Utah Bar JOURNAL

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2004 Mid-Year Convention pull-out registration form inside

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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: Diamond Fork, Utah County, by Bret Hicken, Hicken & Hatch, Spanish Fork.

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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 Utah Bar Journal

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2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
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Contingency Fees: Should They Be Limited in Personal Injury Cases That Settle Early?

by Steven T. Densley

Lawyers in the United States are increasingly subject to criticism for the perception that they are more interested in money than in honoring long standing ethical principles that govern the profession. When lawyers receive compensation that is grossly disproportionate to work done, amounting in some cases to more than ten thousand dollars per hour,[1] this perception is hardly unfair. And the problem is not limited to mass tort cases or class actions. Personal injury attorneys retained in run-of-the-mill automobile claims, for example, can charge a full third or more of any award even when cases they bring settle before the attorney is required to do much work.

Unlike many other professions, the practice of law is governed by ethical principles governing reasonable compensation. But lawyers increasingly breach these ethical standards, undermining the public's confidence in and respect for our profession. This is why the national legal reform organization Common Good[2] has asked the Utah Supreme Court to revise Rule 1.5 of the Utah Rules of Professional Conduct.

The proposed change would encourage early settlement by reducing attorney fees in personal injury cases to a reasonable level when early settlement occurs. The revised rule would reduce the burden on courts, pass significant savings on to the public and would ensure that more money is paid more quickly to accident victims – who are supposed to be the beneficiaries of our tort system, after all.

Background

Currently, Rule 1.5 requires that "a lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." The rule also provides factors to be considered in determining reasonableness: the amount of time and labor required; whether the questions involved are difficult or novel; and the level of skill needed, among others.

Courts, ethics committees and legal commentators agree that the risk of non-recovery is the only justification for the percentage contingency fee.[3] A contingent fee is a risk-sharing joint venture in which an attorney adds his time, effort, and talent to the client's claim. Its distinguishing characteristic is risk: if there is no recovery, then the attorney gets no fee. Where there is real risk of non-recovery and therefore non-payment, it is appropriate for the rate of payment under a contingency fee to exceed the hourly rate for lawyers of similar qualifications. Where there is little risk of non-recovery, however, a contingent fee should be correspondingly low. In sum, determining the reasonableness of a contingent fee is directly related to the risk and difficulty associated with that particular case. In fact, in the case of *In re Discipline of Babilis,* 951 P.2d 207, 210-11 (Utah 1997), the Utah Supreme Court upheld a disciplinary court's decision that charging a contingency fee for an uncontested probate matter "was excessive because there was little or no risk that [the] client would not recover."

A Utah Bar Ethics Advisory Opinion supports the principle that risk of non-recovery is the foundation for the contingent fee. That opinion reads: "Implicit in the concept of the contingent fee is the notion that there is an actual contingency upon which the attorney's chances of being compensated are based. In other words, there must be a realistic risk of nonrecovery."[4]

The Proposal

Despite the requirement that attorneys charge "reasonable" fees, tort attorneys are able to enter into fee agreements under which

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they take one-third or more of the recovery as a fee even if the attorney knows the case is low-risk, or even if the case settles before the attorney does much work. Even opponents of the proposal agree that while "[i]t is widely accepted that contingency fees should vary depending on the riskiness and complexity of the individual case," this rule is "almost universally honored in the breach."[5] The proposal seeks to eliminate this practice by making express in Rule 1.5 of the Utah Rules of Professional Conduct that this sort of practice is not reasonable.

Under the proposed rule, when an injured person retains an attorney on a contingent fee basis, the attorney must provide written notice sufficient to allow the allegedly liable party to assess the claim. If a defendant makes a settlement offer within 60 days of the required notice (which must be kept open for a period of at least 30 days), and the injured person accepts that offer, the attorney may charge only an hourly fee that does not exceed 10% of the first $100,000 plus 5% of any amount above $100,000. If the attorney does not provide that notice, the attorney may charge only an hourly fee that does not exceed the limits described above, regardless of how the case concludes. Because some cases may require more work than others, counsel may always petition a court to increase the permissible fee beyond the limits in the rule.

The proposal *does not* require a party to make or accept an early offer, and the proposal will have no impact if no offer is made or accepted. In such cases, the arrangement between injured parties and their counsel will be governed by the fee agreement in place, subject to Rule 1.5's requirement of reasonableness.

Rationale

If lawyers were already setting contingent fees based on the reasonableness factors in Rule 1.5(a), one would expect to find contingent fees charged along a continuum, reflecting the variations in those factors. However, as former Harvard University President, Law School Dean, and now-Professor Derek Bok has noted,

> There is little bargaining over the terms of the contingent fee. Most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of the likely settlement or the odds of prevailing in court.[6]

Professor Bok's observation is confirmed by the empirical evidence: A forthcoming study has found that median contingent fees remain at 33% despite variation in the following variables. 1) time of settlement; 2) amount of settlement; and 3) whether one's own insurance company or the opposing party's insurance company pays the claim.[7] Most significantly, the fee in cases that settle in less than 3 months is 33%.[8]

According to another study, less than 1% of lawyer advertisements placed in the Yellow Pages engage in any form of price competition.[9] Instead, there is a presumption that the percentage rate of a contingency fee is "usually in the amount of one-third."[10] Remarkably, and contrary to the basic relationship between prices and supply, as the number of lawyers has more than doubled, contingency rates have failed to decrease.[11] In fact, a recent study has found that, when adjusted for inflation, the effective hourly rate of contingency fee lawyers has increased 1000%.[12]

In effect, the proposed rule creates the continuum that Professor Bok posits: the rule separates out those claims that can and do settle early, and limits fees only in those cases. In cases that don't settle early, the rule's limits simply do not apply.

Where there is a real dispute between the parties as to liability or damages such that the parties cannot resolve their dispute early, the amended Rule 1.5 would have no effect. Rather than merely being toll-takers charging for access to the Courts, attorneys under these circumstances add real value to their client's claims. The proposed rule thus effectuates the very essence of a fiduciary's duty and the obligations of the current Rule 1.5.

Rule 1.5(a)(4) requires consideration of the "results obtained" in evaluating the reasonableness of a fee. However, as *In re Discipline of Babilis* revealed, "results obtained" cannot be read merely as the final amount recovered, but must include the value an attorney adds to the claim. For example, if a plaintiff is the sole beneficiary of a $100 million life insurance policy, but must hire an attorney to assist in the filling out of paperwork; it would be excessive for the attorney to receive $33 million despite the fact that his efforts were no more arduous than had the policy been for $100,000.

Injured parties are simply not being protected from paying more than the value added by their lawyers. In fact, studies have shown that unrepresented claimants sometimes receive higher net recoveries in personal injury cases than claimants represented by counsel. A nationwide survey of 38,444 automobile claims paid during a two-week period in 1997 compared the payments to claimants who were not represented by counsel to payments of those represented by counsel. The survey revealed that in automobile injury cases, "[bodily injury] claimants represented by attorneys received, on average, a net payment that was $741 *lower* than that received by those who had no attorney" after deducting economic losses and attorney fees.[13]

It is not difficult to see how the proposed rule can encourage settlements and save money for both plaintiffs and defendants. Imagine, for example, a personal injury action in which the plaintiff would be willing to settle for a net $80,000 award, but the defendant is unwilling to pay any more than $110,000 to settle the case. Without the proposed rule, the defendant could reasonably presume that the plaintiff has roughly a one-third contingent fee agreement with her lawyer. The potentially responsible party should not bother to make a settlement offer because his maximum settlement price ($110,000) would not be attractive to plaintiff after her attorney takes a third ($36,666) of the settlement. In order to settle the case, in fact, the potentially responsible party would have to offer $120,000.

The proposed rule, however, creates a window of opportunity in the first 60 days of a claim within which the defendant could make an offer of $100,000 which would be gladly accepted. The plaintiff would get more than he or she was willing to accept and the defendant would pay less than he or she was willing to pay, all without going to trial. The attorney, who investigated the claim and wrote a notice of injury – but did not have to prepare for trial or even file a complaint – would receive a reasonable hourly fee up to $10,000. The rule, then, would ensure a better result for both plaintiff and defendant, and would take another case off the dockets of our already-burdened courts.

The proposed rule for personal injury cases, which aims to reduce fees that go beyond the value added to a plaintiff's claim, is nothing new. In eminent domain litigation, for example, lawyers typically charge a contingency fee only against the difference between the State's initial offer and any higher sum paid after the lawyer is retained.[14] Experience has taught that the large majority of securities class action matters have "no inherent risk."[15] And yet rather than continue to enable attorneys to charge contingent fees for these cases, courts have conducted independent assessments of the risk in particular cases and reduced the attorney's fee accordingly.[16] A contingent fee is an inappropriate method of payment when a life insurance policy claim has already been presented to the insurance company, and a settlement offer made.[17] Oregon limits attorney fees in workers' compensation cases to no more than

25% of the difference between the amount approved by the initial offer and the benefits later approved at hearing or by stipulation.[18] Finally, where a lawyer assists in defending against a government claim for increased taxes, the lawyer takes his contingent fee based upon a percentage of the amount he saves the client.[19]

All of these types of litigation – eminent domain, securities class action, life insurance, workman's compensation, and tax certiorari – have one significant factor in common: there is no substantial risk of non-recovery. However, personal injury litigation is a category of cases where the fiduciary ethical norms of Rule 1.5 have not been routinely enforced.

Those opposed to modifying Rule 1.5 do so principally on the defense that contingent fees are an important means of providing legal services to those who would otherwise be unable to afford them. But the undisputed fact that contingent fees play an important role in our legal system says nothing about the reasonableness of 1/3 contingent fees in low-risk, low-effort cases. The proposed rule preserves contingent fees as a means of extending legal services to plaintiffs who could not otherwise afford them, but limits such fees to a reasonable amount in cases that settle quickly.

The proposed rule will not "diminish plaintiffs' access to justice,"[20] or otherwise deprive injured persons from hiring contingent fee lawyers. Rather, in the only instances in which the rule limits contingent fees, the fee paid to the lawyer is still contingent on a successful result – that is, on a settlement that is acceptable to the claimant. The only difference is that the fee – though still contingent on success – must be reasonable when measured against the number of hours that have been spent on the case.

It has also been argued that the proposed rule will create situations where "everyone but the lawyers would be better off."[21] Certainly, the proposed rule would make parties to personal injury litigation as well as Utah consumers better off. Indeed, a committee of the United States Congress has estimated that the proposal would save Utah consumers in excess of $20 million per year on legal fees.[22] But these results are not at the expense of lawyers' reasonable expectations. Although Plaintiffs' counsel will be unable to collect large fees in cases that settle early, a reasonable hourly fee will still be paid. Moreover, although fewer billable hours will be available to defense attorneys because there will be fewer cases to defend, and fewer protracted cases, the proposal will not affect the amount of a reasonable hourly fee. While it is true that the gains to injured parties and the public are derived from lower attorney's fees, as the Rules of Professional Conduct state: "The profession

has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar."[23]

Conclusion

The Utah State Bar has already acknowledged that the typical contingent fee "will usually be permitted only if the representation indeed involves a significant degree of risk."[24] Therefore, if we can accept the premise that cases that settle early did not involve a significant degree of risk, we must accept the conclusion that it would be unethical to charge a large contingency fee in such a case. Consequently, it is incumbent upon us as attorneys to adopt an alternative to such a practice. There may be ways in which the Common Good proposal could be changed and improved. However, the underlying principle is compelling. The current state of affairs can only exacerbate disrespect for the rule of law. Reform is necessary to give meaning and life to the fundamental fiduciary norms of our profession. It is time to make the ideals embodied in the current rules a reality.

