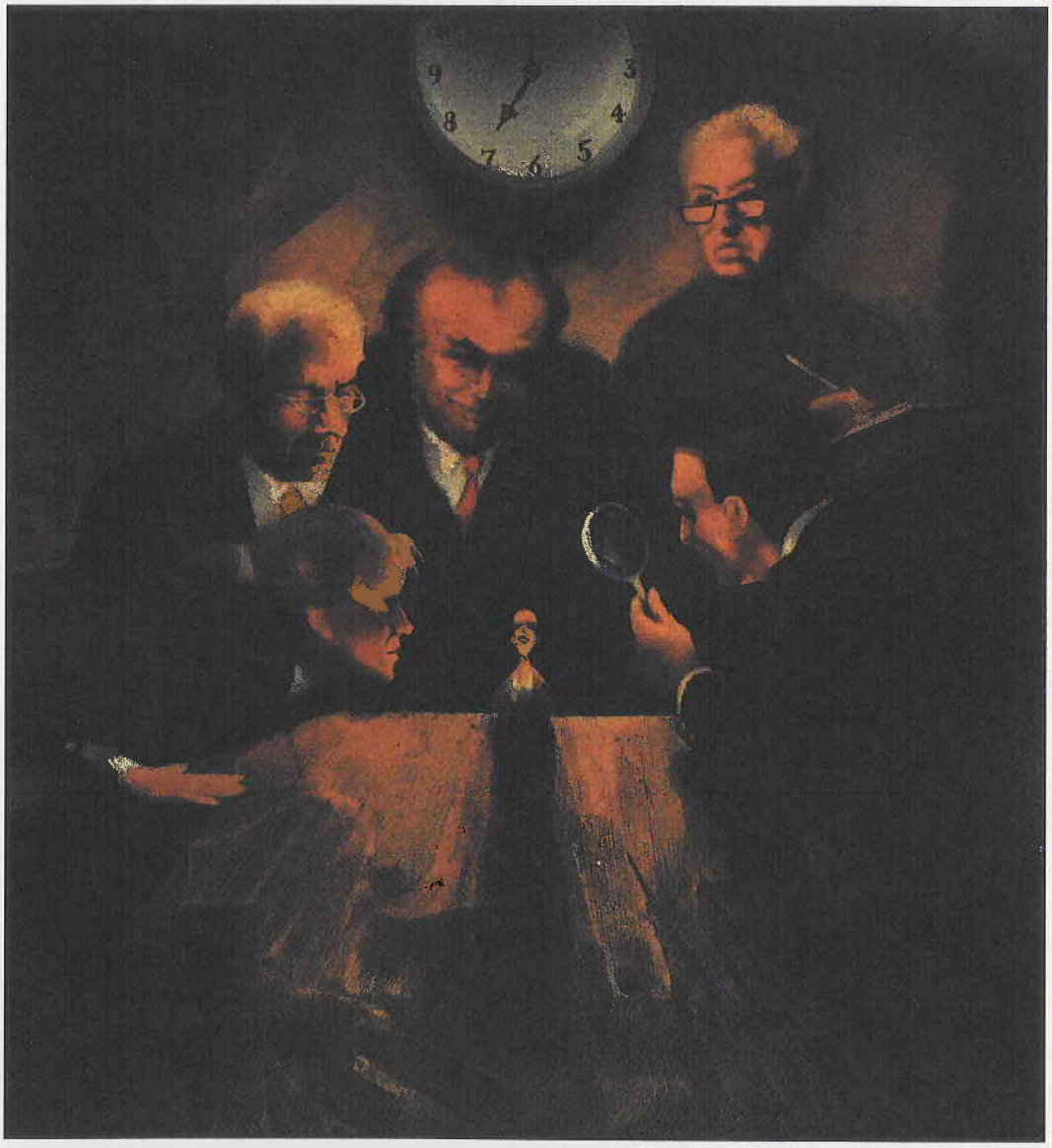
VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL



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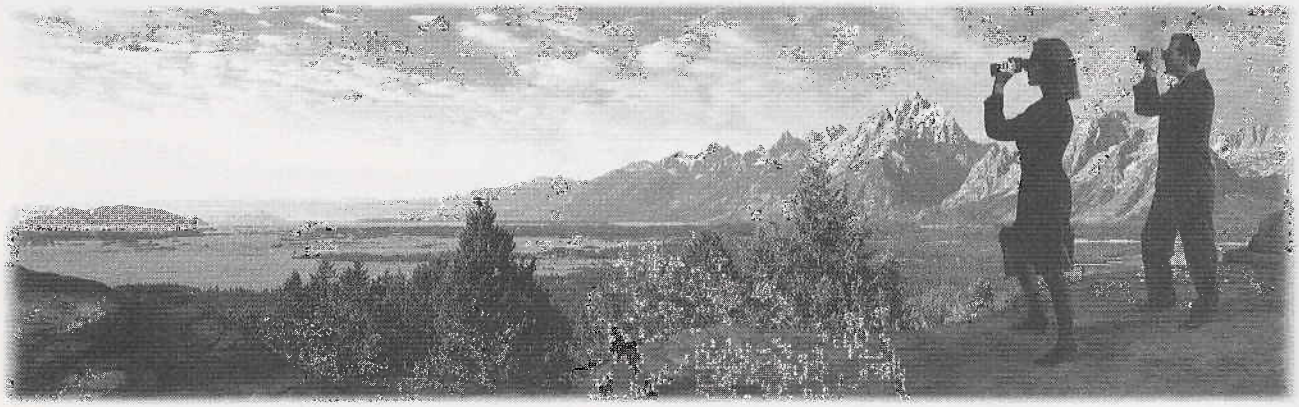

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Volume 3 Number 1 Winter 1998

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

CONTENTS:

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

MISSION OF THE BAR: To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

PREPARED BY
THE UTAH STATE BAR LITIGATION SECTION

VOIR DIRE EDITORIAL POLICY

Voir Dire is an independent intellectual journal for lawyers who litigate cases, and judges who decide them. *Voir Dire* is published twice a year by the Litigation Section of the Utah State Bar.

Voir Dire was created to provide members of the Utah State Bar with an alternative forum to examine issues and express opinions about the adversary system. *Voir Dire* strives to be practical and concrete, lively and readable, and will not avoid controversy or unpopular viewpoints.

The Editorial Board encourages submission of manuscripts of original articles, book reviews, comments, case notes, and letters from members of the Utah State Bar concerning the adversarial process and other material of interest to attorneys who venture into the litigation arena.

All contributions must be typewritten, double spaced electronic printouts, with all references and footnotes numbered consecutively, on 8½" by 11½" paper. Manuscripts should be submitted with an electronic disk to the *Voir Dire* Editorial Board, 645 South 200 East, Salt Lake City, Utah 84111.

Publishing and editorial decisions are based on the Editorial Board's judgment of the quality of the writing, the timeliness of the article, and the potential interest of the readers of *Voir Dire*. If a submission is accepted for publication, the Editorial Board reserves the right to make deletions to conform to space limitations.

No submission will be published that contains defamatory or obscene material, violates the Rules of Professional Conduct, or which may otherwise subject the Litigation Section, the Utah State Bar, the Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.

The opinions and views expressed in *Voir Dire* are those of the authors. The Editorial Board, the Litigation Section, and the Utah State Bar do not necessarily share or endorse any particular views expressed in the materials published in *Voir Dire*.

What Really Happens at the Women Lawyers of Utah Retreat

by Charlotte L. Miller

The great truth is that women actually like men, and men can never believe it.
–Isabel Patterson

For several years I have attended the Women Lawyers of Utah (WLU) retreat. Each time before and after the event I am asked a variety of questions: "What do you women do at a retreat?" "Isn't it just a men bashing session?" "Why do you still need women's organizations since there are so many of you now?" The questions are usually accompanied with looks of distrust and trepidation.

This year the National Association of Women Judges met in Salt Lake City, we are celebrating women in the legal profession at the First Hundred dinner, and I happen to be president of the Bar–and a woman. So I thought it was a good time (and maybe even my responsibility) to try to answer these questions, at least from my perspective.

As with most things, myth and imagination are far more interesting than reality. I'm afraid that is also true of the WLU retreat. There are no secret handshakes, animal or human sacrifices, or hazing rituals. Rather, most of the retreat is spent attending continuing legal education programs–effective oral advocacy, writing styles, client development, client interview techniques. Sometimes these programs will focus on issues that may be encountered more often by women. The social part of the retreat includes dinner, time in the hot tub, hiking with Liz King, and mostly catching up with acquaintances. It provides an opportunity for new lawyers to meet more experienced lawyers in a relaxed, intimate setting. I have heard little, if any, complaining about men. Social conversation often focuses on how to fill the roles of a parent, lawyer and spouse. It is always helpful to learn that even those who appear to juggle those roles with grace and ease, struggle daily. I suppose some men may be disappointed to learn that they are not the center of conversation at the WLU retreat, just as some women may be disappointed to find they are not at the heart of conversations among men.

Although there are an increasing number of women in the legal profession, women are still in the minority. In Utah, seventeen percent of Bar members are women. Because women often are in the minority, especially in positions of power, it is helpful for them to share experiences. I often find myself as the only woman at a business meeting, and there continue to be people who don't know how to interact professionally with professional women. For me, it has been helpful to share difficult experiences so that I can find better ways to react, or not to react, to those situations in the future. Some men continue to be uncomfortable with women in the workplace and therefore make inappropriate comments or take positions that may result in harm to a woman professionally. For example, men who are uncomfortable engaging in business lunches with women, or traveling with a woman colleague, may prevent the woman from having the same opportunities as a man. Finding constructive and educational methods for addressing these situations is one of the benefits of events like the WLU retreat.

It is encouraging that men are also supportive of women in the legal profession. Recently, I attended a National Conference of Bar Presidents convention with some of my colleagues from the Utah State Bar. I sat down one morning at a breakfast table, and two of my colleagues sat on either side of me. A president-elect from an eastern state was sitting across from us and I introduced myself as the president of the Utah State Bar, and I introduced my colleagues. Another attorney complimented Utah on its participation at the convention. The eastern president-elect commented, "They sure know who to put in the middle–the young, good looking chick." My male colleagues were appalled and irritated at the remark. The eastern president-elect immediately lost any credibility with other attorneys at the table. They went out of their way to apologize for the comment and make sure I was not uncomfortable. We have since had great fun laughing at this gentleman's expense. It did me little, if any, harm because this gentleman has no power or authority over me, but imagine how he must make the women associates in his firm feel–if there are any.

One of the greatest examples of support for women in the legal profession is this year's recipient of the Dorothy Merrill Brothers Award. The Bar gives this award to an individual who has contributed to the advancement of women in the legal profession. This year's recipient is James B. Lee. Constance Lundberg nominated James Lee because he was instrumental in getting her hired at Parsons, Behle and Latimer twenty-five years ago when firms in Salt Lake would not hire women. After James fought to get Constance hired he encouraged other firms to hire women. Constance wrote in her nomination:

> James called partners of other firms and chided them, in a good humored, razzing way, about not

> hiring women too. One named partner of another major firm said they were afraid to hire me, because they thought they couldn't control me. James' answer: 'Why the hell would you want a lawyer you could control?'

James not only enabled Constance to have a job, he assigned her major accounts and mentored her. Amazingly, James is still encouraging women lawyers today. Lois Baar, who works with James now, also nominated him. She writes:

> James hasn't given speeches on women's rights. He hasn't joined Women Lawyers of Utah. He hasn't headed up a commission focused solely on women in the legal profession . . . [M]y nomination is based on first hand knowledge of Jim's contribution inside Parsons Behle & Latimer. This is a difficult and rare contribution because it involves building relationships and mentoring women in a way that helps them to learn and gather experiences that make them feel like equals in a profession that has not always welcomed women.

I was extraordinarily lucky to work at Parsons, Behle and Latimer–and for Constance and James before I went to law school. Some of the first lawyers I ever met in my life were Constance Lundberg, Barbara Polich, and Kathleen Lowe, and some of their colleagues–Larry Stevens, Daniel Allred and Randy Dryer. What I realize now is that I never thought of Constance, Barbara and Kathy as "women" lawyers. Each had her own style and all were respected lawyers in the firm. That experience gave me a positive and healthy view of the legal profession. I credit James Lee for creating an atmosphere in which lawyers were allowed to grow in their profession without regard to gender, long before it was politically correct or fashionable to be a "liberated" man.

We all should look to James Lee as an example. If we are more like him, there eventually may be no need for women's organizations and retreats, or the need for them will evolve to serve another purpose.

COMMISSIONER'S REPORT

I'm Back!

by Steven M. Kaufman

It has been six months since I was President of the Utah State Bar. It seems like six years. I have the grand opportunity of once more bending your ear, writing about anything I choose, this being about my fifteenth time at the computer, attempting to convey something of worth. After six years on the Bar Commission, and about seventeen years of Bar work, I sometimes wonder if I have much more to say. But I now have a new computer, and I still have a couple of words left. I sit in an interesting position, not only as an immediate past President but also as an active, voting Bar Commissioner from the Second District. I have the history of the Bar and all that I have experienced in its leadership role and also the ongoing interaction as a Commissioner. This is a difficult but enlightening position from which I must temper my involvement. Obviously, I still have important work to do, but I have to let others take their best shot without trying to take over. To the best of my knowledge, I am the first to have this experience, as a President, and then again as a Bar Commissioner. It is wonderful to still be involved in the day to day workings of the Bar, but obviously to a much lesser degree. I used to spend weekends, workdays, holidays, any day, doing Bar work. Now I actually go to work and practice law. I cannot begin to tell you what a change from being the Prez to practicing law again. Don't get me wrong. A Bar Commissioner still involves a great deal of outside time and effort, but it does not require a dedication for a year like the position of President. It allows me to step back and watch somewhat, rather than always having to be one step ahead.

When I was told I would have the opportunity to write for the *Voir Dire* edition of our *Bar Journal*, I felt especially proud because these editions offer our membership a new avenue of learning. This allows for yet another format for us to express our ideas and ideals. I have spent over twenty years in the practice of law, and as most of you know, my agenda has been to promote civility and professionalism. I've written about "kissing lawyers" and received a great deal of feedback over the years. We did a promotion about the good things lawyers do entitled "Did you hear the one about the lawyer?" To the extent I could, I took that message to Bars around the nation when I was President. The editorial staff of this particular edition, although allowing me full editorial freedom, asked me to talk about what I learned from other state Bars while I had the opportunity to meet and greet their leadership. I can tell you that we are on the cutting edge when it comes to state Bars. Although we are a small to mid-size Bar, we have leadership that commands big ideas. We are progressive in the way we view our duties and obligations as Bar leaders. We have members of the Bar and its Commission alike who are working for a better Bar, not for just today, but for our future membership. We have a commitment to our members which, I found, to be unparalleled. And that is serious stuff because I visited several state Bars, attended both regional and national conventions where people spoke about every issue one might imagine. I picked up important ideas, but what I mostly did was revitalize my vision for our Bar. It is a vision held by most past Presidents and our current President, and I am confident future Presidents will carry the same flag. That flag is the flag of justice and fair play, caring for all mankind so that all have equal access to an honest justice, civility and professionalism within our ranks, and a keen desire to make the practice of law continue to top the list of noble professions. I could go on and on about the way our Bar works, what I learned as President, and what I am learning as a Bar Commissioner again. But I feel it is more important to only suggest that this Bar has had a continued high level of leadership, with a membership that overall is tops in my book, with a judiciary that continues to glow as a light for all to aspire to, with a professional and caring staff to facilitate the needs of our membership.

For the record, it is a beautiful day. Yesterday was Thanksgiving and we have much to be thankful for. I am thankful for all of your friendships. I am thankful that I have the privilege to practice law in a state where professionalism and civility are not just buzzwords, but are ideals of our membership. I am thankful I had one more chance to bend your ear, take a moment of your time, and that you allow me the grand privilege of being a lawyer among your ranks. This will probably be my last opportunity to have this wonderful forum, at least for awhile. By the time you read this, it will be 1998, so may I also wish you a wonderful and fulfilling New Year! I hope to talk to you again.

FROM OUR PERSPECTIVE

Let Us Not Waver in Our Commitment to Provide Legal Services for Utah's Poor

In this column in the Summer 1995 issue, we expressed dismay at what appeared to be the inevitable extinction of the Legal Services Corporation. Since that time, we have been paying close attention to the Bar's efforts on several fronts to provide the poor with meaningful access to the courts, and to the membership's responses to various proposals made by Bar leadership for filling the gaping holes left by the near-demise of the LSC. We hope that what we perceive as a wavering commitment to pick up the slack is merely a reflection of the growing pains inherent in implementing what is, after all, a revolutionary approach to achieving equal justice by ensuring equal access.

In response to the funding crisis at Utah Legal Services Corporation, which received more than eighty percent of its budget from the LSC, the Utah State Bar in 1996 formed the Access to Justice Task Force. Its mission was to review legal services alternatives for Utah's poor, and to look into various options for improving those services.

The recent bad news from the Task Force is that, even as funding resources are disappearing, the legal needs of the poor are "overwhelming." Access to Justice Task Force, Preliminary Final Report, at 2. No surprise there. But what does the Task Force propose that we do about it? Clearly, some sort of organized effort on the part of the Bar is essential; also essential is the membership's commitment to support those efforts, not only with dollars and with donated time, but with public affirmation that access to the courts is essential to sustaining our collective freedom.

The Task Force recommended that the Bar coordinate pro bono programs by sponsoring its own projects, as well as by recruiting and training attorneys to participate in pro bono projects sponsored by other organizations. Early requests for volunteers provoked hundreds of willing attorneys to step forward, but there were no practical means of assigning them to particular cases. The Task Force rightly considers this the Bar administration's role, and, for the last eighteen months or so, the Bar has funded a position aimed at the monumental task of matching volunteer attorneys to cases. Last year, however, the Pro Bono Project staff position went vacant for a period during which cases were not placed. The delay in case placement presumably was compounded further by the necessity of training the person newly hired. Given the "overwhelming" nature of the problem, the Bar ought to fund additional staff positions for this essential project, and take steps to avoid personnel vacancies.

Another of the Task Force's recommendations concerns licensing legal assistants. Although both sides of this matter are addressed more thoroughly in one of this issue's Point/Counterpoint pieces, we favor the Task Force's view that the Bar should look into licensing legal assistants to permit them to provide limited legal services, so long as they work under the close supervision of an attorney. In this manner, the agencies providing legal services to the poor could increase the number of clients served without increasing their budgets.

Perhaps the most controversial of the Task Force's recommendations is its recommendation that attorneys be required, as a condition of renewing their licenses, to report the amount of pro bono work performed during the preceding year. Frankly, we're baffled by the negative responses we've heard, although nobody seems to want to make a public, in-print stand on the point. Indeed, the heat being generated is proportionate to what we'd expect if the Bar were proposing to mandate the *performance* of pro bono work, rather than merely its *reporting*. We hope that this doesn't signify the membership's lack of commitment to performing such work, but it is difficult to come up with alternative reasons for all the flap.

"Equal justice under law" should be more than a catchy phrase carved in stone above the United States Supreme Court. Achieving that lofty goal, a necessary predicate of which is access to the courts, requires more than lip-service from Bar leadership. We urge the Bar leadership to continue its efforts to provide dynamic leadership, and work toward establishing an innovative, adequately funded means of ensuring that those with low income have meaningful access to justice.

This is not enough, however. The Bar's membership must get solidly behind the recommendations of the Task Force; token efforts are insufficient. By common assent, we have just contributed a substantial sum to beautify the new courts complex, arguably the most significant, and grand, public building erected in downtown Salt Lake City in this half of the century. But we must ensure that this is not the greatest measure of our contribution to the public good. Only by safeguarding access to that grand new building for rich and poor alike can we claim that we have met our obligation to ensure equal justice.

REPORT FROM THE CHAIR

In my first Report, I thought I should let you know a little bit about "the Chair," give you an overview of the masterminds leading the Litigation Section, a.k.a. the Executive Committee and a rundown of the overwhelming benefits of Section membership, and issue a plea for help.

"The Chair" this year is more akin to a Sam's Club Synthetic side chair, rather than the Ethan Allan Leather Wingback of my predecessors. I am your basic blue-collar insurance defense attorney who works behind a Steelcase desk in Murray, Utah. I don't have the influence or power of some of my "big name" predecessors. I also don't have the legal experience of the majority of the members of this Section, as I am just entering into my tenth year of practice.

Why, then, or *how* did I ever become "the Chair?" Quite simply, three years ago Rocky Anderson asked me to take a few notes at an 8 a.m. Executive Committee meeting. A little bleary-eyed and very naive, I wholeheartedly accepted the assignment. Rocky also asked me to keep track of the Section's finances. Too embarrassed to publicly admit that I had never balanced my personal checking account, I begrudgingly took on that assignment as well. Three years later, and with funds still in the Section account, I ascended to the position of "the Chair."

The key component of the Section's administrative ensemble is not "the Chair," but the versatile, yet durable Executive Committee. The Committee is comprised of a hybrid of the Section's membership—lawyers from large, small, and solo firms, corporate attorneys, lawyers from state and county government, representatives from Young Lawyers, the Minority Bar, and Women Lawyers. The Committee is also fortunate to receive tremendous insight from the Bench as well. A domestic relations commissioner, and state and appellate court judges complete the committee.

The Executive Committee meets monthly. But the majority of the Section's projects are generated in the subcommittees that meet as needed. Members of the Executive Committee chair the subcommittees. The Section's Executive Committee members are identified in this issue's masthead, and the subcommittees are listed below.

More than 860 astute members of the Bar have availed themselves of the accoutrements of Section membership. A mere $35 Section fee entitles members to discounts to all Section-sponsored seminars—the Trial Academy, Evening With Third District Court Judges, quarterly CLE luncheons, and the NITA Trial Practice Seminar. The Section owns approximately 170 CLE tapes and videos. Section members may check out the tapes at no charge, while everyone else pays $30 per rental.

The Section also provides several benefits with no price tag attached. *Voir Dire*, published twice a year for the entire Bar, is partially subsidized by Section funds. The Section also sponsors Mid-year and Annual Meeting keynote speakers. Mandatory new lawyer ethics training, legislative research, and the Model Utah Jury Instructions emanate from Section subcommittees as well.

