Volume 11 No. 5
June 1998

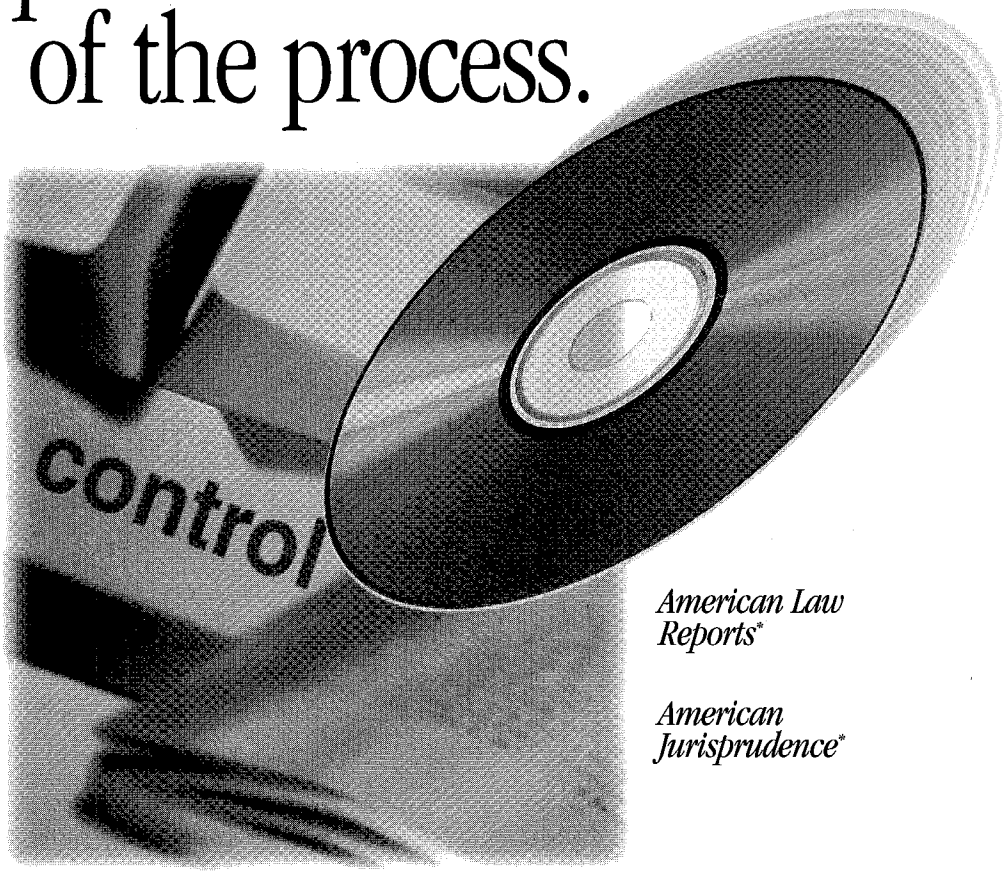
Utah Bar JOURNAL

In legal research, *control* of the outcome requires *command* of the process.

Utah Reporter™ and West's® Utah Code

West's Utah Digest CD-ROM Edition™

Pacific Reporter® 2d on CD-ROM



*American Law Reports**

*American Jurisprudence**

West CD-ROM Libraries™ put you in control, with interlocking research materials that are powerful, easy-to-use and structured to meet your needs. Whether you're beginning your research with a case, a statute or an annotation, West Group's legal research system will guide you to the correct answer–every time.

West Group has united the finest resources in the legal publishing industry into a cohesive, coherent whole. When you access this information through West CD-ROM Libraries, you'll get the power to zero in on big issues with headnotes and case synopses, solidify your argument with KeyCite™, then bring it all together with the very latest data from over 9,000 WESTLAW® databases.

Bring West CD-ROM Libraries into your practice. You'll watch your efficiency soar–while your costs, time and effort plummet.

Make more connections for your research dollar. Contact West Group at 1-800-762-5272.

Please provide OFFER NUMBER 826093.

WEST GROUP™

Bancroft-Whitney • Clark Boardman Callaghan
Lawyers Cooperative Publishing • WESTLAW® • West Publishing

*Available on PREMISE® and Folio® Research Software.
The trademarks shown above are used under license.

9-9512-4/2-98 826093 1-566-907-1

Table of 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.*

COVER: Scene from Mount Timpanogos, by Reid Tateoka.

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

The *Utah Bar Journal* is published monthly, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $40; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

Utah Bar JOURNAL

Volume 11 No. 5
June 1998

Letters to the Editor

Dear Editor:

It is astounding to me that the Bar is only now recognizing that it enjoys an adverse relationship with individual attorneys. (Bar Commission Adopts Long Range Plan, *Utah Bar Journal*, April, 1998, page 6.) My perception after 35 years or so of more or less active observation is that most sole practitioners, small firm members and non-Salt Lake City attorneys have long believed the Bar Association to be their adversary and feel that virtually nothing emanating from it could possibly accrue to their well-being or benefit. However, I suppose it is good to have it out in the open and in writing for the benefit of the naive and unwary.

Don E. Olsen

Dear Editor:

I have followed with interest the debate concerning proposed Rule 6.1. Having read both the proposed rule and commentary as well as the article by James Jenkins in the April 1998 *Bar Journal*, I am not convinced that the proposed rule should be adopted. I agree fully with the conclusion of Mr. Jenkins that as lawyers we are generous in providing pro bono service. The lawyers I know provide many more hours of "guideline pro bono" service to clients and community than the annual 36 hour requirement.

However, I disagree with the conclusion that having to report pro bono service to the bar is any part of a "good faith" effort to encourage additional pro bono service. I, as well as others with whom I have discussed this issue, provide pro bono service to clients and community because we recognize and respond freely to those needs. I do not believe that most of the lawyers in this state need to be reminded of their obligation to provide pro bono service. A substantial motivation to provide service is the voluntary nature of the act. The requirement and "quota" of service hours detracts and devalues the service.

While the proposed rule may have the legitimate purpose to encourage pro bono work, I suspect that the purpose of the reporting aspect of the rule is to create statistics which can be published to demonstrate just how generous lawyers are. I think this rule will have a contrary effect upon public opinion. First the 36 hour requirement will be seen as a token effort. Second, the public will deem the service as being provided to meet a requirement as opposed to a voluntary donation of time or resources. Third, the statistics gathered will be suspect since there is no way to verify whether a particular lawyer provided the service he reported or embellished or exaggerated his report.

In conclusion, I do not believe that lawyers should be encouraged to do good by passing rules and requiring us to report on just how great and compassionate we have been. The reward is in the satisfaction that comes from providing the acts of pro bono service and in the gratitude of those served.

Michael D. Esplin

Letters Submission Guidelines:

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

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

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

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

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

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

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

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

Interested in Writing an Article for the Bar Journal?

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

If you have an article idea or would be interested in writing on a particular topic, contact the editor at 566-6633 or write, *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

Customer Service from the Client's Perspective

by Charlotte L. Miller

The Consumer Assistance Program is one of the most significant milestones of the Utah State Bar during the last year. The Consumer Assistance Program is a service for both lawyers and clients to resolve problems between them. Since the implementation of the Consumer Assistance Program, new complaints with the Office of Professional Conduct have decreased by about 25%. Clients usually call the Consumer Assistance Program because of communication problems with a lawyer. Sometimes, the lawyer has not returned phone calls. Sometimes, client expectations are inappropriate. Most of the calls are from clients who are immersed in a domestic relations problem. Many of these clients have very few occasions to participate in the legal system or to know what to expect from a lawyer, and at the same time they are in a highly emotional and frightening situation. The Consumer Assistance Program provides these clients with an outlet for their frustrations and an opportunity to discuss developing more realistic expectations. Sometimes a client learns that an attorney cannot talk to the client five times a day, every day. Sometimes an attorney learns that good customer service is more than performing a technical legal function, but is listening and showing empathy for the client (bedside manner so to speak).

As a business person, general counsel, and a Bar Commissioner I have had a keen interest in customer service. The first article I wrote as a Bar Commissioner after being elected in 1993 contained suggestions on how lawyers can provide better customer service. I have received more comments about that article than any article I have written since. (Maybe I should have stopped while I was ahead). I have been told that many lawyers have provided copies to their staff members and other lawyers in their offices, especially to new lawyers. Since this is my last *Bar Journal* article as a commissioner, I thought maybe the best service I could provide to lawyers is to update the article.

For the most part, I have had excellent experiences as a client. Although most of the time I am a corporate client, I have referred numerous individuals with domestic relations, criminal, estate, personal injury, etc. issues. Those individuals generally have reported to me that they have been satisfied with their lawyers. The following are some of suggestions for lawyers to provide better customer service that generally can apply to all lawyers – corporate, government, or private practice.

1. **Communicate with your client.** Telephone or write the client after each event in the case. To lawyers, another hearing or a communication from the opposing party may not seem as significant because we have many of those events daily or weekly. But most clients have few legal matters ongoing, so they have more anticipation. If your client over-reacts every time you call, tell your client that you are reluctant to communicate because of the client's reaction. Help the client develop some sophistication about the legal process. Don't expect any client to be as sophisticated or as objective as the lawyer. Otherwise, there may not be any need for the lawyer.

   Voice mail and e-mail are excellent communication tools. Use them wisely and effectively. Personally, it would be difficult for me to engage a lawyer who did not have these tools. Rather than miss each other ten times leaving messages, a client can leave a detailed voice mail and the lawyer can leave an answer on the client's voice mail.

   After you have completed a project for a client and sent a letter or memo, follow up with the client to make sure they received what they needed, or find out if they need more work from you. This is also good client development.

2. **Keep your client's deadlines (or discuss new deadlines.)** Recently, an attorney advised me I would have some research completed by a Wednesday. Wednesday came and went and I received no research memo. A day later the attorney called and said it would be available the next day. Three days later I received the research memo.

Fortunately, the lateness of the research memo was not a problem, but my perception was that the lawyer did not think my deadline was important. If the lawyer had called, presented the problem of meeting the deadline, we could have worked out a new deadline, and I would have felt that my situation was important to the lawyer. Also, if a deadline cannot be met, the lawyer suffers much less stress and anxiety if that situation is discussed with the client rather than the lawyer feeling guilty in silence for two days and hoping the client doesn't call asking for the work.

3. **Teach the support staff they are in a service industry.** Clients interact with a lawyer's support staff as often or more often than they do with a lawyer. Receptionists, secretaries, runners, accountants, legal assistants, etc. who understand that they are in a service industry and treat clients like valued customers are helpful to clients and may be a great marketing device. Secretaries who can be helpful when a lawyer is unavailable are invaluable. Secretaries who are put out by the client's calls are of no value. The following are some examples of good and poor customer relations:

   After a day of telephone tag the client calls the lawyer and the secretary says, "I know she wants to talk to you, she's just down the hall. If you hold on I will get her."

   "She is here but she is not in her office. I have given her your previous messages."

   *****

   "I will check and see if the fax you sent is here and call you right back."

   "I don't know if the fax you sent two hours ago is here because the fax machine is on a different floor."

   *****

   "We sent the package overnight. Let me do a trace to see where it was delivered.

   "You had to get it because I sent it by overnight delivery."

   *****

   "Mr. Perez is with a client, but I will make sure he gets your message."

   "Mr. Perez is with a very important client and cannot be interrupted."

   The best way to encourage a service oriented attitude in your staff is by example. The way you treat your client and talk about your client will influence how your staff treats a client. Also, lawyers need to be cautious of putting the staff in an awkward position when a lawyer hasn't returned phone calls or completed a project timely.

4. **Look at your bills before they go to the client.** Ask yourself if you would be comfortable if the client reviewed the bill while you were sitting in the room. Also, make sure you and your client are clear at the beginning of the matter as to the financial arrangements. Do not be afraid to ask clients for retainers at the beginning of a matter. Many of the problems between clients and lawyers arise when a client does not pay the lawyer for services. Be a smart business person as well as a good lawyer. At the same time, make sure you can identify the service you provided your client for the amount you charged.

5. **Be interested in the client.** Ask the client questions and listen to the answers. The more you know about the client, the better you will be able to serve the client. But do not be insincere. You won't be effective if you ask the same questions over and over.

6. **Don't be afraid of the client.** If the client disagrees with you about a course of action, don't let the client intimidate you. Honest communication with the client is the key to providing good service. Don't give clients false expectations about an outcome in an effort to convince them that you are aggressive and on the client's side. Long term the client will prefer accurate information over "feel good" platitudes.

7. **Don't be afraid to turn a client away.** No matter how financially appealing the matter is, if you do not believe you can do the work, send the matter to someone else, or ask someone else to help you with the matter.

8. **Don't complain about lawyers.** Lawyers are often their own worst enemies. By complaining about other lawyers and the legal system they perpetuate negative perceptions of the legal profession. A client would prefer to hear that you enjoy your work – because your work is the client's work.

9. **Offer solutions.** Lawyers are sometimes seen as people who hold up matters by finding problems. Lawyers need to identify problems, but they also need to offer solutions.

   Example: The lawyer says, "This is the most restrictive non-competition clause I've ever seen. The other side is unreasonable and I recommend you not sign a contract with this provision."

   Another approach: "This is the most restrictive non-competi-

tion clause I've ever seen. Let's find out the goal of the other party in requesting this clause and see if we cannot satisfy its concerns with less restrictive language that will be satisfactory to you. I will draft some alternatives for you to review."

The second approach evidences an understanding on the part of the lawyer that the client is not simply going through a negotiation exercise but really wants to do the deal. This can result in a client viewing the lawyer more as a facilitator than a terminator.

10. **Listen to your client's complaints.** Sometimes the complaints may be invalid, but try to understand what created the problem. If you receive a call from the Consumer Assistance Program, listen willingly to your client's concerns and try to learn from the experience. Don't be defensive. The Consumer Assistance Program is a service for you. Without it, your client may have ended up at the Office of Professional Conduct filing a complaint.

The above suggestions are common sense customer service. But sometimes we all get so overwhelmed keeping up with our workload that we forget to take care of the customer. Think of the following description of lawyers when providing service to your clients:

> True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures – unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see.
>
> But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state.
>
> (From an address by John W. Davis, March 16, 1946 to the Association of the Bar of the City of New York.)

Calling it a Job Don't Make it Right

by Scott Daniels

CHAPTER 1

Verse 1. The defendant Tom Robinson, and his attorney Atticus Finch stand together to hear the jury's verdict. As the jury is polled, each juror repeats "guilty." In the gallery above, the defendant's friends and family grieve quietly, not surprised.

Verse 2. The lower portion of the courtroom gradually clears; the defendant is led away; Atticus gathers his papers into his briefcase and leaves. But as he passes, all in the gallery stand in respect to this lawyer who takes seriously his oath to "never reject for any consideration personal to myself the cause of the defenseless."

Verse 3. Is that what you thought practicing law was going to be like?

Verse 4. Welcome to the real world, where the worth of the soul is not measured by the justice one seeks, but by the hours one bills.

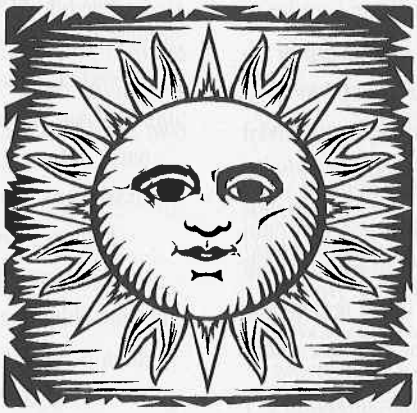
CHAPTER 2

Verse 1. Remember "Cool Hand Luke?" Do you remember the scene where the Warden tells Luke that his mother has died, and that Luke is going to have to spend the next few days and nights "in the box." This is not because Luke has done anything wrong, but because "sometimes, when a man's mother dies he gets thinking about home and about being at the funeral, and he might get a little jackrabbit in him and he might decide to run."

Verse 2. All the prisoners and even all the guards see the unfairness and injustice of this. As on the guards locks Luke in the box, he says "I'm sorry about this Luke, but it's my job."

Verse 3. And Luke answers "Calling it a job don't make it right, Boss."

Mark your calendars now to attend the Utah State Bar's 1998 Annual Convention!



JULY 1 - 4, 1998 • SUN VALLEY, IDAHO

Planning for an Optimum Estate Tax Discount

by L.S. McCullough, Jr. and Lee S. McCullough III

SECTION I. INTRODUCTION

For years, estate planners have been creating limited partnerships or limited liability companies to provide for the management of assets and for the purpose of obtaining a discount on estate taxes. The source of the discount is often taken for granted and misunderstood. In recent years, the IRS has begun to scrutinize and challenge some discounts.[1] The tax court also seems willing to challenge some discounts.[2] In response to this challenge, estate planners need to understand and apply valuation principles so as to appropriately justify optimum estate tax discounts for their clients. The purpose of this paper is to explain the legal justification for an estate tax discount when a partnership interest is transferred by reason of the owner's death. The principles explained in this paper should assist planners in creating entities that optimize estate tax discounts. The words "partnership" or "partnership interest" will be used to apply to limited liability companies as well as limited partnerships, except as stated otherwise.

Section II of this paper describes the valuation methods and the factors that should be used in calculating the value of an interest. Section III analyzes the tools that are currently being used by the IRS to reduce or eliminate discounts on partnership interests. Section IV discusses the effect of state law on the valuation of a partnership interest and suggests that it is an assignee interest, not a partnership interest, that must be evaluated for purposes of applying the estate tax because, under state law, the only interest that a partner can transfer unilaterally and without the consent of the other partners is an assignee interest, not a partnership interest. This argument is based on the fact that the federal estate tax is a tax on the "transfer" of property from the person who dies to his or her living heirs; it is not a tax on the property the decedent owned at death or on the partnership interest which ceased by reason of a partner's death. The federal estate tax is a transfer tax and taxes the value of what is being transferred. Section V concludes by summarizing the steps that should be taken in creating an entity that will

L.S. (Lee) McCullough received his law degree from the University of Utah in 1973 and was admitted to the Utah State Bar. Lee is a Fellow in the American College of Trust and Estate Counsel, a member of the Mountain States Pension Conference, the Utah State Bar, the American Bar Association, the Utah State Bar Tax Section, the American Bar Association Tax Section. He is a past member of the Advisory Counsel on Employee Welfare and Pension Benefit Plans for the U.S. Department of Labor, having been appointed to said Board by former President Reagan. He is President of the law firm Callister Nebeker & McCullough, which law firm specializes in banking, corporate, tax and commercial law. Lee's areas of practice include tax, pension, estate and asset protection planning. He is a past Chairman of the Board of a federal savings and loan association, having been appointed to this position by the Federal Deposit Insurance Corporation (FDIC), and he is a member of the Board of Trustees of various college and hospital foundations. Lee presently serves as the Assistant Editor for the Utah Bar Journal.

Lee S. McCullough III graduated from the J. Reuben Clark Law School at Brigham Young University in April, 1998, in the top 10% of his class. At the same time, Lee also received his bachelor's and master's of accounting, with an emphasis in taxation. Lee has worked part-time as a law clerk for Callister Nebeker and McCullough for the past two years. He plans to take the bar exam in July of 1998 and continue to work for the same firm, practicing in the areas of estate planning and taxation. Lee and his wife Cheryl are currently expecting their third child.

yield an optimal discount that will hold up when evaluated by the Internal Revenue Service.

SECTION II. CALCULATING THE VALUE OF AN INTEREST

A. Valuation Methods

The method used to value closely held corporations for estate tax purposes is also used to value partnership interests and "assignee interests."[3] The value of an assignee interest in a partnership, for estate tax purposes, is the price that a willing purchaser would pay to a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.[4] An arms-length transaction between unrelated parties is generally the surest way to satisfy this test. In the absence of an arm's length transaction, the regulations provide that:

The net value is determined on the basis of all relevant factors including –

(1) a fair appraisal as of the applicable valuation date of all assets of the business, tangible and intangible, including good will:

(2) the demonstrated earning capacity of the business; and

(3) The other factors set forth in paragraph (f) of §25.2512-2 relating to the valuation of corporate stock, to the extent applicable.[5]

"Adjusted book value is computed by taking the book value of the business and making adjustments for the fair market value of the assets, excess depreciation, and other items which affect the fair market value of a business, such as LIFO reserves."

The IRS valuation manual lists six commonly accepted methods for valuing an interest: adjusted book value, comparable price, excess earnings, capitalization of earnings, discounted future earnings, and discounted cash flow.[6] Adjusted book value is computed by taking the book value of the business and making adjustments for the fair market value of the assets, excess depreciation, and other items which affect the fair market value of a business, such as LIFO reserves.[7] The comparable price method multiplies the net income of the company against the price earnings ratio of the industry.[8] The excess earnings method begins with the value of the net tangible assets, subtracts any earnings not based on operations, and adds the value of goodwill.[9] The capitalization of earnings method capitalizes the five year weighted average of adjusted earnings.[10]

The discounted future earnings method and the discounted cash flow method attempt to forecast earnings for five years into the future based on the average growth of the prior five years. The discounted future earnings method uses accounting profits and the discounted cash flow method converts profits into estimated cash flows.[11]

Often, many or all of the approaches described above are used simultaneously, taking the average of them as the reported value of the company in question. Once the entity has been valued, an interest in the entity must be evaluated to see whether it is worth more or less than its proportionate share of the entire entity.

B. DISCOUNTS

Factors that reduce the value of an interest below its proportionate share of the entity are commonly referred to as "discounts." Commonly accepted discounts include a minority interest discount, a lack of marketability discount, a fractional interest discount, and a lock-in discount.

(1) The lack of control feature of a minority interest makes it less attractive to investors than a majority interest. The reduction in price from what a willing buyer would pay for an interest with control to what the same buyer would pay for an interest with no control, is called a minority discount. Under the limited partnership statutes, limited partners generally do not have control over the management or distribution of partnership assets; this control is reserved to the general partners.[12] A minority member of a limited liability company may have a similar lack of control. A person who receives an interest in a limited partnership or limited liability company is merely an assignee and has no rights of control, even if the transferor was a general partner or a majority owner of the entity. This is a very important point to remember. The only thing that a deceased partner can transfer to his or her heirs is an assignee interest, the heirs cannot become partners without consent from the other partners.

Prior to 1993, the IRS attempted to attack minority discounts on inter-family transfers if members of the family held a majority interest.[13] In Rev. Rul. 93-12, the IRS reversed this position, stating that it will apply the same asset value discounting rules to family transfers as it does to unrelated parties.

