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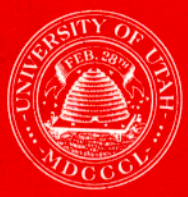

SYMPOSIUM—CURRENT ISSUES IN THE PRACTICE OF LAW

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LAW PRACTICE ISSUES AND DEVELOPMENTS IN UTAH

SHOULD LAWYERS SERVE AS DIRECTORS OF CORPORATIONS FOR WHICH THEY ACT AS COUNSEL?

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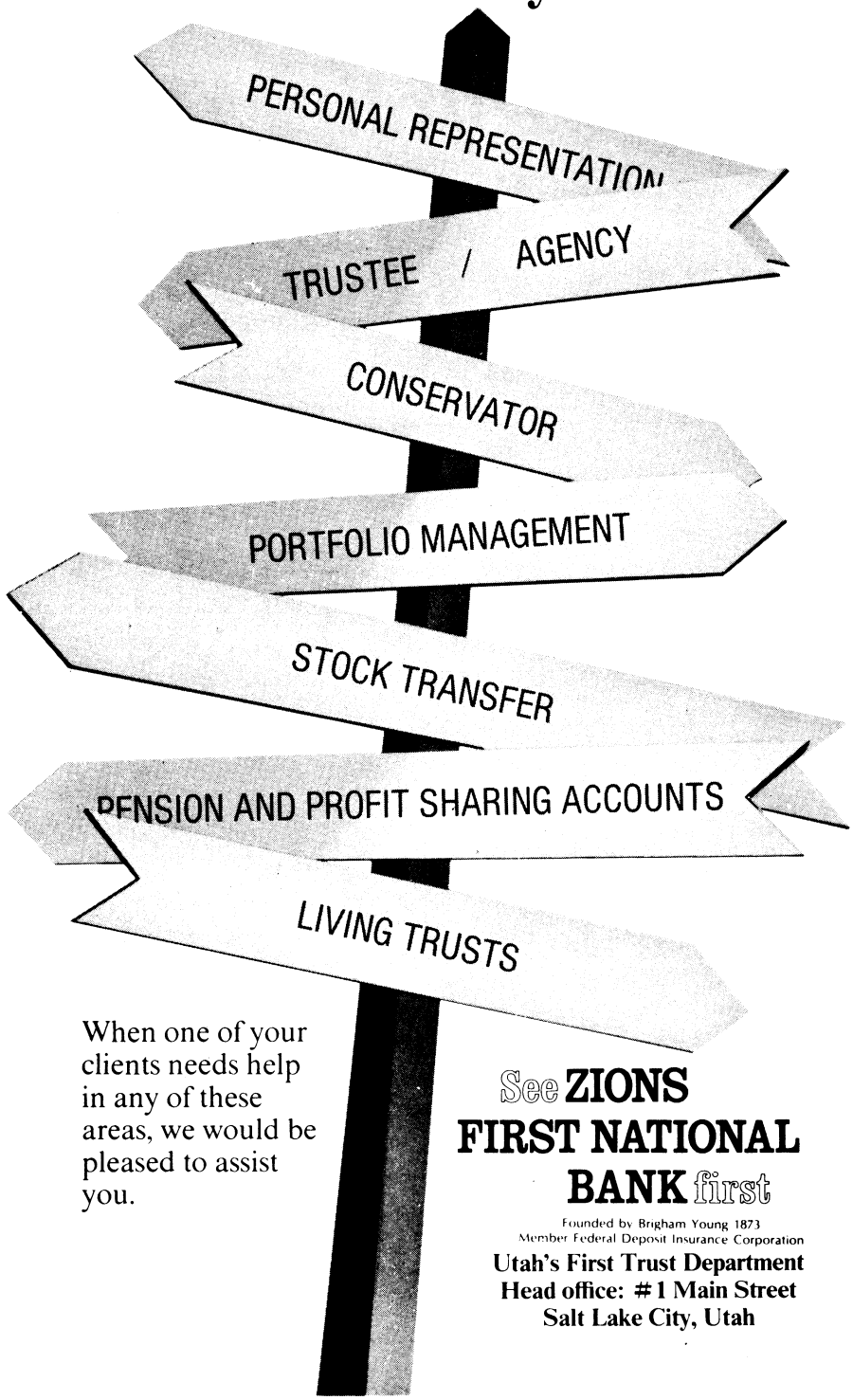

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Symposium—Current Issues in the Practice of Law

INTRODUCTION

Issues surrounding law practice loom larger today than at any time in the recent past. The legal profession confronts a crisis of trust concerning both the effectiveness of those who currently practice law and the ability of the current system to efficiently deliver legal services to those who need them. In recent years, this crisis has been manifested not only by legal challenges to time-honored rules of professional responsibility, such as prohibitions against lawyer advertising, but also by polls showing a decline in trust in our legal system and in the practitioner.

The bar is reacting to these challenges, sometimes defensively in response to judicial rulings, but also constructively as it seeks ways of improving the quality and expanding the availability of legal services, as well as developing new methods and forums for resolving disputes. At the same time, some within the profession question whether some aspects of the drive for consumerism will undermine time-honored values of the profession which actually benefit and protect the consumer. This issue of the *Utah Law Review* includes several articles addressing some of these issues currently confronting the legal profession.

In addition, as a service to members of the Utah State Bar, the editors have also included a section on law practice issues and developments relating most directly to Utah. The individual sections of this part treat the issues raised by proposals on specialization and alternatives to the bar examination. There are also reports on activities of the bar designed to increase access to Salt Lake City's small claims court and on the activities of the Young Lawyers Section in providing a structure for integrating new members into the Utah Bar.

Emerging Changes in the Practice of Law

*Louis M. Brown**

I. An Historical Introduction

A. *The Fable of the Telephone*

At one time in the practice of law there were no such things as telephones. Whether or not our history books contain an account of the effect that the telephone had upon law practice, it seems to me that the "fable of the telephone" is likely more truth than fiction.[1]

Before the advent of telephones, all communications between the client and lawyer were conducted face to face or by correspondence. Presumably most correspondence from the lawyer was marked "confidential," and certainly all face-to-face discussions were treated by the lawyer in a strictly confidential manner. It is easy to imagine the telephone salesman endeavoring to convince lawyers of the benefits of the telephone, and just as easy to imagine that before we lawyers would admit this new invention into our law office, we would insist on carefully considering all the consequences, especially those relating to our rules of professional responsibility. Thus, no doubt our first reaction to the possibility of installing a telephone was a resounding no. The partners in our hypothetical law firm may even have bolstered our sales resistance by means of a full fledged memorandum regarding confidential communications. The fact was that all phone calls had to go through a central operator, who was in a position to eavesdrop—a fact that might well alarm lawyers anxious to protect the confidentiality of lawyer-client conversations. So we could happily shield ourselves from change by sincere reference to our rules of professional responsibility.

Then one day perhaps a client came to our office and asked if he might use the telephone. We told him that we had no telephone and explained why. He understood the reason, but suggested that the office could do a better job of accommodating his needs. Let us suppose that the discussion resulted in a partners' meeting, where it was decided that the office might install a telephone in the reception room for the use of clients. Still, we held strictly to the view that telephones could not be installed in lawyers' offices.

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* Professor of Law, University of Southern California Law Center.

1. The fable of the telephone, and the fable of the typewriter which follows, are supported by research found in V. Raum, Readings in the Changing Practices of the Legal Profession in the Nineteenth and Early Twentieth Centuries (unpublished research paper on file with the author).

This worked rather well for a time, until another client commented that it would be a considerable convenience if the law office were to permit the installation of a telephone in the lawyer's office. In that way, the client could communicate from his office to the lawyer. The client was sensitive to our concern about the principle of confidential communications, but still pushed forward with the suggestion that the telephone be installed. After a partners' meeting, we decided that we could accommodate the client's wishes because confidential communications are within the control of the client. So we installed telephones in some of the lawyers' offices. Those who were unconcerned about confidentiality could now telephone us, but the rules of our office remained that we would not use a telephone to call a client. Of course, it could not have been long before the suggestion occurred that our attorneys might obtain the clients' consent to call them. If the client were to consent, we could telephone that client directly. And so, in this very thoughtful manner, we came to have telephones in our offices.[2]

B. The Fable of the Typewriter

At another point in the history of our fictional law office, someone acquainted us with a gadget called a "typewriter." But we were very familiar with the manner in which legal documents should be prepared. Important documents were always prepared in manuscript by persons carefully trained to copy and write with great accuracy. Our law office had no one trained to operate a typewriter. That bothered us a little bit. But what bothered us a great deal more was the fact that there were no cases in the books upholding the legal validity of documents prepared on a typewriter. The typewriter salesman assured us that a typewriter would reduce office costs and that we could easily obtain adequately trained typists. In fact, he even offered to help train and educate the firm's present, rather efficient scrivener in the use of the typewriter. He pressed upon us the notion that we might still continue to use the well-tried methods of copying for important documents, but employ the typewriter for documents of less importance and for communications of

2. According to one researcher, predecessors to several of New York's largest firms did, in fact, resist the innovation of the telephone. At a predecessor of the Cravath, Swaine & Moore firm, the telephone was installed in the entrance hall and enclosed in a "telephone closet." It was several years before key partners would allow extensions on the partners' desks. V. Raum, *supra* note 1, at 22. Similarly, when Mr. Wardwell joined a predecessor of Davis, Polk, Wardwell, Gardiner & Reed, in 1898, he found that the only telephone was in the clerks' office and was to be used only by the experienced clerks. Again, it took some time before individual phones were installed on each partner's desk. *Id.*

the ordinary sort. Perhaps the firm consulted with some of our clients and found that they were beginning to use the typewriter. Even more persuasively, a case was reported in which a typewritten document was admitted into evidence in a trial. While we eagerly awaited a decision of the appellate court on this point, we decided to install one typewriter for certain internal communications and occasional letters to our clients.[3]

C. *The Fable of the Female Legal Secretary*

Accompanying these disturbing technological changes were shifts in the workforce which these technological changes brought about. The first competent people in the use of both telephones and typewriters were those who had been employed in law offices—all men, of course. But we eventually found that women were claimed to be competent and efficient operators of both the telephone and the typewriter. Indeed, as time went on it became more and more difficult for us to find proficient male typists. This was a very disturbing factor in our law office's operations. Knowing the importance of the prestige of law offices, and the need for secrecy regarding the confidential communications, we were, as careful human beings, mindful of the possible attitudes of our clients. We were especially concerned about modifying the environment in our office in a way that might disturb, in any particular way whatsoever, the prevailing balance. Although some in our office urged that it might be proper to engage the services of a woman as an employee, we resisted this temptation on the ground that we had no idea how our clients would regard such a precipitous change. Furthermore, a few among us voiced concern because of the prevailing view that women gossip too much and we were naturally anxious about any potential threat to the confidentiality of office communications. However, as time went on our hypothetical firm did allow one of the men in our office to employ a female secretary, but only after careful scrutiny and assurances that she would undertake her duties with appropriate office decorum.[4]

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3. Lawyers did, indeed, invest large amounts of time in copying important documents by hand, frequently using scriveners but sometimes doing the job personally. *See* V. Raum, *supra* note 1, at 13-16. The typewriter, naturally enough, received resistance from older lawyers. At the predecessor of the Cravath firm, one partner refused to allow the use of typewriters because "[h]e felt that the clients would resent the lack of personal attention to their business implied in sending them machine-made letters." V. Raum, *supra* note 1, at 17, *quoting* 1 R. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 449 (1964).

4. The first professional legal secretaries were males, and female secretaries were strongly resisted in some law offices. For example, in the 1890's, one of the partners in a significant New York firm insisted that a recently hired female stenographer be released. New

D. *The Meaning of the Fables*

It is easy to smile at the timid accommodation to progress made by the lawyers of the 1890's, but present-day counterparts of these fabled accounts may be unfolding before our very eyes. Resistance to change appears to be a psychological constant and is apt to be no stranger to the law offices of the 1980's.

The material that follows attempts to survey the area in which change appears inevitable and will likely be resisted; it may well be a survey of emerging "fables." Like all surveys, this article is limited by the breadth of its treatment. It is my intention to identify the trends and the likely causes of resistance to them, suggest some of the ways in which these changes might be accommodated, and, in some cases, point out the pitfalls to be avoided. My purpose will be served if members of the legal profession are in some measure induced to take a new look at old ways.

II. New Approaches to Increased Productivity

A. *Technological Innovations*

The automatic typewriter is common today in many law offices and significantly speeds up the preparation of documents. But, if we as lawyers were not tied to the notion that clients must receive a ribbon copy, we might find additional ways to prepare documents for even less expense. Documents prepared on the printing press are as legal and binding as those prepared by the typewriter or by a scrivener, and where standardized documents are appropriate, these can be produced most economically by printing. Furthermore, lawyers might yet decide that, especially for middle income clients, the best way to produce documents at reasonable cost is to combine the cut-and-paste techniques with the use of a photocopy machine. Appearance of a document like the appearance of good clothing can be important, but there is a cost. We must not forget that the basic service for which lawyers are paid is the exercise of legal judgment. In general, we need to be prepared to use technology to perform this most essential task more effectively and not be alienated because it alters traditional procedures.

B. *Paraprofessionals*[5] *and the Fact Gathering Process*

Much of the time consuming work done in law offices does not

York's Cravath, Swaine & Moore employed mainly male secretaries until after World War II. V. Raum, *supra* note 1, at 23-24.

5. The literature on legal paraprofessionals has expanded. *See, e.g., Symposium on*

directly concern law; rather it concerns facts. Law offices spend a great deal of time gathering and organizing factual materials. With this in mind, there are two basic changes occurring within law offices. First, lawyers are concluding that fact gathering and organization can be accomplished by properly trained non-lawyers.[6] In some law offices, this idea may still appear to be as startling an innovation as any of the changes appeared to those who resisted innovation in our fables. Second, new technology may even further affect the fact-gathering processes in law offices. The computer has been used in medical practice as a means of gathering and organizing facts about patients. The same development is emerging in law practice. There are certain relatively standardized fact-gathering operations within law practice which could be accomplished reasonably well, and perhaps very well, by programming a computer.[7] But you might say—What happens to the lawyer? What happens is that the lawyer must focus upon the exercise of judgment and the total decisional processes that accompany the management of the client's affairs. Relieved of time-consuming details, lawyers might concentrate on the complicated human factors in their client's problems, and upon the very complex decisional processes for which their clients need a lawyer's counsel.

It may even be that the fact gathering process, especially for middle and low income clients, can be centralized. Although a computer with such capacities would likely be too expensive to be owned by individual law offices, the computer fact-finder could be a community resource, with many law firms buying computer time, much the way other businesses do today.

C. *New Directions in Legal Research*

Legal research is an important skill for which law students receive some training. Rules regarding the practice of law do not require that legal research be done by a member of the bar, and, in

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Legal Paraprofessionals, 24 VAND. L. REV. 1077 (1971). Bar association interest is evidenced by activities of the Standing Committee on Legal Assistants, American Bar Association, and comparable committees in numerous state and local bar associations.

6. The implicit assumption of this observation is that fact work in a law office may be done by non-lawyers and that fact work does not involve unauthorized practice of law. *See* Brown, *The Authorized Role of the Legal Assistant*, 36 UNAUTH. PRAC. NEWS 9 (1971-72).

However, there is a good deal more we need to know. We need to determine the amount and nature of such fact work now done in law offices. Even more broadly we should investigate, report, and examine the total activities of non-lawyers in law practice and the division of work between lawyers and non-lawyers.

7. *See* 1 COUNCIL ON LEGAL EDUC. FOR PROFESSIONAL RESPONSIBILITY, Sept. 19, 1978, at 1.

fact, legal research is often done by non-lawyers, such as law students. Some law schools have even formalized the research function through student research units.[8]

To assist in legal research we invented an extensive system of indexing and cataloguing. The computer has already become another, more sophisticated, method for indexing and cataloguing legal materials.[9] In the future, the development of the computer to assist in legal research may lead to more significant changes in our research habits. Even at the present stage, it would be helpful if we knew a good deal more about the kind of research that lawyers in fact do, including both the kinds of matters researched and the time involved in doing legal research. It may be that studies currently in process concerning lawyers' working habits[10] will reveal something of this sort, and may be helpful in designing appropriate new uses for computers in law practice.

D. Lawyers and Non-Lawyers

The increasing use of paraprofessionals is part of a general trend toward a larger ratio of non-lawyers to lawyers in law offices. With only scant past and current data on the subject being available, we might discover more about the impact, and the possibilities suggested by, the growing number of non-lawyers working with lawyers. I would guess that while the ratio of non-lawyers to lawyers in traditional practice is about one to one, the ratio now in larger offices is probably more like two non-lawyers to one lawyer. In some of the newest law offices in the country, the ratio is more likely five non-lawyers to one lawyer. The use of non-lawyers in increasing proportions has the potential of greatly increasing output and lowering costs. Surely our goal should be to move in the direction of having the lawyer performing increasingly fewer tasks that might be performed by a non-lawyer, at least if efficient service to our clients is the goal.

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8. *See, e.g., Legal Research Programs at Law Schools*, 64 A.B.A.J. 1589 (1978) (brief summaries of such programs, including fees, at eight selected law schools).

9. *See generally* J. SPROWL, MANUAL FOR COMPUTER-ASSISTED LEGAL RESEARCH (1976) (describing three current systems for computer-based legal research—Lexis, Westlaw, and Juris).

10. One such study is reported in AMERICAN BAR FOUNDATION, ANNUAL REPORT 24 (1977): "This study is an analysis of data drawn from in-depth interviews with lawyers in private practice to determine what kinds of work modern lawyers are doing and how that work is organized and carried out." *Id.*

E. Independent Servicing Units for Solo Practitioners

Current figures indicate that about half of the lawyers who practice in the United States are either solo practitioners or are in relatively smaller producing units of law practice.[11] With the changes likely to occur in personnel ratio, in technological developments, and in specialization, what of the country lawyer, the solo practitioner, and the small law office? There is the risk that these glorious independent practitioners may find it difficult to compete against the large law offices.[12] All is not lost—there are advantages to the client who seeks to develop a professional relationship with a solo practitioner. How do we then safeguard and preserve the smaller law practice units?

If the competitive existence of the solo practitioner is threatened because the larger law offices have cut costs by increasing nonlawyer personnel or by implementing technological developments, perhaps we can rescue the solo practitioner by creating independent servicing units. The automatic typewriter furnishes something of an example. If the larger law office can produce documents at lower cost and better quality because it can afford the complex automatic typewriter, perhaps there is a need for businesses providing automatic typewriters on a time-sharing basis for small law offices. This way, the solo practitioner could use automatic typewriters as they needed them and could avoid investing in expensive equipment. If the time-consuming fact gathering process is conducted in larger law offices by paraprofessionals, why not an independent company of paraprofessionals trained to provide this service for solo practitioners on a piece-work basis? Indeed, lawyers have long been accustomed to the use of independent investigators for some kinds of factual investigations.

It would take a bit of business ingenuity for some independent entrepeneurs to organize such businesses to service the legal profession, and, in fact, this has occurred in some small measure, at least, in connection with legal research. It could be applied to the preparation of various documents. Such services could also be provided in connection with law office administration. One can imagine a per-

11. In 1970, of the 236,085 lawyers in private practice, 118,963 were engaged in individual practice. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977, 181 (98th ed.).

12. If the solo practitioner is to compete with large offices, he must find ways to obtain some of the advantages that size affords. For a rough "blue-print" using the model of larger offices to develop legal service producing units for moderate income clients, see Brown, *Law Offices for Middle Income Clients*, 40 CAL. ST. B.J. 720 (1965). *See also* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 205-24 (1970).

son setting himself up as an independent contractor in law office administration with a view to administering several different small law offices. Presently computers are being used by law offices for certain purposes like internal accounting. What needs consideration is the expansion of our current ideas of independent units to service law offices.[13] This may not always be an easy road for independent contractors or for lawyers, but it could be the kind of development that can preserve the viability of solo practitioners.

III. The Structure of the Law Office

A. *People in the Law Office*

There are some legal developments that may come under the heading of sociological or humanistic changes. Some of these are occurring within law offices. In smaller offices we are familiar with the distinction between lawyers and non-lawyers, and in larger offices, we discover that lawyers are classified as either partners or associates. In even larger firms, lawyers are further divided into categories of partners and categories of associates. These categories or stratifications are apparent not only in the monetary compensation, but also in certain status symbols like position of one's name on the letterhead, size of an office, physical location within the office, and management inter-relationships.[14] Something of the same kind of sociological structuring occurs among non-lawyers in law offices. The developing scene needs to accomodate to two other sorts of individuals whose status structure within law offices has yet to be fixed.

1. The Status of the Paraprofessional—The legal paraprofessional or legal assistant stands somewhere between the legal staff and the non-legal staff. Recently there has been much discussion and considerable effort directed toward educating and training individuals to perform certain tasks traditionally performed by lawyers. By developing various skills, especially fact gathering skills, these individuals can, it is hoped, reduce the costs of operations in law offices. The oft-repeated comment is that lawyers may be pricing themselves out of the market and must find ways to reduce the costs

13. Additional data on the uses by lawyers of independent contractors would be helpful. Lawyers now employ process servers, investigators, probate assistants, accountants, and various sorts of research organizations. In connection with incorporation, and perhaps related activities, there are at least two independent companies which serve the legal profession—U.S. Corporation Service and Prentice-Hall Corporation Service.

14. For a study of the relationships within large law firms, see E. Smigel, Wall Street Lawyer: Professional Organization Man? (1969).

of legal services. While the employment of paraprofessionals may reduce costs, it may also present some problems with respect to the human environment of the law office. The sociologist interested in status structures would inquire about the status of the paraprofessional relative to others within the law office group, especially when some lawyers can still be heard to say that they will not employ paraprofessionals because of possible adverse reactions of clients.

2. *The Status of the Specialist*—Perhaps less severe, but nevertheless of some importance, is the growing pressure in the direction of recognized specialization within law practice. Specialization is a development that has attracted considerable interest. Historically, members of the bar could hold themselves out as specialists only in the fields of admiralty, trademark, and patent law.[15] The Code currently permits other specialties when authorized and approved by the entity responsible for the supervision of lawyers under state law.[16] Although the adjustments to lawyer specialization are likely to come relatively easily, we must be aware of the possible effect of specialization on the structure of a law firm.

B. *Insured Legal Opinions*

With cost-cutting in mind, some non-lawyers have developed alternative enterprises which accomplish some of the activities that go on in law offices.[17] Lawyers tend to call this competition with lawyers, and indeed that is precisely what it may be. One example is the use of title insurance policies, which has replaced the older methods of lawyers' opinions rendered after a real property title search. Some of us assert that title insurance policies are usually better, cheaper, more rapid, and financially more secure than lawyers' title searches. It is conceivable that there will be organizations established to convert the traditional legal opinion into an "insurance policy,"[18] thereby further revising the use made of lawyers. It is conceivable that, for some purposes at least, a business could be set up to insure the tax consequences of a transaction.[19] We

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-14.

16. *Id.* DR 2-105(A)(4). *See generally* SPECIAL COMMITTEE ON SPECIALIZATION, ABA, LEGAL SPECIALIZATION (1976).

17. These activities include: estate planning, insolvency counseling, do-it-yourself divorce assistance, and claims adjusting.

18. *See* Brown, *Preventive Law: Insured Legal Opinions*, 36 CAL. ST. B.J. 411 (1961), *reprinted in* 1961 INS. L.J. 712.

19. An Internal Revenue Service ruling, when obtainable, strongly approximates an insurance policy. *See* Brown, *From the Thoughtful Tax Man*, 48 TAXES 198 (1970). *See also* M. ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 127-30 (1973) (discussing whether governmental administrative agencies should charge fees for advice).

can have a lawyer's opinion regarding the validity of a patent. Why not an insurance policy insuring the validity of a patent? Couldn't we insure an opinion that a course of conduct is not a breach of a contract? We might even consider an insurance policy that gives financial protection against the possibility that an injunction will issue if a course of conduct is undertaken.

C. *Law Office Administration*

The enlargement of the size of law offices in this country suggests the need for developing administrative techniques for law offices. It is no longer uncommon to operate a law office involving one hundred or more employees.[20] Even a law office of twenty-five requires somebody to oversee its operations. So little attention has been given to law office administration that it is nothing short of remarkable that law offices have grown to their present size.[21] There is likely to be a new emphasis on hiring lawyers whose special capacity is law office administration. Although lawyers have always felt that their special capacities lie in the practice of some aspect of substantive law, attorneys cannot practice law without being contained within an appropriate organizational structure. We must come to recognize that law office administration is a function worthy of the highest partnership recognition.[22] Scarcely, if ever, do law offices employ young lawyers with a view to developing their skills in law office administration, and the subject is almost without any recognition in legal education. Still, it is noteworthy that law office administration is the main focus of attention of the American Bar Association's Section on Economics of Law Practice.

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20. In 1969, a work dealing with Wall Street law firms pointed out that they "usually house their 50 to 125 . . . lawyers and 100 to 230 non-professional workers on three or four floors in the Wall Street district." E. SMIGEL, *supra* note 14, at 206. A good guess is that the size of many law firms have doubled or tripled since that writing.

21. There are only a few journals in this field. Among them are LAW OFFICE MANAGEMENT AND ECONOMICS and LEGAL ECONOMICS, produced by the American Bar Association. Articles concerning law office management also appear occasionally in THE PRACTICAL LAWYER. Law reviews rarely, if ever, touch the subject. There are, however, several helpful treatises. H. ALTMAN & R. WEIL, HOW TO MANAGE YOUR LAW OFFICE (1978) (looseleaf); LAW OFFICE ECONOMICS AND MANAGEMENT MANUAL (Vol. I, P. Hoffman ed. 1978, Vol. 2, R. Bigelow ed. 1977) (loose-leaf and current supplement); THE LAWYERS HANDBOOK (rev. ed. 1975); MANUAL FOR MANAGING THE LAW OFFICE: SYSTEMS AND PROCEDURES (1970) (loose-leaf). There is one law school teaching book. STRONG & CLARK, LAW OFFICE MANAGEMENT (1974).

22. In business organizations, the highest recognition in status and compensation is accorded to those who evidence the greatest administrative acumen. Some substantive know-how is, of course, essential, but such knowledge alone does not demonstrate executive ability. An interesting research project could be developed around the theme of determining the backgrounds of those who are the managing partners in law firms.

D. *National Law Offices*

We are currently seeing the development of essentially national law offices, structured to serve clients in a number of different states and throughout the United States. To some, this emerging development may seem as horrendous as did the telephone in the last century, but the trend will not likely be reversed. There are already law firms with branches overseas, and firms with law offices in various states and in Washington, D.C.[23] Many of the clients of such offices are interstate and international in character and are better served by national law offices. If we ever implement a national bar examination, or some other means of recognizing the right of qualified attorneys to practice law in all states,[24] we will have made possible national law offices in the fullest sense.[25]

E. *The Full Service Professional Office*

Our society is constantly growing in complexity. Looked at from a client's point of view, it is often difficult to determine what sort of professional can best assist in handling a problem. Does the client need a lawyer, a marriage counselor, a psychiatrist, or a social worker? Does the client need a lawyer, a business advisor, an accountant, or an engineer? Or does the client need something of a combination of these people? Is it conceivable that there could be organizational modification of the way in which various professionals go about helping individuals in this complex society of ours? Do we need, can we use, should we have, various sorts of full service professional offices? Were it not for the obstacle of certain rules of professional conduct,[26] we might now have a combination of lawyers and accountants—or do we have them now in some other form? Is it better, as we have it now, for a lawyer to refer the client to a marriage counselor, than it would be for the lawyer and the mar-

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23. *See* Brackel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1978); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967); Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

24. *See* Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978) (calling for reciprocity among the states if a lawyer is admitted to the bar in any state).

25. Although firms with offices in more than one state do work on a national scale, they are restricted by state laws limiting the right to practice to attorneys admitted to the bar of the respective state. Thus, the flow between offices is not as unrestricted as it might be, and expansion to new cities frequently involves the need to recruit members of the local bar to get the branch established.

26. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (Dividing Fees with a Non-Lawyer), DR 3-105 (Forming a Partnership with a Non-Lawyer).

riage counselor together to set up an office to service the needs of marriages in trouble?

IV. Emerging Changes in Attorney-Client Relationships

A. *New Attorney-Client Relationships*

Shift in traditional lawyer-client relationships may result from new programs that alter both the way lawyers are paid and the sources of their fees.[27] The changes that are likely to occur will not affect the lawyer-client relationship directly, but are likely to be more subtle. We ought not to fear such changes nor seek to deter their occurrence, but rather to take account of how our law practice might accommodate, and ecen be improved by, the change that is inevitable. One such change, group legal services, is not necessarily a new concept. For many years there have been programs in which a group of clients have employed the services of a lawyer. This idea is expanding in the direction of revising the source of the payment of fees, and may to some extent revise the emphasis which lawyers now seem to place upon the services they are rendering.[28] The expectation is that, for the average client, group legal services may be of better quality and serve a great many more people.[29] The related concept of prepaid legal services, or legal cost insurance, will also cast a searchlight upon the manner in which lawyers render services and the fees that they charge for doing so.[30]

B. *Single-Client Lawyers*

We may also see some growth in law practice for single clients. Basically, there are two categories of single-client lawyers: lawyers employed by the government and lawyers employed as corporate counsel for a single corporate client. The figures show that in 1970

27. A brief summary of the developments is found in Bates v. State Bar, 433 U.S. 350, 398 (1977) (Powell, J., concurring).

28. Group legal service plans, especially of the prepaid variety, may set standards or limits with respect to the amount and nature of the legal services. For example, many such plans provide for an hour or two of consultation per year. The expectation is that clients would avail themselves of such service and that lawyers would have the impetus to develop more fully the area of preventive law practice.

29. Testimony of Timothy J. Muris and Fred S. McChesney before the ABA Commission of Advertising (August 3, 1978).

30. The subject of delivery of legal services receives some attention in professional writing. *See, e.g., Symposium: Legal Services Delivery Systems for the 1970's*, 4 U. Tol. L. Rev. 353 (1973). In legal education the subject has not received the recognition it deserves. *See* Brown, *Delivery of Legal Services—A Stepchild in Legal Education*, in 3 New Directions in Legal Services 106 (1978). The efforts of the ABA are evidenced by the establishment of Consortium on Legal Services and the Public. In a recent speech, Judge Marvin E. Frankel submitted that the idea of publicly funded legal services for the public should be seriously considered. M. Frankel, Justice: Commodity or Public Service (Oct. 1978) (reprinted by the Poynter Center, Indiana University).

something like about twenty-five to thirty percent of practicing lawyers were employed by a single client, either the government or business enterprises.[31]

Single-client law practice alters some of the traditional notions about the practice of law and preserves some others. It preserves the basic concept of the retainer, that is, an arrangement of compensation whereby the lawyer agrees in advance not to work for another client having potentially conflicting interests. On the other hand, single-client practice raises the question of the independence of the members of the bar as a practicing profession. A pragmatic response is that this question ought to have been raised years ago when the government, of necessity, began employing lawyers. Moreover, society and the bar have, generally speaking, gotten along rather well with such single-client lawyers. Still, changes in the relationship between lawyers and clients in the mechanism under which lawyers will be employed, and the method of operations of law offices, may receive greater attention in the future than they have in the past.

C. *Shifting the Burden of Lawyers' Fees*

Perhaps we will see a need to change some of our rules of professional conduct to accommodate the changing methods of providing legal services. Public funds have long been used to pay lawyers to defend individual defendants in criminal cases. The public defender's office is no longer a novel idea. There are numerous administrative agencies in local and national government staffed by employees who are paid by the agencies but who advise private individuals who deal with those agencies.[32] If we expand that notion into something like an ombudsman idea, we come very close to something like a full client service funded by governmental funds, at least with respect to governmental relationships.

The individually or charitably funded legal clinic is now an old

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31. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977, 181 (98th ed.) gives the following data, based on the MARTINDALE-HUBBELL LAW DIRECTORY:

All Lawyers	355,242	.124
Lawyers Reporting	324,818	125
Status in Practice		
Government	35,803	.127
Judicial	10,349	128
Private Practice	236,085	129
Salaried	40,486	130
Inactive/Retired	16,812	131

The estimated percentage of attorneys working for single employers was arrived at by combining the figures for government and salaried attorneys.

32. *See* M. ASIMOW, *supra* note 19.

and traditional method for providing legal services for people who cannot otherwise afford such services. In recent years, this concept has developed into offices sometimes identified as public interest law offices. Although the purposes and functions of such offices are different from the old line legal clinic, they often provide the means for protecting rights which might otherwise go unprotected because individuals lacked the resources to pay costly attorney's fees. Public interest law offices are part of the trend toward viewing basic legal protection as a fundamental human right.

One can also speculate whether more of our legal fees should be paid out of public funds. For example, while the traditional rule in the United States is that each litigant bears his own attorney's fees, the losing litigant bears that burden in other legal systems. Since there are already a number of serious statutory modifications of the rule that each litigant bears his own costs,[33] we should consider shifting the burden of payment of attorney's fees in those situations where the government itself is the litigating party. In this situation, the fees for the lawyer representing the government are paid by the taxpayers. The private litigant must bear his own attorney's fees even when he obtains a judgment in his favor. In such a case he must not only bear the cost of his lawyer's fees, but a proportionate share, small as it may be, of the tax monies used to pay the fees of government counsel. Should we change the rules, or seriously consider changing the rules, so that the attorney's fees of the successful litigant in certain kinds of government matters, perhaps criminal cases, are borne, in whole or in part, out of public funds?[34]

D. A Free Market for Legal Services?

Lawyers have long enjoyed a monopoly on the practice of law, but that status is increasingly under attack.[35] The attack on the

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33. *See* Berger, *Court-Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 303 n.104 (1977).

34. *See* Brown, *Should the Government Reimburse Taxpayers' Attorneys Fees in Tax Litigation?*, 45 A.B.A.J. 978 (1959). A recently enacted statute gives a successful defendant attorney's fees in "an action or proceeding, by or on behalf of the United States." 42 U.S.C. 1988 (1976). *But see* Key Buick Co. v. Commissioner, 68 T.C. 2706 (1977) (denying fees to a victorious taxpayer-petitioner because statutory language requires that the action be initiated by the government).

35. *See, e.g.*, M. FRIEDMAN, CAPITALISM AND FREEDOM 152-53, 155-56 (1962) (lawyers and doctors restrict entry to the professions by controlling admission standards for professional schools and by promulgating rules against unauthorized practice); F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY 288-93 (1972); Llewellyn, *The Bar's Troubles, and Poultices—and Cures?*, 5 LAW & CONTEM. PROB. 104 (1938) (unauthorized practice viewed as "using the processes of law to define and protect a monopoly"); Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974

bar's monopolistic status sometimes comes indirectly, from modifications in both rules of law and procedure, such as the development of settlement procedures for handling auto accident claims[36] and no-fault divorce. A great deal of administrative law practice can now be handled by non-lawyers.[37] Even the settlement of disputes is not something exclusively within the province of the courts or lawyers. The growth of arbitration in this century is rather phenomenal, and there is no requirement in arbitration that lawyers be engaged to represent clients, or even that the lawyers be the umpires, referees or judges. Yet, the man from Mars could scarcely distinguish between the determination of a dispute in arbitration and the determination of a dispute in the courts.

Are we heading for something like a free market in law practice? A free market would be a situation in which there would simply no longer be a monopoly on the practice of law. Clients would have a free choice whether to employ a lawyer or a non-lawyer to represent them in any matter. We can hope that lawyers would be sufficiently trained and knowledgeable so that in such a free market the clients would choose to employ lawyers. Clients now use lawyers in situations where lawyers are not legally required, for example, in arbitration proceedings and before administrative tribunals.

In particular, is there any necessity to continue to preserve lawyers' monopoly with respect to the giving of legal advice? We now say that only lawyers may give legal advice, even though we are far from clear as to what we mean by legal advice. Perhaps some of us might feel that there ought to be a free market for legal advice so that bar associations are no longer burdened by the necessity of policing unauthorized law practice. We may find it advisable to preserve a monopoly with respect to appearances in court so that the administration of justice might not be too severely frustrated by the influx of non-lawyers untutored in the rules of evidence and procedure. Of course, we will still permit non-lawyers to appear in court on their own behalf.

The designation "attorney at law" could be preserved for those licensed to have that designation, and the client could choose whether to employ such a licensed individual or some other person. This choice is already frequently available to consumers in settings other than law. For example, one can hire a gardener or a licensed landscape architect to provide the arrangements of plant life and

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ILL. L.F. 193, 236 (the license to practice law is interference with "the free flow of services, information, and exchanges in the market place").

36. *See* H. ROSS, SETTLED OUT OF COURT (1970).

37. *See generally* J. FISCHER & D. LACHMANN, UNAUTHORIZED PRACTICE HANDBOOK (1972).

greenery around his house or factory.[38] Financial statements can be prepared by certified public accountants, public accountants, bookkeepers, or anybody. If we go to a similar open panel scheme in law, we must be careful to avoid the risk that the less affluent among us are opted out of the opportunity to employ the licensed professional.

E. Preventive Law

At the time when telephones and typewriters were first used in law offices, law offices were almost exclusively places to which parties brought their disputes. Lawyers were, and continue to be, representatives for clients in dispute situations. There is, however, another and vastly different area of law practice, although it is largely in the province of the larger law firms. In the law firm that employs 100 or more people, including lawyers and non-lawyers, it is altogether likely that less than twenty-five percent of those people are involved in law practice concerning dispute resolution.[39] The area of practice in which most lawyers engage is referred to as preventive law.[40] Estate planning, corporate acquisitions and mergers, tax planning, development of real estate transactions, advice and counsel regarding financial matters to corporate enterprises, all involve the application of legal knowledge and skills to facilitate transactions and to avoid later disputes. With appropriate changes in law practice, we should in the future see larger amounts of preventive law practiced for middle and low income clients.[41] This trend will no doubt cause further changes in our methods of producing legal services, and in the role and function of lawyers and non-lawyers in the operation of law offices.

When we get more data on what is the most effective use of lawyers' services, we may find a different mix than we now believe exists. The current impression is that clients' needs are generally centered on problems that involve legal disputes. We may find, however, that clients fall into the categories of (a) those who are

38. *See* CAL. BUS. & PROF. CODE § 5641 (West 1974) (provides for licensed landscape architects but makes explicit that others may design landscaping plans as well).

39. "[L]ess than one fourth of the lawyers in practice today devote a majority of their time to litigation . . . ." Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 578 (1975). While the observation may be correct, Judge Rubin cites no empirical data for support, and this author has seen no data that suggests the breakdown between litigation and nonadversarial practice.

40. *See generally* L. BROWN & E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS (1978).

41. As an example, the Beverly Hills Bar Association is currently engaged in a project to counsel middle and lower income newlyweds about legal aspects of the marriage relationship. *See* L.A. Times, Oct. 5, 1978, Pt. IV, at 1, col. 3.

legally well, (b) those who are about to engage in a course of conduct where legal guidance is or might be appropriate, and (c) those who are in legal trouble. It may be that for each of these classifications we need to provide different kinds of legal care.[42] If so, we may see the development of new types of legal services for legally well persons and business organizations who would benefit from some sort of legal health maintenance program, including perhaps periodic legal checkups and legal audits.[43] The delivery of preventive legal services could involve using new office methods and hiring new personnel in law offices. Someday it may be as usual for business management to have a periodic legal report as it now is to have periodic financial statements. Indeed, one can foresee the time when business people will look back with amazement on the manner in which businesses now operate without periodic legal audits or the preparation of periodic legal status statements.

For both periodic checkup of individuals and legal audits of businesses we need to develop cost-efficient methods to obtain facts and to organize them properly for these preventive law purposes.[44] In some communities we might computerize and centralize the fact processes in order to strive for reduced cost and increased proficiency. The computer would be especially useful in corralling the myriad of legal facts needed for periodic legal audits. Larger law offices might departmentalize their operations so that fact work (done by non-lawyers) is distinct from legal diagnosis (done by lawyers) and legal therapy (done by lawyers assisted by non-lawyers). Solo practitioners, as we have discussed previously, might benefit from new enterprises which make the tools needed for such legal audits, such as computers, available on a time-sharing basis.

F. The Changing Ethical Canons

Recent Supreme Court cases have examined the validity of

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42. The analogous field of medical practice has been subjected to such analysis and criticism. Garfield, *A Clear Look at the Economics of Medical Care* (1972), *reprinted in* L. BROWN & E. DAUER, *supra* note 40, at 125-33.

43. Information concerning the development of techniques for legal audits and periodic checkups is collected in L. BROWN & E. DAUER, *supra* note 40, at 335-58.

44. We have scarcely begun to develop methods to perform periodic review. We need pilot projects, as well as creative thinking, both to reduce time-consuming operations and to explore the benefits and detriments of the process. As we presently approach such review, the fact-finding and fact-organization work (obtaining a legal history of the client and organizing the client's legal facts) takes large amounts of time. Having specialized personnel (legal paraprofessionals) perform such work appears to be one way to reduce costs. After obtaining and organizing such factual information, the next step is the diagnosis to be done by lawyers. For this we should develop a diagnostic methodology. *See* Brown, *Periodic Checkup: Report of a Law School Term Paper Project*, J. LEGAL ED. 438 (1978).

particular canons of the legal profession.[45] More generally, much of what has been said about possible emerging changes in law practice stretches or runs counter to our present rules of professional responsibility and the rules regarding unauthorized practice of the law. Although it was only in 1970 that the ABA revised the Code of Professional Responsibility, our society is moving so rapidly that we must always be aware of the need to revise these rules.[46] The rules of professional responsibility historically have been more limiting than they have been directive.[47] We may need rules of a more affirmative sort which point out constructively the manner in which lawyers should practice law. Eventually lawyers may be required to take affirmative steps to alert clients and potential clients regarding matters of potential legal consequence.

The need for a lawyer is frequently not self-evident, especially with respect to preventive law matters. The ABA's current Ethical Considerations acknowledge that legal problems may not be self-revealing and often are not timely noticed.[48] The time is not too far off when it will be regarded as professionally proper for the lawyer

45. *In re* Primus, 98 S. Ct. 1893 (1978) (personal letter informing potential client of possible legal representation by the ACLU held to be constitutionally protected political expression and hence not subject to a disciplinary rule against solicitation); Ohralik v. Ohio State Bar Ass'n, 98 S. Ct. 1912 (1978) (direct in-person solicitation by lawyer seeking contingent fee may be prohibited by the rules of ethics); Bates v. State Bar, 433 U.S. 350 (1977) (newspaper advertising of routine legal services for fixed fees is protected commercial speech under the first amendment).

Controversy is not limited to restrictions on lawyer advertising and solicitation. For example, the California Supreme Court recently upheld a trial court's decision to enforce California's version of the ABA's disciplinary rule that requires an attorney, and the firm to which he belongs, to withdraw from representing a client when a member of the law firm will likely need to testify in the case. Comden v. Superior Court, 20 Cal. 3d 906, 596 P.2d 971, 145 Cal. Rptr. 9 (1978). Justice Manuel's dissent, which was joined by two other members of the court, argued that courts should disqualify attorneys only when the integrity and efficiency of the judicial process is threatened and should otherwise leave enforcement of disciplinary rules to the bar. The Board of Governors of the State Bar of California has subsequently adopted a resolution to change the rule. L.A. Daily Journal, Oct. 4, 1978, at 1.

46. Even as revised, the Canons have received extensive criticism. *See, e.g.*, Brown & Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. L. REV. 453 (1976) (arguing that the Ethical Considerations fail to address themselves to the role of the attorney as an advisor in preventive law matters); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (urging that the Code reflects a consistent misordering of priorities in protecting the interests of lawyers over those of the general public).

47. The Code of Professional Responsibility is framed in the negative. Almost all of the Disciplinary Rules start with "A lawyer shall not." The Ethical Considerations are somewhat more affirmative, but even they fail to give proper direction to the total lawyering process. *See* Brown & Brown, *supra* note 46; Ownbey, *The Positive Law Ethic*, 38 S. CAL. L. REV. 421 (1965).

48. ABA CANONS OF PROFESSIONAL RESPONSIBILITY EC 2-2.

to initiate the lawyer-client relationship in appropriate situations.[49] Perhaps in the future lawyers will be required to initiate such a relationship.[50]

The means by which members of our profession may take such affirmative action in the future shock those whose habits and whose upbringing stems from past or even present notions of professionalism. On the other hand, the horrifying spectre of rampant post-*Bates* hucksterism may well prove to be as chimerical as our grandfathers' fears about typewriters and telephones. In any event, the essential objective is not necessarily the preservation of a profession under traditional rules. The aim should be the improvement of the legal health of people. The legal profession best serves the public and hence itself by being concerned primarily with the people we are here to serve. That service requires us not to be glued to present day "fables."

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49. *See In re* Primus, 98 S. Ct. 1893 (1978).
50. *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 113 (1975).

Advertising by Lawyers

*Harold G. Christensen**

Lawyers' attitudes toward advertising generally depend upon whether they have a satisfactory client base. Those with well-established practices often find advertising crass if not unethical. Those without such a client base see a professional obligation to make legal services available to all segments of society through advertising.

Opponents of advertising find support for their position in the historical tradition of the bar, while proponents point to the current rise of consumerism as the basis for their view.

I. History

A. *English Sources*

Although it is generally agreed that the traditional ban against advertising by lawyers originated in England many years ago, there is disagreement as to how the proscription arose. After noting that advertising and solicitation are usually treated together, one commentator states:

> Both are derived from the common-law crimes of champerty, maintenance and common barratry. Champerty, the most serious of the offenses, was a bargain in which a party to a civil suit gave the champertor an interest in the subject matter of the suit if the party prevailed in exchange for the champertor's paying the expenses of the suit. Maintenance was maintaining or assisting a party to a suit by "frequently stirring up suits and quarrels" and required more than a single act of barratry. Both advertising and solicitation are obvious descendants of these crimes.[1]

Henry S. Drinker, however, maintains that the prohibition against advertising was a natural outgrowth of the nature of the men who came to study at the Inns of Court in the early days of the English bar.[2] Drinker states that these young men were almost all sons of wealthy parents and had little interest in the law as a means of earning a living. They regarded the law as a public service and "traditionally looked down on all forms of trade and the competitive

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1. Smith, *Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available*, 48 Tex. L. Rev. 285, 290 (1970) (footnotes omitted).

2. H. Drinker, Legal Ethics 210 (1953).

spirit characteristic thereof."[3] Barristers at that time were members of a select fraternity who met every day, not only at court but at dinner as well. In this setting, huckstering was considered bad form. Drinker asserts that it has been a goal of the bar to maintain the traditional dignity which arose at that time.

These seemingly different explanations for the development of the advertising ban are not necessarily inconsistent. One author describes the criminal sanctions regulating the early practice of law as having arisen out of a concern to preserve the professional characteristics which the practice had acquired earlier in its development.[4]

B. American Development

The development of the ban on advertising in this country likewise is not entirely clear. Drinker believes that the dignity which surrounded the practice of law in England was carried back to the colonies by young Americans who had studied in the English Inns of Court in the late eighteenth and early nineteenth centuries. These men became the leaders of the American bar, preserving the English tradition.[5]

There were, however, no formal rules against advertising or solicitation in the United States until 1887 when the Alabama State Bar Association adopted the first Code of Ethics. Rule 16 provided:

> Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interest involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.[6]

In 1908, the American Bar Association (ABA) adopted its Canons of Professional Ethics, imposing greater restrictions on advertising by lawyers.[7] Of the thirty-two canons originally adopted, one, Canon 27, dealt directly with advertising. Having been amended four times, Canon 27's final form "prohibited the solicitation of employment by circulars, advertisements, 'touters,' unwarranted personal communications, the inspiring of favorable newspaper

3. *Id.*

4. Comment, *Bates & O'Steen v. State Bar of Arizona: From The Court to the Bar to the Consumer*, 9 LOY. CHI. L.J. 477, 478 (1978) [hereinafter cited as *Bates & O'Steen*].

5. H. DRINKER, *supra* note 2, at 210.

6. Ala. Code of Ethics Rule 16 (1899).

7. H. DRINKER, *supra* note 2, at 215.

comments, publication of photographs or any other form of self-laudation."[8] The use of professional cards, limited types of data in law lists, and designations of specialties in admiralty, patent, and trademark law on cards were allowed.[9] The original enactment of Canon 27 has been attributed in part to: (1) fear of increasing commercialization of the legal profession; (2) concern that "unscrupulous attorneys were misleading the public through inflated claims of legal skills;" and (3) "fear [at that time] of litigation of causes unpopular to the establishment such as segregation, landlord-tenant and consumer-manufacturer disputes."[10]

In 1928, Canons 33 through 45 were adopted. Two of them dealt with advertising and solicitation: Canon 40, permitting lawyers to write articles about the law for non-legal publications (provided no individual advice was given), and Canon 43, restricting information which could be given on professional cards.[11] Canon 43 was later amended to make it "improper for a lawyer to permit his name to be published in a law list the conduct, management or contents of which are calculated or likely to deceive or injure the public or the profession or to lower the dignity or standing of the profession."[12] Finally, Canons 28 ("Stirring Up Litigation Directly or Through Agents"), 33 ("Partnerships-Names"), 45 ("Specialists"), and 46 ("Notice to Local Lawyers") rounded out the Canons that directly covered advertising and solicitation.[13]

By 1969 there were not only forty-seven Canons but also 322 formal and approximately 1100 informal opinions of the ABA Committee on Professional Ethics interpreting those Canons.[14] According to one author, the Canons concerning advertising and solicitation, and the hundred-plus interpretations they had generated resulted in "chaotic organization" and "confusion twice compounded."[15]

To alleviate the confusion, in August of 1969 the ABA adopted the Code of Professional Responsibility, consisting of nine canons, each with its own Disciplinary Rules (DR) and Ethical Considerations (EC). The traditional ban on advertising was incorporated in Canon 2, entitled "A Lawyer Should Assist the Legal Profession in

8. R. WISE, LEGAL ETHICS 127 (2d ed. & Supp. 1977).
9. *Id.*
10. *Bates & O'Steen, supra* note 4, at 479.
11. *See* H. DRINKER, *supra* note 2, at 217-18.
12. *Id.* at 217.
13. *See* R. WISE, LEGAL ETHICS, 245-57 (1966).
14. *See* II ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL ETHICS OPINIONS (1975); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 323 (1970).
15. Smith, *supra* note 1, at 292.

Fulfilling Its Duty to Make Legal Counsel Available." Under that heading are thirty-two EC's and ten DR's, the first five of which, DR 2-101 through 105, "carry out the principles of the former Canons and of the opinions on advertising and soliciting."[16] There were few changes of substance from the prior Canons of Professional Ethics; as before, the rules prohibited advertising except by office signs, phone number listings, and ordinary business cards.

In 1976, the ABA liberalized DR 2-102(A)(5) and (6) to permit lawyers to purchase display ads in the yellow pages of phone directories, advertising specific information such as office hours, specializations, names of regular clients, acceptance of credit cards, and fee for initial consultation, and offering to furnish, on request, a written schedule of fees and an estimate of the charge for a specific service. These amendments also allowed such information to be included in reputable, approved law lists, in addition to that data which was already permitted under the 1969 version.[17] Only Maine, Michigan, and Oklahoma have adopted the ABA 1976 amendments.

C. Utah Rules

The first formal ban on advertising by lawyers in Utah appeared in the Rules of Professional Conduct of the Utah State Bar, which came into effect in 1937.[18] In 1971, the Code of Professional Responsibility became effective in Utah,[19] but the Utah State Bar has not adopted the ABA's 1976 advertising amendments.

Various reasons have been assigned for the persistence of the advertising ban. Drinker attributes much of it to the closs association which participants in the adversary system still maintain today. He believes that the professional nature of law practice and the mutual esteem among lawyers benefit law practice, and contends that "advertising, solicitation, and encroachment on the practices of others does not tend to benefit either the public or the lawyer in the same way as in the sale of merchandise."[20]

16. R. WISE, *supra* note 8, at 127 (footnote omitted).

17. *Id.* at 133. The clearest example of an approved listing is MARTINDALE-HUBBELL LAW DIRECTORY (1978).

18. The rules were adopted by the Utah State Bar on May 28, 1936, and approved by the Utah Supreme Court on May 7, 1937.

19. See text accompanying notes 11-16 *supra* for a discussion of the Code provisions dealing with advertising which were adopted in Utah. The Code was adopted May 7, 1970, and approved by the court on February 19, 1971.

20. H. DRINKER, *supra* note 2, at 211 (footnotes omitted).

II. The Bates Case and Lawyer Advertising

A. *The Supreme Court Opinion*

Whatever the reasons for its persistence, the ban on lawyer advertising was restricted by the 1977 United States Supreme Court decision in *Bates v. State Bar of Arizona.*[21] In *Bates,* the Supreme Court held that price advertising for routine legal services was commercial free speech protected by the first amendment, but rejected the argument that restraints upon advertising by lawyers, when imposed by a state supreme court, violate the Sherman Antitrust Act.

The narrow holding of the case was that a state may not prevent the publication in a newspaper of a lawyer's truthful advertisement concerning his availability to perform routine legal services for specified fees.[22] The Court emphasized, in fact, that some state regulation of advertising was permissible, noting particularly that false, deceptive or misleading advertising may be subject to restraint.[23] In addition, the Court ennumerated other areas that might be subject to restraint. Advertising claims of the quality of service, for example, are not susceptible of measurement or verification and therefore may be so misleading as to warrant restriction.[24] Similarly, in-person solicitation may provide an opportunity for overreaching and misrepresentation not present in newspaper advertising.[25] The Court further suggested that a disclaimer to protect consumers might be required, that use of electronic media for advertising will warrant special consideration, and that it is conceivable that reasonable restrictions on time, manner, and place of advertising might legally be imposed.[26]

B. *Reaction to Bates*

At its 1977 Annual Meeting, the Utah State Bar amended DR 2-101(b) of the Revised Rules of Professional Conduct of the Utah State Bar.[27] The Utah Supreme Court approved the amendment on

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21. 433 U.S. 350 (1977).
22. *Id.* at 384.
23. *Id.* at 383.
24. *Id.* at 383-84.
25. *Id.* at 384.
26. *Id.*
27. The change added the following language to the old rule:

Provided, however, that a lawyer may advertise in a daily newspaper of general circulation in the area where the lawyer has his office, prices charged for uncontested divorces, simple adoptions, uncontested personal bankruptcies and change of name and charge for initial consultation. Such advertisements may include the lawyer's name, address,

July 18, 1977. The change was intended as an interim rule to serve until the newly created Lawyer Advertising Committee of the Utah State Bar could study the need and desirability of greater relaxation of the restrictions upon advertising.

It may be argued that the interim rule was drawn more narrowly than the *Bates* decision's guidelines.[28] For example, the interim rule expressly permitted advertisement in newspapers only. Although *Bates* involved only newspaper advertising, it can be reasonably inferred from the opinion that limited advertising in any printed media should be allowed. The Court's caveats regarding the place of advertising extended only to in-person solicitation and electronic media.[29]

The interim rule also limited advertisement of fees to the amounts to be charged for uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name, and initial consultation fees. *Bates*, on the other hand, stated that only routine services lend themselves to advertisement and, while the above mentioned services were listed, the Court's language did not clearly limit first amendment protection to only those services.[30] Finally, Utah's interim rule provided that advertisements could include a lawyer's name, address, phone number, and office hours, but specifically proscribed claims as to the quality of legal services, the qualifications of the lawyer, or the lawyer's areas of concentration or specialization, except for the listing of fees for the specified routine services. *Bates* impliedly permitted more.[31]

Following the *Bates* decision, the ABA appointed a task force headed by S. Shepard Tate, President of the ABA, to prepare a recommendation regarding advertising for consideration by the Board of Governors of the ABA. Two alternative proposals were considered by the task force. Both permitted dissemination of infor-

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telephone number and office hours. Such advertisement shall not make any claims relating to the quality of the legal services or the experience, training, competence of the lawyer, or his areas of concentration of practice or specialization, if any, except as herein provided. The lawyer shall not charge more for an advertised service than the advertised price regardless of the complexity of the problem or time involved.

28. In commenting upon the restrictiveness of the interim rule, Chief Justice Ellett of the Utah Supreme Court observed with characteristic humor that it could have been drawn even more narrowly by permitting advertising only in the Arizona Republic where Bates and O'Steen placed the ad which brought them into conflict with the State Bar of Arizona.

29. See text accompanying notes 22-27 *supra*.

30. *See* 433 U.S. at 372.

31. The Court's statement outlining the permissible state regulation of lawyer advertising emphasized that claims about the quality of services may be so inherently misleading as to warrant restriction. The Court, however, did not make a similar qualification for a mere listing of areas of concentration or specialization, independent of a fee schedule for routine services.

mation about legal services and both allowed advertising by electronic media subject to authorization by a state's highest court or other agency responsible for regulating lawyers' conduct. They differed in their approach, however, in that Proposal A adopted a regulatory perspective and specified the exclusive categories of information that could be advertised. In contrast, Proposal B was directive in that it permitted publication of all information not false, fraudulent, misleading, or deceptive and provided guidelines for determination of which advertisements were improper.[32]

The ABA initially approved Proposal A, with radio but without television advertising. Later, at its 1978 annual meeting in New York City, it approved television advertising as well. Thirteen states have now approved both radio and television advertising.[33]

The Utah State Bar Committee on Lawyer Advertising, which was comprised of both lawyers and lay members, recommended adoption of Proposal A with minor changes, but excluded the provision for use of electronic media. The committee also submitted to the Utah State Bar a list of designated areas of practice that could be used by lawyers advertising a concentration area.[34] The Utah State Bar adopted the recommendation of the committee, adding a definition of "print media"[35] and a form of disclaimer to be placed at the beginning of the section entitled "Lawyers" in the classified section of the telephone directory.[36] On December 15, 1977, the Utah Supreme Court adopted the rule and designated areas of practice

32. *See* ABA TASK FORCE ON LAWYER ADVERTISING: PROPOSAL A & PROPOSAL B (1977).

33. THE NATIONAL LAW JOURNAL, Nov. 13, 1978, at 19.

34. The initial designations were: Administrative Law, Admiralty Law, Antitrust and Trade Regulations, Appellate Practice, Banking Law, Bankruptcy, Collections, Consumer Law, Corporation and Business Law, Creditor's Rights Law, Criminal Law, Divorce and Family Law, Environmental Law, International Law, Labor Law, Mining Law, Oil and Gas, Patent, Trademark and Copyright, Pension and Profit Sharing Plans, Personal Injury and Wrongful Death, Product Liability, Real Property, Securities, Social Security Claims, Taxation, Trial Practice, Water Law, Wills and Estate Planning, Workmen's Compensation, and Zoning Law.

Attorneys serving on the Lawyers Advertising Committee included John S. Adams, E. Barney Gesas, L. Brent Haggan, Ray H. Ivie, David S. Kunz, Stanley V. Litizzette, and Peter Stirba, with this writer as chairperson. Vendra Huber and Roy W. Simmons served as lay members on the committee.

35. " 'Print media' means newspapers, trade journals, magazines, or other publications, the primary purpose of which is other than the publication of information about a lawyer or small group of lawyers. 'Print media' does not include, for example, bill boards, handbills, brochures, or sound or electronic broadcasts." REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR DR 2-101(b)(24) (1977).

36. The disclaimer is a general statement explaining to consumers that a listing of areas of concentration or specialization does not imply agency or board certification, but only a particular interest in an area of law. It encourages independent investigation by the consumer.

as recommended by the state bar. Five months later, on May 4, 1978, four additional designations were added: Eminent Domain, Immigration and Naturalization, Natural Resources, and Public Land Law. According to the rule, an advertisement may designate up to a maximum of five areas of practice.[37]

C. *The Actual Impact of the Relaxed Rules*

Since relaxation of the ban, advertising by lawyers in Utah has not been common. An informal survey by this writer reveals that the largest number of ads in any one newspaper edition is six, two of which are submitted by regular advertisers.

One 1976 admittee to the Utah Bar began advertising his services in a Salt Lake City newspaper after the *Bates* decision was handed down in 1977. His early advertisements, following the guidelines set by the *Bates* decision, emphasized his divorce work. Although these advertisements increased the number of divorce cases he handled, he observes now that people thought that his practice was limited to divorces. Later advertisements in a local business magazine, which stressed that he did corporate, partnership, and real estate work ran for approximately six months without response. At the least, this lawyer's experience suggests the need to use considerable care in writing and presenting one's advertising, lest the attorney unwittingly narrows the scope of his practice.

The first Utah lawyer to advertise received a sizable response and plans to continue advertising. He has been practicing since 1973 in the consumer and social issues areas of law practice. He believes that advertising is good for the image of lawyers, since it makes them appear more human, and that advertising is part of a movement toward making legal services more accessible to the public. This attorney also believes radio to be the most effective media, reasoning that people do not look in the newspaper to find a lawyer. On the other hand, he would limit his own advertising to radio, agreeing that if lawyers began advertising on television there would be serious image problems.

The California State Bar made a study of lawyer advertising, in which it surveyed a sampling of lawyers known to be advertising. Of the two hundred attorneys who were advertising, only twenty said advertising had been productive, while thirty said it had not been effective. Although one lawyer reported his practice had

37. REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR DR 2-101(b)(2) (1977).

tripled, others claimed that those responding to the ads were looking for "cheap lawyers."[38]

About six months after the *Bates* decision was handed down, William B. Spann, Jr., the President of the ABA observed:

> [W]e see no sign that lawyer advertising has improved public perception of the function and importance of lawyers to American society. Nor has it provided potential consumers of legal services with the broad knowledge needed to use the justice system effectively. Nor has it appreciably improved the business of most lawyers who have advertised.[39]

Nevertheless, he urged bar associations and lawyers to search for ways to make advertising work, noting a comment by Joseph Sims, head of the Antitrust Division of the Justice Department, that "[i]f the bar won't be responsive to consumer needs, they [consumers] will turn to the government."[40] The desire to be responsive to consumer needs, and avoid governmental regulation, led Spann to appoint a commission on advertising to study advertising techniques, make recommendations to practicing lawyers about the most cost-efficient use of their advertising dollars, and to examine the desirability of institutionalized advertising by bar associations.[41]

III. The Lawyer Solicitation Decisions

A. *The Advertising-Solicitation Distinction*

Subsequent to *Bates,* the legal battle over advertising seemed likely to shift to the validity of the distinction between advertising and solicitation. Prior to *Bates,* the proponents of lawyer advertising argued there was a need to inform the public of the cost and availability of legal services. The *Bates*-type advertising of fee schedules for routine services fits comfortably within the information-delivery argument. On the other hand, solicitation, such as inducing a person who has one lawyer to change to another, or offering one's self as a choice among lawyers, does not fit within this traditional justification for lawyer advertising, since it goes beyond the mere need to know the cost and availability of legal services.

Advertising, in the information-dissemination sense, is theoretically sound. There are few valid criticisms of a process whereby the people for whom the laws are made are provided with information

38. L.A. Times, Mar. 12, 1978, § CC, Part 17, at 1.
39. Spann, *Time to Recognize the Advertising Realities,* 64 A.B.A.J. 5 (1978).
40. *Id.*
41. *Id.*

concerning the whereabouts, areas of speciality, and fees of those who are available to assist people in the assertion of their rights under the laws. To allow such advertising is not even radical innovation, for newspaper advertising as in *Bates* is merely an extension of a lawyer's index such as *Martindale-Hubbell*. The only difference is that newspaper advertising goes directly to the public while *Martindale-Hubbell* collects dust on the managing partner's bookshelf.

