

## MENDING FENCES

Suppose you have used your neighbor's driveway for years to access your backyard. Now a new neighbor arrives and claims that you have no right to use that land. What are your rights? What are your neighbor's rights? We offer these suggestions to those seeking to mend fences with disgruntled neighbors sharing a disputed boundary.

***Do not fear litigation.*** Typically, property line cases begin passionately. A new neighbor will make a blustering demand, send a provocative letter, or serve disturbing legal papers. Property line cases may evolve into a dull war of attrition involving insurance carriers, lawyers, expert appraisers and surveyors. Stubborn delays and strong wills may predominate unless both sides are willing to explore more creative solutions. Although some preliminary litigation excitement may be inevitable, most property line cases will resolve informally well before trial.

***Understand the issues.*** There are only a handful of competing legal doctrines that apply. If the use is "non-exclusive," which means that more than one property owner is using the same piece of land, a party may be able to assert a prescriptive easement right. For instance, if one uses a road for a period of time, one may acquire an easement by prescription. An easement may be acquired by prescription through open and "notorious" use—meaning that the use of the land is obvious—so long as the use is non-exclusive. This situation applies frequently to driveways and roads, because they often are used by more than one person.

On the other hand, title to land that is used exclusively by one person may be acquired under a doctrine called adverse possession. For example, recent decisions have clarified that an area of disputed property within a wall can be acquired only under adverse possession law, which requires the payment of taxes in addition to the meeting of the elements required for a prescriptive easement. In other words, if the land is used exclusively by one person, openly and notoriously, and the person also has been paying the property taxes on the land, then title to the land can be obtained under the theory of adverse possession.

There are other issues, such as in the case of disputed property within a wall, whether someone can prevent the forced removal of a wall, or whether the party in possession is required to pay fair market value for the use of the protective easement that the court in equity may allow. Other doctrines called estoppel and acquiescence can come into play, but they are harder to prove in many instances. The ultimate determination of issues will be decided by the judge ruling in equity or deciding as a matter of law, or the jury acting as fact finder.

***Focus on the facts.*** Answering the following ten questions will help in the evaluation and diagnosis of the prospects for a party in a property line dispute.

(1) What does the survey show? A litigant will need a plot map and a professional survey to file a proper quiet title action.

(2) What insurance is available? A litigant should expect a cross-complaint or counter demand letter and should be prepared to make a claim on his or her title or homeowner's insurance policies.

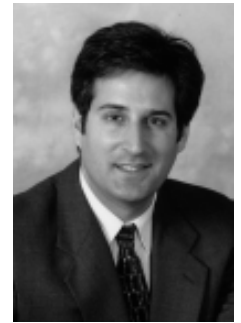
(3) What is the land really worth? Many cases settle because the fair market value of the land is hardly worth the expense and protracted attention of both sides. An owner or possessor should get a real estate appraiser to assist in assessing the worth of the land for each side's use and determining the fair market value.

(4) Is the party in possession's use exclusive or can it be characterized as non-exclusive? If there is a fence, does the fence have a gate so that each side can access the area?

(5) Who has been paying taxes on the land?

(6) Who built the encroachment and why? What investigation did the contractor for the builder do before constructing the encroachment?

(7) Was there any agreement concerning the encroachment?



By: Geoff Gold

### FEATURED ARTICLES

- **Mending Fences-** Pg. 1 by Geoff Gold
- **When the Independent Auditor Resigns -** Pg. 2 by Fred Fenster
- **Notes From Cyberspace - Now UCITA, Now You Don't -** Pg. 3 by Sam Poss
- **What's New -** Pg. 4

MATERIAL CONTAINED IN THIS NEWSLETTER IS FOR GENERAL INFORMATION ONLY AND SHOULD NOT BE INTERPRETED AS LEGAL ADVICE ON ANY PARTICULAR MATTER. TRANSMISSION OF THIS NEWSLETTER DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP. RH&D IS NOT RESPONSIBLE FOR ANY ERRORS OR OMISSIONS IN THE CONTENTS OF THIS NEWSLETTER.

Copyright 2003, Rutter Hobbs & Davidoff Incorporated

(8) When was the encroachment discovered? Query whether use of the encroachment was ever concealed or if it has always been apparent.

(9) What are the uses that each side has or proposes for the disputed area? Which property needs the use more?

(10) How much would it cost each side to live without the use of the land in question?

