Utah Bar JOURNAL

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MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Frosty Branches and Red Berries, by Bret Hicken, Hicken & Hatch, Spanish Fork, Utah.

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Letters Submission Guidelines:

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

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

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The Utah Bar Journal

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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.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
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"Unbundling" Legal Services in Utah

by Debra Moore

By the time this article appears, the Utah State Bar Commission expects to file a petition with the Utah Supreme Court to amend and adopt rules to allow lawyers to better serve a growing demand for limited legal services – also known as unbundled or discrete task services. The petition will seek four key changes:

- Amend Rule 1.2 of the Utah Rules of Professional Conduct to clarify that an attorney and client may agree to limit the scope of the legal services to be provided.
- Amend the Utah Rules of Civil Procedure to allow an attorney to enter an appearance limited to a particular hearing or proceeding.
- Amend the Utah Rules of Civil Procedure to allow an attorney to draft legal pleadings for a client who is otherwise unrepresented in court.
- Amend Rules 4.2 and 4.3 of the Utah Rules of Professional Conduct to allow an attorney to directly communicate with a party who is represented under limited scope agreement, unless the attorney is notified in writing to work through counsel.
- Adopt Rule 6.5 of the ABA Model Rules of Professional Conduct, to allow an attorney to provided limited legal services as part of a non-profit or court-annexed program without checking for unknown conflicts.

As a practical matter, Utah attorneys are already providing limited scope services and engaging in some of the above practices. The purpose of the proposed rule amendments is to encourage more unbundling by resolving questions that arise under ethical and procedural rules that were drafted with only the traditional full service representation model in mind. The petition follows a September 2002 recommendation of the Utah Supreme Court Study Committee on the Delivery of Legal Services that the Court "consider, and when appropriate, adopt rules that allow greater flexibility in the delivery of legal services," with such consideration to include "authorization for lawyers to 'unbundle' legal services, that is, to break traditional legal services into smaller, less complex and expensive, constituent parts." The petition also implements a July 2003 recommendation of the Bar Commission's Task Force on Delivery of Legal Services.

Unbundling is widely considered a "win-win" for attorneys and a large potential market of middle-income clients who forego their legal rights because they are unable or unwilling to pay for full-service representation. At least ten states, including our neighboring states of Colorado, Nevada, and Wyoming, have preceded Utah in adopting unbundling rules. Proposals to adopt unbundling rules are also pending in several additional states.[1]

Numerous resources exist for attorneys interested in expanding their client base by unbundling. The keys to successful unbundling are a thorough initial client consultation and a clearly written limited services agreement. Guidance on these and other unbundling issues is available from the ABA Delivery of Legal Services Committee, which maintains a website accessible to non-members. In addition, California lawyer Forrest "Woody" Mosten has published *Unbundled Legal Services,* a how-to manual replete with helpful forms and other tools, which is available through either the ABA or Mosten's website. One of the pioneers of limited representation who coined the term "unbundling," Mosten was well-received when he spoke to Utah bar members about unbundling at the Mid-Year Meeting in March 2003 and the Fall Forum in September 2003.

Unbundling has been aptly described as a way for attorneys to "rediscover" the middle class. Of course, many Utah lawyers never lost sight of the middle-income market for their services to begin with. But with easy public access to legal information and competition from non-lawyers increasing rapidly, lawyers who serve middle-income Utahns must focus with a vengeance on the value added by their services. Unbundling effectively isolates, and highlights, that value and provides a way for ordinary Utahns to "rediscover" Utah lawyers.

1. In addition to the three neighboring states, states that have adopted unbundling rules include California (for family law cases only), Delaware, Florida, Maine, New Mexico, North Carolina, and Washington. Proposed rules are pending in Virginia, New York, Maryland, and Indiana.

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Practice Pointer: Representing a Client With Diminished Capacity

by Kate A. Toomey

Since becoming a lawyer, I've often thought that it must be especially challenging to represent a client with diminished capacities.[1] Calls to the Office of Professional Conduct's Ethics Hotline, and even some of the informal complaints I've reviewed confirm this. The Hotline calls involve queries about whether an attorney can substitute the attorney's judgment for that of the client, and whether it's consistent with the duty of loyalty for the attorney to initiate proceedings to secure the appointment of a legal representative for the client, especially if the client opposes it. Informal complaints have been submitted to the OPC by family members distressed about what they consider over-reaching by the attorney.[2]

Most often, elderly relatives are the subject of the informal complaints, but consider, too, that a person need not be elderly or mentally retarded to render informed-decision-making difficult if not virtually impossible – youth, dementia, illness, chemical dependency, mental illness, and communication challenges being among the many examples.

We're all familiar with the rule that requires an attorney to "explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation," but in a disabled person's case, wouldn't you necessarily fall short? Rule 1.4(b), Utah R. Pro. Con. And what about the rule requiring an attorney to "abide by a client's decisions concerning the objectives of representation?" Rule 1.2(a), Utah R. Pro. Con.

The Rules of Professional Conduct provide some guidance: "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the person." Rule 1.14(a), Utah R. Pro. Con. This means that the attorney/client relationship should be kept as normal as possible, which of course entails a heightened duty for the lawyer to try to communicate so as to allow the client to decide the scope and objectives of the representation.[3] Lawyers are not allowed to shrug off their duties of communication simply because the client has diminished capacity.

The Comment following the rule acknowledges that although "normal" client-lawyer relationships assume that clients are capable of making important decisions, this may not always be possible. *See* Comment, Rule 1.14, Utah R. Pro. Con. Nevertheless, the attorney must "treat the client with attention and respect," and "has the duty to take action consistent with the client's directions and decisions." *See id.* Remember that even if the lawyer believes the decision ill-considered or unwise, this doesn't necessarily mean it's not been made in the client's interest. As a New Jersey court explained in connection with a case involving a client with Down's syndrome, the lawyer must advocate the client's positions unless they are "patently absurd" or present unreasonable risk of harm to the client's health, safety, or welfare. *See In re M.R.,* 638 A.2d 1274, 1284-1285 (N.J. 1994).

Sometimes, clients have a legal representative – a guardian or conservator who can make decisions on their behalf. *See* Comment, Rule 1.14, Utah R. Pro. Con. This usually makes the lawyer's job easier.[4] But what if there isn't a legal representative, and the lawyer is certain the client can't understand matters related to the representation? In that case, if the lawyer reasonably believes the client can't adequately act in the client's own interests, "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, . . ." Rule 1.14(b), Utah R. Pro. Con.[5]

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As anyone who has faced making similar decisions about elderly family members can attest, this is surely one of the most weighty decisions an attorney can make. Taking protective action depends upon the attorney's reasonable belief that the client needs it. Again, the Comment offers some guidance, permitting the attorney to seek information from "diagnosticians, family members or other interested persons" without violating the confidentiality rule. *See* Comment, Rule 1.14, Utah R. Pro. Con.[6] Beware undue haste, however.[7] Having decided that protective action is necessary, the Comment exhorts lawyers to make it "the least restrictive under the circumstances." As one ABA Formal Ethics Opinion puts it, "appointment of a guardian is a serious deprivation of a client's rights and should be avoided if other, less-drastic solutions are available." Op. 96-404 (1996). Consider the alternatives: would a power of attorney work as well in this circumstance?

Don't ask to be appointed the guardian. *See* ABA Formal Ethics Op. 96-404 (1996). The whole point of seeking a legal representative for the client, who can make considered decisions on behalf of the client, is to maintain your own role as the lawyer.

What about substituting your own judgment for that of the client when there isn't a legal representative empowered to do the decision-making? The Model Rules of Professional Conduct aren't clear on this point, but the Restatement of the Law Governing Lawyers suggests that "the lawyer may be justified in making decisions regarding issues within the scope of representation that would normally be made by the client." Restatement (Third) of the Law Governing Lawyers § 24 cmt. D. (2000). Attorneys who call me on the Ethics Hotline can expect the most conservative answer, and here the answer would be to avoid jumping in without explicit authorization under the rules. Emergency legal assistance is sometimes condoned, as the Comment acknowledges, but in that event, the lawyer should act only to the extent reasonably necessary to maintain the status quo, then regroup.

These are difficult issues, and the rules require additional effort on the part of the attorney who represents a person with diminished capacity. On the other hand, neither are you required to do the impossible. Make the reasonable effort to communicate with a disabled client and follow the course they or their legal representatives set for you. Avoid the temptation of thinking you know what's best for the person with diminished capacities; leave that to the client, or to the legal representative more intimately involved with the client's daily life. In situations in which you are reasonably persuaded that protective action must be taken, consider the options and select the least restrictive.

1. "Diminished capacity" is the nomenclature used in the 2002 changes to the ABA Model Rules of Professional Conduct. Utah's rule still uses the term "disabilitiy."
2. *See e.g. In re McInerny,* 451 N.E.2d 401, 537-539 (Mass. Ct. 1983) (attorney improperly caused elderly client to put funds in joint account with attorney without suggesting need for independent legal advice).
3. *See e.g. Nebraska Bar Ass'n v. Walsh,* 294 N.W.2d 873 (Neb. 1980) (lawyer's failure to fully communicate with deaf client so client could decide whether to pursue appeal resulted in attorney discipline).
4. Though it doesn't necessarily satisfy all the attorney's concerns about the client. We've sometimes had calls from attorneys who don't believe the legal representative is acting in the client's best interests. *See e.g. Developmental Disabilities Advocacy Ctr. v. Melton,* 521 F. Supp. 365 (D. N.H. 1981), *remanded on other grounds,* 684 F.2d 281 (1982); *but see In re Fraser,* 523 P.2d 921, 928 (Wash. 1974) (lawyer fired by guardian properly refused to withdraw until new counsel had been secured when guardian's motives were suspect).
5. Ethics opinions on this subject abound. *See* Laws. Man. on Prof. Conduct (ABA/BNA) 31:603 (subheading "Guardianship And Protective Action; When: Determining Disability) (collecting ethics opinions).
6. Utah's Comment sets forth this exception. By contrast, the Model Rules of Professional Responsibility make it a part of the rule. *See* Rule 1.14(c), Model R. Pro. Con. Ethics opinions from jurisdictions around the country are split on this issue. *See* Laws. Man. on Prof. Conduct (ABA/BNA) 31:603 (subheading "Guardianship and Protective Action; How: Revealing Confidences) (collecting ethics opinions).
7. In *In re Brantley,* 920 P.2d 433, 606 (Kan. 1996), the attorney was sanctioned for filing involuntary proceedings without personally meeting with the client.

Fair Value in Utah

by Talon C. Stringham & Derk G. Rasmussen

We've all seen it: shareholders who can't get along. So what happens when the shareholders of a private company can't resolve their differences? In Utah, there are two statutes that govern these situations. The first, known as a judicial dissolution statute, applies when shareholders are deadlocked. This statute allows a shareholder to petition the court to dissolve the corporation or, pursuant to an election, allows the corporation to repurchase shares for fair value. The second, known as a dissident shareholder action, allows minority shareholders that have been "squeezed out" to dissent from the corporate action and receive fair value for their shares.

APPLICABLE STATUTES IN UTAH

Utah Code Annotated Section 16-10a-1430 (2) provides grounds for judicial dissolution by a shareholder in a variety of circumstances. In these instances, the corporation may elect to purchase the outstanding shares of the shareholder at "fair value," under Utah Code Annotated Section 16-10a-1434. Section 1434 does not define fair value, and the definition of fair value under this statute has not been interpreted in a reported decision in the State of Utah.

Utah Code Annotated Section 16-10a-1301 provides guidance in dissident shareholder actions. This statute states:

> "Fair value", with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action. – Utah Code Ann. §16-10a-1301(4) (1992).

THE DEFINITION OF FAIR VALUE

The laws regarding corporations, as well as the laws governing dissenters' rights and corporate dissolution are determined at the state level. As such, fair value, as defined in these statutes is also determined at the state level.

From an appraiser's perspective, the definitions (or lack thereof) provided in the statutes leave many unanswered questions. Because value can mean different things to different people, it is critical in the performance of a business valuation to define value prior to the commencement of the valuation assignment. In the business valuation profession, this is commonly referred to as identifying the standard of value.

