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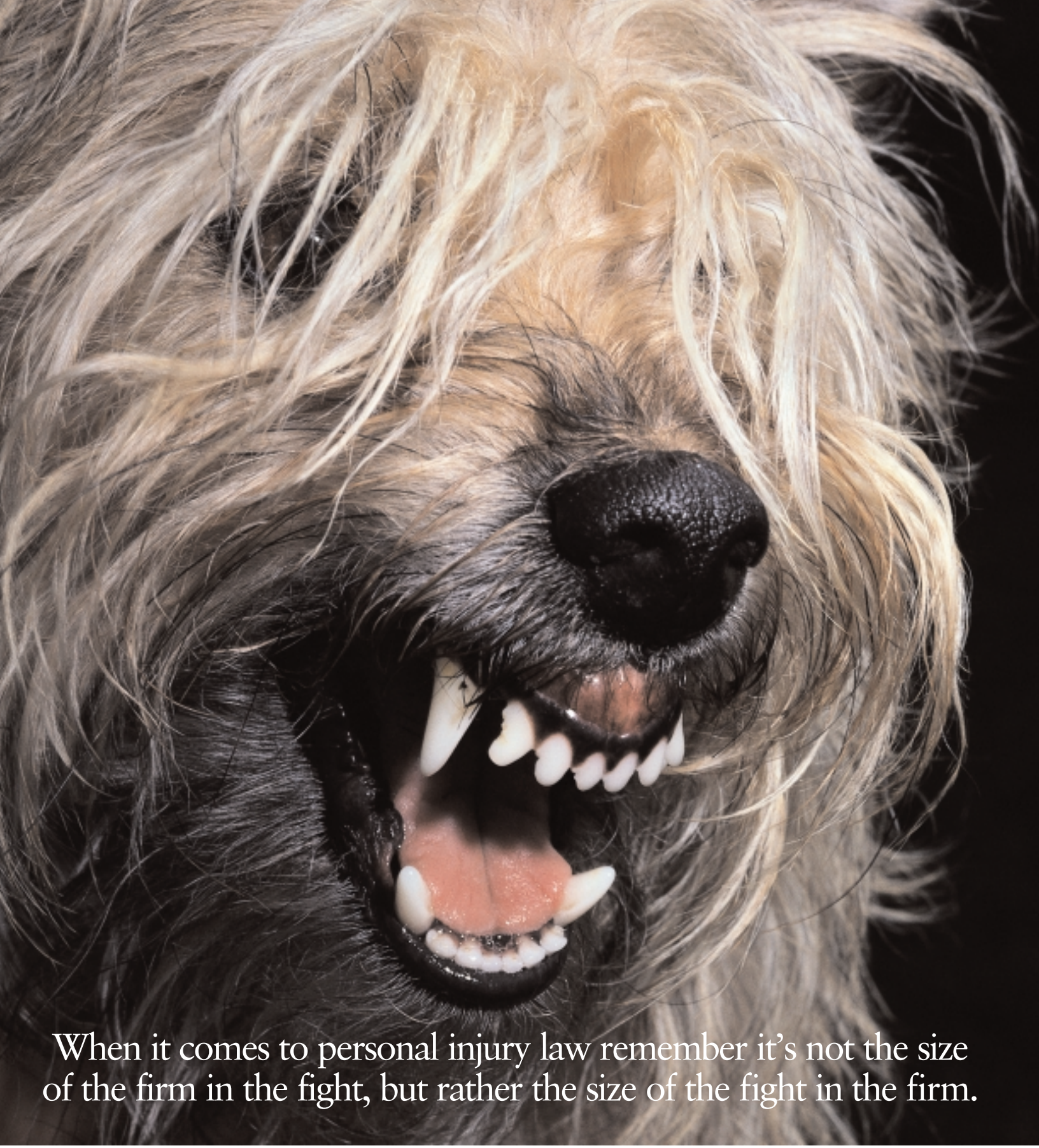

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MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Interesting perspective of the Spiral Jetty at Rozel Point on the Great Salt Lake. Taken by first-time contributor, Paul G. Amann, Utah Attorney General's Office. The Spiral Jetty was created by landscape artist Robert Smithson shortly before his death in 1973.

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

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Letters Submission Guidelines:

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

Cover Art

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

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

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

The Utah Bar Journal

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Submission of Articles for the Utah Bar Journal

The *Utah Bar Journal* encourages Bar members to submit articles for publication. The following are a few guidelines for preparing your submission.

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.
6. Citation Format: All citations should follow *The Bluebook* format.
7. Authors: Submit a sentence identifying your place of employment. Photographs are discouraged, but may be submitted and will be considered for use, depending on available space.

Practice Pointer: Managing Your Trust Account

by Kate A. Toomey

Every attorney knows that lawyers in private practice who handle client money must do so in a manner prescribed by the Rules of Professional Conduct. But the nuances of the requirements often prompt calls to the Office of Professional Conduct's Ethics Hotline. I've discovered that many attorneys share a near-phobic aversion to the whole concept of trust accounts and handling other people's money. Here are some answers to the most common questions.

The first basic principle is that you must hold property that belongs to someone else, either a client or a third person, separate from your own. *See* Rule 1.15(a), R. Pro. Con. This includes money, in which case it must be kept in an account separate from your own – a trust account. *Id.* Unless your client agrees otherwise, the trust account must be in the state where you have your office. Whether your client agrees or not, the trust account must be in a financial institution that will report to the OPC any instances of checks being written against insufficient funds ("NSF checks"). *Id.*

There are a few things you should know with respect to financial institutions notifying the OPC about NSF checks. First, the OPC doesn't provide financial institutions with forms or instructions concerning the reporting requirement. It's up to you to inquire about whether your financial institution already complies, and if not, to make its compliance a condition of your doing business there. Most large financial institutions have procedures in place for making the appropriate notification; if your financial institution doesn't, you must either motivate it to comply, or find a financial institution that will. Second, overdraft protection is great because it keeps an NSF check from actually bouncing, but it doesn't insulate you from the financial institution reporting the check to the OPC, and it doesn't protect you from violating the trust account rules.

Your trust account must be separate from your other accounts, including your general office account. Although attorneys commonly use the same financial institution for all their accounts, the accounts must be designated by separate numbers, and the trust account must be identified as such.

If the amount of interest from a single deposit is likely to be significant, you might consider opening a separate trust account for that client. As you know, interest belongs to clients, and lawyers are not allowed to keep the interest generated by trust accounts. Your client might want the benefit of the interest, and having a separate account is an easy way to accomplish this without having to separate one client's interest from another's. The money in most attorney trust accounts is there for such a brief period that accounting for and paying over the interest to individual clients isn't feasible. This is where the Interest on Lawyer Trust Accounts program comes in handy, because the interest on your trust account can be collected and administrated by the Utah Bar Foundation for worthwhile public interest legal projects such as the Community Legal Center. For more information, check out the Bar Foundation's website at www.utahbarfoundation.org.[1]

Use clearly labeled checks, check registers, and deposit slips that identify the account as an attorney trust account. Lawyers sometimes mistakenly write a check against their trust account when it should have been written against an operating account. Using the same financial institution for all your accounts amplifies this risk because the paper associated with the accounts tends to look the same. One easy way to try to avoid this mix-up is to use a different color or shape for your trust account checks so you can tell at a glance which check you're using.

Maintaining your trust account is up to you, and it's a non-delegable responsibility. The trust accounting rule doesn't provide much detail about how to manage it, but the best-practice principles are basic: keep a separate ledger for each client, and some sort of account journal for the entire account. I'm told that user-friendly bookkeeping programs are available for maintaining trust account records on computers, and this is a solution that more and more attorneys are adopting. Be sure to keep back-up digital records, just in case – you don't want to have your answer to an

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

informal bar complaint about your trust account impeded by a system crash! The other thing you might consider is hiring a bookkeeper.

If you're a solo practitioner, you should be the only signatory on the account. If you're in practice with others, it's a good idea to limit the number of attorneys with signatory power. Don't keep a signature stamp, and never ever let a non-attorney be a signatory, however convenient this might be. This includes your office manager, your bookkeeper, and your spouse. You can imagine what can ensue when an attorney's trust is betrayed, and although you may not have to answer for rule violations if you've taken all the proper precautions, you could find yourself mortgaging your house in an effort to pay back your clients. Don't make it easy for a would-be thief to steal from your trust account.

Proper trust account management includes opening and reviewing monthly statements, and reconciling them at regular intervals. A small problem can quickly become a big problem if you're not on top of the accounting. If someone performs the reconciliation for you, be sure to review it yourself, comparing the actual transaction documents against the ledger.

You must keep the trust account records concerning a particular client for a period of five years after the representation of that client terminates. *See* Rule 1.15(a), R. Pro. Con. As a practical matter, because it's difficult to isolate the records for any given client, prudent attorneys keep all of their trust account records much longer than that. The five-year rule is useful for attorneys who retire from active practice, though.

The most common reason for bouncing a check is an attorney's failure to wait until a deposit is credited to the account before writing a check against the account. It's not good enough to deposit a check into the account, then write a check three days later relying on the fact that this is usually how long the financial institution takes to credit your account. What you need to do is confirm that the deposit has been credited, either by verbally checking, looking at your on-line account records, or waiting until you receive your monthly statement. I know that clients sometimes pressure attorneys to release settlement money immediately, but you have to hold the line on this. You might even consider including a provision in your fee agreement explaining that you won't disperse any money until you've verified that a deposit has cleared.

Your trust account can't be used for your own money, and if your fees are to be drawn from money in trust, remove the earned

fees promptly to avoid co-mingling. Likewise, do not use your trust account for office funds, employee payroll, or anything other than client money and money belonging to third persons. I remember a case in which an attorney used a trust account to avoid having his own money garnished by the IRS; I hope it goes without saying that this isn't allowed.

What should you do about flat fees paid in advance and denominated "earned upon receipt"? Many attorneys, especially criminal defense attorneys, put them directly into their operating accounts, and technically the rules permit it. In my opinion, this isn't the best practice, though. Until you've actually done the work, you're subject to disgorging all or part of it if the representation terminates before the legal matter has been concluded.[2] It's cleaner to put the fee into your trust account, periodically drawing it down as your work progresses, or collecting it in a lump sum when you've completed the representation. Taking this extra administrative step can save you trouble later.

Conversely, if you collect a flat fee *after* you've done the work, don't put it in your trust account. That's co-mingling!

The rules require you to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." Rule 1.15(b), R. Pro. Con. So what should you do if the ownership of the money you're holding is disputed? Continue to hold it in trust, and get some help in resolving the dispute. One suggestion is to explore fee arbitration; the Bar offers an inexpensive program that can help you with this.[3] Another suggestion is to seek declaratory relief in court.

An additional word of caution concerns accepting cash payments from clients. Don't do it if the sum is large or if you have any reason to question the legitimacy of the source. The trust accounting rules don't require you to decline payment in cash, but you should remain alert to the fact that clients sometimes use their attorneys as tools in money-laundering schemes.

What about paying for the charges associated with managing your account? Callers to the Ethics Hotline often ask whether there is a specific amount of their own money that an attorney can keep in the account to pay for administrative fees. The OPC can't set a dollar amount on this, among other things because financial institutions differ in the amount they charge, but you can keep a minimal sum in the account for this purpose. The best practice is to have the financial institution charge your general account; I've heard that this works well.

On a final note, I suggest that you review the rule itself from time to time. Remember that even though it has sub-parts, Rule 1.15 must be understood as a dynamic whole. If you have questions, call the OPC's Ethics Hotline at 801-531-9110.

1. The website has detailed instructions for attorneys and financial institutions concerning how to convert client trust accounts into IOLTA program accounts, and lists financial institutions that already participate.
2. Remember that even if you call a flat fee "non-refundable," or "earned upon receipt," it isn't really. All fees are subject to a reasonability analysis under Rule 1.5(a), and pursuant to Rule 1.16(d), must be refunded if not earned upon the termination of the representation.
3. For information about the fee arbitration program, call Christine Critchley at 297-7022.

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I Will Not Take The Oath (Unless I Really Have To)

by Robert H. Henderson

Sometime I hope to write an article on mediation, or arbitration, or cross examination, or trial tactics, or getting along with difficult lawyers (is there any other kind?), etc. For some time, however, I have been preoccupied with our Bar's "Pledge To Racial And Ethnic Diversity." You know it – you can't miss it. It is so prominently displayed on our Bar's web site that even a computer idiot like me can pull it up. I went to the Utah Trial Lawyer's annual CLE seminar and at lunch I heard my friend and its President, Doug Mortensen, proudly announce that that organization had adopted it.

So. We can all feel good about ourselves, right? Or can we?