During 1998, the Section is planning to co-sponsor a seminar on appellate advocacy. A Section pro bono project is also in the makes, along with a social event. Finally, we hope to have all of the Section news and events on-line on the Bar's Web Site.

We need assistance in helping the Section accomplish the items on this ambitious slate of events. Although the Section has more members than any other of the Bar's organizations, the number of members volunteering for subcommittees is few. With many new events, projects, and/or subcommittees, perhaps several of you would be interested in becoming more involved. Please take a look at the list of subcommittees, call the committee chair, and volunteer to help. You, too, may one day become "the Chair."

Vickie Kidman

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The Bar's Proscription Against Engaging in Offensive Personality

by Charles A. Gruber

An attorney, at the deposition of his wife in an action concerning her former spouse, baits the opposing counsel with "macho" verbal attacks and makes thinly veiled derogatory remarks concerning the opposing counsel's heritage. An attorney at his homeowners meeting berates a member of the Board, verbally abusing him in the meeting, accusing him of criminal conduct, publicly humiliating him, and threatening to make the Board member's life miserable because he is an attorney and can drag the Board member into court. In the midst of a disagreement, a male attorney faxes a female attorney a letter making gender-specific, vulgar remarks impugning all female attorneys' abilities. This, after the female attorney, using a well-known four-letter word, tells the male attorney what he may do with himself. Another attorney, upset with the opposing party's self-help actions, which result in a utility company cutting off power to the attorney's client's house, curses the opposing party's attorney in a letter in which profanity is used in several places.

Each of these incidents has been the source of complaints to the Utah State Bar's Office of Attorney Discipline. Each is considered unprofessional and offensive. And each is considered an ethics violation. But of what rules?

These examples of "offensive personality" are considered to be violations of a little-known rule that is not a Rule of Professional Conduct, but is one of the Rules for Integration and Management of the Utah State Bar ("RIM"). Rule 21 of the RIM provides, in part:

> Duties of attorneys and counselors. It is the duty of an attorney and counselor: . . . To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which he is charged.

Rule 9 of the Rules of Lawyer Discipline and Disability provides, in part, as follows: "It shall be a ground for discipline for a lawyer to: (a) violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers; . . . ." Thus, a violation of Rule 21e, in conjunction with Rule 9 of the Rules of Lawyer Discipline and Disability, constitutes a violation that subjects the attorney to discipline by the Ethics and Discipline Committee of the Utah State Bar.

✦

"[The 'offensive personality'] language is . . . a directive from the Supreme Court to practicing attorneys in Utah to be civil, polite, and respectful."

✦

What are these Rules for Integration and Management? In 1931, the Utah State Bar was statutorily integrated by making all attorneys licensed to practice law in Utah members of the Bar, subject to the rules and regulations promulgated by the Bar. Since then, all rules and regulations of the Bar have been subject to approval by the Utah Supreme Court, which has the constitutional power to regulate attorneys in Utah. In 1981, the Supreme Court, to memorialize its relationship to the Bar, promulgated the RIM. Included in the RIM, as amended, is the language of Rule 21e concerning "offensive personality." That language is not merely hortatory, but is a directive from the Supreme Court to practicing attorneys in Utah to be civil, polite, and respectful.

On January 1, 1988 the Supreme Court adopted the Rules of Professional Conduct. Those rules, and in particular Rule 4.4, reiterate the spirit of Rule 21e. Rule 4.4 (Respect for Rights of Third Persons) of the Rules of Professional Conduct states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The Utah Rules of Professional Conduct are based on the Model Rules of Professional Conduct promulgated by the American Bar Association. The comments following ABA Model Rule 4.4 cite cases from across the country in which Rule 4.4 has been used to sanction attorneys for behavior similar to that described above. Rule 4.4 has been applied to attorneys' actions while representing themselves, representing others, and in their behavior towards opposing counsel, opposing parties, witnesses, judges, court staff, and jurors.

What if it is the client who urges the attorney to engage in offensive acts? Rule

Mr. Gruber is Assistant Disciplinary Counsel with the Utah State Bar's Office of Attorney Discipline.

1.16(a)(1) of the Rules of Professional Conduct mandates that the attorney withdraw from the representation, because such conduct would be a violation of the Rules of Professional Conduct. An attorney may not use the excuse of "following orders" from a client as a rationale for being mean-spirited or abusive.

The Rules of Professional Conduct and the Rules for Integration and Management of the Utah State Bar do not prevent an attorney from aggressively and vigorously representing a client. But the message from the Supreme Court is clear: if an attorney is obnoxious, rude, profane, or bellicose, then that attorney should be disciplined. Civility is not optional; it is a professional requirement, the violation of which can result in sanctions or even possibly the loss of one's license to practice law.

The Uncivil Litigator

At last we have received a submission for this column. We've fictionalized the name of the offending author (as well as that of the person referred to in the letter) because we realize that this letter was part of a larger and acrimonious dispute between counsel. Nevertheless, we consider it an excellent example of uncivil litigation.

Dear Mr., Mrs., Ms., Miss, Master, or Gender Neutral unentity:

From one professional to a P.M.S. handicapped inconsiderate emotionally and intellectually impaired unentity, had there been a problem a simple and courteous phone call would have been sufficient to cure the problem[.] I'm sure this simplicity escaped you. . . . Since we did assume that any law firm would behave professionally and not with an irresponsible emotionally and intellectually handicapped temper tantrum, may we convey our most insincere apologies. . . . Please advise capitol directories of Ms. Uninvolved Attorney's new address and please set aside your petty emotionally handicapped differences with Ms. Uninvolved Attorney long enough to inform this office of her new address and phone number. I don't know if this taxes your attention span or not, however your assistance would be appreciated.

I refuse to have a battle of wits with and [sic] unarmed person, yours [sic]!

Jeffrey E. R. King

POINT/COUNTERPOINT

The Changes in Federal Discovery Rules: A Legacy of Chaos, Ineffectiveness, and Diversion From Real Solutions

by Ross C. Anderson

Clarence Darrow is sitting in his office, immersed in reading The Origin of Species. *A knock at his door.*

Darrow: *(Mumbling; not looking up from his book.)* Yes, Della, what is it?

Della: Mr. Darrow, there are two nice-looking young men here to see you. They don't have an appointment, but say it's urgent.

Darrow: *(Gruffly.)* All right then, show them in.

Door opens. Two young men, one eighteen and the other nineteen years old enter. Darrow looks up from his book, peering over the top of his spectacles.

Darrow: Well, come in, come in. Take a seat.

Nathan and Dick sit down.

Darrow: So what can I do for you two gentlemen? And please make it snappy. I'm preparing for a big case for a teacher who's being prosecuted for teaching science to his students. *(To Nathan.)* Why are you squinting? Have you lost your glasses?

Nathan: As a matter of fact, I have. If I hadn't, we probably wouldn't be here.

Dick: Please don't mind him, Mr. Darrow. Let's get right to the point. What we tell you is absolutely confidential, is that right?

Darrow: Of course. There is no more absolute guarantee of secrecy than the attorney-client privilege.

Nathan: Okay. Well, it's like this. We killed this kid, Robert Franks, we hired Johnny Cochran, and we were acquitted in a criminal trial. Now we've been served with a wrongful death lawsuit filed by this guy named Belli on behalf of the kid's parents.

Darrow: You know, don't you, that I cannot suborn perjury? After you tell me you have killed this boy, you cannot testify under oath to the contrary.

Nathan: But you told us what we say to you is absolutely confidential.

Darrow: No, no, you don't understand. It *is* confidential. Although I cannot disclose what you tell me, I cannot permit you to lie under oath. And you'll *have* to testify—even before trial. Certainly the plaintiffs will want to take your deposition.

Dick: We'll just tell it our way and you have to keep quiet about it. Isn't that what you said—that the attorney-client privilege is absolute?

Darrow: Well, it is—conditionally, that is. You see, I can't permit you to lie under oath. If you lie, I will have to disclose to the court that you are committing perjury.

Dick and Nathan stand.

Dick: You're not making sense, Mr. Dar-

Mr. Anderson is a shareholder of the Salt Lake City law firm Anderson & Karrenberg.

row. First you tell us that our communications are strictly confidential; then you tell us if we put on a defense you will tell the world we're lying. What kind of adversary system is this? And now you're our adversary, because we told you the truth. Adios, Mr. Darrow.

Dick and Nathan exit. Door slams closed. Curtain closes.

SCENE 2

Gerry Spence is alone, standing in his office, speaking to himself in a mirror. His telephone rings and he picks it up.

Spence: Yes, send them in.

Door opens; Nathan and Dick enter.

Spence: What are you two gentlemen staring at? Haven't you ever seen a lawyer wearing a Davy Crockett coat and cowboy hat? Sit down!

Nathan and Dick sit.

Spence: Now, what can I do for you?

Nathan: Well, we've had a wrongful death case filed against us. But, let there be no misunderstanding; we didn't do anything wrong. We didn't hurt anyone; in fact, we were both bird watching in a park and drinking gin when someone committed the dastardly deed of which we both have been accused.

Spence: Don't say another word—not until I explain the rules. I don't want you to tell me anything you won't testify to under oath. For instance, let me try a hypothetical on you. *(Winking at both of them.)* Suppose, just suppose, you killed someone and you told me about it, then you wanted to testify you didn't. I couldn't let you testify that way because I would know you were lying. So, if you're going to lie under oath, don't let me know the truth.

Dick: I think we learned that trick before, sir. But of course, we wouldn't lie to a man in a Davy Crockett coat. *(Pause.)* By the way, doesn't it make it more difficult for you to represent a client if the client doesn't tell you the whole truth?

Spence: Of course it does, but the adversary system doesn't go so far as to allow an attorney to let his client lie under oath. So I just shouldn't know about it if a client plans on lying.

Nathan: Sounds like quite a charade to me.

Spence: Never you mind. Tell me, what can I do for you? And, by the way, Nathan, why are you squinting? Did you lose your glasses?

Nathan: I might have and I might not have. You don't think I'd tell you, do you?

Dick: Please, Mr. Spence. We know that you always win—at the trial level, anyway—and we need your help. We've been sued for killing this fourteen-year-old kid, Robert Franks, and we need to beat the case. Although we're young, we've got tons of money from our parents. We don't want to lose our fortune to some shyster lawyer.

Spence: Count me in, as long as you will grant me the book rights. Do you have a copy of the complaint?

Dick: Yes, here it is. It's pretty simple. It just says that we kidnapped Robert Franks, killed him with a chisel, and tried to extort money out of the kid's father by the use of a ransom note, typed on an Underwood typewriter.

Spence: And where was the case filed?

Nathan: Let me tell you all about it. I'm a law student at the University of Chicago. The case was filed in federal court in Chicago. Mr. and Mrs. Franks, the plaintiffs, moved to Ophir, Utah, to get away from it all after their son was killed. As neither of us has ever even set foot in that state—although we plan to join the festivities in 2002—the federal court has jurisdiction based on diversity of citizenship.

Spence: Well, I'll have to check that court's local rules right away to determine whether we need to make certain preliminary disclosures of information to the other side.

Nathan: *(Glancing at Dick.)* Here we go again! *(Addressing Spence.)* You'll disclose *nothing* without our permission! And anyway, sir, every first-year law student knows that the Federal Rules of Civil Procedure apply in all federal district courts and that uniformity of procedure is an underlying goal of the Federal Rules.[1]

Spence: I'm afraid that's just not the case any more, Nathan. The federal district courts are all over the place when it comes to certain matters of pretrial discovery, and you never quite know from one day to the next what the rule is in any district, or even in any particular court. We once had uniformity; we now have utter chaos. *(Spence opens a book he just happens to have on his desk.)* Listen to this, from the Rand Institute for Civil Justice:

> [A]fter [the Civil Justice Reform Act (CJRA) of 1990] all [ten] pilot and [ten] comparison districts have adopted one of five approaches providing either voluntary or mandatory exchange of information by lawyers, sometimes only for specified types of cases . . . . Two pilot districts and one comparison district required lawyers to mandatorily disclose certain information, including anything bearing significantly on their sides' claims or defenses. Two other pilot districts and one other comparison district have a similar mandatory requirement, but they apply it to all information bearing significantly on both sides' claims or defenses.[2]

Nathan: Sounds like chaos to me. But since CJRA was enacted, Rule 26 was amended, effective December 1, 1993. That's brought the federal courts all back into line, hasn't it?

Spence: No, just the opposite![3] Rule 26(a)(1), which requires pre-discovery disclosures of all sorts of information, allows

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[1] One of the hallmarks of litigation in federal court over the past half century has been that litigants and their counsel could predict with some degree of certainty that procedural rules would be consistent from state to state in the federal system and from district court to district court within each state. There were many beneficial effects which flowed from this predictability: lawyers could be confident in advising clients regarding federal court proceedings in many states; businesses could make reasoned predictions on a nationwide basis of the process which they could expect in litigation; forum shopping among various federal district courts based on some anticipated procedural advantage was virtually unheard of; and extreme variations in the application of the Rules by individual judges was relatively unusual.

Uniformity in the Federal Rules of Civil Procedure has been a continuing goal of the Judicial Conference.

Richard L. Edwards, *Is Mandatory Disclosure Working?*, FOR THE DEFENSE, Sept. 1996, at 18.

[2] JAMES S. KAKALIK, ET AL., RAND INST. FOR CIV. JUST., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 61 (1996).

[3] "[T]he situation as it exists presently is a nightmare for lawyers and litigants alike. Rather than create a solid framework of predictability, the present procedural patchwork instead has brought an unwelcome whiff of anarchy to the American civil justice system." Edwards, *supra* note 1, at 18.

courts and litigants to opt out of the rule altogether. More than half of the federal district courts initially elected to bag the rule.[4] And, according to a survey conducted by the ABA Litigation Section, in those districts that did not generally opt out, approximately twenty percent of those responding to the survey reported that litigants or judges had opted out in one or more cases.[5] In fact, the survey revealed that a number of respondents were confused as to whether their local court *had* or *had not* opted out.[6] It's little wonder, actually, because not only is there a wide variance in the rules; finding them can be a bit difficult. "The local procedures which are applicable may appear in local rules, in general or standing orders, or in civil justice expense and delay reduction plans that all districts promulgated . . . under the [CJRA]."[7]

Dick: Listen, this is all terribly fascinating, but I have a lawsuit that I'd like to get on with—so can we talk about what's most important here—me and my immediate problem?

Spence: Sorry about all this, Dick. I like to deal with matters of substance, too, but more and more it seems as if a bunch of academics and judges have a need to do something—anything—to justify their committee memberships. So they keep loading a bunch of burdensome procedural nonsense on us that ends up consuming more of our time and attention than the substance of our lawsuits.

Dick: But what is their rationale?

Spence: Well, the amendment to Rule 26(a)(1) was meant to reduce the time expended on pretrial discovery in civil cases and to cut costs.[8]

Dick: That's a good thing for us clients, isn't it?

Spence: It would be if it worked. The results, however, have been just the opposite. The Rand Study found that "[n]either mandatory nor voluntary early disclosure significantly affects time or costs."[9] In fact, according to the ABA Litigation Section survey, the Rule 26(a)(1) disclosure requirement "is not perceived as lessening conflict, reducing discovery demands, or facilitating settlements. It is perceived as *increasing* discovery costs."[10]

Dick: Yeah, but I'll bet if it increases costs, lawyers must love it.

Spence: That cynicism seems fitting for you, Dick, but believe it or not, most lawyers do want to accomplish something significant during their careers, serve their clients well, and not spend all their time jumping through a bunch of unnecessary procedural hoops. The truth is, in the ABA Litigation Section survey, to which about 1,200 responded,[11] seventy-five percent of the respondents said they would like to see mandatory disclosure *dumped*.[12]

Costs also have been increased unnecessarily by the new Rule 26(a)(2), which requires the production of written expert reports. Even before the amendment, the excessiveness of expert witness costs was a major reason why resort to the courts was generally beyond the reach of all but the wealthiest in our society; the amendment has increased expert costs dramatically. No reasonable justification was offered for imposing upon litigants the excessive costs of compliance with the preposterous requirements of Rule 26(a)(2). The Advisory Committee was, at best, naïve in suggesting that "in many cases the report may eliminate the need for a deposition."[13] But every practicing lawyer knows that experts will normally be deposed, regardless of whether a report is produced. Such depositions are crucial to the proper preparation for trial. Those depositions can even win or lose cases. Although the requirement of written expert reports has not been the focus of discussion in the ongoing debate over the changes to the Rules, it is perhaps the *least* justified and produces perhaps the *most* waste of all the amendments.

Nathan: If these changes have turned out to be so unpopular in practice, why didn't someone speak up *before* the Rules were amended?

Spence: Plenty of folks did speak up, but they were pretty much blown off by the Advisory Committee, the Judicial Council, a majority of the Supreme Court and the Senate.[14] Opposition to the amendments came from such diverse groups as the American Bar Association, the American Corporate Counsel Association, Defense Research Institute, Public Citizen Litigation Group, the Alliance of American Insurers, the NAACP Legal Defense Fund, American Trial Lawyers Association, Lawyers for Civil Justice, American Civil Liberties Union, and International Association of Defense Counsel.[15] In the face of nearly universal condemnation, the Judicial Conference was almost alone in its advocacy for the amendments.[16] It seemed pretty arrogant to a lot of us.[17]

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[4]KATHLEEN L. BLANER, ET AL., LITIGATION SECTION, AMERICAN BAR ASS'N, MANDATORY DISCLOSURE SURVEY: FEDERAL RULE 26(A)(1) AFTER ONE YEAR 2-3 (1996).

The absence of uniformity is reflected in the following outline:

A. Fifty-three (53) district courts have either explicitly opted out of FRCP 26(a)(1) and/or adopted a local or CJRA plan rule that differs from FRCP 26(a)(1).
   1. Twenty-one (21) of the "opt out" districts do not appear to require any form of pre-discovery disclosure either in their local rules or in their CJRA plans.
   2. Thirty-two (32) of the "opt out" districts have their own pre-discovery disclosure rules.
B. Thirty-six (36) districts have implemented FRCP 26(a)(1) in their districts.
C. Additional information is required for the remaining five (5) district courts.

COMMITTEE ON PRETRIAL PRACTICE & DISCOVERY, LITIGATION SECTION, AMERICAN BAR ASS'N, MANDATORY PREDISCOVERY DISCLOSURE: A FIRST LOOK (1994).

[5]BLANER, ET AL., *supra* note 4, at 3.

[6]*Id.* at 3-4.

[7]Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D. 229 (1994).

[8]"Mandatory prediscovery disclosure had been advocated by a few proceduralists and academics beginning in the late 1970's as a potential solution to the perceived abuses of discovery practice." BLANER, ET AL., *supra* note 4, at 1. "The impetus driving the disclosure amendment clearly involved the same forces which resulted in the passage of the CJRA—the search for ways to reduce the time expended on and the costs associated with pretrial discovery in civil cases in the federal district courts." *Id.* at 10.

[9]KAKALIK, ET AL., *supra* note 2, at xxvi.

[10]BLANER, ET AL., *supra* note 4, at 30.

[11]*Id.* at 2.

[12]*Id.* at 30.

[13]*Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 635 (1993) (Committee Notes on Rule 26(a)(2)).

[14]The House of Representatives voted to delete the disclosure provisions, but the Senate failed to act before the Thanksgiving 1993 recess and the amendments to the Rules therefore automatically became law. *See e.g.* BLANER, ET AL., *supra* note 4, at 10.

[15]*See, e.g.*, Dissenting Statement of Justice Scalia, *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 512 (1993) (joined by Justice Thomas and joined by Justice Souter as to Part II (concerning the discovery rules)) ("This revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations."); Griffin B. Bell, et al., *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GA. L. REV. 1, 29 n.110 (1992).

[16]Even the Utah State Bar Litigation Section weighed in on the issue. After a poll of its members showed that 77% (132 of 172 respondents) opposed the amendments to the discovery rules, the Litigation Section sent a letter to Senator Hatch, Chair of the Senate

Dick: Excuse me, gentlemen. I know you lawyers love this sort of esoterica, but, frankly, I'd rather be reading Nietzsche. Do you think we can discuss for a minute where we go from here?

Spence: OK, Dick. But before I can tell you what we need to do first, I need to check out whether the federal court in Chicago requires Rule 26(a)(1) disclosures. That will make a big difference in terms of what we will do and when. Unlike other lawyers, I just happen to have on hand a book that tells us which courts have adopted, and which courts have opted out of, Rule 26(a)(1). *(Spence thumbs through book.)* Uh, uhm. Let's see, now. Illinois . . . Illinois. Here it is. Oh, oh. I'm not sure which district Chicago is in; the rules are different even among courts in the same state. In the federal court for the Central District of Illinois, Rule 26(a)(1) *is* in effect and the parties may *not* agree to opt out. In the Northern District, the Rule is *not* in effect, except as ordered by the judge in specific cases. And in the Southern District, the rule *is* in effect, with the exception of Rule 26(a)(1)(c), but the parties can agree to opt out.

Nathan: Chicago is in the Northern District, Mr. Spence.

Spence: OK, then. Initial disclosures won't be required—that is, unless the judge says they will.

(Orchestra plays "Twilight Zone" theme; curtain closes.)

SCENE 3

(One month later. Spence, Dick and Nathan are sitting in Spence's office.)

Spence: Well, fellas, the judge has ordered that Rule 26(a)(1) will apply in this case. Therefore, I have asked you to bring me boxes of documents, including all of your cancelled checks. Do you have them?

Dick: Yes, we both brought our checks. But what are you going to do with them?

Spence: Well, the complaint alleged that you prepared a ransom note with an Underwood typewriter. We denied that allegation. *(Thumbing through stacks of cancelled checks.)* Aha, here is a check that we will have to produce–or at least describe—to Mr. Belli. It's made payable to Ace Typewriters and, in the lower left corner, it says, "For typewriter." That check will be relevant to the allegation about the Underwood typewriter.

Nathan: Why would we give it to *him*? Did he request it? Is there a subpoena? Is there a Rule 34 request for production of documents?

Spence: No. Rule 26(a)(1) requires that we produce, *without* a discovery request, a copy or description of all documents that are relevant to disputed facts alleged with particularity in the pleadings.

Nathan: And who decides whether a fact has been stated with particularity?

Spence: I do.

Nathan: *(Shocked.)* My own lawyer determines it? Then we insist you determine that there aren't any facts stated with particularity and at least wait until Belli asks for the documents!

