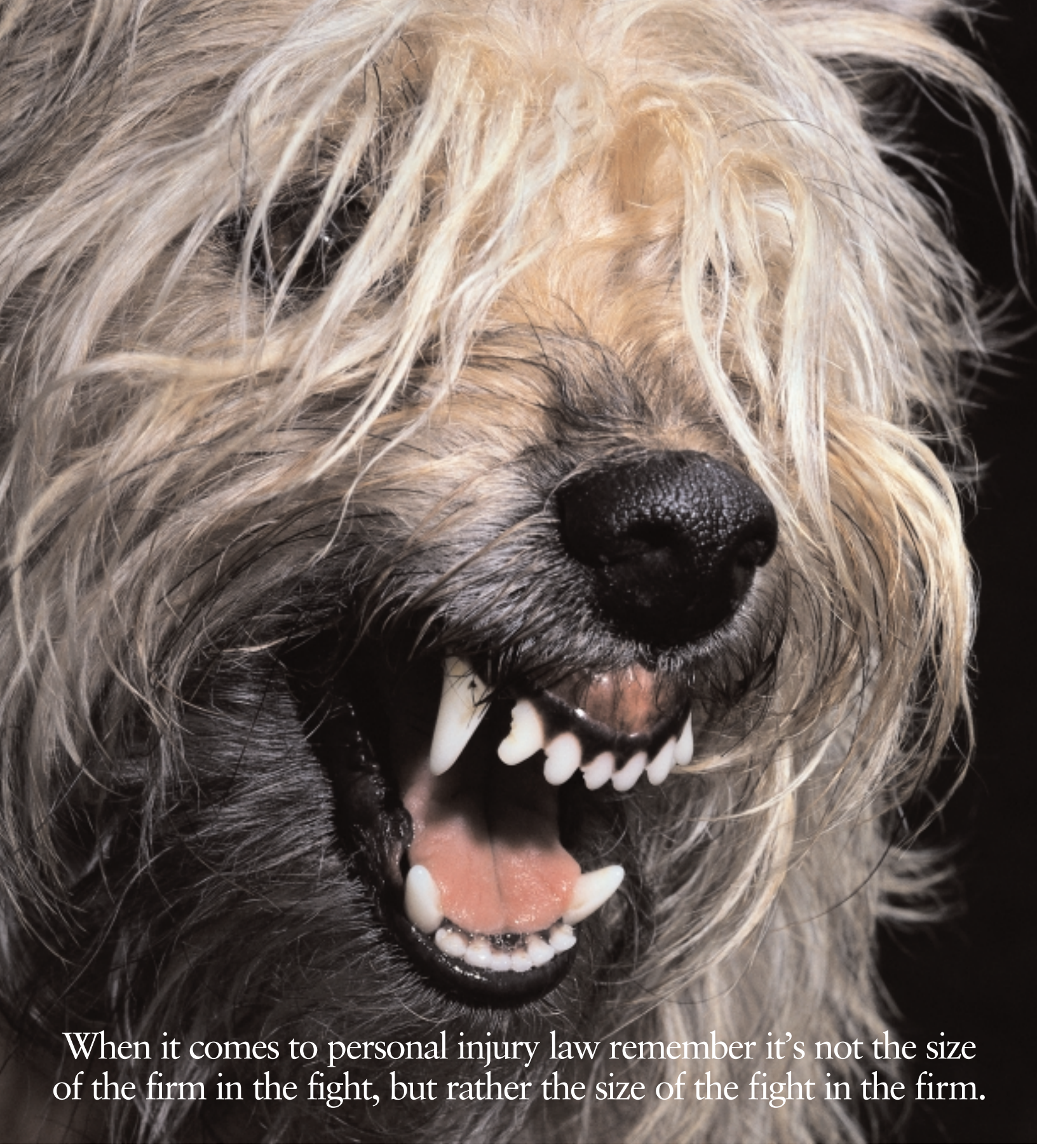
Utah Bar JOURNAL

Volume 18 No. 2
Mar/Apr 2005



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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

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

COVER: Mountain Flowers on the North Slope of the Uinta Mountains near the head waters of Hayden Fork of the Bear River. Taken by Ronald C. Barton, full-time investigator for the Utah Attorney General's Office.

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

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Letters Submission Guidelines:

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

Cover Art

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

Interested in writing an article for the *Bar Journal?*

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

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

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 encouraged and will be used depending on available space.

The Utah Bar Journal

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

Letter From the Editor

Dear Readers,

Careful readers will notice something different about this issue of the *Bar Journal.* Unlike previous years, this issue is a "combined" issue for March and April. To cut costs, the need for which is clearly presented in George Daines' President's Message, the Bar Commission has decided to reduce the number of annual issues to six.

In recent years we have published nine times, combining January and February, June and July, and August and September. Starting in 2005, we will have six combined issues.

One of the principal purposes of the *Bar Journal* has been to give the Bar a vehicle to provide notices regarding upcoming activities, proposed law and rule changes, judicial vacancies, etc. The pervasive use of electronic communications has reduced this role for the *Bar Journal,* and accordingly reduced the need for monthly issues.

The editors of the *Bar Journal* intend to put the same effort into six issues that it has given to nine in the past. Hopefully, readers will notice an improvement. We are, however, largely reliant on members of the Bar for our content, so please consider writing and submitting something for our consideration.

Bill Holyoak, Editor
Utah Bar Journal

Dear Bar Members:

by N. George Daines

It is timely for a report about the finances of the Bar. The financial situation of the Bar is very good. The changes initiated some fifteen years ago have dramatically improved the Bar's finances and its financial management. What was a weakness has become a pronounced strength. Financial reporting is excellent. Operations are managed within approved budgets. The Bar employs excellent financial and accounting experts. There are adequate reserves. Five and ten year projections are developed and considered. During my service, the budget sessions have included robust discussions about the budget and the costs of new programs and initiatives. It is my personal observation that the Bar Commission is frugal and your money is well spent.

The bulk of the Bar revenue is license fees; the primary expense are the salaries and benefits of staff employees. The license fee was set at $350 in 1990 and remains at $350 today, some fifteen years later. It is a remarkable achievement that there have been no increases during that fifteen year period. During that same time the consumer price index has increased 39.2%. During the previous fifteen year period (1975-1990) annual license fees increased 538% from $65 to $350. In fairness, that was a time when the Bar also greatly expanded its mission and programs. Nevertheless, a record of no increases for the last fifteen years is noteworthy.

Precisely because of this good management, the Bar Commission now foresees a time when license fees will need to be modestly increased on an annual basis. The alternative is to annually reduce programs. The Bar cannot indefinitely finance ongoing programs with 1990 dollars. The pattern before 1990 was to obtain incremental increases in the license fees almost every year. Under present rules, this process would entail a new petition and approval by the Supreme Court for every step increase, no matter how small. That is one option. The Bar Commission prefers a process where it would approve modest increases in license fees matching the levels of inflation. Such increases are not really increases, but simply keeping pace with the real value of money (license fees).

To this end, the Bar Commission has recently petitioned the Utah Supreme Court to approve a five year pilot program granting it this discretionary authority to increase bar license fees based upon annual increases in the consumer price index. If this authority is granted, on an annual basis, the Commission would decide whether or not some portion of the consumer price index increase in the previous year should be applied to the next year's license fee. This right to increase license fees will be an annual decision. The right is not cumulative. The Commission would be evaluating whether it is necessary to fund additional programs and personnel costs. The Finance Committee's recommendations as to reserve levels will also need to be considered. It should be emphasized that these increases will be limited to no more than the level of inflation in the previous year and would be discretionary with the Commission on an annual basis.

The Bar Commission has studied its financial situation carefully and concluded that for the foreseeable future it can and should commit itself to operate within these increases. This commitment will inevitably require some financial tradeoffs. The advantages and costs of any new programs will need to be weighed against whether older programs should be continued. The Bar Commission has passed a Resolution setting forth financial principles to guide its future decision making. A copy of the Resolution follows this message. I encourage you to review those principles and discuss them with the Commissioners. In addition, the Supreme Court Petition with its attached Exhibits can be accessed at: www.utahbar.org. The extensive exhibits detail the Bar's historic budgets and future projections. If you wish further detail and understanding please study those materials.

The Bar Commission is determined to manage your funds carefully and prudently. We welcome your input. I would appreciate and pass on any comments that you wish to make to all of the Commissioners, my email address is george@cachecounty.org. I am also available to discuss this financial report with you by telephone or in person, please call my assistant Sharon at 435-716-8374 to set up a time for a telephone appointment or a meeting. The goal of the Bar Commission is to represent you well in making these decisions.

BUDGET RESOLUTION

THIS RESOLUTION of the Utah State Bar is passed by majority vote of the Commission on July 14, 2004, at its regular Bar Commission Meeting.

Whereas the Budget and Finance Committee has duly considered the financial condition of the Bar and provided its recommendations to the Commission; and,

Whereas the Commission has carefully considered the financial condition of the Bar during its annual retreat and at various Commission meetings; and,

Whereas future budgets show a probable diminishment of reserves and the possibility of future deficit budgets; and,

Whereas licensing fees have remained fixed for some 15 years while Bar costs and expenses have increased; and,

Whereas the Commission believes the general level of expenditures remains necessary to the accomplishment of the Bar's mission; and,

Whereas the Commission believes that a method of obtaining discretionary authority for the indexing of licensing fees is appropriate and necessary; and,

Whereas as a part of this Resolution certain financial principles should be made a matter of record for the guidance of future Commissions and for the understanding of Utah lawyers.

NOW THEREFORE BE IT RESOLVED:

1. **Indexed Licensing Fees.** That the Commission petitions the Utah Supreme Court for discretionary authority to increase licensing fees on an annual basis at a rate not to exceed the rate of inflation as determined by the Consumer Price Index (CPI). If in any given year the Commission decides not to increase licensing fees, any subsequent annual increase shall be determined solely by the averaged rate over the previous 12 most recent months and shall not be cumulative. Further, that this Petition seek authority to make these increases for a five (5) year trial period commencing with the 2005-2006 fiscal year. This system will provide for the continuing operation of the Bar based upon the present value of current licensing fees.

2. **Overall Budget Level.** That the Commission on an annual basis will develop its budget and programs to operate within the projected revenue available, including maintenance of the reserves as described herein.

3. **Reserves.** It is appropriate and necessary that the Commission maintain and establish a reasonable level of financial reserves. After due consideration the Commission has determined that level to be approximately one-third of its annual operating budget. It is expected that there will be fluctuations as a result of each year's operations.

4. **Programs to be Budgeted to Operate on a Break-Even Basis.** Certain Bar programs are budgeted on a basis that they will cover the expenses attributed to their operation. The Commission, as a matter of principle, has determined that the following programs should be budgeted in this manner: (1) Annual Conventions; (2) Spring Conventions; (3) Fall Forum; and (4) Bar Admissions.

5. **Donations.** The Commission receives numerous requests for donations from a variety of worthy causes both related and unrelated to its mission. The Commission has for some time considered what should be the appropriate methodology for responding to such requests. The number of worthy requests always exceeds the funds available. The Commission believes that these principles should guide its response to these requests. First, all requests for donations, except extraordinary requests, should be processed and evaluated simultaneously during preparation of the annual budget. Second, licensing fees are mandatory. Third, the Commission encourages donations by its members to the Utah Bar Foundation and other organizations which use voluntarily collected funds to assist worthy causes. Fourth, multiple year commitments are generally inappropriate. Fifth, donations should be limited to those programs which assist in the accomplishment of the mission of the Bar.

Bar Commission Candidates

First Division Candidates

Uncontested Election: According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

Herm Olsen is running uncontested in the First Division and will therefore be declared elected.

HERM OLSEN

I was admitted to the Utah State Bar in 1976 and the Navajo Nation Trial Bar in 1977. My education includes: B.S., magna cum laude from Utah State University; J.D. from the University of Utah. I am also a member of the District of Columbia Bar, Navajo Nation Bar, and the Utah Trial Lawyers Association. I serve on the Board of Directors for the Navajo Legal Aid Services, 1994–present. I am President of the Cache Chamber of Commerce, 2005–2006. My practice areas are personal injury, municipal law, criminal defense, and collections. Prior to returning to Utah in 1980, I worked for the U.S. House of Representatives, Appropriations Committee, and for Congressman Gunn McKay.

STATEMENT OF CANDIDACY:

I appreciate the opportunity of serving as a Utah State Bar Commissioner from the First Division. As a practicing attorney for nearly 30 years, I hope to bring to the Bar a sense of awareness for small firm practice. The Utah State Bar leadership has done an excellent job of keeping members informed and providing meaningful input to legislative initiatives. We must remain vigilant in protecting the rights of Utahns and ensuring access to the legal system from increasing attacks by special interest groups. Thank you for your support.

Third Division Candidates

MICHAEL B. BENNETT

Michael B. Bennett is a Shareholder and Vice President of the Law Offices of Bennett & DeLoney, P.C. A graduate of Brigham Young University with a BS in accounting, an MBA, and his law degree, he is licensed in Oregon and Utah. A frequent presenter at national collection and commercial law seminars, Mike's practice is focused in the commercial law area, in particular, in the collection area. He was one of the original founders of the Collection Section of the Bar, and served as the first Chair of the Collection Section. Mike is also actively involved in community affairs, and is currently serving as President of the Sandy City Symphony and Chorus.

STATEMENT OF CANDIDACY:

Dear Colleagues and Friends:

Thank you for your encouragement and nomination as a Bar Commission candidate in the Third Division.

We have a fine Bar Association with the potential to be the best Bar Association in the Country.

That may seem a lofty goal, but it is within our reach if we continue our efforts to be more inclusive and responsive, reaching out to those attorneys who do not office downtown, or who have smaller practices, especially solo practitioners. We also need to reach those who have specialty areas of practice that may have been overlooked in the past.

We must continue improving until everyone feels that the benefits of being a member of the Utah Bar either meet or exceed the dues we pay. If we can one day say that every member would willfully join the Utah Bar if membership were purely voluntary, then we will have become the best Association in the country.

Please join with me in making that difference.

DALE B. KIMSEY

Dale B. Kimsey has been a solo practitioner for the last three years. Prior to opening his office in Sandy he practiced law in California. He is a graduate of Brigham Young University in Public Relations and Pepperdine University School of Law; is admitted to the 9th and 10th circuits, US Supreme Court and Utah and California Supreme Courts. His practice is centered on business, mostly startups and reorganizations; he strives to serve all business client needs including: Contracts, Real Estate, Business Organization, Governmental Regulations, and Civil and Commercial litigation.

Mr. Kimsey has been active in the bar and the community since first admitted to practice. His local activities include; Chair of the NLCLE committee for the last two years and co-chair of the first Fall Forum, the local convention and networking opportunity for Utah lawyers and Chair of Prelitigation Panels for the Department of Occupational and Professional Licensing. He has enjoyed working on the Governmental Relations Committee this year, seeing how the "part time" legislature works with the Bar and the need that the Bar has to help the Legislature accomplish its job. Once a month he serves as a Judge Pro Tem; he is a certified Mediator and Arbitrator, which he has done for over twenty years. He teaches Business Law as adjunct faculty at Eagle Gate College and is a member of the Institutional Review Board at the University of Utah Medical Center.

STATEMENT OF CANDIDACY:

I have been in practice in Utah for three years. Prior to that time I was the ethics officer for the Salt Lake Olympic Organizing Committee and before that I was engaged in private business. I have had the distinct experience of knowing what it is like to be both a new attorney in Utah, as well as an "old" attorney. I have practiced in mid and small sized firms and have been in-house counsel for some of the businesses I helped to start. I work with Government Agencies and as a private practitioner.

We have a large group of attorneys at this time who are "new" – either having recently finished law school or moved here from other jurisdictions. We have multi jurisdictional and multi practice issues to deal with in the near term. Among the New Lawyer CLE committee's concerns is the necessity to understand how the system works. It has been the goal of the Committee to provide information and services to attorneys in Utah with our seminars and through the website to make that information easier to find. In the initial Fall Forum we had the same goal. I think we have been successful; our profession offers a lot to the people of this state. Working with attorneys in Utah has been collegial and informative. I

would like to see it stay that way.

I have the perspective of the new attorney combined with years of experience. This is our business and our life; I would like to have your vote to help with the effort.

LORI W. NELSON

Lori W. Nelson is a partner in the law firm of Dart, Adamson & Donovan where she practices primarily in the area of domestic relations. Ms. Nelson received her B.S. in Philosophy from the University of Utah in 1987 and her J.D. degree, also from the University of Utah in 1992. She is a past chair of the Family Law Section Executive Committee and has served as a member of the Judicial Council Standing Committee on Children and Family Law since its inception in April 2000. Ms. Nelson is the co-chair of the Utah State Bar Governmental Relations committee and the legislative liaison for the Family Law Section. She is also serving as a liaison to the Supreme Court's Advisory Committee on Professionalism and sits on the Utah Council for Conflict Resolution. Ms. Nelson was named Family Law Lawyer of the year 2001 – 2002 and is listed in Best Lawyers in America.