1. No matter the merits of the tobacco settlement, the $30 billion in fees, payable over the next 25 years, awarded to the approximately 300 lawyers from 86 firms is nearly without equal. Countless newspaper and magazine articles have detailed accounts of attorneys from the respective states earning thousands of dollars per hour for their work in the tobacco litigation. *See, e.g.,* Daniel Wise, *Judge Freezes $625M Tobacco Award to Law Firms,* N.Y.L.J., October 23, 2002, at http://www.law.com/jsp/article.jsp?id=1032128807449 (discussing how attorneys representing New York state in tobacco settlement awarded sum amounting to $13,000 per hour); Pamela Coyle, *Tobacco Lawyers Reveal How They'll Divvy Up Fee,* New Orleans Times-Picayune, May 12, 2000 (discussing how Louisiana attorneys representing the state will receive $6,700 an hour for their services); Susan Beck, *Trophy Fees: A behind-the-scenes account of the controversial awarding of $13 billion to the plaintiffs' tobacco bar,* The AM.Law., December 2, 2002, at http://www.nylawyer.com/news/02/12/120202i.html (discussing how Mississippi attorneys representing the state will receive $22,500 per hour); Dennis Chapman and Richard P. Jones, *Tobacco Accord Worth $2,853 Hourly to Firms,* Milwaukee J. Sentinel, at http://www.jsonline.com/news/state/jul99/tobac13071299.asp (discussing how Wisconsin attorneys representing the state in the tobacco suit will receive $2,853 per hour).
2. Information about Common Good can be found at http://www.cgood.org/about/.
3. *See, e.g., Attorney Grievance Comm'n v. Kemp,* 496 A.2d 672, 678-79 (Md. 1985) ("[Where] the risk of uncertainty of recovery is . . . low . . . it would be the rare case where an attorney could properly resort to a contingent fee . . . ."); Virginia State Bar Association, LEO 1461 (April 13, 1992) *cited in* Nat'l Reporter on Legal Ethics and Professional Responsibility, Va Ops. 21 (1992) ("[M]atters which carry no such risk to the lawyer are not usually matters in which a contingent fee arrangement is appropriate."); Stewart Jay, *The Dilemmas of Attorney Contingent Fees;* 2 Geo. J. Legal Ethics 813, 835 (1989) ("[C]ontingent fees are permitted only if the representation involves a significant degree of risk.").
4. Utah Bar Ethics Advisory Opinion Committee, Op. 114 (1992), at http://www.utahbar.org/opinions/html/114.html.
5. Public Citizen's Critique of Common Good's Proposal to Amend the Ethical Rules for Utah Attorneys, July 14, 2003.
6. Derek Bok, The Cost of Talent: How Executives and Professionals are Paid and How it Affects America, 140 (1993).
7. *See,* Insurance Research Council, *Paying for Auto Injuries* (forthcoming Jan. 2004).
8. *See, id.*
9. *See,* Jeffrey O'Connell, Brown & Smith, *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiff's Personal Injury Bar – And a Proposed Solution,* 6 Conn. Ins. L.J. 423, 427 (2000),
10. American Trial Lawyers' Association, *Keys to the Courthouse: Quick Facts on the Contingent Fee System,* at 3 (1994).
11. *See,* Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without The Prince of Denmark,* 37 UCLA L. Rev. 29, 104 (1989) (citing as other grounds for inflated pricing of attorney services: mandated minimum fees, advertising and solicitation restrictions, and limits on group legal services and legal clinic operations).
12. Lester Brickman, *Effective Hourly Rates of Contingency Fee Lawyers: Competing Data and Non-Competitive Fees,* 81 Wash. U.L.Q. (forthcoming November 2003).
13. Insurance Research Council, *Injuries in Auto Accidents: An Analysis of Insurance Claims,* at 77-78 (1999).
14. As the leading treatise explains: "[T]he [contingent] fee is determined by a percentage of the total recovery (usually between three percent and ten percent) or a percentage of the difference between the final award and the initial offer (usually between twenty percent and thirty-three and a third percent)." 8A *Nichols on Eminent Domain* §15.06(3) (3d ed. 1994)
15. *In re: Quantum Health Resources, Inc.* 962 F. Supp. 1254, 1258 (C.D. Cal. 1997) (citing Janet Alexander *Do Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L. Rev. 497, 525 (1991).
16. *Id.* at 1259.
17. *See In re: Teichner,* 470 N.E.2d 972 (Ill. 1984).
18. *See* Leslie I. Boden et al., *Reducing Litigation: Using Disability Guidelines and State Evaluators in Oregon,* 30 1991). *See also* Leslie I. Boden, *Reducing Litigation: Evidence from Wisconsin,* 18, 22-25 (1988).
19. *See, e.g. Citicorp Real Estate Inc. v. Buckbinder & Elegant,* 503 so.2d 385 (Fla. Dist. Ct. App. 1987); *Dunham v. Bently,* 72 N.W. 437 (Iowa 1897); *Sedbrook v. McCue,* 180 P. 787 (Kan. 1919); *Board of Educ. v. Thurman,* 247 P. 996 (1926).
20. Utah Trial Lawyers Association's Memorandum in Opposition to Petition for Rulemaking to Revise the Ethical Standards Relating to Contingency Fees, July 14, 2003.
21. Public Citizen's Critique of Common Good's Proposal to Amend the Ethical Rules for Utah Attorneys, July 14, 2003.
22. Joint Economic Committee, 18th Cong., *Report on Choice in Auto Insurance: Updated Savings Estimates for Auto Choice,* at Appendix B, *available at* http://www.house.gov/jec/tort/07-24-03.pdf.
23. Preamble: A Lawyer's Responsibilities, Utah R. Pro. Con.
24. Utah Bar Ethics Advisory Opinion Committee, Op. 114 (1992), at http://www.utahbar.org/opinions/html/114.html (quoting *Committee on Legal Ethics v. Tatterson,* 352 S.E.2d 107, 113-14 (W. Va. 1986)).

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APPENDIX I

THE FIRST PROPOSAL IS TO AMEND RULE 1.5 OF THE UTAH RULES OF PROFESSIONAL CONDUCT AS FOLLOWS:

Rules 1.5 Fees.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(d)(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) A contingent fee for representing a defendant in a criminal case; or

(d)(3) A contingent fee in a personal injury matter except as provided herein:

(i) The lawyer shall submit a notice of injury to the allegedly liable party. If the attorney does not submit such notice, or if the client accepts an early settlement offer the lawyer may charge an hourly fee that shall not exceed 10% of the first $100,000 plus 5% of the recovery in excess of $100,000.

(ii) Pursuant to a motion by the lawyer, the court may find that the fees permitted by subparagraph (i) are unreasonably low in light of the reasonableness factors set fort in Rule 1.5(a)(1) through (8).

(iii) For purposed of Rule 1.5(3)(d):

"Early settlement offer" denotes a written offer of settlement made by an allegedly liable party to a personal injury claimant that: (a) is made prior to claimant's retention of counsel or within 60 days of the date the allegedly liable party received claimant's notice of injury; (b) has an expiration date at least 30 days after claimant and claimant's attorney, if any, have actual notice of the offer. If a personal injury claimant is represented by counsel, the allegedly liable party may send a copy of the offer to both the attorney and the claimant.

"Notice of injury" denotes a written notice made by a personal injury claimant's attorney to an allegedly liable party that contains accurate and sufficiently detailed information to allow the allegedly liable party to assess the claim and make a reasonable offer of settlement. The notice shall include information required to be disclosed under Rule 26(a)(1) of the Utah Rules of Civil Procedure.

"Personal injury" denotes the incurrence of bodily injury, sickness, death.

THE SECOND PROPOSAL IS TO AMEND THE COMMENTS TO RULE 1.5 OF THE UTAH RULES OF PROFESSIONAL CONDUCT:

Contingent Fees and Early Offers of Settlement

Contingent fees play a useful and critical role in ensuring access to counsel and the courts for personal injury claimants who would otherwise be unable to afford such access. Nonetheless, standard contingent fees should only be charged where the lawyer undertaking representation bears a substantial risk of non-recovery. Clients should not be charged standard contingent fees where no real risk of non-recovery or non-payment of fees exists. Rule 1.5(d)(3) makes it unethical conduct to charge a contingency fee in situations where an allegedly liable party makes an early settlement offer that is satisfactory to the personal injury claimant – thereby eliminating any risk that a claimant will not recover for his injury. In such a situation, charging a standard contingency fee is excessive and unreasonable; the lawyer representing the claimant may charge only a reasonable hourly rate or fixed fee that is otherwise consistent with this Rule.

Nothing in this Rule requires that a personal injury claimant accept the early settlement offer of the allegedly liable party. If the claimant rejects the early settlement offer of the allegedly liable party, or if no such offer is made within 60 days of the allegedly liable party having received notice of claimant's claim, a lawyer will remain free to charge a contingent fee that is otherwise reasonable and consistent with this Rule.

In order to foster early settlement offers and the swift resolution of personal injury claims, Rule 1.5(d)(3)(i) makes it unethical conduct to charge a contingency fee in a personal injury matter if a lawyer does not provide the allegedly liable party with written notice of the client's alleged injury. Written notice is required even when the allegedly liable party has made an early settlement offer prior to a personal injury claimant's retention of counsel.

An early settlement offer, as defined under Rule 1.5(d)(3)(iii), is one that is made promptly in a manner that permits the early resolution of a personal injury claimant's alleged injury without the expenditure of legal or judicial resources. An early settlement offer qualifies under Rule 1.5(d)(3) only if it is made prior to or within 60 days of an allegedly liable party receiving claimant's notice of injury or prior to claimant's retention of counsel. In order to permit claimant a suitable time to consider the early settlement offer, no offer qualifies under this Rule if it does not remain open for acceptance for at least 30 days. Nothing in this Rule requires an allegedly liable party to make an early settlement offer.

The notice of injury filed by a personal injury claimant must contain sufficient information to permit the allegedly liable party to evaluate the notice. It is, therefore, misconduct to charge a contingency fee if a lawyer conceals material information the lawyer reasonably believes or reasonably should know bears a substantial relationship to the injury alleged or the notice of the injury provided. The Rule therefore requires that a personal injury claimant's notice provide the allegedly liable party with: a) sufficient information to assess the basis for the claim that the allegedly liable party is liable for claimant's injury; and b) sufficient information to assess the relationship between the injury alleged and the value of claimant's claim. The notice must include information required to be disclosed in initial discovery under Rule 26(a)(1) of the Utah Rules of Civil Procedure. Absent compelling circumstances, such material information would also include: a) the name, address, age, marital status and occupation of the claimant; b) a brief description of how the injury occurred; c) a description of the nature of the claimant's injury including the names and addresses of all physicians or other health care providers who provided medical care to claimant in connection with the alleged injury; d) medical records relating to the injury or, in lieu thereof, executed releases authorizing the allegedly liable party to obtain such records from claimant's health care providers; and e) a statement of the basis for believing that the allegedly liable party is liable (in whole or in part) for causing the claimant's injury.

In the event a personal injury claimant's notice is determined to have omitted material information which the lawyer reasonably believes or reasonably should know bears a substantial relationship to the injury alleged or the notice of the injury, the claimant's lawyer is not permitted to charge a contingency fee and shall be subject to discipline or sanction in the same manner as a lawyer who withholds or conceals evidence duly subpoenaed during discovery.

A personal injury claimant's notice of injury, an allegedly liable party's early settlement offer, and all discussions relating thereto shall be inadmissible in any subsequent proceeding except in a proceeding to enforce a settlement agreement or to determine the proper fees to be charged after acceptance of an early settlement offer.

Subsection (d)(3)(i) bars a personal injury claimant's counsel from charging excessive fees when a claimant accepts an early settlement offer, and limits hourly rate charges to 10% of the first $100,000 of the accepted early settlement offer plus 5% of any additional amounts. These restrictions on the total hourly fees an attorney may charge are imposed in order to prevent windfall payments to claimant's counsel which the Rule otherwise precludes. Excessive contingency fee arrangements prohibited by the Rule should not be accomplished by the alternate method of charging exorbitant and excessive hourly rates. The fee restrictions in subsection (d)(3)(i) apply only when the early offer is accepted, an attorney has no risk of non-recovery, and comparatively little effort is necessary to recover the settlement. Accordingly, the restriction of fees is limited to charges made against sums produced with little or no attorney effort when an early settlement offer is accepted.

Subsection (d)(3)(ii) has a savings provision that permits the court, on motion of a personal injury claimant's counsel, to award fees in excess of those otherwise permissible under the subsection. Such awards shall not be routine. The savings provision is intended to permit compensation of attorneys when an early offer is accepted in excess of that otherwise permissible only in the exceedingly rare and unusual situation where an attorney's pre-acceptance representation requires extensive factual investigation or extensive research of legally novel theories of liability. Both an extraordinary effort and an unusually large time commitment are required to justify such otherwise excessive compensation.

The Proposed Contingent Fee Restrictions Are Unfair, Unreasonable, Unworkable and Wrong

by Ralph L. Dewsnup

The proposal to restrict attorneys' fees is flawed. It groundlessly asserts that Utah plaintiffs' lawyers repeatedly violate the existing Rules of Professional Conduct by overcharging their clients in contingent fee cases. It incorrectly declares that the courts are burdened by tort litigation. It misleadingly implies that the only service that lawyers render to their clients is in getting them money. And it disingenuously states that the public will benefit by a proposal that will have the effect of limiting access to legal services.

Utah is not the first state where a petition like Common Good's has been put forth. Nearly identical proposals were rejected by the supreme courts of Alabama and Arizona without comment. The ABA has twice rejected similar proposals, in 1994 and again as part of its Ethics 2000 project.[1] The Utah Supreme Court and the Utah State Bar should resist the clamor from self-styled tort reform organizations whose proposals are disguised as being citizen friendly when, in fact, they impede access to justice, reward dilatory tactics of insurers and deprive citizens of a level playing field.

Utah Lawyers Are Not Overcharging Their Clients

It is axiomatic that the person or entity that puts forth a proposal should bear the burden of showing that it is needed.[2] Neither Mr. Densley nor the group calling itself "Common Good" has provided evidence that Utah lawyers are breaching ethical standards. Indeed, if such conduct has come to their attention, they have a duty to report it.[3] Decisions regarding Utah lawyers should not be made on the basis of claims of misconduct in other states, nor should they be based on anecdotes, speculation, or assumptions.

Rule 1.5 of the Utah Rules of Professional Conduct, as it now exists, sets forth clear guidelines as to when and how fees of all kinds may be charged. Whether contingent, hourly or of some other character, "clearly excessive" fees may not be charged. Among the factors to be considered in determining the reasonableness of a fee are:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.[4]

A fee may be charged that is contingent on the outcome, so long as it is appropriate in the circumstances and reasonable in amount, and as long as the client has been fully advised of the availability of alternative fee arrangements.[5] The representation agreement must be in writing and must spell out the method by which the fee is computed and the way that expenses will be handled.[6] Furthermore, at the conclusion of a contingent fee matter, the client must be given a written statement that shows the remittance to the client (if there is one) and the method by which it was determined.[7] If a client is dissatisfied with the fee arrangement, he or she can make it known. If a fee dispute cannot be resolved between the lawyer and the client, courts are available to review the reasonableness of fees.[8] Furthermore, the Utah State Bar has committees that can become involved in helping to determine if fees charged are appropriate.[9]

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In a brief that was filed with the Utah Supreme Court's Advisory Committee on Professional Rules of Conduct, affidavits from multiple Utah lawyers were provided to show compliance with existing ethical rules and guidelines.[10] Numerous examples were cited where lawyers have voluntarily reduced an agreed upon contingent fee in order to facilitate settlement, help the client, or acknowledge an unexpected break in the case. No examples were cited by proponents of this proposed rule change where unethical conduct in Utah was countenanced.

