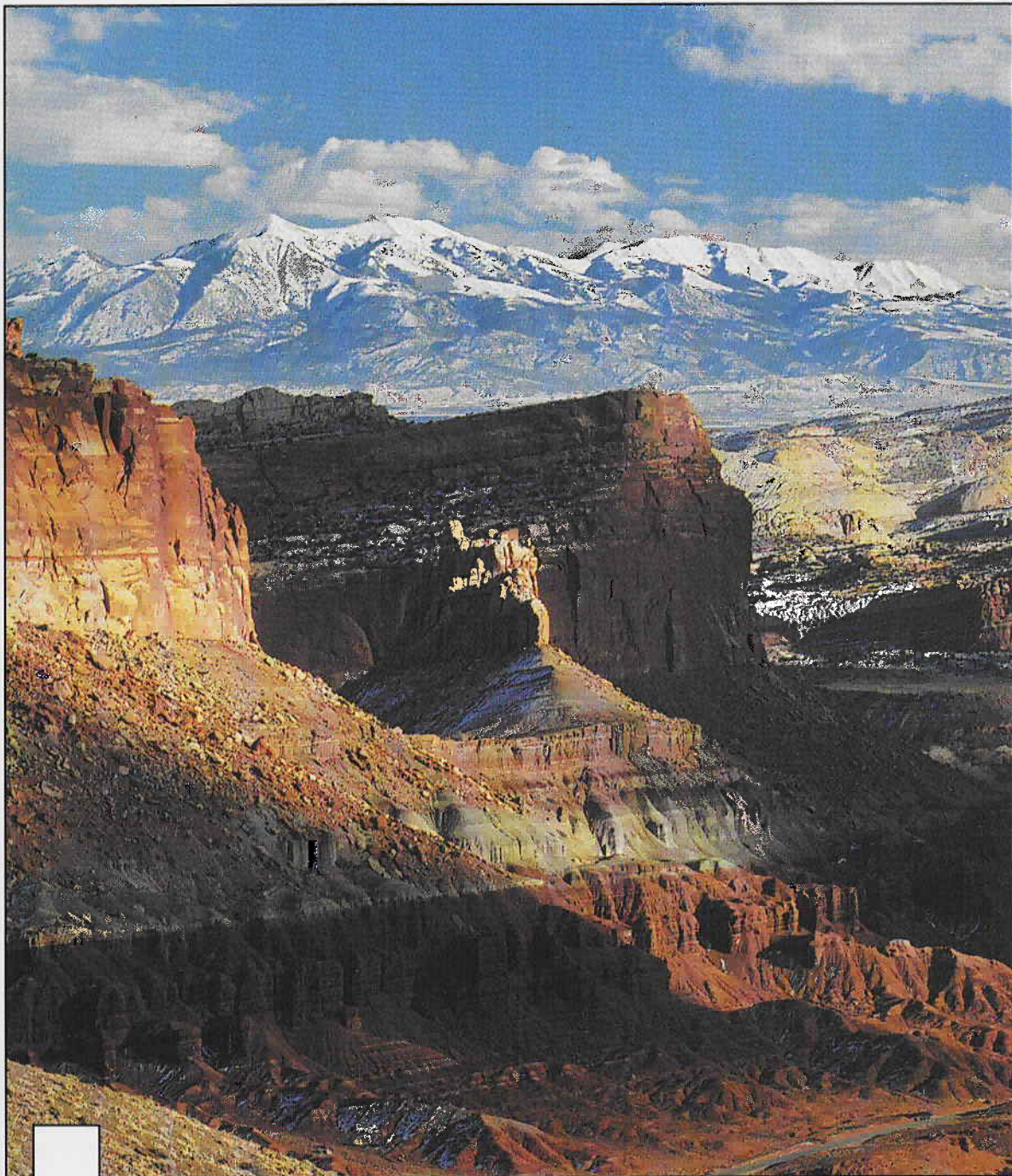


# UTAH BAR JOURNAL

Vol. 5 No. 2

February 1992



|  |           |
|--|-----------|
| <b>Checklist for Reviewing or<br/>Drafting Commercial Leases</b> | <b>7</b>  |
| <b>Judicial Profiles</b>   | <b>13</b> |
| <b>Views on the National Conference<br/>of Bankruptcy Judges</b> | <b>20</b> |
| <b>Listing of Articles Published from 1988 to 1991</b>           | <b>34</b> |