STATEMENT OF CANDIDACY:

Dear Colleagues:

I would appreciate your vote for Bar Commission.

As lawyers, we face increasing challenges each day. These challenges include:

- *changing the public's perception of lawyers;*
- *working with the Office of Professional Conduct to ensure the public is protected;*
- *the changing practice of law due to:*
  – unbundled legal services;
  – multi-disciplinary practice;
  – pro se parties; and,
  – reciprocity with other states.

Also before us is how we can positively impact the laws being made in our state.

As Co-chair of the Utah State Bar's Governmental Relations Committee, one objective of my work has been to improve our relationship with the Legislature. This objective is ongoing and requires the support and participation of all of us. As a Bar Commissioner, I intend to foster this important work.

I believe the Bar's public outreach programs have been extremely beneficial, not only as a means of educating the public, but also as a way of letting the public see lawyers in a non-adversarial context. I support continuing these efforts.

I advocate finding ways to deliver the right legal service to the right client at the right price. Delivering legal services in an efficient and client-centered way has got to be the goal. The work we do is a noble work and I will use my best efforts, along with the Bar's, to reclaim our position as the architects of transactions, counselors and problem-solvers, in every arena from alternative dispute resolution to litigation.

I believe the work I have done to this point on various Bar and Judicial committees, combined with my many years of practice, has prepared me to serve you as a Bar Commissioner and I would appreciate your vote.

STEPHEN W. OWENS

I ask for your vote to continue to serve as your Third District Bar Commissioner.

- Harry Truman Scholarship for leadership and public service (1989)
- Helped run father's successful campaign for U.S. Congress (1990)
- Graduated, Quinney College of Law (1994)
- Clerk, Justice Richard Howe, Utah Supreme Court (1994-96)
- Partner, 6 attorney SLC firm concentrating in medical malpractice defense (1997-present)
- President, Young Lawyers' Division (2001)
- Bar Commission (2002-present)
- Active in Utah Law-Related Education Project (1994-present)
- Enjoys exploring Utah
- Married, two daughters, resides in Holladay

STATEMENT OF CANDIDACY

FIRST TERM ACTIVITIES

- *No dues increase*
- *Encouraged expansion of Lawyers Helping Lawyers to assist Bar members in crisis or facing bar complaints*
- *Pushed e-mail for bar business*
- *Timely responded to contacts from members regarding Bar issues*
- *Regularly attend meetings, actively engage in debate, cast thoughtful votes*
- *Volunteers for subcommittees and task forces as available*

- *Supports Bar events and initiatives, lobbies legislators for the Bar*

GOALS FOR COMING TERM

- *Expand services to members facing Bar complaints (affecting roughly 7% of active members at any one time)*
- *Encourage quicker dismissal of unfounded claims*
- *Push for judicial raises*
- *Expand lobbying efforts on key bills/issues affecting lawyers*
- *PR efforts to remind public of the importance of lawyers and the good things lawyers do in an increasingly complex society*

RODNEY G. SNOW

STATEMENT OF CANDIDACY

I would be honored to have your vote for Bar Commissioner from the Third Division. I have practiced law for over 34 years. I began my career in Washington D.C. at the United States Environmental Protection Agency in 1971. By the end of 1973, I was an Assistant United States Attorney for the District of Utah. In 1978, I resigned to join the law firm of Clyde and Pratt, now Clyde Snow Sessions and Swenson, where I specialize in litigation. Recently, my practice has also evolved to include the role of arbitrator and mediator.

While I have served on Bar and court committees, the time now seems right to seek the opportunity to serve as a Bar Commissioner. My two-year battle with throat cancer, which is now behind me, not only adjusted my voice, but my perspective.

If elected, I will work to develop a more effective ADR program with our courts at all levels. The goal is to improve the art of counseling and problem solving at a level clients can afford.

My past service includes: Member of the ethics and advisory committee; executive committee of the litigation section, Supreme Court advisory committee on Rules of Criminal Procedure; Governor's commission on criminal and juvenile justice; past president of the Federal Bar Association and the American Inn of Court I; Bar prosecutor and special prosecutor appointed by the Utah Supreme Court. For the year 2003, I received the Distinguished Lawyer of the Year award at the annual convention. I am also a Fellow in the American College of Trial Lawyers.

Take the Oath, it Doesn't Matter Anyway

by Michael N. Martinez

In the December *Bar Journal,* Bob Henderson let loose a stream of consciousness which questioned the purpose of diversity pledges, such as the one the Bar and various law firms have recently entered into. Bob's ramblings label self-enforcing pledges as mere crutches for minority bar members to be chosen over those who have succeeded through their own "diligence, tenacity, persistence, self- reliance and intellectual firepower." But, of course, he states, one really can't express that because questioning a "preferred class" of "attorneys of color" is "hostile to democratic dialogue."

The point he tries to make is that we don't need to create sham reasons to diversify because diversity of the bar, and other institutions, is "a natural consequence of the intellectual richness and ever expanding breadth of the practice of law." Diversity, Bob says, will occur when attorneys "of color" rely on diligence, tenacity, persistence, self-reliance and intellect rather than seeking preferences based upon their immutable characteristics.

Bravo for Bob in having the fortitude to say what is apparently the attitude of the majority of the justice/legal system honchos. That is, since the system has opened its doors to a few preferred class attorneys, enough already with integrating efforts, even through self-congratulatory pledges.

Et tu Bob? There are few minority bailiffs, court clerks, law students, big law firm associates and judges. Judges are apparently on a quota system. On the Third District trial bench, we have one Asian, one African American and one Hispanic. Minority attorneys know that one of them must retire before another will be appointed, maybe.

Diversity pledges, minority advisory boards and ethnic advisors are the institutional response to segregated workforces, segregated universities and a mono-colored Bar. In a perfect world the University of Utah Law School would have graduated a Hispanic attorney before 1974. In a perfect world, where intellect trumps skin color or religion, there is a minority attorney smart enough to be a Utah Supreme Court Justice and, gasp, two minorities of the same ethnicity or race can serve on the bench simultaneously. But, this is not the world Bob paints of diligence, tenacity and intellect vanquishing the discriminatory evil empire. In our world, minority attorneys have been seen and stereotyped, as in the article Bob wrote, as relying on preferences rather than accomplishment. In the legal world, judges see defendants and somehow a transference occurs where minority defendant and their colored advocates meld [meaning: to merge or blend]. In our world, few "preferred" attorneys are chosen to work at big law firms, as judges, or Bar leaders. In the real world, discrimination is so obvious institutions pledge to increase the number of non-majority participants because there is no diversity and it is obvious, even to the myopic [meaning: narrow-minded].

But, take heart Bob, because the diversity pledge you ridicule is really the new, politically correct, way to avoid the mixing of the Bar, bench and preferred. The new age definition of diversity is now so broad it encompasses the color white. Those of "color" that have historically been discriminated against now compete with the "culturally diverse," the "socially diverse" and the "geographically diverse." For example, former University of Utah President Bernard Machen hired a colleague from Michigan, white male of course, and brought him to the U. as a "geographically diverse" hire. He considered Latter Day Saints, who did not go on a mission, to be "culturally diverse" and a billionaire, literally, is a member of the Utah Board of Regents because she is,

MICHAEL N. MARTINEZ has served on numerous Bar committees and supports Utah State Bar activities. A sole practitioner for nearly 18 years, providing legal services to mostly Spanish speaking individuals; he has written and lectured extensively on issues of affirmative action, civil rights and diversity.

"economically diverse."

No Bob, you sob too loudly against your very salvation. The diversity pledge and the diversity movement is a ruse by those who have nixed the inclusion of minorities. It is a brilliant move, and too subtle for many to grasp. But, now you know. The diversity movement is the answer to the race card. It is the answer to a self-described farm boy's prayers. Mockingly, the new wave dogma of diversity is inclusive of the very persons who perpetuate the dual system. The politically correct colored folk will now embrace their very tormentors as adding diversity to their struggle, while disavowing those who rant against the MAN as being old school.

It may be correctamundo that the derided preferred classes are intellectually challenged. How else can you explain their embracing the very ones who have shut them out. How else can you explain belief that a generic, self-congratulatory, diversity pledge will make one iota of difference to hiring authorities. How else can you explain that we will soon embrace a preferred class consisting of pasty colored albinos who perpetuate the exclusion of the have-nots. How else can you explain why so many are so proud of having taken the plunge, err, pledge.

Bravo, just brilliant, politically correct, new wave dogma, championing the colorless as the politically hip and preferred diverse. Bob, I tip my hat to you and your brethren. All I can say is, "curses, foiled again."

Practice Pointer: Common Misconceptions About the Office of Professional Conduct and the Disciplinary Process

by Kate A. Toomey

We're all lawyers, and understand in general terms the mechanisms by which we describe ourselves as a self-regulating profession: the profession itself, and not some outside agency, investigates, prosecutes, and disciplines its own. But my informal conversations with attorneys, along with communications from respondents and their counsel, suggest that there are a fair number of misconceptions about the Office of Professional Conduct ("OPC") and the disciplinary process. This article addresses the most common of these. But first, here's a true-false quiz:

1. The OPC can discipline attorneys for violations of the Rules of Professional Conduct.
2. The only people who can complain to the Bar about an attorney are the attorney's clients.
3. In attorney discipline matters, where there's no harm there's no foul.
4. If the complainant withdraws his or her Bar complaint, the complaint is automatically dismissed.
5. Once a client complains about an attorney, the attorney can't contact the client anymore.
6. If an attorney resigns before a Bar complaint has been resolved, the OPC has no jurisdiction to investigate or prosecute the attorney.
7. If a Bar complaint is filed against an attorney and the attorney doesn't hear anything from the OPC for awhile, the complaint has been dismissed.
8. Anyone calling the OPC can find out whether a complaint has been filed against an attorney.

If you're sufficiently compulsive about figuring things out for yourself, you can answer these questions by reviewing the Rules of Lawyer Discipline and Disability ("RLDD"), which are part of the Supreme Court Rules of Professional Practice. In that case, read no further!

For those of you with a more casual approach to learning, the short answer is that each of these statements is false. Here's a little more information.

1. **The Truth:** Only the Supreme Court, the district court, and the Ethics and Discipline Committee can discipline attorneys for professional misconduct. *See* Rules 10, 11, RLDD. The OPC screens and investigates information, brings disciplinary cases to the screening panels of the Ethics and Discipline Committee, and prosecutes cases before the district court, and the Utah Supreme Court. *See* Rule 4, RLDD. It has no authority to discipline anyone for professional misconduct.
2. **The Truth:** There is no standing requirement for filing Bar complaints. The relevant rule provides that "A disciplinary proceeding may be initiated against any member of the Bar by any person, OPC counsel or the Committee, by filing with the Bar, in writing, an informal complaint in ordinary, plain and concise language setting forth the acts or omissions claimed to constitute unprofessional conduct." Rule 10(a)(1), RLDD. The OPC receives complaints from judges, opposing counsel, opposing parties, clients' relatives, witnesses, other attorneys, creditors, former spouses, lovers, and friends, and pretty much anyone else with an alleged grievance.
3. **The Truth:** The RLDD don't provide an escape hatch for avoiding Bar complaints just because no one has been harmed. The Standards for Imposing Lawyer Sanctions ("Standards"), which are also part of the Supreme Court Rules of Professional Practice, are designed for use in imposing sanctions following a determination that an attorney has violated the Rules of Professional Conduct. These contemplate various forms of discipline depending in part upon whether there was injury or even *potential* injury "to a client, the public, the legal system, or the profession." *See* Definitions, Standards. The most severe sanctions may be generally appropriate even if there was only potential harm. *See e.g.* Rule 4.2(b), 4.2(c), 4.3(b) Standards; *and see* Rule 3, Standards.
4. **The Truth:** The rules provide that "Neither the unwillingness of the complainant to prosecute an informal or formal complaint,

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.

nor settlement or compromise between the complainant and the respondent, nor restitution by the respondent, shall, in and of itself, justify abatement of disciplinary proceedings." Rule 17(e), RLDD; *see also* Rule 6.4, Standards (fact that complaint is withdrawn is neither aggravating nor mitigating).

5. **The Truth:** Nothing in the RLDD prohibits an attorney from contacting a client who has filed a Bar complaint. The OPC sometimes even encourages it – for example, if the complaint includes an allegation that the attorney has not provided the client's file upon request at the termination of the representation, the attorney certainly can return the file. Although this won't automatically result in the complaint's dismissal, especially if there are other allegations involved, an attorney's efforts to rectify the consequences of the misconduct, especially if it's prompt and without compulsion, sometimes helps resolve at least one of the matters at issue and it demonstrates the attorney's good faith.

6. **The Truth:** Resigning from the Bar doesn't end the Supreme Court's and the OPC's disciplinary jurisdiction. *See* Rule 6(a), RLDD. Neither is resignation a mitigating factor potentially warranting a downward departure from the appropriate presumptive sanction. *See* Rule 6.4(c), Standards. There's a special procedure for resignation with discipline pending, but this is a form of public discipline in which the respondent submits a sworn petition to the Supreme Court that among other things admits facts that constitute grounds for discipline. *See* Rule 21, RLDD; Rule 2.8, Standards. This can only be accomplished with Supreme Court approval, and it isn't the same as "resigning from the Bar." *See* Rule 21, RLDD.

7. **The Truth:** The RLDD require the OPC to notify complainants and respondents of the disposition of a complaint. *See* Rule 4(b)(7), RLDD. Until you receive a letter informing you of the disposition of a complaint, don't assume that the OPC has decided to dismiss it, or declined to prosecute it. If you're concerned because you haven't heard anything in awhile about a pending complaint, feel free to call the OPC (801-531-9110) to check on its status.

8. **The Truth:** Callers can learn the *public* discipline history of an attorney, but the OPC does not disclose information about an attorney's history of complaints (or lack thereof) or the attorney's non-public discipline. *See* Rule 15, RLDD. There are a couple of exceptions to the general confidentiality rule,[1] but these don't apply in the situation of a caller asking the OPC for information concerning an attorney's history. If you're ever in the uncomfortable situation of having to respond to a Bar complaint, you'll want to be familiar with the RLDD because these are the procedural rules governing disciplinary matters. The OPC can't offer you legal advice about these rules, but we're happy to discuss our opinion of what they require, and point you to specific provisions of the rules such as the statute of limitations. And remember that if you want to discuss your substantive ethical responsibilities pursuant to the Rules of Professional Conduct, you can call the OPC's Ethics Hotline (801-531-9110).

1. Among other things, an attorney can give an express, written waiver of confidentiality allowing the OPC to release such information for limited purposes such as a job application. *See Rule* 15(a)(1), RLDD.

New Highways Under an Old Law? R.S. 2477 and its Implications for the Future of Utah's Federal Public Lands

by Heidi McIntosh

A Civil-War era statute, enacted in 1866 and repealed in 1976 subject to valid existing rights, has taken center stage in a debate over the preservation of Utah's magnificent public lands. A full discussion of the legal, political, and practical implications of Revised Statute 2477 is infeasible here. Instead, this article provides an abbreviated overview of recent attempts to breathe new life into this long-dead law and what it means for Utah's spectacular national parks and remote canyon country.

I. R.S. 2477: An Obscure Civil-War Era Federal Statute Takes Center Stage in the Utah Wilderness Debate.

Revised Statute 2477 ("R.S. 2477") became law shortly after the Civil War when Congress enacted it as part of the Mining Act of 1866. One hundred and ten years later, Congress repealed it with little fanfare when it passed the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 et seq., the organic act for the aptly-named Bureau of Land Management.

R.S. 2477 is one sentence long, and seemingly fairly straightforward. It provides simply that "the right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932. Little did Congress know when it enacted this little-known provision that it had sown the seeds for a controversy that would take us from the hoop skirts of the mid-19th century to the computer age of the twenty-first century in which cattle tracks pioneered by early settlers are mapped using satellite technology.

Although Congress repealed R.S. 2477 in 1976, any valid existing rights-of-way were grandfathered as long as they met the requirements of the statute. The exact nature of these requirements has led to decades of dispute over which routes were legitimate highways as of 1976 (or earlier if the land was "reserved" as a national forest or national park, for example, before 1976). Officials in several Utah counties took notice of the provision in the 1980s, and argue that, among other things, passage of vehicles alone amounted to construction of a highway. Countless dirt trails and tracks were tagged as county highways based on this theory. On the other hand, conservationists and the Department of Interior take the position that construction of a highway means actual physical labor conducted with the intent to create a durable travel surface that leads to an identifiable destination, ruling out the designation of "beaten paths" as highways.

An appreciation of the real-world backdrop of this controversy is key to understanding why thousands of dirt tracks across the public domain have become the focal point for much of the debate over the future of Utah's wild landscapes. After all, the majority of the routes do not appear on official highway maps, access no particular, identifiable destination, have never been constructed by a road grader; and do not have the usual indicia of "constructed highways" like culverts, curbs, shoulders, gravel, or asphalt.