The Pledge, ironically, at least to me, in a footnote, defines "attorneys of color." Curiously, at least to me, "color" is defined narrowly. (What about those people of "color" that don't meet the definition?) Make no bones about it, The Pledge, by its own terms, creates a "preferred" class for "attorneys of color." Having created a "preferred" class, The Pledge then, in Soviet, Kafkaesque reasoning, would have participants "adopt a policy against discrimination at any level . . ."

The Pledge is our version of the preference policies and "Diversity" driven philosophy at issue in *Grutter v. Bollinger,* 539 U.S. 306 (2003). Let me make it perfectly clear, as our 37th President liked to say, I am for "Diversity." Diversity is a good thing, not a bad thing. But diversity should be about inclusion, not exclusion. Creating classes is about exclusion. Creating preferred classes is exclusive by definition.

Furthermore, diligence, tenacity, persistence, self reliance, and intellectual firepower are also good things – and I am for them, too. Of course, I am also for Fatherhood, The Love of My Life, and The Runnin' Utes. But who makes diligence, dedication, tenacity, persistence, self reliance, intellectual firepower, Fatherhood, The Love of Their Life, or The Runnin' Utes the goal of their policy?

A diverse Bar should be a natural consequence of the intellectual richness and ever expanding breadth of the practice of law. A concept like "Diversity" should not be the end, or even a means to the end. "Diversity" is good, but it is wrong to make "Diversity," in and of itself, a goal. "Wrong" in what sense, you say? Wrong in the sense of the stigma it casts, and wrong that it presupposes that the object of its ill-advised favor needs it. Wrong in the sense that it presupposes that I, a white man, won't do the "right thing" without it. Wrong in the sense that it implies that "Diversity" is more important than equal protection under law, and that "Diversity" is more important than commonly held community beliefs that merit, diligence, dedication, tenacity, persistence, self reliance, and intellectual firepower matter. There is a great scene in "Heaven Can Wait" where Warren Beatty asks his lawyer, Charles Grodin, "Wouldn't that be wrong?" to which Grodin replies "Wrong in what sense?" to which Beatty answers "You know, just plain bad."

Most of all, I am troubled, discouraged, and saddened that there is no meaningful social dialogue on this or related issues. I've been fervently hoping someone else would at least comment. The silence is deafening. I rest my case. Advocating "Diversity" has become the equivalent of the McCarthy era "loyalty" pledges. The very culture of "Diversity" stifles unhindered discussion and investigation of its validity, if any. "Diversity" fosters and reinforces a culture that is hostile to democratic dialogue. Does The Pledge "work" in any measurable way? Or, is it counter productive? Is it at least possible that it could be a negative thing? Does it thwart the very objectives it seeks? Is there a better way? Are there situations where "Diversity" has been unfair?

For example, suppose the availability of one job with competing applicants. Is The Pledge "ok" if it results in a job for a member of a preferred class, but the loss of that job for a single mother of 4 who has worked her way through law school with the goal of a job that gives her children a better life? Or, a person of "color," but not a *defined* color. Or, "Farm Boy," educated in a not very good public school, first in his family to graduate from anything, never having received any national advantage, except, of course, the wonderful opportunity of being called upon to

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fight his country's necessary and unnecessary wars?

Difficult and unpleasant questions, these, but ones insulated from examination by the "Diversity" culture, ones not addressed by a "feel good" pledge. Imagine questioning your Bar leaders, or UTLA's leaders, or the leaders of any firm that has adopted The Pledge, about who does, and does not, benefit from The Pledge. (Does anybody keep track?) Merely asking questions, expressing dissent from the party line, brings charges of being "Diverse" insensitive, if not outright racist. Instead, back room, low voice, side of mouth comments and cynicism result, along with the charges of insensitivity and racism.

We have become so hyper-sensitive about color, gender, and religion that we have stopped talking to each other about it in any meaningful way, if at all. As for me, as I look at the signature line on The Pledge, I can't help, for the life of me, thinking of Sir Thomas More.

The story is, I hope, well known. Greatly oversimplified, Henry VIII wanted to dump his wife for the divine Ms. Boleyn. The King greatly desired Thomas More's blessing. Unfortunately for all, especially More, the desired blessing took the form of requiring More to state that he believed several things that he did not believe, *i.e.,* that an Act of Parliament took priority over the Law of God, that the King could bestow Supremacy of the Church, and that the immunity promised the Church in the Magna Carta and in the King's own coronation oath could be ignored. Even worse, for More, it required him to state that he believed these things which he did not believe under oath. This More, who embraced the full, rich enjoyment of life, and who surely knew and understood the consequences of refusing, refused to do. To More, life was valueless if he disclaimed his heart by taking an oath he did not believe. As More put it, " . . . first men will disclaim their hearts and presently they will have no hearts." (Heady stuff, eh? Brilliant. Moving. I've done a lot of bad stuff, but God help me if I disclaim my heart.)

More: "I insult no one. I will not take the oath. I will not tell you why I will not." (Merely stating why he would not take the oath would have, itself, constituted treason.)

Norfolk: "Then your reasons must be treasonable."

More: "Not 'must be'; may be."

Norfolk: "It's a fair assumption."

More: "The law requires more than an assumption. The law requires a fact."

More: "Some men think the earth is round, others think it flat; it is a matter capable of question. But if it is flat, will the King's command make it round? And if it is round, will the King's command flatten it? No, I will not sign."

More felt so strongly that his life was valueless if he took an oath that he did not believe that he chose beheading and became "A Man for All Seasons," a play by Robert Bolt, a great read that you can easily scarf down in an evening, then later a movie. Paul Scofield won both a Tony and an Oscar for his portrayal of Sir Thomas More. Has that ever happened before or since?

I love sports analogies: I couldn't carry More's jock strap. Let's face it – I am past the apex of a mediocre career. If pushed, I will take The Pledge. Meanwhile, I hope for the day when my own, private pledge, without reservation, in my own heart and mind and soul, that I "will not deny to any man (or woman) either justice or right" (remember this from the Great or "Magna" Charta of June 15, 1215 at Runnymede on the Thames?) will suffice. I hope for the day of truly equal opportunity, racial, gender, and religious harmony, and widespread prosperity, liberty and happiness. I also hope for the end to banal "Diversity" pledges, not to mention hoping for Fatherhood, The Love of My Life, and The Runnin' Utes.

The Construction Attorney's Toolbox – Building Solutions

by Kent B. Scott

Introduction

Today's current economic climate presses owners and contractors to complete projects in less time for less money. These pressures have created more demanding time schedules and monetary budgets that, in turn, have created an increased number of disputes. Another developing trend is the increased costs in time, money, efficiencies and lost opportunities taken up by these disputes. Rather than solving the technical problems experienced on the project, the parties get mired down into bolstering opposing positions. The fees incurred in resolving disputes become a major component of the dispute. The dollars that should go into the project are now going into the project dispute.

A construction project, by its very nature, can be a combustible breeding ground of disputes. There is a lot of money that passes through many hands over a period of months or even years. There are risks over which neither party has immediate control. Profit margins are often low and there is little room for adjustments or mistakes. There are many variables and components that are poured into the creation of a home, office tower, sports arena, church or other building improvement.

The creation of a construction project is an art requiring the parties to design, build, change, pay, and negotiate with each other so as to produce the desired result, *i.e.,* a place to live, work, play, worship or otherwise gather. The expectations of the parties involved with a project do not always result in a meeting of the minds. Differences in what was wanted and when for a desired price can give rise to conflict in many forms. Most conflicts are readily resolved, but some continue to fester and grow. Some disputes find their way into legal counsel's office where the client comes for assistance in having a problem solved.

This article will address some of the tools available to the attorney who is in the midst of a dispute the parties could not resolve on their own. Four tools representing systems of dispute resolution are discussed: (1) negotiation, (2) mediation, (3) arbitration, and (4) dispute review boards. These tools are not meant to replace the courtroom, which is the foundation of the dispute resolution process in our country. The four tools discussed herein are, for the most part, optional and consensual. They represent *alternate* ways of bringing a disputed matter to resolution. They are to be used by the lawyer to bring about a resolution every bit as much as the Utah and Federal Rules of Evidence and Utah and Federal Rules of Civil Procedure. To know when, where and how to use these tools is the art of the advocate.

A. Negotiation

Most conflicts between parties involved with a construction project are resolved through negotiation. Negotiation has, is and will be the most widely used method in which to resolve disputes. The parties, as a general rule, feel better about reaching a resolution by common consent as opposed to having a judge, jury or arbitrator impose a resolution.

According to the Harvard Model of Negotiation, there are seven components that make up a negotiation. They are:

1. Alternatives

Most conflicts have more than one way of being resolved. In order for a conflict to be resolved information about the subject and personalities of the parties is essential. "If the client accepts this alternative what will happen?" "Are there other alternatives?" "What will happen if the client walks away?"

2. Interests

What are the client's needs and wants? What are the needs and wants of the other party? Find the interests of the parties and you will be on the road to resolution.

3. Options

Options are the possibilities that operate to reach an agreement. It takes creativity and courage to explore different ways of seeing the problem. Attorneys want to please their clients but should

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not be a mirror of their client's thoughts and feelings. The best clients are open to suggestions. The attorneys and clients that make resolutions happen develop the capacity to look past their positions and focus on their interests.

4. Legitimacy

Both attorneys and clients need to evaluate whether a proposed resolution is going to work. In order to make that assessment, it is best to measure a specific proposal against objective criteria. The feelings of the parties are important, but so is the workability of the resolution reached. If it doesn't work, the parties will climb back into the arena of conflict. On the other hand, if it works, then work it through to final resolution.

5. Commitment

It takes commitment to reach a resolution and to carry out its requirements. Most parties want to have their problem resolved, but they lack the commitment to reach that result. Attorneys vary in their level of commitment. Unfortunately there are those attorneys who commit themselves to prolong a dispute for one of the following reasons:

- it is in their economic interest to keep the dispute going;
- they have not taken the time to study the information required to enter into successful negotiations; or
- they have not developed the independence required to deliver information to the client that it does not want to hear.

Clients also vary in their level of commitment. The ability to reach a resolution to a conflict is inhibited by one or more of the following:

- the client gets hung up on its position and is not able to see options;
- the client is not willing to spend the time and effort to obtain and evaluate information about the dispute; or
- the client is not willing to accept responsibility for resolving the dispute ("it's all his fault" or "this is the attorney's job").

6. Communication

Communication means there are a "sender" and a "receiver." Too often people are caught up in what they are going to say to respond to what is being said ("sending"). They do not focus on that which is being said ("receiving"). When everyone is "sending" and no one is "receiving" stalemate results. Effective negotiation requires two-way ("sender" – "receiver") communication.

7. Relationship

Some disputes involve relationships that need to be continued (joint venture partners). Some relationships have the potential to develop for the better once the dispute is resolved (architect-owner, owner-contractor, contractor-surety). Other relationships need closure. The relationship factor is critical when evaluating the options for a resolution and determining which option, if any, fits the interests of a particular party.

Conflict is not the enemy. It is the mother of opportunity to negotiate a just resolution. How the parties in their negotiations react to a particular set of circumstances determines the success or failure of a commercial relationship. The road to resolution is prominently marked with learning opportunities.

B. Mediation

The 1997 Edition of the AIA A-201 General Conditions contains a provision that requires the parties to mediate their dispute before resorting to arbitration or litigation. The contract requirement, in part, states:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

The mediation of a construction dispute has traditionally been voluntary. The AIA A-201 mediation requirement, similar contract provisions and required court-annexed alternative dispute resolution programs have brought a new element to the dispute resolution scene: mandatory mediation. Mediation is here to stay and it is here to grow. Attorneys will be doing more mediations than trials. The art of mediation advocacy should be one of the sharpest tools in the toolbox. Here are some of the questions being asked by the contractors and clients involved with a mediation of a dispute:

Mediation Defined

Mediation is a procedure where two or more parties attempt to resolve their dispute with a neutral party ("mediator"). The mediator remains neutral throughout the meeting. The process is confidential and no resolution can be reached without the consent of the parties. If an agreement is reached, the agreement will be binding and can be enforced by the courts.

Anatomy of a Successful Mediation

The success of a mediation is controlled mainly by the parties. Some of the critical components of a successful mediation involve:

- The background and capabilities of the mediator.
- The attendance of people with the knowledge and authority to settle.
- The needs and interests of the parties.
- Whether a trial or arbitration has been scheduled.
- Commitment of the parties and their attorneys to participate.
- The extent to which information has been exchanged.
- The amount of time and money expended or to be expended.