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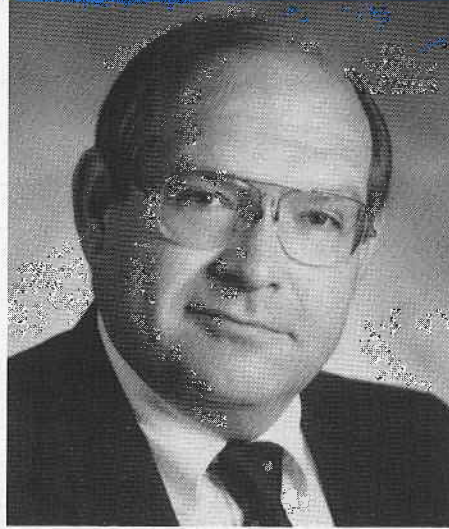
|   |    |
|---|----|
| President's Message .....   | 4  |
| <i>by James Z. Davis</i>  |    |
| Commissioner's Report .....   | 5  |
| <i>by Randy L. Dryer</i>  |    |
| Checklist for Reviewing or<br>Drafting Commercial Leases .....                            | 7  |
| <i>by Gregory S. Bell</i>   |    |
| Judicial Profiles   |    |
| Judge John H. Allen .....   | 13 |
| <i>by Terry Welch</i>   |    |
| Judge J. Dennis Frederick .....   | 14 |
| <i>by Elizabeth Dolan Winter</i>  |    |
| State Bar News .....  | 17 |
| Views from the Bench .....  | 20 |
| Views on the National Conference<br>of Bankruptcy Judges<br><i>by Judge Glen E. Clark</i> |    |
| Case Summaries .....  | 22 |
| The Barrister .....   | 25 |
| Utah Bar Foundation .....   | 28 |
| CLE Calendar .....  | 30 |
| Classified Ads .....  | 33 |
| Utah Bar Journal Listing for Articles<br>Published from 1988-1991 .....                   | 34 |

COVER: Winter in Capitol Reef National Park, by Kent M. Barry, Esq., Assistant Attorney General, Education Division.

Members of the Utah Bar who are interested in having their photographs on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah 84111, 532-5200. Send both the transparency and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

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## The Correctness of Political Correctness

*By James Z. Davis*

In the September 1991 edition of the ABA Journal, there appeared an article entitled, "The Politically Correct Law School".

At the risk of beating the issue to death, I believe that certain excerpts from that article are helpful, not only in defining the notion of political correctness, but divergent views about the correctness of political correctness.

The article begins by quoting the Webster's Dictionary definition as "marked by or adhering to a typically progressive orthodoxy on issues involving especially race, gender, sexual affinity or ecology." Beyond that, however, the article suggests that certain groups with respect to certain issues have seized the "moral highground" and that "Anyone who disagrees or raises doubts runs the risk of being thought of as a racist or sexist or homophobic."

Perhaps the most troubling thing about the article is its suggestion that, to the extent taking a position on an issue which is not politically correct, more and more students and others are intimidated into not expressing their views. This phenomenon is not limited to the observations set out in the article, but extends to the media, the Bar, the courts,

and lawyers generally. Fundamental notions of free debate and argument stand little chance of prevailing against political correctness. Indeed, the preferred methodology for individuals and groups who are politically correct to deal with thoughts and ideas inconsistent with theirs is to intimidate those who may share other views or, preferably, to prevent those other views from being expressed at all.

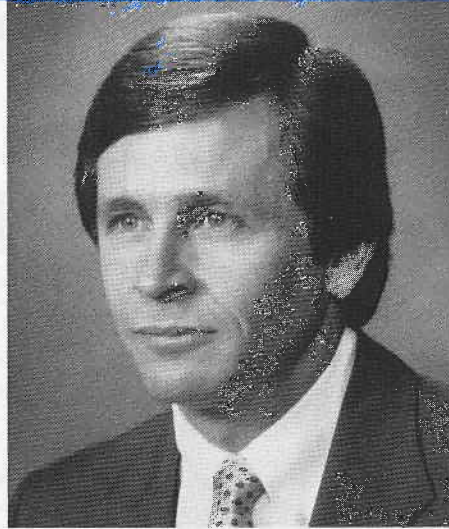
One of the individuals identified in the article suggests that political correctness is "in part a cover for a political power grab by the left," and suggests that very few politically correct people or groups are demanding "an increase in the number of Evangelical Christians, National Rifle Association members and right to life advocates." (The letter, together with such things as serious discussion of population control, being among the politically correct issues of the "right").

While it does not appear to me that the impact of political correctness has made itself felt in Utah to the degree it has in other areas, it seems to me that we should all maintain an awareness of the impact of political correctness on freedom of expression, especially of those individuals or groups who or issues which may not currently be politically correct, and

especially on this anniversary of our Bill of Rights.