At its heart, the R.S. 2477 controversy is not about roads. Instead, it is a legalistic embodiment of a philosophical battle about the fate of Utah's vast and remarkable public lands, from the jagged teeth of the San Rafael Swell, to the incised canyons of Cedar Mesa in the south. It is about whether large parts will be preserved as wilderness or for other natural values, or whether they will be dominated by off-road vehicles and other types of development.

R.S. 2477 is viewed by some as the key to undermining wilderness designation for scenic, remote public lands because roads disqualify areas for lasting preservation under the Wilderness Act of 1964. In legislation that stands out for its unique poetry, the Wilderness Act defines "wilderness" as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain . . . retaining its primeval character and influence without permanent improve-

HEIDI MCINTOSH is a lawyer and the conservation director of the Southern Utah Wilderness Alliance. She also serves on the board of Western Resource Advocates.

ments of human habitation." 16 U.S.C.1131-36.

However, wilderness is not the only place threatened by R.S. 2477. Certain Utah counties, with help from the Utah Attorney General's office, have proposed more than 15,000 "highways" throughout Zion National Park, Canyonlands National Park, Dinosaur National Monument, Grand Staircase-Escalante National Monument, and many lands proposed for wilderness designation in America's Redrock Wilderness Act. According to a January 14, 1993 National Park Service memorandum, about 17 million acres in 68 parks could be impacted by right-of-way claims, which the agency said "could be devastating" for the parks' fish and wildlife habitat, historical and archaeological sites, and wilderness.

Private landowners in Utah have also faced R.S. 2477 claims across their lands from county officials who claimed that faint routes that did not appear on title searches and which were barely visible on the ground were "highways" established when the land was once owned by the federal government.

One last prefatory point: R.S. 2477 is not the sole source of access to the public lands. To the contrary, the BLM has granted thousands of rights-of-way across federal public land under the authority of FLPMA, and has done so with public participation and environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. Section 4332 (1969). In doing so, the BLM takes "into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety and good engineering and technological practices" in deciding whether to issue rights of way. In other words, limiting R.S. 2477 "highways" to those that were actually constructed and serve a legitimate highway purpose does not "lock up" the public domain as some have claimed. In fact, even routes that do not meet the R.S. 2477 criteria may remain open for travel – but they just would not be owned, managed and developed at will by the counties. Instead, they would be managed in a balanced, considered way to promote the sound stewardship of all the land's resources – natural quiet, wilderness, wildlife, water quality, hiking, those who prefer ORVs and jeeps, and for a broad array of other interests as well.

II. The Utah Federal Court Defines R.S. 2477 Requirements in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.

The U.S. District Court for the District of Utah handed down a landmark decision in 2001 which clarified each of the R.S. 2477 elements. It did so in the context of sixteen R.S. 2477 claims in the Grand Staircase-Escalante National Monument, in wilderness

study areas, which are under continuing review for permanent wilderness designation,[1] and in other areas proposed for wilderness designation. The claimants were San Juan, Garfield and Kane Counties.

In *Southern Utah Wilderness Alliance v. Bureau of Land Management ("SUWA v. BLM"),* 147 F. Supp. 2d 1130 (D. Utah 2001), the court upheld the BLM's administrative determinations that all of but one of the alleged rights-of-way did not meet the R.S. 2477 requirements. First, the court found that the BLM's requirement that the routes be "constructed" was consistent with R.S. 2477 and that routes that had been created by passage of vehicles alone did not meet the statutory standard. "Congress in 1866 desired that R.S. 2477 rights-of-way be intentionally, physically worked on to produce a surface conducive to public traffic." The court also ruled that mere "use" "sets a lower standard . . . than the one intended by Congress."

Second, the court upheld the BLM's determination that routes that fade away into the desert with no apparent destination did not amount to "highways." Third, the court held that a 1910 coal withdrawal was a "reservation" within the meaning of R.S. 2477 and that, accordingly, the county's inability to demonstrate "construction" of a "highway" before the land was withdrawn was fatal to its R.S. 2477 claim. The three counties who had made the R.S. 2477 claims, represented by the Attorney General's office, appealed the case to the 10th Circuit Court of Appeals, which will hear oral argument on February 11, 2005.

SUWA v. BLM is an important contribution to the law of R.S. 2477, but it is not the first case to hold that those claiming under R.S. 2477 and similar lands grants must perform an act of purposeful construction to create a durable highway surface. Over a century ago, the Supreme Court decided *Bear Lake & River Waterworks and Irrigation Co. v. Garland,* 164 U.S. 1 (1896), in which it reviewed a parallel provision of the 1866 Mining Act granting rights-of-way for the "construction" of canals. The court held that no rights vested against the government under this statute's "construction" requirement without the "performance of any labor." *Id.* at 18. "Until the completion of this work, or, in other words, until the *performance of the condition upon which the right . . . is based,* the person taking possession has no title, legal or equitable, as against the government." *Id.* at 19.

Many other cases address R.S. 2477 and its various aspects, and most arise in the context of disputes between private property owners where title to the land was part of the federal estate.[2] The bottom line, however, is that no federal case has ever held that a claimant may gain rights to federal public lands simply by the passage of vehicles alone – the characteristic that most of the controversial claims throughout the west hold in common.

This makes sense. It seems improbable at best that Congress in 1866 intended to give away federal public lands on the basis of the mere passage of occasional, haphazard travel or exploration. Instead, in every one of the land grant statutes passed during that era, Congress offered a deal to prospective grantees: Work the land, and we will reward you with a property interest. For example, the Homestead Act, the Desert Lands Act, and the Mining Act of 1872 all gave settlers property rights to public lands, but specifically conditioned on the exertion of effort to create a lasting kind of development – a ranch, irrigation system, or a working mine – that would contribute to the settlement of the west's open territory. It stretches common sense to believe that Congress would have opened the door to thousands of highway claims based on long-dormant tracks created by long-ago desert prospectors and wanderers, especially given that such claims can undermine the sound management of federal land resources, and threaten the interests of private property owners whose lands were once part of the federal estate.

III. The State Of Utah Turns to Litigation Under The Quiet Title Act

Despite *SUWA v. BLM,* the State of Utah and at least one Utah county have plunged ahead with R.S. 2477 claims in ecologically fragile places, in wilderness study areas, and for dirt off-road vehicle tracks that the BLM recently found to be damaging to public lands and barred future use. These routes include a now-overgrown two-track in Salt Creek (aside from the Green and Colorado Rivers, the only perennial stream in Canyonlands National Park), routes in the Mexican Mountain and Swazey's Leap Wilderness Study Areas, and a number of ORV routes the BLM blocked in its May 2003 San Rafael Route Designation Plan, a plan which was lauded by conservationists, the state and Emery County, the latter of which received substantial funding to hire a new sheriff deputy to patrol this remote part of the state.

The Utah Attorney General's office is attempting to establish that these and thousands of additional routes are highway rights-of-way by using the Quiet Title Act, 28 U.S.C. § 2409(a) ("QTA") in conjunction with R.S. 2477. The QTA is a limited waiver of the United State's sovereign immunity which would otherwise protect the federal government from suit. Under this statute, the claimant must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired and the right, title or interest claimed by the Untied States." *Id.* In most cases,

a 12-year statute of limitations applies, and a claimant must provide 180-days notice prior to filing a suit.

Toward this end, the state is collecting data on an undisclosed number of routes that it says it will eventually litigate under the QTA. An indication of the breadth of the state's ambition is plainly on view in the maps submitted with the state's June 2000 notice of intent to sue. These are available at http://www.highway-robbery.org/lands/utah.htm. These maps show R.S. 2477 claims in every national park in Utah, and also include popular and peaceful hiking trails in the Wasatch Mountains above Salt Lake City. These claims even took Salt Lake County officials by surprise, ultimately leading to their public disavowal of the claimed highway rights-of-way.

The Department of Interior responded to the state's 2000 notice of intent with a letter of its own, arguing that the maps did not provide the specificity required by the Quiet Title Act, and were thus, inadequate. Since then, the State of Utah has filed notices of Intent to Sue with the Department of Interior for nearly two dozen claims, including the claim in Salt Creek in Canyonlands National Park. As of this writing, the state has yet to file a federal lawsuit to claim any of the routes, although San Juan County has independently filed a claim for Salt Creek, in Canyonlands National Park. (A scheduling order in that case requires the state to file its complaint in intervention by February 28, 2005.)

IV. The Road Not Taken: The Leavitt/Norton Memorandum of Understanding

On April 9, 2003, Department of Interior Secretary Gale Norton and then-Governor Michael Leavitt signed a Memorandum of Understanding ("MOU") which provided a non-litigation alternative by which the BLM would evaluate R.S. 2477 claims. Both the Secretary and the Governor lauded the MOU for its streamlined process and for what they asserted would be the resulting protection for national parks, national wildlife refuges, wilderness areas, and wilderness study areas. Under this alternate process, the state would submit applications for "highways" which met the qualifying terms of the MOU. The BLM would review the applications, supplementing them where necessary, and charge the state for the costs involved. The BLM would then grant a "disclaimer of interest" – essentially a quit claim deed – to the state if it found the application met the MOU terms.

About a year before the MOU, the Department of Interior issued new regulations that would make it easier for it to transfer R.S. 2477 rights-of-way to states and counties.[3] It did so by amending an obscure regulation implementing an equally obscure provision of the Federal Land Policy and Management Act of 1976 ("FLPMA") relating to the "disclaimer of interest in lands."[4] This disclaimer provision, set forth in FLPMA Section 315, authorizes the Secretary of Interior to issue a

> disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

The revisions do two important things: first, they eliminate the requirement that the claimant be a "present owner of record," so that both states and counties can assert claims; and second, they eliminate the normally applicable twelve-year statute of limitations set forth in the federal Quiet Title Act. These new revisions provide the federal vehicle for the granting of R.S. 2477 rights which survive the MOU process and are ultimately approved by the BLM.

To date, the state has submitted just five claims to the BLM for evaluation under the MOU. (Two of the active claims are listed on the BLM's website, with others to follow as they move through the evaluation process. http://www.ut.blm.gov/rs2477/default.htm.) Conservationists discovered that the first claim, for the Weiss Highway in western Juab County, was actually built by the federal Civilian Conservation Corp., and as a result did not qualify as an

R.S. 2477 highway. Accordingly, the state withdrew the application for this claim on September 15, 2004. An inauspicious beginning, this first application proved embarrassing for the state and, at a cost of $10,000, expensive to boot.

One of the primary flaws of the MOU is that it is incorporates a new R.S. 2477 test focused largely on whether a route is "used" – an approach specifically rejected by the courts. Instead, leading cases focus on the terms used in the R.S. 2477 statute – "construction" and "highway" which "connects the public with identifiable destinations or places." The MOU's grounding in suspect legal bases, its origin in secret negotiations between the Governor and the Secretary without involving interested stakeholders, and its failure to address R.S. 2477 claims in sensitive areas like national parks and other areas, were all factors leading to its failure to garner widespread, energetic support as a mechanism to resolve the R.S. 2477 controversy.

V. The State of Utah's R.S. 2477 Strategy – Combining the QTA, MOU and a Good Dose of Secrecy

As described above, the state's strategy has been to rely on the Quiet Title Act, and to a lesser extent, the Leavitt/Norton Memorandum of Understanding in its pursuit of R.S. 2477 rights. The claims themselves, and the supporting evidence to substantiate them, grow out of a murky process in which the public to date has been carefully excluded. The secrecy surrounding the process of identifying the public highways under R.S. 2477 is so extreme that the counties must promise not to disclose any information about their R.S. 2477 highways as a condition to the Attorney General's office agreement to represent them in the QTA process. (This has led to bizarre and baffling encounters between county officials who demand that the BLM respect their R.S. 2477 rights but, when questioned further, are barred from telling the BLM where those R.S. 2477 rights-of-way are.) Conservationists have had success in administrative appeals after the Attorney General's office refused to provide supporting information about certain R.S. 2477 claims, but the door has only begun to crack open in what should be a public process.

VI. Conclusion

Regardless of the outcome of the state's appeal in *SUWA v. BLM,* the thousands of R.S. 2477 claims awaiting resolution make finding an alternative to litigation a sensible goal. Opening the door to countless lawsuits by counties and/or the state to sue the BLM for R.S. 2477 highway rights-of-way every time a land manager makes a decision to protect public lands from ORVs, or to enhance wildlife habitat, or stream health and water quality is not a workable solution. Already, the BLM is shying away from making determinations about county rights of way under R.S. 2477 as they proceed with their broad periodic planning exercise. As a result, the BLM will eventually come out with plans for millions of acres which the state and counties, absent a significant policy shift, will challenge for their failure to recognize these – sometimes invisible – highway claims.

One example of a better strategy for recognizing valid claims and purging the public lands of bogus claims is the R.S. 2477 Rights of Way Act of 2003, H.R. 1639, sponsored by Congressman Mark Udall of Colorado. This bill, endorsed by the Chair of the Pima County, Arizona County Supervisors, the *Grand Junction Sentinel,* the *Rocky Mountain News,* and Costilla County, Colorado, will be introduced again in this Congress. It would clear the public lands of the uncertainty posed by outstanding R.S. 2477 claims by requiring that all claims be brought within a four-year deadline. It also imposes reasonable requirements on the claimants, such as requiring proof that construction of a claim had occurred.

In the words of the *Grand Junction Sentinel,*

> A 140 year old law that was ignored for decades should not become a 21st century means to turn old cow trails into public passageways across national monuments, wildlife refuges or wilderness areas. Nor should it be used to cloud titles and open access to private lands.

January 23, 2005.

Lastly, the State of Utah should at a minimum open its process to the public and federal land managers who deserve to see what claims the state is pursuing in the name of public transportation needs. In the end, it is difficult to imagine an issue more imbued with public character than the location and identify of public highways. Casting sunlight on what has to now been such a secretive process could be the first step in a resolution of this issue that could meet with the approval of all stakeholders – and it would save Utah taxpayers millions of dollars now earmarked for litigation.

1. Despite its spectacular scenery and vast remote landscapes, there has never been a wilderness bill for Utah's BLM lands (although several thousand acres of wilderness were created along the borders of Arizona and Colorado as part of wilderness legislation for those states).
2. *See, e.g., Central Pacific RR v. Alameda County,* 284 U.S. 463 (1932) (court found R.S. 2477 right-of-way where route first developed by passage of vehicles had later been constructed); *U.S. v. Vogler,* 859 F.2d 638 (9th Cir. 1988), *cert denied* 488 U.S. 1006 (1989) (Park Service had authority to regulate R.S. 2477 claim); *Sierra Club v. Hodel,* 848 F.2d 1068 (10th Cir. 1988) (decision on scope of R.S. 2477 right-of-way); *U.S. v. Gates of the Mountains Lakeshore Homes,* 732 F.2d 1411 (9th Cir 1984) (state law could not authorize power lines to be placed in R.S. 2477 right-of-way).
3. 68 Fed.Reg.494-503 (January 6, 2002) (amending 43 C.F.R. Part 1860 et seq.)
4. Section 315 of FLPMA,43 U.S.C.§ 1745 (1976).

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Valuing Intangible Assets in Bankruptcy Cases[1]

by David E. Leta & James H. Jones

Valuing a debtor's intangible assets is often critically important in a bankruptcy case. Plan confirmations, hearings on asset sales, relief from stay motions, valuations of security interests and other like matters frequently turn into contests between lawyers and expert witnesses over valuation opinions. Valuing an "intangible" asset is particularly tricky. This article will briefly address a) the differences in valuing an intangible asset as part of a going concern business vis-à-vis a liquidation, b) the valuation methods and factors considered by courts, and c) the qualifications of a proper "expert" to express a valuation opinion about these unique assets.

Usually, all assets can be placed into one of three categories: monetary, tangible, and intangible. Historically, the assets of a traditional "brick and mortar" company were either monetary or tangible. Today, more and more worth is tied to intangible assets such as patents, trademarks, copyrights, contract rights and customer relationships. Therefore, it is increasingly important to correctly value these assets in order to properly represent a debtor that owns the asset, a creditor with an interest in the asset or a buyer that wants to buy the asset.[2]

The threshold determination in any such analysis is whether the asset is being valued as part of a going concern or as something separate from the business. The outcome under each approach is usually very different. In general, an intangible asset will have the highest value when it is being used in the business that created the asset, rather than when it is being sold apart from that business. In contrast, the value of a tangible asset can be fairly constant and more easily measured, at least over the short term, regardless of whether it is being used in one business or in another business.