Unlike advertising of the information-dissemination nature, solicitation connotes more direct contact between lawyer and potential client. Such contact increases the dangers of overreaching and the exercise of undue influence on lay persons and no doubt decreases the dignity of the profession. These are the justifications that have been cited for proscribing advertising and solicitation at least since the ABA adopted its Canons of Professional Ethics in 1907.

Although the Supreme Court has not recognized a legal distinction between "advertising" and "solicitation," it is this writer's view that the distinction suggests the most workable test for determining whether conduct constitutes protected commercial speech under the first amendment. The test should center around the content of the communication, the size of the group to which the communication is directed, and its method of transmittal. If the communication disseminates information to the general public or a large group of people about a lawyer's availability, including such items as telephone number, office, address, hours, and areas of specialty, then it should be generally allowed as appropriate lawyer "advertising." On the other hand, in-person communication suggesting the quality of the lawyer's work and directed to one person or a small group of people goes beyond the dissemination of general information and should be considered unallowable "solicitation."

Although gray areas may occasionally appear, the test need not be difficult to apply. Motive would be irrelevant and there would be no need for a showing of actual overreaching to establish solicitation. It is the likelihood of overreaching or undue influence that is the basis for the proscription. Any given communication would be examined simply to see if, in any respect, it went beyond the dissemination of the availability of legal services to the general public. If so, it would not be proper.

The advertising-solicitation distinction, however, has not been the basis for the approach taken by the United States Supreme Court since *Bates*. Instead, the Court has relied on motive as the

test. If the motive is pure, the in-person solicitation is protected communication.[42]

B. The Supreme Court Opinions

In companion cases decided May 30, 1978, the United States Supreme Court held that the state may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in overreaching, deception, or other improper influence.[43] However, a state may not regulate in a prophylactic fashion all solicitation activities of lawyers simply because there may be some potential for substantive evils. In particular, such regulation is not permitted where nonprofit organizations engage in solicitation as a form of political expression and association.[44]

In *Ohralik v. Ohio State Bar Association,*[45] an Ohio lawyer personally approached the victims of an automobile accident and succeeded in obtaining them as clients for prosecution of claims arising from the accident. Later, both clients discharged him and filed complaints with the attorney's county bar association, which ultimately led to his being indefinitely suspended by the Ohio Supreme Court.[46]

On appeal, the Ohio State Bar Association, and the ABA as *amicus curiae,* emphasized the dangers of solicitation, including among other things the "likelihood of overreaching and the exertion of undue influence on lay persons," intrusions into individuals' privacy, the clouding of the lawyer's judgment by "pecuniary self-interest," and the debasing of the legal profession.[47] The appellant argued that while the state might legitimately prevent fraud, undue influence, and the like, no specified wrongs had been alleged or proven in his case. He thus challenged the validity of DR 2-103(a) and DR 2-104(a) as applied in his case.

Justice Powell agreed with the appellant that the "appropriate

42. *See In re* Primus, 98 S. Ct. 1893 (1978); Ohralik v. Ohio State Bar Ass'n, 98 S. Ct. 1912 (1978).

43. Ohralik v. Ohio State Bar Ass'n, 98 S. Ct. 1912 (1978).

44. *In re* Primus, 98 S. Ct. 1893 (1978).

45. 98 S. Ct. 1893 (1978).

46. The Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio rejected the lawyer's claim that his conduct in soliciting the clients was protected under the first and fourteenth amendments and found that he had violated DR's 2-103(a) and 2-104(a) of the Ohio Code of Professional Responsibility which prohibit a lawyer from recommending employment of himself to a non-lawyer who has not sought his advice regarding employment of a lawyer. The Board recommended public reprimand. The Supreme Court of Ohio adopted the findings of the Board but ordered the sanction increased to indefinite suspension. 98 S. Ct. at 1917 & n.9.

47. *Id.* at 1921.

focus is on [his] conduct," but disagreed that "actual proven harm to the solicited individual" must be shown before a state could discipline a lawyer who solicits in-person for pecuniary gain.[48] The Justice went on to say:

> Appellant's argument misconceives the nature of the State's interest. The rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.[49]

Unlike the newspaper advertising in *Bates,* in-person solicitation is not "visible or otherwise open to public scrutiny." In this case, the circumstances under which the appellant solicited employment from the accident victims were such that the victims were particularly susceptible to overreaching.[50]

In *In re Primus,*[51] the lawyer was engaged in private practice in South Carolina and was also affiliated with the American Civil Liberties Union (ACLU), an organization acknowledged by the Court to be engaged in litigation involving substantial civil liberties questions as a vehicle for effective political expression and association as well as a means of communicating useful information to the public. She addressed a gathering of women concerning their legal rights as persons who had been sterilized as a condition to their receipt of public medical assistance.

After the meeting, the ACLU told the lawyer that it was willing to provide legal representation for the women who had been sterilized. Upon receiving information that one of the women in attendance at the meeting desired to institute suit against her physician, the lawyer apprised the woman by mail of the ACLU's offer. The letter served as the basis for the South Carolina Supreme Court's

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48. *Id.* at 1923.

49. *Id.*

50. *Id.* at 1924. The Court pointed out that the appellant

> approached two young accident victims at a time when they were especially incapable of making informed judgments or assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released.

Id. at 1924.

51. 98 S. Ct. 1893 (1978).

public reprimand of the lawyer for violating the Canons of Ethics' prohibition of solicitation.[52]

On appeal, it was held that application of disciplinary rules for the lawyer's solicitation activity violated first and fourteenth amendment protections for political expression and association as the lawyer's actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU. In addition, the action did not involve undue influence, overreaching, misrepresentation, or invasion of privacy.

The Court distinguished *Ohralik* on the ground that Primus's action was not undertaken for financial gain and stated that "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs."[53] Thus, while the showing of potential abuse sufficed to justify the restrictions imposed in *Ohralik,* the Court required a showing of actual harm to justify the disciplinary action taken in *Primus.* The record in the *Primus* case did not show that any improper activity had taken place.[54]

Justice Powell noted that a state is "free to fashion reasonable restrictions with respect to the time, place and manner of solicitation by members of its Bar"[55] and may forbid in-person solicitation for pecuniary gain under circumstances likely to result in solicitation that is in fact misleading, overbearing, or involves other features of deception or improper influence. In addition a state "may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation."[56]

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52. A complaint was filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina charging that the sending of the letter was solicitation in violation of the Canons of Ethics. The Board approved a panel report recommending that the lawyer be found guilty and administered a private reprimand. The Supreme Court of South Carolina adopted the panel report but increased the sanction to a public reprimand. *Id.* at 1897-99.

53. *Id.* at 1906.

54. The opinion stated:

> The record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case. . . . The letter was not facially misleading; indeed, it offered "to explain what is involved so you can understand what is going on." The transmittal of this letter—as contrasted with in-person solicitation—involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct.

Id. at 1906-07 (footnote omitted).

55. *Id.* at 1908 (citations omitted).

56. *Id.*

The application, however, of South Carolina's disciplinary rules to appellant's solicitation by letter on behalf of the ACLU violated the first and fourteenth amendments.[57]

C. *The Aftermath of Ohralik and Primus*

Pressure continues to mount for a rule that would permit any form of advertising, including solicitation, that is not false, deceptive, or misleading. The Justice Department, for example, has adopted the position that in-person solicitation of specific cases helps people get information at the time they need it and, thus, prefers a test of undue influence.[58] On August 24, 1978, the Board of Governors of the California State Bar tentatively approved a change in its Rules of Professional Conduct to permit in-person solicitation.[59] The proposed rule will be circulated for comment. If finally approved, California lawyers may seek out clients and offer to represent them in specific cases unless:

> 1. The statements the lawyer makes are false and misleading or tend to confuse, deceive or mislead the client;
> 2. The potential client is in such a physical, mental or emotional state that he or she would not be expected to exercise reasonable judgment in hiring a lawyer;
> 3. The lawyer's approach to the client involves any kind of intrusion, coercion, duress or harassment;
> 4. The potential client already has told the lawyer he or she does not want to discuss the case with the lawyer; or

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57. *Id.* at 1909. Justice Marshall's concurring opinions in *Ohralik* and *Primus* characterized the *Ohralik* situation as a classic example of "ambulance chasing fraught with obvious potential for misrepresentation and overreaching," where the lawyer foisted himself upon his clients and "acted in gross disregard for their privacy." 98 S. Ct. at 1912, 1925-26 (Marshall, J., concurring). The lawyer's behavior was objectionable not so much because he solicited business, but rather because of the "circumstances in which he performed that solicitation and the means by which he accomplished it." *Id.* at 1926. *Primus* was, by contrast, a "'solicitation' of employment in accordance with the highest standards of the legal profession," in that the lawyer was "acting not for her own pecuniary benefit, but to promote what she perceived to be the legal rights of persons not likely to appreciate or to be able to vindicate their own rights." *Id.*

Justice Rehnquist concurred in *Ohralik*, but dissented in *Primus*, saying:

> We can of course develop a jurisprudence of epithets and slogans in this area, in which 'ambulance-chasers' suffer one fate and 'civil liberties lawyers' another. But I remain unpersuaded by the court's opinions in these two cases that there is a principled basis for concluding that the First and Fourteenth Amendments forbid South Carolina from disciplining Primus here, but permit Ohio to discipline Ohralik in the companion case. I believe that both South Carolina and Ohio acted within the limits prescribed by those amendments, and I would therefore affirm the judgment in each case.

Id. at 1909 (Rehnquist, J., dissenting).

58. [1978] TRADE REG. REP. (CCH) No. 344 at 5.

59. ST. B. OF CAL. REP. August, 1978, at 1.

5. The lawyer knows that, or does not check to find out if, the potential client is already represented by a lawyer.[60]

Reaction to the proposed revision was intense and varied.[61]

The Board of Bar Commissioners of the Utah State Bar is not considering a revision of the Utah Code of Professional Responsibility in light of the *Ohralik* and *Primus* decisions. Neither decision invalidated the challenged Code provisions, as each turned on the application of the Code to the particular fact situation before the Court. Moreover, since those decisions represent the two extremes, it does not seem profitable to attempt to codify by interpolation all situations falling within the extremes. It would seem more appropriate for the disciplinary committees to apply the principles enunciated by the Supreme Court while enforcing the existing rules, recognizing that motive, purpose, and setting are important considerations in judging the conduct of practitioners.[62]

IV. Summary and Conclusion

The *Bates* decision, permitting limited, truthful advertising of routine legal services, is based upon the sound policy of allowing dissemination of information to lay persons of the availability and cost of legal services. Even then, there may in reality be more effective and legitimate means of educating the public about legal rights and the availability of lawyers. Bar sponsored classes that inform consumers of the availability and nature of legal services and educate them about our legal system may do more good than newspaper advertisements. To many people, advertising is a way to sell products, not to impart information.

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60. *Id.* at 2.

61. The decision of the California Board of Governors was reached by a vote of 12-6 after what was described as vitriolic debate. The opponents of the revision said they were "shocked" and "outraged." One said that the hospitals would be filled with lawyers waiting to bribe the nurses to let them be first to contact accident victims. Another reacted: "If we approve ambulance chasing—and that is just what this is—the profession will be relegated to the lowest possible level."

A lawyer member of the California Board of Governors who voted for the proposed rule said, "It is about time we give the little guy a chance to hussle and get a little business," while another described the revised rule as implementing a more particular prohibition against solicitation than that which existed before. Under the revised rule, he said, "Lawyers could not go to the scene of accidents, to hospitals or to funeral homes." Several felt that the Supreme Court had given them no alternative by its decision in *Primus*. *Id.* at 1, 6-7.

62. The action of the California Bar appears to be an overresponse to Justice Marshall's suggestion in his concurring opinion in *Ohralik* that professional associations should look to *Ohralik* and *Primus* for guidance in redrafting disciplinary rules that must apply across a spectrum of activities ranging from clearly protected speech to clearly proscribable conduct. *See* 98 S. Ct. at 1907 (Marshall, J., concurring).

In the area of lawyer solicitation, this writer would prefer a rule that would permit states to prohibit solicitation, as traditionally distinguished from advertising.[63] A major problem with the Supreme Court's approach in *Ohralik* and *Primus* is its difficulty of application. Motive is often hard to judge, particularly after the fact, and a lawyer subjected to disciplinary action for solicitation will no doubt rationalize his motives and attempt to analogize to *Primus*. Under the Supreme Court's approach, clear examples of "ambulance chasing," as in *Ohralik*, will be prohibited, but more clever and subtle methods of solicitation will likely be condoned.

To allow advertising but disallow solicitation would not violate the constitutional guarantee of free speech. The sanction against the lawyer in *Ohralik* was upheld not because actual overreaching or other adverse consequences occurred but rather because the lawyer solicited employment for pecuniary gain under circumstances likely to result in adverse consequences. Solicitation, as distinguished from advertising, is fraught with adverse consequences in whatever form it takes no matter how pure the lawyer thinks his or her motives are. Further, the Court in *Ohralik* over-emphasized pecuniary gain as an impermissible motive while virtually taking for granted in *Primus* that the motive associated with asserting civil rights is allowable. It may well be that the lawyer whose motive is pecuniary gain will render more competent and objective service than a lawyer submersed in politics, whose motive is to promote the civil rights of his client. In any event, the only predictable result of solicitation is an increase in litigation in what is already the world's most litigious society.

It seems, however, that the traditional ban on lawyer solicitations will likely be liberalized. In the future, an important part of a lawyer's practice may be bidding on legal work through truthful, non-laudatory, and non-overreaching offers of representation submitted in writing to potential clients. For the near future, though, lawyers will likely continue to be chosen by clients as they are today—by reference from other lawyers and the recommendation of other clients, business associates, family, or friends.

63. This is the approach adopted in Justice Rehnquist's dissent in *Primus*. *See* 98 S. Ct. at 1909-12 (Rehnquist, J., dissenting).

Lawsuits: First Resort or Last?

*Michael Traynor**

Our affluent society is a fast-breeder of grievances. There is an abundance of things to quarrel about. Unfortunately, it has become a routine maneuver for the quarrelsome to initiate a lawsuit or to provoke one at the outset of a controversy. It ill becomes us, however, to reach for the weapons of litigation without regard to whether their firepower is offset by their capacity for recoiling as well as the risk of counterfire. Lawyers should be the first to perceive the long-range disadvantage of premature hostilities, even when their clients do not. They can remind their clients, when necessary, that litigation is ordinarily a costly means of last resort. The corollary is that the first resort should ordinarily be good-faith negotiation between adversaries and their counsel that might open up avenues to a fair, equitable, and expeditious settlement.[1]

For perspective, we can review the disadvantages of litigation as a first resort, and the causes of its overuse, before proceeding to consider the alternative of negotiation as a rule or custom.[2]

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1. *See* L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 115-27 (1971); *see also* 1 H. HART & A. SACKS, THE LEGAL PROCESS 312-65 (tent. ed. 1958); H. ROSS, SETTLED OUT OF COURT 136-75 (1970); T. SCHELLING, THE STRATEGY OF CONFLICT 21-52 (1960); Bacon, *Of Negotiating*, in CENTURY READINGS IN THE ENGLISH ESSAY 76 (Wann ed. 1926); Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637-65 (1976); Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model*, 7 LAW & SOC'Y REV. 667 (1973); King & Sears, *The Ethical Aspects of Compromise, Settlement and Arbitration*, 25 ROCKY MTN. L. REV. 454 (1953); Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); *Symposium—Negotiation and Settlement*, 5 LITIGATION 1 (1978); Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67 (1969).

On techniques of settlement, see H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CASES FOR SETTLEMENT, *passim* (1973); M. WESSEL, THE RULE OF REASON 125-40 (1976); Armstrong, *How and When to Settle*, 19 ARK. L. REV. 20 (1965); Brady, *The Settlement of Controversies: The Will and the Way to Prevent Lawsuits*, 45 A.B.A.J. 471 (1959); King & Sears, *supra*, at 460-62.

2. This article does not explore other methods of dispute processing such as arbitration, mediation, conciliation, neighborhood justice centers, ombudsmen, dispute avoidance, abnegation of rights, criminal plea bargaining, or self-help. *See generally* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Nader & Singer, *Dispute Resolution*, 51 CAL. ST. B.J. 281 (1976). Helpful articles on arbitration include Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 745-52 (1973); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Raffaele, *Labor Arbitration and Law: A Non-Lawyer Point of View*, 29 LAB. L. REV. 26 (1978). On arbitration as an adjunct to court procedure, see ch. 743, 1978 Cal. Legis. Serv. 2370 (to be codified in CAL. CIV. PROC. CODE §§ 114.10 to .32) (mandatory arbitration of civil actions not involving more than $15,000); N.D. CAL. TEMP. R. 500 (mandatory arbitration of certain monetary claims not exceeding

I. THOSE UNBECOMING LAWSUITS

At the outset, potential litigants must quit themselves of any sentimental picture of the courthouse as an institution of peace and wisdom that has displaced both outlaws and vigilantes. Perhaps there never was so much peace and wisdom as we imagine, even in rural settings. Today the roads to the courthouse are jammed with unruly traffic,[3] and the courthouse itself sometimes resembles a bureau for the mechanical processing of papers rather than a forum of justice.

The unbecoming litigation entails heavy costs not only for the public, but also for the litigants. Would-be litigants should be counseled to understand that facts "that could be quickly agreed to in dispute negotiation must be laboriously reconstructed" in court.[4] Such reconstruction includes not only the investigation, assembly, and coherent presentation of relevant facts, but also compliance with rules of evidence and court procedures. Apart from needless financial costs, unsuitable litigation robs precious time from parties, witnesses, jurors, judges, and lawyers.

To what end? Ultimately, there is no contested trial in approximately ninety percent of all civil cases; these are resolved by agreement of the parties, voluntary dismissal, default judgment, judgment by the court that a claim or defense has no merit as a matter of law, or other disposition without a contested trial.[5] So high a percentage, even though it may include cases worthy of trial but settled by parties unwilling or unable to pursue litigation to the end, suggests that in the main there are more productive ways to resolve

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$100,000), 505 (voluntary arbitration); CAL. R. CT. 1601-17 (West 1978); Halperin, *Arbitration of Superior Court Cases*, 51 CAL. ST. B.J. 472 (1976).

On other methods of dispute resolution, see D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS (1977); Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675 (1975) (responding to Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974)); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Harley, *Justice or Litigation*, 6 VA. L. REV. 143 (1919).

3. In California, during the ten year period between fiscal years 1966-67 and 1976-77, the total filings in state superior courts increased from 446,709 to 713,917. [1968] JUDICIAL COUNCIL CAL. ANN. REP. 124, Table 11; [1978] JUDICIAL COUNCIL CAL. ANN. REP. 136, Table 11. *See also* [1977] AD. OFF. U.S. CTS., ANN. REP. 79-80, 82, 89, 99-107, 121; Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, FORTUNE, April 1973, at 65; Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901-09 (1971); Kline, *Curbing California's Colossal Legal Appetite*, L.A. Times, Feb. 12, 1978, part VI, at 1; *The Chilling Impact of Litigation*, BUS. WEEK, June 6, 1977, at 58; *Symposium—Crisis in the Courts*, 31 VAND. L. REV. 1 (1978).

4. Eisenberg, *supra* note 1, at 657-58.

5. *See, e.g.*, [1978] JUDICIAL COUNCIL CAL. ANN. REP., *supra* note 3, at 138-45.

controversy than trials.

When the dice roll ninety percent of the time against trial, the tactic of bringing or provoking a lawsuit to induce a favorable settlement is of questionable wisdom.[6] The very overuse of such a maneuver militates against whatever tactical advantage it is purported to have. Moreover, the hasty filing or provocation of a lawsuit may be disadvantageous. Lawsuits have a capacity for gaining a momentum of their own that may impel litigants to make costly commitments that they and their lawyers may find difficult to withdraw from until trial is imminent.[7] Should not the lesson be that there are less costly ways than an aborted lawsuit to quicken such settlement? Should not it be a lawyer's responsibility to evaluate with his client all the costs of litigation against the ten percent chance of a trial whose outcome still remains unpredictable?

Even as to the ten percent of controversies that ultimately go to trial, it would be fallacious to conclude that they were therefore intrinsically worthy of trial. Although some may be worthy, others go to trial solely or primarily because the lawyers are unprepared, or grossly overvalue their case, or undervalue their opponents' case, or are intransigent and fail to attempt in good faith to negotiate a reasonable solution for their clients.

Why is it that parties begin the litigation process before attempting to negotiate in good faith, especially in the face of the high percentage of dispositions short of trial? The factors may include a growing spirit of contentiousness,[8] lack of devotion to truth,[9] and excessive concern for "substance and right" rather than reasonable compromise.[10] Another unsavory factor is the apparently increasing

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6. *See* H. Ross, *supra* note 1, at 218. In analyzing the negotiation progress involved in insurance claims adjustment, Ross found that statistics confirmed the expectation that filing suit may be perceived as "merely a negotiation tactic or a routine procedure" and hence "may be expected to have relatively little effect on [the] value [of the recovery]." *Id.*

7. *See* H. Ross, *supra* note 1, at 156-58, 165-66, 216, 219-20.

8. *See* Note, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 Wash. & Lee L. Rev. 1179, 1197-98 (1977); Ryan, *"Costly Counsel,"* Wall St. J., Apr. 13, 1978, at 1, Col. 1 (noting the growing "spirit of contentiousness" of our "litigious society").

An uncompromising spirit may be on the rise. Less than ten years ago, it was confidently asserted that "behind almost every civil proceeding lies a background of settlement negotiation." *An Analysis of Settlement, supra* note 1, at 67. In a more recent statement, Justice Silverman lamented the frequency with which lawyers acknowledge that they have been unable to negotiate. Statement by Silverman, J., in a panel discussion, found in Professional Responsibility of the Lawyer 139 (N. Galston ed. 1977).

9. *See* Frankel, *The Search for Truth—An Umpireal View*, 30 Rec. B.A. City N.Y.7614, 34 (1975) ("We are too much committed to contentiousness as a good in itself and too little devoted to truth").

10. *See* Eisenberg, *supra* note 1, at 648.

tendency to gamble for high stakes by parties either who can afford the costs of litigation or who are willing to borrow against the contingency of a remunerative settlement via this tactic. The gambling game may be played in reverse by a potential defendant who refuses negotiation, as a device that may constrain his adversary to drop a claim or to initiate litigation that may be too costly to pursue.

The element of intransigence that propels the calculating litigant at times also marks the litigation of zealots who envisage their own proclaimed legal rights on solitary ground, uncomplicated by the legal rights of anyone else. Their aggressive use of litigation serves to weaken the capacity of the judicial system to carry its overall workload with optimum effectiveness.

The increasing tendency to resort to litigation instead of negotiation as a means of first resort permeates everyday human relations in disquieting ways, jeopardizing the chances for expeditious and peaceful resolution of controversy. Consider the following examples. An executive resigns from his company and hands to the president a complaint he has just filed for claims arising out of his employment. Former employees of a large corporation arrive at the office of the new business they have organized and learn that they have just been sued by the corporation for misappropriation of trade secrets and intentional and improper interference with contract. An injured workman on a construction project is not satisfied with workmen's compensation and without warning sues numerous parties other than his employer, namely, the owner, the architect, the financing bank, other contractors, and the manufacturer and the distributor of the machinery that allegedly injured him. The author and publisher of a book learn from a newspaper that they have just been sued for defamation. In some family's castle, one spouse may announce to the other that earlier in the day he or she filed a petition for divorce and for custody of the children.

The reverse of the coin is a potential defendant's intransigence, provoking a lawsuit by disregarding attempts to resolve disputes without litigation, as in the following examples. An administrator implacably refuses to implement an administrative remedy such as reinstatement of a public employee who has been wrongfully dismissed. A health insurance company summarily rejects a valid claim or effectively frustrates it by dilatory tactics. A purveyor of professional services obdurately refuses to discuss a claim relating to the quality of the services or the fairness of the fee. A government bureau cavalierly denies or frustrates a reasonable request for access to public records or, conversely, cavalierly denies or frustrates a reasonable request that a record be sealed from public inspection to

protect a trade secret or a right to privacy. An ex-spouse announces to the other that he or she will no longer make support payments.

One aspect of the contemporary litigation relates to a dual phenomena, the prodigious growth of a government's power to regulate our lives and the increasing awareness of citizens of their rights vis-à-vis their rulers. A state agency, for example, may bring a consumer protection action against a company, attended by a barrage of publicity, without first seeking voluntary compliance. Conversely, an individual may insist on litigating a controversy without exhausting his administrative remedies.

In each instance, the intransigent litigant not only closes the door to amicable settlement but also needlessly burdens the judicial system, contributing to the proverbial delays that impair the administration of justice. Apart from the waste of judicial time and resources in the processing of avoidable litigation, there are damaging repercussions beyond the courthouse. To the extent that a society becomes needlessly litigious it impairs its own productivity. There is no way to convert into plowshares the swords that have been crossed in a legal battle.

The ultimate victims of intransigent litigants are those who confront consequent delays along the avenues to the courtroom. A potential litigant with a grievance truly worthy of a judicial hearing may be deterred from seeking one by the prospect of such delay. He may resort instead to aggressive self-help or, perhaps worse still, he may passively resign himself to a negation of his rights. Either alternative is an unfortunate one.

II. The Starting Point for a Rule or Custom to Foster Negotiation in Lieu of Litigation as a First Resort

Our common-law system at times calls for absolute rules, such as a rule that determines whether an original owner or a bona fide purchaser prevails when the wrongful act of a third party creates a loss for one or the other.[11] In the main, however, it operates by rational compromise. Although the adversary system occasionally enables a winner to take all, most disputes are resolved by compromise. Many disputes are still resolved without a lawsuit.[12] Most of

11. *See* Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. U.L. Rev. 750, 764-66 (1964) (suggesting, however, that in some contexts it might be preferable to formulate a rule that acknowledges the equal weight of competing claims and policies and avoids the all-or-nothing result required by traditional concepts); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 Calif. L. Rev. 845, 865-66 (1961).

12. E. Cahn, The Moral Decision 275 (1955) (estimating "that over half of the contro-

those that result in a lawsuit are resolved without a trial.[13] Even those disputes that go to trial are frequently adjudicated without a complete victory for either side.[14]

There are, for example, leeways for reasonable compromise in the estimation of damages, not only in personal injury cases but frequently in other cases, such as contract cases and property cases.[15] Compromise is involved in more than just the determination of damages. Courts have substantial discretion in formulating equitable remedies such as injunctions,[16] and such remedies often involve compromise.[17]

Moreover, judicial procedures encourage conciliatory settlement by reasonable compromise of the claims of both parties. Thus, the Federal Rules of Civil Procedure, for example, provide that "they shall be construed to secure the just, speedy, and inexpensive determination of every action;"[18] authorize a pretrial conference that may cover "such other matters as may aid in the disposition of the action;"[19] and enable district courts, "in all cases not provided

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versies that could be taken to court are never litigated"); H. Ross, *supra* note 1, at 136, 141 (stating that in the insurance adjustment of bodily injury claims "better than 19 in 20 claims are disposed of informally through negotiation").

13. E. Cahn, *supra* note 12, at 275-76. *See* [1978] Judicial Council Cal. Ann. Rep., *supra* note 3, at 138-45.

14. The inherent difficulties of the fact-finding process suggest why litigants cannot be certain of a complete victory. In a lawsuit, "there must be a recognition at the outset that nicely accurate results cannot be expected; that society and the litigants must be content with a rather rough approximation of what a scientist might demand." Morgan, *Foreword* to A.L.I., Model Code of Evidence 4 (1942).

15. *See* Taylor v. Pole, 16 Cal. 2d 668, 673, 107 P.2d 614, 616 (1940) (in a tort case, the jury has "wide latitude" and "elastic discretion" to estimate damages); Allen v. Gardner, 126 Cal. App. 2d 335, 341, 272 P.2d 99, 103 (1954) (in a contract case, where substantial damage is shown but amount "is entirely uncertain or extremely difficult of ascertainment the sum to be awarded is a question for the jury in the exercise of a sound discretion").

16. *E.g.*, Brunzell Constr. Co. v. Harrah's Club, 253 Cal. App. 2d 764, 62 Cal. Rptr. 505 (1967).

17. *See Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1063-64 (1965) (examples of injunctive relief framed to recognize legitimate interests of both parties and that strike a middle ground between their initial claim and defense). In the public law area, it has long been recognized that courts seek the help of the parties in shaping relief and that compromise characterizes many equitable decrees. *See* E. Cahn, *supra* note 12, at 273-77 (characterizing the decree in Brown v. Board of Educ., 349 U.S. 294 (1956), as the product of compromise by the Court); Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1298-1302 (1976) (equitable decrees in public law litigation are frequently characterized by negotiations and even compromise between the parties).

Even when the injunction is cast in absolute terms, the parties themselves often negotiate further and the defendants frequently arrange cash settlements in lieu of the plaintiff's injunctive relief. *See* Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 Stan. L. Rev. 1563 (1975).

18. Fed. R. Civ. P. 1.

19. *Id.* 16.

for by rule," to "regulate their practice in any manner not inconsistent with these rules."[20] These procedures provide judges with some authority to facilitate settlements.[21] In addition, regional procedures of federal courts may require attorneys to file a pretrial statement that summarizes the status of settlement negotiations and indicates whether additional negotiations are likely to be productive.[22] Comparable procedures are gaining ground in state courts.[23] In a growing number of courts, settlement conferences are mandatory.[24]

Other legal rules encourage negotiation and settlement. The rules of evidence afford an evidentiary privilege for settlement negotiations.[25] In some states, statutes enable a party making a settlement offer to recover subsequent costs, including expert witness fees, if the other party fails to obtain a judgment better than the offer.[26] In some cases, the courts have discretion to award or deny costs and interest[27] and might exercise that discretion against a litigant who unreasonably prolonged a case by refusing to accept a reasonable settlement.[28] To discourage lawyers who represent the

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20. *Id.* 83.

21. *See* Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971). On the judge's role in encouraging settlement, see Rosenberg, *The Adversary Proceeding in the Year 2000*, 26 Mo. B.J. 302, 311 (1970); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 Jud. 400, 407-08 (1978).

22. *E.g.*, N.D. Cal. R. Civ. P. 235-7(n).

23. *E.g.*, Cal. R. Ct. 207.5; Standards of Judicial Administration Suggested by the Judicial Council § 9(c), (d), reprinted in Cal. R. Ct. app. (pretrial conference and mandatory settlement conference).

Under a new rule, effective since 1977, a prehearing conference may be ordered in cases on appeal in California to consider simplification of issues, the possibility of settlement, and other matters. Cal. R. Ct. 19.5.

24. *See, e.g.*, R. Schauer, Civil Trials Manual for the Los Angeles Superior Court, *Settlement Procedures*, §§ 10-17 (1977). The court requires the litigants to attend or to send representatives with "full authority to make decisions and negotiate," to submit written statements as required by the settlement judge, and to bring evidence and documents pertinent to damages and to settlement. *Id.* §§ 11, 12, 13. If the rule is violated, the court may assess monetary sanctions "in the amount of costs and actual expenses, including attorneys fees incurred by any and all other parties in connection with the mandatory settlement conference." *Id.* § 10. *See* Wisniewski v. Clary, 46 Cal. App. 3d 499, 504-06, 120 Cal. Rptr. 176, 179-81 (1975) (upholding a Los Angeles superior court's authority to impose sanctions, including attorney's fees, but reversing order imposing fees for plaintiff's nonappearance under former rule that only referred to defendant's failure to appear).

See also Spector, *Financing the Courts Through Fees: Incentives and Equity in Civil Litigation*, 58 Jud. 330, 336-38 (1975).

25. *E.g.*, Cal. Evid. Code §§ 1152, 1154 (West 1966 & Supp. 1978); Utah Code Ann. § 78-27-30 (1977); Utah R. Civ. P. 68(b). *See generally* 4 J. Wigmore, *Evidence* §§ 1061-1062 (Chadbourn rev. ed. 1972).

26. *See, e.g.*, Cal. Civ. Proc. Code §§ 998, 1025 (West 1955 & Supp. 1978). *Cf.* Fed. R. Civ. P. 68.

27. Fed. R. Civ. P. 54(d); Cal. Civ. Code § 3287(b) (West 1970) (interest on unliquidated claim); *Id.* § 1032(c) (West Supp. 1978) (costs in certain actions).

28. *E.g.*, Bowman v. West Disinfecting Co., 25 F.R.D. 280, 283-84 (E.D.N.Y. 1960)

gambling plaintiff and the intransigent defendant, courts might impose such costs on a lawyer who has caused unreasonable delay or has otherwise abused the judicial process.[29]

Increasingly, courts and legislatures are adopting rules that require the exhaustion of private or administrative remedies prior to court action. Thus, statutes defining the content of fire insurance policies require the insured to provide notice and proof of loss to the insurer.[30] In defamation cases, a statute may require a demand for retraction and an opportunity for timely correction as prerequisite to any recovery of special damages.[31] A prospective litigant may first be required to arbitrate;[32] to follow a contract settlement procedure;[33] to pursue a grievance remedy;[34] to comply with a by-law for internal settlement within a union or unincorporated association;[35] to attempt conciliation, as in employment discrimination cases;[36] to

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(costs denied to party who unreasonably prolonged the case); Mabrey v. McCormick, 205 Cal. 667, 669, 272 P. 289, 289 (1928) (interest denied since defendants were always willing and ready to settle under true contract); Hull v. Goodman, 4 Utah 2d 162, 290 P.2d 245, 247 (1955) (dicta that question of costs is in discretion of the trial court). *See generally* Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, 34 N.Y. ST. B.J. 477, 478 (1962); Sander, *supra* note 2, at 129 & n.49; Sands, *Attorney's Fees as Recoverable Costs*, 63 A.B.A.J. 510 (1977); Note, *Deterring Unjustifiable Litigation by Imposing Substantial Costs*, 44 ILL. L. REV. 507 (1949); Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953). *See also* Note, *Groundless Litigation and the Malicious Prosecution Debate: An Historical Analysis*, 88 YALE L.J. ____ (1979).

29. *See* Weiss v. United States, 227 F.2d 72 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); Monk v. Roadway Express, Inc., 73 F.R.D. 411, 417 (W.D. La. 1977); 28 U.S.C. § 1927 (1970); FED. R. CIV. P. 56(g) (contempt sanctions against attorney who, in summary judgment proceeding, presents affidavits in bad faith or solely for the purpose of delay); CAL. CIV. PROC. CODE § 365 (West Supp. 1978) (attorney's failure to comply with requirement of prior notice before commencing medical malpractice action "shall be grounds for professional discipline"); Annot., 12 A.L.R. Fed. 910 (1972); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

30. *E.g.*, CAL. INS. CODE § 2070 (West 1972); UTAH CODE ANN. § 31-33-34 (1974).

31. *E.g.*, CAL. CIV. CODE § 48a (West Supp. 1978) (defamation by newspaper or radio). *See* Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d 121, 216 P.2d 825 (1950).

32. *E.g.*, Clogston v. Schiff-Lang Co., 2 Cal. 2d 414, 41 P.2d 555 (1935) (requiring compliance with contract arbitration provision); Cone v. Union Oil Co., 129 Cal. App. 2d 558, 563-64, 277 P.2d 464, 468 (1954); UTAH CODE ANN. § 78-31-1 (1977) (making contracts to arbitrate future controversies specifically enforceable); H. HART & A. SACKS, *supra* note 1, at 340-44; Annot., 72 A.L.R.2d 1439 (1960).

33. Clack v. State, 275 Cal. App. 2d 743, 746, 80 Cal. Rptr. 274, 276 (1969).

34. *E.g.*, Morton v. Superior Court, 9 Cal. App. 3d 977, 983, 88 Cal. Rptr. 533, 536 (1970) (class action by city employees barred by requirement that plaintiffs exhaust administrative remedy of grievance procedure for employment disputes).

35. *See* Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 474, 551 P.2d 410, 415, 131 Cal. Rptr. 90, 95 (1976) (tort action); Robinson v. Templar Lodge, 117 Cal. 370, 376, 49 P. 170, 171 (1897); Killeen v. Hotel & Restaurant Employees' Int'l Alliance, 84 Cal. App. 2d 87, 91, 190 P.2d 30, 33 (1948); Simpson v. Salvation Army, 49 Cal. App. 2d 371, 374, 121 P.2d 847, 848 (1942). *See generally Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983, 1069 (1963); Comment, *Exhaustion of Remedies in Private Voluntary Associations*, 65 YALE L.J. 369 (1956).

36. *E.g.*, 29 U.S.C. § 626(d) (Supp. V 1975) (age discrimination); 42 U.S.C. § 2000e-

undertake a government contract renegotiation;[37] to file a tort claim against a public entity, so as to give it "notice and an opportunity to investigate and settle meritorious claims without litigation;"[38] or to give ninety days notice of a malpractice claim to a health-care provider.[39] In a sales case, requisite notice of breach of warranty "opens the way for normal settlement through negotiation."[40] The recently enacted federal Magnuson-Moss Warranty Act impels sellers to incorporate dispute-settling procedures in written warranties and buyers to use such procedures before resorting to court.[41]

Insurance companies are now typically expected to attempt to effectuate a settlement and to accept reasonable settlements within policy limits. For example, California by statute now prohibits unfair claims settlement practices in insurance cases, such as an insurer's failure to acknowledge and act with reasonable promptness on communications about claims, or its failure to attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."[42] Moreover, if an insurer does not accept a reasonable settlement within policy limits, it risks becoming liable for an amount far in excess of those limits as well as for damages covering the insured's emotional distress or physical injury, and possibly even punitive damages.[43] The "implied

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5(b), (f)(1) (Supp. V 1975) (Title VII cases).

37. *E.g.*, Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 20 (1974) ("the design of the Renegotiation Act was to have renegotiation proceed expeditiously without interruption for judicial review"); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 770 (1947).

38. Viles v. State, 66 Cal. 2d 28, 32, 423 P.2d 818, 822, 56 Cal. Rptr. 666, 670 (1967). For statutory provisions, see, *e.g.*, CAL. GOV. CODE §§ 905,.2, 910,.6(b), .8, 911,.2, .6, 945.4, 948, 949 (West 1966 & Supp. V 1978); UTAH CODE ANN. §§ 63-30-11 to -15 (1978 & Supp.).

The notice requirement should be administered in conjunction with principles of substantial compliance, *see* CAL. GOV. CODE §§ 910.6(b), .8, 911; mistake or excusable neglect, CAL. GOV. CODE § 911.6; and estoppel of the public entity when it has misled the claimant. *E.g.*, Fredrichsen v. Lakewood, 6 Cal. 3d 353, 491 P.2d 805, 99 Cal. Rptr. 13 (1971).

39. *E.g.*, CAL. CIV. PROC. CODE § 364(a) (West Supp. 1978). *Cf.* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1078 (1977) (suggesting that many meritorious claims may be settled during the notice period, but that groundless actions would still be prosecuted).

Section 365 of the California Code of Civil Procedure provides that failure to comply with the notice requirement shall not invalidate court proceedings or jurisdiction to render a judgment, but that any such failure by an attorney "shall be grounds for professional discipline."

40. U.C.C. § 2-607(3)(a), Comment 4. *See* Vogel v. Thrifty Drug Co., 43 Cal. 2d 184, 188, 272 P.2d 1, 4 (1954) (notice must be pleaded and proved).

41. 15 U.S.C. §§ 2302(a)(8), 2310(a) (1976).

42. CAL. INS. CODE § 790.03(h) (West Supp. 1978). UTAH CODE ANN. § 31-34-10 (1974) provides: "All claims shall be settled as soon as possible and in accordance with the terms of the insurance contract." *See* Wasserman, *Settle the Insurance Claims: New Legislative Clout*, BEVERLY HILLS B.A., Nov.-Dec. 1973, at 19.

43. *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr.

obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty."[44] Given the objective of precluding the insurer from taking a gamble against excess liability "which only the insured might lose,"[45] it seems reasonable to suggest that a duty to settle could be extended beyond the area of insurance to such analogous areas as indemnity or fiduciary relationships.

Generally accepted concepts of professional responsibility are also conducive to settlement. For example, the Federal Rules of Civil Procedure state that a lawyer's signature on a pleading "constitutes a certificate" that "there is good ground to support it; and that it is not interposed for delay."[46] It is questionable whether a lawyer can certify a pleading when he and his client knowingly rejected an opportunity for a reasonable settlement. Although it is the client who ultimately decides whether to settle a dispute, lawyers have a professional responsibility to assist their clients in reaching reasonable settlements.[47] It is significant also that "with increasing frequency, clients have been charging their attorneys with negligence regarding a settlement," including "failing to recommend a settlement."[48]

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711 (1974) (recovery for physical impairment and, if requisite intent to injure is shown, punitive damages); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (recovery for loss and emotional distress); Note, *Insurer's Liability for Refusal to Settle: Beyond Strict Liability*, 50 S. CAL. L. REV. 751 (1977).

44. Communale v. Traders & General Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958).

45. Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 940, 553 P.2d 584, 586, 132 Cal. Rptr. 424, 426 (1976).

46. FED. R. CIV. P. 11. *See also id.* 7(b)(2). Rule 11 deserves better enforcement in the federal courts and provides a useful model for state rules. *Cf.* ch. 1165, 1978 Cal. Stats. (to be codified in CAL. CIV. PROC. CODE § 411.30) (certificate by plaintiff's attorney in medical malpractice case).

47. The recent Code of Professional Responsibility makes clear that the decision to settle is the client's decision. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, Ethical Consideration [hereinafter cited as EC] 7-7 (1976). Although the Code exhorts lawyers to represent clients "zealously within the bounds of the law," it also cautions that zeal must be tempered by reason: It is "often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." EC 7-8. *See also* Disciplinary Rule 7-102(A)(1).

Unless an essential principle is at stake, "a settlement on a reasonable basis, on a fair estimate of the relative chances of the parties, is always better for the client than litigation, involving time, expense, and ill-feeling, though often considerably less fees to the lawyers." H. DRINKER, LEGAL ETHICS 102 (1953). *See* King & Sears, *supra* note 1, at 454-55. *See also* E. CAHN, *supra* note 12, at 275-76; Eisenberg, *supra* note 1, at 665 ("Indeed in terms of sheer number of dispute-settlements effected, the most significant legal dispute-settlement institution is typically not the bench, but the bar"); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 735 (1977).

48. MALLEN & LEVIT, LEGAL MALPRACTICE §§ 138, 346 (1977). *Cf.* Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968) (lawyer in conflict of interest situation held liable

Moreover, a reasonable settlement is likely to prove more beneficial for the client than a courtroom victory won at exorbitant cost. Such settlements, for example, might cover tax planning; convenient scheduling and deferral of payments; use of stock or other property in lieu of cash; institution of remedial programs in lieu or partially in lieu of money (for example, training and promotion programs in an employment discrimination case); reciprocal obligations of each party (for example, cross-licenses to patents); and retraction of defamatory statements or correction of erroneous statements in lieu of damages. An additional benefit of such settlements is their relative privacy in contrast to the publicity that might attend a lawsuit.

In sum, a rule or custom that parties attempt to negotiate before they sue each other is harmonious with the rational administration of justice.[49]

III. Rule or Custom?

As we have seen, there is no dearth of rules designed to foster negotiation. The salient objective of rules that require the exhaustion of available remedies and notice of breach of warranty, to take two examples, is to make some measure of negotiation the clear first resort.[50] We might well apply comparable rules in a wider area to potential plaintiffs and potential defendants and their counsel.

Negotiation, or at least notice, might be made a condition of maintaining an action. No particular form of notice should be required.[51] Once notice is provided, the expiration of a period for nego-

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to insured's assignee for failure to conclude authorized settlement within policy limits).

49. Note the following arbitration clause: "Any disputes arising from the execution of or in connection with this Contract, shall be settled amicably through friendly negotiation. In case no settlement can be reached through negotiation, the case shall then be submitted . . . for arbitration . . . ." Jen Tsien-Hsin & Liu Shao-Shan, *People's Republic of China*, in 3 Yearbook—Commercial Arbitration 153, 156 (Sanders ed. 1978). *See* Smith, *Standard Form Contracts in the International Commercial Transactions of the People's Republic of China*, 21 Int'l & Comp. L.Q. 133, 138-39 (1972). For disputes within its jurisdiction, if friendly negotiations fail, the Foreign Trade Arbitration Commission in China will encourage and facilitate conciliation. If conciliation fails, the Commission will decide the case by arbitration and award. Most cases are settled by friendly negotiations or conciliation. Interview with Jen Tsien-Hsin, Secretary-General, Foreign Trade Arbitration Commission, China Council for the Promotion of International Trade, People's Republic of China, in Peking (May 23, 1978). *See also* Dicks, *People's Republic of China*, in East-West Business Transaction 391, 434-35 (Starr ed. 1974); Li, *Trade with China: An Introduction*, in Law and Politics in China's Foreign Trade 12-13 (Li ed. 1977).

50. *See* L. Patterson & E. Cheatham, *supra* note 1, at 125.

51. *See* Cal. Civ. Proc. Code § 364(b) (West Supp. 1978) (for medical malpractice claims, "[N]o particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature

tiation could be made the equivalent of "final" agency action that ordinarly must occur before judicial review is sought of an administrative agency's decision; negotiation thereafter would not be required.[52] Adversaries whose disputes proved beyond resolution by negotiation would still have access to the courts. As in the renegotiation of government contracts, "[t]here is no limitation or denial of the contractor's normal litigation rights when the renegotiation process is at an end.[53]

A rule, making negotiation or notice the ordinary prerequisite to litigation, could be attended by sanctions enforceable by a court. A court could be authorized to assess costs as well as actual expenses, including reasonable attorney's fees, or impose other reasonable sanctions against any party to an action or proceeding who unreasonably failed or refused to attempt in good faith to negotiate a fair, equitable, and expeditious settlement before the action or proceeding commenced. Such a rule would also enable the court to impose comparable sanctions against any party's counsel who unreasonably caused or contributed to such a failure or refusal.

Society should be able to impose sanctions against misuse of its resources. In a medical operation, the patient pays not only for the surgeon but also for the operating room, anesthesia, and related costs; nonetheless, a committee of doctors may inquire: "Was this operation necessary?" In a lawsuit, however, we take it for granted that although the client pays for the lawyer and a filing fee, he does not pay (except as a taxpayer along with thousands of others) for the courtroom, judge, and court personnel. No committee of judges or lawyers inquires: "Was this lawsuit necessary?" It seems reasonable, given the enormous demands on our judicial system, to impose moderate sanctions against those who have misused it.

Sanctions should be commensurate with the violation. For example, if the defendant offered $50,000 before litigation and the plaintiff unreasonably refused even to respond and then sued, went to trial, and recovered only $25,000, it would seem reasonable for the

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of the injuries suffered").

Generally speaking, it is good practice to give the other party notice of the claim and the essential facts upon which it rests, and sometimes also the legal basis of the claim. *See* King & Sears, *supra* note 1, at 461 (suggesting that "a letter, neither formal nor threatening, should be sent to the other party or his attorney if he has one"). In some circumstances, it may even be helpful to provide a draft of the proposed complaint.

52. *Cf.* 29 U.S.C. § 411(a)(4) (1970) (four month time limit under Labor-Management Reporting and Disclosure Act); 29 U.S.C. § 482(a) (1970) (three month exhaustion period for disputes over union elections); CAL. CIV. PROC. CODE § 364 (West Supp. 1978) (90 day notice period for medical malpractice claims); CAL. GOV. CODE § 912.4(c) (West 1966) (claim against governmental entity deemed denied if not acted on within requisite time period).

53. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 23 (1974).

court in its discretion to order the plaintiff to pay the defendant's costs, expenses, and attorney's fees. Similarly, if the plaintiff offered to accept $25,000 before litigation and the defendant unreasonably refused to offer anything more than a token and the plaintiff then recovered $50,000 at trial, he would ordinarily be entitled as of right to costs, but the court should also have discretion to order the defendant to pay the plaintiff's expenses and attorney's fees. Prior to trial, there could be milder sanctions. For example, a court might hold back the case of a plaintiff who refused to attempt to negotiate, or advance the case against a defendant who likewise refused.

"Attempt" of course connotes good faith, though it may fall short of a negotiated solution, lengthy negotiations, or bargaining akin to collective bargaining. Sanctions would be imposed only against those who unreasonably foreclosed any opportunity for negotiation and thereby provoked unnecessary litigation. There would be no major innovation comparable to the English practice of awarding attorney's fees to the prevailing party.

There is good reason to limit sanctions to those cases in which a party acts unreasonably. Sometimes a refusal to negotiate or give notice may not be unreasonable, as in the following examples: The filing of a lawsuit is necessary to preclude a fraudulent conveyance; or the lawsuit is brought solely as a test case of legal principle (though even here prior discussions may sharpen the issues and engender stipulation on undisputed facts); or the case arises in a series of similar cases with the same defendant in which negotiations have proved futile; or antitrust policies make negotiation inadvisable without court intervention; or the statute of limitations will run the day after the lawyer takes on the case (negotiations, however, might proceed promptly after filing). Conversely, a potential defendant has no obligation to attempt negotiations in the face of a spurious claim or a threat of legal action motivated by the allure of capitalizing on nuisance value.[54]

A special situation may arise which involves neither a single party who unreasonably proceeds to litigation nor one who unreasonably precludes negotiation, but two parties who each proceed unreasonably on separate courses to litigation. The opportunities are there in forum-shopping.[55] In this double-header of intransigence, the forum that ultimately takes jurisdiction might order a stay

54. *See* H. Ross, *supra* note 1, at 199-204 ("danger value"), 204-11 ("nuisance value"); Carlson, *Nuisance Value Settlements—A Necessary Evil?*, 22 Ins. Counsel J. 156, 158 (1955).

55. *See generally* Note, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29 U. Chi. L. Rev. 740 (1962).

of all further proceedings until a reasonable period for negotiation expires. It also might limit sanctions or decline to impose them, not because the party that prevailed in its choice of forum acted reasonably in failing to negotiate with or notify his adversary, but because that adversary was no less intransigent.

A rule of prerequisite negotiation or notice is a small but significant step toward civility in legal disputes. Realistically, it is not too far ahead of its time, for courts and legislatures are moving in that direction. Insofar as rules of civility mitigate the disturbances of a litigious society they advance the day for a custom of civility that governs by the moral force of widespread acceptance.[56]

By advancing to minimal rules, with an eventual custom of civility in mind,[57] lawyers not only serve their clients, they also contribute to the administration of justice. Ideally, a custom is preferable to a rule, for it withstands legalistic challenges, clever efforts to create exceptions, and pretenses at compliance. Moreover, a custom of civility relies not on sometimes cumbersome enforcement mechanisms but on individual and professional responsibility.

When rules of civility evolve into daily customs of courtesy, lawyers will have reached what Lon Fuller so aptly called "the dividing line where the pressure of duty leaves off and the challenge of excellence begins."[58]

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56. "Custom, cohesiveness, and collective responsibility are of enormous importance to our calling." Levi, *The University, The Professions, and The Law*, 56 CALIF. L. REV. 251, 251 (1968). *See* Morris, *Custom and Negligence*, 40 COLUM. L. REV. 1147 (1942). *See generally* J. BROWNE, THE LAW OF USAGES AND CUSTOMS 14-37 (1888); P. VINOGRADOFF, COMMON-SENSE IN LAW 148-68 (Arno Press. ed. 1975); P. VINOGRADOFF, CUSTOM AND RIGHT 21-39 (1925); Barton, *supra* note 3, at 573-74, 578-79, 583; Braybrooke, *Custom as a Source of English Law*, 50 MICH. L. REV. 71 (1951); Mallonee, *The Growth of Custom into Law*, 1 VA. L. REGISTER 1 (N.S. 1915); Wright, *Opposition of the Law to Business Usages*, 26 COLUM. L. REV. 917 (1926); Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192 (1955); Note, *The Generative Force of Custom and Usage in Law*, 6 ST. JOHNS L. REV. 216 (1931).

57. *Cf.* 1 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 347 (D. Appleton ed. 1912): "Too much importance is attributed to legislation, too little to manners. These three great causes serve, no doubt, to regulate and direct the American democracy; but if they were to be classed in their proper order, I should say that the physical circumstances are less efficient than the laws, and the laws very subordinate to the manners of the people."

58. FULLER, THE MORALITY OF LAW 42 (rev. ed. 1969).

Limitations on the Right to Counsel: The Unauthorized Practice of Law*

*Donald T. Weckstein***

One of the least appreciated services that the organized bar performs is the protection of the public from the unauthorized practice of law. Despite frequent admonitions in court opinions and bar journals that the purpose of prohibiting the unauthorized practice of law is to protect the public and not to protect the economic monopoly of the bar,[1] the public remains unconvinced. Perhaps the public believes that the government is over-paternalistic in not trusting people to protect themselves from their own folly; perhaps the public reacts to the inherent conflict of interest in having members of the bar, including judges, lecture them on the need to employ lawyers; or perhaps the bar's educational effort has been simply inadequate; or maybe the average person is irresistibly tempted to sacrifice quality of service for economy. Whatever the reason, the fact remains that efforts to prevent non-lawyers from performing legal services are generally resented rather than appreciated.

This phenomenon was dramatically illustrated in 1962 when the Arizona Supreme Court held that it was the impermissible practice of law for a real estate broker to fill in blanks on a standard-form purchase contract.[2] Within months, a referendum was passed, by a margin of almost four to one, adopting a constitutional amendment that permitted real estate brokers and salesmen to draft or fill out, without charge, any and all instruments incident to a sale, exchange, or lease of property.[3]

It is apparent from cases such as this that the efforts of the bar and the courts to explain the goals of the restrictions on unauthorized practice of law have not been entirely successful. Even when

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1. *E.g.*, Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914, 922 (1942); *In re* Baker, 8 N.J. 321, 85 A.2d 505, 511-12 (1951); Marden, *The American Bar and Unauthorized Practice*, 33 UNAUTH. PRAC. NEWS 1 (1967); Onion, *Elimination of Unauthorized Practice of Law*, 26 TEX. B.J. 14 (1963).

2. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *aff'd on rehearing*, 91 Ariz. 293, 371 P.2d 1020 (1962).

3. ARIZ. CONST. art. 26, § 1. *See* Adler, *Are Real Estate Agents Entitled to Practice a Little Law?*, 4 ARIZ. L. REV. 188 (1963); Hamner, *Title Insurance Companies and the Practice of Law*, 14 BAYLOR L. REV. 384 (1962); Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963). *See also* Martin, *Professional Responsibility and Probate Practices*, 1975 WIS. L. REV. 911, 912 n.9, describing similar public reaction to a Wisconsin decision requiring that an executor retain counsel to appear in probate court.

some restrictions are tolerated, the public will not maintain the fragile consent implied from silence when the courts attempt to limit activities of other professions and occupational groups too severely. This is especially true when non-lawyers are prohibited from performing services that they have traditionally performed and that are incidental to their legitimate businesses.[4]

This article will examine the goals of unauthorized practice restrictions, clarify and analyze the scope of the restrictions, evaluate their application in various contexts, and propose a framework for future resolution of unauthorized practice issues.

I. Goals of Unauthorized Practice Laws

The most frequently stated purpose of prohibiting non-lawyers from practicing law is to protect the public from incompetent and unethical performance of legal services.[5] This assumes that lawyers will be more competent and more ethical than non-lawyers in performing legal services. Requirements for admission to the practice of law, such as a general and legal education and completion of a bar examination, probably assure that at least a minimum level of competence is attained by lawyers. Although the lawyers' public image may suggest otherwise,[6] the evidence of good moral character required for an applicant to the bar, the existence of the Code of Professional Responsibility, and the control of conduct through disciplinary machinery and the courts probably result in lawyers as a whole maintaining fairly high ethical standards.[7]

Whether or not one who has not met the same requirements for admission to the practice of law should be deemed to lack the requisite competency and ethics to perform legal services presents a more difficult question. In many areas of the law, it is likely that a non-lawyer specialist will have greater knowledge than a general legal practitioner. For example, real estate brokers may know more property law, trust officers more estate law, architects more construction law, and accountants more tax law than lawyers who do not specialize in these areas. Members of these other professions are often

4. See text accompanying notes 25-33 *infra*.

5. *E.g.*, Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180, 52 N.E.2d 27, 31 (1943); Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951); R.J. Edwards, Inc. v. Hert, 504 P.2d 407 (Okla. 1972); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 509, 179 S.W.2d 946, 948; ABA Code of Professional Responsibility EC 3-1. See authorities cited note 1 *supra*.

6. *See* Weckstein, *Watergate and the Law Schools*, 12 San Diego L. Rev. 261, 262-63 (1975).

7. *See* Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 Tex. L. Rev. 267 (1970).

subject to state licensing and to professional regulation that mandates adherence to a code of ethics, although requirements may differ from those of the lawyer. Thus, on one hand, a person consulting a lawyer does so with the confidence that the lawyer has met minimum requirements of competence and ethics and is theoretically subject to discipline for departures from certain standards. On the other hand, a non-lawyer may be able to perform certain specialized services more competently than the lawyer, but is not subject to the same standards of competence, ethics, and enforcement as are lawyers. Laypersons competent in particular areas of the law, however,may not recognize legal issues in areas outside their own specialty, even though the issues may be relevant to transactions within that specialty.[8] Whereas the concept of the seamless web of the law is familiar to the lawyer, persons untrained in law may not be alert to potential legal problems in peripheral areas generated by a seemingly routine transaction.

The competency and the integrity of advocates who appear before legal tribunals is essential to the efficiency of the legal system.[9] Lawyers are trained to research thoroughly and knowledgeably the law and facts and to marshall and present logically the relevant evidence. In addition, they should be familiar with court procedures and the limits of ethical advocacy. This training and knowledge not only protects the client but is relied upon by judges who might otherwise need to spend considerable time inquiring into the accuracy and completeness of a litigant's cause. Although it is no secret that not all lawyers are effective courtroom advocates, lawyers are less likely than laypersons to make poorly organized, inaccurate, or incomplete courtroom presentations. While some lawyers have been justly criticized for raising time-consuming technicalities, it is often difficult for a non-lawyer to distinguish between a technicality and a constitutional right. Moreover, it has been the experience of administrative tribunals that do not require lawyer representation that some laypersons, apparently trained by watching legal dramas on television, tend to prolong unduly proceedings by inappropriately using their limited knowledge of technical rules of evidence.

Some defenders of the restriction of unauthorized practice claim that there are public advantages to having a strong and independent bar, including a large segment of private practitioners, and

8. *See* Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 174 (1967).
9. *Id.* at 175.

that these goals are served by protecting lawyers from competition.[10] To whatever extent there was merit to this boot-strapping argument, its force has been dissipated by recent developments allowing lawyers to advertise and to price their services competitively.

All of the arguments in support of the bar's monopoly in performing legal services must be weighed against the rights of individuals to choose freely between lawyer and non-lawyer representation, particularly when the latter may be less expensive and more readily available. The bar has been successful in convincing their brethren on the bench and in lawyer-dominated legislatures that members of the public lack sufficient knowledge to choose, that they will be irrevocably harmed by choosing a layperson over a lawyer, and that they can be adequately served by available lawyers. They have, however, had less success in convincing the public of this view. In addition, recent decisions striking down the minimum fee schedules[11] and anti-advertising regulations of the bar[12] raise the possibility that unauthorized practice laws may also be vulnerable to attack under the antitrust laws or the Constitution.[13] Therefore, the anti-competitive goal of limiting the practice of law raises significant questions.

II. The Law of Unauthorized Practice

State statutes and judicial opinions typically provide that only a lawyer may practice law. It therefore becomes critical to define what is the "practice of law." Unfortunately, attempts to articulate a satisfactory definition have proven largely unsuccessful. Some statutes fail to provide any guidance;[14] statutes and judicial opinions list specific illustrations of activities included within the practice of law,[15] but are careful to include a caveat that they are not all inclusive.[16] Some attempts to be comprehensive are tautological in nature—defining the practice of law as those activities commonly performed by lawyers.[17] The fact is that lawyers perform many ac-

10. *See id.* at 174-75; L. Patterson & E. Cheatham, The Profession of Law 370-71 (1971).

11. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

12. Bates v. State Bar, 443 U.S. 350 (1977).

13. *See, e.g.*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir. 1978). See text accompanying notes 113-129 *infra*.

14. *E.g.*, Cal. Bus. & Prof. Code § 6125 (Deering 1974): "No person shall practice law in this State unless he is an active member of the State Bar."

15. *E.g.*, N.C. Gen. Stat. § 84-2:1 (1975).

16. State Bar Ass'n v. Connecticut Bank & Trust Co., 146 Conn. 556, 563, 153 A.2d 453, 457-58 (1959); N.C. Gen. Stat. § 84-2:1 (1975).

17. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961);

tivities that do not require legal training or knowledge,[18] and it has even been suggested that "there are laymen who perform every kind of task performed by lawyers."[19]

The Code of Professional Responsibility, while eschewing formulation of a specific definition, states: "Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer."[20] The essence of this judgment, according to the Code, is the lawyer's "educated ability to relate the general body and philosophy of law to a specific legal problem of a client."[21]

Implicit in such attempts to delineate the "practice of law" is the recognition that lawyers perform acts that do not require their professional judgment. Further, no clear line can be drawn that will distinguish in all circumstances those activities to be performed by non-lawyers from those reserved exclusively for members of the bar. Whether or not a particular activity is considered off limits to laypersons generally depends upon: 1) the nature of the activity, 2) relevant qualifications of the non-lawyer engaging in the activity, and 3) under what circumstances the service is performed.

Activities included within the practice of law which potentially are reserved for lawyers include representative appearances before legal tribunals, preparation of pleadings and other documents in connection therewith, drafting of instruments affecting legal rights and obligations, and giving legal advice. As a generalization, courtroom advocacy on behalf of another is deemed to be the heart of the lawyer's functions and is most likely to be prohibited to nonlawyers. The other enumerated activities may be allowed when they are incidental to some other legitimate activity performed by a nonlawyer or if they are conducted under supervision of or in conjunction with a lawyer.

Following this approach, a few states have gone so far as to define statutorily the "practice of law" as representation of another before a tribunal authorized to make legal decisions[22] while designating the preparation of legal documents and giving of legal advice as the "business of law."[23] The practical difference between these

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State Bar Ass'n v. Connecticut Bank & Trust Co., 146 Conn. 556, 563, 153 A.2d 453, 457-58 (1959); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940).

18. *See* Q. JOHNSTONE & D. HOPSON, *supra* note 8, at 81-92, 101-02, 106-30.
19. *Id.* at 163.
20. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5.
21. *Id.*
22. *E.g.*, LA. REV. STAT. ANN. § 37:212(1) (West 1964); TENN. CODE ANN. § 29-302 (1955).
23. LA. REV. STAT. ANN. § 37:212(2) (West 1964); TENN. CODE ANN. § 29-302 (1955).

categories is that the practice of law is prohibited to non-lawyers, whether or not done for compensation, while the business of law is unauthorized only if the client pays for the services.[24] A dichotomy based upon the presence or absence of compensation misconceives the purposes of unauthorized practice regulation. The intent is not to protect a prospective client *from paying compensation* for incompetent or unethical legal services, but to protect that client *from receiving such services.* It would be of small comfort to a client that he did not have to pay for services of a non-lawyer whose incompetence resulted in a loss of title to property, an invalid will, or criminal liability for violation of security laws. On the other hand, if freedom to choose a non-lawyer to perform certain legal services is important, that freedom should not be denied simply because the non-lawyer insists on compensation for his services.

