyers. There is a strong business case for diversity. By the late 1990's, major corporations positioning themselves to respond to changing American demographics and the global marketplace began requiring their outside law firms to demonstrate a commitment to promoting diversity. To get an idea of the extent of this corporate movement, as well as a wealth of resources on diversity issues, visit the website of the Minority Corporate Counsel Association ("MCCA") at www.mcca.com. The movement continues to gain momentum and its effects have been and continue to be felt by Utah law firms. One step that Utah law firms can take to demonstrate their commitment is to adopt the diversity pledge.

Promoting diversity can yield other competitive advantages in the search for and retention of legal talent, and in the creativity and quality of a firm's work product. Ultimately, promoting diversity requires valuing and developing the contributions of each individual in the firm. This is implicitly recognized in the UMBA pledge, which states the goal of "full and equal opportunity and participation for all attorneys, including attorneys of color" and requires employers to:

- assist each newly hired attorney (regardless of race, ethnicity, or level) in learning the workplace's culture, history, practices, and procedures; and to
- ensure that all attorneys, including attorneys of color are afforded, on a consistent basis, opportunities equivalent to those provided to all other attorneys in the quality and quantity of legal work assignments as necessary to develop skills and acquire experience for success and advancement.

I often hear (and wholeheartedly agree with) claims that the quality of legal practice in Utah compares favorably to that of anywhere in the country. We may be tempted though, to point to our geography and the demographics of our labor force as ready excuses for a lack of diversity in our legal workplaces. We must take care that such explanations do not serve as self-fulfilling prophecies. By providing strong leadership to challenge some of the assumptions that underlie our hiring, training, and promotion practices, and that may unintentionally create barriers to inclusion, Utah law firms can continue to point with pride to the quality of their legal talent and work product. Adopting the diversity pledge is an excellent start.

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Electronic Discovery: New Power, New Risks

by David K. Isom

It is now clear that electronic information is so pervasive and important in civil litigation in the United States that every civil litigator in Utah must know how to pursue and provide electronic discovery, and every individual and company likely to bring or defend a civil lawsuit must understand the decisive impact of electronic discovery.

This article is a primer for lawyers and their clients, both individuals and companies, who are or may become involved in a civil lawsuit as plaintiff or defendant.

The first section defines electronic discovery and outlines possible repositories of electronic evidence.

The second section explores the characteristics of electronic evidence that make electronic discovery fundamentally different than paper discovery.

The third section explains why electronic discovery is so important.

The last section makes suggestions both for seeking electronic discovery and for preserving and producing electronic information.

I. Electronic Discovery Primer: What Electronic Discovery Is

"Electronic discovery" has become the common label for the formal process in civil lawsuits of the discovery of factual information that, at any time, has been created, retained, stored, processed, converted, reviewed, produced or presented in electronic form by computers or other electronic media.

The phrase is common, however, only among those who have already been involved in electronic document disputes. Recent discussions with lawyers, paralegals and law firm administrators who have not been involved in electronic discovery revealed a number of other reactions as to what the phrase "electronic discovery" might mean, including: using Lexis or Westlaw for computerized legal research; using any of the various available computer processes or software to convert paper documents to digital data for management in litigation; realizing that digital data are discoverable "documents" within the meaning of Rule 34 of the Federal and Utah Rules of Civil Procedure.

"Electronic discovery" customarily refers to the formal process of requesting or producing electronic information under Rules 26, 34 and 45 of the Federal Rules of Civil Procedure and similar Utah rules. These issues should be distinguished from two related sets of issues that are beginning to receive more deserved attention.

One set is the issues created by lawyers' use of their own computers in producing legal work.[1] The other set of issues arises from the use of electronic media to do "informal" discovery – i.e., investigative, unilateral, creative electronic fact research. The ascendance of the World Wide Web, and the development of gargantuan databases and sophisticated search engines, has made informal, unilateral electronic research as important as the formal electronic discovery discussed here.

The current range of lawyer attitudes about electronic discovery is remarkable. For some lawyers who have not been involved in electronic discovery, it still comes as a surprise that electronic data are even discoverable "documents."[2]

There is a middle group of lawyers that is slowly, sometimes painfully, learning about electronic discovery. For example, in *Jones v. Goord,*[3] the plaintiffs' lawyers requested a category of documents that, in retrospect, could have been interpreted to have included electronic documents. The requesting lawyers apparently did not think to press production of the electronic

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documents until six years into the litigation, however, even though those lawyers had known for years that the defendants had responsive electronic documents. After the defendants had produced the requested paper documents, plaintiffs belatedly moved to compel production of what they contended were "essential" electronic documents, arguing that the electronic documents would be easier and cheaper to handle and would allow statistical analysis critical to the plaintiffs' claims. The court denied the motion and prevented electronic discovery, largely because enormous expense had already been incurred in producing the paper documents, and because the plaintiffs were simply too late in realizing that electronic discovery might be valuable. In short, the plaintiffs could not get the electronic information that they deemed essential, and that the court acknowledged was relevant, because the lawyers waited too long to press for the information.

The third group of lawyers is those already introduced to electronic discovery issues. They are left to muse at the breadth of their duties to produce their own clients' documents, to celebrate the power of electronic discovery in uncovering their adversaries' secrets and vulnerabilities, and to scramble to keep up with the dizzying pace of technological change in electronic discovery.

Electronic discovery was recognized in the rules of civil procedure beginning in 1970.[4] Courts began tussling with issues unique to electronic discovery in the early 1970s.[5] Judge Thomas Greene's opinion in 1985 in *Bills v. Kennecott Corporation*[6] became the most-cited electronic discovery case of the 1980s, and was prophetic:

> This court need not dwell on the benefits computers provide over traditional forms of record keeping. The revolution over the last fifteen years speaks for itself. From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development. Computers have become so commonplace that most court battles now involve discovery of some type of computer-stored information.

108 F.R.D.at 462.[7]

In the 1990s, e-mail and other new forms of computer and electronic communication catapulted electronic information from the back room and the boiler room to the library and office and

boardroom and bedroom. Email and the internet transformed business and personal communication and created legal and ethical issues whose breadth we have only begun to grasp. In a recent landmark opinion, U.S. District Judge Shira Scheindlin opined that "virtually all cases" involve the discovery of electronic data.[8] The recent avalanche of electronic discovery cases suggests that she is right.

It is now harder to imagine where electronic information cannot be found than where it might. Here is a list of possible sources of electronic data to prime the pump of imagination for other places to look: office computer hard drives, including metadata;[9] home computers; laptops; personal digital assistants; network systems drives; servers; data from internet user groups; hard and floppy disks; email; calendars and appointment books; cell phone data; telephone logging and answering machine records; fax machine data and logs; building security logs; web sites; web logs; global positioning data from trucks and, increasingly, from cars; chat room data.

II. Why Electronic Discovery Is So Different than Paper Discovery

Some analysts argue that the process, duties and risks of electronic discovery are similar to those of paper discovery.[10] But for the lawyer in the trenches who faces the risk of disciplinary action, or tort liability, or monetary discovery sanctions for violating these duties – and for the client at risk of discovery sanctions, tort liability for spoliation, and even criminal liability – the differences between paper duties and electronic duties are, well, shocking.

This section examines the characteristics of electronic discovery that have led to the creation of the new duties and risks.

A. Accessibility

When stored data existed primarily on paper, the line between which documents must be searched and which not seemed brighter. In a case involving a large company in which the actions of a certain person – say, Ms. Jones – were the subject of the action, Ms. Jones' files and the files of documents relating to her activities could be searched and produced. After agreeing to produce those documents, a party could confidently respond that all documents relating to Ms. Jones that could be produced without undue burden had been produced. Few courts forced further search for documents on the prospect that a stumbling search of huge deposits of random additional documents might disclose additional pertinent evidence.

B. Informality

There was something about the formality, the ritual of putting ideas on paper, that made the writer circumspect and the recorded thoughts and feelings measured. Raw emotion or conspiracy were expressed in person or on the telephone, and evaporated in the moment. Email, on the other hand, has seemed to invite astonishing candor and to tempt pettiness and chatter. And now a whole new generation of media that lures balder candor is upon us, including computer chat rooms, video conferencing and telephone messaging. These media unflinchingly record what might turn out to be unfortunate candor, and cause fits or jubilation for the lawyers and clients who find the preserved candor in discovery.

C. Invisibility

When documents were paper, records managers seemed more consistently aware of which preserved communications still existed, and had document retention and destruction policies that were more or less effective and more or less enforced. Electronic communications are less visible and less manageable. People throughout companies seem genuinely shocked in the heat of discovery battles by how much evidence had been created and

retained of which they had been oblivious. Companies have not yet mastered the retention and destruction of electronic documents.

D. Durability

Information swirling in electrons has created new legal and ethical issues both because in some forms the information has the half-life of a bubble, and in other forms has the durability of dirt. New duties of evidence preservation have arisen exactly because, without intervention, important electronic evidence may quickly be overwritten or erased, routinely and even innocently.

On the other hand, it is the near impossibility of truly destroying or hiding emails and other electronic data that has changed the rules in other ways.

E. Retention Cost

The cost of retaining paper documents was sufficient to cause most companies to adopt policies of routinely and regularly destroying old documents. Though those policies may not have been applied consistently, still it appears that paper documents were in fact consistently destroyed after a few years. With electronic documents, retention costs (not counting the liability costs if the documents confirm some liability) are approaching nil, which has caused some to raise the question whether deliberate destruction of electronic evidence is ever justifiable or cost-effective.

III. Why Electronic Discovery Is So Important

Electronic discovery is important, first, because discovery is important in the American civil litigation. "Broad discovery is a cornerstone of the litigation process"[11] in this country. The United States Supreme Court has recently affirmed its oft-repeated holding that American civil litigation "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[12]

The second reason electronic discovery is so important is that electronic information in our society is so pervasive: most facts that will end up in the eye of some litigation storm are now recorded, described, admitted, discussed, reified, denied or challenged in some electronic medium. In 2002, approximately 31 *billion* email messages were sent each day,[13] which makes email the second most popular medium of communication worldwide, next only to voice.[14] There will be an estimated 60 billion emails sent per day by 2006.[15] Something less than 1% of all written

human communications even reaches paper these days.[16]

IV. Seeking and Providing Electronic Discovery

Though a reading of the rules of civil procedure on their face would not provide any clue as to how the duties and opportunities of electronic discovery compare to those of paper discovery, vast differences exist.[17]

This section makes various suggestions for handling electronic discovery in light of the new cases.

A. Both Parties

The first suggestion applies to both parties: meet and negotiate early, preferably at or before the Rule 26 conference, regarding electronic discovery. The party seeking electronic evidence (of course, in some cases, each party will be seeking electronic information from the other) should use the conference to determine what electronic evidence might exist and what computer and expert resources might be needed to get the evidence. The producing party has an incentive in this meeting to face the discovery questions early and determine as much as possible about the scope of the duty to preserve evidence. Early stipulations about what electronic information must be retained and what may be ignored may narrow the task for both parties of dealing with electronic information.

B. Seeking and Getting Electronic Documents

Here are suggestions for those seeking electronic documents.

1. Expressly Request Electronic Documents

First, specifically and explicitly request electronic information. Though the rules include electronic data implicitly within the scope of any request for a "document," do not rely upon an implicit request, for two reasons.

First, you are more likely to get the electronic data if you expressly demand it. In most of the cases in which requests for electronic data were denied or restricted, the fact that the requester seemed not to have thought about electronic data when it issued broad requests for documents was a factor in restricting discovery. It is probable for the foreseeable future that lawyers responding to document requests will under-produce electronic documents unless the request is explicitly for electronic documents.

Second, explicit electronic requests are likely to be more powerful. For example, a litigation manager of a Fortune 500 company recently told the author[18] that his company had just trebled the amount that it authorized for settlement of a wrongful termination claim because the ex-employee's lawyer served an explicit, well-craft request for electronic documents.

2. Narrow the Request

While courts continue to affirm the right of litigants to obtain broad discovery, overbreadth of discovery requests is the most common ground for denying discovery. Moreover, in the few cases in which the cost of providing electronic discovery has been shifted to the seeking party, overbreadth of the document request is the primary cause for shifting the cost to the seeking party.

3. Focus on the Benefit of the Information

Though a court will weigh numerous factors to decide whether to allow electronic discovery and which party will pay for the discovery, the factors are designed to answer one fundamental question: How does the potential benefit of the discovery compare to the cost or other burden of the discovery? Be prepared to identify the anticipated benefit of the discovery that you seek.

4. Specify the Production Format

In most cases, you will want electronic information to be produced in electronic form, since much important information will be lost if you accept a paper "copy" of the electronic data. You should typically seek paper versions only to the extent that they contain marginalia or information other than is contained in the electronic version.

