UTAH BAR JOURNAL

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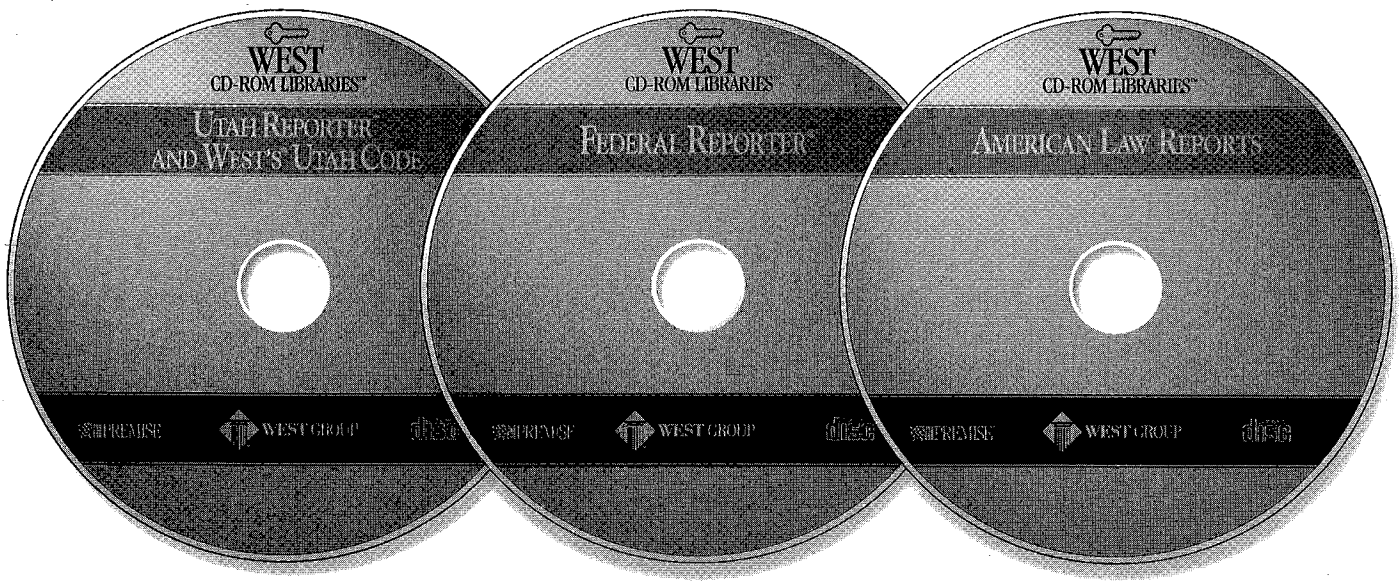

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UTAH BAR JOURNAL

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

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COVER: From Inside An Abandoned House, Ophir, Utah, by Brett P. Johnson.

CORRECTION

The Credit for the December 1997 cover photograph should have read as follows: "Provo River in Winter" by Judge Fred D. Howard, Provo, Utah"

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Randle, Deamer, Zarr, Romrell & Lee, P.C., 139 East South Temple, Suite 330, Salt Lake City, UT, 84111-1169, 531-0441. Send a slide, transparency or print of each scene you want to be considered.

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LETTERS

Dear Editor:

I recently received Vol. 10, No. 7 (per the cover) or 8 (per the table of contents), the October 1997 issue of the *Utah Bar Journal*. Since the demands of work and family leave little leisure reading time, like many attorneys no doubt, I generally select one or two articles to skim. I was thus anxious to read Mr. Perry's article about the Grand Staircase-Escalante National Monument, since I hadn't had an opportunity to educate myself on the topic. I was sorely disappointed at the partisan tone and content of the article.

I first had misgivings when I read in the author's bio that Mr. Perry has filed a case challenging the monument designation. A party litigant is unlikely to present a balanced view, and for this reason, should usually not be allowed to abuse the forum of a nonpolitical educational journal to air his side of an ongoing case. My suspicions were confirmed with the first sentence ascribing political motivations to the proposed designation. The tone of the article only deteriorated from there, at one point disparagingly describing the President as "dron[ing] on and on," even disintegrating into vituperative paragraphs ending in exclamation points. Probably only your editors prevented even less professional use of gimmickry such as all capital letters or bold sentences. I hope Mr. Perry's briefs are more dispassionate and therefore more persuasive. This article at least bordered on the rabid.

I rely on the *Bar Journal* to educate me on issues of interest. The *Journal* need not steer clear of controversy, but should at least strive to present a balanced view of currently litigated issues. This is especially true where the litigation concerns government agencies, which are often hamstrung by restrictions on public comment about ongoing cases. I hope Mr. Perry's polemic is not an indication of a new editorial trend at the *Journal*.

Sincerely,
Eva Novak

Dear Editor:

I read with interest David Negri's December article about the Grand Staircase-Escalante Monument. Mr. Negri's article concludes in part that the designation of the monument will withstand judicial attack because President Clinton in his proclamation mentioned the "exemplary opportunities for geologists, paleontologists, archeologists, historians, and biologists." What Mr. Negri omitted to mention was the truth about Mr. Clinton's reasons for designating 1.7 million acres of our State as a monument. Would Mr. Negri's opinion be the same if Mr. Clinton's proclamation would have read as follows?

"Good morning ladies and gentlemen. This morning I am about to unilaterally take away the right of all citizens to mine, explore for oil and gas, graze, or even use most of 1.7 million acres of land in Utah. There are a number of reasons why I have decided to take this action at this time.

First, as you all know, it's an election year with election day just six weeks away. My recent decisions about the timber rider have created negative views about me and have disaffected many members of the environmental community. Even though Kathleen McGinty, my Chairperson on the Council of Environmental Quality, believes 'there is a danger of abuse of the withdraw/antiquities authorities especially since these lands are not really endangered,' this sort of bold action will help me at the voting booth with those same disaffected 'enviros.'

Secondly, even though I haven't the slightest idea about where this area actually is, several large contributors to my campaign don't want the competition that all those coal reserves could create for them.

While the Utah voters and Congressional delegation, who have never supported me, will be angered, those critical special interest voters out west will love it."

When the truth comes out Mr. Negri the Monument may crumble.

Sincerely,
Allen K. Young

Re: Response to Charlotte L. Miller's article on Pro Bono

Dear Editor:

I have served as a judge pro tem in small claims court, and as a hearing officer for Salt Lake City in business license issues. I recently became legal officer for the Utah Wing of the Civil Air Patrol. I understand these services to be pro bono. I am concerned with the direction being taken in defining what constitutes pro bono work. I gather from statements made by various members of the Utah Supreme Court and the leadership of the bar, that such services will not qualify in the future as pro bono for purposes of satisfying rule 6.1. All pro bono work is not and can not be limited to cash contributions or the representation of

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, Utah Bar Journal and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author or each letter if and when a letter is rejected.

individuals.

President Miller, in her article, states "the Implementation Committee will review and refine, if necessary, the definition of pro bono . . ." If the new definition does not include the type of services described above, then the bench and bar are saying such services have no value. Is this the message they want to send?

Further, I know attorneys who represent individuals for free or at a substantially reduced rate. The work of these attorneys is not recognized by the bar, because the bar doesn't know about it. Not all pro bono work is performed by Legal Services Corporation. I know of clergymen who have referred low income families and individuals to attorneys in their congregations for help. This work goes on without hoopla or pictures in the *Bar Journal*. The very nature of this type of charitable work does not lend itself to public display. The decision of who qualifies for pro bono assistance should not be limited to some panel or Bar committee.

Respectfully,
Michael W. Crippen

Interested in Writing an Article for the *Bar Journal*?

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

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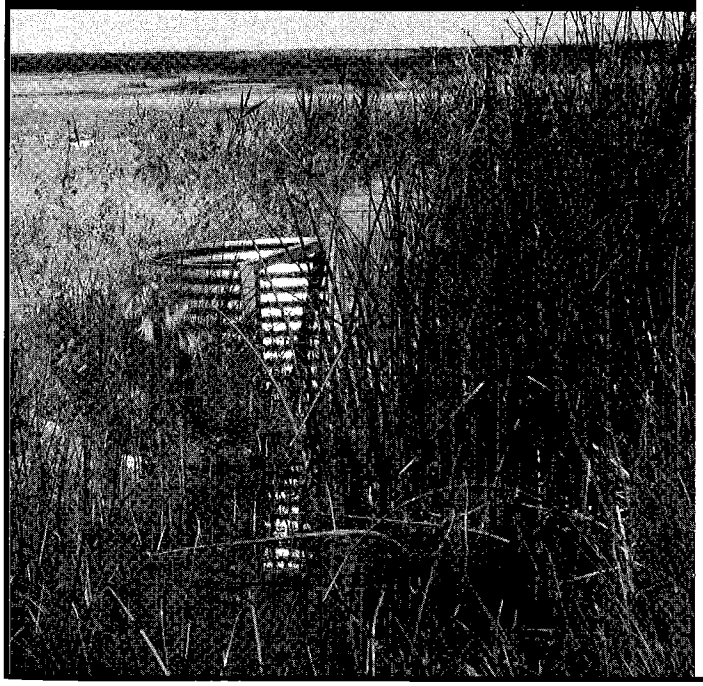

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Bar Organization: Understand It and Participate in It

By Charlotte L. Miller

Utah State Bar members often ask me about the structure of the Board of Bar Commissioners and the Bar in general. Understanding the structure will help both new and more experienced attorneys know how to become involved in the Utah State Bar and provide services to the legal profession.

COMMISSIONERS

Thirteen individuals serve as voting Bar Commissioners. Two of the commissioners are not lawyers ("public members") and are appointed by the Utah Supreme Court for three-year terms. Eleven of the commissioners are elected to three-year terms by the Bar members in their respective judicial districts: the first, second, and fourth judicial districts each have one elected commissioner; the fifth, sixth, seventh and eighth judicial districts (which is the Bar's fifth division) combined have one elected commissioner; and the third judicial district is represented by seven commissioners. The following organizations appoint ex officio commissioners to one-year terms: University of Utah College Of Law, J. Reuben Clark College of Law, Legal Assistants Division, Minority Bar Association, Women Lawyers of Utah, and Young Lawyers Division. The two American Bar Association representatives and the immediate past Bar President also serve as ex officio members. The Administrative Office of the Courts appoints a person to serve as liaison to the Bar Commission.

To be elected to the Bar Commission a member of the bar must submit a petition signed by members of the Bar. The petition is usually due in February or March in order for the Bar member's name to be placed on the ballot. Candidates for the Bar Commission are allowed to place a photograph and a 200 word statement in the *Bar Journal* and to include a campaign letter in the ballot envelope. Bar members usually vote in March or April. In the third division, there is often more than one seat to be filled during each election so multiple candidates may be seated in the same election. If you are interested in running for Bar Commission you should review the applicable rules.

The Bar Commission meets ten to twelve times a year to discuss and decide upon policies and procedures for the Bar. The Commission also makes appointments to a variety of positions and determines Bar award recipients. The Executive Director of the Bar reports to the Bar Commission and oversees the Bar staff, who are located at the Law & Justice Center.

EXECUTIVE COMMITTEE

The Executive Committee consists of the President, the President-elect, and one to three additional Commissioners appointed by the President. The Executive Committee's responsibilities vary depending upon the President. Often the Executive Committee will develop the agenda for the Bar Commission meetings and will address matters that arise between Commission meetings.

LONG RANGE PLANNING COMMITTEE

The Long Range Planning Committee continually develops and refines the long range plan for the Bar. The current committee was appointed by the President, but the Long Range Planning Committee has developed a formula for its future membership.

PRESIDENT-ELECT

The President-elect is selected by the thirteen voting members of the Bar Commission. Only the eleven lawyer voting

members of the Bar Commission are eligible to run for President-elect. A person becomes a candidate for president-elect by providing written notice of his or her candidacy to the members of the Bar Commission before January 1 of the year in which the election is to occur. Candidates provide information in the *Bar Journal* and make formal speeches to the Bar Commission. In 1996 and 1997, the election was held at the May Commission meeting. This year, the election will be held in March. A retention election is held following the selection by the Commission. The only person who is on the ballot for the retention election is the person selected by the Commission. The entire Bar receives a retention ballot, and over 50% of the Bar members must vote against retention in order to prevent the candidate from becoming president-elect. Since fewer than 50% of the Bar members return ballots, its is highly unlikely that a candidate would not be retained. The president-elect takes office in July of the year in which he or she is elected and takes office as president in July of the following year.

On many occasions the Commission has discussed the process of electing the president-elect. Some Bar Commissioners support changing the process so that all the members of the Bar vote directly on the president-elect in order to increase involvement and interest by Bar members, and to have a more democratic process. Others believe such as system would result in expensive campaigning and may prevent presidents from being selected from outside the more populated Wasatch front area. There is also a debate as to whether any member of the Bar should be allowed to be a candidate for president-elect or whether the candidates should be limited to the lawyer members of the voting Bar commissioners. There is also discussion about eliminating the retention election since it appears to provide little, if any, real participation by Bar members. All sides of these issues struggle to find the process that is best for the Bar – there are no good or evil agendas in this debate – rather, it is a topic about which reasonable minds (and good hearts) can differ. If any Bar members have ideas or opinions about these issues I encourage them to contact a Bar commissioner.

SECTIONS, COMMITTEES, DIVISIONS, TASK FORCES

Bar Committees are appointed by the Bar President, with approval by the Commission. Examples of Bar Committees are the Admissions Committee, Needs of the Elderly Committee, Member Benefits Committee, Ethics Advisory Committee. These Committees receive their assignments from the Bar Commission and are funded primarily with Bar funds.

Sections are funded by dues from members who join the sections. Leadership of the sections is determined by each section. The Legal Assistant Division is similar to a section. The Young Lawyers Division is also similar to a section, except it receives funding from the Bar. The Minority Bar Association and the Woman Lawyers of Utah are separate entities from the Bar.

Task forces and special committees are often appointed by the President or the Bar Commission. Examples include the Futures Commission, the Family Court Task Force, the Small Firm Task Force, and the Access to Justice Task Force. These groups receive missions from the Bar Commission.

SERVICE TO THE PROFESSION

Members of the Bar are responsible to keep watch over the legal profession to ensure that the profession maintains high standards. We need good people committed to professionalism to step forward to join committees and sections, to run for Bar Commission, and to volunteer for appointments. There is never a good time to volunteer – long hours of work, enjoying one's family and other community commitments make it difficult to find time for service to the profession. Nonetheless, I encourage each Bar member to look beyond his or her current cases, and participate in providing guidance for the future of the legal profession.

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Enforceability of Exculpatory Clauses In Hazardous Recreational Activities

By Gary L. Johnson

People come to Utah from all over the world to climb mountains, raft rivers, ski our slopes[1] and ride horses and mules down canyon trails. These are hazardous recreational activities, and those who engage in them should know that they are climbing, paddling, skiing, or riding into their own potential set of harmful possibilities.

Utah recognizes that parties not engaged in public service[2] may properly bargain against liability for harm caused by the ordinary negligence in the performance of contractual duty. The exception to this rule is if the harm is wilfully inflicted or caused by gross or wanton negligence. *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 904 (Utah Ct. App. 1995). These types of exculpatory clauses are often described as hold harmless agreements, disclaimers, releases, covenants not to sue, waivers, limitations of liability or limitations of damages. These contractual provisions take three forms:

1. Releasing Liability. Parties may contract to release a party from potential liability after injuries have occurred, e.g., insurance settlement agreements. Utah courts have held that such releases are valid when their language is unambiguous and unequivocal.[3]

2. Shifting Liability. Parties may contract to shift potential liability from one party to another, e.g., indemnity provisions designed to allocate the risk of loss or injury resulting from a particular adventure. It is the law in Utah that indemnity agreements, like releases, are valid only if the contract language clearly and unequivocally expresses the parties' intent to indemnify one another.[4]

3. Avoiding Liability. Parties may contract to avoid a party's potential liability before injuries have occurred. Often described as exculpatory clauses, such provisions relieve one party from the risk of loss or injury in a particular transaction or occurrence and deprive the other party of the right to recover damages for loss or injury. "Such exculpatory or hold harmless provisions may release parties from liability for their ordinary negligence."[5]

GARY L. JOHNSON is a Shareholder and Director at the Salt Lake City law firm of Richards, Brandt, Miller & Nelson.

The Utah Court of Appeals noted in *Woodside Homes* that our courts apply the same tests to contracts that release, shift or avoid potential liability for negligence. "When the intent to relieve a party from liability for alleged negligence is clearly and unequivocally expressed in a contractual provision, we will enforce that provision." *Id.* at 905. The *Woodside Homes* court then noted that Utah's rule for enforcing release, indemnity and exculpatory agreements has been articulated as follows:

> [T]o constitute a clear unequivocal expression of intent to indemnify for a party's own negligence, an indemnity agreement need not contain specific language to that effect; rather, the language and purpose of the entire agreement, together with the surrounding facts and circumstances, may provide a sufficiently clear and unequivocal expression of the parties' intent.

Id., citing *Healey v. J.B. Sheetmetal, Inc.*, 892 P.2d 1047, 1049 (Utah App. 1995). Outside of skiing, there is a dearth of Utah state appellate case law addressing the application of a release/hold-harmless agreement within the context of hazardous recreational activity. There are Utah state district court cases, cases from the United States District Court for the District of Utah and from surrounding states that have addressed the enforceability of releases for injuries resulting from people engaged in hazardous recreational activities. A review of those cases will be helpful in understanding the enforceability of exculpatory clauses.

HORSEBACK RIDING

In *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989), plaintiff Simkin arrived at the Heil Valley Ranch to go horseback riding with a group of friends. Before any of the participants in the ride were allowed to mount their rented horses, they were required to come into the ranch's office and sign a release of liability. The release required the participant to acknowledge that the riding of horses involved a risk of physical injury and that any horse might act or react unpredictably at times and that was an inherent risk assumed by the horseback rider. *Id.* at 782.

Plaintiff Simkin mounted a horse but was holding the reigns too tight, causing the horse to rear up and fall backwards upon her. She sued Heil Valley for negligence and breach of warranty. Heil Valley raised the release in an affirmative defense and moved for summary judgment, which

the district court granted. The Colorado Court of Appeals reversed, finding that the release was not clear and unambiguous. The Colorado Supreme Court then took up the issue. *Id.* at 783.

The Colorado Supreme Court began its analysis by noting that exculpatory agreements have been viewed with disfavor, but that such agreements "are not necessarily void, however, as long as one party is not at such obvious disadvantage and bargaining power that the effect of the contract is to put him at the mercy of the other's negligence." *Id.* at 784. The court then went on to state the following test for determining the validity of an exculpatory agreement:

> In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.

Id.

The Colorado Supreme Court only examined the fourth factor as being an issue in its case. The court noted that courts in other jurisdictions are split on the issue of whether exculpatory agreements must have the word "negligence" specifically mentioned, or whether more inclusive and general terms may be employed, for the agreement to be enforceable.[6] The Colorado Supreme Court concluded as follows:

> We agree that use of the specific terms "negligence" and "breach of warranty" are not invariably required for an exculpatory agreement to shield the party from claims based on negligence and breach of warranty. The inquiry should be whether the intent of the parties was to extinguish liability and whether this intent was "clearly and unambiguously expressed." (citation omitted.) In the present case, the agreement was written in simple and clear terms that were free from legal jargon. It was not inordinately long or complicated.

Id. at 795. The Colorado Supreme Court upheld the trial court's dismissal of the claim and reversed the court of appeals.[7]

SNOWMOBILING ACTIVITIES

In *Zollman v. Meyers*, 797 F. Supp. 923 (D. Utah 1992), the court denied a snowmobile tour operator's motion for summary judgment because it found that the language of the release executed by the plaintiff prior to embarking on a snowmobile tour was ambiguous. Prior to making that determination, the court recognized that:

> [p]arties can enter into an agreement, the result of which is that the purchaser consents that the seller shall be free of liability for the consequence of conduct which would otherwise be negligent.

Id. at 926, citing *Rosen v. LTV Recreational Dev., Inc.*, 569 F.2d 1117 (10th Cir. 1978).[8] The court also concluded that ". . . it is not the public policy of the state of Utah to prohibit a business such as High Country from seeking to limit its liability." *Id.* at 927. The court then noted that it must determine whether the exculpatory provision is ambiguous, and therefore, unenforceable. *Id.*

"[T]he court found that the release gave the impression that someone who signed the release was not assuming the risk of an accident that occurred when a rider encountered a hazardous situation and followed High Country's instructions."

The court's analysis of the release is as follows:

> The release agreement contains six clauses. Three of the six clauses directly relate to this motion. In the second clause, the signer agrees to accept all of the risks associated with the outing. In this clause, High Country enumerates some of the risks involved in snowmobiling, including the failure to follow instructions. The third clause states in bold print that the signer will not hold High Country liable, even if High Country or its employees act negligently. Finally, in clause five, the signer agrees to stop and follow instructions if encountering a hazardous situation. Otherwise, the signer agrees to assume all risk.

Id. at 928.

The court found that clause five rendered the release ambiguous. This is because the court determined that clause five was subject to a reasonable interpretation that if a snowmobile rider stopped and waited for instructions when encountering a hazardous situation, they were not assuming the risk of an accident. This interpretation was bolstered by clause two of the release which expressly indicated that failure to follow instructions was a risk assumed by a snowmobile rider. Thus, the court found that the release gave the impression that someone who signed the release was not assuming the risk of an accident that occurred when a rider encountered a hazardous situation and followed High Country's instructions. Since this was a reasonable interpretation of clause five, the court found the release ambiguous and denied summary judgment in favor of High Country.

In a more recent decision by a Utah state court judge, the enforceability of an exculpatory agreement arising out of a snowmobile accident was at issue. In the case of *Gabala v. Rocky Mt. Recreation of Utah, Inc.*, Civil No. 95-03-0058, Third Judicial District Court, Summit County, Utah (February 13, 1996), plaintiff had signed a release prior to renting a snowmobile from Defendant. Plaintiff was injured in the use of the rented snowmobile and brought suit against the defendant, who raised the release in an affirmative defense.

In dismissing plaintiff's Complaint, the District Court noted that "when someone signs a release in order to participate in a risky recreational activity, that action should not be undertaken lightly." The court when on to rule:

> The Court finds that the Release signed by the plaintiff is a document that is clearly understandable to a lay person of average intelligence. Considering all the facts and circumstances surrounding plaintiff's execution of this Release, the Court finds that the document is unambiguous and enforceable. Even though the plaintiff may not have understood all of the ramifications of the Release, a lay person reading the document can understand that snowmobiling is a risky activity, that he was assuming the risk of injury in undertaking the activity and that he was releasing defendants from any liability for such injury.

SKYDIVING ACTIVITIES

In *Schutkowki v. Carey*, 725 P.2d 1057 (Wyo. 1986), the Wyoming Supreme Court addressed the applicability of a release executed by a woman who was injured while skydiving. The plaintiff hired the defendants to teach her to skydive. Before she jumped for the first time, she executed an agreement which released each of the defendants from any claim for personal injuries attributed to the skydiving activities. Plaintiff had a difficult landing on her first jump and she suffered back, arm and leg injuries.

Plaintiff filed an action against the defendants claiming that they failed to warn her of the risks of skydiving and that they did not adequately instruct her or direct her during the skydiving procedures. The court first noted that specific agreements which bar negligence actions that arise from personal injuries sustained during the course of hazardous recreational activities are enforceable in the absence of willful misconduct. The court also adopted the four-party test developed by the Colorado Supreme Court (set forth above) for use in determining whether releases absolving parties from liability are enforceable in the context of hazardous recreational activities.

In applying the test, the Wyoming Supreme Court noted that private recreational businesses such as those providing skydiving services are not in the class of service providers which owe a special duty to the public, nor do they provide the types of service which are special or particularly necessary for the general public. Also, the court held that the service provided by the defendants was not a necessity to any member of the public. Since it was not an essential service, there was no unfair bargaining advantage held by the defendant skydiving instructors. In addition, there was no evidence on the record to suggest that the plaintiff did not understand the implications of the agreement she signed or that she was unfairly pressured into signing it.

Finally, the court analyzed the release to determine whether it clearly and unequivocally demonstrated the parties' intent to eradicate liability for negligence. The court held that the failure to use the word "negligence" in the text of the release was not fatal with respect to showing a clear and unequivocal intent to eradicate liability for negligence. As such, the court read the plain language of the release and determined that it was the intent of the parties to release the skydiving instructors from liability for negligence. In this regard, the court noted:

> Adult private parties should not enter into a contract for hazardous recreational services lightly. The agreement language is unambiguous; it clearly shows that appellant intended to relinquish all liability claims she might accrue against appellees. We will enforce the exculpatory clause.

Id. at 1062.

"The court first noted that specific agreements which bar negligence actions that arise from personal injuries sustained during the course of hazardous recreational activities are enforceable in the absence of willful misconduct."