There are situations, however, where the payment of compensation may be relevant to the establishment of the unauthorized practice of law. For example, one common exception to the prohibition of law practice by non-lawyers is when the legal services are incidental to other legitimate services performed by the non-lawyer and no separate fee is charged for the legal aspects of the transaction.[25] Thus, it is commonly held that a real estate broker may fill in the blanks of a purchase and sale agreement so long as the basis for the broker's compensation is the bringing together of a buyer and seller of the real estate and not the incidental preparation of a legal document.[26] Some jurisdictions also regard the preparation of deeds granting title, mortgage or trust deeds, and related documents as incidental to the real estate dealer's business function.[27] Similarly, financial institutions and title companies have been permitted to prepare legal documents incidental to the granting of a loan or insuring of legal title.[28] Bank trust departments, accountants, and other business representatives also may be allowed to give advice with legal implications and to draft or fill in standardized legal documents incidental to the performance of services for their customers.[29] In some states the incident to business exception is limited

24. LA. REV. STAT. ANN. § 37:212(2) (West 1964); TENN. CODE ANN. § 29-302 (1955).

25. *See* cases cited notes 26-31 *infra.*

26. *See* Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E.2d 771 (1966); Gustafson v. V.C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435 (1941).

27. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Ingham County Bar Ass'n. v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955); State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

28. *E.g.,* Bar Ass'n v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959). *But see* Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

29. *See, e.g.,* Merrick v. American Sec. & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert.*

to filling in standard forms prepared by lawyers, drafting incidental legal documents, and giving legal advice that is simple rather than complex in nature.[30] Thus, the courts of California and Minnesota have concluded that a layperson should not be allowed to furnish legal services that are incidental to another business or profession but involve difficult legal questions since their resolution would reasonably demand a trained legal mind.[31]

The extent to which laypersons may perform legal services incidental to other occupations has been greatly influenced by customs in various localities and in certain occupations. In California, for example, lawyers are rarely involved in the purchase and sale of residential real estate. Real estate brokers, lending institutions, title insurance companies, and escrow agents handle all details from the initial agreement to the closing.[32] In the construction industry, it has become customary for architects to draft contracts and specifications, interpret them, settle disputes which may arise under them, and generally act as advocates and representatives of property owners or developers.[33]

In some jurisdictions a non-lawyer's holding himself out to practice law constitutes unauthorized practice.[34] Although whether or not a fee was charged and whether or not the services rendered were a single act or a series of transactions are relevant to the determination,[35] a holding out to practice may be found even when the services were performed without compensation or on just a single occasion. A person who proffers advice to a friend that he has

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denied, 308 U.S. 625 (1940); Ingham County Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955); Auerbacher v. Wood, 142 N.J. Eq. 484, 59 A.2d 863 (1948); *In re* Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd*, 299 N.Y. 728, 87 N.E.2d 451 (1949). *But see* Oregon State Bar v. John H. Miller & Co., 235 Or. 341, 385 P.2d 181 (1963). *See also* AMERICAN BAR FOUNDATION, UNAUTHORIZED PRACTICE HANDBOOK 132-38 (1972).

30. See cases cited note 31 *infra*. *See* People v. Title Guar. & Trust Co., 227 N.Y. 336, 125 N.E. 666 (1919); Gustafson v. V.C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435 (1941). *But see* People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940). For the view that drafting legal documents for a residential real estate transaction is not routine, but requires a lawyer's judgment and knowledge, see Special Committee on Residential Real Estate Transactions, *The Proper Role of the Lawyer in Residential Real Estate Transactions*, 1976 A.B.A. REP. 7-8.

31. Agran v. Shapiro, 127 Cal. App. 2d 807, 273 P.2d 619 (1954); Gardner v. Conway, 234 Minn. 468, 479-81, 48 N.W.2d 788, 795-96 (1951).

32. *See* Comment, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331, 1343 (1966).

33. *See* Q. JOHNSTONE & D. HOPSON, *supra* note 8, at 315-54.

34. *E.g.*, People v. Goldsmith, 249 N.Y. 586, 164 N.E. 593 (1928).

35. *See In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965). *Compare* People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940), *with* People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919).

grounds for a lawsuit is not likely to have violated the proscription, whereas a law student who draws a will for a friend without compensation probably has.

Law students and paralegals enjoy no special privilege to practice law unless their activities are performed under the supervision of a lawyer who takes responsibility for the end product. Stated positively, a law student or paralegal may engage in a wide variety of activities such as legal research, drafting of legal documents, interviewing witnesses, and drafting interrogatories so long as a lawyer supervises and accepts responsibility for the work product.[36] In many states law students are also permitted to make court appearances and participate in the trial of a case. This is usually done pursuant to student practice rules adopted by the state court, the legislature, or the integrated bar association with official delegated authority.[37] Typically student practice rules require the student to have a minimum level of legal education, to perform the practice under the supervision of a responsible attorney, and to maintain the standards of professional ethics.

A recent opinion by a California intermediate court of appeals held that state's student practice rules[38] invalid as applied to representation of a felony defendant.[39] The court reasoned that the rules were authorized by the State Bar without prior approval of the state court, and that representation by a student denied the defendant adequate counsel as guaranteed by the sixth amendment. No specific defect in the student's representation was cited, however. The California Supreme Court has granted a petition to review this case and also has tentatively granted a State Bar request to approve the existing student practice rule.

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36. *See In re* McKelvey, 82 Cal. App. 426, 255 P. 834 (1927); Johnson v. Davidson, 54 Cal. App. 251, 202 P. 159 (1921), *rev'd on other grounds sub nom.* Crawford v. State Bar, 54 Cal. 2d 659, 355 P.2d 490, 7 Cal. Rptr. 746 (1960); Florida Bar v. Thomson, 310 So. 2d 300 (Fla. 1975); People v. Alexander, 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964); *In re* Christianson, 215 N.W.2d 920 (N.D. 1974); Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933). *But see* State v. Hardy, 61 Wyo. 172, 156 P.2d 309 (1945). *See also* Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153 (1971); Comment, *Unauthorized Practice of Law Students*, 36 TEX. L. REV. 346 (1958); Annot. 13 A.L.R.3d 1137 (1967).

37. Forty-seven states, the District of Columbia, and Puerto Rico authorize some form of supervised law student practice. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1977-78, at 119 (1978). *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (Brennan, J., concurring).

38. STATE BAR OF CALIFORNIA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS (1976).

39. People v. Perez, 147 Cal. Rptr. 34, (Ct. App. 1978), *petition for hearing granted*, (Cal. S. Ct. Aug. 17, 1978).

While legislative and administrative bodies have adopted rules defining who can practice law, courts generally have held that control of the practice of law is a judicial function.[40] Accordingly, they have struck down legislative regulations in conflict with what the courts believed were appropriate minimum standards for admission to practice.[41] On the other hand, judicial deference has been given to legislative regulation of the practice of law found to be reasonable.[42] Further, as evidenced by the specific amendment to the Arizona Constitution permitting real estate brokers to draft certain legal documents,[43] each state's constitution controls the allocation of powers within that state.

Judicial control over who may appear in court and draw related pleadings and motions may reasonably be grounded on the court's right to protect itself from inefficient and incompetent advocates and to safeguard its standards of justice by protecting litigants from inadequate representation. It is less reasonable to assume that the concept of the lawyer as an "officer of the court" necessitates that courts control legal practice unconnected with pending or contemplated litigation. Nevertheless, an Oklahoma decision,[44] later reconsidered,[45] finding that the courts lacked power over non-judicial aspects of the practice of law in the absence of legislative authorization is an unusual example of judicial self-denial.

Although the practice of law clearly includes appearances on behalf of another before a tribunal with authority to decide legal controversies, the proscription against such practice by non-lawyers does not always apply to appearances before administrative agencies. At one extreme are decisions by state courts striking down legislation or administrative rules that permit non-lawyers to serve as advocates in quasi-judicial proceedings before public utility commissions, workers' compensation boards, or other state agencies on

40. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961), *aff'd on rehearing*, 91 Ariz. 293, 371 P.2d 1020 (1962); *In re* Baker, 8 N.J. 321, 85 A.2d 505, 511-12 (1951); *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); *In re* Splane, 123 Pa. 527 (1889). *See* AMERICAN BAR FOUNDATION, *supra* note 29, at 3-5, 119-24, 246-50.

41. *In re* Bailey, 30 Ariz. 407, 248 P. 29 (1926); Merco Constr. Eng'rs, Inc. v. Municipal Court, 21 Cal. 3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978); *In re* Lavine, 2 Cal. 2d 324, 41 P.2d 161 (1935); State v. Bander, 106 N.J. Super. 196, 254 A.2d 552 (Super. Ct. Law Div. 1969); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932).

42. *See* Merco Constr. Eng'rs, Inc. v. Municipal Court, 21 Cal. 3d 724, 728-29, 581 P.2d 636, 147 Cal. Rptr. 631 (1978); Eagle Indem. Co. v. Industrial Accident Comm'n, 217 Cal. 244, 18 P.2d 341 (1933).

43. *See* notes 2-3 *supra* and accompanying text.

44. Edwards, Inc. v. Hert, 42 J. OKLA. B. ASS'N 2798 (1971).

45. R.J. Edwards, Inc. v. Hert, 504 P.2d 407 (Okla. 1972).

the theory that only the court may authorize one to practice law.[46] Thus, while a layperson may negotiate another worker's compensation claim or fill out an application for such benefits, only a lawyer is permitted to appear in a representative capacity before the boards in certain jurisdictions.[47] Other states and the federal government take a more permissive approach and defer to legislative or administrative rules regulating who may appear before administrative adjudicative bodies.[48] The federal practice ranges from requiring that only lawyers may appear as advocates before boards such as the CAB and FCC[49] to permitting any person to appear in a representative capacity before boards such as the NLRB.[50] In between these extremes are agencies that allow lawyers and other persons who exhibit requisite professional qualifications to make representative appearances. For example, the IRS allows certified public accountants and "enrolled agents" who pass tests of competency or experience to practice.[51] The ICC authorizes appearances by "class B" practitioners who successfully complete an examination on transportation law and practice.[52] There is also no restriction on who may appear as an advocate before arbitration tribunals even though arbi-

46. *E.g.*, Denver Bar Ass'n v. Public Utilities Comm'n, 154 Colo. 273, 391 P.2d 467 (1964); People v. Goodman, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1937); Stack v. P.G. Garage, Inc., 7 N.J. 118, 80 A.2d 545 (1951); *In re* Unauthorized Practice of Law, 175 Ohio St. 149, 192 N.E.2d 54 (1963).

47. *See* Wilkey v. State, 244 Ala. 568, 14 So. 2d 536, *cert. denied*, 320 U.S. 787 (1943); Goodman v. Beall, 130 Ohio St. 427, 200 N.E. 470 (1936); West Va. State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (1959); Annot., 2 A.L.R.3d 724 (1965). *Compare* Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (1939), *with* Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961).

48. Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 122 (1926); Eagle Indem. Co. v. Industrial Accident Comm'n, 217 Cal. 244, 18 P.2d 341 (1933); Carr v. Stringer, 171 S.W.2d 920 (Tex. Civ. App. 1943); State *ex. rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961); 5 U.S.C. § 555 (1976). *See* Bennett, *Non-Lawyers and the Practice of Law Before State and Federal Agencies;* 46 A.B.A.J. 705 (1960); Vom Baur, *Administrative Agencies and Unauthorized Practice of Law*, 48 A.B.A.J. 715 (1962).

49. 47 C.F.R. § 1.23(a) (1977); 14 C.F.R. § 302.11 (1977).

50. An unpublished survey of 35 federal agencies, made by the author in 1970, revealed that 14 agencies permit only lawyer representation, 16 allow representation by anyone without regard to professional qualification, and 5 admitted to practice lawyers and other classes of persons with identified professional qualifications. D. Weckstein, Control of Practice and Discipline of Representatives Before Federal Administrative Agencies, Part I, 59 (1970) (unpublished report to the Administrative Conference of the United States).

51. 26 C.F.R. § 601.502 (1977).

52. 49 C.F.R. § 1100.8(a)(c) (1977). Incidentally, as a result of the Agency Practice Act of 1965, 5 U.S.C. § 500 (1976), any lawyer licensed by a state cannot be excluded from practice before a federal administrative agency other than the Patent Office, which individually certifies patent attorneys on the basis of their demonstrated compentency in the area. *Id.* at § 500(e) (1976). All agencies, however, do retain the right to disbar from practice before them individual lawyers who commit unethical acts or engage in contemptuous behavior. *Id.* at § 500(d)(2) (1976).

trators render decisions on legal and factual questions that are final and binding with only limited grounds for appeal to the courts.[53]

One reason for allowing non-lawyers to appear before administrative and arbitral tribunals is that such bodies are designed to adjudicate controversies in an informal, inexpensive, and expeditious manner. The relative high cost and technical proficiency of lawyers might frustrate these objectives. A similar policy has been used to justify the exclusion of lawyers as advocates in small claims courts. Not only are lawyers not required to appear in these courts, but in many jurisdictions representative appearances are prohibited.[54] The limited jurisdiction of these courts is used to justify this departure from the policy that lawyers are needed to protect the litigants. A further safety valve is provided by allowing a losing defendant to take an appeal de novo to a higher court.[55]

It should be noted that while many administrative hearings deal with relatively small monetary claims, others involve substantial potential liabilities and acquisitions or protection of valuable operating licenses. Nevertheless, the rules and cases frequently fail to weigh such factors in determining whether lawyer representation is required.

The doctrine of federal supremacy limits a state's authority to regulate the practice of administrative law within its jurisdictions. The United States Supreme Court held in *Sperry v. Florida*[56] that Florida lacked the power to preclude a non-lawyer patent agent from activities involving representation of clients before the U.S. Patent Office even though his activities might constitute the practice of law. Wisconsin applied the *Sperry* doctrine to allow exclusion of a non-lawyer transportation practitioner from representing clients before the State Public Service Commission but not from representing the same clients as a class B practitioner before the ICC.[57] Although the full impact of the *Sperry* doctrine has not been determined, it is probable that IRS approved accountants and enrolled agents are free from state regulation of their federal tax practice.[58] Furthermore, it is possible that lawyers who are licensed in one state may be beyond the regulatory authority of another state

53. *See* United States Arbitration Act, 9 U.S.C. § 10 (1976).

54. *E.g.*, CAL. CIV. PROC. CODE § 117.4 (Deering Supp. 1978).

55. *Id.* § 117.8 (Supp. 1978).

56. 373 U.S. 379 (1963).

57. State *ex rel.* State Bar v. Keller, 21 Wis. 2d 100, 123 N.W.2d 905 (1963), *cert. denied*, 377 U.S. 964 (1964).

58. *See* Bennett, *supra* note 48, at 708-09.

when they confine their activities in that state to the practice of federal law.[59]

While it may be true that one who represents himself has a fool for a client, a long-standing exception to the unauthorized practice rules is that an individual is free to appear before a court on his own behalf or to otherwise perform legal services for himself.[60] Particularly following recent attempts to simplify the law of divorce and probate, some individuals—preferring to save a buck and sacrifice a lawyer—have attempted to do their own legal work with the aid of published forms, guide books, do-it-yourself kits, and non-legal advisors. The bar, with mixed success, has generally resisted these encroachments on their traditional terrain. The publication of books and kits that contain standard forms for wills, trusts, marital dissolutions, and bankruptcies, along with instructions for use, have generally been held to be permissible activities protected by the first amendment.[61] Where, however, the distribution of such aids is accompanied by legal advice pertaining to particular individuals, the courts have held that the line between aiding persons to represent themselves and engaging in the unauthorized practice of law has been crossed.[62] For example, Norman Dacey's book, *How to Avoid Probate* (and lawyers), was held to be protected, but his offering of estate planning counseling to potential mutual fund customers was condemned as unauthorized practice.[63] Another example is the fine line drawn between acting as a scrivener for a person performing his own legal services, which is permissible,[64] and drafting legal instru-

59. *See* Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1710, 1724-26 (1967). *But see* Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889 (1957), *appeal dismissed*, 358 U.S. 52 (1958).

60. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975); Merco Constr. Eng'rs, Inc. v. Municipal Court, 21 Cal. 3d 724, 735-37, 581 P.2d 636, 147 Cal. Rptr. 631 (1978) (Newman, J., dissenting); Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954); Carr v. Grace, 321 So. 2d 618 (Fla. Dist. Ct. App. 1976); Annot., 27 A.L.R. Fed. 485 (1976).

61. New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967); State v. Winder, 42 App. Div. 2d 1039, 348 N.Y.S.2d 270 (1973); Oregon State Bar v. Gilchrist, 272 Or. 552, 538 P.2d 913 (1975). *Contra*, Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225 (Fla. 1973). *See also* Project, *The Unauthorized Practice of Law and Pro se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976); Annot., 71 A.L.R.3d 1000 (1976).

62. Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339 (1967); State Bar v. Cramer, 399 Mich. 116, 249 N.W.2d 1 (1976). For a critical view of the distinction suggested in the text, see Note, 6 MICH. J.L. REF. 423 (1973).

63. *Compare* New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967), *with* Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339 (1967).

64. *See* Mickel v. Murphy, 147 Cal. App. 2d 718, 720, 305 P.2d 993, 995 (1957); Colorado Bar Ass'n v. Miles, 557 P.2d 1202 (Colo. 1976); State *ex rel.* Wright v. Barlow, 131 Neb. 294,

ments for him, which absent other circumstances is not lawful.[65]

Complications arise when the "person" seeking self-representation is a corporation. Of necessity, a corporation must act through natural persons. The question then arises as to whether or not non-lawyer employees, officers, or directors who act for the corporation may perform legal services for it. As a general rule, a corporation may not appear in court *in propria persona*.[66] Court appearances on behalf of a corporation may be made only by lawyers authorized to practice in that court. A lawyer who is a corporate employee may represent the corporation only if he is licensed to practice in the forum jurisdiction or has received permission to appear *pro hac vice*.[67] On the other hand, non-lawyer or out-of-state lawyer employees commonly are permitted to prepare legal documents, give legal advice, or render other internal legal services for the corporation.[68] A national or multi-national corporation frequently employs lawyers who are not officed in a state where they are authorized to practice. These corporations do not lack sophistication regarding the need for qualified legal counsel so the policy of public protection is inapposite. Nevertheless, there is justification for requiring that court appearances on behalf of the corporation be made by, or in association with, a locally licensed lawyer, since he will presumably be familiar with local procedures, court rules, and laws and will be subject to the disciplinary authority of the local courts. While a corporation may use its own employees to perform corporate legal affairs, it may not use them to perform legal services for others.[69]

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268 N.W. 95 (1936).

65. *See* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936). See text accompanying notes 23-33 *supra*.

66. Phillips v. Tobin, 548 F.2d 408 (2d Cir. 1976); Simbraw, Inc. v. United States, 367 F.2d 373 (3d Cir. 1966); Turner v. American Bar Ass'n, 407 F. Supp. 451 (N.D. Tex. 1975); Merco Constr. Eng'rs, Inc. v. Municipal Court, 21 Cal. 3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978); Tuttle v. Hi-Land Dairyman's Ass'n, 10 Utah 2d 195, 350 P.2d 616 (1960). Exceptions have been recognized for appearances in small-claims courts which prohibit lawyer representation. Prudential Ins. Co. v. Small Claims Court, 76 Cal. App. 2d 379, 173 P.2d 38 (1946). Federal administrative agencies tend to allow appearances by corporate officers or employees even if they otherwise require attorney representation. 47 C.F.R. § 1.23(a) (1977).

67. See text accompanying notes 83-86 *infra*.

68. *See* Paradise v. Nowlin, 86 Cal. App. 2d 897, 195 P.2d 867 (1948); Q. JOHNSTONE & D. HOPSON, *supra* note 8, at 166. *But see* Kentucky State Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972).

69. State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961). Interesting situations develop with collection agencies that file suit to collect claims referred to them. If the agency receives a good faith assignment of the claim from the original creditor, it then becomes the real party in interest and may bring suit through an attorney of its choice. *See* Cohn v. Thompson, 128 Cal. App. Supp. 783, 16 P.2d 364 (1932). If, however, the creditor

The concept that a corporation may not practice law or hire lawyers to practice for it is a traditional but disappearing bug-a-boo of the legal profession. The theory was that only a natural person can be tested for requisite skills, take an oath to uphold the Constitution and laws, meet educational qualifications, and exercise the confidential fidelity required of lawyers.[70] The corporate entity was believed to be an impermissible lay intermediary between its lawyer employees and the clients.[71] In addition to the possibility that he would be representing conflicting interests, the lawyer who rendered legal services to third parties on behalf of a corporation was thought to risk violation of ethical proscriptions against sharing legal fees with a non-lawyer entity, disclosure of client's confidential communications, solicitation of business, and commercialization of the profession.[72] The prohibition against intermediaries has now been dropped in favor of its underlying rationale that seeks to avoid lay exploitation or control of legal services.[73]

Given an appropriate economic incentive, the legal profession recognized belatedly that its prohibition against corporations practicing law had placed form over substance. Accordingly, when an opportunity arose for gaining significant tax advantages by rendering professional services in corporate form, organizations of lawyers and doctors successfully lobbied state legislatures to authorize professional practice through professional associations or corporations. These entities were designed to have sufficient corporate characteristics to qualify as corporations for tax purposes but, to safeguard traditional professional standards, ownership and control were limited to professional members and some corporate attributes such as limited liability were adopted in attenuated form.[74] In most states

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has only employed the agency to collect the claim on his behalf, including assignment of the claim for purposes of collection, then it would be the unauthorized practice of law for the agency to retain a lawyer to bring suit on the claim, Berk v. State, 225 Ala. 324, 142 So. 832 (1932), unless the creditor has also authorized the agency to select a lawyer who would have a direct attorney-client relationship with the creditor and would not share legal fees with the collection agency. *See* State v. Lytton, 172 Tenn. 91, 110 S.W.2d 313 (1937).

70. *See* State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 234, 140 A.2d 863, 870 (1958); *In re* Co-operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910); Ohio *ex rel.* Green v. Brown, 173 Ohio St. 114, 180 N.E.2d 157 (1962); Nelson v. Smith, 107 Utah 382, 394, 154 P.2d 634, 640-41 (1944); *Committee on Unauthorized Practice: Informative Opinion A of 1961,* 47 A.B.A.J. 1133 (1961).

71. See authorities cited note 70 *supra;* ABA CANONS OF PROFESSIONAL ETHICS No. 35; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 122 (1934), 10 (1926), 8 (1925).

72. *See* Snyder & Weckstein, *Quasi-Corporations, Quasi-Employees, and Quasi-Tax Relief for Professional Persons,* 48 CORNELL L.Q. 613, 659-71 (1963).

73. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) & (C), EC 5-21, EC 5-23.

74. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C), EC 5-24; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 303, 48 A.B.A.J. 159 (1962); Snyder & Weckstein, *supra* note 72 at 655-98.

the professional corporation is now accepted as a normal business structure for the practice of law.

As the preceding discussion has demonstrated, the boundaries of what is and what is not the unauthorized practice of law are not discernible by a simple application of logic to any acceptable definition of the practice of law. Despite efforts by the organized bar, the proposition that "only a lawyer can engage in those activities which constitute the practice of law" is subject to so many exceptions that it is hardly tenable as a guideline, let alone a rule of law. Consequently, a few courts and scholars have attempted to formulate a guideline based on the "public interest."[75] In other words, the critical issue is whether the public good will be better served by permitting only lawyers to perform certain activities or by also allowing other individuals or occupational groups to perform them. In one sense, this approach merely restates the basic problem, but recognition of the public interest as paramount at least focuses judicial analysis on policies underlying unauthorized practice laws.

The public interest was considered paramount in a series of group legal service cases decided by the United States Supreme Court. These cases established that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"[76] and that efforts to frustrate that right through the application of unauthorized practice laws and ethical proscriptions against solicitation were unconstitutional. Specifically, the Court held in one case that the NAACP could solicit potential plaintiffs to bring desegregation suits to be tried by lawyers employed by the association.[77] In other cases the Court held that labor unions could channel their members' injury cases, redressable under either state or federal laws, to lawyers employed by the unions or found by the unions to be competent and willing to charge no more than a fee determined to be reasonable by the union.[78] Despite the fact that these activities may have violated the letter of state unauthorized practice statutes and ethical rules, they were held to involve modes of expression and association protected by the first and fourteenth amendments in that the asso-

75. *See* Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952); L. PATTERSON & E. CHEATHAM, *supra* note 10, at 369, 372.

76. United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971).

77. NAACP v. Button, 371 U.S. 415 (1963).

78. United Transp. Union v. State Bar, 401 U.S. 576 (1971); United Mine Workers Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964).

ciation or union members could band together and delegate authority to their officers to seek better protection of their legal rights. The Supreme Court was not unconcerned with the evils at which unauthorized practice laws and the canons of ethics were aimed, and required that the group plans avoid lawyer representation of conflicting interests and exploitation of legal services or fees by the lay groups. Although some dissenting justices questioned whether the public interest in accessible, competent, and economical legal services justified the Court's intervention in traditional state regulation of the legal profession on constitutional grounds,[79] these cases did provide the impetus for the organized bar to belately recognize the importance of these public interests.[80]

III. NON-RESIDENT ATTORNEYS

In the United States, each state regulates admission to law practice within its own jurisdiction. Thus, a lawyer admitted to practice in Utah is not necessarily entitled to practice law in Nevada. Similarly, each federal court maintains its own roster of admitted attorneys, although admission to the bar of the state in which the federal court is located is usually the only requirement.[81] The theory is that because laws and procedural rules vary from state to state, passing a bar examination or practicing law in one state is insufficient to demonstrate competency to practice in another state.[82] In addition to measuring competency, each state independently has evaluated the moral character of applicants to its bar.

Despite these barriers to practicing law across state lines, opportunities for some mobility do exist. An out-of-state attorney is usually permitted to make occasional appearances on a *pro hac vice* basis—"for this case only."[83] When the *pro hac vice* privilege is granted, most states require that a local attorney be associated on the case to ensure that the non-resident attorney will be informed

79. *See* United Transp. Union v. State Bar, 401 U.S. 576, 599 (1971) (Harlan, J., concurring and dissenting).

80. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-33, DR 2-101, 2-103, 2-104; Armstrong, *Ethical Problems in Connection with the Delivery of Legal Services*, 12 SAN DIEGO L. REV. 336 (1975); *Elson, Canon 2—The Bright and Dark Face of the Legal Profession, id.* at 306.

81. *See* Brakel & Loh, *Regulating the Multi-State Practice of Law*, 50 WASH. L. REV. 699, 717-18 (1975). The federal courts are now considering, and are likely to adopt, uniform requirements for admission to practice, perhaps including specific law school courses, experience, and/or an examination.

82. *See generally id.*

83. A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE (1968); Brakel & Loh, *supra* note 81, at 702-06.

of local procedures and laws and that the court can maintain disciplinary control over counsel. The privilege to appear may be limited or withdrawn in the court's discretion.[84]

Some states and federal district courts have raised qualifications and have limited the number of *pro hac vice* appearances that may be made by an attorney during a specified period. During the active days of the civil rights movement in the South, a federal district court adopted regulations requiring that an attorney be admitted to the bar for at least five years, make no more than one *pro hac vice* appearance during any one year, and be associated with local counsel.[85] This effectively denied the right of counsel to litigants seeking civil rights remedies or defending actions brought against them on constitutional grounds. Local counsel was generally not available to serve and many of the out-of-state lawyers who volunteered to represent these litigants were relatively recent admittees to the bar. Ultimately, these regulations were struck down as schemes to prevent representation of civil rights litigants or as unreasonable restrictions that went beyond legitimate qualifications for *pro hac vice* appearances.[86]

In some states it is possible for a lawyer who has been practicing in another state to be admitted on motion—that is, without having to take another bar examination. Generally, admission on motion is limited to lawyers who have practiced for a specified time, usually five years, in a state that grants reciprocal admission on motion.[87] Therefore, since California does not admit any lawyers unless they pass a California examination, California lawyers typically will be ineligible to be admitted on motion in another state even though that state admits attorneys on motion from reciprocating states. Thus, admission to practice without examination seems to depend more upon economic and political considerations than upon concern with ensuring that lawyers are competent, ethical, and knowledgea-

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84. For example, F. Lee Bailey was denied permission to continue as counsel for a defendant charged with a capital offense because of Bailey's wide distribution of a letter claiming that his client could not get justice in New Jersey. The court considered this an unethical attempt to influence the disposition of the case. State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom.*, Matzner v. New Jersey, 393 U.S. 924 (1968), noted in 1969 UTAH L. REV. 227. *See also In re* Belli, 371 F. Supp. 111 (D.C. Cir. 1974). *Compare In re* Evans, 524 F.2d 1004 (5th Cir. 1975), *with* Magee v. Superior Court, 8 Cal. 3d 449, 506 P.2d 1023, 106 Cal. Rptr. 647 (1973).

85. *See* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968).

86. *Id.*; Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968); *see* A. KATZ, *supra* note 83, at 2-6; Brakel & Loh, *supra* note 81, at 732-33; Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65 (1968). *See also* Lefton v. City of Hattiesburg, 333 F.2d 280, 285-86 (5th Cir. 1964).

87. *See* Brakel & Loh, *supra* note 81, at 707-13.

ble about local laws. Economic protectionism is also evident in the requirement of some states that a lawyer will not be admitted to practice unless he is a resident of the state and/or intends to engage in the full-time practice of law in the state.[88] Attorneys are thus discouraged from maintaining an active law practice in more than one state at a time.

State control over the practice of law, however, is not absolute. Standards for admission to and exclusion from the state must be consistent with federal constitutional principles. Thus, a state cannot deny admission to an applicant for the bar on grounds not rationally related to the function of a lawyer.[89] Qualifications for admission *pro hac vice* or on motion cannot be unreasonably strict or impose restrictions unrelated to the fitness to practice law in the jurisdiction.[90] Experience requirements and traditional bar examination requirements are not irrational. But it does seem constitutionally suspect for a state to admit experienced attorneys from one state on motion but not from another because of the lack of reciprocity. Also, previously noted, the doctrine of federal supremacy may allow attorneys who have been admitted to practice in the federal courts or are practicing before a federal agency to practice in other states when they deal exclusively with federal laws.[91]

The advent of the Multi-state Bar Examination has lessened the burdens of being admitted to practice in more than one state.[92] This examination, which consists of multiple-choice questions on various subjects commonly tested by individual states, is administered in several states throughout the country at the same time. Use of this uniform test is an explicit recognition of a core of law common to the various states. Several states will now accept an applicant's Multi-state Bar Examination score even if the test was taken in another state.

Factors that support further measures to allow lawyers to practice in more than one state include: mobility of the population; interstate and international activities of business clients; lawyer

88. *Id.* at 707-10.

89. Schware v. New Mexico Bd. of Bar Examiners, 353 U.S. 232 (1957); *see* Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966); Sherman, *supra* note 86, at 107-14.

90. See authorities cited note 86 *supra*. *See* Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731 (1967). *But cf.* Brown v. Wood, 257 Ark. 252, 516 S.W.2d 98 (1974), *cert. denied*, 421 U.S. 963 (1975).

91. See notes 56-59 *supra* and accompanying text. *See* Brakel & Loh, *supra* note 81, at 717-20; Sherman, *supra* note 86, at 103-07. *See also* Cowen v. Calabrese, 230 Cal. App. 2d 870, 41 Cal. Rptr. 441 (1964).

92. *See* Covington, *The Multistate Bar Examination—A New Approach*, 26 ARK. L. REV. 153 (1972).

specialization by legal subject rather than geographical location;[93] the predominance of similarities rather than differences among laws of the various states, as evident in the adoption of uniform state laws; legal education emphasizing nationally orientated teaching materials; American Bar Association accreditation of law schools which affords graduates the right to take the bar examination in any state; the broad range of federal laws; the impact of constitutional restrictions on state laws; and the leadership of the Federal Rules of Procedure and Federal Rules of Evidence as models for state courts. Many law firms, influenced by such factors, have established branch offices in several states and the District of Columbia. This could mark the beginning of national law firms, similar to existing national accounting firms, that would facilitate service to clients with multi-state interests. The typical reaction of state bars, however, has been to increase the barriers to multi-state practice by adopting longer residence and practice requirements and threatening to step-up their enforcement of unauthorized practice laws.[94]

IV. The Unmet Need for Counsel

It may be laudable to require that for one's own benefit, he must seek legal services only from qualified counsel, but it is untenable to insist upon such a requirement when qualified legal counsel is not available. This "catch-22" aspect of the unauthorized practice laws has been recognized in a few cases.

While his views did not prevail, Justice Douglas in *Hackin v. Arizona* questioned "whether a State, under guise of protecting its citizens from legal quacks and charlatans, can make criminals of those who, in good faith and for no personal profit, assist the indigent to assert their constitutional rights."[95] Hackin, who had graduated from an unaccredited law school but was refused admission to the Arizona Bar, had been convicted for practicing law without a license because he had represented an indigent prisoner in his attempt to fight extradition to another state on a murder conviction. Since extradition proceedings were considered ministerial rather than judicial, Arizona ruled that there was no right to appointed counsel. The Supreme Court dismissed the appeal for want of a substantial federal question.

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93. In fields such as securities, labor, antitrust, tax, and transportation law, a specialist probably spends ninety percent of his time applying federal law and the other ten percent applying state laws whose development has been greatly influenced by the federal laws.

94. *See Multistate Practice Torn Between Trends*, 3 Bar Leader 23-24 (1978). *But cf.* ABA Comm. on Professional Ethics, Opinions, No. 316, 53 A.B.A.J. 353 (1967).

95. 389 U.S. 143, 144 (1967) (Douglas, J., dissenting).

A few years later, a "jailhouse lawyer" fared somewhat better in *Johnson v. Avery*.[96] The Supreme Court there held that one prisoner could not be disciplined for aiding another in preparing a writ of habeas corpus, at least in the absence of available alternative assistance. The state's interests in preserving prison discipline and in limiting the practice of law to licensed attorneys were found insufficient to justify this restriction on the right of prisoners to petition for habeas corpus. The Court noted that: "The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."[97] All members of the Court had doubts about lawyers' having the exclusive right to prepare such writs. Justice Douglas would have extended a right to laymen—in and out of prison—"to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law."[98] The dissenting justices agreed on the need for assistance to prisoners but would have required the state to furnish competent persons, not necessarily lawyers, to render the aid rather than allow the "inept representation of the average unsupervised jailhouse lawyer."[99]

Decisions striking down unreasonable restrictions on *pro hac vice* appearances where qualified local counsel was unavailable and the Supreme Court's upholding of group legal service plans suggest that an individual's right to counsel, including nonlegal counsel, may at times outweigh a state's interest in regulating the practice of law.[100] This is especially likely when local legal counsel is not available because of the limited financial means of the client, the specialized or unpopular nature of the case, or the lack of governmental obligation to furnish a qualified lawyer. "Certainly," as Justice Douglas has observed, "the States have a strong interest in preventing legally untrained shysters who pose as attorneys from milking the public for pecuniary gain . . . but it is arguable whether this policy should support a prohibition against charitable efforts of nonlawyers to help the poor."[101] And, in any event, "state provisions regulating the legal profession will not be permitted to act as obsta-

96. 393 U.S. 483 (1969).

97. *Id.* at 490 n.11.

98. *Id.* at 498 (Douglas, J., concurring).

99. *Id.* at 501 (White, J., dissenting).

100. *See* A. KATZ, *supra* note 83, at 3-8; Sherman, *supra* note 86, at 114-30; *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, *supra* note 90. *See also* Lefton v. City of Hattiesburg, 333 F.2d 280, 285-86 (5th Cir. 1964); United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946); Note, *The Right to Non-Legal Counsel During Police Interrogation*, 70 COLUM. L. REV. 757 (1970); 11 WM. & MARY L. REV. 787 (1970).

101. Hackin v. Arizona, 389 U.S. 143, 151-52 (1967) (Douglas J., dissenting).

cles to the rights of persons to petition the courts and other legal agencies for redress."[102]

V. Enforcement of Unauthorized Practice Laws

The organized bar has sought to deter the unauthorized practice of law through education, negotiation, and prohibition. The bar has attempted to educate the public and would-be practitioners by informing them of state restrictions on unauthorized practice and of the protective purposes underlying the regulations. The American Bar Association and individual state bar associations have entered into conference agreements with various organizations representing other professions and occupations whose activities are closely related to the law such as accountants, architects, bank and trust companies, collection agencies, insurance agencies, title insurance companies, and real estate brokers.[103] These agreements serve to educate the group involved and provide a basis for voluntary compliance with law practice regulations. There is a possibility, however, that these agreements that divide economic markets among competitors may run afoul of antitrust laws.[104]

A person who engages in the unauthorized practice of law risks: 1) a misdemeanor criminal penalty;[105] 2) having an injunction against such activities ordered upon application of an interested party, which more often than not turns out to be a bar association;[106] and 3) being held in contempt of court. In some states *quo warranto* proceedings may be brought against a corporation that exceeds its powers by practicing law or against individuals who, without authority, seek to exercise the functions of an attorney as an "officer of the court."[107] The issuance of this writ may result both in forbidding certain activities in the future and in the imposition of a fine for past offenses. Also, non-lawyers and non-resident lawyers have been denied entitlement to fees when their performance of services

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102. *Id.* at 151.

103. *See* VII Martindale-Hubbell Law Directory 71M (1978); V. Countryman, T. Finman & T. Schneyer, The Lawyer in Modern Society, 522-29 (2d ed. 1976); Q. Johnstone & D. Hopson, *supra* note 8, at 184-87.

104. *Editorial Opinion & Comment,* 63 A.B.A.J. 455 (1977); Comment, *The Bar as a Trade Association: Economics, Ethics and the First Amendment,* 5 Harv. C.R.-C.L. L. Rev. 334, 336-39 (1970).

105. *E.g.,* Cal. Bus. & Prof. Code § 6126 (Deering 1974); Tenn. Code Ann. § 29-303 (1955) (also providing for treble damages in a civil action).

106. *See* V. Countryman, T. Finman & T. Schneyer, *supra* note 103, at 514; Q. Johnstone & D. Hopson, *supra* note 8, at 177-78; Note, *Remedies Available to Combat the Unauthorized Practice of Law,* 62 Colum. L. Rev. 501 (1962). *See generally* American Bar Foundation, *supra* note 29, at 98-110, 242-305.

107. *See* Onion, *supra* note 1, at 75. See authorities cited note 106 *supra.*

has been found to be the unauthorized practice of law.[108]

Sanctions may also be imposed against lawyers who aid individuals in unauthorized practice. In 1937, the American Bar Association adopted a canon that made it unethical for a lawyer to aid the unauthorized practice of law.[109] This prohibition is continued in the Code of Professional Responsibility which also continued proscriptions against a lawyer sharing legal fees with a non-lawyer[110] or forming a partnership with a non-lawyer if the practice of law is one of the activities of the partnership.[111] The Code also suggests that lawyers have an affirmative duty to assist in preventing the unauthorized practice of law.[112] Since many businesses that render law related services frequently employ or consult lawyers, these ethical restraints on the legal profession may deter more unauthorized practice than is prevented by direct action against non-lawyers.

VI. Antitrust and Constitutional Restraints on Unauthorized Practice Laws

A system that excludes certain individuals from the practice of law and that is regulated by those already admitted to the practice raises serious questions under current interpretations of federal antitrust law and the Constitution. Anticompetitive practices of the bar, if not required by the state, are subject to federal statutes that prohibit attempts to monopolize, practices that tend to reduce competition, and restraints on trade.[113] Although restrictions on practice may be exempt from antitrust laws if they are deemed to be part of a state regulatory program,[114] the state action exemption is not absolute.[115] If state regulation is directly counter to federal antitrust policies, the underlying state interests will be examined to determine which will prevail. In addition, if state action is found, regulations may be violative of the first amendment,[116] the fourteenth amendment,[117] or other constitutional provisions.[118] Although state requirements regarding education, character, and examinations have been held constitutional because of their rational relation to

108. *E.g.*, Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).
109. ABA Canons of Professional Ethics No. 47.
110. ABA Code of Professional Responsibility DR 3-101, -102.
111. *Id.* DR 3-103.
112. *Id.* Canon 3.
113. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
114. Bates v. State Bar, 443 U.S. 350 (1977); Parker v. Brown, 317 U.S. 341 (1943).
115. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).
116. NAACP v. Button, 371 U.S. 415 (1963). See text accompanying notes 76-78 *supra.*
117. Gibson v. Berryhill, 411 U.S. 564 (1973).
118. Sperry v. Florida, 373 U.S. 379 (1963). See text accompanying note 56 *supra.*

the practice of law,[119] many unauthorized practice rules remain untested under the Constitution as well as under federal antitrust laws.

Several recent cases serve to illustrate issues and trends that will be significant in determining what restrictions on the practice of law will be tolerated. In *Goldfarb v. Virginia State Bar,*[120] a minimum-fee schedule, published by a county bar and enforced by the state bar, was held to constitute price fixing in violation of section 1 of the Sherman Act. The defendants argued, *inter alia,* that their activities were exempt from the Sherman Act because the practice of law is a "learned profession" and because their conduct was state action. Addressing the issue directly for the first time, the Court held that the sale of professional services is not exempt from the Sherman Act, but added:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.[121]

The Court found that the state action exemption did not apply because the state had not required the conduct; the county and state bars had joined in an "essentially . . . private anticompetitive activity."[122]

The state action exemption to the Sherman Act was held to apply in *Bates v. State Bar,*[123] where the Arizona Supreme Court adopted and enforced a rule forbidding lawyers from advertising. But, under the first amendment, certain advertising by lawyers was held immune from state prohibition. The Court recognized both the lawyers' right to publicize and the clients' right to receive relevant information.

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119. *See, e.g.,* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (moral character); Whitfield v. Illinois Bd. of Examiners, 504 F.2d 474 (7th Cir. 1974) (bar exam); Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), *cert. denied,* 385 U.S. 960 (1966) (legal education); Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961) (pre-legal education); *In re* Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973) (bar exam); Hooban v. Board of Governors, 85 Wash. 2d 774, 539 P.2d 686 (1975), *appeal dismissed,* 424 U.S. 902 (1976).

120. 421 U.S. 773 (1975).

121. *Id.* at 788-89 n.17.

122. *Id.* at 792.

123. 443 U.S. 350 (1977).

A recent case in a Virginia federal district court narrowly construed the state action exemption.[124] Surety Title Insurance Company sought to search and insure titles to real estate for home buyers without the involvement of licensed attorneys. The Virginia Supreme Court had previously held that only a lawyer may prepare a deed transferring real estate. The Virginia State Bar had adopted an opinion that it would be an unauthorized practice of law for a title company to issue a title insurance policy to a non-lawyer based upon a title examination by lay employees of the company unless an attorney requested the committment to insure. The presence of the attorney in the transaction was thought to guard against the evil of having a layperson rely upon the rendering of a legal opinion of sufficiency of title made by another layperson. Although the advisory opinions of the State Bar were not binding on title companies, attorneys who prepared a deed in a transaction that did not comply with the opinion could be subject to disciplinary action by the bar.

The court found that the unauthorized practice of law opinions were issued by the State Bar pursuant to a command of the state, but that the practice was nevertheless in violation of federal antitrust laws. The court found that the opinion process was not sufficiently related to legitimate state interests[125] in restricting the practice of law to qualified persons to justify the anticompetitive effects of the opinions and their potential enforcement through disciplinary sanctions. Since criminal penalties were available after a judicial determination of the unauthorized practice of law, additional sanctions against attorneys through the State Bar processes were unnecessary and unfair. Because the bar had a direct pecuniary interest in defining the extent of its own monopoly through an expansive definition of the practice of law, the opinion process offended basic notions of fairness.

The holding of the district court in the Surety Title Insurance case has been vacated by the Court of Appeals for the Fourth Circuit and remanded with instructions to withhold final decision until the Virginia Supreme Court decides a pending unauthorized practice case against Surety.[126] Although the federal courts have exclusive jurisdiction to enforce federal antitrust laws, a state court decision in favor of Surety could moot the controversy or at least clarify the role of the State Bar and courts in the unauthorized practice enforcement process. Meanwhile, in apparent response to the federal

124. Surety Title Ins. Agency v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated & remanded*, 571 F.2d 205 (4th Cir. 1978).

125. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

126. 571 F.2d 205 (4th Cir. 1978).

district court opinion, the Virginia State Bar has recommended to the state supreme court that before an opinion on the unauthorized practice of law is promulgated, public comments be invited and considered, the state attorney general file an analysis of the economic effect of any restraint which may be caused by the proposed opinion, and the opinion be reviewed by the court.[127]

Allowing the bar to define the scope of its own economic monopoly raises constitutional concerns. In *Gibson v. Berryhill*,[128] the Alabama Optometric Association, consisting entirely of self-employed optometrists, brought action against non-association optometrists employed by an optical corporation. The association claimed that the employees were aiding the corporation in the illegal practice of optometry and that it was unprofessional conduct for an optometrist to be employed. The charges were brought before the State Board of Optometry composed entirely of members of the complaining association and having authority to issue and revoke licenses of optometrists.

The State Board sought to enjoin the corporation from the unlawful practice of optometry, but the federal district court held that the Alabama regulatory scheme was unconstitutional because, *inter alia*, the members of the Board could directly benefit by eliminating the competition of employed optometrists. While the state supreme court eventually held that it was not illegal for an optometrist to be employed by another person, the United States Supreme Court affirmed the district court's finding that due process of law is violated when the members of an adjudicatory board have a substantial pecuniary interest in the matters they decide. The Court also held, however, that comity required no further intervention in the state process.

Recent actions in some states to add non-lawyers to unauthorized practice committees and to provide for public input into opinion and enforcement processes of the bar are constructive steps to ameliorate the effect of the bar attempting to define and enforce its own monopoly.[129] Even so, the bar may still face antitrust hurdles unless state action is found, and constitutional hurdles, if it is.

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127. *See Lawscope*, 64 A.B.A.J. 1215 (1978). The intervention of the court in an advisory opinion process could raise a question concerning the authority of the court to perform non-judicial functions. A court may make rules in implementation of its judicial power, including defining who may or may not practice law in the court of the state, but it usually may not render advisory opinions unless so authorized by the state constitution.

128. 411 U.S. 564 (1973).

129. *See Lawscope, supra* note 127; *Editorial Opinion & Comment*, 63 A.B.A.J. 455 (1977).

VII. A GLIMPSE AT THE PAST AND A FRAMEWORK FOR THE FUTURE

The recognition that the public needs to be protected from legal services rendered by unqualified persons is a relatively recent phenomenon. At times, many states required no special qualification, except perhaps good moral character, to practice law.[130] Even after the general acceptance of competence standards for admission to the bar, there was little concern about non-lawyers' activities until 1914 when the New York County Lawyers Association appointed the first standing committee on unlawful practices. The American Bar Association's opposition to unauthorized practice has been traced back to 1919, but its activities designed to fight unlawful practice did not begin until 1930. Not entirely coincidentally, this was a period of economic depression when lawyers, along with almost everyone else, were struggling to protect their livelihood from competition and economic catastrophe.[131]

The fact that the primary motivation for the adoption of unauthorized practice laws may have been protection of lawyers' income rather than protection of the public does not necessarily diminish the latter purpose.[132] It is not unfamiliar to the law to have a selfish motivation result in a beneficial and lawful act. The real questions are whether or not these laws do in fact provide significant and needed protection for the public and whether or not on balance the overall public interest is served.

Whatever the original motivation for their adoption and enforcement, and whether appreciated by the public or not, the enactments limiting the practice of law to licensed professionals have probably resulted in a higher quality of legal services, in general, than would otherwise have been the case. To be balanced against this benefit to the public, however, are the likely higher costs of these professional services, their non-availability to some persons, and the limitations on freedom of choice and action. Past attempts by the organized bar to exclude non-lawyers from the practice of law have failed to accommodate these competing interests. The objective has too frequently been to protect as much of the trade jurisdiction of lawyers as their competitors and the public will tolerate, rather than to protect the overall interests of the public.

Adoption of "the public interest" as the test for determining the boundaries of unauthorized practice recognizes the appropriate

130. *See* J. HURST, THE GROWTH OF AMERICAN LAW 250, 277-79 (1950).

131. *Id.* at 323.

132. *See generally Symposium—Legislative Motivation*, 15 S.D. L. REV. 925 (1978).

priorities, but furnishes little guidance for the actions of non-lawyers and leaves too much discretion to enforcement authorities. While case by case adjudications will identify factors relevant to the serving of the public interest, there is a need for more concrete guidelines for the bar, its competitors, and the courts.

As a first step, it is helpful to identify legitimate and pertinent public interests. Among those are competent if not high quality legal services, reasonable cost, maximum availability, and freedom of choice. Pertinent, but not legitimate, is maintaining the legal profession's "fair share" of the economic pie. It has been suggested that the traditional barrister's monopoly should prevail for court-room representation since it is there that the public is most in need of the talents of lawyers, but that lay competition should be allowed in the preparation of legal documents and giving of legal advice.[133] While it is true that qualified legal advocates are needed in the courts, the training and knowledge of lawyers is equally important to the solicitor's role. The quality of legal advice and draftsmanship depends not only on legal knowledge, analysis, and expression skills, possessed more generally by lawyers than others, but also on the ability to recognize relevant legal issues. The possible relevance of areas of law may not be recognized or understood by even competent non-lawyers who are knowledgeable in other fields of law. As in the practice of medicine, the original diagnosis of a legal problem may be the most critical element. Probably, more legal rights are lost through ignorance of their existence than through sloppy advocacy to achieve their enforcement. Many lawyers claim that they make more money trying to rectify the mistakes made by laypersons who initially represent themselves or others than they lose by not being consulted in the first instance.[134] Furthermore, since an initial mistake may extinguish legal rights, failure to consult qualified legal counsel may cause irreparable harm. Accordingly, the unauthorized practice laws should continue to have force both within and beyond the courtroom.

On the other hand, our society values an individual's freedom to represent himself. Both the courts and society have survived the exercise of this freedom in spite of occasional inconvenience to the courts and avoidable losses to individuals. It is a strange logic that

133. *See, e.g.*, T. EHRLICH & M. SCHWARTZ, REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT, before the Sen. Subcomm. on Representation of Citizen Interests: Comm. on Judiciary, 93d Cong., 2d Sess., 3-4 (Comm. Print 1974); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 708-11 (1977).

134. *See, e.g.*, Onion, *supra* note 1.

supports the freedom of an individual to represent himself, no matter how incompetently, but denies him the right to receive aid from another, more competent than he, but not a licensed professional. Rather than totally deny such aid, we should prohibit non-lawyers' misrepresentation of status and exploitation of people in need of assistance. In this way, we can accomodate the conflicting interests of the bar, non-lawyers, and the public.

I propose a framework for the future application of unauthorized practice laws that affords the protection of licensed professionals to the public but allows individuals to make knowledgeable waivers of that protection after disclosure of the principal risks and under conditions that minimize adverse consequences of a waiver. Traditional remedies should continue to be available against any person who falsely advertises that he is a licensed lawyer or who otherwise falsely holds himself out as qualified to act as a lawyer. Disbarred or suspended lawyers also should continue to be prohibited from misrepresenting their status, acting as lawyers, or performing legal services through another person.[135] Such individuals have proved unworthy of trust and should be denied the privilege of even the limited law practice here suggested for laypersons.

Court appearances on behalf of others and preparation of related pleadings and papers normally should be limited to lawyers, or paraprofessionals or law students acting under lawyer supervision. When the Constitution requires that qualified legal counsel be available, as in felony and misdemeanor cases involving potential incarceration,[136] the litigant must be afforded such representation, regardless of his inability to pay, unless he knowingly waives that right. Any waiver of the right to counsel must meet the standards of *Faretta v. California*.[137] That is, the record must show that the defendant was made aware of the dangers and disadvantages of self-representation, and that he knowingly and voluntarily gave up the right to be represented by a lawyer. While lawyers can generally be expected to conduct a more effective defense, "[p]ersonal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."[138] "[W]here the defendant will not voluntarily accept representation by counsel, the po-

135. *See, e.g.*, Cadwell v. State Bar, 15 Cal. 3d 762, 543 P.2d 257, 125 Cal. Rptr. 889 (1975).

136. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

137. 422 U.S. 806 (1975).

138. *Id.* at 834.

tential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly."[139]

I propose that the *Faretta* approach be extended to allow a litigant, at least in non-criminal cases, to choose knowingly and voluntarily a non-lawyer to aid in his representation so long as he waives legally trained counsel with full awareness of the potential consequences. This right seems especially compelling when the litigant chooses to be assisted by a lawyer admitted to practice in a state other than the forum jurisdiction. Since, however, the court has a right to be protected against incompetent or unscrupulous advocates, a non-lawyer should be denied permission to assist the litigant unless he agrees to comply with relevant laws, procedures, and standards of ethics. This is not a suggestion that a court conduct an ad hoc bar and character examination of all non-lawyers who seek to aid a litigant. Any administrative burden could be reduced by requiring that the non-lawyer file an affidavit disclosing his education, experience, past criminal record, if any, special relation to the litigant or to the subject matter of the suit, and other facts deemed pertinent by the court. The court could supplement the written information with a brief inquiry in open court that would allow an opportunity to observe demeanor. In order to avoid the creation of a sub-profession of unlicensed lay advocates, a non-lawyer should not be allowed to receive compensation unless he is licensed to practice law in another jurisdiction. Since the non-lawyer would be assisting the litigant to represent himself rather than appearing as an advocate, the extent of his participation could be limited by the court. Contempt powers of the court, coupled with power to withdraw permission to participate, would ensure compliance with relevant rules. Before waiving legally qualified counsel, the litigant should be warned about the possibility of these sanctions and that a withdrawal of permission would not be cause for delay or mistrial.

Whether or not participation of lay assistants in criminal trials should be allowed raises more difficult questions. In addition to balancing interests relevant to unauthorized practice, any proposal must ensure compliance with the sixth amendment right to effective assistance of counsel. While a *Faretta* waiver estops a defendant from claiming that his own defense was a denial of that right,[140] it is not clear that a defendant could constitutionally waive legally qualified counsel in favor of a non-lawyer. It may be that a criminal

139. *Id.*
140. *Id.* at 834-35 n.46.

court should allow a non-lawyer to assist retained or appointed counsel but not to undertake exclusive representation even with the knowing and voluntary consent of the defendant.

Courts should be more lenient in granting a non-lawyer permission to participate in litigation, even as an advocate, when: qualified legal counsel is not available; in lower courts when the amount or principle at stake is not great; and before administrative tribunals when specialized technical knowledge may be more important than general legal knowledge and skills. Legislative determinations allowing lay advocacy before administrative agencies should be given presumptive validity.

A lawyer from another state who is a specialist in the subject matter of the litigation or who regularly represents the litigant should be freely afforded *pro hac vice* privileges subject only to a condition that he comply with local rules of law, procedure, and ethics. Courts should have discretion to require association of local counsel depending upon the nature of the case, the past experience of the non-resident counsel, the availability of local counsel, and the additional expense.

Corporations should generally be allowed to appear by non-forum-state lawyer employees under similar guidelines, and by non-lawyer employees when technical issues predominate and when intimate knowledge of the company is of great importance.

Informed waivers of protection of unauthorized practice laws should also be allowed for legal services not related to court procedures. Since these legal services are not performed under the supervision of a judge, other safeguards should be provided. Restrictions on non-courtroom practice by out-of-state lawyers should be minimal. In any state, an attorney should be allowed to handle transactions involving federal law or the law of a state in which he is licensed. Unless, however, the work is related to federal or admitted-state transactions, the non-resident lawyer should refrain from giving advice on local law or preparing documents under the laws of a state in which he is not admitted.[141] In addition, such advice or legal drafting should not be permitted unless the client acknowledges in writing that he is aware that the non-resident attorney is not admitted to practice law in the local jurisdiction. Whatever the allowable practice in a particular state, lawyers should not be permitted to solicit legal business in a state in which they have not been licensed.

Legal services rendered by a non-lawyer incidental to his legiti-

141. *Cf.*, *In re* Estate of Waking, 47 N.J. 367, 221 A.2d 193 (1966); Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964).

mate business should be considered lawful provided that: (1) the services are of a type routinely handled by a non-lawyer; (2) no separate charge is made for the legal aspects of the services; (3) the client is advised in writing of his freedom to employ a licensed lawyer to perform the services; and (4) the client indicates in writing his acceptance of these limited legal services by a non-lawyer. A layperson should be permitted to charge a separate fee for drafting legal documents or giving legal advice related to other business done for the client if a more formal waiver statement is signed.[142] The arguments in favor of this type of informed consent are especially compelling when the legal services are performed by a person knowledgeable in other fields, such as accountancy or real estate, and concern matters related to those fields.

I urge that non-lawyers performing legal services pursuant to such a waiver be held to the same standard of care for malpractice purposes as are ordinarily prudent lawyers in the locality.[143] It would

142. A separate document entitled "Waiver of Protection of the Laws Against Unauthorized Practice of Law" would be part of the transaction. A suggested statement of information and waiver follows:

INFORMATION

This State has enacted laws that require that all legal services be performed by licensed lawyers unless the protections and benefits of these laws are voluntarily waived, in writing, by the recipient of such services from a non-lawyer after having the purposes of the unauthorized practice laws explained as set forth herein.

The laws of this State and Nation can be very technical and complex, and a person not legally trained may not be able to give advice about the law or prepare documents which affect your legal rights as competently as a lawyer could. While non-lawyers may have considerable knowledge of the laws in limited areas related to their business or profession, they are less likely than lawyers to recognize all the laws and legal problems that may be relevant to your transaction. Lawyers are subject to a Code of Professional Responsibility that requires them not to disclose confidences and secrets you tell them in the course of professional consultations. They are also prohibited from accepting you as a client if they have any personal interests or other clients with interests that may conflict with yours. Lawyers who violate these rules are subject to discipline by the courts of this State. Persons in other professions and businesses may not be subject to similar rules, and your confidences disclosed to them are not generally protected by law.

WAIVER

I am aware that I could employ a lawyer, at my own expense, to perform the legal aspects of this transaction.

With knowledge and understanding of the above information, I nevertheless agree to waive the protection and benefits of the State's laws against unauthorized practice of law for purposes of the transaction to which this waiver is attached. This waiver does not, however, waive any right of action against the non-lawyer performing this transaction for negligence or other breach of the standard of care required for the performance of such transactions, including the legal aspects thereof.

143. *But see* Bland v. Reed, 261 Cal. App. 2d 445, 67 Cal. Rptr. 859 (1968), refusing to hold a non-lawyer practicing before an Industrial Accident Commission to a lawyer's degree of care since the legislature permitted practice by non-lawyers with awareness of the dangers involved.

be unfair and unreasonable, however, to hold laypersons to the higher standard of care of lawyers who are specialists in a particular field of law.

In summary, this proposed framework for the development of the laws of unauthorized practice would continue the protective elements of the laws while giving individuals an option to waive protection under limited conditions and with knowledge of potential consequences. Non-lawyers would be able to perform legal services of a limited nature in circumstances when lawyers may not be readily available or desired by the client, and when economic savings may be achieved without a great risk of seriously harming the client's interests. The impact of the adoption of these proposals on the extent of lay competition and the cost of legal services is difficult to predict, but at least the legitmate goal of protection of the public would be explicitly recognized and brought home to all parties affected—the lawyers, the non-lawyer competitors, the recipients of legal services, and the courts. Whether or not this framework finds acceptance in the law, it is hoped that it will at least stimulate discussion and consideration of new approaches to the old problem of the unauthorized practice of law.

Law Practice Issues and Developments in Utah

Status Report on Lawyer Specialization

*Stephen H. Anderson**

Although the Utah State Bar has had a committee on lawyer specialization intermittently since 1969, no comprehensive report of the committee's activities has been made to members of the Bar. Consequently, there have been a number of inquiries about what, if anything, the State Bar is doing about regulating specialization, and the Bar's apparent inactivity may even have prompted various sections of the Bar to originate their own limited specialization committees. This article will attempt to bring Utah Bar members up to date on the status of specialization in Utah in the context of specialization nationwide.

I. Evolution of Specialty Regulation

For the past quarter of a century at least, the American Bar Association (ABA) has been wrestling with the pros and cons of specialty recognition and regulation in the legal profession.[1] It is only recently that the ABA undertook full scale involvement with this problem area, beginning with a resolution by the Board of Governors in the fall of 1967, creating the ABA's Special Committee on Specialization. In 1969, when that Committee proposed that a few states begin experimental programs,[2] interest in specialization increased considerably.[3] Four states—California, Texas, New Mexico,

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1. Subcommittee of the Board of Governors Implementing the Recommendations of the Committee on Specialization and Specialized Legal Education, *Report*, 79 A.B.A. Rep. 403 (1954); Special Committee on Specialization and Specialized Legal Education, *Recommendations, Id.* at 582; *Statement of the Committee on Unauthorized Practice of Law on Specialization and Specialized Legal Education*, Unauth. Prac. News, December, 1954, at 4.

2. Special Committee on Specialization, *Report*, 94 A.B.A. Rep. 248-49, 843-44 (1969).

3. Andrus, *Legal Specialization*, Wis. B. Bull., August, 1969, at 9; California State Bar, *Preliminary Report, Committee on Specialization: Results of Survey on Certification of Specialists*, 44 Cal. St. B.J. 140 (1969); Capwell, *View Favoring ABA's Approach to Specialization*, Wis. B. Bull., August, 1969, at 23, *reprinted in* 11 Law Off. Econ. & Management 101 (1970); Derrick, *Specialization: Where Do We Go From Here?*, 33 Tex. B.J. 255 (1970); Epps, *The Virginia Plan of Specialization*, 41 N.Y. St. B.J. 294 (1969); Heidenreich, *Minnesota Specialization—Interpretive Results*, 10 Law Off. Econ. & Management 191 (1969); Roberts, *The Lawyer Specialist: A Profile*, Mo. B.J. 505 (1969); *Should Legal Specialists Be Certified? Local Lawyers Discuss Pro & Con*, 41 Clev. B.J. 156 (1970); Wilson, *Specialization: Formal Recognition Is Needed Quickly*, 48 Mich. St. B.J. 23 (1969).

and Florida—eventually undertook experimental programs representing two widely divergent philosophies.

The limited pilot programs adopted by California (approved in 1971 and implemented in 1973) and Texas (approved in 1973 and implemented in 1975) are commonly referred to as "certification" or "board certification" programs. They represent bar emphasis on the quality and competence of lawyers who hold themselves out to the public as specialists, and, to that end, require minimum periods of practice, examinations, peer ratings, continuing education, specific practice requirements in the area of specialty, and recertification. The Texas and California certification programs are not identical and are limited to only a few areas of the law.[4] Both states instituted their plans on an experimental basis and both have extended the initial trial periods rather than make the programs permanent.

The plans instituted by New Mexico (1973) and Florida (1975) are known as "self-designation" plans. They emphasize the concept of public access to lawyers practicing in particular areas of the law by allowing lawyers to designate themselves as specializing in or as limiting their practice to a few areas. Quality assurance is not stressed and only minimal requirements are imposed.[5] Both states issue disclaimers to the public stating that a specialist designation by an attorney does not imply that he is an expert or necessarily more competent in the area than other attorneys.