The following is a brief outline of the events involved in a mediation:

- The attorneys prepare a short brief for the mediator.
- The parties sign a confidentiality statement.
- The parties summarize their positions in a joint session.
- The parties go into separate confidential meetings with the mediator to discuss objectives, needs and settlement options.
- The mediator shuttles between the parties in an effort to find common ground.
- If a settlement is reached, a written agreement is created that outlines the general terms of the resolution. The agreement may provide for more detailed documentation to be drafted and signed by the parties.
- If a settlement is not achieved another session may be scheduled or the mediator may offer some suggestions to consider that may assist the parties in future negotiations or other settlement efforts.

When and Where to Mediate

There is no set formula for assuring that a mediation will succeed. Mediation can be effective at any stage of the dispute: pre-litigation, during litigation, on appeal. Most mediations occur after a claim has been filed and some exchange of information has taken place. The decision as to whether or when to mediate will vary with each case. However, the statistics from the major institutional mediation services indicate that mediation is most successful when the dispute is in its early stages before the parties have expended their resources on combat. It is important to realize that successful mediation involves a good faith exchange of information between the parties.

The mediation should take place at a neutral site. For mediations

involving out of state participants, a value judgment will need to be made concerning the time and expenses that will be incurred. Consideration should be given to use telephonic or video conferencing. On-line mediation is becoming more popular to resolve both commercial contract and mass tort claims that involve defective construction materials. Also, most mediators are available to travel to a neutral site to conduct the mediation.

Who Should Come to the Mediation

The following is a brief summary of those who would be expected to attend the mediation:

- Legal counsel: yes, if the party is represented.
- Client: the person with authority to settle, and others with knowledge of the facts.
- Experts: avoid having experts involved. They are hired to support your position and often complicate the process where settlement options are being discussed. Experts, however, may be helpful to describe and understand technical information.
- Documents: less is better. Summaries, graphs and charts are useful.
- Others: associates, secretaries or assistants are discouraged. If there is a need, make advanced arrangements so all parties approve and understand their respective roles.
- Other information specifically requested by the mediator.

Making the First Move

There is no advantage for one party or the other to move the process forward. The mediator will take the time and make the effort to understand the position and interests of each party. The mediator will know when to start the process of making offers. Usually the mediator will seek a consensus on the easy issues and work toward an agreement on more difficult matters thereafter. Trust the mediator.

How Long Will the Mediation Last?

It is common to schedule mediations for either a half or one full day. More time should be scheduled for mediations that require extensive travel, the presence of many parties or involve complex fact or legal issues. It is best to build in a margin of "float" time for the mediation session. Multiple day mediations have their own built-in challenges. Often the parties recess after the first day and go home to re-think their case in a light that supports their original position. Consequently, the parties begin the next day needing to be "warmed up" and put back into the solution / settlement mode.

In General

The expanded acceptance and use of mediation in the construction industry is evidenced by the inclusion of the mediation process in the AIA's most recent edition of the Conditions of the Contract for Construction (15th Ed. 1997). It reads:

> Any claims arising out of or relating to the contract … shall … be subject to mediation as a condition precedent to arbitration and the institution of legal or equitable proceedings by either party.

Mediation provides an opportunity for people to have their input into how the process is designed and conducted. The parties are given an opportunity to confidentially express their interests and values without compromising their positions while in the presence of other parties. It provides the parties a sense of involvement and control over the dispute resolution process and the terms of a settlement.

C. Arbitration

Arbitration has long been favored as a means of resolving construction disputes. Many standard construction contract documents provide for a mandatory binding arbitration of all disputes arising under or related to the contract.

Arbitration Statutes

Both federal and Utah law, like the law in virtually every other state, favor arbitration as a cost-effective and timely means of resolving disputes. Consistent with these policy considerations, both statutory law and case law support judicial orders compelling arbitration when required by statute or contract.

The Federal law is found in Title 9 U.S.C. §1, et seq., and is known as the Federal Arbitration Act, enacted in 1925. Current Utah law is set out in the Utah Uniform Arbitration Act, Utah Code §78-31a-101 through 131, and is patterned after the Revised Uniform Arbitration Act, and applies to all contracts entered into after May 6, 2002. Disputes arising under contracts entered into prior to May 6, 2002 will be governed by the arbitration act in force on the date the agreement was signed. (Utah Code §78-31a-131).

The Utah Uniform Arbitration Act replaced the old Utah Arbitration Act (Title 78, Chapter 31, repealed) for the purpose of serving as a comprehensive codification of arbitration practice and procedure. The new Utah law deals with such matters as arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure, arbitrator immunity, discovery, subpoenas, pre-hearing conferences, dispositive motions, punitive damages, attorneys' fees and other remedies which could be the subject of an arbitration award.

Commencement of Arbitration and Selection of Arbitrator(s)

Arbitration is initiated by a demand for arbitration. The most common arbitration clause found in construction contract documents requires arbitration to proceed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). A demand for arbitration pursuant to the AAA's rules is a very simple document, requiring only a general and brief statement outlining the identity of the parties and their counsel, if known, the nature of the claim and the amount of the damages sought.

The method for the selection of arbitrators is found in the AAA's Construction Industry Rules, or in the applicable federal or state statutes. The method of selection can also be defined in the parties' Agreement or, if needed, the Court will appoint the arbitrator.

Case Management

The arbitrator will generally schedule a preliminary hearing wherein the arbitrator and parties' counsel will discuss:

- the parties in interest
- claims of the parties
- scheduling of discovery
- scheduling of motions
- disclosure of witnesses
- handling exhibits
- exchange of expert reports
- procedures governing the evidentiary hearing
- the form the award will take.

Discovery and Motions

In most instances, the type, amount and time frame for discovery are left to the arbitrator's discretion. Most arbitrators try to get the parties to agree on reasonable limits on discovery, especially depositions, but will impose such limits where the parties fail to agree.

The arbitrator has the authority to issue subpoenas and subpoenas duces tecum upon third parties as allowed by the Utah and Federal Rules of Civil Procedure.

In theory, arbitrators have always had authority to summarily dispose of all or portions of the claims submitted for arbitration. Dispositive and summary motions may be filed resulting in a final or interim award. Because of the limited avenues of appeal available in arbitration, the summary disposition of claims is carefully considered by the arbitrator or arbitration panel.

The Arbitration Hearing

At the evidentiary hearing, the procedure is in form very similar to that encountered in litigation. It is, however, considerably less formal, particularly as to evidentiary matters. Simply stated,

the rules of evidence are "relaxed" in arbitration. Rule 31(b) of the AAA Construction Industry Rules provides:

> The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Responses to questions are answered in a more narrative manner. AAA Construction Industry Rule 32(a) states that "the parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to understanding and determination of the dispute. Conformity to the legal rules of evidence shall not be necessary." Most arbitration acts contain similar provisions. In short, the test by which evidence is judged in arbitration is materiality, not admissibility. The arbitrator has the authority to weigh the evidence received.

The Award

Once the arbitrator is satisfied that all evidence is in, he or she will close the hearing and begin deliberations that lead to the award. Historically, arbitration awards have been extremely brief, consisting essentially of a net award of damages in favor of one of the disputants and perhaps an award of attorney's fees and/or arbitration costs. Currently, many arbitrators, as well as organizations such as the American Arbitration Association will provide either a detailed or reasoned award upon request by the parties.

A detailed award must specifically list the arbitrator's award as to each component of each party's claims and culminate in a net award as to damages, attorney's fees (where applicable), arbitration costs and interest. A reasoned award takes the process one step further, requiring the arbitrator to provide at least a minimal written explanation for each component of their award. Findings of fact and conclusions of law are frequently not submitted unless requested by the parties and agreed upon by the arbitrator.

Under the rules of the American Arbitration Association, an arbitrator must issue the award within 30 days from the date the hearing is closed. Neither the Utah Uniform Arbitration Act nor the United States Arbitration Act has established any such time frame.

Modification of Award

Under the Utah Uniform Arbitration Act and the American Arbitration Association's rules, a party has twenty days from the date the award is received to seek modification of the award to correct any clerical, typographical, technical or computational errors. The arbitrator has no authority to re-determine the merits of the award but may correct calculations or descriptions of persons or property. This provision is an exception to the common law *functus officio* doctrine that states when arbitrators finalize an award and deliver it to the parties, they no longer have the power to act on any matter.

The Federal Arbitration Act has no such exception. Parties under the Federal Arbitration Act must, however, bring a new proceeding in the U.S. District Court to clarify an arbitrator's decision. Under the Federal Arbitration Act a motion to modify may be filed with the court at any time within three months after the award has been filed or delivered.

Motion to Vacate Award

There is no authority to vacate an award under the American Arbitration Association's rules. A motion to vacate the award under the Utah Uniform Arbitration Act must be filed within ninety days from the receipt of the award. Under the Federal Arbitration Act, a motion to vacate may be filed at any time within three months after the award has been filed or delivered.

Once an award has been issued, it may become subject to efforts to vacate by a dissatisfied party. Reversal of an arbitrator's award can only be done by a court. Under the federal and Utah statutes, an arbitrator's award will be vacated if it appears that:

- The award was procured by corruption or fraud;
- The arbitrator is guilty of bias or other misconduct;
- The arbitrator exceeded his or her powers;
- There was no arbitration agreement;
- The arbitrator failed to postpone a hearing;
- The arbitrator refused to hear material evidence; or
- The arbitration was conducted without proper notice.

Courts have traditionally deferred to arbitrator's awards and have been reluctant to revisit them when challenged by a dissatisfied party. However, the Utah Supreme Court in the case of *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996), stated that a court may explore further the propriety and basis for an arbitrator's award and that an award could be vacated if it violates public policy.

Summary

The arbitration of construction disputes is governed by the terms of the Federal Arbitration Act, the Utah Uniform Arbitration Act, or the rules agreed upon by the parties such as the Construction Industry Rules of Arbitration authored by the American Arbitration Association.

In choosing to arbitrate a dispute, the parties waive their rights to have a court or jury determine the outcome of their dispute. The parties can agree to arbitrate either an existing dispute or a dispute that may arise in the future. In such an event, they need to consider the rules under which the arbitration will be conducted. The arbitration award is final and may not be overturned except on limited grounds.

D. Dispute Review Boards

A dispute review board is a neutral group of persons usually selected by the owner and contractor at the beginning of the construction project to resolve future disputes as they arise on the job. The persons on the board have the technical background and experience to understand and help resolve construction disputes. They visit the job regularly during the construction process and become familiar with the project's design and construction requirements.

The purpose of dispute review boards is to hear disputes in an informal, non-adversarial atmosphere, and to provide technical recommendations for timely resolution of disputes. The role of the dispute review board is to provide an independent assessment of both parties' positions, and to resolve the dispute before the parties adopt rigid positions leading to a breakdown in communication on the job. In summary, a dispute review board is a process where the parties invest time and money in seeking a technical solution as distinguished from arbitration where the parties present evidence in support of their position in order to obtain an award.

Creating the Dispute Review Board

A dispute review board should initially be established by the contract documents. The suggested language by the American Arbitration Association for incorporation into the contract documents is:

> The parties shall impanel a Dispute Review Board (DRB) of three members in accordance with the Dispute Review Board Procedures of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.

On projects where a dispute resolution board is specified, contractors should inform all subcontractors that a dispute resolution board has been established and require them to participate in the process when their work or materials are involved with or may be affected by the dispute. The expenses of establishing and maintaining the dispute review board should be the responsibility of the parties involved with the dispute.

Once the contract is signed, the owner and general contractor will select a group of one to three persons to act as the dispute review board. In some cases, the persons will be selected in a completely neutral fashion with the aid of an organization such as the American Arbitration Association. In other cases, the owner and general contractor may each nominate one member to the board and each member will then select a third member to serve on the board.

The board member is usually a professional with technical expertise (architectural, engineering, legal, accounting, scheduling, etc.) to offer counsel and assistance in working on a technical solution to the problem at hand. Once the board is established, each board member is given a set of contract documents in order to enable them to become familiar with the project and the scope of work involved. The board members should meet periodically at the project site with both parties to review the construction progress, even when there are no disputes in existence.

Whenever the parties are unable to resolve a dispute, the dispute should be immediately referred to the dispute review board for a prompt recommendation or decision. Depending on the agreement of the parties, the decisions of the dispute review boards may be merely non-binding recommendations or may be binding decisions.

The notice of a dispute to the board should be in writing, and notice should be given to all interested parties. The notice should state in full detail the issues of the dispute to be considered by the board.

When a dispute is presented to the board, the contractor and the owner will be given an opportunity to present their views and supporting evidence at a hearing. Normally the hearing is held at the job site in an informal manner, without the presence of attorneys. The board will establish the procedure for the hearings. The board may ask questions of the parties or witnesses but should express no opinions concerning the merits of the case during the hearing.