(2) A lack of marketability discount reflects the fact that there is no market in which the interest could easily be sold. The asset is worth less because its value cannot easily be obtained. For example, an investor would pay more for publicly traded stock

that is trading for $100 than for an assignee interest in a partnership that represents $100 in underlying assets because the cost and time involved in selling the assignee interest reduces its value.

A right of first refusal seemingly limits the marketability of an interest. However, rights of first refusal that do not include a fixed price have generally been found not to affect the lack of marketability discount because they do not limit the buyers to whom the partner could sell, or the price the buyers would pay for the interest. The right of first refusal merely governs the order in which prospective buyers can purchase the interest.[14]

(3) A fractional interest discount reflects the costs and hassles of dividing up the assets if the partnership is liquidated. If a partnership owns nothing but marketable securities, very little fractional interest discount would be available, because they can easily be distributed to the various partners without any effect on the value of the individual securities. If the partnership owns nothing but equipment used in a trade or business, the cost and time involved in selling the equipment will reduce its value.

(4) A lock-in discount reflects the fact that the holder of the interest may be prohibited from selling, transferring, or liquidating the interest due to restrictions found in the partnership agreement or in state law. This is often considered as part of the lack of marketability discount. In a limited partnership, a general partner normally can withdraw at any time and receive that value of his interest less any damages if the withdrawal was in breach of the partnership agreement.[15] A limited partner can generally only withdraw and receive the value of his interest if permitted by the partnership agreement.[16] If the partnership agreement is silent about the rights of limited partners to withdraw and does not designate a time for dissolving the partnership, a limited partner may generally withdraw only upon 6 months notice to each general partner.[17] An assignee of an interest in a partnership is not a substitute partner in a limited partnership, or a substitute member in a limited liability company, and has no ability to transfer such interests or to withdraw from the partnership, nor can the assignee force the partnership to buy him out or to liquidate. Differences in the governing instrument of an entity, or the state laws under which an entity is formed, determine the amount of lock-in discount that is appropriate.[18]

"If the partnership agreement is silent about the rights of limited partners to withdraw and does not designate a time for dissolving the partnership, a limited partner may generally withdraw only upon 6 months notice to each general partner."

The withdrawal of a general partner usually causes the dissolution of a limited partnership.[19] The dissolution of a partnership entitles the other partners and assignees to receive the liquidation value of the partnership. Thus, the value of an interest inherited by an assignee would not receive a lock-in discount if he inherited it from the sole general partner of the partnership.

SECTION III: IRS TOOLS FOR ATTACKING DISCOUNTS

The Internal Revenue Service recognizes that valid discounts are part of the proper valuation of an entity.[20] On the other hand, the IRS has attempted to ignore the discounts when an entity is created, or structured in a certain way, solely for tax avoidance purposes. In a series of recent private letter rulings, the IRS has used the substance over form doctrine, the step transaction doctrine, and Sections 2703 and 2704, arguing each of these in the alternative, to disregard partnerships for federal estate tax purposes where the partnerships were formed and funded shortly before the death of the taxpayer; thus indicating that there was no business purpose for the partnership.[21] This section summarizes the tools currently being used by the IRS to attack valuation discounts.

A. Substance over Form

In *Estate of Dorothy Morganson Schauerhamer*,[22] three limited partnerships were formed to hold the assets of a taxpayer for the benefit of the taxpayer and her family members. The taxpayer was the sole contributor to the partnerships and a general partner of each of the partnerships. The partnerships were established according to all the proper formalities and the taxpayer's assets were transferred to the three partnerships. As the partnerships earned income, the decedent, in violation of the partnership agreements, deposited the income from the partnership assets into her own bank account instead of the partnership bank accounts. When the taxpayer died, the IRS used the substance over form doctrine to ignore the existence of the partnerships and include the entire value of the partnership assets in the estate of the taxpayer under Section 2036, because the taxpayer retained "possession or enjoyment" of the property.

In *Estate of Murphy v. Commissioner*,[23] a taxpayer owned a 51.41% interest in closely held corporation. Eighteen days before her death, the taxpayer gave a 1.76% interest to her children, leaving a minority interest to be included in the taxpayer's estate. The tax court refused to allow the discount

because they concluded that the sole purpose of the transfer was to reduce estate taxes. Thus, the form of a transaction will be ignored if nothing of substance is intended to change as a result of a transfer.

B. The Step Transaction Doctrine

The step transaction doctrine is used when various steps are taken as part of an integrated plan, the sole purposes of which is to achieve estate tax savings. In the recent letter rulings mentioned above, a partnership was formed, and interests were given by the decedent to his family members, all within a short time before the death of the decedent. In each of these rulings, the IRS held that "formation of the partnership and the subsequent transfer of the partnership interests on the decedent's death are treated as a single testamentary transaction . . . thus, the partnership assets are properly viewed as the subject matter of the transfers."[24]

C. Chapter 14 of the Internal Revenue Code

Chapter 14 of the Internal Revenue Code was introduced with The Revenue Reconciliation Act of 1990.[25] Sections 2703 and 2704 have been used by the IRS to attack discounts taken by taxpayers on the value of partnership interests. The IRS has used Section 2703 to ignore the existence of a partnership for valuation purposes, if the partnership was obviously established for tax avoidance, as opposed to business purposes. The IRS uses Section 2704(a) to tax the lapse of any voting or liquidation rights. Section 2704(b) is used to ignore restrictions on partnership interests if such restrictions are self imposed by provisions in a partnership agreement and are more strict than under state law.

(1) Section 2703

Section 2703(a) provides that "the value of any property shall be determined without regard to (1) any option, agreement, or other right to acquire or use the property at a price less than the fair market value of the property" or "(2) any restriction on the right to sell or use such property." By its terms, this section appears to apply to restrictions on the right to transfer or liquidate partnership interests. Section 2703(b) provides a safe harbor exception to this rule, providing that an agreement will not be disregarded for valuation purposes if the following three requirements are met:

(i) The right or restriction is a bona fide business arrangement;

(ii) The right or restriction is not a device to transfer property to members of the family for less than full and adequate consideration in money or money's worth; and

(iii) At the time the right or restriction is created, the terms of the right or restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.

"A taxpayer who funds a partnership solely with liquid assets should document a business purpose for the partnership, such as asset protection, asset management, an investment business, or the allocation of business risks and opportunities. In Estate of Harrison v. Commissioner, *the tax court found that the provision of necessary and proper management of the decedent's properties was a sufficient business purpose for the existence of the partnership."*

Section 2703 raises the question as to what is or is not a valid business purpose for a limited partnership. In the proposed regulations to the anti-abuse rules, the IRS included two examples that indicated that a partnership whose sole asset is a personal residence lacks a business purpose.[26] These examples were not included in the final regulations; nevertheless, it is likely that the proposed regulations reflect the IRS position on the matter. Insurance partnerships, on the other hand, seem to have been recognized by the IRS as having a valid business purpose.[27]

Another issue is whether a partnership whose sole assets are cash and marketable securities could have a business purpose. Substantial judicial authority indicates that some discount is appropriate for interests in corporations even if owned 100% by the taxpayer and consisting entirely, or substantially, of liquid assets.[28] Despite this authority, and the fact that the IRS has not successfully attacked a partnership on this basis, at least two cases have held that the value of stock in a corporation is not entitled to any discount where the corporation's assets consist solely of cash and marketable securities.[29] The President's Revenue Proposals for 1998 suggest that all discounts should be eliminated except as they apply to active businesses.[30] This would probably include all partnerships whose assets consisted solely of cash, marketable securities, personal residences, etc.

A taxpayer who funds a partnership solely with liquid assets

should document a business purpose for the partnership, such as asset protection, asset management, an investment business, or the allocation of business risks and opportunities. In *Estate of Harrison v. Commissioner*,[31] the tax court found that the provision of necessary and proper management of the decedent's properties was a sufficient business purpose for the existence of the partnership.

(2) Section 2704

Section 2704(a) treats the lapse of a voting or liquidation right as a taxable transfer for gift and estate tax purposes if "the individual holding the right immediately before the lapse and members of such individual's family holds, both before and after the lapse, control of the entity." A "voting right" is defined as "the right to vote with respect to any matter of the entity." Control of a partnership is defined as "the holding of either (a) at least 50 percent of the capital or profits interests in the partnership, or (b) in the case of a limited partnership, any interest as a general partner."[33] The Treasury Regulations to Section 2704 provide that "a voting right or a liquidation right may be conferred by and may lapse by reason of a State law, the corporate charter or bylaws, an agreement, or other means."[34]

"The valuation of a partnership interest becomes an issue under federal estate tax law when the owner dies and transfers the interest to an heir or beneficiary."

A general partner usually has voting or liquidation rights that lapse upon the death of the general partner. If a family member inherits the general partner's interest, the lapse of such rights will be a taxable transfer unless the partnership agreement provides that his assignee automatically inherits his rights as a general partner.[35] A limited partner has no voting or liquidation rights as long as the partnership agreement states a definite time for the termination of the partnership.[36] If a general partner dies holding both a general and limited partnership interest in an entity, his voting and liquidation rights apply to both interests and the amount of the lapse also applies to both interests.[37]

Section 2704(a)(2) provides that the amount of the transfer described in Section 2704(a)(1) is "the excess (if any) of the value of all interests in the entity held by the individual described in paragraph (1) immediately before the lapse (determined as if the voting and liquidation rights were nonlapsing), over the value of such interests immediately after the lapse." In recently issued TAM 9804001, the IRS applied Section 2704(a) to the lapse of a general partner's voting and liquidation rights. The lapse of these rights constituted a taxable transfer valued by determining the amount that a willing buyer would pay for the lapsed rights "determined as if the voting and liquidation rights were nonlapsing." Because the rights discussed in the TAM were such that the general partner had a controlling vote in a partnership as well as a right to unilaterally liquidate the partnership, it is clear that the transfer had a real and determinable value. If, on the other hand, the general partner had a minority vote and a non-unilateral right to liquidate the partnership, it is likely that the transfer would have little or no value.

Section 2704(b) provides that the value of any transferred interest that is subject to an "applicable restriction," is determined without regard to the restriction if the transferor and members of his family control the entity immediately before the transfer. An "applicable restriction" is one that limits the ability of the entity to liquidate and which lapses after the transfer, or can be removed by the transferee or his family after the transfer.[38] Section 2704(b) does not apply if the restriction on liquidation is no more restrictive than the limitations that would apply under applicable state law in the absence of the restriction.[39] Since state law does not allow a deceased general or limited partner to transfer anything but an assignee interest, Section 2704 should not apply to the transfer of an assignee interest in a partnership and the restriction on transferability should be taken into account in establishing the value of the partnership interest.

SECTION IV: THE EFFECT OF STATE LAW ON THE VALUATION OF AN INTEREST

A. State Law Determines What is Actually Transferred

Discounts for minority interests, lack of marketability, and the lock-in effect are based on the provisions of the partnership agreement, and upon state law. Because Section 2704 looks through self-imposed restrictions in the partnership agreement, state law becomes the most important single factor that determines an appropriate discount. This section attempts to explain which state law provisions govern the valuation of an interest.

The valuation of a partnership interest becomes an issue under federal estate tax law when the owner dies and transfers the interest to an heir or beneficiary. The first step in valuing the interest in the estate is discovering what was actually transferred. The estate tax regulations provide that the tax is "an

excise tax on the transfer of property at death and is not a tax on the property transferred."[39] In most cases, the general or limited partnership interest owned by a decedent is not transferred in its entirety to the heirs of the decedent.

Under the Revised Uniform Limited Partnership Act, and under the Utah Limited Partnership Act, "an assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled."[41] An assignee can only become a limited partner if "the assignor gives the assignee that right in accordance with authority described in the partnership agreement" or "all other partners consent."[42]

Thus, an assignment, whether a lifetime gift or a testamentary disposition, should be valued by considering the rights of an assignee, and not the rights of a substitute partner. The value of an interest in the hands of an assignee should be calculated based on the fact that the assignee has no right to liquidate or dissolve the partnership, withdraw from the partnership, vote on partnership matters, transfer a partnership interest, or receive his capital interest in the partnership upon his demand.[43] Thus, an assignee interest should receive a significant discount for lack of control, lack of marketability, and the lock-in effect.

"An extremely common misunderstanding in gift and estate tax valuation is that the estate tax is on the transfer of a limited partnership interest as opposed to the transfer of an assignee interest."

Without exception, the limited partnership statutes in all fifty states place substantial restrictions on the rights of an assignee of a partnership interest. These provisions apply to any type of partnership interest – limited or general. It is true that the other partners may decide to make the transferee a substitute partner, but the deceased partner cannot unilaterally make the assignee a substitute partner and the transferee has no legal right to become a substitute partner. Because the possibility that the other partners may elect to make the assignee a substitute partner cannot be valued, it is considered to be of no value for federal estate tax purposes.

An extremely common misunderstanding in gift and estate tax valuation is that the estate tax is on the transfer of a limited partnership interest as opposed to the transfer of an assignee interest. This misunderstanding has led the IRS to calculate the value that is transferred by examining the rights of a partner under state law, as opposed to the rights of an assignee.[44] This incorrect approach may yield a smaller discount than is appropriate because a partner generally has more rights under state law than an assignee. It also leads to the conclusion that Section 2704 applies if any restrictions in the partnership agreement on the rights of a partner are stricter than the restriction on the rights of a partner under state law. If, on the other hand, the rights of an assignee control the value that is transferred, the rights of a partner in the partnership agreement are irrelevant, and Section 2704 does not apply because it is almost impossible to restrict an assignee interest any more than it is restricted under state law.

To illustrate the extent of this misunderstanding, fourteen states have amended their limited partnership statute in the past two or three years to further restrict the rights of a limited partner.[45] This has presumably been done to allow greater discounts and avoid the self imposed restriction attack of Section 2704. These changes are unnecessary and should not effect the calculation of the discount except in the uncommon situation where a partnership agreement provides that an assignee automatically becomes a substitute partner upon receiving an interest in the partnership.

The consequence of this misunderstanding is even greater when dealing with limited liability companies because most state limited liability company statutes place fewer restrictions on the rights of members than those placed on limited partners under limited partnership statutes. For example, the Utah limited liability company statute provides that a member may demand a return of his initial contribution upon his voluntary withdrawal from the company.[46] If voluntary withdrawal is prohibited by the operating agreement, and if the membership interest is the item being valued, Section 2704(b) will apply because the restriction in the operating agreement is an "applicable restriction," or a restriction stricter than the limitations that would apply under state law. If, on the other hand, an assignee interest is the item being valued, the assignee has no right to demand a return of his contribution under state law,[47] and Section 2704(b) does not apply.

B. The Estate Tax is On the Privilege of the Transfer

In *Estate of D.J. Harrison, Jr.*,[48] a decedent's limited partnership interest was correctly valued, for purposes of estate tax liability, without reference to the decedent's power to dissolve the partnership because the power to dissolve the partnership was

extinguished at the death of the decedent. In other words, the tax was on the value of the transfer from the decedent to the assignee, and the power to dissolve the partnership was not transferred to the assignee.

In *Ahmanson Foundation v. United States*,[49] the court discussed the value that is the proper subject of the estate tax as follows:

> The valuation of property in the gross estate must take into account any changes in value brought about by the fact of the distribution itself. It is undisputed that the valuation must take into account changes brought about by the death of the testator. Ordinarily, death itself does not alter the value of property owned by the decedent. However, in a few instances such as when a small business loses the services of a valuable partner, death does change the value of the property.[50]
>
> The valuation should also take into account transformations brought about by those aspects of the estate plan which go into effect logically prior to the distribution of property in the gross estate to the beneficiaries. Thus, for example, it a public figure ordered his executor to shred and burn his papers, and then to turn the ashes over to a newspaper, the value to be counted would be the value of the ashes, rather then the papers. Similarly, if a will provides that prior to the distribution of the estate a close corporation owned by the testator is to be recapitalized, with one class of stock in the gross estate exchanged for another, the value of the gross estate would be based on the shares resulting from the recapitalization.[51]

The *Ahmanson* case involved the valuation of corporate stock, where 99 of the 100 outstanding shares were bequeathed to one recipient, and the remaining share, which was the only voting share, was given to a second recipient. The court sought to distinguish a change in value brought about by the testator's death from a situation where the assets in the gross estate change value because they ultimately come into the hands of multiple beneficiaries as opposed to their value in the hands of the testator. The court held that "there is nothing in the statutes or in the case law that suggests that valuation of the gross estate should take into account that the assets will come to rest in several hands rather than one."[52]

In making this argument, the court quoted several cases, using language that has led some to believe that the estate tax is on the property as it existed in the hands of the testator. This language is quoted in full below:

> It is a tax on the privilege of passing on property, not a tax on the privilege of receiving property. The tax is on the act of the testator not on the receipt of the property by the legatees. It was not a tax upon succession and the receipt of benefits under the law or the will. It was death duties as distinguished from a legacy of succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death.[53]

It is true that the estate tax is a tax on the privilege of transferring property and not on receiving property. But it is only a tax on the interest which ceased in a situation, like *Ahmanson*, where the interest was actually transferred to some recipient or recipients. In a situation where a limited partnership interest becomes restricted by reason of death, it can hardly be said that the testator enjoyed the privilege of passing the formerly nonrestricted rights to anyone.

"The Land court noted the pronouncement made in earlier cases that 'the object of an estate tax is not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.'"

In *United States v. Land*,[54] the court had to decide the fair market value of a partnership interest for estate tax purposes after the death of a partner. The partnership agreement provided that if any member wished to withdraw from the partnership during his lifetime, the other partner would have the option of purchasing his interest at two-thirds of its calculated value, but that, at the death of a partner, the surviving partner would be entitled to purchase the deceased's interest at its full value. If the surviving partner chose not to purchase the interest at its full value, the partnership would be liquidated and dissolved.

The *Land* court noted the pronouncement made in earlier cases that "the object of an estate tax is not the interest to which some person succeeds on a death, but the interest which ceased by reason of death."[55] The court went on to provide the following:

> This reliance is misplaced. This is another instance of the truth of Justice Holme's observation that there is danger in reasoning from generalizations unless you have the particulars which they embrace in mind. As other courts have pointed out . . . , the Supreme Court described the estate tax as one on 'the interest which ceases by reason of the death' simply to distinguish it from a succession

> tax, which is calculated and graduated on the individual portion of the estate each heir or legatee receives rather than on the aggregate property passing from the decedent.[56]

To shore up this position, the *Land* court quoted the Supreme Court in *Knowlton v. Moore*,[57] wherein it states that "it is the power to transmit, or the transmission from the dead to the living, in which [estate taxes] are more immediately rested."[58] The *Land* court held that the value to be taxed was the full fair market value of the partnership interest, not the value of the interest to the decedent prior to death. It reached this conclusion by stating the following:

> Death tolls the bell for risks, contingencies, or restrictions which exist only during the life of the decedent. A potential buyer focuses on the value the property has in the present or will have in the future. He attributes full value to any right that vests or matures at death, and he reduces his valuation to account for any risk or deprivation that death brings into effect, such as the effect of the death on the brains of a small, close corporation. These are factors that would affect his enjoyment of the property should he purchase it, and on which he bases is valuation. The sense of the situation suggests that we follow suit.[59]

"Next, it is essential that a bank account be established for the partnership, that partnership income is paid directly to such account, and that partnership funds are not commingled with personal funds."

In summary, the *Land* case directly addresses the estate tax on the transfer of a partnership interest and is clearly distinguished from *Ahmanson*, which involved a transfer of stock. State law does not alter the nature of the stock as it is transferred from a decedent to a transferee. The *Ahmanson* court held that a decedent should not be able to reduce his estate taxes by naming multiple beneficiaries as opposed to a single beneficiary. On the other hand when a partnership interest is transferred by reason of the owner's death, state law operates to change the nature of the interest, so that rather than inheriting the rights of a partner, the beneficiary inherits the rights of an assignee. The *Land* case holds that when the value of an interest is altered by reason of the death of the owner, the estate tax is on the value of the interest that was transferred from the dead to the living.

SECTION V: FORMING AN ENTITY TO PRODUCE AN OPTIMAL ESTATE TAX DISCOUNT

The first step in forming a limited partnership that will provide an estate tax discount is to document the business purposes of the partnership in the partnership agreement. These will depend on the assets contributed, but may include asset protection, management convenience, or the allocation of business risks and opportunities. If the primary purpose is to obtain a discount by making a death-bed gift, it is not likely that the IRS will allow the discount. Assets with no reasonable business purpose should not be contributed to the partnership.

The tax on the lapse of a general partnership interest can be avoided by allowing an assignee of a general partnership interest to automatically step into the shoes of the general partner. At the same time, the partnership agreement should clearly state that an assignee of a limited partnership interest does not become a partner, or succeed to any of the rights of a partner, unless all of the other partners vote to allow the assignee to become a partner. A lapse of voting or liquidation rights can also be avoided by created a Subchapter S corporation to serve as the sole general partner. Another option is to allow the lapse to occur, but reduce the value of the rights subject to the lapse to a de minimus amount. The value of the voting rights can be reduced by assuring that there are always at least two general partners and that neither of them has a controlling vote. The value of the liquidation rights can be reduced by providing that neither general partner has the unilateral power to liquidate the partnership during his life and that the partnership does not dissolve or liquidate upon the death of a general partner. Because a willing buyer would not pay much for a minority voting right or a non-unilateral liquidation right, the amount of the lapse is de minimus.

Next, it is essential that a bank account be established for the partnership, that partnership income is paid directly to such account, and that partnership funds are not commingled with personal funds. Similarly, the assets purportedly transferred to the partnership must actually be transferred by deed, assignment, or physical transfer. General partners should operate the partnership in a manner that recognizes the fiduciary duty they owe to the limited partners. Distributions of income and the use of the partnership assets should not indicate that the general partner has retained individual possession and enjoyment of partnership property for the use of the general partner.

If gifts of partnership interests are to be made, it is wise to allow for the passage of time between the formation of the partnership and the time of the gifts. This will lessen the likelihood that

the IRS will use the step-transaction doctrine to collapse the steps into a single testamentary transaction. Gifts should be used to reduce the primary donor to a minority position in the partnership. It would be wise to have the other family members also contribute assets to the partnership so it is not capitalized solely by one member. An appraisal of the value of the assignee interest that is received may allow the donor to give more assets in the form of partnership interests in a particular year than he would be able to give if the assets were given outside of the partnership context.