Fair value is one of several different standards of value used in the valuation profession.[1] Although the business valuation community has interpreted the various standards of value, it is nevertheless important to define the standard of value applied within an appraisal. In fact, the Uniform Standards of Professional Appraisal Practice require that the standard of value be stated and defined within the appraisal report.[2] Nevertheless, because the laws surrounding the "fair value" standard of value have been made and interpreted by those not necessarily versed in valuation theory, the exact definition is somewhat unclear, and raises unique issues that are not as prevalent under other standards of value. However, we cannot ignore the possibility that the statutes are purposely vague in order to allow for a determination of these issues on a case-by-case basis.

The statutes typically leave much to be desired in terms of providing a clear definition for "fair value" and the impact of controlling

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vs. non-controlling shares, and marketable vs. non-marketable shares. Absent this definition, the appraiser is left to case law and/or his/her own interpretations regarding the appropriate procedures to use in the performance of the appraisal.

Although there are similarities between the statutes of different states, the laws may have been interpreted differently in each of the various states. As such, the appraiser may look to case law from other states in order to gain insight; however, because of the inconsistencies in interpretation, the appraiser must exercise caution in the application of another state's interpretation.

FAIR MARKET VALUE VS. FAIR VALUE

In discussing the relevant case law in Utah, a definition of fair market value will help the reader understand the nuances of fair value. Fair market value is defined as the cash or cash equivalent price at which property would change hands between a willing buyer and willing seller, neither being under a compulsion to buy or sell and both having a reasonable knowledge of the relevant facts. This definition does not allow for the value of stock in the hands of any one particular owner. As such, minority and marketability discounts may apply.

By way of contrast, in many states fair value has been interpreted through case precedent as a pro-rata portion of the control value of the enterprise. Some states allow the application of marketability discounts; while others have taken the approach that the use of marketability discounts should be determined on a case-by-case basis. The application of discounts varies from state to state and has not yet been completely resolved in Utah.

Fair value usually differs from fair market value in several respects. Fair market value assumes a hypothetical willing buyer and a hypothetical willing seller, neither being under a compulsion to buy or sell and both having a reasonable knowledge of relevant facts. In the situation of fair value there is rarely a willing seller. Most courts are concerned with the concept of fairness and, as a result, fair value is generally intended to be *equitable* to the unwilling seller.

When the standard of value is fair market value, the appraiser knows, based in part on the number and proportion of shares being valued, whether or not a controlling value is applicable. Furthermore, when fair market value is the standard of value, the appraiser will typically apply a marketability discount of some

sort to the values derived in order to account for the lack of liquidity of the ownership interest.

RELEVANT CASE LAW

There are two cases that help define fair value in Utah. Each of these cases falls under the dissident shareholder statute. Although there are no decisions that fall under the judicial dissolution statute, the authors have been involved in a case under this statute that was decided in binding arbitration.

Oakridge Energy, Inc. v. Clifton[3]

In a case of first impression in Utah, *Oakridge Energy, Inc. v. Clifton,* the conclusions reached indicated that a fair value appraisal in a dissenting shareholder action should consider each of the three measures of value used in the Delaware block method; namely:

1. Market Value

2. Asset Value

3. Investment Value

Mathematical weightings are then assigned to the indications of value from each of the three measures of value, and the resulting weighted average is the concluded value.

The three approaches to value used in the Delaware block method are akin to the three basic approaches to determining value typically used by appraisers, although there are some differences. Investment value in the context of the Delaware block method means value based on expected earnings and/or dividends. It is similar to the value based on the income approach typically used by appraisers. However, it mixes the traditional income approach and market approach in that it may derive capitalization rates either by traditional income approach methods or by traditional market approach methods.[4]

Market value in the Delaware block method refers to prior transactions in the subject company's securities as opposed to the traditional appraisal concept of market value that uses multiples of both income statement and balance sheet parameters based on comparable companies.[5] However, this does not mean that traditional market approaches do not apply. As will be evidenced in the case examined in the next section, the court will often consider evidence regarding comparable companies.

In *Oakridge Energy v. Clifton,* the Utah Supreme Court reviewed case law from other states with similar statutes, and noted that the majority of the cases they reviewed indicated that value should be determined based on estimates of fair value using the market value, net asset value, and investment value methods. The Court also noted "the courts have traditionally favored investment value, rather than asset value, as the most important of the three elements." In the authoritative, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies,* noted business appraiser Shannon Pratt indicates that in reviewing the various court interpretations of the Delaware block method, "Investment value typically is accorded the greatest weight."

Utah's *Oakridge* case did not consider whether or not discounts should be applied.

Hogle v. Zinetics Medical, Inc.[6]

In the *Hogle, et al. v. Zinetics Medical, Inc., et al.* case, the Utah Supreme Court considered whether or not the district court "adequately considered the *Oakridge Energy* valuation factors." In this case, both parties to the suit used expert witnesses, and neither party presented any evidence regarding the value of the company using an asset value method. The court was not concerned, however, and noted that because Zinetics Medical was a going concern it was not necessary to consider the asset value of the company.

In consideration of the market approach, both appraisers used comparable companies in the determination of value of Zinetics Medical. However, the Supreme Court agreed with the district court that the market approach was not relevant. The district court noted, "[n]either expert could discover even one company which could reasonably be characterized as 'comparable' to Zinetics."

Although the authors do not believe that this case indicates that the market approach should never be used in determining the fair value of a company in Utah, a close reading of this case highlights the need to use particular caution in choosing comparable companies.

By ignoring the asset approach, and by disregarding the market approach presented by the experts in the Zinetics Medical case, the Court's determination of value was based solely on investment value, vis-a-vis the Income Approach.

The Court also considered whether or not marketability or minority

interest discounts apply in the determination of fair value in Utah. Quoting the Eighth Circuit Court of Appeals in *Swope v. Siegel-Robert, Inc.*[7] the Utah Supreme Court noted, "the American Law Institute explicitly confirms the interpretation of fair value as the proportionate share of the value of 100% of the equity, by entitling a dissenting shareholder to a 'proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability'… fair value in minority stock appraisal cases is not equivalent to fair market value. Dissenting shareholders, by nature, do not replicate the willing and ready buyers of the open market. Rather, they are unwilling sellers with no bargaining power." The court concluded that no discounts should be used in the valuation of Zinetics Medical.

Although Utah's Supreme Court disallowed a marketability discount in the *Hogle* case, it is the authors' opinion that the issue has not been decisively determined. As indicated by the Utah Supreme Court, there may be circumstances that warrant a marketability discount.

As mentioned earlier, one must avoid reading too much into the decision of the Court, or the case law of other states. Nevertheless, a closer examination of the *Swope* decision (a Missouri case quoted by the Utah Supreme Court in the *Hogle* case) appears to indicate that the issue of marketability should be determined on a case-by-case basis. In support of this, the *Swope* decision states in part:

> Although both parties in their thorough briefs argue at various junctures that this case or that policy mandates that the Court apply or decline to apply discounts, the principle which emerges most strongly and clearly from King[8] is that such a decision is discretionary. The Court's discussion of Missouri case law, as well as that of other states, must, therefore, proceed with the understanding that no law or policy requiring or forbidding the application of discounts may hold sway with the Court, which is required by its interpretation of Missouri law to rest its decision on its own discretion, *after considering every relevant fact and circumstance.* (Emphasis and footnote added.)

The following quote by Vice Chancellor Jack B. Jacobs of the Delaware Court of Chancery, (the Court which pioneered the

use of the Delaware Block Method on which Utah relies), may also prove useful:

> Both my Court and the Delaware Supreme Court recognize that valuation cases are extremely fact driven. Very few conclusions on valuation issues have universal applicability, though statements found in some opinions may have the appearance, and might be interpreted by some, as having sweeping generality.[9]

Non-Published Fair Value in Judicial Dissolution Case

As mentioned previously, there is no case law in Utah providing guidance in judicial dissolution cases; however, the authors were involved in a judicial dissolution case that was settled in binding arbitration. In that case, the decision closely matched the decisions in *Oakridge Energy* and *Hogle,* in the sense that the income approach was afforded the most weight. The market approach was afforded some weight; however, that amount was relatively insignificant in the final determination of value.

The arbiter in that case did not allow a minority discount; however, he did apply a small marketability discount of 15 percent. The authors believe this decision on discounts to be the most theoretically correct if the purpose of the statute is equity for the parties. An equitable decision might require that a marketability discount be applied because even controlling shares may be non-marketable to some degree. However, it is the authors' opinion that any decision on the applicability of discounts should be done on a case-by-case basis.

Although both the dissenters' rights statute and the judicial dissolution statute both use the term "fair value," it remains to be seen whether the Utah courts will define fair value the same way in both types of cases. It is foreseeable that some would argue that because fair value is not defined in the minority dissolution statute that the definition of the term "fair value" is the equivalent to that used in dissenters' rights cases. These individuals will likely rely on the *Berrett v. Purser & Edwards*[10] case, which states that the same term used in different areas of the Utah Code are defined the same way. Others will likely argue that the statutes are completely separate, and that an equitable decision would require a different definition of fair value. This argument may have merit, in that the circumstances involving a minority shareholder who has been "squeezed out," may be very different from the circumstances involving equal shareholders who are deadlocked.

CONCLUSIONS

In accordance with the *Oakridge Energy* case, fair value in the state of Utah requires the appraiser to consider all three basic approaches to value: the asset approach, the market approach, and the income approach. Both the *Oakridge Energy* and *Hogle* cases indicate that the courts prefer the income approach when determining fair value. The *Hogle* case indicates that minority discounts do not apply in dissenter's rights cases; however, marketability discounts may be appropriate depending on the circumstances of the case. Both the *Oakridge Energy* and *Hogle* cases were determined under the dissenters' rights statute, and the applicability of these decisions to judicial dissolution cases remains to be seen. As more decisions are made regarding the two fair value statutes in Utah, additional guidance will be provided that will benefit appraisers.

1. Other standards of value include fair market value, intrinsic value, and inherent value.
2. Uniform Standards of Professional Appraisal Practice, Standards Rule 10-2 (a) (v).
3. *Oakridge Energy, Inc. v. Clifton,* 937 P.2d 130, 315 (Utah 1997).
4. Pratt, Shannon P., Robert F. Reilly, and Robert P. Schweihs. Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 4th Edition, 2000, p. 791.
5. *Id.*
6. *Hogle, et al. v. Zinetics Medical, Inc., et al.,* 2002 UT 121; 63 P.3d 80; 462 Utah Adv. Rep. 31.
7. *Swope v. Siegel-Robert, Inc.,* 243 F.3d 486, 492-93 (8th Cir. Mo. 2001), cert. Denied, 534 U.S. 887 (2001).
8. *King v. F.I.J., Inc.,* 765 SW.2d 301 (Mo. App. 1989).
9. Shannon Pratt, "Fair Value: A View from the Delaware Court of Chancery" (interview with Jack B. Jacobs), Business Valuation Update, September 1999, p. 2.
10. *Berrett v. Purser & Edwards,* 876 P.2d 367, 369-70 (Utah 1994).

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Making Your Case at the Legislature

by R. Chet Loftis

There is a considerable difference between making the law and applying it. Making the law is not about reaching a favorable result based on a particular set of facts. It is, instead, about making the case for why a certain word or concept is worthwhile and socially acceptable as compared to the alternatives.

Clearly, we, as lawyers, can make this case, whether in support or opposition to a bill, and make it quite effectively by, among other things, keeping in mind some of the following.

Understand the Issue

Things rarely go as smoothly as you would expect. It is amazing where opposition to a bill can come from and the form it can take. The only way to prepare for this is to understand the issue as thoroughly as possible, minimize unintended consequences, and listen to the concerns of potential detractors.

Similarly, when you have concerns with a pending bill, you should operate on the assumption that a good deal of thought has gone into it. This is not to suggest that any amount of thought can make a bad bill good, but it does generally mean that a superficial analysis and a generalized argument in opposition will neither be appreciated nor persuasive – no matter the source.

Understand the Process

There is an art to passing or killing a bill. A thorough understanding of the process is as important, if not more so, than any substantive knowledge or argument you can advance. This means that you need to know what everyone's role is, how things really get done, what is doable, where the bridges and bottlenecks are in the process, and, most important, when to speak and when to keep quiet.