5. Know the Technology or the Technician

Through research, seminars or consultants, learn about the latest in document search and retrieval technology, sources of potentially important electronic evidence, and technology for managing and extracting the most important information as cost-effectively as possible.

C. Preserving and Producing Electronic Documents

Here are some basic principles for parties and lawyers producing electronic information.

1. Locate Relevant Documents

The lawyer and client should meet as soon as they are aware of a reasonable likelihood that documents might be pertinent to legal claims. They should brainstorm where responsive electronic data might be found. Initially, invoke the rule of brainstorming – that

there are no outlandish suggestions, and all conceivable locations must be considered. Use the list of sources of electronic data outlined above to prod memory.

2. Preserve Relevant Documents

The duty to preserve evidence is vastly more demanding than the duty that applied in paper discovery. The timing, for example, is different. In paper discovery, in general, a party could make whatever mandatory disclosures were required and then wait to search for documents until a document request or subpoena had been served. In part because electronic evidence might routinely be overwritten or erased daily or weekly, the recent cases demand that a party preserve documents before they are requested. In most jurisdictions, the preservation duty now attaches as soon as any legal claims are reasonably foreseeable.

Together, the lawyer and client have the affirmative duty to communicate the need to preserve relevant documents to all persons over whom they have control. Imagine all the people who might have created or received relevant data in some form. In addition to the creators and addressees of any communication, consider secretaries, assistants, information technology personnel, managers, clerks, officers, directors, friends, relatives, accountants and investors. Remember that, because of the recent dynamics of the workforce, "'former employees' now populate this planet."[19] Consider whether anyone who formerly had any of the above relationships to the transaction might still have pertinent electronic data.

Create a written, detailed document preservation plan from the beginning that specifies who will do what by when to assure that appropriate documents are not destroyed.

3. Take Responsibility

The lawyer's duty in comparison to the client's is more demanding than before. Now a lawyer must take affirmative action to make sure that the client understands in detail what documents might become relevant in an action, and where such documents might be located (most people within a client organization will be genuinely unaware of all the locations where potentially relevant information might reside).

4. Consider a Consultant

Consider whether an outside consultant would be useful to assist

in the production of electronic information. A consultant might be useful in locating and mining the myriad sources of electronic data, in providing evidence as to the completeness of the production, and in protecting privileged information.

5. Evaluate Retention Duties

Determine whether your adversary has violated any state[20] or federal statutory or regulatory duty to maintain or preserve documents. For example, certain employment records must be retained for two years after a decision not to hire a candidate, and publicly-traded companies have broad new document retention duties under the Sarbanes-Oxley Act of 2002.[21] If your adversary claims not to have documents that by statute or regulation it is required to have, this fact can compound the probability of sanctions for not having the documents.[22]

1. *See, e.g.,* Lise Pearlman, *Ten Ways to Risk Ethical Nightmares With Your Computer,* GP Solo, Vol. 20, No. 4 (June 2003) (discussing ethical issues relating to a lawyer's use of computers and electronic communication media, such as encryption and privilege, electronic advertising and billing for electronic services).

2. In the world outside litigation, there is obviously semantic tension as to whether "document" is limited to paper or includes electronic data. Some legal commentators have suggested that in litigation usage the term "document" should be restricted to paper. *E.g.,* Lisa M. Arent, *EDiscovery: Preserving, Requesting and Producing Electronic Information,* 19 Santa Clara Computer & High Technology L.J. 131 n.5 (2002). To be sure, since the main medium of preserving teachings has been paper since sometime after 105 AD when paper apparently was invented in China, "document" has mostly signified paper.

   But the etymology of "document" shows that the term can and should encompass electrons. The root of "document" does not imply paper, but simply "to teach." Since electronic media are now the main repositories of knowledge or teachings, "document" has begun to shed its paper bonds and has embraced electronic media. It will likely continue to do so.

   Rule 34 of both the Federal and Utah Rules of Civil Procedure defines "document" broadly to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." The cases uniformly interpret this to mean that discoverable "documents" include all electronic data without limitation. This article similarly uses "document" in the broadest sense, including all electronic data of any form.

3. No. 95 Civ 8026, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 15, 2002).

4. The 1970 amendments to Rule 34 of the Federal Rules of Civil Procedure expanded the definition of "documents" to include "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Utah has also adopted this definition in Rule 34 of the Utah Rules of Civil Procedure.

5. *E.g., Adams v. Dan River Mills, Inc.,* 54 F.R.D. 220 (W.D. Va. 1972) (holding that Rule 34 allowed the discovery not only of printouts in a usable form, but also of "computer input information such as computer cards or tapes").

6. 108 F.R.D. 459 (D. Utah 1985).

7. Judge Greene's statement that as of 1985 most court battles involved electronic discovery disputes is not supported by the reported cases or commentaries. Until the late 1990s, electronic discovery issues in the reported cases were scarce.

8. *Zubulake v. UBS Warburg, L.L.C.,* No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003).

9. "Metadata" is information created by the computer or communication medium that is in addition to the data that the creator of the data intended to create.

10. It is true that neither the written ethical rules nor the rules of civil procedure have yet been amended to reflect the pervasive new duties attendant to electronic discovery. But the duties themselves, as fashioned by courts faced with a new reality, have changed significantly from the duties attached to paper discovery.

11. *Jones v. Goord,* No. 95 Civ. 8026, 2002 U.S. Dist. LEXIS 8707, at *1 (S.D.N.Y. May 16, 2002).

12. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002).

13. Grace V. Bacon, *Fundamentals of Electronic Discovery,* 47 Boston Bar Journal 18 (2003).

14. Ron Miller, *Email: The Other Content Management,* Econtent, Jan. 2003, (http://www.econtentmag.com/Articles/ArticleReader.aspx?ArticleID=882 (viewed July 15, 2003)).

15. Bacon, *supra* note 13 at 18.

16. www.sims.berkeley.edu/research/projects/how-much-info/index.html.

17. A detailed analysis of the new duties and opportunities is beyond the scope of this article. The following is a list of the leading recent cases that have created or recognized these astonishing new duties: *Park v. City of Chicago,* 297 F.3d 606 (7th Cir. 2002); *Byrnie v. Town of Cromwell, Bd. of Educ.,* 243 F.3d 93 (2d Cir. 2001); *Zubulake v. UBS Warburg L.L.C.,* No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y. May 13, 2003); *Metropolitan Opera Assn v. Local 100, Hotel Employees and Restaurant Employees International Union,* 212 F.R.D. 178 (S.D.N.Y. 2003); *Jones v. Goord,* No. 95 Civ. 8026, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 15, 2002); *Rowe Entertainment, Inc. v. William Morris Agency, Inc.,* 2002 U.S. Dist. LEXIS 8308 (S.D.N.Y. May 8, 2002); *In re Triton Energy Ltd. Sec. Litig.,* No. 5:98CV256, 2002 U.S. Dist. LEXIS 4326 (E.D. Tex. March 7, 2002); *Trigon Ins. Co. v. United States,* 204 F.R.D. 277 (E.D. Va. 2001); *McPeek v. Ashcroft,* 202 F.R.D. 31 (D.D.C. 2001); *Simon Property Group L.P. v. mySimon, Inc.,* 194 F.R.D. 639 (S.D. Ind. 2000); *Linnen v. A.H. Robins Co.,* No. 97-2307, 1999 Mass. Super. LEXIS 240 (Mass. Super. June 15, 1999).

18. Statement used with permission.

19. Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles,* 81 Neb. L. Rev. 868 (2003).

20. *E.g., Park,* 297 F.3d at 616 (in a state action, the Illinois Record Act might create a basis for spoliation of employee records; in this federal action, EEOC regulations applied)

21. Pub. L. No. 107-204, 116 Stat. 745.

22. *E.g., Byrnie,* 243 F.3d at 108-09 (intent in destroying documents is irrelevant to a claim of spoliation if the documents were required by statute or regulation to be kept). *See generally Steffen Nolte, The Spoliation Tort: An Approach to Underlying Principles,* 26 St. Mary's L. J. 351, 368-69 (1995) (collecting cases relying upon breach of statutory or regulatory document retention duty to satisfy some element of sanctions or tort liability for spoliation).

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Obtaining Medical Records After HIPAA: New Federal Privacy Protections Change the Rules for Attorneys

by Robert R. Harrison

I. INTRODUCTION

On April 14, 2003, the first phase of new federal regulations governing the privacy of medical records became law. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[1] creates a complex array of rules governing the secure storage and exchange of information in connection with electronic data transactions ("the Transactions Rule")[2] and a distinct set of requirements regarding the confidentiality and privacy of individually identifiable health information ("the Privacy Rule").

This article focuses on the requirements and implications of the Privacy Rule for attorneys needing to obtain protected health information from covered entities for litigation or administrative proceedings.

II. BASIC PRIVACY RULE CONCEPTS

A. Protected Health Information

Protected health information is broadly defined as any individually identifiable health information. That includes any information which derives from or relates to the individual's past, present or future physical or mental health or condition, the provision of health care to the individual, or the past, present or future payment for the provision of health care to the individual, and which either identifies the individual or could reasonably be used to identify the individual.[3] In other words, it includes virtually any information about an individual's health care or medical condition and any directly associated costs.

B. Covered Entities

The Privacy Rule identifies as "covered entities" three categories of enterprise: health plans, health care clearinghouses, and virtually all health care providers who transmit health information electronically. Although there are some possible exceptions under limited circumstances, as a general rule attorneys should assume that any health care provider is a covered entity.

C. Business Associates

A covered entity is required to enter into a contractual relationship with "business associates." A business associate is any person or entity who performs functions on behalf of the covered entity if those functions involve the use or disclosure of individually identifiable health information. Attorneys engaged by covered entities are business associates of those entities and must comply with any requirements of the mandatory Business Associate Agreement which governs that relationship. Other attorneys requesting records from covered entities are not business associates.

D. General Rules for Disclosure

Covered entities may use and disclose protected health information without consent[4] and without authorization under a wide range of circumstances. Most of the uses and disclosures for which authorization are not required are identified in three primary categories defined as Treatment, Payment, and Health Care Operations.[5] Although certain legal services fall within the definition of Health Care Operations, the process of disclosing medical records to attorneys for use in litigation does not.

The Privacy Rule provides separate requirements governing the disclosure of protected health information to attorneys in connection with judicial or administrative proceedings.

III. DISCLOSURES IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

There are three alternatives in obtaining protected health information from a covered entity for use in judicial or administrative proceedings. Records may be disclosed (1) pursuant to a court order; (2) pursuant to a subpoena with required additional documentation; or (3) pursuant to an authorization meeting specific new requirements.

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A. Obtaining Protected Records With a Court Order

The Privacy Rule does not affect the release of records in response to a court order. There remains the potential for delay in obtaining a signed order, but the Privacy Rule imposes no additional restrictions. However, this option is not available in prelitigation proceedings in medical malpractice actions as there is no court of competent jurisdiction to issue the order.

B. Obtaining Protected Records With a Subpoena

Medical records and other protected health information no longer may be obtained with a subpoena alone. The Privacy Rule preempts less-restrictive state laws, including the Rules of Civil Procedure, and any state laws contrary to its provisions. For purposes of preemption analysis, "contrary" means that the covered entity could not comply with both state and federal requirements, or that the state requirement (though not explicitly inconsistent with the federal requirement) may be inconsistent with accomplishing the purposes and objectives of the provisions of HIPAA. Attorneys utilizing a subpoena must provide additional privacy assurances.

There are two approaches to satisfying the "subpoena-plus" requirements of the Privacy Rule. First, counsel may serve a subpoena with satisfactory assurances of notice to the subject of the records. The second approach is to serve a subpoena with satisfactory assurances of reasonable efforts to secure a qualifying protective order.

Subpoena with satisfactory assurances of notice

The Privacy Rule provides that medical records may be disclosed in response to a subpoena, without a court order or protective order, if the subpoena includes satisfactory assurances that reasonable efforts have been made to notify the patient (or appropriate family member of a decedent or unemancipated minor) of the request. The definition of satisfactory assurances, however, includes more than just notice.

For this notice provision, there is a four-part test for satisfactory assurances: (1) written notice to the individual (2) containing sufficient information to allow the individual to raise an objection to the subpoena; (3) expiration of "the time for the individual to raise objections," and (4) a statement that either (a) no objections were filed, or (b) objections filed have been resolved in favor of the disclosure requested.

Differing interpretations already have caused a variety of frustrations. For example, although the Rules of Professional Conduct prohibit an attorney from contacting a represented party, some providers have been advised to release records only if they receive

satisfactory assurances that the attorney requesting the records gave notice directly to the patient (almost always the plaintiff) at the patient's last known address. As another example, although the Privacy Rule contains no such requirement, some providers have been advised that a letter from an attorney containing the assurances is not enough, rather the requesting attorney must submit an affidavit.