Utah Courts Are Not Overburdened by Tort Litigation

According to the Utah courts' website,[11] in 2002 a total of 294,561 cases were filed in Utah's district courts. Of that number, 2,165 (less than 1%) of them were classified as "torts," which included malpractice, personal injury, property damage and wrongful death. During the same year, there were 7,675 probate cases (adoptions, guardianships, commitments, etc); 21,167 domestic cases (divorces, custody disputes, etc.); and 8,754 property rights cases (condemnations, evictions, foreclosures, etc.). If a rule were to be adopted that extinguished all forms of torts in Utah, the caseload would be reduced by less than 1%. This is hardly indicative of a burden on the courts that requires intervention.

Contingent Fee Lawyers Earn Their Fees Just Like All Lawyers Do

For some reason, proponents of this rule to restrict fees assume that it is easy to predict which cases will be resolved quickly. Nothing could be further from the truth.[12] Facts seldom fall easily into place. Witnesses can be hard to find. Viewpoints differ. Government investigations are incomplete or inadequate. Insurance companies dissemble.[13] Injuries are of uncertain severity and complexity. People are not bumpers and fenders. They are unique. Furthermore, they are almost always new to the legal process. They are sometimes frightened, wary and in need of help. They have lots of questions. Lawyers do not just waltz in, take money from willing insurance companies, peel off a large cut and toss the rest to the client. Typically, a contingent fee lawyer deals with the following issues:

Researching the law on questions that are raised in what should be the most straightforward of situations;[14] answering client questions about insurance coverage, medical bills, threatened termination from work, etc.; obtaining historical as well as medical information; interviewing witnesses (the client, family members, witnesses and others); obtaining medical reports and prognoses; obtaining employment information and income loss information; hiring experts (reconstructionists, doctors, economists, etc.); working with insurers (health and accident, workers' compensation, etc.) on collection matters, subrogation liens and coverage questions; handling minors' claims; establishing special needs trusts; working with structured settlements (qualified assignments, release language, etc.); helping the client to navigate a complicated maze of insurance intricacies (liability, health and accident, underinsured, uninsured, no-fault, worker's compensation and a variety of federal and state entitlements, coverages and programs); and otherwise helping to reassure and represent people who feel overwhelmed and vulnerable.

It shows an inadequate understanding of the role and duties of a

lawyer for the proponents of this fee restriction rule to think that contingent fee representation is ever like picking low hanging fruit. It is an affront to the integrity of the plaintiff's bar and to the bar in general to argue to this effect.

Public Access to Legal Services Will Be Restricted, Not Fostered, by This Proposal

The contingent fee has been rightly called the poor man's key to the courthouse. Those who are injured, out of work and inundated by unexpected bills and expenses can seldom afford to pay an attorney's hourly rate for representation. Most victims would be deprived of access to the courts if not for the willingness of some attorneys to risk their time and often their own money to provide legal services with the only prospect of payment for their services coming at the end of the case and then, only if the case is successful. Thus, any proposal that would discourage a lawyer from taking those risks could reduce the number of times that an insurer would have to make a payment of any kind to the victims of their tortfeasor insureds.

Common Good's proposal would cap contingent fees at 10% of the first $100,000 of recovery and 5% thereafter. If an attorney were to be compensated at the rate of $150 per hour, on a case that returned $100,000 of recovery, that would be the equivalent of 66.7 hours of work. If the recovery were $50,000, that is 33.3 hours of work. If the recovery were $15,000 that is 10 hours of work. If the compensation rate is more than $150 per hour, then even less time can be justified. It requires a certain dedication for any lawyer to be willing to spend his or her time and risk his or her money on a cause that can take unexpected twists and turns and be of uncertain outcome. Lawyers who understand that there are no "slam dunks" in litigation respect the fact that, but for the contingent fee, many people would not be able to obtain legal redress for their injuries.

For those that think $150 an hour (or more) is a hefty fee for a lawyer to earn, it should be remembered that out of this the lawyer must pay for all overhead (rent, telephones, secretary, insurance, computers, office machines, dues, library, etc.). If "tort reformers" can succeed in creating an economic disincentive for lawyers to take smaller tort cases, then they can successfully deprive victims of access to justice and make more money. What a novel idea!

It is no criticism of insurance companies to say that they seek to reduce the amount of money that they pay in claims. They are most often corporations who have a duty to maximize their profits by reducing the claims that they pay. They are not supposed to be altruistic. Given their responsibilities to shareholders and policyholders, they can only pay money when to not pay it would subject them to legal or economic sanctions that would harm their profits. Thus, it is folly to suppose that, without the threat of legal or economic sanction that the lawyer provides, an insurance company will "do the right thing" or be "fair and reasonable." It is simply sound public policy to permit citizens to have every possible means to level the playing field by having legal representation. Within the parameters of the present rule 1.5, citizens can obtain such representation by entering into contracts of their own choosing with terms that they work out between themselves and their lawyer without interference from their adversaries.

The Proposed Rule Will Result in More Litigation

The fee limitations proposed by Common Good would only apply to "personal injury matter[s]."[15] A "personal injury" is defined as "the incurrence of bodily injury, sickness or death."[16] The definition invites confusion. Harassment in the work place can produce sickness, as can disputes with insurance companies. Are those cases included? What about will contests that obviously involve death? Are life insurance disputes covered? They involve the incurrence of death. Maybe health and accident coverage disputes are subject to the rule since they involve the incurrence of sickness. Are civil commitment proceedings comprehended? They often involve the incurrence of mental illnesses, which could

be a form of "sickness." These and similar issues will ultimately have to be litigated.

Proponents argue that parties are not forced to settle their cases and, once they have complied with the notice requirement, can always refuse to accept "early settlement" and proceed with a normal contingent fee contract. However, if it is later determined that the early notice failed to contain "accurate and sufficiently detailed information to allow the allegedly liable party to assess the claim and make a reasonable offer of settlement," then the contingency fee agreement is voided, and the rule's fee limitations are imposed.[17] Does anyone doubt that satellite litigation will arise as defendants (and their insurers) who are hit with large verdicts claim that the notice was inadequate and that, therefore, the fee should be capped?

Thus, rather than solving a problem (a problem that does not exist), the proposed rule only creates problems and raises issues that will result in more, not less, litigation.

The Proposed Rule Is Inequitable

Perhaps the biggest problem with the proposed rule is its one-sidedness – the obvious unequal protection of the law that results from imposing this restriction on only the plaintiff's side of a limited class of clients and only on a limited segment of the bar. There are no consequences for a defendant or his counsel who chooses not to make an early offer of settlement (even where liability is clear) or who rejects a reasonable offer of settlement from the plaintiff. The defendant is not even required to make an early offer of settlement. Thus, the net effect of the rule is to require the plaintiff to lay out his case to the defendant before the plaintiff has had an opportunity to take any discovery from the defendant and allows the defendant to put undue pressure on the plaintiff to buy a pig in a poke, that is, to accept a settlement offer before the plaintiff knows the full extent of his damages or of the defendant's wrongdoing (or even the identity of all the potentially responsible parties).[18]

The rule also drives a wedge between the plaintiff and his attorney by creating conflicting incentives. The plaintiff may have an incentive to accept an early offer of settlement, particularly when the defendant is telling him that he won't do better at trial and will have to pay his attorney a greater percentage of his recovery if he rejects the offer. At the same time, plaintiff's counsel may have an incentive to reject what he thinks is an unreasonably low offer and earn his full, agreed upon fee. An ethical rule that creates a conflict of interest between an attorney and his or her client is a

contradiction in terms.

It is argued that a plaintiff's attorney whose work warrants a fee in excess of the limit placed by the rule can apply to the court for an adjustment. However, in order to make such an application, the lawyer must act against the interests of his client and violate the conflict of interest rules. This will foster disharmony between lawyer and client and may cause lawyers with foresight to avoid representation where such conflicts can arise. This will reduce the pool of attorneys willing to take contingent fee work and consequently reduce the public access to legal services.

The proposed rule presents other problems as well. It requires the submission of a notice that then gives the potential defendant 60 days to make an early settlement offer. Presently, insurance companies have duties to investigate claims when they arise. Under the proposed rule, insurance companies could sit back and wait for the claimant's attorney to do the work and submit the notice. Does anyone think that the savings realized in this shift of responsibility to the plaintiff's attorney will result in higher payments to victims?

The proposed rule also does not address the need for creative fee structuring when the primary motivation of a claimant (who cannot afford to pay an hourly fee) is to secure non-monetary remedies such as injunctions and apologies or when the claimant wants the opportunity to confront his or her wrongdoer or make the wrongdoer appear in court and defend his conduct.

The rule also ignores the problems that are encountered when a statute of limitations is going to run and there is not time to submit a notice and wait 60 to 90 days for a response.

The detrimental effect on an attorney's willingness to take smaller cases on a contingent fee has already been discussed. Suffice it to say that clients who can afford to pay for legal representation are not affected by this rule. Those affected are ones who cannot afford legal representation and who rely on the contingent fee to give them access to justice.

Conclusion

The Rules of Professional Conduct are not mere suggestions. They are requirements, the nonobservance of which can result in disbarment. Therefore, they must be cautiously studied, carefully written, easily understood and subject to uniform application. The proposed rule limiting contingency fees in a narrow class of cases is ill conceived, inequitable and unnecessary. It is a solution in search of a problem. Utah should reject it out of hand.

1. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994); Stephanie Francis Ward, *Group Seeks Cap on Contingency Fees,* A.B.A. J. eRep. (May 23, 2003).
2. *See, e.g., Koesling v. Basamakis,* 539 P.2d 1043, 1046 (Utah 1975) (the proponent of a proposition bears the burden of proof, including the burdens of production and persuasion).
3. Utah Rules of Professional Conduct Preamble, para. 11, & Rule 8.3.
4. *Id.* Rule 1.5(a).
5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994). 6. Utah Rules of Professional Conduct Rule 1.5(c).
7. *Id.*
8. *See, e.g., Jones, Waldo, Holbrook & McDonough v. Dawson,* 923 P.2d 1366, 1371 (Utah 1996); *Centurion Corp. v. Ryberg, McCoy & Halgren,* 588 P.2d 716, 716-17 (Utah 1978).
9. Presumably the Fee Arbitration Committee, the Client Security Fund Committee, the Ethics Advisory Opinion Committee and the Disciplinary Committee are all available to assist in questions involving the propriety of a fee.
10. The petition to limit fees was originally filed with the Utah Supreme Court. The court referred it to the Supreme Court Advisory Committee on Rules of Professional Conduct for study. The committee asked for briefs to be submitted in support of and in opposition to the proposal. Briefs were submitted in May and July 2003. Oral argument was heard by the full committee in October 2003.
11. The court's website can be accessed at http://www.utcourts.gov/stats/FY02/dist/fy2002_9.htm. All statistics cited in this section are available on that website.
12. At oral argument on this proposal, Mr. Densley cited certain advertising efforts of lawyers who claim that they can usually tell a prospective client on the phone whether they have a "good case" as proof that cases were easy. Deciding that a case has potential and is therefore a "good case" does not mean that it is an easy case or that it will be resolved quickly or without significant opposition, risk and expense. A case is a "good case" when a lawyer's assessment of risks means that he or she is willing to take it on a contingent fee.
13. *See, e.g., Campbell v. State Farm Mut. Auto. Ins. Co.,* 2001 UT 89, ¶¶ 28-32, 65 P.3d 1134 (citing examples of State Farm's misconduct), *rev'd on other grounds,* 123 S. Ct. 1513 (2003).
14. In what should be the most straightforward of cases, insurance companies contest the necessity and reasonableness of medical care; they demand so-called "independent" medical examinations by doctors and others who have known biases; they hire accident reconstructionists, engineers and human factors experts who minimize the forces of impact in collisions and obfuscate causes and effects; they demand production of medical records that may be twenty years old; and they throw up roadblocks to prompt resolution by forcing parties to incur costs and expenses that can deter pursuit of smaller cases.
15. *See* Mem. in Supp. of Pet. for Rulemaking to Revise the Ethical Standards Relating to Contingency Fees app. A, § 1 (available online at http://cgood.org/library/download/Early%20Offer%20Petition.pdf?item_id=25733).
16. *Id.*
17. *See id.*
18. *See* Paul M. Simmons, *The "Common Good" Proposal to Limit Contingency Fees: Where's the Commonality?* Utah Trial J., Summer 2003, at 10-16.

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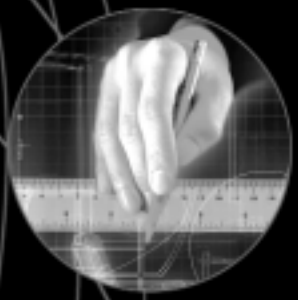

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Utah's New OneStop Business Registration Website

by Klare Bachman

A few years ago, former Governor Michael Leavitt challenged State agencies to offer government services 24/7. The Utah Department of Commerce, Division of Corporations and Commercial Code embraced the challenge. Along with a partnership of other government agencies, including Workforce Services, the Labor and Tax Commissions, the IRS, local business licensing bureaus, and Utah Interactive, Inc., we began work on a Web site where an applicant could accomplish business registration requirements, in a timely manner, with nearly every federal, state, and local regulatory agency.

Support for the concept was easy; meeting all the diverse needs was challenging. Some agencies collected basic public information, some collected only private information, and some collected both. Each agency had its own way of doing things. However, surprisingly enough, the partnership coalesced quickly and the project moved forward.

At first the project seemed pretty straightforward – just collect the data, share the common parts, segregate the unique parts, and seamlessly the prepared applicant should be able to start doing business. It was initially estimated that it would only take a few months to get the Web site developed and working. What a utopian idea that turned out to be! In reality, it took 18 months to accomplish the first phase. Workforce Services took the managing partner role and Utah Interactive, Inc. became the development arm of the partnership. Each partner assigned a business and technical representative and contributed what financial resources they had to fund the project.