Understand Your Role

An advocate's role at the Legislature is not to dictate or degrade, but to educate and persuade. No one likes an outsider who acts like a know-it-all, is long-winded, or tries to talk over everyone's head. Your task is to establish your credibility and make your case in the limited time you have, keeping in mind that, by and large, the legislative arena is based on relationships and a general desire to find workable solutions among competing interests. More than any other group, we, as lawyers, need to play carefully to our strengths without putting people off. Remember that while the people you run in to may not be legally trained, they generally have good contacts, subject matter expertise, and years of built-up institutional memory.

Know Your Opponents

Your most important audience will not be with legislators, allies, or government officials. It will be with the opponents of your bill. If you can work out a solution with them, there is very little that you can't accomplish on the Hill. If you can't, then it will be important that you understand their position and give them credit where it is due as you take your case forward.

Find Allies

It's hard to overstate how important this is. Anytime you can combine your lobbying strength and contacts with the right ally, it can do nothing but help your cause. In doing this, however, you can never expect someone else to carry your water. Still, the more momentum you can create, the better.

Be Creative

One of the most enjoyable aspects of the legislative process is the ability to change the law to make way for a good idea. There really is no limit to what you can do as along as it is constitutional, financially feasible, and sellable.

Be Diplomatic

Finality is not one of the objectives or strengths of the legislative process. You can kill a bill this year only to have it back for as long as there is one legislative sponsor willing to give it life. You have to be careful in what you do and say because it can always come back to haunt you. After all, in politics, you never know when this session's friend will be next session's enemy and vice versa.

R. CHET LOFTIS, general counsel to the Utah Medical Association, solo practitioner, member of the Bar's Legislative Committee, and former legislative staff attorney, has drafted over 350 bills and has been instrumental in passing, among other things, significant tort and health insurance reform laws.

Be Concise

Legislators are constantly bombarded with information. They just don't have the time or propensity to listen to long, complicated arguments – no matter how well reasoned they might be. They need to know whom you represent, the bill number, the sponsor, the location of the bill, your position, and why – all in 60 seconds or less. If they want to know more from you, they will ask. This requires a great deal of preparation and clear thinking. The same goes for written materials. They must be concise and on point. You will almost always get extra time to make your case if you have a solution to propose, especially if you've worked it out with the other side.

Get to the Right People

For every issue, there is a group of players made up of agency officials, legislators, and stakeholders. Find one and they can generally lead you to the rest. Find none and they may very well combine against you, irrespective of the merits of your idea.

Keep the Big Picture in Mind

The Legislature is a very fluid environment that starts with a lot of posturing and generally ends up with things falling within a certain range of reasonableness. Getting too caught up in a particular moment or issue can cause long-term damage to relationships, reputations, and interests. While there are definitely times to fall-on-one's-sword, it is critically important to know when and, more important, how.

How a bill is drafted can be just as important as how it is advocated, especially since we all have to live with the finished product. Here are some things to keep in mind.

Different Process

The process for passing a bill is different than the process for drafting it. It is equally important to understand both.

Legislative Drafting Manual

Before drafting legislation, familiarize yourself with the Legislative Drafting Manual available on the web at www.le.utah.gov. The Manual is written by the Office of Legislative Research and General Counsel ("Legislative Research") and is the authoritative guide to drafting legislation in Utah.

Working With the Sponsor

Selecting a sponsor is the single most important decision you can make. Consideration should be given to the willingness of the sponsor to actively advocate the bill, the sponsor's relative political power, and the sponsor's general understanding of the underlying issues. The sponsor's job will be to lead the bill through the process as you continue to do all of the leg work in educating legislators and responding to detractors.

Working With Legislative Research

Once you have a sponsor, the sponsor will open a bill file with Legislative Research. The bill file will then be assigned to a drafting attorney. The attorney will work with the sponsor and anyone else approved by the sponsor to see drafts or be part of the drafting process – make sure you've been approved.

Legislative staff members are capable and professional. They know the process, have subject matter expertise, and can be very helpful – especially as you work with the sponsor and come to appreciate the unique role of and extreme pressures placed on nonpartisan staff.

The drafting attorney is required to put a constitutional note on a bill before it is introduced. Usually, the note says the bill doesn't have any obvious constitutional concerns. Sometimes, the note opines otherwise. If you disagree with a note, you should direct your concerns to the drafting attorney, remembering that this is the one area of legislation that falls outside of the political process and into the professional judgment of those who serve as legal counsel to the Legislature. In any event, you should not overreact to a constitutional note. They are rarely, if ever, the deciding factor in a bill's success or failure. Instead, they serve as an important avenue of communication between the Legislature and its lawyers.

Fiscal Note

Money is the root of all evil because it is also the root of everything else – including legislation. After a bill is drafted and approved by the sponsor, it is sent to the Legislative Fiscal Analyst's Office for a fiscal note that describes how much the bill will cost state government and the private sector if passed. Just about any fiscal note, in the current environment, can kill a bill – a critical fact that needs to be taken into account in drafting and lobbying.

Grafting Into the Law

The most difficult aspect of drafting legislation is to make sure that what you are adding to the law is consistent with what is already there. You must realize that drafting legislation is not like drafting a stand-alone contract. You must figure out where your idea fits into the existing statutory framework and how to make everything work together. Special care should be taken when offering an amendment to a pending bill inasmuch as amendments are generally drafted with much greater haste and perhaps less overall thought than the bill itself.

Precision Drafting

You must choose your battles wisely in the legislative arena. The last thing you want is for your opponents to be able to attack the language of your bill rather than its merits. The best way to counter this is by drafting your bill as narrowly and as precisely as possible.

Avoid Legalese

In the end, it doesn't do you a lot of good if you are the only person who knows what was "intended" by some highly technical and convoluted language in a bill. After all, if the language is ever challenged, there is no telling what a court may rule. If you are dealing with a complex area of the law, it is better to have a good definition section and to liberally break concepts down into subsections.

Intent Language

The general rule is that intent language should be avoided because well-drafted legislation should speak for itself. Even so, a couple of exceptions to this rule have developed over the years.

The first is intent language in the general appropriations bill. This intent language is commonly used and is very important because its gives executive branch agencies specific directions on what is expected of them in operating the agency with the money appropriated. This kind of intent language essentially has the full force of law in the eyes of the state agency to which it applies.

The second is intent language read on the floor of the House or Senate and "spread on the Journal." This language is generally the product of competing interests that have reached a compromise and want to memorialize certain aspects of that compromise in the record of the Legislature – more, perhaps, to keep each side honest than to use in future litigation.

The third is intent language in the form of an uncodified section of the bill itself. This is a new development that gives a sponsor the ability to express the intent behind a bill without that language actually becoming part of the Code. This can be helpful in trying to educate possible opponents of what is really intended. It can also become a distraction or lightning rod if not done right.

Common Drafting Conventions

The Legislative Drafting Manual explains all of the common drafting conventions. At a minimum, you should have a good understanding of:

- the different parts of a bill; e.g., long title, short title, sections affected, uncodified sections, notes, etc.
- the words used to explain what is happening to the sections included in a bill and their significance; e.g., enact, amend, renumber and amend, repeal, repeal and re-enact
- how subsections operate on the same and different levels
- the precise use and meaning of common drafting words; e.g., "shall," "may," "may not," "or," "and," "including," etc.
- how the code is organized into titles, chapters, parts, subparts, sections and subsection.

Lastly, lobbying, like other practice areas, has its own unique set of pitfalls and challenges. It never hurts to engage or associate with someone who knows the ropes, can size things up, and hit the ground running.

Holme Roberts & Owen LLP

is very pleased to announce that the following attorneys have joined the firm.

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*The lawyer is not yet admitted to the bar of this state.

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Helpful Employment Law Websites

Compiled by Katherine K. Hudman

How long does a plaintiff have to file an employment discrimination charge with the EEOC? What should an employer's family medical leave policy say? Are employees entitled to a lunch break? Answers to these, and many other employment law questions, can be found on the Internet.

To facilitate attorneys efforts in quickly finding websites that will assist them in addressing employment law questions, the following tables compile helpful websites, organized by topic. The topics start with federal and state laws, courts/cases, and agencies, then move to general legal and employment topics, and finally turn to employment-specific topics that are alphabetically arranged beginning with benefits and ending with workers' compensation. The web address for each website is provided under the relevant topic, followed by a brief description of the website's content.

So, next time your employer-client asks you whether they can ask applicants about their arrests or if they can run a credit check on an employee, you will have the secret weapon at your finger tips. Just refer to the table below, and you will be on your way to the answer in no time flat.

FEDERAL GOVERNMENT

Laws:

- uscode.house.gov (U.S. Code)
- www.findlaw.com/casecode (table of contents for links to federal laws, federal courts)
- thomas.loc.gov (pending bills and past bills)
- www.findlaw.com/11stategov/ut/laws.html (provides link to view bills proposed by Utah congressional members)
- www.access.gpo.gov/nara/cfr/cfr-table-search.html (Code of Federal Regulations)
- www.washlaw.edu (links to federal laws, regulations)

Courts/Cases:

- www.supremecourtus.gov/opinions/opinions.html (Supreme Court opinions)
- www.uscourts.gov (provides links to Circuit and District Courts)
- www.findlaw.com/casecode (table of contents for links to federal laws, federal courts)
- www.washlaw.edu (links to federal courts)
- forms.lp.findlaw.com (provides links to federal court forms)

Branches/Departments/Agencies:

- www.house.gov (U.S. House of Representatives)
- www.senate.gov (U.S. Senate)
- www.whitehouse.gov (White House/Executive Office)
  - www.whitehouse.gov/government (links to various cabinet level departments such as Labor Department and Health and Human Services)
  - www.whitehouse.gov/government/independentagencies.html (index w/ links to federal agencies and commissions)
- www.fedstats.gov (access point for statistics collected by all federal agencies)

UTAH STATE GOVERNMENT

Laws:

- www.le.state.ut.us/Documents/code_const.htm (allows for search of code and constitution by title or key word)
- www.le.state.ut.us/Documents/bills.htm (can search bills by number, subject, sponsor, etc. from here)
- www.rules.utah.gov (allows for search of Utah Administrative rules)
- www.findlaw.com/11stategov/ut/laws.html (provides links to Utah's Attorney General Opinions and various county codes)

KATHERINE K. HUDMAN is a member of Kirton & McConkie's Employment Law and International Law practice groups. Her practice focuses on advising clients on employment-related issues and representing clients in employment-based litigation.

Courts/Cases:

- www.utcourts.gov/opinions (Utah Supreme Court and Court of Appeals opinions)
- www.findlaw.com/11stategov/ut/laws.html (provides links to search 10th Circuit, Utah Supreme Court, and Utah Court of Appeals opinions)
- www.ck10.uscourts.gov (United States Court of Appeals for the Tenth Circuit)
- www.utd.uscourts.gov (Utah Federal District Court homepage)
- forms.lp.findlaw.com (provides links to Utah state and federal court forms)

Branches/Departments/Agencies:

- www.utah.gov (official Utah State website; links to government and other sites of interest)
- www.le.state.ut.us (Utah Legislature home page; links to constitution, code, bills, committee meetings, etc.)
- www.utah.gov/government/agencylist.html (index with links to all Utah government agencies)
- corrections.utah.gov/community/sexoffenders (from this page, can link to a form allowing searches of sex offender registry list)

OTHER STATES LAWS, COURTS, AGENCIES, FORMS

- www.findlaw.com/casecode (table of contents for links to states – scroll to bottom of page)
- www.courts.net (links to state courts and opinions)
- www.law.cornell.edu/opinions.html (links to state laws, agencies, courts)
- www.washlaw.edu (links to state laws, courts, etc.)
- www.hrcomply.com/index.law.html (updates on changes in state employment laws)
- forms.lp.findlaw.com (provides links to state court forms)

GENERAL LEGAL SITES

- www.washlaw.edu (index for links to federal laws, state laws, court opinions, and various other subject matter)
- findlaw.com/01topics (index of legal topics on which findlaw.com provides legal information including contracts, constitutional law, tax law, etc.)
- public.findlaw.com (site targeted to the public; has multiple topic areas; provides articles and other writings on various topics including employment)
- lawcrawler.findlaw.com (legal web and database search; powered by google)
- dictionary.lp.findlaw.com (dictionary for legal terms)
- lawyers.findlaw.com (site to search for lawyers by practice area, state, name)

GENERAL EMPLOYMENT SITES

- www.dol.gov (Federal Department of Labor)
  - www.dol.gov/dol/topic/index.htm (index of topics available through DOL site including wage issues, FMLA, unemployment)
  - www.dol.gov/dol/audience/aud-employers.htm (DOL index site of resources available to employers)
- www.findlaw.com
  - biz.findlaw.com/employment_employer/ (lists of articles, FAQ's, forms)
  - findlaw.com/01TOPICS/27labor/index.html (index for employment law resources accessible through findlaw.com including documents, web sites, laws, etc.)
  - news.findlaw.com/legalnews/business/labor (links to current events concerning employment)
- www.nolo.com (click on employment on left hand side; provides helpful links to various topics, Q & A's., etc.)

