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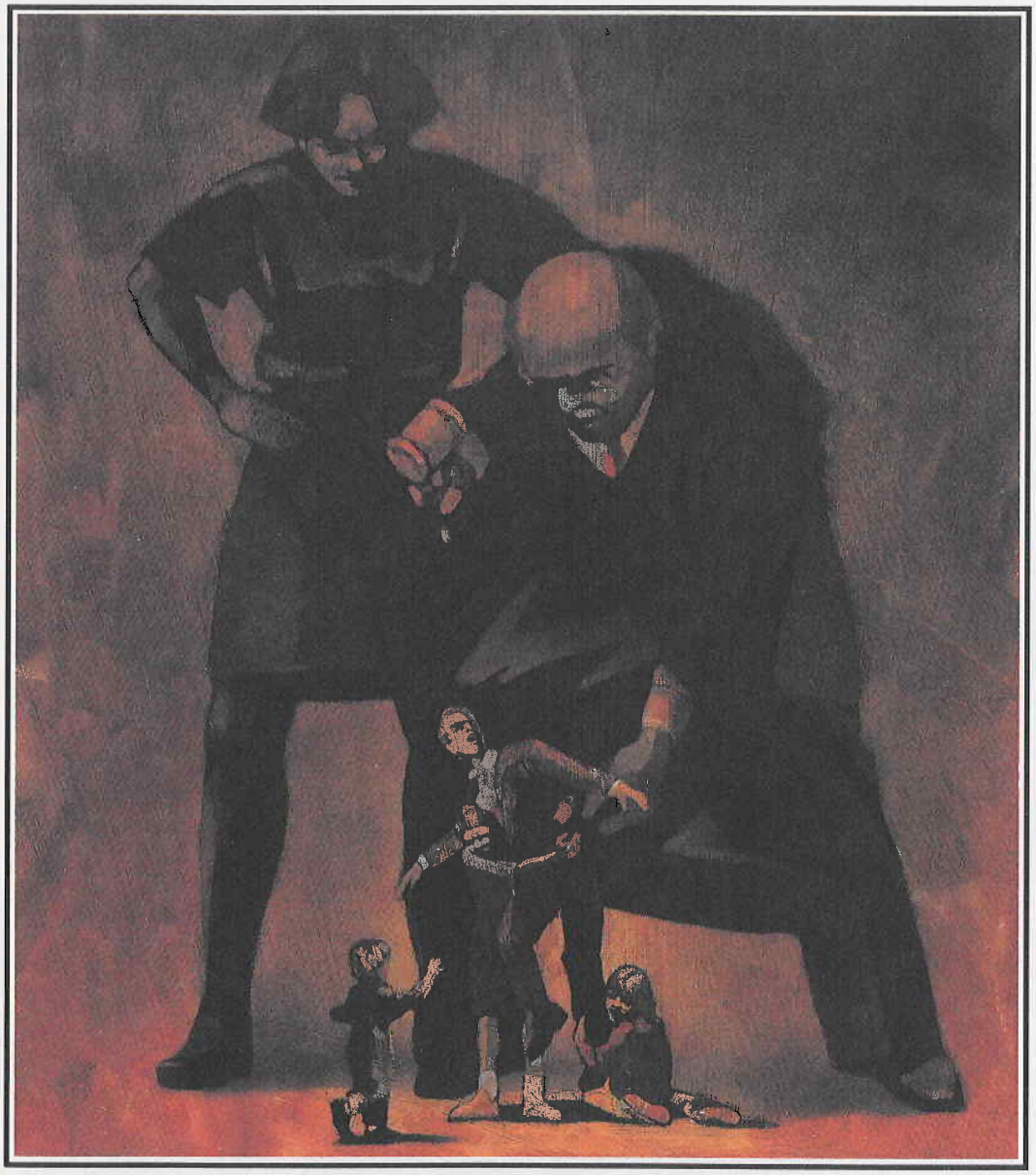