While the same can be said for tangible assets, the differences between going concern value and liquidation value are even more striking with respect to intangible assets where value is more closely tied to other intangible factors such as human resources, secrecy and uniqueness. For example, if a particular software application was created by a team of programmers who continue to improve and trouble-shoot the application, it is unlikely that the software would have as much value to the business, or to a prospective buyer, if the programmers left the business, or if the asset were sold separately from the business. Similarly, if a secret process or formulation is a critical component in the manufacture of a particular product, a public disclosure of the secret in a bankruptcy case may very well destroy the entire value of the asset. Thus, certain intangible assets may have no value outside the business setting in which they were created, and, in public proceedings like bankruptcy, special care should be taken to prevent an accidental diminution in the value of these assets.

Once the practitioner decides whether to value the asset as part of a going concern or in liquidation, additional preliminary steps still need to be completed. These preliminary steps include correctly identifying the asset; identifying the property rights associated with that asset; and determining whether that asset has any value when separated from the business.

When these steps are completed, a valuation analysis can be conducted. The intangible assets of a business can be valued as a group or in isolation. When valuing assets as a group, the residual method is often employed. The basic residual method subtracts the value of the tangible assets from the overall value of the business. When valuing intangible assets independently, three methods are commonly used: the cost method, market method and income method. The cost approach focuses on the expense to the business from reproducing or duplicating the asset. The market approach requires the use of comparables,

DAVID E. LETA is a partner and member of the Bankruptcy Group at Snell & Wilmer LLP.

JAMES H. JONES is an associate attorney and member of the Bankruptcy Group at Snell & Wilmer LLP.

including actual sales prices and royalty rates for similar types of property. The income method takes anticipated future income from the asset and calculates a present value based on that income stream. Depending upon the type and characteristics of the intangible asset, one or more of these methods may be most appropriate for determining the realistic value of the property. Oftentimes, all three are used and then adjusted to reflect the particular traits of the asset.

In litigation, the value of an intangible asset is established through experts. In bankruptcy court, the *Daubert* standard is applied to determine the admissibility of expert testimony. The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) held that Rule 702 of the Federal Rules of Evidence supersedes the earlier *Frye* test, which focused on whether the expert testimony was "generally accepted" within the scientific community. Under *Daubert,* the trial judge serves as a "gatekeeper" to ensure the reliability of testimony presented to the jury. The *Daubert* Court relied upon four factors in determining reliability: a) whether the methodology can or has been tested; b) whether the theory has been subjected to peer review; c) the potential error rate and the existence of controlling factors; and d) whether the theory is generally accepted. Subsequent decisions have held that courts may consider additional factors.[3]

Today, courts recognize that *Daubert* applies to the admissibility of all expert witnesses, not just to experts testifying on scientific matters. For example, the Seventh Circuit, in F*rymire-Brinati v. KPMG Peat Marwick,* 2 F.3d 183, 186-87 (7th Cir. 1999), used *Daubert* to find that the trial court improperly allowed the valuation opinion of an accounting expert who admitted that his valuation was a "fairly simple pass" and that he did not "employ the methodology that experts in valuation find essential."

After the trial court has satisfied its role as a gatekeeper and determined that the expert's methodology is reliable, the expert must then proceed to convince the trier of fact (usually the judge in the bankruptcy context) that his valuation, and not the valuation of the opposing expert, correctly determines the value of the asset. Persuasive expert testimony is clear, concise and based on reliable and verifiable methods. In ultimately determining which expert witness is correct, courts frequently rely upon common sense to discard a valuation outright or to call into question an appraiser's basic assumptions. In *Georgia-Pacific Corp. v. United States Plywood Corp.,* 318 F.Supp. 1116 (S.D.N.Y. 1970), where the value of a royalty from an infringed patent was at issue, the court considered such factors as the nature of the patented product, the duration of the patent, the profitability of the product under patent, the commercial relationship between the licensor and licensee, the licensor's program to maintain its monopoly, the rates of comparable patents, and the effect of selling the patented specialty in promoting sales of other products.

Because key business assets are increasingly intangible in nature, one cannot overstate the importance in a bankruptcy case of identifying the intangible assets at the start of the proceeding, determining the components of the business that make the assets valuable, protecting the assets from diminution during the case, and obtaining persuasive expert testimony to establish a proper valuation of the assets.

1. These materials are an excerpt of a paper presented by David E. Leta at "VALCON: Legal and Financial Perspectives on Business Valuations & Restructuring," Las Vegas, March 3-4, 2005, sponsored by The University of Texas School of Law and The Association of Insolvency & Restructuring Advisors (AIRA).

2. *See* Weston Anson, *Valuing Trademarks, Patents, and Other Intangibles in a Bankruptcy Environment,* 15-1 ABIJ 29 (February 1996) ("the value of a typical corporation's intellectual capital in today's information-based economy can easily exceed by two or three times the stated book value of the corporation's tangible assets"); R. Carter Price, *Asset Valuations in Reorganizations,* 17-10 ABIJ (December 1998/January 1999) ("The sale of the name 'Pan Am' reportedly brought $500,000 to the bankrupt[cy] estate . . . .").

3. *Kumbo Tire Co., LTD., v. Carmichael,* 526 U.S. 137, 149 (1999).

The High Court in Cyberspace: A Preview of MGM Studios v. Grokster

by John Tehranian

> *"As a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the 'communications revolution' of our time, then to pronounce upon the inadequacies of the present copyright act."*

Although Harvard Law Professor Benjamin Kaplan made this wry observation in his seminal tome *An Unhurried View of Copyright* almost four decades ago, his words ring just as true today. The current legal regime has come under repeated fire for its inability to protect intellectual property owners adequately in the digital era. Most recently, the vast growth of peer-to-peer (P2P) file sharing networks on the Internet has spurred this criticism.

Over the past five years, the entertainment industry and a series of entities facilitating P2P networks have engaged in an epic struggle in the courts and before Congress. Now, the United States Supreme Court will provide guidance: on December 10, 2004, the high court granted *certiorari* in *MGM Studios v. Grokster,* to review a Ninth Circuit decision that immunized P2P networks from liability on secondary theories of copyright infringement because they facilitated substantial noninfringing uses. Oral arguments take place this March. The case will likely constitute the most significant contemplation of copyright law in the digital era. At the locus of the case lies the ability of our legal regime to respond to complex issues of technological change and intellectual property protection – an issue of particular interest to observers in Utah concerned about Hollywood's recent legal challenge against such companies as ClearPlay and CleanFlicks over the bowdlerization of movies for violence and sexual content.

THE LEGAL BACKGROUND:

Theories of Secondary Copyright Liability

Two common-law theories of secondary liability – contributory and vicarious – have traditionally assisted content creators in their legal battles against the developers of new technologies that facilitate copyright infringement. Both liability theories require that the technology enable an underlying act of direct infringement. Contributory liability then attaches where there also exists (1) knowledge of the infringement by the defendant, and (2) material contribution by the defendant to the infringement. Vicarious liability, an outgrowth of the respondeat superior doctrine from tort law, requires (1) a direct financial benefit to the defendant from the infringement, and (2) the right and ability of the defendant to control the actions of the infringer. Individuals who aid the copyright infringement activity of others are therefore held accountable under these two theories.

Sony v. Universal

The Supreme Court last assessed the applicability of secondary liability theories to technology providers two decades ago. In *Sony v. Universal Studios,* 464 U.S. 417 (1984), the major motion picture studios filed suit against Sony for contributory and vicarious copyright infringement stemming from its development of the Betamax technology. Warning of the potential demise of Hollywood at the hands of video recording technology, the studios argued that the advent of the Betamax (and, ultimately, its more popular counterpart, the VHS) would devastate both the television and motion picture industries by dramatically reducing audiences for television programming; consumers could simply record programs, especially movie reruns aired on television, and watch them at a later date. *Universal v. Sony,* 480 F. Supp. 429, 466 (D.C. Cal. 1979). The studios also contended that the recording features of the Betamax would annihilate the potential market for film rentals by enabling consumers to create their own libraries by recording movies from television. *Id.* at 467. In 1983, Jack Valenti, the President of the Motion Picture Association of America ("MPAA"), appeared before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary and testified that "the VCR is to the motion picture industry and the American public what the Boston strangler is to the woman alone." The Supreme Court,

JOHN TEHRANIAN is an Associate Professor of Law at the University of Utah, S.J. Quinney College of Law, where his scholarship and teaching focus on intellectual property, technology and constitutional issues, especially those related to copyright law. This article also appears in the March 2005 issue of volume 47 of Orange County Lawyer.

however, disagreed.

First, the Court found that the existence of potential infringing uses for a technology should not render that technology illegal *per se.* Specifically, the Court shielded manufacturers of "staple article[s] of commerce" used in infringement if these articles possessed "substantial noninfringing uses." *Sony,* 464 U.S. at 442. Second, the Court found that consumers are entitled under the fair use doctrine to the practice of time-shifting – the recording of a televised program for personal and private viewing at a different time. As a result, the Court concluded that the VCR possessed significant noninfringing uses and Sony could not be held liable under either a theory of contributory or vicarious liability for acts facilitated by its Betamax technology.

The Current War Against P2P File Sharing

The entertainment industry's more recent legal battles have focused on file sharing on the Internet. Initially, the industry enjoyed a run of success, winning its high profile battle against the leading first-generation file sharing system – Napster. Napster utilized a centralized server that gave its operators the ability to control network content, and the company and its servers resided in the United States. As a result, Napster was not only subjected to the very real threat of liability, but to effective enforcement of injunctive relief.

Despite winning the *Napster* litigation, the industry's success was ephemeral; users rapidly turned to new and more sophisticated P2P technology. According to a *Websense* survey published in April, 2002, in the year *after* the shutdown of Napster, the number of P2P sites multiplied by 535%. Such second-generation systems as Gnutella, Grokster, and KaZaa have dramatically expanded the gamut of infringing activity. Rather than merely enabling the exchange of audio mp3s (as Napster did), these systems also allow users to swap commercial software, movies, graphics, and text files. The networks have also adopted superior file organization and retrieval techniques, thereby enabling users to access copyrighted materials with greater agility.

Besides facilitating greater potential infringement, legal enforcement against the second-generation networks has grown more arduous. Unlike Napster, the second-generation networks utilize a decentralized architecture. Without delving too deeply into the technological niceties at issue, Napster housed a centralized index of available files on servers that it owned and operated. As a result, it possessed the ability to filter the types of files traded on its network. By contrast, the second-generation networks have purposefully divested themselves of the ability to control content:

either each user on a network houses her own index, or several computers connected to the network function as supernodes that maintain file indexes. Indexes are not maintained on servers owned and operated by the P2P technology provider. Thus, second-generation systems have shielded themselves from vicarious liability by precluding their own ability to control or monitor infringing activities on their networks.

Additionally, shell corporations now operate many second-generation networks. These entities can easily relocate their systems and operations to venues with more favorable laws. The story of KaZaa, the world's most popular P2P software, epitomizes the viability of such legal arbitrage. Facing an adverse judgment in the Netherlands, the Dutch owners of KaZaa sold their software and service to the nebulous Sharman Networks Ltd. A corporation shrouded under a notorious veil of secrecy, Sharman Networks is officially incorporated in the South Pacific tax haven of Vanuatu. Best known as the host of the most recent season of CBS's series *Survivor,* Vanuatu just happens to recognize no copyright laws. Thus, while KaZaa was a named defendant in the *Grokster* suit, it ceased to defend itself during the course of litigation and a default judgment resulted; however, the ability to enforce any judgment against KaZaa is very much in doubt. The peculiarly transnational characteristics of cyberspace combined with the nature of piracy have therefore rendered legal action against P2P networks increasingly difficult.

Sony Revisited: *MGM v. Grokster*

Despite these challenges, the entertainment industry has remained undaunted in its efforts to seek legal recourse against second-generation P2P networks. In 2002, the industry filed suit in the Central District of California against the Grokster, StreamCast, and KaZaa second-generation networks. The defendants earned partial summary judgment that absolved them of secondary liability for acts of infringement occurring on their networks. *MGM v. Grokster,* 259 F. Supp. 2d 1029 (C.D. Cal. 2003). The Ninth Circuit affirmed. *MGM v. Grokster,* 380 F.3d 1154 (9th Cir. 2004). However, the entertainment industry did succeed elsewhere. In 2003, the Seventh Circuit affirmed a lower court judgment that helped shutdown the Aimster P2P network. *In re Aimster Copyright Litigation,* 334 F.3d 643, 651 (7th Cir. 2003). With the circuits split in their treatment of file-sharing technology, the issue was ripe for Supreme Court review. Three significant issues will dominate the Court's analysis of copyright liability for P2P systems.

The Parameters of the Non-Infringing Use Defense

First, the High Court must clarify *Sony v. Universal* and determine

the level of noninfringing use necessary to shield companies from secondary copyright liability. To impose contributory liability, a court must find that a defendant possessed knowledge of the underlying act of infringement. *Sony* held that courts could not impute constructive knowledge of infringement to technologies with "commercially significant" or "substantial noninfringing uses," *Sony,* 464 U.S. at 442, but the Court declined to define these terms with any precision. There is little doubt that P2P systems are capable of noninfringing uses and that some noninfringing uses do occur on the networks. However, in *Aimster,* the Seventh Circuit found that the "respective magnitudes" of the actual infringing and noninfringing uses of a technology constituted a threshold issue for the purposes of liability imposition. *Aimster,* 334 F.3d at 649-50. To shield itself from secondary liability, a defendant must demonstrate that substantial noninfringing uses of its technology are not only theoretical, but actually probable. *Id.* at 653. By stark contrast, in *Grokster,* the Ninth Circuit construed *Sony* as immunizing from secondary liability any technology "capable" of substantial or commercially viable non-infringing use. *Grokster,* 380 F.3d at 1160. *Sony* failed to specify whether the "substantial noninfringing uses" defense applied only to contributory liability actions, or to both contributory and vicarious liability theories – a key point that begs clarification.

The Ability to Control Network Content

Secondly, the High Court must clarify the relevance of network design to the secondary liability inquiry. In *Grokster,* the Ninth Circuit found an inability to control content on one's network, even if that inability stems from the technology provider's willful desire to divest itself of such control, entirely irrelevant to the liability calculus. For example, the *Grokster* court noted that "the possibilities for upgrading software located on another person's computer [to enable control of the content shared on P2P networks] are irrelevant to determining whether vicarious liability exists." *Grokster,* 380 F.3d at 1166. While the *Aimster* court declined to consider the matter of vicarious liability, it deemed design choices profoundly relevant to the issue of contributory liability: "[I]f the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." *Aimster,* 334 F.3d at 653. Technology creators therefore cannot turn a blind eye toward infringing activities on their networks. "Willful blindness is knowledge," noted the *Aimster* court. *Aimster,* 334 F.3d at 653. Applied in the vicarious liability context, these words implicitly impose a duty on network creators to consider copyright concerns in their architectural

decisions, lest courts impose vicarious liability on them for failing to exercise their potential "ability to control" at the outset. Thus, the Seventh Circuit's *Aimster* decision considers a defendant's ability, both *ex ante* and *ex post,* to separate infringing and non-infringing activities vital to a court's decision to impose secondary liability.

Should Congress or the Courts Decide?

Finally, the Court faces a key issue that goes to the heart of our constitutional structure and the balance and separation of powers: should the courts or Congress take the lead in shaping our intellectual property laws and their response to rapid technological change? On one hand, in declining to outlaw the Betamax, the *Sony* Court noted that "[s]ound policy, as well as history, supports our consistent deference to Congress when technological innovations alter the market for copyrighted materials." *Sony,* 464 U.S. at 431. This is particularly true where – as in the copyright arena – there is a paramount need for coordinated and considered national policy. On the other hand, since courts enjoy relative insulation from popular pressure, they are less prone than Congress to capture by dominant lobbying interests. Moreover, many argue that the judicial process is better suited for the *ad hoc,* fact-specific inquiries needed to respond to the exigencies and externalities of technological change – especially since the secondary liability doctrine in copyright law is the exclusive creation of the courts, not Congress.

The Non-Legal Backdrop to *Grokster*

For adherents of legal realism, two background points also bear significant consideration. Although neither observation speaks to the strict legal merits of the case, each inextricably affects the issues at play before the Court.

First, while a cursory examination suggests that *MGM Studios v. Grokster* pits the entertainment industry Leviathan against the rogue and nimble entities that facilitate P2P networks, this perception is not entirely warranted. Contrary to the representations in legal pleadings and the popular press, Grokster and Sharman Networks are hardly the only players who have economically benefited from the advent of P2P. Indeed, mainstream corporate interests have also profited handsomely. P2P file sharing has fueled consumer demand for broadband access, much to the delight of DSL and cable operators. Mass infringement of copyrighted music and movies has driven computer and hard drive demand as well as sales of such consumer electronics as mp3 players. One of the great ironies of the wave of media conglomeration witnessed over the past two decades is the fact that one of the appellants in *Grokster* is Sony – the alleged infringer in the *Sony v. Universal* case and a company whose content creation wing is threatened by unadulterated P2P file swapping while its computer and personal electronics division has thrived on demand generated from P2P file sharing.

