

UTAH BAR JOURNAL

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Developments in Employment Law



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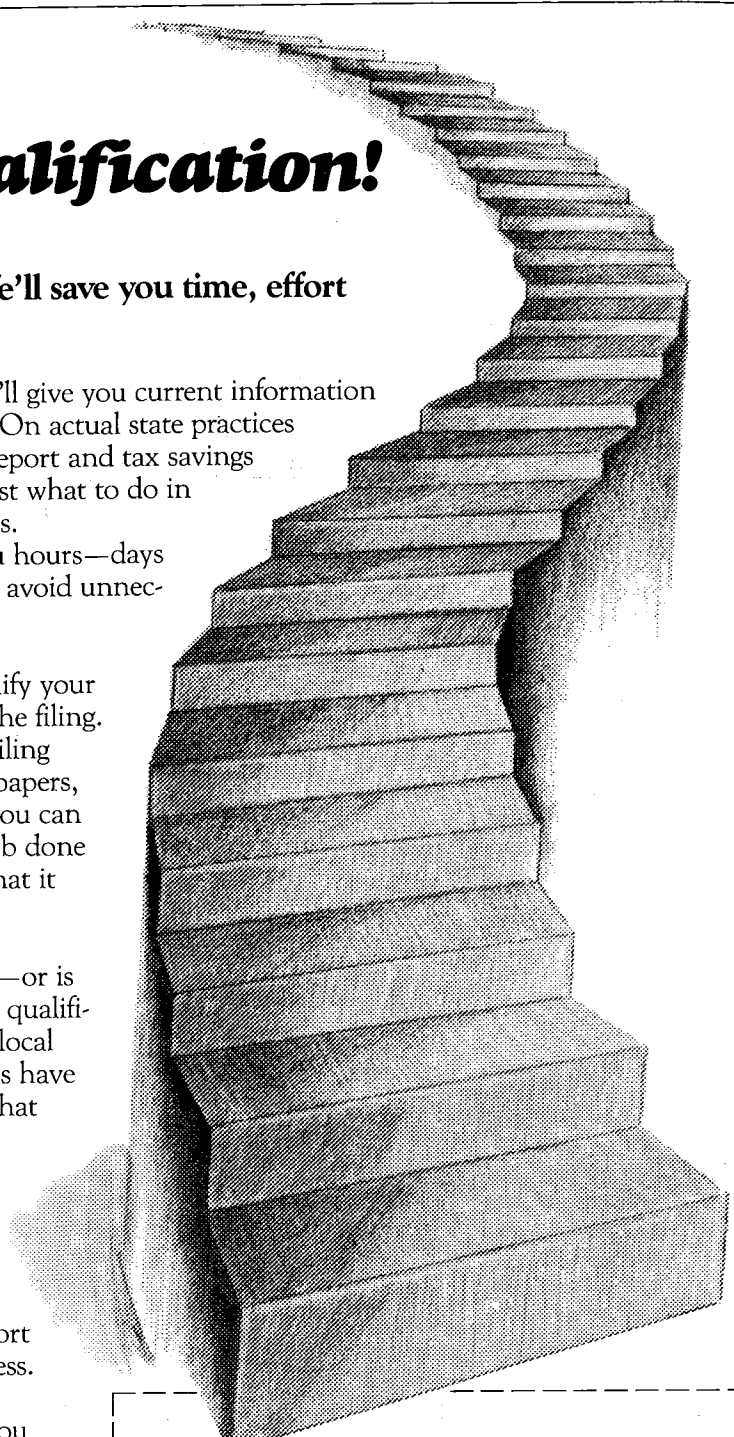


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COVER: Our thanks to Clint J. Broadbent, a student at the University of Utah with a double major in economics and Spanish, for the cover artwork which illustrates some employment-related issues of current legal interest. Clint is co-owner of Legal Art Works.

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LETTERS

EDITOR'S NOTE: Although the following letters were not addressed to the Utah Bar Journal, the Journal was recently asked by the Government Law Section of the Bar to publish the letters and the Journal is happy to oblige.

January 30, 1989
Justice Michael D. Zimmerman
Utah Supreme Court
State Capitol
Salt Lake City, Utah 84114
Re: Article in *Utah Bar Journal* on Ethics

Dear Justice Zimmerman:

I read your article, "Professional Standards Versus Personal Ethics: The Lawyers Dilemma," which appeared in the December 1988 edition of the *Utah Bar Journal*. A note at the end indicated that it was based on a commencement address which you gave at the University of Utah College of Law in May 1988. The note also stated that it was a slightly edited version of your remarks. I am not sure to what extent your remarks were edited or taken out of context in the printed article.