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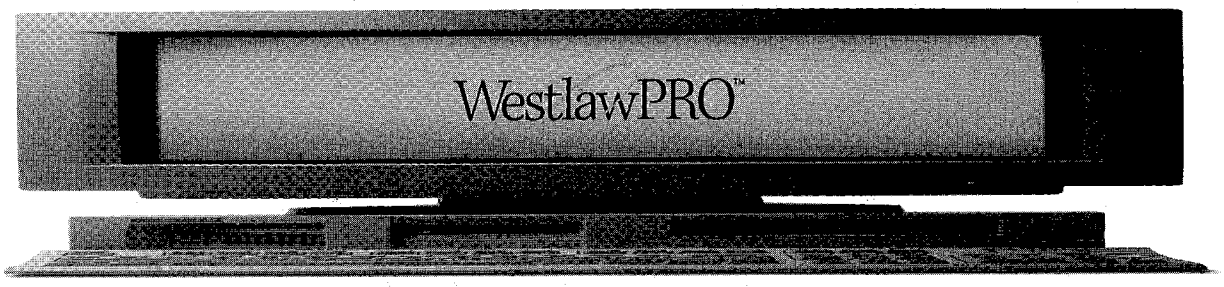

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VOIR DIRE EDITORIAL POLICY

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 8 1/2" by 11 1/2" 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*.

President's Message

The Challenge to Improve

by James C. Jenkins

I decided as a young boy that I wanted to be a lawyer. It seemed to me to be a career full of variety and challenge, an opportunity to make a meaningful impact upon the lives of others, and a respectable way to earn a living. Over the years, I have heard some lawyers complain about occupational burnout. I have heard some people blame attorneys for disrupting or damaging their lives and I have heard many jokes which demean and dishonor the profession. I am probably as cognizant as anyone of all the criticisms which are lodged against our profession but I have never regretted that decision made long ago. Practicing law has been and remains one of the greatest privileges of my life.

Last month I had a simple and perhaps ordinary experience which reinforced for me the merit of my career choice. I have recently been engaged in a contract case scheduled for trial in federal court. Both parties and their counsel have been under considerable pressure to meet discovery deadlines. As part of our preparation, my partner, Tom Willmore, and I conducted depositions of some twenty witnesses over eleven days; half of that time was spent in Logan and the other half in Los Angeles. It is the kind of case where a lawyer would have ample opportunity to be disagreeable, contentious or obstructive. But that has not happened.

Shigeru Watanbe and his associate, Matthew Kanny, serve as opposing counsel. Shig and Matt are members of the Los Angeles office of the firm Kelley Drye & Warren. Although we have only been acquainted for a short time, I have been impressed with their demonstrated competence and professionalism.

During the first few days of depositions, it was discovered that because some employees of Shig's client worked in branch offices outside of Los Angeles, it would be difficult to maintain the original schedule and still comply with the court's date to cut off discovery. While Matt was in Logan, Shig called from Los Angeles to explain the problem. Instead of insisting that his witnesses could not be deposed, he offered some proposals to resolve the problem. He suggested that we could reschedule witnesses if the depositions would be held at his client's place of business. This would reduce the travel time for most of the eleven witnesses. I pointed out that my hotel reservations had already been confirmed. I had not planned to rent a car and I wasn't enthusiastic about driving the L.A. freeways to locate an alternate site. I was also worried about having access to a phone and a copy machine during the depositions. He simply said that if I would agree to accommodate his client's needs, he would take care of mine.

For the next five or six days, Matt or Shig personally drove to my hotel and transported Tom, me, and our client to the depositions and returned us each evening to the hotel. Shig made arrangements for a phone and copy machine. They each were courteous and considerate to witnesses. They were patient with my questioning and refrained from interposing unnecessary objections. They did not coach their witnesses during my examination, but allowed me to fairly determine information as I requested it, and whenever I inquired about information which could have been confidential or proprietary to their client, it was simply designated protected under a confidentiality and protective order which we had jointly negotiated, without the necessity of prior motion or court intervention.

Although the work was taxing and challenging, we were able to effectively accomplish our task and serve the respective interests of our clients without hostility and obstruction. I gained a genuine respect for Shig and Matt not only as competent attorneys but as gentlemen.

I think there is a lesson in my experience. When we fail to exercise civility and morality in our professional practice, our work then becomes unbearable. Clients are not properly served and criticism of lawyers abounds.

What a wonderful privilege it is to serve as president of this great organization. I thank Charlotte Miller, Steve Kaufman, Dennis Haslam, Paul Moxley, and Jim Clegg for the outstanding leadership and service they each provided as presidents of the Utah State Bar during the five years I have been a Bar Commissioner. Among the many accomplishments which I hope we will together achieve during this year is a goal to encourage every lawyer to be better both as a professional and as a person. The work we do is important. We can make a difference in people's lives. I invite you to write or call me with your ideas and suggestions for improvement, and I eagerly look forward to working on your behalf.