While, most assuredly, the specter of political correctness has not been raised in connection with burning bankruptcy issues, water law and the rule against perpetuities, Bar programs may provide a forum for those whose views may or may not be shared by all of our members. It is my sense of current Bar leadership that universal acceptance of one's views should not be a condition precedent to giving our members and others an opportunity to be exposed to those views. I have been advised by some of our members, however, that there are individuals and issues whose views and subject matters should not be a part of Bar programs however timely and relevant.

As always, I would very much appreciate your sharing your thoughts with me or any other member of the Bar Commission or staff. For example, if there are issues or individuals who should be considered "out of bounds" where Bar programs are concerned, perhaps guidelines should be developed. On the other hand, perhaps decisions such as these should be left to the sound judgment of our committees, sections and the Bar Commission. Please be in touch.



## Judicial Performance Evaluation – Utah is a Recognized Leader

By Randy L. Dryer

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*Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.*

— Socrates

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**S**o begins the just completed report of the Judicial Performance Evaluation Committee summarizing the findings of the recently completed bar survey evaluating Utah's judiciary. Judging by the survey results, Utah's judiciary scores high marks on all four of Socrates' necessary attributes of a good judge.

94 judges were evaluated, 18 of whom will stand for retention election this November. The Judicial Council, by statute, must evaluate each judge standing for retention election and determine whether the judge will or will not be "certified" by the Council. Certification is a determination by the Judicial Council that a judge has satisfactorily met five evaluation criteria established by the Judicial Council. These criteria are:

1. A satisfactory score on the certification portion of the bar survey;

2. No formal sanctions by the Judicial Conduct Commission during the judge's current term;

3. Compliance with the case processing standards adopted by the Council — presently no more than 6 cases under advisement over 60 days during the past two years and no single case over 180 days under advisement;

4. Completion of 30 hours of approved judicial education each year; and

5. Self certification that a judge is physically able to serve and has complied with the Codes of Judicial Conduct and Administration.

The Council will make public its certification decisions in August of this year, just prior to the November elections. The Council's decision will appear in the voter information packet published by the state. Whether a judge has or has not been certified by the Council will appear on the ballot next to the judge's name.

The bar survey, developed by the Judicial Performance Evaluation Committee under the able leadership of attorney Joseph Novak and administered by Dan Jones & Associates, an independent public opinion research firm, is the cornerstone of the Utah

Judicial Council's program to assess judicial performance.

The survey is the two year work product of the Judicial Performance Evaluation Committee, which is a standing committee of the Judicial Council consisting of a representative from each court level, 3 citizen representatives, a bar commissioner and an attorney chairman. I have had the pleasure of serving as the commission's representative for the past two years.

### THE 1991 BAR SURVEY

10,200 survey questionnaires were sent to over 2,000 attorneys statewide. Many of us received more than one survey. The attorney survey pool was drawn from the entire 5,000 statewide members of the bar and was distilled down to those attorneys who had appeared before the particular judge being surveyed with sufficient frequency within the last year to be considered personally familiar with the professional behavior of the judge. Approximately 3,000 attorneys regularly practice in Utah's courts of record and approximately 68% of those 3,000 were surveyed. Of the 10,200 surveys mailed

out, an impressive 67% were completed and returned.

For those of you who received a survey question, you may recall the survey instrument was divided into two parts — one part asking a series of questions designed for the individual self improvement of the judge and the other part asking a series of questions which would be used by the Judicial Council in making its certification decision. Under rules recently adopted by the Judicial Council, a judge must receive a satisfactory score of 70% on 75% of the certification questions and an overall 70% satisfactory response on all certification questions.

In addition to the certification questions, a "catch all" question asked whether, taking everything into account, the responding attorney would recommend the Council certify the particular judge.

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## SURVEY RESULTS

Utah's judiciary scored very high on the survey as shown by the three charts below. Space restrictions preclude publication here of the survey results for the juvenile, circuit courts and the commissioners, but such information is available at the State Court Administrators office.