Inauguration of certification and self-designation pilot projects in California, Texas, New Mexico, and Florida stimulated considerable activity in a number of other states before any thorough evaluation of the pilot programs was possible. Consequently, between 1973 and 1975 the ABA Committee on Specialization requested in its reports to the Board of Governors that states which had not initiated specialization programs forego implementation until the Committee had an opportunity to evaluate the then existing programs.[6]

Consistent with that recommendation, on June 18, 1975, the

4. California certifies in only three areas: tax law, workmen's compensation law, and criminal law. Four more areas are pending. Originally, Texas certified in labor law, criminal law, and family law. Three additional areas have been added: probate/estate planning law, personal injury trial law, and civil trial law. ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULL. NO. 5, Enclosure A, at 3, 16 (Sept. 1978).

5. In New Mexico, for example, a lawyer states by affidavit to the Bar that he has devoted a required percentage of his time in the preceding five years to the designated specialty field. Florida requires minimum continuing education in the specialty, as well as "substantial experience." *Id.* at 5, 11.

6. ABA SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES § 238, at 1 (1974) (Report of Special Committee on Specialization); *Id.* § 113, at 1 (1973) (Report of Special Committee on Specialization).

Utah State Bar Committee on Specialization[7] recommended to the Bar Commission that no further action on the question of lawyer specialization in Utah be taken until at least June 1, 1976. That recommendation was adopted by the Commission. Although the ABA Committee on Specialization dropped its "no action" request to the states in 1976, the Utah Specialization Committee was not activated again by the Bar Commission until 1977. In February 1978 the House of Delegates of the ABA formally adopted the revised report of the ABA Standing Committee on Specialization concerning the regulation of specialization by the states.[8]

II. Present Status of Speciality Regulation

In spite of the large number of articles, reports, committee meetings, and proposed plans regarding lawyer specialization in the past several years, actual implementation of specialization programs and expansion of existing programs has been slow.[9] This is especially evident in California, which still certifies in only three areas although its plan is the oldest in existence,[10] and in New Mexico, where only about nine percent of the lawyers participate in a self-designation plan which has been in operation for more than five years. Several states have rejected the concept of specialty regulation altogether.[11]

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7. The Committee had been intermittently active from 1969 to 1972 when, under Chairman John H. Allen, it studied the proposed certification plan in California.

8. The first set of major recommendations developed by the ABA Standing Committee on Specialization was contained in the Committee's Discussion Draft I, dated October, 1976. After submission of that draft numerous comments were received by the Committee, and the draft was revised and reduced to formal recommendations which were presented to and approved by the House of Delegates of the ABA at its midyear meeting in New Orleans in February, 1978. ABA Summary of Action of the House of Delegates 10-11 (Feb. 1978) (Report of Standing Committee on Specialization). For a summary of the recommendations, see text accompanying notes 21-28 *infra*.

9. For example, in 1969, a full scale plan was proposed in Virginia. *See* Epps, *supra* note 3. Eight years later, the Council of the Virginia State Bar adopted a resolution approving the concept of designation and certification of specialties by Virginia lawyers. The Virginia Committee on Specialization reported to the ABA in 1978 that it was continuing to work on a proposed plan and expects to complete its assignment during the fall of 1978. ABA Standing Committee on Specialization, Information Bull. No. 5, Enclosure A, at 17 (Sept. 1978).

10. See Wolkin, *The Bar: The Certificated and Uncertificated*, A.L.I.-A.B.A. Continuing Legal Educ. Rev., Sept. 22, 1978, at 1, for figures showing that in California the number of lawyers who have qualified by examination is 269 in criminal law, 129 in workmen's compensation law, and 120 in tax law. Three thousand five hundred California lawyers were eligible for certification and nearly 2,400 applied. One thousand seven hundred fifty-two lawyers were certified with 1,357 obtaining certification under the grandfather clause and the rest qualifying by examination. My personal contacts with California Bar officers indicate that no particularly enthusiastic trend of participation is either developing or continuing.

11. See Table 1 at 685 *infra*.

On the other hand, Florida reported that sixty percent of the eligible attorneys participated in its program, and Texas claims a higher rate of attorney involvement than California has experienced. Additionally, from 1977 to 1978, twenty-four states reported to the ABA that they had changed their position regarding the regulation of specialties. Utah was among that group. See Table 1, which is based on my own broad categories and in some cases uncertain and arbitrary classification, for a rough representation of the current specialization picture.[12]

The Utah Committee on Specialization, after being reactivated by the Bar Commission in 1977, continued its previous study of available literature, plans proposed or in operation in other states, and coordination with the ABA Committee. Additionally, telephone interviews were conducted with bar officials or staff members in Florida, New Mexico, Texas, and California. A questionnaire[13] was given to each Utah Committee member, and responses were discussed in committee meeting. On March 17, 1978, by a split vote, the Committee rejected an immediate formal certification program for Utah pending further information on experience in other states and further study and refinement by the ABA Committee. Reasons for the rejection included: plans in operation elsewhere were too few and too limited to establish program acceptance, utility, or a broad data base; and start-up and administrative costs are potentially heavy.[14] The Committee believed that any program should begin on a self-designation basis, and if well accepted, progress to two-tier self-designation plus board certification program, and finally to certification alone.[15] Therefore, the Committee voted to recommend that the Bar implement a self-designation plan, administered by a Utah board of attorney specialization, which would also be directed to continue to evaluate and make proposals for a possible board certification plan.

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12. Table 1 is based on data derived from reports submitted by the various states to the ABA Standing Committee on Specialization and contained in ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULL. No. 5, Enclosure A, at 1-18 (Sept. 1978).

13. Some questions asked included: Do you favor any kind of bar regulated specialization program in Utah?; If so, what type—self-designation, full certification, or two-tier?; If we propose a program, what about the mechanics—financing, staffing, indentification of specialty areas, determination of standards, and coordination with other regulation?; Should we recommend that a formal board of specialization be established to implement our recommendations?; and What about other requirements, such as minimum years of practice, continuing legal education, and grandfather provisions?

14. Cost of the California Plan, with only three areas of certification, was over $170,000 the first year. *Proceedings of Specialization in the Law Conference*, ABA ANN. REP. 22 (1973).

15. Florida's program is evolving along these lines.

16. A copy of the plan may be obtained from the Utah State Bar or the author.

TABLE 1

Regulation Rejected	*Studying or No Action*	*Plan Proposed But Not Yet Adopted*		*Plan in Operation*	
		Certification	*Self-Designation*	*Certification*	*Self-Designation*
Alabama	Delaware	Alaska	Arkansas	Arizona	Connecticut
Illinois	Hawaii	Colorado	Georgia	California	Florida**
Nebraska	Indiana	Florida**	Idaho	Texas	Iowa
North Carolina*	Kentucky	Kansas	Maine		New Mexico
Oklahoma	Louisiana	Massachusetts**	Massachusetts**		
Oregon*	Maryland	Missouri**	Michigan		
	Minnesota	New Jersey**	Missouri**		
	Mississippi	Washington	New Jersey**		
	Nevada	District of Columbia**	South Carolina		
	New Hampshire		District of Columbia**		
	North Dakota				
	Ohio				
	Pennsylvania				
	Rhode Island				
	South Dakota				
	Tennessee*				
	Utah*				
	Vermont*				
	Virginia				
	West Virginia				
	Wisconsin*				
	Wyoming				

* Reports from these states indicate that the decision in *Bates v. State Bar*, 433 U.S. 350 (1977), has had an impact on either proposed specialization programs or studies about the possibility of such programs. Many of the states indicated are now relying solely on changes in their advertising rules. Utah is in that group.

** These states have elements of a two-tier program, including some self-designation and some certification.

The draft self-designation plan[16] was modeled after the one adopted in Florida, and required, among other things, designation of only board-approved areas of practice as a specialty, a minimum of three years' practice of law (or its equivalent, such as specialized postgraduate education or teaching experience), substantial experience (largely undefined) in the designated specialty area, and a minimum of ten hours approved continuing legal education in the specialty per year. No more than three areas of specialty could be designated, and renewal of the right to designate would be required every three years.

A qualifying lawyer would be permitted to publicize his designated areas of practice on his letterhead, business cards, office door, in the yellow pages of the telephone directory, in approved law lists, and by other means approved by the board. Descriptive words or phrases such as "areas of practice," "practice limited to," and "specializing in" could be used only as authorized by the board. Under the draft plan, permitted listings in the yellow pages included either alphabetical listing of lawyers or listing of lawyers under area of practice headings or both. Law firms could not designate a firm specialty and they would not be permitted to show designated specialities for lawyers grouped under the firm name.

Among its duties, the board would: determine, define, approve, and publish areas of practice appropriate for designation; establish standards of education, experience, proficiency, and other criteria for determining qualification under the plan; provide necessary procedures for testing, investigation, revocation, and renewal; prepare and submit to the Bar budget and other financial data; and issue reports to the Bar and public. Finally, the Bar would publish in the yellow pages and elsewhere as necessary a disclaimer to the effect that attorneys who list areas of practice in the yellow pages have not been certified by the Utah Bar as having any more competence in these areas than any other attorney.

On June 27, 1977, the Supreme Court in *Bates v. State Bar*[17] held that a lawyer may not be restrained from truthfully advertising routine legal services. This decision cut across both the advertising and specialty designation areas of professional regulation. In December of 1977 and in May of 1978, pursuant to recommendations made to it by the Bar because of the *Bates* decision, the Utah Supreme Court adopted a number of changes in the State Bar Disciplinary Rules governing advertising,[18] and made concurrent changes

17. 433 U.S. 350 (1977).

18. UTAH STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (Publicity), 2-102

in the Ethical Considerations promulgated for members of the Bar.[19] Under the new rules, Utah lawyers are permitted to publicize in print media that their practice or that of a firm "is limited to" or "concentrated in" as many as five areas of practice.[20]

Members of the Utah Specialization Committee believed that the new advertising rules came so close to the draft designation plan for lawyer specialization that the plan would not meet with broad acceptance and the public would not be materially benefitted. Without a massive public education program, laypersons would hardly draw a meaningful distinction between "specializing in" as allowed under the draft designation plan and practice "limited to" as authorized under the new advertising rules. Moreover, absent some real meaning to the public, lawyers could hardly be expected to pay a fee and conform to even the minimal requirements of a specialization plan for the now dubious privilege of using a phrase such as "specializing in"—especially with an accompanying statement by the Bar that the lawyer is not necessarily more competent than others. As a result of the above considerations, the Committee decided not to submit a self-designation plan to the Bar Commission. Currently the Committee is considering alternatives for future recommendations.

III. Some Areas of General Agreement

Over the past few years some areas of general agreement with regard to lawyer specialization and regulation have emerged.[21]

1. Self-classification as "specialists" by lawyers is widespread. Although the public has not had ready access to lawyer lists in which lawyers indicate areas of specialty, lawyers widely regard themselves as specialists in certain areas. An Illinois Bar Association survey indicated that only one percent of the lawyers' responding considered themselves exclusively general practitioners; forty-eight percent said they engaged in specialized practice only.[22] In addition, sixty-five percent of lawyers surveyed by the Young Lawyers Section of the ABA called themselves "specialists."[23]

(Professional Notices, Letterheads and Offices), 2-105 (Limitation of Practice). *See* Christensen, *Advertising by Lawyers*, 1978 Utah L. Rev. 619.

19. Utah State Bar Code of Professional Responsibility EC 2-9, 2-10 (Selection of a Lawyer: Lawyer Advertising).

20. *Id.* DR 2-101(B). A list of approved specialty designations appears in *id.* DR 2-105(B).

21. ABA Standing Committee on Specialization, Information Bull. No. 4, at 1-23 (Feb. 1978) (Report to the House of Delegates).

22. *Id.* at 6.

23. *Id.*

Interestingly, Utah lawyers do not seem to fall in that niche. A 1974 Utah State Bar survey showed that only twelve percent of the lawyers responding considered themselves to be specializing in three or fewer areas. Questionnaires for the Lawyer Referral Program indicate a similar finding. Several years ago, most participating lawyers marked four or five areas in which they would accept referrals. More recently a high percentage have marked from ten to as many as twenty areas.[24] Small Utah firms with up to five or six lawyers demonstrate no great inclination to refer business to lawyers regarded as specialists but choose to handle most matters themselves even though the size of the firm, as a practical matter, limits areas of special practice or experience.

2. Specialization is generally unregulated.

3. Information available to the public about lawyer specialties is limited by professional prohibitions against advertising (relaxed since *Bates),* lack of generally accepted labels and definitions, and lack of quality standards for law practice categories. An ABA survey in 1974 found that seventy-eight percent of all adult Americans agreed with the statement that "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."[25]

4. Bar regulation of specialization can increase the accuracy of information available to the public and the bar about lawyers who have appropriate qualifications to help with particular problems.

5. States have had difficulty pursuing access and quality objectives concurrently. Emphasis on public access to lawyers who practice in certain areas may dictate use of the minimal requirement approach of self-designation plans. Current advertising rules prompted by *Bates* are based on this philosophy. Emphasis on quality assurance through certification programs necessarily limits the volume of "specialists" identified for the public and to date has severely limited the number of specialty areas.

6. Proponents of proposed or bar operated specialization programs agree that:[26]

a. Participation in specialization regulation programs should be on a voluntary basis.

b. A specialization regulation program should not deny the right of any lawyer to practice in any field of law, even though he is

24. The rapidly growing number of lawyers and consequent competition probably provides a partial explanation for the increase in the number of areas selected.

25. ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULL. No. 4, at 8 (Feb. 1978) (Report to the House of Delegates).

26. *Id.*

not certified or designated in that field.

c. Specialization regulation programs should permit the lawyer to be certified or designated in more than one field of law if he meets the standards established for more than one field.

d. Specialization regulation programs should require specialists who have accepted clients referred from another lawyer, for specific purposes, not to take advantage of their position to enlarge the scope of their representation.

e. Specialization regulation programs should have appropriate safeguards to ensure the lawyer's continuing qualification as a specialist.

f. Specialization regulation programs should be financed by the participants.

7. Labels for law practice categories should be designed to produce some degree of uniformity from state to state, to better assist the public, and to ensure that national or regional public information and education programs can be as accurate and uniform as possible.[27]

8. It is better for the bar to regulate the advertisement of specialties than either to allow lawyers to publicize and identify their practice on an ad hoc basis or to abdicate the role of regulator to some government agency such as the Federal Trade Commission. Since unregulated practice descriptions may merely confuse the public, the organized bar has a duty to present specialty labels in some orderly and understandable fashion and to regulate the advertisement of those labels.[28]

IV. Unresolved Issues and Continuing Problem Areas

Notwithstanding enthusiastic reports by various groups involved with the subject of specialization, some of the most fundamental problems still remain the subject of debate. In Utah, for instance, with a relatively small bar and large rural areas, there is no assurance that lawyers want or would support any specialization program. As noted previously, only nine percent of the eligible law-

27. For an in-depth review of the problems and goals of law category labels, see ABA Standing Committee on Specialization, Information Bull. No. 5, Enclosure C (Sept. 1978).

28. Without some degree of uniformity in the description of practice areas

> [l]awyers, who actually do the same thing may be classified differently, thereby depriving the public of an opportunity to find a list of such lawyers and compare them. Many categories may be created and described in "legalese" or other terms incomprehensible to the public. A lawyer, by the unique way in which he describes his services, may suggest that he is the only one performing certain functions or otherwise, intentionally or unintentionally, engage in misleading promotion and solicitation.

Brink, *Is Specialization Dead?*, Bar Leader, Jan.-Feb., 1978, at 20, 22.

yers in New Mexico have taken advantage of the self-designation program there.

Fears and concerns expressed over the years are still present. Will certification or other specialization programs discriminate against the rural lawyer, the general practitioner, or the recently admitted lawyer? Will they channel business to big city lawyers and large firms? Will they increase the cost of legal services to the public? Would there be enough business in any given specialty to allow lawyers in a rural area to meet minimum requirements for designation as a specialist? Will board certification of specialists create groups of elitists who corner large segments of business? Will a lawyer who makes the hard choice of designating two or three specialties risk the loss of business in other areas? How difficult and how costly will it be to specialize?

After suffering the drudgery of law school and the trauma of bar exams, many lawyers resent the idea of facing further and repeated examination, however voluntary the program might be. This factor leads to a multitude of other questions. Do written or oral examinations truly test competence? Should recertification be mandatory and, if so, how often? Should "grandfathering" be allowed? Do years of practice requirements unfairly discriminate against young lawyers? How many years should be required? How can "substantial involvement" in an area be measured to correlate with competence?[29] Are peer review or reputation requirements too subjective or political? Will the program start-up costs be too great? In a small bar, such as Utah's, will too few lawyers participate to make the program financially self-sustaining?

Still other questions surround programs requiring continuing legal education. How will quality education be assured? Who should be primarily responsible for initiating educational programs, tying them into approved specialty areas and insuring that there are programs available for each specialty? How can the costs be kept within the budgets of young lawyers? What happens when requirements for certification in a particular area, taxation for instance, vary widely from state to state? Is the public more misled than served? Should a lawyer who is board certified in one state be allowed to advertise that fact in another state, especially when the second state has different requirements for certification?

When a bar undertakes to certify specialists, is this a warranty of competence? Does any special liability or actionable duty attach

29. For instance, a lawyer may have been substantially involved in criminal law for a number of years, but have lost many cases because of his own errors.

to the bar? To the specialist? Will the specialist be held to a higher standard of care and perhaps be more vulnerable to malpractice actions? What are the frontiers of lawyers' first amendment rights under *Bates?* As a practical matter, have those rights mooted all but full certification programs?[30]

Finally, what about the myriad of certification and specialization programs being proposed by sub-groups of the bar and by independent organizations? In his now famous address at the Fordham University School of Law on November 26, 1973, Chief Justice Warren E. Burger proposed that all other specialization programs be put aside and a single program certifying lawyers who wish to appear in court be adopted—essentially, the English Barrister system.[31] Burger's suggestion was subsequently followed in part by the Court of Appeals for the Second Circuit.[32] On December 9, 1977, the Association of Trial Lawyers of America voted to establish a National Board of Trial Advocacy to conduct a certification program for trial attorneys.[33] Locally, the Tax Section of the Utah Bar formed its own Committee on Specialization this year.

These are abbreviated examples of a significant and growing phenomenon. Everyone wants to get into the act. The ABA specialization committee's position is that a piecemeal approach to certification is not in the public interest, and that certification should be handled either by the state's integrated bar or the state bar association, rather than by specialized groups.[34]

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30. Extended observations on how *Bates* has affected specialization appear in: ABA STANDING COMMITTEE ON SPECIALIZATION INFORMATION BULL. No. 4 (Feb. 1978); Brink, *supra* note 28, at 20-23; Morrison, *Field Advertising—Special Competence or Ordinary Hucksterism? We Need A Specialization Rule Now!,* 66 ILL. B.J. 78-82 (1977).

31. Burger, *The Special Skills of Advocacy,* 42 FORDHAM L. REV. 227 (1973).

32. Early in 1974 Chief Judge Irving R. Kaufman of the Court of Appeals for the Second Circuit appointed the Advisory Committee on Proposed Rules for Admission to Practice. See *Qualifications for Practice Before the United States Courts in the Second Circuit,* 67 F.R.D. 159 (1975).

In 1976, Chief Justice Burger appointed a twenty-four member committee to consider qualifications for practice in the federal courts. After two years of study and deliberation, the committee's primary recommendations were that (1) uniform standards for competency in federal trial practice should be implemented through requirements of an examination in federal practice subjects and four trial experiences in actual or simulated trials, and (2) each district create an attorney performance review committee. Public hearings on the recommendations will be held in the spring of 1979, and the committee will make its final recommendations to the Judicial Conference of the United States in September, 1979. *See* Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, Sept. 21-22, 1978 (unpublished report circulated by the Administrative offices of the United States Courts).

33. ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULL. No. 4, at 2 (Feb. 1978).

34. Address by Frederick R. Franklin, Staff Director of ABA Special Committee on

V. Recommendations and Conclusion

At its midyear meeting in New Orleans in February 1978, the ABA House of Delegates approved the recommendations of the ABA Standing Committee on Specialization, which contained a statement of principles to be used as a model for the states in regulating lawyer specialization. The recommendations stated:

> 1. that the authority governing the practice of law in each state regulate the information provided to the public about lawyers' specialties, within the provisions of each state's rules of professional responsibility;
> 2. that such state regulation include measures to ensure truthfulness and quality assurance, and compliance by all lawyers with the regulatory standards;
> 3. that such state regulation include measures to provide broader access by the public to competent legal services by means of a designation plan, a certification plan, a combination of these, or by other methods.
> 4. that such state regulation be accomplished with the assistance of informed and concerned laypeople; and
> 5. that such state regulation permit lawyers to use reasonable and responsible means and forums to inform the public about their areas of specialized competence consistent with truthfulness and quality assurance standards, and consistent with each state's rules of professional responsibility.[35]

As you will note, the recommendations do not leave open the question of whether or not to regulate, but only what kind of regulation each state should impose. Obviously, the present impasse of the Utah Committee on Specialization is not on track with the ABA recommendation, but the Utah Supreme Court's adoption of new rules on advertising in conformity with *Bates* does provide some regulation. Therefore, any further progress on specialization regulation in the state should be based on the cooperative efforts of the advertising, continuing legal education, and specialization committees of the Bar.

The first step in any further regulation should be another amendment to the advertising rules, deleting the phrases "limited to" and "concentrated in,"[36] and instead limiting statements about

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Specialization, *Specialization and the Practice of Law*, Kentucky Bar Association Annual Convention (May 24, 1974).

35. ABA Summary of Action of the House of Delegates 11 (Feb. 1978) (Report of Standing Committee on Specialization).

36. *See* Utah State Bar Code of Professional Responsibility DR 2-101(B)(2), 2-105(A)(2).

areas of practice to an unadorned, unqualified listing of the practice designations.[37] Further amendments should be adopted to limit strictly the size of type, total space, borders, and other materials to promote uniformity in advertising and to ensure that advertisements impart only information and do not huckster the public. Legal advertising should be limited to one area of a newspaper, with all ads appearing together. Yellow page listing for lawyers should emulate the uniformity of listing achieved by physicians. At least until general uniformity in designation or certification programs from state to state is achieved, lawyers who have been designated or certified in one state should not be allowed to advertise that fact in another. Thus, for example, a lawyer certified in California as a tax specialist should not be allowed to advertise that fact in Utah.

With these additional ground rules on advertising, the bar can once again review the possibilities of a regulated designation-type specialization program as a first step toward eventual board certification of specialties, which I believe will inevitably come at least in certain areas. Almost certainly we will need to develop a new vocabulary or device to distinguish adequately the specialist who has complied with bar specialization requirements from the noncomplying lawyer who is advertising under the authority of *Bates*. Perhaps a logo or symbol may be devised for display opposite the name of lawyers who have satisfied the more stringent bar requirements and the public educated to associate the logo only with lawyers complying with bar standards.

Just as the experience of the few states with specialization plans over the past few years has resolved a number of previously unanswered questions and identified problem areas, accumulation of data over the next several years will resolve a number of the issues raised earlier in this article. Any program eventually adopted in Utah will benefit from the experience of other states. In the meantime, the ABA Standing Committee on Specialization is moving closer to developing model guidelines for designation and certification plans. All states should benefit from the development of such model guidelines because of the vast amount of information upon which they will be based and because of the uniformity they will encourage nationwide.

Public identification of the lawyer specialist pursuant to some sort of regulation appears to be a growing fact of life in the legal

37. Such a proposal conforms to one made by the ABA Standing Committee on Specialization in its Discussion Draft II. *See* ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULL. No. 5, Enclosure B, at 6-10 (Sept. 1978).

profession. It remains to be seen how fast, how far, and in what direction Utah will move in this evolving area.

Rites of Passage: The Bar Exam

*Robert Peterson**

I. INTRODUCTION

The purpose of this piece is to reflect on the role of the bar exam as an educational or accrediting device, without necessarily assuming that it fulfills either function in any meaningful way. My credentials for this task probably could not withstand voir dire,[1] but as a member of a committee formed by the Utah State Bar Association to consider the bar exam and its alternatives, I am in a position to outline the issue.

The bar has long enjoyed the privilege and responsibility of determining its own membership and in large part determining acceptable standards of performance.[2] That the legal profession still enjoys these privileges may be attributable to the intrinsic merits of that system, gross inertia, or the ability of a small group to recognize a good thing and capitalize on it. To be sure, the organized bar's dominion over its own affairs has been eroded. Notable are the judicial curtailment of the bar's ban on legal advertising[3] and the inclusion of lay members on bar commissions in some states.[4] Nonetheless, the bar continues to enjoy a considerable measure of self-determination, particularly in view of the rewards and stature which accompany membership. Although their determinations are typically subject to review by the highest court of the state,[5] the integrated bars have for practical purposes complete autonomy in determining who shall be accredited to participate in, and who shall be excluded from, the practice of law.

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1. I have been, and currently am, a practicing lawyer, have taken bar examinations in two states, and was for two years an Associate Professor of Law at the University of Utah College of Law. Although this background does not qualify me as an expert on legal education, the practice of law, or bar exams, I am advised that others have declined this opportunity to discuss the bar exam so at least I won't be trespassing on anyone else's turf.

2. While other professions and trade unions also enjoy the privilege of determining their own memberships, only the legal profession is privileged to have its determinations reviewed by a body, the state Supreme Court, comprised of its present and former members.

3. *E.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

4. The California Bar Commission, for example, has lay members.

5. *E.g.*, UTAH CODE ANN. §§ 78-1-14, -19 (1953).

With precious few exceptions,[6] the successful completion of a bar exam is prerequisite to the privilege of practicing law, unless the applicant has successfully passed the bar in another jurisdiction having a reciprocal relationship with the jurisdiction in question. In Utah, admission requires successful completion of both the multistate exam, and an exam written and administered by the Utah State Bar, consisting of essay questions covering specific areas of the law and a section testing knowledge of a lawyer's professional responsibility. In most states, including Utah, the applicant also must have graduated from an accredited law school and must have his moral fitness for practice determined. This combination of requirements is a source of frustration to law school graduates, who naturally view the requirement of passing yet another exam as a bitter pill to have to take.

No longer does the bar participate in the training and education of the lawyer prior to admission to the bar.[7] Since admission to the bar after a clerkship in a law office has been abolished in most jurisdictions,[8] the bar exam has become a sort of baccalaureate ceremony, written and administered by a group with no formal role in the education of law students. Does this suggest that the bar examination is at best a useless exercise and at worst an exclusionary device to protect the vested interests of present bar members? It is not only applicants and their friends and relatives that ask this question. In sessions of the present Bar Exam Committee, some have advocated the abolition of the bar exam. Others have argued that the organized bar should re-establish its role in the process of educating uhe bar by imposing an articleship or clerkship requirement prior to the admission to the bar, in addition to the requirement of graduation from an accreditied law school. Probably the only area of agreement on the Committee was that the bar exam provides, at best, a limited test of the applicant's ability to practice law.[9]

My own view is that the bar examination should not be analyzed in isolation. What is needed is a comprehensive, integrated analysis of academic legal education, clerkship requirements, con-

6. Mississippi, Montana, West Virginia, and Wisconsin allow those who graduated from specified law schools to practice law without taking the bar exam.

7. Of course, individual members of the bar frequently teach one or more courses in law schools, as adjunct teachers or professors, or participate in clinical programs for law students. But the bar as an institution does not typically involve itself in the training of law students.

8. In Utah, for example, formal academic training became mandatory in 1947.

9. This brief synopsis of the Committee's views is based on personal recollections of the thrust of conversation at its meetings and is by no means exhaustive of the viewpoints expressed by members of the Committee.

tinuing legal education, specialization, and the bar exam. Unless one has a clear understanding of how the bar exam fits within a larger scheme, he is not in a position to gauge its usefulness. What I intend to do here is sketch out such an analysis, admitting that the empirical data requisite to the final resolutions of questions posed is not forthcoming.

II. Do We Need a Bar Exam?

A. *The Adequacy of Legal Education*

The first question is whether, given the prerequisite of a degree from an accredited law school, a bar examination should be required at all. Clearly, there is no need for a bar exam if modern legal education is an adequate preparation for the practice of law. If you were to ask a cross-section of the faculties of first-rate law schools whether legal education provides the student with the practical skills and tools necessary to practice law at the level of an experienced practitioner, my guess is that a majority would respond in the negative. Most law teachers would acknowledge that modern legal education is designed to provide the broad philosophical underpinnings and analytical skills that will serve the lawyer throughout a lifetime of practice, as well as an introduction to those areas of law most likely to be of concern to the average lawyer. Law schools, however, do not seek to develop the narrower, technical skills that the lawyer learns and hones during practice.

B. *What the Bar Exam Measures*

On the other hand, even if law school does not adequately train the student to practice law, the bar examination seems to be merely a somewhat redundant test of the very skills developed in law school education. The exam primarily tests the ability of the applicant to apply law to rather simple and discrete facts in an analytical fashion. The applicant must be conversant with a wide range of law, but need only demonstrate a recognition of the legal problems presented. He need not demonstrate the skills required to put this recognition to use. Such an exam was probably appropriate to test whether the breadth of knowledge and analytical skills necessary for the practice of law had been acquired by the clerk-applicant, whose law office training presumably provided good technical skills, but perhaps an insufficient knowledge of law and theory. Today, however, the bar exam may be little more than a test of the applicant's ability as a law student.

One justification often given for the bar exam is that it forces the applicant to pull together all that he has learned in three years. But this is not quite true. The exam does force the student to review what he has learned in the past three years, but the average bar exam question is confined to a single area of the law and does not require an integration of knowledge in any meaningful fashion. Because the bar exam consists of a series of short questions, it does not confront the applicant with a complex problem requiring an integration of various areas of the law in a sophisticated fashion. The bar exam thus does not measure the applicant's ability to produce the kind of work product, or series of work products, that a lawyer would be called upon to produce if confronted with even a comparatively simple legal problem. In fact, the examination does not require so much as a single, analytical memorandum. Most bar exam questions require less than an hour's worth of off-the-top-of-the-head analysis.

Thus, a good case can be made for the proposition that the bar exam as presently administered is a largely redundant and useless exercise. If the bar exam provides a useful review of a legal education, it would make more sense to give it several years after graduation from law school, to insure that legal education is retained.

C. A New Bar Exam?

A more viable alternative would be to change the nature of the exam so that it more correctly measures the ability of the applicant to function as a lawyer. It has been proposed, for example, that each applicant be given a representative legal problem to research. The applicant would be expected to spend a day in the library and then another day drafting a memorandum. The memorandum would develop the legal theories in support of a hypothetical client, as well as the procedural and evidentiary issues likely to be raised. While there may be a disagreement as to whether such a testing device would be superior to the present bar format, there is not likely to be any disagreement that such an innovation would be considerably more difficult to administer. It would require nearly 200 different problems and sorely tax available library resources. In fact, such a test would probably have to be administered over a period of several months so that each applicant could have access to the reference materials required. Even then the exam would provide only a limited review of the skills a lawyer employs.

If we were really committed to measuring the applicant's preparation to practice law, the applicant should at least be required: to examine witnesses; to draft pleadings, a brief, and conveyancing

instruments; and provide oral argument on his brief. Of course, such drastic changes in the nature of the bar exam would so surcharge the resources of the bar that they are highly unlikely to occur.

III. The Real Need—Technical Skills

If law school graduates are not competent to practice law, it is not because they lack breadth in their legal education, but because they lack technical skills. For example, some members of the Bar Exam Committee lamented the almost complete lack of courtroom skills among those recently admitted to the bar. Underscoring these personal observations was the recent, much publicized remark of Chief Justice Burger that many of those currently practicing before federal courts reveal dismaying ineptness.[10] Trial practice, being more visible than other activities of lawyers, tends to provoke more discussion. But if remarks regarding the quality of trial practice are true, one might extrapolate that the average performance of a lawyer in reviewing documents, advising clients, and the like is probably not of any higher degree of quality.[11] Assuming that a certain degree of incompetence or ineptness exists among lawyers, and further assuming that the bar exam, in its present state, does not serve to ferret out that lacking, what can be done about it?

A. Mandatory Clerkship Program?

One proposal offered to the Bar Exam Committee was to establish a mandatory clerkship program. Some members of the Bar Exam Committee were of the opinion that the Utah Bar should accept formal responsibility in the training of lawyers and that a mandatory clerkship program would be a way to accomplish the task. Since the program was discussed only in general terms, it is not clear whether it would replace or merely supplement a bar examination. There was also no firm proposal as to the length of the clerkship or whether particular requirements and conditions would be imposed during that period.

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10. Chief Justice Burger's remarks have been challenged, both on the merits and on grounds that he lacked an adequate foundation for entering his remarks into evidence, so to speak. He does not stand alone, however. A panel of second circuit judges has proposed stringent standards for admittance to practice before that circuit because of a perception that the quality of practice before that circuit was unacceptable. *See Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 F.R.D. 159 (1975).

11. Incompetence in a non-trial setting could be more detrimental to the client than incompetence at trial. In the courtroom, intervention by the judge may well serve to diminish the impact of any perceived ineptness on the part of a lawyer for one of the parties. No such curb exists in the solitude of the lawyer's chambers.

The mandatory clerkship proposal undoubtedly owes much to the British system, in which the bar takes an active role in the education of the fledgling lawyer. It might thus be profitable to examine the way in which the British articleship or pupilage requirements fit into the overall education of a British lawyer. To begin with, the academic education of a British lawyer is far different from that given in this country. Law is the equivalent of an undergraduate major in Britain, the core around which is arranged a liberal education. Most of the twenty-five major British law schools do not teach such courses as conveyancing, procedure, and evidence.[12]

In contrast, courses in evidence and civil procedure are basic to the curriculum of probably all American law schools. Moreover, the most striking change in American legal education in recent years has probably been the introduction of clinical and problem-solving courses. These courses offer the second and third year student the oportunity to deal with real and simulated legal issues in much the way a practicing lawyer does. To be sure, such courses are generally not required. Nonetheless, these innovations reflect the fact that American law schools are more deeply committed to providing professional training than their British counterparts.

In Britain, the professional training administered by the bar requires an elaborate super-structure. One who seeks to become a solicitor after acquiring a university law degree is required to enter into articles of clerkship for at least two years. During that time the clerk is also required to take courses administered by or through the bar and pass examinations. Not only has such an elaborate system never been created in this country, it seems unlikely that it ever will be, given the expense that would be entailed and the numbers of lawyers being produced in this country each year in fifty jurisdictions, each of which would be responsible for such a program.

America's limited experience with mandatory clerkship programs has been such as to leave one doubtful about the likelihood that such a program would be successful in Utah. At present, only three states still maintain some form of mandatory clerkship or apprenticeship requirements.[13] The main problem has been the ina-

12. Ablard, *Observations on the English System of Legal Education*, 29 J. LEGAL EDUC. 148, 154 (1978). The British have thus evolved an elaborate educational system whereby the universities are responsible for the teaching of philosophical or jurisprudential law, and the bar is responsible for the professional training of lawyers. The result is that many who take undergraduate law degrees do not practice law and, conversely, many practicing lawyers never attend academic law schools. *Id.*

13. The states are Rhode Island, Vermont, and Delaware. In addition, New Jersey

bility to adequately supervise the clerkship program so as to provide a uniform, consistent, and effective clerkship experience. Considering that the present Utah Bar numbers some 2000 and there are 200 applicants for the bar each year, it follows that at least one out of every ten Utah lawyers would be responsible for a clerk. This suggests that it would be difficult to find enough lawyers willing to supervise clerks. In addition, many lawyers confine their practice to selected areas. A clerk for such a lawyer would not likely gain the broad technical background that the clerkship program is meant to provide.

Notwithstanding the above-listed problems the majority of law students have informal clerking experiences, as the "clerk" for practicing lawyers during law school. In addition, most recent admittees to practice work either for or with experienced lawyers. Thus, unless the bar adopted a highly structured clerkship program with careful supervision, the experience of the average new admittee would be essentially unchanged.

B. Other Alternatives

The bar might better serve the public and its members if it conducted yearly practice courses for new law school graduates. The graduates now spend June and July studying for the bar exam. This time could be better spent attending classes to teach technical skills, such as (1) drafting qleadings, wills, and conveyancing documents; (2) examining witnesses; (3) presenting oral argument; (4) dealing with clients; and the like. Such practice courses might consist of demonstrations by experienced counsel, handouts of basic instruments, and exercises to be done by the admittees. It seems likely that some sort of programmed learning approach could be utilized. In my judgment, these practice courses should be required and be in lieu of a bar examination.

If the bar has any problems, it is the lack of technical skills among lawyers. Any real, long-range solutions will involve much more than addressing the bar exam and its alternatives. One approach may be to create a number of specialties of legal practice and create courses designed to prepare lawyers to be specialists. For example, if the quality of trial practice continues to be a problem, perhaps it should be made a specialty and certification required for those who intend to appear in court. If specialization were adopted as a requisite to practice in specialized areas, instead of being

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requires completion of an approved course in skills and method. THE AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1977, 61, 65-68 (1978).

merely a credential, incompetence in certain critical areas could be largely eliminated. Specialization may also be the springboard for the bar to reclaim a significant role io educating lawyers. By providing the training that would be required of lawyers to become specialists, the bar would be upgrading the quality of its members.

Clearly, a great deal of careful thinking needs to be done before adopting any changes of the magnitude suggested here. For instance, rural communities might require different treatment. Nevertheless, I am confident that the bar would better serve the public and its members if it diverted the energies now spent in testing to teaching.

The Salt Lake County Bar's Small Claims Court Project

*Kent M. Kasting**

I. THE BACKGROUND

Small claims courts in Utah are created by statute[1] for the purpose of resolving those minor disputes which do not justify the expenditure of large amounts of judicial time and attorney's fees. These courts have nonexclusive jurisdiction in cases involving the recovery of money where the amount claimed does not exceed $400.00.[2] Typically, landlord-tenant disputes, minor automobile accident claims, consumer warranty claims, and small collection matters are brought before the court for adjudication. Thus, the small claims court has traditionally been referred to as "the people's court."[3]

Salt Lake City's small claims court is currently operated and administered by the Circuit Court in and for Salt Lake County and is governed by the provisions of the Circuit Court Act of 1977.[4] Circuit court judges, with the help of their staffs, are responsible for the operation of the small claims court, in cooperation with the Salt Lake City Commission.

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1. UTAH CODE ANN. §§ 78-6-1 to -15 (1977 & Supp. 1978).

2. *Id.* § 78-6-1 (Supp. 1978). Prior to January 1, 1978, the jurisdictional limit was $200.00.

3. *See, e.g.*, Conner, *Night Small Claims Court: "The People's Court" Reaches Out to the People*, 10 U.W.L.A. L. REV. 1 (1978).

4. UTAH CODE ANN. §§ 78-4-1 to -33 (Supp. 1978). Prior to July 1, 1978, and at the time the Salt Lake County Bar program was initiated, the Salt Lake City courts were responsible for the operation of the small claims court within the limits of Salt Lake City.

Before November of 1977, a different city judge was assigned each week to hear one session of small claims court cases. Because the judge's time was limited and facilities were crowded, the city clerk's office permitted only twenty small claims cases to be filed each week. After the clerk's office received twenty filings, on a first-come, first-serve basis, the calendar was closed, and those whose cases were not accepted were told to try again the following week. This procedure not only caused delays in litigation, but undoubtedly kept many small claims from being filed at all. The small claims court appeared to be anything but the people's court.

The need for some type of reorganization in the small claims court system was evident. In October of 1977, the Salt Lake County Bar, in cooperation with the Salt Lake City court judges and with the approval of the State Judicial Council, initiated a program to make possible unlimited filings in the small claims court.

II. The Bar's Program

The greatest roadblock to unlimited filings was the need for additional judges. Other localities had created greater access to small claims court, and encouraged public participation, by holding night sessions of court and using volunteer attorneys as "settlement officers."[5] These settlement officers would work with the parties to effect a settlement or, in the alternative, to prepare their cases for presentation to the small claims judge.[6] In Salt Lake City, however, the lack of available judges, due to the crowded dockets of the circuit courts, represented the more significant hurdle to greater accessibility to the small claims court. Accessibility could be increased if night sessions could be held. Thus, the Salt Lake County Bar Association responded with the idea of using volunteer attorneys as judges pro tem with the authority to decide the legal disputes of parties before them in the small claims court.

Therefore, the Salt Lake County Bar Association asked for help from members of the Bar. A general description of the proposed program, along with an application to sit as a judge pro tem during the evening sessions, was included in the Association's monthly newsletter. The response of the County's Bar membership was overwhelming: over two hundred members submitted applications to serve as judges pro tem in the evening sessions. All applications received were submitted to the Salt Lake City judges for their review and approval. The pro tem appointments were made and,

5. *See* Connor, *supra* note 3, at 14-15.
6. *Id.*

because of the great number of applications, individual members of the County Bar were requested to serve as judges pro tem approximately one night every two to three months. Meeting between the Salt Lake County Bar and the State Judicial Council, the Salt Lake City court judges, and the Salt Lake City court personnel helped complete the arrangements and paved the way for a smooth-running program. In addition, the Salt Lake County Bar worked closely with the Salt Lake City clerk's office to obtain its help in the overall administration of the program, the providing of court personnel to assist the judges pro tem, and the providing of courtrooms for the Tuesday, Wednesday, and Thursday evening sessions.

Prior to the actual start of the program, the County Bar Association prepared and distributed a descriptive small claims court manual to assist the volunteer judges in recognizing common small claims court problems. The manual was also designed to aid the judges pro tem in explaining small claims court procedure, basic rules of evidence, and basic courtroom etiquette to those who would be litigating in evening court.

A week before the first evening session, the Bar Association and the Salt Lake City judges sponsored a seminar for all Bar members participating in the program. This seminar, conducted by a Salt Lake City court judge, instructed the new pro tem judges about small claims court procedures and problems they would likely encounter as judges pro tem. The success of the program may be attributed in part to the almost universal attendance at this seminar.

Presently two small claims court night sessions are held each Tuesday, Wednesday, and Thursday evening, with two separate pro tem judges sitting each night. Each pro tem judge has a clerk provided him by the Salt Lake circuit court clerk's office. The judges pro tem have the same authority as regular circuit court judges, except that they cannot issue bench warrants or orders to show cause. Such matters are automatically referred to a regularly appointed circuit court judge. In the small claims court, litigants may either use the evening sessions with judges pro tem sitting, or may file for a day-time setting to be heard by a regular circuit court judge by complying with the procedure utilized before the night-time small claims court project began.

Before a small claims matter can be heard before a judge pro tem, each litigant in a suit must sign a waiver allowing the case to be tried by a judge pro tem instead of a regularly appointed circuit court judge. If a defendant refuses to sign the waiver, the case is immediately transferred to the day-time calendar for trial before a regularly sitting circuit court judge. The trial is scheduled for a time

and date certain to avoid the delay that would be caused if the plaintiff were required to re-file in accordance with the traditional procedure. This procedure also advances the policy of discouraging avoidance of judges pro tem as a mere strategy to delay the suit.

The County Bar Association plans to continue its small claims court project indefinitely and to expand it as the need arises. The Bar also intends to solicit a new calendar of judges each year.[7] The Bar Association has also planned additional seminars to acquaint the judges pro tem with specific problems in areas of the law most frequently litigated in small claims court, such as landlord-tenant and consumer protection law.

III. The Results

After the first night-time sessions, Salt Lake City's two daily newspapers commented favorably about the program. In addition, one television station interviewed a judge pro tem and another station lauded the program in editorial comment, urging its continuation and expansion. The Salt Lake County Bar Association, since the inception of the program, has secured additional press coverage, including an update on the original stories generated in the newspapers. Such favorable reactions to meaningful reform is a significant help at a time when lawyers generally seem under suspicion, and the media is focusing on the crisis in public confidence in legal institutions.

The Salt Lake City circuit clerk has kept statistics on a monthly basis, starting with November 1977. The success of the program is borne out by the statistics which follow, comparing the disposition of cases before and after the institution of the project:

	Nov.-Feb. 1976-1977	Nov.-Feb. 1977-1978
Number of Cases Filed and Served	318	716
Number of Cases Settled Before Hearing Date	21	81
Number of Cases Heard by the Court (both parties present)	133	334

7. Certificates of appreciation, signed by the Mayor of Salt Lake City, the presiding Circuit Court Judge and the Salt Lake County Bar Association President, will be presented to all Salt Lake County Bar members who have served in the capacity of judge pro tem.

Number of Default Judgments (plaintiff present, defendant not present)	40	138
Number of Cases Dismissed (defendant present, plaintiff not present)	69	60
Number of Cases Stricken (neither party present)	34	56
Number of Cases Taken Under Advisement	0	47
Number of Cases Filed and not Served	21	113

The court clerk will continue to maintain statistics on a monthly basis so that the success of the program can be monitored and expansion can be made when and where necessary.

In July of 1978, the Salt Lake County Bar received national recognition for its small claims court project when it applied for and received the American Bar Association's Award of Merit for Single Project Excellence. This award is presented each year to Bar Associations demonstrating service to the general public and the legal profession.[8]

Finally, as a result of this project, the Salt Lake County Bar has been asked by the American Bar Associations' Special Committee on the Resolution of Minor Disputes to participate in an extensive study of ways to adjudicate most effectively small claims court matters. This committee is now analyzing the statistics of the Salt Lake County Bar's program, and comparing its results to the results in similar programs across the nation.

IV. Conclusion

Response to the small claims court project by members of the Bar, the judiciary, court personnel, the news media, and the general public has been overwhelmingly positive. The facts and figures speak for themselves. Over two hundred members of the Salt Lake County Bar Association have volunteered to serve as judges pro tem and have been serving in that capacity since November of 1977. All circuit judges and circuit court personnel have been enthusiastic and cooperative in assisting the Salt Lake County Bar Association

8. In 1978, only six other state and local Bar Associations were similarly recognized.

in the administration and operation of the project. Favorable statements in the news media have brought about greater public awareness and acceptance of the project. The statistics showing the increased use of the small claims court forum by the general public indicates that the public desires such a program and prefers minor dispute resolution by temporary judges to unreasonably crowded dockets.

The Young Lawyers Section of the Utah State Bar

*Patrick A. Shea**

The Young Lawyers Section (YLS) of the Utah State Bar comprises all individuals admitted to the Utah Bar thirty-six years of age or younger.[1] Unlike other sections of the Bar which have traditionally focused on areas of specialization in the legal profession, the YLS attempts to fulfill particular needs of young lawyers and the Bar as a whole. The recent rapid growth of the Utah Bar[2] coupled with the current declining public regard for the legal profession require increased efforts to integrate new members of the profession and to improve the public image of lawyers. The YLS meets these needs by easing the new lawyer's transition from law school into practice and by providing public service for the benefit of the community and the Bar.

I. The Transition Function

Law school in many aspects is a disjointed activity that has, at best, an indirect relationship to the practice of law. The theoretical approach of examining distinct and supposedly separate topics is not the approach of the practitioner.

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1. The YLS is considering changing the definition of the YLS from a chronological age category to a years-of-experience category because of the recent increase in older students graduating from law school.

The Utah State Bar Commissioners in May of 1978 required, for the first time, that the YLS establish and maintain a roster of members who have indicated an affirmative interest in working with the YLS. The new roster will facilitate a better organization and better communication among YLS members.

2. Rapid growth of the Utah Bar is illustrated by the fact that whereas in 1968, 63 lawyers were admitted to the Utah State Bar, in 1978, 235 lawyers were admitted. Telephone interview with Dean W. Sheffield, Executive Director, Utah State Bar, in Salt Lake City, Utah (Oct. 30, 1978).

Traditionally, individual members of the Bar shouldered the responsibility of bridging the gap between theory and practice. Before the rapid period of growth, the Bar was by and large a collegiate organization. New members were guided through the beginning period of their careers by senior members of the Bar whom they met in court or whose clients they represented. The slow pace of the legal process facilitated the proper socialization of new attorneys. Now, with more than 1,500 attorneys licensed in Salt Lake County alone[3] and an ever-increasing case load, the old process has broken down.

The YLS has stepped into the breach by sponsoring and participating in a variety of activities designed to help the new lawyer develop skills. For example, the YLS has actively assisted the Bar in implementing basic skills seminars dealing with topics such as client relations, office management, work control, and appearances in court. Also, the YLS publishes the *Barrister,* a bi-monthly publication that focuses on current Bar topics with particular emphasis on areas affecting the new attorney. Since the YLS intends to increase the scope and frequency of the *Barrister* in the next few years, new members of the Bar are strongly encouraged to participate.

In November of 1977, the YLS sponsored Law Call, a program that gave young lawyers an opportunity for client contact while at the same time providing a public service. During the three day program, members of the public were invited to telephone YLS to discuss legal problems with a participating member. The lawyer taking the call did not give legal advice, but rather listened to the problem and determined through the telephone interview if the problem warranted referral to one of a number of attorneys who had agreed to meet with potential clients. Law Call received three hundred calls and made two hundred referrals during the three day period. This program not only increased opportunities for new lawyers to meet with and provide services for clients, but also made lawyers more accessible to the public.

Through programs such as the basic skills seminars, the *Barrister,* and Law Call, the YLS helps young lawyers gain valuable experience, develop legal and practical skills, and shed insecurities. The effectiveness of the YLS in easing the transition from school to practice will increase as these programs are supplemented by others.

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3. *Id.*

II. The Public Service Function

The YLS has become increasingly aware of the need for public service. The Canons of Ethics, the Code of Professional Responsibility, and common sense dictate that the Bar devote time to public service. Our legal system is dependent not only on lawyers who understand the system, but also on citizens who understand and accept the legal process. Congestion in the courts, increasing case loads, and a potential oversupply of lawyers demand more efficient and effective use of lawyers and of the legal system.

In recent years with the advent of Watergate, Koreagate, and now Cookiegate (GSA investigation), the public is increasingly distrustful of attorneys. The typical evening television news scene shows an attorney with a black briefcase and client in tow, stating "No comment." In addition, with the increased complexity of statutes and regulations, simple questions answered yes or no by an attorney five years ago are now answered with pages of conditions and qualifications.

On a more fundamental level, a recent survey shows an alarming ignorance in school age children of the basic tenets of our democratic form of government. For instance, the nationwide survey indicated that over 50% of thirteen year olds believe that the President can declare a law unconstitutional.[4] Responsibility for this apparent failure to educate young citizens is not limited to lawyers, it extends far beyond. Nevertheless, because of their working knowledge of our legal system and our system of government, attorneys should assume special responsibility for educating our student population.

The YLS through its public service work seeks to increase public awareness of what lawyers and the legal system can and cannot do. It seeks to improve the tarnished image of the legal profession, to raise the public's level of knowledge of the law, and to improve the administration of justice. For example, under a grant from the Utah Endowment for the Humanities, the YLS recently produced and performed a play entitled "Whatever's Fair" in sixteen high schools in Utah, Salt Lake, and Davis Counties. The play portrayed fundamental concepts of due process and fairness and provided a vehicle for discussion among students, attorneys, and other members of the public. The YLS will soon publish a consumer handbook that will review typical consumer transactions and attempt to answer fundamental legal questions frequently associated with such transactions.

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4. National Assessment Offices, Dep't of Health, Educ. and Welfare, Education for Citizenship: A Bicentennial Survey 25-26 (1976) (pamphlet).

Through community service projects the Bar and the YLS can begin to regain public confidence and respect. The YLS will continue to initiate and support similar projects to allow new attorneys a means of gaining experience while serving the public.

III. The Challenge Ahead

Despite some initial success, challenges remain. Some young lawyers do not participate in public service projects, maintaining that their "professional time" is too important to be volunteered. Besides defeating the public service function of the Bar, this attitude also thwarts good business development for the new attorney. That is, the young lawyer through his public service activities meets potential clients, thus increasing his own business prospects. Public service not only helps the public, but also stimulates a good legal market.

The significant increase in the number of lawyers in Utah in the last ten years has created a potential for an oversupply in the Utah legal marketplace. Many practicing attorneys, with their twelve to fourteen hour days, cannot appreciate this, but the recent law school graduate searching for a job has an entirely different perspective.

With increasing numbers within and increasing pressures from without comes an urgent need to plan and work together as attorneys to maintain a cohesive, efficient, and effective legal community. The YLS is at the point of tension between the senior, well-established members of the Bar and the inexperienced, recent graduates from law school. The YLS through its programs eases the transition of the new attorney into practice, maintains the flow of communication and education among senior and junior members, and provides valuable services to others. In that frustrating, anxiety-ridden, and tiring "rite of passage," the only way the young attorney will survive and, for that matter, the only way the Bar will survive, is if "we come together."

Should Lawyers Serve as Directors of Corporations for Which They Act as Counsel?

In recent years, the question whether lawyers should serve as directors of corporations for which they act as counsel has become a most provocative subject.[1] Those who oppose lawyer-directors[2] point to conflicts of interest inherent in such a dual position, and to the clearly unsettled and seemingly insurmountable hurdles of maintaining the attorney-client privilege. Proponents, on the other hand, argue that lawyer-directors are uniquely qualified to meet the modern corporate need for quality legal services from informed counsel.

This Note will examine these relevant arguments of both opponents and proponents and conclude that unless carefully designed procedures are employed to mitigate the conflicts and hazards of this dual position, the benefits derived therefrom will not justify the risks imposed upon client corporations. When such mitigating procedures are followed, however, the advantages of lawyers serving as directors of client corporations may clearly outweigh any disadvantages that remain. Included also are suggested objective criteria and procedures designed to perform this mitigating function. Even though the focus of this Note is on the effect the dual position of lawyer-director has on the lawyer, one should not overlook the possible impact such a dual position might have on the director.[3]

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1. *See, e.g.*, M. EISENBERG, THE STRUCTURE OF THE CORPORATION 172-77 (1976); G. HAZARD, ETHICS AND THE PRACTICE OF LAW 34, 141-44 (1978); J. LIEBERMAN, CRISIS AT THE BAR 180-82 (1978); OUTSIDE COUNSEL/HOUSE COUNSEL: SPECIAL PROBLEMS OF ATTORNEYS ON THE BOARDS OF AMERICAN INDUSTRY 85-89 (N.Y.L.J. press 1973); Mundheim, *Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporations For Which They Act as Counsel*, 33 BUS. LAW. 1507 (1978) [hereinafter cited as *1978 Panel Discussion*]; Panel Discussion, *Lawyers as Directors*, 30 BUS. LAW. 41 (1975) [hereinafter cited as *1975 Panel Discussion*]; Address by Harold M. Williams, Chairman of SEC, *Corporate Accountability and the Lawyer's Role*, before the ABA Section of Corporation, Banking and Business Law, *reprinted in* 465 SEC. REG. & L. REP. (BNA) H-1 (Aug. 8, 1978) [hereinafter cited as *Address by Harold Williams*].

2. The term "lawyer-director" will be used throughout this Note as a shorthand notation for a lawyer who serves as a director of a corporation for which he acts as counsel.

3. *See generally* M. FEUER, PERSONAL LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS (2d ed. 1974); W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 265-1359 (vols. 2, 3, & 3A, 1969, 1975); KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS (2d ed. 1973); PRACTISING LAW INSTITUTE, DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS (A. Cohen & R. Loeb co-chairmen 1977) (Corporate Law and Practice, Course Handbook Series No. 229) [hereinafter cited as PLI No. 229]; Ruder, Wheat & Loss, *Standards of Conduct Under the Federal Securities Acts*, 27 BUS. LAW 75 (1972) (Special Issue—Officers' and Directors' Responsibilities and Liabilities).

I. ARGUMENTS FOR AND AGAINST LAWYERS SERVING AS DIRECTORS OF CORPORATIONS FOR WHICH THEY ACT AS COUNSEL

Both opponents and proponents of lawyer-directors agree that lawyers should be allowed and even encouraged to serve as directors of non-client corporations.[4] This suggests that the bottom-line arguments for and agaist lawyer-directors are not related to lawyers serving as directors,[5] nor to lawyers having corporations as clients,[6] but to the merger of roles arising when one simultaneously serves the same client as both counsel *and* director. Consequently, the scope of the analysis here is limited to those arguments that address the benefits and detriments of that merged role.

A. Arguments Against Lawyer-Directors

There are two principal arguments against lawyer-directors:[7] (1) a lawyer-director cannot maintain his independent professional judgment due to the conflicting interests, duties, and loyalties created by his merged role, and (2) a lawyer-director cannot be sure that the attorney-client privilege will attach to the confidences and secrets of his corporate client. Both arguments give rise to the objection that the lawyer's effectiveness is diminished when he serves as a lawyer-director.[8]

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4. To exclude the lawyer's qualities from the board room would be inconsistent with the diversity of viewpoint and independence of thought which are essential to the proper functioning of a truly independent board of directors. . . . I think that accepting a position as an independent director should be viewed as part of the lawyer's public service obligation.

Address by Harold Williams, supra note 1, at H-2. *See 1978 Panel Discussion, supra* note 1, at 1510, 1516-18; *see generally* other authorities cited note 1 *supra*.

5. There may be reasons why a particular lawyer may not want to serve as a director of even a non-client corporation, *e.g.*, the lawyer may not want to be subject to the increased duties and liabilities placed on directors, including outside directors. *See, e.g.*, Estes, *Outside Directors, More Vulnerable Than Ever*, 51 HARV. BUS. REV. 107 (1973); Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1 (1969). *See also* authorities cited note 3 *supra*.

6. There are several ethical and practical considerations that arise for a lawyer who has a corporation for a client. Such considerations include the determination of to whom or what the lawyer owes his loyalty and allegiance, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CPR] EC 5-18; G. HAZARD, *supra* note 1, at 43-57; notes 29-38 *infra* and accompanying text, and the considerations with respect to maintaining the attorney-client privilege, *see* notes 82-121 *infra* and accompanying text.

7. Sometimes opponents of lawyer-directors will break these basic arguments down into sub-arguments. *See, e.g., 1975 Panel Discussion, supra* note 1, at 51-58.

8. Professor Mundheim stated the problem as follows:

If I am prepared to support a course of action as a director, how will that affect my lawyer's role in: first, articulating the risks involved in the course of action I have decided to support as a director; and second, having the other members of the board take my description of the risks seriously and weigh them independently when they

1. Loss of Independent Professional Judgment—The first argument against lawyer-directors contends that the conflicting interests, duties, and loyalties created by their dual position prevent them from exercising truly independent judgment on behalf of their clients. Initially, this argument focused on the concern that a lawyer-director, in effect, had himself for a client.[9] To have such a "fool for a client" was said to jeopardize seriously the soundness of judgment, so easily obscurred by self-interest, that an effective lawyer must maintain.[10]

Although a lawyer may be justified in acquiring self-interests in certain situations,[11] the general rule states that the lawyer's judgment should be exercised "solely for the benefit of his client and free from compromising influences and loyalties."[12] Any self-interest, even if congruent with a client's interest, may nonetheless be a conflicting interest if the lawyer's concern therefor exceeds his concern for the client's interest.[13] Such a conflicting interest may influence professional judgment,[14] compromise conduct,[15] and cause the service rendered for the client to be different from what it would be if there were no conflict.[16] In short, such a conflict impairs a lawyer's independent professional judgment by making that judgment, to some degree, dependent on matters other than the client's welfare.

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know how I am going to vote as a director?
1978 Panel Discussion, supra note 1, at 1509.

9. Rostow, *The Lawyer and His Client*, 48 A.B.A.J. 146, 147 (1962); Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A.J. 89, 170 (1949).

10. Mr. Justice Brandeis took the view that lawyers should not serve as directors of corporations they represented professionally. L. BRANDEIS, OTHER PEOPLE'S MONEY 198 (2d ed. 1932). This argument is of questionable validity today, especially with respect to a large public corporation. *See generally* M. EISENBERG, *supra* note 1, at 1-6, 139-48; M. MACE, DIRECTORS: MYTH AND REALITY (1971). In a public corporation the role of the modern director, rather than actively managing the corporation, is typically limited to: (1) providing advice and counsel, (2) serving as a restraining factor by watching out for the shareholders' interest, and (3) acting in crisis situations. *Id.* at 13. Others identify the director's function as one of monitoring. *See* Leech & Mundheim, *The Outside Director of the Public Corporation*, 31 BUS. LAW. 1799, 1799-1806 (1976), *reprinted in* PLI No. 229, *supra* note 3, at 191-96; *The Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1606-07 (1978).

11. Self-interests are justified when they involve a reasonable fee, CPR EC 2-16, DR 2-106; when they involve a reasonable contingent fee in a civil case, *id.* EC 5-7, DR 5-103(A); or when they are fully disclosed to the client, *id.* DR 5-101(A), DR 5-104(A).

12. *Id.* EC 5-1. *Cf. The Corporate Director's Guidebook, supra* note 10, at 1599.

13. "Attorneys must not allow their private interests to conflict with those of their clients. . . . They owe their entire devotion to the interests of their clients." United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963) (citations omitted). *See also* Transamerica Ins. Group v. Chubb & Son, Inc., 16 Wash. App. 247, 554 P.2d 1080 (1976).

14. *See, e.g., In re* Seder, 73 Wis. 2d 629, 245 N.W.2d 895 (1976); L. BRANDEIS, *supra* note 10, at 198; CPR EC 5-3.

15. *See, e.g., In re* Kerr, 84 Wash. 2d 109, 524 P.2d 406 (1974).

16. G. HAZARD, *supra* note 1, at 33-34.

The lawyer-director finds himself faced with a multiplicity of potential conflicts of interest.[17] The most visable of these conflicts pertain to self-interest, such as the large legal fees that a lawyer-director or his firm receives from the corporation.[18] While this conflict is essentially the same as that which faces any lawyer who serves predominantly one large client,[19] it is aggravated by the lawyer-director's merged role. That is, the lawyer's self-interest in maintaining his legal fees may directly conflict with his duties as a director.[20] For example, suppose the corporation wishes to phase out one of its divisions, a trust company, that has been a valuable client of the lawyer-director or his law firm. Clearly, the lawyer-director could not exercise independent judgment in considering the phase out. Accordingly, the lawyer-director would have to absent himself from that portion of the board meeting devoted to the phase out decision.[21] The lawyer could not, however, absent himself or his firm from active representation of the disappearing trust company.[22] Arguably, the lawyer-director's knowledge that the trust company *may* be phased out, even if the decision to do so has not yet been finalized, could affect his independent judgment in handling the

17. *See generally* authorities cited note 1 *supra*. In order to ensure loyalty to the corporation, proposals have been made to comprise the board wholly of independent directors. *See, e.g.*, M. EISENBERG, *supra* note 1, at 172-74. If that goal is not achievable, then the next best approach is said to be a single board composed of a clear majority of independent directors. *Id.* at 174-76; Leech & Mundheim, *supra* note 10, at 1830. Creating a board with a clear majority of independent directors was the concern of two recent cases. In the first, SEC v. Mattel, Inc., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,807 (D.D.C. 1974), involving violations of the SEC's antifraud and corporate reporting requirements, a consent decree required Mattel to appoint additional unaffiliated directors, approved by the SEC and the court, in sufficient number to constitute a majority of the board. In the second, Springer v. Jones, No. 70-1445-F (C.D. Cal. Nov. 23, 1974), a settlement was reached requiring significant changes in the composition of the Northrop Corporation's board. The settlement agreement stipulated that 60% of the board of directors consist of "independent outside directors" and that "no lawyer who serves as (or is associated with a law firm serving as) outside counsel to Northrop can be a director." M. EISENBERG, *supra* note 1, at 176 n.128.