The project's specification document proved that in addition to unique information, agencies collected many common data elements from each applicant. Partners were given capability to download only those data elements they are required by law to collect. The outline of these data elements soon determined that there were a few registration types that were just too complex to fit a one-stop registration portal, such as non-profit corporations. Those had to be eliminated from the Web site registration capability, although they may be re-addressed in future updates. Some traditional ways of conducting business had to be re-evaluated by the partners. Each partner had to ask the question, "Do we really need to process registrations this way?" For example, thanks to legislative changes, electronic signatures are now acceptable which eliminated the requirement for "wet" signatures.

Two focus groups were used to garner input from legal and accounting communities, since those professionals often assist in new business start-ups, as well as business owners themselves. The first focus group was introduced to the concept of the program and given a preview of the Web site. Many questions were asked and a lot of good ideas were offered. A few months later, the second focus group actually used the prototype and provided valuable feedback on what worked and what didn't.

In this first phase, the goal was to capture the majority of businesses that wanted to function in Utah and to mitigate as many bureaucratic hurdles as possible in a single stop on the Internet. So what does the online OneStop Business Registration process entail? It begins with an introduction and a registration page. The registration feature allows the user to work on the filing until the process is completed or save unfinished entry for later completion. Each user is given 120 days to complete the original filing process.

The entry page informs the user what documents or information should be readily available to complete the process. It also contains a link to a tutorial site where a user can go through the process without actually creating a registration. This allows the user to become familiar with the site and aids the actual process.

The next few pages provide general information on doing business in Utah. The user is then asked to specify the type of business entity being registered. Subsequent pages reflect requirements

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based on the type of entity selected. For instance, if the user selects "domestic corporation," they will be led through multiple pages requesting all the significant data elements to conduct business as a corporation in Utah. If the user selects "sole proprietor," "DBA" or "assumed name," a minimum of information is requested and the user is finished in less time.

Once the entity type is determined, the user is directed to type in and submit the selected business name. At this point, the user must pay a $22 name reservation fee that will be credited at the end of the registration process. Approval of the name may take up to 24 hours to complete. Until the complicated statutory requirements for name availability in the registration process is simplified, it cannot be automated, (see UCA §16-10a-401). Therefore, the Division has dedicated personnel to check each name prior to approval. Name requests submitted during business hours are likely to be returned very quickly. Names submitted on a weekend or after business hours will not receive a response until the next business day.

While the business name is pending, the user can complete the rest of the application for registration, such as information about business principals, location, purpose, number of employees, tax collection, hazardous waste, etc. Again, the type of entity selected drives the questions. Throughout the online program, there are help buttons or even online "chat" to assist with more detailed information and explanations. The site also provides a check off page detailing for the user what components have been completed, which ones have errors needing edits and what is still pending before the entire application can be submitted.

Depending on the entity type, there may be an additional charge (not to exceed the amount it would cost to file in-house). No further edits are permitted once the final submission has been made and registration numbers assigned. A summary page is displayed listing all the registrations for which data was collected and any corresponding numbers, such as business entity file number, FEIN, state tax numbers, employer numbers, etc.

From the information collected, OneStop combines data elements necessary to draft basic documents. Options are available to add specific clauses not especially listed in the statute and to print a copy of Articles of Incorporation or Articles of Organization for the entity if corporation or limited liability company was chosen. This document will be electronically submitted to the Division to be added to their image database of business entity documents. Phase two of the application will have a more robust piece to generate the Articles of Incorporation. The OneStop team is presently working with the legal community to enhance this portion of the application.

OneStop, as part of the state's new business resource portal at www.business.utah.gov, contributed to the state's "Best of the Web" award from the National Center for Digital Government in the fall of 2003. OneStop partners are very proud of what they have accomplished with this innovative and bold venture. The web site offers the level of service that business people deserve and have come to expect. It is a perfect resource for professionals and businesses to move out of a regulatory quagmire and into the world of commerce. Sometimes it's difficult for businesses, practitioners, and regulators to let go of the traditional piece of paper filing and rely on the wonderful technology at their fingertips, but the benefit is faster and easier registration. Now that the OneStop Business Registration Web site is a success, the partnership looks forward to additional partners and future enhancements. Since the launch in August 2003, nearly 2,000 business registrations have been completed online. Development of Phase II is set to begin soon. OneStop Business Registration can be accessed at www.business.utah.gov.

For further information, please contact the project manager, James Whitaker, Department of Workforce Services: phone (801) 526-9454 or email jameswhitaker@utah.gov.

Diversity Pledge Marks New Chapter in History of Utah State Bar

by Cheryl Mori-Atkinson

This year, the American Bar Association welcomed its first-ever African-American President, Dennis W. Archer. In his debut speech in August, Archer noted the significance of his presidency, stating, "Today is a new beginning, a new chapter in the history of the world's largest voluntary organization. We sweep aside the past to officially and emphatically declare that our association's leadership is open to every lawyer regardless of race or color."[1] Archer has also noted, however, that when compared to the general population, lawyers of color are "woefully underrepresented."[2] For example, it is estimated that minorities now represent 25% of the United States population, while just 10% of lawyers are people of color.[3] Because of this disparity, Archer has identified diversity as a priority for the ABA and has placed a major emphasis on efforts to increase diversity in the legal profession.

In the midst of this new chapter in the ABA's history, the Utah State Bar begins a new chapter of its own. In November 2003, the Utah Minority Bar Association ("UMBA"), with the support of the larger legal community, unveiled the Utah Pledge to Racial and Ethnic Diversity for Utah's Legal Employers at its annual Awards and Scholarship Banquet. The "Diversity Pledge," as it has come to be known, is a commitment by members of the Utah legal community to promote diversity in the profession and to further efforts to expand opportunities for attorneys of color.[4]

The concept for Utah's Diversity Pledge began in the fall of 1999 when the Utah Minority Bar Association, under the leadership of Trystan Smith and Clayton Simms, set out to address what its members considered to be its biggest challenge, namely increasing the number of attorneys of color in Utah's law firms. What developed over the next several years was a concerted effort by UMBA to challenge itself and the members of the larger Bar to begin a dialogue regarding diversity and its benefits for the legal profession. The result of these efforts is the Diversity Pledge.

Although not the first of its kind,[5] the Diversity Pledge marks a significant milestone for Utah. Like the rest of the nation, the face of Utah is changing. In 1960, the number of minorities in Utah was less than 2%.[6] Now, minorities make up 15% of Utah's population.[7] Unfortunately, however, less than 3% of active Utah Bar members are lawyers of color. The Diversity Pledge seeks to change that, so that the legal profession in Utah better reflects the changing face of the state and the nation. Sponsors of the Diversity Pledge recognize the benefits of promoting diversity – not just for minorities but for the profession as a whole. In a recent directive to lawyers, Archer explained:

> As lawyers we share an allegiance to a legal system that warrants and commands the respect of all members of society. Sadly, that system is not in place today, and it never will be until we tear down the barriers that continue to thwart advancement of lawyers of color. Public confidence in our profession – and the justice system as a whole – requires that law firms and the judicial system reflect the full diversity of our society.[8]

The Bottom Line

As this new chapter unfolds, UMBA hopes the Diversity Pledge will make a difference in Utah. UMBA recognizes, however, that not everyone will embrace diversity just because it's the right thing to do. Therefore, it is important that legal employers – and law firms in particular – realize that diversity is simply good for the bottom line.

Corporate America has recognized this principle for years. Businesses know that to thrive or even survive in these times, they must reflect the diversity of society. That is why we now see companies aggressively promoting diversity and targeting advertising to a diverse customer base. As corporate America has increased its diversity efforts, internal legal departments have also focused efforts on achieving diversity. The legal department of American Airlines, for example, consists of 40 attorneys, 15 of

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whom are female and 10 of whom are minorities.[9] Gary Kennedy, senior vice president and general counsel, states that "A workforce rich in diversity allows us to benefit from the many different racial, ethnic, religious, educational, cultural, lifestyle and social backgrounds our employees possess . . . This in turn enhances our ability to provide quality service to our customers and career opportunities to our employees."[10]

Other companies also recognize that achieving diversity is just "good business."[11] Pharmaceutical company Merck & Co., Inc.'s deep commitment to diversity is embodied in its corporate mission statement, which states, "The ability to excel – to most competitively meet society's and customers' needs – depends on the integrity, knowledge, imagination, skill, diversity and teamwork of our employees."[12] In keeping with its mission statement, Merck's corporate culture continually focuses on recruiting diverse talent. Says Valerie J. Camara, Merck Patent Counsel and representative to the company's Diversity Worldwide Business Strategy Team, "In the type of business we're in, innovation is key, and having a diverse talent pool can give us a competitive edge."[13] Likewise, Microsoft Corporation, recognized as one of the most global companies in the United States, concentrates heavily on diversity. Senior vice president, general counsel and corporate secretary, Bradford L. Smith, says, "If your customers are global, you can't understand them unless you are as diverse as they are. Our business imperative is to have diversity inside the company that is comparable to U.S. diversity."[14]

As corporate legal departments throughout the country have become more focused on diversity internally, they are also beginning to demand diversity in the outside law firms they hire. For instance, in 1995, American Airlines instituted a Minority Counsel Program, which was designed to increase minority participation on work staffed by outside law firms.[15] Microsoft also works to ensure that law firms staff assignments with a diverse group of people and considers the firms it hires on three different levels of diversity.[16] First, Microsoft tries to identify women and minority law firms with which it can do business; second Microsoft works with minority partners in otherwise majority-partner law firms; and third, Microsoft shares information with firms and helps them to increase their diversity efforts.[17] The Boeing Company takes an even tougher approach. Says, Douglas G. Bain, Senior Vice President and General Counsel, "Many companies ask outside law firms about diversity, but we're going to ask them for data. We'll ask them to back it up, and move our work if they don't comply."[18] To put into perspective the economic benefits of

diversity to law firms, the Philip Morris family of companies alone purchased over $1.3 billion of legal work from minority and women-owned firms in 2001.[19]

In light of this environment, most national law firms now understand that achieving internal diversity is critical in order to remain competitive. This shift in thinking has caused many law firms to emphasize diversity within their own organizations. These firms realize that as clients become more diverse and as more clients demand diversity in outside counsel, those firms that are able to recruit and retain a diverse work force will have a competitive edge over those that don't. Likewise, as Utah becomes more global and as Utah law firms seek more national and international clients, it is imperative from a business perspective that Utah firms attract and maintain a diverse work force. And as the local face of Utah becomes more diverse along with the rest of the nation, diversity becomes even more important.

Steps to Achieve Diversity

As this new chapter in Utah's history unfolds, it is important to note that the Bar has already made great strides in recent years. We are beginning to see more women and minorities in various areas in the Bar and on the Bench. Moreover, the strong support of the Diversity Pledge shows that many Utah legal employers are embracing the notion that recruiting a diverse work force is good business practice and good for the profession. However, achieving diversity will not be easy. Recognizing that barriers exist and achieving an understanding of these barriers is critical to developing a successful diversity program.

A 2001 study conducted by the Minority Corporate Counsel Association identified the most common challenges to any diversity program. They include:

1. Little understanding between diversity and the bottom line or its connection to strategic business initiatives.
2. Myth of the Meritocracy – a cultural bias that conceptualizes diversity at the expense of quality of legal service, instead of quality because of diversity.
3. Revolving Door for Incoming Attorneys of Color – the diversity at the associate level is not reflected in the senior partnership or management of most firms.
4. Lack of senior partner commitment and involvement in the planning and execution of diversity initiatives.
5. Insufficient infrastructure and resources for diversity programs.
6. Attrition of women attorneys driven by lack of work/life programs.
7. Negative stereotypes and assumptions about ability and work ethic, which become self-fulfilling prophecies.
8. Emphasis on entry-level recruitment instead of lateral hires who can provide role models and mentors for young associates.
9. Good intentions but little willingness to examine specific issues of each firm historically.
10. External consultants design and implement a training program that is not owned or understood by the firm's senior management.[20]

These barriers are not insurmountable, however, as evidenced by the many successful diversity programs already in place throughout the country. Utah law firms can learn from these examples.

First, to be effective, a diversity program should start with a well-formed plan. Many leading national law firms have put in place committees or task forces to address issues of diversity. Focus groups and discussions are also helpful to determine goals and areas of concern. For example, as part of a company-wide push for diversity, the Philip Morris law department implemented the Philip Morris Worldwide Law Department 2001 Diversity Action Plan.[21] The plan was developed in three steps. First, the senior lawyers decided what the plan would accomplish; next they convened a group to actually develop the plan; and next they solicited input from focus groups across the company.[22] Once a plan is in place, a committee can raise awareness within the firm and focus firm-wide efforts on diversity goals. To actually effect change, however, firms must promote diversity from the top. Senior partners must be committed to diversity efforts and be actively involved in the process.[23] Firm-wide ownership and participation are also important to a successful diversity initiative. Therefore, resources should be allocated in a way that facilitates such involvement and ownership.[24] Also critical to any diversity program is a confidential or anonymous forum to raise diversity issues. Firms that are receptive to issues raised by attorneys will be better able to change their culture and practices to further diversity efforts.[25]

Utah's New Chapter

The Diversity Pledge is an important first step in achieving diversity in Utah's legal profession – but it is not the only step. UMBA hopes that it is the beginning of a long chapter in Utah's history where legal employers make it a priority to recruit, hire, retain, and promote qualified, yet ethnically diverse, attorneys of color. As stated by Marty Barrington, associate general counsel for Philip Morris Companies, Inc., "We don't do diversity because it's a good thing to do, or even because it's the moral thing to do, but

Pledge to Racial and Ethnic Diversity for Utah's Legal Employers

I. In an effort to pursue full and equal opportunity and participation for all attorneys, including attorneys of color, each participant pledges to:

A. Recruit qualified applicants of color;[27]

B. Provide attorneys of color equal access and opportunity for training, mentoring, guidance, evaluation, and opportunities to grow and succeed;

C. Provide attorneys of color equal opportunity to participate fully in administrative, professional, social, and marketing activities;

D. Invite to partnership or shareholder status attorneys of color who meet the requisite criteria; and

E. Adopt a policy against discrimination at any level within the firm.

II. To increase the number of offers of employment extended to law students and attorneys of color by taking the following steps whenever possible

A. Increase the pool of applicants of color who will meet the hiring criteria by:

1. identifying and recruiting students of color through law school placement administrators, faculty members, present or former summer clerks, organizations of law students, job fairs, local receptions for law students of color, and other organized law student activities;

2. identifying and recruiting attorneys of color as lateral hires through referrals of law school placement administrators, faculty and/or other practicing partners, local specialty bar associations, or other resources.