Other providers have stated that they will not recognize or accept the satisfactory assurances unless those assurances are included in the subpoena itself rather than in accompanying separate documentation as described in the Privacy Rule.[6] Yet another issue arises from the lack of precise definition of the time allowed for an objection to be raised, though there appears to be an emerging consensus that ten days is appropriate.

Despite the relatively clear language of the subpoena provisions, it is inevitable that physicians and hospitals have differing advice on what they can or cannot accept as satisfactory assurances. Counsel should be prepared for a range of entity-specific requirements which go beyond the requirements of the Privacy Rule, as well as differing and perhaps conflicting legal advice regarding the required assurances. Some relief from this patchwork of inconsistency will soon be available. Additional guidance is anticipated from the Office of Civil Rights, and efforts are underway through the Utah Hospital Association to provide a website resource summarizing the requirements of individual hospitals.[7] Judicial development of the contours of these provisions will be longer in coming.

Subpoena with documentation that a protective order has been requested

Requesting a protective order is an option which seems deceptively easy in that it requires only satisfactory assurances from the party seeking the information that reasonable efforts have been made to secure a qualified protective order.[8] However, there is ambiguity in what constitutes reasonable efforts. It is not clear that merely attaching a motion for protective order to the subpoena satisfies that test.

Moreover, it is unclear whether a covered entity must or even may disclose the records if advised of the filing of a memorandum in opposition to the motion for protective order, nor is there an explicit requirement for informing the covered entity that an opposition memorandum has been filed. In theory, a stipulated protective order could be agreed to, perhaps as part of the attorney planning meeting required by Rule 26 of the Utah Rules of Civil Procedure, but that approach is not available in the medical malpractice prelitigation process.

"Minimally Necessary Disclosure" Issues With Subpoenas

The Privacy Rule requires most disclosures to be limited to those which are minimally necessary for the purpose of the disclosure. However, a specific exception exists for records produced or disclosed pursuant to subpoena.[9] Covered entities need not make a minimal necessary determination when responding to a HIPAA-compliant subpoena request. A related misconception is that subpoenas must specify the dates of treatment for which records are requested and may not request the entire medical record. The Office of Civil Rights has clearly stated that a request for the entire medical record is valid.

C. Obtaining Protected Records With an Authorization

Authorizations from the subject of the records are another option. This approach will require, in each case, a tailored document that reflects compliance with ten required elements. There are several potential problems with using authorizations. First, they are available subject to the cooperation of the patient, and counsel may not always have that. Second, they may be revoked at any time. Third, and perhaps most significant, they are subject to rejection by the covered entity with no recourse other than revision or further legal process. The latter issue is already arising where, as with subpoena requests, covered entities impose institution-specific requirements beyond the Privacy Rule threshold.

Despite these limitations, there are situations in which an authorization may be the preferred approach. For example, counsel for a plaintiff may find it easiest to use an authorization to obtain that client's health care records, and in some cases defense counsel may consider authorizations the easiest approach. An authorization may be the preferred choice where records are sought from areas beyond the subpoena power of the court, and may be required under litigation agreements in multi-district litigation. Authorizations also may be necessary for matters submitted to contractually-mandated arbitration.

The following minimum core requirements must be met in each authorization:

- The authorization must be written in plain language, implicitly meaning that it must be understandable at the eighth grade reading level.
- The authorization must include a specific and meaningful description of the protected information to be disclosed.
- The authorization must identify the entity or class of entities authorized to make the disclosure. The Office of Civil of Rights has confirmed that where records are sought from multiple

sources, each individual entity need not be identified as long as the categories of entities are adequately identified.

- The authorization must have an expiration date or event. The Privacy Rule does not specify a maximum time limit. Individual covered entities may have internal limitations on the expiration of an authorization, and state law may impose specific time limits. Counsel relying upon authorizations in other states should consider those states' requirements when preparing authorizations.
- The authorization must indicate the purpose or use of the disclosure.
- The authorization must state the individual's right to revoke the authorization at any time.
- The authorization must state the process by which the authorization may be revoked.
- The authorization must state any exceptions to the right to revoke. The exceptions are (a) to the extent the receiving party has relied upon the authorization in using or further disclosing the records, and (b) in relation to insurance agreements which include a right in the insurer to object to the revocation.
- The authorization must state that information disclosed may be subject to redisclosure and may no longer be protected by the Privacy Rule.
- The authorization must have a signature of the individual or legally authorized personal representative and the date signed. The Privacy Rule restricts the definition of personal representative to persons legally authorized to make health care decisions. The Privacy Rule does not require a notarized signature, but does not preclude adoption of that requirement by covered entities.
- An additional requirement not applicable in the subpoena context, but required elsewhere, is that treatment may not be conditioned on the signing of an authorization.

There are special authorization provisions for psychotherapy notes. However, the rule that a separate authorization is required for psychotherapy notes is misleading. The rule does not apply to psychotherapy or mental health notes maintained in the patient's medical record, it only applies to notes created for the use of the physician or therapist and maintained separately from the medical record. Thus, most psychotherapy or mental health notes maintained in hospital and physician office records may be released without a separate authorization. Covered entities may not legitimately argue that an authorization for "the complete medical record" is inadequate to obtain psychotherapy notes maintained in that medical record, or that HIPAA requires an authorization rather than a subpoena for such records.

A prohibition against compound authorizations applies in the context of psychotherapy notes. Multiple authorizations for protected health information other than psychotherapy notes may be combined as long as none of the authorizations conditions treatment on signing the authorization, but authorizations for disclosure of psychotherapy notes may be combined only with other authorizations for disclosure of psychotherapy notes.

IV. SPECIAL CIRCUMSTANCES

A. The Medical Malpractice Prelitigation Process

The Privacy Rule does not address the special situation in states such as Utah in which an administrative prelitigation process is mandated by state law as a prerequisite to filing a medical malpractice action. The Utah Health Care Malpractice Act requires a potential medical malpractice plaintiff to file, with the Division of Occupational and Professional Licensing of the Department of Commerce ("DOPL"), a Notice of Intent to Commence an Action and a Request for Prelitigation Panel Hearing.[11] The hearing process must be concluded before a complaint may be filed.[10]

Because there is no court with jurisdiction prior to the filing of a complaint, medical records for these administrative prelitigation hearings are obtained through subpoenas issued by DOPL upon an affidavit of the requesting attorney that the records requested are necessary for the process. Upon completion of the review panel's deliberations, a non-binding opinion is issued on the merits of the claims and the matter is closed. The entire process is conducted under strict confidentiality, and no part of the record may be used in a subsequent lawsuit.

The Privacy Rule imposes no obligation on DOPL, and subpoenas may be issued by DOPL in the same manner, and upon the same affidavits, as in the past. As in litigation, the new privacy provisions are required between the requesting party and the covered entity from whom the records are requested. The only difference is that the subpoena is signed by DOPL rather than the requesting attorney.

Authorizations may be used to obtain the records in preparation for the prelitigation hearing, but care must be taken to draft them broadly enough to cover both the prelitigation process and the subsequent lawsuit. Otherwise, the records will need to be either returned or destroyed and then obtained again if a lawsuit is filed. As in litigation, another possible approach is the use of a protective order. However, the only potential source of a protective order is DOPL, and even assuming the authority of DOPL to enter a protective order in this limited circumstance, that authority ends at the conclusion of the prelitigation process and there would be no provision for enforcing the protective order once the administrative process is concluded. Further, a qualified protected order requires return or destruction of the records at the conclusion of the use for which the disclosure is initiated.

B. Independent Medical Examinations

Although there is no specific provision for medical examinations performed for the purpose of establishing the medical or health condition of a claimant in a civil or administrative action, there is no exception stated or implied. Physicians performing independent medical examinations most likely will require the patient to acknowledge receipt of the physician's notice of privacy practices and will require a compliant authorization or court order prior to performing the requested examination and releasing the results.

V. ENFORCEMENT AND SANCTIONS

Health care providers are experiencing a high level of uncertainty and anxiety regarding enforcement of HIPAA. There are civil money penalties of $100 per occurrence, not to exceed $25,000 per year. Criminal fines and imprisonment range from a maximum of $50,000 and 12 months for a simple knowing violation up to $250,000 and ten years for an intentional disclosure for financial gain or for malicious harm.

The Department of Health and Human Services and the Office of Civil Rights have consistently indicated that the initial focus of enforcement will be on guidance and education rather than on sanctions.[12] Even so, ambiguity in portions of the statute, the lack of regulatory[13] and judicial enforcement guidance, and the significant criminal penalties and civil money fines conjoin to leave many covered entities taking defensive positions of strict and narrow interpretation, causing frustration for counsel attempting to secure records.

VI. CONCLUSION

The Privacy Rule establishes a federal threshold of protection for the privacy of protected health information. It does not limit more restrictive state or federal law, nor does it mandate replacement of existing institutional practices that do not conflict with its provisions.

As providers become more comfortable with their understanding of the Privacy Rule, and especially as the Office of Civil Rights, the new CMS Office of HIPAA Standards, and the courts create a body of guidance interpreting those requirements, the acquisition of records will become a more routine process. Until that time, litigation counsel will need to exercise considerable flexibility and cooperation in order to obtain the documents essential to representation of their client's interests.

1. Pub. L. 104-191.
2. An additional subset of technical requirements, the Security Rules, are not effective until 2005.
3. 45 C.F.R. § 160.103.
4. Although consent was required in the Proposed Rule, DHHS responded to hundreds of concerns that a consent requirement would impair the very system that HIPAA intended to facilitate. The consent requirement was dropped from the Final Rule and consent has no relevance to HIPAA other than in the context of an authorization.
5. 45 C.F.R. § 164.501.
6. 45 C.F.R. § 164.512(e)(1)(iii).
7. www.uha-utah.org
8. 45 C.F.R. § 164.512(e)(1)(ii)(B).
9. 45 C.F.R. 164.502(b)(2)(v).
10. Utah Code Ann. §§ 78-14-8, 78-14-12 (1986).
11. Waiver is permitted if all parties agree.
12. 45 C.F.R. 160.304 (2001).
13. In the Interim Final Enforcement Rule, the Office of Civil Rights defers defining *violation* until the conclusion of the notice-and-comment rulemaking process.

The Utah HIPAA Preemption Analysis is available at www.attygen.state.ut.us, under Consumer Assistance.

The Law Firm of

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USERRA: Navigating Uncharted Legal Territory

by Jim Barber

Our nation lately has experienced the largest military call-up in over a decade. As military deployments end and service members return home, they and employers alike are confronted with questions that accompany these returns. Understanding the Uniformed Services Employment and Reemployment Rights Act (USERRA), Chapter 43 of Title 38, U. S. Code, as passed by Congress in October 1994 answers these questions and eases the reemployment process.

USERRA prohibits employment discrimination based on military service, articulates the rights, benefits and protections afforded to service members while on military leave and upon return from military leave, and governs the reemployment of service members upon completion of military service. USERRA also provides its own enforcement procedures to ensure compliance.

Utah State Law Provides More Extensive Rights

Familiarity with USERRA is essential, but it is also necessary to be aware of the military leave laws of each state in which an employer operates. In Utah such laws are found in Title 39 of the Utah Code. Although not required under USERRRA, State of Utah employees are given fifteen (15) days paid military leave per year, in addition to annual vacation leave and a violation of Utah's reemployment rights could also be punishable as a misdemeanor. USERRA does not restrict any state law more beneficial than rights provided to the returning service member under federal law. However, USERRA does supersede any state law, which attempts to reduce, restrict or eliminate rights or benefits provided under USERRA.

USERRA Navigating Uncharted Legal Territory

Since the Veteran's Reemployment Rights Act (VRR) was replaced by USERRA few courts have decided cases using USERRA. USERRA case decisions commonly rely on VRR rulings and legislative intent. There are, however, some cases that help navigate USERRA's uncharted legal territory. *Lapine v. Wellesley,* 304 F.3d 90 (1st Cir. 2002) offers an analysis of legislative intent and *Rogers v. City of San Antonio, Texas,* 211 F.Supp.2d 829 (W.D. Tex. 2002) reviews VRR case history and current application of USERRA.

Using an abundance of caution, the court in *Rogers,* supra on March 24, 2003 issued an Order Granting Motion for Certification Under 28 U.S.C. § 1292(b), 2003 WL 1571550 (W.D. Tex.) allowing the parties to appeal two specific items to the Fifth Circuit Court of Appeals, before proceeding further. On May 2, 2003, the Petition for Permission to Appeal was filed. Said Petition was *granted* by the 5th Circuit court of appeals on May 27, 2003, all briefs have recently been filed and this matter is currently under consideration by the court. As of the printing of this paper application of USERRA by the courts seems to remain unclear.