Spence: But he mentions in the complaint you used an Underwood. That seems pretty particularized!

Nathan: What about notice pleading? He didn't *have* to mention the brand name of the typewriter. According to you, we're being required to produce certain documents only because a lawyer happened to draft an allegation with more particularity than required. This could mean the whole case! And just because you—my lawyer!—decide that the use of the word "Underwood" makes this a "disputed fact alleged with particularity in the pleadings." Why should a lawyer's disregard of the notice pleading provisions of Rule 8—by unnecessarily stating facts with the sort of particularity not even required in averments of fraud or mistake—result in my lawyer making me turn over documents that might never otherwise be requested?

Spence: Sorry, boys. That's the way it goes under the new rules.

Dick: Oh, yeah? Well, this is the way this goes. *(Gestures with hand.)* Adios, Mr. Spence!

Dick and Nathan exit. Door slams shut. Curtain closes.

SCENE 4

Dick and Nathan walking in park, watching the birds.

Dick: I just don't understand it, Nathan. We go to one lawyer who assures us what we tell him is privileged, then all of a sudden he turns on us, ready to tell the world things he had promised to keep secret. Then the next lawyer is going to voluntarily disclose a document that will hang us, without even being asked for it—and just because Belli happened to throw the word "Underwood" into one sentence of the complaint. Mr. and Mrs. Franks don't need a lawyer; ours seem to want to do the job for them!

Nathan: You know, Justice Scalia might be the greatest living enemy of the First and Fourth Amendments, but he was right on when he noted that the amendments to Rule 26 "would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side."[18] The new Rule truly seems to transform the lawyer's obligation to the client into a higher obligation to the opponent and the "system."

Dick: But in all fairness, don't you think the disclosure requirements will really save time and money in most cases?

Nathan: Not only is that belied by the experience of those who actually practice law, but the disclosure requirements simply add a layer of discovery. The disclosure requirements result in additional costs for the exchange of information in many cases that otherwise would not involve discovery. For instance, the new rule requires extensive disclosures, which necessarily drive up fees and other costs right in the

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Judiciary Committee, arguing that "[t]he proposed amendments to Rule 26 are inimical to the attorney-client relationship, the adversarial process, and the purported goals of reducing the expense of, and speeding up, the litigation process." Letter from W. Cullen Battle, Chair, and Ross C. Anderson, Chair-Elect, Utah State Bar Litigation Section, to Senator Orrin G. Hatch (Oct. 20, 1993), on file with *Voir Dire*.

[17]Former Attorney General Griffin Bell has described the arrogant approach of the judicial conference:

> [T]he Advisory Committee developed its automatic disclosure proposal in June of 1990 and defended it over the next two years against opposition from a wide variety of persons, including lawyers, litigants, and trial judges, who urged the Committee to withdraw or modify its proposal. A review of the Advisory Committee's deliberations reveals a process in which the Advisory Committee, pressured to reform the litigation system, finally rejected the public comments it received, instead adopting a radical and untested change to Rule 26.

Bell, et al., *supra* note 15, at 3.

beginning of a lawsuit, yet, prior to the new rule, in forty-two percent of state tort, contract and property cases, and in forty-eight percent of federal cases, no formal discovery was filed.[19] And in the federal cases surveyed, more than ten discovery requests were served in fewer than five percent of cases.[20]

Dick: And what is the effect of incurring so much expense early in the litigation?

Nathan: First of all, it *deters*, rather than *promotes*, early settlements.[21] What else can we expect, when the parties are forced to expend significant amounts of time and money in the beginning of a lawsuit, before settlement negotiations are normally pursued? *(Pulls a book out of his very large coat pocket.)* Perhaps this best sums up the failure of the new Rules:

> Rule 26(a)(1) disclosure has not had a significant impact on federal civil litigation. To the extent that it has had any measurable effects, most are negative. The [ABA Litigation Section] survey provided no evidence that, at the one year mark, disclosure had reduced discovery costs or delays. Nor do the responses suggest that disclosure has reduced conflict between adversaries during the discovery process. Consequently, during its first year of implementation, disclosure has not resulted in the systemic improvements for which its proponents had hoped.
>
> Most of the effects identified by the survey are moderately negative. Disclosure was perceived by the respondents as increasing overall discovery costs and as providing one more mechanism for parties to use as a tactical weapon . . . . [A] substantial majority of the respondents voiced strong opposition to disclosure and roughly three-quarters of the respondents said that Rule 26(a)(1) should not be continued as a rule of procedure.[22]

Dick: You know, Nathan, I liked it a lot more in the old days when you read things to me like *Crime and Punishment.* But, while you seem to have such an obsession with this issue, what do you think would be effective in cutting down delay and costs?

Nathan: That's simple. If the attorneys would meet together, set up a discovery plan, and have the court approve the plan and set discovery deadlines and a trial date, cases would move along rapidly and either settle or go to trial much more expeditiously than at present.[23]

Dick: You always seem to have the right approach, Nathan. Except, of course, when you dropped your glasses next to Robert's body—and when you typed that ransom note on your own Underwood typewriter!

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[18]Dissenting Statement of Justice Scalia, *supra* note 15, at 510.

[19]Randall Samborn, Reports: *Little Discovery Abuse*, NAT. L.J., May 31, 1993, at 3.

[20]Edwards, *supra* note 1, at 20.

[21]In the most recent ABA survey, "approximately 70% of the respondents agreed or strongly agreed that disclosure has not facilitated settlements; only about 10% of the respondents indicated that they believe disclosure has facilitated settlement." BLANER, *supra* note 4, at 38.

[22]*Id.* at 1.

[23]*See, e.g.*, KAKALIK, *supra* note 2, at 64 ("Of all the policy variables we investigated as possible predictors of reduced lawyer work hours, only judicial management of discovery seemed to produce the desired effect."); Bell, et al., *supra* note 15, at 6, 49-53; Edwards, *supra* note 1, at 21 ("Perhaps the use of [the tools provided by the Federal Rules of Civil Procedure] in a thoughtful, predictable, and limited way, together with early cooperative interaction between and among lawyers and the judge assigned to the case, can achieve the ends of streamlined discovery and increased civility . . . .").

The New Federal Discovery Rules: 26(a)(1)&(2)– A Big Step in the Right Direction

by Magistrate Judge Ronald N. Boyce

Civil procedure is at the heart of the American dispute resolution system. It is designed to accommodate a wide variety of disputes and contentions and to provide a mechanism for their orderly and just resolution. The Federal Rules of Civil Procedure have provided the core process for effective disposition of civil litigation since their adoption in 1958.[1] But as litigation changes and application of the Rules has shown the need and requirement for improvements, changes have been made. Of special concern has been how to effectively expedite civil litigation, avoid quibbling contentiousness, gather all relevant information for determining the issues, and maintain a reasonable and affordable process. The Rules' purpose is just, speedy, and inexpensive resolution of disputes.[2] Obviously, this has not always been achieved.

One significant area of complaint is discovery abuse. Some say that a crisis exists in civil dispute resolution.[3] Discovery provisions were intended to reduce the element of surprise and to get all the facts out in order to expedite dispute resolution. In some cases, however, discovery is used as a weapon to exhaust a weaker adversary, to run up costs, and to turn pretrial proceedings into the real litigation.[4] Obstreperous lawyers cause judges to expend excessive amounts of time intervening in discovery disputes.[5] The clamor for reform has grown louder, and not surprisingly, become a political issue.[6] In response, and also not surprisingly, Congress intervened in an effort to find an acceptable solution. In 1990 it enacted the Civil Justice Reform Act establishing pilot programs in federal district courts. The CJRA also required all federal district courts to implement a "civil justice expense and delay reduction plan" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[7] The CJRA expressly directed "encouragement of cost effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[8] The CJRA went beyond discovery and provided directions in other litigation management areas. It did not dictate uniformity but set up a tolerance and range of flexibility for experimentation to see what worked and what did not, with allowance for local variations.[9] This theme has been prominent in the federal approach to correcting discovery abuse.[10] The standard is one of experimentation and local accommodation.

In August 1991 the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amendments to the Federal Rules of Civil Procedure.[11] After significant debate, hearings, and discussion, the amendments were submitted to Congress for adoption, and became effective December 1, 1993.[12] Although the Rules contain several opt-out allowances permitting local variation,[13] the District of Utah adopted the Rules as proposed.

The 1993 Amendments to the Rules provide for three distinct forms of disclosure: Rule 26(a)(1) automatic disclosure, Rule 26(a)(2) disclosure of expert witnesses, and Rule 26(a)(3) pretrial disclosure.[14] In addition, Rule 26(e) requires supplementation of all disclosures. The new rules had their formulation in the scholarly work of a few distinguished and very experienced jurists.[15] Nevertheless, a debate was waged among all segments of the legal community before the adoption of the rules. The most controversial rule is 26(a)(1), the mandatory or automatic disclosure rule.[16] Based on the opt-out allowance in Rule 26(a)(1) and because of the controversial nature of the new rule, several federal districts elected to opt-out. In Utah, Rule 26(a)(1) was adopted on an experimental basis and now has been made a permanent part of the Utah federal practice.[17]

Magistrate Judge Boyce is a Magistrate Judge of the United States District Court.

[1]The Federal Rules of Civil Procedure were promulgated by authority of the Act of June 19, 1934. The current version is codified at 28 United States Code section 2072.

[2]*See* FED. R. CIV. P. 1.

[3]*See* Rogelo A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Advisory Process*, 36 B.C. L. REV. 479, 480 (1995); Charles V. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing"*, 46 HASTINGS L. J. 679, 683 (1995).

[4]Attorneys who seldom try cases in court, but who are constantly in the judicial process in the pretrial stages, refer to themselves as "litigators."

[5]*See* Lasso, *supra* note 3, at 485.

[6]Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 563-64 (1992) (describing the civil pretrial process as "time consuming, burdensome, and expensive").

[7]28 U.S.C. § 471. The District of Utah was one of the pilot districts.

[8]*Id.* § 473(a)(4).

[9]*See* Edward D. Cavanagh, *Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied By Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993).

[10]*See generally* Paul D. Carrington, New Confederacy? Disunionism in the Federal Courts, 45 Duke L.J. 929 (1996); Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 1992 ARIZ. ST. L.J. 1393.

[11]137 F.R.D. 53 (1991).

[12]146 F.R.D. 401 (1993). The Rules were transmitted to Congress by the Supreme Court. As Justice White noted, the Court accepted the work of the Judicial Conference of the United States and the committees. Justices Scalia, Thomas and Souter dissented. *See id.* at 501. Their criticism and skeptical inertia has not, however, proved to be accurate based on the experience in the District of Utah.

[13]Although legislation has been introduced to repeal the new rule changes, it is doubtful that such legislation will ever be fruitful and efforts to effect a change also have failed. Lasso, *supra* note 3, at 487 n.20.

[14]Rule 26(a)(3) is not treated in this discussion, and has proved to be uncontroversial.

[15]*See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295 (1978); William Schwarzer, *Slaying the Monster of Cost and Delay; Would Disclosure Be More Effective Than Discovery*, 74 JUDICATURE 178 (1991); *see also* Griffin B. Bell, et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992).

[16]*See* Sorenson, *supra* note 3, at 729.

[17]The trend has been a slow movement towards nationalization by federal districts opting for adoption. DONA STIENSTRA, FED. JUD. CTR., RESEARCH DIV., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Mar. 28, 1997). More than half of the

The adoption of Rule 26(a)(1) and an allied rule, Rule 26(f), imposes a higher duty to serve truth by assuring that facts pertinent to the dispute are disclosed. But Rule 26(a)(1) and the other disclosure rules are not requirements for general and unlimited discovery.[18] They address specific discovery areas. The game of hide and seek that often was the practice in the past has been eliminated. Gamesmanship is out.[19] The obligation exists to make full disclosure. Truth is paramount over advocacy.

When Mr. Anderson's talented scenario is carefully considered, what Nathan and Dick seek of Darrow and Spence is suppression of evidence and the corruption of truth. Although Darrow may not have been as sensitive to the paramountcy of truth at all times in his career, the actions of Darrow and Spence in the scenario were proper and in accord with ethics and the rules, as well as the service of justice and truth.[20] The adversary system in the discovery stage is subordinated to the obligation for truth.[21] The new rules demand a more professional posture but do not undermine any legitimate lawyer/client interest.

Rule 26(a)(1) is a legislatively directed standard for disclosure. The rule works in harmony with Rule 26(f), which mandates that counsel meet prior to the Rule 16 pretrial conference "to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case" and also to arrange for the 26(a)(1) disclosures.[22] Counsel have the opportunity to work out their differences and arrive at a mutually agreeable discovery plan. Counsel can stipulate to many of the demands of the discovery process. Absent agreement by counsel, Rule 26(a)(1) requires automatic disclosure in four areas. First, the name, address and telephone number of all persons "likely" to have "discoverable information"[23] relevant to disputed facts [24] "alleged with particularity in the pleadings, identifying the subjects of the information." There is an incentive to plead with particularity to obtain greater automatic disclosure. The particularity of pleadings also confines and informs the limits of disclosure. Second, a copy or

> ***"The adversary system in the discovery stage is subordinated to the obligation for truth."***

description "by category and location" of all "documents, data compilations, and tangible things" in a party's "possession, custody or control" that are relevant must be provided based on the particularity of the pleadings. Note that documents in the possession and control of others are not required to be disclosed. Third, a computation of damages claimed by the disclosing party must be submitted, making available for copying or inspection under Rule 34, the unprivileged documents or other evidentiary material on which the compilation is based, including material on the nature and extent of injuries suffered.[25] Finally, "any insurance agreement" that may satisfy the judgment must be made available for inspection and copying under Rule 34 standards.[26] The scope of Rule 26(a)(1) is designed to get discovery going without a request and to require disclosure of enough information to speed up the process.[27]

Has Rule 26(a)(1) accomplished the hoped-for ends? A short-term questionnaire by the ABA Litigation Section's Committee on Pretrial Practice and Discovery, suggested little effect. But approximately 35,000 requests were sent out and only 1200 responses were received, which suggests the experience level was not deep. This is corroborated by the fact that the study was made only one year after the Rule came into use. In addition, there were internal inconsistencies in the narrative responses. The report concluded the "incongruity may be a reflection of lingering hostility toward disclosure stemming from strong opposition to [automatic disclosure] when the rule was first proposed." The Litigation Section report will not support any critical conclusion.

The Rand Corporation evaluated the CJRA[28] and found no significant cost or delay reduction. The study found, however, a reduction in the expenditure of judicial time, which is important in times of crowded dockets.[29] The final Report of the Judicial Conference of the United States (May 1997) on the CJRA, supports a reevaluation of whether national uniformity should override local opt out systems.[30]

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federal district courts have adopted the 26(a)(1) provision. Some implement the rule through the CJRA plan or have variations of local rule disclosure. Ross Anderson is right that the "balkanization" of the Rules is a minefield for some attorneys. Nevertheless, this came about by the experimentation theme of the CJRA and the Rules. The time has come for nationalization and the end of local experimentation.

[18] *See United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1994) (District Court may limit discovery where appropriate).

[19] *Marchant v. Mercy Med. Ctr.*, 22 F.3d 933 (9th Cir. 1994).

[20] Recently, the spectacle in the Phillip Morris Company libel litigation case shows an aggravated case of discovery abuse. *See* Steve Weinberg, *Hardball Discovery*, 81 A.B.A. J. 66 (1995). The Texaco Company's destruction of documents during civil rights litigation also shows the adversary system at its worst in the discovery process.

[21] "The discovery rules in particular were intended to promote the search for truth that is at the heart of our judicial system." *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993).

W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895 (1996) asserts that discovery does not belong in the adversary system, that restraint of "partisan zeal" is required, and the emphasis is on "truth finding." Wendel's characterization is too encompassing. There is still room for legitimate advocacy in the discovery context. But deliberate suppression of evidence or quibbling obstructionism is not legitimate advocacy.

[22] FED. R. CIV. P. 26(f).

[23] The source of nondiscoverable, privileged or protected information need not be disclosed. *See* FED. R. CIV. P. 26(a) (advisory committee note). If a privilege is applicable to either documents or other information required for disclosure, a privilege log or other process meeting Rule 26(b)(5) standards must be used. *See* FED. R. CIV. P. 26(b)(5).

[24] An admission in an answer will foreclose the need for discovery on that item.

[25] This requires eventual and, it is to be hoped, early disclosure of medical and psychological reports. *See Harding v. Goodyear Tire & Rubber Co.*, 170 F.R.D. 477 (D. Kan. 1997).

[26] Indemnification agreements do not come under this provision. Also, there is no requirement for disclosure of calculations that must await discovery. *See Pine Ridge Recycling v. Butts County*, 889 F. Supp. 1526, 1527 (M.D. Ga. 1995).

[27] A full consideration of Rule 26(a)(1) would require discussion at length and is beyond the purpose of this article. For an in-depth discussion, see Robert Matthew Lovein, *A Practitioner's Guide: Federal Rule of Civil Procedure 26(a)—Automatic Disclosure*, 47 SYRACUSE L. REV. 225 (1996).

[28] FINAL REPORT, THE CIVIL JUSTICE REFORM ACT OF 1990, app. A (May 1997) (hereinafter "CJRA REPORT"). It should be noted that the Rand evaluation was not a general assessment of Rule 26, but a more generalized assessment of the CJRA.

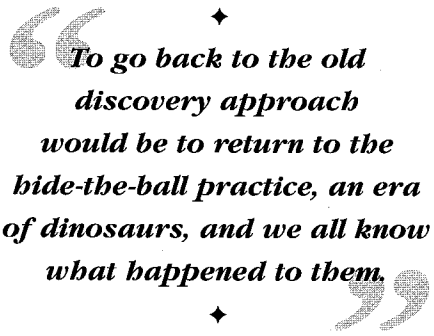
[29] *See* Federic G. Melcher, *The Positive Effect of Early Discovery Management: A Summary of the Discovery Recommendations in the Rand Report on the Civil Justice Reform Act*, 36 JUDGES J. No. 2 (1997).

[30] *See* CJRA REPORT, *supra* note 28, at 34. There is no suggestion that Rule 26(a)(1) should be discarded.

The studies are preliminary and ongoing research into discovery methods is still needed. But full assessment should not delay needed national implementation of Rule 26(a)(1).

The experience in the District of Utah has been positive. Although anecdotal, the following benefits have been observed: First, counsel generally accept the automatic disclosure requirements and act positively with a proper level of professionalism to make the process work. Second, the number of discovery disputes that require judicial resolution has been significantly reduced[31] as has the intensity of the disputes. Third, courts have granted early summary judgment in a noticeable number of cases, apparently based on critical early discovery. Also, unwarranted affirmative defense claims are more easily eliminated. Fourth, discovery periods in noncomplex litigation are often shortened. Fifth, counsel appear to be able to elect alternative dispute resolution earlier and with more accuracy. Sixth, a number of cases appear to settle earlier. Seventh, counsel are more willing to manage and resolve discovery. Arguably, not all of these observations are attributable to automatic disclosure, but the perceived positive effects of the process led the judges of the District of Utah to make automatic disclosure under Rule 26(a)(1) a permanent part of federal practice.[32] To go back to the old discovery approach would be to return to the hide-the-ball practice, an era of dinosaurs, and we all know what happened to them.

Mr. Anderson challenges the efficacy of Rule 26(a)(2), which provides for disclosure of expert witnesses when testimony is to be used under Rules 702, 703 or 705. The purpose of Rule 26(a)(2) is to provide fairness in the presentation of expert evidence and to avoid ambush by an expert.[33] Without prior notice of an expert's opinion and the basis for it, an opposing party is disadvantaged. Rule 26(a)(2) requires disclosure of the "identity" of a person "who may be used at trial" to present expert testimony and that person may be deposed. In addition, unless stipulated



or directed by the court with respect to a witness who is "retained" or "specifically employed to provide expert testimony in a case" or an employee of a party whose duties regularly involve expert testimony, a "written report prepared and signed by the witness" must be provided. The critical feature of the duty to provide a written report is whether the witness is "retained."[34] Normally, if the expert is a treating physician or fact witness who has not been retained to provide expert testimony, no report is required.[35]

The expert witness report must be full and complete.[36] The failure to comply with Rule 26(a)(2) can result in sanctions, including the preclusion of the expert's testimony.[37] The report obligations apply to direct and rebuttal experts and the reports are subject to Rule 26(e) supplementation. The report requires the disclosure of the witness's opinions and the basis and reasons therefor, the data or information "considered" by the witness,[38] exhibits to be used as a summary or in support for the opinion, qualifications (including publications within the preceding ten years), compensation for the testimony, and cases in which the witness has testified (within four years). The scope of the disclosure eliminates the need for interrogatories.[39]

One of the purposes of the rule is to reduce the need for depositions. If the report is complete and precise, a subsequent deposition is often redundant.[40] The report can shorten any subsequent deposition and focus attention more particularly on specific areas of inquiry.[41] The costs of the report are balanced. The proponent pays for the expert report. The rebuttal party pays for the rebuttal expert's report. The party wishing to take a deposition must pay for the deposition. The deposition should be less expensive because of the report. Costs are balanced and shifted.[42]

Will the report eliminate the use of expert witness depositions?[43] To a great extent, the reluctance to use a report in lieu of a deposition is a matter of insecurity of counsel, and with time there should be a greater weaning away from the deposition security blanket. A second problem is opposing counsel's unwillingness to make counsel offering the expert

[31]Justice Scalia's dire prediction that another level of dispute would result from the new rules has not materialized in Utah. In fact, disputes as to Rule 26(a)(1) disclosures have been almost non-existent.

[32]States have also adopted the same approach. Colorado, Alaska, Arizona and Nevada are among those states that have accepted the general disclosure approach with local variations. *See* Gerald G. MacDonald, *Investigating Alternative Approaches to Federal Discovery Reform Initiations Under Rule 26(a)(1)*, 36 JUDGES J. No. 2, at 4 (1997); Court Delay Reduction Comm., National Conference of State Trial Judges, Jud. Div. Am. Bar Ass'n, *Discovery Guidelines Reducing Cost and Delay*, 36 JUDGES J. No. 2, at 9 (1997).

[33]*See Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980) (failure to make discovery concerning expert witness rendered expert evidence unfair in light of liberal admission standards of Fed. R. Evid. 703, 705); *see also State v. Clayton*, 646 P.2d 723, 727 (Utah 1982) (opinion of Durham J., recognizing need for discovery access to an expert's opinion in light of liberal use of expert testimony).