RACE CAR DRIVING

Washington has not adopted a test as specific as the Colorado Supreme Court, but it has handled in much the same way the interpretation and application of releases in the context of recreational activities. In *Conradt v. Four-Star Promotions*, 728 P.2d 617 (Wash App. 1986), the plaintiffs (husband and wife) brought suit against the operators of a racetrack for injuries sustained during the course of an automobile demolition race. Prior to entering the race, Mr. Conradt executed a release which contained information regarding the obvious and inherent risks and dangers in racing, the voluntary assumption of any risks, and a waiver and release in favor of the promoters of any liability for injuries sustained during the course of any racing activities. The court recognized that there was bold-face emphasis throughout the document and took special note of the fact that above the signature line there was a conspicuous statement which read: "I have read this release." Accordingly, the court held that there was no question that the release was unambiguous in its waiver of negligence claims and that in light of the fact that there were no facts on the record which would indicate that the defendants acted with gross negligence, plaintiffs' claims were barred by the terms of the release.

The Court of Appeals of Arizona handled a similar situation in the same fashion. In *Valley Nat'l Bank v. National Ass'n for Stock Car Auto Racing, Inc.*, 736 P.2d 1186 (Ariz. App. 1987), a woman was injured after a car involved in a raceway automobile accident spun out of control, entered the pit area, and struck her. Prior to entering the pit area, the plaintiff was required to execute a "Benefit Plan Registration – Release and Indemnity Agreement," a "Release of Liability," and a pit pass which contained a release of liability. The court recognized that if parties can expressly agree to preclude a cause of action for negligence there is no public policy which prevents such an agreement.

The court noted that there was no employment relationship between the defendants and the plaintiff and there was no unequal bargaining power which would affect the enforceability of the releases. Further, the court held that the releases are valid if their terms were made clear to the signatories or if a reasonable signatory would have known of the terms of the release. The language of the releases was clear and unequivocal and had enough bold print that the content of the releases was sufficiently clear to the plaintiff. Thus, the release was enforced.

THE NEED FOR EXCULPATORY CLAUSES IN HAZARDOUS RECREATIONAL ACTIVITIES

Scholarly commentary has accounted for the continuing vitality of exculpatory clauses in the area of recreational or "thrill-seeking" activities by advancing the "causation factor" or "black hole" theory.[9] Under this approach, exculpatory clauses for hazardous recreational activities are regularly upheld because of the "extent and unforseeability of factors beyond the parties' control – the 'black hole' of causation . . . ."[10]

The risk apportionment involved in hazardous recreational activities has been described in the following manner:

> Simply stated, thrill seekers seem to be on their own where the possibilities of injury extend beyond the complete and practical control of the beneficiary of the clause or where the injury occurs as a result of a combination of actions, some of which are within the control of the

thrill seeker. This line of thinking leads to a "black hole" theory, which has a rough sort of fairness to commend it. When a skydiver breaks his leg or falls into a power line, it seems equitable to conclude that the actor assumed the risk that such injuries would appear.[11]

If Utah's hazardous recreational industries are to remain viable, Utah's framework for analyzing and enforcing exculpatory clauses should be consistently followed. An important element in such an analytical framework, however, is the consideration that the individuals who enter into these exculpatory provisions appreciate the impact and extent of the waiver or hold harmless agreement. If the language of the exculpatory clause is: (1) written clearly and is understandable by the average lay person,[12] (2) if the wording of the exculpatory clause is displayed prominently and in an adequate type size, and (3) if the intent to relieve the provider of the activity from liability for alleged negligence is clearly and unequivocally expressed in the contractual provision, our courts should enforce that provision. The timorous may stay at home.[13]

[1]This article will not address the statutory scheme enacted in Utah for the skiing industry. See Utah Code Ann. §§78-27-51 through 54. For cases discussing the application of the Inherent Risk of Skiing Act, see *White v. Deseelhorst*, 879 P.2d 1371 (Utah 1994); *Clover v. SnowBird Ski Resort*, 808 P.2d 1037 (Utah 1991); see also, *Ghionis v. Deer Valley Resort Co.*, 839 F.Supp. 789 (D. Utah 1993) (also discussing an exculpatory agreement).

[2]The California Supreme Court has attempted to identify some of the elements that distinguish an activity as being in the "public service." In *Tunkl v. Regents of University of California*, 60 Cal. 2nd 92, 32 Cal. Rptr. 33, 383 P.2d 441, 444-46 (1963), the California Supreme Court stated:

> In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type that is generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

[3]*Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 904 (Utah Ct. App. 1995); *Simonson v. Travis*, 728 P.2d 999, 1002 (Utah 1986) (observing releases are enforceable when they are unambiguous, explicit and unequivocal); *Krause v. Utah State Dept. of Transportation*, 852 P.2d 1014, 1020 (Utah Ct. App.) *cert. denied*, 862 P.2d 1356 (Utah 1993) (observing that the court first must assess whether release's language is unambiguous); but c.f. *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 437-38 (Utah 1983) (refusing to enforce liquidated damages to provision because the language employed by the parties did not "clearly and unequivocally" express an intent to limit defendant's tort liability).

[4]Historically, Utah courts applied a strict construction rule of indemnity provisions. See *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1189 (Utah 1983). The Utah Supreme Court, however, has relaxed the rule of strict construction and adopted the modern and more lenient "clear and unequivocal test" for enforcing indemnity agreements. See *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 370-71 (Utah 1990) (upholding indemnity provisions whose language clearly and unequivocally expressed licensee's intent to indemnify licensor).

[5]*Russ v. Woodside Homes, Inc., supra*, 905 P.2d at 905. The Utah Supreme Court has affirmed that parties to a contract may generally exempt themselves from negligence liability as long as the language used clearly and unequivocally expresses an intent to limit tort liability. *Interwest Constr. v. Palmer*, 923 P.2d 1350, 1356 (Utah 1996).

[6]In Utah, it is not necessary that the exculpatory language refers expressly to the negligence of the indemnitee, so long as the intention to indemnify can be "clearly implied from the language and purpose of the entire agreement." *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 370 (Utah 1990) (quoting *Niagara Frontier Transp. Auth. v. Tri-Delta Constr. Corp.*, 107 Ad.2d 450, 487 N.Y.S. 2d 428, 430 (1985)); "Although this rule has developed in the context of indemnity agreements, it applies with equal force to releases and exculpatory or hold-harmless agreements." *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 905 (Utah App. 1995); compare, however, the Utah Supreme Court's statement that an exemption from negligence liability is not achieved "by inference or implication" from general language. *Interwest Constr. v. Palmer*, 923 P.2d 1350, 1356 (Utah 1996).

[7]The Utah Limitations on Liability for Equine Activities Act can be found at Utah Code Ann. §§78-27b-101 and 102.

[8]Despite being decided two years after *Freund v. Utah Power & Light Co.*, 793 P.2d 362 (Utah 1990), Judge Anderson makes no reference to the more lenient test for enforcing indemnity agreements set forth in that case. *Freund* and its progeny obscures somewhat the precedential value of *Zollman*.

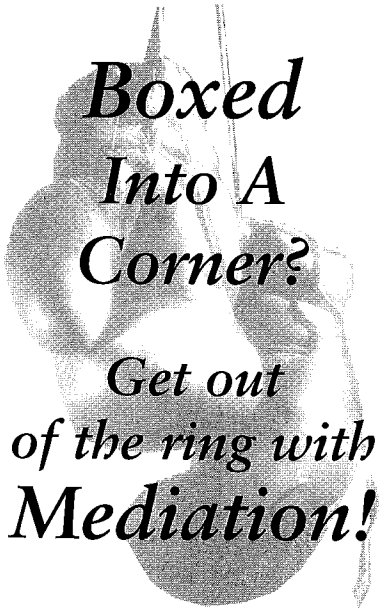
[9]Cava & Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 Santa Clara Law Review 611, 639-45, and cases cited therein.

[10]*Id.* at 639.

[11]*Id.* at 642.

[12]On crafting readable contractual provisions, see generally Egan, "A Dozen Ways to Write a Clearer Contract", 6 *Utah Bar J.* 17 (March 1993).

[13]*See Murphy v. Steeplechase Amusement, Inc.*, 250 N.Y. 479, 166 N.E. 173 (1929).



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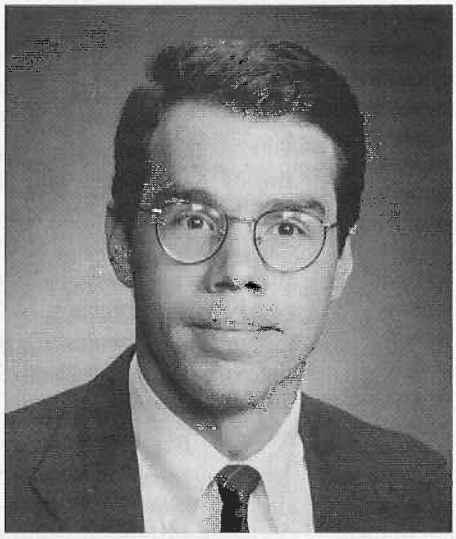
Understanding Legal Malpractice

By Michael F. Skolnick and Richard Masson



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Legal malpractice claims threaten every attorney. An increasing number of us can expect to be sued during our professional lives. While most insurers report only gradual increases in the number and size of legal malpractice claims, the same insurers report that it is becoming progressively more expensive to resolve such issues.[1]

Malpractice claims can be intimidating and demoralizing. The vast majority of attorneys strive on a daily basis to practice competently and effectively on behalf of their clients. When clients sue them, attorneys often feel betrayed and bewildered. Knowing the basics of malpractice law may help prevent a lawsuit against you. If the unspeakable occurs and you are sued, some background knowledge can help ease your burden by making your defense more clear.

This article presents an overview of legal malpractice law in Utah and some related principles of basic risk management. The term "legal malpractice" as used in this article covers actions for professional negligence, breach of fiduciary duty, breach of contract and other statutory and common law causes of action. It does not include violations of the Utah Rules of Professional Conduct, which may subject an attorney to discipline by the Utah State Bar, but do not by themselves give rise to a cause of action for legal malpractice.[2] Nevertheless, courts have found such ethical standards relevant to the standard of care in legal malpractice actions.[3]

PROFESSIONAL NEGLIGENCE

Three distinct causes of action are available in Utah for an attorney's malpractice: (1) the tort of malpractice (professional negligence); (2) breach of fiduciary duty; and (3) breach of contract. Professional negligence is the most common vehicle for malpractice claims in Utah.[4] The four elements of a tort malpractice claim are: (1) an attorney-client relationship; (2) a duty of care owed by the attorney to the client arising from that relationship; (3) a breach of the duty; and (4) proximate causation of actual damage to the plaintiff.[5]

THE ATTORNEY-CLIENT RELATIONSHIP

An attorney-client relationship can arise from an express contract or by an implied in fact contract based on the conduct of the parties.[6] In order to determine whether an attorney-client relationship exists, courts must consider who the attorney claimed to have represented in his own pleadings or other self-generated documents, whether an employment contract or retainer agreement exists and the parties' admissions about the relationship.[7]

An attorney-client relationship may be proved by showing that the client sought and received the advice of the lawyer in matter pertinent to the lawyer's profession. The client's mere belief, however, that an attorney-client relationship exists, unless reasonably induced by representations or conduct of the attorney, is not sufficient to create the relationship.[8] Payment of attorney fees does not by itself determine whether an attorney-client relationship exists, but is only one indicia of such a relationship.[9]

The attorney-client relationship would seem to be the most straight-forward of the four elements of a tort malpractice claim. The relationship is, however, not always as simple as it looks. Take, for instance, the increasingly prevalent practice of office sharing, where an attorney rents an office from a law firm or in concert with a number of solo practitioners. If one attorney in the office sharing relationship gets sued, the other attorneys in the relationship may assume that they are not exposed to the claim. That is not necessarily true.

No matter the understanding of the relationship among the attorneys, a *de facto* partnership may exist for the purposes of liability to a client.[10] In order to safeguard against a *de facto* partnership (and hence establishment of an attorney-client relationship with your office sharing attorneys' clients) avoid acts or omissions that could lead a client to reasonably believe that he was being represented by an entity rather than the individual attorney.

Use of a joint name on letterheads and pleadings can lead to joint liability. Prudence dictates that attorneys practicing in any kind of association or non-partnership arrangement should expressly specify on their letterhead and in their pleadings the nature of the entity. Retainer agreements should reiterate the legal nature of the entity and should also delineate to what extent the client will receive the services and assistance of other attorneys in the association.[11]

Attorneys should define the scope of the attorney-client relationship at the outset of each case by sending clear and precise engagement letters. If representation is declined, a rejection letter should be sent as soon as possible, warning the client of the applicable limitation period. Finally, avoid the practice of "ghost-writing" pleadings for friends that want to handle a case *pro se*. An attorney-client relationship may be formed, with all of its attendant obligations.[12]

"Attorneys should define the scope of the attorney-client relationship at the outset of each case by sending clear and precise engagement letters."

DUTY OF CARE

An attorney is required to possess the legal knowledge and skills common to members of his profession, and to represent his client's interests with competence and diligence.[13] An attorney, however, is not required to know all the law, nor to second guess the trial judge.[14] If an attorney holds himself out as a specialist in a particular field of law he has a duty to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used, by reputable specialists practicing in the same field, in the same or a similar locality and under similar circumstances.[15]

Unfortunately, attorneys sometimes take cases that deal with areas of law in which they have little skill or knowledge. Consequently, the attorney may end up spending either too much time with the case trying to learn the details of the applicable law, make substantial errors due to lack of experience or knowledge, or may not pay the case the proper amount of attention. In any event, the attorney may ultimately end up hurting the client.[16]

Sometimes attorneys become overwhelmed by their case load and lose track of important dates, like filing deadlines.[17] It is important for an attorney with a high-volume practice to keep it manageable. Malpractice claims often result from administrative error.[18] Many administrative errors can be easily solved by instituting a docketing and scheduling system. Not only will such a case management system be helpful to the attorney, but it will also make the client feel more confident in the attorney's representation. Insurance underwriters look for these types of case management systems when underwriting legal malpractice risks.

Where the attorney is charged with an error regarding law, the applicable law is the law in the relevant jurisdiction that existed at the time the attorney's services were rendered.[19] In *Watkiss & Saperstein v. Williams*, the Utah Supreme Court upheld the trial court's dismissal of plaintiff's legal malpractice claim despite the fact that the defendant law firm failed to file a timely complaint in the underlying case. The court found that at the time the law firm filed the complaint, the firm was correctly following applicable District of Columbia law regarding the triggering of the statute of limitations. The Court concluded the law firm could not be required to anticipate changes in the law, even where the change ultimately time-barred its clients' complaint.[20]

Ambiguities in the duty of care can arise in several common situations. One of these is the so called "tripartite relationship" that occurs when an insurance company hires an attorney to defend its insured against a claim. The attorney should be aware of several potential conflicts. One conflict is where a coverage dispute exists. If the insurance company has taken on the defense under a so called "reservation of rights" the attorney hired to defend the case must be careful to avoid giving advice on the coverage issue. A coverage issue should not present a conflict of interest if counsel limits his role to defending the liability claim.[21]

Another ambiguous situation occurs when an attorney is hired by an insurance company to represent the insurance company in performing some task which foreseeably benefits the insured. In this case the attorney is the employee or agent of the company, not the insured. No attorney-client relationship exits between the attorney and the insured, and consequently there is no corresponding direct duty of care.[22] Of course, the insurance company still has a contractual obligation and duty of care to its insured. Thus, if its attorney commits legal malpractice, the company may be liable to the insured. Prudence dic-

tates that the attorney make absolutely clear to the insured that she represents the insurance company only.

EXPERT TESTIMONY

In order to prevail on an attorney malpractice claim a plaintiff must define the applicable standard of care and prove the attorney violated that standard. Ordinarily this must be done through expert testimony.[23] Summary judgment may be granted based upon plaintiff's failure to designate an expert witness to define the applicable standard of care. Without such an expert, the trier of fact would arguably be unable to determine whether a breach occurred. This principle should apply in a bench trial as well as a jury trial, inasmuch as the alleged malpractice might involve an area of practice in which the court has little or no experience.[24]

In *Preston & Chambers v. Kolller*,[25] the Utah Court of Appeals confirmed that in order to prevail on all but the most obvious malpractice claims, a plaintiff must provide expert testimony on the applicable standard of care. Cases where such testimony is not required include those where the propriety of defendant's conduct is "within the common knowledge and experience of the layman." A typical example is failing to file a lawsuit within the applicable limitation period.

Plaintiffs have resorted to creativity in showing breach of the standard of care. In *McGuinness v. Barnes*,[26] the New Jersey Supreme Court upheld a trial court's denial of a motion in limine by a defendant attorney in a malpractice case. The plaintiff had sued his attorney for allowing a statute limitation to run on the client's medical malpractice claim. The client asserted that the attorney failed to obtain certain hospital records, failed to obtain an expert witness, and failed to procure a New York lawyer to institute suit in a New York court.

After representing the client, the attorney participated as a panelist in two CLE programs in which the attorney stated that attorneys handling medical malpractice cases should always obtain hospital records and use their best efforts to find an expert witness willing to testify on plaintiff's behalf. During trial the client attempted to use the attorney's comments to impeach the testimony of the attorney's expert witness that defendant had met the applicable standard of care. The court denied the attorney's motion to bar the plaintiff's use at trial of the defendant's comments, holding that his speech was not privileged.

PROXIMATE CAUSE

In a legal malpractice action the client must prove a better result would have been obtained in the underlying matter if the attorney had exercised reasonable care. This concept is commonly referred to as the "case within the case."[27] The case within the case concept is linked to the fourth element of the attorney malpractice case: proximate causation of damages. A client does not have a malpractice claim against his or her attorney unless the attorney's malpractice resulted in loss of a viable claim or otherwise caused damage.

"Summary judgment may be granted based upon plaintiff's failure to designate an expert witness to define the applicable standard of care."

In *Williams v. Barber*,[28] the Utah Supreme Court held:

> Generally speaking, incurring liability through a breach of duty does not necessarily result in damages. The adoption [of such a rule] would require this court to either ignore the requirement of proximate cause with respect to a finding of damages in tort or expand the concept of liability beyond its commonly held meaning.[29]

For purposes of proving proximate cause in a legal malpractice case the plaintiff must objectively show that absent the attorney's negligence, the underlying action would have been successful. In *Harline v. Barker*,[30] the Utah Supreme Court explained this means establishing what the result of the underlying action *should have been*, which is an objective standard, not what a particular judge or jury would have decided, which is a subjective standard.[31]

In *Harline*, the defendant attorneys successfully argued that they were not the proximate cause of plaintiff Harline's denial of discharge in bankruptcy. The Supreme Court held that the bankruptcy court's determination that Harline had acted fraudulently and should be denied discharge precluded Harline from relitigating the cause of his denial of discharge in the malpractice action.

Another available defense in the area of causation is comparative fault of the plaintiff. In *Western Fiberglass Inc. v. Kirton, McConkie and Bushnell*,[32] the Utah Court of Appeals held that evidence supported the finding that a client who had sued the defendant law firm for failure to perfect a security interest was himself fifty percent negligent. The evidence showed that the client disregarded the law firm's advice to be represented by counsel during closing of the deal from which the accounts receivable arose and relied on the other side's counsel to complete the paperwork.

DAMAGES

The type and amount of damages recoverable in a legal malpractice action will depend upon the nature of the underlying case. The trier of fact must determine what the client in the underlying case lost. Damages, however, cannot be based upon speculation or conjecture. They can only be awarded if "there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that the plaintiff suffered injury and damage and also that it was proximately caused by the negligence of the defendant."[33]

Although it may be difficult for plaintiff to prove actual damages in a legal malpractice action, damages for attorneys defending such claims are guaranteed. An attorney's loss in terms of time, costs, and higher insurance premiums has been estimated to average close to $50,000.[34] Regardless of whether the plaintiff manages to prove damages, an attorney still suffers significant damage from undergoing the ordeal of a malpractice action.

This underscores the advisability of avoiding a fertile area for generating malpractice claims: fee recovery lawsuits. Fee recovery lawsuits frequently generate attorney malpractice counterclaims. The common plaintiff rationale seems to be that if I countersue for malpractice, the fee claim may go away. Unfortunately this often proves true. By the time the attorney has satisfied her deductible, wasted many billable hours assisting in her defense and is facing a possible increase in malpractice

rates because of the insurance company's defense costs, it becomes clear that it would have been more economical to write off the fee.[35]

Another key to avoiding malpractice claims is frequent communication with your client. New developments should be communicated to the client quickly, whether bad or good. In the oft repeated words of one Salt Lake practitioner, "if you're going to eat a little crow, eat it while its young." When calling to impart bad news to the client, be ready with constructive suggestions about addressing the problem.

BREACH OF FIDUCIARY DUTY

In addition to the tort of malpractice a separate cause of action may exist for breach of fiduciary duty. In *Kilpatrick v. Wiley, Rein and Fielding*,[36] the Utah Court of Appeals explained that legal malpractice claims based upon negligence concern violations of the standard of care; legal malpractice claims based upon breach of fiduciary duty concern violations of the applicable standard of conduct. The fiduciary duty of an attorney hired solely to represent the interest of a client is of the highest order and the attorney must not represent interests adverse to those of the client; the attorney must adhere to high standards of honesty, integrity and good faith in dealing with his client, and is not permitted to take advantage of his position or superior knowledge to impose upon the client, nor to conceal facts or law, nor in any way deceive the client.[37]

In a legal malpractice action based on breach of fiduciary duty, the client must show that if the attorney had adhered to ordinary standards of professional conduct and had not breached fiduciary duties, the client would have benefited. The same standard of causation applies whether the alleged breach is a negligent act, a fiduciary breach or even a contractual breach.[38]

BREACH OF CONTRACT

The Utah Court of Appeals has recognized that legal malpractice actions based on breach of contract are conceptually distinct from those based on negligence or breach of fiduciary duty.[39] A dearth of case law exists in Utah for legal malpractice actions alleging breach of contract. A breach of contract action by a client against her attorney is based upon breach of promise by the attorney. The client must show breach of promise as well as the other ingredients of a contract cause of action: foreseeability, causation and damages.[40] Damages for breach of contract include losses directly resulting from the breach if such losses were reasonably within the contemplation of the parties at the time they entered into the contract.[41] A malpractice suit based upon breach of contract is usually asserted by a client seeking to take advantage of the longer prescriptive period for contract actions.[42]

RIGHT TO JURY TRIAL

One disturbing aspect of attorney malpractice cases – given the current disdain in which the public generally holds attorneys – is exposure to trial by jury. In *Harline v. Barker*, the Utah Supreme Court reduced the scope of cases in which legal malpractice plaintiffs are entitled to jury trials. The defendant attorneys in *Harline* obtained summary judgment on the ground that regardless of any malpractice they allegedly committed, the plaintiff Harline would have lost his bankruptcy discharge because of his own fraud upon the court – an efficient, intervening cause of the bankruptcy court's denial of his bankruptcy discharge.

"The fiduciary duty of an attorney hired solely to represent the interest of a client is of the highest order and the attorney must not represent interests adverse to those of the client . . . ."

On appeal the Utah Supreme Court stated that only a bankruptcy judge could have decided the issues in the underlying suit. Accordingly the malpractice plaintiff would not be entitled to have a lay jury in the malpractice action decide what the outcome of the underlying suit would have been, absent the attorney's negligence.[43] This principal would presumably apply to other underlying cases where trial by jury is unavailable, for instance domestic cases or an appeal.

STATUTE OF LIMITATIONS

Legal malpractice actions based on professional negligence must be filed within four years of the time the cause of action accrues.[44] Actions based on breach of fiduciary duty must also be filed within four years.[45] The cause of action accrues when the act complained of is discovered or, in the exercise of reasonable care, should have been discovered. In determining the date of accrual:

> [The trial court] must explore the particular facts of the action and make the following determinations: when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem; whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered to him or her; and whether such damage or injury would put a reasonable person on notice of the need for further inquiry as the cause of damage or injury.[46]

LIABILITY TO THIRD PARTIES

An attorney, while performing his obligations to his client, is not liable to third parties in the absence of fraudulent or malicious conduct.[47] In *Atkinson v. IHC Hospitals, Inc.*, the Utah Supreme Court held that an attorney who had a contractual duty to represent a medical malpractice defendant had no corresponding duty under a third-party liability theory to assure that a settlement for plaintiffs was sufficient to fit their needs.[48] Although declining to impose third party liability, the *Atkinson* court did discuss the theory of third party liability and situations in which it might apply. The court stated that in order to establish a cause of action under a third party liability theory, plaintiff must:

> [A]llege and prove that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.[49]

Cases where third party liability has been found include drafting and administering wills and estates; fraudulent misrepresentations; creditors of a corporation in receivership; purchasers at a foreclosure sale where attorneys conducted the sale improperly; and giving a legal

opinion on a bond.[50]

Attorneys may also be liable to third parties for committing acts that subject them to other causes of action. Recent Utah claims include alleged violations of the Fair Debt Collection Practices Act (for a wrongful garnishment), alleged breach of peace and trespass (for assisting a client in a nonjudicial repossession of personal property) and alleged violations of the Racketeer Influenced and Corrupt Organizations Act (for assisting a bank client in an allegedly unlawful foreclosure). These types of claims can be especially problematic from a defense standpoint if they fall outside the attorney's malpractice insurance coverage.