Employee – Service Members

The terms of USERRA are broad, applying to anyone in the uniformed services whether voluntary or involuntary who was employed in any non-temporary position even for only one day prior to being called up.

"Service" in the uniformed services is defined as the performance of duty on a voluntary or involuntary basis in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive duty for training, full-time National Guard duty, absence from work for an examination to determine an individual's fitness for any of the named types of duty, funeral honors duty performed by National Guard or reserve members, duty performed by intermittent disaster response personnel for the Public Health Service, and approved training to prepare for such service.

"Uniformed services" consist of the United States Army, Navy, Marine Corps, Air Force, Coast Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, Coast Guard Reserve, Army National Guard, Air National Guard, commissioned corps of the Public Health Service and any other category of persons designated by the President in time of war or national emergency. Part time, full time and probationary employees are protected under USERRA.

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Employers – Public & Private

USERRA applies to all public and private employers, and their successors, regardless of size or location in the world. USERRA does not require the employer to be involved in interstate commerce or to employ a minimum number of employees to apply. The employer must grant an employee leave to fulfill their military obligations whether the employee's service is voluntary or involuntary. Employers are prohibited from interfering with the frequency or length of military leave taken by its employees.

Invoking Protected Rights Procedures by Service Member

A service member is entitled to rights furnished by USERRA provided that the service member meets the criteria outlined in Table 1.

Advance Notice to the Employer

The service member or an appropriate military officer must provide advance written or verbal notice to the employer of all military duty, unless giving notice is impossible, unreasonable, or precluded by military necessity. The law requires "advance" notice, but does not specifically address how far in advance notice must be given.

Maximum Length of Military Leave

The cumulative leave of absence from employment for one employer that causes a service member to be absent from a position of employment may not exceed five years. Normally leaves for service obligations will be cumulatively counted in the computation of the five-year period, however there are eight categories of exceptions that permit the five-year period to be extended. Those categories are listed in Table 2.

TABLE #1

A service member is entitled to rights furnished by USERRA provided that the service member meets the following criteria:

1	The service member held a civilian job with the employer; and
2	The service member provided advance notice to the employer that the service member was leaving the job for service in the uniformed services; and
3	The service member's period of service has not exceeded a cumulative service period in excess of five years, unless extended by operational directive; and
4	The service member was released from service under honorable conditions; and
5	The service member timely reported back to work or submitted a timely application for reemployment.

TABLE #2

There are eight categories of exceptions that permit the five-year period to be extended. Those categories are:

1	Service required beyond five years to complete an initial period of obligated service; or
2	Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit; or
3	Required training for reservists and National Guard members; or
4	Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations; or
5	Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress; or
6	Active duty (other than training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent; or
7	Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect; and
8	Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States. It is important to note that the two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation under category three above.

Release from Military Service

Notice of Return to Employer & Submitting a Reemployment Application. A service member returning from service must timely notify the employer of their intent to return to work. *A service member's failure to submit an application for reemployment within the time periods set forth by USERRA, will subject the service member to the employer's established policy governing unexcused absences, which may be deemed by the employer, without discrimination, as a voluntary termination of employment by the service member with the employer.* Timely application for reemployment is based upon the service members' length of military service (See Table 3).

Notably there is no specific form for the application, however the service member should notify their employer in writing that the service member is ready to return to work.

TABLE #3	
Length of Military Service	**Time Period for Reemployment Application**
1 to 30 days	No later than the next day following the expiration of 8 hours since the start of a regularly scheduled working period and time required for safe transportation from place of service to the service member's residence.
31 to 180 days	Within 14 days of the service member's release from service. "This does not mean that the service member must wait 14 days, if the service member wishes to return to work as soon as possible, the service member should submit their application for reemployment immediately."
181+ days	Within 90 days of the service member's release from service. "This does not mean that the service member must wait 90 days, if the service member wishes to return to work as soon as possible, the service member should submit their application for employment immediately."

Deadlines for application for reemployment may be extended up to two years for a service member who is hospitalized or convalescing from an injury that occurred or was aggravated during military service. A deadline will be extended by the length necessary to accommodate the injured service member if the time of the service member's recovery will take longer than two years, if due to circumstances beyond the service member's control.

Waiver of Reemployment Rights

A service member may not waive their USERRA rights to reemployment before or during their military service. The USERRA right to reemployment does not mature until the service member has returned from the period of service. Thus, any service member's USERRA rights that have not matured cannot be waived. The intent of USERRA is to keep the service member's options open until the service member returns to civilian life.

Reemploying Returning Service Member's Positions

A returning service member with less than 91 days military service is entitled to return to the position in which the service member was employed or would have been employed if their employment had not been interrupted.

A returning service member whose military service was more than 90 days is entitled to return to the position in which the service member was employed or would have been employed, or a position of like seniority, status, and pay.

Seniority Rights

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority they would have received with reasonable certainty had the service member remained continuously employed. A right or benefit is considered seniority based if it accrues or is determined by length of service.

Rights Not Based on Seniority

Service members called up must be treated as if they were on a leave of absence. While absent the service member must be allowed to participate in any rights and benefits not based on seniority that are available to employees on non-military leaves of absence, whether such leave is paid or unpaid. If the employer has several types of leaves, the service member is entitled to the *most favorable treatment* among all of the employers' comparable leaves.

Training & Retraining

USERRA requires that employers make reasonable efforts to allow returning service members to refresh and upgrade their skills to qualify for reemployment in the position they would have held if the service member had not been called to military service.

Reemployment Not Required

USERRA provides that reemployment is not required under certain circumstances. Those exceptions are stated in Table 4.

TABLE #4	
Reemployment is not required under the following limited exceptions:	
1	When *changed business circumstances* make it impossible or unreasonable for the employer to comply with the law; or
2	When the service member was *not honorably discharged* from uniformed service; or
3	When reemployment of a disabled service member would impose *undue hardship* on the employer; or
4	When leaving for uniformed service the service member was a *temporary worker* for a brief, nonrecurrent period of time with no expectation that employment would continue indefinitely or for a significant time period.

These limited exceptions will be narrowly construed in favor of the returning service member and the burden of proof concerning an exception will be on the employer.

Termination of Service Member after Reemployment

Any service member reemployed may only be terminated *for cause* during a specific period of time after reemployment. This period of protection is based upon the length of military service (see Table 5).

TABLE #5

Length of Military Service	Termination Protection Time Period
1 to 30 days	0 days
31 to 180 days	180 days
181+ days	1 year – 365 days

"At Will Employment"

Returning service members cannot be terminated, except *for cause,* for a specified period of time, even if they were at-will employees before they were called up for military service.

USERRA & Collective Bargaining Agreements

USERRA supersedes any collective bargaining agreement that decreases, restricts or eradicates any right or benefit provided under USERRA. See: *Rogers,* supra.

Disabilities Incurred or Aggravated while in Military Service

USERRA provides a three (3)-part reemployment procedure for service members with disabilities incurred or aggravated while in military service (See Table 6).

Protection from Discrimination and Retaliation

USERRA prohibits an employer from discriminating in employment or taking any adverse employment action against a service member because of their past, present or future military obligations. This ban is broad, extending to most areas of employment including hiring, promotion, reemployment, termination and benefits. The law protects from discrimination past members, current members and persons who apply to be a member of any of the branches of the uniformed services. Once a *prima facie* case is established the burden of proof is clearly on the employer.

Employers are prohibited from retaliating against anyone who files a complaint under the law, who testifies, assists or otherwise participates in an investigation or proceeding under the law, or who exercises any right provided under the law, whether or not the person has performed military service.

Benefits

Healthcare Benefits

A governmental healthcare program commonly known as Champus or TRICARE, automatically covers service members called up for a period of service of at least 31 days. However, many service members may wish to continue their employer provided health-care benefits, especially for their dependents.

USERRA provides that a service member on military leave has the right to elect continuation of health benefits coverage under COBRA-like terms if the service member was a participant in the employers health benefits plan immediately before the service members call up. This requirement, unlike COBRA, applies to all health benefits plans, not just group plans. Unlike COBRA, USERRA applies to all employers regardless of size.

Health benefits coverage under USERRA continues for the lesser of 18 months from when military leave commences or a period ending the day after the service member fails to return to work as provided by USERRA after having been discharged from military

TABLE #6

USERRA provides a three-part reemployment procedure for service members with disabilities incurred or aggravated while in military service. The reemployment procedures are:

1	The employer must make reasonable efforts to accommodate a service member's disability so that the service member can perform the position that the service member would have held if the service member had remained continuously employed.
2	If, despite reasonable accommodation efforts, the person is not qualified for the position in (1) due to the service member's disability, the service member must be employed in a position of equivalent seniority, status and pay, so long as the service member is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.
3	If the service member does not become qualified for the position in either (1) or (2), the service member must be employed in that position that, consistent with the circumstances of that service member's case, most nearly approximates the position in (2) in terms of seniority, status and pay.

service. When a service member's military leave is less than 31 days, the service member cannot be required to pay more than the service member's usual share of the health benefits premium. If the employer's policy permits employees to pay only their share of the health benefits premium while on other types of leave, then the service member on military leave is entitled to the same benefit. However in the absence of such a policy, after 31 days, the service member wishing to continue health benefits coverage while on military leave can be required to pay no more than 102 percent of the premium cost to maintain the coverage. If a service member chooses not to maintain health benefits coverage while on military leave, the service member may seek reinstatement of coverage on return to work with no plan waiting periods or exclusions.

USERRA & FMLA

Employers must count the months and hours that service members would have worked if they had not been serving military service towards the service member's FMLA eligibility. Simply put the months and hours the service member would have worked, *but for* the service member's military service, must be combined with the months employed and the hours actually worked to determine if the employee has completed the 12 months and 1,250 hours of work required for eligibility for leave under the FMLA.

Pension & Retirement Benefit Plans

USERRA provides that a "pension plan" must comply with the requirements of reemployment law and would be any plan providing retirement income to employees to termination of employment or later. Pension plans tied to seniority are given separate, detailed treatment under USERRA (See Table 7).

Repayment of service member's contributions can be made over three times the period of military service but no longer than five years.

Defined benefit plans, defined contribution plans and profit sharing plans that are retirement plans are covered by USERRA.

Multi-employer Plans

In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if the employer is no longer functional, to the overall plan. Within 30 days after reemployment, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment.

Vacation

Under USERRA, service members called up are entitled to all non-seniority based benefits that are available to other employees who take non-military leaves of absence. Service members continue to accrue vacation; sick time and remain eligible for such benefits as company bonuses and life insurance while on military leave, *only if employees on non-military leave are entitled.* Employers must allow service members at their request to use any vacation the service member had accrued before the beginning of the service members military leave instead of unpaid leave. However, employers may not force service members to use vacation time while performing military service. Vacation was recently discussed in *Rogers,* supra.

Enforcement

A great place to start is with the Ombudsmen Services Program, which provides information, counseling and **informal mediation** of issues relating to compliance with USERRA. You may contact the program by visiting their website at www.esgr.org/employers/thelaw.asp.

On a more **formal level,** the Department of Labor is the enforcement authority for USERRA. Veterans' Employment and Training Service (VETS) of the Department of Labor assist service members with issues involving USERRA. VETS maintain a USERRA adviser on its web site, www.dol.gov/vets, to answer the most often asked questions. The law gives VETS right of access to examine and duplicate employer documents and interview persons with information it considers relevant to an investigation. The law authorizes

TABLE #7

Pension plans that are tied to seniority are given separate, detailed treatment under USERRA. For these type plans USERRA provides:

1	A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan.
2	Military service must be considered service with an employer for vesting and benefit accrual purposes.
3	The employer is liable for funding any resulting obligation.
4	The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

VETS to subpoena attendance and testimony of witnesses and production of documents relating to any matter under investigation.

If a complaint is not successfully resolved by VETS the non-federal employee complainant may request their complaint be submitted to the U.S. Attorney General for possible court action. When the U.S. Attorney General is satisfied that a complaint is meritorious, the U.S. Attorney General may file a court action on the complainant's behalf. Complaints of federal employees are submitted to the Office of Special Counsel, www.osc.gov/userra.htm. If the Special Counsel believes there is merit to the complaint, the OSC will file before the Merit Systems Protect Board and appear on behalf of the complainant.

Service members continue to have the option to ***privately file court actions.*** They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the U.S. Attorney General, or have been refused representation by the U.S. Attorney General. Damages can include double award of back pay or lost benefits in cases where violations are found to be willful. The law, at the court's discretion, allows for awarding attorney fees, expert witness fees and other litigation expenses to successful plaintiffs who retain private counsel. Further the law prohibits charging court fees or costs against anyone who brings suit. Only persons claiming rights under the law may bring lawsuits.

Jury Trial

The court in *Spratt v. Guardian Automotive Products, Inc.,* 997 F. Supp 1138, (N.D. Indiana 1998), held that USERRA, which now provides for liquidated damages, also provides the right to a jury trial under the Seventh Amendment.