- www.hrgopher.com (compilation of HR websites by topic)
- www.elinfonet.com/contracts.php (employment law articles, sample forms, sample policies, sample contracts, access to federal employment laws)
- www.ahipubs.com (contains featured stories about current employment topics; can sign up to get free newsletters about various employment-related topics; can download various sample policies by e-mail)
- fatty.law.cornell.edu/topics/employment.html (Cornell University provides broad coverage on employment law in the following areas: Collective Bargaining, Employment Discrimination, Unemployment Compensation, Pensions, Workplace Safety and Worker's Compensation. Like many of Cornell's Legal Information Institute sites, these pages have access to the United States Code, CFR, state laws, and recent U.S. Supreme Court Decisions on the given subject.)
- www.erieri.com/freedata/hrcodes/index.htm (contains helpful summaries of federal, state, and international employment laws)
- www.epf.org (Employment Policy Foundation; a nonprofit, nonpartisan public policy research and educational foundation based in Washington, D.C. focusing on workplace trends and policies; contains numerous papers regarding various employment issues such as immigration and employee benefits)
  - www.epf.org/labor01/getpdf01.asp (Annual American Workplace Report; evaluates the "state of the workplace" by comparing the current condition of the economy to past years)
- www.employer-employee.com (site for employers and employees; contains many articles on various employment topics such as motivating employees, firing, sexual harassment, dating in work place, etc.)
- info.load-otea.hrdc-drhc.gc.ca/federal_legislation/home.htm (Canadian Labour Law website)

BENEFITS

- www.treas.gov/press/releases/200212101018476663. htm (Department of Treasury Press release on proposed regulations governing Cash Balance Retirement Plans. A cash balance pension plan combines the benefit formula of a defined contribution plan with the investment security of a defined benefit plan. A cash balance plan establishes a "hypothetical account" for each employee and credits the account with hypothetical "pay credits" and "interest credits." The proposed regulations would apply to cash balance plans – the same rule that applies to defined contribution plans. Consequently, a cash balance plan would generally satisfy the age discrimination rules if the pay credits to an employee's account are not less than the pay credits that would be made if the employee were younger)
- www.treas.gov/press/releases/docs/cashbalance.pdf (proposed regulations governing Cash Balance Retirement Plans)
- www.dol.gov/ebsa/regs/fedreg/final/2002026522.htm (interim final rule governing black out periods; generally, written notice is to be provided to participants and beneficiaries of individual account plans of any "blackout period" during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under the plan may be temporarily suspended)
- www.pbgc.gov (Pension Benefit Guaranty Corporation; government insurance corporation for defined benefits plans)
  - www.pbgc.gov/publications/SMBWEB2.PDF (Small Business Guide)
- www.ebri.org (Employee Benefit Research Institute is a nonprofit organization committed exclusively to data dissemination, policy research, and education on economic security and employee benefits; Members only site, but some information is available to nonmembers)
  - www.ebri.org/publicpr/index.htm (index to facts, research, and studies)
- www.americanbenefitscouncil.org (advocate of employer sponsored benefit programs; provides legislative, regulatory, judicial, and policy papers regarding a variety of topics including HIPAA, 401k's, Medicare, Cash balance plans, etc.)
- www.bc.edu/centers/crr (research site maintained by Boston College; has numerous papers on retirement issues like IRA's and borrowing from 401k's)
- www.wiser.heinz.org (an independent nonprofit organization devoted to educating women about retirement issues; includes guide to job benefits and articles regarding the marriage tax penalty, social security, disability insurance, what to do if you get a divorce or become a widow, and retirement planning)
- cobrahelp.com (members only site, but contains general information and recent case citations regarding COBRA that that is accessible to nonmembers)

DISABILITIES – FEDERAL/STATE

- www.eeoc.gov (Federal Equal Employment Opportunity Commission home page; links to applicable federal laws (Title VII and ADA), publications by EEOC, summary sheets, etc.)
- www.labor.state.ut.us/Utah_Antidiscrimination ___Labo/utah_antidiscrimination___labo.htm (Utah Labor Commission Home Page; provide links to Utah discrimination laws and other relevant information)

DISCRIMINATION – FEDERAL/STATE

- www.eeoc.gov (Federal Equal Employment Opportunity Commission home page; links to applicable federal laws (Title VII and ADA), publications by EEOC, summary sheets, etc.)
- www.labor.state.ut.us/Utah_Antidiscrimination___Labo/utah_antidiscrimination___labo.htm (Utah Labor Commission Home Page; provide links to Utah discrimination laws and other relevant information)
  - www.rules.utah.gov/publicat/code/r606/r606-002.htm (pre-employment inquiry guide)

DRUG FREE WORKPLACES/TESTING

- www.drugfreeworkplace.gov (information on drug testing, drug free workplaces, substance abuse – links will take to www.usdoj.gov/dea/demand/dfmanual/index.html that has sample policy)
- www.le.state.ut.us/~code/TITLE34/34_10.htm (link to Utah's Drug and Alcohol testing statute)

FAIR CREDIT REPORTING ACT

- www.ftc.gov/os/statutes/fcrajump.htm (Federal Trade Commission index page for resources available to assist w/ Fair Credit Reporting Act compliance)
  - www.ftc.gov/bcp/conline/pubs/buspubs/credempl.htm (Using Consumer Reports: What Employers Need to Know)
  - www.ftc.gov/bcp/conline/edcams/fcra/summary. htm (A Summary of Your Rights Under the Fair Credit Reporting Act)

FAIR LABOR STANDARDS ACT/PAYMENT OF WAGE/EMPLOYMENT OF MINORS

- www.dol.gov/esa/whd (Department of Labor, Wage and Hour division)
- www.le.state.ut.us/~code/TITLE34/34_04.htm (link to Utah's Employment of Minors law)

- www.le.state.ut.us/~code/TITLE34/34_12.htm (link to Utah's Minimum Wage law)
- www.le.state.ut.us/~code/TITLE34/34_09.htm (link to Utah's Payment of Wages law)

FAMILY MEDICAL LEAVE ACT

- www.dol.gov/dol/topic/benefits-leave/fmla.htm (Department of Labor, summary page w/ links to other sources of information)
  - www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/toc.htm (FMLA regulations – written in question/answer format)

HEALTH INSURANCE PORTABILITY & ACCOUNTABILITY ACT

- www.hhs.gov/ocr/hipaa (Office of Civil Rights link for HIPAA information)
- www.hipaadvisory.com (provides HIPAA news, articles, whitepapers, regulations, etc.)

IMMIGRATION

- www.immigration.gov
  - www.immigration.gov/graphics/lawsregs/handbook/hand_emp.pdf (handbook for employers regarding I-9 forms completion)
- www.dhs.gov/dhspublic/display?theme=23 (provides links to Department of Homeland Security's pages on naturalization, lawful permanent residency, temporary visitors, visas, and necessary forms)
- www.oalj.dol.gov/public/ina/refrnc/dbtc.htm (Judge's Benchbook on Labor Certifications)
  - www.oalj.dol.gov/public/ina/refrnc/bbsupp95.htm (95-96 Supplement to Judge's Bench Book)
- findlaw.com/01topics/20immigration/index.html (provides index to all immigration resources available through findlaw.com including articles, journals, government agencies, etc.)

NLRA/UNIONS

- www.nlrb.gov (National Labor Relations Board's index page; provides links to forms, rules, regulations, and decisions)
- www.le.state.ut.us/~code/TITLE34/34_0E.htm (link to Utah's Right to Work Statute)
- www.le.state.ut.us/~code/TITLE34/34_0C.htm (link to Utah's Deductions for the Benefit of Labor Organizations law)

OSHA

- www.osha-slc.gov (Federal government OSHA site)
- www.uosh.utah.gov (Utah government web site for Utah laws, regulations, and other relevant information)

Social Security/Medicare

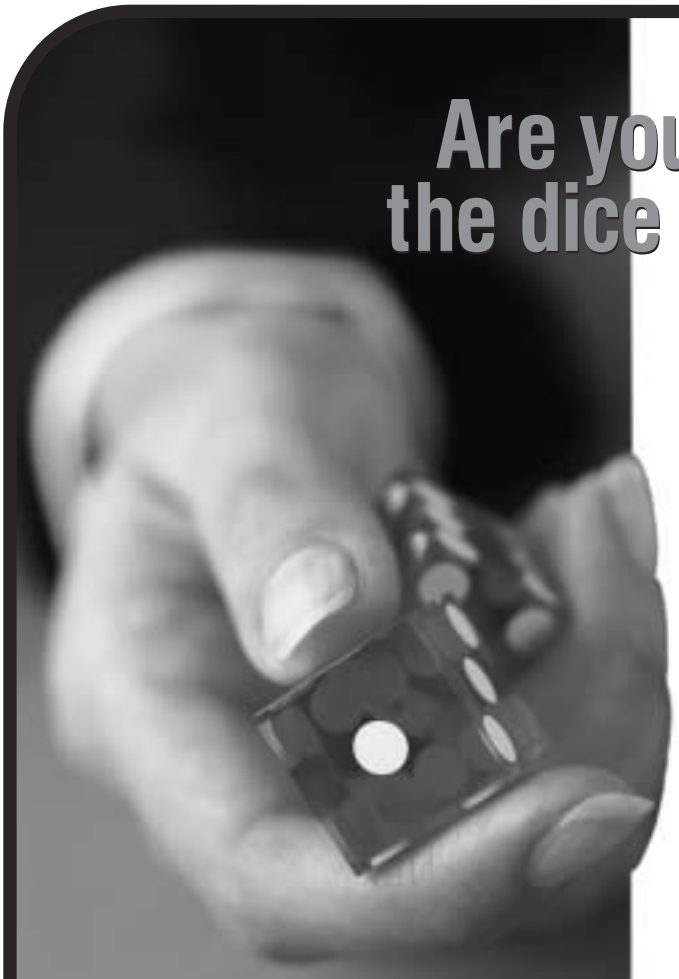
- www.ssa.gov
  - www.ssa.gov/cola/colafacts2003.htm (fact sheet on tax contributions, income limits, etc.)
  - www.ssa.gov/employer/ (employer wage reporting instructions)
  - www.ssa.gov/employer/ssnv.htm (discusses social security verification service)
  - www.ssa.gov/retirement.html (information on how to apply for social security retirement benefits)
  - www.ssa.gov/disability.html (information on how to apply for social security disability benefits)
  - www.ssa.gov/notices/supplemental-security-income (information on supplemental security income)
  - www.ssa.gov/OP_Home/handbook/ssa-hbk.htm (comprehensive guide of Social Security's benefit programs – updated for 2001)
- www.medicare.gov (Medicare information)
- www.cms.hhs.gov (Medicare information)

UNEMPLOYMENT

- www.dol.gov/dol/topic/unemployment-insurance/index.htm (Department of Labor index page for unemployment sources)
- www.jobs.utah.gov (Utah Department of Workforce Services; Information regarding unemployment, submissions of reports online, etc.)
  - www.jobs.utah.gov/ui/Handbook/index.asp (Employer's Handbook)

WORKERS COMPENSATION

- www.labor.state.ut.us/indacc/indacc.htm (Utah Labor Commission site for workers' compensation/industrial accident laws, regulations, and other relevant information)
  - www.labor.state.ut.us/indacc/Pamphlets/Employers__Guide/ employers__guide.htm (Employer's guide to workers' compensation)



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Utah's Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration

by Kent B. Scott & James B. Belshe

I. INTRODUCTION

This article will discuss the provisions of the recently adopted Revised Uniform Arbitration Act (RUAA) the Utah Legislature passed in 2002. The RUAA became effective in Utah on May 15, 2003. The RUAA is codified in UTAH CODE ANN. §§ 78-31a-101 through 131. Its provisions will apply to all contracts that are entered into after May 6, 2002, and to contracts made before May 6, 2002 by agreement of the parties. As of November, 2003, the RUAA has been adopted by eight states[1] and is currently being considered by eleven others.