B. Include, when possible, attorneys of color on committees that have responsibility for the recruitment, hiring, training, evaluation, and advancement of attorneys; and

C. Communicate to each attorney and staff member the firm's commitment to achieving the objectives stated herein, as well as the firm's intolerance for discrimination within the workplace.

III. To increase retention and promotion rates for attorneys of color by taking the following steps whenever possible:

1. Assist each newly hired attorney (regardless of race, ethnicity or level) in learning the firm's culture, history, practices, and procedures;

2. Help ensure that all attorneys, including attorneys of color are afforded, on a consistent basis, opportunities equivalent to those provided to all other attorneys in the quality and quantity of legal work assignments as necessary to develop skills and acquire experience for success and advancement.

SIGNATORIES

The undersigned Signatory has signed this Diversity Pledge this _____ day of _____, 2003, to evidence their commitment to its goals and to the steps to meet those goals which are set forth herein.

_____

[NAME OF EMPLOYER]

_____

[NAME OF SIGNATOR]

because we want to be the best law department in the world."[26] Likewise, the Diversity Pledge demonstrates the Utah legal community's commitment to be the best that it can be.

Message from the Utah Minority Bar Association:

As part of its ongoing efforts to further diversity in Utah's legal profession, UMBA will be seeking feedback on the effectiveness of the Diversity Pledge. UMBA will be asking for input from members of the bar regarding diversity efforts within their firms and the success or failure of such efforts. UMBA would also like to publicize successful diversity initiatives by local law firms and other legal employers. To this end, UMBA welcomes any comments, suggestions, or constructive criticism from all members of the bar. To comment, please contact Cheryl Mori-Atkinson at mori-atkinsonc@sec.gov. For an electronic copy of the Diversity Pledge, please go to www.utahbar.org.

UMBA would like to acknowledge and express appreciation to the founding sponsors of the Diversity Pledge:

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1. James Podgers, *Breakthrough Presidency,* ABA Journal, October 2003, at 81.
2. Dennis W. Archer, *A Diverse Directive: We Need More Lawyers of Color to Help Promote the Rule of Law,* ABA Journal, October 2003, at 8.
3. *See* Joan E. Lisante, "Selling Business on Diversity," ABA Journal eReport (October 31, 2003) <http://www.abanet.org/journal/ereport/oct31diverse.html>.
4. A number of founding sponsors have already committed to increase their diversity efforts and have signed on to the Diversity Pledge. UMBA welcomes and encourages all Utah legal employers to join this initiative by committing to diversity and signing on to the Diversity Pledge.
5. Utah's Diversity Pledge is based largely on The Colorado Pledge to Diversity, first signed by leading law firms in Denver in 1993. The original document, signed by 23 firms, acted as a call to action to create a law firm working environment conducive to hiring and retaining attorneys of color. Since 1993, Colorado's Diversity Pledge has been updated to reflect a commitment by each of the participating law firms to take a more active role in increasing diversity. Similar diversity pledges have been implemented in a number of legal communities throughout the country.
6. *See* Pamela S. Perlich, *Utah Minorities: The Story Told by 150 Years of Census Data* (October 2002) <http://www.business.utah.edu/bebr/onlinepublications/Utah_Minorities.pdf>.
7. *See id.*
8. Archer, *supra.*
9. *See* Alea J. Mitchell, *Making Diversity Work! American Airlines,* Diversity & The Bar, September/October 2003. This article and all other articles cited from Diversity & The Bar can be located at the Minority Corporate Counsel Association's website at www.mcca.com. The website also contains a wealth of useful information regarding diversity and best practices for achieving diversity.
10. *Id.*
11. T. Sumner Robinson, *Global Companies, Global Commitments: Counsel at Merck, Microsoft and Boeing Approach Diversity With Similar Passion,* Diversity & The Bar, May/June 2003.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* A. Mitchell, *supra.*
16. *See* Robinson, *supra.*
17. *See id.*
18. *See id.*
19. Hope E. Ferguson, *Diversity Efforts Provide Competitive Edge to Philip Morris Companies, Inc.,* Diversity & The Bar, December 2001.
20. Scott Mitchell, *MCAA Presents Its Recent Research Findings: Law Firm Diversity,* Diversity & The Bar, December 2001.
21. *See* Ferguson, *supra.*
22. *See id.*
23. *See id.; see also* S. Mitchell, *supra.*
24. *See S.* Mitchell, *supra.*
25. *See id.*
26. Ferguson, *supra.*
27. Attorneys of color include Hispanic, Asian American, African American, Native American and/or Pacific Islanders.

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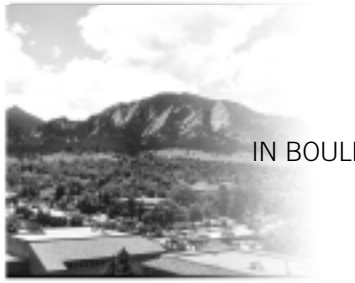

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What is an Agricultural Cooperative, Anyway? COOP 101

by Steven G. Johnson

If you were to ask someone to list the types of business entities in Utah, they would most likely name corporations (including S corporations), partnerships, limited partnerships, limited liability companies and partnerships, and sole proprietorships. Few would know to also mention cooperatives.

Cooperatives have played an important role in the economic development of this country, especially in rural areas. They continue to play a significant role in providing agricultural products, cooperative housing, rural power and communication services and credit union services. In fact, one would be safe to say that just about every Utahn consumes on a daily basis goods or services provided by cooperatives.

COOPERATIVE HISTORY

Cooperatives have existed throughout history as people have worked together for the common good. One of the earliest verified cooperatives in this country has been discovered in central Arizona, where early pioneers found approximately 150 miles of irrigation canals dug by the Hohokam Indians to bring water to their desert farms in the Salt and Pima River basins. Legend suggests that the first cooperative established by settlers in the thirteen colonies was an insurance company organized by Benjamin Franklin in 1752, called the Philadelphia Contributorship for the Insurance of Houses from Loss by Fire.[1]

One of the best-known cooperatives in history was the Rochdale Society of Equitable Pioneers, organized in Rochdale, England in 1844. The Society was established to help weavers who had lost their jobs through the mechanization of the textile industry. These weavers, together with other craftsmen (including a shoemaker, clogger, tailor, joiner and cabinet maker), studied both successful and unsuccessful cooperatives. From their studies, they developed a set of rules by which the Society would be governed.

The Rochdale policies and practices were:

1. open membership
2. one member, one vote
3. cash trading
4. membership education
5. political and religious neutrality
6. no unusual risk assumption
7. limitation on the number of shares owned
8. limited interest on stock
9. goods sold at regular retail prices
10. net margins distributed according to patronage.

Cooperatives in this country and throughout the world still follow these principles.

The Rochdale Society started with only 28 members. Its shop was originally open only on Monday and Saturday nights. By the end of the first year, membership had grown to 74 craftsmen, and the Society recorded a small profit. By 1850, membership had grown to 600, and the Society was a success.

In March of 1868, the Zions Cooperative Mercantile Institution, the "People's Store," was established in Salt Lake City. ZCMI, as it became known, was a community-owned merchandising business dedicated to the support of home manufacturing. One of its goals was to sell goods as low as possible, and to divide the profits among the people at large. Although not a true cooperative, ZCMI spawned a region-wide system of local cooperatives owned and operated by the people.

In 1874, representatives from the Grange, an organization set up to help farmers and rural America after the Civil War, went to England to study successful cooperatives. A year later, the Grange published a set of rules for the organization of cooperative stores to serve the rural community. These rules are based on the Rochdale principles.

STEVEN G. JOHNSON is the Director of Legal and Administrative Services for Norbest, Inc., a Utah agricultural cooperative.

In the early part of the 20th Century, many farmer cooperatives were established. By the 1920s, there were about 14,000 farmer cooperatives operating in the United States. Many of today's major farmer cooperatives were formed during this period. Some of these cooperatives are now ranked as some of the largest food companies in the world. This article discusses the basic laws relating to agricultural cooperatives.

LEGAL MILESTONES FOR COOPERATIVES

Two events, one statutory and one judicial, have helped to define cooperatives and have made possible their development in the 20th Century. The first is the Capper-Volstead Act.[2] The Capper-Volstead Act was enacted in 1922 as an amendment to the 1914 Clayton Antitrust Act. Capper-Volstead provides a limited exemption from the antitrust laws for agricultural producers to market their products on a cooperative basis. It also contains provisions to ensure that producers of agricultural products do not abuse their collective power to the detriment of consumers.

The Act liberalizes the eligibility requirements for cooperatives, and affirmatively grants authority to farmers to act together for processing, preparing for market, handling and marketing the agricultural products they produce. In a leading case interpreting Capper-Volstead, *National Broiler Marketing Ass'n v. United States,*[3] the Supreme Court recognized that the Act allows farmers to raise capital and engage in value-adding activities that prepare their products for market without violating the antitrust laws. It increases the economic strength of farmers so they can better weather adverse economic periods and deal on a more equal basis with processors and distributors.

The second milestone for cooperatives arose out of a dispute by a Washington workers' cooperative with the Internal Revenue Service over the payment of federal income taxes. In *Puget Sound Plywood, Inc. v. Commissioner,*[4] the Tax Court defined what it means to do business on a cooperative basis. Reviewing the history of cooperatives and citing the principles established by the Rochdale Society, the court recognized that any type of a business, including stock corporations, may qualify as a cooperative if it is doing business on a cooperative basis. This case has been cited in numerous cooperative cases since it was written, not because it makes new law, but because it defines what an entity must do to be treated as a cooperative for tax purposes. These principles have been adopted in other non-tax cooperative areas as well.

The *Puget Sound Plywood* case discussed the three guiding principles which define modern cooperatives. They are (1) the subordination of capital, (2) democratic control, and (3) the allocation of profits to the members on the basis of their patronage of the business. These principles are codified in Utah's agricultural cooperative laws, and are the basis for defining how agricultural cooperatives operate today.

SUBORDINATION OF CAPITAL

Unlike corporations and other entities that are established to return company profits to the equity owners of the businesses, agricultural cooperatives are established to provide services and goods to their members. Profits are secondary to their purposes.

In the Agricultural Cooperative Associations Code, Utah has codified the "subordination of capital" principle by mandating that common, voting stock may only be issued to current producers of agricultural products.[5] If a member ceases to be a current producer of agricultural products, that person's membership is terminated,[6] and they may no longer exercise control over the facilities, assets or activities of the association.[7] Preferred shareholders are not entitled to vote or otherwise control the cooperative,[8] unless they are also members of the association. To become and to remain a voting member of a cooperative, a person must actually be using the services or goods provided by the cooperative. Passive investors may not be cooperative members. In other words, the members of an agricultural cooperative are the farmers who use the services or the products of the cooperative. In these matters, cooperatives differ from corporations or limited partnerships which place the greatest importance on the ownership of equity. They are more like those partnerships and limited liability companies where all of the owners are the active participants in the business.

A Utah agricultural cooperative member may only hold one share of the common voting stock of the business.[9] Dividends on common stock or membership capital may not exceed 8% per annum.[10] Earnings in excess of dividends and reserves are allocated not on the basis of stock ownership or investment, but on the basis of patronage (see below).

DEMOCRATIC CONTROL

Control of a cooperative is by the people who actually use the business, and not by nonmember equity holders. As stated above, members must be current producers of agricultural products. Members may hold only one share of the common voting stock of the business. Each member is entitled to only one vote (this is referred to as the "one man-one vote" cooperative principle),[11] so that each member has an equal right to control the business. Equity ownership is traditionally irrelevant in voting because each farmer owns only one share of common voting stock.

During the 2003 legislative session, the Agricultural Cooperative

Associations title of the Utah Code was amended to allow cooperatives to provide that members may have not only the one vote based on membership, but also additional votes based on actual patronage with the association.[12] This amendment recognizes that those who use the cooperative more than other members may be granted more control over the cooperative than those members who use it less. The amendment is permissive rather than mandatory, allowing cooperatives to continue with the single vote per member if they desire.

A vote may not be cast by proxy,[13] although a vote may be cast by a signed, notarized ballot.[14] These rules encourage a person to be present at the cooperative's meetings in order to participate in the management of the business. Not only must a person patronize the business in order to be a member, but also that person should actively control the business. In this regard, a cooperative differs from equity-based entities such as corporations and limited partnerships.

ALLOCATION OF PROFITS

Unlike other businesses where profits are distributed based on the ownership of the equity in the business, cooperatives distribute profits in proportion to the members' active participation in the cooperative endeavor.[15] The participation in the business of the cooperative is called "patronage."[16] The more a member uses a cooperative, the greater share of the profits the member receives. For example, a farmer who produces 10% of the apples sold by a cooperative will receive 10% of the profits of the business for that year, while a farmer who produces only 3% of the apples marketed by the cooperative will receive only 3% of the profits for that year.