After the hearing is concluded, the board meets in private to deliberate and reach a conclusion. The board's recommendation or decision should then be submitted to both parties in a written report.

If the board's function is to provide a non-binding recommendation, the parties may accept or reject the board's recommendation. The parties should notify each other and the board within a certain time period as to whether they accept or reject the recommendation. Failure to file such notice within the time specified will constitute an acceptance of the recommendation. If the recommendation is rejected, the parties may appeal back to the board, offer other methods of settlement, or proceed toward the next step in the dispute resolution process. The board's recommendations may be presented as evidence in any future dispute-resolution forum.

Summary

Dispute review boards offer a cheaper and time-saving method of resolving disputes as they occur. They also allow the parties to retain a cooperative relationship on a project. This cooperative relationship allows the construction project to progress more rapidly and prevents time wasted in preparing documentation in anticipation of some future litigation battle. Any costs incurred in establishing a dispute review board should be recouped from the savings of avoiding such litigation.

E. Dispute Resolution Contract Clauses

Prime Contract Dispute Resolution

Article 4 of the AIA A-201 General Conditions of the Construction Contract (15th Ed. 1997) provides a dispute resolution system that is used for most commercial projects. The resolution of disputes is handled through a procedure beginning with the architect's review (4.4.1 – 4.4.8). All claims not resolved by the architect are handled by mediation (4.5.1 – 4.5.3). Claims not resolved by the architect or through mediation are resolved by arbitration (4.6.1 – 4.6.6). The award of the arbitrator is final and binding.

The following is a simplified version of a dispute resolution clause that may be used in a contract between the owner and prime contractor.

1. Disputes: Claims, disputes or other matters in question between the parties arising out of or relating to this contract shall be subject to the Dispute Resolution Procedures set forth in this Article.

2. Notices of Claim: If a dispute arises out of or relates to this contract, or the breach thereof, the claimant shall first advise the other party of the details of the claim within ten days from the time the facts underlying the claim became known to the claimant. The notice shall be in writing with sufficient detail and backup information to permit the other party to evaluate the claim.

3. Negotiations: Within ten days after notification of a claim in writing, a representative(s) of the Owner and the Contractor shall meet and endeavor to negotiate a resolution. Representatives of both parties shall attend with authority to settle any claim.

4. Dispute Review Board: If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties, within ten days from the termination of the negotiations, shall impanel a Dispute Review Board (DRB) of three members in accordance with the Dispute Review Board Procedures of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes between the Parties. The decision of the DRB is (is not) binding.

5. Mediation: If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation or the Dispute Resolution Board, the parties agree to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

6. Arbitration of Disputes: If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the Dispute Resolution Board, or mediation, then any controversy or claim shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration may include by consolidation or joinder any other additional party who is or may be involved in the claim. The arbitrator(s) shall have the power to award to the prevailing party reasonable costs and attorneys' fees in addition to the costs of arbitration.

7. Venue: The location of any dispute review board, mediation or arbitration shall be held in Salt Lake City, Utah.

Subcontract Dispute Resolution

The following is a sample of a dispute resolution clause that may be used in the prime contractor's subcontract.

1. In case of any dispute involving Contractor and Owner which arises from or relates to Subcontractor's Work, Subcontractor agrees to settle such dispute in the manner provided by the Contract Documents between Contractor and Owner. Subcontractor consents to be joined, at Contractor's option, in any arbitration, mediation, dispute review board or other dispute resolution proceeding that involves Subcontractor's Work. Subcontractor also agrees to be bound to the Contractor to the same extent the Contractor is bound to the Owner on all matters pertaining to Subcontractor's Work. Subcontractor agrees to pay a proportionate share of the fees and costs incurred by Contractor in any dispute resolution proceeding involving the performance or non-performance of Subcontractor's Work. Fees shall include but not be limited to design, expert, consulting and attorneys' fees.

2. All other claims and disputes involving Contractor and Subcontractor shall be resolved in the following manner: (a) All Subcontractor claims are subject to the notice provisions of this contract. (b) the Parties agree to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure. (c) The parties agree that all claims not resolved by mediation may, at Contractor's option, be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration may include by consolidation or joinder any additional parties who is or may be involved in the claim. The arbitrator(s) shall have the power to award to the prevailing party reasonable costs and attorneys' fees in addition to the costs of arbitration. (d) The parties agree that the location of any mediation or arbitration shall, at Contractor's option, be held in Salt Lake City, Utah.

CONCLUSION

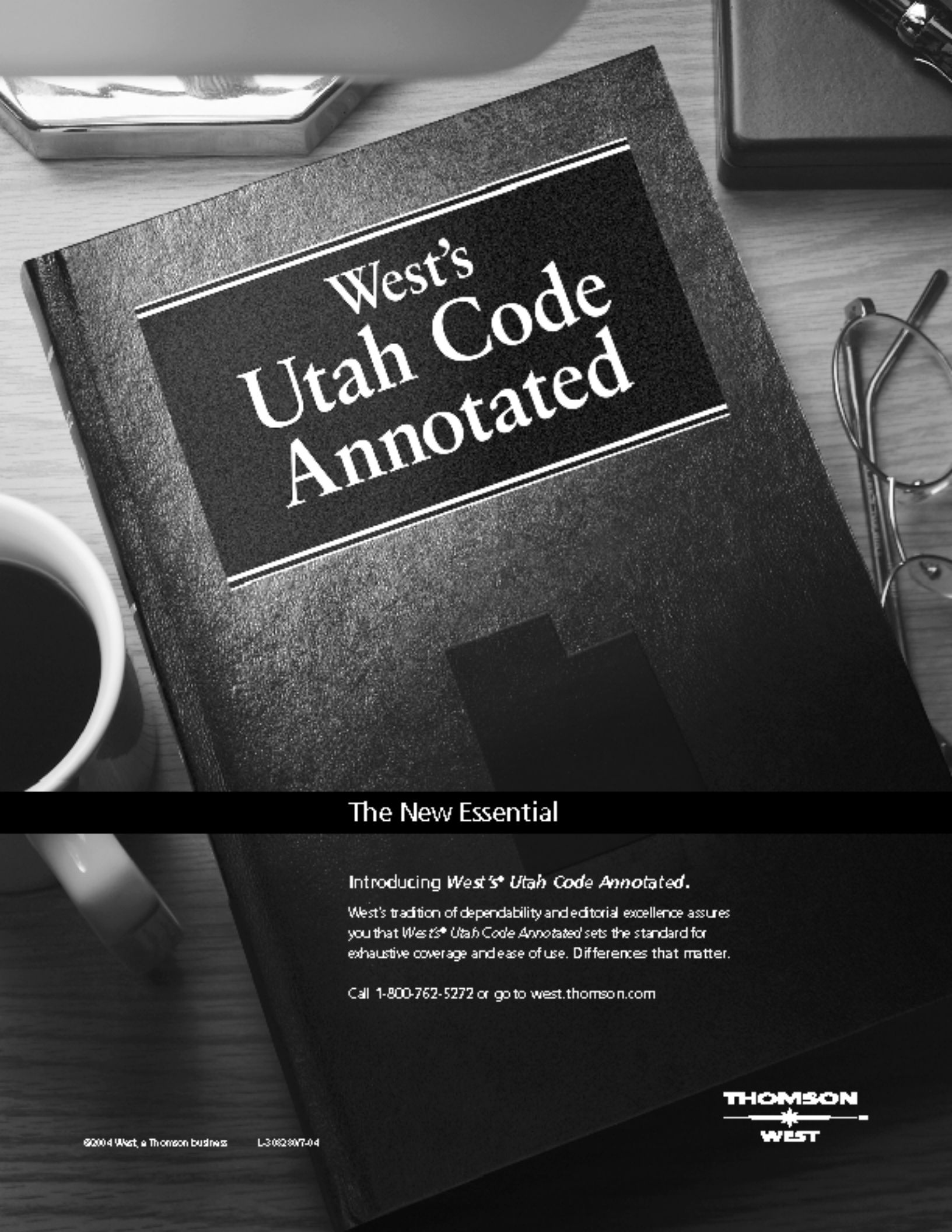
The resolution of construction claims can be built with various tools using one or more in conjunction with the other. The attorney is both the author of the process and the craftsman who uses these tools to bring about a desired result for the client. Legal counsel can use negotiation, mediation, arbitration, dispute review boards or other devices of their own creation to hammer and chisel their way to resolution.

Negotiation, even though failed, can be the foundation upon which a successful mediation is accomplished. Likewise, a failed mediation can focus the parties on further negotiation or a second mediation. There is no authoritative study on the success rate of mediation. However, one source, the American Arbitration Association, has reported that eighty-five percent of the mediations conducted under their administration have resulted in a settled resolution.

The number of arbitrations in the construction industry continues to grow. The Utah Uniform Arbitration Act (based on the Revised Uniform Arbitration Act) is a culmination of arbitration practice and procedure that has evolved under both the Federal Arbitration Act and Utah's old Arbitration Act. For a more defined discussion on the Utah Uniform Arbitration Act see the article entitled *Utah's Revised Uniform Arbitration Act: a Makeover for the Face of Arbitration* published in the December 2003 edition of the *Utah Bar Journal* (Vol 16 No. 9).

Dispute review boards represent a process where time and money are expended on the solution rather than building and supporting positions adverse to others. In addition, the construction industry has long embraced other dispute preventive methods such as "partnering" which is an informal method of meeting together and defining how to best implement the contract requirements and meet contract expectations.

Basic to the dispute resolution systems, however used, is our established system of justice with the courts, both trial and appellate, as an institution open to the public at large. Without this system of justice, the processes of negotiation, mediation, arbitration and dispute review boards would be given little meaning. To the extent our courts continue to recognize and acknowledge the valuable alternate forms of dispute resolution, the parties to a dispute and their legal counsel will be able to find faster, less expensive and more efficient ways of resolving construction disputes.



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Employment Law Update: November 2002–November 2004

by Ellen Kitzmiller

In the two years following the previous Employment Law Update (*Utah Bar Journal* Vol. 15, No. 8 (November 2002)), a number of employment related cases of note have been decided in Utah appellate courts. This article will provide a short summary to help *Utah Bar Journal* readers to keep up with this ever growing and changing area of law.

Guns in the Workplace

By far the most highly publicized controversy in the employment arena has concerned the right of Utah employees to bring firearms into the workplace. In *Hansen v. America Online, Inc.*, 96 P.3d 950, 2004 UT 62, the Utah Supreme Court reviewed a trial court ruling that a private employer can prohibit its employees from bringing guns onto the employer's property. The action arose out of the employer's decision to terminate three employees because they transported firearms in their cars onto a leased employee parking lot for the purpose of an after-work target shooting outing. *Id.* at ¶¶2-4. In the employer's view, their conduct constituted an impermissible violation of its Workplace Violence Prevention Policy which, among other things, prohibited bringing weapons of any sort onto company property, including its parking lots. *Id.* On appeal, the employees argued that their terminations unlawfully violated "clear and substantial" public policy where the Utah Constitution explicitly provides that "[t]he individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for lawful purposes shall not be infringed." Utah Const. art. 1, §6.

The Supreme Court's analysis was predicated on the "at-will" nature of the relationship between Utah employers and their employees, noting that exceptions thereto are narrow and of relatively recent origin. *Id.* at ¶¶8-14. Among the recognized exceptions is "exercising a legal right or privilege."[1] Accordingly, the issue before the Court was whether the employees' constitutional right "to keep and bear arms" constitutes a "clear and substantial" public policy that displaces the at-will employment relationship.

The Court observed that Utah "employer[s] owe[] a duty to [their] employees . . . not to exploit the employment relationship by demanding that an employee choose between continued employment and violating a law or failing to perform a public obligation of clear and substantial public import." *Id.* at ¶10. On the other hand, an employer's insistence that its employees relinquish legal rights or privileges as a condition of employment "will not expose the employee[s] to possible criminal penalties or other legal sanctions." *Id.* at ¶11. In the Court's view, the balance tipped in favor of the employer's legitimate interest in "regulat[ing] the workplace environment to promote productivity, security, and similar business objectives" over the employees' interest in "maximiz[ing] access to their statutory and constitutional rights within the workplace." *Id.*

The Court noted that the "clear and substantial" public policy embodied in the Utah Constitution at Article 1, sec. 6, is subject to a qualifying provision that "nothing herein shall prevent the legislature from defining the lawful use of arms." *Id.* at ¶13. The Legislature recently exercised that authority when passing Firearms Laws, Utah Code §§63-98-101 through -102, which laws are designed for the "sole purpose . . . to preempt efforts by the University of Utah to restrict the possession of firearms on its campus . . . ." *Id.* at ¶16. During debate, members of the Legislature stated that the new Firearms Laws were not intended to limit the right of private employers to restrict possession of

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guns in the workplace. *Id.* at ¶¶17-19. Accordingly, an employer who exercises that right is not in violation of any "clear and substantial" public policy. In particular, because no public policy was violated in connection with the contested terminations, the Supreme Court affirmed judgment for the defendant employer.