Utah's RUAA was patterned after the Revised Uniform Arbitration Act that was approved by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in August, 2000. The NCCUSL version of the Revised Uniform Arbitration Act was finalized after a four-year drafting period. This project was undertaken to bring arbitration law into line with developments in the field of arbitration since the original Uniform Arbitration Act was approved in 1955. The RUAA has been endorsed by the American Bar Association, the National Academy of Arbitrators, the American Arbitration Association, and others.[2] The Revised Uniform Arbitration Act was adopted by the NCCUSL without a single negative vote being cast by the Uniform Law Commissioners.[3]

II. HISTORY

The original Uniform Arbitration Act ("UAA") was promulgated by the NCCUSL in 1955. Thereafter, the UAA was enacted by 49 jurisdictions. Utah did not adopt the UAA until 1985.

The 1925 United States Federal Arbitration Act ("FAA") was enacted by Congress in 1925 and applied to all contracts involving interstate commerce. The FAA and the Utah Uniform Arbitration Act have a number of similar provisions. The old Uniform Arbitration Act, the Federal Arbitration Act, and the new Revised Uniform Arbitration Act were created to ensure the enforcement of pre-dispute arbitration agreements. The limited grounds for vacating or modifying awards are similar in all three acts.

Like the current Federal Arbitration Act, Utah's old Uniform Arbitration Act deals mainly with such basic matters as the enforcement of arbitration agreements, appointment of arbitrators, compelling attendance of witnesses, limited discovery rights and review of awards. The old statute left much to be worked out in the courts, the rules of arbitration administration organizations, and the agreements of parties.

The RUAA is more complete and comprehensive of arbitration practice and procedure. It was created to codify case law addressing the arbitration process, and to resolve ambiguities in and questions raised by the old UAA. The new Utah Revised Uniform Arbitration Act deals with such matters as arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure, arbitrator immunity, discovery, subpoenas, pre-hearing conferences, dispositive motions, punitive damages, attorneys' fees and other remedies which could be the subject of an arbitration award.

III. PUBLIC POLICY FAVORING ARBITRATION

Utah's public policy favors arbitration. The Utah Uniform Arbitration Act provides for the arbitration of pre-existing disputes (by agreement of the parties) as follows:

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> "[o]n motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement: ... (b) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate."[4]

The Act also provides: "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim."[5]

The Utah Supreme Court has a well established history in defining a public policy that liberally encourages the broad enforcement of extrajudicial dispute resolution agreements that have been voluntarily entered into. *See eg. Central Florida Investments, Inc. v. Parkwest Associates,* 40 P.3d 599 (Utah 2002); *Intermountain Power Agency v. Union Pacific R.R. Co.,* 961 P.2d 320, 325 (Utah 1998); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.,* 925 P.2d 941, 946 (Utah 1996); *Allred v. Educators Mut. Ins. Ass'n,* 90 P.2d 1263, 1265 (Utah 1996); *Docutel Olivetti Corp. v. Dick Brady Systems, Inc.,* 731 P.2d 475 (Utah 1986); *Lindon City v. Engineers Constr. Co.,* 636 P.2d 1070 (Utah 1981).

Federal public policy also favors arbitration of pre-existing disputes. Section 2 of the Federal Arbitration Act is similar to the new Utah Revised Uniform Arbitration Act and reads in relevant part as follows: "... an agreement in writing to submit to arbitration, an existing controversy arising out of such content shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

In Dean Witter Reynolds, Inc. v. Byrd, the Supreme Court of the United States considered whether an arbitration agreement that was enforceable pursuant to statute must be enforced, even if the enforcement would result in bifurcated proceedings.[7] The Supreme Court has consistently held that courts must compel arbitration when a valid arbitration agreement exists and a motion to compel arbitration is made. *See eg. Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 35 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983); *Southland Corp. v. Keating,* 465 U.S. 2 (1984): *Perry v. Thomas,* 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. V. Dobson,* 513 U.S. 265 (1995); *Doctor's Assocs. V. Cassarotto,* 517 U.S. 681 (1996).

IV. RUAA HIGHLIGHTS.

The Federal Arbitration Act and the old Utah Uniform Arbitration Act are bare-bones statutes that address matters affecting basic arbitration principles. The new Utah Revised Uniform Arbitration Act was designed to be more comprehensive and to (1) codify existing case law interpreting arbitration statutes, (2) resolve ambiguities inherent within the statutes, and (3) modernize arbitration practice and procedure. The following represents the top ten highlights of arbitration practice and procedure under the new RUAA:

1. Arbitrability: Jurisdiction, and Venue – Utah Code Ann. §§ 78-31a-107, 108, 127 and 128

The old UAA did not address the question of who decides arbitrability of a dispute and by what criteria.[8] Section 78-31a-107(1) of the Utah RUAA restates the proposition that was the central premise of the old UAA, as well as the current FAA, that agreements to arbitrate are "enforceable ... except upon a ground that exists at law or in equity for the revocation of contract."[9]

Section 78-31a-107(2) and (3) defines who decides the important issue of arbitrability when the parties themselves have not decided. Matters of substantive arbitrability; i.e., "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate,"[10] are for the courts to decide. Matters of procedural arbitrability; i.e., "whether a condition precedent to arbitrability has been fulfilled,"[11] are for the arbitrator to decide. This dichotomy about who determines substantive and procedural arbitrability follows the majority approach under both the old UAA and the current FAA.[12]

Although the general rule in section 78-31a-107(2) is that the court decides substantive arbitrability, the parties may agree that

the arbitrator shall make this determination. Arbitration organizations, such as the American Arbitration Association and the International Chamber of Commerce, provide that arbitrators rather than courts make the initial determination of substantive arbitrability.[13]

Utah Code Ann. § 78-31a-127(1) defines jurisdiction to enforce arbitration agreements. It differs from the old Utah UAA, which conferred jurisdiction to enforce arbitration clauses on courts in the state where the agreement was made.[14] Section 78-31a-127(1) grants power to enforce an arbitration agreement in Utah courts with personal and subject matter jurisdiction over the controversy.

Section 78-31a-127(2) deals with jurisdiction to enter judgment on an arbitration award. It provides that an agreement providing for arbitration in a particular state confers "exclusive jurisdiction" on the courts of that state to enter judgment.

Section 78-31a-128 addresses the venue requirements in matters relating to the judicial supervision and management of arbitration proceedings. Any application for judicial relief or remedy is to be made in the county specified in the arbitration agreement. Where the parties do not designate a county, venue is proper in the court where an adverse party resides or has a place of business. If there is no such residence or place of business then venue is appropriate in a court of any county. All subsequent judicial proceedings relating to the arbitration are to be held in the court hearing the initial motion for relief. Forum shopping is prohibited.

2. Arbitrator Disclosure – Utah Code Ann. § 78-31a-113

Section 78-31a-113 provides that neutral arbitrators must make a full and timely disclosure (1) to the parties and other arbitrators of financial interests they may have in the outcome of the arbitration; (2) relationships with a party, witness or other person or entity involved in the arbitration; and (3) in the case of a party-appointed arbitrator, the nature of the arbitrator's relationship with the party appointing the arbitrator. Matters regarding failure to disclose by an arbitrator are grounds for vacating an award. The disclosure requirement is ongoing throughout the course of the arbitration, and for a reasonable period thereafter.

3. Arbitrator and Administrator Immunity – Utah Code Ann. §§ 78-31a-115 and 126

Section 78-31a-115 follows the pre-existing rule that both arbitrators and organizations administering an arbitration are immune from civil liability for actions taken in the course of arbitration. Furthermore, except for cases in which arbitrator misdeeds have been prima facie established, arbitrators are incompetent to testify about arbitration matters. The new RUAA also provides for payment of attorneys fees by the party that unsuccessfully seeks to compel arbitrator testimony.

4. Consolidation – Utah Code Ann. § 78-31a-111

Section 78-31a-111 prevents courts from consolidating arbitrations where the arbitration agreement of a party opposing consolidation expressly prohibits it. For arbitration agreements that are silent on the issue of consolidation, the Utah Uniform Arbitration Act strikes a compromise. Section 111 rejects the position of the majority of federal cases that prohibit consolidation under any circumstance. Instead, Section 111 provides that consolidation is appropriate where the disputes arise out of the same transactions, have issues in common, and the prejudice resulting from a failure to consolidate is not outweighed by delay or prejudice to those opposing consolidation.

5. Provisional Remedies – Utah Code Ann. § 78-31a-109

Section 78-31a-109 codifies existing law in many jurisdictions which allow courts to grant provisional remedies in aid of arbitration. This section grants arbitrators the authority to grant similar relief in arbitration. To make an arbitrator's interim order effective, the new Utah RUAA provides for court enforcement of the granting of arbitrator awarded provisional relief, but not the denial of that relief.

6. Case Management – Utah Code Ann. § 78-31a-116

Section 78-31a-116 gives an arbitrator the authority to conduct preliminary conferences with the parties to resolve scheduling and discovery matters prior to holding hearings on the merits. The arbitrator along with the parties should consider creating an Arbitration Scheduling Order that, at a minimum, addresses the following: (1) the date and place of arbitration, (2) cutoff dates for adding claims and parties, (3) fact and expert discovery, (4) witness disclosure, (5) disclosure and handling of exhibits, (6) motion cutoff, (7) pre-hearing briefs, (8) form of the award, (9) need for a reporter, (10) interim status conferences, (11) technology needs for the hearing and (12) a system for communicating with the arbitrator.

7. Discovery/Subpoenas – Utah Code Ann. § 78-31a-118

Section 78-31a-118 leaves discovery to the parties and the arbitrators to decide on a case by case basis. All discovery tools permitted by the Utah and Federal Rules are available for the parties to use if they choose to do so. However, the arbitrator has wide discretion in limiting the scope of discovery. Discovery should be fair, efficient, and cost-effective.

Section 118 gives authority to arbitrators to order discovery of third parties. Prior to the enactment of the new RUAA, there had been some conflict as to the authority of an arbitrator to order discovery from third parties. Under the RUAA, the arbitrator has a broad range of sanctions to use.

Utah Code Ann. § 78-31a-118(3) is the provision of the Utah RUAA

governing discovery practice. Under the new RUAA the parties are allowed great freedom in formulating their own discovery rules. For the drafting committee, discovery epitomized the conflict over whether arbitration would become merely a surrogate form of litigation or whether it would remain a dispute-resolution mechanism separate from litigation.[15] Many proponents of arbitration have advocated that Arbitration is more efficient than litigation due largely in part to limited and efficient discovery. However, there is concern that arbitration is becoming too professionalized and is taking on more of the attributes of traditional litigation. The challenge will be to keep the complex simple.

Utah Code Ann. § 78-31a-118(7) is a new provision that should help parties secure necessary information in an arbitration proceeding that involves persons located outside the state of the hearing. Under the old Utah UAA, enforcing a subpoena or a discovery related order against a person in another state required two court actions as well as additional arbitration involvement.

For example, suppose an arbitration regarding a construction dispute is held in Utah. As part of the arbitration, one party must depose a witness, who will be unavailable for the hearing. Furthermore, let's suppose the witness resides in New Mexico. Under the old UAA, the party taking the deposition must seek a subpoena from the arbitrator under section 17(a); request enforcement of that subpoena by a court in Utah; and then file the Utah court order in the appropriate court in New Mexico for the subpoena's issuance and enforcement. The person upon whom the subpoena was served would then file its objection with the court of the jurisdiction wherein that party resides.

However, under section 118(7), in any state that has adopted the RUAA, like New Mexico, the party may take the subpoena directly from the arbitrator in Utah and serve it upon the party. Should the party fail to comply, the New Mexico court would enforce the subpoena. The New Mexico court would also determine matters involving the subpoenaed party's objections, if any.