CONCLUSION

Legal malpractice suits are an increasingly prevalent and expensive part of practicing law. Every attorney is a potential target. Attorneys, fortunately, can decrease their vulnerability by knowing and understanding what malpractice entails, and then taking simple preventative measures to avoid suit. In the end, however, the best way to avoid a legal malpractice suit, in addition to complying with the applicable standard of care, is to treat clients courteously, communicate regularly, and treat them the way you would want to be treated.

[1]Legal Malpractice in the 1990s, American Bar Association's Standing Committee on Lawyers' Professional Liability.

[2]*Tanassee v. Snow*, 929 P.2d 351, 355 (Utah App. 1996).

[3]50 ALR 5th 301. In fact, the American Law Institute may soon adopt The Restatement (Third) of the Law Governing Lawyers. The Restatement would act as a source for determining the duty of care in malpractice suits. Violation of the standard of care set forth in the Restatement could result in legal malpractice liability. Nancy L. Marshall and Patricia A. Lynch; "Lowering the Bar", *ABA Journal*, Nov. 1997.

[4]*Kilpatrick v. Wiley, Rein and Fielding*, 909 P.2d 1283, 1290 (Utah 1996).

[5]*Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996).

[6]*Margulies v. Upchurch*, 696 P.2d 1195, 1200 (Utah 1985).

[7]*Atkinson, v. IHC Hospitals, Inc.*, 798 P.2d 733, 735 (Utah 1990).

[8]*Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727 (Utah App. 1990).

[9]*Id.* at 728.

[10]Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §5.3 (4th ed. 1996).

[11]*See id.* §5.3.

[12]Elizabeth Cohen, "Afraid of Ghosts", *ABA Journal*, Dec. 1997, at 80.

[13]*Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982).

[14]*Young v. Bridwell*, 437 P.2d 686, 690 (Utah 1968).

[15]Model Utah Jury Instruction 7.45.

[16]John Gibeaut, "Avoiding Trouble at the Mill", *ABA Journal*, Mar. 1997, at 48.

[17]*Id.* at 49.

[18]Legal Malpractice in the 1990s, American Bar Association's Standing Committee on Lawyers' Professional Liability.

[19]*Watkiss & Saperstein v. Williams*, 931 P.2d 840, 846 (Utah 1996).

[20]*See also, Jensen v. Sharp*, 858 P.2d 987, 989 (Utah 1993).

[21]Mallen & Smith, *supra* note 10, at §28.18.

[22]*Atkinson*, 798 P.2d at 735.

[23]*Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 826 n. 8 (Utah App. 1989), *cert. denied*, 789 P.2d 33 (1990).

[24]Mallen & Smith, *supra* note 10, at §32.16.

[25]943 P.2d 260 (Utah App. 1997).

[26]683 A.2d 862 (N.J. Sup. L. 1994).

[27]Paul D. Rheingold, "Legal Malpractice: Plaintiff Strategies", *Litigation*, Winter 1989, at 13. (The case within the case concept generally makes legal malpractice cases more time consuming and expensive than other tort suits.)

[28]765 P.2d 887, 889 (Utah 1987).

[29]*Id.* at 889.

[30]*Harline*, 912 P.2d at 433.

[31]*Id.* at 440.

[32]789 P.2d 34, 36 (Utah App. 1990).

[33]*Dunn v. McKay, Burton & Thurman*, 584 P.2d 894, 896 (Utah 1978).

[34]Gibeaut, *supra* note 16, at 48.

[35]Mallen & Smith, *supra* note 10, at §2.13, *see also Watkiss*, 931 P.2d at 841.

[36]909 P.2d 1283 (Utah App. 1996).

[37]*Id.* at 1290.

[38]*Id.* at 1291.

[39]*Id.* at 1290.

[40]Roy R. Anderson and Walter W. Steele, Jr., "Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle", 47 *SMU Law Review* 235 (1994).

[41]*Id.* at 255.

[42]Mallen & Smith, *supra* note 10, at §8.5.

[43]*Harline*, 912 P.2d at 440.

[44]*Merkley v. Beaslin*, 778 P.2d 16 (Utah App. 1989).

[45]*United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 890 (Utah 1993).

[46]*Merkley*, 778 P.2d at 19.

[47]*Atkinson*, 798 P.2d at 735-36.

[48]*Id.* at 736.

[49]*Id.* at 735, *citing Flaherty v. Weinberg*, 492 A.2d 618, 625 (Md. 1985).

[50]*Atkinson*, 798 P.2d at 736.

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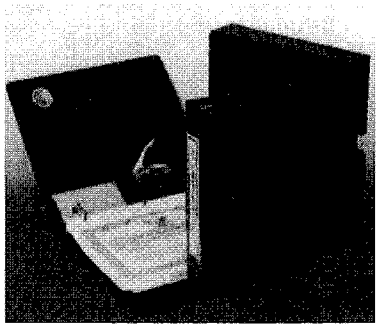

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Where We Have Been and Where We May Be Headed: Some Thoughts on the Progress of the Utah Judiciary

Remarks delivered to the Utah Bar Foundation at the Utah Law & Justice Center on December 2, 1997, by Chief Justice Michael D. Zimmerman

Before I begin, I want to extend my personal thanks to those of you who are and have been Utah Bar Foundation Trustees. You have consistently spent the IOLTA monies entrusted to you to support access to justice for those who cannot afford it. I trust that you will continue this important work. Money is the scarcest of commodities and one that is essential if access to justice is to be more than rhetoric.

As we are nearing the end of this year, the end of my term as chief justice, and approach our move to the new headquarters of the judiciary – the Scott M. Matheson Courthouse – it seemed a good time for me to sit back and take stock. When my friend, Pam Greenwood, asked me to speak, she said that I could take liberties today and give you a subjective view of what I think is important about where we have been in the recent past, and what we may face in the future. She even said that I could be a bit provocative. I always like that license, and am going to take it. This exercise in perspective is not directed at the Bar Foundation, but to all those who are members of, or affiliated with, the legal and judicial world.

Some of what I will say today about the future will be greeted with anxiety, some with skepticism, and probably some with downright disbelief. I don't claim to be prescient. But I do think that the issues I am raising are very real and must be faced. I hope that the overall message you take away is one of opportunity for the judiciary and the legal profession, not threat. In any event, it does all of us good to take the long view from time to time, so that we can put the little changes we encounter into bigger perspective, and to recognize that calls for little changes now may presage a major challenge in the future.

In 1984, when Scott Matheson made me the last of his six appointments to the Utah Supreme Court, it was probably fair to say that the Utah judiciary was a separate branch of government in name only. It had no institutional leadership, lacked an administrative infrastructure, did no coordinated planning, and was funded from a variety of sources, state and local, all of which gave each of its parts a rather parochial character. Although there was an organization called the judicial council, it was essentially a district court coordinating body. It had no real authority.

We were certainly not alone. Many state judiciaries had been, and some still are, in similar positions. For some years a reform movement had been building across the country that strove to get state judiciaries out from under local control, to unify them, to professionalize them, and to give them the structure and administrative capabilities that would permit them to really become coequal branches of government. Utah caught that reform movement in the early 1980s, and the fruits have been good indeed.

Within six months of the time when I joined the court as its junior member, the Utah voters passed a revision of the judicial article of the constitution that made possible serious reform. In the years that followed, we have created a state-funded, centralized system of unified trial courts, with all judges selected by merit and retained by a yes-no ballot.

Governance for this branch is now centralized in the hands of a judicial council composed of elected representatives from all levels of the courts and from the bar. The council speaks to the executive and legislative branches on policy and budget matters with a degree of unanimity that is rare for judiciaries across the nation. And although prior to the amendment, the supreme court had little to do with the rest of the system, now the chief justice is the chief administrative officer of the system.

I want to take a moment to discuss some unique aspects of the governance and administrative structure of Utah's judiciary. To the extent that other states' judiciaries are centralized, almost all are run either by the chief justice alone or by the supreme court as a whole. None have given the constitutional power to determine the direction of the judiciary to elected representatives from all levels of the courts. Here in Utah, the constitutional amendment and its implementing legislation installed at the helm a powerful, elected judicial council that represents all levels of courts, including justice courts, and the bar. This has produced one of the strongest, and I think, best judicial branch governance and management structures in the country.

It assures that all levels of court have their perspectives considered. Yet because

no court level dominates the council, all must work out their differences and make common cause for anything to be accomplished. Largely because the need for the development of consensus, the council has proven itself to be capable of developing and refining initiatives, and of mounting support for them to see that they are implemented.

This is possible because the council has developed a culture in which newly elected council members, judges who often start out with parochial interests and perspectives, come to see the needs of the judiciary as a whole and are capable of placing the needs of the system ahead of the needs of their own court level and geographical area. We have a right to be proud indeed of what we have accomplished. We have become a coequal branch of government in fact as well as in name.

I suspect some of you have heard much of this litany before. But I repeat it today because when I talk with chief justices from around the country, and with others involved in court administration, they are continually amazed that we have been able to do so much in so short a time. We have managed to construct one of the more unified and progressive state judiciaries in the country in barely a decade.

Now, having said all this about what has been accomplished, it is fitting that we ask what challenges the future holds. While it is tempting to think that the heavy lifting is over, I am afraid it is not. My view is that we are fortunate to have such a good governance and administrative structure in place, because we are going to face challenges in the coming years, challenges that are not unique to Utah, for which a solid governance structure will be essential, and which will make the challenges we have already met seem relatively easy by comparison. And these new challenges will be not only to the judiciary, but also to the bar and the entire judicial-legal culture.

Today, I would like to focus on what I think are essentially two types of challenges that we will face, although there are certainly others. I choose these because they will require changes not only in how we do our business, both in the courtroom and administratively, but because they will test our ability to handle changes of a type quite different than we have implemented over the past decade.

An example of the first type of challenge is one that is masked by what may appear to be a more routine proposal for administrative restructuring. This is the family court proposal. This proposal suggests that we merge the juvenile and district courts and establish a family court with jurisdiction over the entire area of family law, including domestic relations and juvenile matters. The Judicial Council has pledged to take the proposal up in the fall of 1998, after we have moved into the Matheson courthouse and concluded full consolidation of the third district court.

This is an issue that, at first blush, seems similar to the question we dealt with when we decided to consolidate the circuit and district courts. And I suspect it will raise some of the same emotions and arguments within the bench and bar. But while the arguments for the circuit-district court consolidation were premised on a more efficient use of judicial resources and more jurisidicational flexibility, and these concerns also partially undergird the family court proposal, there are deeper justifications for the family court proposal that raise much more fundamental and much more perplexing issues.

At root, this challenge is a demand that judges and courts assume a stronger administrative, protective, or rehabilitative role toward those appearing before them, that they become more involved in what some have termed "therapeutic jurisprudence." This is in contrast to the more traditional "dispassionate magistrate" model of judge that most of us are used to. Those arguing for more involved judiciaries note that when certain types of matters come into court, the court becomes the entry point into the governmental system of individuals needing social services. The demand is that judges and the judicial system become more expert in these problems and more active in seeing that those services are provided, rather than dealing only with the manifestations of their problems that fit within our traditional civil or criminal law tasks. This may involve simple coordination with social service agencies, or it may involve ongoing supervision of the provision of those services.

It is the demand for just such deeper involvement by judges that underlies part of the push for a family court. Specifically, the family court proposal is grounded upon the claim that the present system divides jurisdiction over family problems along lines that make sense to lawyers, judges, and the law, but not to the family unit. The argument is that a family court, augmented by broader social services, would do a better job of dealing with the many manifestations of a dysfunctional family. It is not enough for the courts to treat the symptoms individually, be they divorce, child custody disputes, incidents of child abuse and neglect, or of juvenile crime. Rather, the family itself should be the focus of attention. The motto of the family court proposal is "one family, one judge." And the judge in this motto will almost necessarily function as a supervisor and monitor of social services to the family.

The demand for more involved judging that is part of the push behind the family court proposal is also becoming evident in other areas. The drug court model that has gained much recent attention is also premised on therapeutic judging. The judge coordinates and cooperates with various agencies in helping drug addicts beat their habits. This is done by supervising the defendant's progress through repeated visits to court, with the judge alternatively encouraging those who are towing the mark, and threatening with jail those that do not. The program seems to work, and I am certain we will see strong pressure for it to expand. But we need to be honest – the demand for such involved judging, in family or drug court, or elsewhere, has large cultural implications for the judiciary.

For many years, those across the country occupying positions analogous to our district and appellate judgeships, and who constitute the vast majority of judges, have largely organized their judiciaries around their vision of the world. These judges tend to see the "dispassionate, disinterested magistrate" model of judge that they learned about in law school, the one who sits passively while lawyers present their two contending visions of reality, as the preferred model. These judges have tended to look down on those involved in person-centered judging, such as juvenile or family court judges.

But as the public and legislatures, not to mention the federal government, increasingly demand more participation and coordination by the judiciary in the addressing of social problems that evidence themselves in courts, the judiciary is going to have to face a new cultural reality. The detached magistrate model of their law school days will increasingly not be the preferred model in the trial courts. The ability of lawyers to realistically perform

all the active roles the adversary system model assigns them is increasingly questioned. More trial judges are going to have to become more adept at entering into the management of peoples' problems, and coordinating social services to address those problems. And more of the resources of the judiciary are going to be committed to supervising and providing such services, a fact which has large implications for our ability to handle our more traditional work in the old, somewhat hands-off manner.

Many of you may say that the judiciary can and should resist these demands because they fundamentally change the nature of the court system and its adversarial premises, and will require shifting funds from our traditional core functions to newer, less central activities. I suppose that these pressures can be resisted for a while, but I think that resistance is futile, and probably unwise in the long run.

First, this is not like consolidation or other internal structural reforms we have undertaken in the past. Those changes were largely invisible to the public and were essentially technocratic. They may have seemed momentous to us, but they were "inside baseball." For that reason, they could be resisted until a consensus matured among the inside players – lawyers and judges. However, these new demands will come from outside – from legislatures and the public, groups who have little respect for our internal sensitivities, and are quite willing to impose their reforms on us if we seem reluctant to craft them ourselves. We can choose to be the agents of innovation, or the subjects of innovation.

A second reason I think resistance is both unwise and futile is that there is every reason to believe that the federal government will play an increasing role in demanding better coordination between courts and social services. And it has unique power to require changes, and a unique insensitivity to our status as a separate branch of state government.

The most obvious example of how the federal government may work is in the area of drug courts. It has offered grants to local governments to set up drug courts, entirely by-passing the state court systems and without consulting us. We have to participate in such programs, since a judge is an essential part of the program. But the federal dollars go to the local government for the prosecution and social service support needed for drug court calendar. I think we can anticipate the mandating of such programs if they prove to be successful. And that mandate will be through the carrot of federal funding.

The best we can hope for is that at the national level organizations that speak for the state courts can sensitize the relevant federal agencies and Congress to the need to respect the integrity of state judiciary administrative machinery. This may prevent these programs from shattering the coherence that our administrative and structural reforms have permitted us to bring to planning and resource allocation within the state judiciaries. But it certainly will not stop the programs.

The price of appearing to resist such initiatives from the federal government can be large. An instructive example not well known is the recently established program to strengthen child support collection nationwide. One element of this program requires that states determine paternity in simplified administrative proceedings. The federal government is intent on taking paternity determinations out of courts and away from juries, which they see as a slow and unduly cumbersome way of determining such questions.[1] To this end, the federal legislation requires that if a state has a constitutional provision that precludes these determinations from being shifted to administrative agencies and out of courts, such as a mandate that a jury trial be available, the state has five years to repeal that provision or face a draconian cut in funding for the child support program.[2] It seems unlikely that any state legislature will long resist such pressures.

On a national level, state court leaders think that we are on the verge of a virtual avalanche of legislation essentially federalizing aspects of the state courts by mandating how we do business in specific areas. I think our only hope of effectively coping with these federal efforts is for us to get out in front of the reform parade. Only then will we have any chance of regaining essential credibility with the public and the other branches of state government so that they will support our efforts to have some control over how these new programs are run and how they are integrated with our administrative structure and our more traditional ways of doing business. We must acknowledge the desire for change and participate in its formulation. We must be seen as part of the solution, not part of the problem.

Moving from the area of therapeutic or involved judging, I see a second challenge confronting the judiciary, and the legal profession. This is the increasing demand for access to justice. This challenge has fewer federal ramifications than therapeutic justice, but it is no less important. The administrative and structural changes that we have made in Utah's judiciary in the past decade mirror what has been going on across the country in state courts. However, as dramatic as we see these changes as being, they have had relatively little impact on the availability of legal services, the ease of access to the judicial dispute resolution machinery, or to the public's perception of the legal system.

The public increasingly sees the judiciary, and the legal profession as a whole, as inadequately responsive to the needs of the average person. There is serious question about the premise of the lawyer-centered adversary system model upon which our traditional way of doing business is grounded. Lawyers are too expensive for many, yet the machinery of justice is effectively inaccessible to members of the public who are unrepresented. The court rules are arcane and judges often have no patience or time for unrepresented people who gum up machinery designed for use only by expert lawyers.

In Utah, we have felt pressures to make the judicial processes more open and accessible, and to provide alternatives. We have responded reasonably well, I think.

For example, the courts worked with the bar and the legislature to institute court annexed alternative dispute resolution. We are in the process of expanding it across the state in the district courts, and have seen demand for it grow in particular areas, such as use in victim-offender mediation, landlord-tenant disputes, and domestic relations. The evidence to date is that while judges and lawyers may be slow to get on the ADR bandwagon, the public is quite pleased with the process.

We have also made it easier for the public to come to court without a lawyer, through the institution of our Quik Court kiosks, where simple pleadings can be prepared on a computer. And, in the area of domestic violence protective orders, we have established a system where deputy court clerks and volunteers help guide complainants through the protective order process. In effect, we are providing paralegals to help them claim their legal rights.

While we have made some changes, they only scratch the surface. The depth of the unmet need for a way to assert legal rights has recently been documented by the Access to Justice Task Force organized by the bar. The study conducted by that task force has made it abundantly clear that there is no way that those who need those services can pay for them in the current market and in the current lawyer-based legal processes. For much of the public, what the law actually *is* means little, because they have no realistic access to the law's machinery. And they do not see lawyers or judges as very concerned about the problem.

To the extent that we resist changes that increase access for those without full legal representation because such increased access is disruptive of our existing way of doing business, I think we are in danger of finding ourselves in the same situation as doctors before the managed care revolution – professionally myopic, unduly wedded to old models that work for the insiders, but not for the public, and quite proud of the quality product our expensive machinery can produce, without paying much attention to the fact that most people cannot afford it.

If the courts, and the bar, are to regain an acceptable measure of public confidence, if we are to be able to credibly claim that our system really offers justice for all, we are going to have to open the system up. Among the measures I predict we will have to take in the near future is simplified procedures for certain essential types of proceedings, such as domestic relations, so that people can represent themselves. The access to justice task force suggests that the bar consider broadening the license for paralegals, so that more people can obtain the assistance necessary to represent themselves. This seems one sound contribution to solving the cost problem.

Dealing with more pro se litigants will probably lead us to put on staff more clerks who fulfill a de facto paralegal role, assisting parties with their cases. We have already done so in the domestic violence protective order area. It is easy to see it expanding elsewhere.

We will need to make dispute resolution machinery more usable. Alternative dispute resolution will need to grow dramatically, and be more widely available, particularly in small matters. While it may provide what some see as less than perfect justice to the parties in that context, we have to recognize that it is better than unobtainable perfect justice.

These changes I am predicting, this opening up of the system to pro se litigants and crafting alternative means of resolving disputes, amounts to a fairly frontal assault on the adversary system model of doing business.[3] Lawyers become less important, and judges and their staffs fulfill a broader range of functions than is traditional. We can lead out on these issues, assuring that the reforms are done in the best way possible and capturing some of the credit from the public, or we can resist, and let others make the reforms from without. If that occurs, we can expect poorly crafted solutions that will be unnecessarily disruptive, and less successful than they could be.

The challenges I foresee are profound. Broadly speaking, both the demand for therapeutic justice in specialized areas, and broader access to justice for the public, reflect the view that *how* the law is administered will become more important than *what* the law is. The judiciary will be under immense pressure to look outward, to the public, rather than inward, to the profession. And this may create tension between the bar and the courts, tension of a kind new to our relationship.

In many ways, the challenges I see materializing in the near future are far more difficult to address than the challenges we faced over the past decade in restructuring the Utah judiciary. The reason they are more difficult is that they bring other players into the equation, and they strike at some of the root assumptions of the judicial-legal culture in which we have all been raised and comfortably cocooned for all of our careers.

But even if the challenges I have described today all materialize, I am optimistic about our ability to handle them. We in the Utah judiciary have put together a flexible and strong administrative structure that has shown itself capable of developing and implementing significant change quickly. In the process, we have broadened the vision of many of those within the judiciary and the bar. I think that those people are fully capable of including in that broadened vision a future where the judiciary retains a central place in the public's conception of justice, and where it does a far better job of achieving its aspiration of making justice available to all the citizens.

I wish us all luck.

[1] *See* 42 U.S.C. §666(a)(5)(I).

[2] *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.)

[3] For a detailed discussion of this model, see Michael D. Zimmerman, *Professional Standards Versus Personal Ethics: The Lawyer's Dilemma*, 1989 Utah L. Rev. 1.

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Dear Access to Justice Task Force

By Gary G. Sackett

The following is a slightly modified form of a letter that was sent to the Access to Justice Task Force by 16 Questar Corporation in-house lawyers. It primarily addresses the mandatory *pro bono* reporting recommendation of the Task Force. Recent coverage of this issue in the *Utah Bar Journal* has been rather one-sided, heavily tilted toward the proponents of mandatory reporting of service or contributions.

Many lawyers and firms responded to a call for comments to the Task Force, the great majority of which *opposed* the reporting proposal. Yet, there has been little, if any, reporting of what appears to be major opposition on the issue. Although the following does not capture the totality of the reasons stated in the various comments that the proposal should be rejected, it can perhaps serve as the representative of the many individuals and firms that are opposed to mandatory *pro bono* reporting.

We, the Questar Corporation Legal Department and 16 of its attorneys, have read the preliminary report and discussed it at length. We concur with the concerns of the legal community about the necessity to address this important issue and to find ways to improve the dissemination of legal services to those who truly need but cannot afford them. Accordingly, we applaud the Task Force's efforts to analyze the current state of legal-service availability in Utah and to seek improvements in the system. Individually and collectively, we commit to continue to participate in a variety of law-related public services.

We concur with all of the recommendations *except* for the provision that requires mandatory reporting of *pro bono* services. Although the goal of such reporting may be laudatory, we believe is an artificial, coercive device designed to pressure lawyers to provide *pro bono* services beyond their inclination otherwise to do so.

If there is a shortage of *pro bono* resources available to Utahns, we encourage the Task Force and, ultimately, the Utah State Bar to focus their efforts on education and moral persuasion of lawyers and other measures in the *pro bono* spirit – not to resort to a mandatory reporting mechanism that seems philosophically discordant with the notion of "*pro bono* services."

GARY G. SACKETT is Vice President and General Counsel for Questar Corporation, an integrated, regional energy company based in Salt Lake City that employs 19 in-house attorneys. He holds a J.D. degree from the University of Utah (1977) and a Ph.D. in mathematics from the University of Southern California (1969).

He serves as Chair of the Utah State Bar Ethics Advisory Opinion Committee, a position held since 1992. He previously served as Chair of the Bar's Unauthorized Practice of Law Committee.

Utah Rule of Professional Conduct 6.1 provides the framework for lawyers to provide *pro bono* services:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system to the legal profession, and by financial support of organizations that provide legal services to persons of limited means.

This has been the guiding provision since the adoption of the Rules in 1988 and should continue to provide the foundation for each lawyer's obligation. It is an advisory rule (a lawyer *should render* – not, a lawyer *must render*) that properly addresses the moral and professional responsibilities of Utah lawyers to provide assistance to Utah's justice system. If there is evidence that it is not being taken seriously, then the Bar should undertake less draconian measures to improve the results.

Encouragement and persuasion of lawyers to be generous with their time and financial resources is admirable; artificial pressures to do so for fear of appearing on a list of non-contributors – official or otherwise – is not within the spirit of Rule 6.1 and is offensive to us. If the reporting of *pro bono* work or contribution is not to be the subject of disciplinary action and will be kept confidential (as the proposed rule indicates), then there is no legitimate purpose for such reporting.