***Avoid self-help remedies.*** Consider an angry landlord who feels that a tenant must go. It would be unwise for the landlord to just lock the tenant out. The proper procedure is to bring an unlawful detainer action. Why? The law presumes that the one in possession has the right to continue in possession. Similarly, in a property line case neither side should engage in self-help. Cutting down trees, removing encroachments, and interfering with land currently being used by a party in possession may expose one to claims for wrongful entry and

trespass (not to mention compensatory damages and penalties).

Also, rash conduct may cause a court to act in its discretion to compensate the victim under equitable principles, or it may give the opposing party a defense or cross-claim where none existed previously. Matters are often settled by compromises such as lot line adjustments, improvements paid for by one or another, licenses or easements, or options or other shared use agreements.

In the end, good fences do not always make good neighbors.



*Geoff Gold's practice focuses on litigation, including real estate disputes. If you have any questions about your entitlement to land, please call Geoff Gold at (310) 286-1700 or e-mail him at [ggold@rutterhobbs.com](mailto:ggold@rutterhobbs.com).*



## WHEN THE INDEPENDENT AUDITOR RESIGNS

*By: Fred Fenster*

Imagine the following facts: A major corporation recognizes that it must obtain capital contributions from outside investors in order to remain a viable business. To assist in achieving that objective, the corporation retains an independent auditor and charges it with the responsibility of issuing an opinion respecting the corporation's financial condition. During this period of time, a wealthy individual expresses serious interest in investing \$10,000,000 in the corporation provided the corporation's audited financial statements are satisfactory. After carefully evaluating the applicable books and records, however, a dispute arises between management and the outside auditor regarding the characterization and treatment of certain transactions reflected on the corporation's unaudited financial statements. Unable to resolve the impasse, the outside auditor resigns without issuing an audit opinion.

Subsequently, the corporation retains another outside auditor to provide the necessary opinion, but in the interim, the investor decides not to make the investment due to the lack of an audited financial statement. As a direct result of the investor's departure, the corporation is unable to timely raise the requisite financing and is forced to cease its operations.

The issue is whether the independent auditor that refuses to provide an audit opinion is legally responsible for the corporation's \$10,000,000 loss and attendant inability to remain in business.

The answer to this question is set forth in the case of *National Medical Transportation Network v. Deloitte & Touche*. Initially, the Court noted that an auditor who is either permitted or required to resign based on the dictates of the applicable professional standards need not provide the client with a reasonable opportunity to employ a successor auditor prior to resigning: "Professional standards simply require an auditor to cooperate with the client's attempt to

retain a successor auditor by responding 'promptly and fully on the basis of facts known to (the auditor), to the successor's reasonable inquiries.'"

Moreover, once it is determined by the independent auditor that a corporation's management lacks a commitment to honesty in financial reporting, there is good cause to resign. In such instance, the reliability of the management's representations is properly questioned by the auditor, and it does not matter if the withdrawal unduly jeopardizes the corporation's interests. In short, the professional standards "permit or compel an auditor to resign if good cause exists."

Determining that good cause existed in this case, the Court trenchantly noted:

"When defendant (auditors) presented their initial audit results, Medtrans's chief executive officer Roberts responded with a threat. Despite knowing defendants and Medtrans's own chief financial officer had determined Medtrans's unaudited financial statements to be materially inaccurate, Roberts continued his attempts to market Medtrans's shares based on those statements. The parties' differences over the audit persisted despite defendants' attempts at resolution. Ultimately, Roberts told Johns 'you're finished.' Johns replied defendants' only choice was to resign."

Such resignation was proper, appropriate and in keeping with professional standards. In today's litigious world, auditors must maintain their independence at each step of the analysis and be prepared to resign rather than compromise their principles in the face of a client's pressure to do otherwise.

*Fred Fenster is a trial attorney with almost three decades of experience representing notable sports figures, as well as a multitude of other clients in complex business disputes. He may be reached at (310) 286-1700 or [ffenster@rutterhobbs.com](mailto:ffenster@rutterhobbs.com).*

# NOTES FROM CYBERSPACE

## NOW UCITA, NOW YOU DON'T

### Uniform Computer Information Transactions Act (UCITA) Stymied

A proponent of UCITA recently described the Act as “the most intensely debated, comprehensive, uniform law ever introduced . . . a testament to the adage that ‘no good deed ever goes unpunished’.”

An opponent of UCITA says:

“[t]he simple case is that it is a bad thing for consumers of any type, whether you are an individual or a business.”