Resources:

Several good resources exist. For example, the ***best continually updated*** USERRA information website that I have found is www.roa.org. Once on the site, click on "Legislative Affairs" then on "Law Review Archive" at the bottom of the drop-down menu.

Other sources include: 1) Military Reservists Economic Injury Disaster Loan www.sba.gov/reservists/disloan.html; 2) Soldier's and Sailor's Civil Relief Act http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/Legal%20Assistance%20Home%20Page.nsf/626e6035eadbb4cd85256499006b15a6/0806a532899687ce852568a800531506!OpenDocument; and 3) www.ngaus.org/ngmagazine/cap599.asp.

Obtaining and Maintaining State Trademarks in Utah

by Kevin B. Laurence & Matthew D. Thayne

It is widely known that a federal trademark registration is preferable to a state trademark registration or reliance on common-law trademark rights. However, in some circumstances a state trademark registration has value. This article provides an analysis of the reasons for registering trademarks with a state as compared with federal registration and reliance on common-law trademark rights. The procedures for obtaining and maintaining registrations in Utah are also presented in this article. There is also an overview of infringement remedies available to owners of marks registered in Utah.

Limited Circumstances Meriting State Registration Instead of, or Concurrently with, Federal Registration

Federal registration of a mark is preferable to state registration because of the greater rights provided to the owner. However, a federal registration cannot always be obtained. When it appears that a mark may be difficult to federally register and a significant investment has not been made in the mark, it is typically better to select an alternative mark having a higher likelihood of being federally registered. Nevertheless, selection of an alternative mark having a higher likelihood of being federally registered is not always the most advantageous option. For example, a locally focused business with no prospect for geographic expansion may prefer continuing to use a mark that has gained significance in a local market, without concern for the ability to obtain a federal registration.

Many marks are not eligible for federal registration because of their limited use within one state. A federal registration can be granted only for a mark that has been used in association with goods or services in interstate commerce[1] as there is otherwise no federal power[2] to grant the registration. However, a business need not even necessarily render its services in more than one state to qualify for federal registration.[3] In fact, it has been held that a solely intrastate, single-location restaurant serving an undefined quantity of interstate travelers sufficiently affects interstate commerce to meet the federal registration eligibility requirements.[4] Nevertheless, if a mark is used solely in connection with a local services business not patronized by a significant number of interstate travelers, or if it is used solely in connection with goods sold exclusively within one state and not sold to a significant number of interstate travelers, it probably does not qualify for federal registration.[5]

Before pursuing state registration for a mark that is presently used only in a limited manner in Utah and abandoning the federal route, consideration should be given to the potential use of the mark outside of Utah. While federal registration requires that a mark be used in interstate commerce, it can also be sought before the mark has been used in interstate commerce if the applicant has a "bona fide intention to use the mark in commerce."[6] This route to federal registration begins with the filing of an "intent-to-use" application.[7] The ability to declare the use of a mark months or even years after an intent-to-use application is filed provides businesses with tremendous flexibility. On this basis, an application for federal registration should be filed for any mark that is currently ineligible for federal registration, if use of the mark is

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likely to expand outside of Utah, or if it is at all foreseeable that the product or service will soon be offered and/or advertised via the Internet.

For businesses with a very limited expectation of using a mark outside of Utah, forgoing federal registration in favor of state registration may sometimes be a viable, even preferred, option. In addition to being less rigorous than the federal registration process,[8] a state registration can be obtained much more quickly than a federal registration. Achieving federal registration typically takes one year, and often much longer, while state registration can often be accomplished in a matter of weeks. A state registration is also much cheaper to obtain than a federal registration, due in part to the comparatively nominal filing fee for an application for registration in Utah.[9] More importantly, however, the legal fees for obtaining a state registration are typically much less than those for obtaining a federal registration because the standards are generally not as rigorous and fewer obstacles are typically encountered.

Seeking state registration either in conjunction with, or preliminary to, seeking federal registration is not a strategy that is typically recommended. However, the strategy may be useful to an owner who believes state registration is needed in a key state (where the mark has been used) while federal registration is being sought, especially if federal registration is being sought via an intent-to-use application and the timetable for the expected use is not entirely certain. The strategy may also be useful as a fallback plan for an owner of a mark who has decided to use a mark that may be difficult to federally register on the Principal Register.[10]

For marks that are ineligible for federal registration or that are not considered to merit the expense of seeking federal registration, a state registration may also be useful in preventing others from obtaining a federal registration for an identical or similar mark, as it may put others on notice of the mark. Trademark searches often include searches of state registration databases, and thus others searching to clear a mark for use and to assess the likelihood of obtaining federal registration will know of, or at least are able to know of, the state-registered trademark. Knowledge of a similar or identical mark should deter others from seeking to register such a mark, as an application for federal registration must include a verified statement[11] alleging ownership and entitlement to use the mark.[12]

Advantages of a Registration in Utah over Registrations in Other States and Common-Law Trademark Rights

Just as state registrations can provide a defensive advantage against

those seeking nationwide rights, a state registration provides an effective notice to others seeking to clear a mark for use in Utah or in other states. While a registration in Utah does not preclude those in other states from using an identical or similar mark, it certainly discourages those with an expectation of nationwide expansion from using an identical or similar mark. Of course, a business operating in a region of the United States that is geographically remote from Utah with limited expansion plans may be comfortable with the risk involved in using an identical or similar mark. However, a Utah registration should be particularly helpful in deterring others in close geographic proximity to Utah from using an identical or similar mark because the risk of causing confusion is greater and the limitation on business expansion poses an even greater obstacle than it does for businesses that are geographically remote.

Many of the rights possessed by owners of state registrations would already exist under common law. Under common-law rights, trademark rights extend only to the geographical area of use. Accordingly, under common law, it may not constitute trademark infringement if a mark used only in one region of Utah is the same as or is identical to a mark used in another region of Utah. While some states consider a state registration to be effective throughout the entire state, the law in Utah with regard to this matter is not yet clear. However, at least one federal district court has interpreted a previous Utah trademark statutory scheme as providing statewide protection.[13]

While some states give a state registration greater evidentiary effect by providing that a registration is prima facie evidence of ownership of the mark,[14] Utah's procedural advantage in this regard is rather limited.[15] Nevertheless, an owner of a mark that cannot or chooses not to take advantage of the benefits of federal registration would be well advised to obtain a state registration instead of relying solely on common-law rights. This becomes even more clear after considering the additional benefits available to owners of registered marks during litigation.

Infringement Remedies Available to Owners of Marks Registered in Utah

As mentioned previously, state registration provides less extensive benefits than federal registration. However, Utah does provide for some significant infringement remedies. A Utah trademark registrant whose mark has been or is being infringed may seek an injunction prohibiting the manufacture, use, display, or sale of the offending mark or goods sold in connection therewith.[16] An infringement plaintiff may also seek profits derived from the wrongful use,[17] damages that the plaintiff has suffered because of the wrongful use,[18] and even an order of seizure and destruction of any copies or imitations of the plaintiff's mark.[19] Moreover, if the court finds that the defendant committed the infringement "with knowledge" or "in bad faith," the court has the power to award punitive damages in an amount up to three times the profits and damages of the plaintiff, along with attorney fees.[20]

Infringement of a state mark in Utah generally conforms to the federal infringement guidelines.[21] It occurs when another person or business uses, without the registrant's consent, "a reproduction, counterfeit, copy, or colorable imitation" of the mark "in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which that use is likely to cause confusion, mistake, or to deceive as to the source of origin, nature, or quality of those goods or services."[22] Infringement also occurs when a person or business "reproduces, counterfeits, copies, or colorably imitates any mark and applies the reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in [Utah] of goods or services."[23] However, if the second form of infringement is found – *i.e.,* if the mark was reproduced and *intended* to be used on or in connection with a sale or distribution of goods or services but was not actually used – lost profits and/or damages are not recoverable unless it is proved that the defendant had the specific intent to deceive or cause confusion or mistake.[24]

State Registration Procedure in Utah

Filing for a state trademark registration in Utah is relatively simple and inexpensive, particularly when compared with federal registration. Under the Registration and Protection of Trademarks and Service Marks Act,[25] which became effective on May 6, 2002, to obtain a Utah state trademark registration, an application must be filed with the Division of Corporations and Commercial Code (the "Division"), a division of the Utah Department of Commerce. Applications may be downloaded from the Division's Web site in PDF (Portable Document Format) file format at http://www.commerce.state.ut.us/corporat/pdfforms/tmapp.pdf.

The most notable application requirements are as follows: The application must specify "the goods or services on or in connection with which the mark is used" and "the mode or manner in which the mark is used on or in connection with those goods or services."[26] The application must also state "the date when the mark was first used anywhere" and "the date when the mark was first used in [Utah] by the applicant or a predecessor in interest."[27] In addition to attesting that the mark is currently in use, the applicant must verify that to the applicant's knowledge,

"no other person has registered, either federally or in [Utah], or has the right to use" a mark in the "identical form" as applicant's mark, or "in such near resemblance to the mark as to be likely, when applied to the goods or services of the other person, to cause confusion, mistake, or to deceive."[28]

The application must be accompanied by a filing fee and two "specimens," or samples showing the mark as actually used in the ordinary course of business.[29] In other words, the Division is looking for samples of the mark as it appears on the goods, containers, tags, labels, advertisements, and/or documents as used by the mark's owner. For purposes of filing, it is acceptable to send photocopies of a specimen. Finally, if a registration application has previously been filed at the federal level with the U.S. Patent and Trademark Office, the state application must provide information relating to the federal application, including reasons for refusal if the federal application was denied. Once the application has been completed, it can be either hand-delivered or mailed to the Division, which is on the main floor of the Heber Wells Building, located at 160 East 300 South in Salt Lake City. The mailing address for trademark applications is Box 146705, Salt Lake City, Utah 84114-6705.

Assuming the application conforms to the statutory requirements, the Division will then examine the application for compliance with the statutory requirements.[30] First, the Division will ensure that the application has been filled out properly and that all the requisite information has been provided. Next, the Division will perform a search of existing trademarks registered in Utah, specifically looking for marks that conflict with the applicant's mark. That is, the Division will look for registered marks and trade names that so resemble the applicant's mark that a likelihood of confusion would exist between the goods or services of the applicant and those of the identified mark. The search is not as extensive as one that would be performed at the federal level, and in fact does not include any search of the federal registration database. Accordingly, it is not uncommon for a state search to miss potentially conflicting marks. However, the search does at least provide some indication of the mark's uniqueness. Depending on the results of the search, the Division will then either certify registration of the mark[31] or notify the applicant of the refusal and the reasons therefor.[32] Should the application initially be rejected, the state registration procedure in Utah, like its counterpart at the federal level, allows for an applicant to reply to the rejection with arguments in response thereto and/or an amendment to the application itself.[33]

Procedures for Maintaining Trademark Registrations in Utah

Once a certificate of registration has been issued, assuming that the registration is not cancelled, it is effective for five years after the registration date.[34] After the five-year term has expired, it can be renewed for an additional five years, and renewals can continue every five years thereafter for as long the trademark is being used by its owner and the statutory requirements continue to be met.[35] In other words, trademark registrations have the potential to exist in perpetuity. Renewals are attained by filing a renewal application, which is identical to the original registration application, at least six months before the expiration of the registration.[36] Just like the original application, a renewal application must be accompanied by a regulatory fee.[37] Additionally, the application must include "a verified statement that the mark has been and is still in use" and either another specimen or "a verified statement that the mark has not changed."[38] Any registrations in effect before the current statutory scheme went into effect on May 6, 2002 continue for their term as it existed under the prior statutory scheme, which was 10 years, and are then renewable in accordance with the current scheme for additional five-year terms.[39]

Although mark registrations are theoretically renewable for a limitless number of terms, they may be cancelled for a variety of reasons. First, of course, a trademark registration that has not been renewed will be cancelled.[40] In addition, the registrant or assignee of a mark may submit a request for voluntary cancellation.[41] A registrant might choose to have its mark cancelled, for instance, if the mark is no longer being used in commerce. If a registered mark is no longer in use, and its owner *does not* request cancellation, a third party may bring a court action to compel cancellation of the mark for abandonment. A mark is abandoned if it is no longer in use and its owner has no intent to resume its use, or if its "significance as a mark has been lost due to any course of conduct of the owner, including acts of omission or commission."[42] Likewise, the Division will cancel registration of a mark upon a competent court finding that (1) the mark was granted improperly, (2) the mark was obtained fraudulently, (3) the registrant is not the mark's owner, (4) the mark has become a "generic" name for the corresponding goods or services,[43] or (5) the mark is likely to cause confusion, mistake, or deception with respect to a mark registered federally with the U.S. Patent and Trademark Office before the filing date of the application for registration in Utah.[44]

Conclusion

Because trademarks can be such a valuable part of the assets of a business, it is important to develop and protect them. Although trademark registration in Utah does not provide the level of protection or benefits provided by federal registration, given the ease and inexpensiveness of state registration it should not be overlooked as part of a comprehensive trademark strategy, particularly for a mark that may be ineligible for federal registration.