Secondly, weighing heavily in *Grokster* is the economic history of the entertainment industry since it lost the *Sony v. Universal* case. The parade of horribles vividly portrayed by Jack Valenti and the MPAA never came to be. Far from sounding the death knell of Hollywood, the VCR spurred major growth: studios now derive more profit from DVD/video rentals and sales than from theatrical ticket sales. Through the lens of history, the entertainment industry's position in *Sony* seems tainted by myopia. In losing the *Sony* litigation, the industry actually won; and one cannot help but wonder if the same results would obtain again.

Indeed, cries of wolf have greeted every major technological innovation that has affected the entertainment and media industries over the past century. Composers feared that the player piano would irreparably harm their economic interests; the publishing industry warned that the copy machine would undercut its commercial viability; the music industry augured that the euphony of FM radio transmissions would devastate the market for music sales; and Hollywood predicted its demise at the hands of the home video recorder. On the other hand, the magnitude and scale of potentially infringing uses empowered by P2P technologies vastly exceeds that of any prior innovation, including the VCR. In particular, the unprecedented ease and speed with which P2P networks have enabled copyright infringement may render such historical analogies thoroughly inapposite.

The Likely Impact of *Grokster*

MGM v. Grokster represents the Supreme Court's first foray into the world of digital copyright and it comes at a critical time: the circuit split created by the divergent opinions in *Aimster* and *Grokster* has created uncertainty for both content creators and technology developers. No matter how the Court rules, *MGM v. Grokster* promises to have a dramatic effect on the course of technological development. The outcome of the case may have an immediate impact on a panoply of top-selling consumer electronics, including CD and DVD burners, TiVo, iPods, and DVD players equipped with parental control/content-editing technology; it will also affect the pace and scope of technological change in the coming years. Most significantly, the case will impact the way in which the law balances public rights of access to copyrighted works with the legitimate interests of copyright owners in reaping just rewards for their creative labors.

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DAVID S. EVANS | formerly of the KPMG, LLP, in Portland, Oregon, has joined the Firm as an associate in our Salt Lake City office. He will practice in the areas of Corporate and Securities Law.

RICK L. GUERISOLI | has joined the Firm as an associate in our St. George office, and will practice in the areas of Real Estate and Litigation.

Durham Jones & Pinegar continues to grow. We're looking for highly-qualified associates (top 10% and/or Law Review) with five years or less experience in Corporate, Securities, Business Litigation, Real Estate, and Bankruptcy in our SLC office, and in Estate Planning (5-15 years) in our St. George office.

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Speaking Objections

by Judge Samuel D. McVey

All trial attorneys and judges have or will run into them – those "speaking objections." Speaking objections are nothing more than an interruption of opposing counsel with a speech rather than a simple, succinct objection stating a rule or point of evidence pursuant to Rule 103 of the Utah and Federal Rules of Evidence.

At worst, speaking objections could be grounds for reversal of a verdict if prejudicial enough or may be too indefinite to preserve an issue for appeal. *See, e.g., People v. Pitts,* 223 Cal.App.3d 606, 273 Cal.Rptr. 757, 825 (1990), *superseded on other grounds, Pitts v. County of Kern,* 17 Cal.4th 340, 949 P.2d 920 (1998); *People v. Holmes,* 15 Cal.App.4th 1783, 19 Cal.Rptr.2d 740, 748 (1993) (for illustrative purposes only; case ordered not published). At best, courts around the country and numerous attorneys characterize them as unfair. *See, e.g. Kane v. Szymczak,* 41 Va.App. 365, 585 S.E.2d 349, 355 (2003); *Michaels v. State,* 773 So.2d 1230, 1231 (Fla.App. 2003). National Institute of Trial Advocacy, *The Effective Deposition,* §14.5 (2000). While your author is probably in no position to be pointing any fingers, I would like to throw in with those who believe speaking objections are unfair. I think most seasoned attorneys and judges, including us mediocre ones, would agree.

Attorneys seem to lodge speaking objections for three general purposes: 1) to coach a trial or deposition witness; 2) to argue to the jury during trial – before the appropriate time for closing argument; and 3) to make at least some objection when an attorney is at a loss over what to say about bothersome evidence or argument.

The Coaching Objection

Farmer Brown's mongrel stallion allegedly trespassed on Mr. Curmudgeon's property and impregnated his prize filly, knocking her out of the upcoming racing season and causing a loss of thousands in potential winnings. In a deposition, Farmer Brown's attorney just got Curmudgeon to admit that Farmer Brown kept the stallion in a fenced pasture. Curmudgeon's attorney realizes his client forgot to mention a carefully rehearsed point. Fearing to let the point pass until his turn to ask Curmudgeon questions, the attorney objects:

> ATTORNEY: "Objection. Lack of foundation as to whether my client has ever inspected the fence and seen gaps and whether he has ever seen Farmer Brown's horse get through the fence and come on my client's property."
>
> WITNESS CURMUDGEON: "Oh yeah. I would like to add that fence is broke down and I seen that horse come through it personally many a time."

As you can see, speaking objections coach the witness. They also waste time and money, adding unnecessary pages to transcripts, as the following example, taken from *The Effective Deposition,* shows:

> DEPOSING ATTORNEY: Now, Ms. Vardas, you've told us that you ran this company for the last seven years. During that time, how profitable was your company?
>
> DEFENDING ATTORNEY: I object. You are misstating her prior testimony. Also, we don't know what you mean when you say, "how profitable." You know that's a term that hasn't been defined, so your question is ambiguous. Nobody can understand it. Besides that, none of this is relevant to this case. I mean, what does this have to do with your claim that the company somehow mislabeled? Besides that, you haven't shown any personal knowledge.
>
> DEPOSING: The question is not ambiguous; it is perfectly clear. Anybody could understand it, and you know that.

JUDGE SAMUEL D. MCVEY was appointed to the Fourth District Court in April 2004 by Gov. Olene Walker. A graduate of the United States Naval Academy and Brigham Young University Law School, he served in the United States Marine Corps from 1977 to 1989, and again in 2003. He was a partner in the law firm of Kirton & McConkie from 1989 to 2003.

Besides that, we've been over this before and I'm not misstating anything. The witness can tell me if she understands the question or not. And you know perfectly well that this has a lot to do with this case. Those profits properly belong to us, or at least a share of them do. So, why don't you let her answer?

DEFENDING: Well, I have a right to understand the question so that I can protect my client's interests. You're trying to trap her with these trick questions, and that's not fair. Why don't you just ask a reasonable question without trying to force your views on her? Besides that, your question assumes facts not in evidence. It sounds like you are referring to some document. If you have a document, you should show it to her.

DEPOSING: I'll ask whatever questions I want, and not what you want me to ask. I'm not trying to trap anybody, and I resent your suggesting that. Why don't you just state your objection for the record, and let's get on with the deposition. Ms. Vardas, would you please look at what I am having marked as Vardas Deposition Exhibit 73? Would you please read the first paragraph into the record?

DEFENDING: Objection. Come on, counsel. You know the document speaks for itself.

The Miniature Closing Argument

In a South Carolina trial, a prominent citizen is accused of taking indecent liberties with a 17-year-old girl, committing the common law offense of carnal knowledge. Defense Counsel has the girl's mother on the stand. The girl's mother likes the accused and hopes he will keep his promise to marry her daughter. Defense counsel hopes to raise the issue of consent to produce a jury nullification:

> DEFENSE COUNSEL: "Mrs. Doe, what if any statements has your daughter made about this event?"
>
> WITNESS: "Oh, she gave herself freely to the defendant because she loves him."
>
> PROSECUTOR: "Objection Your Honor! What she gave wasn't hers to give. It belonged to the Great State of South Carolina!"[1]

Here the prosecutor is hoping to argue to the jury during the defense case rather than address a proper objection to the bench on relevancy or other appropriate grounds.

The "I Don't Know What Else to Do" Objection.
During closing argument in a federal eminent domain case, the landowner's attorney is illustrating discrepancies between the government appraiser's final appraisal on the one hand and his draft appraisal on the other. The Special Assistant U.S. Attorney, noticing numerous nods of approval in the jury box, stands up:

> FEDERAL ATTORNEY: "Objection! She's misstating the evidence. She's misleading the jury and trying to inject her own opinions into this case. She's being improper. My witness is offended Your Honor. She's blatantly trying to show differences between the draft and final report and that's just improper because my witness said the draft didn't include a lot of things."
>
> LANDOWNER'S ATTORNEY: "And I object. He's impugning my integrity and that is a personal insult. The witness never said that. It's offensive to me!"
>
> JUDGE: "Well, this is argument counsel. Both objections are overruled. Ladies and gentlemen of the jury, I remind you the arguments of counsel are not evidence, you are the exclusive judges of the facts in this case and will rely on your memories to determine those facts."

Note that the federal attorney's discomfort at his expert's report being picked apart leads him to feel something's wrong there but he is not quite sure what. So he wants to say something right away and not wait until his chance for rebuttal argument. In response, the owner's attorney, perhaps not quite sure what the objection means, chooses not to think of responding that the objection doesn't mean anything of legal import and of requesting an appropriate admonition to jury and counsel. Rather, she feels a need to defend herself and especially to bring up the irrelevant point that opposing counsel has been "offensive." Of course, opposing counsel provoked the latter outburst by claiming his witness was offended. Being offended during argument appears to be a legally groundless objection but we make it hoping it will be sustained because if something is offensive, maybe someone will decide it does not matter whether it is also happens to be the truth. Finally, counsel stated no legal rule supporting their objections.

Though we may not see many cases overturned based on speaking objections, we should avoid them as counsel, and as judges we should courteously try to preclude or overrule them and guide counsel to make an appropriate Ron Boyce/Ed Kimball objection such as "Hearsay," "Relevance," "Foundation as to Time," and so forth. *See generally,* R. Boyce & E. Kimball, *Utah Evidence Law* (1996). To this end, Stephen Nebeker wrote an article all should read called "Trial Objections," printed in The Ultimate Utah Trial Notebook, a publication of the Foundation of the American Board of Trial Advocates. He wrote that counsel should "state the specific ground for the objection" under Utah Rules of Evidence, Rule 103. He gives examples of simple language for evidentiary and procedural objections for most any situation we might encounter. He points out the value and propriety of approaching the bench when speaking objections seem unavoidable in jury trials rather than blurting them out in the presence of the jury. I have a copy of his article and if he and his publisher let me share it, I will.

1. To avoid using an example resembling any prior cases arising from around here, I am indebted to Senior Judge Cox of the Court of Appeals of the Armed Forces who witnessed the foregoing example in his home state.

Bring some muscle to the tussle

Large contingency fee lawsuits require an experienced, trial tested, and well financed team of plaintiff attorneys. Otherwise, the defense will play hardball, hoping to wear your client down and force a lowball settlement.

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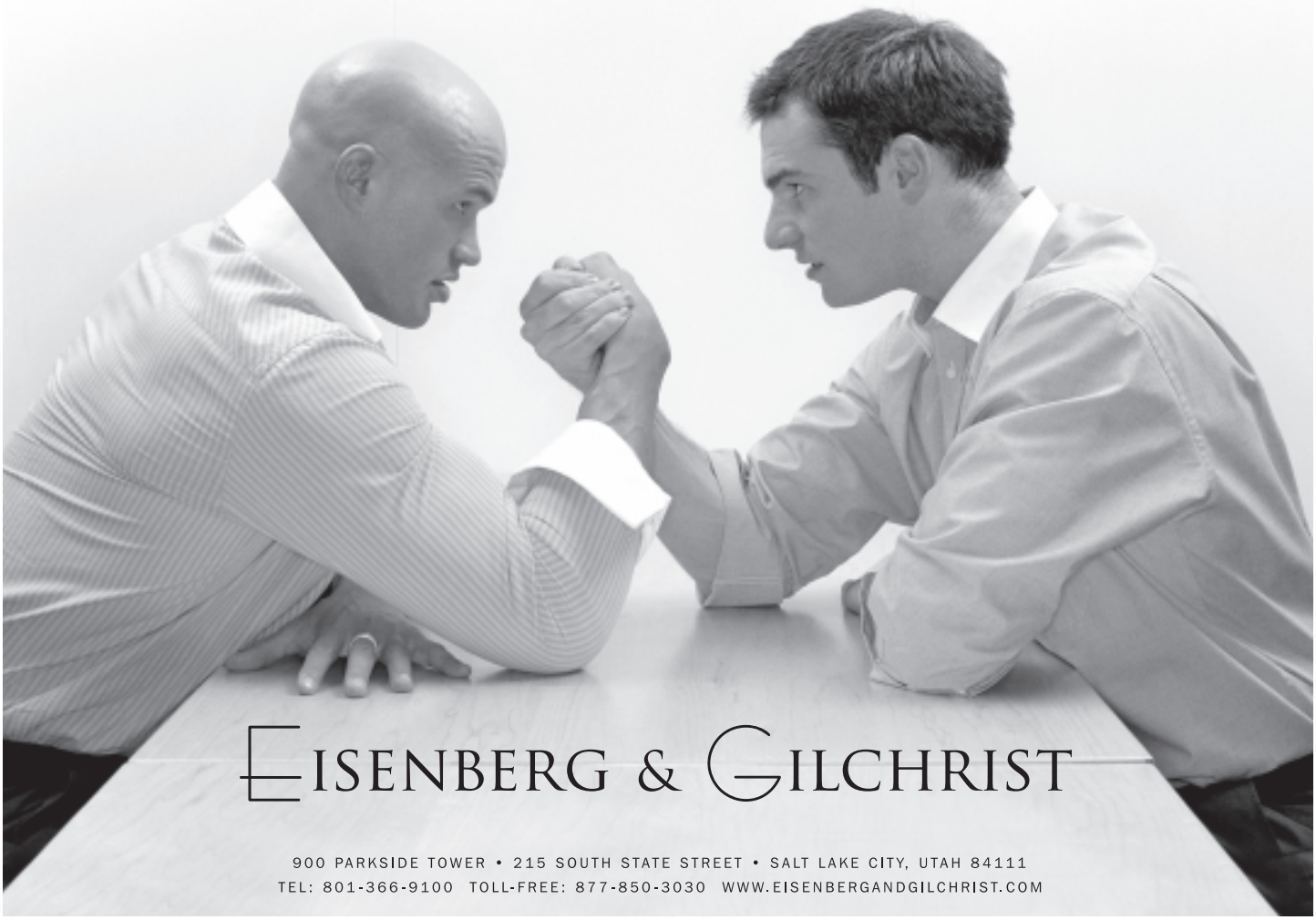
Here are some of results we achieved for our clients in the last year, in additions to many other six figure recoveries we also helped lawyers and their clients obtain in 2004.

$4.50 million	trucking accident
$3.75 million	product liability
$3.75 million	insurance bad faith
$3.10 million	trucking accident
$1.50 million	wrongful termination
$1.00 million	wrongful death (adult heirs)
$1.00 million	medical malpractice

We'll work with your firm whether you need the entire case handled from start to finish or whether you are looking to co-counsel with us all the way through trial. Our fee is a portion of your contingency fee, and our contingency agreements are customized to fit your needs and our specific role in helping your client.

Please contact us to discuss how we may be able to work with you to make your next big case a smashing success.



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Utah Standards of Professionalism & Civility

By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved these Standards.

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

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

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

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

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

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

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

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

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

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

11 Lawyers shall avoid impermissible ex parte communications.

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

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

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

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

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

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

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

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

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

Standard 2 – Civility, Courtesy and Fairness

by Gus Chin

Editors' Note: *A member of the Supreme Court's Advisory Committee on Professionalism will discuss one of the new Standards of Professionalism and Civility with each issue of the* Bar Journal. *The opinions expressed are those of the member and not necessarily those of the Advisory Committee.*

Our actions as lawyers are governed by various rules, codes, and professional expectations. This fact, although well known, is often the bane of those who violate the prescribed ethical or professional standards. Some believe that because ethics and professionalism are one and the same there is no need for another set of codes or conditions. However, then-Chief Justice E. Norman Veasey of the Delaware Supreme Court, a professionalism advocate, reasoned: "What is the difference between ethics and professionalism? Ethics is a set of rules that lawyers must obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should do to serve a client and the public."[1]

It is concern over the decline in the virtues of professionalism that led to the promulgation of the Utah Standards of Professionalism and Civility.[2] In particular, Standard Two of the twenty standards adopted by the Utah Supreme Court states:

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

These expected virtues of civility, courtesy and fair dealing are seemingly opposite to the media's negative portrayal of lawyers. In the October 2004 issue of Trial, Washington D.C. attorney Ronald Goldfarb, commenting on the images of lawyers portrayed in television shows such as *Ally McBeal, the Defenders, Law and Order, Perry Mason, and The Practice,* observed that the difference between the image portrayed and the reality of the profession "may be the reason so many lawyers are unhappy in their work."[3] Most of today's popular lawyer shows portray a negative image of lawyers engaged in deception, corruption, and other unethical practices. As a result the public has become and continues to be somewhat disillusioned. Evidence of this is found in a 1996 *U.S. News & World Report* article declaring that: "Outside of their profession, lawyers have become symbols of everything crass and dishonorable in American public life; within it, they have become increasingly combative and uncivil toward each other."[4]

The Standards are intended to reinforce the positive attributes and virtues of our noble profession. It may even become necessary in the near future to invoke some type of disciplinary action by the courts or by the bar in order to curtail conduct that is damaging our profession in order to achieve the desired level of disciplined professionalism and foster an improved positive public image.