REPORT FROM THE CHAIR

You have probably noticed that this issue of *Voir Dire* is dedicated to domestic law issues. In an Executive Committee meeting, a very persuasive domestic law Commissioner enlightened the general litigators on the committee about the importance of domestic law. After our brief but informative tutorial session, we unanimously agreed that an issue of *Voir Dire* dedicated to domestic law would not only be of interest to several practitioners, but was also a necessity given several questionable practices occurring daily in the domestic courtrooms by litigators of all experience levels.

I was given my first domestic case during my first year of practice. A senior partner engulfed my doorway telling me of the torment his sister's friend in their church group was experiencing with her new husband. A simple, quick and undisputed annulment was needed. I wholeheartedly consented to help out but knew I was doomed when he left my office indicating that this would be a very good learning experience for me. He handed me the firm's domestic law handbook, authored sometime in the '70s, as my guidepost in this fortuitous "pro bono" assignment.

After spending nearly 150 billable hours, the "quick" annulment was finalized. Every facet of the lawsuit presented problems never encountered by any of the general litigators in my firm. I found myself calling several of my classmates who ultimately referred me to a network of very helpful domestic law practitioners. I gained a new respect for domestic law practice and vowed that I would never again take on a domestic case.

To my dismay, my next encounter with the world of domestic law was of a more personal note–my own divorce and custody proceedings. I began the process thinking I could represent myself and save a lot of money in the process. How tough could it be to simply divide the domestic possessions in half and set up a workable custody schedule? I soon realized that I was again way out of my league, and immediately called a domestic law guru.

In initially embracing a cavalier attitude that I could handle my own uncontested divorce, I ignored the long-term consequences of a divorce. I failed to take into account the fact that my two-year-old daughter would need financial support from both parents for another sixteen years. I didn't realize that my retirement account was no longer mine. The house was no longer easily divisible into equal parts. Most importantly, I was naive in thinking that my former spouse and best friend of ten years would amicably resolve this matter.

Needless to say, a divorce or any domestic law matter involves issues not encountered in the typical lawsuit. As litigators we all need to divest ourselves of the cavalier attitude about simple domestic law cases. Indulge yourself in the wealth of domestic law information contained in the pages to follow. Respect your fellow domestic law litigators because you never know when, or how, you will need their assistance.

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I will step aside as chair of the Litigation Section in July, and Janet Goldstein, a solo practitioner in Park City, will lead the Section next year. During her tenure on the Executive Committee, Janet has shown remarkable dedication to the Section's future, and I am confident that she will continue to lead the section with energy and vision.

The Executive Committee worked very hard this year to bring a variety of programs to Section members. One of our many new projects is a mentor program under construction in the Litigation Section's portion of the Bar's Web page. This service, planned to begin in July, 1998, will enable Section members to e-mail questions of interest to experienced litigators for answers which will be indexed and available for all to read by accessing the page at http://www.utahbar.org/section/Lit/litcom.html. The Section will conduct its annual meeting and host a good old-fashioned BBQ in Park City on September 12, 1998. More details will be provided as the date nears.

I have been honored to serve as chairperson of the Litigation Section. Over the past year this "chair" has thoroughly enjoyed the opportunity to meet and work with many members of the Bar, including those who call the "leather wingbacks" home. As my short tenure expires, I'll head back to the comforts of my green synthetic chair behind my Steel case desk in Murray with a renewed appreciation and understanding of the benefits of involvement in the Bar.

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As this issue went to press, the Section's Executive Committee voted to cease publishing *Voir Dire*, and this issue will therefore be our last. The Bar Commission informed us that it would fund only one issue per year, and the Executive Committee determined that a single annual issue is insufficient to fulfill our commitment to provide meaningful and timely discussions of issues. I want to thank the members of the Editorial Board, both past and present, for making *Voir Dire* such an excellent publication.

Vicky Kidman

POINT/COUNTERPOINT

Final Report of the Utah Family Court Task Force: Summary of Principal Recommendations

by Tim Shea

The Utah Family Court Task Force makes its case for a family court in its final report. At its meeting in August of this year, the Judicial Council will dust off the final report, issued December 16, 1994, and consider those arguments. The arguments for and against a family court are taken up in the Point/Counterpoint portion of this series. This article serves as a summary of the major Task Force recommendations. The Task Force report is available on the Utah courts' web page: www.courtlink.utcourts.gov.