8. Motions – Utah Code Ann. § 78-31a-106

Utah Code Ann. § 78-31a-106 is the provision of the Utah RUAA governing motion practice. The old UAA used the term "application" for all actions filed with courts involving the arbitration process. For example, a party seeking to compel another person to arbitrate a matter would file an "application" with a court for an order to compel arbitration.[16] The Utah RUAA changed the terminology so that section 106 requires that all actions be filed "by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing motions." Thus, a party seeking to require another to arbitrate would file a motion to compel arbitration with the appropriate court.[17]

9. Remedies – UTAH CODE ANN. § 78-31a-126

Utah Code Ann. § 78-31a-126(3) is a new provision that grants courts discretion to award "reasonable attorneys' fees and other reasonable expenses of litigation" to a prevailing party in a "contested judicial proceeding" to confirm, vacate, modify or correct an award. Still, Section 126(3) is discretionary. For example, where a party challenges an arbitration award because the law on the matter is uncertain but the party loses, a court might well decide not to grant attorneys' fees and costs because the losing party has appealed on a close issue or has helped to develop arbitral law on the matter in dispute.[18]

Section 126(3) is prohibitive. For example, section 126(3) prohibits a court from awarding attorneys' fees and costs where a party has not "contested" a judicial proceeding.

Section 126(3) is a waivable provision under section 105(3). Where parties believe that a judicial challenge is likely by whoever loses the arbitration, they may agree that a court does not have the authority to add attorneys' fees and costs to a judgment.[19]

10. Post Arbitration Hearing and Appeals Utah Code Ann. §§ 78-31a-119, 121, 123, 124, 125 and 126

Prior to the adoption of the RUAA in Utah, Utah Code Ann. § 78-31a-13 governed the modification of awards by an arbitrator. Under section 13, a party was able to apply directly to the arbitrator for clarification of an award. The RUAA follows the old UAA approach. Utah Code Ann. § 78-31a-121 provides a mechanism for parties to apply directly to the arbitrator to clarify an award. This provision is an exception to the common-law *functus officio* doctrine, that states when arbitrators finalize an award and deliver it to the parties, they can no longer act on any matter.[20]

The benefit of section 121 of the new Utah RUAA is evident in comparison with the FAA, which has no similar provision. Because the FAA has no clear statutory authority for arbitrators to clarify awards, case law on this issue is contradictory and confusing. Often, parties under the FAA must bring a new proceeding in the U.S. District Court to clarify an arbitrator's decision.[21] The procedure for correcting errors under section 121 of the new Utah RUAA enhances the efficiency of the arbitral process in a manner similar to that of the old Utah UAA.

Though heavily debated, the drafters of the RUAA decided to not revise the old UAA with regard to vacatur. While Utah Code Ann. § 78-31a-124 has changed in form, the content remains quite similar to old Utah Code Ann. § 78-31a-14.

V. CONSUMER ISSUES

Some have questioned whether there should be special safeguards imposed on pre-dispute agreements requiring arbitration. The questions have been raised most often in the areas of employee/

employer and consumer/service provider relationships. The Drafters of the RUAA specifically steered clear of providing special requirements for arbitration agreements involving particular types of parties and transactions.

The RUAA is intended to apply to ALL agreements to arbitrate. If arbitration agreements conflict with applicable contract law, then the agreement may be unenforceable. The RUAA cannot change the federal law that precludes it from singling out agreements to arbitrate for special limitation. Therefore, the matter of arbitral fairness must be left to the respective state and federal legislative bodies and to the courts for further development.

VI. FEDERAL PRE-EMPTION

To date, the preemption related opinions of the United States Supreme Court have focused on two key issues; (1) enforcement of the agreement to arbitrate; and (2) issues of substantive arbitrability. The Supreme Court has specifically and consistently opined that state law, including adaptations of the RUAA and the like, limiting contractual agreements to arbitrate, must yield to a strong public policy as codified in Sections 2, 3 and 4 of the Federal Arbitration Act. Thus, the FAA remains preemptive of state statutes that limit the parties agreement to arbitrate or does not otherwise place arbitration agreements on an equal footing as other contracts.

If a conflict exists between the Utah Uniform Arbitration Act and the FAA concerning matters of arbitrability, it is clear that the FAA would preempt the application of the Utah Uniform Arbitration Act. The Utah Supreme Court held in *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.* that "state law governing arbitration is preempted only 'to the extent it actually conflicts with federal law.'"[22]

For example, in the case of *Mastrobuono v. Shearson Lehman Hutton, Inc.,* there was a direct conflict regarding the arbitrator's authority under a state statute to award punitive damages.[23] The underlying contract contained a choice of law provision requiring disputes to be resolved under the laws of New York. It also contained an arbitration clause. The Court ruled that New York law was preempted by the FAA because New York law denied arbitrators the ability to award punitive damages. Accordingly, if there is a conflict between a state statute that limits arbitrability and the provisions of the Federal Arbitration Act, the state statute, to the degree that it conflicts with the FAA, will be preempted and the more inclusive provisions of the FAA will be applied.

Take note, however, that the Supreme Court has been silent with regard to "back end" issues such as standards and procedure for vacatur, confirmation, and modification of arbitration awards. Thus, it is unclear whether or not the FAA preempts the RUAA on these matters.

VII. CONCLUSION

Will the new RUAA change the breadth and scope of arbitration practice and procedure; or is the RUAA the culmination of arbitration practice and procedure that has evolved under the Federal Arbitration Act and the old Uniform Arbitration Act?

Whatever the outcome, it was the intent of the National Conference of Commissioners on Uniform State Laws to provide each state with an opportunity to establish a uniform and effective means of arbitration practice and procedure that could be referenced to and used throughout the country.

Like any important statutory change, the RUAA required compromises by the many participants who had differing interests. Nevertheless, all who took part in the drafting process worked toward the same end for a more efficient, modern, and fair arbitration system that was consensual and served the best interests of the contracting parties and the public as a whole.

To everyone: Happy Arbitrating!

1. Adopting states in alphabetical order: Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, and Utah. *See* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp
2. *Id.*
3. The Revised Uniform Arbitration Act was approved by a vote of: 50 for the act, none against the act, one abstention and two not voting. Each state had a vote along with the District of Columbia, Puerto Rico and the Virgin Islands; Senator Lyle served as one of the National Law Commissioners and was instrumental in getting the RUAA adopted in Utah's 2002 General Legislative Session; Senate Bill 171.
4. Utah Code Ann. §§ 78-31a-108(1)(b).
5. Utah Code Ann. §§ 78-31a-108(7).
6. Federal Arbitration Act 9 U.S.C. 2.
7. *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct 1238, 84 L.Ed.2d 158.
8. Andrew D. Ness, *The Revised Uniform Arbitration Act of 2000,* 21 Fall Construction Law 35 (2001).
9. Heinsz, 56 JUL Disp. Resol. J. At ?
10. Utah Code Ann. § 78-31a-107(2).
11. Utah Code Ann. § 78-31a-107(3).
12. Heinsz, 56 JUL Disp. Resol. J. at 31.
13. *Id.* at 40.
14. UAA § 17.
15. *Id.* at 34.
16. *Id.* at 30.
17. *Id.* at 31.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Buzas Baseball, inc. v. Salt Lake Trappers, Inc.,* 925 P.2d 941, 952 (Utah 1996) citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941) and *Volt Information Sciences v. Stanford,* 489 U.S. 468 (1989).
23. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995).

Supreme Court Adopts Professionalism Standards

by Justice Michael J. Wilkins, Utah Supreme Court

In an effort to enhance both the daily experience of lawyers, and the reputation of the bar as a whole, the Utah Supreme Court has recently joined a growing number of jurisdictions by adopting standards of professionalism and civility applicable to all members of the Bar, and to those lawyers who appear in our courts from other jurisdictions. These standards are not yet mandatory, but the Court anticipates judges throughout the state will begin educating counsel appearing in their courts on these standards when conduct needs improvement.

By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved the twenty Standards of Professionalism and Civility recommended in the report. Prior to issuance of the order, the Court had authorized publication of the report on the Utah State Bar's web page and solicited written comments from Bar members.

Many jurisdictions have hoped to increase civility in the legal profession by promulgating codes of civility. In 1992, the Seventh Federal Judicial Circuit issued its "Proposed Standards for Professional Conduct." According to the Court's Professionalism Committee, the Seventh Circuit's standards have become a model for other courts and bar associations. In addition to the Seventh Circuit's standards, the Professionalism Committee reviewed the Florida Bar Trial Lawyers Section Guidelines for Professional Conduct, the Texas Lawyer's Creed, the Civility and Professional Guidelines for the Central District of California, the ABA Guidelines for Conduct and Lawyer's Duties to Other Counsel, the San Diego County Bar Association's Civil Litigation Code of Conduct, the Federal Bar Association Professional Ethics Committee's Standards for Civility in Professional Conduct, and the American Inns of Court Professional Creed. Following this review process, the Professionalism Committee spent countless hours drafting and refining the twenty Standards of Professionalism and Civility printed below.

The members of the Committee have earned the thanks and admiration of the Court for their devotion and the quality of the final report. Of particular note, Justice Matthew B. Durrant has served with distinction as chair of the Professionalism Committee since the committee's formation in October of 2001. During the past two years, he has made numerous presentations to both the bench and bar concerning the work of the Professionalism Committee, the standards, and their implementation. With the full support of the Supreme Court, Justice Durrant has urged state and justice court judges to require lawyers appearing before them to adhere to the Standards of Professionalism and Civility.

As the newly-appointed chair of the Professionalism Committee, I have been asked by the Court to focus on methods for making the Standards of Professionalism and Civility the behavioral norms for the Utah legal profession. Opportunities to discuss and understand the new standards will be frequent and varied. The Supreme Court and the Professionalism Committee urge your support of this effort.

For those of you who have not yet been exposed to the new standards, please take a moment to review them. I believe you will find them not burdensome, but rather, helpful. Either way, the Court will expect members of the Bar to be familiar with them, and to make an honest effort to apply them in practice.

Utah Standards of Professionalism and Civility

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive,

hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Annotation: See generally Preamble to Standards for Professional Conduct Within the Seventh Federal Judicial Circuit ("7th Cir. Standards"); Preamble to American College of Trial Lawyers Code of Pretrial Conduct ("ACTL Pretrial Code"); Preamble to Federal Bar Association Standards for Civility in Professional Conduct ("FBA Standards"); American Inns of Court Professional Creed. All Annotations may be found at www.utprofcomm.org.

Lawyers' Duties

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Annotation: American Board of Trial Advocates Principles of Civility ("ABOTA Principles"), No. 1; see also ACTL Pretrial Code, Std. 4(a); Participant's Manual for the Professionalism Course, State Bar of Arizona, February 1999, Professionalism Principle X ("Arizona Professionalism"); ABA Section of Litigation, Guidelines for Conduct, Lawyers' Duties to Other Counsel ("ABA Guidelines"), No. 2; FBA Standards, No. 2.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Annotation: Civility and Professionalism Guidelines for the Central District of California ("Central Dist. Cal."), No. A. 3; The Texas Lawyer's Creed, a Mandate for Professionalism, promulgated by the Supreme Court of Texas ("Texas Creed"), No. II. 6; FBA Standards, Nos. 3 & 13.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Annotation: ABOTA Principles, No. 3; ACTL Pretrial Code, Stds. 3(b) & 4(b); American College of Trial Lawyers Code of Trial Conduct ("ACTL Trial Code"), Std. 13(d) (1994); see also Texas Creed No. III. 10; 7th Cir. Standards, Lawyers' Duties to Other Counsel, No. 4; FBA Standards, Nos. 5, 24 & 25.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Annotation: ABOTA Principles, No. 28; ACTL Pretrial Code, Std. 4(c); see also ABA Standards, No. 29.

