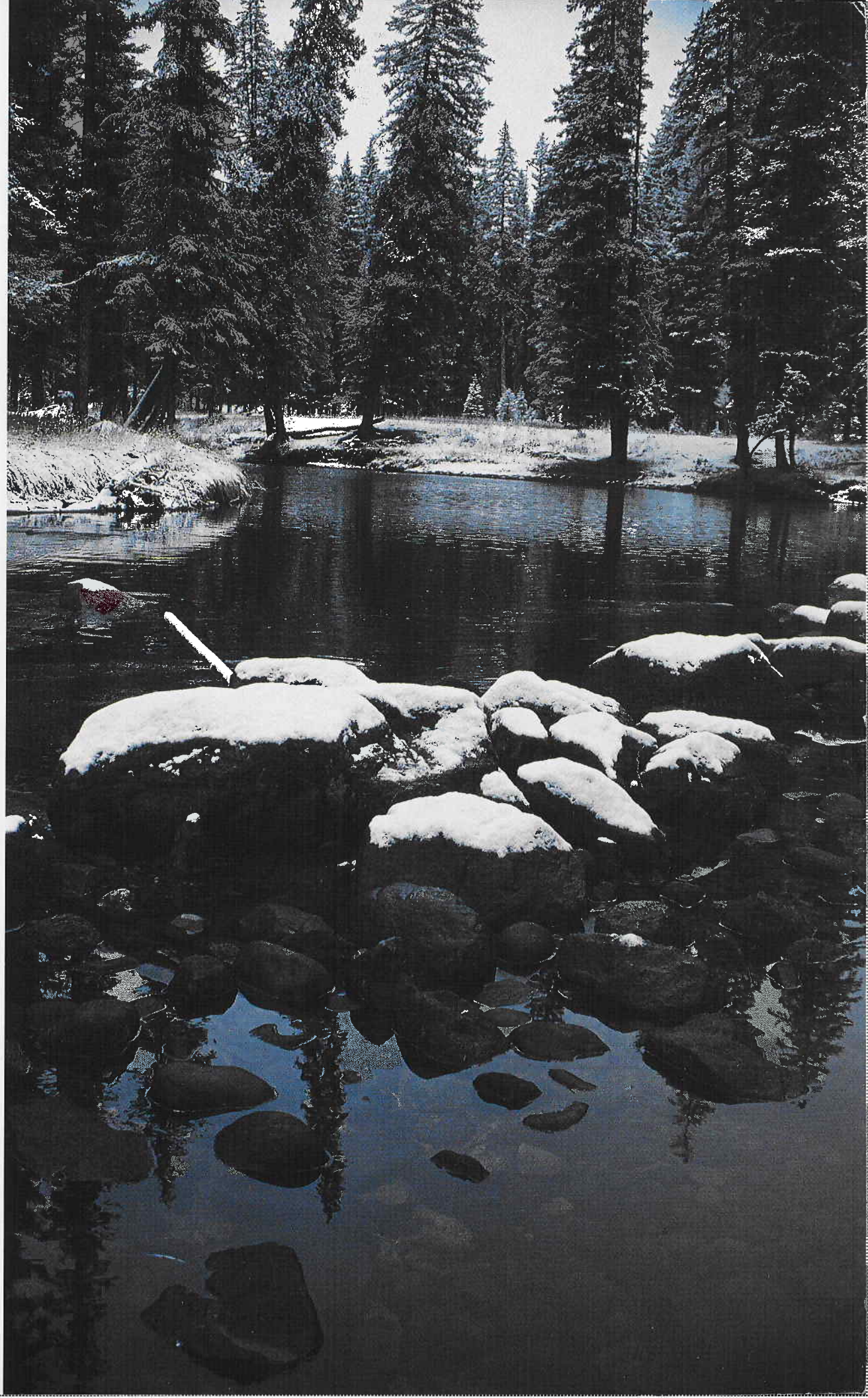
# Utah Bar JOURNAL



Volume 11 No. 10
December 1998

# 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:** Upper Provo River in Wasatch County, by Bret B. Hicken, Hicken & Hatch.

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, McConkie & 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. 10
December 1998

# Letters to the Editor

## *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.

# The Utah Bar Journal

**Published by**
**The Utah State Bar**
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077
www.utahbar.org

# The Season of Giving

*by James C. Jenkins*

On October 20, 1998 I was honored to present by motion to the Supreme Court 219 new lawyers for admission to the Utah State Bar. As I looked upon those new lawyers and their friends and families assembled in the rotunda of the State Capital Building I was impressed by the great power and opportunity to provide service that these new admittees had to give. Most of them will each engage in a professional career extending beyond thirty or forty years.

The legal profession is a profession of service. In my experience, the great majority of Utah lawyers have joined the profession for unselfish reasons. But those who contemplate becoming a lawyers for monetary wealth or personal honor and aggrandizement fail to comprehend the most important purpose of the profession, and of life.