At the death of a partner, a qualified appraiser should calculate the value of the entity using the valuation principles discussed above. A second appraiser should value the assignee interest transferred by the decedent. This second appraiser should refer to the restrictions on an assignee interest as provided by state law and the value of the assignee interest should receive a discount for lack of marketability, for lack of control, and for the lock-in effect.

By following the principles discussed above, taxpayers should be able to create limited partnerships and limited liability companies that provide valid business purposes advantages as well as optimum estate tax discounts. While the IRS may attempt to limit discounts on entities created solely or primarily for the avoidance of estate taxes, the current laws do not allow the IRS to eliminate estate tax discounts for entities that are appropriately established for valid business purposes.

[1]The 1997 IRS business plan includes a study of discounts. Also, beginning in 1997, the gift tax return form (Form 709) contains a box that must be checked to indicate whether the taxpayer is claiming a discount. Furthermore, the Department of Treasury General Explanations of the Administration's Revenue Proposals for 1998, Greenbook, p.129, contain a proposal eliminating discounts except as they apply to active businesses.

[2]*Estate of Cloutier v. Com.*, CCH Dec. 51,151(M), 71 TCM 2001 (1996); *Estate of Scanlan v. Com.*, CCH Dec. 51,458(M), 72 TCM 160 (1996) (reducing discounts on the value of corporate stock).

[3]Treasury Regulation §20.2031-3; Rev. Rul. 68-609, 1968-2 C.B. 327.

[4]Treasury Regulation §20.2031-3; §25.2512-3(a).

[5]*Id.*

[6]IRS Valuation Guide for Income, Estate and Gift Taxes – Valuation Training for Appeals Officers, p. 7-14 (CCH Federal Estate and Gift Tax Reports, Number 239, January 28, 1994).

[7]*Id.*

[8]*Id.* at 7-15.

[9]*Id.* at 7-16.

[10]*Id.*

[11]*Id.* at 7-17.

[12]*See* RULPA §§302, 303, 403(a). A general partner's control over an entity is generally limited by fiduciary duties that he owes to limited partners. Bromberg and Ribstein on Partnerships section 6.07 (1994); Rev. Unif. Partnership Act section 404 and Unif limited partnership Act section 17; In *re Bennet* 970 F.2d 138 (5th Cir. 1992), citing *Huffington v. Upchurch*, 532 S.W. 2d 576 (Tex. 1976). Valuation Discord: An Exegesis of Wealth Transfer Tax Valuation Theory and Practice, by Professor Jeffrey N. Pennell, Casner & Pennell, Estate Planning (Supp. 1995). A general partner's fiduciary duties cannot be removed without incurring other negative consequences. In TAM 100711-97, a partnership agreement provided for income to be distributed to the limited partners in the "complete discretion" of the general partner. This provision caused all transfers of limited partnership interests to be considered transfers of a future interest; thus, the annual exclusion did not apply.

[13]Rev. Rul. 81-253.

[14]*Estate of George A. Lehmann v. Commr.* T.C. Memo 1997-392.

[15]*See* RULPA §§602, 604.

[16]*Id.*

[17]*Id.*

[18]*See* Part IV.

[19]RULPA § 801.

[20]*See* IRS Valuation Guide for Income, Estate and Gift Taxes – Valuation Training for Appeals Officers, pp. 9-1 to 9-51 (CCH Federal Estate and Gift Tax Reports, Number 239, January 28, 1994).

[21]TAM 973004, 9719006; PLR 9723009, 9725002, 9735003.

[22]73 TCM 1997-242, Dec. 52,061(M).

[23]T.C. Memo. 1990-472.

[24]*Id.*

[25]Pub. L. No. 101-508, 104 Stat. 1388 (1990).

[26]Examples 5 and 9 of Proposed Regulations to Section 2703 (partnership to hold a residence is not a business purpose).

[27]PLR 9309021, 9042023 (the first expressly admits it is set up with an objective to carry on a business and divide the gains therefrom).

[28]*See* S. Stacy Eastland, The Art of Making Uncle Sam Your Assignee instead of your Senior Partner: The Use of Family Partnerships in Estate Planning, n. 20 (Unpublished, 1996) (citing (*Estate of S.C. Simpson v. Comm.*, 67 TCM 2938 (1994); Albert L. Dougherty, 59 TCM 772 (1990); *Estate of Charles B. Gillett v. Comm.*, 50 TCM 636 (1985); *Estate of Luta C. Mundy v. Comm.*, 35 TCM 1778 (1976); *Estate of Alin Thalhermer v. Comm.*, 33 TCM 877 (1974)).

[29]*Estate of Luton v. Commissioner*, 68 T.C.M. (CCH) 1044 (1994); *Estate of Jephson v. Commissioner*, 87 T.C. 297, 303-304 (1986). *See also* Valuation Discord: An Exegesis of Wealth Transfer Tax Valuation Theory and Practice, by Professor Jeffrey N. Pennell, Casner & Pennell, Estate Planning (Supp. 1995).

[30]Department of Treasury General Explanations of the Administration's Revenue Proposals for 1998, Greenbook, p. 129.

[31]52 T.C.M. 1306, 1307 (CCH), T.C.M. ¶87,007 at 41 (RIA) (1987) (allowing a 45% discount).

[32]Treas. Reg. §25.2704-1(a)(2)(iv).

[33]Treas. Reg. §25.2704-1(a)(2).

[34]Treas. Reg. §25.2704-1(a)(4).

[35]TAM 9804001.

[36]RULPA §603.

[37]TAM 9804001. *See also* Treas Reg. §25.2704-1(f), Example 5.

[38]Section 2704(b)(2).

[39]Section 2704(b)(3); Treas Reg. §25.2704-2(b).

[40]Treas. Reg. §20.2033-1(a).

[41]RULPA §702; Utah Code §48-2a-702.

[42]RULPA §704; Utah Code §48-2a-704.

[43]RULPA §702; Utah Code §48-2a-702.

[44]*See* PLR 9730004, 9723009, 9725002, 9735003.

[45]Alaska, California, Colorado, Delaware, Florida, Georgia, Montana, Nevada, Rhode Island, South Dakota, Tennessee, Texas, Virginia and Washington. (Per Author's survey performed 1-20-98).

[46]Utah Code §48-2b-132.

[47]Limited liability company statutes restrict the rights of an assignee in the same manner as is done under the limited partnership statutes. *See* Utah Code §48-2b-131(2)(b)(i).

[48]52 TCM 1306, Dec. 43,609(M), TC Memo. 1987-8.

[49]674 F.2d 761 (9th Cir. 1981).

[50]*Id.* at 768 (Internal citations omitted).

[51]*Id.* at 768 (Internal citations omitted).

[52]*Id.* at 768.

[53]*Id.* (Internal citations omitted).

[54]303 F.2d 170 (5th Cir. 1962).

[55]*Id.* at 171.

[56]*Id.*

[57]178 U.S. 41 (1900).

[58]*Id.* at 56.

[59]*Land*, 303 F.2d at 173.

Supreme Court Seeks Attorney to Serve on Evidence Advisory Committee

The Utah Supreme Court is seeking applicants to fill a vacancy on the Advisory Committee on the Rules of Evidence. Each intrested attorney should submit a resume and a letter indicating interest and qualifications to Brent M. Johson, P.O. Box 140241 Salt Lake City, Utah 84114-0241. Applications must be received no later than July 31, 1998. Questions may be directed to Mr. Johnson at (801) 578-3800.

Motions for Summary Judgment Where There is a Motive to Deny

by Robert B. Sykes and Ronald J. Kramer

Once again, the law of summary judgment is thrust into the legal spotlight. The recent Paula Jones ruling[1] in Federal Court in Arkansas prompted a media and talk show feeding frenzy, with much of the discussion focused on the appropriateness of summary judgment where credibility is at issue.

Paula Jones contends that then Arkansas Governor Bill Clinton made unwanted, outrageous sexual advances toward her in May 1991.[2] The court appears to have rendered summary judgment in favor of Clinton in part because there was allegedly a scarcity of believable evidence.[3] Under Arkansas law, the tort of intentional infliction of emotional distress requires that the defendant knew that emotional distress was a likely result of his conduct; that the conduct was extreme and outrageous; that it caused distress; and that the distress was so severe that no reasonable person could be expected to endure it. *Jones v. Clinton,* 1998 U.S. Dist. Lexis at 55-56 (E.D. Ark. 1998). Judge Wright held, inter alia:

> Plaintiff's actions and statements in this case *do not portray someone who experienced emotional distress so severe* in nature that no reasonable person could be expected to endure it . . . . In sum, *plaintiff's allegations fall far short* of the rigorous standards for establishing a claim of outrage under Arkansas law and the Court therefore grants the President's motion for summary judgment on this claim . . . . Reduced to its essence, the record taken as a whole *could not lead a rational trier of fact to find for the non moving party* and the Court therefore finds that there or no genuine issues for trial in this case.

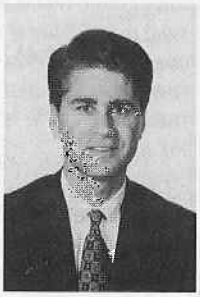
Id. at 61, 63-64 (emphasis added). Of course, Bill Clinton flatly denies any inappropriate conduct; but the court is compelled to accept Paula Jones' version of the hotel room encounter on summary judgment. Doesn't that leave credibility issues on the damages and "outrage" tort that should go to the jury?

Jones v. Clinton presents an interesting study on the tug-of-war between alleged lack of evidence on the one hand, and a credibility question on the other. Credibility disputes where the two parties view the facts differently are undoubtedly more common than credibility situations where the facts are known to only one party, and that party has a motive to deny (i.e., lie). The focus of this article is on that less-common body of summary judgment law which involves a motive to deny by one party. It can be a tricky issue for both judges and lawyers, and warrants analysis.

I. THE LAW OF SUMMARY JUDGMENT

Summary judgment is only appropriate where there are no genuine disputes over material facts. *Hipwell v. IHC Hospitals, Inc.*, 944 P.2d 327, 339 (Utah 1997); *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991). The record and facts

Robert B. Sykes is a shareholder in the Salt Lake City law firm of Sykes & Vilos, P.C. The firm practices personal injury law with an emphasis on brain and spinal cord injury cases. Mr. Sykes has been a frequent lecturer at brain injury conferences for attorneys on such topics as Demonstrative Evidence, Cross Examination, Presentation of Expert Testimony, *etc. He has also authored several articles and book chapters dealing with brain injury litigation. Mr. Sykes is a graduate of the University of Utah and the University of Utah College of Law. He also served for six years in the Utah Legislature.*



Ron J. Kramer is an attorney with the Salt Lake City law firm of Sykes & Vilos, P.C., where he practices in the areas of personal injury, commercial litigation, civil rights and administrative law. Mr. Kramer holds degrees in both International Relations and English from Brigham Young University, and J.D. from University of the Pacific, McGeorge School of Law. He is admitted to the state and federal bars of Utah.

must be viewed in a light most favorable to the party opposing summary judgment. *Hipwell* at 337; *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). In fact, the court in applying the standard must construe not only facts but all *reasonable inferences* therefrom in the light most favorable to the non moving party. *Lopez v. Union Pac. R.R. Co.*, 932 P.2d 601, 602 (Utah 1997); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991). The Tenth Circuit has observed that "[w]hen different ultimate inferences may be drawn, the case is not one for summary judgment." *Exnicious v. United States of America*, 563 F.2d 418, 424 (10th Cir. 1977).

The moving party must carry the burden under Rule 56(e) of showing that there are no genuine issues of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Gonzales v. Millers Casualty Ins. Co.*, 923 F.2d 1417, 1419 (10th Cir. 1991); *Drysdale v. Ford Motor Co.*, 947 P.2d 678, 680 (Utah 1997). "The moving party carries the burden of showing *beyond a reasonable doubt* that it is entitled to summary judgment . . . .", *Hicks v. City Watonga*, 942 F.2d 737, 743 (10th Cir. 1991) (emphasis added), quoting *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987). The non-moving party, in order to defeat summary judgment, need only make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. The summary judgment motion may be opposed by any of the types of evidentiary materials listed in Rule 56(c), except the pleadings themselves. *Id.* at 324. Those materials include "depositions, answers to interrogatories, admissions on file, and affidavits, if any . . . ." which show that there is a "genuine issue as to any material fact." Rule 56(c). Deposition exhibits identified and authenticated at the depositions are surely included in the broad purview of "depositions."

Summary judgment is disfavored in negligence cases. The Utah Court of Appeals has stated: "As a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed 'only in the most clear-cut case'." *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 825 (Utah App. 1989) (citing *Ingram v. Salt Lake City*, 733 P.2d 126, 126 (Utah 1987)). *See also, Apache Tank Lines v. Cheney*. 706 P.2d 614, 615 (Utah 1985), and *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985). The Supreme Court has held that "[o]rdinarily, whether a defendant has breached a required standard of care is a question of fact for the jury." *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). Summary judgment is inappropriate unless the applicable standard of care is "fixed by law," "and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances." *Wycalis*, 780 P.2d at 825. The Utah Supreme Court has further held that since summary judgment denies the losing party the Article 1, Section 11, Utah Constitutional privilege of a trial, any "doubt or uncertainty as to the questions of negligence . . . should be resolved in favor of granting . . . a trial." *Butler v. Sports Haven Int'l*, 563 P.2d 1245, 1246 (Utah 1977).

"Summary judgment is disfavored in negligence cases. The Utah Court of Appeals has stated: 'As a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed 'only in the most clear-cut case'.'"

In considering whether or not there are genuine issues of material fact, the court does not weigh the evidence, but merely inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991), *cert. den.*, 112 S. Ct. 97 (1991). However, factual questions are to be decided by a jury only "if reasonable persons could differ about them on the evidence." *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, §45, at 320 (5th Ed. 1984), as cited in *AMS Salt Industries v. Magnesium Corp.*, 942 P.2d 315, 320 (Utah 1997)). The court also held that "when the facts are so tenuous, vague, or insufficiently established that determining [the legal issue] becomes 'completely speculative,' the claim fails as a matter of law." *Harline* at 439, as cited in *AMS Salt Industries* at 320.

The memorandum supporting the motion for summary judgment must begin with a concise statement of material facts "*and shall specifically refer* to those portions of the record upon which the movant relies." Local Rule 4-501(2)(a) (emphasis added). Finally, none of the material facts asserted by the moving party are deemed admitted if they are specifically controverted by the opposing party. Local Rule 4-501(2)(b).

II. MOTIVE TO DENY PREVENTS SUMMARY JUDGMENT

A. Critical Facts in Exclusive Control of Defendants.

Summary judgment is obviously never appropriate where credibility is at issue. Where relevant facts are alleged by a party who has sole knowledge of the existence of the fact, and has a motive to deny the truth, is credibility then at issue by definition, preventing summary judgment? The answer is "yes." In the examples in III and IV below, the truth of the defense claims (i.e., which person was driving at the time of a fatal accident, and whether the defendant stopped on a business errand) is within the exclusive knowledge and control of defendants. Where there are no witnesses who can substantiate the relevant fact one way or the other, other than parties with a motive to deny, then the demeanor of the witness in admitting or denying is an important credibility consideration. Contrary circumstantial inferences are also an important consideration as to whether a defendant is to be believed. These are all jury questions.

B. The Law on Credibility

Where knowledge of the critical facts or events at issue in a case is largely or exclusively within the control of the movant, then:

> . . . credibility is an issue and the party has the burden of proving his case by the preponderance of credible testimony. . . It is particularly true *where the uncontradicted witness has an interest in the case which requires the jury to weigh his credibility.*

Block v. Biddle, 36 F.R.D. 426, 429 (D.C. Pa. 1965) (emphasis added). This credibility issue is sufficient reason in itself to deny summary judgment. The Advisory Committee Note to Rule 56(e) states:

> Where an issue as to a material fact *cannot be resolved without observation of the demeanor of witnesses* in order to evaluate their credibility, summary judgment is not appropriate.

Advisory Committee Note, 1963 Amendments to Rule 56 (emphasis added), quoted in Wright & Miller, Vol. 10A Federal Practice and Procedure, Section 2726, page 115 (1983).

Judge Learned Hand of the Second Circuit noted many years ago the importance of demeanor and credibility evidence:

> It is true that the carriage, behavior, bearing, manner and appearance of the witness – in short, his "demeanor" – is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed should, take into consideration the whole nexus of sense impressions which they get from a witness . . . . *Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story;* for the denial of one, who has a *motive to deny*, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 268-69 (2nd Cir. 1952) (emphasis added). *Dyer* was cited with approval by the United States Supreme Court in *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408, 82 S. Ct. 853, 855 (1962), and by the Tenth Circuit in *Aylett v. Secretary of Housing and Urban Development*, 54 F.3d 1560, 1566 (10th Cir. 1995). The policy behind these rules of law is fairness:

> Courts have been reluctant to deprive the non-moving party of the opportunity of testing the credibility of the movant or his witnesses in open court in this context. As explained by one commentator, "there is a justifiable judicial fear of the injustice which could result from the judgment based on affidavits asserting facts that are, because of their nature, incapable of being effectively controverted."

"Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

Wright & Miller, supra at 120-21, citing Bauman, "A Rationale for Summary Judgment," 33 Indiana L.J. 467, 492 (1958).

Accordingly, where knowledge of the disputed fact is in the exclusive control of the moving party, the trial court should view with suspicion any allegedly "uncontroverted" statements by the moving party because that party has "a motive to deny." Such statements cannot form the basis for summary judgment.

III. THE CASE OF THE DRUNKEN TRUCK DRIVER

In 1987, Michael Corning[4] was terminated from his employment as a truck driver due to a reduction in force. Michael enjoyed working for the company and was popular with the other drivers. A couple of days later, he came by the terminal with the

intention of cleaning out his truck and taking his personal belongings home. He brought with him a gallon of rum, from which all the other drivers and the foreman partook over a several hour period. About 2:00 p.m. that day, an unexpected call came in requesting that a truck be sent out immediately to Las Vegas to pick up a load of scrap metal for transport to Salt Lake City. The assignment to go to Las Vegas was given to Joe Hanks.[5] Joe asked the foreman if he could take Michael along for the ride, and permission was given. As the two pulled out of the terminal that day, Joe (the employee) was driving and Michael (the guest) had the remainder of the gallon of rum with him.

Seven hours later, the truck entered Santa Clara, Utah, but was going too fast to make a sharp turn. It careened over on its right side, slid a goodly distance, hit several trees and other objects, sustained terrible damage, and finally uprighted itself. Michael was killed instantly, but Joe, the employee, was hardly injured. Joe had a .18 blood alcohol level, and Michael a .22. Joe told the police that Michael was driving. A Highway Patrol officer who investigated the accident interviewed Joe in the hospital and suspected that Joe, not Michael, was the driver, but never charged him because he didn't have sufficient evidence.

Michael's heirs sued the trucking company and Joe for wrongful death. In defense, Joe claimed that they had changed drivers in Parowan, 50 miles from the accident scene. Both sides hired competent accident reconstructionists who found that, because of the extensive damage to the cab and other factors, it was simply impossible to determine scientifically who was driving at the time of the accident. After extensive discovery, the defendants moved for summary judgment, enclosing the deposition and affidavit of Joe claiming that Michael was driving. What result? Clearly, Joe had a "motive to deny" that he was the driver since he would have been charged with a serious criminal offense had he been driving (in addition to significant civil liability).

The trial judge initially granted summary judgment on the ground that plaintiff had no competent evidence to rebut the unchallenged affidavit and deposition testimony of Joe. After receiving the ruling, we immediately filed for reconsideration and were preparing for an appeal, when the Judge *sua sponte* reversed himself, noting that because Joe's credibility was challenged, there was a question of fact which precluded summary judgment.[6]

"In this 1998 case, the district court again faced a situation where only one party has knowledge of the fact in question, and that party's affidavit is opposed only by circumstantial inference and a motive to deny. Must that party's affidavit be believed?

IV. THE DETOURING PHOTOGRAPHER

In this 1998 case, the district court again faced a situation where only one party has knowledge of the fact in question, and that party's affidavit is opposed only by circumstantial inference and a motive to deny. Must that party's affidavit be believed? In this case the defendant, Scott Cotter,[7] a photographer, crashed into the plaintiff's vehicle at the intersection of 3900 South and 1300 East in Salt Lake County. The plaintiff claimed that Cotter ran the red light, which was supported by two eyewitnesses; however, Cotter swears that his light was green. The accident occurred about 9:00 a.m. in the morning, and Cotter claimed he was on his way to his studio, just a few blocks away. We noted that Cotter lived considerably south and east of the accident scene, but that the location of the accident was actually *north and west* of his studio. We wondered why he took this roundabout, indirect route to work. In deposition, Cotter testified that he came as far west as 700 East before turning east on 3900 South. This "detour" took him approximately 24 blocks out of his way. He claimed the detour was necessary due to heavy construction at a certain location on Highland Drive.

If Cotter was simply driving to work, his business would have been insulated under the "coming and going rule."[8] However, if he was on a "business errand," his business would be a defendant, an advantage in a personal injury case. Several things made us doubt Cotter's story that he was simply driving from his home to work. First, the alleged construction slow-down would have to be really awful to justify a 24 block detour, and evidence suggested it really wasn't that bad. Second, the alleged detour took Cotter right past 1300 East, a major intersection, which would have saved Cotter at least 12 blocks, even if the detour was legitimate. Third, we checked the Salt Lake County construction schedule and found out that the construction at the site alleged by Cotter didn't start until 45 days after the accident.[9] Lastly, our investigation revealed that a developing lab frequently used by his business was located north of the accident scene, near part of the detour. A stop at this lab not only explained the detour, but made this part of the trip a "business errand," and would result in liability for the business.

Defendant denied stopping at the lab, and no one at the lab could remember. It boiled down to this: only the defendant,

who had a motive to deny it, knew for sure whether he made the business stop. It was the defendant's assertion on the one hand, versus considerable circumstantial inference on the other, with only the defendant knowing for sure.

The defendant filed a motion for summary judgment on the business, attaching his affidavit denying that he made the stop. The court granted summary judgment, commenting that plaintiff had produced no contrary evidence to the defendant's affidavit. Is this a reversible error because the judge failed to consider defendant's motive to deny?[10] Is the defendant's motive to deny, alone, sufficient basis to deny summary judgment? We submit that summary judgment should have been denied under the authority cited because Cotter's motive to deny creates a credibility issue that the jury must evaluate.

V. THE "PURE SPECULATION" DISTINCTION

Those moving for summary judgment often try to characterize a non movant's opposition as based on "pure speculation," thus justifying summary judgment. There is fine line between speculation and credibility in a motive to deny case.