This reporting requirement has a Big Brother quality that is unworthy of our profession. Ostensibly, the reporting of little or no service by any individual lawyer would not be grounds for discipline. What, then, is the purpose of setting up yet another administrative procedure and the staff to deal with it? To provide statistics? This could be done without the formality and silent pressures of required filing of thousands of affidavits that have no substantive significance. To "commend communities and lawyers for outstanding efforts?" To do this would require review and assessment of lawyers' individuals reports by someone – presumably Bar per-

sonnel – a procedure quite inconsistent with confidential treatment of the data. (There are more straightforward methods of recognizing outstanding public service.) To "remind lawyers of their special responsibility?" This can be done without resort to shame tactics; if *pro bono* participation is lacking, surely the Bar is creative enough to "remind" lawyers of their responsibilities in a more professional manner.

If we assume that many lawyers – in particular, some in-house counsel, government and transactional lawyers – are not in a position to provide competent legal services to persons of limited means, the new procedure under the rule would create a data base at the Bar offices that would contain the amounts of private donations of these lawyers. This is not data that should be assembled by, or be available to, the Bar or any of its employees or officials. As noted, it serves no purpose, and it is inimical to the notion that a person's private donations are a matter between donor and donee.

We cannot emphasize enough the primary conclusions that we have drawn: mandatory reporting will create either (1) a meaningless but costly administrative procedure that will absorb resources that could be put to better use otherwise, or (2) a "Big Brother is watching" mechanism in which Bar or court personnel will make evaluations about which lawyers are "properly" complying with the mandate. Neither is acceptable.

With these principle ideas firmly stated, we address the alternative: Even if there is to be a reporting requirement, the types of services to the legal community that would qualify for reporting should not be divided into direct-representation-of-the-needy "Type (a)" activities and more general, public-service "Type (b)" activities. This division in the proposed rule suggests that "Type (b)" activities are "fillers" that are less worthy than "Type (a)" representation. Such a division favors those attorneys whose practices may have significant components of family law, domestic relations law and those legal areas that most often arise in the context of indigent persons. Attorneys whose practice and expertise are in other areas may have relatively little opportunity to provide *competent pro bono* service to such individuals.

If there is to be mandatory reporting, then the full range of public-service activities listed in parts (a) and (b) of the rule should equally qualify for inclusion in the required hours. For example, many corporate attorneys dedicate extensive time to services that directly benefit public access to, and benefit from, the legal system: sitting as pro tem judges; serving on Bar and Supreme Court committees that deal with public-interest aspects of the law (disciplinary screening panels, Law Day, unauthorized practice, ethics and children's needs committees); serving as coaches and judges in public-school mock trial activities; and providing free services to persons who would not generally fall in the narrow categories of "persons of limited means." Yet, many of these attorneys have little or no ability to satisfy the conditions of "Type (a)" service.

A related difficulty with a blanket requirement is the issue of competency. There are attorneys – many in-house counsel or those exclusively engaged in transactional practice, for example – who have little or no direct experience in providing legal advice and services in the areas traditionally considered as "*pro bono* service." It is *not* a service to the public to impose artificial pressures on lawyers to come forward and provide legal services that they are less competent to render than other public services they might perform.

Although the proposal offers the alternative for an attorney to provide financial support to appropriate legal-service organizations, this does not mitigate the indignity of the proposal. Financial contributions should be truly voluntary. They should not result from Bar pressures that have the effect of inducing lawyers to "buy out" an obligation.[1]

Our *pro bono* obligations are clear under Rule 6.1, and it seems to us unworthy of the profession to pursue such principles with a reporting system that is transparently designed to pressure lawyers to give time or money to particular causes for fear of having their *pro bono* hourly reports disclosed or even reviewed by Bar or court officials.

Finally, there is some evidence to suggest that there is no shortage of volunteer pro bono services, but rather a shortage of organizational resources. This is not a criticism of those who are currently dealing with the problem, but an observation that perhaps more Bar efforts and resources should be channeled toward marshaling the volunteers that have come forward. At least one member of the Board of Bar Commissioners has noted that a recent call for volunteers produced an abundance of volunteers, but that many of these lawyers were never called upon specifically to participate in programs for which they might be qualified or trained.

In conclusion, the "Florida Rule" proposed by the Task Force should be rejected, and the Utah State Bar should not petition the Utah Supreme Court to adopt it. The proposal is a coercive, unprofessional rule that is inconsistent with the legal profession and the goals and standards it aspires to. If there is a shortage of *pro bono* service available from Utah lawyers, there are far more professional and direct ways to organize, encourage and persuade lawyers to give of their time and financial resources than to shame them into it with artificial reporting requirements.

[1]There was an analogous procedure in place during the Civil War by which able-bodied men could buy their way out of service to the Union – a practice that we look upon with considerable disdain in these enlightened times.

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Discipline Corner

DISBARMENT

On December 12, 1997, the Utah Supreme Court issued an opinion reversing the Second District Court of Utah's suspension of Jean Robert Babilis, and stating that disbarment was the appropriate sanction for Babilis's misconduct. Babilis violated Rules 1.4 (b) (Communication), 1.5 (Fees), 1.13 (Renumbered in 1995 as Rule 1.15) (Safekeeping Property), 3.3 (Candor Toward the Tribunal), 7.1 (a) (Communications Concerning a Lawyer's Services) and 8.4 (c) (Misconduct) of the Rules of Professional Conduct.

The Utah State Bar appealed a Second District Court order suspending Babilis from the practice of law for three years. The Bar filed a complaint alleging that Babilis had accepted representation of an estate in an uncontested probate matter on the basis of a contingency fee, converted estate funds to his own use, and lied to his clients and a court about his handling of the case. Although the District Court found that Babilis committed serious violations of the Rules of Professional Conduct, it entered an order sanctioning Babilis with a suspension. On appeal, the Bar asserted that the trial court, instead of suspending Babilis, should have disbarred him. Babilis cross-appealed, arguing that the trial court should have imposed a lesser penalty than a three-year suspension. Babilis also contended that the Bar had no right to appeal the trial court's disciplinary order.

The Supreme Court held that the Bar has a right to appeal disciplinary orders imposed by district courts and that Babilis's misconduct warranted disbarment. Moreover, the Court opined:

> Intentional misappropriation of a client's funds is always indefensible; it strikes at the very foundation of the trust and honesty that are indispensable to the functioning of the attorney-client relationship and, indeed, to the functioning of the legal profession itself. *See In re Davis*, 754 P.2d 63, 66 (Utah 1994); *In re Wilson*, 409 A.2d 1153, 1154-55 (N.J. 1979); *Carter v. Ross*, 461 A.2d 675, 676 (R.I. 1983); *cf. In re Smith*, 925 P.2d 169, 174 (Utah 1996). The honesty and loyalty that all lawyers owe their clients are irrevocably shattered by an intentional act of misappropriation, and the corrosive effect of such acts tends to undermine the foundations of the profession and the public confidence that is essential to the functioning of our legal system. Lawyers should be on notice that an intentional act of misappropriation of a client's funds is an act that merits disbarment.

The District Court refused to award restitution, apparently because it decided that the issue had been litigated and resolved by a settlement between the client and Babilis. But the Supreme Court remanded the matter for the purpose of making factual findings and awarding an appropriate restitution designed to compensate the client.

Chief Justice Zimmerman wrote a concurring opinion, which provides as follows:

> I concur in the court's opinion. However, I write to note the importance this court is placing on the terms of the Standards for Imposing Lawyer Sanctions and on trial courts adhering to those standards, both in classifying conduct for purposes of determining the presumptive sanction and in assuring that mitigating and aggravating circumstances are weighed appropriately before any decision is made to depart from the presumptive sanction.
>
> There is good reason for requiring adherence to these standards. One of the failings of the disciplinary regime as it existed before the present one was that when sanction recommendations came to this court from the Bar Commission, there was no set of standards that defined the sanction generally appropriate for any given type of conduct. That meant that the Bar's recommendations had something of an ad hoc character to them, when viewed over the years, and that this court's action on those recommendations had a similar character. In the absence of a detailed set of guidelines, both the Commission and this court were left a bit at sea, which raised the possibility that those similarly situated might not receive similar sanctions. This lack of guidelines was noted by the court and was one of the factors that prompted the adoption of the current standards.
>
> Now that we have standards, we should be vigorous in requiring that trial courts follow them so that all concerned know that each judge across the state before whom disciplinary matters are brought is following the same script. This will lessen concerns on the part of lawyers that the sanction imposed in a given case will depend more on the judge before whom the matter is tried than on the nature of the conduct; it will increase the confidence of trial judges that if they follow the standards, they will not be overturned unexpectedly; and it will lessen the inclination of lawyers to appeal sanctions in the hope that this court will idiosyncratically lessen a sanction that is in accordance with the standards' detailed requirements. These standards are a significant advance in the effort to treat similarly situated persons similarly, something that is essential if the lawyer discipline machinery we have crafted is to retain the confidence of the Bar and the public.

For a full copy of the opinion, see *In the Matter of the Discipline of Jean Robert Babilis*, No. 960167, Filed December 12, 1997, at:
http://www.at.state.ut.us/usctx2n.htm.

SUSPENSION

On November 13, 1997, the Honorable Timothy R. Hanson, Third District Court, entered an Order of Suspension, suspending Loren D. Israelsen from the practice of law for three years for violation of Rule 8.4 (Misconduct) of the Rules of Professional Conduct. Israelsen was also ordered to pay the Utah State Bar its costs of prosecution of the matter, and to attend the Utah State Bar Ethics School. The Order was based on a Discipline by Consent entered into by Israelsen and the Office of Attorney Discipline.

On October 11, 1996, a Felony Information was filed by Jonathan Goldstein, Assistant United States Attorney for the Eastern District of Missouri, charging Israelsen with one felony count of conspiracy, in violation of Title 18, U.S.C. §371.

The Felony Information alleges, in pertinent part, the following:

> From on or about September 1, 1988, and continuing through on or about March 30, 1992, in the Eastern District of Missouri and elsewhere, Health Products International, Inc., and Loren D. Israelsen, Defendants herein, together with others known and unknown to the United States Attorney, did knowingly and willfully combine, conspire, confederate and agree with each other to enter and introduce into the commerce of the United States, imported merchandise by means of fraudulent and false invoices, declarations, letters, paper and by means of false written and verbal statements, in violation of Title 18, U.S.C. §542(b).

At all times material to the Felony Information, Israelsen performed work for Defendant Health Products, Inc., serving during some part of that period as vice-president, general counsel and director, and retained during some part of that period as outside legal counsel. At various times material to the Felony Information, Evening Primrose Oil ("EPO") was a substance marketed by Defendant Health Products or affiliated companies as a health food supplement for humans. This product was manufactured in Surrey, Great Britain and Nova Scotia, Canada, by a company named Efamol Limited ("Efamol"). On February 12, 1985, and continuing through March 30, 1992, the FDA effected an import alert regarding the EPO. The purpose of the import alert was to inform employees of the United States Customs Service and the FDA that, pursuant to the decision and authority of the FDA, EPO would not be permitted importation and entry into the United States. The import alert regarding EPO instructed government agents not only to inspect entry and shipping documents for the product description "Evening Primrose Oil," but also to inspect these documents for other indicia that the importation contained EPO by other names. On September 1, 1988, and continuing through March 30, 1992, any importation of EPO known to the United States Custom Service or the FDA was either denied entry into the United States, was re-exported after entry, or was destroyed. On approximately six occasions in May 1988, Health Products, alone or with an affiliated company, attempted to import through Chicago, Illinois, certain shipments of merchandise from Efamol. The FDA alerted Health Products that all of the entries were to be refused admission into the country because they were found to contain EPO. During the Summer of 1988, in order to continue importation of EPO, Health Products developed a plan by which the identity of the product EPO would be hidden from the United States Customs Service and the FDA so that the product could be allowed entry into the United States. Both Health Products, Israelsen and others agreed and conspired to hide the identity of the product. In his role as vice-president, general counsel or outside counsel for Health Products, Israelsen participated in the plan to import and distribute EPO into and within the United States of America.

Israelsen pled guilty to violating Title 18, U.S.C. §371, Conspiracy to Import by False Statements; a Class D felony. The United States District Court for the Eastern District of Missouri accepted Israelsen's plea, and sentenced him to two years of supervised probation and a fine of $25,000. The Government agreed not to bring any further charges against Israelsen. The Government further agreed that mitigating factors existed, including: Israelsen did not use sophisticated means; there were no tax losses to the United States or other losses to individuals; Israelsen clearly accepted responsibility for his offense.

Israelsen's actions consisted of criminal acts that reflect adversely on his fitness as a lawyer. Therefore, Israelsen violated Rule 8.4(b) of the Utah Rules of Professional Conduct. In taking the actions for which he was convicted, Israelsen should have known that he was violating his duties and responsibilities as an attorney licensed to practice law in the State of Utah. As a result, Israelsen violated Rule 8.4(a) of the Utah Rules of Professional Conduct. Finally Israelsen's actions consisted of conduct involving deceit or misrepresentation and he thereby violated Rule 8.4(c) of the Utah Rules of Professional Conduct.

SUSPENSION

On November 26, 1997, the Honorable G. Rand Beacham, Fifth District Court, entered an Order of Suspension, suspending Thomas A. Blakely, from the practice of law for three months for violation of Rules 8.4(a) and (b) (Misconduct) of the Rules of Professional Conduct. Blakely was also ordered to pay the Utah State Bar its costs of prosecution of the matter, to attend the Utah State Bar Ethics School, and to participate in and successfully complete a counseling program for sexual abuse. The Order was based on a Discipline by Consent entered into by Blakely and the Office of Attorney Discipline.

In August 1996, Blakely summoned his client to his office to have her sign some papers. The client was facing criminal charges for theft. During the consultation, Blakely made sexual advances towards his client. Blakely terminated his sexual advances when he heard a noise in his outer office. The client later filed a complaint with the St. George Police Department.

On November 20, 1996, Blakely was charged with one count of Forcible Sexual Abuse, a second-degree felony. On March 7, 1997, Blakely entered a plea of No Contest in Abeyance to the charge of Gross Lewdness, a Class A misdemeanor. The period of abeyance is eighteen months.

ADMONITION

On November 19, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.7(b) (Conflict of Interest: General Rule) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

The attorney represented a client in a custody/visitation matter involving the client's children from a former marriage. In July and August of 1995, the attorney acted unprofessionally when he hugged his client's wife without her consent. The attorney's conduct adversely affected the attorney-client relationship.

On June 6, 1996, a Screening Panel of the Ethics and Discipline Committee voted to direct the Office of Attorney Discipline to file a formal complaint in District Court against the attorney. The Panel also recommended that the attorney be issued an admonition in lieu of formal charges being filed if he attended psychiatric counseling and the Utah State Bar Ethics School. Because the attorney attended counseling sessions with a licensed clinical psychologist and also attended and successfully completed the Utah State Bar Ethics School, the attorney stipulated to an Admonition.

ADMONITION

On December 4, 1997, an attorney was

admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.3 (Diligence) and 1.4 (Communication) of the Rules of Professional Conduct.

In August 1991, an attorney was retained by a client and his family to represent them in an action against doctors and a hospital for the wrongful death of the client's mother. The attorney proceeded with the prosecution of the wrongful death claim, including presenting the case for pre-litigation panel review and attempting to locate experts to testify as to negligence and causation. The attorney had difficulty locating credible experts, and enlisted the aid of another firm. Neither the attorney nor the second firm could find an expert who would testify. On more than one occasion, the case was dismissed for lack of prosecution. The matter was dismissed in 1994 and 1995 and re-filed by the attorney in 1995. The attorney did not inform the client and his family that the matter had been dismissed without prejudice. In 1995, the client attempted on numerous occasions to contact the attorney, but the attorney would not call him. In early 1996, the attorney met with the client and his family; the client and his family decided that they wanted to try to find an expert on their own. In January 1996, the attorney wrote the client a letter stating that the statute of limitations would run on March 30, 1996. In early 1996, the client and his family attempted to find an expert to testify, and located a consulting expert on the east coast who was of the opinion that the malpractice case had merit. On March 29, 1996, the client faxed a letter to the attorney reporting the family's progress in finding an expert. In July 1996 the client sent a letter to the attorney stating that while researching at the court, he had discovered that the matter had been dismissed. The letter demanded a written response within the month of July 1996.

The client consulted another attorney to explain to him the status of the case. The client's new attorney spoke with the original attorney but the original attorney did not withdraw in the matter. In August 1996, an Order To Show Cause why the matter should not be dismissed for failure to prosecute was issued by the Third District Court. A hearing was set for September 18, 1996 and notice was served by mail on the original attorney as attorney for the client and his family. The matter has now been dismissed.

ADMONITION

On December 4, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.3 (Diligence) and 8.1 (Bar Admissions and Disciplinary Matters) of the Rules of Professional Conduct.

On November 26, 1996, the attorney was retained to represent a client in a

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divorce action filed earlier in 1996 in the State of Georgia. The attorney was not licensed to practice law in Georgia. The attorney prepared an answer for the client to file pro se in Georgia. The court papers, served on the client on November 12, 1996, gave notice that there were hearing dates of November 27, 1996, and January 2, 1997, in Georgia. The attorney informed the client that he did not think that the client needed to attend those hearings because he did not think that the notice was appropriate. The attorney told the client that he would try to get the dates continued. Thereafter, the attorney left messages with the client's wife's attorney in Georgia regarding a continuance of the January 2, 1997 hearing, but never actually discussed the matter with that attorney. The attorney did not try to contact the court in Georgia to obtain a continuance. The client was not aware that the January 2, 1997, hearing date had not been continued. Owing to health reasons and because the attorney told the client that the client need not attend the January 2, 1997, hearing, the client did not attend that hearing. As a result of his not attending the hearing, the client was not present to contest his former wife's claims and a default judgment was entered which disadvantaged and damaged the client.

The default action has not been set aside primarily because the client has been unable to afford another lawyer to set aside the default or to represent him in a foreclosure action caused by his former wife's failure to make payments on the marital residence. When asked by the client after the default to forward his file to him in Georgia, the attorney failed to do so. Additionally, the attorney failed to respond to the Office of Attorney Discipline's investigation until August 7, 1997, after the OAD made requests for information and cooperation.

ADMONITION

On December 4, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.3 (Diligence) and 1.4 (Communication) of the Rules of Professional Conduct.

In September 1995, an attorney was retained by clients to represent them in an action against a car dealership and a credit corporation following the purchase of an automobile from the dealership. The automobile had significant repair problems and was repossessed by the credit corporation after the clients refused to make further payments. On October 24, 1995, the attorney sent a letter to the car dealership and asked for a response within ten days, stating that if the attorney did not hear from the car dealership, the attorney would "be forced to file a formal complaint in a court of law seeking all available remedies, including punitive damages and attorneys fees." On November 8, 1995, the attorney had her associate prepare a complaint, but the complaint was neither filed nor forwarded to the clients. The clients relocated from Utah to Idaho, but informed the attorney of their new address. They attempted to call the attorney, but the attorney did not return their calls. The only communications from the attorney to the clients were monthly billing statements. The last date of actual contact between the clients and the attorney was on November 2, 1995, during a conference for which the clients were billed $75. Because the attorney did not respond to their calls, in April 1996 the clients retained an Idaho attorney to contact the attorney on their behalf to find out the status of their case. The Idaho attorney sent several letters to the attorney asking for a response. Finally, the Idaho attorney sent the attorney a letter on June 18, 1996, confirming a telephone conversation approximately six weeks prior. In that letter, the Idaho attorney confirmed that the attorney would send a status report to the clients. The attorney did not send that status report.

PROBATION

On November 19, 1997, the Third District Court entered an Order of Discipline (Probation) and Limited Disability Status, filed under seal, placing an attorney on a limited disability status pursuant to Rule 25 of the Rules of Lawyer Discipline and Disability. The attorney was placed on probation for a minimum period of twenty-four months for violation of Rule 1.1 (Competence) of the Rules of Professional Conduct.

The attorney admits that she suffers from a mental disability known as bipolar personality disorder. Notwithstanding the attorney's bipolar personality disorder, she has functioned as an attorney and counselor at law without supervision or serious incident since she was initially issued a law license in 1989. In February 1996, the attorney undertook the representation of a client in a domestic relations action which was tried. Prior to, during and immediately following the trial of this matter, the attorney's ability to practice law was adversely affected by her bipolar personality disorder in that she was undergoing a change in medication and during this time the medication was not effective in alleviating the symptoms of the disorder. Since that time, the attorney has made substantial efforts on behalf of the client to request that the court set aside the Findings of Fact and Conclusions of Law and Order. She has admitted to the Bar that her mental condition may have been a significant factor in the client receiving an adverse result at trial. The Bar has received information and records from the attorney's treating psychiatrist, who confirms that the attorney was suffering a psychotic break as a result of her preexisting bipolar personality disorder at the time of the client's trial. The Bar is further informed by her doctor that the attorney's mental condition has been stabilized and she has returned to a functional state by reason of the administration of a medication new to her treatment. The attorney has stipulated to probation, during which time she will report to two supervising attorneys.

Food and Clothing Drive Participants and Volunteers

We would like to thank all participants, volunteers and the executives of the Utah and Salt Lake County Bar Associations for their assistance and kind support in this year's Food and Clothing Drive. Through these persons' efforts, this was the most successful Drive we have had during the eight years we have been in existence. Over four truck loads of food and clothing and several thousand dollars were contributed and distributed to the participating shelters. The bulk of the clothing was delivered to the Rescue Mission, which has a policy of promptly distributing donated items to homeless families and individuals. The generosity of all in contributions in kind and effort reflected the spirit of Christmas.

Leonard W. Burningham
Toby Brown
Sheryl Ross

1998 MID-YEAR MEETING PROGRAM

( ) Indicates Number of CLE Hours Available

THURSDAY, MARCH 5, 1998

6:00 - 8:00 p.m. **Registration and Opening Reception**
Holiday Inn Lobby

Sponsored By: JONES, WALDO, HOLBROOK & MCDONOUGH

FRIDAY, MARCH 6, 1998

7:30 a.m. **Registration & Continental Breakfast**
Holiday Inn Lobby

Sponsored By: FARR, KAUFMAN, SULLIVAN, GORMAN, JENSEN, MEDSKER, NICHOLS & PERKINS
OLSON & HOGGAN
SCALLEY & READING
SNOW & JENSEN

8:00 a.m. **Opening General Session**
Welcome and Opening Remarks
Featured Address by Hon. David Sam, U.S. District Court, District of Utah

8:15 a.m. **Keynote Address:** (1)
ETHICS: How to Deal with Disagreement, Conflicts, & Hot People Without Using A Blowtorch
Michael Brandwein, National Educator & Consultant
Ironically, many important things that lawyers learn about argument and persuasion are ineffectively applied to interpersonal communication with clients, colleagues and others. This skill-packed session demonstrates specific and practical techniques you will use immediately to increase constructive, cooperative problem-solving communication.

Sponsored by: DURHAM, EVANS, JONES & PINEGAR
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VANCOTT, BAGLEY, CORNWALL & MCCARTHY
THE LITIGATION SECTION
IVIE & YOUNG

9:05 - 9:30 a.m. **Refreshment Break**

Sponsored By: KRUSE, LANDA & MAYCOCK
COHNE, RAPPAPORT & SEGAL

9:15 a.m. - 12:30 p.m. **Kids' Fiesta Fun Activity** -
Meet at Fiesta Fun - Family Fun Center, 171 E. 1160 S.

9:30 a.m. **Breakout Sessions:** (1 each)

1 **Settling Cases on Appeal: An Introduction to the Appellate Mediation Office at the Utah Court of Appeals**
Karin S. Hobbs, Chief Appellate Mediator, Utah Court of Appeals
Hon. Michael J. Wilkins, Utah Court of Appeals
Participants will learn the difference between mediation and arbitration, the purpose of mediation, selection of cases for mediation, notice of mediation conference to attorneys, confidentiality, extensions on briefing and transcripts, ethical issues in mediation, and the benefits of appellate mediation.

2 **Justice and Sensitivity: Direct and Cross Examination Techniques for Questioning Victims of Child Abuse and Child Sexual Abuse**
Barbara Bearnson, U.S. Attorneys Office
Hon. Kimberly K. Hornak, 3rd District Juvenile Court
Stephen R. McCaughey, McCaughey & Metos
Hon. A. Lynn Payne, 8th District Court
The nuts and bolts of interviewing child witnesses.

3 **Eminent Domain: Some Principles in Trial Strategy**
Perrin R. Love, Campbell, Maack & Sessions
Clark W. Sessions, Campbell, Maack & Sessions
Basic condemnation law and more specific training on trial strategies.

4 **Courtroom Etiquette - A Dixie Perspective**
Terry L. Hutchinson, Slemboski & Hutchinson
Winning and losing in the courtroom and dealing with fellow counsel and clients.