It is indeed unfortunate that incivility and discourteous behavior have become so widespread that many observers have been desensitized or even disillusioned. Some lawyers take the charge of zealous representation to the extreme by supplementing the facts and issues with unnecessary, irrelevant and gratuitous comments. Some also elect to abuse the free speech clause by resorting to the use of "colorful" language during discussion with opposing counsel and even during court proceedings. Lawyers who conduct themselves in such an uncivil manner only add to the problem. In addition to media reports, these comments have also been incorporated in court pleadings and briefs resulting in judicial commentary. For example, in *Prince v. Bear River Mutual,* 2002 UT 68, 56 P.3d 524 the Utah Supreme Court, in the addendum to its opinion, said:

> We feel it necessary to comment on the briefs in this case. Appellant's counsel has submitted briefs that are replete with pejorative remarks and epithets regarding opposing counsel, the trial court, Dr. Marble, and indirectly, this court. Statements such as Bear River's arguments are "supercilious," "absolutely foolish and asinine," and "ridiculous," that Bear River is "ignorant," that the trial court "ignored . . . every opinion ever written by this [c]ourt" and "fail[ed] to read and comprehend the

GUS CHIN is employed as a senior prosecutor in the Salt Lake City Prosecutor's office.

> actual language" of the applicable statute, that Dr. Marble is "notorious" and a "charlatan," and that Dr. Marble's opinion is "inarticulate" and an "absurd legal opinion" are wholly inappropriate in an appellate brief. Statements implying that small claims judges are not "real judge[s]" and that this court disregards the truth by prefacing an argument with "[o]n the outside chance the truth matters" are likewise inappropriate. Such remarks are merely argumentative and repugnant to fundamental and rudimentary notions of civility and decorum expected of attorneys, and as we have stated before, "[d]erogatory references to others . . . ha[ve] no place in an appellate brief and [are] of no assistance to this [c]ourt in attempting to resolve any legitimate issues presented on appeal."

Id. at ¶62 (citation omitted).

Reportedly, in a 2001 address to Virginia law school graduates, Chief Justice William Rhenquist remarked that "incivility remains one of the greatest threats to the ideals of American justice and to the public's trust in the law."[5] Lawyers who fail to exercise the requisite courtesy to each other as well as to the court undermine the virtues of the profession.

In remarks delivered to the Tulsa Chapter of the American Inns of Court in Tulsa, Oklahoma, on May 2,1997, Justice Clarence Thomas said: "I believe that the decline in civility among lawyers is due to a broader, more intellectual change in our vision of the law's role in our society."[6] Commenting further, Justice Thomas said: " Civility then is the natural functioning of a legal profession in which we are all servants of that higher, nobler master, the Constitution and the law. The lawyer on the other side, or the judge is not the enemy, but a fellow traveler on the journey toward discovering the correct legal answer."[7] Even though we may be understandably disappointed in the outcome, there is really no excuse for personal attacks or epithets against opposing counsel. Resorting to personal attacks or epithets is a base reaction that demonstrates a lack of personal and professional discipline.

The kind of discipline encouraged by the Standards are really not lost virtues of a bygone era. The challenge is to encourage those seeking legal representation to carefully examine the reputation of lawyers they hope to retain. Supposedly, many in search of legal representation ask for a lawyer who, among other things, is reputed to be "tough," "shrewd," or "unrelenting." These noteworthy traits are often used to portray the negative side of lawyers and are not truly indicative of the calibre or quality of the legal representation. Moreover, they are more often associated with meanness, suggesting a "pit bull" or "Rambo" disposition.

In the October 2004 *ABA Journal* there is a story about two Florida personal injury lawyers whose advertisements associate their character and practice with that of the pit bull breed of dogs.[8] The Florida Bar filed a complaint alleging violations of advertising rules prohibiting use of images that are not "objectively relevant" to attorney selection, and are "misleading, deceptive or manipulative." Judge William C. Herring, who presided over the complaint, found the ads and images used to be constitutionally protected free speech. The two lawyers said they chose the pit bull because of its strength, loyalty, tenacity and confidence. Amusingly, a pit bull breeder felt that associating the dog with the attorneys " would drag down the breed of the dog, as opposed to the other way around."[9]

Fairness is one of the cardinal rules of good lawyering especially for trial lawyers. Some lawyers are notorious for discovery violations even though they are duty bound to disclose to opposing counsel. Others encourage their clients to be uncooperative and dishonest. Yet others engage in frivolous motion practice in an effort to either demoralize the other side or extend the litigation process. While this type of conduct is sometimes addressed by the court, it often goes unnoticed for a period of time. The type of conduct described above misleads the public into believing that lawyers will do anything and everything to win, regardless of the cost or consequences.

Maybe we could learn from an anecdote about Abraham Lincoln. "A man came to him in a passion asking him to bring a suit for $2.50 against an impoverished debtor. Lincoln tried to dissuade him, but the man was determined upon revenge. When he saw that the creditor was not to be put off, Lincoln asked for and got $10 as his legal fee. He gave half to the defendant, who thereupon willingly confessed to the debt, and paid up the $2.50, thus settling the matter to the satisfaction of the irate plaintiff."[10]

I challenge the naysayers who take the position that incivilty, discourtesy or unfairness cannot be curtailed by the Utah Standards of Professionalism and Civility. To paraphrase John Lennon, "Give Professionalism a chance." Although there is no absolute solution to the growing problem of incivility and unfairness which plagues our profession, the Standards are a good starting point. They will serve as a professional barometer to lawyers and the public and in time may help restore the respect due our noble profession.

1. Chief Justice E. Norman Veasey, "Making it Right-Veasey Plans Action to Reform Lawyer Conduct," Bus. L. Today, Mar.-Apr. 1998, 42,44.
2. See Report of the Supreme Court's Advisory Committee on Professionalism, June 2003.
3. Lawyers on Television, Trial, October 2004.
4. John Marks, The American Uncivil Wars: How Crude, Rude, and Obnoxious Behavior Has Replaced Good Manners and Why That Hurts Our Politics and Culture, *U.S. News & World Rep.,* Apr. 22, 1996, at 66.
5. "Would Learned Counsel Please Stop Screaming", Patrick Jonsson, *The Christian Science Monitor,* 7/17/01, quoted in Richard Endacott, "Civility in the Practice," *The Nebraska Lawyer,* Aug., 2003.
6. Remark: A Return to Civility, 33 Tulsa L.J. 7, 10.
7. *Id.* at 11.
8. "Judge Takes Bite Out of Bar's Pit Bull Complaint.". *ABA Journal* October 2004.
9. *Id.*
10. Excerpt from *First Kill All the Lawyers: Legal proverbs, epitaphs, jokes and anecdotes* (Bill Alder, ed.).

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Commission Highlights

During its regularly scheduled meeting of December 3, 2004, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines gave a follow-up report on the Section Leadership meeting as well as the meeting with the Supreme Court. The definition of the practice of law was one of the items that was discussed.

2. John Baldwin gave his Executive Director's report. John stated that Iron Mountain provides traditional off-site storage or archived paper information, including full records management tools. Recently, Iron Mountain has added electronic services. The Bar has engaged Iron Mountain as a member benefit partner, obtaining discounts on various services for lawyers, and has engaged it for services for internal Bar operations.

3. John reported that several years ago, the Bar distributed a book on the rights and responsibilities of a young person in Utah and produced a booklet entitled "On Your Own", which was aimed at high school seniors. This information will be added to our home page and will be providing links to other sources of similar information through the new civic education coalition.

4. John stated that the federal courts are currently engaged in discussions regarding their pro hac admission requirements and the possibility of permitting a specified number of limited appearances before requiring lawyers to take the bar exam.

5. John reported that our existing malpractice insurance underwriter, GE Westport, has decided to withdraw from the Utah market effective December 31, 2004. Marsh, the Bar-endorsed insurance broker, has selected Liberty International Underwriters (as in Liberty Mutual) as a new underwriter. The change will take place January 1, 2005.

6. John reported that content acquisition is well underway for the Casemaker library, including the placement of Utah case law back to 1939. We are currently working with the law schools to acquire a law review content and we are on track to "go live" January 30, 2005. We are continuing to provide training to various groups and at the Bar offices every second Tuesday at noon. Mid-January we will send out an e-mail with instructions for setting up log-in and password account information.

7. John reviewed the October financial statement. He stated that the Law and Justice Center is continuing to age and we have had several large leaks in the roof which have been patched, but may require complete resurfacing sooner or later. Also, cement work on the front and rear steps might require some investment soon.

8. The *Bar Journal* is now on the website in PDF format which should facilitate review and reprinting.

9. It has been reported that we continue to receive complaints from several attorneys regarding their irritation and the inconvenience of the security screening at the entrance to the Matheson Courthouse. After discussion a motion was made to not get involved with court security. The motion passed with none opposed.

10. Security of the Law and Justice Building was discussed. A web camera has been installed above the reception desk as well as a "panic button" which notifies staff and tenants of a threat and which would return the elevator to the main floor. We will be providing staff training on dealing with office violence and will develop an improved protocol for how to deal with emergency incidents.

11. It was reported that we have begun to finalize staff recommendations on how we may more effectively provide information on the Bar's web site which will "create an information clearing house tailored to meet the needs of the individual consumer's personal legal services" and "publicizing the information by low cost methods" as proposed by the Commission's Task Force on the Delivery of Legal Services.

12. The OPC Annual Report is now on the Bar's home web page and OPC will continue to provide "practice pointers" articles in the *Bar Journal.* OPC will continue to provide CLE ethics education, which last year totaled 32 hours.

13. The resolution on "Educating for Democracy" was adopted.

14. Discussion ensued regarding the upcoming ABA Mid-Year Convention and it was stated that the ABA meeting is a direct benefit to the membership. The motion was made and approved to contribute money to the ABA social. It was noted that Judge Raymond Uno would be an award recipient at the ABA luncheon on Sunday, February 13, 2005.

15. The report of the Client Security Fund Committee was approved.

16. A motion to correct the Energy, Natural Resources Law Section proposed by-laws was approved. It was noted that the section is reducing the dues amount and allowing for associate membership.

17. John Baldwin discussed the aspects of the Newport Beach Marriott Hotel as the 2006 Annual Convention location. Discussion followed and the Commission approved the convention site.

18. Katherine Fox discussed the proposed, revised policies and procedures of the Needs of the Elderly Committee. After discussion, the Commission approved the revised policies and procedures.

19. Nate Alder would like to create a small sub-committee to determine how to communicate more effectively with legislators. The committee members include: Lori Nelson, Judge James Z. Davis, David Bird, John Baldwin, George Daines and John T. Nielsen. A discussion followed on various legislative issues. David Bird noted that the best time to lobby is six weeks prior to the legislative session.

20. George Daines led a discussion on legislative relations and judicial compensation support. The motion to adopt a resolution in support of the AOC's recommendations for judicial office compensation increase passed unopposed.

21. George Daines led a discussion regarding budget sub-committee on lawyers assistance and a discussion followed. The motion passed unopposed to organize a budget sub-committee to review lawyer assistance. Rusty Vetter was appointed chair.

22. David Bird gave a report on the Judicial Council. Dave noted steps are being taken towards electronic filing in the state courts. He noted the implemented fax filing policy – if the filing is less than ten pages filing by fax is permitted.

23. Yvette Diaz reported that the committee on mandatory insurance disclosure is moving along. The committee would like to conduct a survey on malpractice coverage using the annual licensing fee form.

24. Annual Convention co-chairs will be Mike Petrogeorge and Lauren Scholnick.

During its regularly scheduled meeting of January 28, 2005, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines reviewed the ABA agenda for its mid-year meeting and noted there are many good sessions relating to the National Association of Bar Executives, National Conference of Bar Presidents and National Conference of Bar Foundations.

2. George Daines commended Katherine Fox on the good job she did with writing the Petition for Indexing of Bar Fees. The petition has been filed and is now pending before the Supreme Court.

3. Lowry Snow noted that the Southern Utah Bar Association has been made aware of the scheduled Commission lunch for the Spring Convention in St. George.

4. George Daines reported that we are continuing to monitor and do everything we can to support the legislatively-requested judicial salary increase. George anticipates making a statement to the Legislature at the Joint Appropriations Committee Meeting and is asking other Bar members to speak in support as well.

5. John Baldwin updated Commissioners on the status of recently filed petitions by noting that the Court granted the Petition to Increase the Bar Exam Score. The Court ordered the increase to occur in a one-step process (as opposed to the two-step process requested in the petition) for the July 2006 Bar Exam which will raise the passing score to 135 or 270.

6. Toby Brown reported that the Bar is very close to having Casemaker online and active. He will e-mail a live link to Commissioners for access to our current library. He further reported that the difficult part is getting Utah law reviews incorporated but he is working with law schools to expedite that process. Toby also stated that once Casemaker becomes live, he will post a link on the Bar's homepage to make logging in more convenient. He also plans on placing a notice in the *Bar Journal* asking lawyers to provide the Bar with their e-mail addresses for increased access to the Casemaker library.

7. Toby Brown reported the ABA will be conducting a *pro bono* program review at the request of Utah Legal Services February 14-16 and the Bar will be participating in that review. It is a 2-1/2 day process and the Bar will eventually get ABA recommendations on how to better serve the public in the *pro bono* area. John Baldwin stated that the former *pro bono* program model the Bar used was not efficient and these new recommendations should help the Bar in recruiting and sending referrals to Utah Legal Services.

8. John Baldwin reported the Bar is currently in a positive cash position. If the Commission prefers, we could budget expenses less liberally and income more conservatively (and closer). George Daines stated we may not run a deficit this year and asked Commissioners to look at the balance sheet for details because it shows a strong cash position. John Baldwin emphasized the need to start thinking about cash outlays for repairing the roof on the Law & Justice center which will cost approximately $40,000 – $60,000 for an overall replacement.

He also informed the Commission the building elevator had its first major repair and the cement work on the steps is more ragged in places than previously thought and also will need replacement in the future.

9. John Baldwin informed Commissioners our current insurance underwriter (Chubb) has withdrawn. Liberty Insurance is sending out notices to customers but fears approximately one-half of existing Bar members will not renew their malpractice policies. Grant Clayton is in the process of sending out letters encouraging more lawyers to obtain malpractice coverage.

10. Judge Norman H. Jackson, who sits on the Utah Court of Appeals, recently submitted his resignation. The Bar generally nominates six lawyers to be on the Appellate Court Nominating Commission at the March meeting. Daniel L. Berman and Kate Lahey were our formerly designated members, but they need to be replaced. Yvette Diaz replied there is no diversity on this Commission and asked the those present to bear this fact in mind when choosing these candidates for replacement.

11. John Baldwin referenced a former meeting with Debra Moore, Chief Justice Christine Durham, himself and managing partners of larger law firms in which they prepared a list of Bar group benefits for larger law firms since the thought was expressed that "the Bar does nothing for large law firms and focuses solely on small and solo practitioners".

12. A lengthy discussion was held on formalizing law school faculty/student relationships. George Daines informed Commissioners that a recommendation for this proposed rule came about during a discussion among Yvette, himself and the law school deans on their request to treat their faculty as members of the Bar. Scott Matheson discussed this proposed rule with the University of Utah law faculty and they were quite excited because currently, for those not licensed in Utah, they must affiliate themselves with an active member of the Bar and act as an assistant. He further said this would be a good opportunity to expand in the *pro bono* area and enhance Bar relationships which send a good signal. The Admissions Committee will be provided a copy of the proposed rule and provide pertinent feedback on various aspects. George would like to continue this discussion in March.

13. Annette Jarvis is the recipient of the 2005 Dorathy Merrill Brothers Award and Cheryl Luke is the recipient for the 2005 Raymond Uno Award.

14. Lowry Snow was nominated and unanimously approved as the Bar representative to sit on the Judicial Council's new Standing Committee on Self-Represented Parties.

15. The UPL Committee asked for authorization to seek an injunction against two individuals. The vote was unanimous for approval to seek the injunction.

16. Charles R. Brown stated the ABA has requested that all state bars join the already-drafted appeals brief relating to the Gramm-Leach Act. As background, the FTC and the Justice Department filed an appeal regarding the Act's privacy and notification provisions and their applicability to lawyers. The ABA would now like bars to file as an *amicus.* The basic premise is whether the FTC can regulate attorneys under the Act's privacy provisions. The ABA's position is that Congress did not intent to include lawyers within the scope of the Act, and that extensive state regulation of attorney conduct, including the paramount requirement for the protection of client confidentiality (including client financial information) should prevail rather than a new federal regime which on its face is inapplicable. The motion to join passed unanimously.