1. 15 U.S.C.A. §1051(a)(1) (West Supp. 2003) ("The owner of a trademark used in commerce may request registration . . . .").
2. The interstate commerce requirement stems in part from the necessary reliance on the Commerce Clause in Article I, Section 8, of the U.S. Constitution to provide a basis for the federal power to grant federal registrations. Like Congress's Commerce Clause power in general, the power to regulate trademarks in interstate commerce is quite broad. Under the Lanham Act, the federal legislation dealing with trademarks, "commerce" is defined as "all commerce which may lawfully be regulated by Congress." 15 U.S.C.A. §1127 (West Supp. 2003). In other words, even purely intrastate activity is sufficient to invoke Congress's power if it "substantially affect[s] interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995).
3. *See, e.g., Larry Harmon Pictures Corp. v. Williams Rest. Corp.,* 929 F.2d 662, 666 (Fed. Cir. 1991) ("It is not required that . . . services be rendered in more than one state to satisfy the use in commerce requirement.").
4. *Id.* at 663; *see also In re Gastown, Inc.,* 326 F.2d 780 (C.C.P.A. 1964) (holding that operator of intrastate service stations sufficiently affected interstate commerce to come within Congress's power under Lanham Act).
5. *See, e.g., In re Conti,* 220 U.S.P.Q. (BNA) 745, 748 (T.T.A.B. 1983) (holding mark used in connection with local barber shop as insufficiently affecting interstate commerce to qualify for federal registration).
6. 37 C.F.R. §2.34(a)(2) (2002).
7. Once a trademark examiner at the U.S. Patent and Trademark Office has reviewed such an intent-to-use application and concluded that it is allowable, the applicant must verify within six months that the mark has been used in interstate commerce. 37 C.F.R. §2.88 (2002). However, the applicant can request additional time to verify the use. The applicant can obtain extensions of the deadline for showing use in six-month increments for up to three years after the application has been considered allowable. 37 C.F.R. §2.89 (2002). Note, however, that any extension beyond one year after the decision regarding the acceptability of the application requires a showing of good cause. 37 C.F.R. §2.89(c) (2002).
8. As discussed in the "State Registration Procedure in Utah" section, the search performed by the state is not nearly as extensive as that performed at the federal level.
9. The fee for filing an application for registering a mark in Utah is presently $20, as authorized at Utah Code Ann. §70-3a-303 (2002), whereas the fee for filing an application for federal registration is presently $325, as indicated at 37 C.F.R. §2.6(a)(1) (2002).
10. In addition to the requirement that a mark is used in interstate commerce, to be registered on the Principal Register, a mark must meet the requirements provided in 15 U.S.C.A. §1052 (West 1997 & Supp. 2003). For example, the mark must not so resemble a mark owned by another when used on the goods or in connection with the services as to be likely to cause confusion or mistake as to the source of the goods or services. Also, when used on the goods or in connection with the services, the mark must not be merely descriptive of the goods or services. A mark that does not meet the criteria for registration on the Principal Register because of the mark's descriptiveness, but that is still capable of distinguishing goods or services of one source from those of another source, may still be registered on the Supplemental Register. A mark registered on the Supplemental Register is entitled to use the ® symbol like a registration on the Principal Register to give notice to all that the mark is federally registered. However, a registration on the Supplemental Register does not provide the rights of a registration on the Principal Register. 15 U.S.C.A. ß§1091-1096 (West 1997 & Supp. 2003).

11. Although verification can be achieved by an oath, most applications include a declaration instead of an oath. 37 C.F.R. §2.32(b) (2002). When a declaration is used in lieu of an oath, the party must include a statement that "all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true." 37 C.F.R. §2.20 (2002). The declaration must additionally warn the declarant that willful false statements and the like are punishable by fine or imprisonment or both under 18 U.S.C.A. §1001 (West 2000), and that such willful false statements and the like may jeopardize the validity of the application. This warning informs the applicant that a verified statement cannot be truthfully made if the federal applicant has knowledge of a confusingly similar mark protected by a state registration.
12. In accordance with 37 C.F.R. §2.33(b)(1) and (b)(2) (2002), it must be alleged in the verified statement that, to the best of the verifier's knowledge, no one other than the applicant has the right to use the mark in commerce, either in identical form or in such near resemblance as to be likely to cause confusion or mistake when applied to the goods or services of another.
13. *Nielsen v. Am. Oil Co.,* 203 F. Supp. 473, 477 (D. Utah 1962) ("By reason of the registration of the trademarks . . . in Utah . . . defendant is entitled, under the statutory law of Utah, to the exclusive intrastate use throughout the entire State of such trademarks . . . .").
14. *See* 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §22:1 (2003).
15. Utah merely provides that a certificate of registration will be "competent and sufficient proof of the registration of the particular mark." UTAH CODE ANN. §70-3a-304(3) (2002).
16. *Id.* §70-3a-404(1)(a) (2002).
17. *Id.* §70-3a-404(2)(a)(i) (2002).
18. *Id.* §70-3a-404(2)(a)(ii) (2002).
19. *Id.* §70-3a-404(2)(b) (2002).
20. *Id.* §70-3a-404(3) (2002).
21. In fact, the Utah statutory scheme provides that it "shall be interpreted to provide for the registration and protection of trademarks and service marks in a manner substantially consistent with the federal system of trademark registration and protection" and that "a construction given the Trademark Act of 1946 [(the Lanham Act)], 15 U.S.C.A. Sec. 1051, *et seq.,* should be used as persuasive authority." *Id.* §70-3a-102 (2002).
22. *Id.* §70-3a-402(1)(a) (2002).
23. *Id.* §70-3a-402(1)(b) (2002).
24. *Id.* §70-3a-402(2) (2002).
25. S.B. 150, Gen. Sess. (Utah 2002) (codified at UTAH CODE ANN. §70-3a-101, et seq. (2002)).
26. UTAH CODE ANN. §70-3a-302(1)(c)(ii) (2002).
27. *Id.* §70-3a-302(1)(c)(iii) (2002).
28. *Id.*
29. *Id.* §70-3a-302(1)(c)(vi) (2002).
30. *Id.* §70-3a-303.
31. *Id.* §70-3a-304 (2002).
32. *Id.* §70-3a-303(5).
33. *Id.*
34. *Id.* §70-3a-305(1) (2002).
35. *Id.* §70-3a-305 (2002). Before the change was enacted in 2002, Utah state registrations were effective for 10 years.
36. *Id.* §70-3a-305(2).
37. The fee is presently $20.
38. *Id.* §70-3a-305(5).
39. *Id.* §70-3a-305(4).
40. *Id.* §70-3a-307(1)(b) (2002).
41. *Id.* §70-3a-307(1)(a) (2002).
42. *Id.* §70-3a-103(1)(a) (2002).
43. Generic marks are those that do not serve to distinguish a product or service from others of like kind. In other words, a generic term designates a type of product or service rather than identifying a particular good or service within the genus. To put it succinctly, a valid trademark can be considered an adjective and a generic trademark a noun. A trademark that once served to distinguish a product or service can become generic and be cancelled for this reason. Aspirin and linoleum are but two examples of this – both started out as marks identifying a particular product and became generic marks identifying a type of product.
44. *Id.* §70-3a-307(1)(c) (2002).

Fourteenth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

The holidays are a special time for giving and giving thanks.
Please share your good fortune with those who are less fortunate.

SELECTED SHELTERS:

The Rescue Mission
Women & Children in Jeopardy Program
Volunteers of America Utah Detox (non-profit alcohol & drug detox center)
Jennie Dudley's Eagle Ranch Ministries

WHAT IS NEEDED?

CASH!!! cash donations can be made payable to the shelter of your choice, or to the Utah State Bar. Even a $5 donation can buy a crate of oranges or apples.

new or used winter and other clothing: for men, women & children
boots, gloves, coats, pants, hats, scarves, suits, shirts, sweaters, sweats, shoes

housewares: bunkbeds, mattresses, cribs, blankets, sheets, books, children's videos, stuffed animals, toys

personal care kits: toothpaste, toothbrushes, combs, soap, shampoo, conditioner, lotion, tissue, barrett's, ponytail holders, towels, washcloths, etc.

all types of food: oranges, apples, grapefruit, baby food, formula, canned juices, canned meats, canned vegetables, crackers, rice, beans, pasta, peanut butter, powdered milk, tuna fish
(please note that all donated food must be commercially packaged and should be non-perishable.)

DROP DATE:

Friday, December 19, 2003 • 7:30 am to 6:00 pm
Utah Law & Justice Center rear dock – 645 South 200 East • Salt Lake City
Volunteers will meet you as you drive up.

If you are unable to drop your donations prior to 6:00 pm, please leave them on the dock near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm and to coordinate the collection for the drop. If you are interested in helping please contact:
Leonard W. Burningham: (801) 363-7411 • Toby Brown: (801) 297-7027

Thank You!

Commission Highlights

During its regularly scheduled meeting of September 19, 2003, which was held in Logan, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Victoria K. Kidman, Chair of the UPL Committee and Marsha Thomas, past Committee Chair appeared to update the Commission on their work. Vicky summarized the caseload work and Marsha summarized the sub-committee's marketing efforts which is designed to prevent the unauthorized practice of law before it occurs, particularly among members of the minority community.

2. George Daines reported on the Delivery of Legal Services and issues related to raising the small claims court jurisdictional limit from $5,000 to $10,000. A discussion followed his presentation.

3. Debra Moore directed discussion for the Bar's Professionalism Award. The Commission concluded that the award would be given at the Mid-Year Convention which would be more suitable timing and the award would be given to one recipient from each of the five Bar divisions.

4. Debra Moore reported that she had asked Nanci Snow Bockelie to head up the Bar's participation in the Fordham Forum.

5. Debra Moore reported on the Leadership Conference. She has asked Jenniffer Byde, Wally Felsted, Deno Himonas and James Blanch to form a steering Committee.

6. John Baldwin reported on the State Law Library Study.

7. Debra Moore distributed handouts on Bar Committee Chair Appointments and Commission Liaison assignments.

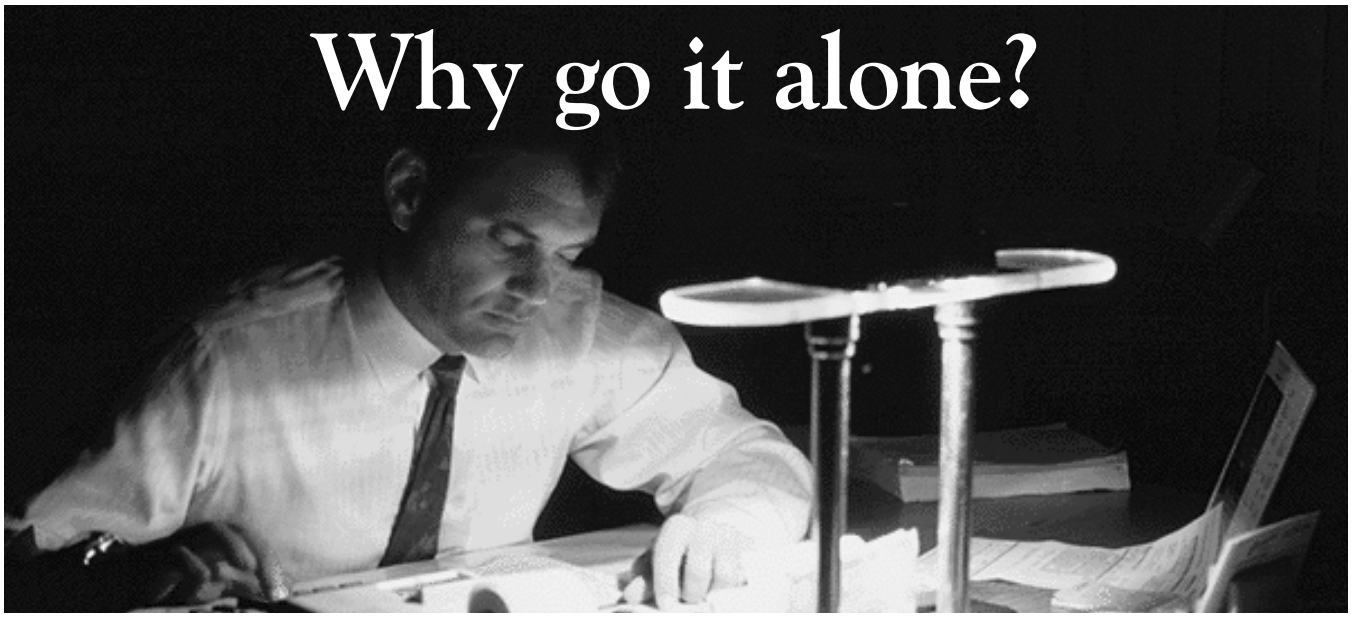
8. Debra Moore introduced both the "Project Lawyers Serve" and "Legal Match" proposals. She said that they were both web-based interactive programs designed to provide opportunities, not only for the public but also for lawyers. The former initiative would create a type of online Tuesday Night Bar program and the latter would provide online Lawyer Referral Service (LRS) technology and potentially offer a more complete outsourcing of the Bar's LRS.