In this respect, a cooperative is different from all other types of business entities. Other entities usually make distributions based on ownership of equity capital, or equally, as the case may be. Cooperatives base the amount of their distributions instead on the use of the cooperative by the members.

TAXATION OF COOPERATIVES

With respect to income taxes, cooperatives are not taxable entities, although they may pay taxes on their profits from non-member business. They do pay property taxes as well as sales and use taxes. In this respect, they are treated much like other pass-through entities such as partnerships and most limited liability companies. These entities do not pay taxes on their profits. Instead, the individual cooperative members, partners or LLC members pay taxes on their share of the income. Generally, cooperative members are each taxed on the distributions they respectively receive based on their patronage of the business. Cooperatives fall within the exemption from corporate income and franchise taxes found in Section 59-7-102(1) of the Code.

LIABILITY OF MEMBERS

Although cooperatives are treated in many respects as partnerships for tax purposes, from a liability standpoint, they are similar to corporations and limited liability companies. A member of a cooperative is not personally liable for the debts and obligations of the cooperative.[17] Creditors must resort only to the assets of the cooperative, and not to the assets of the individual members, in order to satisfy a cooperative debt. There are no known cases in Utah that have faced the issue of piercing a "cooperative veil" as one sometimes sees with corporations.

COOPERATIVES IN UTAH

A very high percentage of agricultural goods consumed by Utahns are produced by cooperatives, especially dairy products and canned fruits and vegetables. Many agricultural products are sold under well-known cooperative trademarks such as Norbest, Sunkist, Welch's, Ocean Spray, Land O'Lakes, TreeTop, Blue Diamond, Florida's Natural, Birds Eye, Cenex Harvest States and Agway. Some agricultural cooperatives headquartered in Utah are Intermountain Farmers Association, Norbest, Inc., Moroni Feed Company, Utah Wool Growers, Inc., Mountainland Apples, Inc., Payson Fruit Growers, Inc., Cache Valley Select Sires, Inc., and Producers Livestock Marketing Association.

In addition to agricultural cooperatives, there are many other kinds of cooperatives in Utah. Like agricultural cooperatives, these non-agricultural cooperatives also follow the requirements of operating on a cooperative basis identified in the *Puget Sound Plywood* case. South Jordan-based Deseret Generation & Transmission Cooperative is a power cooperative. It provides wholesale electric services to its six member distribution cooperatives. These six member cooperatives, Bridger Valley, Dixie Escalante, Flowell, Garkane, Moon Lake and Mt. Wheeler, provide electrical services to much of rural Utah. Empire Electric, Strawberry Electric and Wells REC are three other rural electric cooperatives that service parts of the State that are not served by the Wasatch Front power companies.

There are three rural telephone service cooperatives in Utah. UBTA-UBET Communications, Emery Telcom, and South Central Utah Telephone provide telephone service to 54,000 rural telephone customers. Without these rural telephone cooperatives, many rural areas may not have access to telephone service.

There are 128 credit unions in Utah. They range from very small to very large associations. Some serve employees of school

districts. Others serve employees of hospitals or other companies. Some serve members of unions or residents of certain geographical areas.

Associated Food Stores is a cooperative that provides the products sold by its member retail stores in Utah.

As our society evolves, the use of cooperatives also evolves. Interest has been expressed regarding the establishment of child-care cooperatives. They are becoming popular in several urban areas of the country. Another type of cooperative seeing increased popularity is the value-added cooperative. In this kind of cooperative, raw agricultural commodities are converted into consumer products, with the profits from the venture returning to the farmers who produced the agricultural commodity.

Cooperatives are not leftovers from a bygone era. They continue to play a very important part in the economy of the State of Utah. They provide hundreds of jobs and a high percentage of the products and services we use on a daily basis. They have characteristics of other business entities, as well as important distinctions. Attorneys should know enough about cooperatives to avoid confusing them with other forms of businesses.

1. United States Department of Agriculture, *Co-ops 101: an Introduction to Cooperatives,* Cooperative Information Report 55, 1997 (p.2).
2. 42 Stat. 388 (1922), 7 U.S.C. §§ 291-292, entitled "An Act to Authorize Association of Producers of Agricultural Products." The Statute is commonly referred to as the Capper-Volstead Act in honor of its principal sponsors, Senator Arthur Capper and Representative Andrew Volstead.
3. *National Broiler Marketing Ass'n v. United States,* 436 U.S. 816, 824-827 (1978).
4. *Puget Sound Plywood, Inc. v. Commissioner,* 44 T.C. 305 (1965), acq. 1966-1 C.B.3.
5. Utah Code Annotated, § 3-1-10(1)(a). Unless otherwise noted, all references to Code Sections are to the Agricultural Cooperative Associations provisions of Utah Code Annotated. Other kinds of cooperatives such as housing cooperatives and credit unions have separate statutory schemes.
6. § 3-1-10(3).
7 § 3-1-11(4).
8 § 3-1-11(5).
9 § 3-1-10(2).
10 § 3-1-11(2). The 2003 Legislature amended this section to allow dividends on preferred stock to exceed 8% per annum. The amendment does not apply to common stock.
11 § 3-1-10(5)(a)(i).
12 § 3-1-10(6).
13 §3-1-10(5)(a)(ii).
14 § 3-1-10(5)(b).
15 § 3-1-11(3).
16 § 3-1-10(1).
17 § 3-1-10(4).

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Private Income Withholding for Collection of Child/Spousal Support NON IV-D Collection Services

by Karma Dixon & Emma Chacon

Utah Code Ann. § 62A-11-403 and 78-45-7.1 requires that whenever a child support order is issued or modified in the State of Utah, the obligor's income is subject to immediate income withholding. In addition, state law requires that all child support orders issued by a court or administrative body after January 1, 1994 must contain a provision for immediate income withholding unless the court finds good cause for not requiring the withholding or the court has approved an alternate arrangement between the parties. The court must make a written finding of good cause or approval of an alternative arrangement. In addition, if for any reason a specific provision is not included in the child support order, the obligor's income is nevertheless subject to immediate income withholding. Income withholding has dramatically increased the payment of support for children.

Income withholding can be commenced by:

1. The Office of Recovery Services under Title 62A Chapter 11 Part 400 if either party to the order applies for full child support with ORS, or;
2. The court under Title 62A Chapter 11 Part 500.

In order to have the Office of Recovery Services (ORS), initiate income withholding to collect child support, it is necessary to have an open case for full child support services with ORS.

If you prefer to have the court initiate income withholding, state law still requires that all payments be processed through a state distribution unit (SDU) designated in statute. The designated SDU for Utah is the Office of Recovery Services. In these cases, ORS provides only the withholding record keeping. Full child support services cannot be provided in these cases, but the accounting function will be done without charge. These cases are called **Non-IV-D** income withholding because they are not subject to many of the child support program requirements established in Title IV-D of the Social Security Act.

How Does Non IV-D Income Withholding Work?

If you have a judicial or administrative order for child support that is subject to income withholding you may go directly to the clerk of the District court and file an ex parte motion for income withholding. The forms are available from the clerk. Once the motion has been granted and signed by the judge, the requesting party must:

- Mail a copy of the Notice of Income Withholding to the non-custodial parent's employer
- Mail a copy of the notice to the non-requesting party
- Mail a copy of the notice to the Office of Recovery Services – Attn: T-59

The notice instructs the employer to forward withheld support to ORS. ORS is responsible to document and distribute the child support payments to the custodial parent. Either party to the order may request this service through the clerk of the court.

Non IV-D case services are limited in nature and not subject to many of the requirements or benefits associated with full IV-D child support services. Since the services provided under the Non IV-D program are limited, the program may not meet the needs of everyone. Listed below are some of the advantages and disadvantages associated with the Non IV-D program.

Advantages of Non IV-D Services

- ORS does not charge a fee for Non IV-D services

KARMA DIXON is the Division Chief for the Child and Family Support Section of the Utah Attorney General's office. She has practiced law for almost 24 years, with emphasis in domestic and criminal law.

EMMA CHACON has served as the Director of the Office of Recovery Services for the state of Utah since 1993.

- ORS acts as a clearinghouse for all payments received on Non IV-D cases. Payments received are processed, recorded, and disbursed to the child support recipient within two days of receipt
- ORS plays a minimal role in the child support collection process
- Either party to the order may open a full IV-D services case with ORS at any point by completing an application for services. There is no application fee.

Disadvantages of Non IV-D Services

- Since Non IV-D services are limited in nature, ORS **cannot** do the following on Non IV-D cases:
- Engage in locate activities to find non-custodial parents, their income or assets
- Issue, modify, or terminate Notices to Withhold for income withholding
- Make adjustments to the amount of ongoing child support or the withholding amount as children emancipate
- Provide any other enforcement action such as tax intercept, levy on assets, etc.
- Review or initiate modification of judicial or administrative orders for child support
- Monitor cases for monthly payment delinquencies
- Collections are limited to current child and spousal support only. Non IV-D services do not allow for the collection of medical, day care, or other arrears debts that may be owed.

Responsibilities of Non IV-D Parties

The responsibilities of the requesting party who is taking advantage of Non IV-D services are outlined in Utah Code Ann. § 62A-11-502, and in the Utah Administrative Code, Rule R527-301. The responsibilities of the requesting party include:

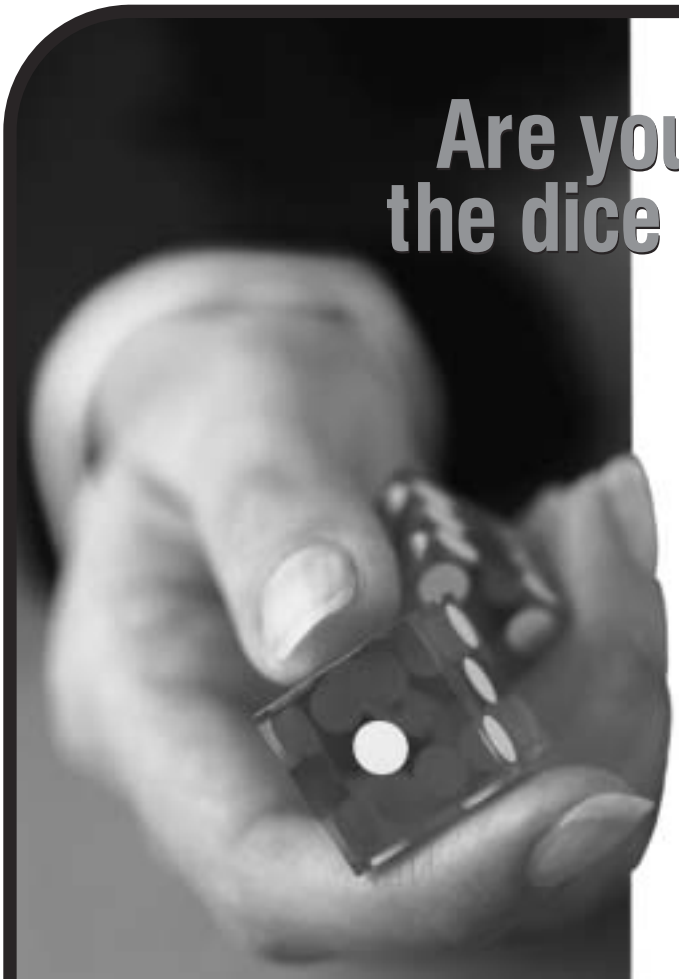
- Establishing, modifying, or terminating income withholding through the clerk of the court. **Specifically, this requirement places the responsibility of making these changes with the non-custodial and custodial parent. ORS cannot provide these services.**
- Providing copies of income withholding to all parties involved (employer, non-requesting party, and ORS).

Criteria for Successful Non IV-D Cases

Clearly, Non IV-D child support services are not for everyone. The following criteria may be useful in deciding if your case might be appropriate for Non IV-D services:

- The non-custodial parent has a stable employment history.
- You want to keep ORS involvement to a minimum.
- Both parties are willing to resolve any future issues regarding child support directly through the court.

More information regarding this subject is available on the web at www.ors.utah.gov or www.utahbar.org/sections/familylaw or by contacting your local clerk of court or the Office of Recovery Services at (801) 536-8500 or 1-800 662-8525.



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UMBA Awards Banquet Honorees

The Utah Minority Bar Association is Proud to Recognize the Following Individuals Who Were Honored at UMBA's Annual Awards Banquet November 21, 2003:

Senator Orrin Hatch, Recipient of the Pete Suazo Community Service Award, for his efforts to assist immigrant students attend college with his proposed D.R.E.A.M. Act.

Sherrie Hayashi, Director of the Utah Antidiscrimination and Labor Division, recipient of the Distinguished Attorney of the Year for her service as the former Executive Director of the Multi-Cultural Legal Center.

Carl Hernandez III, Assistant Dean of Admissions at the J. Reuben Clark Law School, and **Reyes Aguilar, Jr.,** Associate Dean of Admissions at the University of Utah College of Law, co-recipients of the Honoree of the Year Award for their commitment to diversify our law schools.

2003 UMBA Scholarship Winners: **Rose Montoya** (University of Utah) & **Robert Mooney** (BYU).

UMBA Also Congratulates Its Newly Elected Officers for 2003-2004

President	Ross I. Romero Jones, Waldo, Holbrook & McDonough
President-Elect	Sean D. Reyes Parsons Behle & Latimer
Secretary	Bibiana Ochoa Gonzalez & Ochoa
Treasurer	Vanessa Ramos-Smith Utah Federal Defenders Office

And UMBA Thanks: Yvette Diaz of Manning, Curtis, Bradshaw & Bednar, for her dedicated and excellent leadership as President this past year.