Employment Contracts

In *Prince, Yeats & Geldzahler v. Young,* 94 P.3d 179, 2004 UT 26, the Utah Supreme Court considered whether a law firm had entered into, and then breached, an employment contract with its associate attorney. (Significantly, the law firm brought a claim against the associate for breach of fiduciary duty, not treated herein.) Essentially, the associate asserted that the law firm breached two oral contracts with him: first, a promise that he would receive increased compensation and be elevated to shareholder status; and second, that he would receive a "fair and equitable" portion of fees for certain contingency fee cases. *Id.* at ¶¶2-7 (summarizing discussions between the law firm and the associate regarding the terms of his employment).

"Under the terms of his original employment agreement, which was never reduced to writing, the firm president indicated that, as a general rule, attorneys at the firm received increased compensation based on performance and positive results. Further, the usual partnership track for a lateral hire with [the associate's] experience ranged from two to three years, depending on performance." *Id.* at ¶2. Further, partners in the firm met with the associate to negotiate an appropriate allocation of contingency fees and communicated their intention to be "fair" in attempting to determine the amount of compensation that the associate would receive. *Id.* at ¶5. The parties reached a tentative verbal agreement on a one third/two thirds split between the associate and firm, respectively. The firm reduced the agreement to writing and requested that associate sign, but the associate instead made a "counteroffer" agreeing to the split provided his employer "made him a shareholder, allowed him a voice in that year's bonus distribution, and guaranteed an increased salary for the next two years." *Id.* at ¶6. When the parties continued to disagree on their respective rights and obligations, the firm filed suit for breach of fiduciary duty and the associate countersued for breach of oral contract. In the wake of a jury verdict in favor of the associate, the firm appealed denial of its motion for summary judgment on the contract claims. *Id.* at ¶¶6-7.

The Supreme Court held that discussions concerning the general relationship between performance and compensation, or the

firm's usual practices concerning compensation and elevation to shareholder status, were too indefinite to create a contract. "Without some definite language addressing the amount, timing, or conditions of [the associate's] potential additional compensation . . . comments [by the firm president] represent 'only the facade of a promise, . . . statements made in such vague or conditional terms that the person making them commits himself to nothing. . . . [W]here there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of a contract the parties ought to have made and enforce it." *Id.* at ¶14 (internal citations and punctuation omitted).

Likewise, the defendant law firm's statements regarding the anticipated "fair and equitable" division of a contingency fee were too indefinite to create an express contract. "[N]o agreement was ever reached on the integral feature of the alleged contract – [the associate's] compensation. Other than the tentative one-third/two-thirds division . . . , which [the associate] expressly rejected with his counteroffer, the parties never agreed upon the specific amount of, or formula to determine, [the associate's] share of fees. In the absence of any consensus on actual numbers or adoption of a mutually satisfactory method of calculating 'fair and equitable' compensation, [the firm's] stated desire to be 'fair' . . . , standing alone, is too indefinite to create a contractual obligation." *Id.* at ¶¶16-17. Accordingly, the Court reversed the trial court's denial of summary judgment on the contract claims and entered summary judgment for the defendant law firm.

Employer's Liability for its Agents

In *Wardley Better Homes and Gardens v. Cannon,* 61 P.3d 1009, 2002 UT 99, the Utah Supreme Court found a corporate employer liable for the misconduct of its agent. The facts were these: a real estate agent fraudulently extended the duration term in real estate listing agreements existing between his brokerage and certain property sellers. He changed the term from one day to one year. *Id.* at ¶¶2-3. When the sellers contracted with a second brokerage, and subsequently sold the properties to a principal of that brokerage, the first brokerage sued to enforce the contract stated in the listing agreements. *Id.* at ¶5. After the purchaser countersued for negligence, fraud and breach of contract, the brokerage expanded its suit to include claims for interference with contract, interference with prospective economic relationship, and conversion. *Id.*

Following a bench trial, the court ruled in favor of the purchaser, who thereafter moved for an award of attorney fees based on the "bad faith" statute, Utah Code §78-27-56. The trial court denied the motion, the purchaser appealed to the Supreme Court, and the case was poured over to the Utah Court of Appeals. The Court of Appeals rejected the purchaser's argument that, because the employer's agent fraudulently altered the listing agreements, the agent's knowledge of that act could be imputed to his employer and, *ergo,* the employer was guilty of bad faith in initiating the suit to enforce the fraudulently altered listing agreements. *Wardley Better Homes and Gardens v. Cannon,* 21 P.3d 235, 2001 UT App 48. The Court of Appeals reasoned that "[t]here is no legal support for the claim that vicarious liability should be applied in a manner that imputes the agent's knowledge to the principal to answer for the principal's own actions." *Id.* at ¶¶7-12. The purchaser appealed the case to the Supreme Court.

The Supreme Court agreed that, as a general rule, imputed knowledge is constructive and cannot be used when determining an individual's subjective mental state. However, the Court went on to hold that this limitation does not apply where the principal is a corporation "because a corporation has no belief or intent independent of that of its officers and agents" – thus a corporation's knowledge "is entirely imputed." *Id.* at ¶22. (citations and internal punctuation omitted). Consequently, the question of whether the first brokerage had acted in bad faith within the meaning of the "bad faith" attorney fee provision was answered by reference to the subjective mental state of its agent. *Id.* at ¶23.

The employer also argued that the real estate agent was an independent contractor, not an employee, and that the agent's fraudulent conduct exceeded the scope of his authority. The Supreme Court swiftly dismissed the first argument, reiterating its prior holding that "[t]he relationship between a real estate broker and its agents is that of employer and employee." *Id.* at ¶25 (citing *White v. Fox,* 665 P.2d 1297, 1301 (Utah 1983)). The Court went on to hold that the agent's fraudulent conduct was, indeed, within the scope of his authority. "[T]he fact that [the agent] committed fraud does not necessarily mean that he acted outside of his authority. Scope of authority refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded a methods, even though quite improper ones, of carrying out the objectives of the employment." *Id.* at ¶26 (citing *Birkner v. Salt Lake County,* 771 P.2d 1053, 1056 (Utah 1989)).

Damages for Breach of Employment Contract

In *Kraatz v. Heritage Imports,* 71 P.3d 188, 2003 UT App 201,

the Utah Court of Appeals considered the proper measure of damages for wrongful termination in breach of the plaintiff's employment contract. Although the plaintiff was hired for a five-year term, he was fired after twenty-seven months. *Id.* ¶1. Following a trial court ruling that his termination was not wrongful, the plaintiff appealed and the case was reversed and remanded for a determination of damages. See *Kraatz v. Heritage,* 1999 UT App 70. The trial court then awarded the plaintiff certain direct damages and a portion of his attorney fees, but denied consequential damages as a matter of law, and the plaintiff appealed the case for a second time. 2003 UT App 201 ¶¶2-3.

On appeal, the Court of Appeals explained that the plaintiff was entitled to recover *both* general and consequential damages "to place the plaintiff-promisee in as good a position as he would have been in had the defendant-promisor not breached the contract." *Id.* at ¶4 (citing Williston, Law of Contracts §64:1 (4th ed. 2002)). General damages consisted of his salary over the remainder of his five-year employment contract, plus the value of an array of benefits lost as a result of his termination, including company stock, a profit bonus, club memberships, relocation expenses, health care expenses, attorney fees and costs, and prejudgment interest on any damages, including consequential damages, that were "fixed as of a particular time and measurable by facts and figures." *Id.* at ¶¶7-47, ¶¶56-81 (discussing measure of each damage category *seriatim*).

In addition, the Court explained that the plaintiff was entitled to recover whatever consequential damages – for example, the value of 401(k) contributions, Christmas bonuses and Jazz tickets – he could prove against the three-part test set forth in *Mahmood v. Ross,* 1999 UT 104, 990 P.2d 933, and *Castillo v. Atlanta Casualty Co.,* 939 P.2d 1204 (Utah Ct. App. 1997). *Id.* ¶49. That test requires proof that (1) consequential damages were caused by the breach; (2) such damages were foreseeable at the time the parties contracted; and (3) the amount is provable "within a reasonable certainty." *Id.* The "reasonable certainty" standard is less exacting "than that required to establish the fact or cause of a loss. . . . [and] is met . . . if there is sufficient evidence to enable the trier of fact to make a reasonable approximation." *Id.* ¶54 (quoting *Cook Associates v. Warnick,* 664 P.2d 1161, 1166 (Utah 1983)). Because *Mahmood's* "reasonable certainty" factor has yet to be defined or applied in subsequent Utah case law, we may see a third appeal if the parties are unable to satisfactorily resolve their dispute on remand.

Preemption under the Utah Anti-Discrimination Act

In *Gottling v. P.R. Inc.,* 61 P.3d 989, 2002 UT 95, the Utah Supreme Court considered whether to expand the common law tort of wrongful termination in violation of public policy to encompass causes of action based on discriminatory conduct by small businesses. The plaintiff alleged that she was terminated because she refused sexual overtures by the owner of the company where she was employed. *Id.* at ¶2. However, because the company employed fewer than fifteen (15) employees, she was unable to assert a sexual harassment claim under the Utah Anti-Discrimination Act ("UADA") which, like its federal analog, applies only to employers "employing 15 or more employees within the state for each working day in each of 20 calendar

weeks or more in the current or preceding calendar year." Utah Code §34A-5-102(8)(a)(iv). Instead, the plaintiff asserted a common law claim for wrongful termination, and pointed to the UADA as evidence of Utah's "clear and substantial" public policy against workplace harassment. *Id.* at ¶3.

The Court's analysis turned on whether the Utah Legislature had intended the UADA to displace "the contemporaneous application and development of the common law" in Utah. *Id.* at ¶8. The Court held that the UADA's exclusive remedy provision explicitly states that intention, thereby preempting *all* common law causes of action based on the specific grounds listed therein: race, color, sex, retaliation, pregnancy, childbirth, pregnancy-related conditions, age, religion, national origin, and disability. Utah Code Ann. §34A-5-107(15). Moreover, since the UADA prohibits "employment discrimination" generally, its preemptive effect is not limited to those employers who employ 15 or more employees and are covered by the UADA. Rather, it preempts common law causes of action for employment discrimination against *all* employers, including small employers not subject to its prohibition on employment discrimination. *Id.* at ¶¶10-11.

In a companion case, *Byers v. Creative Corner, Inc.,* 57 P.3d 1064, 2002 UT 96, the Utah Supreme Court applied the rule in *Gottling* to a wrongful termination claim where the asserted public policy was pregnancy discrimination. The Court affirmed the trial court's dismissal of the plaintiff's claim where the defendant employer employed fewer than 15 employees. *Id.* at ¶3.

Claim Preclusion

In *Massey v. Board of Trustees of Ogden Area Community Action Committee, Inc.,* 86 P.3d 120, 2004 UT App 27, the Utah Court of Appeals considered the preclusive effect of a failed federal claim on the aggrieved employee's common law claim in Utah state court. Following his termination as a high-level executive with a Utah non-profit corporation, the plaintiff filed a claim in federal court pursuant to 42 U.S.C. §1983 ("Section 1983") which permits a private cause of action to redress violations of constitutional or other federal rights by state actors. *Id.* at ¶2. Massey alleged that his expectation of continued employment was a property interest, and that his termination deprived him of that interest without constitutional due process. *Id.* The federal court dismissed Massey's claim for failure to show that his former employer was a "state actor" within the meaning of Section 1983, which ruling was affirmed by the Tenth Circuit Court of Appeals. *Id.* ¶3.

Thereafter, Massey filed a second action in state court for breach of contract and wrongful termination in violation of public policy. The trial court granted summary judgment in favor of the defendant employer on the basis of *res judicata,* and the plaintiff appealed. *Id.* at ¶4. The state appellate court applied the federal law of claim preclusion (noting that the result would be same under to state law) which requires: (1) a judgment on the merits in an earlier action: (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits. *Id.* at ¶9 (citation omitted). While conceding the second prong, the plaintiff protested that his claims asserted in the state court action were different from those adjudicated in the federal court because they were "different in fundamental theory" and the federal court's ruling on the "state actor" issue on his Section 1983 claim was merely a threshold matter that did not go to the merits.