9. John Baldwin discussed the Annual Convention site study. After considerable discussion based on the provided information, the Commission elected to make a final decision next meeting.

10. Debra Moore and John Baldwin discussed the 2003 Long-Range Planning issues.

11. John Baldwin stated that he and Debra had recently met with the Budget and Finance Committee. Debra said that budget planning would commence at the October Commission meeting. Commissioners should provide early input and make early requests for information so that adequate planning could be insured. A copy of the fiscal year end Deloitte & Touche audit report was distributed.

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.



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SPOTLIGHT
on Professionalism

The *Bar Journal* recently learned of a nice compliment paid by Judge Michael D. Lyon to Ogden attorneys James Hasenyager, Cynthia Campbell, and Richard Campbell. The judge was asked to provide a copy of his letter to the *Bar Journal,* and an excerpt follows:

I have continued to reflect upon the case that you tried last week in my courtroom. While the issues in the case were interesting, the focus of my ruminations has been on the outstanding lawyering I observed for three days. No lawyers could have been better prepared, knowledgeable, and skillful as advocates. At the same time your respect and courtesy to each other and to the court infused the whole proceeding with uplift. You exemplified the very best in our profession. It was a privilege for me to preside over the trial.

Heard or seen something similar?
E-mail your anecdote to: jorme@email.utcourts.gov

2004 Mid-Year Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2004 Mid-Year Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing, no later than Friday, January 16, 2004, to:

Maud Thurman, Executive Secretary
645 South 200 East, Suite 310
Salt Lake City, UT 84111

1. **Dorathy Merrill Brothers Award**
   For the Advancement of Women in the Legal Profession.

2. **Raymond S. Uno Award**
   For the Advancement of Minorities in the Legal Profession.

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.

Notice of Petition for Reinstatement to the Utah State Bar by Elliott Levine

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Reinstatement ("Petition") filed by Elliott Levine in *In re Elliott Levine,* Third District Court, Civil No. 940906067 BD on October 3, 2003. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Callister Nebeker & McCullough, P.C.

is pleased to announce that

Jeffrey N. Clayton
has resumed his practice of law with the firm
following a three year sabbatical.

Mr. Clayton joins the firm's
Employee Benefits Practice Group
chaired by W. Waldan Lloyd, with members Lynda Cook,
David O. Parkinson and Mark C. Quinn.

The firm is also pleased to announce that

Stephen F. Mecham
former Chair of the Utah Public Service Commission
and
D. Ann Savage
have joined the law firm of counsel in the
firm's Government Relations and Financial Institutions Regulation Practice Groups.
They join Louis H. Callister, Fred W. Finlinson,
George R. Sutton, Brian W. Burnett,
and Geri A. Allison in those areas.

And that
Kent M. Brown,
Bradley E. Morris, and
Lawrence R. Dingivan
have joined the firm.

Callister Nebeker & McCullough
A Professional Corporation
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, Utah 84133
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Discipline Corner

PUBLIC REPRIMAND

On September 24, 2003, Blaine P. McBride was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(b) (Communication), and 8.4(a) (Communication) of the Rules of Professional Conduct.

In summary:
Mr. McBride was retained to assist a client to establish paternity and seek visitation with the client's child. Opposing counsel stalled negotiation and other discussions and eventually claimed that the file had been misplaced, and Mr. McBride believed that time should have been given for opposing counsel to find the file. After Mr. McBride encountered communication difficulties with opposing counsel for one year, Mr. McBride failed to either pursue mediation ordered by the court, or to set the matter for a scheduling conference with the court to pursue the unresolved issues. Mr. McBride also failed to fully explain the options available to his client.

Mitigating factors include: absence of dishonest or selfish motive and remorse.

Aggravating factors include: prior record of discipline.

INTERIM SUSPENSION

On September 25, 2003, the Honorable L. A. Dever, Third Judicial District Court, entered a Ruling on Motion for Interim Suspension Pursuant to Rule 19, placing E. Keith Howick on interim suspension.

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

ADMONITION

On September 26, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 8.2(a) (Judicial Officials) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent the defendants in a civil case. After the case concluded, the attorney filed a motion to disqualify the judge presiding over the case. The attorney made public statements about the judge's qualifications and integrity with reckless disregard for the truth or falsity of those statements.

ADMONITION

On September 26, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), and 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:
An attorney was retained to prepare living trusts, a quit claim deed for real property, and to place the property in the trusts for the clients. The clients became aware that one of their properties had not been included, and one they did not own had been included. The attorney represented to the clients that the attorney would provide continuing support, but did not fulfill the commitment when the attorney ceased practicing law.

PUBLIC REPRIMAND

On September 29, 2003, William C. Halls was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Halls served as general counsel and manager of a company. The company intended to go public through merger with a publicly traded company. Financial information was provided to investors. Mr. Halls was aware that financial information was provided and it was ultimately discovered that the financial information was inaccurate. The investors filed a civil lawsuit. Additionally, discovery revealed that the principal supporter in the company had told Mr. Halls that the company was in default under significant obligations. Mr. Halls wrote to the investor to request forbearance of any financial proceeding and a withdrawal of a note of default so he could search out and obtain new investors. Thus, the financial information provided to the publicly traded company did not adequately disclose the money owed to the principal supporter. A summary judgment was obtained against Mr. Halls by the investors based upon the strict liability imposed on a manager by the Utah Securities Act.

ADMONITION

On September 29, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4(a) (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to obtain dissolution of the client's marriage. The attorney's contract with the client stated no services would be provided until the quoted fee was paid. Two months

later, the attorney reviewed the client file and finding no record of the client having paid a retainer, believed no payment had been received. At that time, the attorney was not aware that an employee was embezzling from the law firm. Believing no fees had been received, the attorney took no further action on behalf of the client, but did not close the file. A year later, the attorney reviewed the client file and attempted, unsuccessfully, to locate the client. The client and the client's spouse believed they were divorced and each remarried. When the attorney finally located the client, the attorney learned of the second marriages and immediately took the initial steps to obtain dissolution of the first marriage. The client retained new counsel to complete this process.

ADMONITION

On September 29, 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) and (b) (Fees), 1.15(b) (Safekeeping Property), 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 attorney did not provide a written fee agreement to the client to explain the flat fee agreement. Approximately two years later, the client requested a copy of the file, but was told that the file had been shredded. The client requested an itemized statement from the attorney, but it has never been provided.

PUBLIC REPRIMAND

On October 2, 2003, E. Kent Winward was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Winward was retained to file a chapter 7 bankruptcy petition. The clients had purchased two used cars prior to the bankruptcy filing and Mr. Winward told his clients a redemption of the vehicles would not affect their credit. He had the clients sign a document titled "redemption agreement". The clients thought this was the agreement with the creditor but it was an agreement with Mr. Winward concerning payment for his services related to the redemption agreement. After the meeting of creditors, the clients telephoned Mr. Winward's office, spoke with his secretary concerning the amounts to offer for redemption and assumed Mr. Winward was handling the redemption. The clients made repairs to the vehicles in the amount of $5,188. Four months later, the creditor repossessed the clients' vehicles. Mr. Winward assumed the clients were no longer interested in the redemption and did nothing further in that regard. Mr. Winward did not follow up with the clients. After the repossessions, the clients attempted to contact Mr. Winward several times, but he did not return their calls.

PUBLIC REPRIMAND

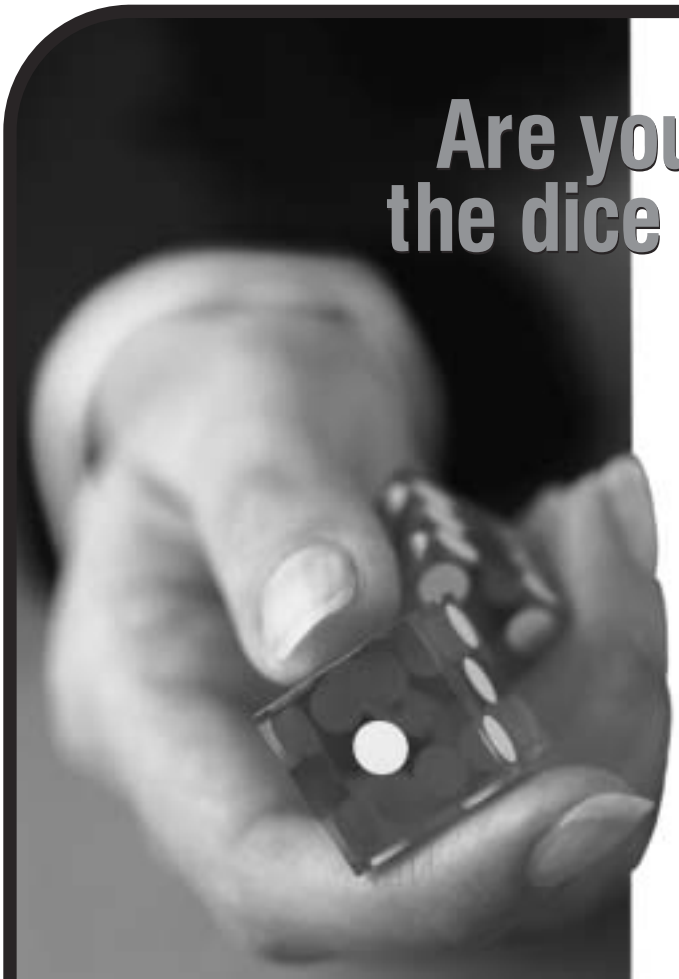
On October 2, 2003, E. Kent Winward was publicly reprimanded by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4(b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Winward filed a chapter 13 bankruptcy petition primarily to stop a foreclosure on the clients' residence. The clients' mortgagee filed a motion for relief from stay. The clients stopped making chapter 13 plan payments and the case was dismissed. When the case was dismissed, the mortgagee resumed foreclosure. The clients went to Mr. Winward to file a second chapter 13 bankruptcy petition. After meeting with Mr. Winward's office, the clients, though unable to pay the filing fee for several days, believed their petition would be filed the next day. Mr. Winward decided he would not file the petition until the clients delivered to him the filing fee but did not inform the clients of this decision. The mortgagee conducted the foreclosure sale, after which Mr. Winward's office filed the clients' second chapter 13 petition, which was no longer necessary.

ADMONITION

On October 2, 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:
The attorney filed three chapter 13 bankruptcy petitions on behalf of the client to forestall foreclosure on a residential loan. Each case was dismissed prior to plan confirmation. In the third case, the mortgagee on the residence persuaded the bankruptcy court to dismiss the case with prejudice on the basis that the client's three filings had been made in bad faith. The attorney did not appear for the hearing which resulted in the order of dismissal with prejudice, but does appear on the certificate of service for the order. The attorney did not at that time have any record keeping system to track client cases which were dismissed with prejudice. The attorney filed a fourth chapter 13 bankruptcy on behalf of the client, in violation of the bankruptcy court order. The mortgagee filed a Motion to Dismiss Void Ab Initio and for Sanctions. The attorney did not attend the hearing on this motion. The court granted the motion and sanctioned the attorney with an order to pay the mortgagee's attorney fees and lost interest.



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New Legal Assistant Division Officers & Directors

by Sanda Kirkham, Chair

As incoming Chair of the Division, I am proud to introduce to you the newly-elected officers and directors of the Legal Assistant Division for 2003-2004. These talented professionals will continue the LAD tradition of service to its members, to the Bar, and to the Community.

Front row, left to right: Peggi Lowden, Bonnie Hamp, Tally Burke, and Denise Adkins. Back row, left to right: Cynthia Mendenhall, Danielle Davis, Robyn Dotterer, Sanda Kirkham, Ann Bubert, and Thora Searle.

Region I Director Denise Adkins – Serving her second term as the Division's first director for Box Elder, Cache, Rich, Morgan, Davis and Weber Counties, Denise is from Ogden where she has worked for 9 years for Ted Godfrey, Esq. She specializes in collections law of which she has 17 years of experience. Denise serves as the Education Chair in Northern Utah and is presently working to increase awareness and involvement in the LAD in that area.