While the focus of the article concerns the need for ethical practitioners in the area of civil litigation, I am concerned with that portion of it on page 35 that may suggest to some that criminal defense attorneys may properly operate free of any ethical responsibility for their actions.

I believe that there is a distinction to be made, implicit in your article, between zealously representing a criminal defendant without making moral judgments about the correctness of the client's cause or the justness of the result sought, on the one hand, and using proper and ethical means to do so on the other hand. Unfortunately, I think there are some who are not making that distinction in interpreting your article.

I think you would agree that there are limits to any attorney's zealous representation of a client, including criminal defense attorneys. I think that defense attorneys are sometimes confronted with very difficult ethical issues, but my understanding is that the *Rules of Professional Conduct* apply to all members of the Bar. For example, under Rule 1.2 and Rule 3.3 of the *Rules of Professional Conduct*, no attorney should assist a client in perpetrating a fraud against the court by putting on perjured testimony.

This limitation was recognized by the United States Supreme Court in *Nix v. Whiteside*, 89 L.Ed.2d 123 (1986), wherein a criminal defense attorney properly refused to cooperate with his client in presenting perjured testimony at trial:

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause," *Ibid*. "Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law."

Id. at 134.

I believe that many criminal defense attorneys in Utah take their ethical responsibilities seriously. I would like to see such attorneys used as role models for young attorneys practicing criminal defense work, similar to your suggestion that civil litigators should seek role models among ethical civil practitioners.

Some attorneys with whom I have spoken interpret your article as advancing the position that criminal defense attorneys have no ethical constraints on their conduct. Such an interpretation, I believe, does a disservice to the spirit of the article as well as to the many ethical defense attorneys in this state, and may encourage others to act in violation of their ethical responsibilities.

I am not at all convinced that your article truly advocates such a position. In fact, I think the opposite is true. I know that its purpose was to encourage ethical conduct. I thought I would bring to your attention my concerns in the event that your remarks were either taken out of context or you believe some further clarification might be helpful.

Very truly yours,

Creighton C. Horton II
Assistant Attorney General
Litigation Division

February 28, 1989

Creighton C. Horton II, Esq.
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Dear Mr. Horton:

Thank you for your letter regarding my article on the conflict between professional standards and personal ethics that appeared in the December 1988 number of the *Utah Bar Journal*. You suggested some have read my article as implying "that criminal defense attorneys may properly operate free of any ethical responsibility for their actions."

The title of the article expresses its basic theme—that a lawyer following the literal requirements of the Code of Professional Conduct may still engage in conduct that is difficult to defend as a matter of personal ethics. I did state that the criminal defense lawyer, although bound to conform his or her behavior to the technical requirements of the Code of Professional Conduct, can legitimately assert the "adversary system excuse" in response to calls that he or she act in accordance with some higher personal ethical code. But, as I explained, the criminal defense attorney's justification for not heeding the call of personal ethics is because when that attorney is defending his or her client against the overwhelming power of the state, the client is, in a real sense, a surrogate for us all as the lawyer attempts to ensure that the state proceeds against the defendant only in accordance with the constitution and the laws.

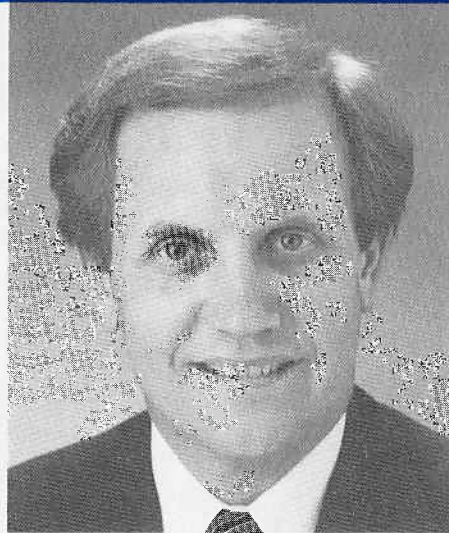
I am hard put to understand how what I said regarding the conflicting demands of the Code of Professional Conduct and one's personal ethical code could be construed as suggesting that criminal defense lawyers have no constraints on their conduct. I suppose, however, that some who do not like the role criminal defense lawyers must play under our system, or who think that certain members of that group violate the Code of Professional Responsibility, might read the article and leap to the mistaken impression that I was granting them license to do as they please. I hope this letter will alleviate any concerns you might have had about my true intentions.