18. The 15 largest fees paid during 1975 by corporations to law firms of lawyer-directors ranged from $994,025 to $2,100,000. *Rich legal links to boardroom*, BUS. WEEK, Jan. 24, 1977, at 24.

19. There are at least some law firms and lawyers who recognize that no single client should account for more than five percent of the firm's business. Otherwise, the firm's reputation for independence may be cast in doubt. G. HAZARD, *supra* note 1, at 69; Forrow, *Special Problems of Inside Counsel for Industrial Companies*, 33 BUS. LAW. 1453, 1471 (1978) (remarks of Mr. Subak). For inside counsel, who only has one client, remaining independent thus presents a formidable challenge. One commentator has suggested that "[f]or inside counsel to be truly independent, he must have the very strong belief that any time he gets fired, he can pick up a pretty good job on the outside the next day." *Id.*

20. *See Address by Harold Williams, supra* note 1, at H-2.

21. *See The Corporate Director's Guidebook, supra* note 10, at 1599.

22. The CPR DR 2-110(A), (C) does not allow a lawyer to withdraw voluntarily from representing a client except under very extreme circumstances.

trust company's legal affairs.

Further potential conflicts arise from any other benefit, tangible or intangible, that the lawyer-director stands to receive as a result of his dual position. While this type of conflict is analogous to that of any lawyer whose client wishes to make him a gift,[23] or privy to special business opportunities,[24] the conflict is greater for the lawyer-director whose duty of loyalty to the corporation may require fidelity above and beyond that required of the lawyer. The director may, for example, be required to avoid personal interests, direct or indirect, in *any* contracts or transactions to which the corporation is a party, no matter how remote.[25] Moreover, the director's duty of fairness requires that the corporation have first shot at any "corporate opportunities."

A potential conflict of interest also arises from the fact that a lawyer-director may be held to a higher standard of care simply because he has the legal training of an attorney.[27] Concern for his own liability may, therefore, obscure the objectivity with which he watches over his client's liability.[28]

All of the above mentioned conflicts are accentuated by the conflicting loyalties that a lawyer-director owes to the corporation on the one hand and to himself or his law firm on the other. Even more troublesome, however, is the conflict between loyalties owed as a director to the corporation[29] and loyalties owed as a lawyer to the client,[30] the difficulty arising in precisely defining who or what is his corporate client.[31] The lawyer has but one guideline in this

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23. *See* CPR EC 5-5.

24. *Id.* DR 5-104.

25. The degree of independence that some would impose on directors has led one commentator to suggest that only a "newly arrived Martian would qualify." Wall St. J., Oct. 20, 1978, at 18, col. 1.

26. *E.g., The Corporate Director's Guidebook, supra* note 10, at 1600.

27. *See* Escott v. BarChris Constr. Co., 283 F. Supp. 643 (S.D.N.Y. 1968); authorities cited note 5 *supra*; *1975 Panel Discussion, supra* note 1, at 41-47.

28. "Service as a director makes it likely that (whether or not acting as counsel) he will be seen as a principal, forcing him to worry about his own liability as well as that of the company. Such worries could hamper him in giving his most considered judgment." J. LIEBERMAN, *supra* note 1, at 181. *But see* note 2 *infra*; text accompanying note 51 *infra*.

29. *See generally The Corporate Director's Guidebook, supra* note 10.

30. The lawyer's duties owed to his client are best summarized by Canons 4, 5, 6 and 7 of the CPR: A Lawyer Should Preserve the Confidences and Secrets of a Client; A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client; A Lawyer Should Represent a Client Competently; and A Lawyer Should Represent a Client Zealously Within the Bounds of the Law. The problem of conflicting loyalties is one which any lawyer may face, *see* CPR DR 5-105; Fordham, *There are Substantial Limitations on Representation of Clients in Litigation which are not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193 (1978), but which is made worse for the lawyer-director.

31. This problem of identity is also the main problem the lawyer has in preserving the

respect: he "owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."[32] The director, however, "commits allegiance to the enterprise" and must watch after the "best interests of the corporation and its shareholders."[33] A major conflict thus arises when the lawyer's client—that nebulous corporate "entity"—turns out to be a different person, or group of persons, than the director's "enterprise."

To illustrate,[34] suppose the executive vice-president of the client corporation comes unannounced to the lawyer-director's office and discloses that a report certified to the government as correct under the federal securities laws is actually false and was knowingly submitted in that form. As a *director,* such an occurrence should present little difficulty. Because directors may be held personally liable for derelictions of officers that they knew about, or would have known about by fulfilling their supervisory responsibility, and because the corporation itself may also be liable to those injured by the misconduct, the director's responsibility is clearly to minimize the corporation's liability and the directors' liability, including his own.[35] Accordingly, the director should gather as much information as possible about the situation and inform the board thereof so that it can chart a suitable course of action. In other words, the "enterprise" to which the director owes his allegiance is the board.

As a *lawyer,* however, the duties in this fact situation are not so clear. Identifying the client presents some difficult problems, both morally and legally. Morally, the lawyer must face the possibility of seriously injuring, or at least subordinating, the interest of a person who has not only trusted him in the past, but who is likely to be a long time business friend. If the lawyer refused to listen to this "heretofore client" as he begins to unburden himself, the lawyer will surely appear to be violating a trusting relationship and abandoning a friendship. If the lawyer does listen, facts might be disclosed that implicate both the "heretofore client" and the organiza-

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attorney-client privilege. See notes 82-95 *infra* and accompanying text. *See also* authorities cited note 39 *infra.*

32. CPR EC 5-18. Unfortunately, this Ethical Consideration defines who is not the client, rather than who is the client. As a practical matter the lawyer must always deal with the corporation through its officers, directors, stockholders, or employees, yet none of these persons are the corporate entity to whom the lawyer owes his allegiance. *See* Marsh, *Relations with Management and Individual Financial Interests,* 33 BUS. LAW. 1227, 1227-28 (1978). *But see id.* at 1239 (commentary by Kenneth J. Bialkin).

33. *The Corporate Director's Guidebook, supra* note 10, at 1599.

34. The genesis of this example is borrowed from G. HAZARD, *supra* note 1, at 46-53.

35. For comprehensive works on the subject of the substantive liabilities of directors and officers, see authorities cited note 3 *supra.*

tion which the lawyer is paid to serve. Moreover, by listening, the lawyer knows that the person doing the talking believes the disclosure to be confidential. Thus, when the lawyer is uncertain he can maintain the disclosure as confidential, his listening becomes the first step of what could easily turn out to be a betrayal of confidence, and hence a grave moral wrong.

Legally, the lawyer is faced with a similar dilemma. Once the corporate officer begins to speak, the lawyer must recognize that a lawyer-client relationship is being formed. If the lawyer decides to treat the corporate officer as a client—that is, if the lawyer continues to listen—he may learn of facts that could subject the officer to criminal or civil liability. By the rule of confidentiality, the lawyer may not disclose these facts to others, such as the board of directors.[36] Yet the board of directors, by retainer agreement or otherwise, may very well consider itself as the client to which the lawyer owes his allegiance. Accordingly, the board will expect the lawyer to advise it what to do, including the possibility of instituting legal proceedings against the corporate officer. If the lawyer fails to so advise the board, a very real possibility in light of his professional duty owed to the corporate officer, the board will likely feel betrayed and most assuredly disappointed. In contrast,

> if the lawyer treats the executive as a non-client, he must consider giving him some sort of "Miranda warning," that is, tell him that any disclosures he makes may have to be revealed to the board and perhaps to others. Giving a "Miranda warning" represents a decision by the lawyer that his client is the board of directors and not the officer. If such a warning is given, the lawyer will leave the executive in the lurch, perhaps requiring him to go elsewhere for legal advice and therewith drawing some kind of line between himself and the company he has been bound to serve. . . .
>
> Thus, whichever way the lawyer decides who is his "client," he creates potentially serious consequences for someone who up to that point had regarded him as a confidential advisor.[37]

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36. Apart from the issue of client identity, the lawyer must also decide whether the situation involves a "past" wrong, so that he must treat its disclosure as confidential, or whether it is a wrong continuing into the future, in which event the rule of confidentiality *may* not apply. G. HAZARD, *supra* note 1, at 49. *But cf.* CPR DR 4-101(C), 7-102(B) (as amended February 1974); ABA FORMAL OPINION 341 (1975) (a lawyer cannot reveal a fraud under DR 7-102(B), as amended effective Mar. 1, 1974, due to the mandate of DR 4-101 that a client's confidence or secret be kept confidential).

37. G. HAZARD, *supra* note 1, at 49-52 (citations omitted). Giving the "Miranda warning" may also have far-reaching legal consequences for the lawyer.

> To give the warning is to treat the executive as a nonclient. Information received from a nonclient can be a "secret" of the corporate client that the lawyer should not disclose except to those who personate the client, that is, the board of directors. But such

As the example illustrates, the lawyer-director may find himself forced to serve two clients with differing interests. The loss of independent professional judgment and violation of client confidentiality resulting from such conflicting service is expressly prohibited by the Code of Professional Responsibility.[38]

2. *Loss of the Attorney-Client Privilege*—The second principal argument against lawyer-directors claims that their dual status prevents successful invocation of the attorney-client privilege.[39]

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information is not a communication from a client, for the executive is not the client. The disclosure is not covered by the attorney-client privilege, as it would be if the executive is treated as the client. Hence, whatever the lawyer hears from the executive after having given the "Miranda warning" is information that a court may compel him to reveal, even though it may be very damaging to the corporation. Giving the "Miranda warning" is necessary to protect the executive but it also reduces the protection given the corporation under the attorney-client privilege.

Id. at 51-52.

38. CPR EC 5-14, DR 5-105. *See also* authorities cited notes 9-11 *supra*. The feasibility of minimizing such conflicts was the subject of a survey by the author of this Note of lawyers from major law firms in Salt Lake City. In a questionnaire mailed to one partner in each of 57 law firms located within Salt Lake City during October 1978 [hereinafter referred to as *The SLC Law Firm Survey*], lawyers were asked if they believed significant problems faced a lawyer-director. Of the 32 lawyers responding (representing 32 different law firms), 81% responded "Yes," 13% responded "No," and 6% did not respond. Those who responded "Yes" (26) were further asked if they believed these problems could be mnimized by following careful procedures. 58% said "Yes," 31% said "No," 4% said "Not Sure," and 7% did not respond.

The Salt Lake lawyers were also asked if they now serve, or have ever served, as a director of a client corporation. 81% said "Yes," and 19% said "No." Those who responded "Yes" (26) were further asked if they had ever experienced any difficulty with avoiding conflicts of interest. 50% said "Yes," 46% said "No," and 4% did not respond.

As general background information, one of the questions asked in the survey dealt with the size of the law firm to which the respondent belonged. The breakdown of the responses received was as follows:

Size of Firm	Number responding	Number Sent*	Number in Salt Lake City*
1 - 5	10	25	56
6 - 10	10	16	20
11 - 15	4	7	7
16 - 20	3	1**	1**
21 - 30	1	6	6
More than 30	4	2**	2**
Total:	32	57	92

* Based on firm size listed in the biographical section of the 1978 edition of MARTINDALE-HUBBELL LAW DIRECTORY ("Of Counsel" not included).

** Discrepancies between "number responding" and the "number sent" or "number in Salt Lake City" are assumed to be due to the growth or mergers of Salt Lake firms that has occurred since MARTINDALE-HUBBELL was published.

Further results from *The SLC Law Firm Survey* are summarized in notes 45, 47, 48, 66, 67, 68, 72, 83 *infra*.

39. *See, e.g.*, G. HAZARD, *supra* note 1, at 141-42; J. LIEBERMAN, *supra* note 1, at 181;

This privilege, long recognized as a legitimate means for effectuating the administration of justice,[40] may only be claimed if the following elements are present:

1) legal advice is sought by a client
2) from a professional legal adviser in his capacity as such, and
3) all communications relevant to that purpose are made in confidence, and
4) the protection of the privilege has not been waived.[41]

To understand the difficulties the lawyer-director may have in establishing these elements, consider the communications that occur in a corporate board meeting. For any board meeting communication to be privileged, not only must the lawyer-director identify the client,[42] he must also make sure that the advice requested of him

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Hershman, *Special Problems of Inside Counsel for Financial Institutions*, 33 BUS. LAW. 1435, 1439-40 (1978); *1978 Panel Discussion, supra* note 1, at 1508; *1975 Panel Discussion, supra* note 1, at 53.

Preserving the attorney-client privilege when the client is a corporation presents a significant problem for any lawyer, not just a lawyer-director. *See generally* Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542 (1968); Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299 (1963); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 ILL. B.J. 376 (1965); Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352 (1967); Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 CATH. LAW. 138 (1976) [hereinafter cited as *The Corporate Attorney-Client Privilege*]; Comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation*, 39 FORDHAM L. REV. 281 (1970); Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303 (1977).

40. *See* CPR *Preamble.* A lawyer must be fully informed of all the facts before he can properly carry out this responsibility. *See id.* EC 4-1. The purpose of the attorney-client privilege is to encourage full disclosure of relevant facts and full communication between counsel and client within the professional relationship. If such communications were not privileged, it is assumed that the inducement needed to encourage full disclosure by the client would be lacking. *The Attorney-Client Privilege and the Corporation in Shareholder Litigation, supra* note 39, at 305-06. However, this assumption is not verifiable—i.e., there is no empirical data available which will accurately demonstrate whether the privilege actually encourages communications between attorneys and their clients. *Id.* at 306-07.

41. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). The court in *Diversified Industries* also cited a more lengthy explanation of the conditions under which the attorney-client privilege is applicable as stated by Judge Wyzanski:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinates and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 601-02, *citing* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

42. The determination of who or what is the corporate client is not easy for any lawyer

is in his role as attorney, rather than business advice in his role as director. Whether his roles are seperable in this fashion, especially in the context of a board meeting, is an unanswered question.[43] Moreover, the lawyer-director must receive and retain the communication in confidence. Whether board meeting communications are given in an atmosphere of sufficient confidentiality to justify the use of the attorney-client privilege, especially if that communication is noted in the corporate minute books, is also unanswered.[44] Finally, the lawyer-director must take affirmative steps to see that the privilege has not and will not be waived.[45] When a director or officer openly communicates in a board meeting with a lawyer-director as a lawyer, aware the the lawyer-director may have a duty to disclose the communication as a director, he may waive the privilege.[46]

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dealing with the corporate "entity," let alone a lawyer-director who is constantly changing roles. *See generally* authorities cited note 39 *supra*.

43. *See* J. LIEBERMAN, *supra* note 1, at 181. For some the distinction may appear clear. For others, the distinction is very fuzzy. *See* Forrow, *supra* note 19, at 1473.

44. Query: Are all board meeting communications that are directed to a lawyer who is present, but who is not a director, privileged? Those who attend board meetings as lawyers, not as lawyer-directors, clearly believe they are. *See 1978 Panel Discussion, supra* note 1, at 1512. *See also* J. LIEBERMAN, *supra* note 1, at 181; note 46 *infra*. But, a good argument can be made that the corporate minutes of board meetings, which minutes are supposed to be a record of what transpires in the board meeting, are not privileged because of the large group of persons who have access thereto. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 616 (8th Cir. 1977) (Gibson, J., concurring in part and dissenting in part).

45. Waiver of the privilege need not be express, it may be found solely from the conduct of the parties. *See, e.g.*, Rosenfeld v. Ungar, 25 F.R.D. 340 (D.C. Iowa 1960) (testimony given with respect to privileged communication waives the privilege, unless timely objection is made); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954); Smith v. Bently, 9 F.R.D. 489 (S.D.N.Y. 1949) (reference to privileged communication inserted in the pleadings constitutes a waiver). *Cf.* Fey v. Stauffer Chem. Co., 19 F.R.D. 526 (D. Neb. 1956) (a file in possession of non-lawyer employees remained protected where it contained a significant amount of lawyer's work-product).

If the courts were subsequently to hold that a lawyer-director is incapable of maintaining the confidences and secrets of their corporate clients, and if a corporation learns of this holding, then the mere act of hiring or retaining a lawyer-director could constitute a waiver of the attorney-client privilege. For the corporation and lawyer-director who find this to be an undesirable threat, it would seem that the client corporation has the burden to establish that it has no waived the privilege. This burden could conceivably be met, at least presumptively, by stating in an employment contract or retainer agreement that the corporation does not, by the single act of employing or retaining a director who is also counsel, waive its right to keep its confidences and secrets confidential.

In *The SLC Law Firm Survey, supra* note 38, 81% of those responding indicated they had served, or were serving, as directors of client corporations. This group (26) of lawyer-directors was further asked if they had ever experienced any difficulty with maintaining the attorney-client privilege: 27% said "Yes," 58% said "No," and 15% did not respond.

46. It is clear that only the client, not the attorney, may waive the privilege. *See, e.g.*, Timken Roller Bearing Co. v. United States, 38 F.R.D. 57, 64 (N.D. Ohio 1964); Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). Thus, the question posed in the text would apparently turn on whether the officer or director who had the communication with the lawyer-director could be considered as the client, or at least an agent of the

These privilege requirements present a formidable challenge for the lawyer-director. Because the ultimate outcome is uncertain, opponents would argue that a lawyer-director does his client and the legal system a disservice by assuming this dual capacity.

B. Arguments for Lawyer-Directors[47]

The principal arguments in support of lawyer-directors have been stated as follows:

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client with sufficient authority to waive the privilege. While corporate agents who have the authority to employ or consult an attorney in behalf of the corporation do have the authority to waive the privilege, *see The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, supra* note 39, at 296, disclosure by such agents to others within the group having similar authority does not constitute a waiver. United States v. Aluminum Co., 193 F. Supp. 251, 253 (N.D.N.Y. 1960). Therefore, if the lawyer-director were only a lawyer, the answer to the question would seem to turn on whether all those present at the board meeting at the time the communication was made had authority to waive the privilege. Because those present at the board meeting are likely to have that requisite authority, it would seem that all such communications would be protected. See note 44 *supra*. But where the lawyer is also a director, under a duty as a lawyer or director to disclose the communication to persons who may not fall within the group possessing the requisite authority, the privilege would seemingly be in jeopardy.

One may legitimately question if a situation could ever exist where a lawyer-director would be under a duty to disclose information received from corporate agents to any person outside of the group where the privilege exists. Such situations may exist in the context of client frauds or crimes. *See* CPR DR 4-101(C). Although the Securities and Exchange Commission (SEC) has recently attempted to impose such a duty on lawyers, a recent case hints that it may not be successful. In SEC v. National Student Marketing Corp., [Current Volume] FED. SEC. L. REP. (CCH) ¶ 96,540 (D.D.C. 1978), the SEC attempted to use its broad powers to require the corporate bar to act as the SEC's deputy, in effect requiring the bar to police corporate financial dealings on behalf of the investing public. To effectuate this desire, the SEC brought suit directly against two major law firms, arguing that if the corporate client refuses to accept its lawyer's advise on what facts should be publicly disclosed, the lawyer himself must disclose those facts. The court, in effect, sidestepped the critical issue of the lawyer's duty to disclose confidential information to the SEC by a narrow finding that the SEC had not claimed in its complaint a continuing violation, and that without such a claim the SEC was without jurisdiction to complain of conduct which took place following the illegal conduct. [Current Volume] FED. SEC. L. REP. (CCH) ¶ 96,540, at 94,201 & n.74. The individual named defendants, however, one of whom was a lawyer-director, were nonetheless found guilty of aiding and abetting in violation of the securities laws. *Id.*

For an interesting discussion relative to the issues surrounding a lawyer's duty to disclose confidential information on tender offers, see Valente v. PepsiCo., Inc., [Current Volume] FED. SEC. L. REP. (CCH) ¶ 96,496 (D. Del. 1978) (officers and directors, including some lawyer-directors, held liable for reckless failure to disclose material omissions in a tender offer); Kaplan, *Legal Ethics Forum*, 64 A.B.A.J. 619 (1978).

47. There appears to be a significant number of corporations, especially small corporations, that use the services of lawyer-directors. In the early 1970's, one study indicated that of the 12,000 to 13,000 companies which file with the SEC (companies with securities listed on national exchange, more than 500 shareholders, and more than $1,000,000 of assets), approximately one in six (16.7%) had directors who were attorneys and whose law firms were also employed by the companies as outside counsel. *1975 Panel Discussion, supra* note 1, at 51 n.15. That ratio remained essentially unchanged according to studies performed in the mid 1970's. *See Rich legal links to the boardroom*, BUS. WEEK, January 24, 1977, at 24.

1) lawyer-directors frequently have special knowledge of litigation and other matters of vital significance to directors;

2) lawyer-directors have a special perspective on day-to-day management;

3) board membership is necessary to place legal counsel in a position to deal as an equal with senior management; and

4) board membership makes the outside attorney, the lawyer-director, more accessible to other members of the board.[48]

Other studies, not limited to reporting corporations under the SEC laws, indicated the number of lawyer-directors to be much higher. *See* PLI No. 229, *supra* note 3, at 117.

Of the 32 lawyers responding to *The SLC Law Firm Survey, supra* note 38, the following responses were obtained to the questions indicated:

Question	Percent Responding		
	Yes	No	No Response
(1) Does your law firm allow its members to serve as directors of			
(a) client corporations?	84	16	0
(b) non-client corporations?	81	16	3
(2) Do you now serve, or have you ever served as a director of a			
(a) client corporation?	81	19	0
(b) non-client corporation?	69	28	3
(3) Are you aware of other members of your firm who serve as directors of			
(a) client corporations?	75	16	9
(b) non-client corporations?	66	22	12
(4) Are you personally acquainted with other lawyers in Utah who serve as directors of their			
(a) client corporations?	97	0	3
(b) non-client corporations?	84	10	6

48. *Address by Harold Williams, supra* note 1, at H-2. Most lawyers are of the opinion that "lawyers, as lawyers (not as business-persons), have special qualifications that enable them to be good directors." In *The SLC Law Firm Survey, supra* note 38, the question was asked:

> Do you think that lawyers, as lawyers (not as business-persons), have special qualifications that enable them to be good directors
>
> (a) of non-client corporations?
>
> (b) of client corporations?

72% of the responses received responded "Yes" to both questions, 6% responded "Yes" to question (a) only and 13% responded "Yes" to question (b) only. The other 9% responded "No" to both questions, or did not respond.

Major qualifications which the respondents to the questionnaire perceived lawyers as possessing that enabled them to be good directors included:

—Their ability to judge and assess potential legal and administrative problems.

—Their knowledge of organizational problems and relationships, including the formalities required in financing, the obligations of pension and profit sharing funds, and potential securities problems.

—Their good judgment, objectivity, and unusual analytical skills.

—Their familarity with corporate law, current business and community affairs, and government actions.

That a lawyer has special knowledge of litigation and other matters of vital concern to the board, making it imperative that a lawyer attend board meetings, is readily acnowledged.[49] Whether that lawyer must also be a director to share effectively this ability is where the controversy arises.[50] Proponents argue that "[b]ecause of his relatively high risk of liability, the lawyer-director has a great incentive to know the business of the corporation—to be sure that problems are resolved in a careful and appropriate way." Moreover, the lawyer-director "brings to his board role significant resources and opportunities to know what is going on in the company . . . [and] can serve as an *informed monitor.*"[51]

That counsel for a corporation has a special perspective on day-to-day management is also readily recognized.[52] Especially for the large corporation, general counsel is involved in all major transactions, reports directly to top management, has accessibility to independent legal counsel, and is consulted before legally significant transactions occur. All these activities allow general counsel to prac-

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—Their education and knowledge as to directors responsibilities and duties.

—Their broad perspective, usually coupled with in depth legal and business experience.

—Their ability to deal with government regulations which small corporations may not be able to handle.

These views are generally echoed by some very prominent lawyers:

> I think lawyers make good directors because, for the most part, they are intelligent, well-trained, skeptical and conscientious. They are also, for the most part, making sure the right thing is being done and have a sense of their own responsibillity. Those are pretty good qualities and I think they should be available to serve as corporate directors.

Letter from Kenneth J. Bialkin of Willkie, Farr & Gallagher, New York City, to Bryant R. Gold (Oct. 5, 1978).

> I think lawyers make good directors because their practice teaches them to be prudential—to think ahead about possible conflicts and risks—and to raise ethical issues which outside non-lawyer directors might not think about. Lawyers also have the virtue or failing of speaking up without waiting to be asked, while an outside businessman director would be more inclined to go along with management.

Letter from Lloyd N. Cutler of Wilmer, Cutler & Pickering, Washington D.C., to Bryant R. Gold (Oct. 9, 1978).

"[T]he lawyer for a company is required to dig deeply into its affairs. Thus, the lawyer tends to be a well-informed director with special sensitivities to certain problems, such as compliance with regulatory requirements." Letter from Robert H. Mundheim, General Counsel of the Treasury, Washington, D.C., to Bryant R. Gold (Oct. 11, 1978).

49. *See, e.g., 1978 Panel Discussion, supra* note 1, at 1511-12; *1975 Panel Discussion, supra* note 1, at 61; *Address by Harold Williams, supra* note 1, at H-2.

50. A common recommendation made by opponents to lawyer-directors is that counsel be invited to regularly attend board meetings. *1978 Panel Discussion, supra* note 1, at 1508; *1975 Panel Discussion, supra* note 1, at 61; *Address by Harold Williams, supra* note 1, at H-2.

51. *1978 Panel Discussion, supra* note 1, at 1508 (emphasis added).

52. *See* G. HAZARD, *supra* note 1, at 141-42.

tice preventative law.[53] Given all these close ties to management, it becomes obvious that

> the director role complements the counsel role insofar as he may be alerted to problems early in their development. Since he has access to the board he *can give his warnings at an early stage.* The hardest counseling decisions occur where *inattention has allowed a situation to deteriorate,* as the passage of time may make it increasingly difficult to admit that a mistake has been made.[54]

In addition, all levels of management are more likely to be responsive to legal input when it comes from one who is accorded considerable weight in the policy decisions of the company.[55] Board membership may be required just to get management's attention,[56] since "presence and indeed, some few extra stripes, can make the difference whether the lawyers are brought to bear in a timely and effective fashion . . . . It is just as simple as that."[57]

Obviously, board membership makes the lawyer-director more accessible to other board members. That those directors need access to the lawyer-director may not be so clear. The right to outside advice, however, is one of the important rights essential to the proper performance of a director's job. Thus, "[t]he director should be assured that, in appropriate circumstances, he (alone or together with fellow directors) has a direct channel of communication with the enterprise's principal advisors, including . . . its regular corporate counsel . . . ."[58]

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53. *Id.*

54. *1978 Panel Discussion, supra* note 1, at 1508 (emphasis added).

55. [It] is somewhat unrealistic and even officious to suggest that the lawyer can perform the same function if he simply attends the board meeting and advises as to legal matters when he is requested to do so. First of all, there is nothing to compel the corporation to invite the lawyer to attend (at his normal charge). Many companies, in fact, do not invite their lawyer to attend board meetings to provide advice. Many companies do not value the existence of the lawyer's insights and will not provide the outside lawyer with this information. It is foolish, it seems to me, to assume that any but the largest corporations, nor any but the most enlightened corporations, will regard the outside lawyer who is not a director in the same way, so far as information is concerned, as if he were a director.

Id. at 1513-14 (remarks of Mr. Bialkin). *See also* Forrow, *supra* note 19, at 1469 (remarks of Mr. Fleishman).

56. [U]nderlying an effective policy in preventative law . . . is a little like the message my wife used to give to our four kids when she had just about reached the end of the line and was fed up with the messy rooms and all the rest of it, and she would say, "I'm not kidding. I'm serious. I really mean it." And only the lawyers really fortified with the support of the executives [, as when they share equal status on the board,] can deliver that message effectively.

Id. at 1465.

57. *Id.* at 1466 (emphasis added).

58. *The Corporate Director's Guidebook, supra* note 10, at 1611.

Corporations have a critical need for informed and effective counsel. The foregoing arguments claim that that need is best fulfilled by the lawyer-director's dual role. As stated by the general counsel of a major corporation "[t]he need to provide informed counsel to the corporation to avoid legal difficulties outweighs the need to be able to assert the strongest possible basis for the attorney-client privilege when legal problems do surface."[59] Those remarks, while directed primarily to general or inside counsel, also apply to outside counsel.[60] Preventative law, according to the above source, is the chief service provided by the lawyer-director. Whether it involves counseling, settling claims, or preparing for and participating in litigation, such law can be practiced *effectively* only by one in an *informed* position, on equal footing with those who will make corporate decisions.[61]

Some proponents of lawyer-directors further claim that a corporation should have the freedom to select whomever it believes can best serve its needs as counsel and as director.[62] A fundamental

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59. Forrow, *supra* note 19, at 1461.

60. Mr. Forrow admits that a somewhat stronger case can be made for inside counsel acting as director than for outside counsel, but remains committed to his personal view that "the Code of Professional Responsibility should not bar lawyers from serving as directors of corporations for which they act as counsel." Letter from Brian D. Forrow, Vice President and General Counsel of Allied Chemical Corp., to Bryant R. Gold (Oct. 5, 1978).

61. *See* Forrow, *supra* note 19, at 1460-67. The argument advanced by Mr. Forrow, and acknowledged by SEC Chairman Williams, is persuasive only so long as the lawyer-director actually uses his position of director as leverage to become fully "informed" and "effective" with respect to all the legal concerns of the corporation. However, as pointed out previously, the role of director, especially in the larger corporations, may not necessarily involve such active, probing participation. This is not to say that the position of director could not and should not include such involvement, *see The Corporate Director's Guidebook*, *supra* note 10, at 1604-11, only that it traditionally has not. *See generally* M. MACE, *supra* note 10.

The justifications for permitting lawyer-directors, therefore, might appear strongest where the lawyer functions as an "inside" director, whether he actually is an "insider" or not. Some have argued that a lawyer-director could not possibly qualify as anything but an inside director. *See* Leech & Mundheim, *supra* note 10, at 226. Others continue to refer to the lawyer-director as an outside director, but question his independence. *See* M. EISENBERG, *supra* note 1, at 146. *The Corporate Directors Guidebook*, *supra* note 10, refers to lawyer-directors as "affiliated directors," characterizing them the same as others who supply services or goods to the corporation. *Id.* at 1620.

As to whether access to in depth information by itself will really improve the effectiveness of a lawyer-director, see *Manager's Journal, Officers of the Board?*, Wall St. J., Aug. 14, 1978, at 14, col. 3.

62. *See 1978 Panel Discussion*, *supra* note 1, at 1515 (comments of Mr. Wander). *See also id.* at 1513 (comments of Mr. Biaklin):

> [A] client recently used the following argument to urge me to join a board. He said: "I would like you to go on the board because I know that if you are on the board you are going to worry about liability, your own liability as well as our liability; and if you are worried about your own liability, I know you will try to get us to do the right thing. So I want you there, worrying." He said, "If you yourself are worrying, I will feel a little better about it."

concern of the legal profession has always been the manner in which a client selects his lawyer. The ideal selection process exists where a client knows of the reputation, competency, and integrity of a particular lawyer, and chooses its counsel on that basis.[63] These same considerations apply to the selection of a director.[64] Only if there exists an overriding public policy that would overrule the corporation's decision should that ideal selection process be disturbed.[65]

II. Balance of Competing Factors

Both those in favor and those opposed to lawyers serving as directors of corporations for which they act as counsel acknowledge that their opinions ultimately result from a balance of competing factors.[66] To opponents, the potential conflicts of interest signaling a loss in independent judgment and the uncertainties surrounding the availability of the attorney-client privilege clearly tip the balance against lawyer-directors. To proponents, the corporation's strong need for informed and effective counsel tips the balance the

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Of course, one could argue that a corporation, being a creature of statute, need not have any freedoms that the legislature does not choose to grant to it. But that argument, persuasive as it may be, ignores a recent trend in the law which seems to recognize that a corporation has some basic rights. *E.g.*, First Nat'l Bank of Boston v. Belotti, 98 S. Ct. 1407, 1416 (1978); Radiant Burners, Inc. v. American Gas Ass'n., 320 F.2d 314, 324 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also In re* Jackier, 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

63. *See generally* CPR Canon 2, EC 2-6 to 2-8.

64. *See The Corporate Director's Guidebook, supra* note 10, at 1608. *See also* Cohen, *Philosophy of Board Activity and Responsibility*, PLI No. 229, *supra* note 3, at 369-71.

65. For the publicly-held corporation, the idea of giving the corporation a completely free hand in the selection of its directors may not comport with the underlying principles of the securities laws, and hence with public policy. *See* Loo & Ratner, *The SEC's Role in Director Selection*, PLI No. 229, *supra* note 3, at 141-66. The SEC is currently attempting to use its regulatory authority to mandate the selection of independent directors, Wall St. J., Oct. 20, 1978, at 18, col. 1, and to require lawyers to disclose confidential information. See note 46 *supra*. An additional argument that has been advanced in support of lawyer-directors is the numbers argument. That is, if statistical surveys indicate that there are approximately 2,000 public companies that have directors who are attorneys and whose law firms are also employed by them as outside counsel, see note 47 *supra*, then 2,000 corporations, 2,000 lawyers, and 2,000 law firms cannot be wrong. *1975 Panel Discussion, supra* note 1, at 58-59.

66. "The crux of the problem is to assure that decisions concerning board composition can withstand a reasoned and thoughtful balancing of these costs [refering to the negative aspects of lawyer-directors] against the benefits expected from a given director's board service." *Address by Harold Williams, supra* note 1, at H-2, H-3.

Some law firms have already performed the balance and concluded that their members should not serve as directors of client corporations. *See* Cutler, *The Role of the Private Law Firm*, 33 Bus. Law. 1549, 1552 (1978). *See also A Questionnaire on Firm Ethics*, 24 Prac. Law. 48 (1978) (results to be published in a future issue). In *The SLC Law Firm Survey, supra* note 38, 16% of the responding lawyers indicated their firms do not allow their lawyers to serve as directors of client corporations.

other way. Despite these substantial arguments favoring lawyer-directors, independent professional judgment and the attorney-client privilege are so central to the effective practice of law that unless steps are taken to prevent their loss, the balance will almost always tip against lawyer-directors.

Because procedures can be followed that will effectively mitigate the arguments against lawyer-directors, and such mitigation may well tip the balance in their favor, a flat prohibition of lawyer-directors would seem inappropriate.[67] The better approach would permit the individual lawyer-director, his firm, and the corporation, to perform the balance in light of their particular fact situation.[68]

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67. Several have proposed that the Code of Professional Responsibility should be amended to state that it is unprofessional for a lawyer to serve on the board of a corporation for which he acts as counsel. *See, e.g., 1978 Panel Discussion, supra* note 1, at 1507; *1975 Panel Discussion, supra* note 1, at 41; *Address by Harold Williams, supra* note 1, at H-4. Often the proposition is narrowed to whether "a provision [should] be added to the Code of Professional Responsibility which would state that it is unprofessional for counsel to a company to serve on the board of any *publicly held company* he advises." *1978 Panel Discussion, supra* note 1, at 1507 (emphasis added).

In *The SLC Law Firm Survey, supra* note 38, the question was asked: Do you think the Code of Professional Responsibility should prohibit lawyers from serving as directors of client corporations? Of the 32 lawyers responding to the survey, 81% said "No," while 19% said "Yes." To those who responded "No" (26), the question was further asked: Would you favor a narrower prohibition (e.g., prohibiting lawyers from serving as directors of large publicly-held client corporations from which they (or their firms) receive a significant portion of their income)? Only 12% said "Yes," while 88% said "No."

Mr. Lloyd N. Cutler, of the firm of Wilmer, Cutler & Pickering, Washington, D.C., a participant in the *1978 Panel Discussion, supra* note 1, states:

> I agree . . . that any rule ought to be limited to publicly held corporations. For smaller closely held private companies, it may simply be unfeasible to have different lawyers on the Board than those who represent the corporation generally, or to do without a lawyer on the Board. Moreover, the owners of a closely held corporation are perfectly capable of understanding the conflict and of making an intelligent waiver.

Letter from Mr. Lloyd N. Cutler of Wilmer, Cutler & Pickering, Washington, D.C., to Bryant R. Gold (Oct. 9, 1978).

A recent Lou Harris survey of outside directors (including some who would not qualify as independent) asked whether legal counsel should serve on the boards of their clients. Thirty-six percent responded that they should, while 56% said that they should not. *Address by Harold Williams, supra* note 1, at H-2.

In August 1977, William B. Spann, Jr., the incoming ABA president, announced the formation of a special committee with the task of drafting a new code of professional responsibility. *See* J. LIEBERMAN, *supra* note 1, at 217, n.*. Whether the new code should specifically address the question of lawyer-directors is a topic of much concern and interest among the committee's members. Conversation with Samuel D. Thurman, Professor of Law, University of Utah, and member of the committee (Oct. 9, 1978).

68. A practical factor that should be considered in the balance, in addition to the arguments already discussed, is the effect a prohibition of lawyer-directors would have on the corporation. *See 1978 Panel Discussion, supra* note 1, at 1510, 1515-17. Many lawyers feel that the compensation a director presently receives is insufficient to justify the time and effort required to fulfill competently a director's position. *See 1978 Panel Discussion, supra* note 1, at 1510, 1516, 1518. Serving as a lawyer-director thus provides legal fees to a lawyer that

An effective way to perform this balance is to ask two sets of questions. The first set requires personal inquiry into the maintenance of independent professional judgment and the attorney-client privilege. The second set, to be addressed only if the first set is answered affirmatively, relates to the positive aspects of serving as a lawyer-director. The first set asks:

1) Will the lawyer-director *systematically* minimize self-interests and conflicting duties that might tend to lessen his independent professional judgment?[69]

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makes it worth the time he spends and the risks he assumes through his dual service. *See Address by Harold Williams, supra* note 1, at H-2. If lawyers were prohibited from serving as directors of client corporations, the practical effect, according to some, would be to discourage financially lawyers from serving as directors in any setting.

For the very small corporation, which does not have the benefits of in-house counsel, a prohibition against lawyer-directors could have the effect of keeping all lawyers out of the board room. This is because, as discussed below, small corporations do not usually compensate their directors to the same degree that large corporations do. Hence, the indirect compensation the lawyer-director is able to receive by virtue of the legal work his firm does for the corporation justifies time spent as a director and makes him accessible to the board. Furthermore, the lawyer-director may be willing to attend the board meeting without billing the corporation for the full time he is present, thereby enabling the small corporation to have a lawyer attend the board meeting at less expense than if it were to hire the time of a non-director lawyer, who would most likely bill for the full time he was present.

In *The SLC Law Firm Survey, supra* note 38, lawyers were asked how a lawyer-director should bill a corporation for time spent in board meetings. The choices and responses of the 32 lawyers who returned the survey were as follows:

Statement	Percent Agreeing
(1) He/She should bill for the full time present	28%
(2) He/She should bill for only partial time present (that portion spent in rendering legal advice, as opposed to business advice)	3%
(3) He/She should not bill for any time present (directors are expected to attend board meetings, and any renumeration received is up to the corporation)	41%
(4) Other	25%
(5) Not Responding	3%

The amount of compensation that directors actually receive varies a great deal. One study indicates three principle means of paying cash compensation to outside directors: (1) annual fee only, used by about 20% of the corporations responding to the study; (2) per meeting fee only, which was used by about 10% of the corporations, and (3) both an annual fee and amount per meeting, used by about 70% of the corporations. Of those which paid an annual fee only, the average compensation paid for 1975 was $7,400 with roughly 26% paying less than $4000, and 18% paying more than $12,000. Of those which paid a per meeting fee only, the average compensation paid in 1975 was $3110, with 14% paying less than $1000 and 5% paying more than $7000. Of those which paid both an annual fee and amount per meeting fee, the average compensation paid in 1975 was $8930, with only 0.7% paying under $1000 and roughly 20% paying over $11,000. PLI No. 229, *supra* note 3, at 118-20 (Board of Directors Third Annual Study, February 1976, Korn/Ferry, Int'l). *See also* Leech & Mundheim, *supra* note 10, at 1831-32; Wall St. J., Oct. 31, 1978, at 1, col. 5.

69. See notes 8-38 *supra* and accompanying text.

2) Will the lawyer-director follow *careful procedures* aimed at preserving the attorney-client privilege?[70]

If the lawyer-director can honestly answer "Yes" to both of these questions and act accordingly, the negative aspects of serving as a lawyer-director will likely be mitigated. The inquiry should then focus on identifying the positive aspects of serving as a lawyer-director by asking:

1) Will the merged role of lawyer-director provide access to information and influence within the corporation conducive to higher quality legal services than would otherwise result?

2) Will the merged role of lawyer-director give the corporation the benefits of the lawyer-director's individual skills and talents otherwise unavailable to it?

3) Has the corporation made an informed selection of the lawyer-director after full disclosure of any potential conflicts?

The remainder of this Note focuses on procedures, primarily objective in nature, which a lawyer-director should use in order to help him answer an honest "Yes" to the first set of questions above.[71]

III. Procedures a Lawyer-Director May Follow to Minimize the Negative Aspects of His Dual Position

A. *Maintaining Independent Professional Judgment*

In the context of serving corporate clients as lawyer-directors, the first step in maintaining independent professional judgment is avoiding the appearance of impropriety.[72] The type of activities that might be considered improprietous include the same self-interest conflicts that opponents claim destroy the lawyer-director's independence.[73] Thus, the relatively objective standards employed to

70. See notes 39-46 *supra* and accompanying text.

71. A lawyer contemplating accepting a directorship must also give careful consideration to the increased risks of personal liability to which he will be subjected. *See, e.g.*, Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968); *1975 Panel Discussion, supra* note 1, at 55-58.

72. *See* CPR Canons 5, 9. In *The SLC Law Firm Survey, supra* note 38, the question was asked: Do you, or your firm, follow any special procedures when dealing with a corporate client to ensure you avoid conflicts of interests? Of the 32 lawyers responding to the survey, 53% answered "Yes," 31% answered "No," and 16% did not answer.

73. The Ethical Considerations associated with Canon 9 of the CPR impose a duty on the lawyer to promote public confidence in the American legal system and in the legal profession. EC 9-1. Public confidence may be eroded by a lawyer who acquires a self-interest of the type that could destroy independent judgment, even though it does not in fact affect the lawyer's independence. In other words, even ethical conduct of a lawyer may appear unethical to a layman. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); Bicas v. Superior Court, 116 Ariz. App. 69, 567 P.2d 1198 (1977).

define the appearance of impropriety[74] may signal the lawyer-director that his independent professional judgment is threatened.

An area of impropriety readily apparent to the layman, and one which opponents of lawyer-directors are quick to identify as involving a conflicting self-interest, is the huge legal fees paid to many law firms by corporations for which firm members serve as directors.[75] To the layman, untutored in the amount of legal work a corporation requires and unfamiliar with the billing rates of large law firms, such fees may appear unconscionably high, especially when derived from a locked-in service arrangement. Although fees received may actually be far from the point of compromising the lawyer-director's independent professional judgment, he should nonetheless carefully scrutinize his dual position through the eyes of the layman. If the appearance of impropriety exists, a flag has been raised that independence could legitimately be questioned.

To avoid loss of independent professional judgment through personal or firm interest in attorneys' fees, lawyers should apply objective criteria in deciding which corporations may be served by lawyer-directors. A suggested objective criteria in this regard is the five percent rule. That is, a presumption against serving as a lawyer-director would attach to corporations which, during a twelve month period, account for more than five percent of the law firm's net income or a specified dollar amount, whichever is less.[76] This presumed loss of independence would need to be convincingly rebutted before the law firm would allow its member to accept a directorship. Adherence to such a five percent rule would set a standard for avoiding the appearance of impropriety that even a layman could appreciate. More importantly, it would serve as an easily applicable standard for avoiding loss of independence due to conflicting financial interests.

It should be remembered, however, that application of a five percent rule or any other objective standard does not, in itself, guarantee independence. The lawyer-director should periodically ask

74. That the standard to determine a professional impropriety is an objective one is implicit in the wording of CPR Canon 9 and its accompanying Ethical Considerations.

75. See note 18 *supra*.

76. Admittedly, five percent is somewhat of an arbitrary figure. Nevertheless, there is some indication that five percent is generally accepted as a quasi-materiality standard to measure at what point someone's dependence, or self-interest, may become significant. *See* G. HAZARD, *supra* note 1, at 69. *Cf.* MODEL BUS. CORP. ACT § 52 (1960) (shareholder owning at least five percent of all outstanding shares is vested with certain inspection rights).

Since five percent of some large firm's income may represent a sum large enough to call into question a lawyer-directors independent professional judgment, a specified dollar amount may have to be imposed in lieu of the five percent rule.

himself: "If I were not a director, and did not receive any of the personal benefits flowing from my directorship (such as locked-in business for my firm, stock dividends, etc.), would my performance as a lawyer be materially different from what it is now?"[77] Only if an honest "No" can be answered to that question has the lawyer-director effectively maintained his independence, regardless of any objective rule he purportedly follows.

Avoiding material self-interest, however, is only half of the battle. In order to maintain independent professional judgment, the lawyer-director must also successfully confront the inherent conflict of duties and loyalties that are built in to his position.[78] While these conflicts cannot be totally eliminated, it is believed that most of their serious consequences can be minimized by defining the corporation as the client to be served. Once defined, it should be clearly communicated to all the individual parties concerned by issuing a "Miranda-type warning." Such a warning would put all corporate officers and directors, who seek advice about their own involvement in various corporate activities,[79] on notice that they are not individually the client to whom the lawyer owes his allegiance. Accordingly, they should seek out separate counsel for any matters concerning personal risks and liabilities arising from their past conduct within the corporation. Had such a "Miranda-type warning" been given to the executive vice-president in the example discussed above, the lawyer-director's duty to the board, rather than to the vice-president, would have been clear.[80] Thus, the lawyer-director could have avoided the troubling conflicts that accompany such post-problem client determinations, thereby maintaining his independent professional judgment for the benefit of the corporation.[81]

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77. "Independence may be jeopardized if the board member's compensation is *materially* important to him . . . ." Leech & Mundheim, *supra* note 10, at 1830 (emphasis added).

78. See notes 29-38 *supra* and accompanying text.

79. Out of painful experience, we have made it a practice to define and limit our role at the earliest sign of . . . conflict; to give something akin to a *Miranda* warning to corporate officers who seek advice about their own involvement . . .; and to recommend separate counsel when the risk of real conflict is substantial.

Cutler, *supra* note 66, at 1555. *See* G. HAZARD, *supra* note 1, at 50-51; Forrow, *supra* note 19, at 1467.

80. The director owes his loyalty and allegiance to the corporation, which would be the board in this situation. Having given the Miranda-type warning well in advance of the actual discussion with the executive vice-president, the lawyer's duty is also clear because he has consciously made the decision that the executive vice-president, in his personal capacity, is not a client. That leaves the board as his client, the same entity to which he owes his loyalty as a director. *See* G. HAZARD, *supra* note 1, at 50-51.

81. When the lawyer-director has properly educated the executive vice-president as to the reasons for the warning, and has properly tutored him with respect to the procedures he

B. *Preserving the Attorney-Client Privilege*

While the justifications for the attorney-client privilege have been questioned,[82] there is no doubt that the privilege is available today, even for the fictional corporate entity.[83] Because a corporation must necessarily function through its agents, special problems arise for the lawyer-director in defining which agents represent the corporation for purposes of the privilege.

Currently, three separate tests are employed by the courts to determine if the communiciations between an attorney and an agent of the corporation should be privileged. These tests are (1) the control group test, (2) the *Harper & Row,* or subject matter, test, and (3) the *Diversified Industries* test.

The control group test, formulated in *City of Philadephia v. Westinghouse Electric Corp.,*[84] protects only those communications made by a corporate agent who is in a position to control, or to take a substantial part in a decision which will control, the corporation's actions.[85] Under this "bright line test,"[86] the narrowest of the three, a lawyer can be quite certain when the privilege will attach. The

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should follow in the event that he ever needs to seek out legal advice relative to his individual conduct within the corporation, there is a good possibility that the executive vice-president would go directly to an outside, unaffiliated lawyer, thereby minimizing many of the moral dilemmas that could plague the lawyer-director in a face-to-face meeting. Moreover, even if the executive vice-president does come first to the lawyer-director, the lawyer-director knows (because he has previously made up his mind to do so) that the first thing he must do, before the executive vice-president can even begin to talk, is to remind the executive vice-president of the warning, why it was given, and the possible effect that disclosing information to him may have.

82. *See The Attorney-Client Privilege and the Corporation in Shareholder Litigation, supra* note 39, at 304-08.

83. Radiant Burners, Inc., v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963). *See generally* authorities cited note 39 *supra. See also* Annot., 55 A.L.R.3d 1322 (1974); Annot., 9 A.L.R. Fed. 685 (1971); Annot., 34 A.L.R.3d 1106 (1970).

To be distinguished from those communications protected by the attorney-client privilege are those "materials assembled by or for a person in anticipation of litigation or in preparation for trial," which materials are privileged from disclosure under the "work product" rule, now covered by FED. R. CIV. P. 26(b)(3). Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 601 (8th Cir. 1977). For a thorough discussion of both rules, see 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: *Civil* §§ 2017, 2021-2028 (1970). In *The SLC Law Firm Survey, supra* note 38, attorneys were asked if they, or their firms, follow any special procedures when dealing with a corporate client to ensure they preserve the attorney-client privilege. Fifty percent answered "Yes," 34% answered "No," and 16% did not answer.

84. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963).

85. 210 F. Supp. at 485.

86. Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 HARV. L. REV. 424, 426 (1970) [hereinafter cited as *Attorney-Client Privilege for Corporate Clients*].

control group test has been followed by a significant number of courts.[87]

The *Harper & Row* test, formulated in *Harper & Row Publishers, Inc. v. Decker*,[88] rejected the control group test as too narrow. Recognizing that important communications are often made to lawyers by corporate employees who are not in control positions, the *Harper & Row* or "subject matter test"[89] protects all communications related to the subject matter of an employee's duties and made at the direction of corporate superiors.[90] Application of the test requires a two step determination: "First, the employee must furnish the attorney information which he has acquired from the exercise of his duties of employment . . . . Second, the method by which the employee became aware of the information must be consistent with the employment relationship."[91] Only a limited number of courts have adopted this test.[92]

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87. The control group test was expressly adopted by the tenth circuit in Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968), and has also been followed by numerous federal district courts. *See, e.g.*, Perrignon v. Bergen Brunswig Corp. 77 F.R.D. 455 (N.D. Cal. 1978); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); United States v. IBM Corp., 66 F.R.D. 154 (S.D.N.Y. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).

At least one state has developed a variation of the control group test. *See* D.I. Chadbourne, Inc. v. Superior Court, 388 P.2d 700, 36 Cal. Rptr. 468 (1964); *The Corporate Attorney-Client Privilege, supra* note 39, at 149 n.43. The dominant approach in most state courts, however, permits the privilege for communications from any officer or employee of the corporation. *See, e.g.*, 89 F. Supp. 357 (D. Mass. 1950). That approach no longer has vitality in the federal system. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 503-41 (1975); *Attorney-Client Privilege for Corporate Clients, supra* note 86, at 433 n.29.

88. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by equally divided Court*, 400 U.S. 348, *rehearing denied*, 401 U.S. 950 (1971).

89. *See, e.g., The Corporate Attorney-Client Privilege, supra* note 39, at 147; Annot., 9 A.L.R. Fed. 685, 699 (1971).

90. 423 F.2d at 491-92.

91. *The Corporate Attorney-Client Privilege, supra* note 39, at 149 n.44.

92. *See* Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973) (although not discussed, this apparently represents a shift for this court from its previous position of following the control group test. *See* Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969)); Rockwell Mfg. Co. v. Chicago Pneumatic Tool Co., 57 F.R.D. 111 (N.D. Ill. 1972). *See also* Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976). *Cf.* Duplan Corp. v. Deerin Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) (two part test combining elements of both control group and subject matter tests).

The primary distinction between the control group test and the subject matter test appears to be as follows:

> The control group test treats those employees not vested with high decision making authority as third parties to the attorney-client relationship. The subject matter test,

The *Diversified Industries* test, recently formulated by the Court of Appeals for the Eighth Circuit in *Diversified Industries, Inc. v. Meredith,*[93] modifies the *Harper & Row* test to bring it more in line with the purposes of the attorney-client privilege. The eighth circuit recognized the possibility for abuse under the *Harper & Row* test by funnelling all corporate communications through attorneys to prevent subsequent disclosure. At the same time, the eighth circuit realized that the control group test did not comport with the realities of modern business practice.[94] Therefore, the *Diversified Industries* test protects corporate employee's communiciations only if:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[95]

The existence of three distinct tests for determining when the attorney-client privilege applies to corporate communications requires that the lawyer-director be thoroughly acquainted with the particular test applied in the jurisdiction where his corporation does business. When the corporate client does business in several locations, thereby being subject to suit in several jurisdictions, the lawyer-director would do well to comply with the conditions of the narrow control group test.

Several other significant hurdles must be overcome before the lawyer-director can assume the privilege will apply.[96] First, communications should be made to the lawyer-director in his capacity as a lawyer, not in his capacity as a director.[97] In written communications, the attorney should insist that those requesting legal advice address him by his legal title,[98] and request only legal advice.[99] A

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on the other hand, envisages protection for communications by those employees who have acquired information during the course of their employment, but excludes from its scope declarations by these same persons should they be mere witnesses.

The Corporate Attorney-Client Privilege, supra note 39, at 149-50 n.45.

93. 572 F.2d 596 (8th Cir. 1977).

94. *Id.* at 608-09.

95. *Id.* at 609.

96. See notes 39-46 *supra* and accompanying text.

97. *E.g.*, Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954); United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753 (D. Del. 1943).

98. *See, e.g.*, Burnham, *supra* note 39, at 543-44; Heininger, *supra* note 39, at 383; Pye,

lawyer-director's response should be, by express words in the document, a legal opinion. Separate stationery and a defining introductory sentence, such as "In response to your request for legal advice, the following opinion is rendered,"[100] should suffice. In addition, all written legal communications should be filed separately from business communications.[101]

Secondly, the lawyer-director must establish that the communication sought was requested by the client, not volunteered by the lawyer-director.[102] For those who subscribe to the traditional corporate model, wherein the director participates in managing the corporation, the director may very well appear to be the same person as the corporate client.[103] When the lawyer-director is also viewed as a representative of the corporation, it may be difficult to establish the client-request/attorney-response necessary for the privilege.[104] In

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The Attorney- Corporate Client Privilege, 40 OKLA. B.A.J. 1397, 1401 (1969), *reprinted in* 15 PRAC. LAW. 15, 22 (1969).

99. One of the elements required for the privilege to exist is that the information be sought by the client. When a lawyer requests factual information from his client, it is ordinarily assumed that it is to be evaluated for a legal purpose, and therefore the privilege will attach. United States v. Aluminum Co., 193 F. Supp. 251, 253 (N.D.N.Y. 1960). This assumption, however, may not be valid when the client volunteers the information. *See* Withrow, *How to Preserve the Privilege,* 15 PRAC. LAW. 30, 33 (1969). Therefore, it would be well to establish expressly why the information is being given by the client to the attorney so as to preclude the possibility of an erroneous assumption.

100. *See* Burnham, *supra* note 39, at 544; Heininger, *supra* note 39, at 383-84; Withrow, *supra* note 99, at 35.

101. Burnham, *supra* note 39, at 544; Heininger, *supra* note 39, at 383; Pye, *supra* note 98, at 1402 (15 PRAC. LAW. at 22).

102. Requiring that clients request legal advice encourages full and complete disclosure to the attorney, unfettered by fear that others will be informed. *E.g.,* Glade v. Superior Court, 76 Cal. App. 3d 738, 744, 143 Cal. Rptr. 119, 123 (1978). Clients who request legal advice are normally moved by the need of such guidance to disclose relevant information. By readily volunteering unrequested information, a lawyer does so without the full disclosure of an importuning client, and the full disclosure purpose of the attorney-client privilege is frustrated. *See* L.J. v. J.B., 375 A.2d 1202, 1204 (N.J. Super. App. 1977); *In re* Westinghouse Elec. Corp. Contracts Litigation, 76 F.R.D. 47, 56 (W.D. Pa. 1977). Once the client has triggered the inquiry, however, the privilege clearly should protect communications made from lawyer to client, or client to lawyer. *See also* Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977); *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, supra* note 39, at 282.

For the corporate lawyer, who is often required to seek out problems within the corporation on which to give opinions, see Brereton, *Abrogation of the Corporate Privilege in Stockholder Suits,* 15 PRAC. LAW. 24, 29 (1969), the establishment of client request may be provided by a comprehensive retainer agreement that expressly requests the lawyer to render periodic legal opinions on the legality of corporate practices as observed by, or disclosed to, the lawyer during the term of the employment agreement.

103. See note 10 *supra.*

104. "[T]he question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?" City of Phil. v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). Where the lawyer-director seeks the requested advice,

order to comply with the narrowest of attorney-corporate privilege tests, requests for major legal advice should be made by a resolution of the board of directors; or, if that is not practical, by a letter signed by a majority of the directors *not* including the lawyer-director.[105] Such a resolution or letter will be privileged so long as it is a request for legal advice, confined to the relevant facts, and meets the other requirements suggested previously.[106] Any references made in the corporate minutes to the resolution should be carefully drafted so as not to constitute a waiver of the privilege.[107] Corporate minute books may not be protected by the attorney-client privilege.[108]

Thirdly, a lawyer-director must establish that the communication was made, and has been maintained, in confidence.[109] Since the

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one might consider the lawyer-director to be both the attorney and the client. If this were the case, the lawyer-director would find himself in the unfavorable position of requesting advice from himself, a situation to which the attorney-client privilege would clearly not attach.

105. Most incorporation statutes restrict a director from approving a contract of the corporation in which the director has a financial interest.

106. See note 41 *supra* and accompanying text.

107. The minute books should only refer to the fact that a resolution requesting legal advice was passed, not to the substance of the request. This is because, as a general rule, if a client "waives the privilege with respect to some documents or communications relating to a specific subject, then he has waived the privilege as to the other documents relating to that specific subject. . . . [But] the waiver must relate to the content of the privileged matter not only to its existence." *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, supra* note 39, at 296 (citing Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970); Chore-Time Equip., Inc. v. Big Dutchman, Inc., 258 F. Supp. 233, 234 (W.D. Mich. 1966); *In re* Associated Gas & Elec. Co., 59 F. Supp. 743, 744 (S.D.N.Y. 1977)).

108. In Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977), the board of directors of Diversified passed a resolution authorizing an outside law firm to conduct an investigation and inquiry "into the matters disclosed and discussed in this regard at this meeting" (concerning allegations that Diversified had bribed purchasing agents of companies with which it dealt). *Id.* at 607. The law firm was to issue a report to the board of directors detailing its findings and recommendations. Certain corporate minutes restated critical portions of the report, while other minutes only mentioned the existence of the investigation and did not reveal the contents of the report. *Id.* at 608 & n.1. The majority of the court, after fashioning a new test to determine which corporate employees' communications could be protected by the privilege, see notes 93-95 *supra* and accompanying text, held that the report, which was based on confidential interviews between the law firm and employees of Diversified, and the relevant portions of the corporate minutes which restated critical portions of the report, were entitled to protection under the attorney-client privilege. These documents were privileged "because disclosure would reveal directly or inferentially the contents of the interviews." *Id.* at 611.

In dissent, Judge Gibson looked carefully at the problems involved in holding corporate minutes protected. After criticising the majority and the briefs of the parties for not addressing the discoverability of the minutes as a separate issue, he concluded that corporate minutes should not be protected. *Id.* at 616 (Gibson, J., dissenting).

See generally Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901 (1969).

109. See notes 45-46 *supra* and accompanying text.

corporate structure makes communications with any single person extremely difficult, all persons who must hear, handle, or see the communications should come within the confines of the particular test used in the jurisdiction. If persons who do not need to hear, see, or handle the communication are allowed to do so, the privilege will be deemed to have been waived.[110]

The burden of establishing that the requisite confidentiality has been maintained is on the person or entity seeking to invoke the privilege.[111] It is, therefore, imperative that the corporation establish careful procedures to maintain the confidence of all legal communications. Furthermore, because corporate agents who have the authority to employ or consult counsel in behalf of the corporation also have the authority to waive the privilege,[112] the lawyer-director, as one such agent, should follow those same careful procedures within his law firm to insure preservation of the privilege.

Recommended procedures to preserve confidentiality focus primarily on form[113] so that a court may easily determine which of a multitude of documents are subject to the privilege. High on the list of procedures[114] is the maintainence of separate files for legal matters.[115] Material entering the legal file should be carefully screened to insure that all elements of the privilege are present.[116] Access to

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110. Only the client can waive the privilege, and to support a finding of waiver, there must be evidence that the client intended to waive it. Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). See note 46 *supra*. *See also In re* Jackier, 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978),

111. *E.g.*, Shere v. Marshal Field & Co., 26 Ill. App. 3d 728, 327 N.E.2d 92, 94 (1975).

112. See note 46 *supra*.

113. Withrow, *supra* note 99, at 33.

114. The procedures suggested herein, while developed primarily to help in-house counsel preserve the privilege, are nonetheless considered to be of great worth to the outside lawyer-director. Problems facing in-house counsel with respect to preserving the privilege are similar to those of the lawyer-director because both must become heavily involved in business, technical, and legal advice, and both must communicate their advice to the corporate "entity."

115. *See* Burnham, *supra* note 39, at 544; Heininger, *supra* note 39, at 383; Pye, *supra*. note 98, at 1402 (15 PRAC. LAW. at 22).

116. The requisite elements for the privilege to attach are stated in note 41 *supra* and accompanying text. Besides separate files, the use of special stationery, legal titles, and legal language will greatly aid a court in finding the privilege applicable.

While the privilege clearly attaches to a formal legal opinion, many of a lawyer-director's communications may be a mixture of business advice and legal advice. The basic rule with respect to *mixed communications* appears to be that the privilege will not be lost if the advice is primarily legal, Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963), but it will be lost if the advice is primarily business, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950); Pye, *supra* note 98, at 1401 (15 PRAC. LAW. at 20-21). *See Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, supra* note 39, at 289-90. *See also* American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962).

the file should be limited to those within the corporate control or other privileged group.[117] Reports that must circulate between counsel and members of the corporate control group should be sent directly, avoiding unprivileged intermediaries. Where possible, legal opinions should deal with a single legal problem preferably calling for legal conclusions.[118] Legal opinions and other written documents containing confidential matters should be clearly marked, with an admonition that they are not to be copied.[119] Coupled with this, record retention schedules should be adopted and enforced.[120]

Finally, the lawyer-director must recognize that there are some circumstances where the attorney-client privilege is unsettled, and the privilege may never attach. Shareholder litigation is perhaps the best example of such a circumstance.[121]

C. *Summary of Suggested Procedures*

To summarize briefly, the suggested procedures a lawyer-director can follow in order to help maintain independent professional judgment and to help preserve the attorney-client privilege include:

1) Adopt an objective standard that sets a limitation on the amount of legal fees or other benefits the law firm or lawyer-director will receive from the client corporation.[122]

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117. See notes 84-95 *supra* and accompanying text for a brief summary of the various groups within the corporation to whom the privilege may apply.

118. A court would be hard-pressed to rule against the privilege when the opinion clearly covers the following four points:

[1] Addresses someone in the "control group."

[2] Recites that the lawyer has been asked for a legal opinion as to the specific proposal.

[3] Discusses the applicable statutes and case law.

[4] Expresses basically a legal conclusion.