Movants often cite opinions like *Weber v. Springville City*, 725 P.2d 1360 (Utah 1986) as justifying summary judgment in close cases. In *Weber*, a small child was severely injured when he fell into a stream near an apartment house. Apparently, the child wandered away from the apartment building and was found nearly drowned a short time later down stream. The most critical fact of this case was that no one saw the boy fall in, and there was "no evidence indicating the point *where* he fell into Hobble Creek." *Id.* at 1363 (emphasis added). There were apparently several points near the apartment where the child could have fallen in, each under the control of a different defendant. The trial court granted summary judgment, upheld by the Utah Supreme Court, in part based upon the fact that the evidence of causation was totally speculative, and "merely shows a possibility of causation." *Id.* at 1368.

Close inspection shows that a *Weber*-type case presents a much different summary judgment issue than a motive to deny case. In *Weber*, there was simply no one who saw *where* the child entered the water. While it is speculatively possible that various defendants knew about, and were withholding, information, there was no specific inference pointing to exclusive knowledge of facts that a witness would have a motive to deny. Hypothetically, the outcome would have been different if, perhaps, an employee of the irrigation company that maintained the creek claimed to have seen the child walking to another location maintained by a different defendant. In such a hypothetical instance, the witness's credibility would definitely be at issue. Therefore, *Weber* is arguably correctly decided because there was no hard fact from which one could draw a causative inference, and there was no witness which one could infer had a motive to deny that causative inference.

In contrast, the drunken truck driver and detouring photographer both unquestionably were in exclusive possession of crucial facts on which there was a strong motive to deny the inference that would help the plaintiff's case. In those cases, to rule in favor of the moving party on summary judgment, the court must in essence accord the moving party credibility, something which it cannot do on summary judgment.

CONTRARY

Where the non-moving party demonstrates that a movant is in exclusive control of information about a fact on which the movant has a motive to deny, then summary judgment is not appropriate. The witness's credibility is at issue because of the motive to deny, and that alone is sufficient to prevent summary judgment.

The formula for deciding these cases should thus be fairly simple. Does the moving party possess exclusive knowledge of the fact/event at issue on which movant has a "motive to deny?" if "yes," then summary judgment is inappropriate because the movant's credibility is at issue and credibility is always for the jury.

[1] *See Paula Corbin Jones v. William Jefferson Clinton*, 1998 U.S. Dist. Lexis 3902 (E.D. Ark. 1998).

[2] Some fairly lurid, outrageous conduct is alleged in the Amended Complaint, including multiple attempts at blatant, non-consensual, sexual conduct. This included offensive touching of various parts of the body and alleged exposure by Governor Clinton of his genitals. Ms. Jones alleged that as she tried to leave after several minutes, Clinton "detained" her, "looked sternly" at her and said "You are smart. Let's keep this between ourselves." *Id.* at 7-9. The actual description in the opinion of the conduct alleged against Clinton is surprisingly explicit.

[3] The court strained to characterize its ruling as solely based on the law, and admitting as true everything claimed by Paula Jones. Nonetheless, the court clearly appeared to be making value judgments about the credibility of the evidence, which will have to be addressed by the appellate court if the matter is appealed.

[4] A fictitious name, but a real case.

[5] Also a fictitious name.

[6] A few weeks later, the case settled for a sizable sum on the eve of trial.

[7] A fictitious name.

[8] *Whitehead v. Variable Annuity Life Ins. Co.*, 801 P.2d 934 (Utah 1989).

[9] It was this little lie, more than anything, that prompted us to look for a motive to hide something.

[10] We'll never find out. About a month later, the case was settled for a sizable amount on the eve of trial.

Declaratory Relief Under the CDA: Post Garrett

by. Paul A. Reynolds

I. INTRODUCTION

The material in this article represents the view of the author and does not represent the views of the federal agency to which the author is affiliated.

Parties in disagreement over the interpretation which should be placed on an event in contract performance sometimes consider seeking declaratory relief under the Contract Disputes Act (CDA).[1] An inspection of the act might encourage this course, because the language suggests that declaratory relief is available. However, the judiciary historically has been reluctant to declare the rights of the parties. In *Garrett v. General Electric Co.*,[2] the Federal Circuit Court agreed with the Board that the Board had jurisdiction of a nonmonetary, post-acceptance order of the Navy to correct deficient parts at no cost to the Government. The lengthy dissenting opinion suggested that the case might be a jurisdictional "barn opener."[3]

Subsequent litigation suggests that the Board and the Court of Federal Claims intend to preserve the tradition of judicial restraint in granting declaratory relief under CDA.

II. THE ACT

The Contract Appeals Boards and the Court of Federal Claims have jurisdiction to decide cases involving disputes between the Government and its contractors. This judicial power is derived from the CDA. The statute indicates that disputes take the form of "claims," and the agency Contracting Officers will make "decisions" on the claims which will serve to frame the scope of any dispute.[4] The Federal Acquisition Regulation (FAR),[5] and the Federal Courts Administration Act,[6] contain refinements to the "claim" concept. "Claim" is defined in the FAR as: ". . . [A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."[7]

The language "interpretation of contract terms" clearly suggests the availability of declaratory relief. As regards the jurisdiction of the Court of Federal Claims, the availability of declaratory relief is now explicit:

"The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(4)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act."[8]

Again, the language suggests that the court may decide a claim for declaratory relief.

III. CASELAW

The scope of these provisions has been tested. In *Garrett v. General Electric Co.*,[9] the Federal Circuit sustained the ASBCA decision to decide on appeal of a Navy nonmonetary, post-acceptance direction to the contractor to correct deficient parts at no cost to the Government. The court interpreted the direction as "other relief," and therefore a "claim" under the FAR definition.[10] The court, therefore, decided that the Board had correctly determined its jurisdiction.

After accepting engines delivered under the contract, the Navy determined that there were latent defects in the engines. The inspection clause in the contract included provisions for monetary and nonmonetary relief in the case of latent defects.[11] The clause stated that in the event of a latent defect, the contractor could be required to correct or replace the item at no cost to the Government. In effect, the court decided that the Board

Paul A. Reynolds is the local Counsel for the Defense Contract Management Command, a component of the U.S. Department of Defense. Mr. Reynolds has been employed by the Department of Defense since 1988 where his practice is in Government Contracts, Federal Labor Law, the False Claim Act, and Government Ethics. Mr. Reynolds received a J.D. from California Western School of Law in 1984, and a B.S. in Philosophy from the University of Utah in 1980.

could take jurisdiction to interpret the meaning of the inspection clause.

The decision is significant, as noted in the dissenting opinion, because the Government generally enjoys the right under standard clauses, to direct changes to a contract, which the contractor must perform first, and then seek compensation, either through routing administrative processes or through litigation.[12]

The *Garrett* decision acknowledged the generally recognized proscription against judicial involvement in contract administration. However, the court determined that the post-acceptance direction to perform was not usual contract administration and justified taking jurisdiction. Did *Garrett* expand the Board's declaratory jurisdiction?

Prior to *Garrett*, the Board had taken jurisdiction over nonmonetary claims in other contexts.[13] Appeals of nonmonetary default terminations were accepted for resolution.[14] The logic in *Malone* is compelling. If the Government terminates the contract but does not seek monetary recovery, the contractor will be left without a remedy. There also is little likelihood that the Board would be interfering with administration under a default termination.

"The fact that the Government was still negotiating with the contractor indicated to the Board that the appeal was premature. A traditional analysis would suggest that such appeals are an uneconomical use of judicial resources."

In addition, it is well settled that Boards will decide compliance disputes regarding the Cost Accounting Standards (CAS).[15] The CAS regulations suggest this was intended.[16] The reasoning behind the CAS exception may be that the dispute concerns a system compliance versus a discreet dispute over one contract. Deciding a CAS compliance issue would not interfere with the ability of the Government to acquire goods and services. Also, resolution of the compliance issue could obviate the need for costly cost impact efforts.

Decisions after *Garrett* indicate that the declaratory floodgates will not open. The ASBCA declined to interpret the clause which bars claims when a contractor has failed to submit a timely Termination Settlement Proposal.[17] In that appeal, the contracting officer took the position that the contractor had failed to submit a proposal within the time required by the FAR. The Government indicated its willingness to continue negotiations but said that the right to appeal the decision was forfeited. Unhappy with negotiating a settlement under the circumstances, the contractor sought an interpretation of the contract. The Board declined to interpret the provision under the doctrine of ripeness. The Board relied on the fact that the contractor had not perfected a claim based on a settlement proposal with a proper CDA certification. Also, the Board indicated that it was premature to decide whether it could effectively decide a dispute that, due to current negotiations, was actually a potential failure to settle in the future.[18] Even though there was no risk to the Government in terms of interfering with the delivery of goods and services, the Board declined to inject itself into the process. This could be construed to mean that post-termination for convenience negotiations where considered part of the normal administrative process. The fact that the Government was still negotiating with the contractor indicated to the Board that the appeal was premature. A traditional analysis would suggest that such appeals are an uneconomical use of judicial resources.

Another recent Board decision denied access to declaratory relief on similar grounds.[19] In that appeal, the Board declined to provide an interpretation of the funding clause in the subject contract on the ground that the "claim" really was a disguised monetary claim. The contractor had pending equitable adjustment requests and a termination to settle on the contract and wanted to know if these actions were limited by the funding clause. The Board again characterized the appeal as premature, pointing out that the resolution of the funding clause was interconnected with the resolution of the Government's monetary liability, and that subsequent litigation was likely. Therefore, the Board would be subjecting itself to unnecessary piecemeal review.

The Federal Court of Claims has joined the Board in stating its conservative approach to declaratory relief.[20] In *Valley View Enterprises, Inc. v. United States*, a case similar to *Garrett*, the contractor had installed a heating system in a building for the military. The contracting officer notified the contractor that the work was deficient and requested a corrective action plan at no cost to the Government. The contractor requested a final decision, alleging a contract change. Not receiving a decision, the contractor sought a declaration of its rights from the court. Citing the interest of the Government in receiving goods and services prior to litigation of the monetary issues surrounding a procurement, the court decided that the contractor had not stated a claim.[21] In addition, the court pointed out that the line

of demarcation for involvement in contract administration should not be drawn prior to acceptance of performance. In this case, unlike *Garrett*, the Government had not accepted the goods and services.[22]

IV. SUMMARY AND CONCLUSION

The reluctance of the Board and Court of Claims to issue declaratory relief is intact. Some guidelines appear from the caselaw. The judiciary will take jurisdiction in some generally recognized contexts. These include CAS noncompliance and default determinations at no cost.

However, parties seeking an interpretation of the contract in other context may be disappointed. *Garrett* appears to represent an unusual result. The contract was complete. The parts were accepted. The Navy chose to direct the contractor to engage in additional work with no expectation of compensation. The Board believed that this situation merited an interpretation.

In *Valley View*, the controlling facts included the fact that performance was only nearly complete, and the fact that the Government had not accepted the work. As the *Valley View* Court pointed out, these are close decisions; however, the court decided to fall on the side of declining declaratory relief.

The caselaw also showed that the Board does not like to provide contract interpretation of issues which appear to be part of a developing monetary dispute. The Board will look to doctrines such as ripeness to decline to hear such claims.

It is interesting that the caselaw referred to these appeals as "monetary" or "nonmonetary." Ultimately, a contract dispute, or claim, always relates to money. A party wants an interpretation of the contract because it needs to decide how to proceed and maintain a favorable economic position. In the CAS context, a contractor wants a ruling on compliance before spending money to analyze the cost impact of the accounting disagreement. In that circumstance, the Board will give an interpretation.

Enforcement of a change order is monetary in the sense that it costs money to do the work. Either the contractor or the Government pays for the effort. In *Garrett*, the Board was willing to interpret the contract. In *Valley View*, the court was not willing.

Thus, the "monetary" distinction is of limited utility. Clearly, the Board is reluctant to interpret change orders because to do so would interfere with the delivery of goods and services. The judiciary will avoid interpreting contract performance which is likely to be settled by future administrative action or "monetary" litigation involving the same issues. A court or board will look to the ripeness doctrine, the monetary/nonmonetary distinction, or the principle of non-interference with administration to reject these declaratory appeals. Where a party is without a remedy, or the regulations clearly show an intent that the type of dispute is a "claim," the judiciary will interpret the contract.

[1]Contract Disputes Act of 1978, 41 U.S.C. 601 *et. seq.*

[2]*H. Lawrence Garrett III, Secretary of the Navy v. General Electric Company*, 987 F.2d 747 (1993).

[3]*Garrett* at 752.

[4]Contract Disputes Act, section 605.

[5]Federal Acquisition Regulation, 48 CFR 1.

[6]Federal Courts Administration Act, 28 U.S.C. 1491 (1992).

[7]FAR 33.201.

[8]Federal Courts Administration Act, 28 U.S.C. 1491(1)(2).

[9]*Garrett, supra.*

[10]*Garrett* at 749.

[11]*Garrett* at 748; *see, e.g.,* FAR 52.246-2.

[12]*Garrett* at 754.

[13]*See, e.g.*, the string cites in Westinghouse Electric Corporation, ASBCA no. 47868, 95-1 BCA 27,364; *Valley View Enterprises, Inc. v. United States*, 35 Fed. Cl. 378 (1996).

[14]*Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988).

[15]*Litton Systems, Inc., Guidance and Control Systems Division*, ASBCA no. 31148, 87-3 BCA 20,066.

[16]FAR 52.230-2(b).

[17]*Hughes Missle Systems Co.*, ASBCA No. 46982, 94-3 BCA 27,055.

[18]*Hughes, supra.*

[19]*Westinghouse, supra.*

[20]*Valley View Enterprises, Inc. v. United States*, 35 Fed. Cl. 378 (1996).

[21]*Valley View* at 383.

[22]*Valley View* at 386.

How To Prepare Your Personal Injury Case for Trial

by Rex Bush

Years ago, it is said, great trial lawyers were basically great orators, who depended more on their rhetoric to win their cases than on a command of the facts. Those days are gone. Today preparation is universally recognized by successful trial attorneys as the key to success at trial. This article is meant to help the attorney who now and then handles personal injury cases to better prepare a personal injury case for trial.

MAKE SURE YOU HAVE A CASE

The best time to think about jury instructions is before you file suit. Get a copy of the Model Utah Jury Instructions-Civil and select the instructions you plan to use at trial. Use these as a guide during discovery.

START FACT INVESTIGATION IMMEDIATELY

Contact witnesses and investigating police officers immediately. Get statements from these witnesses. Use a recorder that works with your telephone. With crucial fact witnesses, especially when liability is in dispute, consider taking the statement under oath with a court reporter present. Then, later, after suit is filed you can make sure the witness sticks to that story by providing the witness with a copy of the statement to review before deposition. Visit the scene of the accident. Take pictures.

FILE SUIT TIMELY

For most negligence cases you will need to file suit within four years. U.C.A. §78-12-25-(3). But be aware of special statute of limitation problems. For example, an action on a written policy or contract of insurance must be filed within three years of the loss. U.C.A. §31A-21-313(1). This applies to uninsured motorist (UM) and underinsured motorist (UIM) claims. So, if you wait more than three years to resolve the third-party claim and find the coverage is inadequate you've already missed the three year statute for UM and UIM claims. So, be sure to calendar these date when the case comes in the door.

If a plaintiff dies and the cause of action survives, suit must be filed within on year of death. U.C.A. §78-12-37. If the defendant dies before suit is filed, suit must be filed within the period of the statute of limitations applicable to the cause of action or within one year after issuance of letters testamentary, whichever is greater. *Gray Realty Co. v. Robinson*, 184 P.2d 237 (Utah 1947).

For claims against Utah state or local government a written notice of claim must be filed within one year after the claim arises. U.C.A. §63-30-11; U.C.A. §63-30-12; and U.C.A. §63-30-13. If the claim is against the state or its employee the notice must be filed with the attorney general *and* the agency concerned. U.C.A. §63-30-12. If the claim is against a "political subdivision" or its employee the notice must be filed with the governing body of the political subdivision. U.C.A. §63-30-13. The notice of claim is deemed filed on the date of the post-office cancellation mark. U.C.A. §63-37-1.

On receipt of your notice of claim the state or political subdivision is to notify you within 90 days of its approval or denial. Your claim is deemed denied if you haven't heard from the agency within 90 days. Once you receive the denial or the 90 days pass you have one year to file suit. U.C.A. §63-30-15. If your plaintiff is a minor the time for filing the notice of claim is tolled during her minority. *Scott v. School Bd.*, 568 P.2d 746 (Utah 1977).

On claims against the federal government, an administrative claim (Form 95) must be filed with the proper federal agency within two years of the accident or occurrence.

Rex Bush is a sole practitioner who limits his Sandy practice to representation of plaintiffs in personal injury cases. He is past chair of the Solo and Small Firm Committee of the Utah State Bar, for which he was honored by the Bar in 1996 for outstanding service to the legal profession. He has been listed in Who's Who in American Law since 1994 and has published several articles on personal injury related subjects.

GET THE COMPLAINT SERVED

You must serve the complaint within 120 days after it is filed. Rule 4(b) of the Utah Rules of Civil Procedure. If an auto accident or other defendant has left the state, you may serve that defendant through the Division of Corporations of the Utah Department of Commerce. Utah Code Ann. Section 41-12a-505. You must first make a diligent attempt to obtain a current address. *Carlson v. Bos*, 740 P.2d 1269 (Utah 1987). If this fails, you may serve the defendant by filing a copy of the summons and complaint with the Division along with a five dollar filing fee. Then, within 10 days of that filing you must send by registered mail to the defendant at the last known address a "notice of process" along with an affidavit of compliance with the above section.

After service is done, send a set of all the documents to the claims adjuster who will retain defense counsel. Once service is accomplished by this means on an out-of-state defendant, the defense is in the awkward position of having to prepare a defense without the assistance of the defendant.

MAKE SURE THRESHOLD IS MET

In auto accident cases your plaintiff, by the date of trial, must have met the Utah personal injury threshold to be able to receive general damages. U.C.A. §31A-22-309(1). Remember that this does not apply to special damages so you can still pursue a claim for past medical specials and past lost wages without meeting one of these criteria.

"The threshold can be met in one of five ways: death, dismemberment, permanent disability or impairment, disfigurement, or medical expenses in excess of $3,000."

The threshold can be met in one of five ways: death, dismemberment, permanent disability or impairment, disfigurement, or medical expenses in excess of $3,000. While you won't likely get a threshold challenge on a death or dismemberment case, you might get one if you are meeting threshold through medical expenses, impairment or disfigurement.

Medical Expenses of $3,000

While not mentioned in the threshold statute it is widely assumed that the medical expenses must be both reasonable and necessary, so you may get a threshold challenge at trial especially if your plaintiff's medicals are heavy in so-called "soft" medicals such as chiropractic care. You can prepare for this challenge by having your primary care physician testify that the medical treatment was medically necessary and that the charges were reasonable when compared to the charges of other providers in the locale.

You can also prepare for such a threshold challenge by having your plaintiff meet threshold in more than one way.

Permanent Impairment

As threshold can also be met by an impairment rating based on objective findings, be sure you ask for an impairment rating when you request a narrative from the plaintiff's treating doctor(s).

What are "objective findings?" I wondered about this after reading the words in the threshold statute, thinking there must be some legal definition to supply the meaning. After hours of research at the law library and on the Internet I finally concluded that "objective" as used in the statute has the same meaning as it's used by doctors in the term "SOAP notes," which are a doctor's notes to the file after he sees a patient. SOAP stands for Subjective, Objective, Assessment and Plan. "Subjective" means the patient's complaints, Objective is what the doctor observes, Assessment is what the doctor thinks about the condition, diagnosis, and prognosis. Plan is recommendations on treatment. So "Objective" findings are the doctor's findings as opposed to the subjective complaints of the patient. It can include range of motion limitation, a disc lesion and all the other factors traditionally reported on SOAP notes as "objective."

This conclusion is supported by the recent Utah case of *McNair v. Farris*, No. 960567-CA (Ut. Ct. App. August 21, 1997), in which McNair's case was dismissed for failure to meet threshold. The Utah Court of Appeals doesn't come out and specifically say it the way I have above but by implication confirms that objective findings are those findings of the doctor as opposed to complaints of the patient. Cited in that case are cases from other states that give further support to this approach.

Disfigurement

Threshold can also be met through "permanent disfigurement" which generally means a scar. Some cases from other jurisdictions have held that a minor scar does not constitute disfigurement but there are no Utah cases on this subject.

If your plaintiff has disfiguring scarring get an estimate from a plastic surgeon on the cost of surgical revision.

KNOW THE VALUE OF YOUR CASE

In the old days valuation was simple: you took the medical specials and multiplied by three. That practice was abused when plaintiffs learned of it and began to incur unnecessary medical care in an effort to artificially drive up the value of the case. Today multipliers are still used but knowing what num-

bers to apply and when to apply them is something that takes judgment and experience.

Although valuation requires judgment which comes with experience there are several tools you can use to help value a case even if you don't have years of experience working with personal injury cases. Verdict research can be helpful and it comes in two kinds: local and national. National verdict research is far less helpful than local but may have some usefulness on select cases especially of an unusual nature. National verdict research is available from Jury Verdict Research Inc. of Solon, Ohio. A set of its books is available at the University of Utah Law Library.

For local verdict and settlement research the best resource is Rocky Mountain Verdicts & Settlements published by Dave Wilde. This monthly publication contains personal injury verdicts and settlements from the Rocky Mountain area but primarily from Utah. It's a valuable tool to find out what juries are awarding, what cases are settling for and which experts are being used. For a small fee you can have a search done of its computerized database.

For subscription information contact Dave Wilde at (801) 268-2321 or (801) 567-0300 or write Rocky Mountain Verdicts and Settlements, P.O. Box 571261, Salt Lake City, Utah 84157-1261. You may also find this publication at the University of Utah Law Library.

"Some attorneys claim they never get involved in their clients' care and treatment. While idealistic, this approach is neither humane nor effective."

MONITOR MEDICAL CARE

Some attorneys claim they never get involved in their clients' care and treatment. While idealistic, this approach is neither humane nor effective.

Part of getting top dollar for your case comes from identifying all injuries and making sure they are diagnosed and treated. Today, most doctors are specialists and may not be fully aware of injuries treated by other specialists so as to spot and diagnose all accident related injuries. A classic example is the TMJ (temporo-mandibular joint) disorder. For example, I had a client who had sustained a disc herniation in a rear-end accident. When he was talking with me in my office I heard a clicking noise every time he opened his mouth. I asked him about it and found out that yes indeed his jaw joints had been very painful and had been popping and clicking since the accident. I discussed it with his primary care physician who agreed to refer him to a TMJ specialist. Not only would the case have been undervalued had the TMJ not been diagnosed and treated but the client would have been consigned to some serious TMJ problems for the rest of his life.