17. Discussion was held on the Paralegal Division. Danielle Davis Price explained the requirements stated in the current affidavits of "direct supervision" and "80% paralegal work" are outside the scope and intent of the petition that originally created the Paralegal Division. Peggi Lowden said the primary concern is to expand membership and provide copies of the previously filed petition and order approving the same. The motion to request the Paralegal Division to draft and submit to the Commission at the next meeting an affidavit in compliance with the Supreme Court petition requirements passed unanimously.

18. Lowry Snow reported on the Southern Utah flooding issues, stating in part that one life was lost, as least 26 homes were destroyed and over $100 million in damage occurred to infrastructure. Lowry will work with George Daines and John Baldwin on this and extend the offer for assistance to Shawn Guzman (who is currently coordinating the effort in St. George).

19. Rusty Vetter reported on the status of the sub-committee of Lawyers Helping Lawyers. The committee has gathered information from other states with comparable programs and it appears we are spending "a lot more money than other comparable-sized states". The committee is looking at an employee assistance program ("EAP") as an alternative to LHL. The goal in this area is early assistance which an EAP will provide versus later intervention provided by LHL. The final report will be submitted by the subcommittee in March and Rusty said they will recommend that requests for proposal be sent out to vendors to ascertain optional service and the best leverage for funding.

20. Charles R. Brown gave the ABA's delegate report, stating that the ABA House of Delegates is meeting on Monday, Feb. 14th and many Utah lawyers will be speaking including Mark Buchi (UAPA) , Frank Carney/David Nuffer (electronic filing), Hon. Paul Cassell and Orrin Hatch (sentencing guidelines).

21. David R. Bird reported on the Judicial Council, stating there is a new librarian for the state law library (Jessica Van Buren). Dave also reported that there are increased numbers of lawyers on the new Governor's staff (e.g. Mike Lee – Governor Huntsman's legal counsel, Mike Mower – Governmental Affairs Liaison, Bar Commissioner Yvette Diaz – Community and Arts, as well as Bar Commissioner D'Arcy Dixon Pignanelli, Lisa-Michelle Church, Russ Skousen, Gayle McKeachnie and Max Farbman.)

22. Steve Owens presented Clark Newhall's e-mail on the ineffectiveness of LegalMatch and his request that "the Bar should drop it". Rex Huang and Felshaw King have also received many disparaging LegalMatch comments from lawyers. Katherine Fox replied that the Bar has four more years on the contract and that there is no legal basis to break the contract. John Baldwin reported that some lawyers are happy with the new program but that we will continue to monitor it.

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

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Notice of Approved Amendments to Utah Court Rules

Under its expedited rulemaking authority, the Supreme Court has approved amendments to the following Utah court rules. The amendments are effective when indicated but subject to further change after the comment period. The comment deadline is April 1.

SUMMARY OF AMENDMENTS:

URCP 009. Pleading special matters. Amend. Describes method for identifying persons to whom a defendant wants to assess fault under Utah Code Section 78-27-41. Effective May 2, 2005 Approved as an expedited amendment under Rule 11-101(6)(F). Subject to further change after the comment period.

URCP 026. General provisions governing discovery. Amend. Discovery plan should include deadline for identifying non-parties to whom fault will be allocated. Effective May 2, 2005 Approved as an expedited amendment under Rule 11-101(6)(F). Subject to further change after the comment period.

To see the text of the amendments and to submit comments, go to: http://www.utcourts.gov/resources/rules/comments/. Proposed rule amendments are also published in the Pacific Reporter Advance Sheets.

To view the text of the amendments from the web page, click on the rule number. You can comment and view the comments of others by clicking on the "comments" link associated with each body of rules. It's more efficient for us if you submit comments through the website, and we encourage you to do so. After clicking on the comment link, you will be prompted for your name, which we request, and your email address and URL, which are optional. This is a public site and, if you do not want to disclose your email address, omit it. Time does not permit us to acknowledge comments, but all will be considered.

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One method of submitting a comment is sufficient.

Save This Date!

Please mark your calendars for the Annual Utah State Bar Law Day celebration on Friday, May 6, 2005! Mr. Gregory G. Skordas of Skordas Caston & Morgan, L.L.C. will be our keynote speaker: THE AMERICAN JURY: WE THE PEOPLE IN ACTION. Lunch and the awards banquet will be held at the Little America Hotel, 500 South Main Street in Salt Lake City, at 12:00 noon. Please contact Michael Young, (801) 963-9993 or David Bernstein, (801) 521-3773 if you have any questions.

Mock Trial Volunteers Needed

The Twenty-sixth Annual Utah Mock Trial Competition is fast approaching, and we would greatly appreciate your help. It is an exciting opportunity to interact with and support our youth as they learn about the legal system and their rights and responsibilities as citizens.

We need 300 attorneys and community representatives to participate as judges for the 94 playoff rounds (February 28 – March 16), quarter-final rounds (March 18 and 19) and the semi- final rounds (March 23). Each trial is judged by a panel of three individuals: a judge or attorney acting as the presiding judge; an attorney acting as a panel judge; and a community representative acting as the third judge. Each mock trial lasts 2 1⁄2 to 3 hours.

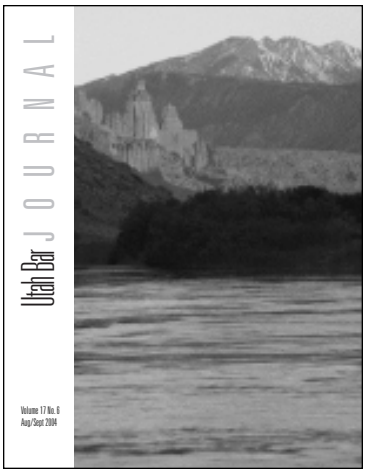
If you are interested in judging you may access the schedule by going to the Utah Law- Related Education Project's web site at www.lawrelatededucation.org and going to the mock trial page where there is a link to the schedule, or you may contact the Project office at (801) 322-1802. Thank you for your contribution to this vital project.

Notice Appointing Trustee to Protect the Interests of the Clients of the Late Melvin E. Leslie

On February 4, 2005, the Honorable Joseph C. Fratto, Jr., Third Judicial District Court, entered an Order Appointing Trustee to Protect the Interests of the Clients of Melvin E. Leslie. Pursuant to Rule 27 of the Rules of Lawyer Discipline and Disability, Gary Atkin is appointed as trustee to take control of client files and other property that was in Mr. Leslie's possession, and distribute them to the clients.

2004 Utah Bar Journal *Cover of the Year Announced*

The winner of the *Utah Bar Journal* Cover of the Year award for 2004 is Bret B. Hicken of Spanish Fork, Utah. His photograph of Fisher Towers on the Colorado River Scenic Byway near Moab, Utah was featured on the cover of the Aug/Sept 2004 issue of the *Utah Bar Journal.*



Mr. Hicken is one of more than 60 attorneys, or members of the Paralegal Division of the Utah Bar, whose photographs of Utah scenes have appeared on at least one cover since August, 1988. This is Mr. Hicken's 15th photograph to be featured on the cover of the *Journal.* Covers of the year are framed and displayed on the upper level of the Law and Justice Center.

The editorial board of the *Bar Journal* welcomes your feedback about the covers and invites you to submit your own photos for consideration on a future cover.

Congratulations to Mr. Hicken, and thanks to all who have provided photographs for the cover in 2004.

Notice of Ethics & Discipline Committee Vacancies

The Ethics & Discipline Committee of the Utah Supreme Court is seeking volunteers to fill vacancies on the Committee. The Ethics & Discipline Committee is divided into four panels which hear informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint shall be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court upon recommendations of the Chair of the Ethics and Discipline Committee. Please send your resume to Lawrence E. Stevens, Chair of the Ethics and Discipline Committee, Parsons, Behle & Latimer, 201 South Main Street, #1800, P. O. Box 45898, Salt Lake City, UT 84145-0898 no later than May 2, 2005.

YLD Public Education Committee Needs Volunteers

The Public Education Committee of the Young Lawyers Division is looking for volunteers from all areas of the legal community (not just lawyers) to tutor the kids of Salt Lake's Backman Elementary and help them improve their reading skills.

You give a little, you get a lot!
Reading with a child at Backman for just a half-hour once a week will improve that child's life and enrich yours. Tutors are needed from 8:00 am to 2:40 pm Monday through Thursday, and Fridays from 8:00 am to 12:15 pm. Please post this ad at your firm or spread the word via email.

For more information, contact Chad Derum at Manning Curtis Bradshaw & Bednar at 363-5678 or cderum@mc2b.com. Or you can contact Barbara Lovejoy at Backman Elementary at 578-8100 ext.206 or horizons@darnfastnet.com.

Announcing the reformation of the Utah State Bar Banking and Finance Section and the installation of Section Officers:

Kevin G. Glade	Gary E. Doctorman	Nathan S. Dorius
Chair	Vice Chair	Treasurer

First Lunch and CLE will be held April 13, 2005
Law & Justice Center

Legal Aid Society of Salt Lake Adopts "Fee for Service" for Low-Income Family Law Cases

Legal Aid Society of Salt Lake's Board of Trustees approved the adoption of "fee for service" for low-income family law cases. Faced with ever dwindling funding for these cases, the charge of a one-time client fee will enable Legal Aid to provide quality legal representation to low income clients with family law cases. Under this plan, Legal Aid will charge a client fee for low-income family law cases based on household income relative to the federal poverty rate. Families having household income up to 100% of federal poverty will pay the one-time client fee of $200 and families earning between 100-150% of federal poverty will pay $400. A new category of income eligibility was added for families with income between 150-200% of poverty level, these families will pay the one-time fee of $600. To illustrate, federal poverty for a parent and two children is $15,670 per year, and with the increase in income eligibility, the same family could earn up to $31,340 and still pay the nominal flat fee of $600 and receive services.

Over the last several years, funding for low-income family law cases from federal grants and local sources has been reduced or eliminated altogether which has forced Legal Aid to lay off attorneys and paralegals. Prior to the reduction in funds, Legal Aid opened over 1,400 low-income family law cases annually. Last year, with limited resources and staff, they only opened 45 new cases. Even though it opened a self-help clinic at the Matheson courthouse in 2003 to provide forms so individuals can represent themselves, Legal Aid has received a lot of feedback from the community about the desperate need for full legal representation.

Fortunately, Legal Aid's other programs have fared better. Service for victims of domestic violence in protective order cases and family law cases for clients who have a protective order has not been adversely affected. There is no charge for protective order representation and only a small administrative fee for the domestic violence related family law cases.

Executive Director, Stewart P. Ralphs explained that because of shrinking budgets, many non-profits have had to incorporate a sliding fee scale or limited fees to support their programs. He expressed optimism stating, "The adoption of fee for services will breathe new life into our family law program and enable Legal Aid to replace legal staff and grow the program to meet the increased need in our community." Board members were also pleased that the new "fee for service" initiative increases raises the eligibility for services from 150% of the federal poverty level to 200% based on household income, making it possible for Legal Aid to serve working families that it was not previously able to serve.

Because of the limited revenues that the "fee for services" will generate, Legal Aid will only accept and prosecute cases involving simple property issues such as a marital home, simple financial accounts (i.e. bank checking and savings accounts), pension and retirement accounts, and personal property such as household furnishings, vehicles, personal effects, etc. Legal Aid will not take cases involving complex property issues such as extensive real property (other than the marital home), business entities, trusts, family inheritance, or intricate financial holdings.

Discipline Corner

SUSPENSION

On November 29, 2004, the Honorable Derek Pullan, Fourth Judicial District Court, entered Findings of Fact, Conclusions of Law, Ruling and Order of Suspension: Three Years suspending Daniel D. Heaton for a period of three years, effective October 20, 2004, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4 (a) and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Heaton was retained to represented a client in a bankruptcy matter. The client and the creditors attempted to contact Mr. Heaton for three months without success. Mr. Heaton filed the client's bankruptcy six months later, and then failed to attend the creditors' meeting. In another matter, Mr. Heaton was retained to handle an expungement of records. Four months had passed when the client called Mr. Heaton to check on the progress of the case. Two months later Mr. Heaton informed the client he had misplaced the file but would refund the client's fees and assured the client he would attend to the matter promptly. Mr. Heaton refunded half of the fee to the client and kept half of the fee for the remaining paperwork. The client attempted to contact Mr. Heaton thereafter without success. In a third matter, Mr. Heaton was retained to represent a client in a bankruptcy matter. The client paid Mr. Heaton's attorney's fees but when the client attempted to contact Mr. Heaton, he had vanished. Mr. Heaton failed to timely respond to the OPC's requests for information in all three matters. In a fourth matter, Mr. Heaton engaged in the unauthorized practice of law by assisting a client in a lawsuit while placed on administrative suspension for failure to pay his Bar dues to the Utah State Bar.

Mitigating factors include: no prior disciplinary record; substantial personal or emotional problems; willingness to make full restitution; affected by an impairment or disability for which Mr. Heaton sought and completed treatment.

PUBLIC REPRIMAND

On January 31, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.2 (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johnson was retained by a client in an immigration matter. The client instructed Mr. Johnson not to apply for a TN visa because the client wanted permanent residency. Mr. Johnson sent the client an engagement letter stating that he would pursue and conduct research on a TN visa. The client communicated the discrepancy, but Mr. Johnson did nothing to rectify the error. Mr. Johnson missed a deadline for filing an application for an H-1B visa. The draft documents for the H-1B visa were sent to the client for approval after the deadline. Mr. Johnson did not keep his client reasonably informed of the status of the matter and did not promptly comply with requests for information. Mr. Johnson charged the client for research on a TN visa when he was specifically instructed not to pursue that visa and he failed to complete the entire application.

Aggravating factors include: Mr. Johnson failed to appear at the Screening Panel hearing pursuant to Rule 32 of the Rules of Lawyer Discipline and Disability; Mr. Johnson refuses to acknowledge the wrongful nature of the misconduct involved; Mr. Johnson lacked a good faith effort to rectify the consequences of the misconduct, in particular conducting and billing for the TN visa research; failure to communicate with the client in a reasonable manner and instead, continued to make demands throughout this proceeding for work that was not requested; and Mr. Johnson failed to resolve/communicate, and instead made demands through this proceeding that the client owed him for the TN application, which was not requested and not done.

ADMONITION

On January 19, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), 5.3 (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in a divorce matter. The client requested that the attorney communicate the status of

the case through the client's parent. The attorney did not follow up on requests and questions and failed to effectively communicate with the client's parent. The attorney also failed to supervise the attorney's secretary regarding client contact and failed to timely return the client's file.

ADMONITION

On January 19, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 8.1(a) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in two cases. The client terminated the attorney's services before the work was concluded and requested a refund of attorney's fees. The attorney filed a motion to withdraw from both cases. The scope of the trial did not justify the extent of the preparation the attorney claimed. The attorney refused to refund any portion of the fees. The attorney testified to the Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court that the client only requested that the attorney withdraw from one case when the attorney had filed motions to withdraw from both pending cases on the same day.

ADMONITION

On January 20, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent two clients in a lawsuit but the attorney did little or nothing to pursue the clients' case

until about eight months after being retained. The attorney did not understand the outstanding obligations when retained and failed to respond to outstanding discovery requests served upon the clients' former attorney. The attorney also failed to pursue a new stipulated discovery plan with opposing counsel and failed to file a notice of withdrawal when the attorney ceased representation. The attorney did not respond to the clients' attempts to communicate with the attorney and did not communicate the attorney's change of business location to the clients. The attorney did not respond to the Office of Professional Conduct's requests for information.

Mitigating factor included: No prior record of discipline.

ADMONITION

On January 24, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney drew a check for the interest from the attorney's IOLTA account to the Utah Bar Foundation. The attorney authorized the firm's bookkeeper to write off the non-negotiated IOLTA check and write a new check against the trust account to transfer the interest to the firm's operating account based on the misunderstanding that the money belonged to the firm. Later, the Utah Bar Foundation negotiated the check for IOLTA interest rendering the attorney's trust account overdrawn. Upon receipt of the overdraft notice the firm transferred the funds from its operating account to the trust account to cover the overdraft.

"and Justice for all"

"We the People . . . United We Run"

April 30, 2005 • 8:00 a.m.

S. J. Quinney College of Law at the University of Utah

Presented by the Utah State Bar

Law-Related Education and Law Day Committee

SIGN-UP ON-LINE, BY MAIL, IN PERSON Register on-line at **www.andjusticeforall.org** or mail or deliver in person the completed registration form with fee to: Law Day Run/Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111. **Registration Fee** until April 20: $22 ($10 for Baby Stroller Division, see below). **Deadline for pre-registration is April 20!** After April 20, race day registration from 7:00 a.m. to 7:45 a.m. with a registration fee of $25 ($12 for the Baby Stroller Division).