Withrow, *supra* note 99, at 34-35.

119. Austern, *Corporate Counsel Communications: Is Anybody Listening?* 17 BUS. LAW. 868, 871 (1962).

120. The presumption may be that retaining records and files longer than needful may constitute a waiver of the privilege, especially where the records or files are moved to a storage facility to which members not belonging to the control group have access. Other practical reasons exist for getting rid of old records. These reasons, as well as practical procedures of how to open, maintain, and close client files are discussed in K. STRONG & A. CLARK, LAW OFFICE MANAGEMENT ch. 8 (1974).

121. *See* Brereton, *supra* note 102; *The Attorney-Client Privilege and the Corporation in Shareholder Litigation, supra* note 39. *See also, The Corporate Attorney-Client Privilege, supra* note 39, at 153-74.

To illustrate, some courts involved in shareholder litigation disallow the privilege completely on the theory that the shareholders are owners of the corporation and should, therefore, have access to all the corporation's documents. Garner v. Wolfinbarger, 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated and remanded,* 430 F.2d 1093 (5th Cir. 1970), *cert. denied,*

2) Periodically verify the effectiveness of this objective standard by asking oneself probing subjective questions about one's independence.[123]

3) Administer a "Miranda-type warning" to all corporate clients as soon as the client relationship is established, making sure all the individual officers and directors receive notice thereof.[124]

4) Become acquainted with the attorney-corporate privilege test used by the courts in the jurisdictions in which the corporation may be sued.[125]

5) Communicate legal matters only to corporate personnel who fall within the applicable test. If special elements must be present for the privilege to attach, document their existence.[126]

6) Insist that all requests for legal advice use the proper legal title of the lawyer, not the business title of the director.[127]

7) Separate all legal advice from business or other advice. Use special stationery and defining introductory sentences. Maintain separate files for legal matters.[128]

8) Require that all requests for major legal opinions be made by way of board resolution. If this is not feasible, at least procure a letter signed on behalf of the corporation by a majority of the directors, not including the lawyer-director.[129]

9) Draft corporate minutes carefully, recognizing that mate-

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401 U.S. 974 (1971); News-Journal Corp. v. State *ex rel.* Gore, 136 Fla. 620, 187 So. 271 (1939) (dicta only). *Cf.* Pattie Lea, Inc. v. District Court, 161 Colo. 493, 423 P.2d 27 (1967) (accountant-client privilege not available). Courts that take this approach generally view the directors, officers, and controlling shareholders as trustees, and the minority shareholders as beneficiaries with complete rights of inspection. Other courts carve out special exceptions to the privilege because of a special relationship between the parties, often involving a director, and sometimes a lawyer-director. *See, e.g.*, Valente v. PepsiCo., Inc., 68 F.R.D. 361 (D. Del. 1975); Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972). Both of these decisions are analyzed in *The Corporate Attorney-Client Privilege, supra* note 39, at 164-73. *See also In re* TransOcean Tender Offer Sec. Litigation, 78 F.R.D. 692 (N.D. Ill. 1978). Still other courts allow the corporation to claim the privilege unless the opposing party can show "good cause" why the privilege should not be invoked. See Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *The Corporate Attorney-Client Privilege, supra* note 39, at 158-62; *The Attorney-Client Privilege and the Corporation in Shareholder Litigation, supra* note 39, at 315-17.

122. See notes 72-81 *supra* and accompanying text.

123. See note 77 *supra* and accompanying text.

124. See notes 78-81 *supra* and accompanying text.

125. See notes 84-95 *supra* and accompanying text.

126. For example, if one of the elements requires a showing that the communication of an employee was made at the direction of the employee's corporate superior then the lawyer-director should procure a letter or other documentation from the corporate superior to establish clearly that this element was present.

127. See notes 97-99 *supra* and accompanying text.

128. See notes 100-01, 114-15 *supra* and accompanying text.

129. See notes 102-06 *supra* and accompanying text.

rial located therein may not be protected by the privilege, and may constitute a waiver of related material.[130]

10) Establish meticulous procedures, both within the corporation and within the law firm, to insure that all communications will be maintained in confidence.[131]

11) Retain outside independent counsel for the corporation, not a lawyer-director, nor a member of the lawyer-director's firm, at the first sign of shareholder litigation.[132]

12) Procure adequate indemnificaion insurance to minimize personal and corporate liability.[133]

IV. Conclusion

Qualified lawyers should serve as directors of non-client corporations. They should, however, make full disclosure of any potentially conflicting self-interests.

Qualified lawyers should serve as directors of client corporations only if they are convinced the corporate and societal benefits flowing from their dual service exceed the respective burdens created by their conflicting duties. The benefits will be substantial where the lawyer-director has special talents to share with the corporation, where the corporation might not otherwise receive the same quality of legal services the lawyer-director can provide, or where the lawyer-director uses the position of director as independent leverage to gain access to relevant information that can be used to help deliver quality legal services to the corporation. On the other hand, if the lawyer-director fails to follow mitigating procedures aimed at maintaining his independent professional judgment and preserving the attorney-client privilege, corporate and societal detriments may be substantial. A lawyer must carefully balance competing factors in deciding whether or not to serve as director of a client corporation and should strictly adhere to standards and procedures developed in the preceding sections to avoid the hazards inherent in such a dual role.

Bryant R. Gold

130. See notes 107-08 *supra* and accompanying text.

131. See notes 110-20 *supra* and accompanying text.

132. See note 121 *supra* and accompanying text.

133. *See generally* Johnston, *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 Bus. Law. 1933 (1978).

RECENT DEVELOPMENTS IN UTAH LAW

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I. INTRODUCTION

This section consists primarily of brief expositions of selected, noteworthy cases recently decided by the Utah Supreme Court. In addition, the survey includes the examination of a decision of the Court of Appeals for the Tenth Circuit that purports to construe Utah law and an analysis of the Amendments to the Utah Governmental Immunity Act passed by the Utah legislature during the 1978 Budget Session.

II. CITIES AND TOWNS

The Council-Mayor Option Under the Utah Optional Forms of Municipal Government Act

In *Martindale v. Anderson*,[1] the Utah Supreme Court had its first opportunity to interpret provisions of the Optional Forms of Municipal Government Act.[2] Faced with deciding whether executive powers not enumerated in the Act were held by the mayor or

1. 581 P.2d 1022 (Utah 1978).

2. UTAH CODE ANN. §§ 10-3-1201 to -1228 (Supp. 1977). The Act was originally passed by the Utah Legislature in 1975 and codified at UTAH CODE ANN. §§ 10-6-101 to -132. See the discussion of the Act in *Utah Legislative Survey—1975*, 1975 UTAH L. REV. 790, 790-94. In 1977 the legislature repealed the Act, as well as other chapters in title 10, and reenacted it, with slight modifications, as presently codified. Ch. 48, 1977 Utah Laws 267. The recodification is discussed in *Utah Legislative Survey-1977*, 1977 UTAH L. REV. 521, 522-27.

by the city council, the court concluded that the council-mayor option provided for all executive powers, including powers not enumerated, to be exercised by the mayor. The court's interpretation affirms the availability of an alternative form of local government in which the mayor has significant powers.

The citizens of Logan voted to adopt the council-mayor form of government in 1975.[3] Shortly after the new form of government became effective in 1976, three members of the five-member city council brought a declaratory judgment action to determine whether the council or the mayor had the power to buy and sell city property, approve subdivision plans, and transfer funds within a departmental budget.[4] The trial court concluded that under the council-mayor option, the council could exercise all executive powers not specifically delegated to the mayor.[5] It reasoned that since none of the functions in dispute were among the mayor's enumerated powers, the council retained them.

On appeal, the Utah Supreme Court stated:

> When the Act is read in its entirety, and each provision thereof is read in context with all of the others, and when viewed in the light of the legislative history of municipal government in Utah, we are compelled to conclude that it in fact provides for the absolute separation of executive and legislative powers. A fortiori, the 1977 modifications to the Act specifically vest the whole of the executive powers in the Mayor and only the legislative powers in the Council . . . .[6]

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3. Brief for Respondent at 4, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978). The *Martindale* court pointed out that the distinguishing feature of the council-mayor form of government was the fact that power is shared between two governing bodies instead of being vested in a single body. *Id.* at 1025.

Other jurisdictions with provisions for an optional form of municipal government similar to Utah's council-mayor form include: Ohio, OHIO REV. CODE ANN. §§ 705.71-.86 (Page 1976); Oklahoma, OKLA. STAT. ANN. tit. 11, §§ 11-101 to -125 (West Special Pamphlet 1977); Pennsylvania, PA. STAT. ANN. tit. 53, §§ 1-501 to -534 (Purdon 1974); and Washington, WASH. REV. CODE ANN. §§ 35A.12.010 to .190 (West Special Pamphlet 1978).

4. 581 P.2d at 1024.

5. *Id.* at 1027.

6. *Id.* Though the court noted that the 1977 Act "remains basically unchanged in its present form," *id.* at 1026, two important differences should be noted which strengthen the court's reasoning. Ch. 33, §§ 10, 11, 1975 Utah Laws 108, contains the following language:

> The optional form of government known as the council-mayor form vests the government of a municipality which adopts this form in a mayor and a municipal council . . . .
>
> The municipal council of a municipality adopting an optional form of government provided for in this act shall be the governing body of that municipality and shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of them by law.

The 1977 Act modified the language in the above sections, now codified at UTAH CODE ANN. §§ 10-3-1209 to -1210 (Supp. 1977). Section 1209 provides:

Once it had decided that the mayor held all executive powers, the court examined each of the three functions in dispute to determine whether it was executive or legislative.[7] The court upheld the trial court's ruling that the city council must approve the transfer of "encumbered" funds within a department, but reversed the lower court decisions on the purchase and sale of property and the approval of subdivision plans. These two functions, the court held, were to be exercised by the mayor.[8]

The court's decision in *Martindale* clarifies the extent of the shift in power from the council to the mayor made possible by the council-mayor form of government.[9] A mayor under the council-mayor form has more enumerated powers and greater administrative responsibility than a mayor in a municipality using the traditional commission form of government.[10] With the addition of executive powers not enumerated the mayor's authority is further extended.[11] The authority to buy and sell property, for example, has

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The optional form of government known as the council-mayor form vests the government of a municipality which adopts this form *in two separate, independent, and equal branches of municipal government; the executive branch consisting of a mayor and the administrative departments and officers; and the legislative branch consisting of a municipal council.* (Emphasis added.)

The words "shall be the governing body of that municipality" were not included in section 1210, thus eliminating from the 1977 version of the Act a phrase which the court felt had caused the trial judge to misinterpret the law. 581 P.2d at 1027.

7. To distinguish between legislative and executive functions, the court defined legislative powers as policy-making powers and executive powers as policy-execution powers. *Id.* at 1027. Examples of contrasting legislative and executive municipal functions are discussed in E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 10.06 (3d ed. 1966).

8. 581 P.2d at 1027-29.

9. A form of government in which the mayor has increased powers is not a new option in Utah. From 1959 until 1975 voters could adopt a "Strong Mayor" form of municipal government. Ch. 20, 1959 Utah Laws 42. The "Strong Mayor" form was repealed in 1975 at the time the council-mayor form was adopted. Ch. 33, 1975 Utah Laws 114. The current version of the council-mayor form is at UTAH CODE ANN. §§ 10-3-1201 to -1228 (Supp. 1977). As the court noted, the basic elements of the council-mayor form and the "Strong Mayor" form are similar. 581 P.2d at 1024-25. Although the "Strong Mayor" form of government was never adopted by a Utah municipality, it appears to have been the legislative intent in enacting the 1975 and 1977 versions of the Optional Forms of Municipal Government Act to continue to make available a "Strong Mayor" form of government. Brief of Amicus Curiae at 9-10, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978).

10. Compare the powers enumerated in UTAH CODE ANN. § 10-3-1219 (Supp. 1977) to those enumerated in the Municipal Administration Act. *Id.* § 10-3-809 (Supp. 1977).

11. In a dissenting opinion, Justice Crockett disagreed that executive powers not enumerated should be exercised by the mayor. Acknowledging that separation of powers was a fundamental principal of American government, Justice Crockett felt that since "the legislative branch derives its powers directly from and is responsible to the people, the residuum of any undelegated power is reposed therein . . . ." 581 P.2d at 1030 (Crockett, J., dissenting). He felt that the traditional American rule of strict construction of municipal powers (Dillon's Rule) should be used "when any city officer asserts the power to act as the Mayor has here." *Id.* at 1031 n.11. It should be noted that Dillon's Rule applies to grants of munici-

usually been entrusted to legislative bodies of Utah cities and towns,[12] as has the power to approve plans for subdivisions.[13] Under *Martindale,* these powers are taken from the control of the municipal council and placed in the hands of one person.

At first glance, the mayor's authority to control what is done with municipal resources seems to be all encompassing. The council, however, under the council-mayor form has the ability to limit the actions of the mayor. In the section of the Act enumerating the responsibilities of the mayor, the mayor is required to perform other duties "required by ordinance not inconsistent with this part."[14] It appears, therefore, that the council, by passing ordinances, can prescribe duties for the mayor as long as they are not in contravention of the section. Such duties could include procedural guidelines which the mayor would be required to follow in carrying out his executive functions. The *Martindale* court, though pointing out that the council has no executive role regarding property, recognized that the council can establish general rules for the mayor to follow when exercising his power to buy, sell, or manage municipal property.[15]

The court's language creates the impression that the council's policy-making role is insignificant. However, in discussing the mayor's power to approve subdivisions, the court referred to Logan City ordinances that placed significant controls on the mayor's actions. The ordinances list conditions for approval and require public notices, public hearings, approval by the city planner, and review by the planning commission.[16] Such provisions would make it difficult for the mayor to act hastily or independently in approving subdivision plans. It appears that the city council could place similar legislative controls on the purchase and sale of municipal property and, conceivably, on most other executive functions. Although

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pal power from the state to municipalities. The Utah Legislature in 1977 added a liberal construction clause to the Municipal Code that appears to reject the approach of Dillon's Rule. See UTAH CODE ANN. § 10-1-103 (Supp. 1977) and the discussion of the clause in *Utah Legislative Survey—1977, supra* note 2, at 522-23.

12. UTAH CODE ANN. §§ 10-8-1 to -2 (1972).

13. The court referred to three Utah statutes that could be read as indicating that subdivision approval has been considered a legislative function in Utah. 581 P.2d at 1028. In his dissent, Justice Crockett pointed out that each statute "can refer to nothing other than the Council." *Id.* at 1031 (Crockett, J., dissenting). The majority opinion, however, stated that "[t]he inconsistencies in the terminology of the statutes in referring to the approving authority is of some concern, but is by no means overpowering," and went on to explain that the terms "legislative body," "legislative authority," and "governing body" were used in their generic sense. *Id.* at 1028. Other states have considered subdivision approval to be an administrative function. *See, e.g.,* Boutet v. Planning Bd. of Saco, 253 A.2d 53, 55 (Me. 1969).

14. UTAH CODE ANN. § 10-3-1219(9) (Supp. 1977).

15. 581 P.2d at 1027.

16. *Id.* at 1028.

the mayor can veto any ordinance passed by the council, the veto can be overridden by a two-thirds vote of the council members.[17] The council, then, is in a position to balance the mayor's executive powers through legislation.

The *Martindale* case is an important decision for municipalities in Utah. By concluding that the council-mayor option is "a true separation of powers form of government"[18] and that the mayor holds all executive powers, even those not enumerated, the court preserves a strong-mayor alternative in municipal government. City officials and voters should now be able to determine more easily which of the several forms of government available to them is best suited to their needs.

III. Civil Procedure

Long-arm Jurisdiction

Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp.[1] marked a significant effort by the Utah Supreme Court to adopt clear guidelines for asserting jurisdiction over nonresident defendants under the Utah long-arm statute.[2] The plaintiff Abbott executed a purchase agreement with a local dealer in Salt Lake City to buy an airplane manufactured by the defendant Piper, a Pennsylvania corporation. The plane proved defective, and Abbott commenced an action for breach of contract and warranty against both the dealer and Piper. Piper moved to quash service of summons for lack of personal jurisdiction. The trial court granted Piper's motion without holding an evidentiary hearing to resolve factual conflicts regarding Piper's contacts with Utah, but the Utah Supreme Court reversed and remanded. If the contacts of Piper with Utah proved as extensive as Abbott alleged,[3] the court indicated that jurisdiction over

17. Utah Code Ann. § 10-3-1214 (Supp. 1977).
18. 581 P.2d at 1027.

1. 578 P.2d 850 (Utah 1978).
2. Utah Code Ann. §§ 78-27-22 to -28 (1977).
3. Resisting Piper's motion to quash, plaintiff Abbott filed an affidavit by the president of Intermountain Piper, Inc., a Utah corporation, which, under contract with Piper, distributes Piper products to Utah Piper dealers. The affidavit alleged that:

> Piper employs a Regional Sales Representative and a Regional Service Representative who regularly visits [Utah] . . . . Piper has entered into a number of written contracts with Utah residents . . . [and] has established Piper Flite Centers in Utah to encourage Utah residents to use Piper products . . . . Piper has property located in Utah . . . [and] is regularly . . . directing and controlling the sales and use of Piper manufactured products in [Utah]. . . . Piper . . . sends its employees to Utah for the purpose of inspecting and approving facilities as authorized Piper Service

Piper would be warranted under the long-arm statute by force of the court's newly clarified standards.

Utah's long-arm statute enumerates six activities which, when conducted in Utah by a nonresident defendant, subject the defendant to Utah's jurisdiction on claims arising from those specific activities.[4] Because it is based on specific activities deemed to warrant jurisdiction, the Utah long-arm statute represents *specific*[5] personal jurisdiction, and its reach is circumscribed only by the due process requirement that the defendant have "minimum contacts" with the forum state.[6]

Prior to *Abbott,* the Utah Supreme Court seriously restricted the reach of the long-arm statute by failing to distinguish between the "minimum contacts" parameter of specific personal jurisdiction and the weightier forum contact requirements of *general*[7] personal jurisdiction under the Utah "doing business" statute.[8] General personal jurisdiction under the "doing business" statute is confined to

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Centers . . . [and] performs [through agents] warranty services in [Utah] . . . and . . . regularly seeks the aid of Utah residents in promoting its business in Utah.

Brief for Appellant at 3-4, Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (Utah 1978).

4. The statute provides that:

> Any person . . . whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself . . . to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) The causing of any injury within this state whether tortious or by breach of warranty;
>
> (4) The ownership, use, or possession of any real estate situated in this state;
>
> (5) Contracting to insure any person, property or risk located within this state at the time of the contracting;
>
> (6) With respect to actions of divorce and separate maintenance, the maintenance in this state of matrimonial domocile at the time the claim arose or the commission in this state of the act giving rise to the claim.

UTAH CODE ANN. § 78-27-24(1)-(6) (1977). The words "transaction of any business within this state" in subsection one means "activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the State of Utah." *Id.* § 78-27-23(2). Abbott's allegations brought Piper squarely within subsections one, two, and three.

5. Strachan, *In Personam Jurisdiction in Utah,* 1977 UTAH L. REV. 235, 251-54.

6. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Assertion of jurisdiction on the basis of "minimum contracts," however, may not rest upon contracts so attenuated as to "offend notions of fair play and substantial justice." *Id.* at 316, *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940). The Supreme Court later refined this language in Hanson v. Denckla, 357 U.S. 235 (1958), holding it to be essential to personal jurisdiction that the nonresident "purposefully [avail] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 253.

7. Strachan, *supra* note 5, at 254.

8. UTAH CODE ANN. § 16-10-111 (1973). The principle of general personal jurisdiction as applied to any businesses that may be sued under the business name is contained in UTAH R. CIV. P. 4(e)(4), 4(e)(10), 17(e).

situations where a nonresident corporate defendant has forum state contacts which are substantial and continuous;[9] it carries no requirement that the plaintiff's claim arise directly from the defendant's activity within the forum state.[10] The distinction between specific and general personal jurisdiction is critical in cases where the forum-state activities of the defendant which give rise to the plaintiff's claim are "minimum contacts" within the long-arm statute, but where such activities are less than substantial and continuous.

The Utah Supreme Court's past confusion of specific and general personal jurisdiction and the distinct statutes giving rise to each has produced some irrational case law.[11] Long-arm jurisdiction was granted in *Hill v. Zale Corp.*[12] where the plaintiff brought an action against a Texas corporation which had employed him through an Alaska subsidiary. As the plaintiff's claim did not arise from any Utah activity, the long-arm statute was an improper source of jurisdiction.[13] The Utah Supreme Court, however, denied long-arm jurisdiction in *Union Ski Co. v. Union Plastics Corp.*[14] where the Utah plaintiff's claim arose from a contract partially

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9. This core requirement has been variously expressed by the Utah Supreme Court. In Dykes v. Reliable Furniture & Carpet, 3 Utah 2d 34, 277 P.2d 969 (1954), the Utah Supreme Court held that jurisdiction under the "doing business" statute requires that:

> [the] outsider, as a practical matter, [be] present in the state personally or by authorized representation, to further his business interests with local inhabitants through real and identifiable contracts representing a *continuity of dealing and activity not too dissimilar from that indulged by local business people* attending to their own business pursuits.

Id. at 37, 277 P.2d at 972 (emphasis added). For a survey of the various contact requirements which the Utah court has generated to govern the "doing business" statute, see Strachan, *supra* note 5, at 237-38.

10. Hanson v. Denckla, 357 U.S. 235, 251-52 (1958). Professor Strachan states that "[i]n cases where the claim does not arise out of [the] defendant's forum-state activity, federal due process requires extensive forum-state activity." Strachan, *supra* note 5, at 245. *Accord,* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446-48 (1952).

11. Exemplary of this confusion is Hill v. Zale Corp., 25 Utah 2d 357, 482 P.2d 332 (1971), where Justice Crockett, for a unanimous court, wrote: "If there is any difference between what is stated as the 'doing business' and 'minimal contacts' tests it is probably more in semantics than in substance. In practical application they are essentially the same." *Id.* at 360, 482 P.2d at 334.

12. 25 Utah 2d 357, 482 P.2d 332 (1971).

13. The language of the statute explicitly states that the claim must arise from acts of the nonresident defendant occurring within the forum state. UTAH CODE ANN. § 78-27-23(2) (1977).

14. 548 P.2d 1257 (Utah 1976).

> The fundamental problem with the decision is the court's view that the minimum contacts standard, as embodied in the long-arm statute, requires the same substantial and continuous local activity by a nonresident defendant as is required under the doing business standard. This interpretation cannot be justified on either constitutional or statutory grounds.

Strachan, *supra* note 5, at 246.

negotiated in Utah whereby the nonresident defendant was to manufacture ski boots in California and distribute them exclusively through the Utah plaintiff. This latter decision denying jurisdiction was the illegitimate child of a forced union between the Utah long-arm statute with its proper "minimum contacts" requirement and the Utah "doing business" requirement that the forum contacts of a nonresident defendant be substantial and continuous. Precisely the same mismatch, reading the substantial and continuous test into the long-arm statute, caused the trial court in *Abbott* to deny jurisdiction. Denial of jurisdiction on such grounds abrogates the Utah legislature's expressed determination to extend long-arm jurisdiction to the utmost allowed under the fourteenth amendment.[15] Thus, the unanimous decision of the Utah Supreme Court in *Abbott,* wherein the court recognized that "there can well be a significant and controlling difference" between the "doing business" and "minimum contacts" concepts,[16] not only replaces the court's confused record on long-arm jurisdiction with an accurate reading of the statute,[17] but also, and for the first time, gives moment to the expansive legislative intent of the long-arm statute.[18]

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15. The long-arm statute "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." UTAH CODE ANN. § 78-27-22 (1977).

16. 578 P.2d at 853.

17. In *Abbott,* Justice Wilkins acknowledged and repudiated the court's past practice of interchanging the standards of specific and general personal jurisdiction. *Id.*

18. It appears, however, that not all of the Utah Justices have adopted the guidelines set forth by Justice Wilkins in *Abbott.* Soon after *Abbott,* in Dahnken, Inc. v. Marshinsky, 580 P.2d 596 (Utah 1978), Justice Crockett denied long-arm jurisdiction where the plaintiff's claim arose from the nonresident defendant's purchase in Utah of a ring from the plaintiff's store. The claim thus arose from a business transaction by the defendant within Utah, and thereby falls within subsection one of the long-arm statute. UTAH CODE ANN. § 78-27-24(1)(1977). Further, the defendant's purchase of a ring in Utah quite possibly met due process requirements, since the nonresident defendant apparently initiated the contacts with the Utah plaintiff and thereby "purposefully avail[ed] itself of the privilege of conducting activities within the forum state." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Justice Crockett writing for the majority in *Dahnken,* however, denied jurisdiction, implidly because of insufficient contacts. Concurring in the result, Justice Wilkins maintained that the "minimum contacts" standard was possibly met, albeit by a bare minimum. In such borderline cases the analysis shifts to the relative smallness of the claim and the convenience of the parties, among other factors. 580 P.2d at 598-99; *See* International Shoe Co. v. Washington, 326 U.S. 310, 317. In *Dahnken,* the relative smallness of the plaintiff's claim, coupled with the expense of litigating in Utah, would in all likelihood have financially compelled the defendant to default. *Id. See* Strachan, *supra* note 5, at 258-59. Such a result, Justice Wilkins concluded, would offend "fair play and substantial justice." 580 P.2d at 598.

In Producers Livestock Loan Co. v. Miller, 580 P.2d 603 (Utah 1978), Justice Crockett's majority opinion evokes the court's confused pre-*Abbott* language of "substantial and continuous" with regard to an assertion of long-arm jurisdiction. In *Producers,* a Utah resident was retained by the New York defendants to manage a livestock operation for the defendants. Under a contract negotiated in Utah, the Utah resident arranged to have the livestock of the

IV. CONSTITUTIONAL LAW

A. *Standing to Sue and Constitutional Challenges*

In *Baird v. State*,[1] the Utah Supreme Court set out at length the standing requirements for plaintiffs challenging the constitutionality of Utah statutes in declaratory judgment actions. The plaintiff in *Baird*, alleging only that he was employed or employing in Utah and that he was a member of a class of citizens with similar complaints, sought by declaratory judgment to have the Utah Occupational Safety and Health Act of 1973[2] (Utah OSHA) declared unconstitutional.[3] The district court struck down the Act, but the Utah Supreme Court reversed.

Justice Maughan, writing for the majority, held that the district court should have dismissed the action on its own motion, since the plaintiff's allegations did not give him sufficient standing to challenge the Act's constitutionality.[4] The court emphasized that a claim of denial of equal protection can be urged only by a plaintiff who is himself a victim of discrimination; the plaintiff may not base his claim upon the rights of third parties. Likewise, the court stated that a violation of due process can only be asserted by a plaintiff whose rights have been impaired by the enforcement of the statute. Thus, the plaintiff must allege a specific, personal, and particularized economic or physical injury, sustained or threatened, in order to have standing to challenge the constitutionality of a statute or

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defendants pastured in certain western states. Significantly, all of the financing between the New York defendants and the Utah plaintiff was funneled through the Utah resident who was retained as an agent by the New York defendants.

The majority opinion correctly concludes that the defendants were subject to long-arm jurisdiction in Utah because they had conducted business within Utah through their Utah resident agent. *Id.* at 605-06. As such, long-arm jurisdiction requires only a showing of minimum contacts among the plaintiff, the forum, and the defendant's forum activities. Yet, the majority opinion discusses the contacts requirements almost exclusively in terms of the "doing business" statute standard of "substantial and continuous" contacts. *Id.* at 605. Ironically, the forum-state activity of the defendants through their agent was so extensive and prolonged as to probably warrant jurisdiction under the "doing business" statute, without recourse to the Utah long-arm statute.

1. 574 P.2d 713 (Utah 1978).

2. UTAH CODE ANN. §§ 35-9-1 to -22 (1974).

3. The plaintiff asserted that the act was unconstitutional because it violated the separation of powers doctrine, denied equal protection of the laws, and deprived an accused of his rights "accorded in a criminal action," thereby taking life, liberty, or property without due process of law. The plaintiff's assertions, however, were all pleaded in the abstract, for he did not allege that he personally had been or would be denied these rights by enforcement of the Act. 574 P.2d at 717-18.

4. *Id.* at 715.

regulation.[5] Without such an alleged injury creating a justiciable or actual controversy, the majority held that the court had no jurisdiction to render a declaratory judgment.[6]

Nine months after its lengthy discussion of standing in *Baird*, the court in *Jenkins v. State*[7] created a vague exception to the *Baird* rule of particularized injury. In *Jenkins*, the plaintiff, as a resident of Salt Lake County, challenged the membership of Utah public school teachers and administrators in the Utah Legislature as unconstitutional. He did not allege any direct injury as the basis for this action. In a particularly brief opinion, Justice Maughan, writing for the majority, stated in dicta[8] that the supreme court may grant standing "where matters of great public interest and societal impact are concerned."[9] At the same time, the court affirmed the need for plaintiff's specific injury in order to achieve standing in cases not falling under this "public interest" exception. Justice Crockett, in his concurrence, agreed and added that on rare occasions questions of standing could be disregarded in order to decide issues of great public interest and to minimize the time, effort, and expense of further litigation.[10]

This "public interest" exception poses significant problems when compared to the strict requirement of a particularized injury formulated in *Baird*. Justice Wilkins, in dissent, quoted *Baird's* specific rejection of public interest as a basis for plaintiff's standing:

> The general rule is applicable that a party having only such interest as the public generally cannot maintain an action. In order to pass upon the validity of a statute, the proceeding must be initiated by

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5. *Id.* The Utah court has and should continue to allow declaratory judgment standing where plaintiff can prove threat of future harm or possibility of prosecution for an illegal act. *See, e.g.*, Salt Lake County v. Salt Lake City, 570 P.2d 119 (Utah 1977) (threat of future harm resulting from termination of water service by a city, without notice, a sufficient basis for standing); Kesler v. Utah State Div. of Health, 30 Utah 2d 90, 513 P.2d 1017 (1973) (plumbing contractor did not have to violate regulation dealing with sprinkling systems to have standing to contest the regulation); Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944) (water appropriator could obtain determination of water right priority before purchase of irrigation equipment).

6. Concurring in the result, Chief Justice Ellett stated that counsel for the plaintiff in oral argument had disclosed that the plaintiff had been fined under the Act and that Utah OSHA agents had trespassed on his property; thus plaintiff should have standing. These facts, however, were not included in the pleadings. Chief Justice Ellett, joined by Justice Crockett, went beyond the barrier of standing to find the entire Act constitutional. 574 P.2d at 718 (Ellett, C.J., concurring).

7. 585 P.2d 442 (Utah 1978).

8. The court did not proceed to the merits of the case, since the proper parties were not named as defendants. *Id.* at 443.

9. *Id.*

10. *Id.* (Crockett, J., concurring).

> one whose special interest is affected, and it must be a civil or property right that is so affected.[11]

In addition to its inconsistency with *Baird,* the recognition of a "public interest" exception runs counter to the vast majority of recent cases in western states concerning a plaintiff's standing to challenge the constitutionality of a statute.[12]

Finally, *Jenkins* provides no guidance as to what types of public issues are of such importance that the court can overlook the *Baird* requirements and confer standing upon the plaintiff. The constitutionality of Utah's OSHA in *Baird* was an issue that affected thousands of Utah employees and employers, yet the court did not confer standing. Unfortunately, the *Jenkins* court does not define "matters of great public interest and societal impact"[13] nor does it distinguish the public interest issue in *Jenkins* from that in *Baird.* Without specific limitations, the nebulous "public interest" exception posited in *Jenkins* could easily nullify the definitive standing requirements of *Baird* in future cases challenging the constitutionality of legislation in Utah.

B. Refusing Admission to an Educational Program on Sole Ground of Age Violates Equal Protection

In *Purdie v. University of Utah,*[1] the Utah Supreme Court held that a state university violated the equal protection provisions of the constitution of Utah[2] and the equal protection clause of the fourteenth amendment[3] by refusing plaintiff admission to an educational program with limited resources on the *"sole* ground"[4] of her age.

The plaintiff was a fifty-one year old woman whose application to the graduate program of the Department of Educational Psychol-

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11. *Id.* at 444 (Wilkins, J., dissenting), *quoting* Baird v. State, 574 P.2d 713, 716-17 (Utah 1978).

12. *E.g.,* American Metal Climax v. Butler, 188 Colo. 116, 532 P.2d 951 (1975); Colorado Chiro. Ass'n v. Heuser, 177 Colo. 434, 494 P.2d 833 (1972); Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 67 (1976); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); Kelly v. Silver, 25 Or. App. 441, 549 P.2d 1134 (1976). State v. Human Relations Research Foundation, 64 Wash. 2d 262, 391 P.2d 513 (1964); Budd v. Bishop, 543 P.2d 368 (Wyo. 1975); Cranston v. Thomson, 530 P.2d 726 (Wyo. 1975). *Cf.* State v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974) (relied upon by the majority in *Jenkins*).

13. 585 P.2d at 443.

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1. 584 P.2d 831 (Utah 1978).
2. UTAH CONST. art. I, § 2.
3. U.S. CONST. amend. XIV, § 1.
4. 584 P.2d at 832 (emphasis in original).

ogy at the University of Utah was admittedly rejected on the sole ground of her age. In all other respects, including educational background, experience, academic record and test scores, the plaintiff's application exceeded the normal requirements for admission to that program.

In dismissing her complaint for declaratory and injunctive relief, the court below held that the use of age as a criterion for admission was "a reasonable practice in light of the limited resources available."[5] In reversing the district court, Justice Wilkins' unanimous opinion noted that the dismissal by the lower court precluded any evidentiary hearing as to the following significant factors:

> whether an age-based decision is influenced by the extent to which an applicant equals or exceeds normal requirements of admission; the resources actually available to the department; the qualifications and ages of successful applicants of the 1975 academic year; and whether any policies or regulations governing admissions have ever been duly promulgated.[6]

In its analysis of the case, the court applied the "two-tiered" approach to equal protection adopted by the United States Supreme Court. Under the "two-tiered" approach the burden rests with the party contesting the government's classification to show that it lacks a rational relationship to a legitimate state purpose.[7] An exception arises when the classification involves "suspect"[8] criteria or impinges upon "fundamental" rights.[9] In these situations, the state's action is subject to strict judicial scrutiny,[10] and the burden is on the state to show that a compelling state interest is served by the classification.

In applying the less stringent test to the abbreviated record

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5. *Id.*

6. *Id.* at 832-33.

7. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, *rehearing denied,* 411 U.S. 959 (1973).

8. The "suspect" class is one characterized as being "saddled with such disabilities, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972) (illegitimacy); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); Loving v. Virginia, 388 U.S. 1 (1967) (race). *Cf.* Craig v. Boren, 429 U.S. 190 (1976) (sex).

9. Rights regarded as "fundamental" are those expressly guaranteed or clearly implied by the federal constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

10. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

before it, the Utah court still found that the state had failed to show a rational relationship between the use of age as a criterion for admission and the state's apparent objective—optimizing the allocation of a limited resource in order to maximize the benefits to the state.[11] The court declined to apply the strict scrutiny test by following the United States Supreme Court's holding that age is not an inherently suspect classification,[12] and that education is not a fundamental right.[13]

Challenges to classifications based on age are rare in Utah.[14] The issue of equal protection of the law, however, has been confronted frequently. The standard of review expressed in *State v. Mason,*[15] and followed by the Utah court in subsequent cases, required only "*some* basis for the differentiation between classes . . . [and that] the differentiation [bear] a *reasonable relation* to the purposes to be accomplished by the act."[16] For example, in *Slater v. Salt Lake City,*[17] the court upheld a statute which, for the purpose of keeping the sidewalks uncongested, prohibited the sale of magazine subscriptions in the business district but exempted the sale of newspapers and articles for charities. The "reasonable relation" relied on by the court in *Slater* was, at best, minimal. The case is typical of the court's traditionally deferential treatment of state actions.[18]

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11. Brief for Appellee, Purdie v. University of Utah, 584 P.2d 831 (Utah 1978).

12. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

13. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). *Contra,* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1421, 96 Cal. Rptr. 601 (1971).

14. The only case tried prior to *Purdie* was Coleman v. Department of Employment Security, 29 Utah 2d 326, 409 P.2d 355 (1973), in which the court upheld, in a very brief opinion, a section of the Unemployment Compensation Act (UTAH CODE ANN. § 35-4-3 (1974)) which required that unemployment compensation be reduced by 50% on any amount received by the individual under a retirement plan to which both employer and employee contributed. Plaintiff alleged that this unconstitutionally discriminated against retirement-age citizens.

15. 97 Utah 501, 78 P.2d 920 (1938). In *Mason,* the court upheld a statute protecting local farmers. The statute required a license or payment in cash to purchase farm products for resale but exempted commission merchants. Aimed at those who obtain possession or control of the products for resale, the statute protects farmers from having a season's labor hauled away by those with bad credit.

16. *Id.* at 507, 78 P.2d at 923 (emphasis added).

17. 115 Utah 476, 206 P.2d 153 (1949).

18. *See, e.g.,* Bryson v. Utah State Retirement Office, 573 P.2d 1280 (Utah 1978) (for purpose of discouraging termination of employment by firemen and police officers, statute provided for only 80% refund of money contributed to retirement system if they quit before retirement—other government employees received 100%); Kohler v. Industrial Comm'n, 555 P.2d 293 (Utah 1976) (for purpose of encouraging the beneficence of workmen's compensation, statute required a widow's award reduced to a one-third lump sum on remarriage, but would continue to pay a minor daughter who marries); Howe v. Tax Comm'n, 10 Utah 2d 362, 353 P.2d 468 (1960) (for purpose of raising revenue, tax was levied on motels, hotels, and lodgings for less than 30 days, but not on apartments or rooming houses); Davis v. Ogden

Based on the court's application of the "reasonable relation" standard expressed in *State v. Mason*[19] and subsequent decisions,[20] it could have accepted, with clear conscience, the state's age-based classification. By reversing the lower court in *Purdie,* the Utah Supreme Court has adopted a more exacting standard of review.

The standard of review in *Purdie* is similar to that employed by the United States Supreme Court in *Massachusetts Board of Retirement v. Murgia,*[21] which dealt with a statute setting the mandatory retirement of all uniformed state troopers at age fifty. In its analysis, the United States Supreme Court relied on the "rational basis" test, which it characterized as employing "a relatively relaxed standard."[22] In spite of this language, the Court looked beyond "mere rationality" and undertook a much more sophisticated inquiry. Focusing upon the character of the classification in question, the relative importance of the benefits lost by individuals in the class discriminated against, and the state interests asserted in support of the classification, the Court upheld the constitutionality of the statute.

Although both *Murgia* and *Purdie* deal with age discrimination, the holding in *Murgia* is not controlling. The medically proven fact that physical ability decreases as one's age increases made it easy for the Court to find a rational relationship between the classification and the state's objective of protecting the public.[23] Conversely, the state of Utah may be unable to demonstrate that age is a rational basis for determining which of its citizens should receive the benefits of higher education. *Purdie* is akin to *Murgia* in that the criteria to be established on remand[24] suggest a depth of analysis for finding a rational basis that is more stringent than previously applied in Utah cases. It is important to focus on the character of those factors, because it is clear that they deal with the necessity of weighing very specific, data-like evidence. These criteria indicate that the Utah court may reach a different decision in an age discrimination case where the empirical evidence falls below a minimum threshold and thus fails to demonstrate a rational basis for the classification.

Purdie signals a new direction for the Utah Supreme Court in

City, 117 Utah 315, 215 P.2d 616 (1959) (ordinance for purpose of raising local revenue required graduated license fee based on gross receipts from attorneys with own practice within corporate city limits, but exempted those working for others, for firms, or for corporations).

19. 94 Utah 501, 78 P.2d 920 (1938).
20. *See* cases cited in note 18 *supra.*
21. 427 U.S. 307 (1976).
22. *Id.* at 314.
23. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 n.7 (1976).
24. See text accompanying note 6 *supra.*

the area of equal protection. The interest in freedom from discrimination on the basis of age[25] and the interest in the availability of higher education to qualified applicants are of sufficient importance that the court has fashioned a more exacting standard of review. Although it does not apply the strict judicial scrutiny reserved for suspect classifications or fundamental interests, the court does demand more determinate evidence from the state before it will find a rational basis for the discriminatory practice. This suggests that the reasonable relationship approved in past Utah cases would not be sufficient under the more demanding standard imposed in *Purdie.*

V. Criminal Law and Procedure

A. *Appeal of Juvenile Court Certification Orders*

Utah's juvenile courts have been granted the power to certify that a person fourteen years of age or older charged with committing "an act which would constitute a felony if committed by an adult . . . [be] held for criminal proceedings in the district court . . . if it would be contrary to the best interest of the child or of the public to retain jurisdiction . . . ."[1] While nearly every state has a similar statute,[2] the courts are sharply divided on the issue of whether a juvenile has an immediate right to appeal a certification order.[3] In *State ex rel. Atcheson,*[4] a case of first impression, a div-

25. In 1975, the legislature inserted "age" among the grounds for discriminatory employment practices. Utah Code Ann. § 34-35-6(a) (Supp. 1977).

1. Utah Code Ann. § 78-3a-25 (1977).

2. Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of Justice, and a Proposal for the Reform of Kentucky Law,* 62 Ky. L.J. 122, 126 n.6 (1973).

3. Decisions holding that certification orders are final and appealable as a matter of right include: P.H. v. State, 504 P.2d 837 (Alaska 1972); *In re* Maricopa County Juvenile Action No. J-73355, 110 Ariz. 207, 516 P.2d 580 (1973); J.T.M. v. State, 142 Ga. App. 635, 236 S.E.2d 764 (1977); State v. Harwood, 98 Idaho 793, 572 P.2d 1228 (1977); Templeton v. State, 202 Kan. 89, 447 P.2d 158 (1968); *In re* Welfare of I.Q.S., 244 N.W.2d 30 (Minn. 1976); State v. Evangelista, 134 N.J. Super. 64, 338 A.2d 224 (Super. Ct. Law Div. 1975); *In re* Doe, 86 N.M. 37, 519 P.2d 133 (1974); State *ex rel.* Juvenile Dep't v. Johnson, 11 Or. App. 313, 501 P.2d 1011 (1972); *In re* Houston, 221 Tenn. 528, 428 S.W.2d 303 (1968); D.H. v. State, 76 Wis. 2d 286, 251 N.W.2d 196 (1977).

Decisions holding that certification orders are not appealable include: D.H. v. People, 561 P.2d 5 (Colo. 1977); *In re* Clay, 246 N.W.2d 263 (Iowa 1976); *In re* Trader, 272 Md. 364, 325 A.2d 398 (1974); *In re* Watkins, 324 So. 2d 232 (Miss. 1975); *In re* D.R., 515 S.W.2d 438 (Mo. 1974); *In re* Becker, 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974); Commonwealth v. Croft, 445 Pa. 579, 285 A.2d 118 (1971).

Decisions holding that certification orders are not appealable as a matter of right, but will be heard by extraordinary writ include: People v. Chi Ko Wong, 18 Cal. 3d 698, 557 P.2d 976, 135 Cal. Rptr. 392 (1976); State v. Everfield, 342 So. 2d 648 (La. 1977); People *ex rel.* L.V.A., 248 N.W.2d 864 (S.D. 1976).

ided Utah Supreme Court[5] declared that such orders are directly appealable.[6]

In *Atcheson,* the defendant was charged with second degree murder[7] and aggravated robbery.[8] Since he was seventeen years of age when both of the alleged offenses were committed, and both offenses would be felonies if committed by an adult, the defendant was a proper candidate for certification.[9] The Salt Lake County Attorney's motion for certification was granted by juvenile court and the defendant appealed.

Noting that the immediate right to appeal the certification order was a threshold issue,[10] the court recognized that the right to appeal juvenile court orders to the supreme court[11] was limited to appeals from final orders.[12] Since the "various legislative and judicial protections that have been developed for juveniles are effectively and finally foreclosed by a certification order,"[13] the court determined that such orders are final and, therefore, appealable. The decision supports the objectives of Utah's juvenile court system:

> It is the purpose of this act to secure for each child coming before the juvenile court such care, guidance, and control, preferably in his own home, as will serve his welfare and the best interests of the state; to preserve and strengthen family ties whenever possible; to secure for any child who is removed from his home the care, guidance, and discipline required to assist him to develop into a responsible citizen, to improve the conditions and home environment responsible for his delinquency; and, at the same time, to protect the community and its individual citizens against juvenile violence and juvenile lawbreaking. To this end this act shall be liberally construed.[14]

By reducing the chances that a faulty certification order will go undetected, the decision assures that these goals will more certainly be met.

Similar to Utah, the majority of states that have decided the

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4. 575 P.2d 181 (Utah 1978).

5. Justices Maughan and Wilkins concurred in the decision of Justice Hall. Chief Justice Ellett joined in Justice Crockett's opinion concurring in the result but dissenting on the appealability issue.

6. 575 P.2d at 183.

7. UTAH CODE ANN. § 76-5-203(1) (1977).

8. *Id.* § 76-6-302(1)(a) (1977).

9. *Id.* § 78-3a-25 (1977).

10. 575 P.2d at 182.

11. UTAH CODE ANN. § 78-3a-51 (1977).

12. 575 P.2d at 182, *citing In re* Persinger, 19 Utah 2d 186, 429 P.2d 37 (1967).

13. 575 P.2d at 183.

14. UTAH CODE ANN. § 78-3a-1 (1977).

issue of the immediate right to appeal certification orders have held that such orders are final and appealable.[15] The United States Supreme Court has stated that juvenile certification must "measure up the essentials of due process and fair treatment . . . ."[16] *Atcheson* notifies juvenile courts that certification orders will be subject to immediate scrutiny. Such impending appellate review, previously unknown to judges deciding certification questions, will constrain them to provide all of the consideration and process due a juvenile defendant. Abuse of discretion will not survive the careful scrutiny applied by a court that intends to promote the statutory purposes of the juvenile system.

Prior to *Atcheson,* certification orders were apparently only appealable after a juvenile defendant was found guilty of a felony in adult criminal court.[17] Immediate review of certification will not only permit the defendant to request juvenile process without the stigma of a felony conviction, but will do so without the time delay of a full scale criminal trial. Eliminating such delay economizes the judicial process and permits the rehabilitative treatment of youths still young enough to benefit from the juvenile reform system.

In dissent, Justice Crockett argued that certification "is but the transfer of the case from one court to another" and that holding such orders to be appealable would "obstruct and delay the process of justice" and place "unnecessary burdens on this court."[18] In light of the judicial economy achieved when a needless criminal trial is avoided by prior detection of a certification order error, and the just retention of a juvenile within the system that can rehabilitate him, the dissent's arguments are unconvincing. The majority supported its recognition of the finality of a certification order by construing the statute as "terminating" juvenile court authority;[19] the dissent failed to analyze the statute.

Atcheson's impact on certification proceedings in Utah's juvenile courts should be positive. More importantly, by greatly reducing the possibility of incorrect certification, the decision will keep the more rehabilitative juveniles within the system designed for them.

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15. See cases cited note 3 *supra.*

16. Kent v. United States, 383 U.S. 541, 562 (1966).

17. *See generally* Summers v. State, 248 Ind. 551, 230 N.E.2d 320 (1967); Note, *Review of Improper Juvenile Transfer Hearings,* 60 VA. L. REV. 818, 836 (1974).

18. 575 P.2d at 184 (Crockett, J., dissenting).

19. *Id.* at 182, 183.

B. Killing of a Fetus not Proscribed by Automobile Homicide Statute

In *State v. Larsen,*[1] the Utah Supreme Court unanimously reversed an automobile homicide[2] conviction stemming from the death of a fetus.[3] Death resulted from injuries sustained by the mother, a passenger in the car with which the defendant collided.[4] The court found that neither the statutory definition of "person"[5] nor the statutory use of "another" included a fetus. Thus, the killing of a fetus was not proscribed by the Utah homicide statutes.[6]

At common law an infant could not be the subject of homicide unless first born alive.[7] Utah, however, has abolished common law crimes.[8] It was, therefore, incumbent upon the court to determine the breadth of the Utah Criminal Code's use of "person."[9] In the absence of a clear legislative pronouncement that "person" includes a fetus, the court refused to join what the prosecution called a "legal trend" to recognize the killing of a fetus as homicide.[10] The court impliedly rejected the contention that legislative concern for fetal life, as voiced in Utah's criminal abortion statutes,[11] evidences legislative intent to protect a fetus under the homicide statutes.[12] Several other state courts have also refused to expand the coverage of their homicide statutes in the absence of legislative action.[13]

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1. 578 P.2d 1280 (Utah 1978).

2. UTAH CODE ANN. § 76-5-207 (Supp. 1977) provides: "Criminal homicide constitutes automobile homicide if the actor, while under the influene of intoxicating liquor, a controlled substance, or any drug, . . . causes the death of *another* by operating a motor vehicle in a negligent manner." (emphasis added).

3. The mother had been pregnant for about 26 weeks. The fetus weighed approximately one and one-half pounds. A medical expert testified that a fetus of such size has a 25% chance of survival outside of the womb. State v. Larsen, 578 P.2d 1280, 1281 (Utah 1978).

4. *Id.* at 1281 n.2.

5. UTAH CODE ANN. § 76-1-601(5) (Supp. 1977) defines "person" as "an individual, public or private corporation, government, partnership, or unincorporated associaton."

6. The Code does not define "another," and it was, therefore, necessary for the court to interpret the Code definition of "person." 578 P.2d at 1282. *Accord,* State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971).

7. Keeler v. Superior Court, 2 Cal. 3d 619, 625-26, 470 P.2d 617, 620, 87 Cal. Rptr. 481, 484 (1970). *See also* Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines,* 52 MARQ. L. REV. 105 (1968).

8. UTAH CODE ANN. § 76-1-105 (Supp. 1977).

9. *Id.,* § 76-1-601(5) (Supp. 1977). *See* note 6 *supra* and accompanying text.

10. 578 P.2d at 1282. *See* Brief for Respondent at 11-19, State v. Larsen, 578 P.2d 1280 (Utah 1978).

11. UTAH CODE ANN. §§ 76-7-301 to -314 (Supp. 1977).

12. *See* Brief for Respondent at 8-10, State v. Larsen, 578 P.2d 1280 (Utah 1978).

13. *Compare* Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); State v. Gyles, 313 So. 2d 799 (La. 1977); *and* State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971), *with* People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 820 (1978). Earlier English and American case law is collected in Meldman, *supra* note 7.

The *Larsen* decision calls attention to the absence of a feticide statute in Utah, and poses the question of its necessity. Although it is doubtful that Larsen would be convicted under feticide statutes currently in force elsewhere, it is nonetheless important to examine the constitutional limitations upon and alternative approaches to legislation in this area. As this issue goes to print, the Utah Legislature is considering a feticide statute that incorporates many of the suggestions made below.

The decision of the United States Supreme Court in *Roe v. Wade,*[14] an abortion case, indicates that viability of the fetus may be a necessary prerequisite to the constitutional application of any feticide statute. The Court determined that "state regulation protective of fetal life" is justified at the point the fetus becomes viable "because the fetus presumably has the capability of meaningful life outside the mother's womb."[15] By implication, a non-viable fetus possesses no capability for independent existence and has yet to attain the legal status of independent human life. Feticide statutes in California[16] and Michigan[17] have survived constitutional attacks[18] because the courts have construed them in terms of viability. Therefore, in at least two states, as a matter of constitutional law, the destruction of a non-viable fetus is not the taking of a human life and does not constitute homicide.[19] The Supreme Court has stated that viability is a medical judgment, implying that its determination is properly made by the trier of fact.[20]

Present feticide statutes fall into three categories. The first type focuses on the mens rea of the actor in relation to the fetus: "Murder is the unlawful killing of . . . a fetus, with malice aforethought."[21] The mens rea requirements of such statutes limit feticide crimes to murder. Offenses arise, however, that do not involve the willful,

14. 410 U.S. 113 (1973).

15. *Id.* at 164.

16. CAL. PENAL CODE § 187 (West Supp. 1978).

17. MICH. COMP. LAWS ANN. § 750.322 (MICH. STAT. ANN. § 28.544 (Callaghan 1974)).

18. People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976); Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973).

19. Although the courts recognize that the time of viability cannot be fixed with exactness, People v. Smith, 129 Cal. Rptr. 498, 503 (1976); Larkin v. Cahalan 208 N.W.2d 176, 180 (Mich. 1973), they acknowledge certain indicators that may demonstrate viability. They include: fetal age of at least 24 weeks, People v. Smith, 129 Cal. Rptr. at 503; N.Y. PENAL LAW § 125.00 (McKinney 1975) (conclusively presumes viability of the fetus after it has been carried 24 weeks); fetal weight of at least 600 grams, People v. Smith, 129 Cal. Rptr. at 503; electronically measurable brain waves, Larkin v. Cahalan, 208 N.W.2d at 180; C. SAGAN, THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE 204-09 (1977); and the attainment of such form and development of organs as to be normally capable of living outside the uterus by itself or with the aid of life support systems generally available in the community. *See* Larkin v. Cahalan, 208 N.W.2d at 180.

20. Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1975).

21. CAL. PENAL CODE § 187 (West Supp. 1978).

premeditated killing of a fetus, and yet are sufficiently objectionable to invite prosecution of the offender. If the mens rea of murder cannot be proven, prosecution of these offenses is impossible under such statutes. In addition, calling feticide murder may invoke the death penalty.[22] However repugnant such killing of a fetus may be, the speculative nature of the victim's pre-birth life suggests that capital punishment may be excessive.[23] Moreover, enactment of such a statute would add little to the coverage of Utah's criminal code because a willful attack upon a pregnant woman, coupled with an intent to destroy the fetus is already punishable under Utah's criminal abortion law.[24]

The second category of feticide statutes also requires a specific intent to kill, but differs from the first category in that the actor's murderous intent may be directed either at the fetus *or* its mother.[25] By reducing the punishment of feticide to manslaughter, such a statute overcomes only one of the objections raised earlier: it avoids the arguably excessive application of the death penalty.[26]

The third category of statute is preferable.[27] As defined therein, the elements of feticide, which is punished as manslaughter, are the actor's knowledge of the woman's pregnancy[28] and his subsequent willful assault on that woman.[29] The actor need harbor no intent to kill the woman, or to kill or harm the fetus. Such a statute, if adopted by Utah, would have the dual advantage of a nonexcessive yet adequate punishment for feticide and would permit convictions for the offense under a wider array of mens rea possibilities. Furthermore, since this statute allows prosecution for the intentional killing of a fetus, any need to prosecute a feticide under the ambiguous

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22. *See* UTAH CODE ANN. § 76-3-206 (Supp. 1977).

23. *See Utah Prosecutors to Study Status of Fetus*, Salt Lake Tribune, May 1, 1978, § B, at 1, col. 3, *quoting* Ronald N. Boyce, Professor of Law, University of Utah College of Law.

24. UTAH CODE ANN. §§ 76-7-301 to -314 (Supp. 1977).

25. *E.g.*, FLA. STAT. ANN. § 782.09 (West 1976).

26. *See* UTAH CODE ANN. §§ 76-5-203, -205 (Supp. 1977).

27. For example, WYO. STAT. ANN. § 6-71 (Supp. 1975) provides: "Whoever unlawfully kills an unborn child, or causes a miscarriage, abortion or premature expulsion of a fetus, by any assault or assault and battery willfully committed upon a pregnant woman, knowing her condition, is guilty of a felony . . . ."

28. If a woman is at least 24 weeks pregnant, so that the fetus is arguably viable, the fact that she is large with child should create a presumption that her attacker knows she is pregnant. *See* cases and authorities in note 19 *supra;* 5B LAWYER'S MEDICAL CYCLOPEDIA § 37.2b (rev. ed. 1972).

29. In Utah, assault is a narrow, technical crime. UTAH CODE ANN. §§ 76-5-102 to -104 (Supp. 1977). One commentator proposes that in lieu of the words "assault or assault and battery willfully committed," the words "willful and/or reckless application of force upon a pregnant woman" be substituted in the Wyoming statute cited in note 27 *supra. Utah Prosecutors to Study Status of Fetus, supra* note 23.

provisions of Utah's criminal abortion statute would be eliminated.[30]

It is apparent from the mens rea requirements of each of these alternative statutory approaches that Larsen would not be guilty of feticide under any of them. The death of the fetus in this case, however, was a fortuity; Larsen could not have known that it would result. Larsen's conduct was nonetheless reprehensible, and legal sanctions exist for his prosecution.[31]

The supreme court's holding in *Larsen* reveals a gap in the coverage of Utah's homicide statutes. The case will be significant if it motivates the legislature to enact a statute similar to those in the third category that provide further protection to the fetus and are consistent with constitutional limitations.

C. *Sixth Amendment Right to Trial by Jury Composed of Representative Cross-Section of the Community*

In *State v. Pierren,*[1] the Utah Supreme Court upheld the constitutionality of a Utah statute requiring jurors to be over twenty-one years old.[2] A jury found Pierren guilty of distributing pornographic material.[3] On appeal, Pierren asserted, *inter alia,*[4] that the exclusion of young people ages eighteen to twenty years from the jury defeated his sixth amendment right to trial by jury.[5] Specifically, he contended that the exclusion of this group imposed upon him "a jury which was not a representative cross-section of the community."[6] The court rejected the contention that eighteen to twenty year olds were a cognizable group, whose exclusion would deprive Pierren of the guarantee of the sixth amendment. The court's test and analysis, however, failed to conform with the constitutional mandates of the sixth amendment established by a current United States Supreme Court decision.

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30. The criminal abortion statute's mens rea requirement of "an intent other than to produce a live birth," is inherently ambiguous. UTAH CODE ANN. § 76-7-301(1) (Supp. 1977).

31. UTAH CODE ANN. § 41-6-44 (Supp. 1977) (driving under the influence of alcohol).

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1. 583 P.2d 69 (Utah 1978).

2. UTAH CODE ANN. § 78-46-8(1) (1977).

3. Three other individual defendants and Eagle Book, Inc. were also found guilty on the same charge. 583 P.2d at 70.

4. Pierren also claimed that the statute under which he was convicted was unconstitutional, that closing remarks of defense counsel admitted guilt and deprived him of his right to effective counsel, and that the trial court erred in failing to define the geographical limitation of community standards. The court rejected all claims. 583 P.2d at 70.

5. U.S. CONST. amend. VI, § 1.

6. Brief for Appellants at 20, State v. Pierren, 583 P.2d 69 (Utah 1978).

In *Taylor v. Louisiana*,[7] the United States Supreme Court considered the constitutional mandate of the sixth amendment. For the first time, the Court held that the presence of a fair-cross-section of the community on jury lists is essential to the sixth amendment's guarantee of a jury trial.[8] Taylor was convicted of aggravated robbery by an all-male jury. He assailed the Louisiana constitutional and statutory provisions that required women to manifest in writing their desire for jury service.[9] Taylor insisted that by requiring such a declaration the provisions excluded virtually all women as a class, which defeated his sixth amendment right.

The *Taylor* Court applied a two-step analysis. First, women constituted a group "sufficiently numerous and distinct" to be an identifiable class of society. Second, exclusion of this class violated the fair-cross-section requirement.[10] As to the question of whether any group exclusion would deny appellant his rights to a fair-cross-section of the community, the Court rejected an actual impact test urged by the dissent[11] and, instead, embraced a potential impact test.[12] By focusing on the potential impact test, the Court acknowledged that the excluded group need not act or vote as a class for appellant to have his fair-cross-section rights violated. Rather than attempting to discern whether the class acted or tended to act as a cohesive group, the Court looked to the subtle and elusive effect of women on the composite perception of the community. To the Court, the test was whether a community made up exclusively of one sex would be different from a community composed of both.[13] After remarking that the two sexes are not fungible,[14] the Court referred to the "subtle interplay of influence [of] one on the other," calling it one of the "imponderables."[15]

Pierren raised the constitutionality of the systematic exclusion

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7. 419 U.S. 522 (1975).

8. *Id.* at 530.

9. *Id.* at 523-24.

10. We are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service. This conclusion necessarily entails the judgment that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied.

Id. at 531.

11. *Id.* at 538-39 (Rehnquist, J., dissenting).

12. The Court adopted not a factual, case by case, actual impact test, but the more abstract potential impact test. *Id.* at 532.

13. *Id.*

14. The Court stated that a "flavor, a distinct quality is lost by the exclusion of women." *Id.* at 532.

15. *Id.*

of eighteen to twenty year olds from juries in Utah. The *Pierren* court concluded that eighteen to twenty year olds were not a cognizable class "possess[ing] unique qualities, ideas, attributes and the like that cannot be represented by other segments of society."[16] The court relied on the determination of *United States v. Olson,*[17] a case prior to *Taylor,* where the eighth circuit held that since the appellant failed to show the difference in attitudes, a "difference in viewpoint," or a difference in "decisional outlook," the exclusion of the eighteen to twenty year old age group was not constitutionally defective.[18] As its test, the *Pierren* court adopted three criteria: "(1) the presence of some quality or attribute which defines and limits the group; (2) a cohesiveness of attitudes or ideas or experience which distinguishes the group from the general social milieu; and (3) a community of interest which may not be represented by other segments of society."[19] The *Pierren* court found these criteria not met with respect to the exclusion of eighteen to twenty year olds and, thus, appellants fair-cross-section rights were not violated.

These rigid criteria adopted by the *Pierren* court are subject to attack on their face in light of the *Taylor* Court's two-step approach. In adopting the three criteria, the *Pierren* court failed to distinguish which criteria go to the issue of finding an identifiable group and which criteria go to the issue of whether the exclusion of this group, once identified, constitutes an infringement of appellant's fair-cross-section rights. The first criterion is defensible as focusing on the first step of the *Taylor* test, the existence of an identifiable group. The second criterion, which requires a cohesiveness of "attitudes or ideas or experience," goes further than a mere finding of a sufficiently numerous and distinct class. Indeed, it seems to relate to the second step of the *Taylor* test, whether the exclusion of the group violates the fair-cross-section requirement. Moreover, this criterion seems to require that for an excluded class to violate appellant's fair-cross-section rights, the excluded group must act as a class. Yet *Taylor,* in focusing upon a potential impact test, expressly recognized that "it is not enough to say that women when sitting as jurors neither act nor tend to act as a class."[20]

The third criterion of community of interest, by contrast, probably meets the *Taylor* standard, since the *Taylor* Court stated that "[t]he truth is that the two sexes are not fungible; a community

16. 583 P.2d at 72.
17. 473 F.2d 686 (8th Cir. 1973).
18. *Id.* at 688.
19. 583 P.2d at 72, *quoting* United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976).
20. 419 U.S. at 532.

made up exclusively of one is different from a community composed of both."[21] Thus, it seems that the second of the *Pierren* court's three criteria fails to meet the potential impact test of *Taylor* when determining if the identified class, if excluded, would violate appellant's fair-cross-section rights.

The court in following pre-*Taylor* case law[22] ignored the potential impact of exclusion of young persons on Pierren's fair-cross-section rights. A finding in *Pierren* that the materials were pornographic required application by the jury of community standards.[23] Inclusion of a person eighteen to twenty years old, with arguably less conservative views than his elders, may have had a subtle yet significant impact on this determination. Moreover, even if the inclusion of such a group would not have affected the outcome in the *Pierren* case, this does not mean appellant's fair-cross-section rights were not violated. In *Taylor,* the Court acknowledged that the subtle effects of women sitting on juries need not change the outcome of that particular case for the appellant to claim violation of his fair-cross-section rights.[24] The *Taylor* Court discussed at length the subtle interplay of women in a jury. Such should have also been the task of the *Pierren* court before dismissing Pierren's claim. Failure to employ the potential impact test of *Taylor* leaves the *Pierren* court's analysis subject to constitutional challenge.