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Annotation: See Civil Litigation Code of Conduct, San Diego County Bar Association ("San Diego Bar"), No. III. 13; Texas Creed, No. III. 19; FBA Standards, No. 23.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Annotation: ABOTA Principles, No. 5; ACTL Pretrial Code, Std. 4(e); ACTL Trial Code, Std. 13(b); see also Central Dist. Cal., B.1.a; The Florida Bar Trial Lawyers Section, Guidelines for Professional Conduct ("Fla. Guidelines"), No. D.5; FBA Standards, No. 48.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Annotation: ABOTA Principles, No. 6; Central Dist. Cal., B.1.b.; cf. Texas Creed, No. III. 4; Aspirational Statement on Professionalism, entered by Order of Supreme Court of Georgia, October 9, 1992, ("Georgia Aspirational"), No. 5; FBA Standards, Nos. 49 & 50.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Annotation: See ABA Guidelines, No. 28; ABOTA Principles, No. 27; see generally CJA Rule 4-504.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Annotation: ABOTA Principles, No. 7.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Annotation: ABOTA Principles, No. 8; ABA Standards, No. 9; see ACTL Code, Stds. 6(b) & 9(i); FBA Standards, No. 15.

11. Lawyers shall avoid impermissible *ex parte* communications.

Annotation: ACTL Pretrial Code, Std. 8(a); San Diego Bar, No. II. 8; compare Utah Supreme Court Rules of Professional Practice, 3.5(c), with Utah Canon 3(B)(7), Code of Judicial Conduct; FBA Standards, No. 33.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or such correspondence is specifically invited by the court.

Annotation: Cf. ABOTA Principles, No. 29; Texas Creed, No. III. 13.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Annotation: ABOTA Principles, No. 12; ACTL Pretrial Code, Std. 2(c); see also Georgia Aspirational, No. 1; FBA Standards, No. 8.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Annotation: See ABOTA Principles, Nos. 13 & 17; ACTL Pretrial Code, Stds. 1(c); ACTL Trial Code, Std. 13(a); Texas Creed No. II. 10; FBA Standards, No. 10.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Annotation: See generally ABOTA Principles, Nos. 13-16; ACTL Pretrial Code, Std. 1; FBA Standards, Nos. 9, 11, 30, 31 & 32.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Annotation: ABOTA Principles, No. 18; ACTL Pretrial Code, Std. 13(b); see also ABA Guidelines, No. 18; Texas Creed, No. III. 11.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Annotation: See generally Utah Supreme Court Rules of Professional Practice, 4.4; Utah Rules of Civil Procedure 11, 26 & 37; FBA Standards, Nos. 14, 17 & 19.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Annotation: See Fla. Guidelines, No. E.9; FBA Standards, No. 16.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Annotations for 17 - 19: See generally ABOTA Principles, Nos. 19-26; ACTL Pretrial Code, Stds. 5(a), 5(c) & 5(e)(5); FBA Standards, Nos. 18 & 20.

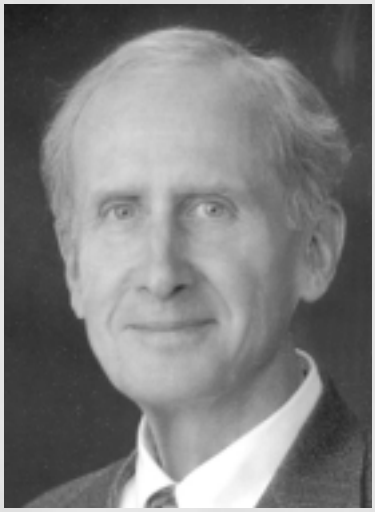
20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Annotation: ABOTA Principles, No. 2; see also Texas Creed, No. III. 9.

A TRIBUTE TO JAY ELLSWORTH JENSEN

May 19, 1928 – September 16, 2003

Jay graduated from the University of Utah School of Law in 1956, and was admitted to practice in the same year. In early 1958 he joined the firm then known as Moreton, Christensen & Christensen. On December 31, 1961, the firm was reorganized, Jay became a partner, and the name changed to Christensen & Jensen.



Jay's very successful career was occupied, primarily, in the defense of casualty cases. During the course of his practice, he joined the International Association of Defense Counsel and the Federation of Insurance Defense and Corporate Counsel. He was elected to fellowship in the American College of Trial Lawyers, and his career was climaxed by the Utah State Bar's award of Distinguished Lawyer of the Year for 2003, which was awarded to him at the State Bar meetings in Sun Valley, Idaho in July. Less than two months later, he passed from this life, a victim of pancreatic cancer, which he had battled for more than two years.

No one loved the profession more than Jay. He was both a great lawyer and a "great guy." He continually demonstrated a knack for getting to the heart of a dispute and working out a resolution of the problem. His focus was always beyond the specific dispute, and to the larger issues of life and happiness. Because of this, he was rarely bogged down in the daily frustrations inherent in the practice of a busy trial lawyer.

Letters submitted to nominate Jay as Lawyer of the Year best represent the legacy Jay has left behind for each to strive toward. One of his nominators wrote:

He is scrupulously honest. He is kind. He is the only lawyer I have met in over 20 years of practice that routinely makes a friend of the opposing party and opposing counsel. Even in emotionally difficult cases I have seen an opposing party demonstrate respect and admiration for Jay because he has demonstrated respect for him or her, and treated each with dignity and understanding. That is his nature.

Jay has proven that one can be a great lawyer and a great guy. He is living proof that a lawyer does not need to denigrate opposing counsel, complain about judges, or poke fun at opponents in order to be a successful and worthy adversary. . .

His secretary added:

During the last two years he maintained such a positive approach to this life-altering challenge and was always very positive and upbeat with everyone at the firm. His strength and positive attitude helped us all as we were feeling helpless and concerned for him. Mr. Jensen always took the time to speak with staff members and ask about their family, etc. He was a wonderful example to everyone in how to take life's twists and turns in stride and make the best of each day. He had an exemplary work ethic and worked tirelessly for his clients – always being the gracious professional and down-to-the-basics kind of lawyer.

The firm has received many tributes from members of the legal community and others. All recognize his abilities, his skill as a trial lawyer, and his professional accomplishments. However, they all emphasize his qualities as a man – his genuine humility, his honesty, his high moral standards, his even temper, his devotion to his profession, his firm, his friends, his church, and above all, his family. For these, he will be most remembered; and his exemplary career will continue to influence all who knew him.

Commission Highlights

During its regularly scheduled meeting of October 24, 2003, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. John Baldwin reported that the Commission should make the selections for the Professionalism Award in time for the Mid-Year Convention in March. For this initial award, Commissioners need to recommend one name from each Division by the January Commission meeting. It was noted that Justice Wilkins has replaced Justice Durrant as chair of the Court's Professional Committee.
2. Joni Dickson Seko and Billy Walker reported on the recent MJP regional meeting they had recently attended. They noted that Utah's Code of Civility and the work of the Court's Professional Committee as well as the Advisory Committee work on Ethics 2000 were of great interest to the group. Joni continued that the Casemaker program has been adopted by a majority of these western states. The biggest difference, however, is that these states impose a nominal fee of $15-25 per lawyer for the service to offset the cost. Idaho has granted reciprocity with Utah and information on admission on motion is now on the Bar's website. Montana's Board of Bar Examiners has approved reciprocity with Utah, but their Supreme Court appears to have some reservations. Oregon appears to be extremely pleased that an increase in the passing score on Utah's Bar Exam has been approved by the Commission and is very interested in whether our Supreme Court approves it.
3. Debra Moore reported that the Utah Trial Lawyers Association was interested in petitioning the Court to allow lawyers to be certified in a specialty practice area of the law. A petition would be necessary because the applicable Rules of Professional Conduct would need to be revised. The Commission declined to recommend any changes as it would involve additional Bar resources.
4. Yvette Diaz announced that official invitations to the annual Utah Minority Bar Association Scholarship Dinner have been sent out. Christopher John, General Counsel for General Motors will be the speaker and the Diversity Pledge will be "rolled out" at the dinner.
5. Debra Moore announced that the Leadership Conference would be held on Thursday, September 30. Debra reminded the Commissioners of the upcoming NCPB ABA meeting in San Antonio scheduled for February 5-7th and the Western States Bar Conference in Scottsdale, March 17-20, 2004.
6. George Daines reported on the small claims court committee.
7. David Bird reported on the Judicial Council.
8. John Rees discussed creating a "cyberspace" section. He believes that a good deal of important technological issues (such as SPAM, privacy, etc.) are not being adequately addressed by the IP section which seems to focus primarily on patents and intellectual property topics. Informal approval was granted with formal approval pending.
9. Christian Clinger reported on the Young Lawyer's Division "Fall Clean-Up". This event includes landscaping and clean-up of the Salt Lake County Children's Justice Center.
10. John Baldwin conducted a PowerPoint presentation on the Bar budget forecasts. John emphasized that budget decisions should be made in light of the Bar's mission and vision statements. He reviewed governance issues with the Commission and answered a number of questions.

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.

Happy Holidays!

from the Utah State Bar Commissioners & Staff

Notice to All Bankruptcy Practitioners

As of October 1, 2003, papers filed with the United States Bankruptcy Appellate Panel of the Tenth Circuit will be available in .pdf format on the BAP PACER website. www.bap10.uscourts.gov

To better serve all parties and provide significant and meaningful access to the Court's records, the United States Bankruptcy Appellate Panel of the Tenth Circuit ("BAP") has instituted a policy, effective October 1, 2003, to image papers, *other than briefs and appendices,* and make them available to the public through the PACER internet website. Limited images are available on dockets of most cases beginning June 1, 2003.

Please be aware that any papers filed with the BAP will be made publically accessible. Any personally identifying information of a confidential nature, for example social security numbers, credit card numbers, and names and addresses of minor children, should be redacted to prevent public access to that sensitive information.

In the event that it is necessary to file a paper containing confidential or sensitive information that should not be made available to those outside the appeal, please contact the Clerk's office of the BAP at (303) 355-2900, and arrangements can be made.

The BAP internet site does not allow electronic filing. However, papers may be filed electronically when authorized in advance by the Clerk. Papers may also be submitted for filing by facsimile at (303) 335-2999 or by mail.

For further information, please contact the BAP Clerk's Office: (303) 355-2900 or 10th_Circuit_Bap@ca10.uscourts.gov

2004 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2004 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, April 23, 2004. The award categories include:

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

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 to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, January 16, 2004.

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.

Notice of Direct Election of Bar President

In response to the task force on Bar governance the Utah Supreme Court has amended the Bar's election rules to permit all active Bar members in good standing to submit their names to the Bar Commission to be nominated to run for President-Elect in a popular election and to succeed to the office of President. The Bar Commission will interview all potential candidates and select two final candidates who will run on a ballot submitted to all active Bar members and voted upon by the active Bar membership. Final candidates may include sitting Bar Commissioners who have indicate interest.

Letters indicating an interest in being nominated to run are due at the Bar offices, 645 South 200 East, Salt Lake City, Utah, 84111 by 5:00 P.M. on March 1, 2004. Potential candidates will be invited to meet with the Bar Commission in the afternoon of March 11, 2004 at the commission meeting in St. George. At that time the Commission will select the finalist candidates for the election.

Ballots will be mailed May 3rd and will be counted June 1st. The President-Elect will be seated July 14, 2004 at the Bar's Annual Convention and will serve one year as president-elect prior to succeeding to president. The president and president-elect need not be sitting Bar commissioners.

In order to reduce campaigning costs, the Bar will print a one page campaign statement from the final candidates in the *Utah Bar Journal* and will include a one page statement from the candidates with the election ballot mailing. For further information, call John C. Baldwin, Executive Director, 297-7028, or e-mail jbaldwin@utahbar.org.

Notice of Petition for Immediate Transfer of Lamonte L. Hansen to Disability Status

On October 29, 2003, the Honorable James R. Taylor, Fourth Judicial District Court, entered an Order Transferring Lamonte L. Hansen to Disability Status.

Notice of Direct Election of Bar Commissioners

Second and Third Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for one member from the Second Division and three members from the Third Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after January 2, and **completed petitions must be received no later than March 1.** Ballots will be mailed on or about May 3 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. May 31. Ballots will be counted on June 1.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost.

1. Space for up to a 200-word campaign message plus a photograph in the April issue of the *Utah Bar Journal.* The space may be used for biographical information, platform or other election promotion. Campaign messages for the April *Bar Journal* publications are due along with completed petitions, two photographs, and a short biographical sketch **no later than March 1.**
2. A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division.
3. The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar **no later than March 15** enough copies of letters for all attorneys in their division. (Call Bar office for count in your respective division.)