The Court of Appeals rejected these arguments. First, because the facts underlying the plaintiff's Section 1983 claim were the same as those underlying his common law claims for breach of contract and wrongful termination, the claims were "related in time, space, origin and motivation, and form a convenient trial unit that may defendant could expect to be brought in one suit" – in short, his state law claims based on the same facts "could and should have [been] brought . . . in the prior suit." *Id.* at ¶12. Second, the Court held that the federal court's ruling on the "state actor" issue constituted a judgment on the merits because it constituted a necessary element of his Section 1983 claim. *Id.* at ¶¶14-15. Once the federal suit was disposed of with prejudice, that judgment foreclosed any possibility of reviving claims based on the same facts, albeit on different legal theories, in another forum. This result could have been avoided if the state law claims had been raised before the federal court at the outset of the litigation.

Conclusion

While your practice may not focus on employment law, if you represent employers or employees, you will likely face an employment law question. Hopefully, this update will help you keep up to date on state employment law issues.

1. The other exceptions are for: refusing to commit an illegal or wrongful act; performing a public obligation; and reporting an employer's criminal activity to a public authority. *Id.* at ¶9 (quoting *Ryan v. Dan's Food Stores, Inc.,* 972 P.2d 395, 408 (Utah 1998)).

Notice of Election of Bar Commissioners

First 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 First Division and two 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 3, and **completed petitions must be received no later than February 15.** Ballots will be mailed on or about May 2 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. May 31. Ballots will be counted on June 1.

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

1. Space for up to a 200-word campaign message plus a photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. *Campaign messages for the March/April* Bar Journal *publications are due along with completed petitions, two photographs, and a short biographical sketch* ***no later than February 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 April 18*** *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.

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, 2005. Potential candidates will be invited to meet with the Bar Commission in the afternoon of March 10, 2005 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 2nd and will be counted June 1st. The President-Elect will be seated July 13, 2005 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 e-Bulletin 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.

Karin Hobbs Receives the 2004 Peter W. Billings, Sr. Award

Karin Hobbs, long-time mediator and ADR mentor, received the 2004 Peter W. Billings, Sr. Award for Excellence in ADR at the State Bar's recent Fall Forum on Friday, October 22nd at the Marriott-University Park Hotel. The award honors the legacy of Peter W. Billings, Sr., a pioneer and a champion of the collaborative dispute resolution process and mediation in Utah.

Karin is known by many for her skill as a mediator, and for her talent as a trainer for advocates and neutrals in Alternative Dispute Resolution. Karin has also worked tirelessly for the ADR Section of the Bar from its inception.

Karin's work includes the mediation of over 1000 cases in a variety of subject matters, including property, employment, personal injury, family and construction law. She has been an adjunct professor of ADR at the S. J. Quinney College of Law at the University of Utah. She is also an associate member of the International Academy of Mediators and a previous board member for the Utah Council on Conflict Resolution.

She has trained many attorneys in the art of ADR Advocacy, as well as many neutrals in how to be better mediators and arbitrators.

2005 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2005 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 nominations 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 22, 2005. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Section of the Year
4. Distinguished Committee of the Year

2005 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2005 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 17, 2005.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

Bar Welcomes New Admittees

242 new admittees were welcomed into the Utah State Bar at an admission ceremony held at the Salt Palace on October 21, 2004. Family and friends of the new admittees gathered to listen while Matthew B. Durrant, Justice of the Utah Supreme Court, addressed the audience. Michael J. Wilkins, Associate Chief Justice of the Utah Supreme Court conducted the event and a large gathering of judges from both the Utah Supreme Court and the United States District Court for the District of Utah were in attendance. Refreshments were provided after the ceremony.

A sincere thank you goes to all the volunteers who donate their time to assisting with the admission process. Over 100 attorneys volunteer their time to assist the Bar in everything from reviewing applications and conducting character and fitness hearings to drafting and reviewing Bar exam questions and grading exams. These attorney volunteers include members of the Admissions Committee, the Character and Fitness Committee, the Special Accommodations Committee, and the Bar Examiner Committee. The Bar greatly appreciates the contribution made by these individuals. THANK YOU!

Todd B Alder
Warde S Allan
Jared G Andersen
Dax D Anderson
Jared M Anderson
Meb W Anderson
Michelle L Anderton
Brent A Andrewsen
Tammie J Anstead
Aaron M Aplin
David L Armond
Harold H Armstrong
Michael R Arsenault
Jamison D Ashby
Michael M Ballard
Joel M Ban
Todd S Barfuss
Jason W Barrus
Peter J Baxter
Sara N Becker
Scott S Bell
Jonathan M Benns
Doug A Bernacchi
Bronson D Bills
Jedediah P Bingham
Richard Bissell
Jayme L Blakesley
Virginia A Blanchard
Brynn Bowen
Daniel W Bower
Bradley J Britzmann
Stevin E. Brooks
Daniel Brough
Mary E Brown
Meagan B Brunson
Bryan C Bryner
J. Scott Burris
Christopher W Call
J. Simón Cantarero
Jennifer R Carrizal
Reuben H Cawley
Yoram Chady
Holly S Chamberlain
Richard K Chang
Michelle H Christensen
K. Adam Christian, Jr.
Michael E Christiansen
Bret S Clark
Timothy K Conde
Harold F Cook, Jr.
Jeremy R Cook
Royce B Covington
Nathan A Crane
Jessie M Creighton
Timothy J Curtis
Timothy P Daniels
Joshua M Deere
David B Dibble
Aaron P Dodd
Ryan K Done
Aaron M Drake
Thomas J Ellis
David C Epperson
Jeremy B Eyre
Brandon A Fairbanks
Nicole G Farrell
Darin C Fawcett
Gregory N Ferbrache
Jared C Fields
Daniel E Flynn
Douglas B Foley
Charles A Foster
John B Fowles
Robert S Fox
Terry L Fund
Barton L Gertsch
Claire Gillmor
Heidi G Goebel
Lisa Gray
Richard E Grealish
Jeramy R Green
Stephen L Griffith
Rick L Guerisoli
Jason D Hadley
Kimberly M Hammond
Jack G Hanley
Gregory K Hansen
Jeremy H Harris
Kirk R Harris
Matthew L Harris
Deacon G Haymond
Tara A Haynes
Elizabeth B Henry
Brian H Hess
Dusten L Heugly
Bryce B Higbee
Derrick M Higley
Joseph S Hill
Steven W Hopkins
Jennifer E Horan
Brian R Hughes
Jason C Hunter
Blair R Jackson
Lori A Jackson
Cameron N Jacobson
Erik G Jacobson
Jonathan G Jemming
Shane K Jensen
Casey W Jewkes
Brock E Johansen
Benjamin D Johnson
Craig R Johnson
Tiffany L Johnson
David A Jones
Martin D Jones
P. Justin Judd
Robert A Justman
Kristopher S Kaufman
Walter T Keane
Joshua F King
Aaron M Kinikini
Ryan M Lambert
Timothy J Larsen
Janci M Lawes
Jonathan D Lear
Aaron D Lebenta
Lisa E Lewis
Joshua Little
Charles Livsey
Ellen Hall Loveland
Kathryn Lusty
Nathan D Lyon

R. Spencer Macdonald
Joseph B Mackey
Amber K Spencer Madsen
York A Major
Jarod R Marrott
Jared A Martin
David F Marx
Daniel B Mathews
Stephen J Mayfield
Mark C McBride
Sean P McBride
Willis F McComas
Timothy S McCoy
Kathleen E McDonald
Russell B Mead
Clark Merkley
Jeffery C Metler
Hillary J Morgan
Theron D Morrison
Daren G Mortenson
Brennan H Moss
C. Lee Mumford
Tyler L Murray
Karthik Nadesan
Kristen D Nehrke
Bruce L Nelson
Nathan D Nelson
Michael J Nielson
W.R. Theodore Nolan
Amanda R Oaks
Mel C Orchard III
Jared J Pace
Bryan J Pack
Aerie Parkinson
Brett R Parkinson
Warren M Pate
Gary W Pendleton
Joshua K Peterman
Brett H Peterson
Vaughn R Pickell
Candice Pitcher
Paul R Poulsen
Jared W Quincy
J. Reed Rawson
Nicole Reitze
Spencer W Rice
Lance D Rich
Brandon R Richards
Eric B Robinson
Christopher C Rogers
Christopher J Rogers
Jeanette D Rogers
Scott B Romney
Melinda S Rosevear
Brent W Salazar-Hall
Stephanie E Sankey
Keely Schneiter
Michael J Scott
Christine M Seaman
Rafael A Seminario
Chen Shen
Charity Shreve
Jessica Shulsen
Thomas J Siepmann
Blynn A Simmons
Nicole A Skolout
Emily V Smith
Mark R Smith
Matthew D Smith
Megan L Smith
Mathew N Sorensen
Charles C Spence
Gregory A Steed
Kathryn J Steffey
Gregg D Stephenson
Erin M Stone
Harold W Stone III
Benjamin B Stoneman
Ryan D Stout
Robert D Strieper
Jacob A Sweeten
Michelle Swift
Ariel K Taylor
Wade Taylor
John M Tefan
Travis R Terry
Ann S Thomas
Heather L Thuet
Jenifer L Tomchak
Mandie J Torgerson
Don M Torgerson
Phillip M Truman
Kevin A Turney
Melanie J Vartabedian
Thomas R Vaughn
Carol Warnick
Chad T Warren
Brian C Watts
Jason P Webb
Russell B Weekes
David J Weissman
Nicholas D Wells
Joanne Wetzler
Joseph A Willard
Jay B Wimmer
James T Wolverton
Brandon G Wood
Mark T Woodliff
Gregory S Wright
Flerida Ruth C Zabala

Fund for Client Protection Seeks Five new Committee Members

The Utah State Bar Lawyer's Fund for Client Protection Committee is seeking five new committee members. The purpose of the Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the State of Utah, occurring in the course of the lawyer/client or fiduciary relationship between the lawyer and the claimant.

Appointments to the committee shall be for a term of three (3) years, or the term uniformly determined for all Committee members by the Utah State Bar. Vacancies shall be filled by appointment by the President of the Utah State Bar, with the approval of the Board of Commissioners, for the term.

If you are interested in serving on this committee please contact:

Christine Critchley
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111-3834
(801) 297-7022
e-mail: ccritchley@utahbar.org

UTAH STATE BAR
2005 SPRING CONVENTION

(FORMERLY KNOWN AS THE MID-YEAR CONVENTION)

MARCH 10–12

DIXIE CENTER at St. George
1835 Convention Center Drive
St. George, Utah

Full online Brochure/Registration will be available January 3, 2005
www.utahbar.org

Brochure/Registration materials available in the
January/February 2005 edition of the *Utah Bar Journal*

2005 SPRING CONVENTION ACCOMMODATIONS

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

Hotel	Rate (+10.25%–10.35% tax)	Block Size	Release Date
Best Western Abbey Inn (435) 652-1234 bwabbeyinn.com	$79	40-Q 5-K	2/10/05
Best Inn & Suites (435) 652-3030 (800) 718-0297 bestinn.com	$66	15	2/10/05
Budget Inn & Suites (435) 673-6661 budgetinnstgeorge.com	$76.46	20	2/24/05
Comfort Suites (435) 673-7000 (800) 245-8602 comfortsuites.net	$65	60	2/10/05
Crystal Inn St. George (fka Hilton) (435) 688-7477 (800) 662-2525 crystalinns.com	$65–$75	43-Q 15-K	2/07/05
Fairfield Inn (435) 673-6066 marriott.com	$69	71	2/24/05
Hampton Inn (435) 652-1200 hamptoninn.net	$82	20	2/04/05
Holiday Inn (435) 628-4235 holidayinnstgeorge.com	$79	50	2/17/05
Las Palmas Condos at Green Valley Resort (435) 628-8060 (800) 237-1068 gvresort.com	$99–232/nightly	limited # (15) 1-3 bdrm condos	2/11/05
Ramada Inn (800) 713-9435 ramadainn.net	$79	50	2/10/05

Notice of Approved Amendments to Utah Court Rules

The Supreme Court and Judicial Council have approved amendments to the following Utah court rules. To see the text and effective date of the amendments, go to: http://www.utcourts.gov/resources/rules/approved/ and then click on the rule number.

Summary of amendments:

Code of Judicial Administration

CJA 01-205. Standing and ad hoc committees. Amend. Establishes the Judicial Outreach Committee. Technical amendments.

CJA 03-111.03. Standards of judicial performance. Amend. Establishes 30 hours per year as the minimum standard for certification.

CJA 03-114. Judicial outreach. Amend. Identifies the responsibilities of the Judicial Outreach Committee.