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 indicated 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 2nd. 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.

Special Recognition

On November 5th, Catholic Community Services of Utah (CCS) presented Jay Kessler with its community service award, in appreciation of his three-year commitment to staffing the weekly, three hour street law clinic at the St. Vincent de Paul Homeless Resource Center (the clinic is sponsored by Utah Legal Services). The award is presented annually to people who help make Utah a better place through their extraordinary service. Jay was described at the annual CCS awards dinner as an outstanding example of pro bono service because of his compassion for impoverished clients and the many hours he commits to their assistance.

Notice of 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 2nd.

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.

Public Disclosure of Law Schools

Information obtained by the Bar indicating the law school from which a lawyer has graduated has by policy been considered non-public and accordingly has not been disclosed to the public. Information regarding a lawyer's status as active or inactive, a designated business address, phone number, date of admission, other states of licensure and the existence of any public discipline is available to the public upon request, along with an e-mail address if the e-mail address has been specifically authorized for disclosure.

The Bar Commission has been requested to also make the name of the law school from which a lawyer has graduated available to the public upon request.

The Commission is seeking your opinion regarding whether or not the name of the law school from which a lawyer has graduated should remain confidential as a matter of privacy or may be disclosed to the public to assist in lawyer selection and because such information is already almost universally available in a variety of published voluntary listings.

Please send your comments by January 31, 2004 to Bar Executive Director John Baldwin @ barsurvey@utahbar.org.

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

SPOTLIGHT on Professionalism

In a "hotly contested" civil matter pending in federal court, documents earmarked for delivery to local counsel for submission to the court for in camera review were erroneously delivered instead to opposing counsel, Salt Lake attorney Gregory D. Phillips. Mr. Phillips, upon learning of the mistake, "willingly relinquished" the documents, still sealed in the original envelope. Out-of-state counsel was sufficiently impressed that he wrote to Judge David Nuffer to "point out . . . and commend Mr. Phillips' professionalism." Nicely done, Mr. Phillips! (And our thanks to Judge Nuffer for sharing the letter.)

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

Discipline Corner

RESIGNATION WITH DISCIPLINE PENDING

On December 10, 2003, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Clay Harrison.

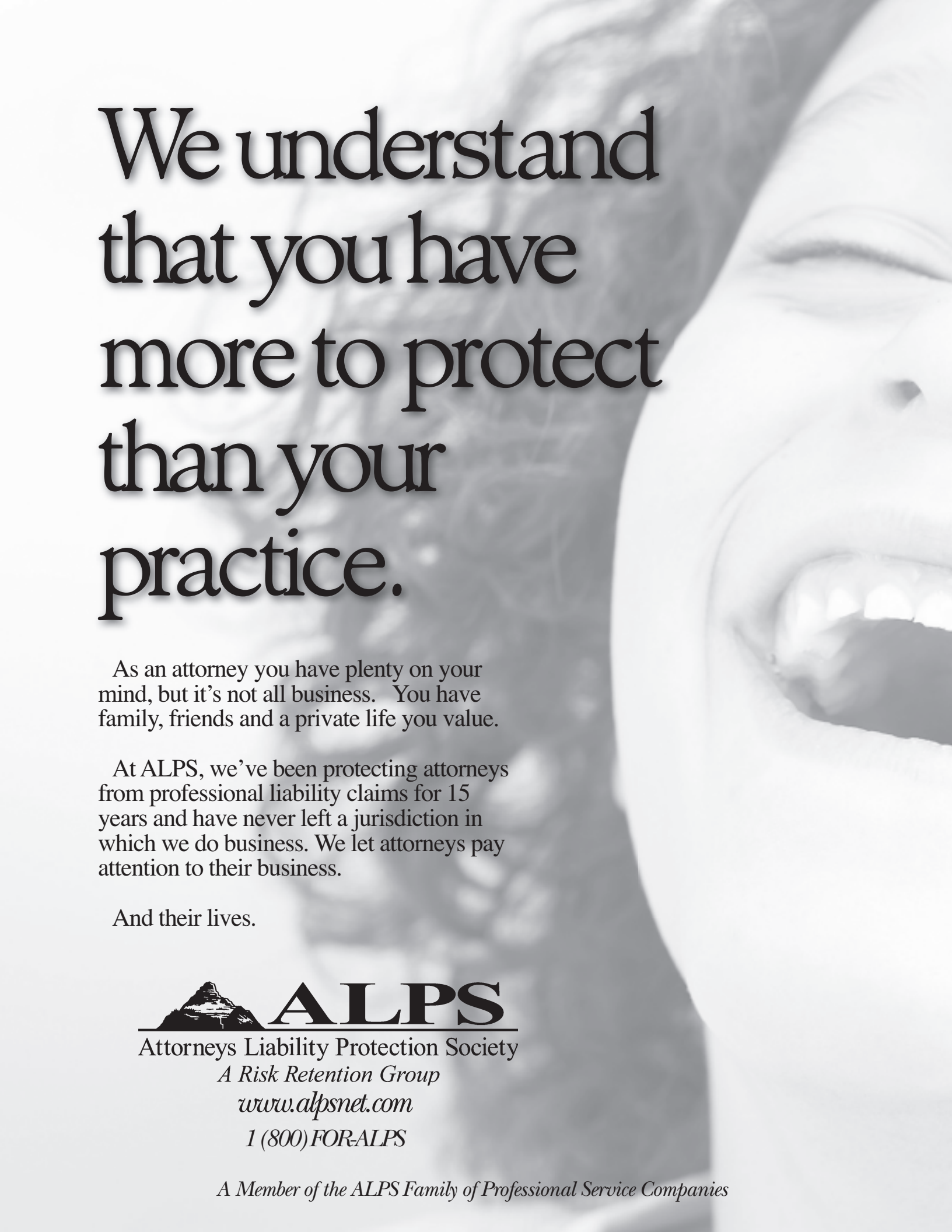
In summary:
The Office of Professional Conduct ("OPC") received nine complaints against Mr. Harrison. On March 21, 2003, Mr. Harrison entered guilty pleas to charges of securities fraud, misuse of trust account, wrongful appropriation, and unlawful dealing of property by a fiduciary. Mr. Harrison submitted a Petition for Resignation with Discipline Pending to the Utah Supreme Court on November 12, 2003. Mr. Harrison's petition admits that the facts constitute grounds for discipline.

Mr. Harrison committed securities fraud by receiving money from a client and failing to inform the client of facts he knew that would have convinced the client not to invest. Mr. Harrison misused his trust account by commingling personal funds with those being held in trust. Mr. Harrison committed wrongful appropriation by diverting funds to a use other than that designated as a part of the closing of the transaction, without consent from the bank, and with the intent to temporarily deprive it of the use and benefit of those funds. Mr. Harrison unlawfully dealt with property in his fiduciary capacity by allowing others to use funds held in his trust, and entrusted to him as a fiduciary, which involved a substantial risk of loss or detriment to the person for whose benefit the property was entrusted.

ADMONITION

On December 10, 2003, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney represented a client in a DUI matter. The client had previously been represented by another attorney, but when that attorney was unable to continue representation, the client's file was referred. The attorney failed to explain the circumstances of assuming the file from the previous attorney. The attorney failed to complete a brief requested by the court. The attorney failed to inform the client of an oral agreement with the prosecutor to delay the filing of the brief requested by the court.



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Young Lawyers' Commitment to the Community

by Christian W. Clinger, President – Young Lawyers Division

Christian W. Clinger, YLD President

Robert B. Lamb, YLD Treasurer

Jason P. Perry, YLD Secretary

Candice Anderson Vogel, President-Elect

The Young Lawyers Division ("YLD") of the Utah State Bar has had a very productive year in 2003. With its 12 committees, the YLD has given significant contributions to its membership as well as to the public. Here are some of the YLD's highlights since July 2003.

YLD's Leadership/Executive Committee: This past summer, the YLD's 2,000 members had the opportunity to elect new officers. Christian W. Clinger, an associate attorney at Callister Nebeker & McCullough, was elected as the 2003-2004 YLD president. Robert B. Lamb, an associate attorney at Suitter Axland, was elected as Treasurer, and Jason P. Perry, the Deputy Director for the Utah Department of Commerce, was elected as Secretary. Candice Anderson Vogel, a partner at Manning Curtis Bradshaw & Bednar, was elected as president-elect for the 2004-2005 term. Vicky Fitlow, a partner at Wrona & Fitlow, is the past-president of YLD.

and Justice for all Committee: (Wade Budge, committee chair / Debbie Griffiths, co-committee chair) The YLD partnered with the "and Justice for all" campaign to help raise operating funds for the Community Legal Center. The YLD sponsored phone-a-thons this past Summer and Fall as well as the annual "Bar Sharks for Justice" pool tournament this past November. Through these events, the YLD raised over $20,000.00 for "and Justice for all." All proceeds went directly to "and Justice for all."

Tuesday Night Bar Committee: (Jami Momberger, committee chair / David Hall, co-committee chair) The Utah State Bar and the YLD provide a free legal advice program in Salt Lake City known as "Tuesday Night Bar." This is an evening where lawyers volunteer to meet one-on-one with individuals for 30 minutes at no cost. Approximately 1,500 individuals meet with attorneys each year. Over 75 young lawyers are directly involved with "Tuesday Night Bar." The purpose of this program is to assist the public in determining their legal rights. The Tuesday Night Bar is held every Tuesday each month between 5:00 p.m. and 6:30 p.m. at the Utah Law & Justice Center, 645 South 200 East. Appointments for this program may be scheduled by calling 531-9077.

Community Service Committee: (Kelly Latimer, committee chair / Christina Micken, co-committee chair) The Community Service Committee has had a busy year. This past Summer and Fall, over 30 young lawyers landscaped and beautified the West Jordan Children's Justice Center helping the facility be a welcoming place for children that have suffered abuse or neglect. In December, the Community Service Committee organized with the Division of Youth Services an evening of playing games and decorating holiday cookies and gingerbread houses with children under the supervision of the Division of Youth Services who have been removed from their homes but not yet placed with a foster family.

Needs of the Children Committee: (Patrick Tan, committee chair / Marianne Guelker, co-committee chair) This past year, the Needs of the Children Committee helped update a brochure to help recognize and prevent child abuse. This pamphlet is being distributed to the public and those working with children. The Needs of the Children Committee has also created a public education project teaching students, ages 14 to 18, about careers in the legal profession.

Public Education Committee: (Sonia Sweeney, committee chair / Paul Farr, co-committee chair) The Public Education

Committee is planning several impressive projects for 2004. These projects include teaching students the importance of tolerance and avoiding conflicts and disputes; recruiting judges, attorneys, and the public for the annual Mock Trial Competition in conjunction with Law Day; and finally, coordinating efforts to teach students about the historic 50th Anniversary of *Brown vs. Board of Education.*

Law Day Committee: (Kelly Williams, committee chair / Michael Young, co-committee chair) The Law Day Committee is already planning next year's Law Day celebrating the 50th anniversary of *Brown vs. Board of Education.* The committee is organizing an awards dinner with a nationally recognized keynote speaker. More information will be published in the near future, but mark your calendars now for May 7, 2004 for this exciting Law Day event.

Utah State Bar Conventions Committee: (Sammi Anderson, committee chair / Doug Larson, co-committee chair) The YLD sponsors and organizes New Lawyer CLE courses at the Bar's annual and mid-year meetings. These classes provide valuable training to new lawyers in teaching the fundamental principles of various areas of law. Additionally, the YLD is planning the carnival for the annual Bar convention in Sun Valley.

CLE Committee: (Amy Hayes, committee chair / Kevin Jones, co-committee chair) The CLE committee is planning a series of CLE luncheons for 2004. These one hour courses will focus on the "nuts and bolts" of different subjects of law. Watch for more information on these great seminars.

YLD *Bar Journal* Committee: (Jeff Colemere, committee chair / Gary Guelker co-committee chair) The YLD *Bar Journal Committee* solicits articles from young lawyers to publish in the *Utah Bar Journal.* If you have an article idea or would be interested in writing on a particular topic, contact Jeff Colemere or Gary Guelker.

Professionalism Committee: (David Bernstein, committee chair) The Professionalism Committee is working on implementing the Utah Supreme Court's report on professionalism with young lawyers. Through the committee's work, it will help teach the importance of professionalism and improve working relations between attorneys.

Membership Committee: (Kim Neville, committee chair) The Membership Committee is responsible for increasing participation amongst the 2,000 young lawyers within the Bar as well as within the YLD. Every attorney under the age of 36 or within their first three years of practice if over the age of 36 is automatically a member of the YLD. There are no annual dues or membership fees. If you would like to be involved with the YLD or serve on a committee, please contact Christian Clinger at (801) 530-7412 or Kim Neville at (801) 257-1846 or visit the YLD web page at www.utahbar.org/sections/newyl

The YLD is committed to serving both the profession and the community at large. The YLD thanks the Bar as well as the many law firms that have supported the YLD in 2003. We look forward to a productive and promising year in 2004!

A Tribute to Dean W. Sheffield…

I met Dean Sheffield in 1960 before I took the Bar examination when he was Executive Director of the Utah State Bar. He was encouraging. He was direct. He was pleasant

After being a member of the Bar for several years, I met Dean again when I joined the Bonneville Kiwanis, of which he was a member. Some years later, when Dean was President of the club and I was a prosecutor in the County Attorneys office, I received a call from Dean at the office. After announcing who he was, he said, "Barney, you are a lousy member of our club. You have missed meetings, you have a bill on the books for lunches you haven't eaten. At the board meeting last night, we discussed your situation, your trial schedule for the County, and decided you could stay in the club if you would pay half of what you owed for lunches and dues, and become a good member. What do you want to do?" I was a little shocked, but said I wanted to remain a member in good standing. But for Dean's caring way and interest, I would have been out. My opportunity to serve in Kiwanis over the years only existed due to Dean's invitation to retain my membership.