[34]*See* Lovein, *supra* note 28, at 260.

[35]*See Salas v. United States*, 165 F.R.D. 31 (W.D.N.Y. 1995); *Wreath v. United States*, 161 F.R.D. 448 (D. Kan. 1995). Also, the rule does not apply to Rule 701 witnesses. *See* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 111 (1996).

[36]*See Smith v. State Farm Fire & Cas. Co.*, 164 F.R.D. 49 (S.D. W. Va. 1995).

[37]*See* FED. R. CIV. P. 37(c)(1); *Walsh v. Emergence One, Inc.*, 26 F.3d 1417, 1420 (7th Cir. 1994); *China Resource Prods. Ltd. v. Fayda Int'l, Inc.*, 856 F. Supp. 856 (D. Del. 1994). The provisions of Rule 26(a)(2) are subject to a "harmless" evaluation. *See Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir. 1996).

[38]This rule requires more than just the disclosure of information relied on and it expands the duty of disclosure. It enables a party to know if an opposing expert is selecting limited or questionable material for an opinion. *See* Comment, 69 TEMPLE L. REV. 451, 478 (1996).

[39]*See Lawrence v. First Kansas Bank & Trust Co.*, 169 F.R.D. 657 (D. Kan. 1996).

[40]Absent a stipulation or court order, a deposition may not be taken until a report is provided. *See* FED. R. CIV. P. 26(b)(4).

[41]The judges of the District of Utah who were surveyed (not all judges could be contacted) were of the opinion that the report was much more helpful to the court than a deposition. Depositions of experts are often disjointed, poorly planned, discontinuous and uneven.

[42]Robert D. Cooter & Daniel L. Rubinfeld, Reforming the New Discovery Rules, 84 GEO. L. J. 61, 69 (1995).

[43]*See* Robert Pass, *Big Changes in the Federal Rules*, 20 LITIG. No. 4, at 10, 14 (1994).

report fully comply with the completeness requirements of Rule 26(a)(2). Both of these problems should be cured over time as attorneys become more familiar with the utility of the rule and adapt to its use. The expert witness disclosure reports have other benefits. If used in conjunction with an oath or affidavit, the report is an excellent and complete summary judgment document. The report assists in cross-examination and impeachment. It can be an admission of a party.[44] In appropriate cases, a report may alert a party to the need for a motion for exclusion of the expert opinion because of its deficiency[45] or the expert's prior affiliation with a party. Rule 26(a)(2) has been widely adopted by the federal courts and there is unlikely to be any significant change in the rule. Eighty districts have adopted the rule as proposed, four others have adopted the rule with revisions, and three districts have adopted the rule in substance under a CJRA plan or local rule.[46]

The new federal discovery rules[47] provide a means to avoid discovery conflicts, reduce delay, and save court time. They have worked well in the District of Utah. The CJRA Final Report is positive. Attorneys should learn the rules and use them effectively. Federal judicial officers must act positively to implement changes to reduce discovery abuse and make the system work.[48] In that way, the administration of civil justice will be improved and dinosaurs will be in Jurassic Park, not civil court.

[44] *See* FED. R. EVID. 801(a)(2)(B)&(C).
[45] *See* FED R. EVID.104(a); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
[46] *See* STIENSTRA, *supra* note 17.
[47] Obviously not all the discovery changes have been discussed.
[48] *See* John K. Narsutis, *An Answer to Litigation Abuse: Active Docket Control Helps Against Deliberate Delays*, 34 JUDGES J. No. 4 (1995); Melcher, *supra* note 29.

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PRACTICE POINTERS

Representing Persons With Mental Disabilities

by Linda V. Priebe

Your newest client, Paul Miller, approaches you for help because his small business is failing. He is generally a competent business person, and for the most part his business is growing and profitable. Periodically, Mr. Miller goes on incredible buying sprees for a few days or weeks. He grossly overstocks his inventory and contracts for extensive remodeling and custom equipment. These buying sprees sink him so heavily in debt that his business teeters on the edge of bankruptcy. Mr. Miller also has periods when he is so full of guilt that he considers abandoning his business.

His personal life follows much the same pattern. For months, events within his family occur at a regular pace. Then Mr. Miller begins working around the clock, getting by with one or two hours of sleep per night. He is filled with grand plans for his business and personal lives, and appears fully energized to accomplish those plans.

If you are questioning whether Mr. Miller may have a mental disability, you are correct. Mr. Miller's behavior displays symptoms of a major mental illness commonly referred to as bipolar disorder. Bipolar disorder is characterized by dramatic mood swings, from extreme mania to abject depression. Major mental illness, such as bipolar disorder, is one of several categories of mental disabilities that may have an effect upon an attorney's representation of a client.

Common Types of Mental Disability

The term "mental disability" includes several types of mental disorders: mental retardation, developmental disability, mental illness, and/or traumatic brain injury. Persons with mental retardation are characterized by below average intellectual or cognitive functioning, which becomes evident during the formative developmental years. Developmental disability (including mental retardation) is defined under federal law to include severe mental impairments manifested before the age of twenty-two which substantially limit one's ability to function in three or more of seven major life areas. The seven major life areas are independent living, economic self-sufficiency, language, learning, self-care, self-direction, and mobility.[1] Mental illnesses include such things as schizophrenia and bipolar disorder, and are generally thought to result, at least in part, from some type of chemical imbalance in the brain.[2] Mental disability also may result from traumatic brain injury caused by physical damage to the structures of the brain from automobile collision, stroke, asphyxiation, or the like.

Common Legal Implications of Types of Mental Disability

An attorney must be aware of the type of mental disability (*i.e.*, traumatic brain injury versus mental illness) that a client may have to effectively represent that client. The different types of mental disabilities can have very different legal implications for your client. For example, a common issue involving persons with mental disabilities is whether the person was legally competent at a particular point, such as at the signing of a will or contract, or during the commission of a crime.

In persons with mental retardation, developmental disabilities, or traumatic brain injury, the person's mental condition is the result of something that has caused a long-term effect on cognitive functioning. Medical science has no treatment that reverses the cognitive effects of mental retardation, developmental disability, or traumatic brain injury. Persons with these types of mental disabilities may meet the legal criteria for adjudication of incompetence, depending upon the severity of their disability and the complexity of the subject matter requiring decision or action. A person with a mental disability may simultaneously be competent for one purpose and incompetent for another. The level of cognitive functioning required for effective decision-making regarding a subject such as one's criminal defense may be less than that required for decisions such as choosing where to live. The level of competence of a person with mental retardation, developmental disability, or traumatic brain injury may also improve through education about the legal system or other training.

In contrast to the long-term nature of these disabilities, the mental condition of a person with a mental illness, such as Mr. Miller, naturally fluctuates. As a result, persons with mental illnesses may be completely free of symptoms at one time, yet be significantly impaired (to the point of meeting the legal criteria for incompe-

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[1] 42 U.S.C. § 6001(8) (1987).

[2] The American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) ("DSM IV") is the universally recognized guide to mental disabilities.

tence) a few weeks or months later.

This fluctuation of mental condition is thought to relate in part to changes in body chemistry, and thus brain chemistry. In addition, it is possible to modify the brain chemistry of many persons with mental illness through drug therapy. This treatment may reduce, and in some instances eliminate, the symptoms of mental illness. As a result, a person with a mental illness whose condition has deteriorated (commonly referred to as "decompensation") to the point of incompetence may be capable of having his or her competency restored quickly, either as a result of the natural cycle of the mental illness or because of drug therapy.[3]

Service Systems for Persons With Mental Disabilities

The type of mental disability also implicates the type and source of public services to which a client may be entitled. Persons with mental retardation, developmental disabilities, or traumatic brain injury in Utah are generally eligible for services from the Utah Division of Services for People with Disabilities. The DSPD's in-patient facility is the Utah State Developmental Center in American Fork.[4] Those with mental illness are generally eligible for services from the county local mental health authorities (such as Valley Mental Health) and the Utah Division of Mental Health. The Division of Mental Health's in-patient facility is the Utah State Hospital in Provo.

It is fairly common for the public, including legal professionals and some social service providers, not to recognize the distinctions between the various types of mental disability, and to think of them all as "mental illnesses." For example, many legal professionals are unaware that Utah law provides separate mechanisms for involuntary civil commitment of persons with mental illness to local mental health authorities,[5] and involuntary civil commitment of persons with mental retardation to the DSPD.[6]

Such confusion appears in Utah's criminal justice system, and frequently results in persons with mental retardation or traumatic brain injury being sent to the Utah State Hospital for evaluation of their competency to assist with their defense.[7] If professionals at the Utah State Hospital find such a person incompetent to assist with her legal defense, she commonly remains at the hospital for treatment to restore her competency. But, as explained above, if the person has mental retardation or a traumatic brain injury, it is unlikely that

"It is fairly common for the public, including legal professionals and some social service providers, not to recognize the distinctions between the various types of mental disability, and to think of them all as 'mental illnesses.'"

treatment with medications for mental illness, such as that provided at the Utah State Hospital, will be effective in restoring competency. As a result, such a person is at risk of being confined to the Utah State Hospital for an extended period without effective treatment or services. This gives rise to significant questions implicating civil rights law and professional standards.[8]

How to Determine the Type of Mental Disability

The question of whether a person has a mental disability is very delicate. Because mental disability carries a stigma in our society, it is important that practitioners be sensitive to the client's potential reluctance to disclose the existence of a mental disability. Before asking a client whether he has ever been diagnosed with a mental disability, be sure you have fully explained, in plain, clear language, the nature of your role. In particular you should stress your ethical obligations of loyalty, zeal, and confidentiality, including the exception for disclosures necessary to effectively represent the client.[9] You also should explain to the client that a person's medical condition, and especially mental condition, is likely to be brought up in any legal dispute, and to perform effectively, you must know whether the client has ever been diagnosed with a mental disability and what treatment and/or services the client has received.

If you find it difficult to communicate meaningfully with your client, it is possible your client has a communication impairment rather than, or in combination with, a mental disability. If effective communication does not occur, despite your efforts to use plain language, ask your client for preferences regarding alternative forms of communication. These might include using an interpreter or obtaining assistance from someone who knows the client's communication style.

If a client has not previously been diagnosed with a mental disability but presents you with indications that such a disability may exist, suggest that the client be evaluated by a qualified professional. If you suspect the disability is a mental illness, a clinical psychologist or a psychiatrist can conduct the appropriate evaluation.[10] If you suspect that the disability is mental retardation, developmental disability, or traumatic brain injury, look for a Qualified Mental Retardation Professional. QMRPs are clinical psychologists who have particularized training and expertise with regard to developmental disabilities, mental retardation, and traumatic brain injury. Few

[3]The forced use of mental health medications in order to restore the competency of a criminal defendant to stand charges has significant constitutional implications. *See Riggins v. Nevada*, 504 U.S. 127 (1992); *Woodland v. Angus*, 820 F. Supp. 1497 (D. Utah 1993).

[4]Formerly known as the Utah State Training School.

[5]*See* Utah Code Ann. §§ 62A-12-234 to -235.

[6]*See* Utah Code Ann. §§ 62A-5-101, 5-302, 5-309 (1988).

[7]Lawyers must realize that a person with a mental disability who has been found incompetent to assist with his or her criminal defense may also be incompetent for other purposes, such as serving the sentence imposed or providing informed consent to mental health treatment.

[8]*See, e.g., State v. Murphy*, 760 P.2d 280 (Utah 1988).

[9]*See* Utah R. Prof. Conduct 1.14 (proposed comment).

[10]Accepted professional standards for evaluations of mental illness include the following elements:

- Taking the client's social and mental history;
- Performing a standard mental status examination, based upon a personal interview with the client and testing; and
- Making a diagnosis, prognosis, and recommendations for a plan of treatment and services in the most appropriate least restrictive manner.

mental health professionals are QMRPs, but if your client needs such an evaluation, it is worth the effort to find a good one.[11]

The Presumption of Competence

If the example of Paul Miller, a person with a major mental illness, surprised you because of Miller's ability to function in society, you are not alone. Many people are surprised to learn that persons with significant mental illnesses are capable of functioning at very high levels in our society much of the time.[12] Unfortunately, the stigmas that have historically existed in our society continue. But clinical professionals' understanding of mental disabilities has increased significantly since the time when widespread institutionalization was the norm and when our society failed to recognize the unique talents and abilities of all persons with disabilities.

Fortunately, over the last few decades there has been an explosion in the development of legal policy recognizing the rights of persons with mental disabilities. One significant legal development in virtually every state is that persons with mental disabilities are presumed competent unless legally adjudicated otherwise.[13] Even if a person is incompetent in fact, he will not be considered incompetent in law unless a court has so adjudicated. To the great surprise of most people not regularly involved in disability law, the presumption of competence extends also to persons who have been involuntarily civilly committed.[14]

In Utah, adjudication of a person's mental competence generally occurs in a guardianship proceeding.[15] In those proceedings, evidence of the proposed ward's capacity to protect his or her personal and financial interests will be presented and, if warranted, a guardian will be appointed to protect the ward's interests. The guardian is then the legally authorized representative of the incompetent person.

Utah Rule of Professional Conduct 1.14: Client Under a Disability

At some time in your career, you are likely to encounter a question regarding a client's mental condition. Fortunately, Utah Rule of Professional Conduct 1.14 recognizes that potential:

✦

"Many people are surprised to learn that persons with significant mental illnesses are capable of functioning at very high levels in our society much of the time."

✦

> When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority,[16] mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client.[17]

This language is consistent with the "normalization principle" used in the social services field, and entitles a client with a disability to the same representation as clients without disabilities: an attorney who is diligent, competent and communicative.[18] If the client does not have a guardian, the attorney must represent the client's expressed desires, regardless of whether the client has a mental disability, and must refrain from substituting the attorney's judgment for that of the client. The proposed comment to Rule 1.14, recently distributed for public comment, also recognizes that a client's incompetence for one purpose does not constitute incompetence for all purposes. The proposed comment admonishes attorneys to respect the decisions of a client with a mental disability regarding those subjects the client is able to understand and deliberate about.[19]

Section (b) of Rule 1.14 addresses the situation in which the attorney believes that the client may be incompetent regarding the subject matter of the representation. It states:

> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own *best* interest.[20]

The word "best" has been emphasized in the above quote because the version of the rule distributed for comment deletes that word from the rule. The proposed comment specifically states "A client who is making decisions the lawyer believes are ill-considered is not necessarily unable to act in the client's own interest."[21]

The proposed comment points out that the action taken should be the least restrictive available under the circumstances, noting that full guardianship is a serious

[11]You can obtain referrals to QMRPs in private practice in Utah by contacting the DSPD.

[12]Some studies of the general population estimate that only 25% of the population is unaffected by some type of mental impairment, and the remaining 75% are evenly divided into mild, moderate and significant impairment.

[13]The proposed Comment to Utah Rule of Professional Conduct 1.14 also embodies the presumption that a person with mental disabilities is competent to assist with her legal representation unless formally adjudicated incompetent.

[14]This is true unless there has been a separate adjudication of incompetence. *See* Utah Code Ann. § 62A-12-245(c) (1993); *see also Mills v. Rogers*, 457 U.S. 291, 298-99 n.16 (1982) (the United States Supreme Court assumed that involuntarily committed mental patients retain a constitutional liberty right to refuse involuntary treatment with anti-psychotic drugs; the constitutional right to refuse treatment presumes the patient's competence by allowing the choice to accept or reject treatment); *but see Jurasek v. Payne*, 959 F. Supp. 1441 (D. Utah 1997) (involuntarily civilly committed mental patients are legally incompetent). The *Jurasek* decision is on appeal to the Tenth Circuit Court of Appeals.

[15]*See* Utah Code Ann. § 75-5-303 et seq. (1988). Another overarching principal in disability law is that any limitations on the autonomy or rights of persons with mental disabilities should be accomplished in the least restrictive manner. That principal is also recognized in Utah law in the statutory preference for limited guardianships over full guardianships. *See id.* § 75-5-304(2). In addition, there are other, less restrictive, alternatives to limited guardianship, including the next friend, guardians ad litem, powers of attorney, representative payees, close relatives and friends, self-advocacy, citizen advocacy, and protective services such as the Utah Long Term Care Ombudspersons, Child or Adult Protective Services, and the Disability Law Center.

[16]At least one commentator has expressed concern over Rule 1.14's coupling of the status of a child with that of a person with a mental disability, fearing that it may perpetuate the stereotype of persons with mental disabilities as childlike. *See* Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 REV. L. SOC. CHANGE 609, 619 n.49 (1989-90).

[17]UTAH R. PROF. CONDUCT 1.14(a) (1995).

[18]Herr, *supra* note 16, at 619.

[19]*See* UTAH R. PROF. CONDUCT 1.14 (proposed comment).

[20]UTAH R. PROF. CONDUCT 1.14(b)(1995) (emphasis added).

[21]UTAH R. PROF. CONDUCT 1.14 (proposed comment).

and drastic deprivation of a client's rights. The proposed comment suggests a guardian ad litem as an alternative.[22] The proposed comment further points out that in limited emergency circumstances (such as eviction), an attorney may be authorized to make decisions on behalf of a client. The proposed comment cautions, however, that the attorney should take steps for formal appointment of a legal representative after the emergency has passed.[23] It also points out that in situations in which an attorney represents a guardian, rather than the ward, and becomes aware that the guardian is acting adversely to the ward's interest, the attorney may have an obligation to prevent or rectify the guardian's misconduct.[24]

The proposed comment concludes that disclosure of a client's disability in legal proceedings could adversely affect the client. Unfortunately, no guidance in resolving that difficulty is provided. The proposed comment merely points out that the lawyer's situation in such cases "is an unavoidably difficult one."[25]

The proposed comment to Rule 1.14(b) fails to note that when an attorney seeks guardianship for a client, there may be a conflict of interest between the client's expressed desires and interest in autonomy and the attorney's view of what is in the client's best interest. In the event that the attorney files a petition for guardianship of the client, the attorney likely would be prohibited from continuing representing the client under the Utah Rules of Professional Conduct governing conflict of interest.[26] An attorney who reasonably believes that the client cannot adequately act in his or her own interest may want to first consult with an appropriate clinician. If the clinician confirms that the competence of the client is in doubt, then the attorney could inform an appropriate person (such as a family member), entity (such as Adult Protective Services), or court of the potential need for a guardian. The attorney thereby would avoid becoming the proponent of the guardianship petition, and should defend the client in the guardianship proceedings to prevent the client's decision-making authority from being limited any more than is absolutely necessary.

✦

"[W]hen an attorney seeks guardianship for a client, there may be a conflict of interest between the client's expressed desires and interest in autonomy and the attorney's view of what is in the client's best interest."

✦

Conclusion

Mental disability law combines fascinating issues of constitutional law, medical science, and professional standards. As the body of law and clinical understanding continues to grow, it is likely that all legal practitioners will, at some point, encounter a circumstance involving mental disability law.[27] A general understanding of mental disabilities and their causes is important for practitioners when they encounter issues involving mental disability law.

[22] *See id.*

[23] UTAH R. PROF. CONDUCT 1.14 (proposed comment).

[24] *See id.*

[25] *Id.*

[26] UTAH R. PROF. CONDUCT 1.7 (1995).

[27] For more in-depth information, the author recommends the comprehensive legal treatise "Mental Disability Law: Civil and Criminal" by Professor Michael L. Perlin of New York Law School, available through Lexis Law Publishing, Charlottesville, Virginia. The Disability Law Center ((801)363-1347) also is a source of technical support to attorneys in Utah.

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POINT/COUNTERPOINT

The Case for Licensing Paralegals

by Shelly A. Sisam

Although many issues come to mind in considering whether paralegals should be licensed, this discussion will not address how the shift to licensure should occur, for that is an issue still to be debated. Instead, I will focus on the reasons why paralegals, also commonly referred to as legal assistants,[1] should be licensed. Two goals are common to nationwide efforts to license paralegals. First, there is an urgent need to increase access to justice for low and moderate income people. Second, the public must be protected.

Access to Justice

Courts and Bar associations throughout the country are debating the means by which legal representation can be made more accessible to people with low and moderate incomes. One proposal involves using paralegals for work now being performed exclusively by attorneys, on the theory that paralegal time is less expensive than attorney time.

> ***"When adequate protections for the public are in place, non-lawyers have important roles to perform in providing the public with access to justice."***

The Oklahoma Supreme Court recently identified duties that may properly be performed by a legal assistant under the supervision of an attorney:

1. Interview clients
2. Draft pleadings and other documents
3. Carry on legal research, both conventional and computer aided
4. Research public records
5. Prepare discovery requests and responses
6. Schedule depositions
7. Summarize depositions and other discovery responses
8. Coordinate and manage document production

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[1] In 1984, the National Association of Legal Assistants ("NALA") adopted the following definition of "legal assistants":

> Legal Assistants (also known as paralegals) are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANTS, Sept. 1977. This broad definition reflects the diverse nature of the work performed by paralegals, and emphasizes the importance of the paralegal working under an attorney's supervision.

9. Locate and interview witnesses
10. Organize pleadings, trial exhibits and other documents
11. Prepare witness and exhibit lists
12. Prepare trial notebooks
13. Prepare for the attendance of witnesses at trial
14. Assist lawyers at trial

Taylor v. Chubb, 874 P.2d 806 (Okla. 1994). Paralegal programs certified by the American Bar Association maintain curricula that meet high professional standards, and usually offer intensive training in each of these areas. Paralegals trained on the job are also trained, out of necessity, in many of the same areas.

Well-trained paralegals can be used more efficiently and effectively if they are allowed to assist lawyers in these areas. In turn, their assistance can allow the attorney time to increase contact with clients, as well as time to develop the substantive legal issues in the case. This all computes to lower the cost of legal representation, and arguably improves its quality.

Protection of the Public

The American Bar Association's Commission on Non-Lawyer Practice has published an as-yet unadopted report on licensing paralegals. *See* ABA Comm'n on Non-Lawyer Practice, Non-Lawyer Activity in Law-Related Situations: A Report with Recommendations. The Report notes, "The protection of the public from harm arising from incompetent and unethical conduct by persons providing legal or law-related services is an urgent goal of both the legal profession and the states. When adequate protections for the public are in place, non-lawyers have important roles to perform in providing the public with access to justice." The report further notes that "the net effect of regulating the activities will be a benefit to the public."