The right to trial by jury is a cherished right and safeguard of American citizens. Since systematic exclusion of an identifiable group renders a jury pool unconstitutional, courts should be very thorough in weighing the delicate nuance of potential rather than actual impact. In the final determination, exclusion of eighteen to twenty year olds from Pierren's jury may not have violated the fair-cross-section requirement, but *State v. Pierren*[25] failed to analyze perceptively Pierren's right to a jury trial and thus casts doubt on the result.

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21. *Id.*

22. *See* United States v. Test, 550 F.2d 577 (10th Cir. 1976); United States v. Olson, 473 F.2d 686, 688 (8th Cir. 1973); United States v. McVean, 436 F.2d 1120 (5th Cir. 1971); People v. Hoiland, 22 Cal. App. 3d 530, 99 Cal. Rptr. 523, 525-27 (1971); State v. Stewart, 120 N.J. Super. 509, 295 A.2d 202 (Super. Ct. App. Div. 1972); State v. Spivey, 114 R.I. 43, 328 A.2d 414 (1974); State v. Boggs, 80 Wash. 2d 427, 495 P.2d 321 (1972).

23. Miller v. California, 413 U.S. 15, 37 (1973).

24. 419 U.S. at 532.

25. 583 P.2d 69 (Utah 1978).

D. Waiver of Privilege Against Self-Incrimination

In *State v. White,*[1] the Utah Supreme Court held that a prosecutor may properly comment to the jury on the failure of a defendant, after taking the stand, to testify to material issues in the case on grounds of the privilege against self-incrimination.[2] At the trial, the accused took the stand solely to state his name, address, and occupation. The trial court confined cross-examination to these preliminary matters. During his closing argument before the jury, however, the prosecutor commented on the defendant's failure to testify to any of the material issues in the trial.

On appeal the defendant argued that the prosecution's remarks were prejudicial. Although the basis of the defendant's argument is not clear from the opinion or the briefs, it finds support in *Griffin v. California*[3] where the United States Supreme Court held that the prosecution cannot comment on the defendant's reliance on the constitutional privilege against self-incrimination. If White had not waived this privilege, the prosecutor's comment was clearly improper.[4] Therefore, the sole issue the *White* court was called upon to determine was to what extent the defendant had waived his constitutional privilege.[5] The court held for the state reasoning that simply by taking the stand White had waived his claim to the privilege, even though he had not testified to the merits of the case. Although the United States Supreme Court has not expressly addressed the question of waiver posed by this case, the *White* decision seems to run contrary to the policies supporting the privilege as enunciated by the Court.

Significant policy considerations underlie the granting of the fifth amendment privilege. Historically the privilege served as a protection against the use of torture for extracting confessions.[6] Today, the privilege serves as a protection for the innocent by forcing the prosecution to establish its case on more reliable evidence

1. 577 P.2d 552 (Utah 1978).

2. *Id.* at 555. U.S. CONST. amend. V. (explicitly applied to the states by Malloy v. Hogan, 378 U.S. 1 (1963)); UTAH CONST. art. I, § 12; UTAH CODE ANN. § 77-1-10 (1953).

3. 380 U.S. 609 (1965). *Griffin* invalidated a provision of the California Constitution that allowed the trial judge and the prosecutor to comment on the failure of a defendant to testify. The Court pointed out that comment on the accused's failure to testify penalized the defendant for exercising his fifth amendment privilege and violated the due process clause of the fourteenth amendment. *See also* UTAH R. EVID. 39.

4. *See* Griffin v. California, 380 U.S. 609, 615 (1965).

5. In some cases there may be a question as to whether the prosecutor's remarks were a comment on the failure to testify, but in *White* this issue was clear. *See Utah Supreme Court Survey—1977,* 1978 UTAH L. REV. 389, 433.

6. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 118, at 251 (2d ed. 1972).

than the self-incriminating admissions of the accused[7] and by allowing a defendant to abstain from testifying if his mannerisms and behavior might prejudice him before the trier of fact.[8] In addition, the privilege enhances the judicial process by removing a significant incentive for perjury,[9] encourages witnesses to testify who might otherwise fear that they could incriminate themselves,[10] and assures that even the guilty are treated in a manner consistent with basic respect for human dignity.[11]

When the defendant in a criminal prosecution takes the stand, the question of waiver of the privilege arises. Briefly stated, waiver is necessary in order to prevent a defendant from prejudicing the prosecution's case by testifying in his own behalf and then refusing to submit his testimony to scrutiny regarding its truth.[12] The United States Supreme Court noted in *Brown v. United States*[13] that when a defendant elects to testify, he must submit to cross-examination on the issues he has put in dispute. Otherwise, the privilege would be not only a safeguard for the defendant, but a positive invitation for him to mutilate the truth as well.[14]

While the rule is well established that a defendant waives his claim to the protection of the privilege when he testifies, the exact scope of the waiver has not yet been determined. One line of authority espouses the view that the Utah court seems to have adopted in *White,* namely, that the accused waives his privilege upon taking the stand whether or not he testifies regarding the merits of the case.[15] This is distinctly a minority view, and it appears that only Florida and Missouri have ever followed it with any degree of regularity. This rule has the virtue of being simple to apply, but it is not supported by the policies discussed above. In order to determine the proper scope of waiver, the policies supporting the privilege must be balanced against the policies favoring waiver. The policy that a

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7. *Id.* at 252.

8. Wilson v. United States, 149 U.S. 60, 66 (1893). One who is under the strain of a trial might not react well to the pressures of interrogation and could create an unfavorable impression despite the truthfulness of his testimony. *See* Clapp, *Privilege Against Self-Incrimination,* 10 RUTGERS L. REV. 541, 548 (1956).

9. C. MCCORMICK, *supra* note 6, § 118 at 252.

10. *Id.*

11. *Id. See* 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 442 (1883), *cited in* Clapp, *supra* note 8, at 548.

12. Brown v. United States, 356 U.S. 148, 155-56 (1958); Grantello v. United States, 3 F.2d 117, 121 (8th Cir. 1924); *see* State v. Mattivi, 39 Utah 334, 341, 117 P. 31, 34 (1911).

13. 356 U.S. 148 (1958).

14. *Id.* at 155-56.

15. *See* Odom v. State, 109 So.2d 163, 165-66 (Fla. 1959); State v. Hood, 313 S.W.2d 661, 664 (Mo. 1958).

defendant should not be allowed to employ the privilege to prejudice the prosecution's case does not support a wholesale waiver of the privilege whenever a defendant takes the stand.[16] For example, when the defendant's testimony goes only to preliminary matters such as his name and address, the prosecution's case has not been prejudiced, and there is no reason to find a waiver of the privilege.[17]

Furthermore, a rule of wholesale waiver may be prejudicial to the defendant's case. Allowing comment on matters the defendant has not addressed seems to assume that anyone who invokes the privilege is merely using it as a screen to hide his guilt. In reality, however, there may be many reasons why a defendant would want to limit his testimony. For example, he may fear that his behavior on the stand will prejudice him before the trier of fact if he testifies about certain aspects of the case, even though he is innocent.[18] He may also fear the prosecution will attack his credibility by bringing out past convictions that would not otherwise be admissible.[19] In either of these situations, the prosecutor should not be allowed through comment to solemnize this silence into evidence against him.[20] In short, a rule that finds a wholesale waiver of the privilege whenever the defendant takes the stand will undoubtedly discourage an accused from offering any useful information at all, even with respect to matters which are purely preliminary or collateral.

A major line of authority adopts the view that an accused, when he testifies, becomes liable to cross-examination the same as any other witness and that the scope of the waiver is determined by the permissible scope of cross-examination.[21] This position has several advantages over the wholesale waiver rule. It preserves for the accused some of the protection afforded by the privilege by allowing him to determine the scope of his testimony. It also encourages the defendant to come forth and offer what evidence he has without confronting him with the "cruel trilemma of self-accusation, per-

16. *See* Grantello v. United States, 3 F.2d 117, 121 (8th Cir. 1924).

17. *Id.*; C. McCORMICK, *supra* note 6, at § 132.

18. *See* Wilson v. United States, 149 U.S. 60, 66 (1893).

19. *See* Smith v. United States, 358 F.2d 683, 684 (3d Cir. 1966).

20. *See* Griffin v. California, 380 U.S. 609, 614 (1965). Even if wholesale waiver upon taking the stand is recognized, the rules limiting cross-examination in the majority of jurisdictions will afford the necessary protection to the defendant in most instances. This is, however, not always the case. Indeed, the *White* decision makes it clear that the privilege may afford some protections not afforded by limitations on cross-examination.

21. Brown v. United States, 356 U.S. 148, 155-56 (1958); Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925); People v. Ing, 65 Cal. 2d 603, 422 P.2d 590, 594, 55 Cal. Rptr. 902, 906 (1967); People v. Eaton, 275 Cal. App. 2d 584, 80 Cal. Rptr. 192, 196 (1969); State v. Schroeder, 201 Kan. 811, 443 P.2d 284, 292 (1968); State v. Vance, 38 Utah 1, 33-34, 110 P. 434, 447 (1910); *see* State v. Shockley, 29 Utah 25, 48-49, 80 P. 865, 873 (1905).

jury, or contempt."[22] At the same time the interests of the prosecution are protected by allowing the prosecutor to test the accuracy and credibility of the defendant's testimony through a thorough cross-examination.

In 1910, after a thorough consideration of the matter, the Utah Supreme Court adopted this position in the case of *State v. Vance.*[23] *Vance* expressly stated that a defendant in a criminal proceeding does not waive all claim to the protection of the privilege upon taking the stand.[24] The considered resolution of the court was that the scope of cross-examination of an accused must be confined to the subject matter of his testimony on direct examination.[25] The court explained that this limitation on the scope of cross-examination was essential, since adopton of a broader rule would ignore the defendant's constitutional right against self-incrimination.[26] In *White,* the court has reversed this long standing rule without so much as an acknowledgement of the old position or an explanation of their decision to adopt a new one.

Inasmuch as the United States Supreme Court has never considered a case where the accused testified solely to preliminary or collateral matters, this area of constitutional law is still unclear. The Court has intimated, however, how it might hold if confronted with the question. In *Brown v. United States,* the Court noted in dicta that "the breadth of [the defendant's] waiver is determined by the scope of the relevant cross-examination."[27] This is the position which Utah adopted earlier in *Vance.* The Court's decisions in *Malloy v. Hogan*[28] and *Griffin v. California*[29] emphasized the importance that the Court places on the fifth amendment privilege. When faced with a decision on waiver, the Court is not likely to make a decision that will compromise this important right. It seems probable that the dicta in *Brown,* a position already supported by many jurisdictions, would be adopted by the Court.[30] *Malloy* makes

22. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). *See* C. McCormick, *supra* note 6, § 132, at 281 n.41.

23. 38 Utah 1, 110 P. 434 (1910).

24. *Id.* at 33-34, 110 P. at 445.

25. *Id.*; State v. Belwood, 27 Utah 2d 214, 216-17, 494 P.2d 519, 521 (1972) (cross-examination not allowed to exceed the scope of direct examination where accused testified solely to preliminary matters).

26. 38 Utah at 39, 110 P. at 447.

27. 356 U.S. 148, 154-55 (1958).

28. 378 U.S. 1 (1963). The Court noted that the fifth amendment privilege is the essential mainstay for assuring an American system of criminal prosecution that is accusatorial rather than inquisitorial. *Id.* at 7.

29. 380 U.S. 609 (1965). See text accompanying note 3 *supra.*

30. It should be noted that there are some problems with this position, since a few

it clear that this is an area of constitutional concern, and that all courts must look to federal standards and federal decisions when applying the privilege. It is important, therefore, that state courts, when ruling on the question, consider which position the Supreme Court would adopt.

The decision in *White* seems hasty and ill-considered. It could be the result of the parties having failed to bring the important issues to the full attention of the court. If the issue is clearly presented, litigated, and appealed in another case, the court may reevaluate its position. It should be noted that the opinion in *White* points out alternative grounds upon which the court could have reached its decision.[32] If the question of waiver is reconsidered, the court could use these points to distinguish *White*.

VI. Employment Discrimination

Proof of Violation

In *Beehive Medical Electronics, Inc. v. Industrial Commission of Utah,*[1] the Utah Supreme Court permitted an employee to establish a prima facie violation of the Utah Anti-Discriminatory Act[2] upon the mere showing that the employer maintained a pay differential between male and female employees engaged in similar work. This approach represents a significant shift in the proof requirements in Utah wage discrimination cases and brings Utah in line

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jurisdictions follow the wide open rule of cross-examination. Further, the scope of cross-examination in all jurisdictions is a matter for the sound discretion of the trial court. Thus, the protection afforded by the privilege might be restricted depending on the particular jurisdiction.

31. Malloy v. Hogan, 378 U.S. 1, 11 (1963).

32. 577 P.2d at 555.

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1. 583 P.2d 53 (Utah 1978). Chief Justice Ellett and Justice Crockett filed dissenting opinions.

2. Utah Code Ann. §§ 34-35-1 to -8 (1974 & Supp. 1977). The code states that it shall be a discriminatory or unfair practice:

> For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, because of race, color, sex, age, religion, ancestry or national origin. No applicant nor candidate for any job or position shall be deemed "otherwise qualified" unless he or she possesses the education, training, ability, moral character, integrity, disposition to work, adherance to reasonable rules and regulations, and other qualifications required by an employer for any particular job, job classification or position to be filled or created.
>
> As used in this chapter, "To discriminate in matters of compensation" means the payment of differing wages or salaries to employees having substantially equal experience, responsibilities, and competency for the particular job.

Id. § 34-35-6(1)(a) (Supp. 1977).

with other jurisdictions which have taken forceful steps to eradicate entrenched wage discrepancies between male and female employees.

Prior to *Beehive*, *Kopp v. Salt Lake City*[3] represented the court's only construction of the Utah Anti-Discriminatory Act. In *Kopp*, the trial court found Salt Lake City in violation of the Act upon a showing by the plaintiff, a female employed as a dispatcher for the police department, that she was paid a lower wage than male police officers doing similar work. The Utah Supreme Court reversed, noting that factors in addition to similarity of work, such as classification and seniority, are properly considered in determining whether an employer has discriminated solely on the basis of sex. The court held that the absence of such factors had not been shown.[4] Essentially, the court's holding placed the burden on the employee to show that a pay differential between male and female workers doing the same work was the result of discrimination solely on the basis of sex.

In *Beehive*, the female employee was nominally a "junior buyer" and was paid a lower wage than at least two other males who were designated "senior buyers."[5] The trial court found that the respective duties of the female employee and her male counterparts did not significantly differ or require disparate levels of skill. Consequently, the employer had discriminated against the complaining employee by utilizing fictitious job titles as a justification for paying her a lower wage.[6]

In contrast with *Kopp*, and notwithstanding the employer's assertions that there was no evidence that the employee's title or rate of pay were "related to her being a woman,"[7] the *Beehive* court permitted relief to the female employee upon her showing (1) that she was doing work comparable to that done by her male counterparts, and (2) that she was paid a lower wage. Thus, the court effectually placed the burden on the employer to justify the differential. The court's departure from *Kopp* is in accord with the practice in other jurisdictions,[8] particularly in the federal courts, where the Equal Pay Act of 1963[9] is applicable. In *Corning Glass Works v.*

3. 29 Utah 2d 170, 506 P.2d 809 (1973). *See generally* 1974 UTAH L. REV. 162.

4. 29 Utah 2d at 173, 506 P.2d at 811.

5. Brief of Appellant at 3-5, Beehive Medical Elec., Inc. v. Industrial Comm'n, 583 P.2d 53 (Utah 1978).

6. 583 P.2d at 56.

7. Brief of Appellant at 3-5, Beehive Medical Elec., Inc. v. Industrial Comm'n, 583 P.2d 53 (Utah 1978).

8. *E.g.*, Brown v. Wood, 575 P.2d 760 (Alaska 1978).

9. 29 U.S.C. § 206(d)(1) (1976). The Utah Supreme Court has said that the Equal Pay

Brennan,[10] the Supreme Court of the United States held that in a suit under the Equal Pay Act the injured party "must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' "[11] The court further stated that once the employee has carried the burden of showing that the employer is paying him a lower wage than employees of the opposite sex for equal work, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions."[12]

In *Beehive,* the Utah Supreme Court has made a major statement against discriminatory practices in employment and has indicated that a pay differential between employees of the opposite sex doing equal work will on its face be viewed with disfavor. The result should prove to have an economically equalizing effect on the ever-increasing population of working women.

VII. Family Law

Stepfather Visitation Rights

In *Gribble v. Gribble,*[1] the Utah Supreme Court decided for the first time that a stepfather may, in a divorce proceeding, receive visitation rights to a stepchild even though the child's natural mother objects. The stepfather and natural mother married when the child was two months old and remained married for approximately four years. During that time the child, though never formally adopted by the stepfather, resided exclusively with them never

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Act is "generally similar" to the Utah Anti-Discriminatory Act. Kopp v. Salt Lake City, 29 Utah 2d 170, 171 n.1, 506 P.2d 809, 809 n.1 (1973). The Equal Pay Act specifies that in order for the provisions thereof to be applicable, the work done by male and female employees must be "equal." The second circuit, in Shultz v. Wheaton Glass Co., 421 F.2d 249, 265 (2d Cir. 1970), has interpreted "equal" as meaning "substantially equal." In Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972), work done by male and female employees was held to be substantially equal even though the male employees did 16 tasks the female employees did not do.

10. 417 U.S. 188 (1974), *aff'g* Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).

11. *Id.* at 195.

12. *Id.* at 196. The exceptions in the Equal Pay Act that will justify a pay differential are those "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(i)-(iv) (1976). The Utah Act also contains exceptions under which an employer may justify a pay differential between employees of opposite sexes doing similar work. Utah Code Ann. § 34-35-6 (1974 & Supp. 1977).

1. 583 P.2d 64 (Utah 1978).

knowing his natural father. In the divorce proceedings, the trial court denied the stepfather a hearing to determine visitation rights and held as a matter of law that a stepparent is not entitled to such a hearing. The stepfather appealed.

The Utah Supreme Court, basing its holding on a statute adopted by the 1975 Utah Legislature,[2] reversed the lower court decision and remanded the case for a visitation rights hearing.[3] The pertinent part of the statute provides that "[v]isitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child."[4] The court read the statute to limit visitation rights to those mentioned therein, but also held that a stepparent could qualify as a "parent" if found to stand "in loco parentis" to the child.[5] To so stand, a stepparent must intend to assume the obligations of a natural parent in raising the child.[6] On remand the trial court was directed to determine, by hearing, if the stepfather stands in loco parentis to the child, and if so, whether it is in the child's best interest to grant visitation rights.[7]

While holding in appellant's favor, the Utah Supreme Court rejected his assertion that to consider what is best for the child the court should adopt the "psychological parent approach."[8] The proponents of this approach argue that, in the child's early years, the psychological ties that a child develops with parents and others are more important than biological ties.[9] Consequently, in child custody and visitation cases the court should focus on nothing other than the child's best interest, realizing that biological kinship is no more significant in the decision than psychological kinship. Such an approach would prevent the painful and potentially damaging sever-

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2. UTAH CODE ANN. § 30-3-5 (1976).

3. 583 P.2d at 68.

4. UTAH CODE ANN. § 30-3-5 (1976).

5. 583 P.2d at 68.

6. *Id.* at 66. *See* Fevig v. Fevig, 90 N.M. 51, 559 P.2d 839 (1977). In its fullest application, the doctrine places the surrogate parent in exactly the same position as a natural parent with all of the same rights and obligations. Sparks v. Hinckley, 78 Utah 502, 5 P.2d 570 (1931). *See generally* 67 C.J.S. *Parent & Child* §§ 71-77 (1950).

7. 583 P.2d at 68. The Utah court relied heavily on Spells v. Spells, 378 A.2d 879 (Pa. Super. Ct. 1977), for its reasoning. Although no statute was involved in *Spells*, the premises and conclusion were basically the same. The Pennsylvania court reasoned that the status of in loco parentis entitles a stepparent to the rights of a natural parent; therefore, since a natural parent has visitation rights, so does a stepparent who stands in loco parentis.

8. Brief for Appellant at 9-10, Gribble v. Gribble, 583 P.2d 64 (Utah 1978).

9. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). The authors propose a complex series of reforms for deciding parent-child cases, the proposition here being only one of them. For a criticism of some of these proposals, see Foster, Book Review, 12 WILLAMETTE L.J. 545 (1976) (BEYOND THE BEST INTERESTS OF THE CHILD, J. GOLDSTEIN, A. FREUD & A. SOLNIT).

ance of an affectionate child-adult relationship simply because biological ties do not exist.

The welfare of the child has long been the standard of decision in custody and visitation cases.[10] Even the *Gribble* court gave lip service to the standard, stating, "[i]n proceedings to determine custody and/or visitation, the welfare of a minor child is of paramount importance . . . ."[11] In the opinion, however, the court looked first to the status of the claimant and second to the interests of the child in deciding whether a visitation rights hearing was warranted.[12] Thus, strong emotional dependence, developed by association rather than blood, cannot be considered until blood relationship is established.

An alternative reading of the statute would preserve the legislative intent to pay primary attention to the welfare of the child. The term "other realtives" should be interpreted to mean any person who has a significant relationship with the child, biological or psychological.[14] Such a reading would produce the same result in *Gribble*, yet would also assure that the best interests of the child will be met in future cases.

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10. *See* Miller v. Hedrich, 158 Cal. App. 2d 281, 322 P.2d 231 (1958); *In re* Two Minor Children, 231 A.2d 475 (Del. 1967); Valencia v. Valencia, 46 Ill. App. 3d 741, 360 N.E.2d 1384 (1977); Molier v. Molier, 53 App. Div. 2d 996, 386 N.Y.S.2d 226 (1976); Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019 (1974); Lines v. Lines, 75 Wash. 2d 489, 451 P.2d 914 (1969).

11. 583 P.2d at 66. The opinion in *Gribble* constantly focuses on the issue from the standpoint of what the parents' rights are, rather than focusing on what is best for the child. Many courts have acknowledged that a parent has a natural right to visitation. *See, e.g.*, L.A.M. v. State, 547 P.2d 827 (Alaska 1976); *In re* Marriage of Delf, 19 Or. App. 439, 528 P.2d 96 (1974). But those same courts almost unanimously agree that a parent's rights are secondary to a child's rights. *See* Raymond v. Raymond, 165 Conn. 735, 345 A.2d 48 (1974); *In re* Two Minor Children, 231 A.2d 475 (Del. 1967); Huffman v. Huffman, 176 N.W.2d 859 (Iowa 1970). *But cf.* Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733 (1977)(arguing that too often the courts infringe on the constitutional rights of parents when making custody decisions).

12. The Utah Supreme Court is not the first court to state that the child's welfare is controlling and then decide the issue by looking to the parents' rights. "The problem, particularly in visitation cases, lies in the fact that courts confuse parental rights with children's rights . . . . And out of the parental battlefield where children are the ultimate casualties, the courts only pay lipservice to a child's welfare by parroting the 'best interest' doctrine." Henszey, *Visitation by a Non-Custodial Parent: What Is the "Best Interest" Doctrine?*, 5 J. FAM. L. 213, 226 (1976-1977). On remand, the *Gribble* court instructed the trial court to "determine whether the appellant stands in loco parentis to his stepchild and *if so*, whether it is in the child's best interest to grant the appellant a right of visitation . . . ." Gribble v. Gribble, 583 P.2d at 68 (emphasis added).

13. The court also indicated that it would be within the discretion of the trial court to condition the rights of visitation upon appellant's payment of child support, if he is found to be in loco parentis. Once again the court focuses on the parent and ignores the welfare of the child. Concerning the child's welfare the court says, in effect, if the child does not get the benefit of the stepfather's financial support, he does not get the benefit of his association either.

The Utah Supreme Court has, by this decision, demonstrated its willingness to protect parent-child relationships that are not biological. It falls short, however, of adopting an approach that assures that the welfare of the child will be the paramount concern. The reasoning of the New York Family Court in *Bennett v. Marrow*[15] argues in favor of reconsidering the narrowness of the *Gribble* decision:

> If our hopes for tomorrow are to be realized, there must soon come a time when we direct our efforts to rearing future generations of children free from the wreckage of shattered emotions brought on by custody determinations, judicial or otherwise, predicated on concepts other than what is best for the child. Obviously, in many if not most cases, the natural parent can give the love and care that the child requires. When this is not the case, then the one who the child preceives as the parent may well be the parent the court should recognize.[16]

VIII. GOVERNMENTAL IMMUNITY

Amendments to the Utah Governmental Immunity Act

The 1978 amendments to the Governmental Immunity Act[2] (Immunity Act) partially clarify the relationship between the Immunity Act and the Indemnification of Public Officers and Employees Act[3] (Indemnification Act). Furthermore, the amendments extend the reach of the Immunity Act's substantive protections and procedural requirements.

Immunity Act v. Indemnity Act—Prior to the amendments, a plaintiff could pursue one of two remedies for injuries resulting from an act or omission of a government employee engaged in a governmental function. First, he could sue the governmental entity under

14. Under the *Gribble* opinion, for example, aunts and uncles could conceivably be entitled to visitation rights, but the stepparent's brothers and sisters arguably would not be, regardless of how close they were to the child. This interpretation of the statute could result in a severance of the child's important associations.

15. 3 FAM. L. REP. (BNA) 2471 (N.Y. Fam. Ct. 1977).

16. *Id.*

1. UTAH CODE ANN. §§ 63-30-2 to -5, -11 to -13, -27 to -29, -34 (Supp. 1978) (effective March 30, 1978).

2. *Id.* §§ 63-30-1 to -34 (1978 & Supp. 1978). The Immunity Act initially grants immunity to all governmental entities engaged in performing governmental functions. The Act then waives this immunity in certain broadly-defined circumstances. Where governmental immunity has been waived, a plaintiff must comply with several procedural requirements in order to recover from the government. The Act also provides a maximum amount that may be recovered from a governmental entity.

3. *Id.* §§ 63-48-1 to -7 (1978).

section 10 of the Immunity Act which expressly waives, except in certain circumstances, governmental immunity for the negligent acts or omissions of government employees.[4] This statutory remedy, however, limits the amount of damages recoverable from a governmental entity[5] and necessitates compliance with several procedural requirements.[6] Second, a plaintiff could bring a direct action against the negligent employee, who, at common law, enjoyed no immunity unless he was performing a discretionary act.[7] With the passage of the Indemnification Act in 1974, this latter alternative became a more attractive one.

The Indemnification Act bolstered the common law remedy available to a plaintiff by providing the employee with a deep pocket. Essentially, the Act provides for the indemnification of a government employee who is held personally liable for an act or omission committed during the performance of his duties, within the scope of his employment, or under color of authority.[8] The Act prohibits indemnification for punitive damages[9] and ordinary damages resulting from an act or omission "due to gross negligence, fraud, or malice,"[10] but contains neither the liability limitations nor the procedural safeguards found in the Immunity Act.

That this latter deficiency provided an avenue for plaintiffs to avoid the circumscriptions of the Immunity Act was suggested in a concurring opinion in *Cornwall v. Larsen*.[11] The plaintiff in *Cornwall* brought an action against a deputy sheriff, a sheriff, and Salt Lake County for a personal injury allegedly caused by the deputy sheriff's negligent operation of a motor vehicle. The Utah Supreme Court affirmed a judgment of dismissal for the county because the plaintiff's action was barred by section 63-30-15 of the Immunity Act, which requires an action brought against an entity to be commenced within one year of the entity's denial of a claim.[12] However, the court held that the failure to comply with the short statute of limitations did not similarly bar the plaintiff's cause of action against the employees, since the provisions of the Immunity Act only apply to suits

4. *Id.* § 63-30-10 (1978).
5. *Id.* § 63-30-34 (1978).
6. *Id.* §§ 63-30-12, -13, -15 (1978).
7. Note, *The Utah Governmental Immunity Act: An Analysis*, 1967 UTAH L. REV. 120, 132; 1974 UTAH L. REV. 636.
8. UTAH CODE ANN. §§ 63-48-3 to -4 (1978).
9. *Id.* § 63-48-3(5) (1978).
10. *Id.* § 63-48-3(4) (1978).
11. 571 P.2d 925 (Utah 1977).
12. *Id.* at 926.

against governmental entities.[13] In his concurring opinion, Mr. Justice Wilkins recognized that it was possible under the statutes to deny a plaintiff direct recovery from the governmental entity because of noncompliance with the Immunity Act's short statute of limitations, yet to allow indirect recovery from the governmental entity, through the Indemnification Act, when suit is brought against an employee.[14] Thus, the *Cornwall* decision essentially encouraged future plaintiffs to forego their statutory remedy against the entity in favor of their common law remedy against the employee.

The legislature quickly responded to *Cornwall* by adding a second paragraph to section 63-30-4 of the Immunity Act. It provides:

> The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties . . . is . . . exclusive of any other civil action or proceeding . . . against the employee . . . unless the employee acted or failed to act through gross negligence, fraud, or malice.[15]

The amendment states an alternative proposition. The first alternative provides that a remedy against the governmental entity is exclusive. The second alternative provides that a remedy against a government employee is also exclusive. Since the common law provides the only remedy in a direct action against a negligent employee, to say that this remedy against an employee is exclusive of any other action against the employee is nonsense. When faced with the obligation of interpreting an ambiguous statute, a court may resort to the title of the act for a clarification of legislative intent.[16] In this instance, reference to the title may be particularly helpful. The title of the 1978 amendments is "An Act . . . Providing that the Remedy Against a Governmental Entity Provided by the Act is Exclusive of Any Other Civil Action by Reason of the Same Subject Matter . . . ."[17] If "remedy" is accordingly limited to a plaintiff's cause of action against the governmental entity for an employee's act or omission, the amendment abolishes the common law cause of action[18] against the employee in situations where the Act provides

13. *Id.* at 927.

14. *Id.* at 929 (Wilkins, J., concurring).

15. UTAH CODE ANN. § 63-30-4 (Supp. 1978).

16. *E.g.*, American Smelting & Ref. v. State Tax Comm'n, 16 Utah 2d 147, 150, 397 P.2d 67, 70 (1964); Donahue v. Warner Bros. Pictures Distrib., 2 Utah 2d 256, 265, 272 P.2d 177, 183 (1954).

17. Governmental Immunity Act Amendments, ch. 27, 1978 Utah Laws 91.

18. The abolition of the common law cause of action against the negligent employee will likely be challenged as violative of the state constitution which provides that an injured

a cause of action against the governmental entity.[19]

The amendment thus revitalizes the safeguards of the Immunity Act in situations where immunity has been waived, and consequently limits the application of the Indemnification Act to those suits where there has been no waiver and a common law action against the negligent employee provides the exclusive remedy.[20] However, that the Indemnification Act retains any relevance presents a paradox.[21] It is logical to assume that the legislature passed the Indemnification Act to protect government employees from plaintiffs, who, for one reason or another, chose to sue the employee rather than the entity when the entity is amenable to suit. With the passage of the above amendment to section 63-30-4 the need for such protection is obviated. It is, however, somewhat less logical to argue that the Indemnification Act expressed a legislative intent to provide an indirect remedy against an entity, when, by its refusal to waive immunity, the legislature has expressed its unwillingness to assume liability. Yet, after the amendment, the sole effect of the Indemnification Act is to afford the opportunity for an end run of the Immunity Act's exceptions to waiver.

The legislature can correct this inconsistency in one of two ways. If it believes that government employees should never be

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person shall have remedy by due course of law. UTAH CONST. art. I, § 11. However, since the common law remedy is abolished only when the plaintiff has a remedy, albeit limited, against the government, the provision is probably constitutional. In *Masich v. United States Smelting, Ref. & Mining Co.*, 13 Utah 108, 125, 191 P.2d 612, 624 (1948), the Utah Supreme Court held that the Occupational Disease Act did not violate a partially disabled employee's right to due process of law. The Occupational Disease Act abolished an employee's common law action against his employer for negligence and provided a statutory remedy against the employer for totally disabled employees but not for certain categories of partially disabled employees. Thus, the Occupational Disease Act, in denying any remedy for the partially disabled employee, goes further than the Immunity Act, which only abolishes the common law action against an employee when a remedy exists against the governmental entity.

19. The common law cause of action is not abolished when the employee acted through gross negligence, fraud, or malice. UTAH CODE ANN. § 63-30-4 (Supp. 1978). The preceding section also provides for the joinder of an employee, in a representative capacity, in situations where the plaintiff may have a cause of action against the governmental entity. A plaintiff will often gain certain procedural advantages by making the employee a party in the action. For example, some discovery tools may only be used against another party. UTAH R. CIV. P. 34-36.

20. Theoretically, a plaintiff injured by a negligent employee performing a proprietary function may still recover against either the governmental entity *or* the employee. This is so since the common law has always provided a remedy against a governmental entity performing a proprietary function, and the Immunity Act amendments only abolished the common law action against an employee where the Immunity Act established, for the first time, a remedy against the governmental entity.

21. The legislature seemed to recognize the paradox when it provided that a plaintiff bringing an action solely against the employee must give proper notice to the entity when the entity has a duty to indemnify the employee. UTAH CODE ANN. § 63-30-11 (Supp. 1978).

required to assume liability for their acts or omissions that occur within the scope of their employment, it should repeal both the Indemnification Act and the exceptions to waiver found in section 10 of the Immunity Act. This would result not only in statutory parsimony, but would oblige all suits arising from employee negligence to be brought against the entity under the Immunity Act. On the other hand, if the exceptions to waiver in section 10 represent a determination that government funds should not be expended to pay judgments under these circumstances, the legislature should preclude indirect recoveries with the repeal of the Indemnification Act alone.

Extension of Substantive Protections—The legislature also extended the Act's immunity provision to include governmentally-owned hospitals.[22] This change responds to *Greenhalgh v. Payson City*,[23] where the Utah Supreme Court held that the proprietary functions of a governmental entity are not within the scope of the Act and that the operation of a hospital is a proprietary function. The inclusion of hospitals within the Act,[24] coupled with the Act's limitations on liability,[25] should reduce malpractice insurance premiums.

Extension of Procedural Requirements—Finally, the legislature instituted a uniform procedural system applicable to all tort suits against the state, whether the entity being sued is the state itself or a political subdivision and whether the plaintiff's cause of action arises from performance of a governmental or proprietary function.[26] The uniform procedures result from: (1) the expansion of the definition of "claim" from "any claim brought against a governmental entity or its employee as permitted by this act,"[27] to "any claim brought against a governmental entity or its employee for which the entity may be liable;"[28] and (2) the provision that, in all actions against a governmental entity, a plaintiff must give notice of claim to the entity within one year after the cause of action arises.[29] Be-

22. *Id.* § 63-30-3 (Supp. 1978).

23. 530 P.2d 799 (Utah 1975).

24. See note 2 *supra*.

25. UTAH CODE ANN. § 63-30-34 (1978).

26. *Id.* § 63-30-13 (Supp. 1978). The version prior to the amendment required a plaintiff suing a political subdivision to file a notice of claim within 90 days after the cause of action arose. *Id.* § 63-30-13 (1978). The amended section 13 provides for a one year notice period, which is the same as the notice period for presenting claims against the state. *Id.* § 63-30-12 (Supp. 1978).

27. *Id.* § 63-30-2(5) (1978).

28. *Id.* § 63-30-2(5) (Supp. 1978). For a discussion of the significance of the deleted language, see *The Utah Governmental Immunity Act: An Analysis, supra* note 7, at 131 n.80.

29. UTAH CODE ANN. § 63-30-12 to -13 (Supp. 1978).

cause of the extension of the procedural requirements to proprietary functions, all plaintiffs must now comply with the notice requirement[30] and short statute of limitations period[31] or be barred from recovery.

IX. Real Property

A. *Construction of Real Estate Contract Insurance Clauses*

In *Dubois v. Nye*,[1] the Utah Supreme Court held that a standard earnest money receipt clause providing that "[a]ll risk of loss and destruction of property, and expenses of insurance shall be borne by the seller until date of possession"[2] did not relieve the buyers of liability for negligently causing a fire prior to the date of possession. The court based its conclusion on traditional indemnity agreement analysis, ignoring the insurance aspects of the clause. This limited approach caused the court to import indemnity clause policy considerations into an agreement to provide insurance.

Indemnity agreements shift the risk of loss from one party to another, the indemnitee being held harmless for future loss or damage. Traditionally, courts have refused to enforce indemnity clauses to relieve a negligent party of liability unless the clause "clear[ly] and unequivocal[ly]"[3] provided for coverage of such negligence.[4] This rule of "strict construction" is the basis of the court's prior holding in *Union Pacific Railroad v. El Paso Natural Gas Co.*[5] The Utah court there concluded that a contract clause purporting to

30. *Id.*

31. *Id.* § 63-30-15 (1978).

1. 584 P.2d 823 (Utah 1978).

2. *Id.* at 824. The buyers entered the premises with the seller's permission before the agreed date of possession, and the fire occurred during that time.

3. Howe Rents Corp. v. Worthen, 18 Utah 2d 263, 266, 420 P.2d 848, 849 (1966).

4. Prior Utah cases have interpreted broad language as not indemnifying a party's negligence. In Union Pacific R.R. v. Intermountain Farmers Ass'n, 568 P.2d 724 (Utah 1977), the court held that a lease providing that the lessee would protect the lessor "from all injury, damage or loss . . . from any cause whatsoever" did not relieve the lessor of liability for its own negligence. *Id.* at 725. Similarly, in Howe Rents Corp. v. Worthen, 18 Utah 2d 263, 420 P.2d 848 (1966), the court held that a clause providing that "Lessee assumes all liability for damages . . . to any person [and] shall be liable for all damages to or loss of the equipment regardless of cause" did not indemnify the lessor of a cement mixer for his negligent acts. *Id.* at 264-65, 420 P.2d at 848-49.

Other courts agree with the Utah position. *E.g.*, Southern Pacific Co. v. Gila River Ranch, Inc., 105 Ariz. 107, 460 P.2d 1 (1969); Paul Hardeman, Inc. v. J.I. Hass Co., 246 Ark. 559, 439 S.W.2d 281 (1969); Vinnell Co. v. Pacific Elec. Ry., 52 Cal. 2d 411, 340 P.2d 604 (1959); Zadak v. Cannon, 59 Ill. 2d 118, 319 N.E.2d 469 (1974). *See generally* Annot., 68 A.L.R.3d 7 (1976); Annot., 27 A.L.R.3d 663 (1969); Annot., 15 A.L.R.3d 786 (1967).

5. 17 Utah 2d 255, 408 P.2d 910 (1965).

excuse Union Pacific "from and against *any and all* liability, loss, damage, claims . . . *of whatsoever nature* . . . *howsoever caused*"[6] did not release the railroad from liability for loss caused by its own negligence. This rule of strict construction arises from a concern that upholding such agreements tends "to encourage carelessness."[7] The courts look with disfavor on attempts to contract away the basic social duty of exercising due care.

In interpreting the clause as merely an indemnity agreement, the *Dubois* court disregarded the insurance language. Other State courts have interpreted and enforced similar language as valid contractual provisions allocating the cost and burden of insurance.[8] In *Weems v. Nanticoke Homes, Inc.*,[9] a Maryland court concluded that a real estate contract clause similar to the one in *Dubois* was an agreement to provide insurance which expulpated the seller from liability for fire damage caused by its own negligence.[10] Rejecting arguments made by the buyer's insurance company that the clause was an indemnity agreement to shift the risk of loss from one party to another, the court stated, "[h]ere one party has agreed to provide insurance against 'any and all loss.' Obviously there is no similarity between such a clause and a 'hold harmless' or indemnification provision."[11]

The Utah court has also taken this approach, recognizing that parties may contract to allocate the cost and burden of insurance. In *Bonneville on the Hill v. Sloane*,[12] the court held that a lease providing that the tenant would leave the premises "in as *good condition* as when entered upon, *except* for . . . *damage by the elements or by fire*,"[13] would relieve the tenant of liability for fire damage caused by her own negligence. Basic to the court's holding was a recognition that the parties intended that the landlord would provide insurance protecting the premises from damage caused by fire regardless of the source.[14]

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6. *Id.* at 257, 408 P.2d at 912 (emphasis in original).

7. *Id.* at 259, 408 P.2d at 913.

8. General Cigar Co. v. Lancaster Leaf Tobacco Co., 323 F. Supp. 931 (D. Md. 1971); Gordon v. J.C. Penney Co., 7 Cal. App. 3d 280, 86 Cal. Rptr. 604 (1970); Cerny-Pickas & Co. v. C.R. Jahn Co., 7 Ill.2d 393, 131 N.E.2d 100 (1955); New Hampshire Ins. Co. v. Fox Midwest Theaters, Inc., 203 Kan. 720, 457 P.2d 133 (1969); Commerce and Indus. Ins. Co. v. Orth, 254 Or. 226, 458 P.2d 926 (1969).

9. 37 Md. App. 544, 378 A.2d 190 (1977).

10. The clause stated that "[i]nsurance in the proper amount to cover any and all losses shall be the responsibility of the buyer." 378 A.2d at 192.

11. *Id.* at 194.

12. 572 P.2d 402 (Utah 1977).

13. *Id.* at 403 (emphasis in original).

14. *Id.* at 404.

These cases recognize that the rationale behind strictly construing indemnity clauses as not relieving a party of liability for negligence has no application where the parties have contracted to allocate the costs of insurance. Since, as many courts have noted, "fire loss is nearly always caused by someone's negligence,"[15] insurance policies are, therefore, written to protect against all losses and include those arising from the insured's negligence. Under an insurance contract then, the insurer assumes the risk of negligence and the parties simply contractually decide who will pay the premiums. No risk allocation occurs between the parties, so no express agreement as to who will be liable for negligence is necessary. The court's desire to discourage carelessness is not realized by strict construction; an express attempt by the parties to allocate liability for negligence is meaningless when the insurance company already bears that liability.

The insurance provision in *Dubois* may submit to varying interpretation, but it seems clear that the parties intended that the seller insure both parties' interest in the property.[16] Courts have observed that contracting to allocate the costs of insurance is a "commonsense effort" by the parties to provide protection without duplication in coverage.[17]

The major impact of *Dubois* will be on draftsmen seeking to allocate the costs of insurance among the parties to a contract. Past Utah decisions suggest that if contract clauses are to be enforced to exculpate liability for negligent acts, they must use language expressly including negligence.[18] The *Dubois* decision extends this rule to the interpretation of contract clauses to provide insurance.[19] While there exists convincing authority and policy which could be used to persuade the court to limit the holding of *Dubois*, the careful draftsman will avoid this necessity by employing language specifically dealing with negligence in agreements to allocate costs of insurance.

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15. Dubois v. Nye, 584 P.2d 823, 827 (Utah 1978) (Wilkins, J., dissenting).

16. Both the seller and the buyer have an insurable interest in the property. *See* G. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 24:100, 104 (2d ed. Anderson 1960).

17. *See, e.g.*, Mayfair Fabrics v. Henley, 97 N.J. Super. 116, 234 A.2d 503, 507 (Super. Ct. Law Div. 1967).

18. Home Rents Corp. v. Worthen, 18 Utah 2d 263, 265, 420 P.2d 848, 849 (1966). "If it had been the intent of the parties that the defendant should indemnify the plaintiff even against the latter's negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable . . . ." *Id.*

19. It is unclear what effect *Dubois* will have on the *Bonneville* holding that a lease clause providing that the tenant would not be liable for fire loss indemnified the tenant for her own negligence. The *Dubois* analysis seems to undercut this holding, but the court may choose not to extend that analysis into the landlord-tenant area.

B. *Rights of First Refusal*

In *Weber Meadow-View Corp. v. Wilde*,[1] the Utah Supreme Court held that a vendor, if he acts in good faith, can defeat a first right of refusal by requiring the holder to meet the identical terms of a third party offer where the third party offer includes a particular piece of real property. Moreover, the court stated that the holder of the first right of refusal seeking specific performance had the burden of proving bad faith on the part of the vendor by showing that the vendor engaged in subterfuge or collusion.[2] This decision significantly weakens first rights of refusal in Utah.

In this case, Weber Meadow-View Corporation (Weber) owned a first right of refusal on the property of the defendant, Mrs. Wilde, which provided that should the owners decide to sell all or part of the property, "they must first offer said land to the grantees . . . at the lowest bona fide price and upon the same terms they are willing to accept from any other vendee."[3] In 1976, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (Mormon Church) offered to buy Mrs. Wilde's property for $200,000,[4] which included a particular house under the control of the Church, valued at $48,000.[5] Weber then exercised its first right of refusal by submitting to Mrs. Wilde an offer of $200,000, which included an offer of any piece of real property selected by Mrs. Wilde with a value of up to $50,000. Mrs. Wilde accepted the Church's offer, and Weber sued her for specific performance based upon its contract right.[6] The Utah Supreme Court ruled that since there was no proof offered by Weber that Mrs. Wilde acted in bad faith or engaged in collusion or subterfuge, she could require Weber to provide her with the particular house described in the Church's offer even though the property was under the control of the Church.[7]

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1. 575 P.2d 1053 (Utah 1978).
2. *Id.* at 1055.
3. Brief of Appellant at 9, Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978). The first right of refusal on Mrs. Wilde's property was originally granted to Weber's predecessors in interest by Mrs. Wilde and her husband in a court settlement. *Id.* at 2-3.
4. 575 P.2d at 1054.
5. *Id.* at 1056 (Maughan, J., dissenting).
6. *Id.* at 1055 (Maughan, J., dissenting).
7. *Id.* at 1055. *See also* Reply Brief of the Appellants at 5-13, Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978). The appellant asserted that its argument of bad faith was not excluded on appeal just because it was not included in the stipulated facts and issues at the trial court. From this failure to allege bad faith, the supreme court presumed the fact that Mrs. Wilde had acted in good faith even though the appellant's briefs included statements that implied there might have been collusion between the Church and Mrs. Wilde to defeat the first right of refusal. Brief of Appellant at 14, Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978).

While jurisdictions have varied as to what contract language constitutes a first right of refusal, once found, such a right has generally been upheld as a valuable contract right.[8] Under a first right of refusal, the owner, after deciding to sell, is required to offer the property first to the holder of the right at the same price and on the same terms and conditions as the owner is willing to sell the property to a third party.[9]

The difficulty in this area of the law stems from the fact that, in determining whether the holder has met the vendor's third party offer, two significant policy considerations clash—freedom of choice and stability of contract. In *Weber,* the Utah Supreme Court, in requiring that the holder of the first right of refusal meet the exact terms set by the seller,[10] failed to balance these equally valuable but alternative policy considerations and decided the case exclusively on the basis of the vendor's freedom of choice.[11] By requiring the holder of a first right of refusal to meet the exact terms set by the owner when these terms require a non-unique piece of property, the court is adopting a standard which could well result in severely weakening a contract right for which valuable consideration has been paid. Admittedly, the court's position protects the vendor's freedom of choice to accept a particular piece of property in exchange for his own property. The court, however, did not address the question of whether the seller's freedom to select any particular piece of property offered by a third party is ever outweighed, in the interest of integrity and stability of contracts, by the holder's recognized first right of refusal. Arguably, where the property offered by the third party is highly unusual, such as a unique antique or desert oasis ranch property, the law should protect the seller's right of choice. But, where the third party offer contains a piece of property with characteristics similar to the property offered by the holder of the first right of refusal, the law should enforce the well-established right and refuse to allow the vendor to claim uniqueness as a guise

8. Cumming v. Neilson, 42 Utah 157, 167, 129 P. 619, 622 (1912).

9. Mercer v. Lemmens, 230 Cal. App. 2d 167, 40 Cal. Rptr. 803, 805 (1964); Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976); Chournos v. Evona Inv. Co., 97 Utah 335, 93 P.2d 450 (1939).

10. 575 P.2d at 1055.

11. While the balancing of such equally important policy considerations in the law is by no means an easy task, this is no excuse to avoid the balance by blindly embracing one of the two competing policies, as the court did in *Weber.* In Chournos v. Evona Inv. Co., 97 Utah 335, 93 P.2d 450 (1939), the court's decision evidenced the type of balancing that was lacking in *Weber.* In *Chournos,* the terms of the first right of refusal required that the lessor's property be sold to both joint lessees. Thus, the court held that an offer by one of the joint lessees for a conveyance to him alone materially changed the terms upon which the lessor had agreed to sell and did not bind the lessor in contract.

to circumvent a valid contract.[12]

In *Haymore v. Levinson*,[13] the Utah Supreme Court held, when the issue was the satisfactory performance of a construction contract, that the buyer should not, by arguing unsatisfactory performance, be allowed to escape his contract obligations based on his own subjective "whim or caprice."[14] This same issue was present in the *Weber* case. A too expansive interpretation of "uniqueness" by emphasizing the vendor's freedom of choice risks undermining the contract right based on the vendor's subjective "whim or caprice."[15]

Thus, when balancing these valid but competing policies the court should limit the freedom of choice of the owner by confining it to situations where the chattel or property offered by the third party is in very scarce supply or is "one of a kind." This standard could be determined from data detailing the market availability of the chattel or piece of property. In this manner, the court could protect the first right of refusal by limiting the number of fact considerations that would have to go to the jury for determination. Whatever the objective standard chosen by the court, it should not be based on subjective desires or wants of the property owner since that owner has already been paid valuable consideration for the first right of refusal.

Additionally, the court in *Weber* presumed the seller's good faith in accepting a third party offer by requiring the holder to prove bad faith by showing subterfuge or collusion.[16] This position seems consistent with the court's total embracement of the vendor's right to freedom of choice. Under these circumstances it is difficult to conceive of many situations wherein the vendor would be acting in bad faith. As such, the court's treatment of the burden of proof issue is consistent with its policy choice.

If, however, the court were to attempt a delicate balancing of the policy issues involved, a shift in the burden of proof to the vendor would work in tandem with the balance because the seller would have to prove that the particular piece of property contained in the third party offer is somehow unique or special before the seller could claim a just cause or excuse for failing to convey the property to the holder.[17] If the property contained in the third party offer was

12. Brownies Creek Collieries, Inc. v. Asher Coal Mining Co., 417 S.W.2d 249, 252 (Ky. 1967). The court stated that "minor variations which obviously constitute no substantial departure" from the third party's offer should not undermine the first right of refusal.

13. 8 Utah 2d 66, 328 P.2d 307 (1958).

14. *Id.* at 69, 328 P.2d at 309.

15. *Id.*

16. 575 P.2d at 1055.

17. Mercer v. Lemmens, 230 Cal. App. 2d 167, 40 Cal. Rptr. 803 (1974). The court found

similar to the piece of property in the holder's offer, then the seller's failure to accept the holder's offer would not constitute an excuse which would allow the defeat of a valid first right of refusal.

In *Weber*, a first right of refusal allowing the holder to submit a valid offer "upon the same terms they [vendors] are willing to accept from any other vendee"[18] was defeated and did not constitute an absolute first right of refusal. The case, however, may be limited to its facts, since the court had before it no evidence showing the holder's ability to provide property having similar characteristics to that offered by the Church. In another case, such evidence, when coupled with the rationale supporting the value of a first right of refusal, may persuade the court to adopt a more objective standard in determining whether the terms of the holder's offer comport with the offer of the third party.[19]

The careful draftsman could circumvent this case by including in a first right of refusal wording to the effect that the holder can validly exercise his right by tendering a piece of property or other item of cash equivalency determined by fair market value. Alternatively, the draftsman could restrict third party offers to those which set forth terms of payment in cash.[20]

C. Finder Engaged in the Real Estate Brokerage Business Must Be Licensed Under Utah Law in Order to Receive Compensation

In *Diversified General Corp. v. White Barn Gold Course, Inc.*,[1] the Utah Supreme Court held that a person who contracts with a seller to find a buyer for real estate, a "finder," is engaged in the real estate brokerage business and must be licensed under Utah law in order to receive compensation.[2] The majority opinion, however,

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that the seller's refusal to accept the holder's offer raised a presumption of bad faith requiring the seller to rebut the presumption by showing just cause or excuse.

18. 575 P.2d at 1056 (Maughan, J., dissenting).

19. An alternative is to recognize an absolute first right of refusal that allows the holder to pay equivalent value for any piece of property offered in trade by a third party. This approach would generally support a first right of refusal as a valuable contract right. Of course, this alternative undermines the freedom of choice to accept a unique piece of property in lieu of cash payment.

20. Brief for Respondents at 16 n.9, Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978).

1. 584 P.2d 848 (Utah 1978).

2. According to statute, it is unlawful for anyone to act as a real estate broker without a license. "Real estate broker" is defined as anyone who for a fee assists another in any transaction that is calculated to result in the sale of real estate. Standing to sue for any fee derived from a transaction that is calculated to result in the sale of real estate is limited to licensed real estate brokers. UTAH CODE ANN. §§ 61-2-1, -2, -18 (1978).

did not clarify the reasoning behind its holding nor did it effectively distinguish a prior Utah case. As a result, the decision in *Diversified General* leaves basic questions regarding the legal status of finders in Utah unresolved.

Jurisdictions considering whether their broker licensing statutes include the activities of finders within the scope of activities reserved to licensed brokers have reached differing conclusions. Enactments have been interpreted broadly in some states to include the activities of finders within the regulated activities. Similarly worded statutes have been interpreted narrowly in other states to exclude such activities so long as the finder did nothing but introduce the parties. An analysis of the reasoning in these cases reveals that most courts approach their statutes with the observation that the legislative intent in enacting the licensing statutes was to protect the public from unscrupulous and unqualified persons in the real estate business.[3] Inasmuch as the courts agree on this major premise, their differing conclusions result from the adoption of different minor premises.

Courts adhering to the broad interpretation proceed on the minor premise that the statute must encompass the broadest possible range of activities in order to accomplish its remedial purpose.[4] These courts conclude that the statute excludes laymen from participating for profit in any activities, including those of a finder, that may result, directly or indirectly, in the sale of real estate.[5] A contrary interpretation, they feel, would render the statute a "toothless enactment."[6]

On the other hand, courts that interpret the statute narrowly adopt the minor premise that since the purpose of the statute is protection of the public, only those activities in which the public needs protection should be regulated. This would include activities that result in legal liabilities between the parties (buyer and seller) and require special competency or trust.[7] These courts conclude that a finder, whose employment is limited to the bringing of interested

3. Tyrone v. Kelley, 9 Cal. 3d 1, 507 P.2d 65, 72, 106 Cal. Rptr. 761, 768 (1973); Thomas v. Jarvis, 213 Kan. 617, 518 P.2d 532 (1974); Andersen v. Johnson, 108 Utah 417, 421, 160 P.2d 725, 727 (1945).

4. *See* Bonasera v. Roffe, 8 Ariz. App. 1, 442 P.2d 165, 166 (1968); Corson v. Keane, 4 N.J. 221, 72 A.2d 314, 316-17 (1950); Donadt v. Eberle, 20 N.J. Misc. 349, 27 A.2d 612, 614 (1942); Annot., 24 A.L.R.3d 1160, 1172 (1969).

5. Bonasera v. Roffe, 8 Ariz. App. 1, 442 P.2d 165, 166 (1968); Corson v. Keane, 4 N.J. 221, 72 A.2d 314, 316-17 (1950); Donadt v. Eberle, 20 N.J. Misc. 349, 27 A.2d 612, 614 (1942).

6. Baird v. Krancer, 138 Misc. 360, 246 N.Y.S. 85, 88 (Sup. Ct. 1930).

7. Tyrone v. Kelley, 9 Cal. 3d 1, 507 P.2d 65, 72, 106 Cal. Rptr. 761, 768 (1973); Andersen v. Johnson, 108 Utah 417, 427, 160 P.2d 725, 730(1945) (Wade, J., concurring).

parties together, does not need to be a licensed broker.[8] The California Supreme Court pointed out in *Tyrone v. Kelley*[9] that "[n]either considerations of competency nor of trust are of importance where the undertaking is merely to seek out . . . and introduce a [buyer to a seller]."[10]

The basic problem with the decision in *Diversified General* is that the court adopts the broad interpretation without firmly adopting its rationale. The court supports its decision by referring to a number of cases that espouse the broad interpretation as discussed above. But at the same time the court fails adequately to distinguish a prior decision, *Andersen v. Johnson,*[11] that interprets the Utah statute narrowly.

Andersen allowed recovery of a finder's fee by a plaintiff who had introduced prospective sellers of property in one county to a broker in another.[12] The concurring opinion in *Andersen* noted that "[t]he dealings which the statutes aim to protect the public in are those which result in legal liabilities between [buyer and seller]."[13] This passage, which *Diversified General* quoted with approval, reflects the premise that since the statute is designed to protect the public, it need only regulate those activities where the public needs protection. This is the typical rationale of courts that interpret the licensing statutes narrowly. The appearance of this reasoning in the *Diversified General* opinion is confusing, since it supports the position that one whose employment is limited to the bringing of interested parties together need *not* be a licensed broker.

The court distinguishes *Andersen* on the grounds that the plaintiff in *Diversified General* was acting as an agent for the seller[14] (a characterization for which there is no foundation in the record). The court fails to explain, however, how this fact, if it is true, affects the plaintiff's status under the licensing statute. It is an attempt to

8. Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, 962 (1923). *See* P.W. Chapman & Co. v. Cornelius, 39 F.2d 555, 556 (2d Cir. 1930). *Cf.* Stout v. William Kennelly, Inc., 218 App. Div. 385, 218 N.Y.S. 259, 261 (1926)(the court held that an auctioneer of realty was not required to be a licensed broker even though the statute defined broker as any person who "for another and for a fee . . . sells . . . or offers or attempts to negotiate a sale, exchange, purchase, or rental of an estate or interest in real estate").

9. 9 Cal. 3d 1, 507 P.2d 65, 106 Cal. Rptr. 761 (1973).

10. 507 P.2d at 72, 106 Cal. Rptr. at 768.

11. 108 Utah 417, 160 P.2d 725 (1945).

12. The majority opinion in *Andersen* decided that the term "real estate prospect," as used in UTAH CODE ANN. § 64-1-2 (1978), referred only to buyers and not sellers and, thus, the statute did not bar the plaintiff's recovery. Justice Wade, in a concurring opinion that is quoted in *Diversified General,* rejected this definition. 108 Utah at 427, 160 P.2d at 730 (Wade, J., concurring).

13. 108 Utah at 427, 160 P.2d at 730 (Wade, J., concurring).

14. 584 P.2d at 850.

distinguish the cases on their facts rather than on their rationale. This distinction only adds confusion to the court's reasoning. It fails to explain why a broad interpretation of the statute is called for in *Diversified General,* but not in *Andersen,* and more importantly, which rationale the court will follow when interpreting the statute in the future.

The conclusion in *Diversified General* is not disturbing; valid arguments support both the broad and narrow interpretations of the licensing statutes. But the confusion in the opinion is disturbing. By failing to delineate its rationale, the court has left the law uncertain. As a result, it is difficult to predict whether the court will interpret other aspects of the statute broadly or narrowly, or even how other cases involving finders will be decided.[15]

D. Single Action Statute and Mortgage Foreclosure

In *Bank of Ephraim v. Davis,*[1] the Utah Supreme Court held that Utah's single action statute[2] required a mortgagee to exhaust its security in real property by a foreclosure sale before it could employ a writ of attachment to reach the mortgagor's personal property. The court recognized an exception to this rule where the security has "become impaired,"[3] but held that the exception requires more proof of impairment than a mere sworn statement that the value of the security would not satisfy the debt. The court further held that the mortgagee's seizure of the mortgagor's personal property under a prejudgment writ of attachment, which was issued without prior notice, hearing, or court supervision, denied the mortgagor procedural due process. Finally, the court held that the sheriff's failure to file an inventory of the attached property with the returned writ rendered the attachment proceeding void.[4]

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15. *Diversified General* makes it clear that an unlicensed finder may not seek a potential buyer for a seller and owner of property. However, since *Andersen* was not overturned, it also seems clear that a finder *may* seek potential sellers and refer them to a broker. It is not clear whether a finder could seek out potential buyers to refer to a broker, or whether a potential seller could be sought for a buyer.

1. 581 P.2d 1001 (Utah 1978).
2. UTAH CODE ANN. § 78-37-1 (1977).
3. UTAH R. CIV. P. 64C(a).
4. Utah rules require the sheriff to return the writ after service, together with a certificate of his proceedings which "shall contain a full inventory of the property attached." UTAH R. CIV. P. 64C(h). The court strictly interpreted this language, and held that the filing of an inventory is mandatory. The court's interpretation is in line with decisions in jurisdictions with similar rules. *Compare* Glidden v. Wills, 136 Cal. App. 2d 596, 289 P.2d 55 (1955) ("must make a full inventory"), *and* Dickinson v. First Nat'l Bank, 64 N.D. 273, 252 N.W. 54 (1933) ("shall" file an inventory), *with* Fleming v. Moore, 213 Ala. 592, 105 So. 679 (1925) (filing an inventory "is proper but not essential").

In *Bank of Ephraim,* the plaintiff mortgagee sued to foreclose a mortgage it held on defendant's property. In addition, the plaintiff filed with the court an affidavit seeking a writ of attachment of defendant's personal property in a cafe situated on the property, but in which the plaintiff had no security interest. The plaintiff alleged in the affidavit that the value of the real property security had become impaired because it would not cover the full amount of the judgments against it. On the day that the trial court entered its decree of foreclosure, the clerk issued the writ of attachment. When the real property was sold, resulting in a deficiency judgment, the defendant moved to quash the writ. The district court denied the motion and the defendant appealed.

Utah law has contained a single action statute since territorial days.[5] The current statute provides for only one action for the recovery of any debt secured solely by a mortgage on real property.[6] Under the statute, the mortgagee must exhaust the security by foreclosing the mortgage, obtaining a sale of the security, and docketing a deficiency judgment before the mortgagor becomes personally liable for the debt.[7] Therefore, attachment of the mortgagor's personal property ordinarily is not appropriate where the loan is already secured; this would give the mortgagee double security.[8]

The Utah rule on attachment, rule 64C of the Utah Rules of Civil Procedure, recognizes the policy of the single action statute by requiring that attachment seekers allege in their affidavits that the payment of the debt has not been secured by any mortgage or lien on real or personal property within the state.[9] Subsection (a) of rule 64C provides, however, for an exception to this requirement where

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5. The seminal case for interpreting the Utah single action statute is Salt Lake Valley Loan & Trust Co. v. Millspaugh, 18 Utah 283, 54 P. 893 (1898) (interpreting ch. 1, § 606, 1884 Utah Laws 268). The essential provisions of the statute have not changed.

6. UTAH CODE ANN. § 78-37-1 (1977). Such statutes are contrary to the common law rule that a mortgagee could waive the security and bring an action on the note. Smith v. Jarman, 61 Utah 125, 138, 211 P. 962, 967 (1922).