10:20 - 10:30 a.m. **Refreshment Break**

Sponsored By: BLACKBURN & STOLL
CHRISTENSEN & JENSEN
MCKAY, BURTON & THURMAN
ROBERT J. DEBRY & ASSOCIATES

10:30 a.m. **Breakout Sessions:** (1 each)

5 **Pitfalls to Avoid On Your Way to Presenting**

Claims on Direct Appeal and on Certiorari Review
David L. Arrington, VanCott, Bagley, Cornwall & McCarthy
Hon. Pamela T. Greenwood, Utah Court of Appeals
Hon. Richard C. Howe, Utah Supreme Court
Hon. Leonard H. Russon, Utah Supreme Court
Hon. I. Daniel Stewart, Utah Supreme Court
Todd Utzinger, Utah Attorney General's Office
Joan C. Watt, Salt Lake Legal Defenders Association
Panelists will discuss hidden jurisdictional pitfalls that, if not avoided, will result in the dismissal of an appeal for lack of jurisdiction as well as possible strategies to save an appeal despite the failure to file a timely notice of appeal.

6 **Counseling Businesses on Trademarks and Domain Names**
Randall B. Bateman, Thorpe, North & Western
Julie K. Morriss, Trask, Britt & Rossa
A how-to discussion regarding the impact of trademarks and domain names on various types of businesses.

7 **A Shift in the Traditional "Direct Supervision" of Legal Assistants to Licensed "General Supervision"**
Toby Brown, Utah State Bar
Peggi Lowden, President, Legal Assistants Division, Utah State Bar
Suzanne Verhaal, Legal Assistants Association of Utah
Chief Justice Michael D. Zimmerman, Utah Supreme Court
Participants will discuss the need for expanding legal services in Utah, suggesting that licensed legal assistants may be a source to help meet this need.

8a **The Art and Law of Jury Selection - Part II**
Francis J. Carney, Suitter Axland
Ralph L. Dewsnup, Wilcox, Dewsnup & King
Lyle W. Hillyard, Hillyard, Anderson & Olsen
James C. Jenkins, Olson & Hoggan
Hon. Gordon J. Low, 1st District Court
Demonstration and panel instruction focusing on attorney conducted voir dire and the use of pre-trial questionnaires.

11:20 - 11:35 a.m. **Refreshment Break**

Sponsored By: Gridley Ward Havas & Shaw
Morgan & Hansen
Winder & Haslam

11:35 a.m. **Breakout Sessions:** **(1 each)**

8b **The Art and Law of Jury Selection, cont.**

9 **Piercing the Corporate Veil**
Jay D. Gurmankin, Berman, Gaufin, Tomsic & Savage
Peggy A. Tomsic, Berman, Gaufin, Tomsic & Savage
Strategies for piercing the corporate (limited company) veil and company strategies to prevent it.

10 **Remedies for Work Related Injuries in Utah**
K. Dawn Atkin, Atkin & Associates
Mark D. Dean, Workers Compensation Fund of Utah
A discussion of basic workers compensation practice.

11 **Important Issues - Keeping Current!!!**
Presented by Members of the Solo, Small Firm & Rural Practitioners Section
Issues such as the Fair Debt Collection Practices Act, Wrongful Lien Statute, judgments, and the new tax law will be covered in this session geared toward general practitioners.

12:00 noon **Golf Clinic** - *Sunbrook Golf Course*

12:25 p.m. Solo, Small Firm & Rural Practitioners Section Meeting

12:25 p.m. **Meetings Adjourn for the Day**

1:30 p.m. **Golf Tournament** - *Sunbrook Golf Course*

2:00 p.m. **Tennis Tournament** - *Green Valley Tennis Courts*

7:00 p.m. **Reception** - *Holiday Inn Lobby*

Sponsored By: Lexis-Nexis

7:30 p.m. **Dinner:** ***A Comparative Examination of the American Legal System***
Featured Speaker - Prof. Jing Huang, Ph.D.

Sponsored by: Williams & Hunt

PROGRAM CONT.

( ) Indicates Number of CLE Hours Available

SATURDAY, MARCH 7, 1998

8:30 a.m. **Registration & Continental Breakfast**
Holiday Inn Lobby

Sponsored By: NIELSEN & SENIOR
RAY, QUINNEY & NEBEKER
RICHARDS, BRANDT, MILLER & NELSON
STRONG & HANNI

9:00 a.m. **General Session:** (1)
Will Computers Compute in the Year 2000?
Senator Robert F. Bennett, United States Senate
A discussion of the issues surrounding the anticipated technology disaster.

Sponsored By: PARR WADDOUPS BROWN GEE & LOVELESS

9:50 - 10:15 a.m. **Refreshment Break**

Sponsored By: JARDINE, LINEBAUGH & DUNN
STANDARD INSURANCE

10:00 - 11:30 a.m. **"Historic St. George LIVE Tour"**
Art Museum, 200 N. Main Street

10:15 a.m. **Breakout Sessions:** (1 each)

12 **On-Line Bar Licensing: The Future**
Toby Brown, Utah State Bar Technology Administrator
Get a preview of the Bar's on-line licensing system. Beginning with the 1998-99 licensing cycle, Utah Bar members will be able to handle their licensing on-line through the Bar's web page. Learn about this new system and related technologies.

13 **The New Court Calendaring System**
Panel of Judges
Moderator - Hon. Lee Dever, 3rd District Court
Changes to the court calendaring system and other issues that will result from the building of the new courthouse in Salt Lake City.

14 **Tax Code Changes and Their Effects on Individual Taxpayers**
Aric M. Cramer, Halliday & Watkins
General practitioners need to know the tax changes from the most recent revisions to the tax code.

11:05 - 11:20 a.m. **Refreshment Break**

Sponsored By: WEBER COUNTY BAR ASSOCIATION
DAVIS COUNTY BAR ASSOCIATION
SIEGFRIED & JENSEN

11:20 a.m. **Breakout Sessions:** (1 each)

15 **Equitable Defenses in Child Support Cases in Light of the Child Support Guidelines**
Renee M. Jimenez, Utah Attorney General's Office
Stephanie M. Saperstein, Utah Attorney General's Office
A general review of recent cases and an analysis of equitable defenses as applied to child support cases.

16 **ETHICS: Revised Rule 6.1**
Presented by the Access to Justice Implementation Committee
Hear about the proposed Rule 6.1 of the Utah Rules of Professional Conduct. This new rule adopts reporting of pro bono and a revised definition of pro bono. Learn about the Rule and how it might be implemented.

17 **Liability for Defective Design or Construction - No End in Sight?**
Craig C. Coburn, Richards, Brandt, Miller & Nelson
A history of the troubled "builder's statute of repose", how it will be affected by the 1998 Legislature, and a prognosis for the statute's future.

12:10 - 12:20 p.m. **Break**

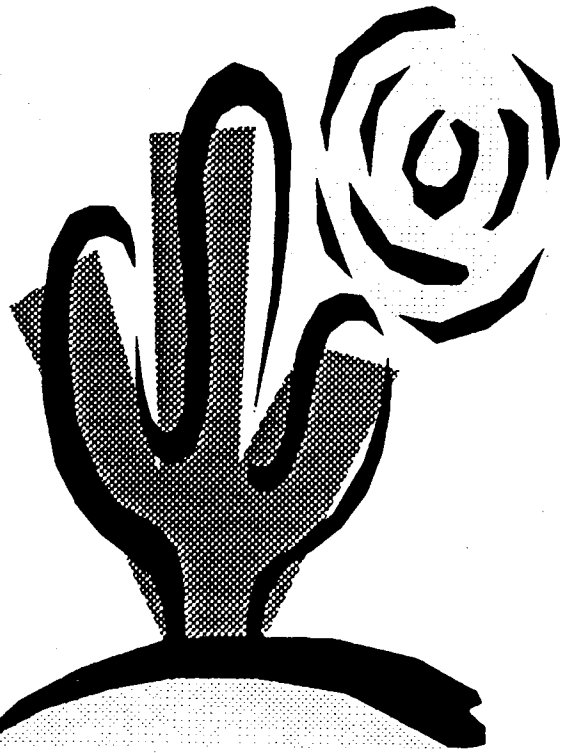
Sponsored By: SALT LAKE COUNTY BAR ASSOCIATION

12:20 - 3:00 p.m. **Salt Lake County Bar Film** (2)
Presentation and Discussion: *To Kill a Mockingbird*
Hon. Leslie A. Lewis, 3rd District Court
Hon. Ronald E. Nehring, 3rd District Court
Ronald J. Yengich, Yengich, Rich & Xaiz
This film will be followed by an intriguing panel discussion.

3:00 p.m. **Meetings Adjourn**

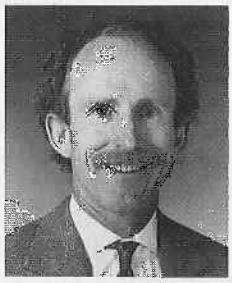
Get out of the snow and into the sun at the 1998 Mid-Year Meeting in St. George, Utah!

Mark your calendars now for March 5-7, 1998. We hope to see you there!



Candidates for Utah State Bar President-Elect 1999-2000

The following Bar Commissioners have announced their intention to run as President-Elect of the Utah State Bar for the 1999-2000 year. At its May 30, 1998 meeting, the Board of Bar Commissioners will be voting to select the President-Elect candidate who will stand for retention election by the entire Bar membership. Please forward any comments you may have to your Bar Commissioner. A list of all Bar Commissioners is found at the back of this *Bar Journal*.



Dear Colleagues,

It is an honor to be a candidate for President-elect of the Utah State Bar. I welcome the opportunity to be of further service to the Bar and to give back something to the profession that has given so much to me.

The purpose of these articles is to acquaint the members of the Bar with the candidates for President-elect prior to the election by the Bar Commission. The person selected by the Bar Commissioners must then be ratified in a retention election by the Bar as a whole.

If elected, I would work hard to accomplish the priority goals in the Long-Range Plan adopted by the Commission. I believe that each President should work within the framework of the Long-Range Plan to insure continuity from one year to the next.

In particular, I am committed to fostering the ideals of professionalism and civility within the Bar and educating the public about our system of justice and the critical role that lawyers play within it. The public needs to be frequently reminded that our system cannot function if lawyers do not zealously represent their clients' interests within the bounds of the rules and professional ethics.

We are one of the few professions that have been granted not only a monopoly on the right to serve the public, but also the privilege to govern and discipline ourselves. With those precious rights comes the responsibility to make sure that all people in this country have access to justice. The Bar does not bear the entire responsibility to provide access to justice, but we need to be leaders in that effort.

I have been practicing law for more than 23 years. My legal career began in Utah when I "hung out my shingle" in Ogden. I know first hand the challenge and difficulty of starting a solo practice from scratch. Next I practiced for several years in a two-person firm.

In 1979, I had the opportunity to become a federal prosecutor in the United States Attorney's Office, and, in 1981, I served as the court-appointed U.S. Attorney. Since 1982, I have been with Parsons Behle & Latimer where I have done a broad mix of litigation. These varied experiences have given me an appreciation of the wide range of needs and interests of lawyers in Utah.

I am very proud to be a member of this profession and will devote the time and energy necessary to lead the Bar into the next century. The Utah State Bar has grown tremendously in recent years and the demographics have changed dramatically. The Bar is now much younger and far more diverse. This presents opportunities for us to include all members in Bar activities and the challenge of preserving the sense of closeness and civility that have always been the hallmark of this Bar. I do not have all the answers to the challenges we face, but I will work hard to seek creative and responsible solutions.

Throughout the years I have been very active in Bar and professional organizations. These include:

Utah State Bar Commissioner (1994-present)

President, Salt Lake County Bar Association (1993-94)

Executive Committee, Salt Lake County Bar (1985-95)

Supreme Court Advisory Committee on Rules of Civil Procedure

Tenth Circuit Advisory Committee

Fellow - American College of Trial Lawyers

Utah Judicial Conduct Commission, Commissioner and Vice Chair

Master of the Bench, American Inns of Court

Office of Attorney Discipline Task Force

Appellate Courts Judicial Nominating Commission

Appellate Operations Task Force

Bar Exam Review Committee

Alternative Dispute Resolution Committee

Courts and Judges Committee

Bar Examiner

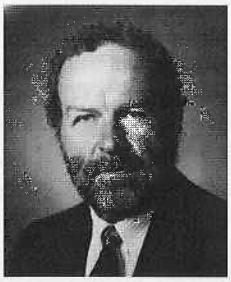
Special Counsel for the Utah State Bar

Trustee, Utah Legal Services

Trustee, Weber County Bar Association

I am presently Chair of the Litigation Department at Parsons Behle & Latimer. I am pleased to have the support of my partners in this endeavor. I would welcome your support as well.

Fran Wikstrom



Fellow Members of the Bar:

I have decided to declare my candidacy for President-Elect of the Bar. I was appointed to the Bar Commission originally, and have continued as an elected Commissioner, to serve as an advocate for our members. If I am fortunate enough to be elected President, it would be my goal to continue that process. As many of you know, during my tenure on the Commission I have been active in attempting to make the Bar a more member friendly organization and to communicate what I believe are the views of a large segment of our members regarding some of the more controversial issues considered by the Commission. I have received comment from many of you (and not just small firm practitioners) regarding your perception that the decision on those issues appear to have been made by the "Establishment" and that the process and the decisions were not inclusive of, nor responsive to, the concerns of the rank of and file members.

I believe that there are sincere, well-meaning people on both sides of those issues, as well as other issues which will face the organized bar. Reasonable differences of opinion are, in my view, one of the most important aspects of diversity.

Thus, it is not my intention to necessarily challenge or oppose the "Establishment" which has traditionally governed this organization. However, if I am elected, my primary goal will be to expand that "Establishment" by causing it to become more inclusive and diverse and, accordingly, more responsive.

I would appreciate your support in accomplishing that goal and would welcome any thoughts, concerns or suggestions you may have.

Very truly yours,
Charles R. Brown

Licensing Paralegals in Utah

By Shelly Sisam

You may have read the Point Counter Point articles in the January issue of *Voir Dire* addressing the issue of licensing paralegals. This may have lead you to ask yourself, "What is happening on this issue in Utah?" As both articles pointed out, there are many different issues to be addressed when considering licensing of paralegals.

In September, the Access to Justice Committee submitted its proposal to the Bar Commissioners. As part of the proposal, it was recommended that the licensing of paralegals move forward. The Legal Assistant Division ("LAD") of the Utah State Bar has appointed a committee that is in the process of reviewing the issue. The co-chairs are Peggi Lowden, President LAD, and Shelly Sisam, Ethics Chair LAD. The committee will be preparing a proposal to submit to the Bar Commissioners some time near the end of March.

If you would like to hear more about the issues, a breakout session will be held at the mid-year meeting in March in St. George. The session is entitled "'Direct Supervision' of Legal Assistants to Licensed 'General Supervision'?" and will consist of a panel to include Chief Justice Michael D. Zimmerman, Toby Brown, Peggi Lowden and Suzanne Verhaal.

Enhancements to the Utah State Bar Endorsed Lawyers Professional Liability Program

This Article is intended to highlight several recent enhancements to the Utah State Bar endorsed Lawyers Professional Liability Program Underwritten by COREGIS/WESTPORT and administered by Continental Insurance Agency.

Creation of Malpractice Prevention Hotline for policyholders. This legal malpractice risk management tool provides policyholders a toll-free confidential resource from local defense law firms to mitigate and proactively take preventive steps regarding potential malpractice claim situations.

A malpractice prevention newsletter, *An Ounce of Prevention*, which is sent quarterly to policyholders. The newsletter contains practical preventive checklists to assist practitioners with their current practices. It also describes emerging legal malpractice trends.

Introduction of *Customized Practice Coverage*, a new policy product that provides coverage units in addition to the Lawyers professional liability coverage. These coverage units are specifically created for law firms, such as employment practices liability coverage, title insurance agent liability, public official's liability coverage, nonprofit director and officer liability coverage and employee dishonesty coverage. These additional coverage units provide an insurance policy for exposures that law firms have from a single blended insurance policy.

Introduction of two new Extended Reporting Period Options, which are automatically included with all lawyer professional liability policies. In addition to the existing one-year, two-year, three-year or unlimited extended reporting periods, the program now offers two additional tail options: FREE extended reporting period endorsements in the event of death or permanent disability.

The purchase on May 31, 1997, of COREGIS by Employers Reinsurance/Westport Insurance Corporation, a wholly owned subsidiary of General Electric Capital. COREGIS/WESTPORT is ranked among the top forty leading property/casualty insurance groups in the United States and is rated A++ by A.M. Best (its highest rating). This ownership structure provides tremendous financial stability along with a corporate parent company that has many resources to invest in the Utah State Bar's Lawyers Professional Liability Program with COREGIS.

The table below details the emerging legal malpractice claim trends in Utah. The table denotes claims activity from the Lawyer Professional Liability Program as of September 18, 1997. The information is offered to help Utah State Bar members be informed of the trends and take proactive preventative measures.

Thank you for your support and interest in the Lawyers Professional Liability Program. With this article, we hope to convey the spirit, intelligence and commitment that both Continental Insurance Agency and COREGIS/WESTPORT provide to the Utah State Bar and its members.

For additional information please call:
Continental Insurance Agency
466-0805
Outside Salt Lake • 1 (888) 466-0805

CLAIMS ACTIVITY BY AREA OF PRACTICE

Area of Practice	*Percentage of Claims*
Personal Injury - Plaintiff	24.0%
Collection/Repossession	13.3%
Domestic Relations	10.7%
Real Estate - Commercial	9.3%
Real Estate - Residential	8.0%
Civil Rights	2.7%
Banking	2.7%
Corporate - General	2.7%
Insurance Co. - Defense	2.7%
Estate/Probate/Trust	2.7%
All Other Categories	21.3%

1998 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1998 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Wednesday, April 1, 1998.** The award categories include:

1. Judge of the Year. This award is presented to the judge whose career exemplifies the highest standards of judicial conduct for integrity and independence; who is knowledgeable of the law and faithful to it; who is unswayed by partisan interests, public clamor or fear of criticism; who is patient, dignified and courteous to all who appear before the court; and who endeavors to improve the administration of justice and public understanding of, and respect for, the role of law in our society.

2. Distinguished Lawyer of the Year. This award is presented to a Utah Bar member who, over a long and distinguished legal career, has by his or her ethical and personal conduct, commitment and activities, exemplified for their fellow attorneys the epitome of professionalism and/or who has also rendered extraordinary contributions to the programs and activities of the Utah State Bar in the prior year.

3. Distinguished Young Lawyer of the Year. Determined by the Young Lawyer's Division (they will be submitting their criteria within the next month).

4. Distinguished Section/Committee. This award is presented to a section and/or committee of the Utah State Bar that has made outstanding contributions of time and talents to Bar activities as well as provided outstanding services, programs and/or activities for Bar members and the public at large during the past year.

5. Distinguished Non-Lawyer for Service to the Profession. This award is presented to a non-lawyer who, over a period of time, has served or assisted the legal profession or the Utah State Bar in a significant way.

6. Distinguished Pro Bono Lawyer. This award is presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney. This award is intended to reflect such contribution of an attorney during the past year as well as contributions over an attorney's career.

Notice of Proposed Amendments to Local Rules of Tenth Circuit Bankruptcy Appellate Panel

The U.S. Bankruptcy Appellate Panel of the Tenth Circuit has proposed amendments to its local rules. The proposed amendments are scheduled to become effective on March 16, 1998. The proposed amendments include:

- Elimination of the appeal docketing statement;
- Extension of the deadlines to file the entry of appearance/certificate of interested parties form and transcript order form;
- Addition of a requirement that all motions include a statement regarding whether the motion is opposed; and
- Clarification of when the Court will issue the mandate.

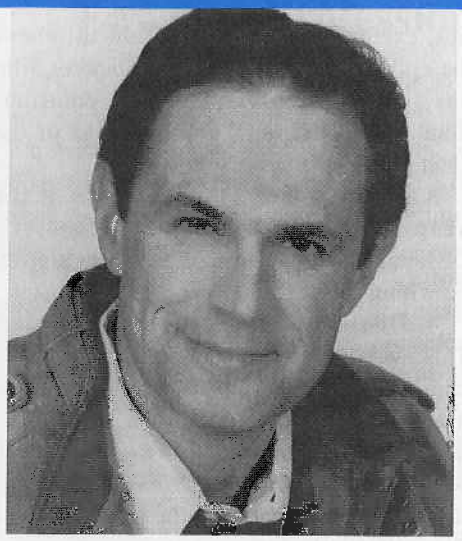
Copies of the proposed amendments are available from the U.S. Bankruptcy Appellate Panel Clerk's Office, Byron White U.S. Courthouse, 1823 Stout St., Denver, CO 80257, or by calling (303) 844-0544. Copies may also be obtained from your local U.S. Bankruptcy Court Clerk's Office, from the U.S. Court of Appeals for the Tenth Circuit **ABBS** (call 1-800-676-6856 to register), or from the following web pages on the Internet:

- U.S. Court of Appeals, Tenth Circuit: http://www.ck10.uscourts.gov/circuit/rules.html
- U.S. Bankruptcy Court, District of New Mexico: http://www.nmcourt.fed.us/bkdocs/
- U.S. Bankruptcy Court, District of Kansas: http://www.solgate.com/~usbcsys
- U.S.Bankruptcy Court, District of Utah: http://home.utah-inter.net/pcadmin/

Assistant Juvenile Court Administrator

(Child Protection)

The Administrative Office of the Courts is seeking an Assistant Juvenile Court Administrator to support the administration and management of the non-judicial activities of the juvenile court. **Primary emphasis of the position is child protection. Duties:** plans & oversees a variety of programs/projects such as substance abuse, state supervision, serious youth offenders, treatment and administration of child protection cases; works with judges, trial court executives, probation officers and clerks of court in identifying the needs of courts and related programs, soliciting input for program enhancement and evaluating program performance; assists the juvenile court administrator in the preparation, organization and follow-up activities attendant to the work of the Board of Juvenile Judges and the Judicial Council; researches, analyzes data and prepares reports in areas such as judicial and staff workloads, program/project management, and resource and budget requirements. **Education & Experience:** Bachelor's degree in judicial/public administration or the behavioral/social sciences plus 6 years of juvenile justice or directly related experience **OR** Master's degree or Juris Doctorate plus 4 years of experience or an equivalent combination of education and experience. Advanced computer skills, statistical analyses, needs assessment methodologies, and report/grant writing skills also required. Experience in child protection law and/or juvenile justice is desirable. Applications may be obtained from and returned to: Human Resources, Administrative Office of the Courts, 230 S. 500 E., #300, SLC, 84102. **Closing date:** February 27, 1998, at 5:00 p.m. Equal Opportunity Employer.



Easy Steps To Avoid Bar Complaints and Malpractice

By Charles A. Gruber, Utah State Bar Office of Professional Conduct

Five Rules of Professional Conduct are the basis of most complaints to the Bar. They are: 1.1 "Competence"; 1.2 "Scope of Representation"; 1.3 "Diligence"; 1.4 "Communication"; and 1.5 "Fees". If you take the following steps, you should be able to avoid complaints based on these Rules or at least be able to defend against them.

When we begin our careers as practicing attorneys, we are faced with what seems like the impossible job of learning the substantive law. The more senior attorneys around us may be willing to offer guidance on legal questions, but unfortunately all too often younger attorneys are not taught survival skills in how to avoid malpractice lawsuits or Bar complaints.

Understanding and carefully nurturing the relationship with the client is one very good way to avoid a malpractice claim or a Bar complaint.

The Beginning of The Client Relationship: The first interview with the client is crucial. In that interview, *listen* to the client. Understand what the client wants, not what *you think* the client wants. Often much of what the client wants is not possible to achieve. It is important to make sure at the end of that first meeting that the client be informed as to what are realistic goals and what are the chances they will be obtained. Tell the client when, why, how and what steps will be taken. Then do it!

Most clients do not really have an understanding of what lawyers do. If they do have some inclination, it may be based on watching T.V. dramas where everything is tied up neatly in one hour. If you give your client a reasonable explanation of how the case will progress and how long it will probably take, the client may be less impatient. Remember, do not promise the moon because you cannot deliver the moon.

Keep asking the client if he or she understands what you are saying. Do not just assume a nod of the head means the client understands. More often than not it can mean just the opposite. At the end of the initial interview, ask the client to tell you what he thinks is going to happen. You will be shocked what the difference is in what the client thinks you said and what you think you said.

If you decide to represent the client, have the client sign a written fee agreement in the first interview. It is required by the Rules, but more importantly it is a document, that in a later dispute, can be reviewed to see just what were the terms of the representation. Be specific in what are the limits of the representation. Often this is difficult, but a statement of the scope of the representation informs the client and protects the lawyer.

Make sure the agreement is clear on how fees and costs are to be figured. This is especially important in contingency fee arrangements. Is the contingency fee computed on the gross or net settlement (after costs are recouped by the attorney)?

Make sure the client reads the agreement in your office. Go over the agreement paragraph by paragraph. Some attorneys even have the client initial each paragraph. Give the client an original and keep an

CHARLES A. GRUBER is an Asistant Counsel for the Office of Professional Conduct, Utah State Bar. He received his B.A. degree from Stephen F. Austin State University in 1973, and his J.D. degree from the University of Texas Law School in 1976. Gruber is admitted to practice in Texas, California, Utah, and the United States Supreme Court.