Did you know that many people receive legal advice and representation from unregulated non-lawyers? For example, federal regulations permit non-lawyers to represent people in administrative proceedings; the representative need not be an attorney until the case reaches the appeal stage. Additionally, legal advice is often offered by neighbors, friends, the media, religious advisors, teachers, co-workers, counselors, computer networks, self-help books and software, owners and employees of businesses, and employees of unions and government agencies. Although most of these sources can never be addressed with a licensing program, licensing paralegals is a step in the right direction to protecting the public by establishing training requirements and regulations, and monitoring and disciplining legal assistants who offer assistance, advice, and counsel.

Conclusion

The American Bar Association Report states, "The factual findings of the Commission demonstrate that non-lawyers, both as paralegals accountable to lawyers and in other roles permitted by law, have become an important part of the delivery of legal services, and that their expertise and dedication to the system have led to improvements in public access to affordable legal services." ABA Comm'n on Non-Lawyer Practice, Non-Lawyer Activity in Law-Related Situations; A Report with Recommendations. Obviously, well-trained paralegals have become an essential part of the legal team. Licensing paralegals will formalize their professional standing, provide uniformity in identifying those who are qualified, establish state-wide standards of professional competence, and provide greater uniformity in the tasks for which legal assistants are used.

A Second Look at Licensing Paralegals

by Betty C. Porter and Karra J. Porter

Write an article opposing the licensure of paralegals to meet the needs of the poor? Sure; then we'll write an article opposing medical care for the poor. We all know that attorneys only resist these proposals to keep their pockets lined.

That's what we thought when we began delving into this issue, but it's not as clear as it may seem at first blush. Examining the issue in greater depth reveals some legitimate concerns.

First, the underlying premise that vital legal needs should be met by non-lawyers merely because a recipient is indigent is philosophically troublesome. "The importance of having 'Equal Justice Under Law' cannot be over emphasized. The legitimacy of our justice system rests on this premise."[1]

With that axiom in mind, it seems incongruous to propose that the legal needs of the less fortunate be met through persons with limited legal training. Such a proposal may allow us to "drift to a two-tier system of justice where poor and middle class Americans cannot redress wrongs or pursue valid legal claims."[2]

If the needs of the poor are indeed worthy of societal intervention, alternatives designed to increase accessibility to lawyers should first be analyzed and, if appropriate, implemented. Those proposals include increased funding for legal services, mandatory pro bono requirements, centralized processing for agencies serving low-income clients, "Quick Court" technology, adjunct court personnel to assist individuals with court processes in specific areas, and greater education of the public about their legal rights.

Exploration of such programs could be impeded by prematurely implementing paralegal licensing. For example, it is not difficult to envision a lawyer concluding that the need to perform pro bono work has been lessened by the licensure of paralegals.

Beyond the philosophical difficulty, the notion of licensing paralegals as a means of assisting the poor raises other questions. Perhaps foremost: Will it meet the need? It is difficult to respond to that question, because in our view the need has not been clearly identified. It is simple enough to say–indeed, it seems unassailable–that the poor and middle class do not have sufficient access to legal services. But do we have sufficient information about the system's failures to determine whether they can be addressed by licensing paralegals?

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Relying principally upon the ABA Comprehensive Legal Needs Study, the Task Force report identifies categories of needs experienced by some forty percent of low-income households nationwide.[3] As reported by the Task Force, the CLNS study found that, when faced with a legal problem, "about 30% took legal or judicial action. Almost 40% took no action at all, and another 24% relied entirely on their 'own efforts.' The remaining eight percent sought the assistance of a non-legal third party."[4]

The report also observed that, "in the majority of almost all instances, therefore, households did not turn to the justice system and often took no action at all. . . . The most frequently given reason (28%) for taking no action was a belief that nothing could be done."[5]

Other reasons for legal inaction identified in the ABA Commission report were "a matter of individuals' perceptions about their problems: [E]ither they view their problems as not serious enough to justify obtaining legal assistance; they believe that their situation does not warrant paying what they expect to be charged; or they suspect that their problem will cost more to resolve than they can afford."[6] The report also concluded that many low-income individuals do not seek legal recourse because they believe lawyers are not available at affordable rates and that for specialized issues few lawyers have the experience needed.[7] Such individuals also were concerned that there are too few lawyers fluent in languages other than English who could represent non-English speaking clients.[8]

It is difficult to assess whether many of these concerns would be addressed by licensing paralegals. Licensure proposals have, to date, been rather vague. For example, the Task Force report recommends that "the Bar pursue some type of licensure of legal assistants which would allow them to provide limited legal service under the general supervision of an attorney or the Bar."[9] The ABA Commission report, although more detailed in its analysis, states that "the most important conclusion of the Commission is that each

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[1] PRELIMINARY FINAL REPORT OF THE ACCESS TO JUSTICE TASK FORCE OF THE UTAH STATE BAR ("Task Force report"), at 30 (1997).

[2] ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS, MINORITY REPORT OF SEVIER & WARNER, at 165 (August 1995).

[3] Task Force report at 11-14.

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *Id.* The Commission report did not analyze the extent to which consumers' views on affordability of legal services are affected by personal priority. We are reminded of a former associate of Karra's who, when callers complained about the estimated cost of a divorce, asked: "How much did you spend on the wedding?" Often, callers did not place the same value on ending a marriage as they did on beginning it. We recognize, however, that for many individuals, unaffordability of legal services is a matter of inability, rather than choice.

[7] Task Force report, at 15.

[8] *Id.*

[9] Task Force report, at 19.

state should conduct its own careful analytical examination . . . to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction."[10]

Another issue not clarified by current proposals is which paraprofessionals will be licensed and for which activities.

> There are three general categories of paralegal practice. A traditional paralegal works with accountability to an attorney. The traditional paralegal is usually a full or part time employee of a law firm, corporation, or government agency working with attorneys. A freelance paralegal (sometimes referred to as a 'contract paralegal') works as an independent contractor with accountability to an attorney . . . . An independent paralegal provides services to clients with regard to a process in which the law is involved, and for whose work no attorney is accountable.[11]

If the notion is merely to regulate the activities of traditional and contract paralegals, the proposal likely would have negligible impact on the legal needs of the poor. To our knowledge, paralegals already perform a wide range of legal tasks, such as drafting discovery responses, pleadings, and contracts, analyzing legal documents, researching legal issues, assisting at trial, and other services limited only by lawyers' imaginations. Such delegation poses no substantial risk to the public because lawyers retain final responsibility for approving and monitoring the paralegals' activities. In other instances of paralegals performing quasi-legal work for employers outside of a traditional law firm, the employing entity generally remains financially and legally responsible for the work as well.

Because licensure of such paralegals without expanding permitted activities seems merely punitive and unlikely to substantially affect the legal needs of the poor, other proposals involve granting greater autonomy to paralegals or licensing independent paralegals, who generally would not work under the supervision of an attorney. That concept has its own concerns, as discussed below. Before reaching that issue, however, we should examine whether the proposal would substantially address the reasons that lower-income people do not seek legal services.

It is difficult to see, for example, how expanding paralegal activities would change laypersons' perceptions of their legal rights or help them realize in the first instance that "[some]thing could be done."[12] Paralegal licensure also would do little to alleviate the problems of attorneys with insufficient knowledge of specialized areas of law, or the shortage of bilingual lawyers. Paralegal licensure may increase the likelihood of an individual obtaining representation for matters with small recovery potential or insignificant fees, but even this conclusion is speculative.

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Aside from the question of whether licensure would significantly address the legal needs of the poor, expanding paralegal autonomy raised other concerns. A fundamental risk with greater paralegal independence is that many critical legal principles faced by the poor are too complex for persons not fully trained in the law. In *Utah State Bar v. Summerhays & Hayden*,[13] the Supreme Court deemed the representation of persons injured in automobile accidents by public adjusters the unauthorized practice of law because it

> necessarily requires legal knowledge and skill and the application of abstract and complex legal principles–such as comparative fault, the elements of negligence, and rules governing liability–to the concrete facts of a particular claim . . . [as well as] legal principles that may affect a claimant's legal ability to pursue the claim, such as statutes of limitation, jurisdictional issues, and affirmative defenses.[14]

In *Summerhays*, the court concluded that the adjusters' actions posed a risk to the public welfare because third-party tort claims against insurance companies are often complex and necessarily require education that most laypersons do not possess.[15] "Public adjusters could jeopardize an injured person's legitimate tort claim against an insurance company due to lack of education and experience," the court wrote. "Such lack of experience can easily result in failure to assert appropriate legal theories and failure to meet procedural requirements."[16]

Applying the Supreme Court's concern about the complexity of legal issues to the present discussion highlights a problem with increased paralegal autonomy. The types of legal needs faced by the indigent, as identified in the Task Force report, are significant:

- *Household/Real Property* (unsafe rental housing, problem with landlord, real estate transaction, ownership problems, condo/coop boards, mobile home problems, tenant problems, utilities problems, property rights, housing discrimination)
- *Community/Regional* (environmental health, opposition to proposed facility, inadequate municipal services, inadequate policing)
- *Family/Domestic* (marital dissolution, prenuptial agreement, elder abuse, domestic violence, child support, state intervention in family)
- *Children's Schooling* (enrollment,

[10]Commission report, at 4.

[11]National Federation of Paralegals Associations, *Unauthorized Practice of Law* (Dec. 10, 1997) <http://www.paralegals.org/Development/upl.html>.

[12]Task Force report, at 15.

[13]905 P.2d 867, 870 (Utah 1995).

[14]*Id.*

[15]*Id.* at 872.

[16]*Id.*

discipline, poor quality education)

- *Wills/Estates* (wills, estate planning, estate administration, inheritance, vulnerable adult, advance directives)
- *Employment* (hiring discrimination, workers and unemployment compensation, pensions, compensation problems, fringe benefit problems, discrimination on job, threats to privacy, working conditions, farmworkers problems, self-employed problems)
- *Difficulties with Public Benefits*
- *ADA Related Discrimination*
- *Health/Health Care* (barriers to health care, problems with charges or payments, violations of patients rights, environmental health problems)
- *Personal Finance/Consumer* (problems related to insurance, tax, obtaining credit, creditors, bankruptcy, contracts, consumer fraud, defective products, debt collection)
- *Personal/Economic Injury* (suffered injury, charged with causing injury, victim of slander or libel)
- *Civil Liberties* (search and seizure, speech, religion, private interference with rights)
- *Immigrants/Non-English Speaker* (language related needs, immigration needs, exploitation)
- *Native Americans*
- *Military Personnel/Veterans* (military service needs, veterans needs)[17]

Many, if not most, of the identified areas are at least as complicated as auto accident tort claims. Is it realistic to assume that someone not fully trained in the law will recognize potential ERISA or ADA or IDEA or FDCPA claims or defenses that may arise out of seemingly routine matters?

Combined with the complexity of many legal needs is a concern about quality of service. Most proposals regarding paralegal licensure contemplate "grandparenting" clauses for practicing paralegals, presumably for due process considerations. Presently, however, there are no minimum qualifications to be a paralegal. Although some employers require a college degree and/or certification, many do not. It is hardly controversial to note that paralegals vary widely in their education, experience, and competence.

Furthermore, even if practicing paralegals were not exempt from licensing requirements, concerns about legal representation by paralegals are still unavoidable. To become licensed to practice law, a lawyer generally must obtain a four-year college degree and achieve a sufficiently high score on a law school admission test to be admitted to an accredited law school. The lawyer must complete three years of intensive study, the purpose of which is to learn to understand and apply legal reasoning and analysis to all legal problems. Even after those hurdles have been met, applicants in Utah still must pass a difficult two-day bar examination and ethics exam. In most cases, a paralegal–who has not had those seven years of preparation–simply cannot be expected to provide representation comparable to that expected of a lawyer.

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"In most cases, a paralegal . . . simply cannot be expected to provide representation comparable to that expected of a lawyer."

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To lessen concerns about quality of representation, certain basic safeguards presumably would be implemented which would, in turn, increase the cost of paralegal services. Requiring paralegals to complete sufficient course work to become familiar with legal principles and procedures, pass an examination designed to ensure minimum levels of capability, and require malpractice insurance or participation in a client protection fund may, if cost is the impediment to legal access, price paralegals out of the targeted market.

In fact, many independent paralegals already do not charge substantially less for their services. According to the Commission minority report, "[t]he testimony before the Commission clearly indicated that the nonlawyer practitioner[s], in such areas as divorce, are pricing their services just below what lawyers charge, not necessarily on the value of their services."[18] For example, a Salt Lake paralegal jailed earlier this year for violating an order enjoining the unauthorized practice of law apparently charged $100 for divorce filings and $300 for bankruptcy filings, an amount not substantially below that advertised by some attorneys.[19] Thus, what may result is a system in which paralegals undercut lawyers just enough to attract cost-conscious clients but have little impact on the unmet legal needs of the poor.

Overall, we believe that expanding the responsibilities and activities of paralegals may be a desirable goal. But greater analysis is needed before it can be viewed as a meaningful solution to legal needs of the poor.

[17]Task Force report, Appendix "B".
[18]Commission report, Minority Report of Russell and Kapp, at 171.
[19]Brian Maffly, "Paralegal Is Sent to Jail", *Salt Lake Tribune*, Aug. 8, 1997, at D9.

CASES IN CONTROVERSY

Loss of Chance Recovery After *Seale v. Gowans*

by D. Matthew Moscon

On August 2, 1996, the Utah Supreme Court issued its opinion in *Seale v. Gowans*,[1] discussing when the limitations period begins to run on a medical malpractice claim. Although the opinion does not mention the loss of chance doctrine, nor was the plaintiff's claim dependent upon such a theory, many have speculated that *Seale* has abolished the loss of chance tort in Utah.[2] At least one complaint brought in the Third District Court has been dismissed on summary judgment on the grounds that *Seale* apparently abolished the tort in Utah.

Seale should not be read to abolish all claims for loss of chance, although Utah cases construing the medical malpractice statute of limitations, including *Seale*, have greatly reduced a plaintiff's ability to recover for a lost chance of survival. In any event, clarification of the issue by our appellate courts would greatly benefit the Bar.

The Case

Beverly Seale, through her estate, brought a claim against her physician and a hospital for failing to detect a mass in her breast during a mammogram conducted in August 1987.[3] The mass was discovered nine months later when Seale had another mammogram at the same hospital. A needle biopsy revealed that the mass was cancerous. The doctor who informed Seale of the biopsy results also showed her that the mass, in smaller form, was visible in the previous mammogram. Immediately upon discovering the mass, Seale underwent a radical mastectomy. At that time, pathological studies revealed that a second malignant tumor had formed and that cancer had spread to eight of her twenty lymph nodes.

Seale received radiation and hormone therapy until August 1991, and all tests for further cancer during that time were negative. In that month, however, a bone scan revealed cancer in Seale's left hip. Seale had been informed in 1988 that the spread of cancer to her lymph nodes indicated a significant statistical increase in the likelihood that cancer would recur. Nevertheless, Seale did not commence her legal action until August 1991, when she was informed that cancer had recurred.

Both defendants moved for summary judgment on the grounds that the two-year limitations period for medical malpractice claims had expired. The district court denied summary judgment, ruling that a question of fact existed as to when the limitations period began. The trial was bifurcated and a jury was asked to consider when Seale "discovered or through the use of reasonable diligence should have discovered" her injury. The jury found that Seale knew or should have known of her injury in June 1988, when she was correctly diagnosed and told of the failure to discover the mass in 1987.

Seale's motion for judgment notwithstanding the verdict was denied. She appealed from that ruling and the Utah Supreme Court reversed, remanding for trial. Announcing its ruling, the Supreme Court stated:

> We agree that the evidence was sufficient to show that in 1988, [Seale] knew or should have known that Dr. Gowans had negligently failed to diagnose her cancer. We also agree that the evidence was sufficient to show that in 1988, Seale knew of the cancer's spread to her lymph nodes. However, defendants have failed to show that the cancer's spread to her lymph nodes was a sufficient legal injury to start the running of the limitations period.[4]

The court concluded that "even though there exists a possibility, even a probability, of further harm, it is not enough to sustain a claim, and a plaintiff must wait until some harm manifests itself."[5] Accordingly, the court held that:

> [W]ithout proof of actual damages, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence. . . . [D]amages in the form of an enhanced risk only are not sufficient to start the running of the statute of limitations . . . .[6]

Many have concluded that this language abolished the loss of chance tort in Utah.

Loss of Chance

In its most basic form, the tort of lost chance seeks to compensate an already ill patient whose chance of recovery has been diminished.[7] For instance, "A", suffering from liver cancer, has a fifty percent

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[1] *Seale v. Gowans*, 923 P.2d 1361 (Utah 1996).

[2] "Loss of chance" is a tort that attempts to compensate a plaintiff who has lost a chance of survival or has suffered a statistical increase in the risk of suffering harm as a result of the negligence of a care provider.

[3] These facts are taken from the court's opinion. *See Seale*, 923 P.2d at 1362-63.

[4] *Id.* at 1364.

[5] *Id.*

[6] *Id.* at 1364-65.

[7] While loss of chance claims can arise in areas other than medical malpractice, the overwhelming majority of reported cases are medical malpractice cases.

chance of surviving for five years. Immediately after discovering the cancer, "A's" physician misprescribes treatment and "A's" chance of surviving to the fifth year drops to twenty-five percent. Does "A" have a claim against the physician? On one hand, "A" has not suffered an injury with a definite physical manifestation. "A" had liver cancer both before and after the malpractice and "A" may live only six months or may live indefinitely without respect to the malpractice. On the other hand, "A" has suffered a statistical injury. "A's" likelihood of surviving indefinitely, or even for a short period of time, was significantly reduced by the malpractice. The question, then, is whether courts can or should allow "A" to bring an action for the loss of that statistical chance.

An analysis of all the variations of this claim is beyond the scope of this article.[8] Courts allowing plaintiffs to present such claims have done so on several theories. Some have held that the defendant's intervening negligence "destroyed" the plaintiff's chance of survival in the manner of an intervening cause.[9] In these cases, the intervening malpractice is seen as the proximate cause for the injury suffered by the plaintiff, which injury is either death or prolonged and/or aggravated suffering. Other courts, relying on Section 323 of the Restatement (Second) of Torts,[10] have allowed plaintiffs to sue a care provider by showing that the provider's conduct increased the plaintiff's risk of suffering harm from the underlying disease.[11] Moreover, those courts recognizing the claim do not uniformly agree on the remedy available to someone who has wrongfully been deprived of a chance of survival.[12] In those states recognizing some form of the claim, there is also differing opinion on whether a plaintiff should be able to bring an action if he or she had less than a fifty percent chance of survival before the intervening malpractice.[13]

Therefore, one problem with the assertion that *Seale* abolished the tort in Utah is that the tort has so many forms. Arguably, *Seale* has limited some aspects of the claim. But *Seale* cannot be said to have addressed the entire theory of law denominated "loss of chance."

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"Determination of whether Utah recognizes the loss of chance tort ultimately rests on the definition of "injury" adopted by Utah courts in medical malpractice cases, and specifically whether a statistical increase or decrease of some outcome is itself an injury."

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Loss of Chance in Utah

As forcefully as one may argue that *Seale* abolished a "pure" or "statistical" loss of chance claim, one might argue that the Utah Court of Appeals recognized a "substitute proximate cause" type of claim for lost chance in *George v. LDS Hospital*.[14] Although the *George* opinion, like *Seale*, did not use the term "loss of chance," the court stated that "'evidence which shows to a reasonable certainty that either delay in diagnosis or treatment increased the need for or lessened the effectiveness of treatment is sufficient to establish proximate cause.'"[15] *George* upheld no-cause verdicts for the physicians named in the suit but remanded a no-cause verdict against a hospital in a case based on the nursing staff's alleged failure to inform the physicians of the plaintiff's deteriorating status. "A jury could have reasonably concluded that the failure of [the nurses] to notify [the physicians] of Ms. George's change in condition prevented them from diagnosing, treating, and possibly saving her life and that this failure therefore was a proximate cause of her worsened condition and hastened her death."[16] Substitution of the physician's negligence for the disease's natural progression as the proximate cause of a patient's death is the basis for the *Hicks* type of lost chance claim. The language in *Seale* does not directly address this scenario.

For the same reasons *Seale* cannot be said to have wholly abolished the tort, *George* cannot be fairly said to have completely recognized the tort. *George* never addressed whether reduction of a chance of survival is, by itself, an injury. The *George* holding presupposes an "injury" (such as death or suffering) that some intervening negligence proximately caused.

Legal "Injury" in Utah

Determination of whether Utah recognizes the loss of chance tort ultimately rests on the definition of "injury" adopted by Utah courts in medical malpractice cases, and specifically whether a statistical increase or decrease of some outcome is itself an injury. The definition of "injury" for medical malpractice cases began taking shape in 1979 when the Utah Supreme Court decided *Foil v. Ballinger*.[17] In *Foil*, the court held that the two-year limitation period "does not commence to run until the injured person knew or should have known that he had sustained an injury *and* that the injury was caused by negligence."[18] Thus, a legal injury has two parts: (1) An understanding by the plaintiff that he or she has been hurt, and (2) the plaintiff's understanding that the harm suf-

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[8] *See Andersen v. Brigham Young University*, 879 F. Supp. 1124, 1127-28 (D. Utah 1995) (discussion of claim); Patricia L. Andel, *Medical Malpractice: The Right to Recover for the Loss of Chance of Survival*, 12 Pepp. L. Rev. 973 (1985) (discussion of claim); see also Daniel J. Anderson, *"Loss of Chance" in Utah*, Utah Bar J., Nov. 1996, at 8 (discussing status of Utah law prior to *Seale v. Gowans*).

[9] *See, e.g., Hicks v. United States*, 368 F.2d 626, 632 (4th Cir. 1966) ("If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.").

[10] Section 323 of the Restatement (Second) of Torts states in relevant part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . his failure to exercise such care increases the risk of harm.

[11] *See, e.g., Thompson v. Sun City Community Hosp.*, 688 P.2d 605, 613-16 (Ariz. 1984) (recognizing claim but holding that increase of harm must be "probable", not "possible").

[12] *See* John A. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10, 16-22 & nn. 1-5 (1987) (survey of states recognizing the tort and a catalog of the variations on the claim).