Region II Director Bonnie Hamp, CLA – Bonnie Hamp is a paralegal with the Litigation Practice Group at Holme Roberts & Owen LLP which represent clients locally, nationally and internationally in a wide range of business, financial employment, tax, securities, intellectual property, environmental and complex litigation matters. Bonnie began her legal career in 1978 and has achieved her Certified Legal Assistant's "CLA" certification from the National Association of Legal Assistants. She recently concluded her second term as the NALA Liaison for the Legal Assistants Association of Utah. Bonnie will begin her second term as Director of for Salt Lake, Tooele and Summit Counties as well as Secretary for the Legal Assistant Division. She also serves on the Unauthorized Practice of Law Committee for the Utah State Bar and is a member of the UPL's legislative committee. She is married to Richard Hamp, an attorney with the Attorney General's Financial Crimes Unit.

Region IV Director Suzanne Potts – Suzanne has been a legal assistant for over 15 years, working primarily in family law and civil litigation. She has been employed by Jones, Waldo, Holbrook & McDonough in St. George, Utah, for the last six years. Suzanne is a mediator having completed basic Mediation Training through the Utah State Bar, Alternative Dispute Resolution in 2001. She is a past member of LAAU, having served as the Southern Regional Director. She is currently a member of the Legal Assistants Division of the Utah State Bar and is serving her second term as the director for Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron and Washington Counties. She presently serves on the Ethics and Membership Committees of the Division. Suzanne is very active in the community and is a volunteer mediator for the Juvenile Court Victim Offender Mediation Program.

Director at Large Ann Bubert – Ann has worked as a Legal Assistant for approximately 10 years. For the first 9 of those years, she worked in the areas of estate planning, probate, tax and corporate law. She currently works in the area of insurance defense. Ann is a graduate of the University of Utah. Ann has enjoyed working with the Legal Assistant Division since it's inception. She has served as Secretary, Finance Officer, Education Chair, and Bar Commission Liaison, and served as Chair of the Division for the 2000-2001 year. She has also served on various Bar committees. She is currently the Professional Standards Chair for the Division.

Director at Large Tally Burke – Tally has been employed by Kruse Landa Maycock & Ricks for the past nine years. Her initial position with KLMR was as the receptionist. She was attending the Salt Lake Community College. It was immediately clear to management of KLMR that Ms. Burke's talents were better suited to the firm in the area of law office management, where she

worked for three years. She is currently working for the senior partner in the corporate and securities area of KLMR, where she is extremely satisfied. In 1996, Tally received her Legal Assistant Certificate. In 1997, she earned her Associate of Applied Science, with a major in Paralegal Studies, from the Salt Lake Community College. She is teaching Paralegal Procedures at the Salt Lake Community College, and is looking forward to the challenge and opportunity of working with excited new legal assistant students. She is a member of NALA, the Legal Assistant's Association of Utah, as well as LAD. As Finance Officer, she is looking forward to continuing her involvement with LAD and promoting legal assistants. Tally serves as the Long-Range Planning Chair as well as our Finance Officer.

Director at Large Deb Calegory – Deborah (Deb) is a certified paralegal who has worked in the legal field for 22 years. She received her paralegal certification through the American Paralegal Association in 1986. She currently works for the law firm of Durham Jones & Pinegar in St. George (formerly Snow Nuffer). She works in the areas of real estate; litigation; and business. Deb has been active in the Legal Assistant Association of Utah, having served as the Southern Region Education Chair during 1995-1996, and as the Southern Region Director in 1996-1997. She was a charter member of the Legal Assistant Division of the Utah State Bar ("LAD") when it was formed in 1996, and has maintained an active role in LAD since its inception. Deb was the Chair of the LAD during 2001-2002. She is currently serving the Division as Parliamentarian and is the Chairman for the Website and Bylaws/Standing Rules Committees.

Suzanne Potts, Shawnah Dennett and Deborah Calegory.

Director at Large Robyn Dotterer, CLA – Robyn worked for Dunn & Dunn in the area of insurance defense prior to her taking a position with Strong & Hanni where she works with Paul Belnap. Robyn works primarily in the areas of insurance defense and bad faith litigation. Robyn achieved her CLA in 1994 and is a past President of LAAU. This is her second term as a Director at Large and she will chair our Utilization Committee and serve as liaison to the Young Lawyer's Division.

Director at Large Shawnah Guthrie – Shawnah currently works for Clifford Dunn in St. George. She has worked for Mr. Dunn for nearly 10 years. Her primary duties include managing all civil litigation cases including discovery, drafting motions and orders, trial preparation, witness interviews, deposition scheduling, etc. She also prepares tax returns and assists with IRS audits. Before moving to St. George, Shawnah worked in Las Vegas, Nevada for a criminal defense law firm, where she worked on all capital murder cases gathering evidence for trial and gathering mitigating evidence for the penalty phase. She also handled a large caseload of personal injury cases. She has worked in the legal field for 16 years. Shawnah will coordinate the outreach activities and work on developing CLE opportunities for our members in the St. George Region.

Director at Large Cynthia Mendenhall – Cynthia is a displaced southerner and describes herself as a "slightly cracked belle." She graduated from the ABA accredited paralegal program at Louisiana State University in 1990. Cynthia was the first LSU student to do an internship within the court system in Baton Rouge as a clerk for Family Court Judge Jennifer Luce, firmly establishing that internship resource for future students. Cynthia works in family law with David Dolowitz and Dena Sarandos at Cohne, Rappaport & Segal, P.C. She is the current Education Chair for the Division and a member of the Utah State Bar's Unauthorized Practice of Law Committee. Cynthia is an avid golfer, reader, and an award winning spinner and weaver.

Director at Large Thora Searl – Thora attended 1 year at Weber State University and has 28 years of experience in the legal field. She worked as a legal assistant to William Thomas Thurman at McKay, Burton & Thurman for 22 years and currently works as a Judicial Assistant to Judge Thurman at the United States Bankruptcy Court for the District of Utah. This is her forth year as a Director of the Legal Assistant Division of the Utah State Bar, serving as the Division's Elections Chair. She enjoys camping, live theater and her 12 grandchildren.

***Bar Journal* Representative Danielle Davis –** Danielle is a paralegal with Strong & Hanni law firm where she specializes in insurance defense litigation. She has worked as a paralegal for over 10 years with experience in insurance defense, personal injury, bankruptcy, construction litigation, adoption, collections, and family law. She received her paralegal certificate from Westminster College. Ms. Davis is a former President, Education Chair, Parliamentarian, and Newsletter Editor for the Legal Assistants Association of Utah (LAAU). She has served on the Governmental Relations and Licensing committees for the Utah State Bar and is currently serving as the *Bar Journal* Committee Representative

for the Legal Assistant Division of the Utah State Bar. She enjoys being involved with LAAU and LAD and recognizes the importance of member participation as it relates to the future of the legal assistant profession in Utah.

Bar Liaison Peggi Lowden, CLA-S – Peggi is a litigation paralegal with the Salt Lake City law firm of Strong & Hanni working in the area of insurance defense. Peggi received her paralegal studies certification of completion from Santa Ana College (ABA Approved) and her A.S. degree in social sciences from Salt Lake Community College. She is a past paralegal educator and currently serves as a guest speaker at local colleges and CLE seminars on topics about paralegal duties and ethics/professional standards. She has served as a team member for the ABA to review curricula for paralegal programs seeking ABA Approval. She is a member of the Legal Assistant Division of the Utah State Bar (LAD), the National Association of Legal Assistants (NALA), and the Legal Assistants Association of Utah (LAAU). She is a past chair of the LAD and serves as its liaison (Ex Officio) member of the Board of Bar Commissioners of the Utah State Bar. Peggi is serving her second term as a lay member of the Utah Supreme Court Ethics and Disciplinary Committee.

And finally,

Chair Sanda Kirkham, CLA – Sanda is a paralegal with the law firm of Strong & Hanni working primarily in the areas of insurance defense, personal injury, construction litigation and products liability. She received her paralegal certification from the School of Paralegal Studies, Professional Career Development Institute with a specialty in litigation. She achieved her CLA designation in 1998 from the National Association of Legal Assistants. She served as the Division's first Bar Liaison, sitting as an ex officio member of the Board of Bar Commissioners of the Utah State Bar from 1996 to 2000. She also served as Bar Liaison to the Legal Assistants Association of Utah from 1995 to 2000. She served on the Legal Assistant/Paralegal Advisory Committee for Utah Valley State College and currently serves as a guest speaker at the local colleges about paralegal duties and responsibilities. She has presented seminars for HalfMoon LLC regarding civil litigation practice for paralegals and has taught preparatory courses for the Certified Legal Assistant (CLA) certifying examination. She was Co-Chair for the committee of the First 100 CLA's in Utah reception and celebration. Sanda currently sits on the Unauthorized Practice of Law Committee and the Governmental Relations Committee of the Utah State Bar.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/06/03	**Fall Corporate Counsel:** 9:00 am – 1:00 pm. $40 section member, $80 others.	4 includes 1 hr. Ethics
11/07/03	**A New Age of Professionalism :** Co-sponsored by the Supreme Court Committee on Professionalism. 9:00 am – 12:00 noon. $85	3 hrs. Ethics
11/12/03	**Immigrant Worker's Rights:** 9:00 am – 5:00 pm. $30 non-profits, $100 private attorneys. Registration info. call Mike Munoz (213) 639-3900 x117	7
11/14/03	**Annual Southern Utah Bar Association Fall CLE:** Gardner Center, Dixie State College, St. George, Utah. 8:00 am – 1:50 pm.. $95 registration before Nov. 3, $115 after.	6 includes 2 Ethics/ NLCLE
11/14/03	**New Lawyer Mandatory:** 8:30 am – 12:30 pm. $45.	Satisfies New Lawyer Requirement
11/19/03	**LAD Fall CLE "With Knowledge You Will Soar":** Preparing your client for mediation, e-Discovery, online research. 8:30 am – 12:00 noon. $45 legal assistant, $60 attorneys.	3
11/19/03	**Evening with the Third District Court:** Hon. Sandra N. Peuler, Hon. Joseph C. Fratto, Robert K. Hilder. Voir dire, state of the courts, new civil procedure rules, Q&A. $15 YLD, $25 Litigation Member, $40 others.	2 CLE/NLCLE
12/03/03	**Basics on Criminal Law:** 5:30 – 8:30 pm. $50 Young Lawyer, $60 others.	3 CLE/NLCLE
12/10&11/03	**Technology for Attorneys:** 8:00 am – 5:00 pm (both days). 12/10/03 – Using Technology to Improve Your Trial Practice. 12/11/03 – Using Technology to Improve Your Office Practice. $160 per course, $295 for both.	8 each day
12/12/03	**Lawyers Helping Lawyers Third Annual Ethics Seminar:** 1:00 – 4:00 pm. $85 pre-registration, $95 at the door.	3 Ethics
12/15&16/03	**Deposition Trianing:** 12/15/03 – Take a Killer Adverse Deposition. 12/16/03 – Take a Killer Expert Deposition. $100 YLD, $150 Litigation Section, $175 others each day.	2 full days 6.5 & 7
12/17/03	**Best of Series:** 9:00 am – 4:00 pm. $20 per session / $100 all day.	6

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.

POSITIONS AVAILABLE

APPELLATE STAFF ATTORNEY: Responsibilities include drafting proposed per curiam dispositions and providing assistance to the court regarding docketing statements, motions, applications for certificates for probable cause, petitions for interlocutory appeal, and petitions for extraordinary writ. MINIMUM QUALIFICATIONS: Graduation from an ABA accredited law school with a juris doctorate degree plus three years experience in the practice of law. Completed application, resume, law school transcripts, and writing samples should be submitted to: Director of Human Resources, Administrative Office of the Courts, 450 South State Street, P.O. Box 140241, SLC, Utah 84114-0241. More information and application forms may be obtained at www.utcourts.gov.

The University of Utah S.J. Quinney College of Law – Non-tenure skills/clinical faculty position beginning 2004-05. Qualifications include academic excellence, successful teaching or promise, administrative abilities, practice experience. Courses include trial/appellate advocacy, interviewing, counseling, negotiating, mediation. Nine-month contract, potential of long-term contract employment, summer employment various years. The University of Utah encourages applications from women and minorities, and provides reasonable accommodation to the known disabilities of applicants and employees. Interested persons should send resume, references, and subject area preferences. Contact: Chair, Faculty Recruitment Committee, University of Utah S.J. Quinney College of Law, 332 South 1400 East, Salt Lake City, UT 84112-0730.

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For Years _____ and _____

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

Explanation of Type of Activity

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

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

B. Writing and Publishing an Article, Self-Study

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

C. Lecturing, Self-Study

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

D. Live CLE Program

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

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

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

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

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

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

Date: _____ Signature: _____

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