Trial Court Certification Question Responses For District Courts Statewide

| Certification Questions  | Pass         | Almost Always    | Usually         | Rarely         | Never         | Total K. Resp.    | No Personal K.  |
|--|--------------|------------------|-----------------|----------------|---------------|-------------------|-----------------|
|  | # %          | # %              | # %             | # %            | # %           |                   |                 |
| 1. The judge's professional behavior is free from impropriety and the appearance of impropriety.                             | 97.0%        | 1571 75%         | 468 22%         | 58 3%          | 1 0%          | 2101 100%         | 261 11%         |
| 2. The judge fairly and impartially weighs all the evidence and arguments of counsel before rendering a decision.            | 91.1%        | 1213 58%         | 702 33%         | 173 8%         | 15 1%         | 2103 100%         | 259 11%         |
| 3. The judge's behavior is free from bias.   | 90.9%        | 1221 59%         | 664 32%         | 167 8%         | 22 1%         | 2074 100%         | 289 12%         |
| 4. The judge discourages inappropriate ex parte approaches from attorneys or participants in a case.                         | 93.7%        | 1035 62%         | 529 32%         | 92 6%          | 14 1%         | 1670 100%         | 1025 38%        |
| 5. The judge demonstrates knowledge of the rules of PROCEDURE.   | 95.7%        | 1272 61%         | 737 35%         | 77 4%          | 14 1%         | 2100 100%         | 262 11%         |
| 6. The judge demonstrates knowledge of the rules of EVIDENCE.  | 95.1%        | 1201 60%         | 711 35%         | 85 4%          | 14 1%         | 2011 100%         | 351 15%         |
| 7. The judge properly applies the law to the facts of the case.  | 90.4%        | 1027 49%         | 866 41%         | 183 9%         | 18 1%         | 2094 100%         | 268 11%         |
| 8. The judge gives a clear explanation of the basis of his or her oral decisions.  | 89.6%        | 1094 53%         | 769 37%         | 187 9%         | 29 1%         | 2079 100%         | 263 12%         |
| 9. The judge's written decisions clearly explain the basis for his or her rulings.   | 89.1%        | 859 51%          | 633 38%         | 161 10%        | 21 1%         | 1674 100%         | 688 29%         |
| 10. The judge maintains order in the court room.   | 99.3%        | 1631 78%         | 451 22%         | 12 1%          | 2 0%          | 2096 100%         | 266 11%         |
| 11. The judge demonstrates appropriate preparation through familiarity with the pleadings, records, memoranda and/or briefs. | 90.9%        | 1209 58%         | 698 33%         | 167 8%         | 24 1%         | 2098 100%         | 264 11%         |
| 12. The judge issues orders, judgments, decrees or opinions without unnecessary delay.                                       | 93.0%        | 1179 57%         | 769 37%         | 110 5%         | 15 1%         | 2064 100%         | 298 13%         |
| <b>Totals</b>  | <b>93.1%</b> | <b>14512 60%</b> | <b>7988 33%</b> | <b>1472 6%</b> | <b>192 1%</b> | <b>24164 100%</b> | <b>4523 18%</b> |

| 12. Taking everything into account, would you recommend the Judicial Council certify this judge for retention? | Yes      | No      | Total Resp. |
|--|----------|---------|-------------|
|  | # %      | # %     | # %         |
|  | 1899 89% | 232 11% | 2125 100%   |

Appellate Ct. Certification Question Responses For All Appellate Court Judges

| Certification Questions  | Pass         | Almost Always   | Usually         | Rarely        | Never        | Total K. Resp.   | No Personal K.    |
|--|--------------|-----------------|-----------------|---------------|--------------|------------------|-------------------|
|  | # %          | # %             | # %             | # %           | # %          |                  |                   |
| 1. The judge's professional behavior is free from impropriety or the appearance of impropriety.      | 98.5%        | 324 81%         | 70 18%          | 4 1%          | 2 1%         | 400 100%         | 114 22.2%         |
| 2. The judge behavior is free from bias.   | 94.3%        | 262 66%         | 100 26%         | 19 5%         | 3 1%         | 384 100%         | 120 25.9%         |
| 3. The judge discourages inappropriate ex parte approaches from attorneys or participants in a case. | 97.2%        | 174 60%         | 37 17%          | 2 1%          | 4 2%         | 217 100%         | 297 57.8%         |
| 4. The judge demonstrates knowledge of the substantive law.  | 91.4%        | 232 55%         | 152 36%         | 32 8%         | 4 1%         | 420 100%         | 94 18.3%          |
| 5. The judge demonstrates knowledge of the rules of evidence and procedure.                          | 91.8%        | 239 58%         | 131 33%         | 28 7%         | 5 1%         | 403 100%         | 111 21.6%         |
| 6. The judge demonstrates an ability to perceive factual and legal issues.                           | 89.6%        | 239 56%         | 141 33%         | 36 8%         | 8 2%         | 424 100%         | 90 17.5%          |
| 7. The judge properly applies the law to the facts of the case.                                      | 88.9%        | 196 46%         | 181 43%         | 41 10%        | 6 1%         | 424 100%         | 90 17.5%          |
| 8. The judge demonstrates an awareness of recent legal developments.                                 | 92.3%        | 238 59%         | 132 33%         | 27 7%         | 4 1%         | 401 100%         | 113 22.0%         |
| 9. The judge's opinions demonstrate scholarly legal analysis.  | 85.0%        | 194 46%         | 163 39%         | 55 13%        | 8 2%         | 420 100%         | 94 18.3%          |
| 10. The judge's opinions are clear and well written.   | 87.9%        | 214 51%         | 155 37%         | 44 10%        | 7 2%         | 420 100%         | 94 18.3%          |
| 11. The judge is adequately prepared for oral arguments.   | 93.1%        | 247 61%         | 138 32%         | 24 6%         | 4 1%         | 405 100%         | 109 21.2%         |
| <b>Totals</b>  | <b>91.5%</b> | <b>2559 59%</b> | <b>1382 32%</b> | <b>312 7%</b> | <b>55 1%</b> | <b>4318 100%</b> | <b>1336 23.6%</b> |