[13] *See id.*

[14] 797 P.2d 1117 (Utah Ct. App. 1990).

[15] *Id.* at 1122 (quoting *James v. United States*, 483 F. Supp. 581, 585 (N.D. Cal. 1980)).

[16] *Id.*

[17] 601 P.2d 144 (Utah 1979).

[18] *Id.* at 148 (emphasis added).

fered was the result or likely result of a tortfeasor's negligence. But this definition neither adopts nor rejects a lost chance claim. In the hypothetical given at the outset of this article, "A" knew that he had been injured by a physician's negligence when he became aware that mistreatment had reduced his chance of survival by twenty-five percent. Still, at the time "A" became aware of the malpractice, the only "injury" suffered was a probability of future harm.

Whether Utah jurisprudence has adopted a definition of "injury" which precludes statistical harm is debatable. Intentionally or not, prior to *Seale* the Utah Supreme Court began to eliminate nonphysical injuries from the lexicon of medical malpractice. In *Chapman v. Primary Children's Hospital*,[19] the court articulated a physical aspect of a legal injury: "Discovery of legal injury, therefore, encompasses both awareness of *physical injury* and knowledge that the injury is or may be attributable to negligence."[20] Although the issue of "statistical" versus "physical" injury was not before the court in *Chapman*, and the statement rightly may be called dictum, both the Utah Supreme Court and the Utah Court of Appeals have quoted this language from *Chapman* to describe the type of injury necessary to begin the limitations period in medical malpractice cases.[21] If Utah courts do not recognize a "statistical" injury, a major portion of lost chance claims, but not all lost chance claims, have been eliminated. If the language in *Chapman* is binding, the *Seale* court may not have had the option of recognizing Seale's statistical injury.

Ironically, the Utah Supreme Court previously has gone to great lengths to avoid ruling on some of the issues it is now accused of ruling on by implication. For instance, in *Hansen v. Mt. Fuel Supply Co.*,[22] the court expressly did not reach the issue of whether the enhanced risk of acquiring a disease is a sufficient injury to support a cause of action.[23] In *Hansen*, the court repeatedly stated that "the claim for medical monitoring damages is separate and distinct from recovery for the enhanced risk of contracting a serious illness due to exposure."[24] Although an enhanced risk of initially acquiring asbestosis (as discussed in *Hansen*) is different than an increased risk of dying from an existent cancer (as discussed in *Seale*), the court's adamant refusal to discuss the enhanced risk claim in *Hansen* was one of the factors that Judge Greene relied upon in *Andersen* to state that Utah has not recognized a claim for lost chance.[25] The *Hansen* court's refusal to discuss an enhanced risk claim compared to the inferential abolition of a lost chance claim in *Seale* adds to the confusion in this area of law.

> ***"If Utah courts do not recognize a 'statistical' injury, a major portion of lost chance claims, but not all lost chance claims, have been eliminated."***

Conclusion

The status of "lost chance" recovery in Utah is at best unclear, and a better articulation of whether any of the various legal claims of "lost chance" or "increased risk" exist in this state is needed. There are a number of policy reasons, identified in *Seale*, which may ultimately persuade Utah appellate courts that loss of chance claims should not be recognized. Nevertheless, until the courts make a definitive statement, practitioners should use great caution when advising clients that such a claim either definitely is or is not recognized.

[19]784 P.2d 1181 (Utah 1989).
[20]*Id.* at 1184 (emphasis added).
[21]*See, e.g., Seale*, 932 P.2d at 1363; *McDougal v. Weed*, 326 Utah Adv. Rep. 11, 13 (Utah Ct. App., Sept. 18, 1997).
[22]858 P.2d 970 (Utah 1993).
[23]*Id.* at 973 n.2.
[24]*Id.* at 975 n.6.
[25]879 F. Supp. at 1130.

NAVAJO NATION BAR ASSOCIATION

The Navajo Nation Bar Association (NNBA) announces its March bar examination scheduled for Saturday, March 28, 1998. Application packets may be obtained from the NNBA office.

The NNBA bar review course is scheduled for January 28, 29 and 30, 1998 in Window Rock, Arizona.

For further inquiries, please contact Andrea Becenti, Executive Director for the NNBA, at (520) 871-2211, or FAX: (520) 871-2229.

Notice of New Rule

The Utah Supreme Court has adopted the following Rule of Lawyer Discipline and Disability. The effective date of the rule is January 30, 1998. Pursuant to Code of Judicial Administration 11-101(4)(E), the rule will be published for comment.

Rule 31. Noncompliance with child support order, child visitation order, subpoena or order relating to paternity or child support proceeding.

(a) Upon entry of an order holding a lawyer in contempt for lawyer's noncompliance with a child support order, child visitation order, or a subpoena or order relating to a paternity or child support proceeding, a district court may suspend the lawyer's license to engage in the practice of law consistent with Utah Code section 78-32-17 and, if suspended, shall also impose conditions of reinstatement.

(b) In the event a district court suspends a lawyer's license to engage in the practice of law, the court shall provide a copy of the order to the Office of Attorney Discipline.

Remarks From Justice Ginsburg

by Justice Ruth Bader Ginsburg

I am delighted to be with you this morning, and plan to spend most of our time together in conversation with you. But before I invite questions, may I take some minutes to convey to you my ideas of what it means to be, as I am, a feminist.

I had the good fortune to be alive and a lawyer in the late 1960s when, for the first time in history, it became possible to urge before courts, successfully, that society would benefit enormously if women were regarded as persons equal in stature to men. In my college years, 1950-1954, it was widely thought that women were not suited for many of life's occupations—lawyering and bartending, military service, service on juries, to take just a few of many examples. So much has changed for the good since then.

While there are still too many people who regard feminism as a threat, people who are discomforted by the very word, I am heartened by the ever growing appreciation of what feminism really means. It means freeing people, men as well as women, to be you and me, allowing people to pursue the talents and qualities they have without artificial restraints. The idea of feminism I hold high was put in this fitting way by a D.C.-area suffragist, Lydia Pearsall, whose life spanned more than a century: "I never wanted to become a man," she said, "just his equal, and in the process, it seemed to me we would both become a little better."

Last year, my grand colleague, Sandra Day O'Connor, first and for twelve years sole woman on the Supreme Court, made a surprise appearance one night in the D.C. Shakespeare Theater's production of *Henry V*. She played the role of Isabel, Queen of France, and spoke the famous line: "Haply a woman's voice may do some good." Indeed it may.

Last May, at the celebration of the reopening of the renovated Library of Congress Jefferson Building, a college student came up to my table and asked if I could help with an assignment. She had one question and hoped to compose a paper by asking diverse people to respond. What, she asked, did I think was the largest problem for the next century. My mind raced past privacy concerns in the electronic age, assisted suicide, deadly weapons, outer space. I thought of Justice Thurgood Marshall's praise of the evolution of the concept "We, the People," to include once excluded, ignored, or undervalued people, then of our nation's motto: *E Pluribus Unum*, of many, one. The challenge is to make and keep our communities places where we can tolerate, even celebrate, our differences, while pulling together for the common good. "Of many, one" is the main challenge, I believe, and my hope for our country and world.

Almost everyday, because of the good job in which fortune, the President, and Congress have placed me, I receive request letters from people across the country. Some want my autograph (and thank you, not with an autopen), others want something I have worn (old shoes, most often). Still others seek words of advice or encouragement. My current answer:

> In the open society that is the American ideal, no doors should be closed to people willing to spend the hours of effort needed to make dreams come true. So hold fast to your dreams, and work hard to make them reality. And as you pursue your paths in life, leave tracks. Just as others have been way pavers for your aspirations and achievements, so you should aid those who will follow in your way. Think of your parents and teachers, of their efforts and hopes for you, then of your children (or children to be), even your grandchildren, of the world they will inhabit. Do your part to help move society to the place you would like it to be for the health and well-being of generations following your own.

On the Jewish New Year just a few days away, Rosh Hashana, a special prayer is offered. I was reminded of it by Cincinnati-based Federal District Judge Susan J. Dlott, who recited the prayer at a November 1996 Federal Judicial Center dinner held at the Supreme Court. It reads, in part:

> Birth is a beginning
> And death a destination.
> And life is a journey:
> From ignorance to knowing;
> From foolishness to discretion.
> And then, perhaps, to
> *wisdom.*

To all in this audience, may I offer the hope that you will continue on life's course, learning and knowing ever more. And may you gain satisfaction, pleasure, and wisdom as you proceed along the way.

Justice Ginsburg is an Associate Justice of the Supreme Court of the United States. These remarks are excerpts of remarks Justice Ginsburg made at the University of Utah on September 27, 1997 for the Obert C. and Grace A. Tanner Humanities Center.

Pick Up the Phone

by James C. Jenkins

> *Technological capacity will always tend to exceed organizational acceptance. . . . We must increase the number of functions performed by technological systems. . . . We must convince the judiciary itself that technology, when properly applied, will improve, not harm, the quality of justice, and will enhance, not impede, independent judgment and action.*
>
> —Final Report, Commission on Justice in the 21st Century, December 1991

One of the oldest and easiest technologies to utilize in the litigation process is teleconferencing. It is simple, inexpensive, and generally well suited to most pretrial proceedings. Yet, it is probably the most under-utilized technological resource in the administration of justice.

Recently, a Salt Lake attorney was instructed to appear in person for a scheduling conference in district court in the southern part of the state. To attend the scheduling conference, she was required to reserve an early morning flight to a community some distance from the site of the hearing, rent a car and drive to the hearing, wait for her case to be called, and then return home later that day. The scheduling hearing lasted only a few minutes. Her attendance at the hearing was necessary because, as a standard practice, the court required all attorneys to appear for all hearings in person.

Whatever the judge's purpose or objective may have been to require in-person attendance, it was not disclosed to the attorney, and she was left with the dilemma of trying to explain and justify to her client a billing for the time and expense of an entire day to participate in a ten minute hearing.

It is to be hoped that this is an extreme example; yet it happens.

> Making the state's dispute resolution service more accessible to citizens who need them is perhaps the biggest challenge facing the Utah justice system. The primary responsibility for increasing access to the courts lies with the judiciary. Practitioners, legislators, and other professionals may offer advice and support, but the initiative and interest must come from within. Only a multi-front attack on the barriers preventing those with legitimate grievances from bringing them to court will successfully lower these barriers. *The biggest single barrier to judicial services is high attorneys fees.*

Commission on Justice in the 21st Century, *supra*.

✦

"[A]ll participants in the judicial system must be innovative to encourage more and better use of technology."

✦

The Utah State Bar has encouraged the appropriate use of telephonic hearings and conferencing since at least 1984. *See Briggs v. Holcomb*, 740 P.2d 281 (Utah Ct. App. 1987). By procedural rules, courts have supported the concept. *See* former Rule 2(k), Third District Rules of Practice; *see also* Rule 4-501(5), Code of Judicial Administration.

The *Briggs* case is an example of how implementation of well-intended innovations can go awry. In *Briggs*, the plaintiff sought summary judgment in a contract action. As part of a demonstration of the then innovative practice of conducting hearings via telephone, counsel for the parties agreed to a telephonic hearing on the motion for summary judgment during the Bar's midyear meeting. On appeal, Holcomb challenged the procedure because no record of the hearing was made. In fact, the experiment was fraught with a number of bizarre circumstances that should have discouraged anyone from again attempting telephone adjudication. Fortunately, and despite these drawbacks, most practitioners have recognized the benefits of this procedure.

Since the Final Report of the Commission on Justice in the 21st Century, several technological advances have been implemented in the court system, such as electronic mail, voice mail, and video recording of proceedings. Electronic filing with approved digital signature authorization is contemplated in the near future. But all participants in the judicial system must be innovative to encourage more and better use of technology. The Technology Subcommittee of the Commission on Justice in the 21st Century listed in its report ten fundamental principals that should be used in making technology utilization decisions:

1. Technology should foster greater access to the courts.
2. Technology should enhance the role of the court as a service institution.
3. Technology should improve the quality of justice.

Mr. Jenkins is a shareholder of the Logan law firm Olson & Hoggan, and is the President-elect of the Utah State Bar.

4. Technology should enhance the effective justice system management by increasing efficiency.
5. Technology should not be used as a substitute for the knowledge, skills, and judgment of individuals, but should assist individuals in the proper utilization of their knowledge, skills, judgment and training.
6. Technology should enhance productivity, reduce delay or otherwise be more cost effective than the system it replaces.
7. Technology should improve the decision making process of judicial managers by providing complete and accurate information.
8. Technology should have a useful life.
9. Technology should be acceptable and convenient to end-users.
10. Technology should accommodate the need for security, confidentiality and protection of privacy concerns.

Telephonic and recording technology today is compatible and available to all courts. The judiciary should formulate uniform guidelines to encourage more telephonic hearings, and attorneys should seek approval to conduct telephonic hearings whenever possible. Although there are still logistical and administrative "bugs" to be worked out, clearly much time and expense can be saved, and litigants and clients will be assured more efficient and inexpensive access to justice through an expanded use of teleconferencing. The next time you need to schedule a hearing, consider picking up the phone.

BAR & BENCH

Evening With the Third District Court

by Janet Goldstein

On November 18, 1997, a crowd of more than two hundred lawyers gathered at the Utah Law and Justice Center to listen to and ask questions of a panel of four judges from the Third District Court: Judge Leslie A. Lewis, presiding judge, Judge Timothy R. Hanson, Judge Sandra Peuler, and Judge Stephen L. Henroid. The panel was moderated by Salt Lake City attorney Roger H. Bullock, a member of the Executive Committee of the Litigation Section of the Utah State Bar, which co-sponsored the program in conjunction with the Bar.

The evening's general topics were: (1) Getting Along in My Court, (2) Special Advice for New Lawyers, (3) How Lawyers Can Help Themselves and Their Clients in View of the Case Load and Time Demands Imposed on Judges, (4) Let's Try to Settle, and (5) If We Don't Settle, Let's Pick a Jury and Try the Case. It was an ambitious agenda, but one that stimulated considerable interest and audience participation.

Judge Peuler led off with her list of "Top Ten Ways to Make a Judge Happy," which brought laughter from the audience and, therefore, obviously made an impression. The list included the following:

10. Rules of Evidence and Procedure are only suggestions. You don't really need to know them, and besides, what's a judge for except to tell you what the rules and law are?
9. Never give a basis for an objection.
8. Right up front, at the beginning of the case, tell the judge that you are convinced the case will never settle.
7. Be a Rambo litigator—who says civility is necessary these days?
6. Always ask to file over-length memoranda.
5. It is a waste of time to send courtesy copies to the court.
4. Don't bother to discuss settlement with opposing counsel before the pretrial conference.
3. Approach the judge often with ex parte motions.
2. Disagree with opposing counsel every chance you get and take your disputes to the judge at least weekly.
1. Always argue with the judge about her ruling after she has made it.

In addition to amusement, which served to drive home the points, the list sparked comment from the other panel members, including the observation that different judges want different things from lawyers. In particular, Judge Hanson indicated that he does not want to receive courtesy copies because he prefers to read the memoranda in the case file. The only way to find out what a particular judge does or does not prefer is to call the judge's clerk. Judge Lewis strongly recommended that lawyers get to know the judge's clerk when the lawyer has a case in front of that judge. (Judge Lewis, by the way, prefers courtesy copies, as does Judge Henroid, but only if the courtesy copies are timely submitted and include the entire package with both sides' memoranda. Judge Henroid suggested that opposing counsel work out which side will submit the copies; he also suggested that lawyers should include their best case, in its entirety, with the relevant portion highlighted.)

The panel was in full agreement that although the judges' clerks are a lawyer's best source of information, lawyers must treat the clerks well. Some lawyers have

Ms. Goldstein is a sole practitioner in Park City.

been known to verbally abuse the clerks, which is counterproductive. Judges are protective of their clerks, and treating a clerk badly is simply not tolerated. Judge Hanson added that his clerk asked him to remind lawyers that it is their job to practice law and please do not ask the clerk to practice law for them.

With respect to communication with a judge in court, Judge Peuler said she lets lawyers know whether she is up to speed on a case, in which event she wants just a summary of the lawyer's position. If a judge does not tell you whether he or she wants a full background, ask. Similarly, Judge Henroid said that the type of presentation a judge wants depends on the judge's preparation. Judge Lewis said side bar conferences, and conferences in chambers during a trial, are time-consuming and lawyers should anticipate necessary motions prior to trial and handle them at that time, rather than waiting to raise them until the middle of the trial. Judge Hanson stated that he does not like bench conferences.

Judge Henroid provided a list of items of "Special Advice" for new lawyers, although all lawyers can benefit from the advice:

1. Civility and professional, courteous conduct are the key: argumentative, rude behavior is not.
2. Listen to and answer the judge's questions.
3. Bring your calendar to court.
4. Do not underestimate the time needed for a hearing, and tell the court in advance how much you need.
5. Be on time.
6. Dress professionally for an appearance on a scheduled matter.
7. Do not be rude to the judge's clerk (particularly not on voice mail!).
8. Judge Henroid does not want to rule on discovery fishing expeditions.
9. Do not have a secretary write or call the court—a lawyer should do it.
10. Do not ask for an emergency hearing and then say you are not available until the following week to appear.

Other advice included the recommendation to stop using the phrase "Comes now . . .," as well as the favorite affidavit ending, "Further affiant saith not . . . ." The panel also recommended pre-marking exhibits and providing a list of exhibits to the court clerk. Additionally, a lawyer should ask permission to approach a witness, and should not ask unnecessary questions on cross-examination. Judge Hanson added that merely restating the matters covered on direct examination is the worst that a lawyer can do, and if the lawyer cannot make headway on cross-examination, he or she should not ask anything. Judge Hanson added that planning is necessary to avoid such mistakes.

As general advice to lawyers not experienced in trial work or unfamiliar with the judges, Judge Peuler recommended that the lawyer go to the court, sit in on a judge's calendar and watch other lawyers "do what you'll have to do." She also suggested getting involved in Bar committees to get to know judges. Judge Hanson agreed that it is valuable to watch a high-quality lawyer in court before one must appear before that judge. Judge Hanson also reminded the audience that there is nothing demeaning or wrong with not being a trial lawyer, and suggested calling in a more-experienced colleague to handle a trial. Judge Peuler stated that using diagrams in court is helpful, particularly for those, like herself, who are "directionally impaired." She also suggested that enlarging critical portions of a contract on poster-board is a valuable tool.

Judge Lewis discussed the topic of how lawyers can help themselves and their clients in light of the tremendous case load that each judge manages. (Judge Lewis has a case load of approximately 850 cases, which she admitted is "staggering".) High on her list are common courtesy, civility, and, yes, humor, in addition to communication skills. Lawyers, she said, are expected to speak well, including proper enunciation and a rate of speech that is not too fast for comprehension. Additionally, she cautioned that lawyers must prepare witnesses concerning the process and experience of being in court and testifying. Judge Lewis suggested taking a witness to the courtroom prior to having the witness testify.

Perhaps the most critical process in relation to conserving judicial resources, is the use of settlement programs and procedures. Judge Lewis referred to the pretrial settlement program in which the trial judge refers the case to another judge or to a senior litigator at no cost to the litigants. Judge Lewis stated that when a trial is scheduled, a pretrial settlement process should be scheduled, with sufficient time between that process and the trial date. Judge Henroid agreed, saying that if a lawyer is not using any alternate dispute resolution option, the lawyer is "missing the boat." Judge Lewis added that the pretrial settlement program should be raised with the judge, and referred to forms she has for that purpose. It is within the judge's discretion to order pretrial settlement procedure. Judge Lewis suggested that although the procedure can be requested before discovery, it makes the most sense to set it after discovery is completed. Judge Lewis concluded her treatment of the topic with the obvious, but sometimes overlooked, reality, stating, "We don't have time to try every case."

Judge Hanson finished the evening with a discussion of jury selection and jury reform, including the questions of lawyer-conducted voir dire, jury questionnaires, and the possibility of jurors asking questions during trial, all of which are being studied and/or tried in some Utah courtrooms. (For example, Judge Henroid has successfully permitted juror questions during trial.) No doubt there will be further exploration of each issue, with discussion among judges and lawyers.

The Litigation Section again wishes to thank Judge Lewis, Judge Peuler, Judge Hanson, and Judge Henroid for their efforts and contributions to the Evening With the Third District Court, and also wishes to thank all who attended for their participation.

IN MEMORIAM

Peter W. Billings

by P. Bruce Badger

I remember my first day of work at Fabian & Clendenin after having just spent three years living in Provo. I walked down the hall and caught a whiff of pipe smoke coming from Pete's office and I remember thinking—this is the best. When he died last fall, I inherited the use of his desk. It's a sturdy piece of furniture, very functional, and obviously full of history. I am cognizant of all that, but best of all, every time I open the top left drawer, I can still smell the tobacco Pete used to store in his desk.

Peter Watson Billings came to Fabian & Clendenin in April 1946, following his release from the army, where as a Major he had been Chief of the Legal Division of the Office of the Chief of Transportation in Washington, D.C. He quickly made his mark as a bright and effective litigator, specializing in antitrust and banking law. For nearly fifty years, he was an active trial and appellate lawyer, including appearances before the United States Supreme Court. During an appearance before the Supreme Court, Justice Frankfurter slipped a note to Archibald Cox, then the Solicitor General, "This lad Billings makes noises like a lawyer and I've looked him up. He's Harvard '41."

Over the years, Pete served as a director of four Utah banks and as general counsel for the Utah Bankers' Association for more than twenty years. He also represented the Utah Commission of Financial Institutions, drafting what became the Financing Institutions Act. He was appointed by Governor Rampton in 1965 as Chairman of the Utah Coordinating Council of Higher Education. He drafted the 1969 Higher Education Act and was elected as the first chairman of the State Board of Higher Education (later the State Board of Regents).

Pete's many accomplishments in and out of court must have impressed some of his toughest critics. Three of his four sons became lawyers and every one of them married a lawyer. Although Pete was a very tough litigator, he always played by the rules and set the tone for the other members of the firm. The summer before Pete died, Governor Rampton commented about Pete to *The Deseret News*: "He's a gentleman. There's no question about it. I've never seen him do a crude or vulgar thing."