TMJ is often caused by car accidents and it often goes undiagnosed. It needs to be diagnosed and treated by a TMJ specialist, typically a dentist who specializes in the area or an oral surgeon, if surgery becomes necessary. Often chiropractors diagnose and treat TMJ and while the diagnosis is helpful and appreciated, treatment of TMJ by a chiropractor adds nothing to the value of the case and is looked at by claims adjusters and juries as simply excessive chiropractic treatment. Only if the treatment is from a dentist or oral surgeon will it add value to the case.

Another often overlooked area is head injury. Brain injuries can occur without there being anything visible on an MRI of the brain. These injuries often go overlooked by the client's primary care physician(s). If your client has difficulty thinking and remembering many months after the accident, contact the primary care physician and discuss the possibility of a referral to a neurologist and/or a neuropsychologist.

It is best if referrals to doctors come from other doctors but this problem is simply dealt with by discussing the matter with the primary care physician and asking her to make the referral if she feels it is appropriate.

Checklists can help you identify all possible injuries. I have combined a TMJ screening checklist from a local TMJ specialist with a head injury screening checklist from a neuropsychologist into one checklist which I have clients fill out at the outset of a case.

This initial screening should be supplemented with ongoing information obtained through periodic contact with the client. Insist that the client keep you informed of changes in physical condition and treatment.

USE MOTIONS IN LIMINE

A Motion In Limine is "a pretrial motion to exclude certain evidence." *Reiser v. Lohner*, 641 P.2d 93, 100 (Utah 1982).

There is no statutory basis for the motion. Nor is it mentioned in any rule of procedure. It first appeared in American case law in a 1933 Alabama case: *Bradford v. Birmingham Electric Co.*, 149 So. 729 (Ala. 1933). And it first appeared in Utah case law in *Bridges v. Union Pacific Railroad Co.*, 488 P.2d 738, 739 (Utah 1971). By raising important evidentiary issues before trial you can fully brief the issue and give the judge a chance to make a well-informed decision. You simplify trial preparation.

You avoid interruptions at trial and thereby speed up the trial process and you create a better foundation for appellate review.

If at all possible, make the motion in writing in advance of trial. If that is not possible, make it orally in chambers *before* the trial starts. Don't file a written motion on the morning of trial.

If the court rules to exclude your proposed evidence, make a proffer of that evidence during trial.

Here are some examples of how the motion has been used in personal injury cases.

Slip and fall case: to determine admissibility of "prior fall" testimony in a slip and fall case, *Erikson v. Wasatch Manor, Inc.*, 802 P.2d 1323, 1325-26 (Utah App. 1990).

Wrongful death: to exclude evidence of alcohol consumption the day prior to a drowning accident. *Pearce v. Wistisen*, 701 P.2d 489, 493-94 (Utah 1985).

Automobile accident: to attempt to exclude a deceased doctor's testimony. *Hansen v. Heath*, 852 P.2d 977, 978-79 (Utah 1993).

Fraudulent misrepresentation: to exclude an expert who was not timely made known to opposing party as required by a scheduling order. *Radcliffe v. Adhavan*, 875 P.2d 608, 611 (Utah App. 1994).

Automobile product liability claim: to exclude evidence regarding use of seat belts. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920, 927-28 (Utah 1990).

Here are some other instances in which the motion has been used: to prevent a bio-mechanical engineer from giving an opinion that the plaintiff could not have suffered injury in the accident; to exclude scientifically unreliable expert testimony.

Once a matter is raised and definitively decided by the court it is not necessary to object at trial to preserve the issue for appeal. However, merely raising the issue is not enough. If the court defers the matter for decision at trial, the party objecting must make a specific and timely objection in order to preserve the issue for appeal.

LIMIT THE NUMBER OF INDEPENDENT MEDICAL EXAMS

Once you file suit, the defense attorney will be able to have your plaintiff examined by a doctor of defense attorney's choice. Utah R. Civ. P. Rule 35(a). Your objections at that point to defense use of a particular doctor will most likely be futile.

There is a better way to assure that the examination is done by a doctor with a reputation for fairness. After filing your demand with the claims adjuster, you may get a request for an independent medical examination (IME). Tell the adjuster you will agree to the IME provided you and the adjuster can agree on a suitable doctor and provided this doctor will be the defense examining doctor under Rule 35 if suit is filed. If the adjuster agrees to this send a letter of confirmation and ask the adjuster to sign it and send it back.

REQUEST A SCHEDULING CONFERENCE

You can greatly expedite the progress of your case by requesting a scheduling conference early on. Some judges won't grant one but most will and some will even assign a trial date at the time of the scheduling conference. You can ask for a scheduling conference right after you receive an answer to your complaint. Asking for and getting a scheduling conference will cut many months off the time you spend in litigation and you will have a happier client because of it.

The legal basis for a request for scheduling conference can be found in Rule 16(b) Utah R. Civ. P. which provides: "in any action, in addition to any pre-trial conference that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held." And Rule 4-104(2) of the Code of Judicial Administration provides that a trial date may be obtained at any time. At the scheduling conference set dates for discovery cut off, motion cut off, exchange of expert witnesses and exchange of trial exhibits.

PLAN AND CONDUCT DISCOVERY

Sit down early on with a copy of Model Utah Jury Instructions-Civil and decide which instructions you plan to give at trial. Make a list of the points you will need to prove to make your case. Then decide which witness or documentary evidence you will use to prove each point. Some of the information you will need may be possessed by the other party.

CONSIDER ALTERNATIVE DISPUTE RESOLUTION

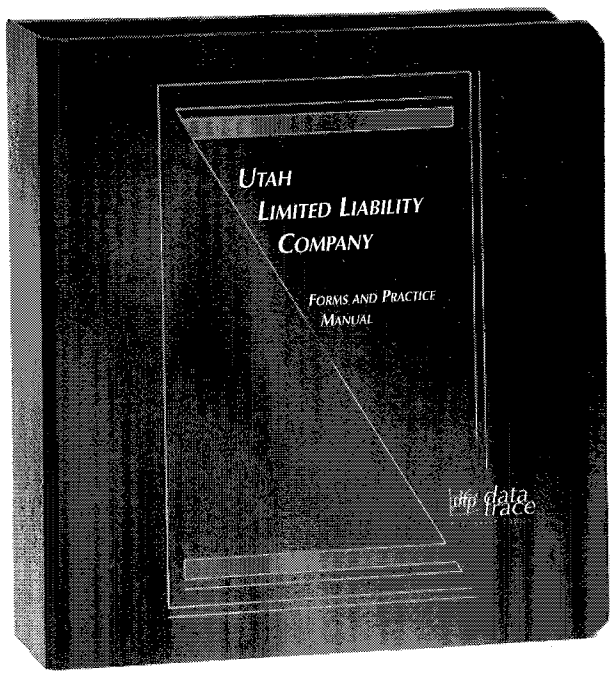
Alternative dispute resolution (ADR) has come into its own in the 90's as the tool of choice among plaintiff's attorneys. Whereas it may take 100 or more hours to prepare for and try a jury trial, arbitration and mediation can be done in a fraction of that time. As a plaintiff's attorney you should take a close look at ADR as means of getting your case resolved.

CONCLUSION

Hopefully this article will help you get started on the road to competent representation of your injured client. Making a checklist can help you to remember and do all those important things that make for a good trial preparation. Use this article as a starting point for your own trial preparation checklist. And hopefully your preparation will be like the part of the iceberg that sunk the Titanic. Your opponent may not be able to see it, but will know darned well it's there.

NOW AVAILABLE

You Need This Book



The first and only Utah LLC Forms and Practice Manual

Utah Limited Liability Company Forms and Practice Manual

You already know that LLCs are the hottest business entity in the country. You also know that Utah has had its law since July 1, 1991.

You Need Forms

You need forms and we've got them. Over 150 to speed up your work along with expert commentary by the leading authorities on Utah LLC Law. You will learn when and why each form should be used.

You've Got A Computer

Great. We've got every Utah LLC form available on computer diskette. Just bring up a form and fill in the blanks. It's that simple.

Utah Limited Liability Company Forms and Practice Manual

This 500+ page book including over 150 forms with detailed analysis costs just $169.95. Optional computer diskette containing every form is available with book purchase for $49.95.

Written for Utah Lawyers by Utah Lawyers

Preston C. Regehr is a shareholder in the law firm of Parsons Behle and Latimer. His practice focuses on small and emerging companies. He is an expert in the intellectual property issue affecting LLC names and trademarks. His business law and tax expertise combined with his extensive practical experience enable him to provide an invaluable manual for Utah practitioners.

To place your order or for more information call

dtp data trace
PUBLISHING COMPANY

P.O.Box 1239 • Brooklandville, MD 21022
E-mail: info@datatrace.com
Web: http://www.datatrace.com/legal

1-800-342-0454

LA1

Discipline Corner

DISBARMENT

On April 10, 1998, the Utah Supreme Court reversed the Third District Court's suspension of Paul R. Ince, and stated that disbarment is the appropriate sanction for his misconduct.

Justice Michael D. Zimmerman summarized the Supreme Court's decision:

> The Utah State Bar ("the Bar") appeals from a district court order rejecting the Bar's request for the disbarment of Paul R. Ince. In its findings of fact, the district court determined that Ince had committed not less than nineteen major acts of misconduct over a fifteen-month period, including misappropriating law firm and client funds for his own use and benefit, forging documents to conceal an illegal transfer of pension funds, and failing to disclose his misconduct to a subsequent employer. Despite finding that the generally appropriate level of discipline fixed by the Standards for Imposing Lawyer Sanctions was disbarment, the court concluded that mitigating factors weighed in favor of suspension. The court then suspended Ince for fifteen months, to be followed by twenty--four months of supervised probation. The Bar appeals, arguing that Ince should be disbarred. We agree and therefore reverse.

The Court found that Ince committed theft and several acts of forgery that, "could have been prosecuted as felonies or misdemeanors and clearly constitute serious criminal conduct for the purposes of rule 4.2(b) [Standards for Imposing Lawyer Sanctions] . . . . These acts seriously adversely reflect on Ince's fitness to practice law, thereby making disbarment the presumptively appropriate sanction." The Court added:

> In *Babilis*, we stated that in the absence of truly compelling mitigating circumstances, the intentional misappropriation of client funds is an act that merits disbarment. 951 P.2d at 217. The Bar urges us to adopt the same posture toward intentional misappropriation of law firm funds, and we do so today. The fact that the majority of the money Ince stole came from his law firm rather than from a client neither changes the essential nature of his conduct nor makes it any less serious. The conduct still falls within the confines of rule 4.2(b) [Standards for Imposing Lawyer Sanctions].

Once a presumptive level of discipline is determined, the trial court may apply Rule 6, Standards for Imposing Lawyer Sanctions, in deciding what sanction should ultimately be imposed. On appeal, the Bar argued that the District Court gave undue weight to insubstantial mitigating factors. The Court noted:

> Although the new Standards are intended to preserve a measure of flexibility in assigning sanctions, the whole basis for their adoption was to avoid the uncertainty that existed under the old rules. Therefore, we offer the following guidance as to the application of aggravating and mitigating circumstances under rule 6.
>
> To justify a departure from the presumptive level of discipline set forth in the Standards, the aggravating and mitigating factors must be significant. In this case, we find that the district court accorded too much weight to mitigating factors which were not particularly compelling. This is especially true given the number of aggravating factors that existed. Thus, the weight of the mitigating factors is at least balanced by the aggravating factors. Under such circumstances, no adjustment to the presumptively appropriate level of discipline is warranted.
>
> To elaborate, the district court found that the following mitigating factors weighed in favor of suspension: Ince (1) had no previous record of discipline; (2) had personal or emotional problems during the relevant time frame; (3) made timely, good faith restitution of the money owed to his employer; (4) enjoyed a good reputation both before and after his misconduct; (5) exhibited remorse and interim reform and did not commit any further misconduct; and (6) demonstrated good work in the Child Protection Division of the Attorney General's office following his resignation from CD&N.
>
> The court also found the following aggravating factors: (1) Ince's conduct demonstrated a dishonest motive (the misconduct was motivated by the desire to support a lifestyle he could not afford); (2) Ince engaged in a pattern of misconduct; (3) Ince committed multiple offenses

– nineteen major acts of misconduct over a fifteen-month period; and (4) the conduct was illegal.

There are a number of general statements which can be made about the mitigating factors the court found to exist in this case and how much weight they should be accorded. First, Ince's restitution should not be given much weight because it was made only after his misconduct had been discovered and he had been confronted by CD&N. After an attorney's misconduct is discovered, restitution can be characterized simply as the "honesty of compulsion" and may be evidence only of the lawyer's ability to raise the money or desire to avoid being disbarred rather than of a sincere desire to rectify the wrongdoing. *In re Wilson*, 409 A.2d 1153, 1156 (N.J. 1979). On the other hand, an attorney who reports his own misconduct prior to discovery and attempts to make restitution even if he lacks the means to do so completely should have those efforts accorded greater weight in the determination of the sanction to be imposed.

The same reasoning applies to Ince's voluntary reporting of his misconduct to the Bar. This disclosure took place only after his misconduct had been discovered by CD&N. At that point, Ince could reasonably anticipate that CD&N would report him to the Bar. Therefore, his disclosure was self-serving. In contrast, an attorney who reports his own misconduct to the Bar prior to discovery, perhaps knowing that the misconduct might not ever be discovered, would certainly be entitled to have this voluntary disclosure weighed heavily as a mitigating factor.

Furthermore, Ince's supposed interim remorse and reform are not compelling. For example, when first confronted by CD&N with evidence of his misconduct, Ince was not forthcoming. He repeatedly admitted to acts of misconduct only when confronted with specific evidence and was never completely willing to admit to undiscovered misconduct.[1] He then failed to disclose the true reason for his resignation from CD&N to the Attorney General. Rather than seeming truly sorry for his conduct and admitting to it, Ince seemed sorry only that he had been caught.

As for reform, Ince's position and reputed good work with the Attorney General's office are not entitled to significant weight. Because his position with the Attorney General did not involve control over client or state funds, Ince has not demonstrated that he would not fall victim to the same temptations if he again encountered financial difficulties at home. The fact that witnesses testified that Ince did good work at the Attorney General's office is similarly unconvincing as these character witnesses were not aware of the full extent of Ince's malfeasance. Without this knowledge, their opinions expressing disapproval of the Bar's efforts to revoke Ince's license were not fully informed.

In the final balance, we must consider all of the circumstances in light of the Standards of Imposing Lawyer Sanctions. The primary purposes promoted by the Standards are to protect the public and the judicial system and to uphold high standards of professionalism. The presumptive sanctions the Standards set forth for various types of misconduct are carefully calculated to further those purposes. None of these purposes would be well-served were we to uphold the decision of the district court and allow an attorney who knowingly violated the [R]ules of [P]rofessional [C]onduct and stole money to support a lifestyle beyond his means to continue practicing in the absence of a significant imbalance of mitigating and aggravating circumstances. Therefore, Ince must be disbarred.

For a full copy of the opinion, *see In the Matter of the Discipline of Paul R. Ince*, No. 04345, filed April 10, 1998, at www.at.state.ut.us/usctx2n.htm.

[1]Although Ince did eventually disclose several incidents of undiscovered misconduct to CD&N, he did so only after significant prodding and was never forthright with respect to his misconduct involving the MSI account.

INTERIM SUSPENSION STAYED

On April 20, 1998, the Utah Supreme Court granted Gary W. Pendleton's Motion to Stay his interim suspension from the practice of law.

Pursuant to Rule 18 of the Rules of Lawyer Discipline and Disability, the Utah State Bar sought and was granted an Order of Interim Suspension by the District Court. The Supreme Court ruled that past substance abuse in the form of illegal use of methamphetamine does not necessarily evidence the "substantial threat of irreparable harm to the public" standard required by Rule 18. In this regard, the Court stated that Rule 18 should be reserved for emergency intervention in practices of currently unfit, incompetent, or impaired lawyers where it is clear that the continued representation of clients would pose the threat required by the rule.

PUBLIC REPRIMAND

On April 21, 1998, the Honorable Michael J. Glasmann, Second District Court, signed an Order of Discipline: Public Reprimand, reprimanding Randall W. Richards for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), and 3.1 Meritorious Claims and Contentions) of the Rules of Professional Conduct. Richards was also ordered to attend the Utah State Bar Ethics School. The Order was based on a Discipline by Consent entered into by Richards and the Office of Professional Conduct.

Richards agreed to represent a couple in November 1990 in a real estate matter involving their failure to make timely payments and problems discovered in the house they purchased. After initiating litigation on behalf of the clients, Richard's subsequent evaluation of the lawsuit indicated the case had no merit.

Richards failed to act with reasonable diligence and promptness in his representation when he failed to respond to the opposing party's discovery requests, thus allowing requests for admission to be deemed admitted, resulting in summary judgment being entered against the clients. Richards failed to protect his clients' interests when, after determining that they had no cause of action against the defendants, he failed to withdraw from the case and thereby allow the clients to take steps to protect their interests until substitute counsel could be obtained.

ADMONITION

On April 11, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.1 (Competence) and 1.3 (Diligence) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School.

In 1991, a client hired the attorney to represent him in a civil action. After the attorney filed a Notice of Readiness for Trial, defense counsel filed an objection to the notice. Later, defense counsel sent discovery requests to the attorney, who did not respond because he believed that the requests had been improperly served after his notice of readiness for trial. The attorney did not seek a court ruling or protective order regarding the discovery; he simply did not respond and did not inform his client that he was not going to respond.

The defendants filed a Motion to Compel responses to the discovery. The attorney failed to file an opposition to the Motion to Compel. The attorney failed to inform his client that a Motion to Compel had been filed, and that he was not going to oppose it.

The Court granted the Motion to Compel and ordered responses to the discovery. A similar motion for another defendant was granted in February 1994. Each order required the client to comply with certain discovery requests within specified times, and stated that the complaint would be dismissed if the client failed to comply. The attorney did not inform the client of these rulings.

On March 4, 1994, the trial court entered orders dismissing the client's complaint with prejudice. Thereafter the attorney filed motions to set aside, but these were denied. The attorney filed an appeal, but the Utah Court of Appeals upheld the trial court's dismissals of the client's action.

The attorney admitted that the dismissal of the client's lawsuit was because of his error and his failure to respond to the defendants' discovery requests. The Court of Appeals concluded that because of the facts in the client's lawsuit, "including the long-standing failure to comply with discovery," the trial court did not abuse its discretion for failure to comply with the court's discovery order.

ADMONITION

On March 18, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

On November 24, 1994, a client employed the attorney to file an appeal of his misdemeanor conviction. The attorney was paid $500 as advance attorney's fees. The attorney failed to perform any meaningful legal services on the client's behalf. The attorney advised his client that he would not need to report to jail to serve his sentence if a certificate of probable cause could be obtained. The client understood this to mean he did not have to report and thereafter, the client was arrested for failure to report to jail to serve his sentence, as no certificate of probable cause had been obtained and the appeal had not been filed. The attorney thereby failed to properly communicate with his client. The attorney has refunded the entire $500 in legal fees to his client.

REINSTATEMENT

On February 25, 1998, the Honorable G. Rand Beacham, Fifth District Court, signed an Order of Reinstatement, reinstating Thomas A Blakely to the practice of law effective March 1, 1998. On November 26, 1997, the Honorable G. Rand Beacham, Fifth District Court, entered an Order of suspension, suspending Thomas A. Blakely, from the practice of law for three months for violation of Rules 8.4(a) and (b) (Misconduct) of the Rules of Professional Conduct. Blakely was also ordered to pay the Utah State Bar its costs of prosecution of the matter, to attend the Utah State Bar Ethics School, and to participate in and successfully complete a counseling program for sexual abuse. The Order was based on a Discipline by Consent entered into by Blakely and the Office of Professional Conduct (formerly known as Office of Attorney Discipline).

CLE Discussion Groups Sponsored by Solo, Small Firm & Rural Practice Section

Utah Law & Justice Center – 12:00 to 1:00 p.m.

June 18 – Patents, Trademarks, Name Registration
Reid Russell, Patent Attorney
July 16 – Arbiration & Mediation
Aug 20 – Title Insurance
Sept 17 – Social Security & Elderly Law
Oct 15 – Bankruptcy
Nov 19 – Foreclosure – Judicial & Non-judicial
Dec 17 – Workman's Compensation Claims & Defenses

Reservations in advance to Amy (USB) (801) 297-7033

Ethics Advisory Opinion Committee

OPINION NO. 98-02
(Approved April 17, 1998)

Issue: May an attorney represent both a county and a city that lies within the jurisdiction of the county as to civil matters?

Opinion: The Utah Rules of Professional Conduct do not require a blanket prohibition of an attorney's representation of both a city and county on civil matters. In the event the two entities are directly in conflict as to a particular matter, however, the attorney may not represent both (and perhaps neither) of the parties in that matter or other matters, unless the attorney can comply with the provisions of Rule 1.7(a).

OPINION NO. 98-03
(Approved April 17, 1998)

Issue: May a lawyer hired by an insurance company to defend an insured in a lawsuit submit billing statements to an outside audit service?

Opinion: Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent. If the lawyer is relying on an insurance agreement for consent, the lawyer must review the agreement with the client to renew the client's consent before sending any billing statements to the outside audit service.

OPINION NO. 98-04
(Approved April 17, 1998)

Issue: May a private practitioner who has been appointed as special deputy county attorney to investigate and prosecute a single matter continue to represent criminal defendants in any jurisdiction in Utah?

Opinion: No. Even assuming such conduct is permitted by Utah statute, Rule 1.7(a) of the Utah Rules of Professional Conduct and the reasoning of Utah Ethics Opinion No. 126 prevent a special deputy county attorney from representing criminal defense claims in any jurisdiction in the State. In addition, Rule 1.10 prohibits any member of the special deputy's law firm from representing criminal defendants in any jurisdiction in the State during the period of the appointment.

OPINION NO. 98-05
(Approved April 17, 1998)

Issue: Is it unethical for a defense attorney to offer a "full satisfaction" settlement, conditioned upon plaintiff's waiving a claim for attorneys' fees against a defendant?

Opinion: It is not unethical for a defense attorney to present an offer of settlement conditioned on waiver of attorneys' fees.