CJA 03-201.02. Court Commissioner Conduct Committee. Amend. Changes composition of Court Commissioner Conduct Committee.

CJA 03-202. Court Referees. Amend. Permits court to hire full or part time referee by contract.

CJA 03-403. Judicial branch education. Amend. Eliminates mandatory attendance at annual judicial conference.

CJA 03-412. Procurement of goods and services. Amend. Increases the amount of contracts within the discretion of the TCE from $1000 to $5000.

CJA 04-202.02. Records classification. Amend. Changes designation of PSI report from "controlled" to "protected" to conform with statute.

CJA 04-402. Clerical resources. Repeal and reenact. Establishes process for clerical weighted caseload.

CJA 04-701. Failure to appear. Amend. Increases bail for failure to appear.

CJA 09-101. Board of Justice Court Judges. Amend. Changes justice court representative on the Education Committee.

CJA 09-103. Certification of education requirements Amend. Amend to conform to statutes.

CJA 11-303. Special admission exception for military lawyers. New. Permits qualified military lawyers on active duty who reside, but are not licensed in Utah, to provide uncompensated limited legal services to military personnel and their dependents

who suffer substantial financial hardship.

Utah Rules of Appellate Procedure

URAP 01. Scope of rules. Amend. Recognizes the new rules governing appeals in child welfare cases.

URAP 02. Suspension of rules. Amend. Adds a reference to two of the new child welfare rules.

URAP 11. The record on appeal. Amend. Requires the trial court to include any presentence investigation report as a part of the record on appeal, and clarifies the manner in which the record should be paginated.

URAP 12. Transmission of the record. Amend. Requires a certified court reporter to prepare and file a transcript index.

URAP 24. Briefs. Amend. Requires parties who are seeking attorney fees to explicitly state the basis for the request.

URAP 52. Child Welfare Appeals. New. A notice of appeal must be filed within 15 days from the order to be appealed. Cross-appeals must be filed within 15 days.

URAP 53. Notice of Appeal. New. Describes the contents and service requirements of the notice of appeal.

URAP 54. Transcript of Proceedings. New. Any necessary transcripts must be requested within 4 days after an appeal is filed.

URAP 55. Petition on Appeal. New. The appellant must file a petition on appeal within 15 days from the notice of appeal. The rule describes the format and contents of the petition.

URAP 56. Response to Petition on Appeal. New. A response to the petition on appeal must be filed with 15 days.

URAP 57. Record on Appeal; transmission of record. New. Establishes what is considered to be the record on appeal and when it must be transmitted.

URAP 58. Ruling. New. The court will issue a ruling based on the record on appeal, the petition, and the response, or the court can order that the case be fully briefed.

URAP 59. Extensions of time. New. The rule describes the procedure and circumstances for extensions of time to file the appeal, the petition, or the response.

Utah Rules of Civil Procedure

URCP 45. Subpoena. Amend. Correct reference to Rule 4 regarding methods of serving subpoena.

URCP 47. Jurors. Amend. Conforms rule regulating conversing with jurors to caselaw.

URCP 56. Summary judgment. Amend. Corrects reference to URCP 7. Technical amendments.

URCP 62. Stay of proceedings to enforce a judgment. Amend. Strikes from the rule the amendments made by HJR 16.

URCP 64. Writs in general. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64A. Prejudgment writs in general. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64B. Writ of replevin. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64C. Writ of attachment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64D. Writ of garnishment. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64E. Writ of execution. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 64F. Waiver of bond or undertaking. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 66. Receivers. Repeal and reenact. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures.

URCP 69. Execution and proceedings supplemental thereto. Repeal. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69A. Seizure of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69B. Sale of property; delivery of property. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

URCP 69C. Redemption of real property after sale. New. Substantial reorganization of rules regulating writs for the seizure of property. Substantial changes to procedures. Substantial changes to seizure and sale of property.

Utah Rules of Criminal Procedure

URCrP 12. Motions. Amend. Describes the process for motions to suppress, including the contents of the motion and whether a written response is required.

URCrP 21A. Presentence investigation reports; Restitution. Renumber from URCrP 21.5 and amend. Changes designation of PSI report from "controlled" to "protected" to conform with statute.

URCrP 27. Stays pending appeal . Amend. Requires a party to serve the Attorney General when seeking a certificate of probable cause from appellate court in a felony case.

Utah Rules of Evidence

URE 608. Evidence of character and conduct of witness. Amend. Changes rule to be consistent with changes to the Federal Rule.

URE 803. Hearsay exceptions; availability of declarant immaterial. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

URE 804. Hearsay exceptions; declarant unavailable. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

URE 807. Other Exceptions. Amend. Transfers Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect changes to the Federal Rules of Evidence.

Utah Rules of Juvenile Procedure

URJP 44. Findings and conclusions. Amend. Clarifies requirement to review proposed order prior to signing.

URJP 45. Pre disposition reports and social studies. Amend. Identifies the official responsible for delivery of the pre-disposition report.

URJP 46. Disposition hearing. Amend. Clarifies requirement to prepare proposed order and review it prior to signing.

URJP 53. Appearance and withdrawal of counsel. Amend. Modifies certification of counsel for withdrawal after final order.

Utah Rules of Small Claims Procedure

URSCP 10. Set aside of default judgments and dismissals. Amend. Reduce time to move to set aside from 30 to 15 days. Effective May 3, 2004

URSCP 12. Appeals. Amend. Conform time to appeal to statute (30 days). Effective May 3, 2004.

Supreme Court Rules of Professional Practice

Chapter 23. Standards of Professionalism and Civility. New. Establishes standards of professionalism and civility.

UMBA Annual Scholarship & Awards Banquet

The Utah Minority Bar Association celebrated its Annual Scholarship & Awards Banquet on October 29, 2004. The UMBA honored some of Utah's best lawyers, activists and students dedicated to serving minority interests. This year, UMBA's Honoree of the Year Award went to Maynard Phyl Poulson who, along with Henry Adams and Judge Ray Uno, drafted the Utah Anti-Discrimination Act and introduced it as a bill and was influential in its passage by the Utah legislature. Mr. Poulson also headed the Utah Anti-Discrimination Division. Upon accepting the award, Mr. Poulson told the audience, "I did what my heart told me to do."

The Distinguished Attorney of the Year Award went to Sylvia Peña who has, for more than a decade, made the 300 mile round trip to Ft. Duchesne several times a month to provide legal services for the minority and underprivileged population living there. Mrs. Peña also works as a contract attorney for Utah Legal Services and has been instrumental in the creation of several programs. Currently, Mrs. Peña's is leading a comprehensive study that will determine the legal needs of Utah's low-income population which, when complete, will be a valuable guide for this state's legal community and policy makers.

Governor Olene S. Walker received the Pete Suazo Community Service Award. Governor Walker has been one of the state's most accessible leaders and has shown sensitivity to the needs of the Utah's minority population. As Utah's first female governor, Governor Walker has spearheaded many important initiatives including education programs, budget security measures, healthcare reform and workforce development. At the banquet, Governor Walker reflected on her time as Utah's leader and told the audience that she has loved being governor. "This state is great because the people are willing to volunteer," she said.

The Keynote Speaker at the event was Lawrence R. Baca, Deputy Director of the Office of Tribal Justice, United States Department of Justice. Mr. Baca was one of the first American Indians to graduate from Harvard Law School and was the first American Indian ever hired through the Department of Justice's Honor Law Program and the first Indian ever promoted to Senior Trial Attorney status at the Department. Mr. Baca told the audience that while minorities have made impressive inroads in the legal community, he has never appeared before a minority judge in all his years of practice.

This year's scholarship recipients are Julio Carranza, a second year student at the J. Reuben Clark Law School and Jeffrey M. Merchant, a second year student at the S.J. Quinney College of Law.

The Utah Minority Bar Association also bid farewell to its current leadership, President Ross Romero, Secretary Bibiana Ochoa and Treasurer Vanessa Ramos-Smith. Next year Sean Reyes will take over as UMBA President. He will be supported by Cheryl Mori-Atkinson as Vice-President, Brent Orozco as Secretary, and Rex Huang as Treasurer.

Trial Advocacy in Domestic Law Cases

For those wishing to attend an all-day training on
Trial Advocacy in Domestic Law Cases, please set aside **Friday, January 7th**.
The training will be at the Law & Justice Center.
Registration fee waived for pro bono volunteers.

Please contact: Steve Julien, Utah Legal Services,
sjulien@andjusticeforall.org
for more information.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re:

Electronic Submission of Selected Documents

EMERGENCY GENERAL ORDER
FILED October 20, 2004

Before **TACHA,** Chief Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL** and **TYMKOVICH** Circuit Judges.

In order to evaluate the usefulness of documents in electronic form the Court adopts this interim order effective December 1, 2004.

Except in social security cases, all parties represented by counsel, including pro se parties who are admitted to the practice of law, (Digital Submitters) must and all other parties may submit certain documents in electronic form (Digital Submission) as provided herein. Electronic submission does not supplant, but is in addition to, written filings required by the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Digital Form or Digital Submission refers to a document in Portable Document Format (also known as PDF or Acrobat format and sometime referred to as Native PDF) generated from an original word processing file, so that the text may be searched and copied: PDF images created by scanning documents do not comply.

(a) ***Briefs.*** In addition to the written filing (original and seven copies), Digital Submitters must furnish the full contents of briefs (from cover through conclusion) in Digital Form. Any attachment(s) to a brief available in Digital Form must be included with the brief (and in the same document).

(1) ***Scanned Attachments to Briefs.*** With the prior approval of the Clerk, documents attached to a written and filed brief that are not available in Digital Form may be submitted along with the written brief in scanned PDF format. If any attachment to a brief is submitted in scanned PDF format all attachments must be so submitted and they must be submitted as one separate PDF document (all scanned documents included as attachments to a brief must be contained in a single PDF document, identified as the Clerk may direct).

(2) ***Notice of Attachments.*** If a brief has attachments the cover page must so state and also state whether the attachments are included in Digital Form, scanned PDF format or only in writing.

(b) ***Appendix.*** Any appendix required by Tenth Circuit Rule 30.1 must be filed in written form. In addition, Digital Submitters must submit all portions of the appendix available in Digital Form in a single PDF document, identified as the Clerk may direct, if that document does not to exceed 7.5 megabytes. If it exceeds 7.5 megabytes, the Clerk must be contacted for supplemental instructions. With the prior permission of the Clerk and as the Clerk may direct, Appendix documents not available in Digital Form may be submitted in scanned PDF format.

(c) ***Motions, Petitions, and other.*** Digital Submitters must submit all motions, petitions for rehearing, cost bills and entries of appearance in Digital Form. The original (but no copies) of each motion, cost bill or entry of appearance, and the original *and all required copies* of petitions for rehearing or petitions for rehearing en banc must also be filed and served in written form as required by the Federal Rules of Appellate Procedure and Tenth Circuit Rules.

(d) ***Submission.*** All digital submissions must be furnished to the Clerk on a compact disc (CD-ROM) or via e-mail to: esubmission@ca10.uscourts.gov.

(1) ***Identification and signing.*** The label of a compact disc, if one is used, or the subject line of each e-mailed document must show the case name, docket number, and party on whose behalf it is presented. A digital submission requiring an attorney's or pro se party's signature shall be signed in the following manner:

s/ Attorney or Pro Se Party
Attorney Bar Number (if applicable)
Address
Telephone number
E-mail address

(2) ***Electronic Mail.*** The subject line of any email must have the docket number and short title of the case.

(e) ***Certification of digital submissions.*** In addition to the certificate of service required by the Federal Rules of Appellate Procedure and Tenth Circuit Rules, Digital Submitters must certify that:

(1) all required privacy redactions (below) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (naming the program, version and the date of the most recent update) and, according to the program, are free of viruses.

(f) ***Service.*** In addition to the service requirements of the Federal Rules of Appellate Procedure and the Tenth Circuit Rules, Digital Submitters must simultaneously provide to all other counsel and pro se parties identical copies of any material submitted to the Clerk in Digital Form or scanned PDF format. The copies shall be provided on a compact disc supplied along with written materials. Compliance with this requirement must be included in the certificate of service.

(g) ***Privacy redactions.*** In the interest of privacy, Digital Submitters must redact all digital submissions as required by any privacy policy of the Judicial Conference of the United States (e.g., names of victims and minors ; financial account numbers; social security numbers [use only the last four numbers], dates of birth, and other data required to be redacted by order of the court). *See* http://www.privacy.uscourts.gov/b4amend.htm. The responsibility for redacting personal data identifiers rests solely with counsel and the parties.

(h) ***Relief.*** For good cause, a party may move for relief from the requirement of Digital Submission.