7. Zion's Sav. Bank & Trust Co. v. Rouse, 86 Utah 574, 47 P.2d 617 (1935); Blue Creek Land & Live Stock Co. v. Kehrer, 60 Utah 62, 206 P. 287 (1922); Hammond v. Wall, 51 Utah 464, 171 P. 148 (1917); Jensen v. Lichtenstein, 45 Utah 320, 145 P. 1036 (1915); Salt Lake Valley Loan & Trust Co. v. Millspaugh, 18 Utah 283, 54 P. 893 (1898). The Utah statute on execution of the deficiency judgment provides:

> If it appears from the return of the officer making the sale that the proceeds are insufficient and a balance still remains due, judgment therefore must then be docketed by the clerk and execution may be issued for such balance as in other cases; but no general execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid.

UTAH CODE ANN. § 78-37-2 (1977).

8. Bank of Ephraim v. Davis, 581 P.2d at 1004.

9. UTAH R. CIV. P. 64C.

the security has, without any act of the mortgagee, "become impaired." The rule does not define the type of impairment contemplated, and the court has not previously interpreted the term. In *Bank of Ephraim*, the court explained that impairment has occurred if the security has *diminished in value* since the time it was accepted by the mortgagee.[10] It is assumed that the mortgagee considered the security to be sufficient when the loan was made.[11] Therefore, unless the security has diminished in value since it was accepted, there is no reason to allow an attachment of the mortgagor's personal property until after the security has been exhausted through the procedures required by the single action statute. Since the plaintiff had merely stated that the security would not cover the judgments against it and had not indicated any change in its value, the court held that the affidavit was insufficient to "invoke the exception under rule 64C(a)."[12] This interpretation of the rule accords with the policy of the single action statute to prevent a mortgagee from acquiring double security for the loan.[13]

The court in *Bank of Ephraim* also held that the procedures of rule 64C, under which the plaintiff obtained the writ of attachment, resulted in a violation of the defendant's right to procedural due process.[14] This holding was based on a series of United States Supreme Court cases that dealt with the denial of procedural due process in statutory prejudgment writs of attachment, garnishment, and replevin.[15] This line of cases rests on the philosophy that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause."[16] The cases require substanti-

10. 581 P.2d at 1005. As authority for this interpretation, the court quoted from *Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 472 P.2d 530 (1970). The Nevada statute construed in *Paramount* allowed prejudgment attachment when the security had become "valueless or insufficient in value to secure the sum due the plaintiff." *Id.* at 534. The Utah court considered the language of the two statutes to be sufficiently similar to warrant the same interpretation and requirements.

11. 581 P.2d at 1005; Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086, 1087 (1890).

12. 581 P.2d at 1005. In the *Paramount* case the Nevada court held that the affidavit must be non-conclusory and that it "must contain an opinion of value by a witness qualified to express such an opinion." 472 P.2d at 534. Although this language was included in the Utah court's quotation from *Paramount*, the Utah court did not expressly adopt this requirement in *Bank of Ephraim*.

13. Blue Creek Land & Live Stock Co. v. Kehrer, 60 Utah 62, 66-68, 206 P. 287, 288 (1922).

14. 581 P.2d at 1005.

15. North Ga. Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Utah's rules and the cases prior to the *Di-Chem* case are analyzed in Note, *Sniadach, Fuentes, and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies*, 1974 UTAH L. REV. 536.

16. Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

ated allegations as a prerequisite to obtaining a writ, judicial participation in its issuance, and statutory provisions for notice and hearing prior to or soon after a deprivation of property.[17] Rule 64C alone does not require notice, hearing, or judicial participation, and writs are issued merely on the strength of a creditor's allegations. Therefore, in *Bank of Ephraim,* the court correctly held that application of rule 64C had deprived the defendant of his property without procedural due process.

Rule 64A, adopted in 1976, now protects the debtor's interests as required by the United States Supreme Court, by providing, *inter alia,* for notice and an evidentiary hearing prior to issuance of the writ in most cases,[18] and for issuance only pursuant to a written order of the court.[19] Rule 64A was not adopted by the Utah court, however, until one month after the plaintiff had obtained the writ in *Bank of Ephraim.*[20] Therefore, although this plaintiff attempted to comply with proper Utah procedure, there was apparently no constitutional method of obtaining the prejudgment writ of attachment.[21] *Bank of Ephraim* indicates that the Utah court is committed to protecting a debtor's right to procedural due process, and parties seeking a writ of attachment in the future should strictly comply with rule 64A as well as properly alleging impairment of security if their debt is already secured by mortgage or lien.

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17. For example, in the most recent case, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court held that a Georgia statute denied defendant's right to procedural due process by providing for a writ of garnishment based on mere conclusory allegations in an affidavit, issuance by a court clerk with no judicial participation, and no provisions for notice or an early hearing.

18. Under rule 64A(2) a writ *may* be issued without notice to the adverse party upon a showing of specific facts indicating that delay will result in immediate and irreparable injury, but subsection (3) provides that the court-ordered writ shall expire within 10 days unless notice and a hearing or consent of the adverse party justify extension by the court.

19. UTAH R. CIV. P. 64A.

20. The court's only comment on this fact is this: "Although Rule 64A was not in effect at the time the attachment was issued, the law in effect was that which is now reflected in Rule 64A." 581 P.2d at 1005.

21. Plaintiff's plight was expressed in its brief:

> Defendant would now ask this Court to impose a duty on the plaintiff, which did not exist at the time the Writ was issued and would further require plaintiff to apply standards not then formulated as it applied for its Writ. With that type of clairvoyance the plaintiff could have foreseen that the defendant would have defaulted on its notes and never have loaned the money in the first place.

Brief of Respondent at 8, Bank of Ephraim v. Davis, 581 P.2d 1001 (Utah 1978).

X. Right of Privacy

A. *Eavesdropping*

In *State v. Boone,*[1] the defendant sold a controlled substance to a police informant while the transaction was being transmitted to narcotics officers through an electronic device concealed on the informant. After the sale had been completed, the defendant was arrested. The Utah Supreme Court held that this use of an electronic transmitter to monitor the conversation, without having obtained a warrant, was neither an unreasonable search and seizure under the fourth amendment of the United States Constitution nor a violation of a fourth amendment right to privacy.[2] Further, the court never reached the issue of whether the defendant's rights under the Utah Offenses Against Privacy Act (Privacy Act)[3] had been violated.

The holding in *Boone* that the surveillance did not constitute an unreasonable search and seizure is in accord with the United States Supreme Court's holding in *United States v. White.*[4] In *White,* the Court held that the use of a transmitter concealed on an informant for the purpose of monitoring a conversation between the informant and the accused did not constitute an unreasonable search and seizure[5] and did not violate any "justifiable and constitutionally protected expectation" of privacy.[6] The Court reasoned that since the use of an informant without a warrant is permissible under the fourth amendment, there is no constitutional justification for distinguishing between "informers . . . and . . . informers with transmitters."[7]

The problem in *Boone,* however, is not constitutional, but statutory. Section 76-9-401 of the Utah Code provides the following definitions:

> (1) Private place means a place where one may reasonably expect to be safe from casual or hostile intrusion and surveillance.

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1. 581 P.2d 571 (Utah 1978).

2. Utah Const. art. I, § 14 is identical to the fourth amendment and, according to the Utah court's decision in *Boone,* affords the same protection against state intrusions as the fourth amendment does against federal encroachments. 581 P.2d at 572.

3. Utah Code Ann. §§ 76-9-401 to -406 (1977).

4. 401 U.S. 745 (1971).

5. The opinion does not make clear whether there was no "seizure" or whether the "seizure" was "reasonable," but either formulation will lead to the same result. As noted in *Boone,* it is irrelevant to the issue of admissibility whether the court considers the intercepted conversation "reasonably seized" or not "seized" at all. 581 P.2d at 573.

6. 401 U.S. at 749.

7. *Id.* at 752.

(2) Eavesdrop means to overhear, record, amplify, or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical, or other device.[8]

Section 76-9-402(1) provides the following substantive offenses against privacy:

(1) A person is guilty of privacy violation if, except as authorized by law, he:
(a) Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or
(b) Installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sound or events in the place or uses any such unauthorized installation; or
(c) Installs or uses outside of a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.
(2) Privacy violation is a class B misdemeanor.[9]

In *Boone,* the court treated the definition of eavesdropping in section 401(2) as a substantive offense against privacy. That section confines eavesdropping to those situations wherein the "consent of at least one party" has not been obtained. The court reasoned that since the informant consented, section 401(2) was not violated and the conduct of the officers was lawful.[10] This analysis evidences both an insensitivity to the obvious purpose of the Privacy Act and a basic misunderstanding of the statutory scheme. The court's cavalier determination that a police informant's consent to the surveillance of a conversation legalizes otherwise unlawful conduct does little to insure privacy when eavesdropping is at issue.

In a dissenting opinion, Justice Maughan argued that sections 401(2) and 402(1) "be construed together" so that the "others" referred to in the definition of eavesdropping in section 401(2) corresponds to "the person or persons entitled to privacy" in sections 402(1)(b) and (c).[11] Under this construction, the officers in *Boone* eavesdropped, since it cannot be seriously contended that an informant who broadcasts a conversation between himself and another is the one entitled to privacy. This interpretation appears more consonant with a legislative intent to provide safeguards

8. UTAH CODE ANN. § 76-9-401(1) & (2) (1977).
9. *Id.* § 76-9-402(1) & (2) (1977).
10. 511 P.2d at 574.
11. *Id.* at 575 (Maughan, J., dissenting).

against surveillance, but does not completely resolve the issue. If, as Justice Maughan maintains, the word "others" in section 401(2) refers to "persons entitled to privacy," it remains unclear why sections 401(1)(b) and (c) require the consent of *all* persons entitled to privacy, whereas for the purposes of eavesdropping as defined in section 401(2) the mere consent of *one* party entitled to privacy extinguishes the privacy rights of the other parties to the communication. Nonetheless, the application of proper rules of statutory construction to this statute renders the inconsistency largely meaningless.

The correct construction of sections 401 and 402(1) requires that one apply the definitions included in section 401 to section 402(1) only to the extent that they appear in the substantive offenses listed in section 402(1). Only section 402(1)(a) contains the term eavesdropping, but it proscribes only an intent to eavesdrop in a private place when coupled with a trespass. Thus, section 402(1)(a) defines an inchoate offense that is complete before actual eavesdropping occurs. Under this section only the *intent* to overhear without the consent of at least one party constitutes an offense. However, once a person actually installs or uses a device to overhear, record, etc., even though having obtained the consent of one party, unless he has obtained the consent of all parties entitled to privacy, he violates either section 402(1)(b) or (c).

Had the court construed the statute in this fashion, the issue of whether the conduct of the officers in *Boone* constituted eavesdropping need never have been reached, since there was neither indication of trespass nor consideration of intent in the opinion. The facts do, however, indicate that privacy violations occurred under sections 402(1)(b) and (c) if the place where the transaction occurred[12] was a "private place" within the meaning of section 402(1). This failure to consider the former sections precluded the court's consideration of a possibly crucial, additional issue. Section 401(1) excepts from its proscriptions such conduct as is authorized by law. In view of the fact that the statute requires the consent of all persons entitled to privacy before any surveillance can occur, law enforcement officers can realistically hope to obtain evidence only upon obtaining a warrant. Since no warrant was obtained in *Boone*, the court, in overlooking the applicability of the Privacy Act's substantive provisions, left unresolved the issue of whether a violation of the Act precludes the admissibility of the evidence obtained.

As a general rule, the fact that evidence is obtained in violation

12. The sale occurred at The Gym, an exercise establishment in Salt Lake City, Utah.

of a statute is irrelevant to its admissibility.[13] This appears to have been the rule in Utah,[14] but after *State v. Jasso*[15] it may no longer be the case. In *Jasso,* the Utah Supreme Court held that a search warrant issued upon an oral deposition was invalid and that evidence secured during the pursuant search was thus inadmissible. The warrant in *Jasso* was issued in violation of the Utah statute which requires such depositions to be in writing.[16] The holding in *Jasso* seems to have been based solely on the ground that the statute had been violated.[17] It is arguable, then, that the *Boone* court's statutory construction resulted in both the sanction of criminal activity on the part of the police officers, and the affirmance of an infirm conviction.

B. Abuse of Personal Identity by Television Advertising

In *Jeppson v. United Television, Inc.*[1] the Utah Supreme Court held that publication of a person's name without prior consent on a television program, presented solely for the purpose of advertising the television station, gave rise to a cause of action for abuse of personal identity within the meaning of section 76-9-405 of the Utah Code.[2] The court interpreted a 1973 change in the statute in reaching its decision.

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13. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2183 (3d ed. 1961).

14. State v. Lauden, 15 Utah 2d 64, 387 P.2d 240 (1963); State v. Fair, 10 Utah 2d 365, 353 P.2d 615 (1960).

15. 21 Utah 2d 24, 439 P.2d 834 (1968).

16. UTAH CODE ANN. § 77-54-4 (1953).

17. The court did cite the fourth amendment. The purpose of the citation, however, was only to provide constitutional authority for the statute. 21 Utah 2d at 28, 439 P.2d at 846. Thus, it was the statutory violation and not a constitutional violation which was the direct basis for the court's inadmissibility ruling. *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained in violation of *constitutional* rights held inadmissable).

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1. 580 P.2d 1087 (Utah 1978).

2. UTAH CODE ANN. § 76-9-405(1) (Supp. 1977) states:

> A person is guilty of abuse of personal identity if, for the purpose of advertising any articles of merchandise for the purposes of trade or for any other advertising purposes, he uses the name, picture, or portrait of any individual or uses the name or picture of any public institution of this state, the official title of any public officer of this state, or of any person who is living, without first having obtained the written consent of his parent or guardian, or if the person is dead, without the written consent of his heirs or personal representatives.

Although not raised in *Jeppson,* it is possible that the entire statutory scheme is constitutionally defective. UTAH CONST. art. VI, § 23 states in part: "[n]o bill shall be passed containing more than one subject . . . ." Section 76-9-405 is found in the Utah Criminal Code and provides that: "(2) Abuse of personal identity is a class B misdemeanor." Yet, the companion section, 76-9-406, provides for injunctive relief and the potential for recovering actual damages, a civil remedy. Including a civil remedy in a criminal bill may qualify as two subjects and, thus, violate the constitutional directions.

The defendant's employee telephoned the plaintiffs at their residence as a part of the television program "Dialing for Dollars." When Mrs. Jeppson informed the defendant's employee that she did not have her television set turned on, the employee said: "Oh, that is unfortunate, because you could have won $50.00." Mrs. Jeppson replied: "Well now I'll tell you, I'd rather have peace in my home than all that garbage on television, even for $50.00."[3] Without the knowledge or consent of the plaintiffs, the defendant's employee had announced the Jeppson's name and phone number on the air, and had televised the conversation.

The plaintiffs' complaint alleged that immediately following the televised conversation they received numerous phone calls about the conversation from people who "used rude, abusive, obscene and threatening language, . . . which caused plaintiffs to be embarrassed, and humiliated, and to fear for their safety . . . ."[4] Three theories were presented in the prayer for relief: (1) invasion of common law right of privacy; (2) abuse of the plaintiffs' personal identity in violation of section 76-9-405; and (3) intentional and malicious infliction of emotional and mental harm.[5] The court found that the plaintiffs' second theory stated a cause of action, reversed the lower court's ruling that the plaintiffs had waived their right of privacy by permitting the publication of their telephone number in a directory, and remanded the case without discussion of the other theories.[6]

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3. 580 P.2d at 1087.

4. *Id.* at 1088.

5. *Id.*

6. *Id.* at 1088-89. Utah has never recognized a common law right of privacy. *See* Prosser, *Privacy,* 48 CAL. L. REV. 383, 388 (1960). Thirty-six states and the District of Columbia have recognized a right of privacy. *See* Rugg v. McCarty, 193 Colo. 170, 476 P.2d 753, 755 n.1 (1960); Taylor v. K.T.V.B., Inc., 96 Idaho 202, 525 P.2d 984, 985 (1974); Estate of Berthiaume v. Pratt, 365 A.2d 792, 794 (Me. 1976); Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973); MASS. ANN. LAWS Ch. 214, § 1B (Michie Law. Co-op 1974).

The legislature, however, granted individuals the right not to have their name appropriated for use in advertising without their consent by enacting the predecessor to section 76-9-405. Act of Mar. 11, 1909, ch. 61, § 2, 1909 Utah Laws 83 (repealed 1973). The impetus to elevate the right of privacy to a legal right was supplied by a now famous law review article, Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890). The New York Legislature enacted a statute, the current version of which is found at N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976), which gave a right of action to a person whose name, portrait or picture was used for advertising purposes or purposes of trade after a young woman lost a suit against a company which had used her photograph on its flour packages, without her consent. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The original Utah statute was taken directly from the New York statute. *See* Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 260, 272 P.2d 177, 180 (1954). The constitutionality of this type of statute has been upheld. Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd,* 220 U.S. 502 (1911). Three states, besides New York and Utah,

In the earlier case of *Donahue v. Warner Bros. Pictures Distributing Corp.*,[7] the widow and daughters of Jack Donahue, a famous singer, brought suit under the predecessor[8] of section 76-9-405 against the distributors and exhibitors of a motion picture which included a portrayal of Donahue's life. In *Donahue*, the Utah Supreme Court rejected the argument that the use of a person's name or picture in any endeavor where profit motive exists falls within the meaing of the phrase "for purposes of trade."[9] The court adopted a restrictive view, holding that the statute applied only to the use of a person's name for actual advertising or for the "promotion of the sale of some collateral commodity."[10]

In *Jeppson*, the defendant relied on the narrow holding of the *Donahue* case to argue that section 76-9-405 should be narrowly interpreted to proscribe the unapproved use of a person's name only in explicit acts of advertising or promoting "the sale of collateral items."[11] The court, however, did not apply such a narrow interpretation of the statute, but adopted a more expansive definition of advertising by holding "that defendant's action fell within the proscription of the statute because 'Dialing for Dollars' is presented solely for the purposes of advertising its television station . . . ."[12]

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have enacted similar statutes. CAL. CIV. CODE § 3344 (West Supp. 1971); OKLA. STAT. ANN. tit. 21, §§ 839.1-.3 (West Supp. 1977); VA. CODE § 8.01-40 (1977). See Annot., 23 A.L.R.3d 865 (1969), for a discussion of invasion of privacy by use of plaintiff's name or likeness in advertising.

7. 2 Utah 2d 256, 272 P.2d 177 (1954).

8. The prior statute, Act of Mar. 11, ch. 61, § 2, 1909 Utah Laws 83 (repealed 1973), simply stated:

> Any person who uses for advertising purposes, or for purposes of trade, or upon any postal card the name, portrait or picture of any person, if such person be living, without first having obtained the written consent of such person, or, if a minor, of his parent or guardian, of [sic] if such person be dead, without the written consent of his heirs, or personal representatives, is guilty of a misdemeanor.

9. 2 Utah 2d at 164, 272 P.2d at 182.

10. *Id.* at 166, 272 P.2d at 184. This nullified the decision of the tenth circuit that a motion picture made for commercial activity for gain or profit as distinguished from an activity designed for educational or informative purposes was within the meaning of the statute. *See also* Prosser, *supra* note 6, at 402 n.161.

The *Donahue* case went through a number of conflicting rulings. It was originally brought in state district court, but was later removed to federal district court because of diversity of citizenship. The federal district court granted the defendant's motion for summary judgment on the grounds that the statute did not include the exhibition of motion pictures. The tenth circuit reversed this decision and remanded the case to the federal district court. Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6 (10th Cir. 1952). The case was then transferred back to the state court where the jury returned a verdict on no cause of action. The trial judge then entered a declaratory judgment in favor of the defendants and the plaintiffs appealed. 2 Utah 2d at 259, 272 P.2d at 179.

11. Brief for Respondent at 12, Jeppson v. United Television, Inc., 580 P.2d 1087 (Utah 1978).

12. *Id.* at 1088.

Although the plaintiffs' name was never included in any explicit advertisement or with a promotional sale of any other "collateral commodity," the court found that the publication of the plaintiffs' name violated 76-9-405.[13]

The court's apparent willingness to hold that the unauthorized use of a person's name in a commercial format, unrelated to the sale of collateral items, is "for the purpose of advertising any articles of merchandise for purposes of trade, or for any other advertising purposes,"[14] appears to be a de facto rejection of the narrow *Donahue* holding. Other jurisdictions have also shown a tendency to be liberal in their interpretation of what activity is "for purposes of trade."[15] They have generally refused to hold that all name uses in radio, television, motion pictures, newspapers, and magazines, which are clearly run for profit, are within the proscription of the privacy statutes.[16] Whether or not the Utah court will extend the proscription of the statute to the broad profit motive standard rejected in *Donahue* will only be known as future cases are decided.

Of course this expansive interpretation of the statute is subject to the first amendment guarantees of freedom of speech and freedom of the press. The United States Supreme Court has consistently recognized that an individual's right of privacy cannot conflict with the needs of a free press. In *Time, Inc. v. Hill,*[17] the Supreme Court stated that "[t]he exposure of the self to others in varying degrees is a concomitant of life in a civilized society. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[18] The *Jeppson* court did not address these constitutional limitations, but as the trend begun by *Jeppson* continues away from the narrow *Donahue* position, constitutional limitations will become increasingly significant.

In reviewing the district court's ruling that the plaintiffs had waived their right of privacy by allowing their name and number to be printed in the telephone directory,[19] the court concurred with

13. *Id.* at 1088-89.

14. UTAH CODE ANN. § 76-9-405(1) (Supp. 1977).

15. *See, e.g.*, Hazlitt v. Fawcett Pub., Inc., 116 F. Supp. 538 (D. Conn. 1953) (applying Oklahoma law); Holt v. Columbia Broadcasting Sys., Inc., 22 App. Div. 2d 791, 253 N.Y.S.2d 1020 (1964).

16. Prosser, *supra* note 6, at 405. *See, e.g.*, Cautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952). *But see, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

17. 385 U.S. 374 (1967).

18. *Id.* at 388. *See also* New York Times v. Sullivan, 376 U.S. 254 (1964).

19. 580 P.2d at 1089. Chief Justice Ellett and Justice Crockett dissented on this issue

rulings in other jurisdictions that a waiver of the right of privacy must relate explicitly to the use for which the person's name is appropriated.[20] The court curtly settled the issue of waiver by specifically stating that "[t]he violation of the statute . . . consists of the publication on the air without plaintiffs' *prior written consent.*"[21]

The court did not find it necessary to decide whether a common law right of privacy exists in Utah.[22] Nevertheless, by giving a broad interpretation to the current statute, and by requiring a person to waive expressly his right to privacy, the court strengthened the individual's right in Utah to be protected from an unauthorized appropriation of his identity.

XI. Statute of Limitations

Utah's Borrowing Statute

In 1972, Enid Allen, a longtime Utah resident, moved with her husband from their Utah home to Montana to become live-in managers of a motel. In January, 1974, while returning from a visit to her Utah home, in which her daughter's family now resided, Mrs. Allen was injured in a bus accident in Idaho. In June, 1976, she filed suit against the bus company in Utah state court, and because her claim was barred by Idaho's two-year statute of limitations,[1] sought to establish a Utah domicile and thereby invoke Utah's longer, four-year statute of limitations.[2] Mrs. Allen admittedly had established a Montana residence, had become a member of a church in Montana, had paid Montana income and motor vehicle taxes, and had registered and voted in Montana. Nevertheless, to establish her Utah domicile, she pointed to her ownership of the Utah home, her maintenance of a Utah driver's license, and her declaration that she had always considered herself a Utahan and intended at some future time to return to Utah to reside.

Notwithstanding her contrary declarations, the trial court concluded that Mrs. Allen had established a Montana domicile. It then

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as well as with the majority's holding that the use of the plaintiffs' name was within the proscription of the statute.

20. *E.g.*, Manger v. Kree Inst. of Electrolysis, Inc., 233 F.2d 5 (2d Cir. 1956); Canessa v. J.I. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62 (Super. Ct. Law Div. 1967).

21. 580 P.2d at 1089 (emphasis added).

22. See note 6 *supra*.

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1. Idaho Code § 5-219(4) (Supp. 1978).

2. Utah Code Ann. § 78-12-25(2) (1977).

dismissed the action on the basis of Utah's "borrowing" statute[3] which generally bars an action in Utah if such action is barred by the statute of limitations in the foreign jurisdiction in which it arose.

In *Allen v. Greyhound, Inc.*,[4] the Utah Supreme Court affirmed. It first reasoned that since one's domicile is based on residence and the intent to remain for an indefinite time, the determination of domicile is one of fact.[5] Therefore, the trial court was entitled to infer from the plaintiff's actions her intent to remain in Montana indefinitely even though she claimed otherwise.

Next, the court addressed an issue raised not by the plaintiff, but by the two dissenting justices. Utah's "borrowing" statute contains an exception "in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued,"[6] allowing him to maintain an action in Utah notwithstanding the foreign statute of limitations. The dissent argued that the plain language of the exception makes it applicable to anyone who at one time in the past had been a citizen of Utah.[7] Consequently, Mrs. Allen's onetime Utah citizenship precluded the application of the statute to bar her claim. The majority disagreed and construed the statute to except only those plaintiffs who were Utah citizens at the time the cause of action arose.[8]

Although the view of the dissent is arguably consonant with a

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3. Utah's "borrowing" statute provides:

> When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

Id. § 78-12-45 (1977).

4. 583 P.2d 613 (Utah 1978).

5. *Id.* at 614-15. Justice Maughan concurred in the result but specifically disagreed with the court's construction of domicile as a question of fact alone. He found it to be a question of law or, at best, a mixed question of law and fact. *Id.* at 616 (Maughan, J., concurring).

6. UTAH CODE ANN. § 78-12-45 (1977).

7. 583 P.2d at 613, 616 (Crockett, J., dissenting).

8. *Id.* at 615. CAL. CIV. PROC. CODE § 361 (West 1954), enacted originally in 1872, served as the model for Utah's "borrowing" statute and the statutes are nearly identical. While the California court has not confronted a set of facts like those in *Allen*, it has not construed its "borrowing" statute otherwise, applying the exception only to plaintiffs who were residents of California at the time their cause of action arose in a foreign jurisdiction and who thereafter continued to be residents of California. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Biewend v. Biewend, 17 Cal. 2d 108, 109 P.2d 701 (1941); Stewart v. Spaulding, 72 Cal. 264, 13 P. 661 (1887).

A similar Montana statute codifies the same restrictions in much less ambiguous language. The plaintiff must be a resident at the time suit is brought, *and* he must either have been a resident at the time the cause of action arose or have become a resident after the cause of action arose but before the foreign statute of limitations expired. MONT. REV. CODES ANN. § 93-2717 (1964).

literal reading of the statute, the majority's interpretation is consistent with the purpose of the law. Utah has a legitimate interest in providing a forum for its residents who are injured while temporarily outside the state. However, there is no equally compelling reason to open the courtroom door to anyone who five, ten or twenty years ago resided in Utah and has since taken up residence elsewhere. Such persons most likely have recourse to courts of the jurisdiction where they now reside and mere onetime state citizenship in this age of mobility should not provide a plaintiff with an opportunity to forum shop.

XII. TORTS

A. *Standard of Care for Landowners*

In *Marchello v. Denver & Rio Grande Western Railroad,*[1] the United States Court of Appeals for the Tenth Circuit, applying Utah law, held that a landowner in Utah may be subject to liability for harm to a licensee[2] caused by a dangerous condition on the land if the landowner *knows or has reason to know* of the condition and *should realize the risk* of such harm.[3] The Utah Supreme Court has previously subjected a landowner to such liability only if he *knew* of the condition and *realized* the risk.[4] The tenth circuit held, however, that recent Utah decisions support the conclusion that the Utah court, faced with this issue, would now adopt the higher standard of care embodied in section 342 of the Second Restatement of Torts in lieu of the more lenient position of the First Restatement.[5]

Marchello was a wrongful death action in which the plaintiff sought damages when her husband was killed while driving an 80,000 pound front end loader across the defendant's railroad bridge. The defendant consented to the crossing and sent a railroad

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1. 576 F.2d 262 (10th Cir. 1978).
2. The Utah court has defined the status of visitors to property as follows:

> In considering the duty of a landowner to persons coming on his property, it is appropriate to point out the distinction between what are termed "invitees" or "business visitors" as compared to those who are termed "licensees." In order to qualify as the former, one who goes upon the premises of another must do so at the invitation of the owner . . . . A licensee is one who goes on the land of another without any such invitation. But in order that he not be a mere trespasser, there must be permission from the landowner . . . .

Stevens v. Salt Lake County, 25 Utah 2d 168, 171-72, 478 P.2d 496, 498 (1970).

3. 576 F.2d at 267.
4. Wood v. Wood, 8 Utah 2d 279, 281, 333 P.2d 630, 631 (1959).
5. In a case decided the same day, another panel of the tenth circuit held similarly. Madison v. Deseret Livestock Co., 574 F.2d 1027, 1034 (10th Cir. 1978), *rev'g* 419 F. Supp. 914 (D. Utah 1976).

supervisor to the site to assist the driver and his employers.[6] One crossing proceeded without incident, but the supervisor directed the driver to reposition the loader's wheels and follow a different path in making the second crossing. This time, as the loader moved onto the bridge, its right wheels broke through an unsupported section of planking and it fell into the river below, killing the driver.

The plaintiff alleged negligence as a matter of law, since the defendant's supervisor had directed the driver onto an area of the bridge that was unsafe.[7] The trial court, however, ruled that the driver was merely a licensee to whom the defendant's only duty under Utah law was to warn of any actually known dangers. Finding that the weakness of the bridge was unknown to the supervisor, the trial court granted the defendant's motion for summary judgment.

On appeal, the defendant urged the court to apply section 342 of the First Restatement of Torts, which provides that a landowner is subject to liability for bodily harm caused to licensees by conditions on the land only if he *"knows* of the condition and *realizes* that it involves an unreasonable risk to them . . . ."[8] The Utah Supreme Court has cited this section with approval.[9] Upon review of two recent Utah decisions, *Stevens v. Salt Lake County*[10] and *Schlueter v. Summit County, Town of Kamas,*[11] the tenth circuit concluded, however, that the Utah court would now apply the more objective standard of section 342 of the Second Restatement of Torts, which provides: "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor *knows or has reason to know* of the condition and *should realize* that it involves an unreasonable risk of harm to such licensees . . . ."[12] Since the trial court had applied the standard of the First Restatement, the tenth circuit reversed the summary judgment and remanded the case for trial.[13]

In *Stevens,* the Utah court considered whether a landowner had

6. The supervisor was given responsibility "to take care of the actual movement and to see that it was done under circumstances satisfactory to the Railroad." 576 F.2d at 265.

7. The court recognized that the alleged active negligence of the supervisor could provide an additional theory of liability. 576 F.2d at 267-68. Application of section 342 does not depend, however, upon active negligence of the landowner; the court applied section 342 in *Madison v. Deseret Livestock Co.,* 574 F.2d 1027 (10th Cir. 1978), which involved no active negligence. Thus, the alleged active negligence was not the controlling issue.

8. RESTATEMENT OF TORTS § 342 (1934) (emphasis added).

9. Wood v. Wood, 8 Utah 2d 279, 281, 333 P.2d 630, 631 (1959); Tempest v. Richardson, 5 Utah 2d 174, 176, 299 P.2d 124, 125 (1956).

10. 25 Utah 2d 168, 478 P.2d 496 (1970).

11. 25 Utah 2d 257, 480 P.2d 140 (1971).

12. RESTATEMENT (SECOND) OF TORTS § 342 (1965) (emphasis added).

13. 576 F.2d at 269.

a duty to maintain his land in a safe condition, and in footnote, quoted with approval a sentence from Comment *f* of section 342 of the Second Restatement of Torts.[14] Although the *Stevens* opinion makes no reference to the text of section 342, the tenth circuit considered it to be supportive of its decision to require application of the Second Restatement in *Marchello*.[15] With the exception of the change of label from "gratuitous licensee" to "licensee," however, the sentence quoted in *Stevens* is exactly the same as in the corresponding sentence in the First Restatement.[16] Therefore, *Stevens* provides little basis for determining whether the Utah court would now apply the standard of the Second Restatement.

Schlueter provides more persuasive support for the *Marchello* decision. Both versions of section 342 involve elements of *knowledge* and of *realization of the risk* of a dangerous condition on the land. The standard of the first section 342 is essentially subjective, imposing liability if the landowner *knows* of the condition and *realizes* the risk.[17] The second section 342 holds the landowner to a more objective standard, subjecting him to liability if he *knows or has reason to know* of the condition and *should realize* the risk.[18] In *Schlueter*, the Utah court did not cite either version of section 342, but it stated in dicta[19] that "a landlord fulfills his duty to a guest or licensee when he refrains from wilfully causing injuries to the guest or licensee or from permitting conditions to exist from which he reasonably *should foresee* that injury might result."[20] In the context of this issue, "should foresee" in *Schlueter* is consonant with "should realize" in the second section 342. In addition, the duty set forth in *Schlueter*, to refrain from permitting dangerous conditions to exist, implies that the landowner knows or at least has reason to know of the condition.

While it is arguable that the Utah court could retain the first section 342 as modified by *Schlueter* and adopt a compromise standard of imposing liability when the landowner *knows* of the condition and *should foresee* the risk,[21] there are other indications that

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14. 25 Utah 2d at 172 n.7, 478 P.2d at 499 n.7.

15. 576 F.2d at 267.

16. *Compare* RESTATEMENT OF TORTS § 342, Comment *e* (1934) *with* RESTATEMENT (SECOND) OF TORTS § 342, Comment *f* (1965).

17. See text accompanying note 8 *supra*.

18. See text accompanying note 12 *supra*.

19. The court held that the plaintiff, who was injured when he slipped and fell on the defendant's property, was no longer a licensee but was a trespasser. 25 Utah 2d at 259, 480 P.2d at 141. Since the duty of care owed to licensees was not at issue, the statements concerning that duty are dicta.

20. *Id.* at 259-60, 480 P.2d at 141-42 (emphasis added).

21. This is the position taken by the trial court in Madison v. Deseret Livestock Co.,

the *Marchello* decision may prove to be correct. For example, on the issue of dangers which are known or obvious to invitees, the Utah court recently applied an objective standard of care[22] harmonious with the applicable section of the Second Restatement,[23] but not with that of the First Restatement.[24] The Utah court thus favors the application of more objective standards of care in other situations involving a landowner and those on his land.

On remand, the trial court may have some difficulty in determining the degree of knowledge required of the defendant by *Marchello.* The tenth circuit directed that the jury must determine whether the defendant had "an obligation to ascertain" whether the second path was safe, or whether the defendant "knew or should have known" of the risk involved.[25] This dicta is inconsistent with the court's own conclusion that the standard that would be applied in Utah is *knows or has reason to know* from the second section 342. *Should know* is not interchangeable with *reason to know*; these terms are distinguished in section 12 of the Second Restatement of Torts.[26] Since the tenth circuit held that the second section 342 applies, gave the confusing jury instructions in dicta, and cited no authority for imposing such a duty to ascertain facts, the trial court should ignore the confusing jury instructions and apply the standard of the second section 342.

Marchello follows a trend apparent in other western states. While some western states have rejected standards of care based solely on the status of the visitor to the land and have adopted a general standard of reasonable care under the circumstances,[27] Utah

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419 F. Supp. 914, 920, 922 (D. Utah 1976).

22. "Where there is a dangerous condition on one's property, which is just as observable to an invitee as to the owner, the owner has no duty to warn or to protect the invitee except to observe the universal standard of reasonable care under the circumstances." Ellertson v. Dansie, 576 P.2d 867, 868 (Utah 1978).

23. "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is *known or obvious to them,* unless the possessor should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS § 343 A(1) (1965) (emphasis added).

24. "A possessor of land is not subject to liability to his licensees . . . for bodily harm caused to them by any dangerous condition thereon . . . if they *know* of the condition and *realize the risk* involved therein." RESTATEMENT OF TORTS § 340 (1934) (emphasis added).

25. 576 F.2d at 269.

26. RESTATEMENT (SECOND) OF TORTS § 12 (1965). Comment *a* of this section explains that " 'reason to know' implies no duty of knowledge on the part of the actor whereas 'should know' implies that the actor owes another the duty of ascertaining the fact in question." *Accord,* RESTATEMENT (SECOND) OF AGENCY § 9, Comments *d* & *e* (1958).

27. *E.g.,* Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City and County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969). For an excellent discussion of the reasons for adopting the

is among those which continue to rely on status distinctions to some extent.[28] For example, Colorado has rejected status-based standards[29] while Arizona has retained them.[30] Yet both have accepted the objective standards of the second section 342.[31] Therefore, the trend in the West appears to be toward the imposition on landowners of more objective standards of care. While *Marchello* does not bind the Utah court, it offers a basis for argument and may accurately predict the future of such cases in Utah.

B. Wrongful Death Actions and the Elimination of the Defense of Marital Tort Immunity

In *Hull v. Silver*,[1] the Utah Supreme Court eliminated marital tort immunity as a possible defense in certain wrongful death actions. On June 22, 1972, Lynn R. Silver, his wife, Marilyn Hull Silver, and another couple died when an aircraft piloted by Mr. Silver crashed en route to Seattle, Washington. Following the accident, the administrator of the estate of Mrs. Silver filed a wrongful death action against the estate of Mr. Silver on behalf of Mrs. Silver's heirs,[2] alleging that negligent operation of the aircraft by Mr. Silver caused the airplane crash and resulting death of Mrs. Silver.[3] The trial court granted the defendants' motion for summary judgment on the grounds of the common law marital tort immunity doctrine. On appeal, the Utah Supreme Court reversed.

The principal basis of the court's decision in *Hull* rested upon the history, interpretation, and application of the Utah wrongful

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general standard of reasonable care under the circumstances, see Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972).

28. The landowner's liability for an unreasonably dangerous use of his land "depends upon several factors: . . .(d) was the affected person a guest; (e) was he a licensee; (f) was he a trespasser?" Schulz v. Quintana, 576 P.2d 855, 856 (Utah 1978). Elimination of status distinctions was expressly rejected in *Schlueter*. 25 Utah 2d at 259, 480 P.2d at 141. *Accord*, Robles v. Severyn, 19 Ariz. App. 61, 504 P.2d 1284 (1973); Gerchberg v. Loney, 223 Kan. 446, 576 P.2d 593 (1978). *See also* Stevens v. Salt Lake County, 25 Utah 2d 168, 171-72, 478 P.2d 496, 498 (1970).

29. Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308, 311 (1971).

30. Robles v. Severyn, 19 Ariz. App. 61, 504 P.2d 1284, 1286 (1973).

31. State v. Juengel, 15 Ariz. App. 495, 489 P.2d 869, 874 (1971); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308, 314 (1971).

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1. 577 P.2d 103 (Utah 1978).

2. Mrs. Silver's heirs included two minor children by a former marriage who were in her custody at the time she was killed. Brief for Appellant at 2, Hull v. Silver, 577 P.2d 103 (Utah 1978).

3. The plaintiff also brought suit against C.W. Silver Co., Inc. and Silco Corporation. 577 P.2d at 103.

death statute.[4] The court examined the language of the statute and pointed out that, unlike Utah's original wrongful death enactment of 1874, the present statute did not limit recovery to cases where the decedent could have maintained an action had he lived.[5] The court also noted two previous decisions holding that a wrongful death action brought by the heirs of the decedent was not a continuation of the deceased's cause of action, but rather an assertion of a *new cause of action* which arose in favor of the heirs upon his death.[6] The wrongful death statutes under consideration in both cases contained language similar or identical to the statute under consideration in *Hull*.[7]

The *Hull* court reasoned that previous interpretations of the wrongful death statute provided principles that determine the kind of defenses that can be raised in a suit under the statute.[8] These principles set forth a distinction between those defenses that inhere in a tort action and those defenses that relate to a personal disability to sue.[9] An analysis of the court's language in *Hull* and the cases

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4. UTAH CODE ANN. § 78-11-7 (1977).

5. 577 P.2d at 104. The current statute provides: "[W]hen the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representative for the benefit of his heirs, may maintain an action for damages against the person causing the death . . . ." UTAH CODE ANN. § 78-11-7 (1977). The original enactment of 1874 provided:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

2 COMP. LAWS OF UTAH § 2961 (1888).

6. The court cited Mason v. Union Pacific Ry., 7 Utah 77, 24 P. 796 (1890), and Van Wagoner v. Union Pacific R.R., 112 Utah 189, 186 P.2d 293 (1947). In *Mason*, the court held that although the heirs must base their cause of action on the same wrongful act on which the decedent would have based his cause of action had he lived, a suit by the heirs was not a continuation of the deceased's cause of action. Rather, a new cause of action vested in the heirs upon his death. 7 Utah at 81-82, 24 P. at 797. The *Van Wagoner* court qualified and refined this concept of a new cause of action in the heirs. The appellants in *Van Wagoner* contended that the contributory negligence of the deceased could not be raised as a defense against the deceased's heirs, who were vested with a new and independent cause of action upon his death. 112 Utah at 208, 186 P.2d at 303. The court disagreed, holding that the legislature did not intend to abolish the defense of contributory negligence in a wrongful death action. "[W]rongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death." *Id.* at 209, 186 P.2d at 303.

7. The wrongful death statutes in effect at the time of *Mason* are found in 2 COMP. LAWS OF UTAH §§ 2961, 2962, and 3179 (1888). The wrongful death statute in effect at the time of *Van Wagoner* is found at ch. 46, § 2912, 1901 Utah Laws 40.

8. See note 6 *supra*.

9. 577 P.2d at 105. The *Hull* court followed the precedent of Johnson v. Ottomeier, 45

cited in support of the opinion reveals that defenses that "inhere in a tort" are those that can be raised by the defendant regardless of his relationship to the deceased. These defenses remain available to the defendant even though a *new* cause of action vests in the decedent's heirs.[10] In contrast, defenses that relate to a personal disability to sue are those that can be raised by the defendant only if he bears a specific relationship to the deceased. These defenses die with the decedent and hence cannot be raised against "the personal representative, who has a new cause of action."[11] The defense of interspousal immunity is in this latter category.

The court in *Hull* was confronted with a potential conflict of policy considerations. The court had previously concluded in *Rubalcava v. Gisseman*[12] that any abrogation of marital tort immunity would be unwise because it would lead to marital disharmony and, should insurance be involved, to collusion between the spouses.[13] It had relied on these policies in *Rubalcava* even though one spouse was dead.[14] Yet, to uphold the rationale of *Rubalcava* and allow the immunity defense in *Hull* would undermine the court's interpretation that the wrongful death statute creates a new cause of action. Conversely, if the court were to follow the rationale behind the statute and disallow the defense of marital tort immunity, it would be forced to compromise the policy considerations underlying *Rubalcava.*

The supreme court side-stepped this dilemma by distinguishing *Rubalcava* on its facts. The court reasoned that "[h]ere, *both* spouses are dead, the conventional family unit has been destroyed, and a wrongful death action has been brought by the heirs. Thus, there is no marital harmony that needs protection, and there is no possibility of collusion."[15] Although this distinction enabled the court to avoid a direct confrontation of the policies involved, it also created uncertainty concerning the application of the marital tort

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Wash. 2d 149, 275 P.2d 723 (1954), in making this distinction. A similar distinction is found in Jones v. Pledger, 363 F.2d 986, 988 (D.C. Cir. 1966).

10. An example of this kind of defense is found in Van Wagoner v. Union Pacific R.R., 112 Utah 189, 186 P.2d 293 (1947). See note 6 *supra.*

11. Johnson v. Ottomeier, 45 Wash. 2d 149, 275 P.2d 723, 725 (1954).

12. 14 Utah 2d 344, 384 P.2d 389 (1963).

13. *Id.* at 346-49, 384 P.2d at 391-92. These are the two policies most often cited by courts choosing to uphold the doctrine of marital tort immunity. *See generally* Greenstone, *Abolition of Intrafamiliar Immunity,* 7 FORUM 82, 83 (1972); 11 DUQ. L. REV. 719, 720 (1973); 6 IND. L. REV. 558, 562 (1973).

14. "The incongruity and illogic of holding that an injured wife would not recover against her husband if he survived, but only if he should die, is patent." 14 Utah 2d at 349, 384 P.2d at 392.

15. 577 P.2d at 103 (emphasis added).

immunity doctrine in Utah.

Four possible fact situations exist that could involve marital tort immunity. First, one spouse could sue the other. Second, one spouse could sue the other spouse's estate in tort. Third, one spouse's estate could sue the other spouse's estate under the wrongful death statute. Fourth, one spouse's estate could sue a living spouse under the wrongful death statute. In *Rubalcava,* the court recognized the defense of marital tort immunity in the first and second situations. In *Hull,* the court rejected marital tort immunity as a defense in the third situation. The fourth situation remains unresolved.

The court's language in *Hull* clearly suggests that a living spouse could not raise marital tort immunity as a defense to a wrongful death action in the fourth situation.[16] If the court were so to hold, however, it would have to face a conflict with the policies underlying marital tort immunity that it avoided in *Hull.* The court in *Hull* distinguished *Rubalcava* on the grounds that both spouses were deceased and not just one as in *Rubalcava.* This distinction, of course, would not apply to the fourth situation, in which only one spouse is deceased. Hence, the policy considerations enunciated in *Rubalcava* would come into direct conflict with the legislature's intended meaning of the wrongful death statute as determined by the court in *Hull.* If *Hull* is to have continued viability, the court will have to reassess the policy considerations stressed in *Rubalcava* and concede that such considerations are not always determinative.

The majority opinion in *Rubalcava* and the dissenting opinion in *Hull* both pointed out that a partial abrogation of marital tort immunity creates incongruities. The court in *Rubalcava* noted that it would be illogical to allow a wife to recover against her husband if he died, but not if he lived.[17] Justice Hall's dissent in *Hull,* in effect, pointed out the illogic of allowing a wife to recover only if she dies, and not if she lives.[18] Although Justice Hall argued in favor of retaining marital tort immunity in wrongful death cases in order to obtain consistency, it should be noted that total abrogation of marital tort immunity would also alleviate such incongruities. Each spouse's rights and liabilities would remain the same whether either spouse lived or died.

In 1970, the Indiana Supreme Court held that the doctrine of

16. "[W]hen heirs of a personal representative bring an action under the Utah wrongful death statute such an action is not subject to the defense of interspousal tort immunity." *Id.* at 104.

17. 14 Utah 2d at 349, 384 P.2d at 392.

18. 577 P.2d at 107 (Hall, J., dissenting).

marital tort immunity had no applicability to actions brought under the Indiana wrongful death statute.[19] Two years later, the same court abrogated the doctrine of marital tort immunity in its entirety,[20] thereby following a growing trend across the country.[21] Perhaps the Utah Supreme Court's recent decision in *Hull* is one step towards a similar objective in Utah.

XIII. UNIFORM COMMERCIAL CODE

Reclamation as an Exclusive Remedy for Breach of Contract

In *Bullock v. Joe Bailey Auction Co.*,[1] the Utah Supreme Court considered whether a seller should recover damages resulting from a buyer's breach of contract where the seller had successfully reclaimed the goods. The court disallowed the seller's recovery of damages by applying, apparently for the first time in any United States jurisdiction, section 2-702(3) of the Uniform Commercial Code (U.C.C.).[2]

Russ Bullock (buyer) was the successful bidder on well drilling equipment sold at auction by Joe Bailey Auction Company (seller) in Ventura, California. Although the buyer had qualified financially[3] for bidding prior to the auction, he was instructed that he was not to receive the equipment until payment was made.[4] Nevertheless, the buyer, before making any payment, and without obtaining the seller's permission, began to move the equipment to Utah. While the equipment was in transit, the buyer gave the seller a

19. *In re* Estate of Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970).

20. Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

21. *See, e.g.*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972)(appendix lists jurisdictions that have partly or wholly abolished marital tort immunity).

1. 580 P.2d 225 (Utah 1978).

2. U.C.C. § 2-702(3) is codified at UTAH CODE ANN. § 70A-2-702(3) (1968). Section 70A-2-702(3) provides: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter (section 70A-2-403). Successful reclamation of goods excludes all other remedies with respect to them." The Utah section parallels section 2-702(3) of the U.C.C. except that the language "or lien creditor" following "or other good faith purchaser" was eliminated from the U.C.C. version by the Code's Permanent Editorial Board in 1966. The amendment has no effect on the outcome of *Bullock*, since *Bullock* involved neither a lien creditor nor any other third party creditor.

3. The seller required verification that financing for the equipment had been arranged before the buyer was allowed to participate in the bidding. Transcript at 33-34. Bullock v. Joe Bailey Auction Co., 580 P.2d 225 (Utah 1978).

4. Brief for Respondent at 3, Bullock v. Joe Bailey Auction Co., 580 P.2d 225 (Utah 1978).

check for the purchase price, which was dishonored at the bank a few days later. Thereafter, the seller notified the buyer of his intention to reclaim the equipment and dispatched a crew to repossess it. To prevent this threatened self-help repossession the buyer obtained a temporary restraining order and the crew was turned away.

The restraining order was dissolved because the buyer failed to appear at a hearing to determine its validity. The seller then reclaimed the equipment. Subsequently, the buyer sued for specific performance of the sales agreement and the seller counterclaimed for damages of $7,357.46 stemming from the breach.[5] The trial judge found that payment was made a condition precedent to the buyer's right to possess the equipment, and decided that no sale was consummated since payment was not made.[6] Therefore, he held that the seller rightfully repossessed the equipment and was entitled to damages resulting from the breach.

The Utah Supreme Court reversed, noting that the facts clearly supported a sale under the U.C.C.[7] Without further analysis, the court held that the seller's reclamation of the equipment excluded all other remedies because of section 2-702(3).[8]

Two related issues are raised in *Bullock*. The first is whether the buyer had the right to possess the equipment. If so, the seller's reclamation of the goods was wrongful. If, however, the buyer did not have rightful possession, then a second issue is raised: whether the seller should have been able to recover damages in addition to reclaiming the equipment.

A buyer's right to possess goods of sale at common law depended upon whether the sale was for cash or for credit. A cash sale was regarded as one in which neither title nor possession was to be delivered until payment in full was made.[9] The cash sale doctrine

5. Specifically, the seller claimed damages as follows: $3,307.46 for the expense of sending trucks, which returned empty due to the issuance of a wrongful restraining order; $2,800.00 for salary expense incurred by the seller in getting the equipment ready to move, which was also made futile by the restraining order; $750.00 for loss of commission on the sale; and $500.00 for costs relative to the resale. Brief for Respondent at 5.

6. 580 P.2d at 227, 229.

7. *Id.* at 228. The court decided there was a sale in *Bullock* on two grounds. First, a sale by auction is complete at the fall of the hammer. UTAH CODE ANN. § 70A-2-328 (1968); *accord,* State *ex. rel.* Robins v. Clinger, 72 Idaho 222, 238 P.2d 1145, 1150 (1951). Second, the court stressed the error of the trial judge's statement that no sale had been "consummated." The court explained: " 'To consummate' is to complete, as distinguished from initiating. In order to consummate something, that 'something' must of course already be in existence." Thus, the court concluded that a contract of sale was initiated, though not completed, i.e., an executory contract existed. 580 P.2d at 227.

8. *Id.* at 229 & n.10. The court applied section 2-702(3) without any discussion of its relevance to the case.

9. Commercial Std. Ins. Co. v. McCollum, 207 F.2d 768 (10th Cir. 1953); *see* Corman,

contemplated no extension of credit,[10] but did include the situation in which a seller gave up possession of the goods in expectation of immediate payment.[11] Upon the buyer's failure to make immediate payment, the cash sale doctrine recognized a seller's right either to sue in conversion for the value of the goods[12] or to reclaim them.[13] The rationale of the cash sale doctrine was that the seller secured his position by retaining the goods until payment was made rather than releasing the goods and employing various credit sale security devices.

A credit sale, on the other hand, gave a buyer the right to possess the goods immediately upon the creation of the sales contract. Generally, a seller's sole remedy for breach was to sue for the price;[14] he could only reclaim the goods upon a showing that the buyer had misrepresented his solvency.[15] Thus, when a seller voluntarily gave up possession of the goods upon the buyer's promise to pay in the future, he thereby assumed the risk that the buyer might become unable to pay.[16]

The U.C.C. has incorporated into its provisions the common law distinction between cash and credit sales.[17] Two corresponding sections, dealing with a buyer's right to possess the goods of sale, exemplify the cash-credit distinction in the Code.[18] Section 2-507 deals with cash sales and provides that a buyer's right to possess the goods of sale is conditioned upon his making payment.[19] Section 2-709 covers credit transactions in which the buyer fails to pay the price as it becomes due. It implies that a buyer has an immediate right to possess the goods of sale, since it only allows a seller to sue

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Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 VAND. L. REV. 55 (1956).

10. Ellis v. Nelson, 68 Nev. 410, 413, 233 P.2d 1072, 1075 (1951).

11. Sterling Brewers Inc. v. Williamson, 269 S.W.2d 249 (Ky. 1954); E.L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N.W. 828 (1913).

12. E.L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 434, 142 N.W. 828, 830 (1913).

13. Goddard Grocer Co. v. Freedman, 236 Mo. App. 370, 373, 127 S.W.2d 759, 762 (1939); Weyerhaeuser Timber Co. v. First Nat'l Bank, 150 Or. 172, 38 P.2d 48, 56 (1934).

14. Gilmore, *The Commercial Doctrine of Good Faith Purchase,* 63 YALE L.J. 1057, 1060 (1954).

15. California Conserving Co. v. D'Avanzo, 62 F.2d 528, 529 (2d Cir. 1933); *In re* Stridacchio, 107 F. Supp. 486, 487 (D.N.J. 1952).

16. *See* Note, *The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code,* 72 YALE L.J. 1205, 1220 (1963).

17. R. NORDSTROM, HANDBOOK ON THE LAW OF SALES 501 (1970).

18. The cash-credit distinction in the Code has also been incorporated into the case law. Stowers v. Mahon *(In re* Samuels & Co.), 510 F.2d 139 (5th Cir. 1975) (excellent analysis of the cash-credit doctrine at common law and under the Code), *rev'd on other grounds,* 429 U.S. 834 (1976).

19. UTAH CODE ANN. § 70A-2-507 (1968).

for the price of the goods.[20]

The Utah Supreme Court's analysis in *Bullock* failed to reach the issue of whether the sale was for cash or for credit. The court incorrectly assumed that if it merely found a sale to exist, and the seller repossessed the goods, then the seller's only remedy was reclamation.

Since the court did not analyze *Bullock* in terms of the cash-credit distinction, it is difficult to determine what the ultimate result would have been if the distinction had been applied. Nevertheless, a strong argument can be made that the sale was a cash transaction, since the trial court found that payment was a condition precedent to the buyer's right of possession.[21] Such a provision typically indicates a cash sale.[22] This finding is not overcome by the buyer's argument that the seller's agent allowed the buyer to remove the goods before payment, since the trial court found that the goods were taken without the permission of the seller.[23] Furthermore, contracts of sale are presumed to be for cash unless there is an agreement to the contrary.[24] It would thus appear that the buyer had no right to possess the goods and the seller was entitled to reclaim them.[25]

Once the right to possession issue is decided, the next issue is the determination of the proper remedy. The *Bullock* court quickly dismissed this issue by applying section 2-702(3) of the U.C.C., which excludes all other remedies with respect to the goods upon the seller's successful reclamation. *Bullock* should not have been governed by this section because it was designed to govern a special situation not present in the case.

An examination of section 2-702 and its rationale demonstrates this section's inapplicability. Generally, a credit seller becomes an unsecured creditor of a buyer and may only sue for the price.[26] Section 2-702 provides an exception to this rule where the buyer has misrepresented his solvency.[27] In that case, if the insolvent buyer already has the goods, the seller can reclaim them if demand is

20. *Id.*

21. 580 P.2d at 227, 229.

22. Commercial Std. Ins. Co. v. McCollum, 207 F.2d 768, 770 (10th Cir. 1953); *see* UTAH CODE ANN. § 70A-2-507 (1968).

23. 580 P.2d at 227, 229.

24. UTAH CODE ANN. § 70A-2-310(a) (1968).

25. *See* Ranchers and Farmers Livestock Auction Co. v. Honey, 552 P.2d 313, 316-17 (Colo. Ct. App. 1976).

26. UTAH CODE ANN. § 70A-2-709 (1968).

27. *Id.* § 70A-2-702 (1968); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 242 (1972).

made within ten days of their receipt.[28] If successful in reclaiming the goods, a seller is excluded from all other remedies with respect to those goods.[29] The official comment to section 2-702 explains that this limitation is imposed because the seller's reclamation of the goods diminishes the pool of assets available to the buyer's other creditors and, thus, constitutes preferential treatment against those creditors.[30] This rationale does not apply to the facts of *Bullock*, since no third party creditors were involved and there is no indication that the buyer was insolvent.[31] It is apparent that neither party believed the buyer to be insolvent because the buyer sued for specific performance and the seller counterclaimed for damages.

Eliminating section 2-702 as controlling, if the sale in *Bullock* was for cash and the seller had the right to reclaim the equipment, two fundamental policies of the Code militate against limiting the seller's remedy to reclamation. First, the Code was designed to eliminate the common law doctrine of election of remedies.[32] A second policy contemplates the liberal administration of the Code's remedies to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.[33] In *Bullock*, however, the court refused to accumulate remedies for the seller, and he was therefore denied a full recovery. In view of the fact that the seller received no "preferential treatment," there is no apparent reason why he should not have been made whole.[34]

Even if the court could term the sale in *Bullock* a credit sale, the only proper remedy in the absence of insolvency is an action for the price under section 2-709. Thus, under the *Bullock* fact situation a credit seller's reclamation would have been wrongful and he should not recover the incidental damages of a wrongful repossession. Indeed, the buyer would have had a cause of action against the

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28. UTAH CODE ANN. § 70A-2-702(2) (1968).

29. *Id.* § 70A-2-702(3) (1968).

30. U.C.C. § 2-702, Official Comment 3 (1972).

31. The court noted that the buyer's financing was delayed. 580 P.2d at 227. This situation does not fall within any of the three Code definitions of insolvency. The Code provides: "A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law." UTAH CODE ANN. § 70A-1-201(23) (1968).

32. This is apparent from section 2-703, which gathers together in one section all the remedies available to a seller for any breach by the buyer. The official comment to section 2-703 states: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach." U.C.C. § 2-703, Official Comment 1 (1972).

33. UTAH CODE ANN. § 70A-1-106 (1968); U.C.C. § 2-703, Official Comment 4 (1972).

34. The Code also allows for recovery of incidential damages resulting from the buyer's breach. UTAH CODE ANN. §§ 70A-2-106, -710 (1968); 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 64 (1965).

seller in conversion if the transaction was a credit sale.

The result in *Bullock* presents an unsettling precedent for sellers. If a buyer and a seller prefer to transact a cash sale, the traditional method of payment by check poses a significant risk for the seller if the check is dishonored. Under the *Bullock* analysis, if the court can find a sale in the transaction, a cash seller who rightfully reclaims the goods of sale cannot recover the costs of repossession and resale. Thus, a cash seller would be well advised to avoid the problem of repossession altogether by requiring payment to be made by cashier's check or by holding the goods securely until the buyer's check clears the bank.

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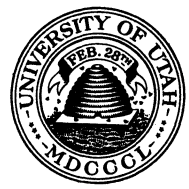

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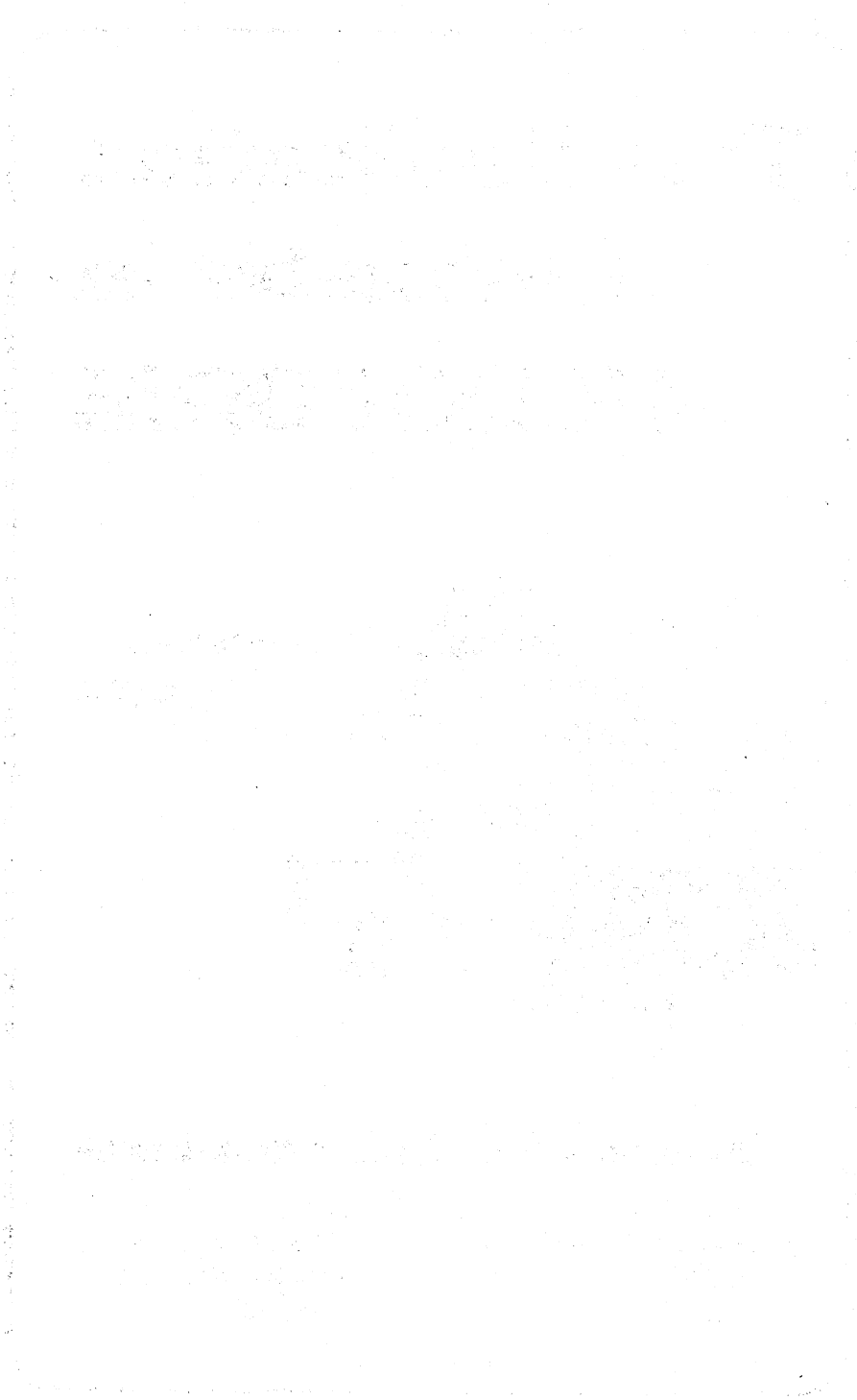
Errata

Pages 162-66; notes 34, 39, 40, 46, 48 & 61. Substitute 42 C.F.R. §§ 123.407(a)(9) & (10) (1977) for existing C.F.R. cites, and delete sentence in note 40.

Pages 146 and 175; notes 49, 50, & 107. Citations and accompanying text mistakenly referred to a related but different federal program. Significantly, these rights are not provided by regulations formulated under the National Health Planning and Resource Act, Pub. L. No. 93-641, 88 Stat. 2225 (1975) (codified in 42 U.S.C. §§ 300k-300t (Supp. V 1975)). *See* 42 C.F.R. §§ 123.407(a)(9) (1977).



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