Thank you for taking the time to write. In the event that others might share your concern, I am taking the liberty of forwarding a copy of your letter and of my reply to the *Utah Bar Journal*. If they conclude that there is a real danger that my views can be read as you suggest, then I will request that they publish our correspondence.

Sincerely,

Michael D. Zimmerman

PRESIDENT'S MESSAGE



By Hans Q. Chamberlain

It is with a great deal of humility that I commence my term as President of the Utah State Bar. I have now served on the Bar Commission since 1982, and I have a deep sense of loyalty to the Bar and appreciate past leaders who have left big shoes to fill. Living in Cedar City and trying to fulfill all responsibilities required will indeed be challenging, but likewise provide a great opportunity to serve and a chance to broaden one's base. I doubt that anyone realizes the complexity of Bar activities until they have to sit down and write their first President's message and report matters of interest to fellow members of the Bar.

The Utah Bar has changed significantly over the past few years, as has the legal profession as a whole. In 1960, 290,000 attorneys were licensed to practice on a national level. In 1986, more than 700,000 enjoyed that same privilege. By the year 2000, estimates indicate that there will be 1 million licensed lawyers in the United States, or one for every 300 people. In 1960, the median age of lawyers was 46, today it is 38 years, and more than one-half of the Bar of the United States have been admitted since 1975.

In 1984, the number of law students was approximately 127,000, but the mix of students has changed significantly, i.e., from 1,900 women in law school in 1960 to 40 percent of the 127,000 enrolled students in 1984. Likewise, between 1971 and 1985, minority enrollment has doubled from 5,600 to 12,300.

In Utah, since July 1985, membership in the Utah State Bar has increased from 4,100 to 5,100 members, with proportionate de-

mands on the Utah State Bar staff and the Bar Commission. As one would expect, the Utah State Bar budget has likewise increased to approximately 1.2 million based on increased membership, regulatory functions and Bar discipline. A separate budget is also administered and maintained by the Bar for the Law and Justice Center. During that same period of time, sections and committees for the Bar have increased in number from 35 to 59.

With that statistical base, what are the major trends facing lawyers today, or perhaps better said, what do you need to watch out for to stay in the mainstream of the practice?

With mandatory continuing legal education coming into effect January 1, 1990, more of us will attend seminars to enhance our skills. The Bar must be receptive to the oft asked question, "What's in it for me?" The Bar Commission and staff are very concerned about how the CLE seminars can help you earn a better living and do your job better. With mandatory CLE attendance, seminars and Bar activities must be more skill-building and technical in nature than they have been in the past.

The changing demographics of the legal work force mandate every bar association's attention. The fact that the number of women lawyers is increasing and that women make up a larger percentage of American workers requires each of us to analyze our views and office policies concerning maternity leave, child care, job flexibility and other family-oriented benefits. We must keep the most important aspects of living in perspective.

With the acceleration of change, ways we do things create an enormous opportunity for service. Thus, my initial pitch to you is to recognize that belonging to an association like the Utah State Bar is often the most effective and least expensive way to keep abreast of change. Hopefully, the Bar can stay in tune with changes and pressures and, as an association, provide early warnings of both expectant changes and the ways in which other associations and individual lawyers are responding to those changes. When you think about it, that's exactly why you join a particular section or seek appointment to a certain committee of the Bar. You want to stay abreast of the latest trends in your area of expertise and provide service to others.

One of my goals this year is to aid you with as much support from an association standpoint as possible to allow you to deliver quality legal services with a high degree of professionalism and hopefully resulting economic rewards. The Bar Commission has recently given serious consideration of the need to keep members interested by recognizing that members expect the Utah State Bar to quantify exactly what it is doing for them, or in other words, to prove that membership is a "profitable investment." My personal view, as a rural lawyer trying to stay abreast of current trends, is that the Utah State Bar, my local Bar association and the American Bar Association have all played a valuable role in performing that task. Hopefully, it has for you. Since there is always room to improve, please let me hear from you this year and give me suggestions on ways to improve the services the Utah State Bar provides.