This column last considered UCITA almost three years ago, *UCITA: New Code for New Mode* (First Quarter 2001). The National Conference of Commissioners on Uniform State Laws (NCCUSL), an organization consisting of legislators, judges, law professors and lawyers from every state, adopted UCITA more than two years ago based on the work of hundreds of lawyers over a 3½ year period. NCCUSL hoped that UCITA would bring the benefits of clarity, uniformity, predictability and facilitation of commerce in electronic contracting and computer licensing that the Uniform Commercial Code (UCC) has brought to traditional commercial transactions. As noted in our earlier article, without uniform or near uniform adoption of UCITA by most or all of the states, these goals cannot be met. However, as also noted earlier, UCITA has faced serious opposition.

Over two years ago, only Virginia and Maryland had adopted UCITA, both with modifications. When the current article went to press, not a single additional state legislature had adopted UCITA. To the contrary, a number of state legislatures have adopted or are considering adopting legislation intended to protect the state’s residents from application of UCITA. Although UCITA is still under consideration in several states, at least for now it appears that the concerns expressed by consumer organizations, the Federal Trade Commission, state attorneys general and even some significant corporations have thwarted the aspirations of UCITA’s champions.

The battle has been fierce, relentless and politically charged. UCITA’s adversaries have voiced their opposition passionately. For example, one commentator states:

“The only organizations it is good for are the software vendors. Don’t call it UCITA, just call it the Licensor Protection Act.”

Another critic observes that:

“UCITA and business-to-business dot.coms are a match made in licensing hell.”

UCITA’s opponents have expressed numerous specific criticisms of the proposed Act. However, the dominant and most comprehensive complaint is that UCITA favors large software publishers and licensors over consumers and business users.

Although the prospects for UCITA may have dimmed, NCCUSL has not thrown in the towel yet. Despite its often-stated position that the attacks against UCITA are unjust and inaccurate, in July 2002, NCCUSL approved 38 amendments to UCITA, many of which addressed these criticisms. Key amendments do the following:

- Clarify that UCITA does not override consumer protection law.
- Make contractual prohibitions of lawful criticism unenforceable.
- Emphasize that the law of fraud, misrepresentation and unfair/deceptive practices regarding disclosure of software defects are not superseded by UCITA.
- Restrict a licensor’s use of electronic self-help to remotely disable software.
- Clarify protections against modifications of licenses by licensors.
- Clarify that the UCITA provision regarding choice of judicial forum in a license conforms to existing law.
- Make prohibitions on reverse engineering for the purpose of product/system integration unenforceable.
- Bar UCITA’s application to non-contractual, voluntary use of open source software (that is, software publicly available at no charge).
- Establish that implied warranties under UCITA do not apply to “freeware” (that is, software available at no charge).

Will these amendments allay the concerns of UCITA’s opponents? Will California and the other remaining states adopt UCITA? Can uniformity be achieved? Stay tuned.

---

*Sam Poss is a business lawyer whose practice includes Internet, computer and high technology transactions. He may be reached at (310) 286-1700 or at [sposs@rutterhobbs.com](mailto:sposs@rutterhobbs.com).*



*By: Sam Poss*

RUTTER

HOBBS &

DAVIDOFF

INCORPORATED  
LAWYERS

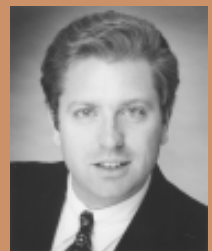
1900 Avenue of the Stars  
Suite 2700  
Los Angeles,  
California 90067-4301

Address Correction Requested

WHAT'S NEW  
R&D LAWYERS

## NEW LAWYERS JOIN THE FIRM

Two lawyers joined our firm in 2003. **Gregory J. Sater** handles complex business litigation matters and trials before state and federal courts, with a particular emphasis on disputes that involve intellectual property rights. Greg graduated from Stanford University (B.A., Human Biology, with distinction) in 1988. He received his law degree from Harvard Law School (J.D., *cum laude*) in 1991.



**William R. Burford** practices in the areas of tax and estate planning and trust and probate administration, where he advises clients on revocable and irrevocable trusts, wills, powers of attorney, charitable giving, tax-exempt organizations, fiduciary/beneficiary conflicts, and estate tax controversies. Bill holds an LL.M. in Taxation from the New York University School of Law, where he was Graduate Editor of the Tax Law Review and a Morris M. Geifman Scholar. He is a native of the state of Michigan and a two-time graduate of the University of Michigan, having received a B.A. in Economics, with high distinction, and a J.D., *cum laude*.