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 $20.00. Sixty-nine opinions were approved by the Board of Bar Commissioners between January 1, 1988 and April 17, 1998. For an additional $10.00 ($30.00 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	_____ ($20.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($30.00 both)

Please make all check 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.

NOTICE

Pursuant to the requirements of U.C.A. 62A-11-304.4, U.C.A. 62a-11-103 (14), and the Federal Welfare Reform Act, Section 653(h)(2), certain information is required to be submitted by parties or attorneys for parties in all cases involving the establishment, modification or enforcement of a support order.

To facilitate collection of the information, the child support worksheets required by Rule 4-912, Code of Judicial Administration, will be revised, effective October 1, 1998. The current worksheet forms are set forth in Appendix G of the Code of Judicial Administration; the new pages will be added to the Appendix upon the next publication of the Code of Judicial Administration in November of 1998. Copies of the new pages were mailed to all members of the Bar in May, 1998. The complete worksheet forms, including the new pages, are also available on the Court's web site at **http://courtlink.utcourts.gov.**

The submission of the forms will become mandatory on October 1, 1998, and, under the Rule, the courts will not enter the final decree of divorce, final order of modification or final decree of paternity until the completed worksheet is filed (including the new pages). In the meantime, attorneys are encouraged to begin using the new form as soon as possible.

Membership Corner

CHANGE OF ADDRESS FORM

Please change my name, address, and/or telephone and fax number on the membership records:

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell, Fax Number (801) 531-0660.

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications for the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare formal written opinions concerning the ethical aspects of lawyers' anticipated professional or personal conduct and to forward these opinions to the Board of Bar Commissioners for its approval.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the bar solicits the participation of lawyers and members of the judiciary who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibilities to consider ethical questions and issue timely, well-reasoned, articulate opinions.
- Involves diverse views, experience and backgrounds from the members of the practicing bar.

If you would like to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest to:

Ethics Advisory Opinion Committee
Gary G. Sackett, Chair
180 East First South Street
P.O. Box 45433
Salt Lake City, Utah 84145

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PUBLIC NOTICE

REAPPOINTMENT OF INCUMBENT PART-TIME UNITED STATES MAGISTRATE JUDGE

The current term of the following part-time United States Magistrate Judge serving the United States District Court for the District of Utah will expire as indicated: F. Bennion Redd, Monticello, Utah, March 28, 1999. The Court is required by law to establish a panel of citizens to consider the reappointment of a magistrate judge to a new four-year term or such other term as provided by law.

The duties of a part-time magistrate judge include the conduct of preliminary proceedings in criminal cases, the trial and disposition of certain misdemeanor cases, the handling of civil matters referred by the Court, and the conduct of various pre-trial matters as directed by the Court.

Comments from members of the Bar and the public are invited as to whether an incumbent magistrate judge should be recommended by the panel for reappointment by the Court. Comments should be directed to:

Markus B. Zimmer
Clerk of Court
United States District Court
Suite 150
Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Comments must be received no later than Friday, August 14, 1998.

Salt Lake City American Inn of Court Wins American Inns of Court Programming Award

The American Inns of Court Foundation has awarded its 1998 Programming Award for Best Research and Documentation to a program presented by the David K. Watkiss – Sutherland II American Inn of Court of Salt Lake City, Utah. This year's Awards, honoring the top programs among hundreds developed by Inns around the country, was presented May 16, 1998 at the American Inns of Court National Conference in New Orleans, Louisiana.

The Watkiss – Sutherland II Inn's award-winning program was entitled "Mount Everest on Trial." The program, presented in segments at monthly Inn meetings over the course of a year, was based on a hypothetical wrongful death and negligence claim asserted by two climbers involved in the May 1996 tragedies on Mt. Everest. Focusing on strategy, style and technique, the presentation included summary judgment arguments, jury selection, opening statements, direct and cross examinations, and closing arguments.

Thirty-four members of the Watkiss – Sutherland II Inn participated in various roles in the trial throughout the year. In addition, three expert witnesses, including former Salt Lake City Mayor Ted Wilson, world-famous high altitude climber Adrian Burgess and an expert on damages, John Brough, CPA, played prominent roles. Eight jurors from the community sat for the trial. Brent Manning, president of the Inn, who also summited Mt. Everest in 1990, created the program.

The Programming Awards were established in 1993 to honor the top ten American Inns of Court programs of the year. Each local American Inn of Court is divided into several teams composed of judges, experienced lawyers, young attorneys, and third year law students, each of which presents one program per year. Programs deal with important issues facing members of the legal profession, and play an integral role in the Inns' efforts to improve the skills, ethics, and professionalism of the legal community.

American Inns of Court encompass over 20,000 active members in 49 states and the District of Columbia. Each chapter – known as an Inn – has members ranging from law students to lawyers and judges with decades of legal experience. In addition to taking part in the programs presented at each meeting, each inexperienced Inn member is assigned a mentor with whom he/she spends time in court, in deposition or in the office. By providing such experiences, American Inns enable members to consider ethics and professional conduct in real-life terms, rather than simply in terms of the classroom or textbook.

1998-99 Licensing Forms

The 1998-99 licensing renewal forms will be mailed during the first week in June. Please note the return address on the printed form. **If you have not received your form by June 15 contact the Bar immediately.**

License fees are due regardless of whether you receive a form. Any Client Security Fund assessment must be paid with your license fees. Payments received without the Client Security Fund assessment will not be processed.

License fees are due July 1, 1998. Payments will be accepted through July 31, 1998 without a late fee. A late fee of $50 will be assessed if your payment is not ***received*** by 5:00 p.m., July 31, 1998. Payments received without the late fee will not be processed until the late fee is paid.

If your license fees and any other assessments are not ***received*** by 5:00 p.m., August 31, 1998 you will be suspended for non-payment of fees. A reinstatement fee of $100 will be assessed to those who have been suspended and wish to reinstate their license.

Due to the volume of forms to be processed you need to allow two-three weeks for processing. This is important to those that need to serve clients in the jails and prison since you are required to have an active sticker to enter the facilities.

If you are aware of an attorney who has moved and has not changed his or her address with the Bar or if you have not changed your address with the Bar, please do so now. Changes must be made *in writing* and should be submitted to Arnold Birrell. The fact you have moved and not changed your address with the Bar or notified another department of the Bar either in writing or verbally will not relieve you from late fees and/or suspension.

44th Annual Rocky Mountain Mineral Law Institute

Snowmass Village at Aspen, Colorado
July 23-25, 1998

The Rocky Mountain Mineral Law Foundation is sponsoring the 44th Annual Rocky Mountain Mineral Law Institute in Snowmass Village at Aspen, Colorado on July 23-25, 1998.

The 44th Annual Institute offers the combined expertise of more than 30 outstanding and experienced natural resources law professionals. Presentations will address a variety of practical legal and land problems associated with the exploration for and development of oil and gas, hard minerals, and water on both public and private lands.

Several general sessions, as well as split sections on mining, oil and gas, landmen's issues and water topics will be presented. Two hours of ethics and four hours of international resources issues are included in the program.

Attorneys, landmen, corporate management, government representatives, university faculty, and consultants will benefit from knowledge gained at this year's Institute.

For additional information, contact the Foundation at (303) 321-8100.

June 20, 1998 is Official Date for this Year's "Legal Aid Roundup" to Benefit Legal Aid Society

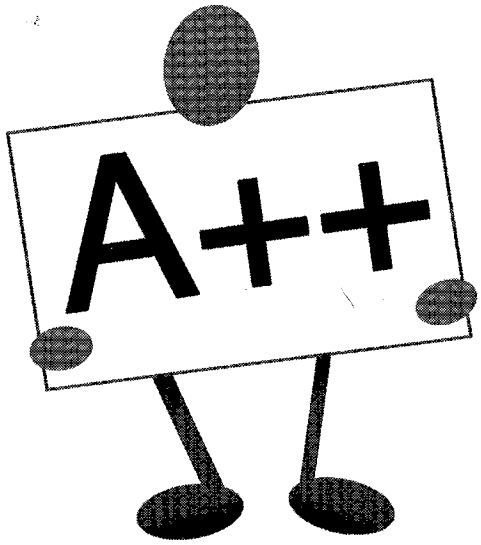
Legal Aid Society will hold its third annual "Legal Aid Roundup" on Saturday, June 20, 1998 at 6:30 p.m. at the Salt Palace Convention Center, South Ballroom.

The event will be a fun evening of dinner and western dancing, rounded out by an exciting opportunity drawing. Entertainment will be provided by The LynnDee Mueller Band. Dress for the event is western wear, cowboy boots optional. For tickets or additional information, please contact Kim at 578-1204.

"Last year's event was a great success, raising more than $20,000 for Legal Aid Society. This is your chance to dust off those cowboy boots from the closet, put on your Levi's and get ready to do some western dancing" states Board President Toby Brown.

Legal Aid Society assists adults and children who are victims of domestic violence to obtain a protective order from the court, regardless of the victim's income and also provides no-cost legal representation to low-income individuals with divorces, child custody and visitation, guardianship, modification of orders and occasionally adoption of children. It does not accept criminal cases.

During 1997, Legal Aid Society assisted more than 3,500 individuals with their family law cases.



The Coregis Lawyers' Insurance Programs Now Have a New, Stronger Owner to Serve Your Firm Even Better

You'll do anything to find the best professional liability insurance coverage for your law firm, right?

Well, your job just got a lot easier.

Coregis' professional liability insurance programs are now part of Westport Insurance Corporation and the Employers Reinsurance Group, which has been writing specialized liability coverage since 1930.

Westport is part of the Specialty Division of Employers Reinsurance Corporation, a GE Capital Services company and rated **A++** by A.M. Best and **AAA** by Standard & Poor's, *the industry's highest financial ratings.* General Electric is our ultimate parent - *the world's largest company* on a market capitalization basis.

Add these strengths to the following facts:

++ Coregis lawyers' programs are the choice of *over 30,000 law firms nationwide.*

++ More bar associations endorse our company's professional liability insurance program *than any other insurance company.*

++ We have insured lawyers *for more than 25 years.*

++ We have *unparalleled claim experience* handling claims against *lawyers.*

Now you can choose experience, quality and financial strength that is greater than any of our competitors. *So, make your decision easy – our business is helping yours.*

COREGIS® / WESTPORT

A GE Capital Services Company

www.coregis-westport.com

Endorsed by the

Utah State Bar

Program Administrator:

CONTINENTAL INSURANCE AGENCY, L.L.C.

1-801-466-0805

Young Lawyer Profile of Laura Gray

by Reagan L. Brenneman

"Do what you need to do for your soul and have faith in what you want to do." When asked the formula for a successful professional life and a balanced personal life, that advice came easily from Laura Gray. Certainly, it is a formula that has worked for her.

Laura Milliken Gray is a solo practitioner in Salt Lake City who delights in her role as a "neighborhood attorney" and who also manages her own mediation service called "Alpine Mediation." Ms. Gray's success is not the product of chance but rather the result of "being centered and knowing what you want." Ms. Gray's cornerstones: helping people, earning respect, providing good, solid legal services, and giving people the dignity they deserve. Those four cornerstones guided Ms. Gray to the practice she now enjoys.

Born and raised in Pittsburgh, Pennsylvania, Ms. Gray made her way west to get her undergraduate degree at the University of Utah. She majored in Political Science, received a certificate in International Affairs, and earned a minor in Spanish. To broaden her undergraduate experience, Ms. Gray studied abroad in both Spain and Mexico. Upon graduation she spent an introspective summer as a caretaker of an estate on a private island in Vermont before embarking on a four-month internship in Washington, D.C. with a Republican Congressman from Pennsylvania. While working in the political arena, Ms. Gray formulated plans to return to Utah, this time for a law degree from University of Utah College of Law.

Ms. Gray entered law school with a public interest based mind set and a focus on immigration law, where she could utilize her Spanish language skills. At the U., she set herself apart by earning the West Publishing Award in Family Law, laboring as a Legal Writing Teacher Assistant, and graduating in 1991 as a Leary Scholar. Following her own formula, Ms. Gray made a conscious decision to dedicate herself to offering direct legal service and gaining practical experience by working for Legal Services rather than writing for Law Review or other journals.

Her accomplishments in law school earned her an associate position with then Anderson & Watkins. After a year in practice, Ms. Gray again applied her formula for success and happiness and realized that a full diet of litigation was not for her. Wanting to be otherwise involved in the legal process, Ms. Gray moved on to examine the flip side of litigation and to clerk for Chief Justice Gordon R. Hall of the Utah Supreme Court. While enjoying what she jokes was "the nicest office I will ever have," Ms. Gray soaked up Chief Justice Hall's sage philosophies, describing him as having "a wealth of experience which characterized his wiseness." One year into Ms. Gray's clerkship, the Chief Justice retired. Having been Chief Justice Hall's last clerk, Ms. Gray went on to become Court of Appeals Judge James Z. Davis' first clerk. Ms. Gray reflects on these clerking experiences as being two of the most wonderful experiences of her legal career.

After clerking, Ms. Gray contemplated her prior experiences and her next move. She perceived litigation as an arduous and inefficient route to resolving problems. Importantly, she remembered her earlier exposure to alternative dispute resolution ("ADR"). In Utah mediation was a newly emerging concept, so new in fact that it was in Albuquerque, New Mexico that Ms. Gray, as a summer clerk during law school, first encountered the process. When she was clerking at the Supreme Court, she returned to New Mexico for classes in ADR and volunteered for Utah Dispute Resolution, mediating small claims and divorces through that organization and on her own.

That she accepted a position as the Alternative Dispute Resolution Administrator for the United States District Court for Utah was logical. As the ADR Administrator, Ms. Gray oversaw Utah's emerging mediation and arbitration program which included training volunteers as mediators and arbitrators. At the same time, she acted as a law clerk for Magistrate Boyce and Magistrate Alba, working mainly on prisoner civil rights litigation.

Missing the "practice" of law, Ms. Gray left the Federal Courts to open her own practice and to be her own boss in the spring of 1996. Her immediate goals were to help people more directly. Fortunate to have earned a solid reputation in the legal community, Ms. Gray is grateful for referrals from friends and professionals. She cites the support of other attorneys as being integral to her successful start.

With plans to become a better divorce mediator, Ms. Gray started her practice doing divorces. Through this early work, she discovered her niche. Seeing that the body of family law had a void regarding gay and lesbian issues, she sought to fill that void. Having gone to law school to help a certain group, Ms. Gray found the group that was under-represented and in need of her services. Noting that the gay and lesbian community lacks the legal access that others have, Ms. Gray has found creative avenues to help her clients.

Because gay and lesbian marriages still go legally unrecognized in Utah, traditional avenues for conflict resolution are closed to non-traditional couples. Thus, Ms. Gray has tailored her practice to encompass estate planning, adoption, contract and quasi-contract law. The creativity required by her tasks is intriguing, and she often shapes entirely new causes of action when she appears in court. Also, Ms. Gray finds that mediation over litigation is the ideal response to the legal problems facing non-traditional couples and individuals. "Mediation suits the non-legal nature of the relationship, assures confidentiality, mitigates uncertain outcomes of the litigation process, and preserves dignity," she says.

Since beginning her practice, Ms. Gray has been able to remove herself from full-time litigation and divorce law to concentrate more on social issues and other interesting aspects of her practice such as estate planning, adoptions, small business planning, and other transactional matters. She also teaches an undergraduate course at the University of Utah called "Women and the Law." This course focuses on the Equal Rights Amendment, Equal Protection, gender discrimination, domestic issues, and other timely gender-related topics. Justice Christine Durham, Judge Pamela Greenwood, Judge Sandra Peuler, and Commissioner Lisa Jones are among the model women in the law who have spoken to Ms. Gray's class. Many of Ms. Gray's students have gone on to become successful attorneys themselves.

Practicing on her own has been incredibly satisfying, Ms. Gray says, as she feels she has found her place in law. Although she will tell you that beginning your own practice is not easy, she places great value on all of the experiences that come along with it: learning how to run a business, managing an office, training a staff, finding clients, collecting fees, financing benefits like health and liability insurance, paying taxes, planning for retirement, dealing with people, and, of course, learning the law. She is quick to note that, despite the hard times, there is a giant tradeoff in that, being self-dependant, she feels she has grown personally more in the last two years than in her entire life. "Mostly, this experience has given me self-assurance," she observes.

Proving that a person can serve the public and be successful at the same time, Ms. Gray thrives on community involvement. She offers a "family and friend" rate to those with financial limitations and donates her time to Legal Aid on a *pro bono* basis. Moreover, she is volunteering her legal expertise as local counsel representing the East High Gay-Straight Alliance in the constitutionally-based school club case. Essentially, Ms. Gray has balanced accessibility and making a living.

Ms. Gray stays active in the ADR arena as well. In addition to managing her law practice, Ms. Gray runs Alpine Mediation. Ms. Gray describes Alpine Mediation as providing "a full service mediation practice for resolving disputes efficiently, economically, and peacefully." Ms. Gray contributes her administrative experience as well as her legal talents – having been the Assistant Chair of the Utah ADR committee, she will become its Chair in July.

In the midst of her career, Ms. Gray recalls why she has settled in Utah. When she needs to be recharged, "I find my spirituality and sanity in the mountains," she expresses. Often, after a busy day, or in the middle of a quiet one, she goes hiking, mountain biking, or snowshoeing in the foothills or mountains with her black Labrador and her Australian Shepherd mix.

If you would like to meet Ms. Gray and hear more about what she has to say, be sure to catch her presentation "Out of the Closet and into the Courtroom" at the Utah Bar Convention in Sun Valley this July.

Check Out This *Long Range Plan*

by Brian W. Jones

It was late on a hot, muggy summer night somewhere in Utah. The young lawyer was putting the final touches on the *Gibson v. Locklear* brief. The office seemed empty . . . but was it? The lawyer heard a faint rustling sound. Looking around the office, and hearing an inviting voice whispering "you can read me like a book . . . don't worry, you won't get caught . . . give it a try . . ." Walking toward the large, inviting mahogany desk, the new barrister quickly forgot the *Gibson v. Locklear* brief (most of it) and focused on clearing a space to "take care of business." That "business" included devouring the contents of the Young Lawyers Division's Long Range Plan. (Pant, breathe, sigh). Caught up in the emotion of the moment, the adventurous young (or new, whichever you prefer) lawyer began to drink in all that the Plan had to offer, and more.

> "A **New Lawyer Handbook** for all new bar-passers! An **Annual Meeting Committee**, designed to promote and encourage Young Lawyer participating in the Bar's Annual Meeting!" The young lawyer screamed with delight.
>
> "Oh stop! I don't know how much more I can take!" the zealous, but happy, advocate shouted.
>
> "I'm already exhausted . . . but I do like it when you offer **Crunch Time CLE** for a last minute opportunity to partake of all you have to give . . ." (Grrrr.)

Things were really heating up. Hopefully, there were no senior partners around. "It would be embarrassing to be caught in a position like this," the young lawyer thought. But the flames of desire for more cried out to the young lawyer's rapidly-beating heart.

> "**A New Member Social** at a Buzz game, **Ice Cream Socials** at Utah's two law schools, and continued support and coordination of pro bono projects like **Tuesday Night Bar** and **Call-a-Lawyer!**" The young lawyer struggled to reciprocate fully, completely to every advance . . .
>
> "Help me! You're too much for one young (and inexperienced?) lawyer to handle! But I like it!"

Winded and exhausted, the young lawyer questioned whether to continue this risky but exciting tryst.

> The question was answered by "**Law Day! *Bar Journal* Profiles! Community Service Projects!**" Ohh! Oh! Ahhh . . .

Overcome with emotion, the young lawyer sat back in the chair and breathed a sigh of relief and satisfaction. "Can it get any better than that?" The young lawyer lazily scanned to the bottom of the Plan. It said, "for the real action, you need to experience the pleasure and excitement of the YLD in the open . . . now *that's* fun. Email Brian at s232bwj@zionsbank.com to find out how. The first ten young lawyers to email get a copy of the Plan." You'll know what to do with it, just don't get caught by your senior partner!

The young lawyer pondered the prospect of bringing the new and exciting relationship out in the open. Would I have enough time? Would my significant other be upset? Would it be more fun out in the open than it is in the privacy of my office? Yes, no, and absolutely. The young lawyer fired off the email and returned to *Gibson v. Locklear* . . .

BUT SERIOUSLY FOLKS

If you've been offended by the little piece of fiction, I apologize; but at least you read it. The YLD officers and executive committee have spent a lot of time during the past year trying to find ways to deliver quality member and public service and communicate effectively with the YLD membership. The results of our efforts are contained in the Long Range Plan compellingly described above. These Young Lawyer articles are the primary vehicle the YLD uses to communicate with its members. Past

Brian W. Jones graduated in 1993 from the University of Utah College of Law. In 1990, he received a bachelor's degree in finance from University of Utah College of Business. Jones is currently an in-house attorney at Zions bank where he used to perform commercial loan work-outs but now oversees and manages the bank's implementation of new and existing bank laws and assists the bank's board of directors with establishing bank policies consistent with those laws. During law school, Jones clerked for the Tax and Revenue Section of the Utah Attorney General's office and completed an internship with Chief Judge Glen E. Clark of the U.S. Bankruptcy Court. Jones is the President-elect of the Young Lawyer's Division and served on the bar's Long Range Planning Committee.

Young Lawyer articles have included descriptions of what the YLD does, the committees in the YLD, various young lawyers who are making substantive contributions to the profession and community, and many other topics. Not all of them are as steamy as this one, but if you're a member of the YLD, you should read them anyway (it can be a very pleasurable experience).

We're looking forward to another successful year for the YLD. All of the new officers are top-notch individuals and first-rate lawyers. We are committed to representing the interests of Young Lawyers and to implementing programs and services that are useful and valuable to the newest members of the Bar and the general public. If there's something the YLD does that you're interested in becoming involved in, or something about the YLD concerns you somehow (no "mandatory pro bono" gripes please), write me, email me, or give me a call.

Act Well Thy Part

by Judge Joseph W. Anderson

Above the door of a nineteenth century building in Scotland these words were etched, "What ere thou art, play well thy part." This statement captures the essence of my "View From The Bench" which comes not only from my limited experience on the bench, but also from a longer stint at counsel's table, from a brief appearance as a witness, and from my experience as a law clerk to a federal judge where I was able to observe many hearings in Federal Court. It represents the musings of one less qualified than most, but who has been given opportunities unavailable to many.