It will have been almost four years from the conclusion of the Task Force study when the recommendations are put to general scrutiny by the courts, the Bar, the public, and ultimately the Utah State Legislature. In the interim, court consolidation has been completed by merging the Circuit Courts into the District Courts in Judicial Districts 1 through 4. The CORIS computer system, perhaps the key feature in the feasibility of a family court, will have been fully implemented throughout the District Court. And the District and Juvenile Courts will have been co-located in many courthouses around the state, including, in Salt Lake County, the Sandy Courthouse, and the Matheson Courthouse.

The family court, as recommended by the Task Force, would not be a separate court at all, but rather a department of the District Court. This family department would have assigned to it the cases now within the jurisdiction of the Juvenile Court–delinquency and status offenses, child protection cases, and termination of parental rights–and the family law cases of the District Court, such as divorce, cohabitant abuse, paternity, Uniform Interstate Family Support, and all custody, support and visitation issues. The complete list of the cases recommended for assignment to the family department is found in the Task Force report. Court staff are working on estimates of the number of judges, staff, and other resources needed for the family department and for the "general department,"consisting of adult felony and misdemeanor and non-domestic civil cases. The Task Force recommends that intra-family crimes be prosecuted in the general department of the District Court.

The Task Force made no recommendations regarding the administration of particular ancillary services. The Task Force's general approach was to assume no change of the status quo. That is, the development of a family court would not

Mr. Shea is the Senior Staff Attorney for the Administrative Office of the Courts.

require those services already administered within the judiciary to be moved outside the courts. Neither would a family court require services currently found outside the courts to be administered from within. The landscape of services supporting family law is irregular and dynamic. The scene as it appeared to the Task Force has changed and likely will further change before legislation is enacted. The family court, if it is implemented, will participate in the debate regarding these services–Which are effective? How should they be administered? When are they appropriate?–but the Task Force discerned no particular "best method" of administering and providing these services.

The Task Force recommended that the family court assume a strong role in developing expertise in the nature and availability of services and coordinating whatever services are ordered in particular circumstances. Inter-agency cooperation–including the courts, state and local bureaus, and private providers–is critical to successful judicial intervention in the lives of families. Although there may be no best method of administering services, the family court appeared to be the focal point through which those services should be coordinated.

Perhaps the most controversial recommendation of the Task Force is that judges be permanently assigned to the family court. Indeed, this recommendation is contrary to the model recommended by the American Bar Association, the National Family Court Symposium, and the Utah Commission on Justice in the Twenty-first Century, all of which recommend some type of rotation of judges between the family law cases and the balance of the court docket.

The Task Force did not expressly recommend implementation of the concept of "one family/one judge." Direct calendaring, as it is called by the National Family Court Symposium, is discussed at length in the final report as one of three possible methods of calendaring cases. Rather than recommend a particular method of calendaring cases, the Task Force articulated several principles and goals of a calendaring system and of case management in general. These principles and goals form the core of family court operations.

Lawyers practicing family law may want to consider more closely the calendaring and case management principles and goals of the final report. In the end, many practitioners care more about the procedures of the court than its structure. The Utah Rules of Civil Procedure and any rules particular to divorce cases and domestic violence cases will remain in effect for civil litigation. The Utah Rules of Juvenile Procedure and the special statutes and rules governing delinquency and child protection procedures will remain in effect for those cases. The Task Force recommends a uniform set of rules for family law cases, but these may be a year more in development.

> ***"Perhaps the most controversial recommendation of the Task Force is that judges be permanently assigned to the family court."***

A lesson learned during court consolidation is to improve upon the uniformity of internal operating procedures–at least as those procedures affect the parties and the management of a case. As stated above, the internal case management functions of the family court are discussed as principles and goals. Actualization of those principles and goals needs further refinement. Internal operations should be reasonably consistent from district to district, but some variations may exist as a result of local circumstances.

Unified Family Courts: Therapeutic Power and Judicial Authority

by Stephen J. Cribari

Unified family courts have existed in this country since 1914.[1] Some states have established state-wide unified family courts, others have instituted partial unified family courts. Recently, several jurisdictions have implemented pilot projects,[2] others are studying their feasibility.[3]

Unified family courts are courts that are designed to dispense *therapeutic justice* in an effort to address the personal and social issues that drive families into court. This brief paper offers a description of unified family courts and raises questions about the expansive judicial power associated with them.

In a unified family court, exactly what is it that is "unified?"