Gruber and his wife Debra are the parents of two daughters and one son.

original–signed by both parties. Keep that retainer agreement in your file and do not lose it.

Get a retainer in hourly cases. Remember that if a client cannot pay at the beginning of the representation, he will not be able to pay later on. Decide at the first meeting with the client if the case is going to be a paying client or a pro bono client. Do not take a paying client hoping for the best, and then let it evolve into a "de facto pro bono" case! You will be angry with the client, and yourself, and likely not do your best.

Finally, know when to say no. If the client does not feel right; if the client cannot pay (unless you take the case pro bono); if the client has unrealistic goals; if the client will not listen–*just say no.* The fee you lose will be small in comparison to the money and time you will spend dealing with this person. If you chose not to represent the client, tell the client *in writing immediately* that you will be unable to represent the person. Save a copy of that letter!

The middle part of the relationship: Calendar, calendar, calendar. Keep a calendar and have at least one backup. The minute you know a hearing date, calendar it. Tickle a date that gives you time to prepare and stick by your tickler system. Show up *on time* to hearings and meetings and *be prepared.*

Keep *detailed* time sheets daily and bill monthly. The most effective way to defend yourself and keep your clients happy, is to keep timely, detailed, and realistic time sheets that are transferred to timely, detailed, and realistic monthly bills. The client knows every month what you have done and when you did it. Even if you are on a contingency fee agreement, keep the same kind of time sheet and billing summary–it will show the client exactly what you have done.

Communication is a key to avoiding Bar complaints. Return your clients' phone calls within 24 hours. Either you or your secretary can and should return every call. The most common complaint of clients is that phone calls are not returned promptly, or not at all. Just have the calls returned by someone. This will do more to prevent Bar complaints, and get you more referrals for new business, than anything you can do.

Keep a phone log of all incoming and outgoing phone calls. Keep phone message slips. Keep dated and detailed notes of telephone conversation with anyone on a case. These logs and notes are valuable in protecting your client's interest during the representation, but they are invaluable in defending a Bar complaint or malpractice action.

Send a short form letter to the client periodically. Insurance defense counsels do this all the time when they write status letters to the carrier. Why not adopt the same system, on a smaller scale, for a simple plaintiff's auto collision case or a workers' compensation claim?

Send copies of pleadings and correspondence to your clients. This is an easy way to keep a client informed of what is happening in the case. Better yet, write a short cover letter to the client explaining what the pleading means and when a hearing is going to be held. The time and postage that you spend on these communications to your client will dramatically lower the chance that the client will file a Bar complaint or sue you.

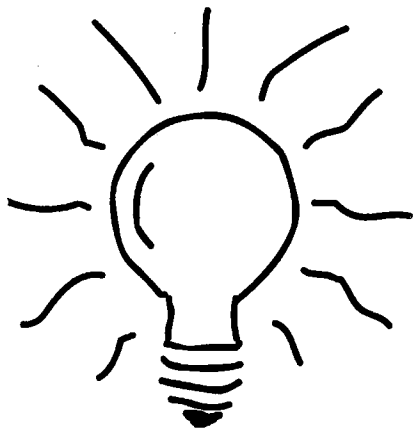
The End of The Relationship: When the case is over, politely tell the client, *in writing*, that your representation for that matter is finished. It is an opportunity to describe how well the representation went, how much you appreciate the client's business and state that you are available to provide future legal services for the client. It also draws a line in time after which you should not be liable if the client sues you.

These are simple steps that every lawyer should take. If you follow these steps, your malpractice carrier will be thrilled, and your clients will be well served and less likely to sue you or file a complaint with the Bar.

(For a better and more complete analysis, read anything and everything that Jay G. Foonberg has written about the practice of law.)

Notice of Court-Annexed ADR Program Expansion

The Judicial Council recently approved expansion of the Court-Annexed ADR Program into the 2nd and 4th Judicial Districts. The program will be implemented in the new districts on April 1, 1998. The program requires parties in all contested matters over $20,000 to view a short videotape regarding the use of alternative dispute resolution. Some cases are exempted from the requirements. (See Code of Judicial Administration, Rule 4-510). Parties may choose to use mediation or non-binding arbitration anytime during litigation. For questions, please call Diane Hamilton at the Administrative Office of the Courts, (801) 578-3984.



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Shelley Hutchinsen
(801) 486-9095

The Child Witness: An Ever-Increasing Fact of Life in Utah Courts

By Judge Donald J. Eyre
Research and Editing Assistance by:
Mary Kathleen-Wolsey and Jennifer Hernandez

With ever-increasing frequency, children are becoming involved in our judicial system. One need only review the Utah Criminal Code to observe that many different crimes have been created which provide special protection to children, and which mandate an increased penalty when the crime victim is a child. Our Legislature's emphasis on child-related crimes, as well as the increased attention given by law enforcement and prosecution to these crimes, has resulted in the appearance of greater numbers of child witnesses in Utah's criminal courts.

Utah's civil courts are also not immune from the increasing involvement of children in the judicial process. Domestic cases, which typically include custody and visitation disputes involving the parties' children, often include allegations of abuse and neglect, which necessarily involve the children, either directly or indirectly, as witnesses in those cases.

Furthermore, the explosion of cases filed under Utah's Cohabitant Abuse Act,[1] wherein a person seeks a protective order against a cohabitant, or seeks a protective order on behalf of children, has proportionally increased the occasions on which children serve in the witness capacity. In 1997, the Legislature went so far as to deem the commission of an act of domestic violence in the presence of a child a crime, thereby potentially enlarging the circumstances under which a child will testify as a witness.[2]

Whenever a child is required to testify, judges, prosecutors, and attorneys face the arduous task of weighing the interests of justice, including the rights of the criminal defendant, against the best interests of the child. The multitude of statutes pertaining to children as witnesses, victims, or perpetrators may compound the difficulty of this task.

The challenge of weighing these competing interests is illustrated by two experiences in my legal career. The first experience occurred several years ago while prosecuting a child sexual abuse crime involving a five-year-old female victim and her foster father. At the preliminary hearing, to establish the elements of the crime, I performed the difficult task of eliciting the necessary testimony from the child concerning the defendant's actions. In addition, some corroborating evidence was introduced. At the conclusion of the hearing, the judge refused to bind the case over for trial and made the following statement: "I'm not going to ruin the life of this fifty-year-old man on the testimony of a five-year old."

The other experience involved enforcing a non-custodial father's right to visitation with his four-year-old daughter. After numerous hearings, and a finding of con-

JUDGE DONALD J. EYRE, JR. was appointed to the Fourth District Court in November, 1994 by Governor Michael O. Leavitt. He graduated from the University of Utah College of Law in 1976. He undertook private practice in Nephi in 1976, was appointed as Nephi City Attorney in 1978, and was elected as Juab County Attorney in 1978 continuing to serve in all three capacities until his appointment to the bench. Since his appointment, he has served on the Jury Education Committee. Judge Eyre and his wife Marcia, a preschool teacher, are the proud parents of four, two sons and two daughters.

tempt with a threatened jail term against the client's former wife, my client finally obtained an extended visit with his child. In the middle of this visitation, he was arrested based upon a complaint of child sexual abuse brought by his former wife. I did not represent him in the criminal trial. On the morning of his criminal trial, I received a telephone call from my client's mother informing me that he committed suicide the night before. He left a note saying he loved his child, and had not improperly touched her, but the pressures of the criminal process were too great for him to endure.

As these examples demonstrate, many competing interests must be considered when dealing with a child witness. It is hoped that, as a judiciary, we have become more sensitive to the need for child witnesses in certain cases. In some cases, the only witness to a very serious crime may be a five-year-old girl, and her testimony should be given the full weight it deserves. On the other hand, as practitioners, we should never forget the great impact a criminal accusation has on a criminal defendant's life, and the safeguards of our criminal justice system should never be unnecessarily compromised.

The Utah Judiciary has recognized the unique problems associated with child witnesses. In fact, the last two judicial conferences included sessions addressing the evolution of laws pertaining to child witnesses. These sessions also discussed the ways in which these competing interests may be better handled. The presenters at those sessions, Professor Karen Saywitz, Ph.D. and Professor John E. B. Myers, are also in the process of preparing a Utah Benchbook on Child Witnesses, which should be available to the judiciary in the near future.

However, it is essential for all individuals involved in such litigation to be aware of the concerns which unavoidably arise when using child witnesses. The purpose of this article is to provide a brief overview of the status of the law with respect to child witnesses in Utah, and to provide some practical suggestions that members of the bar may implement when dealing with a child witness.

A. COMPETENCY OF A CHILD WITNESS

As a preliminary matter, a judge must first determine the competency of the potential child witness before permitting that child to testify. Generally, all individuals are deemed competent to testify if they are capable of perceiving through their senses, and can relate that perception to others.[3]

Typically, a court does not view the age of the child witness as a determining factor in whether the child should be permitted to testify. In fact, in terms of child witnesses who intend to testify as the victims of sexual abuse, there is a presumption that children under the age of ten are competent to testify. However, the trier of fact is obligated to determine the weight and credibility that testimony should be given.[4]

"[A]ll individuals are deemed competent to testify if they are capable of perceiving through their senses, and can relate that perception to others."

Ultimately, it is within the trial court's discretion to decide whether a child satisfies the competency requirements to serve as a witness. In the case of *State v. Smith*, the Utah Supreme Court established standards for determining a child witness' competency. These standards require the child to have a level of intelligence and maturity which enable her to understand the questions posed to her. Furthermore, the child witness must have some knowledge of the facts presented by the case, and be able to remember what occurred. Finally, the child must have a sense of moral duty to speak the truth.[5]

Arguably, a basis exists for the position that the Utah Rules of Evidence (which presume all individuals competent to testify) and the criminal code (which deems alleged victims of child sexual abuse under the age of ten presumptively competent to testify) eliminate the trial court's discretion by requiring any child to testify, regardless of the standards set forth in *Smith*. However, it is my belief the judge maintains the role of gatekeeper in determining the minimum standards of competency with respect to any witness, including child witnesses. The judge is still required to exclude a witness' testimony if the probative value of that testimony is substantially outweighed by concerns of unfair prejudice, confusion of the issues, misleading the jury, or by the court's interest in avoiding undue delay, waste of time, or the unnecessary presentation of cumulative evidence.[6] In addition, judges retain some discretion to make determinations on the admissibility of evidence.[7] Clearly, however, in light of the statutes and rules pertaining to child witnesses, the Legislature intended the testimony of these witnesses to be admitted into evidence in most cases.

B. SPECIAL ACCOMMODATIONS MADE FOR THE CHILD WITNESS VICTIM IN CHILD SEX CRIME CASES AND CHILD ABUSE CASES

In the 1980s, the United States witnessed the emergence of cases involving child sexual abuse in alarming proportions.[8] In an effort to address these disturbing increases, many state legislatures, including the Utah Legislature, adopted or amended evidentiary rules to accommodate the special needs of this emerging group of child witnesses.

The accommodations made in Utah include, but are not limited to, the following: permitting any child to be a witness without the need for a competency hearing,[9] permitting the introduction of out-of-court statements made by an alleged victim of child abuse,[10] permitting videotaped interviews with the alleged child victim into evidence, allowing a child's testimony to be taken through closed-circuit television outside the presence of the defendant, and allowing into evidence the recorded testimony of any child witness or alleged child victim taken outside the courtroom. If the testimony of a child is taken via videotaped interview or closed-circuit television, the child will not be required to testify at any proceeding where that recorded testimony is used.[11]

Another recent statutory addition requires the language used during the examination of a child to be age-appropriate for children thirteen years old or younger. Furthermore, child victims thirteen years old or younger may be accompanied by an advisor whose purpose is to assist the child in understanding the questions posed by counsel.[12]

By the late 1980s, Utah had experienced a dramatic increase in litigation relating to the use of child witnesses in sexual abuse

cases. The amendments to statutes and rules adopted to accommodate child witnesses have been upheld by Utah's appellate courts. However, in upholding these accommodations, the appellate courts have also held that Utah's trial courts are required to strictly comply with the provisions set forth in the applicable rules and statutes. What follows is a review of Utah case law:

1. Admissibility of Hearsay Pursuant to Section 76-5-411 and *State v. Nelson*

Section 76-5-411 of the Utah Code permits the introduction of out-of-court statements made by an alleged child victim of abuse. Specifically, this section permits the out-of-court statements if the child is to testify at trial, or other corroborative evidence of the abuse is present.[13] As such, this section serves as an exception to the hearsay rule. This exception is grounded on the principle that, by requiring the child to testify, or requiring that corroborating evidence be presented, there is some guarantee that the hearsay statements are trustworthy. In addition, it permits the admission of those statements made near the time the incident occurred, without the pressure created by the courtroom setting, because those statements are apt to be the most reliable reports of the incident.[14]

This section also establishes specific requirements to be fulfilled prior to admitting the child's hearsay statements. Many cases have dealt specifically with confrontation clause challenges to the admission of hearsay statements permitted by 76-5-411.

State v. Nelson, the leading Utah Supreme Court case dealing with this issue, required strict adherence with the requirements of 76-5-411.[15] Of primary concern in *Nelson* was the fact that strict compliance with 76-5-411's requirement that the trial court consider all the factors set forth in that section was the only method a trial court could use to assess the reliability of hearsay statements.

The defendant challenged 76-5-411 on grounds it permitted the admission of out-of-court statements in violation of his right of confrontation. The defendant claimed that, though the child testified at trial, her failure to testify about the alleged incident of sexual abuse violated 76-5-411. The Court rejected this argument, stating that 76-5-411 did not require the witness to testify about any specific subject, but rather that the victim take the stand and be subject to cross-examination.[16]

The *Nelson* court found this interpretation of 76-5-411 to be in harmony with the United States Supreme Court case of *California v. Green*,[17] which held that, because the declarant was available to testify and for cross-examination, admission of the hearsay statement did not constitute a violation of the confrontation clause.[18] Given that on direct examination the witness in Nelson testified to having made the out-of-court statements to a police officer, the door was opened for full cross-examination on the substance of these conversations; therefore, the confrontation clause was not violated. In *Nelson*, the defendant also claimed that he was prevented from conducting effective cross-examination because the child was emotionally distressed.[19] The court stated that, absent a showing in the trial transcript that the child's emotional state precluded effective cross-examination, that issue could not be considered on appeal.

"[T]he Court held that the trial judge is required to state which facts are relevant to reliability, and then to explain how those facts justify finding the hearsay statement admissible."

Although it required trial courts to make specific findings and conclusions regarding each factor prior to admitting the child's hearsay statements, the *Nelson* court also held that, if defendant failed to object to the admission of this type of hearsay statement, such failure constituted a waiver of the court's findings of reliability.[20] The Utah Supreme Court also held that failure to object results in a waiver which will not be reviewed if due to counsel's trial strategy, even if the hearsay testimony constituted most of the evidence at trial.[21] Moreover, if the trial court did not make the necessary findings because defendant failed to alert the court to that requirement, the court's actions would not be considered under the plain error rule, despite the existence of evidence rebutting the admissibility of the hearsay statement.[22]

As briefly discussed above, Utah case law clarifies or explains the requirements of 76-5-411. The preceding paragraphs established the requirement that judges make reliability findings pursuant to the factors outlined in 76-5-411. However, these findings may not be so general as to render that section useless. Utah's appellate courts have overturned convictions where objections were made and the reliability of the statements may have been questionable.[23] For example, the mere recitation of statutory language has been held to not comply with the requirements described in § 76-5-411. This issue was specifically addressed in *State v. Matsamas*.[24] In *Matsamas*, the Utah Supreme Court reaffirmed its holding in *Nelson*, and held that trial courts are required not only to enter findings and conclusions regarding each of the factors listed in 76-5-411, but must make these findings specific. In particular, the Court held that the trial judge is required to state which facts are relevant to reliability, and then to explain how those facts justify finding the hearsay statement admissible.[25] The facts relied upon in determining reliability must be those specifically addressing the time the statement was made, as well as the substance of the statements, as opposed to the judge's impression of the child and his or her testimony at the time of trial.[26]

Another consideration regarding the admission of hearsay statements deals with the availability or unavailability of the declarant. It is well-established that, where the child is available to testify and subject to cross-examination, and where the appropriate findings were made as to the reliability of the hearsay, there is no confrontation clause problem. However, problems arise when hearsay statements are offered into evidence, but the child does not testify, and is therefore not subject to cross-examination. Before hearsay testimony may be admitted into evidence, in addition to making reliability findings, the court must find: (1) the child witness to be unavailable, and (2) an "'adequate indicia of reliability.'"[27]

These requirements are best illustrated in the Utah Supreme Court case, *State v. Webb*, in which the Court held that the hearsay statements of an eighteen-month old infant were inadmissible at trial because the prosecution failed to establish the child was unavailable to testify. In

addition, the Court held that the trial judge neither interviewed the child, nor, received expert testimony on the child's ability to testify in court, and failed to specifically find that the child was physically or psychologically unavailable to testify. Consequently, the Court held that, because of her age, the child lacked the ability to perceive, recall, and communicate the information necessary to support the accusation of child sexual abuse against the defendant.[28]

Therefore, in a case such as *Webb*, findings of reliability are of utmost importance in order to safeguard a defendant's constitutional guarantees. However, the downside to *Webb* is that abuse will certainly go undetected, unresolved, and unpunished in cases where clear physical indications are lacking, or where, as in *Webb*, physicians disagree as to the cause of the physical symptoms of the child, simply because the infant does not yet have the capacity to perceive, recall and communicate with sufficient clarity to establish reliability.

2. Videotaped Testimony or Statement when Witness is Either Unavailable or Available to Testify Pursuant to Rule 15.5 U.R.Cr. P.

A defendant's right to confrontation is not absolute under the Federal Constitution.[29] Clearly, under certain circumstances the admission of hearsay statements does not violate the Federal Confrontation Clause.[30] In addition, measures which preserve the essence of the confrontation clause and ensure the reliability of the evidence by "subjecting it to rigorous testing in the context of an adversary proceeding" do not run afoul of the confrontation clause.[31]

Admitting the videotaped statements of an alleged child victim, when those statements have been made outside of court and/or outside the defendant's presence, raise three primary concerns: First, whether an appropriate finding of unavailability was made.[32] Second, whether the contents and making of the statements are reliable.[33] Third, whether the defendant was given a fair opportunity to prepare to meet and defend against the statements prior to trial.[34]

Rule 15.5 of the Utah Rules of Criminal Procedure provides for the admission of videotaped statements and testimony at trial. This rule also prescribes the manner in which those statements must be taken in order to render them admissible. Introduction of the videotape must be made pursuant to the requirements specified in that rule. One such requirement is that the child must be "available to testify and to be cross-examined at trial," or a finding by the judge that the child witness is unavailable, before permitting a videotaped statement to be entered into evidence.[35] Adhering to the requirements of Rule 15.5 is of crucial importance, since failure to determine a witness' availability may be held prejudicial error if the videotaped statement constitutes the most damaging evidence presented at trial.[36]

"[T]he responsibility for getting at what children know rests squarely on the adult, and in particular, on the language of the question, and not on the language of the answer."

Finally, the Utah Supreme Court held that the admission of videotaped interviews of a child was prejudicial error where those interviews were "the most compelling items of evidence" and defendant was not given an opportunity to prepare to meet the statements contained in the videotape in advance of trial.[37] The fact that the child testified and was cross-examined at trial was irrelevant in light of 76-5-411, which specifically provides that notice be given of the intent to use the videotape as evidence "sufficiently in advance of the trial or proceeding, to provide [the defendant] with an opportunity to prepare to meet it."[38] The court stated the importance of strict compliance with that section given that it allows introduction of hearsay statements that would otherwise be excluded.[39]

3. Use of Age-appropriate Language with Children Under 14 Years.

Section 77-38-8 of the Utah Code requires the use of age-appropriate language when conducting examination or cross-examination of a child witness thirteen years of age or younger. This important aspect of our laws is aimed at facilitating child testimony and the truth-seeking process.[40] The traditional methods used to interview children have come under attack, and are viewed as rendering the statements made by a child victim unreliable.[41] Thus, whether the interrogation occurs during the investigatory phase or during in-court testimony, individuals conducting the interrogation must be aware of the difference in language between adults and children, and the limitations of the latter.[42]

One study revealed that "for some children, testifying in the traditional manner interferes with the child's ability to answer questions, thus undermining the very purpose of the trial-discovery of the truth."[43] In *Maryland v. Craig*, the United States Supreme Court agreed with the proposition that, in some cases, the severe emotional distress caused by testifying in the presence of the defendant may render the child victim of sexual abuse incapable of communicating.[44] Given the importance of reliable testimony, it is imperative that counsel and the court be prepared to question a child in terms that are familiar to the child and at that child's level of understanding.[45]

The *Handbook on Questioning Children* is a great resource in understanding the peculiarities of children's language and how to approach the task of questioning them. The author of the handbook points out that children are capable of testifying accurately in court when questioned in an age-appropriate manner.[46] Thus, "[t]he responsibility for getting at what children know rests *squarely on the adult*, and in particular, on the language of the question, and not on the language of the answer."[47]

The judge's responsibility to manage the trial includes a duty to control the manner in which counsel questions a child witness. The judge must ensure that the child understands the question. In doing so, the court increases the likelihood that the child's answer will accurately reflect the child's knowledge, and will represent those things which the child wished to convey. This is particularly important given reports to the effect that children, though capable of giving accurate information, may be misguided or confused by counsel's questioning.[48] For example, counsel's repetition of a question after a child has given his or her answer may leave the child with the impression that the answer given was not what was expected, causing the child to change the response to something he or she senses pleases the examiner.[49] These and other concerns regarding the interrogation of children are more fully addressed in the *Handbook on Questioning Children*.

It is the responsibility of judges, lawyers,

and investigators to become more aware of the language limitation of child witnesses, and use or require questioning techniques that will maximize the truth-seeking purposes of investigations and trials.

4. Use of Advisor to Aid Child Witness Under 13 Years.

It is well-established in Utah that child witnesses may be accompanied by an adult to ease the child's fears of testifying in court, particularly when the child is testifying against an individual in whom the child placed trust at one time. In *State v. Hoyt*, the Utah Court of Appeals held that permitting "a representative from the Victim Assistance Program of the Utah County Attorney's Office to sit near the child as she testified" was within the trial court's "broad discretion for trial management."[50] In so holding, the court apparently relied on the fact that the representative did not consult with or coach the child "but remained silently at her side as a referent of familiarity and unbetrayed trust."[51]

This principle was later codified in section 77-38-8(2) of the Utah Code. However, the statutory provision goes beyond simply permitting the presence of an individual to ease the inherent uneasiness a child witness experiences in testifying at court. According to the statute, a child witness who is thirteen years of age or younger may have an "advisor" appointed by the court to assist "in understanding questions asked by counsel."[52] Apparently, therefore, not only may an advisor sit passively next to the child witness at the stand, but, with the court's permission, may also provide aid to the child by explaining the questions asked during examination.

In addition, under certain circumstances a judge may make clarifications in order to secure accurate testimony from the child. This need may arise given the fact that in subsection (2)(b) the statute states that the child's advisor need not be an attorney.

When selecting an advisor, trial judges need to be highly selective, and should not authorize individuals who may influence the child witness, but instead only permit advisors who will assist the child in giving his or her testimony.

5. It is Within a Judge's Discretion to Allow Use of Leading Questions when Examining a Child Witness.

Permitting or excluding leading questions is within the trial court's discretion, and it is not unusual for a trial court to permit leading questions when attempting to elicit testimony from children. In *State v. Ireland*, the Utah Supreme Court acknowledged that, when interrogating children, leading questions may produce the answer suggested by the question. However, it was the Court's opinion that leading questions are more often necessary "'to develop [the child's] testimony" than with adult witnesses, particularly when the child is testifying about sensitive topics.[53]

"When selecting an advisor, trial judges need to be highly selective, and should not authorize individuals who may influence the child witness, but instead only permit advisors who will assist the child in giving his or her testimony."

With respect to the court's concern relating to the suggestibility of children, it is claimed that such concerns arise "especially when nonsalient, ambiguous, and peripheral information is" sought.[54]

> In empirical studies, young children are found to be more influenced by leading questions when (1) asked for descriptions of unfamiliar people rather than events, (2) pressed for additional details, (3) asked about an event for which they have uncertain and incomplete memory, such as may occur after a long delay, (4) questioned under intimidating conditions, (5) questioned by someone of authority, and (6) when instilled with a negative stereotype about someone and then questioned with misleading suggestions over many weeks.[55]

Many of these concerns may be minimized if the court exercises its discretionary power to manage the trial. In an effort to avoid the suggestibility problem, the court may require that counsel avoid the aforementioned conditions or situations to the extent possible.