| 12. Taking everything into account, would you recommend the Judicial Council certify this judge for retention? | Yes     | No     | Total Response |
|--|---------|--------|----------------|
|  | # %     | # %    | # %            |
|  | 374 88% | 53 12% | 427 100%       |

Appellate Court Certification Question Responses For The Supreme Court

| Certification Questions  | Pass         | Almost Always   | Usually         | Rarely        | Never        | Total K. Resp.   | No Personal K.   |
|--|--------------|-----------------|-----------------|---------------|--------------|------------------|------------------|
|  | # %          | # %             | # %             | # %           | # %          |                  |                  |
| 1. The judge's professional behavior is free from impropriety or the appearance of impropriety.      | 98.1%        | 355 82%         | 69 16%          | 8 2%          | 0 0%         | 432 100%         | 30 6.5%          |
| 2. The judge behavior is free from bias.   | 93.8%        | 280 67%         | 113 27%         | 27 6%         | 0 0%         | 420 100%         | 42 9.1%          |
| 3. The judge discourages inappropriate ex parte approaches from attorneys or participants in a case. | 99.5%        | 175 83%         | 35 17%          | 1 0%          | 0 0%         | 211 100%         | 251 54.3%        |
| 4. The judge demonstrates knowledge of the substantive law.  | 95.4%        | 263 60%         | 162 37%         | 16 4%         | 0 0%         | 441 100%         | 21 4.5%          |
| 5. The judge demonstrates knowledge of the rules of evidence and procedure.                          | 96.7%        | 275 65%         | 133 32%         | 14 3%         | 0 0%         | 422 100%         | 49 8.7%          |
| 6. The judge demonstrates an ability to perceive factual and legal issues.                           | 94.8%        | 272 62%         | 145 33%         | 23 5%         | 0 0%         | 440 100%         | 22 4.8%          |
| 7. The judge properly applies the law to the facts of the case.                                      | 92.3%        | 197 45%         | 209 48%         | 33 8%         | 1 0%         | 440 100%         | 22 4.8%          |
| 8. The judge demonstrates an awareness of recent legal developments.                                 | 95.1%        | 268 65%         | 130 31%         | 16 4%         | 0 0%         | 414 100%         | 48 10.4%         |
| 9. The judge's opinions demonstrate scholarly legal analysis.  | 90.6%        | 224 51%         | 178 39%         | 38 9%         | 2 0%         | 435 100%         | 27 5.8%          |
| 10. The judge's opinions are clear and well written.   | 90.6%        | 225 51%         | 171 39%         | 37 8%         | 4 1%         | 437 100%         | 26 5.4%          |
| 11. The judge is adequately prepared for oral arguments.   | 93.9%        | 275 65%         | 124 29%         | 22 5%         | 4 1%         | 425 100%         | 37 8.0%          |
| <b>Totals</b>  | <b>94.5%</b> | <b>2809 62%</b> | <b>1461 32%</b> | <b>238 5%</b> | <b>11 0%</b> | <b>4517 100%</b> | <b>555 11.1%</b> |

| 12. Taking everything into account, would you recommend the Judicial Council certify this judge for retention? | Yes     | No    | Total Response |
|--|---------|-------|----------------|
|  | # %     | # %   | # %            |
|  | 407 92% | 37 8% | 444 100%       |

Judicial performance evaluations, particularly through surveys of attorneys provide meaningful information to the Judicial Council, the Bar as a whole, the Legislature and to the voters who must vote whether or not to retain a particular judge. Utah's judiciary is an innovative leader in this area. Socrates would be proud.