If you have any questions concerning this procedure, please contact John C. Baldwin at the Bar Office, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to be the mailing address according to the Bar's records.

Discipline Corner

ADMONITION

On October 23, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
An attorney was hired to represent a client in a criminal matter. The client filed a complaint against the attorney. The attorney did not timely respond to the Office of Professional Conduct's requests for information.

ADMONITION

On October 23, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney represented a client in a criminal matter. The attorney did not know the whereabouts of the client. The attorney requested, but was denied a continuance. The court ordered the attorney to cross-examine, but the attorney continued to argue for a continuance. The attorney was escorted to the judge's chambers from the court in handcuffs and the hearing was continued because of the attorney's conduct.

Mitigating factors include: no prior record of discipline, no dishonest or selfish motive, cooperative attitude towards proceedings, experienced interim reform, and experienced humiliation and distress when handcuffed.

UTAH STATE BAR
2004 MID-YEAR CONVENTION

MARCH 11–13

Dixie Center at St. George
1835 Convention Center Drive
St. George, Utah

Full online Brochure/Registration will be available January 2, 2004
www.utahbar.org

Brochure/Registration materials will be available in the January/February 2004 edition of the Utah Bar Journal

2004 MID-YEAR CONVENTION ACCOMMODATIONS

Room blocks at the following hotels have been reserved.
You must indicate you are with the Utah State Bar to receive the Bar rate.

Hotel	Rate (+10.25%–10.35% tax)	Block Size	Release Date
Best Western Abbey Inn (435) 652-1234 bwabbeyinn.com	$79	75-Q 25-K	2/11/04
Best Inn & Suites (435) 652-3030 (800) 718-0297 bestinn.com	$66	20	2/11/04
Budget Inn & Suites (435) 673-6661 budgetinnstgeorge.com	$64–$81	25	2/10/04
Comfort Suites (435) 673-7000 (800) 245-8602 comfortsuites.net	$65	80	2/11/04
Crystal Inn St. George (fka Hilton) (435) 688-7477 (800) 662-2525 crystalinns.com	$65–$75	40-Q 20-K	2/11/04
Fairfield Inn (435) 673-6066 marriott.com	$64	71	2/24/04
Hampton Inn (435) 652-1200 hamptoninn.net	$78	20	2/26/04
Holiday Inn (435) 628-4235 holidayinnstgeorge.com	$79	50	2/17/04
Las Palmas Condos at Green Valley Resort (435) 628-8060 (800) 237-1068 gvresort.com	$95–198/nightly	limited # (9) 1-3 bdrm condos	2/11/04
Ramada Inn (800) 713-9435 ramadainn.net	$65	100	2/11/04

Paralegal or Legal Assistant

by Sanda Kirkham, CLA – Legal Assistant Division Chair

In my short tenure thus far as Legal Assistant Division Chair, I have been amazed at the confusion surrounding the terms "Paralegal" and "Legal Assistant." I continually receive phone calls from attorneys inquiring as to how their "legal assistants" can become "paralegals." It is a common misconception in the legal community, including Utah, that a "legal assistant" is simply someone who assists an attorney, but a paralegal is someone who has formal education, training, and experience to assist lawyers.

In August of 2003, The American Bar Association approved a proposal to change the name of the Standing Committee on Legal Assistants to the Standing Committee on Paralegals. The ABA determined it has become apparent that the term paralegal is gaining in prominence nationwide and that the term legal assistant is becoming less common. Another reason for the change was the term legal assistant is a less well-defined term. Many legal secretaries and others with no formal paralegal experience or training refer to themselves as legal assistants. This has certainly become the popular notion in Utah within the past decade.

In an attempt to further address and clarify this issue, I offer excerpts from an article recently published by NALA at www.nala.org/cert.htm:

> NALA has long stated that the terms "legal assistant" and "paralegal" are synonymous terms. This is not a choice or opinion of NALA, but a fact – the terms are defined as such throughout the United States in state supreme court rules, statutes, ethical opinions, bar association guidelines and other similar documents. These are the same documents which provide recognition of the legal assistant profession and encourage the use of legal assistants in the delivery of legal services.
>
> However, the association has become increasingly aware that while the terms are the same as "lawyer" and "attorney" preference in terms is emerging – different geographic areas use one term more than another. For this reason, we have filed for a certification mark "CP" with the US Patent and Trademark Office. In addition, we have redesigned the CLA certificate to encourage those who have completed the CLA certification to use either CLA or CP as their professional credential. Many may prefer to use the mark "CLA" because of its recognition throughout the legal community, however, the term "Certified Paralegal" may be used with it, as well. Suggested signature lines include the following:
>
> Jane Doe, CLA
> Certified Paralegal
>
> Jane Doe, CP
> Certified Paralegal
>
> Jane Doe, CLA
> Certified Legal Assistant
>
> Jane Doe, CP
> Certified Legal Assistant
>
> The marks may not be used together (i.e., CLA/CP) because this may imply two certifications. As always, the signature block must indicate the non-lawyer status, and must be used in accordance with state and employer ethical codes and procedures.

Specialty Certification

If you have received a CLA Specialist designation, we have also re-designed the CLA Specialist certificate to include the CLA and CP marks. Suggested signature lines for those with the specialty designation may include the following:

Jane Doe, CLAS
Certified Paralegal
Real Estate Specialty

Jane Doe, CLAS
Certified Legal Assistant
Real Estate Specialty

Jane Doe, CP
Certified Paralegal
Real Estate Specialty

Jane Doe, CP
Certified Legal Assistant
Real Estate Specialty

As mentioned previously, marks CLA and CP may not be used together. The signature block must indicate the non-lawyer status, and must be used in accordance with state and employer ethical codes and procedures. Some states do not permit use of the term "Specialist" by attorneys unless they have met certain specific requirements. For this reason, we have used the word "Specialty" in the above examples. We are not recommending use of the initials CPS because this is a mark claimed by another entity for the designation "Certified Professional Secretary."

(Reprinted with permission by NALA).

For those who would like to receive a new certificate, you can contact NALA Headquarters via phone 918-587-6828 or e-mail nalanet@nala.org (on the subject line of your e-mail, please state "Request for NEW CLA Certificate").

I believe that it may be time for the Legal Assistant Division and the Utah State Bar to take a close look at this issue and determine whether or not to move with the tide and change our Division's name to reflect the term "Paralegal" instead of "Legal Assistant."

I would love to hear your comments. Please contact me at skirkham@strongandhanni.com or any of my board members listed on our website.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
12/03/03	**Basics in Criminal Law:** 5:30 – 8:30 pm. $50 Young Lawyers, $60 others.	3 CLE/NLCLE
12/10/03	**Technology for Attorneys: Using Technology to Improve Your Trial Practice.** 8:00 am – 5:00 pm. $160 per course or $295 for both 12/10 & 12/11 courses.	8
12/11/03	**Technology for Attorneys: Using Technology to Improve Your Office Practice.** 8:00 am – 5:00 pm. $160 per course or $295 for both 12/10 & 12/11 courses.	8
12/12/03	**Balancing Your Professional Life: Success and Happiness.** Lawyers Helping Lawyers Third Annual Ethics Seminar. 9:00 am – 12:00 pm. $85 pre-registration, $95 at the door.	3 Ethics
12/15/03	**Deposition Training: Take a Killer Adverse Deposition.** 8:30 am – 4:00 pm. $100 YLD, $150 Litigation Section, $175 others.	7
12/16/03	**Deposition Training: Take a Killer Expert Deposition.** 8:30 am – 3:35 pm. $100 YLD, $150 Litigation Section, $175 others.	7
12/17/03	**Best of Series:** Register for one or all six sessions. $25 per session or $125 for the full day. **Session I: Trail Advocacy, Litigation Practice Tips and Pointers.** 9:00 – 9:50 am **Session II: Communication Technology.** 10:00 – 10:50 am **Session III: Document Retention.** 11:00 – 11:50 am **Session IV: Litigation Support.** 1:00 – 1:50 pm **Session V: Hot Tips on Word, PowerPoint & Excel for the Law Office.** 2:00 – 2:50 pm **Session VI:** TBA. 3:00 – 3:50 pm	6 (Including 1 hr. NLCLE)
01/06/04	**How Political Should the Bar Be?** Co-Sponsor: The Federalist Society. Noon, luncheon at the Alta Club. John T. Nielsen, Scott Daniels, Debra Moore, Prof. Ronald D. Rotunda–George Washington University Moderator, Hon. Michael McConnell–U.S. Court of Appeals. $27 Please call 257-5515, 297-7033 for reservations.	1
01/14/04	**Ethics School: What They Didn't Teach You in Law School.** 9:00 am – 4:30 pm.	7 Ethics
01/23/04	**Third Annual "And Ethics for All" – Legal-Medical Ethical Issues from the Cradle to the Grave.** 9:00 am – 12:00 pm. $95 pre-registration, $105 at the door.	3 Ethics
01/29/04	**Wills & Trusts Part III: Probate**. 5:30 – 8:30 pm.	3 CLE/NLCLE

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 _____

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

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

***PLEASE PRINT**

1. Name _____ **Bar No.** _____ **Effective Date of Change** _____

NOTE: Date means months, day, and year. "Now," "Immediately," or other such phrases will not be accepted. If you do not provide a date the effective date of the change will be deemed to be the date this form is received.

2. Business Address – Public Information

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

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

3. Residence Address – Private Information

Street Address _____ Suite _____

City _____ State _____ Zip _____

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

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

_____ Business _____ Residence

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

Signature _____

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

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.

NOTICE

Bar members interested in formation of Animal Law section of the USB please call Victoria Cramer at 801-299-9999.

POSITIONS AVAILABLE

Utah affiliate of D.C. securities law firm looking for contract attorney to draft private placement memoranda and SEC filings, plus train paralegal. Must have experience with forms 10-K, 10-Q, 8-K, SB-2, 14-A, S-8 and similar registration statements and filings. Please send resume to: Christine Critchley, Confidential Box #40, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail to ccritchley@utahbar.org

City Attorney – The City of Provo, Utah, Council/Mayor form of government (pop. 110,000) seeks an experienced professional to fill the position of City Attorney. This exempt position is responsible to the Mayor for the lawful, efficient and effective direction and production of legal work for the City. Must be a member in good standing with the Utah State Bar with a minimum of ten years municipal or comparable exp. $52,104–$92,640 plus comprehensive benefit package. Apply to Provo City Human Resources, 351 W. Center, Provo, UT 84601 (801-852-6182, FAX: 801-852-6190) before 6:00 p.m. January 15, 2004. EOE/AA

POSITIONS WANTED

Contract Attorney – Experienced attorney can research, draft motions, briefs, pleadings and discovery. Will work part-time, full-time or on a contract basis. Licensed in Arizona and Oregon. Ask for Jeff at 808-0052.

OFFICE SPACE/SHARING

2 law offices for rent. 150 Sq. ft. for $350/mo, 200 sq.ft. with separate entrance for $400/mo. Receptionist, conference room, copier, and secretary space available. Some referrals. Please call Austin or Nelda at 420-0990 or 687-7911.

Historical Bld. on Exchange Place has 844 sq. ft. office space. Suite includes two offices, secretary/reception area and small conference room or third office. Half block from new courts complex, great location for attorneys or any court-related business. $975 month. Receptionist services available and parking. Contact Joanne Brooks or Richard @ 534-0909.

Deluxe office space for one attorney. Share with two other attorneys. Includes large private office, reception area, parking adjacent to building, computer networking capability, law on disc, fax, copier, telephone system. Easy client access in the heart of Holladay. Must see to appreciate. 4212 Highland Drive. Call 272-1013.

OFFICE SPACE FOR RENT: Share with other attorneys. Fax, copy machine, receptionist, plenty of parking, easy access to freeways. Call 685-0552.

Professional Office Suites of Boise – Executive and Virtual Office Suites available starting at $245 per month! Instant telephone and high-speed Internet access; full administrative support services; receptionist/answering services; fully furnished executive suites; conference room access and much more! Contact POS of Boise at 208-947-5895, officeinfo@officeidaho.com or www.officeidaho.com.

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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.