It should be kept in mind that "adults are at times also likely to change their reports as a result of misleading questioning."[56] It is also important to note that "studies of children's responses to misleading questions have mainly concerned suggestibility for details and actions that are not directly related to abuse allegations."[57] In studies directly addressing allegations of abuse, "children evidence substantial resistance to [misleading] questions,"[58] and "are unlikely to commit commission errors to abuse-related questions, although the error rate increases when preschoolers are tested and when age inappropriate language is employed."[59]

The *Ireland* court held that the judge did not err in permitting leading questions "[i]n light of the victim's use of dolls to demonstrate that defendant had sodomized him, the prosecutor's careful use of leading questions, and the trial court's considered opinion that leading questions were necessary to develop the victim's testimony."[60] Thus, there are many unspecified factors that will dictate whether the use of leading questions is appropriate when questioning children.

6. The Use of Other Measures that Protect a Child Witness from Direct Confrontation with the Defendant.

In *Coy v. Iowa*,[61] the U.S. Supreme Court held that the defendant's right of confrontation was violated when a screen was placed between himself and the two thirteen-year-old alleged victims. The Court stated that the literal words of the confrontation clause required face-to-face confrontation, and where the defendant could only hear and dimly see the witnesses, that right was denied. At that time, the Court declined to consider whether any exceptions exist, but stated that, as there had been "no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception."[62]

In *Maryland v. Craig*, the Court was later faced with the question it reserved in *Coy*. The Court held that, while the right of confrontation is not absolute, it is also not easily dispensed with.[63] However, the Court modified its decision in *Coy* somewhat, finding that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[64] The Court held that the state's interest in protecting the welfare of "child

abuse victims from the emotional trauma of testifying . . . is sufficiently important to justify" dispensing with the right of face-to-face confrontation.[65] Therefore, the Court stated that, under such circumstances, it would be permissible to use one-way closed-circuit television. However, before dispensing with face-to-face confrontation, a court must make an "adequate showing of necessity" to indicate that the child would suffer serious emotional trauma if required to testify in the presence of the defendant.[66]

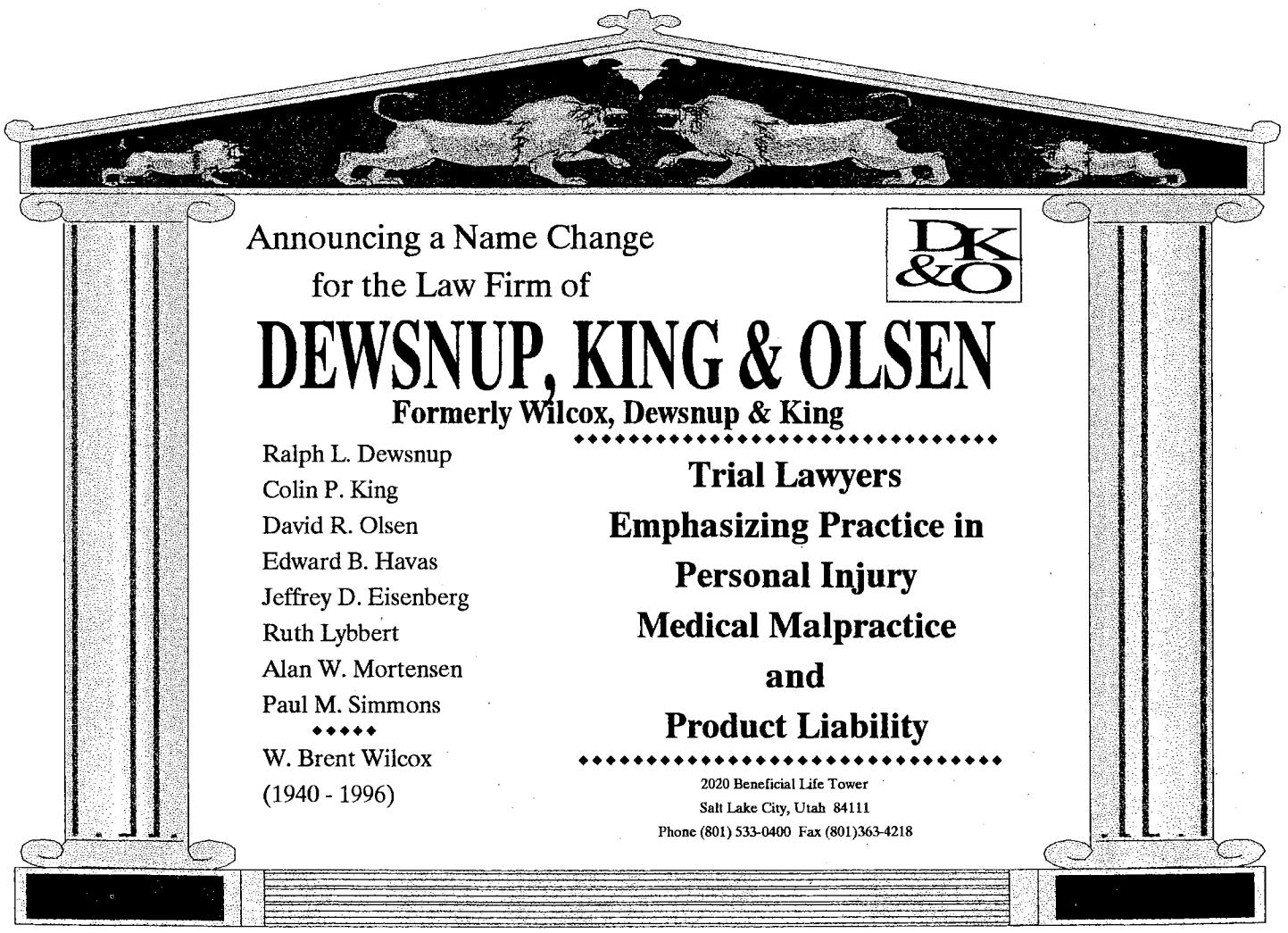
Utah law allows the use of procedures that enable a child witness under the age of fourteen to testify outside the courtroom, either in or outside the defendant's presence.[67] In light of the *Craig* decision, the use of closed-circuit television does not violate a defendant's right to confrontation if the court makes the required findings of necessity. However, Utah's appellate courts have addressed challenges to methods other than the closed-circuit television based on a defendant's right of confrontation.

For example, in *State v. Lenaburg*, the defendant objected to the introduction of a videotaped interview with the child which resulted in "contradictory or confusing portions of her testimony."[68] The court held that "[t]he ability to probe the veracity of the testimony through cross-examination lies at the core of the right of confrontation."[69] In this case, the child did not testify at trial; therefore, the court held that admission of the videotape was prejudicial error because the defendant did not have the opportunity to explore and expose the child's inconsistencies through cross-examination. The chief problem in *Lenaburg* was the lack of adequate findings regarding the child's unavailability and the reliability of the hearsay.

In *State v. Hoyt*, the Utah Court of Appeals held that a child witness need not be seated in the "direct line of sight" of the defendant to comport with the constitutional requirement of the confrontation clause. Counsel tables were reversed, and the defendant was required to sit at the "prosecution table." The prosecutor requested the unusual seating arrangement because the defendant allegedly had "scowled and made faces at the child witness at his preliminary hearing."[70]

The *Hoyt* court noted that nothing in the record showed that a "barrier was erected, or that the table did not provide full view of court proceedings, including an open view of the witness stand."[71] The confrontation clause was not violated because the witness was present in the courtroom, testified at trial, and the defendant was able to view the child. The court, quoting *Coy*, stated: "'The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.'"[72] Therefore, the right of confrontation does not include a right to eye-to-eye contact, but rather a right to "face" the defendant in court, unless an exception to that requirement exists.

Other suggestions and recommenda-



tions contained within *Child Victims, Child Witnesses: Understanding and Improving Testimony* to accommodate child witnesses and reduce the trauma to the child from the experience include the following:

1. Reduce the number of pretrial interviews.
2. Educate child witnesses about standard court personnel and procedures by prior visits to the courtroom.
3. Allow leading questions, and allow special exceptions to laws restricting hearsay testimony.
4. Create child-friendly courtroom environments.

These suggestions and recommendations might reduce the need for more drastic modifications, such as closed-circuit television and videotaped statements, in lieu of testimony with their associated constitutional challenges.

With respect to child witnesses in civil cases, where the constitutional concerns are not nearly as high, video technology is becoming increasingly available in Utah courts. Many of the judges' chambers in Utah have video recording capability, which should increase the requests for private interviews between the judges and the children in contested custody and visitation cases where the child's input is desired or requested. This would eliminate the need for children to testify in open court with its associated trauma and potential damage. Also, when appropriate, the trial judge's power to appoint an attorney guardian ad litem, pursuant to section 78-3a-912 of the Utah Code, to represent the best interest of the minor children in certain cases has greatly increased the ability of the courts to protect the interests of children, and to see that fair and equitable justice is given to all parties involved.

It is hoped that this discussion will assist members of the bar in better handling the ever-difficult task of weighing the interests of justice against the best interests of those children who become involved in our judicial system.

[1]U.C.A. § 30-6-1 et seq.

[2]U.C.A. § 76-5-109.1.

[3]U.C.A. § 78-24-1. *See also* U.C.A. § 78-24-2 ("Every person is competent to be a witness except as otherwise provided in the Utah Rules of Evidence); U.R.E. 601(a) ("Every person is competent to be a witness except as otherwise provided in these rules.")

[4]U.C.A. § 76-5-410.

[5]401 P.2d 445, 447 (Utah 1965).

[6]U.R.E. 403.

[7]U.R.E. 104.

[8]*See Note*, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations", 98 *Harv. L. Rev.* 806, 807 n. 7 (1985) ("Reports of child sex abuse have increased 650% since 1976, exceeding 56,000 cases . . . in 1982.").

[9]U.C.A. § 76-5-410.

[10]U.C.A. § 76-5-411.

[11]U.R.Cr.P. 15.5(1)-(4).

[12]U.C.A. § 77-38-8(1),(2).

[13]*State v. Loughton*, 747 P.2d 426, 431 (Utah 1987).

[14]*Id.* at 429, 431.

[15]725 P.2d 1353 (Utah 1986). *See also State v. Reiners*, 803 P.2d 1300 (Utah Ct. App. 1990) (requiring strict adherence and compliance with reliability findings required by § 76-5-411).

[16]*Nelson*, 725 P.2d at 1355; *see also State v. Van Matre*, 777 P.2d 459, 463 (Utah 1989) (requirement of § 76-5-411 met where child testified but "did not repeat her accusations of defendant in her testimony").

[17]399 U.S. 149, 162 (1970).

[18]*Nelson*, 725 P.2d at 1355 (citing *Green* at 162): *See also State v. Fulton*, 742 P.2d 1208 (Utah 1987) (where victim testified at trial and was available for cross-examination, requirements of § 76-5-411 were met); *Loughton*, 747 P.2d at 429-30 (no denial of right of confrontation where child testified in court and defendant had full opportunity to effectively cross-examine the child as well as the witnesses offering hearsay testimony).

[19]725 P.2d at 1357.

[20]*Id.* at 1355 n.3.

[21]*See State v. Bullock*, 791 P.2d 155 (Utah 1989).

[22]*See State v. Eldredge*, 773 P.2d 29, 34, 36 (Utah 1989) (the defendant "neither requested that [the] findings be made nor objected to the admission of hearsay in their absence."). *See also State v. Hall*, 325 Utah Adv. Rep. 20 (Utah Ct. App. 1997) (trial court's failure to comply with § 76-5-411 will not be reviewed if due to "counsel's 'conscious decision to refrain from objecting,' or if defense counsel 'led the trial court into error'") (quoting *Bullock*, 791 P.2d at 158-59).

[23]*See State v. Reiners*, 803 P.2d 1300 (Utah Ct. App. 1990) (holding judge's error to failing to make specific findings prejudicial); *State v. Webb*, 779 P.2d 1108 (Utah 1989) (excluding hearsay evidence due to unreliability, and holding evidence insufficient to support conviction).

[24]808 P.2d 1048, 1052 (Utah 1991).

[25]*Id.*

[26]*See Reiners*, 803 P.2d at 1306.

[27]*Webb*, 779 P.2d at 1112 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

[28]*Id.* at 1112-13.

[29]*See Maryland v. Craig*, 497 U.S. 836, 844 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1980) (implicit rights of confrontation clause not absolute); *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980).

[30]*Maryland v. Craig*, 497 U.S. at 848-49.

[31]*Id.* at 845-46.

[32]*See State v. Lenaburg*, 781 P.2d 432 (Utah 1989).

[33]*Id.*; *see also State v. Lamper*, 779 P.2d 1125 (Utah 1989).

[34]*See Loughton*, 747 P.2d at 432.

[35]U.R.Cr.P. 15.5(1)(h).

[36]*See Lenaburg*, 781 P.2d at 437.

[37]*Loughton*, 747 P.2d at 432.

[38]U.C.A. § 76-5-411(3).

[39]*See Loughton*, 747 P.2d at 432.

[40]*See* Anne Graffam Walker, Ph.D., *Handbook on Questioning Children: A Linguistic Perspective*, 1 (ABA Center on Children and the Law 1994) [hereinafter *Handbook on Questioning Children*] ("Among the problems characterized as 'lawyerese' . . . [are] the use of 'difficult vocabulary' and complex questions.").

[41]*See* Goodman, G.S., et al., Testifying in Criminal Court, Monographs of the Society for Research in Child Development at 151 [hereinafter Testifying in Criminal Court]; *State v. Bullock*, 791 P.2d 155, 163 (Utah 1985) (dissenting opinion) ("One reason for inaccurate reporting has been attributed by scientific investigators to the use of improper methods of interrogating children.") (citing Raskin & Yule, Problems in Evaluating Interviews of Children in Child Sexual Abuse Cases in Perspectives on Children's Testimony 184, 185 (S. Ceci, D. Ross, M. Toglia, eds. 1989)).

[42]*See Handbook on Questioning Children, supra* note 40, at 9 ("Children and adults do not speak the 'same' language.").

[43]*See Testifying in Criminal Court, supra* note 41, at 143.

[44]*See Maryland v. Craig*, 497 U.S. at 856-57.

[45]*See State v. McMillan*, 588 P.2d 162, 163-64 (Utah 1978) (noting that the child's testimony "was positive and clear, although [defense] counsel managed to cause some confusion in the testimony by asking questions with negatives and double negative clauses.").

[46]*See Handbook on Questioning Children, supra* note 40, at 19. *See also* Goodman & Bottoms, *Child Victims, Child Witnesses: Understanding and Improving Testimony* 306 (Guilford Press 1993) [hereinafter Child Victims].

[47]*Id.* at 20.

[48]*Id.; see also Child Victims, supra* note 46, at 301-09.

[49]*See Handbook on Questioning Children, supra* note 40, at 57.

[50]806 P.2d 204, 210 (Utah Ct. App. 1991).

[51]*Id.*

[52]U.C.A. § 77-38-8 (2) (a)

[53]773 P.2d 1375, 1377 (Utah 1989), (quoting U.R.E. 611(c)).

[54]*Child Victims, supra* note 46, at 306.

[55]*Id.* at 307 (citations omitted).

[56]*Id.* at 306 (citations omitted).

[57]*Id.* at 307.

[58]*Id.*

[59]*Id.* at 306.

[60]773 P.2d at 1377.

[61]487 U.S. 1012 (1988).

[62]*Id.* at 1020-21.

[63]497 U.S. at 845; *see also Coy*, 487 U.S. at 1020.

[64]*Maryland v. Craig*, 497 U.S. at 850.

[65]*Id.*

[66]*Id.* at 864 n.3, 855-56.

[67]U.R.Cr.P. 15.5.

[68]781 P.2d at 437.

[69]*Id.* at 434.

[70]*Hoyt*, 806 P.2d at 209.

[71]*Id.*

[72]*Id.* at 210, quoting *Coy*, 487 U.S. at 1019.

Summary of Recommended Legislation

Prepared by Office of Legislative Research and General Counsel
By Lisa Watts Baskin

BUSINESS, LABOR AND ECONOMIC DEVELOPMENT INTERIM COMMITTEE

H.B. 178, Task Force on Whistleblower Protections – Creates the Task Force on Whistleblower Protections to study statutory protections for whistleblowers in the public and private sectors and appropriates $20,000 from the General Fund to fund the task force.

H.C.R. 1, Resolution Supporting Resources for Affordable Housing – Encourages Congress to increase the amount of the private activity bond cap and low-income housing tax credits allocated to Utah.

S.B. 73, Beer Industry Distribution Act – Defines the relationship between wholesalers and brewers and addresses termination of wholesale agreements, appropriate conduct by brewers, and remedies for violations of a wholesale agreement.

S.B. 74, Demand Drafts – Uniform Commercial Code – Provides for the treatment of demand drafts as checks under Utah's Uniform Commercial Code which allows bank account holders to stop payment on certain charges to their accounts.

S.B. 76, Insurance Law Changes – Contains amendments to insurance laws proposed by the Department of Insurance.

S.B. 82, Master Deeds of Trust or Mortgages – Allows for the filing with county recorders of master deeds of trust and mortgages that would contain "boilerplate" language. The master forms would be referenced when mortgages or trust deeds applicable to specific property are filed.

S.J.R. 4, Resolution Supporting Affordable Housing from Olympic Housing – Urges the Salt Lake Organizing Committee for the Olympic Winter Games of 2002 to assure that media housing constructed in conjunction with the 2002 Olympic Winter Games can become permanent, affordable housing.

EDUCATION INTERIM COMMITTEE

H.B. 7, Computers For Public Schools Pilot Program – Establishes a pilot program for the acquisition and refurbishing of donated computers to be used by schools in the state system of public education. The bill provides an appropriation of $500,000 to the State Board of Education to acquire repaired, refurbished, or upgraded computers which have been recycled in a state correctional facility. Schools receiving the refurbished computers will pay Utah Correctional Industries $100 for each computer to cover costs.

H.B. 179, Transportation of Students By School Districts – Increases the tax rate ceiling on the optional school district transportation levy from 0.0002 to 0.0003, with a provision for a state guarantee up to 85 percent of the state's average cost per mile.

H.B. 182, Class Size Reduction In Grades 7-8 – Appropriates $13,600,000 to the State Board of Education for public school class size reduction programs in grades 7 and 8. The bill establishes requirements for allocating the appropriation to the state's 40 school districts and stipulates that each school receiving the appropriation will submit a plan of creative and innovative ways to reduce class size.

H.B. 184, Educational Technology Initiative Amendments – Identifies appropriation mechanisms used each year to fund the Education Technology Initiative. The bill states that public education funding for the ETI will be made through the Minimum School Program Act and the colleges of education will receive their ETI appropriation by line item appropriation in the general appropriation act.

H.C.R. 3, Professional Development Programs For Educators Resolution – Recognizes the importance of teacher preparation and professional development programs and encourages the Joint Liaison Committee and its advisory task force to continue to bring recommendations to the Legislature for policy support or implementation.

S.B. 77, Middle Schools Task Force – Creates a middle school task force to review and make recommendations on a variety of issues related to Utah middle schools, including teacher and administrator preparation, the need for additional counselors and other support personnel, the delivery of educational services, and discipline and safety. The bill establishes task force membership and appointment authority to the task force.

GOVERNMENT OPERATIONS INTERIM COMMITTEE

H.B. 8, State Treasurer Amendments – Clarifies the responsibilities of the State Treasurer by updating responsibilities and duties of the position and eliminating obsolete requirements.

H.B. 188, Salary Increases For Government Officials – Amends procedures for compensation of municipal officers, county officials, and the Legislature. With the exception of cost-of-living increases, these groups would not receive pay increases until after the next election.

H.B. 189, English As Official Language of State – Declares English to be the official language for the conduct of government business in Utah. The bill provides exceptions when languages other than English may be used and grants rulemaking authority to the State Board of Education and the State Board of Regents concerning the use of foreign languages in the public and higher education systems. It also requires that any funds appropriated or designated for providing services in another language be returned to the General Fund.

H.B. 190, Felon Voting Restrictions – Amends statute to implement the Constitutional amendment eliminating the voting rights of convicted felons. The bill also outlines procedures for eliminating rights upon conviction and restoring the right to vote after completion of probation and parole.

H.B. 193, Election Law – Substantive Revisions – Modifies requirements for canvassing voting returns of local elections

so the canvass may be done no sooner than three days after the election. The bill also requires write-in candidates in third-class cities to file declarations of candidacy.

H.B. 204, State Elections Commission – Creates a State Elections Commission to oversee elections in Utah. This bill transfers the current responsibilities of the Lieutenant Governor as the chief election officer of the state to the newly created commission. It provides for appointments, membership, staffing, transfer of current resources from the Lieutenant Governor's Office, and outlines the duties of the State Elections Commission and its executive director.

H.J.R. 4, Resolution Eliminating Voting Rights of Convicted Felons – Amends the Utah Constitution to eliminate the voting rights of convicted felons.

S.B. 72, Budget Review Task Force – Creates a task force to review selected state government entities' budgets and outlines membership and duties of the task force. The bill also repeals the Legislative Process Committee.

S.B. 79, Election Law – Technical Amendments – Allows persons 17 years old who will be 18 years old by the date of the next local election to serve as election judges. The bill clarifies that a person may not file a declaration of candidacy for, or be a candidate for, more than one office during any election year. The bill also eliminates obsolete reporting requirements for Political Action Committees, Corporations, and Political Issues Committees.

HEALTH AND HUMAN SERVICES INTERIM COMMITTEE

H.B. 4, Statewide Implementation of Foster Care Citizen Review Boards – Makes the foster care citizen review board process available to all children within the state.

H.B. 173, Counseling and Support of Adoptive Families and Children – Requires the Division of Child and Family Services to provide intensive training and support to potential adoptive parents, and ongoing support and individual or family counseling to adoptive parents and their children, as needed, until the adopted child reaches 21 years of age.

H.B. 175, Tax Incentives for Adoption and Guardianship – Provides a tax credit for individuals adopting children in the custody of the state. This legislation is similar to a bill debated during the 1997 General Session.

H.B. 176, Emergency Injection for Anaphylactic Shock – Provides immunity from liability to schools and teachers who administer epinephrine through an auto-injector to a person suffering a potentially life-threatening anaphylactic reaction.

H.B. 205, Insurance Coverage For Metabolic Disease – Expands the basic health insurance plan set forth in statute to include coverage for medically formulated foods and medical formula used to treat the conditions of PKU and other inborn errors of amino acid or urea cycle metabolism.

S.B. 4, Medical Examiner Authority – Authorizes the state medical examiner to perform autopsies in cases of highway fatalities under specified circumstances.

INFORMATION TECHNOLOGY COMMISSION

H.B. 181, Electronic Posting of Notices – Amends the existing open and public meetings law to allow public entities to provide electronic notices of meetings in addition to the existing requirement to publish in a paper of general circulation and post in a public place.

H.B. 183, Quick Court Amendments – Authorizes certain pro se court documents such as uncontested divorces and landlord-tenant actions to be filed electronically with the court.

H.B. 186, Privacy Task Force – Creates an interim legislative entity to study issues of data privacy related to the collection and use of personal information by private entities or individuals. The task force is required to report to the Information Technology Commission and the Public Utilities and Technology Interim Committee by November 30, 1998.

S.J.R. 5, Resolution Encouraging Development of Electronic Voting – Requests that the Lt. Governor's office and the county clerks study the possibility of implementing electronic voting and report back to the Legislature before the 1999 General Session.

JUDICIARY INTERIM COMMITTEE

H.B. 191, Correctional Officer Amendment – Removes the reference to youth corrections from the correctional officer statute.

H.B. 192, Division of Youth Corrections Special Function Officers – Provides for the utilization of special function officers to be employed through contract with the Department of Public Safety or other POST certified law enforcement agencies, or be directly employed by the Division of Youth Corrections.

S.B. 5, Judicial Custody of Youth to Human Services – Authorizes judges to vest legal custody of children and youth in need of intervention from multiple agencies with the Department of Human Services.

S.B. 75, Uniform Probate Code Amendments – Enacts the uniform statutory rule against perpetuities, repeals and reenacts chapter 2 provisions, and provides transitional language.

S.B. 81, Reauthorizing of Juvenile Justice Task Force – Reauthorizes the Juvenile Justice Task Force for one more year.

LAW ENFORCEMENT AND CRIMINAL JUSTICE INTERIM COMMITTEE

H.B. 10, Driving Under the Influence – Conditional Licensing – Establishes a "not a drop" conditional license for persons with prior DUI convictions.

H.B. 197, Traffic Offense Trial Process – Eliminates trial by jury in Class B or Class C Misdemeanor or Infraction offenses, including traffic offenses.

LEGISLATIVE PROCESS COMMITTEE

H.B. 211, Special Session Public Hearing Requirements – Requires that a legislative body hold a public hearing on any special session legislation before it is formally debated or passed.

H.J.R. 6, Resolution Amending Notice for Special Sessions – Proposes to amend the Utah Constitution to require the governor to issue a proclamation at least seven days before the date set for the Legislature to convene in a Special Session. If the governor has officially declared a state of emergency, a proclamation may be issued without the seven days notice.