HELPING TO PROVIDE LEGAL AID TO THE DISADVANTAGED All proceeds from this race are donated to "AND JUSTICE FOR ALL" to help provide much needed legal aid to the needy and people with disabilities in our community. Please consider a charitable contribution over and above the registration fee. Funds benefit clients of Utah Legal Services, Legal Aid Society of Salt Lake and the Disability Law Center.

WHEN? Saturday, April 30, 2005 at 8:00 a.m. Day-of race registration, t-shirts, race numbers, and race packets with goodies can be obtained in front of the Law School between 7:00 a.m. and 7:45 a.m.

WHERE? Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah (just north of South Campus Drive (400 South) on University Street (about 1350 East).

NEW THIS YEAR! The Law Day Run has entered the 21st Century. New this year we have electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted immediately following the race and on **www.andjusticeforall.org.**

PARKING In the parking lot next to the Law Library at the University of Utah Law School (about 1400 East) accessible on the north side of South Campus Drive, just east of University Street (it's just a little west of the stadium.) Limited street parking available. Or take TRAX!

THE COURSE A scenic route through the U of U campus (similar or identical to last year). For race course updates as race day approaches, follow the links from **www.andjusticeforall.org.**

PRIZES FOR INDIVIDUALS AND SPEED TEAMS Medals for the top individual finishers in each age group (male and female). Awards for the top **Speed Team** members, too. **Speed Teams** consisting of five runners (with a minimum of two female racers) can register. All five finishing times will be totaled, with a special trophy to the winning Speed Team's registering organization. Please be sure to specify your team designation on your registration form - there's no limit to the number of teams an organization may have (e.g., RQ&N Team A, RQ&N Team B, etc).

CHAISE LOUNGE DIVISION AND BABY STROLLER DIVISION Register in the **Chaise Lounge Division,** bring your favorite chair and enjoy refreshments while waiting for runners/walkers to cross the finish line! Or register you and your little ones in strollers in the **Baby Stroller Division** and get t-shirts and goodies for both you and your little one. Pre-registration fee for the Baby Stroller Division is $10, race-day registration fee is $12. Registration for the stroller "pusher" is the general race registration amount ($22 pre-registration) — each registrant in the Baby Stroller Division registers and competes only in the Baby Stroller Division. Special prizes will be awarded to the top three participants to cross the finish line pushing a baby stroller.

IN ABSENTIA RUNNER DIVISION If you want to get involved, but can't attend the day of the race, you can register as an ***In Absentia*** runner and your t-shirt and goodie bag will be mailed to you after the race.

RECRUITER COMPETITION It's simple: the organization or individual who recruits the most participants for the Run will be awarded a trophy and air transportation for two on **Southwest Airlines** to any location they fly to in the U.S. To become the 2005 "Team Recruiter Champion," recruit the most registrants under your organization's name. (Last year's champion, Ray, Quinney & Nebeker, set a new record for most registrants!) And, most important, the more runners we register, the more funds we can donate to **"AND JUSTICE FOR ALL"**!

REGISTRATION —"And Justice For All" Law Day 5K Run/Walk
April 30, 2005 8:00 a.m. S. J. Quinney College of Law at the University of Utah

To register by mail, please send this completed form and registration fee to Law Day Run/Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. If you are making a charitable contribution, you will receive a donation receipt directly from "and Justice for all."

First Name: _____ Last Name:_____
Address: _____
City, State, Zip_____
Phone: _____ E-mail Address: _____
Birth Date _____

Recruiting Organization:
_____
(must be filled in for team recruiters' competition credit)

Speed Competition Team: (must be received by April 20, 2005)
_____
(team name)

Shirt Size (please check one)

❒ Child XS ❒ Child S ❒ Child M ❒ Child L

❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

❒ Long-sleeved T-Shirt (*add $6*) ❒ Tank Top (*add $6*)

Baby Shirt Size (*baby stroller participants only*)
❒ 12m ❒ 18m ❒ 24m ❒ Child XS

Division Selection (circle only one division per registrant)

DIVISION	MALE	FEMALE	DIVISION	MALE	FEMALE	DIVISION	MALE	FEMALE
14 & Under	A	B	45-49	O	P	Wheelchair	CC	DD
15-17	C	D	50-54	Q	R	Baby Stroller	EE	FF
18-24	E	F	55-59	S	T	Chaise Lounge	GG	
25-29	G	H	60-64	U	V	In Absentia	HH	
30-34	I	J	65-69	W	X			
35-39	K	L	70-74	Y	Z			
40-44	M	N	75 & Over	AA	BB			

Payment

Pre-registration (*before 4/20/05*)	$22.00
Baby Stroller (*add toregular registration fee*)	$10.00
Long sleeved t shirt/tank top	$ 6.00
Charitable Donation to "AND JUSTICE FOR ALL"	$_____
TOTAL PAYMENT	$_____

Payment Method
❒ Check payable to "Law Day Run & Walk"
❒ Visa ❒ Mastercard
Name on Card _____
No._____ exp. _____

RACE WAIVER AND RELEASE I waive and release from all liability the sponsors and organizers of the Run/Walk, the USATF and USATF-Utah, and all volunteers and support people associated with the Run/Walk for any injury, accident, illness, or mishap that may result from participation in the Run/Walk. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that the entry fees are not refundable..

Signature (or Guardian Signature for minor)
Date

If Guardian Signature, Print Guardian Name

THANK YOU TO OUR SPONSORS

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Pilot Electronic Filing of Debt Collection Complaints

by Denise Adkins

A little over a year ago, our firm was approached to take place in a pilot program with the Utah District Courts for debt collection filings. This pilot was working to develop a program to assist plaintiffs in filing pleadings with the courts electronically. The company who spear-headed this is called Tybera Development Group, Inc. Tybera approached our firm because we represent a collection agency with a significant volume of debt collection civil cases. After the discussion with Tybera on what their goal was, our firm jumped at the chance to be a part of this program. The possibility of a paperless system was enticing and the prospect of filing a complaint with the court and obtaining a civil number within minutes was even more exciting.

What this process entails is, via the electronic world, a PDF or TFF version of the complaint, summons, affidavit of service and any supporting documents are submitted to the court with a cover sheet that, in the court's computer's language, paves the way for the submission. The attorney signs the documents with his digital signature and payment is made with a credit or debit card. Within minutes, the case is assigned a civil number and a receipt is provided to the plaintiff. This is not only beneficial for the courts as it reduces the number of paper filings that are manually entered by clerks each day, but incredibly beneficial to the plaintiff as it reduces costs of courier service to deliver the filings to the court, reduces costs in paper, and reduces the risk of an untimely filing. Filings are taken any time of the day. However, if submitted after 5:00PM, they are clocked into the docket on the following business day. At the time default judgments or other motions or pleadings are submitted to the court for ruling, the clerks review all the documentation submitted with each electronic filing to make sure all the necessary documentation was received in its entirety.

This program will potentially allow other pleadings to be submitted electronically, such as default judgments and garnishments. With those as potentials, we are doing everything we possibly can to see that this program gets the support needed to make the possibilities a reality. A semi-paperless system can be beneficial to all who participate, especially collection attorneys. The capability of submissions of complaints being made electronically and receiving civil numbers back within minutes can assure that there will be no delays when the appropriate time period has elapsed for default judgments to be prepared and filed with the Court. Soon, default judgments can be filed electronically; entry of a default can be made within a week rather than in weeks, so long as all information submitted with the filing is correct. Then, of course, when garnishments can be submitted electronically, the benefits are endless. If you can submit a garnishment electronically, and after verification of the judgment is made, it can be returned to the attorney within minutes with a water mark seal showing its issuance by the court. The attorney can then print out the issued garnishment and hand it to a process server to assure that service of the garnishment is made expeditiously.

I know that the benefits and possibilities that this technology provide will only improve our firm's practice – imagine what it can do for you in your practice.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
04/21/05	**NLCLE: Basics on Criminal Law –** Utah Law and Justice Center, 645 South 200 East, Salt Lake City, UT – 5:30–8:30 pm. $55 for YLD Members; $75 for all others. Agenda TBA	3 CLE/NLCLE
04/28/05	**Annual Spring Collection Law Seminar:** Agenda (Cost, Time, CLE) TBA	
04/28/05	**NLCLE: Bankruptcy Basics in Utah.** 5:30–8:30 pm. $55 for YLD Members; $75 for all others; 3 Hours CLE/NLCLE. Agenda TBA	3 CLE/NLCLE
05/05/05	**Annual Spring Real Property Seminar:** Agenda (Cost, Time, CLE) TBA	
05/05/05	**Annual Spring Corporate Counsel Seminar:** Agenda (Cost, Time, CLE) TBA	
05/12/05	**Annual Spring Business Law Seminar:** Agenda (Cost, Time, CLE) TBA	
05/13/05	**Annual Spring Family Law Seminar:** Agenda (Cost, Time, CLE) TBA	
05/18/05	**Annual Spring Labor & Employment:** Agenda (Cost, Time, CLE) TBA	
05/18–21/05	**NITA Trial Seminar.** 8:30 am– 5:30 pm daily. Salt Palace Convention Center. $800. Initial registration limited to Litigation Section Members – Limited to 48. Agenda TBA.	Approx. 24 (including 6 NLCLE)
05/19/05	**NLCLE: Basics on Intellectual Property.** 5:30–8:30 pm. $55 for YLD Members; $75 for all others. Agenda TBA.	3 CLE/NLCLE
06/05/05	**Annual Paralegal Day Seminar.** Agenda (Cost, Time, CLE) TBA.	
06/10/05	**New Lawyer Mandatory.** 8:30 am–12:00 pm. This Seminar fulfills the Mandatory Seminar Requirement. Cost is $50.00. Agenda TBA.	
06/16/05	**NLCLE: Basics on Personal Injury.** Co Sponsored by the Utah Trial Lawyers Association. $55 for YLD Members; $75 for all others. Agenda TBA.	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.

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

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

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

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

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

NOTICE

Looking for copy of Jean V. Boren Trust, drafted for Arvil R. Boren in Weber County in 1984, probably executed February 13. Family needs to locate copy or attorney who drafted the trust. Contact Keith M. Backman at (801) 479-4777.

FOR SALE

Beautiful 5BR/3.5 bath, custom home w/many extras in quiet wooded park w/creek, in 38 unit planned unit dev in Kaysville (Brookhaven) on private street w/friendly neighbors. Association does yard and snow removal. Near access to Hwy89/I15, express buses to SLC/Ogden. Steal at $249,900. (801) 589-3102 or www.utahrealestate.com.

POSITIONS AVAILABLE

The Law Firm of Olson & Hoggan, P.C. located at 88 West Center, Logan, Utah 84321 (435-752-1551) is seeking to hire a certified Paralegal to work full-time. If you are interested please submit a resume and a cover letter to Marlin J. Grant.

City of West Jordan, Utah seeking trial litigator. (Salary Range $72,446 – $92,456; +generous retirement and benefit package). Must have 6 years of full-time paid employment in the practice of law, emphasis on federal and state litigation. Position provides a full range of legal services for one of the fastest growing Utah Municipal Corporations. A Juris Doctorate from accredited law school and Utah Bar membership is required. Complete job description and required City application may be obtained at www.wjordan.com or by calling Anna at (801) 569-5030. Completed application and resume must be received by 5 pm, Friday, April 1, 2005.

SALT LAKE LEGAL DEFENDER ASSOCIATION is conducting interviews for trial and appellate attorney positions. Salary commensurate with criminal experience. Spanish speaking applicants are encouraged. Please contact F. John Hill, Director, for an appointment at (801) 532-5444.

Durham Jones & Pinegar, AV rated law firm with 45 attorneys, in Salt Lake City, St. George and Ogden, Utah, seeks highly qualified associates (top 10% and/or Law Review) with five years or less experience in Corporate, Securities, Business Litigation, Real Estate, and Bankruptcy for its Salt Lake City office. Also seeks an Estate Planning attorney (5-15 years experience) for its St. George office. Send resume or inquiry to HR Manager at (801) 415-3500.

Myriad Genetics, Inc., is looking for a patent secretary/ patent paralegal to support an in-house patent practice group. Will prepare documents for submission to US and foreign patent offices, maintaining a patent prosecution docketing system, monitoring a deposit account at the USPTO, overseeing annuity payments, and providing general administrative support to the general counsel, and other attorneys, patent agents and law clerks. Must have good interpersonal skills, detail-oriented, highly motivated and able to work independently. Job Code: 1100-1344. Please send a resume and names of three professional references to: jobs@myriad.com, www.myriad.com, EO/AA Employer.

Prominent Salt Lake firm seeks to expand its business and transactional practice by adding an attorney with business transactional and/or real estate experience, and preferably some securities law experience. Attorney must bring a partial book of quality clients. Please send resume to: Christine Critchley, Utah State Bar, Confidential Box #15, 645 South 200 East, Salt Lake City, UT 84111-3834 or e-mail ccritchley@utahbar.org.

PUBLIC NOTICE

PART-TIME APPOINTMENT TO PANEL OF CHAPTER 7 TRUSTEES

The Office of the United States Trustee is seeking resumes from persons wishing to be considered for part-time appointment to the panel of trustees who administer cases filed under chapter 7 of the bankruptcy code. The appointment is for cases filed in the United States Bankruptcy Court for the District of Utah in the following counties: Beaver, Piute, Wayne, Iron, Garfield, Kane and Washington county. Chapter 7 trustees receive compensation and reimbursement for expenses in each case in which they serve, pursuant to court order under 11U.S.C.§330 and §326. Please note this is not a salaried position.

The minimum qualifications for appointment are set forth in Title 28 of the Code of Federal Regulations at Part 58. To be eligible for appointment, an applicant must possess strong administrative, financial and interpersonal skills. Fiduciary experience or familiarity with the bankruptcy area is desirable but not mandatory. A successful applicant will be required to undergo a background check, and must qualify to be bonded. Although chapter 7 trustees are not federal employees, appointments are made consistent with federal Equal Opportunity policies, which prohibit discrimination in employment.

Forward resumes to the Office of the United States Trustee, Attn: Cy Castle, 9 Exchange Place, Ste. 100, Salt Lake City, Utah 84111. All resumes should be received on or before April 1, 2005.

BARNEY & McKENNA, PC, A successful Law Firm with offices in St George Utah and Mesquite Nevada looking for a Transactional Attorney. Experience in Business law, real estate or construction preferred. Send or email (tom@3scorpions.com) confidential resume to Tom Calegory, Barney & McKenna, 63 S 300 East, St George, UT 84770.

Small Downtown Litigation Firm seeks associate with 2–5 years litigation experience. Please send resumes to: Christine Critchley, Utah State Bar, Confidential Box #7 645 South 200 East, Salt Lake City, Utah 84111, or ccritchley@utahbar.org.

Expanding bankruptcy firm seeking associate with bankruptcy experience. Salary plus percentage based on experience. Send resume to Law Firm PO Box 902161 Sandy UT 84090.

AV rated Salt Lake City law firm seeks associate attorney with 1–5 years litigation experience, insurance defense preferred. Send resumes and references to Marli Lloyd at Morgan, Minnock, Rice & James, L.C., 136 South Main Street, Suite 800, Salt Lake City, Utah 84101.

AV rated litigation firm in downtown Salt Lake is seeking an experienced trial lawyer. Salary commensurate with experience. Please send resumes to: Christine Critchley, Utah State Bar, Confidential Box #22, 645 South 200 East, Salt Lake City, Utah 84111, or ccritchley@utahbar.org.

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Executive Offices in Old Town Midvale – Easy freeway access. Fully restored historic building. DSL & network ready. Flexible lease terms. Call Chris Davies 352-8400.

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UTAH STATE BAR STAFF

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

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

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

Maud C. Thurman
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

Diana Gough
Assistant to General Counsel
Tel: 297-7057

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

Admissions
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Deputy General Counsel
in charge of Admissions
Tel: 297-7024

Christie Abad
Admissions Assistant
Tel: 297-7025

Bar Programs
Christine Critchley
Bar Programs Coordinator
Tel: 297-7022

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Connie Howard
CLE Administrator
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Stephanie Long
Section Support
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Consumer Assistance Coordinator
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Pro Bono Coordinator
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Technology Services
Lincoln Mead
Manager Information Systems
Tel: 297-7050

Brooke Bruno
Web Content Coordinator
Tel: 297-7049

Receptionist
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MCLE Administrator
297-7035

Member Benefits
Connie Howard
297-7033
E-mail: choward@utahbar.org

Marion Eldridge
297-7036
E-mail: benefits@utahbar.org

Office of Professional Conduct
Tel: 531-9110 • Fax: 531-9912
E-mail: opc@utahbar.org

Billy L. Walker
Senior Counsel
Tel: 297-7039

Kate A. Toomey
Deputy Counsel
Tel: 297-7041

Diane Akiyama
Assistant Counsel
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Ingrid Westphal Kelson
Paralegal
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Paralegal
Tel: 297-7043

Amy Yardley
Assistant to Counsel
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Angela Fisher
Intake Clerk
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