In a "view" particularized to his profession Shakespeare once said:

> All the world's a stage, And all the men and women merely players; They have their exits and their entrances. As You like It, Act 2, scene 7, 139-143.

This view could be customized to the pursuit of Justice as follows:

> The courtroom is a stage and all the men and women who appear there are merely players. They have their entrances and their exits. The success of the effort to achieve Justice depends upon each of them, from bailiff to judge, doing their part to the best of their ability.

Just as in a play, where the actors depend upon the stage crew, scenery designers, producer and upon the prompting of each other's lines, the success of each participant in the courtroom drama to accomplish Justice depends upon the other participants. None is more important than the others for without each doing his or her part the outcome would be flawed in some way.

THE ROLES OF THE VARIOUS PLAYERS

The Judge

Most obvious, primarily because of costume and of his or her role as decision maker, is the judge, who may be figuratively described as a traffic cop who controls the flow of information and gives direction on the law. To fulfill his or her role the judge must come prepared with a knowledge of the rules that govern courtroom conduct and the law that must be applied to the case. Only with these tools can he or she help other players, e.g. lawyers who seek to introduce or exclude evidence, or a jury which must apply the law to the facts, to fulfill their roles. The judge must also bring to the search for Justice a temperament which inspires the other players to do their best and an ability to discern the truth when called upon as a fact finder.

The Attorneys

The second most obvious group of players, because of the amount of time they spend in the production, and sometimes because of the unfortunate volume or length of their speeches, are the attorneys who control the flow and ebb of evidence by the choice or timing of the presentation of witness testimony and exhibits. They are not properly prepared to fulfill their role unless they have thoroughly completed extensive preparations outside of the courtroom. These preparations, depending upon the role the lawyer plays as prosecutor, plaintiff's counsel or defense counsel, may include investigation, discovery, legal research, counseling with clients, conducting settlement or plea negotiations, pre-trial motion practice, and witness preparation – which in my courtroom includes familiarizing all children who testify with the surroundings, people and process of the courtroom.

Judge Joseph W. Anderson was appointed to the Third District Juvenile Court in August 1995. He serves Salt Lake, Summit and Tooele Counties. He received his law degree from the University of Utah College of Law in 1974. He served as an Associate in the firm of Parsons, Behle and Latimer from 1975 to 1978, then as Assistant Attorney to the U.S. Attorney in Salt Lake from 1982 to 1995. He was an Assistant U.S. Attorney for the Northern District in West Virginia from 1979 to 1982. From 1986 to his appointment to the bench he served as chief of the Civil Division for the Salt Lake U.S. Attorney's Office.

The attorneys must come to the courtroom stage of the proceedings knowledgeable about the rules of evidence which, through presentation and objection, allow appropriate testimony and physical evidence to be considered by the fact finder. They must also be prepared through oral presentation, opening statements and argument, to help the judge in his or her traffic cop role to properly control the flow of evidence and to help the fact finder follow their client's theory of the case. They must supply the adhesive argument whereby the pieces of evidence they have introduced are bound together to form the picture of the truth they have attempted to paint. Finally, attorneys also need to cultivate a realistic view of their role in the search for Justice. Failure to realize that they are facilitators to prepare and present their client's case to the fact finder may lead them to become personally involved, taking ownership of the case. This may cause them to lose the perspective of a "counselor" and can result in the personal attacks on other counsel, witnesses and sometimes the court, which have become commonplace.

The Witnesses

Absolutely essential in the quest for truth and justice are the witnesses who, whether they are bit players or main characters, bring pieces of the puzzle that must eventually be fit together by counsel to create the pictures they hope the fact finder will see and believe. Whether a victim of a crime, an investigating law enforcement officer, a witness to an event, an expert, a custodian of documents, a party to the action, or any of the myriad parts which witnesses play, each must come prepared to present their piece of the collage to the best of their ability. For a witness to an event, this may mean recounting as accurately as possible what he or she observed. For an expert witness it may mean presenting his or her opinion and, more importantly, the analysis upon which it is based while teaching in language and logic which can be understood at the level of sophistication of the fact finder. For a law enforcement officer it may mean coming to court after gathering and protecting evidence according to the law and having organized it in such a way that the fact finder can understand and rely upon it to a degree that dispels reasonable doubt. Usually, whether a witness is adequately prepared to fulfill his or her role in the courtroom drama depends in large measure on the work the presenting counsel has done to inform the witness of the role he or she is expected to play and to prepare him or her to testify.

Support Personnel

Extremely important and usually forgotten in the drama of the courtroom, as in the drama portrayed on stage, are the numerous support personnel who grease and operate the wheels of Justice. Without the excellent work of clerks, bailiffs, secretarial staff and other court employees the work done in the courtroom could not take place. Most attorneys eventually learn that these participants in the work of the court can make a substantial difference from the filing of a case until the verdict is read because they control the machinery through which each case must be processed, they know what is going on and know how to get things done. Too often players in the courtroom drama, including those who should be most thankful – the judges – fail to recognize and appreciate the important work of the support personnel.

PLAYER FAILURE = JUSTICE FAILURE

With little difficulty each of us can think of examples to illustrate the importance of all participants on the stage of the courtroom performing their best in order to foster the pursuit and attainment of Justice. The most noteworthy recent example was the decision of defense counsel, Barry Scheck, in the famous trial of British au pair Louise Woodward. Scheck and his defense team chose to restrict the options of the jury to a guilty or innocent verdict on the second degree murder charge rather than allowing them to consider the lesser crime of manslaughter. After the guilty verdict, defense counsel admitted that their decision was a mistake and put the trial judge in the unfortunate position of having to undo what the jury had already been forced by defense counsel to decided. Had the defense team "played their role" to the best of their ability, the jury would have had the option to decide what some of them apparently would have preferred, and what the trial judge eventually decided anyway. Defense counsel's mistake put the judge in a position which required him to exercise his discretion in a most unusual and extraordinary way to achieve what many believe is Justice.

Most observers seem to agree that the O.J. Simpson criminal trial was not a model to be followed in the pursuit of Justice because, in part, of the many examples of players in the courtroom drama who failed in their responsibilities. Almost all of the players – the law enforcement officers, counsel for both sides, the judge and the jury – were criticized by some for their failure to "play their part" to achieve Justice.

Many times the judicial system has been criticized when a result was reached because of a "technicality." The most obvious

examples are those where a seemingly guilty criminal has been acquitted because some particularly damaging evidence has been excluded due to a law enforcement officer's failure to conduct a search or questioning within the constraints of the law. But such a result, when viewed from the perspective of the courtroom as a stage, is more accurately explained by the failure of one of the players, in this case the law enforcement officer, to "play his or her part" to the best of his or her ability. Had he or she conducted his or her investigation within what are usually the clear guidelines established in the law, the evidence would have been received and presumably Justice have been achieved. In reality, such mistakes by law enforcement officers, while more apparent, are no more fatal to the failure to achieve Justice than the failures of other players in the drama. Examples might include the judge who makes an erroneous ruling to exclude or admit evidence or who fails to apply the law to the facts of the case, a witness who is unprepared or untruthful, an expert who cannot support his or her opinion with adequate credentials or preparation, an attorney who fails in case or witness preparation or fails during the course of the trial to use the Rules of Evidence properly or to articulate the application of the law to the facts for the fact finder.

CONCLUSION

Any of these failures on the part of the courtroom players can result in a denial of Justice. Thus, it is vitally important that each participant in the drama understand and take seriously his or her responsibility to perform his or her part of the drama to the best of his or her ability. And, it is equally important for each participant to understand the limitations of his or her role, and that each of the other participants have equally important roles to play.

"What ere thou art, play well thy part." Only when each "player" in the judicial system follows this maxim can we hope to achieve "Justice."

KIRTON & McCONKIE

IS PLEASED TO ANNOUNCE
THAT

WILLIAM A. MEADERS, JR.
THOMAS L. MONSON
DALE E. HULSE
BERNE S. BROADBENT
TODD E. ZENGER
DAVID S. DOTY
DORANY RODRIGUEZ-BALTAZAR
RANDALL C. ALLEN
MICHAEL M. CONGER

HAVE BECOME ASSOCIATED WITH THE FIRM

Law offices located at
Eagle Gate Tower, Suite 1800
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 328-3600
Facsimile: (801) 321-4893

About Schmidt

by Louis Begley

Reviewed by Betsy Ross

Louis Begley, that enigma of a man who actively practices law for Debevoise & Plimpton in New York City, and writes literature in his spare time (*spare time?*) has produced another novel worth picking up. I still find his best work to have been his first – *Wartime Lies*, but *About Schmidt* may be next in line. (Begley has also written *As Max Saw It* and *The Man Who Was Late*, reviewed in a previous issue of the *Utah Bar Journal*.) *Wartime Lies* addressed the issue of identity in the context of a Jewish boy adopting a Christian mien in an attempt to survive the war. *About Schmidt* also deals with identity, though in a much different, and for most of us, more familiar setting.

The novel is indeed, about Schmidt, a sixtyish lawyer in New York, retiring from a dwindling law practice in a prestigious firm and dealing with the death of his wife. He is leaving a construct behind in which he had found comfort – but now what? Does the life he created represent who he is, or was it just someone he fell into being? Perhaps better said, did he create the life he led, or did the life he led create him?

To some extent Schmidt answers that questions in his disdain for his future son-in-law, a lawyer at the firm whom Schmidt himself shepherded into partnership. Noting the distinction between himself and his son-in-law-to-be Jon, Schmidt says to a friend:

> "No, I wasn't like Jon. Not inside – you, of all people, shouldn't define me by me profession. I'll tell you a guilty secret: I was a romantic when I was in college; when we met, more of a romantic than you, and I've never stopped being one. Jon never began."

But this story is not so sixties and simplistic as to posit the theory that the life we find ourselves leading is always inauthentic, and that we simply all sold out. It is in some ways a story of rebellion against the comfort zone, but leaves open the question of whether what we rebel into is any more authentic than what we rebelled against.

It is also a story about how those around us resist our change. Predictability is comfortable, and change is difficult, for those acting upon us as well as us as actors. Schmidt reflects upon his barber, and notes that "in all the years I have been going to him that man still hasn't learned to keep my shirt collar dry when he washes my hair! The advantage is that the result of his work is totally predictable." And indeed, Schmidt continues to go to him. But there is a cost, as Schmidt also depressingly reflects: "How many more of these cycles of maintenance?"

His daughter, too, resists the changes Schmidt seeks out in his life after career and wife. Finding him taking up with a Hispanic woman younger than she, his daughter and son-in-law advise him:

> "Dad . . . That girl must be young than me.
>
> She is. What's the expression for it? Winter-spring romance. Or do you say spring-winter?
>
> We don't think it's funny. She looks like someone out of a movie about gangs.
>
> Possibly. I think they look for the prettiest girls for those parts.
>
> It was time for the lawyer son-in-law to intervene.
>
> She'll rob you blind, Schmidtie. You've got every right to do whatever you want and live your life, but you should be protected. I'll speak to Dick Murphy. He'll set up something to stop her from getting hold of your money.
>
> I think I can talk to Dick myself if that becomes necessary. By the way, Carrie works hard as a waitress and saves her money. She doesn't show any interest in mine.
>
> Someone will tell her to get interested. Just wait! That was Charlotte's contribution.

Anyway, I don't want her at our wedding. I hope you weren't planning to bring her . . . ."

Does change, the attempt to recreate self, as difficult as it is, result in a greater authenticity? That is a question raised by Begley, but not answered, as the phoenix Schmidt becomes leaves us somewhat uncomfortable. There is no resonant sense at the end of the story that right has prevailed, that the universe is now in order; Schmidt leaves one life behind, but the direction he is heading invites a shaking of heads. Indeed, in some ways Charlotte and Jon act as a Greek chorus in their concerns quoted above. In *Wartime Lies*, Begley forced us to ask whether there is such a thing as an authentic self, or do we simply do what we must to survive? *About Schmidt* is a continuation of that theme.

DNA: "Those who advocate to revitalize the people's way of life"

– ASA Begaye DNA Executive Director

DNA-People's Legal Services, Inc. staff: (l-r) Laura Smith, legal secretary; Matilda Bitsuie, tribal advocate; Derek Haskew, managing attorney; Irene Black, senior tribal advocate.

Irene Black seems quiet and composed. To those who know her, this is an indication that she is probably somewhat nervous. Typically, Black is more talkative than quiet, and more impish than composed.

But today, she is speaking to a group of Dine College students, students faced with some of the same difficulties she faced as a Navajo woman working to make it in a competitive, often prejudiced and increasingly western society.

Black is one of DNA-People's Legal Services, Inc.'s senior tribal advocates, and the students listen, apparently enraptured by her story of struggle and success.

"I originally was interested in being a lawyer because of the money and the prestige," said Black, laughing. "So when there was a job opening at DNA for a legal secretary, I grabbed it."

When she first told her boss that she wanted to be an attorney, she was rebuffed.

"At that time, women, especially Navajo women, we weren't encouraged to do things," said Black. "The other advocates, they just ignored me. They said, 'Why bother? You're never gonna make it.' . . . I think that's probably why I fought so hard."

Black began to read the pleading that she was told to type-up attentively, and she began asking questions.

"This was before computers, so you had to have five copies all with carbon paper . . . it was hell. And so I'm reading the pleadings as I go, and that's making it even slower," said Black.

In the meantime, Black was raising two children, and driving 45 miles each way to take night classes to graduate from college. Eventually, her perseverance caught the attention of a supportive attorney, who helped her learn to do legal research and writing.

Black went on to pass the Navajo bar and become an accomplished advocate, studying under the tutelage of various attorneys who have worked for DNA since, and honing her skills in tribal court.

She credits her family's support as being pivotal in her success. And, she credits DNA with opening her to possibilities she had never imagined before.

"As soon as I got here, I started reading," said Black. "I had never realized before all the problems our people faced, and I really wanted to help."

Today, Black provides legal services to clients at DNA's Mexican Hat office – the same office where she was hired as secretary more than 15 years ago.

DNA's Mexican Hat office is the only legal services office in San Juan County, Utah's poorest, where the average annual per capita income hovers around $5,500. The office's service area, east to

west, stretches a distance greater than that between Logan and Provo – much of which is accessible only via unpaved roads.

Despite its remote location, the staff of four – a legal secretary, two tribal advocates, and one attorney – typically handles between 475 and 600 cases a year.

Last year, Utah Bar Foundation grant monies, in concert with Utah IOLTA funds, were critical in the hiring of the office's now-managing attorney, Derek Haskew. The funds provided Haskew the opportunity to secure a matching grant fellowship from the University of Southern California Law School. That fellowship expires in September.

To keep pace with the demand for legal services, DNA recently hired a second tribunal advocate for the Mexican Hat office. Tribal advocates are equivalent to attorneys in Navajo tribal courts, and therefore are eligible to deal with the bulk of the cases that DNA handles.

DNA's appreciation of Utah's Bar Foundation grant and its extension of IOLTA funds cannot be overemphasized, as DNA's Mexican Hat office currently does not receive any of the Legal Services Corporation's Utah allocation. DNA continues to negotiate with Utah Legal Services, Inc., regarding the provision of LSC monies to cover DNA's Mexican Hat program. In the meantime, the Utah Bar Foundation and IOLTA funds provide crucial support to this much-in-demand legal services program.

DNA-People's Legal Services, Inc. is a non-profit corporation and the largest Native American legal services program in the country. For more than 30 years, DNA has served low income clients on and around the Navajo Nation and throughout San Juan county, Utah.

DNA provides advocacy services for LSC-eligible clients in family, consumer and government benefit law, with the goal of maintaining both a minimum standard of living and a modicum of dignity for our clients.

DNA has taken cases that have led to a number of important federal Indian law, land and resource, and consumer law decisions, including the U.S. Supreme Court decision in *McClanahan v. Arizona Tax Commission*.

UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH

POSITION ANNOUNCEMENT

Position: Second Law Clerk to the Honorable Judith A. Boulden, United States Bankruptcy Judge
Starting Salary: $38,593 (JSP 11) to $46,254 + (JSP 12) or JSP 13, depending on qualifications
Starting Date: Open until filed
Application Deadline: July 17, 1998
Qualifications: 1) One year of experience in the practice of law, legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation, **or**
2) A recent law graduate may apply provided that the applicant has:
a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or
b) served on the editorial board of the law review of such a school or other comparable academic achievement.
Appointment: The selection and appointment will be made by the United States Bankruptcy Judge.
Preference may be given to the applicants who have experience in the practice of law, who have taken bankruptcy related classes or who have commensurate experience, and who have computer skills. **Applicants should send resume and transcript only. Do not provide a writing sample and references until requested.**
Applications should be made to: Judge Judith A. Boulden, United States Bankruptcy Court, 350 South Main Street, Room 330, Salt Lake City, Utah 84101

EQUAL OPPORTUNITY EMPLOYER

Benefits Summary: Employees under the Judicial Salary Plan are entitled to:
- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Choice of federal health insurance programs.
- Paid sick leave of up to 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

Equal Employment Opportunity: The court provides equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age or handicap.
About the Court: The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah. The Clerk's office provides clerical and administrative support for the court which conducts hearings daily in Salt Lake City and monthly in Ogden.

NLCLE: INTELLECTUAL PROPERTY

Date: Thursday, June 4, 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:
ERISA FIDUCIARY RESPONSIBILITY ISSUES UPDATE – QUALIFIED PENSION AND 401(k) PLANS, ESOPs, AND MANAGED CARE PLANS

Date: Thursday, June 4, 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

WHY BAD THINGS HAPPEN TO GOOD LAWYERS

Date: Friday, June 5, 1998
Time: 9:00 a.m. to 4:00 p.m.
(Registration begins at 8:30 a.m.)
Place: Utah Law & Justice Center
Fee: $125.00
(No door registration will be accepted for this seminar).
CLE Credit: 6 HOURS ETHICS

CURRENT CUSTODY & VISITATION ISSUES: A VIEW FROM THE BENCH

Sponsored by the Needs of Children Committee of the Utah State Bar

Date: Tuesday, June 9, 1998
Time: 12:00 noon to 1:00 p.m.
Place: Utah Law & Justice Center
Fee: No charge – Please RSVP to Amy Jacobs at (801) 297-7033, no later than Monday, June 8, 1998.
CLE Credit: 1 HOUR

NLCLE MANDATORY SEMINAR FOR MAY 1998 ADMITTEES

Date: Thursday, June 11, 1998
Time: 8:30 a.m. to 12:00 p.m.
(These times are approximate, and are subject to change. Please call the CLE Department for updated information, (801) 531-9095.)
Place: Gore School of Business Auditorium, Westminster College, 1840 South 1300 East, SLC
Fee: $35.00
CLE Credit: This program will count as ETHICS for the NLCLE requirement and is for new members of the Bar only.

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

_____
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.

1998 ANNUAL CONVENTION

Date: July 1 – July 4, 1998
Place: Sun Valley Resort, Sun Valley Idaho
CLE Credit: 12 HOURS, WHICH INCLUDES 3 IN ETHICS
Please use your official Annual Convention registration form to register for this program. If you did not receive one, please call the CLE Department at (801) 531-9095.

ALI-ABA SATELLITE SEMINAR: LITIGATION CASE MANAGEMENT FOR LEGAL ASSISTANTS

Date: Thursday, July 16, 1998
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS).*
CLE Credit: 6 HOURS

TRIAL ACADEMY IV: EXPERT WITNESSES

Date: Wednesday, July 22, 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 Non-section members
CLE Credit: 2 HOURS CLE/NLCLE

4TH ANNUAL SHAKESPEARE & CLE SERIES: EVERYTHING YOU'VE WANTED TO KNOW ABOUT LITIGATION BUT WERE AFRAID TO ASK

Date: Friday, August 14, 1998
Time: 1:00 a.m. to 4:00 p.m.
Place: Broadcast live from Southern Utah University to several sites around the state! *(Please watch your mail for a more detailed brochure.)*
Fee: $80.00 before July 31, 1998
$95.00 after July 31, 1998
CLE Credit: 3 HOURS

21ST ANNUAL SECURITIES SECTION WORKSHOP

Date: Friday, August 21 – Saturday, August 22, 1998
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: To be determined
CLE Credit: ~8 HOURS
(Please watch your mail for a more detailed brochure.)

Call for Presenters

11th Annual Preserving the Innocence of Children Conference

Multi-Disciplinary Conference on Child Abuse and Domestic Violence and How It Affects the Children

August 4-5, 1998

Sponsored by the Child Abuse Prevention Center of Ogden
(801) 393-3366

Weber State University
Ogden, Utah

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 call (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. 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 Association 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

Salt Lake Firm seeking full time Tax Attorney, recent law school graduate. Send a resume to Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #45, Salt Lake City, Utah 84111.

The Salt Lake City Prosecutor's office is currently is currently accepting applications for an entry level prosecutor position. Must have excellent advocacy skills and criminal law experience. Check with Human Resources for closing date and application procedures. Send resumes to Nina Frese, 451 South 200 East, 4th Floor, Salt Lake City, Utah 84111.

Nielsen & Senior would like to meet with well-qualified attorneys or small, 2-3 person firms practicing in or willing to relocate to the Ogden area, to discuss association with our firm. Nielsen & Senior has a branch office in Ogden, and is seeking to expand its practice there. Please direct written inquiries to Earl Jay Peck, Nielsen & Senior, Suite 1100, 60 East South Temple, Salt Lake City, Utah 84111.

Established general practice SLC firm seeks associate with partnership potential. Must have 5 to 7 years legal experience. Must understand estate planning and tax and be willing to participate in litigation. Please send resume to: Box 51, Maud C. Thurman, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

Salt Lake City Attorney's Office. Senior City Attorney – Salary Range $4092-$6466 or Assistant City Attorney – Salary Range $3256-$5145 depending upon qualifications. (Starting salary is usually below midpoint of salary range) Salt Lake City Attorney's Office is seeking an attorney to represent the City in Federal and Utah State Courts and administrative agencies on civil matters, to prepare and review contracts and ordinances, and to deal with human resources and employment law issues. Senior level requires a JD or LL.B. degree and six years full time paid employment in the practice of law including litigation experience. The Assistant level requires a JD or LL.B. degree and four years full time paid employment in the practice of law including litigation experience. Candidates must be a member in good standing with the Utah State Bar. Preference will be given to candidates who have experience in human resources, employment and discrimination law. Total compensation package includes generous paid leaves (personal leaves, vacation, holidays), retirement and insurance programs (medical, dental, life). Apply at Salt Lake City Human Resources Office, 451 South State Street, Suite 115 or FAX resume including social security number and salary requirements, to 801-535-6614. Applications will be accepted until the position is filled. EOE

POSITIONS SOUGHT

BAR COMPLAINT DEFENSE ATTORNEY: Representation in all Bar disciplinary proceedings. Let me assist you in preparing your response to that Bar Complaint. Five years as Assistant Disciplinary Counsel, Utah State Bar. Wendell K. Smith, 275 East 850 South, Richmond, UT 84333, (435) 258-0011. wksmith@mtwest.net

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.