As many jurisdictional bases as possible are unified under the authority of the family court, which should be a court of stature equal to the highest trial court in the state. At a minimum, a unified family court should hear matrimonial, domestic violence, juvenile delinquency, child protection, and family crisis cases.[4] Some unified family courts, such as Hawaii's, assume limited criminal jurisdiction.

The accelerated and coordinated provision of social services is also unified under the authority of the family court, as is coordination of collateral and ancillary matters, such as substance abuse evaluation and treatment programs for family members not directly before the court.

Unified family courts also differ from traditional courts because they are less adversarial. Wherever possible, the techniques of alternative dispute resolution, including mediation, are utilized.

And unified family courts make a deliberate effort to consolidate before the same judge all cases originating from one family. In some high population or urban areas, such as New Jersey, the one family/one judge concept has been modified to the one family/one team notion. In the one family/one team approach, judges are assigned to teams of case managers and social service providers and it is the team, not the judge, which is the constant for each family. This approach maintains a one-to-one correspondence at the level most closely associated with the family, and allows flexibility in judicial assignment.

Establishing a unified family court can be expensive. The court utilizes advanced technology for case management and tracking, and for retrieving information about litigants. The court relies on personnel trained in this technology as well as in the skills required to interact meaningfully with litigants.

Unified family courts also express a commitment by a community to do what is called *therapeutic justice:* justice that heals a family by addressing the personal and social problems that result in family law cases. Today, those problems most often involve substance abuse, or the mental and emotional problems associated with, or easily mistaken for, substance abuse problems.

Compassionate human contact can change a personality, not just behavior. Compassion–that uniquely human way in which people connect with each other–can provide an environment in which what is good in our personalities can grow. Unified family courts rely on compassion more than on the coercion-based behavior modification programs frequently associated with probation, parole and drug court diversionary schemes. Unified family courts try to create conditions wherein compassionate people can connect with people who need the benefit of a compassionate response to their human situation. This is the most therapeutic endeavor of the unified family court.[5]

Judges who sit in unified family court must have a commitment to this mission.[6] In many unified family courts, judges are required to attend annual training and education programs, and may be offered enhancements, such as increased pay, benefits, or sabbaticals, to encourage continued service in family court.

Because unified family courts address family issues, not just legal issues, unified family court judges have many opportunities to intervene in the lives of individual family members.[7] The power to decide legal issues does not traditionally include

Mr. Cribari is Project Manager of Communities, Families, and the Justice System, an initiative of the ABA Standing Committee on Substance Abuse, funded by a grant from the Robert Wood Johnson Foundation; Mr. Cribari also teaches law with the Columbus School of Law, Catholic University of America, and the Forensic Sciences Department of George Washington University, both in Washington, D.C. The opinions expressed in this article are private to the author and are not necessarily the opinions of the American Bar Association.

[1]Cincinnati, Ohio, had the first unified family court. In 1961, Rhode Island established the first statewide unified family court.

[2]For example, King County, Washington; Cook County, Illinois; Fulton County, Georgia; San Juan, Puerto Rico.

[3]For example, Maryland, North Carolina.

[4]Matrimonial cases include divorce, equitable distribution, custody, visitation, child support, and alimony matters. Domestic violence cases include issuance of protective orders (temporary and final) and contempt proceedings for violations of those orders. Juvenile delinquency cases usually are statutorily defined. Child protection cases include abuse and neglect cases, review of children in placement cases, termination of parental rights and adoption proceedings. Family crisis cases include juvenile status cases, such as truancy, runaway, and unmanageable children cases. Jeff Kuhn, Assistant Director, Administrative Office of the Courts (New Jersey) Family Practice Divsion, Remarks at the Fulton County, Georgia Family Court Pilot Project Mini-Conference (June 27, 1997).

[5]Professor Barbara Babb, of the University of Baltimore School of Law, has stated that we may have a moral obligation to dispense therapeutic justice in family cases. Professor Barbara Babb, Remarks at the Unified Family Court Conference in Markham, Illinois (July 17, 1997).

[6]The unified Family Court of the First Circuit of Hawaii has adopted a Family Court Mission Statement: "The mission of the Family Court is to provide a fair, speedy, economical, and accessible forum for the resolution of matters involving families and children."

[7]"To positively affect family members' behavior, thereby achieving a therapeutic outcome, family law remedies must reflect an integrated approach to family legal issues. This means that decision makers must consider all of the parties' related family legal proceedings, as well as all of the institutions or organizations potentially affecting the behavior of