Pete became deeply committed to establishing legal processes for resolution of disputes outside of traditional litigation. When the American Arbitration Association opened its office in Salt Lake City, he was appointed Chair of its Advisory Committee, serving until he retired in 1996. At the request of the Utah Judicial Council, Pete drafted a bill that allowed alternative dispute resolution in Utah state courts, and was a member of a committee appointed by Judge Jenkins to establish a program for Court-Annexed Alternative Dispute Resolution for the District of Utah.

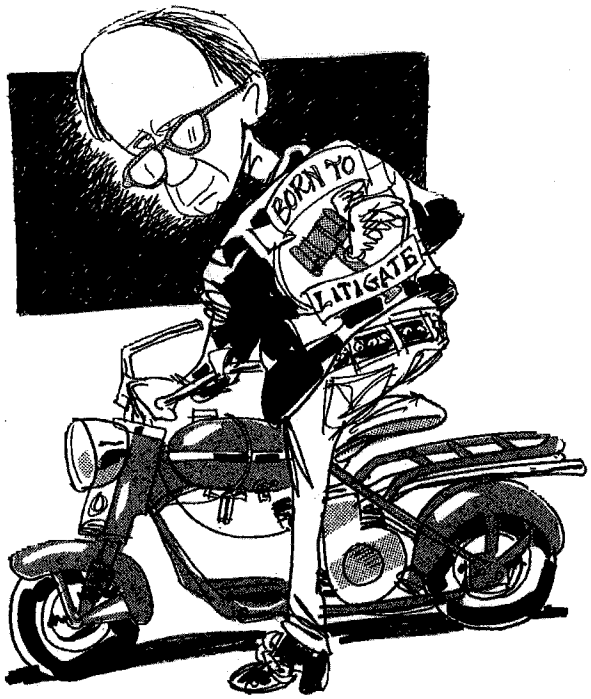
In 1991, at the age of seventy-two, he chaired the Utah Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law, and in 1990-91 was chairman of the Access to the Courts Committee of the Utah Commission for Justice for the 21st Century. In 1996, the American Arbitration Association created the Peter W. Billings Award for service in promoting the use of alternative dispute resolution, and gave him the first award.

Pete's door was always open—even to the newest associates. His advice was always sound and I scarcely remember a conversation with Pete that didn't end with a chuckle. Although his terminal illness led to disfigurement, Pete continued to teach by example. He came into the office every day, and had just walked out of the building headed for the Alta Club the day he was stricken. When others commented on his valor, he responded, "What choice do I have? I can't just sit home all day."

Pete was a tremendous example of a lot of things—how to live, how to work, how to raise a family, how to practice law as though it were a noble profession, how to contribute time and talents and, perhaps most importantly, how to have courage.

Mr. Badger is a shareholder of the Salt Lake City law firm Fabian & Clendenin.

A CREDIT TO THE PROFESSION



Gordon L. Roberts

Those who have practiced law with or against Gordon Roberts--"Gordy," as he is known to his many friends–understand that his reputation as one of Utah's finest trial lawyers stems from a variety of admirable characteristics.

We all know that Gordon is vastly experienced as a litigator. Since graduating from the University of Utah College of Law (Order of the Coif) in 1965, Gordon has proven that a great trial lawyer can try any type of case. Never content to confine himself to a single area of specialization, Gordon has shown himself to be not merely a "jack of all trades," but a "master of all trades." Gordon has tried tax, patent, employment, construction, personal injury, environmental, mining, and even criminal cases, among many others, with a consistently high level of skill and with excellent results for his clients. He has received countless awards and honors during his rich career. To name a few, Gordon has been honored as Advocate of the Year by the Utah Federal Bar Association, Utah Trial Lawyer of the Year by the American Board of Trial Advocates, and Distinguished Lawyer of the Year by the Utah State Bar. Gordon is also a Fellow in the American College of Trial Lawyers and a Fellow of the Trustees of the American Bar Foundation.

Fewer of Gordon's colleagues are aware, however, that Gordon's distinguished career as a litigator began before he was ever admitted to the Bar. During the summer that he took the Bar exam, in 1965, Gordon was working on a significant trial with Elliot Evans, a senior partner at what was then the firm of Parsons, Behle, Evans & Latimer. As new associates often do, Gordon had drafted the trial brief and other legal papers that had been filed with the court, and had carried Mr. Evans's bags to court. When the time came for closing argument, Judge Stewart Hanson indicated that he would like to have Gordon deliver the closing argument. Mr. Evans protested that that would be impossible because Gordon had not yet been sworn in as an attorney. Judge Hanson responded that he did not think it would be a problem if the other side agreed, and the other side eagerly did so, expecting that Gordon's lack of experience would ensure them a victory. Gordon then proceeded–as a twenty-four-year-old freshly out of law school–to deliver an outstanding closing argument that won the case. Gordon thus claimed his first victory even before he became a member of the Bar.

Even beyond his tremendous skill, Gordon is well known in the legal community for his civility and professionalism. He exemplifies the fact that one can simultaneously be an effective, zealous litigator *and* a decent, courteous person. Even in the midst of the most bitterly contested dis-

putes, Gordon exhibits respect for his adversaries and deals with them in an honorable, professional manner. Indeed, one would be hard-pressed to name any lawyer who is better liked by those he has litigated against (and, more often than not, prevailed against) than is Gordon. He considers himself a friend and colleague of all lawyers and requests only that he be treated in the same respectful manner.

In a related vein, Gordon's professional integrity is beyond reproach. His word is his bond; he has no tolerance for deceptive or dishonest practices. He fights vigorously but fairly. As merely one example, Gordon was once defending a deposition at his offices during a particularly contentious piece of litigation. After they had finished for the day, Gordon noticed that the opposing lawyer had inadvertently left a document on the conference-room table that appeared to be privileged. Rather than reading or copying the document, or attempting to use the mistake as leverage against his adversary, Gordon swiftly placed the document in an envelope and sent it directly back to opposing counsel. Such integrity colors every facet of Gordon's approach to the practice of law–from his handling of sensitive discovery issues to his treatment of "bad facts" or "bad cases" when he addresses the court. If every lawyer approached legal practice as Gordon does, written ethical standards, rules of professional conduct, and civility committees would be unnecessary.

As straightforward and candid as he is, however, Gordon is endlessly creative when dealing with the complicated legal issues he faces in his practice. Though never one to shy away from a fight, Gordon never seeks a fight for its own sake. He instead devotes his energies to focusing upon the ultimate objectives of his clients and thinking about the best ways to achieve those objectives. Gordon also has the courage to guide his clients and his adversaries toward sharing this focus. To that end, Gordon has frequently invoked the words of Elihu Root, who observed that "[a]bout half the job of a good lawyer is to tell his client that he is damn fool and to 'stop.'" In all of his cases, Gordon prides himself on always looking for what he calls the "deus ex machina"–the most simple and obvious solution to a difficult problem. By relentlessly focusing on the big picture in this manner and looking at creative alternatives, Gordon has won many seemingly unwinnable cases and has amicably settled many apparently unresolvable disputes.

Not surprisingly, on some rare occasions, Gordon's skillful arguments have proven to be more compelling to juries than to appellate courts. In the case of *Josephson v. Mountain Bell*, 576 P.2d 850 (Utah 1978), for example, Gordon had managed to convince a jury to accept the remarkable proposition that the plaintiffs whose telephone service had been wrongfully cut off had suffered no compensable damages because they could have used a telephone two doors down the street. The Utah Supreme Court felt compelled to reverse this determination, but in doing so, they could not help but pay tribute to Gordon's talents as an oral advocate by remarking that "[t]he fact that defendant's counsel seems to have so persuaded the jury is certainly a tribute to his skill and adroitness in advocacy." *Id.* at 853.

Finally, those who know Gordon Roberts know that he is unerringly loyal to his profession and to his law firm. Gordon has given back to the legal profession by serving on several rules committees and other organizations, and as an adjunct professor at the University of Utah College of Law. Gordon has also spent his entire career at the law firm of Parsons Behle & Latimer, during which time the firm has gone from a six-lawyer operation to the largest firm in Utah, with more than 100 lawyers. This is largely because of the acquisition of additional talented lawyers whom Gordon had the foresight to hire.

For all the remarkable characteristics that make him one of the state's finest trial lawyers, Gordon Roberts is truly a credit to the profession.

Discipline Corner

SUSPENSION

On October 20, 1997, the Honorable Stephen L. Henroid, Third District Court, entered an Order of Discipline: Suspension, suspending William James Denver from the practice of law for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a)&(b) (Communication), 1.16 (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct) of the Rules of Professional Conduct. The suspension was held in abeyance, and places Denver on supervised probation for two years. Denver was also ordered to attend the Utah State Bar Ethics School and regular Alcoholics Anonymous and Lawyers Helping Lawyers meetings, and to pay restitution as specified in the order. The Order was based on a Discipline By Consent and Settlement Agreement entered into by Denver and the Office of Attorney Discipline.

On April 5, 1995, a client retained Denver to represent him in an age discrimination case. Denver was notified that Ohio law applied, and that the statute of limitations might be approaching. Denver failed to provide any meaningful legal services to the client, and the statute of limitations ran on April 7, 1995. Denver failed to provide the OAD a substantive written response to the client's complaint, despite the OAD's two written requests for such a response.

In September 1995, a client retained Denver to represent him in a divorce action. Denver also assisted the client with tax matters. Denver was dilatory in preparing and filing the divorce action, and the case was ultimately dismissed for failure to prosecute. Denver failed to return numerous telephone calls from the client. The client asked Denver to return his case file, but Denver turned over his case to another attorney, who subsequently informed him that the file had been lost.

In December 1995, a client retained Denver to represent her in a divorce action. Denver failed to keep the client reasonably informed about the status of her matter, failed to return her phone calls, and did not promptly comply with her reasonable requests for information. Denver failed to provide her billing statements, despite numerous requests from her that he do so.

In February 1996, a client retained Denver to assist him in a divorce action. Thereafter, Denver was dilatory in representing the client. Denver failed to keep the client reasonably informed about the status of his matter, including failing on two occasions to appear in court, and did not promptly comply with the client's reasonable requests for information.

SUSPENSION

On October 24, 1997, the Honorable Sandra N. Peuler, Third District Court, entered an Order of Discipline: Suspension, suspending W. Thomas Harris from the practice of law for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(a) (formerly Rule 1.13(a)) (Safekeeping Property), 3.2 (Expediting Litigation), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The suspension was held in abeyance, and places Harris on supervised probation for eighteen months. Harris was also ordered to attend the Utah State Bar Ethics School, to attend Lawyers Helping Lawyers sessions at least three times per month, and to pay restitution as specified in the order. The Order was based on a Discipline By Consent and Settlement Agreement entered into by Harris and the Office of Attorney Discipline.

In August 1994, a client retained Harris to represent him in a divorce action. The client eventually retained new counsel. Harris failed to return the balance of the retainer to the client upon the termination of representation. The OAD filed the formal case in the Third District Court on October 3, 1995; Harris reimbursed the client $3,825 on June 26, 1996.

In March 1991, a client retained Harris to represent him in a divorce action. A hearing in the divorce matter required rescheduling because Harris miscalendared the hearing. Additionally, Harris failed to return some of the client's phone calls and failed to promptly cooperate with the OAD's investigation into the client's complaint against him.

In October 1995, a client retained Harris to represent her in a divorce action. Harris failed to diligently prepare and submit to the opposing party a settlement proposal. During a meeting with the client, Harris demanded that the client leave his office. Harris failed to promptly file a written withdrawal of counsel form after his representation of the client terminated. Additionally, Harris failed to respond to the OAD's requests for information until one day before a Screening Panel of the Ethics and Discipline Committee reviewed the client's complaint against Harris.

In August 1991, a client retained Harris to represent her in a divorce action. The divorce was concluded in 1991, but Harris failed to prepare the necessary Qualified Domestic Relations Order. Harris failed to promptly communicate with the client and failed to return to the client the unused portion of the retainer fee she had paid Harris until approximately the time of the Screening Panel hearing.

In October 1995, a client retained Harris to represent him in a divorce action. Harris failed to promptly return documents requested by the client. The client eventually retained new counsel. Harris failed to promptly return the balance of the retainer to the client upon the termination of his representation.

SUSPENSION

On November 19, 1997, the Honorable Pat B. Brian, Third District Court, entered an Order of Discipline, suspending Daniel L. Wilson from the practice of law for thirty days for violation of Rules 1.8(a)(1) (Conflict of Interest: Prohibited Transactions) and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The suspension was stayed without condition. Wilson was also ordered to attend the Utah State Bar Ethics School. The Order was based on a Discipline By Consent and Settlement Agreement entered into by Wilson and the Office of Attorney Discipline.

In January of 1986, a client was referred to Wilson by another attorney for the purpose of preparing and submitting an Offer in Compromise to the IRS for unpaid taxes of approximately $100,000, which had not been discharged in the client's recent bankruptcy. Wilson demanded a $3,000 retainer prior to undertaking the work, which the client was unable to pay. As a condition of being retained, Wilson directed the client to borrow money from Western States Finance Ltd., dba Western States Professional Finance, Ltd. at 24.9% per annum interest. The client asserted that Wilson did not disclose to the client that Wilson owned Western States Finance, Ltd. Wilson denied that he failed to disclose to his client his ownership in the finance company. In February, 1986, the client executed a promissory note and security agreement on a piece of real property in favor of Western States Finance to help pay for the legal services rendered. The client made only about half of the payments required by the agreement. The client's real property was encumbered far in excess of its fair market value. The mortgage in favor of Western States Finance Ltd., was in the third place on the house and there were both superior and inferior liens and encumbrances including an inferior IRS lien that by itself exceeded the value of the property. The first mortgage was in default and foreclosure proceedings were imminent. Because of the conflict created by the foreclosure, Wilson referred the client to another attorney. The client surrendered the property to Wilson as the holder of the second mortgage. Wilson purchased the first mortgage in order to protect his second mortgage, and foreclosed on the property. Although the client lost the property, Wilson asserted that the client suffered no injury because the property was encumbered far in excess of its value, and other interests were threatening foreclosure as well. Wilson claims that the client was fully informed of his options, and gave him authority and permission to acquire the first mortgage and foreclosure on the property. The client disputed that he fully understood the import of his actions. The conflict disclosure and conflict waiver were not reduced to a signed writing, as required by Rule 1.8(a)(1) of the Rules of Professional Conduct. The requirement that conflicts be disclosed and waived *in writing* was not adopted until January 1, 1988, when the Utah Rules of Professional Conduct supplanted the prior Canon of Ethics. Nevertheless, Rule 1.8(a)(1) was violated because the conflict that was created in 1986 continued after the effective date of the rule.

ADMONITION

On April 9, 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(a) and (b) (Communication) of the Rules of Professional Conduct. The attorney was also ordered to pay restitution.

On August 10, 1986, the attorney was retained to send a demand letter in the amount of $6,404.86 on a delinquent account on behalf of a client. On August 22, 1986, a demand letter was sent to the debtor. It is unclear why a lawsuit was not commenced. On August 21, 1986, the client wrote a note to his daughter requesting her to provide an address to the attorney where the debtor might be located. There is no evidence this information was given to the attorney or that the attorney was asked to file a lawsuit.

On November 13, 1986, the attorney was retained by the client to collect a delinquent account in the amount of $1,644.01. On November 25, 1986, a demand letter was sent to the debtor. It is unclear why suit was never filed against the debtor, nor is there evidence to indicate the attorney was asked to file a lawsuit.

From 1986 through the latter part of 1988, the attorney and/or the law firm he worked at represented the client in several other collection matters and there was a considerable amount of communication between the attorney and the client. For reasons now unknown to the attorney, no further action was taken to collect this account.

In July 1992, when the attorney was no longer actively practicing law, the client made a request by telephone to the attorney for the return of all his files, and the attorney told the client that he would have to assemble them from storage.

On March 1, 1994, the client files were returned to the client, who then learned that the collection action had not been completed.

The attorney stipulated to an admonition for his violation of Rules 1.3 and 1.4(a) and (b).

ADMONITION

On November 5, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 8.3(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School.

In February of 1996, an attorney wrote a demand letter to his clients' former counsel. In that letter, the attorney demanded that the former counsel pay to the attorney's clients a "finder's fee" which the attorney claimed the former

counsel had promised the clients in exchange for the clients soliciting others to join in a class action lawsuit the former counsel had filed on behalf of these clients. Instead of responding to the attorney's demand letter, the former counsel forwarded the letter to the Office of Attorney Discipline. The former counsel denied the existence of an agreement regarding a finder's fee, and denied that he asked his former clients to solicit others to join in their lawsuit. The attorney admitted that he was in violation of Rules 8.3(a) and 8.4(d) of the Rules of Professional Conduct when he failed to report the former counsel's alleged actions to the OAD. It had believed a finder's fee had been promised, but instead wrote a letter to the former counsel demanding that he pay the finder's fee. The attorney stipulated to an admonition for these violations.

ADMONITION

On November 6, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 5.5(a) (Unauthorized Practice of Law) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The attorney was also ordered to attend and successfully complete the Utah State Bar Ethics School.

On September 3, 1996, the attorney was suspended from the practice of law for nonpayment of dues. Thereafter, the attorney practiced law while on suspension from the practice of law until March 24, 1997, when he was contacted by the Utah State Bar and paid his dues and late fees.

The attorney failed to respond to the OAD investigation until June of 1997, after a Screening Panel Hearing had been scheduled.

There were no mitigating circumstances. In aggravation, the attorney did not appear to take seriously the violation of the Rules of Professional Conduct. He also had a prior disciplinary history.

UTAH STATE BAR MAILING LISTS

The Bar's roster of licensed lawyers is available for sale to third parties. Any lawyer who wishes to make his or her name unavailable, may do so by submitting a written request to Arnold Birrell at Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834; Fax 531-0660.

Ethics Advisory Opinion Committee

Opinion No. 97-11 – (Approved December 5, 1997)

Issue: May an attorney finance the expected costs of a case by borrowing money from a non-lawyer pursuant to a non-recourse promissory note, where the note is secured by the attorney's interest in his contingent fee in the case?

Conclusion: An attorney's grant of a security interest in a contingent fee from a particular case to secure a loan constitutes the sharing of fees with a non-lawyer in violation of Utah Rule of Professional Conduct 5.4(a).

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $10.00. Sixty-three opinions were approved by the Board of Bar Commissioners between January 1, 1988 and December 5, 1997. For an additional $5.00 ($15.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($10.00 each set)
_____	Ethics Opinions/ Subscription List	_____ ($15.00)

Please make all checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Maud Thurman
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

LEGAL ASSISTANT DIVISION SEMINARS

All seminars are scheduled to be held at the Law & Justice Center, 645 South 200 East, Salt Lake City, Utah

Date/Time	Seminar
January 21, 1998 12:00 – 1:00 pm	Brown Bag Luncheon
February 20, 1998 8:00 am – 4:30 pm	Semi-Annual Full-Day Seminar "Litigation Workshops"
April 16, 1998 12:00 – 1:00 pm	Brown Bag Luncheon
June 17, 1998 2:30 – 5:30 pm	Division Annual Meeting and Half-Day Seminar – "Professionalism"
August 12, 1998 12:00 – 1:00 pm	Brown Bag Luncheon
September 16, 1998 12:00 – 1:00 pm	Brown Bag Luncheon
October 16, 1998 8:30 am – 4:30 pm	Semi-Annual Full-Day Seminar
November 18, 1998 12:00 – 1:00 pm	Brown Bag Luncheon

Attendance fees, registration and speaker information for the seminar listed above will be mailed via announcement prior to each seminar.

FEDERAL BAR ASSOCIATION Dinner and Awards Ceremony

On November 20, 1997, the Federal Bar Association held its Annual Dinner and Awards Ceremony. Each year, Distinguished Service Awards are given to outstanding individuals from the judiciary and academia as well as from public and private practice. The Distinguished Service Awards are given to individuals who have exhibited excellence and integrity throughout their careers.

This year's recipients were U.S. District Court Judge J. Thomas Greene; Brigham Young University Tax Professor Stanley Neeleman; and trial attorney Glenn C. Hanni, Senior Partner at the law firm of Strong & Hanni.

Judge Greene was introduced by a long-time friend and attorney, Wallace R. Bennett. Ken Collins, former student and law partner of Stanley Neeleman, introduced the professor. Glenn Hanni was introduced by U.S. District Court Judge, David Winder, a former law partner at Strong & Hanni.

The officers for the Utah Chapter of the Federal Bar Association for 1998 were also introduced. They are Greg Diamond, President; Jill Parrish, Vice President; Robert S. Clark, Secretary; James Gilson, Treasurer; Peter H. Christensen, Membership Chairman and Mark Vincent, Special Projects.

Visitation Mediation Program

The 1997 Utah State Legislature enacted the Visitation Mediation Program, the purpose of which is to help parents resolve visitation disputes through communication and cooperation. Pursuant to Utah Code Ann. § 30-3-38, cases in which a parent files a pleading alleging court-ordered visitation has been violated *must* be referred to the program. To aid the referral process, attorneys are asked to attach a referral form – developed and offered through the program – to all such pleadings filed on behalf of their clients. If you represent clients with visitation disputes or if you are interested in mediating under the program, please contact the program coordinator, listed below, for more information, referral forms, and mediator applications.

Heidi Nestel, J.D.
Visitation Mediation Program
230 South 500 East #300
Salt Lake City, UT
Tele: (801) 578-3826
Fax: (801) 578-3842

NOTICE

American Bar Association Museum

The American Bar Association is creating a museum at the Chicago Headquarters to display artifacts from important cases, founding and other historic documents, centennial posters and other things important to the legal profession of the several states.

Please submit your suggestions to Harold G. Christensen or Joseph Novak at Snow, Christensen & Martineau, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah, 84145. Please feel free to contact us at (801) 521-9000 or by fax at (801) 363-0400. All suggestions must be submitted by January 31, 1998.

New Chief Disciplinary Counsel for the Utah State Bar

Billy Lee Walker was appointed Chief Disciplinary Counsel for the Utah State Bar on December 5, 1997 to begin January 5, 1998. Mr. Walker has a broad and diverse educational and professional background that will assist him in his new duties as Chief Disciplinary Counsel.

Mr. Walker graduated from Stanford University with a Bachelor of Arts degree in Economics. He received his law degree from the University of Utah College of Law. He has also attended the National Judicial College in Reno, Nevada.