Experienced attorney in the areas of: tax, commercial and bankruptcy litigation and criminal defense; 10 years with IRS; 33 trials, hundreds of adversarial hearings; will be in Utah from June 22-July 10 for job search; Ted Weckel (703) 979-3001.

CALIFORNIA/UTAH ATTORNEY: Attorney has offices in both Southern California and Salt Lake City. Available for court appearances and other work in California. Call George L. Wright @ (801) 322-3000.

OFFICE SPACE / SHARING

LARGE CORNER OFFICE available. Small downtown estate planning firm located in classic landmark building. Excellent decor, including wood floors and large windows. Digital phones, fax, copier, small and large conference rooms and receptionist available. Also, free exercise facilities with showers. Prefer attorney or CPA. Call (801) 366-9966.

Deluxe office space for one attorney. Avoid the rush hour traffic. Share with three other attorney's. Facilities include large private office, large reception area, parking immediately adjacent to building, computer networking capability, law on disc, fax, copier, telephone system, kitchen facilities. 4212 Highland Drive. Call (801) 272-1013.

Historic Building on Exchange Place leasing 1600 square foot office space on garden level with five individual offices, reception/ secretarial area, storage room and separate outside entrance. Great for small firm requiring easy court access. 4 to 5 parking stalls available. $1600. Also available 350 sq. foot individual office space for $380.00. Contact Joanne Brooks, (801) 534-0909.

Restored Mansion 174 East South Temple: available for lease two offices (272 square feet and 160 square feet) with conference room, reception, work room (total 414 square feet), lavatory, kitchen, storage, off-street parking. Fireplaces, hardwood floors, stained glass, antique woodwork and appointments. $1100 per month. Call 539-8515.

Share Space: Share office space at 4625 South 2300 East, Salt Lake City, with two or three other attorneys. Please call (801) 278-4747.

ATTORNEY OFFICE SHARING DOWNTOWN SLC: Reception area and conference room. $250.00/mo. Call David Cook @ (801) 364-2009.

AFFORDABLE/QUALITY SPACE: Prime location. Share space in a landmark downtown office building. Walk to the Federal and State Courthouses then use the free exercise facilities and showers to relieve the stress. Enjoy the view of the city. All of this and more at an affordable price. Call (801) 322-3000.

ATTRACTIVE OFFICE SPACE is available at prime downtown location, in the McIntyre Building, 68 South Main Street. Several elegant offices in different sizes, complete with reception service, secretary space, conference room, telephone, parking, fax machine, copier and library available. For additional information please call (801) 531-8300.

Ideal law firm office suites available from 1,800-11,000 square feet. Located in the beautifully restored Judge Building downtown. Suites offer a great location within walking distance of State and Federal Courts, free exercise facilities, on site storage and management, and very competitive lease rates. Call (801) 596-9003 for more information.

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.

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.**

APPRAISALS: CERTIFIED PERSONAL PROPERTY APPRAISALS/COURT RECOGNIZED – Estate Work, divorce, Antiques, Insurance, Fine Furniture, Bankruptcy, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Twenty years experience. Immediate service available, Robert Olson C.A.G.A. (801) 580-0418.

30 years experience legal secretary, Notary Public, Equipment includes: Computer, laser printer, color printer, fax, transcription equipment. Ramona Vance (801) 966-5664.

Electronic trials, arbitrations, mediations [$500 / day + expenses]; Discovery Managements & Litigation Support: Scanning, OCR, Indexing, Documents to CD-ROM [approx. $1 /pg]. David Pancoast, Esq. d/b/a DataBasics. (702) 647-1947 or (702) 647-3757. http://www.cddocs.com.

Courting A New Opportunity? Make the right motion and turn your prior legal experience into a potentially profitable financial service sales opportunity. Our extensive training, fringe benefits and competitive products can help make this a win-win situation for all parties. Don't settle for less – come to your own defense and join a major player in the financial services industry! **For more information send resumes only with salary history to: Dan Murdock FAX 801-531-8862.** An equal opportunity employer M/F/D/V/. Equitable is The Equitable Life Assurance Society of the United States, New York, NY 10104 GE97-155b

Bob Miller Memorial Day Law Day Run

The 16th Annual Bob Miller Memorial Law Day Run was held on Saturday, May 2, 1998, with over 150 people registered for the run. The race was sponsored by the Utah State Bar under the direction of the Legal Education and Law Day Committee. The top finishers in each of the respective categories were as follows:

Overall, Male
1 Mark Beilstein
2 Reyes Aguilar
3 Matt Curtis

Overall, Female
1 Juli Blanch
2 Sandra Matsumoto
3 Karin Vandenberg

Attorney under 40, Male
1 Jack Morgan
2 Matthew Evans
3 Erik Vogel

Attorney under 40, Female
1 Julie Lund
2 Jennifer Lupton
3 Yvonne Hogle

Attorney 40 & over, Male
1 Scott Mercer
2 Brent Manning
3 Doug Griffith

Attorney 40 & over, Female
1 Mary Tucker

Law Student, Male
1 Scott Finlinson
2 Paul Oestreich

Law Student, Female
1 Kimberly McKinnon
2 Carnie Finlinson

Law Faculty
1 Leslie Francis

Law Enforcement
1 Terry McKinnon
2 Del Mortensen

Judge
1 Tom Arnett
2 Robert Hilder
3 Adam Price

Legal Secretary/ Personnel, Male
1 Dan Platt

Legal Secretary/ Personnel, Female
1 Ruth Hawe
2 Sally Jones
3 Laura Gornley

Paralegal/ Legal Assistant
1 Vickie Bauer
2 Shari Dirksen
3 Teresa Homolka

11-Under, Male
1 Mitchell Johnson

11-Under, Female
1 Elizabeth Johnson
2 Ariel Zaccheo

12-14, Male
1 Issac White

12-14, Female
1 Drew Ann White

15-19, Male
1 Brian Griffith
2 Sean Miller

15-19, Female
1 Tara Davies
2 Lindsey Cole

20-29, Male
1 Jeremy Spearman
2 Ryan Dolan
3 Jason Robinson

20-29, Female
1 Amy Nelson
2 Angela Spearman
3 Kristina Carlston

30-39, Male
1 Tim Hutton
2 Clark Allred
3 Thomas Sorensen

30-39, Female
1 Bobbi Morgan
2 Lynn Strate
3 Heather Hansen

40-49, Male
1 Rusty Bauer
2 Jerry Enright
3 Robert Gayda

40-49, Female
1 Marcia Dignan
2 Jane Curtis
3 Konneen Willis

50-59, Male
1 Leonel Aldana
2 Lino Morgas
3 Don Winder

50-59, Female
1 Gloria Lemke
2 Avery Weight
3 Jan Haley

60-69, Male
1 Dean Anderson
2 Bert Dart
3 Jim Demet

Team Competition
Manning, Curtis, Bradshaw & Bednar:
Jack Morgan, Matt Curtis, Brent Manning, Bobbi Morgan, Kris Jones

Financial sponsorships for the race where provided by the following:

Richards, Brandt, Miller & Nelson
Snow, Christensen & Martineau
Lexis-Nexis
Litigation Section of the Utah State Bar
Van Cott, Bagley, Cornwall & McCarthey
Ray, Quinney & Nebeker
Lawyers Communication Network
Business Section of the Utah State Bar
Workman, Nydegger & Seeley
West Group
University of Utah College of Law

As a resut of the generous support of these sponsors and the race participants, the Utah State Bar will be making a donation to the Court Appointed Special Advocate Program (CASA) in the amount of $1,360.97.

Leftover T-shirts, sizes (L) through (XXL), may be purchased by contacting Pat Moeller at the following address: 50 South Main, Suite 700, Salt Lake City, Utah 84140 (531-2000). A special note of thanks is in order for all of the volunteers who helped to organize and administer the race.

Get to Know Your Bar Staff

KATHERINE FOX

Ms. Fox (as John Baldwin, the Bar's Executive Director, warmly refers to her) is General Counsel for the Bar. First, a word about what Ms. Fox does not do: she does not do attorney discipline. Now that we have that straight, we can talk about what she does do. Several years ago, the Bar decided to segregate general counsel – type duties from the Office of Professional Conduct ("OPC", formerly Office of Attorney Discipline). Thus, there no longer exists a position called "Bar Counsel." (Billy Walker, a wonderful addition to the Bar is now the Senior Counsel with OPC.) But I digress. Generally speaking, KFC (as Richard Dibblee, the Bar's Assistant Executive Director affectionately refers to her) provides for the legal needs of the Board of Bar Commissioners and the Bar. In that capacity, she supervises the defense of lawsuits and responds to subpoenas issued against the Bar. KFC also drafts petitions which create new rules, programs and policies as well as represents the Bar before the Utah Supreme Court. General Trix (another charming Dibblee appellation) overseas the unauthorized practice of law area and also interacts with Admissions, Character and Fitness, Fee Arbitration and other Bar entities. Finally, she does other stuff like fielding telephone inquiries such as, "Are you the Katherine Fox who lives in Sunshine Trailer Park?"

K Fox (as most of her co-workers know her) is chronically overworked and woefully underpaid, but dearly loves her work nevertheless. Her mellifluous laughter has been a welcome addition to the Bar. (Actually, most of us shut our doors in terror when she's around, but please don't let her know.)

On a more personal note, Fluffy (as some of her former law school classmates called her) is a native Midwesterner (Ohio and Michigan) who now calls Utah home. She is a graduate of the University of Michigan (Go Blue!), the University of Utah and the School of Hard Knocks. Fluffy has two of the most wonderful children in the world: Aaron Joseph, a third year engineering student at the University of Texas at Austin, and Leah Rebekah, a senior at West High School who will enter the California Institute of Technology next fall. She relates well to her children whose most frequent comment to her is, "Just *relax*, Mom."

In her spare time (which, of course, is nonexistent given her exemplary work habits and dedication), Stella (what her long time therapist believes her name to be) enjoys eating and sleeping. Her interests include reading (most recently *Independent People* by Halldór Laxress and the *Utah Bar Journal*), Edward Gorey and wandering through cemeteries. She dreams about a small, isolated house perched on a cliff on the Atlantic Coast with white-washed floors – no rugs – and wall-to-ceiling-bookcases, a Bose sound system, delivery of the Sunday New York Times and a Maine Coon cat.

LYNETTE LIMB

Lynette was born and raised in Salt Lake City. She graduated from Granite High School a long time ago (longer than she cares to remember). She has worked at the Utah State Bar for just over four years. She is the Admissions Assistant and assists in getting everybody ready to take the Bar Examination. She also works one weekend a month at Primary Children's Hospital. She works in the lab so she does not have to see the sick little kids; she just gets to play/work with their blood. She loves to play coed softball (for which she is glad they let her play), enjoys doing crafts and hanging out with friends. She would eventually like to live in the Pacific Northwest, but that is in the distant future. She really enjoys her job and all the people she gets to meet.

Utah State Bar

DIRECTORY OF BAR COMMISSIONERS AND STAFF

BAR COMMISSIONERS

Charlotte L. Miller
President
Tel: 463-5553

James C. Jenkins
President-Elect
Tel: 752-1551

Charles R. Brown
Tel: 532-3000

Scott Daniels
Tel: 359-5400

Denise A. Dragoo
Tel: 532-3333

John Florez
Public Member
Tel: 532-5514

Steven M. Kaufman
Tel: 394-5526

Randy S. Kester
Tel: 489-3294

Debra J. Moore
Tel: 366-0132

David O. Nuffer
Tel: 674-0400

Ray O. Westergard
Public Member
Tel: 531-6888

Francis M. Wikstrom
Tel: 532-1234

D. Frank Wilkins
Tel: 328-2200

***Ex Officio**
(non-voting commissioner)

***Michael L. Mower**
President, Young Lawyers Division
Tel: 379-2505

***H. Reese Hansen**
Dean, College of Law,
Brigham Young University
Tel: 378-4276

***Sanda Kirkham**
Legal Assistant Division Representative
Tel: 263-2900

***James B. Lee**
ABA Delegate
Tel: 532-1234

***Paul T. Moxley**
State Bar Delegate to ABA
Tel: 363-7500

***Christopher D. Nolan**
Minority Bar Association
Tel: 531-4132

***Carolyn B. McHugh**
Women Lawyers Representative
Tel: 532-7840

***Lee E. Teitelbaum**
Dean, College of Law, University of Utah
Tel: 581-6571

UTAH STATE BAR STAFF

Tel: 531-9077 • Fax: 531-0660
E-mail: info@utahbar.org

Executive Offices
John C. Baldwin
Executive Director
Tel: 297-7028

Richard M. Dibblee
Assistant Executive Director
Tel: 297-7029

Mary A. Munzert
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

Access to Justice Program
Tobin J. Brown
Access to Justice Coordinator & Programs Administrator
Tel: 297-7027

Pro Bono Project
Lorrie M. Lima
Tel: 297-7049

Admissions Department
Darla C. Murphy
Admissions Administrator
Tel: 297-7026

Lynette C. Limb
Admissions Assistant
Tel: 297-7025

Bar Programs & Services
Maud C. Thurman
Bar Programs Coordinator
Tel: 297-7022

Continuing Legal Education Department
Monica N. Jergensen
CLE Administrator
Tel: 297-7024

Amy Jacobs
CLE Assistant
Tel: 297-7033

Finance Department
J. Arnold Birrell
Financial Administrator
Tel: 297-7020

Joyce N. Seeley
Financial Assistant
Tel: 297-7021

Lawyer Referral Services
Diané J. Clark
LRS Administrator
Tel: 531-9075

Law & Justice Center
Marie Gochnour
Law & Justice Center Coordinator
Tel: 297-7030

Consumer Assistance Coordinator
Jeannine Timothy
Tel: 297-7056

Receptionist
Bree Strong (Mon., Tues. & Thurs.)
Kim L. Williams (Wed. & Fri.)
Tel: 531-9077

Web Site Coordinator
Summer Shumway
Tel: 297-7051

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 Professional Conduct
Tel: 531-9110 • Fax: 531-9912
E-mail: oad@utahbar.org

Billy L. Walker
Senior Counsel
Tel: 297-7039

Carol A. Stewart
Deputy Counsel
Tel: 297-7038

Charles A. Gruber
Assistant Counsel
Tel: 297-7040

David A. Peña
Assistant Counsel
Tel: 297-7053

Kate A. Toomey
Assistant Counsel
Tel: 297-7041

Katie Bowers
Receptionist
Tel: 297-7045

Gina Guymon
Secretary
Tel: 297-7054

Dana M. Kapinos
Secretary
Tel: 297-7044

Stacey A. Kartchner
Secretary
Tel: 297-7043

Robbin D. Schroeder
Administrative Support Clerk
Tel: 531-9110

Shelly A. Sisam
Paralegal
Tel: 297-7037

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 self-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 twelve hours of credit may be obtained through writing and publishing 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 twelve hours of credit 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.

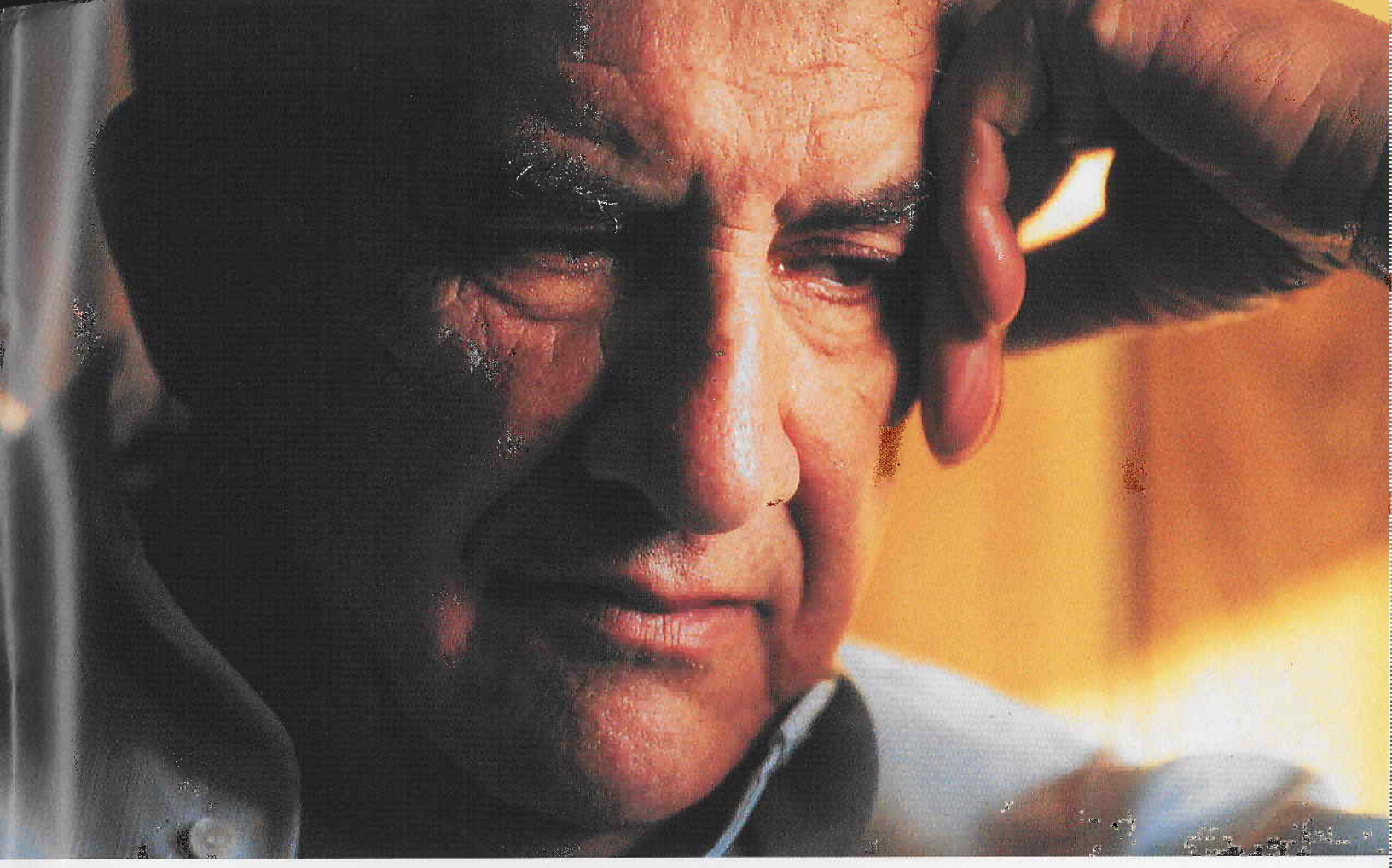
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

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 complete the CLE requirement by the December 31 deadline 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.



You've just heard you need a SPECIALIST.

You're worried.

(Can you go to the one your doctor recommends?)

It's Your
LIFE
It's Your
HEALTH
Take
CONTROL

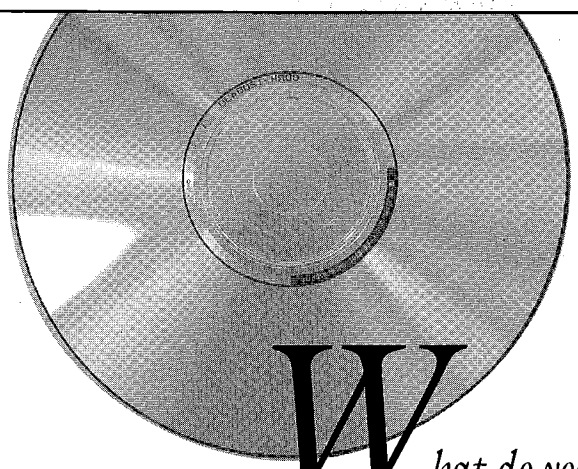
Your doctor has discovered a problem that he wants to refer to a specialist. He has recommended someone he knows and trusts. The question is: Does your insurance company give you the choices you need to make a decision you feel good about? We do. More than any other Utah insurance company. It's called control and it's what the power of choice can do for you. And now, as part of The Regence Group, an affiliation of Blue Cross and Blue Shield Plans in Washington, Oregon, Idaho and Utah, we offer more strength, more choice and more control than ever before. We give you choices you can live with. For a good long time.

Regence
BlueCross BlueShield of Utah

Now a member of The Regence Group of BlueCross BlueShield Plans.
More Strength. More Choice. More Control For You.

USA
Official Health Insurance Sponsor of the 1998 U.S. Olympic Team

www.bcbsutah.com



"The breadth and depth of [these] titles make them wonderful legal research and writing tools ... [They] can leverage an attorney's ability to know the law."

Law Office Computing
April/May 1997 issue

What do you get when you combine Michie's 150 years of legal publishing excellence with the technological vision of LEXIS®-NEXIS®?

LEXIS® Law Publishing and Michie's™ Law on Disc™ Products

The critically acclaimed Michie's™ Law on Disc™ CD-ROM research system is now part of LEXIS® Law Publishing, a new enterprise drawing upon Michie's 150 years of editorial excellence and the technological know-how of LEXIS®-NEXIS®. We currently offer LEXIS® Law Publishing and Michie's™ Law on Disc™ products in 40 states and territories, plus a comprehensive series of federal titles. Why choose a LEXIS® Law Publishing or Michie's™ Law on Disc™ product for your electronic research?

IT'S FAST. The powerful FOLIO® search engine and a sophisticated hypertext linking system enable you to find law "on point" instantly.

IT'S EASY. With a simple click of your mouse you can access an entire library of state law.

IT'S CURRENT. Your subscription includes regular updates and everyday access to a state specific case law update library on the LEXIS® service — at no extra charge.

IT'S AFFORDABLE. Talk to your LEXIS® Law Publishing sales representative to find out about special savings available only to Bar members.

To order or to learn more about LEXIS® Law Publishing and Michie's™ Law on Disc™ products, or to set up an appointment with your sales representative, call us toll-free at 888/217-1730.

LEXIS®
LAW PUBLISHING

888/217-1730
Please use code 6AG when ordering
www.lexislawpublishing.com

A MEMBER SERVICE OF:
UTAH STATE BAR
ORGANIZED 1931