During the pendency of this order, the court will evaluate its effectiveness. The court invites interested parties to send written comments to the clerk of court. After evaluation, the court will decide whether the order should be vacated or whether its provisions should be incorporated into the rules of court wholly or in part.

ENTERED FOR THE COURT

Patrick Fisher, Clerk

Lawyers Face Off on Opposing Sides of the (Pool) Table & Raise Funds for "AND JUSTICE FOR ALL"

The Utah State Bar's Young Lawyers Division with "AND JUSTICE FOR ALL" held their third annual Bar Sharks for Justice Pool Tournament – an event to raise operating funds for "AND JUSTICE FOR ALL." The event was a great success, raising $2,764.

The tournament began Thursday, October 21 at Shaggy's Livin' Room, and the final round of play was held on October 28. All members of the legal community were invited to participate – from law firm partners to associates, legal assistants, and law students. Ryan Carter and David Bernstein from Kipp & Christian captured first place and the coveted shark trophy. Second place went to Carla Moquin and Karthik Nadesan from Snell & Wilmer. Third place went to Scott DuBois and Mike Horner, also from Snell & Wilmer.

"AND JUSTICE FOR ALL" was formed following a 1996 Utah State Bar task force created at the request of the Utah State Supreme Court. The Access to Justice Task Force was asked to find an answer to the question, "Can the poor and the disabled find justice in the Courts?" The Access to Justice Task Force found that the poor and the disabled in Utah have more than 75,000 new legal needs annually. While the needs are staggering and continue to grow, funding to support local legal service is diminishing and falls far behind the need. The central recommendation of the task force was to seek new sources of funding for legal services.

In response, Utah Legal Services, Disability Law Center and The Legal Aid Society unified in a fundraising campaign called "AND JUSTICE FOR ALL." The intent of the campaign is to secure private support from the legal community to preserve and expand access to civil legal services for the poor and people with disabilities in Utah. For more information on "AND JUSTICE FOR ALL" please contact Staci Duke, "AND JUSTICE FOR ALL" Development Coordinator at (801) 924-3182 or visit www.andjusticeforall.org.

"AND JUSTICE FOR ALL"

and

The Young Lawyers Division

Thank the Generous supporters
of the
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Special thanks to the Pool Tournament Committee:
Wade Budge, Jeff Droubay, Debra Griffiths, Kim Neville

Discipline Corner

PUBLIC REPRIMAND

On October 22, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand reprimanding John Bucher for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Bucher was retained to represent a mother and daughter in a Department of Child and Family Services matter and to file a petition to change custody of the mother's grandchild from the mother's daughter to the mother. The mother initially paid Mr. Bucher $500. Mr. Bucher did not file the petition for three months. The mother subsequently paid Mr. Bucher another $400. Mr. Bucher did not communicate in writing the basis and rate of his fee within a reasonable time of the representation to the mother or the mother's daughter. Mr. Bucher did not explain to the mother or the mother's daughter the nature of the legal proceedings or how the proceedings might affect them.

ADMONITION

On October 22, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition admonishing an attorney for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to seek a reduction of felony convictions. The attorney was paid $1500. The attorney performed no meaningful work on behalf of the client. The attorney failed to keep the client reasonably informed of the status of the case and did not promptly comply with reasonable requests for information. The attorney abandoned the representation without providing notice to the client, and without returning the unearned retainer.

Mitigating factors include: The client is willing to have the attorney complete the matter. The attorney was very candid with the Screening Panel. The attorney is receiving professional help for depression. The attorney is now in an office with other lawyers and support staff.

PUBLIC REPRIMAND

On October 22, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand reprimanding John Bucher for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Bucher was retained to represent a client in a misdemeanor

case. Mr. Bucher did not find out the nature of the hearing he needed to attend. Mr. Bucher thought it was a sentencing, but it was a trial. Mr. Bucher filed a motion to continue the trial, but did not file the correct paperwork with the court for the motion to continue, and did not attend the trial. The client was found guilty and a sentencing hearing was scheduled. Mr. Bucher attended the sentencing hearing, and after the client was sentenced, informed the client he would assist with an appeal, but failed to do so.

PUBLIC REPRIMAND

On October 22, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand reprimanding John Bucher for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(b) (Fees), 1.16(a)(3) (Declining or Terminating Representation), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Bucher represented a client in a criminal matter. The client paid Mr. Bucher $10,000. Mr. Bucher failed to communicate the basis of his fee in writing within a reasonable time after commencing representation. Mr. Bucher did not properly handle the case and did not keep the client informed of the status of the case. Mr. Bucher did not explain the matter to the extent reasonably necessary to enable the client to make informed decisions regarding representation. The client terminated the representation by letter, but Mr. Bucher delayed in terminating his representation of the client. Mr. Bucher refunded $1500 to the client.

ADMONITION

On November 8, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition admonishing an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 5.5(a) (Unauthorized Practice of Law), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client's grandchild in a criminal matter. The attorney did not appear for one of the court hearings in the case. The attorney did not return telephone calls requesting information about the case. In another matter, the attorney received a certified letter from the Board of Continuing Legal Education stating that the attorney had not demonstrated compliance with the Mandatory Continuing Legal Education requirements. The letter informed the attorney that if the attorney did not demonstrate compliance within thirty days a petition for suspension from the practice of law would be forwarded to the Utah Supreme Court. The attorney did not comply and was administratively suspended. Thereafter, the attorney appeared in court on behalf of three different clients.

Mitigating factors include: Absence of prior record of discipline and cooperative attitude toward the disciplinary proceedings. The attorney also agreed to participate in binding fee arbitration through the Utah State Bar's Fee Arbitration Program.

Dear Paralegal Member,

As a professional in the legal community, you know how complex the legal system is.

Imagine navigating it with no resources or prior training. Imagine navigating it while facing violence at home, poor health, or language barriers.

Thousands of people in Utah are asked to do just that every day. Increasingly, access to justice in our society depends on access to money. While an attorney is guaranteed in criminal issues, those with civil legal problems who cannot afford representation must face the system alone.

Since 1998, "AND JUSTICE FOR ALL" has been helping low-income individuals, people with disabilities, seniors and minorities get the help they need to solve their legal problems. Whether it's a woman trying to escape a violent spouse, a disabled veteran seeking benefits or a senior citizen protecting her limited resources, "AND JUSTICE FOR ALL" works to help those in our community who have nowhere else to turn.

The Utah State Bar Paralegal Division understands how important it is to ensure access to justice for all Utahns. We are writing to you today to ask you to join us in supporting the work of "AND JUSTICE FOR ALL" by making a tax-deductible donation today. *If you give before December 31, 2004, Morgan Stanley has offered to match each new donor's contribution up to a combined total of $10,000. It's a great way to double the impact of your support.*

As paralegals, we have a responsibility to join others in the legal community in leading this fight to ensure that every person has access to the justice system, regardless of income, age, disability, or minority status. Other agencies including the Utah State Bar and many of the regional and specialty bar divisions have given their support to this cause.

Your gift will allow "AND JUSTICE FOR ALL" agencies to serve thousands of individuals – free of charge – across Utah every year. Let me tell you more about what the partner agencies have done for people in your community, and why they urgently need your financial support to continue this work.

Last year, partner agencies helped over 32,000 people solve their legal problems and get on with their lives. Some of the successes include,

- *Rachel, who had the courage to take her children and leave an abusive husband. Legal Aid Society of Salt Lake helped Rachel get a protective order against her husband and file for divorce. Rachel and her children are now happily living on their own, free of fear.*
- *John, newly diagnosed with MS, who was denied a van with a lift – the only way he could keep his job of 16 years. Disability Law Center helped reverse the decision and John was able to maintain his independence.*
- *Doris, an elderly woman with a brain injury, who was being illegally evicted from her home. After Utah Legal Services challenged the eviction, the owners of the property quickly settled the case, and Doris was able to remain in her home.*

"AND JUSTICE FOR ALL" is committed to providing professional, effective and cost efficient services. Last year, in fact, the average cost per case at their agencies was only $150!

In the last year, the number of people seeking legal aid has increased sharply. With a sluggish economy and one of the fastest growing poverty rates in the nation, the demands for legal aid are greater than ever. That is why we are writing to ask for your support.

You can make a big difference in the lives of disadvantaged Utahns by sending a generous contribution to "AND JUSTICE FOR ALL" today, and please note that you are contributing as a Paralegal Division Member. Your gift will be used to help ensure people across the state get the legal support they need to change their lives for the better.

We are proud to partner with "AND JUSTICE FOR ALL" to make access to justice a reality for thousands of Utah residents. Together, we hope to make a lasting impact on our community and help our neighbors in need. We look forward to hearing from you soon.

Sincerely,
Utah State Bar Paralegal Division
Tally A. Burke, Chair

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
12/10/04	**Lawyers Helping Lawyers 4th Annual Ethics Seminar.** The Duty to Report Misconduct (Rule 8.3) Enhances Professionalism and Promotes Success. 9:00 am–12:00 pm. $85 before 12/03/04 or $100 thereafter.	3 (Ethics)
12/14/04	**Best of Series:** 9:00 am – Ins and Outs of Business Formation, 10:00 am – Éthics, 11:00 am – Technology for your Law Office, 12:00 pm – Casemaker (Free). Each session is $27.00 or $70 for all four.	1
12/17/04	**Benson & Mangrum on Utah Evidence 2004 and accompanying seminar on Utah Rules of Evidence.** 9:00 am–4:30 pm. $185 Litigation Section Members or $200 Others (includes 800 page treatise published by Thomson West, $75.00).	6 CLE/NLCLE
01/19/05	**OPC Ethics School.** This course is mandatory for those admitted on motion. 8:30 am–5:00 pm. $125 before Jan. 7th, after $150.	6 Ethics/NLCLE
01/20/05	**Nuts and Bolts Workshop on Real Property:** 5:30–8:45 pm. $55 Young Lawyer, $75 Others.	3 CLE/NLCLE

To register for any of these seminars: Call 297-7033, 297-7032 or 297-7036, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

PLEASE NOTE: Attorneys who are required to report their completed CLE hours on even years, must file a Certificate of Compliance with the Utah State Board of Continuing Legal Education by January 31, 2005. For your convenience a Certificate of Compliance can be found in the back of this *Journal*.

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

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Classified Ads

RATES & DEADLINES

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

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

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

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

POSITION SOUGHT

Attorney/CPA – Thirteen year practicing attorney and 17 year licensed Certified Public Accountant, seeking associate position with partnership potential. Experience in tax litigation and transactions, corporate transactions, estate planning and commercial litigation. I can be contacted at (801) 578-3532 or attorneyposition_2@hotmail.com

POSITIONS AVAILABLE

PacifiCorp is seeking a Junior Energy Attorney. Applicants should have at least 3 years of relevant law firm experience. A Juris Doctorate degree from an accredited law school, with excellent academic credentials is required. A broad background in a variety of electricity or energy related matters, with an emphasis on transactional, real estate, environmental and utility regulatory issues is preferred. We offer a competitive base salary, incentive plan and comprehensive benefit package. To learn more about this position and PacifiCorp, visit our website at www.pacificorp.com and apply on-line to requisition #045347.

Woodbury Corporation, a Salt Lake City based commercial real estate development and management company, is seeking an attorney for its corporate legal department. Interested candidates should have some real estate and business experience, in one or more of the following areas: Real estate development, commercial transactions, financing, entity formation, lease negotiation and drafting, and landlord/tenant. Spanish language ability a plus, but not essential. Please send inquiries to: Chris Mancini, Woodbury Corporation, 2733 E. Parleys Way, Suite 300, Salt Lake City, UT 84109 or e-mail to c_mancini@woodburycorp.com. (No phone calls, please.)

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Two offices now available at $1,000 month located in the Key Bank Tower, at 50 South Main, SLC. Amenities include: receptionist, conference rooms, fax, copier, and kitchenette. Contact Nedra at 531-7733.

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Professional Building For Lease – 3900 sq ft, Ground Floor, Partially furnished. Law library. Rental $12.00 sq ft. Next to Trax station and to post office. 49 West Center St, Midvale, Utah. Phone 255-6834 between 10:00 am and 1:00 pm week days.

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Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

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Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah Law and Justice Center
645 South 200 East, Salt Lake City, UT 84111-3834
Telephone (801) 531-9077 Fax (801) 531-0660

For Years _____ and _____

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

Explanation of Type of Activity

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

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

B. Writing and Publishing an Article, Self-Study

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

C. Lecturing, Self-Study

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

D. Live CLE Program

There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. However, a minimum of twelve (12) hours must be obtained through attendance at live continuing legal education programs. Regulation 4(d)-101(e)

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

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

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

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

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

Date: _____ Signature: _____

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