S.B. 83, Division of Purchasing and General Services Amendments – Modifies the responsibility of the director of the Division of Purchasing and General Services from stocking and maintaining a central store to operating a stockless, vendor direct, electronic system for procuring goods and services. School districts and political subdivisions of the state are also authorized to subscribe to these services.

S.J.R. 6, Resolution Amending Special Sessions – Proposes to amend the Utah Constitution to allow the Legislature to add items to the Special Session Agenda by a two-thirds or greater vote of each chamber.

NATIVE AMERICAN LEGISLATIVE LIAISON COMMITTEE

H.B. 212, Navajo Revitalization Fund Board – Allows members of the Navajo Revitalization Fund Board to receive per diem and expenses.

H.B. 213, Native American Coordinating Board Membership – Amends the State Native American Coordinating Board, adding representatives from the Department of Environmental Quality, Department of Natural Resources, Department of Transportation, Department of Agriculture, and the State Tax Commission.

NATURAL RESOURCES, AGRICULTURE, AND ENVIRONMENTAL INTERIM COMMITTEE

H.B. 199, Allocation of Sales Tax to Species Protection Account – Transfers $1,500,000 of state sales and use tax receipts each year to the Species Protection Account.

H.B. 206, Eco-terrorism Prohibition and Penalties – Makes it a crime to obstruct or impede the lawful management of forest, mining, or agricultural activities or to solicit or conspire with anyone to do so.

H.B. 207, Environmental Crimes Amendments – Increases criminal penalties and fines in the Air Conservation Act, Radiation Control Act, Water Quality Act, and Used Oil Management Act.

S.B. 11, Transplants of Wildlife – Allows the Division of Wildlife Resources to transplant certain species only in accordance with plans or agreements designating transplant sites, and creates procedures for the preparation, review, and approval of plans for the transplant of certain species.

S.B. 12, Management Plans of Wildlife Resources Land – Provides for notice of proposed acquisitions of private property by the Division of Wildlife Resources, requires the division to prepare management plans for land it owns, and specifies procedures for the preparation, review, adoption, and revision of the plans.

POLITICAL SUBDIVISIONS INTERIM COMMITTEE

H.B. 194, Amendments to County Improvement Districts for Water Services – Establishes a procedure for withdrawing territory within a municipality from a county improvement district for water services.

H.B. 195, Special Districts Amendments – Repeals the community redevelopment agency provisions and restricts the creation of further regional service areas.

S.B. 80, Recodification of Special Districts – Establishes a uniform process for creating independent special districts. This bill is the first phase in recodifying the special district code.

PUBLIC UTILITIES AND TECHNOLOGY INTERIM COMMITTEE

H.B. 180, Extension Of Gas Service Territories – Requires the Public Service Commission to approve a gas corporation's application to extend its system to previously unserved territories if the provision of service could not be economically provided under existing tariffs and the provision does not result in incremental annual increases of more than 1/5 of one percent as measured in rates in effect on July 1, 1998.

H.B. 185, Telecommunications Legislative Committee – Creates a ten member legislative entity to study issues related to the deregulation of the telecommunications industry such as imputation and depreciation and report back by November 30, 1999 to the Public Utilities and Technology Interim Committee and the Information Technology Commission.

H.B. 187, Public Service Commission Reporting Amendments – Requires the Public Service Commission to report to the Public Utilities and Technology Interim Committee biannually beginning October 15, 1998 on the state of the telecommunications industry.

RETIREMENT INTERIM COMMITTEE

H.B. 196, Retirement Office Amendments – Authorizes the retirement office to comingle and pool the funds in investments of the defined benefit plans and the 401(k) and 457 plans. Assets of the retirement fund are evaluated on a fair market value basis rather than on the original book value. The beneficiary designation in a member's file, at the time of the member's death, is binding to the retirement office for the payment of any benefits due. The bill authorizes the board to create excess benefit plans to protect the tax qualified status of the plans, systems, and programs under its control. A surviving spouse, in applying for monthly benefit, is required to use the same application procedures required of a qualified member. The bill authorizes the board to select an independent medical examiner to review an application for disability retirement. The mandatory retirement age of 75 years for a justice or judge is made to apply to the newly created Judges Noncontributory Retirement System. Benefits are specified for disability based primarily on psychopathy.

H.B. 198, Public Safety – Noncontributory Retirement Option – Provides a window of conversion to the Public Safety Noncontributory Retirement System beginning July 1, 1998 and ending December 31, 1998.

REVENUE AND TAXATION INTERIM COMMITTEE

H.B. 200, Income Tax – Election Campaign Fund Designations – Increases from $1 to $2 the designation to be paid into the Election Campaign Fund.

H.B. 201, Property Tax-Circuit Breaker Amendments – Allows a person owing delinquent taxes to qualify for a homeowner's credit, clarifies that a credit may not exceed a homeowner's property tax liability, and provides for retrospective operation.

H.B. 203, Truth in Taxation Hearings – Requires tax entities to hold truth in taxation hearings at or after 6:00 p.m.

TRANSPORTATION INTERIM COMMITTEE

H.B. 174, Window Tinting Amendments – Allows a person to increase vehicle window tinting to the level of tinting that a manufacturer could provide under federal statutes and regulations.

H.B. 177, Collection of Uniform Motor Vehicle Fees Amendment – Requires a county to provide at least 18 months written notice before a change can be made as to whether the county or the state collects uniform fee and motor vehicle fees. The bill requires that the reimbursement fee recommended by the Tax Commission be paid to the entity that collects the fees, be based on a one dollar standard unit and be adjusted annually by the commission based on the Consumer

Price Index.

H.B. 202, Transportation Code Recodification – Updates and reorganizes Title 27, Highway Code; Title 2, Aeronautics; Title 63, Chapter 49, Department of Transportation Act; Title 54, Chapter 11, Ride-Sharing; and other sections related to the Department of Transportation and moves these sections into a new Title 72, Transportation.

S.B. 6, Enforcement and Penalties of Uninsured Motor Vehicle Violations – Allows the Motor Vehicle Division to revoke the registration of a motor vehicle upon receiving notification of a conviction for operating a vehicle without having insurance. The division must charge a registration reinstatement fee of $50. The purpose of the Uninsured Motorist Identification Database program is amended to include assisting in reducing the number of uninsured motorists and assisting in increasing compliance with motor vehicle registration and sales tax laws. The designated agent is required to indicate an owner's failure to provide proof of insurance when they are identified as being uninsured in the database, and provide the information to law enforcement agencies. Information in the database is permitted to be used for issuing citations related to insurance requirements. The bill imposes a fine of not less than $600 for operating a motor vehicle without insurance or without having evidence of having motor vehicle insurance.

S.B. 78, Master Road – State Highway List – Renumbers SR-300 through Snow Canyon and adds a 0.3 mile extension to form SR-8. The bills adds a 0.21 mile West extension on SR-131 (400 North in Bountiful) in order to include a highway structure. The net increase to the state highway system is 0.51 miles.

WORKFORCE SERVICES INTERIM COMMITTEE

H.B. 15, Workforce Services Amendments – Repeals Section 35A-1-209 to eliminate language exempting certain employees from the merit system as it duplicates provisions of Section 67-19-15. The bill moves Section 35A-4-504 from Division of Workforce Information and Payment Services to Division of Employment Development statutes and changes the make up of the Child Care Advisory Committee.

H.B. 208, Unemployment Insurance Amendments – Makes the chair of the Workforce Appeals Board a part-time employee and clarifies when a person has a right of appeal before the board. The bill requires unemployment compensation to be used to repay an overpayment of food stamps, changes the name of the Employment Security Advisory Council, and amends the council's duties.

NOTE: The Office of Legislative Research and General Counsel provided this list of numbered bills as approved by the legislative interim committees. Approval of a bill by a committee indicates the legislation has undergone study and scrutiny during the interim months. This list does not include legislation studied and recommended by the Constitutional Revision Commission, Information Technology Commission, and the Tax Review Commission. Thanks to Ms. Jane Peterson for her assistance.

The Legislature has a website for daily information regarding bills and their status. http://www.le.state.ut.us

VanCott

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We are pleased to announce that

ROBERT M. ANDERSON
has joined the firm as a shareholder

FRANKLIN N. SMITH and CECIL R. HEDGER
have joined the firm as Of Counsel

and

JENNIFER K. ANDERSON and KEVIN L. JONES
have joined the firm as associates

This established group of attorneys was formerly with the law firm of **Anderson & Smith** and have joined Van Cott's Salt Lake City office.

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Judge G. Rand Beacham

By Kim S. Colton

G. RAND BEACHAM was appointed to the Fifth District Court in August 1995 by Governor Michael O. Leavitt. He sits primarily in Washington County. He is a graduate of Snow College and Utah State University, and graduated from the University of Utah College of Law in 1980, after serving two years on the Utah Law Review. He was in private legal practice until his appointment to the bench. He was a member of the Planning Committee for the 1997 District Court Judges Conference. He is married to Diane Beacham, who teaches in the Washington County School District, and they are the parents of three sons and one daughter.

Judge G. Rand Beacham views his daily work as an effort to find and to sustain fundamental values and bedrock principles. Beacham says, "Judging is a great job, because, at its best, it brings order to an unruly world." The work of a judge involves organizing facts, applying the law, and resolving disputes. It is the sort of work Beacham loves. After two years on the bench, he says he is having "much more fun than [he] expected."

Before coming to the bench, Beacham practiced law for fifteen years with Jones, Waldo, Holbrook & McDonough. As a member of the firm's St. George office, Beacham had to be a generalist. The southern Utah legal market does not offer the luxury of specialization. Beacham, however, was comfortable with playing several different roles at the same time, or, more accurately, playing several different instruments at the same time. In his pre-law life, Beacham was a band teacher. He taught band and music for three years at South Cache Junior High before entering law school at the University of Utah.

Beacham graduated from Snow College and Utah State University, majoring in music. He is a "reed man;" he plays the clarinet, the oboe, and the tenor sax. He played oboe for several years with the Southwest Symphony in St. George, but he now plays "only once in a while with [his] daughter, who plays the flute." He says, without the time to practice regularly, he cannot enjoy the instrument. It is apparent that Beacham is a perfectionist and that his training as a musician was excellent preparation for law. He says, "Musicians know how to spend the time it takes to get it right. They know how to work until it is finished." Practicing and performing is what both lawyers and musicians do. "It means a lot of hard work, and the difference between a mediocre and an outstanding performance is often in the details," Beacham says. The connections between music and law are easy for Beacham to draw. They both are about learning and then performing within a set of rules.

Although he majored in music, Beacham's interest in the law was also piqued in college, when as a freshman he read Robert Bolt's play, *A Man For All Seasons*. It was 1967, and Beacham was young and idealistic. A particular scene struck a chord. Sir Thomas More has just explained to Roper, whom Bolt describes as possessing "an all-consuming rectitude," that a "bad man" cannot be arrested simply because Roper knows him to be evil.

> More: And go he should, if he was the Devil himself, until he broke the law!
> Roper: So now you'd give the Devil benefit of law!
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
> Roper: I'd cut down every law in England to do that!
> More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws all being from coast to coast – man's laws, not God's -- and if you cut them down – and you're just the man to do it – d'you

> [sic] really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[1]

Beacham believes the law in the late twentieth century should offer the same sort of protection, and he believes that as a judge he is able to focus on the fundamental principles that provide such safety.

Beacham believes attorneys should similarly focus on fundamentals in their practice of law. Those fundamentals definitely include court-adopted rules of practice. He thinks they provide attorneys with the chance to make motions and oral arguments effectively. He says, "Rule 4-501 of the Code of Judicial Administration has certain problems, but generally it must be followed if attorneys need answers from the Court. When I prepare for a hearing on a motion, my first question is 'why am I listening to this?' If the attorneys have followed the rules of practice, I usually can answer that question fairly quickly." Beacham says sometimes attorneys expect the Court to do their work for them, and sometimes attorneys believe that the way "to win" is to keep talking.

When asked if there was one thing he would have attorneys do differently,[2] Beacham quickly replied: "Organize succinct arguments, present them clearly and courteously, and sit down. It seems some attorneys believe that as long as they can keep talking they might say something to change a judge's mind. It is almost as if they believe that as long as they have breath, they won't lose." According to Beacham, it is all a matter of preparation. "Attorneys that are prepared do not ramble; they are not developing arguments as they go."

Beacham enjoys working in the Fifth District. He says, "We have an excellent relationship among the judges, staff, and the attorneys in the District. Our biggest challenge is growth. Our calendars in Washington, Iron, and even Beaver County are becoming unmanageable for just four judges. The worst part about the job is the huge caseload." Beacham says his biggest personal frustration is not having more time: "It seems I am rarely off the bench." When he is not at work, Beacham enjoys spending time with his family. He and his wife Diane are the parents of four children.

Hard work, organization, clarity, and attention to detail are Judge Beacham's fundamental values for the practice of law. His bedrock principles are honesty and personal integrity.[3] When judges and lawyers practice those fundamentals, they certainly should have "much more fun than [they] expected."

[1] Robert Bolt, *A Man For All Season: A Play in Two Acts* 66 (Vintage International Edition, 1990) (1960).

[2] For additional practice suggestions from Judge Beacham, see G. Rand Beacham "Ten Tips for New Attorneys", *Utah B.J.*, No. 1997, at 34.

[3] *See id.* at 36.

We are pleased to announce that the following Utah lawyers have become partners in the firm:

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Utah Bar Foundation Holds Annual Luncheon

Hon. Michael D. Zimmerman

UBF Grant Recipients Anne Milne, Utah Legal Services and Teresa Hensley, A Welcome Place

Hon. Pamela T. Greenwood and Carman E. Kipp

Photo credit: Robert L. Schmid

The Utah Bar Foundation held its annual luncheon meeting December 2 at the Law & Justice Center featuring Chief Justice Michael D. Zimmerman, speaker. Guests included Utah Bar officials and Commissioners, Utah judiciary, bank representatives and grant recipients.

Hon. Pamela T. Greenwood, Trustee and Board President welcomed guests and Trustee Stewart M. Hanson, Jr. reported on the current status and continuing improvement of the financial condition of the Foundation. He explained the process by which funds are generated with the IOLTA (Interest On Lawyer Trust Accounts) Program and how the Foundation makes these funds available for use by community agencies. He also expressed appreciation to all of the bank officials who help make this possible.

Joanne C. Slotnik, Board Secretary/Treasurer, recognized the scholarship and ethics award recipients–Paul Robert Rudof, Michelle Olsen, Eric S. Lind and Mary Torres Berry. Pamela Greenwood presented an appreciation plaque and book to Carman E. Kipp, retiring trustee, for his six years of service to the Foundation. Trustee Randy L. Dryer introduced Chief Justice Michael D. Zimmerman, speaker.

Eagerly embracing the opportunity offered by Bar Foundation President Pam Greenwood to speak out "provocatively," Chief Justice Michael Zimmerman offered his thoughts on the future of both the judiciary and the legal profession. Noting that hard work over the past decade has developed a state judiciary that is co-equal in fact as well as in name to the other branches of government, the Chief opined that past changes will pale in comparison with what is to come.

The first challenge, masked in benign proposals for administrative restructuring, involves a fundamental shift from the traditional model of the judge as dispassionate magistrate to a stronger, more rehabilitative model of "therapeutic jurisprudence." Our new drug court, recently the subject of much local attention, and the shift towards family courts are both based on this new person-centered model of judging. Because the demand for therapeutic justice is coming from outside the judiciary – from the legislatures and the public – and is being driven by the carrot of federal funding, Zimmerman believes that resistance to the change is both futile and unwise. Rather than lagging behind, he urges us to be in "the front of the parade," so that we can gain some control over how new federal programs will be run and how they will be integrated into our current system.

The second challenge confronting the judiciary and the legal profession is the increasing demand for access to justice. Again, Zimmerman noted that if we don't make changes to open the system up so that more people can have realistic access to legal processes, then others will do it for us. An assault on the adversary system is underway, and we should be actively involved in crafting its future. Simplified procedures for essential types of proceedings, a broader license for paralegals, more clerks who fulfill a de facto paralegal role, and more usable dispute resolution machinery – all avenues for pro se litigants to access justice – must become vibrant and effective components of our system.

The Chief Justice's message was clear. We must look outward, to the public, rather than inward, to the profession, to achieve a justice system that better serves all citizens. The infrastructure is in place. Now we must embrace the future and move ahead.

(Copy of Justice Zimmerman's speech in it's entirety appears on page 18 of this issue.)

CARMAN KIPP

Now Carman Kipp has served two terms
On the Utah Bar Foundation
With cheerful wit and a critic's eye
He spurred our communication.

IOLTA funds and balance sheets
Prime subjects watched by Mr. Kipp
Kept us sound in the fiscal sense
Made sure we didn't double dip.

All the grantees have a story
That pulls hard at our heartstrings
So Carm kept us going with jokes
And rhymes and other funny things.

He pushed judicial histories
Tales of jurists from A to Z
The books are finally done and bound
Biographies for all to see.

But now this good guy has stepped down
Other ventures do call him out
So thank you Carm for all your help
You'll be missed without a doubt.

CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: ANNUAL WINTER ESTATE PLANNING UPDATE

Date: Wednesday, February 4, 1998
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $149.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 3.5 HOURS

NLCLE WORKSHOP: DEPOSITIONS & DISCOVERY

Date: Thursday, February 19, 1998
Time: 5:30 p.m. to 8:30 p.m. (Registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR; HOW TO VALUE THE PERSONAL INJURY CASE: NEGOTIATING STRATEGIES AND TECHNIQUES

Date: Thursday, February 19, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

1998 MID-YEAR CONVENTION

Date: March 5-7, 1998
Place: St. George Holiday Inn
CLE Credit: 9 HOURS, which includes up to 2 in ETHICS

ALI-ABA SATELLITE SEMINAR: HOW TO HANDLE BASIC COPYRIGHT AND TRADEMARK PROBLEMS

Date: Thursday, March 12, 1998
Time: 9 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: HIPAA, COBRA, AND HEALTH PLANS UPDATE

Date: Tuesday, March 17, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

NLCLE WORKSHOP: CRIMINAL PROCEDURE

Date: Thursday, March 19, 1998
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR: LIMITED LIABILITY VEHICLES– NEW DEVELOPMENTS IN THE ORGANIZATION AND OPERATION OF UNINCORPORATED BUSINESSES

Date: Thursday, March 19, 1998
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

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Make all checks payable to the Utah State Bar/CLE

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Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

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NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

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Get to Know Your Bar Staff

MONICA JERGENSEN
CLE Administrator & Convention Coordinator

The first thing everybody should know is that Monica is a "General" in the enemy's army! (She wears red!!!)

Monica was born and raised in Salt Lake City. Her parents are John T. and Susan Durham Nielsen. She is the oldest of four girls and graduated from Brighton High School in 1988. She attended the U of U on a German Scholarship where she soon found out she hated studying German (not Germans) and quickly changed her major to Psychology. She graduated with a B.A. in Psychology in 1994. She is a member of Kappa Kappa Gamma sorority, served as Scholarship Officer for one year and is currently serving as the Scholarship Advisor.

Monica married Kevin Jergensen in August, 1991. Kevin is a CPA and works for the LDS Church in the Auditing Department. While he travels to exotic locations such as Ecuador, Columbia, Australia, and Germany she gets to stay home. They have no children as of yet (her words), but they do have cable TV. (How they happened to get cable TV is another story, but it provided entertainment for the staff.)

Her main outside interests are U of U basketball, fly fishing on the Snake River just below the Grand Tetons, or on Henry's Fork near Island Park, Idaho, hiking in the High Uintahs and enjoying nature. Reading Agatha Christie or Tom Clancy novels, playing the piano, and being an avid supporter of Utah Chamber Artists also occupy her leisure time. She likes to travel. Her favorite trip was to Cozumel, Mexico. She describes the ocean as being clear, blue, and warm. (With an emphasis on warm.) She found the history of the area to be fascinating and describes the ruins at Chichen Itza on the Yucatan Peninsula as incredible. A secret source told me that Monica, at the age of eight, was a "buffoon" in the *Nutcracker*.

Her first real job was working as a clerk at a privately owned video store which she found to be great training for managing the Bar's video library. During college she worked as a receptionist and filing clerk for a Salt Lake law firm. She joined the Bar in April 1990 as a part-time CLE assistant to Toby Brown. She later assisted Kaesi Johansen in coordinating the Mid-Year and Annual Meetings. She assumed her present position in 1994.

Monica's duties at the Bar include planning and coordinating CLE seminars, working with the Mid-Year and Annual Meeting committees to coordinate convention activities and coordinating Bar section activities. She also administers the New Lawyer CLE program and assists attorneys with CLE questions. You will often find her assisting at the front desk or at the registration table for the bar exam, seminars, or the admission ceremony. All of the above are performed with a smile and a pleasant personality.

She says "I really enjoy my job at the Bar. Crazy as it sounds, I enjoy working with attorneys and with my fellow USB staffers. I have only one plea – Do your CLE before December 31! I promise, it makes your life a whole lot easier, and the holidays are so much more enjoyable!"

J. ARNOLD BIRRELL

Arnold was born in Salt Lake City in 1939 and was raised in Twin Falls, Idaho. He graduated from Twin Falls High School, after which, he attended – choke, cough, wheez – BYU. (Arn is one of two BYU fans on the Bar Staff, and we have all learned to accept him despite this fault.) He attended BYU for two years and then took a leave of absence to serve a mission for his church in Australia. Upon his return, he went back to school for about six months, and then decided that making money in the family business sounded a lot better than making no money while going to school. So, he quit school to go to work for the Seven-Up company that his family had started in Salt Lake. He worked for the family business for five years, then changed directions and sold insurance for one year. After his insurance job, he returned to BYU in 1969 and graduated in 1970.

After graduation from college, Arn was ready for the big time! He packed up his family and moved to Los Angeles to work for Grant Thornton, LLP for five years as an accountant. In the meantime, he studied for and passed the dreaded CPA test and received his license. After living in Los Angeles for a while, he was ready to return to Salt Lake City to own and manage three soft-drink plants with his brothers. He then served as Division Controller for the Seven-Up Bottling Company which was owned by Phillip Morris, and then worked for Sorenson Development for five years. And in 1991, the Bar was fortunate enough to acquire his skills and knowledge and the rest, as they say, is history.

Contrary to what many may believe, Arnold does have a life outside the confines of the Utah State Bar offices! Thirty-six years ago this March, he married his wonderful wife Gayle, and they are the proud parents of 5 children who live all over the place – from Salt Lake to Cedar City, to Colorado Springs, to London, England! He has eight grandchildren whom he adores! And, of course, his passion is BYU football and basketball. (He has even remained loyal to his blue and white basketball team over the last two years, despite their record.) He enjoyed participating in team sports until a couple years ago when his knees gave out, and he couldn't get any sympathy from his wife for his turmoil! In addition, he is trying to become a reasonable golfer, but he finds that the ball keeps getting lost! He also enjoys traveling and has visited such places as Japan, Italy, England, Egypt and Israel. (The ruins and history in Egypt are definitely his favorites.) But the most interesting fact about Arnold is that he probably should have been a farmer! His garden at home is 20 feet by 50 feet and he has an incredible ability to garden and grow amazing zucchini, tomatoes, beans, spinach, broccoli, asparagus and any other vegetable you'd imagine.

Since March of 1991, Arnold has been the Financial/Licensing Administrator for the Utah State Bar. His duties include preparing financial statements for the Bar and its sections, setting up budgets for each Bar department, and maintaining all the Bar's financial records. He also supervises the yearly licensing of attorneys – (that's right, pay your bar fees or Arn will suspend you, although he would much rather assist and serve the attorney) – and he maintains the Bar's membership database. Arn would like to interject a comment here: **"Please send me your address changes!!!"** Thank you.

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A. Audio/Video Tapes. No more than one half of the credit hour requirement may be obtained through study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

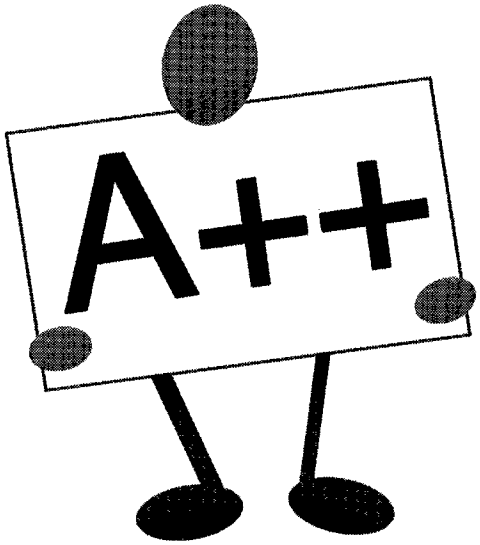
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:** _____

Regulation 5-103(1) — Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.



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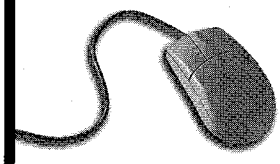

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