Some years later, in a trial with Dean Sheffield as the Defendant's attorney, I found out what an excellent trial lawyer Dean was…he prevailed, in a hard fought case involving alleged fraud and embezzlement.

In all of Dean's 30 years as Director of the Utah Bar, he served with distinction, was a credit to the Bar and all who practice. He was a great public servant, civic club official, as well as a good family man and friend. He will be sorely missed by family, associates and friends. I say God's Speed to Dean Wilmer Sheffield.

Bernard "Barney" Tanner, Bar #3185

How to Effectively Use a Paralegal in a Probate Matter

by Shari Snell Faulkner

Officially, a probate is a court procedure to (a) determine the validity of a will; or (b) determine legal heirs, if no will. A probate proceeding also names a personal representative to perform fiduciary roles in settling a decedent's estate. Whether or not a court proceeding is necessary, unofficially a "probate matter" in a law office would include such things as:

- filing the necessary documents with the court
- assisting the personal representative to inventory all of the probate and non-probate assets
- paying final expenses and debts of the decedent
- filing an estate tax return, if necessary
- filing the necessary income taxes
- preparing an accounting
- distributing the remaining assets to the proper beneficiaries

A paralegal can be extremely effective, both in administration of the estate and in cost-effectiveness, in assisting an attorney with the probate process. Because of all of the tax issues, this area of legal practice can be most challenging. Many times the estate is simple. Perhaps the probate client is someone who has just lost his or her spouse and part of the paralegal's duties is to help the client adapt to his or her new situation. On the other hand, it may be a sophisticated estate worth millions of dollars with a variety of assets and tax issues.

Beginning the Probate Process

After the attorney has determined whether or not a probate action in court is necessary, a paralegal's first responsibility may include drafting the documents necessary for a court probate proceeding. Among other things, a paralegal can make sure that the notice to creditors is published, the attorney is aware of all creditor's claims filed, and the numerous timetables to be dealt with in a probate proceeding are met. If an ancillary probate is necessary, a paralegal can communicate with the attorney in the other state regarding the property owned by the decedent in that state and make sure that all necessary transfers of title are accomplished.

A paralegal can also work closely with the personal representative in making sure the personal representative understands his or her responsibilities and in helping the personal representative carry out those duties. Initially, a paralegal can do such things as (a) follow up on all government benefits, such as Social Security and veteran's benefits; (b) assist the personal representative in opening a bank account for the estate; (c) apply for all life insurance proceeds; and (d) help the personal representative determine the steps necessary to protect the assets of the estate, such as providing proper storage and security of assets, continuing insurance payments, making monthly payments, etc. The duties of a personal representative can be overwhelming for someone who is unfamiliar with the process. Many clients serve in that capacity only once in their lifetime. A paralegal can work closely with the personal representative to make sure that all duties of the personal representative are completed.

Inventory

One of the primary responsibilities of a personal representative is to prepare an inventory of the estate assets, both probate and non-probate assets. (Probate assets consist mainly of solely owned property or property owned as a tenant in common while non-probate assets may consist of property held in joint tenancy, POD (payable on death) accounts, life insurance, pension and profit-sharing plans, annuities, 401(k) plans, KEOGH, employee stock ownership accounts, IRAs, etc.) While a personal representative may not recognize the difference between a probate and a non-probate asset, a paralegal can verify ownership to determine if an asset is probate or non-probate property. Another important responsibility of a personal representative is to determine the value of these assets on the decedent's date of death. A paralegal can be tremendously helpful in fulfilling this task.

United States Estate Tax Return and Utah Inheritance Tax Return

Once a first draft of the inventory has been completed and values at least estimated, a determination can be made whether or not a United States Estate Tax Return must be filed. If it is, a paralegal can be of substantial assistance to the attorney. (One word of advice here, however. It would be wise to send your paralegal to a seminar dealing with the preparation of estate tax returns. These are usually held in major U.S. cities and may last three to five days. But it is well worth the cost and effort.) In preparing an estate tax return, a paralegal must work with the personal representative and gather such information as

- all property in which the decedent had an interest
- gifts made within three years of decedent's death
- transfers with retained life estates
- transfers taking effect at death
- revocable transfers
- annuities
- joint interests
- powers of appointment
- life insurance proceeds

As we are all aware, the IRS has innumerable rules, some of which pertain to the valuation of assets listed in the estate tax return. A paralegal who has learned these rules can proceed with

- obtaining real estate appraisals,
- valuing stocks and bonds,
- getting date of death balances on all bank accounts,
- ordering statements from life insurance companies (to file with the estate tax return);
- obtaining appraisals on collections, antiques, etc.

Valuing assets for an estate tax return is a time-consuming and tedious process, one which is best completed by a competent paralegal. One example of how complex it can be might be how the IRS requires that stock traded on an exchange be valued. You must find the mean (average) of the high and low selling prices of the stock on the date of death. You must also locate and include the value of all dividends that were declared prior to the decedent's death but paid after death. The IRS also requires that all stock splits and reversals declared prior to the decedent's death but not issued until after death be included in the estate tax return. There are special rules if the decedent died on a weekend, if the stock didn't trade daily, or if it the stock was held in a closely-

held business. Even worthless securities owned by the decedent should be listed and described appropriately. With the advent of the Internet, the time and effort to do this task has been greatly reduced. There are also services which will calculate these values for you. In any event, it is important that all assets in the estate tax return be valued according to the IRS regulations and that someone has the knowledge and the time to do that, all at the least possible expense to the client, while still making money for the firm. Who better to perform this task than a competent paralegal?

After all assets have been identified and valued according to IRS regulations, proper deductions must be identified so that the taxable estate can be calculated. The paralegal can again work with the personal representative in identifying the deductions acceptable to the IRS, including such things as

- funeral expenses
- administrative expenses
- claims against the estate
- debts and mortgages
- casualty losses
- transfers for public, charitable and religious uses
- bequests to the surviving spouse (marital deduction)

After all the assets and deductions are appropriately identified and valued, a paralegal should work closely with the supervising attorney in making all tax decisions that must be dealt with in an estate tax return. Then the paralegal can complete the recapitulation schedule of the estate tax return and compute the tax. (Of course, there are now several software programs on the market than can assist in preparing the estate tax return and making the final computations. Part of my responsibilities as the paralegal for the probate section of my firm was to review the available software programs and to recommend the one I believed best suited for our firm's needs.)

After the estate tax return is completed, a paralegal can then marshal the attachments necessary for the estate tax return, including the death certificate, will and trust (if appropriate), all appraisals, life insurance forms, disclaimers, state tax return, and all other supporting documentation. A paralegal can also make sure the estate tax return is signed properly and filed timely with the IRS. A paralegal can also prepare the Utah Inheritance Tax Return and make sure that it is signed properly and filed timely with the State Tax Commission.

While obtaining all the necessary information for the estate tax return, the paralegal can prepare "audit files" to be used if the IRS requests an audit of the return and/or additional information

or verification of information is requested.

One caveat: It is ***very important*** that the supervising attorney review the estate tax return in detail before it is signed by the personal representative and filed with the IRS. The IRS regulations are continuously and rapidly changing, and it is imperative that, no matter how experienced the paralegal and no matter how much the attorney trusts the paralegal, two sets of eyes are better than one. There are many chances in an estate tax return where mistakes can be made, some of which could prove quite costly to the client. While it is important that a supervising attorney review ALL documents prepared by a paralegal, this one is imperative!

Income Tax Returns

A paralegal can work closely with the decedent's accountant in preparing all income tax returns, including (a) preparing of all SS-4 forms to obtain federal identification numbers for the estate and all trusts included in the estate; and (b) helping the personal representative gather all the necessary forms and information for the accountant.

Accounting

An accounting is a summary of income and expenses which shows profits and losses. Although accountings can be waived by the beneficiaries of an estate, it is often required, and quite appropriate so that a personal representative accounts for all the assets for which he or she has been responsible. This protects both the personal representative and the beneficiaries. A paralegal, working with the personal representative, can usually prepare the accounting by balancing the estate checking account, making sure all capital transactions are reported, all income (dividends, interest, rents, etc.) is accounted for and all expenses and distributions are reported.

Distributions and Transfers of Title

Once the estate tax return has been filed, all expenses paid and the accounting prepared, a paralegal may assist the personal representative in making distributions to the proper beneficiaries. This can be accomplished in several smaller or one final distribution. Distributions may be made in cash or in property. The paralegal can assist the personal representative in transferring the title to these assets to the proper beneficiaries, such as preparation of deeds and affidavits of survivorship for real estate and working with stock transfer agents for the transfer of stock and mutual funds. A paralegal can also help by preparing a settlement agreement among the beneficiaries. And finally, a paralegal can assist the personal representative in obtaining receipt and release forms when the distributions are made.

Conclusion

Each probate is unique and there is much more that may go into the management of an estate, such as elections by surviving spouses, renunciations and disclaimers, will contests, calculations of marital deductions, etc. Although these are decisions an attorney must make, a paralegal can help in obtaining and providing the attorney with the necessary information to make these decisions. A paralegal is paramount, however, in working with the personal representative and the attorney in making sure that all steps in the administration of a probate are completed.

The probate process, especially if an estate tax return is required, is detailed and the work must be meticulous. It is necessary that the paralegal in this area work closely with the supervising attorney to assure that no mistakes are made. As stated above, it would also be best if the paralegal obtain some specific training in the preparation of estate tax returns. The more efficient a paralegal is for the client and supervising attorney, the more efficient the supervising attorney is for the firm. The client saves money and the firm makes money. Who could ask for more?

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/14/04	**Ethics School: What They Didn't Teach You in Law School.** 9:00 am – 4:30 pm.	7 Ethics
01/16/04	**Access to Justice Workshops.** 9:00 am – 12:00 pm. Utah Law & Justice Center. Steven Scudder, William Hornsby, Alan Houseman, Professor Elliott Milstein. Questions on Workshops call: 581-7656	2.5
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, $115 at the door.	3 Ethics
01/29/04	**Wills & Trusts Part III: Probate**. 5:30 – 8:30 pm.	3 CLE/NLCLE

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2004 MID-YEAR CONVENTION

MARCH 11–13

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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 $ _____

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

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

POSITIONS AVAILABLE

The City of West Jordan P/T Assistant City Prosecutor. P/T Assistant City Prosecutor – City of West Jordan seeks experienced prosecutor. Responsibilities include representing City in criminal prosecution proceedings. Must be member in good standing with Utah State Bar and a minimum of three years prosecution experience. May either work on hourly basis $35/hr (w/out benefits) or negotiable with part-time benefits. Access application at www.wjordan.com. Submit application and resume to City of West Jordan Human Resource Department, 8000 S. Redwood Road, West Jordan, UT 84088 or fax (801) 569-5049 before 5:00 p.m., February 6, 2004. Applications received first will receive priority in the hiring process. EOE.

ATTORNEYS WANTED. SUPPLEMENT YOUR INCOME: Orlando, Florida, firm seeks attorneys licensed in Utah with 0-5 years experience to handle mediations/litigation on an ongoing contact basis. Fax or e-mail resumes and references to: James F. Welborn; Palmer, Reifler & Associates, P.A. Fax: (407) 875-0739. jwelborn@civilrecoverylaw.com.

Estate Planning Attorney – The law firm of Ray Quinney & Nebeker (www.rqn.com) is seeking an experienced estate planning attorney to transfer a current practice or build a new practice in their Provo, Utah office. Initially, time would be spent between the firm's Salt Lake City and Provo offices, but would eventually be primarily based in Provo. Must be a member of the Utah State Bar. Applicants with any level of experience may apply. Salary negotiable. Please send your resume and references to Mr. Craig Carlile, Ray Quinney & Nebeker, 101 N. University Avenue, Suite 200, Provo, Utah, 84601.

Litigation associate: Eisenberg & Gilchrist has a position available for a highly motivated associate with 2-4 years experience to join our litigation group. Our practice focuses on representing plaintiffs in complex personal injury and business tort litigation. We are looking for an exceptional lawyer and will offer excellent salary bonuses and benefits plus the possibility of an accelerated track to partnership to the right applicant. Our compensation package will be superior to most large Salt Lake City firms. Applicants should have a strong litigation background, including experience drafting complex legal briefs, and some experience with depositions and motion practice. Experience in tort litigation is preferred but not required. Interested applicants should send resume, a writing sample (preferably a recent legal brief),any other submission which illustrates your skills and references (preferably from local attorneys) c/o: Bob Gilchrist, Eisenberg & Gilchrist, 215 S. State, Suite 900, Salt Lake City. All applications will be kept strictly confidential.

Logan firm of Bearnson & Peck, L.C. seeks an associate with 1-3 years experience in transactional work. Send responses to 74 West 100 North, Logan, UT 84321 or fax to 435-787-2455.

South valley firm seeking full or P/T attorney. Pleading/writing skills necessary, must anticipate court appearances, pay commensurate to experience. Submit resume to brenda@cullimore.net or fax to Brenda 571-4888. If questions, you can call 571-6611.

POSITIONS WANTED

Attorney with strong academic, professional credentials, 15+ years complex litigation experience, available on contract basis for discovery matters, dispositive motions, appeals and other projects. Send inquiries to Christine Critchley, Utah State Bar, Confidential Box #12, 645 South 200 East, Salt Lake City, Utah 84111-3834, or e-mail ccritchley@utahbar.org.

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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

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City _____ State _____ Zip _____

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

3. Residence Address – Private Information

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

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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.

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