From 1979 to 1981 Mr. Walker served as an adjudicator for the State Insurance Fund. From 1981 to 1984 he was an Assistant Attorney General, representing various state agencies including the University of Utah, the Office of Recovery Services, the Division of Mental Health, and the Division of Handicapped Services. He was a securities analyst in the Utah Division of Securities prior to working in 1985 through 1988 as the Director of Administrative Hearings in the Utah Department of Social Services.

From 1988 to 1993 Mr. Walker was a Deputy Commissioner in the Utah Department of Financial Institutions acting as Staff Counsel for the department and the Commissioner for Financial Institutions in the regulations of lenders, banks, savings and loans, credit unions and industrial loan corporations.

In 1993 Mr. Walker rejoined the Utah Attorney General's Office as an Assistant Attorney General and has served as Division Chief, managing a staff of 50 professionals including attorneys, paralegals and legal secretaries in the handling of cases on behalf of the Office of Recovery Services. The cases included child support enforcement, welfare over-payment recovery and medical assistance recovery, and the representation and defense of the Office of Recovery Services in state and federal court and all appellate matters.

Proposed Legislation

Anyone having comments upon the following proposed amendments to Utah's long-arm statute may submit them in writing to Representative Patrice Arent, 6281 South Havenbrook Circle, Salt Lake City, UT 84121.

JURISDICTION IN UTAH COURTS

1998 GENERAL SESSION

STATE OF UTAH

AN ACT RELATING TO JUDICIAL CODE;

EXTENDING JURISDICTION OVER DEFENDANTS FOR CLAIMS RELATING TO CERTAIN CONTACTS WITHIN THE STATE

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS: **78-27-24**, as last amended by Chapter 277, Laws of Utah 1992

Be it enacted by the Legislature of the state of Utah: Section 1. Section **78-27-24** is amended to read: **78-27-24. Jurisdiction over nonresidents - Acts submitting person to jurisdiction.** Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising [~~from~~] out of or related to: (1) the transaction of any business within this state; (2) contracting to supply services or goods in this state; (3) the causing of injury within this state whether tortious or by breach of warranty; (4) the ownership, use, or possession of any real estate situated in this state; (5) contracting to insure any person, property, or risk located within this state at the time of contracting; (6) with respect to actions of divorce, separate maintenance, or child support, having resided in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or (7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

Request for Assistance

The Office of Attorney Discipline (OAD) is requesting assistance from attorneys who would be willing to act as supervising attorneys. Attorneys who are found to have violated the Rules of Professional Conduct are, at times, placed on probation and are ordered to work with a supervising attorney. This attorney would supervise the disciplined attorney's case management during the attorney's specified probation period. Probations generally last from one to three years. During the probation period, the supervising attorney is asked to meet with the disciplined attorney on a regular basis and file regular reports with the OAD concerning the status of the disciplined attorney's practice. Supervising attorneys are immune to prosecution while acting in this capacity, and this will be explicitly stated in the Order of Discipline.

The OAD invites all those interested to call the OAD's paralegal, Connie Howard, at 531-9110.

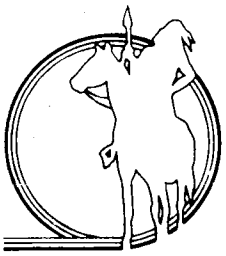
Trial Academy 1998

The Litigation Section of the Utah State Bar announces its second annual Trial Academy. The Trial Academy is one of the Bar's most useful and popular CLE programs and consists of six evening seminars held every other month over the course of the year taught by top-notch trial practitioners and focusing on basic trial skills. This is THE course for any lawyer new to trial practice who wants focused, nuts-and-bolts training in conducting a civil jury trial from start to finish.

On January 28, 1998, the first session will be held at the Law & Justice Center from 6:00 to 8:00 p.m. on the topic of "Civil Jury Selection in Utah." Registration begins at 5:30 p.m. Prominent local trial attorneys will lecture and demonstrate the jury selection process using a mock jury with a federal and state judge sitting jointly on the bench. Extensive materials will be provided.

Students will receive two CLE credit hours for each session attended. NLCLE credit is available. The cost is $25 per session for Litigation Section members and $35 for non-members. Enrollment is limited. To register call Monica Jergensen at the Utah State Bar offices at 531-9077. For further information on the Trial Academy, contact Francis Carney at 532-7300.

Western States Bar Conference



FEBRUARY 18 – 21, 1998
Hilton Waikoloa, Kona, Hawaii

The 50th Annual Western States Bar Conference will be on the Big Island of Hawaii, February 18-21 at the Hilton Waikoloa. Hawaii in February is a premier destination resort with all the amenities one expects from this paradise. This anniversary "futures" program will provide substantive discussions on the profession, bar associations and the courts. Bar leaders and volunteers from 16 western states will gather to assess these topics and how our profession will deal with the significant challenges ahead.

Social activities will include a golf tournament and traditional Hawaiian outings – a luau and dinner cruise.

For further information contact Charles Turner or Dana Vocate of the Colorado Bar Association at (303) 860-1115 or cturner@cobar.org.

Notice of Election of Bar Commissioners Second and Third Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for two members from the Third Division and one member from the Second Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by written petition of 10 or more members of the Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after January 5, and completed petitions must be **received no later than February 2.**

Ballots will be mailed on or about March 2 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. on March 31. Ballots will be counted on April 1.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1) Space for up to a 200-word campaign message plus a photograph in the March issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for March *Bar Journal* publication are due along with completed petitions, a photograph and short biographical sketch **no later than February 2.**
2) A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their district.
3) The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar **no later than February 16** enough copies of letters for all attorneys in their district. (Call the Bar for a count in your respective district).

If you have any questions concerning this procedure, please contact John C. Baldwin at the Bar, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to be the mailing address of the main office or business location according to the Bar's records.

Join the Bar's New Law Practice Management Committee

In October the Bar Commission approved the formation of the new Law Practice Management Committee. This committee will explore law management issues and how they affect the profession. As well, the Committee will focus on building law practice management resources for the Bar membership.

Ryan Tibbitts, of Snow Christensen & Martineau, has been chosen to chair this committee and is looking forward to getting this committee off of the ground.

We encourage all Bar members with interest to join. If you are interested in joining, please contact Toby Brown at 297-7027 or at tbrown@utahbar.org.

Notice of Court-Annexed ADR Program Expansion

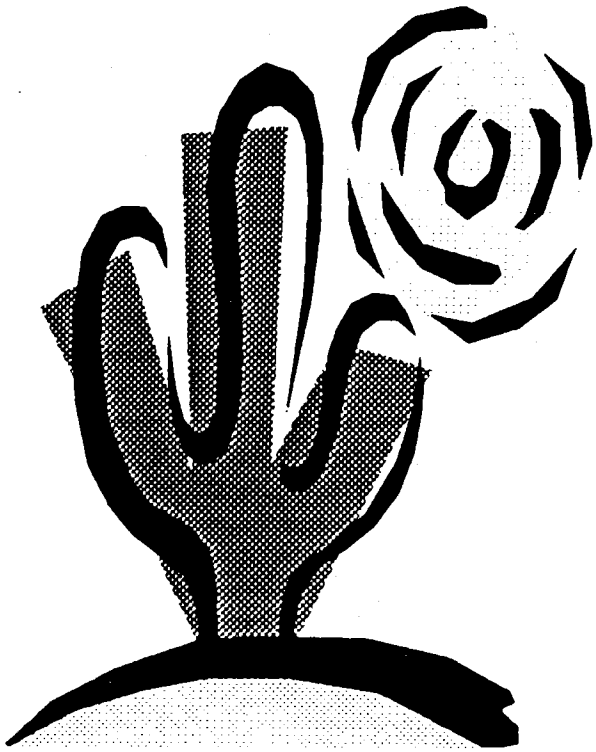
The Judicial Council recently approved expansion of the Court-Annexed ADR Program into the Second and Fourth Judicial Districts. The program will be implemented in the new districts on April 1, 1997. The program requires parties in all contested matters over $20,000 to view a short videotape regarding 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. If you have questions about this program, please call Diane Hamilton at the Administrative Office of the Courts, (801) 578-3984.

1998 Mid-Year Meeting Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 1998 Mid-Year Meeting. These awards honor publicly those whose professionalism, public service and personal dedication have significantly furthered the **advancement of women** and the **advancement of minorities** in the law profession or judiciary. Your award application must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Tuesday, January 20, 1998.**

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!



ABA Judicial Division National Conference of Special Court Judges Seeking Nominations for 1998 Judicial Education Award

The ABA National Conference of Special Court Judges is soliciting nominations by March 1, 1998, for its Annual Award to individuals or institutions who have provided "high quality judicial education and training to judges of limited or special court jurisdiction."

This award has been presented annually for more than 10 years. Selection is by 11 members of the national conference, who will present the award at the 1998 ABA Annual Meeting in Toronto.

Judges in special and limited jurisdiction courts handled more than 90 percent of the cases resolved by trial in this nation. These courts have a variety of names, including city, municipal, magistrate, county, district, civil, family, probate, traffic, juvenile and criminal. Any judge from these or similar limited or special jurisdiction courts is eligible for nomination.

Nominations must be submitted on the original Official Nominating Form, which is available by contacting the ABA Judicial Division, National Conference of Special Court Judges, Attn: Judicial Education Award Board, 541 N. Fairbanks Court, Chicago, IL 60611; Phone 312/988-5685; Fax 312/988-5709; E-Mail: persinj@staff.abanet.org.

Attorneys Needed to Assist Needs of the Elderly Committee Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys by, among other things, providing information on the various legal and other services available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next twelve months.

The Needs of the Elderly Committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Any attorneys interested in participating in this rewarding yet truly worthwhile program are encouraged to contact: Tom Christensen or Mary Ann Fowler @ 531-8900, Fabian and Clendenin, 215 South State, #1200, Salt Lake City, Utah 84111.

Law-Related Education Programs Expand Rapidly in Utah

It's three o'clock on a Thursday afternoon in a Third District Courtroom in Murray. Twenty twelve- and thirteen-year-olds, all appropriately starched and pressed, stand as the three judges take their seats and give the signal for the mock trial to begin. The four plaintiff attorneys outline their case and begin presenting witnesses. The issue is a serious one. The White Aryan Separatist Party ("WASP") and its leader are being sued by the mother of a young man whose murder she claims was directly inspired by hate literature the WASP group distributed. The atmosphere is tense as witnesses are subjected to cross-examination by opposing lawyers, and the lawyers themselves must respond to their adversaries' frequent objections.

At the end of the trial, the members of one of the mock trial teams feel the glow of having been designated as the winner by the judges. But both teams will leave the courtroom with vastly greater knowledge of and appreciation for the legal system than they had before preparing for the competition. After working for months with their volunteer lawyer-coach, few of the students, or the parents who support them, will buy into prevailing stereotypes of lawyers as grasping "hired guns" who care nothing about their communities.

Affording this superb experience to more than a thousand junior and senior high school students who took part in the 1997 Utah Mock Trial Competition required a lot of effort. The staff of the Utah Law-Related Education Project (LRE), which administers the program, had to adapt the case and produce the Mock Trial Manual, conduct the registration process, train teachers, answer questions from volunteer attorney coaches for the teams, schedule and prepare courtrooms, enlist judges, lawyers, and citizen volunteers to act as mock trial judges, and make sure that all teams, judges, and juries were where they were supposed to be for the two initial rounds and for the final rounds.

The Mock Trial Program is just one of ten major citizenship education programs administered by the Utah Law-Related Education Project, a long-time recipient of Utah Bar Foundation support. "The Bar Foundation money is the cornerstone that sustains the project by supporting our administrative staff and program development. We've been able to reach many more people over the years because of that support, together with funding from the Utah State Bar and other grantors," Project Director Kathy Dryer stated.

Expanding the Mentor Program

Several well established LRE programs have recently grown in interesting directions. For example, the Mentor Program has for the last dozen years brought volunteer attorneys into junior and senior high classrooms to teach legal concepts and take students on tours of their law offices. In the last year, thirty-four lawyers from the Attorney General's Office and private law firms have volunteered to expand the program to elementary schools. Working on their own time, these lawyers have taught conflict resolution skills for the students to use at school and at home. They use interactive techniques stressing real conflict situations the children are likely to encounter. The new mentors report that their classroom sessions are satisfying, but exhausting. "At the end of an hour, you feel like you've been in a hotly contested trial," Deputy Attorney General Tom Mitchell commented recently.

Community-Wide Mediation Training

LRE programs aimed at violence prevention and conflict resolution have greatly accelerated in recent years, responding to alarming increases in violent juvenile crime. "We decided that to make our conflict resolution program truly effective, we had to reach beyond the schools and into the wider community," stated Marlu Gurr, LRE Mediation Program Coordinator. With additional aid from the Governor's Office of Ethnic Affairs and the Martin Luther King Commission, LRE has sponsored a path-breaking new program in the twenty-four-block area encompassing West High and Rose Park neighborhoods.

In the first phase of the program, students and teachers in all the neighborhood schools were trained in mediation techniques. In the second phase, the basics of conflict resolution and prejudice awareness will be presented to parents and community members at local PTA meetings. LRE staff has prepared an ethnically diverse group of trainers to assist in this community-wide effort. Soon, a neighborhood Peace Center providing mediation services and other community resources will be established.

Juvenile Justice Programs

In the last four years, under the direction of program coordinator Virginia Lee, LRE has conducted a variety of education programs for youth in the

juvenile justice system. Working with Juvenile Court judges and a group of committed attorneys, educators, and Youth Corrections personnel, Lee has conducted programs that teach young offenders about their rights and responsibilities, stressing accountability and competency development. Through Lee's efforts, three alternative high school teams participated in this year's Mock Trial competition. According to their teachers, these at-risk students have achieved more academic and personal gains from the mock trial experience than from any other single class.

Peer Court

The teen Peer Court, a remarkable new program for minor first offenders is now operating in four Salt Lake City High Schools, with strong administrative and training support from the LRE staff. Under the direction of Kathleen Zeitlin, young offenders who choose this alternative to the normal Juvenile Court process appear before a panel of their peers trained in conflict resolution skills and effective questioning techniques. Panel members use a non-adversarial approach to fashion an appropriate disposition for each offender. Each offender is supported and encouraged by a court-appointed student mentor. The recidivism rate of less than five percent attests to the effectiveness of the new, collaborative LRE program.

CLE CALENDAR

DOMESTIC VIOLENCE CLINIC – PROTECTIVE ORDERS
Date: Thursday, January 8, 1998
Time: 5:00 p.m. to 7:00 p.m.
Place: Utah Law & Justice Center
Fee: No Charge
CLE Credit: 2 HOURS

WHY BAD THINGS HAPPEN TO GOOD LAWYERS: ETHICS & PROFESSIONALISM SEMINAR
Date: Wednesday, January 21, 1998
Time: 8:30 a.m. to 4:30 p.m.
Place: Utah Law & Justice Center
Fee: $100.00 pre-registration
$120.00 registration at the door
CLE Credit: 6 HOURS ETHICS

NLCLE WORKSHOP: LANDLORD/TENANT
Date: Thursday, January 22, 1998
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

FAMILY LAW PRO BONO PROJECT TRAINING
Date: Friday, January 23, 1998
Time: 8:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: FREE to those willing to accept a pro bono case
$45.00 for all others
CLE Credit: 4 HOURS

TRIAL ACADEMY 1998: SESSION 1 – CIVIL JURY SELECTION
Date: Wednesday, January 28, 1998
Time: 6:00 p.m. to 8:00 p.m. (Registration begins at 5:30 p.m.)
Place: Utah Law & Justice Center
Fee: $25.00 for Litigation Section Members
$35.00 for all others
CLE Credit: 2 HOURS (NLCLE)

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.
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

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

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____

Make all checks payable to the Utah State Bar/CLE — Total Due

_____
Name — Phone

_____
Address — City, State, Zip

_____ _____
Bar Number — American Express/MasterCard/VISA — Exp. Date

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Credit Card Billing Address — City, State, ZIP

_____
Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

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.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee,* will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

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.

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin, or age.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

POSITIONS AVAILABLE

ESTABLISHED GENERAL PRACTICE SLC FIRM SEEKS ASSOCIATE WITH PARTNERSHIP POTENTIAL. Must have 5 to 7 years legal experience. Must understand real estate planning and tax and be willing to participate in litigation. Please send resume to: Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #43, Salt Lake City, Utah 84111.

POSITIONS SOUGHT

ENTERTAINMENT LAW: Denver-based attorney licensed in Colorado and California available for consultant or of-counsel services. All aspects of entertainment law, including contracts, copyright and trademark law. Call Ira C. Selkowitz @ (800) 550-0058.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

CALIFORNIA LAWYER . . . also admitted in Utah! I will make appearances anywhere in California, research and report on California law; and in general, help in any other way I can. $75 per hour + travel expenses. Contact John Palley @ (916) 455-6785 or john@palley.com.

CONTRACT WORK. Uncertain about the appellate process? Need assistance with a complex or lengthy motion? Attorney with extensive experience clerking for the Utah Court of Appeals and the Utah Federal District Court seeks contract appellate/motion work. Excellent research and writing skills combined with very reasonable rates. Sheleigh A. Chalkley (801) 532-7282.

OFFICE SPACE/SHARING

OFFICE SPACE FOR RENT: Choice office space for rent in beautiful, historic building in Ogden, Utah. Several elegant offices with character available; great associations; security system; extremely convenient location; and ample parking. For information contact (801) 621-1384.

Historic building on Exchange Place, leasing 1600 Square foot office space with five individuals offices, reception/secretarial area, storage room and separate outside entrance. Located half block from new courts complex and Federal Court. Great for small firm requiring court access. 4 to 5 Parking stalls. Available Dec. 1st, $1600 monthly. Contact Joanne Brooks @ (801) 534-0909.

DELUXE MID-VALLEY OFFICE SPACE Perfect for small firm or solo practitioner. Four large window offices with five interior offices. Up to 3500 square feet. Option of either separate or shared reception area, copy center, conference room and receptionist. Excellent freeway access at 5300 South. Available immediately. Contact Eric Nielson @ (801) 262-5300.

Downtown-Kearns Building. Office for one attorney. Three attorneys presently in suite. Beautiful, furnished conference room, reception area. Fax, printer, copier, telephones, postage meter, computer network provided. Library: Westlaw, Utah Reporter, Federal Reporter, USCA/Regs. Pleasant, professional atmosphere. Parking next to building. (801) 364-5600.

SERVICES

SEXUAL ABUSE/DEFENSE: Children's Statements are often manipulated, fabricated, or poorly investigated. Objective criteria can identify valid testimony. Commonly, allegations lack validity and place serious doubt on children's statements as evidence. Current research supports **STATEMENT ANALYSIS,** specific juror selection and instructions. B. Giffen, M.Sc. Evidence Specialist American College Forensic Examiners. (801) 485-4011.

TOXICOLOGY AND CHEMISTRY: Technical, educational, and expert witness services for legal alcohol (DUI), illicit drugs, priority pollutants, and chemical products. Court-tested exper-

tise in metabolism, biological effects, and forensic analyses (e.g., breathalyzers, gas chromatographs, and mass spectrometers). Contact: Joseph Stewart, Consulting Toxicologist/Chemist, Regional Toxicology and Chemistry Services, Tel/Fax: (406) 443-4546, e-mail: rtacs@mt.net.

LUMP SUMS CASH PAID For Remaining Payments on Seller-Financed Real Estate Notes & Contracts, Business Notes, Structured Settlements, Annuities, Inheritances In Probate, Lottery Winnings. Since 1992, www.cascadefunding.com. **CASCADE FUNDING, INC. 1 (800) 476-9644.**

SHOOTING SPORTS LAWYERS! Join us for networking, shared interests in pro-gun, hunting, and other shooting issues and recreation opportunities. Send name, address, phone/fax number and interests to: Utah Lawyers for Shooting Sports Association, P.O. Box 112383, Salt Lake City, UT 84147.

SECRETARY is seeking part-time evening work out of home office. Have been full time Administrative Assistant for past eight years with Salt Lake Community College. Have Legal Secretary certificate. For further information, resume, or letters of recommendation, please contact: Julie (day) (801) 957-3434, (evening) (801) 263-2188.

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E-mail: info@utahbar.org

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Assistant Executive Director
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Mary A. Munzert
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

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Access to Justice Coordinator & Programs Administrator
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Tel: 297-7024

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CLE Assistant
Tel: 297-7033

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J. Arnold Birrell
Financial Administrator
Tel: 297-7020

Joyce N. Seeley
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Tel: 297-7021

Lawyer Referral Services

Diané J. Clark
LRS Administrator
Tel: 531-9075

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Lisa Farr
Law & Justice Center Coordinator
Tel: 297-7030

Consumer Assistance Coordinator

Jeannine Timothy
Tel: 297-7056

Receptionist

Summer Shumway (a.m.)
Kim L. Williams (p.m.)
Tel: 531-9077

Other Telephone Numbers & E-mail Addresses Not Listed Above

Bar Information Line:
297-7055

Mandatory CLE Board:
Sydnie W. Kuhre
MCLE Administrator
297-7035

Member Benefits:
297-7025
E-mail: ben@utahbar.org

Web Site:
www.utahbar.org

Office of Attorney Discipline

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E-mail: oad@utahbar.org

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Carol A. Stewart
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CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

Utah State Board of
Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

Professional Responsibility and Ethics **Required: a minimum of three (3) hours**

1. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

2. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

Continuing Legal Education **Required: a minimum of twenty-four (24) hours**

1. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

2. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

3. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

4. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**EXPLANATION OF TYPE OF ACTIVITY

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.

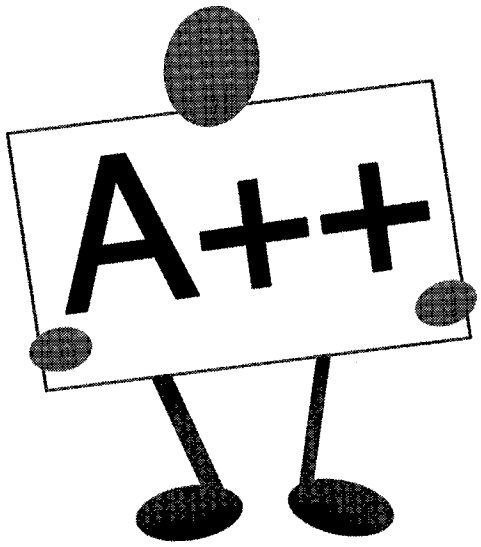
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

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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