Year after year members of our profession provide valuable and necessary service. Not only are lawyers an integral component to the operations of our justice system, they are active in providing service outside the profession as well.

As we approach the holiday season may we each contemplate our opportunities to serve. May we each in self examination determine to be more charitable and to be better lawyers. May we remember how far better it is to give than receive.

Lawyers are uniquely in a position to exercise an influence for good in society. Not only can we provide competent, meaningful and compassionate professional services, but we can be counselors and leaders for good in our families and communities. We can serve on councils and boards, we can join civic groups and service organizations, we can be girl scout leaders, PTA volunteers and soccer coaches. The opportunities for service are boundless and nothing compares to the satisfaction of doing good to others.

Two days after the admission ceremony I was on a jet to Chicago to attend a professional conference. While perusing the airline magazine I found a wonderful story of service by author Michael Konik. Hoping that the special experience of Mr. Konik and Reverend Earl Flowers will inspire each of us to extend our individual efforts of service, the article is reprinted in this addition of the *Bar Journal* as a gift to the members of the Utah Bar.

May I express my sincere best wishes of success and happiness to each of you and your families at this holiday season and throughout the new year. May we all enjoy the rewards of giving of self.

# Candor and Conveying a True Impression

*by John A. Adams*

Most of America was watching President Clinton's August 17 televised speech when, seven months after he ardently denied having had any improper relationship with a young White House intern, he reversed his story. What caught my immediate attention a few lines into the speech was the statement: "While my answers were legally accurate, I did not volunteer information." Moments later he added: "I know my public comments and my silence about this matter gave a false impression. I misled people, . . .." From the standpoint of the lawyers advising the President these were presumably some of the most important words in the entire speech. They were painstakingly chosen and designed to protect the President in light of the pending grand jury proceedings – the product of careful and superb lawyering.

Whatever benefit the President received from the legal posturing may well be outweighed by the political fallout he suffered in the media, from members of Congress and the public who felt that he was engaging in legal hair-splitting rather than stepping forward and admitting his wrongdoing. Many members of the national press and media have commented on that portion of the President's speech. There has been an ongoing chorus among the press corps that President Clinton's legal training, nimble mind, command of language and political instincts make him a difficult person to tie down. The August 31, 1998 issue of *Time* magazine included an article titled "I misled people." The authors offered their plain English translations of the carefully crafted phrases used by the President: "The annoyingly Clintonian 'legally accurate' bit prompted a great national cringe: another 'I didn't inhale.'" The authors described the President's acknowledgement that he gave a false impression as "A weaselly way of saying 'I lied,' without the legal and moral baggage carried by the actual words."

I don't intend to explore here whether the President's statements and silence were merely misleading or constitute a high crime or misdemeanor that warrants Congressional sanctions. Rather, the President's comments and the public's reaction to them provide a springboard to think about the growing perception among the American public that lawyers are calculating, not candid, and that they hinder, rather than facilitate the pursuit of truth. A related perception is that lawyers are more concerned with winning at any cost and in the process line their own pockets rather than seeing justice prevail.

William Glaberson wrote a thought provoking article titled "Lawyers and Ethics" which ran in the September 27 edition of the *Deseret News*. Glaberson quoted some disturbing statements from deans of some of the country's leading law schools about how the use of legal subtleties and distinctions depart from the common citizen's perception of reality:

> "There is a perception increasingly shared by lay people, but also by lawyers," said Anthony Kronman, the dean of Yale Law School, "that the gulf between the law and common sense has opened up in this crisis to a considerable degree. And that has caused people to lose confidence in the law." . . . One legacy of the Lewinsky era is sure to be a re-examination of the influence of lawyers on the country, said Ronald Cass, the dean of Boston University School of Law. "The question," Cass said, "will be whether lawyers are serving any real purpose in life or whether lawyers are simply engaging in semantic arguments that don't make sense to ordinary people."

Another law school dean noted the effects of the adversary system on society:

"There's been this intrusion of the adversary process into life as a whole," said Daniel Fischel, professor and dean-elect of the University of Chicago Law School, "and it colors everything: the way people interact, what they say, their willingness to cooperate with each other."

Fischel said that the Lewinsky battle seemed to highlight a growing worry about whether the lawyerly ideal of prevailing by destroying the opposition

had pushed aside other American values like trust and cooperation.

These observations tell us on one level that the legal profession needs to better educate the public about the role it plays and they also tell us that we need to improve in our efforts to get at the truth more quickly and cost-effectively and achieve just results. On another level, these observations give us an opportunity for individual introspection about the motives and attitudes that shape the manner in which we approach the practice of law.

Our common guide in the practice of law is the Utah Rules of Professional Conduct. I am impressed with the statement in the preamble to the Rules that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." I dare say that only those who have walked in the shoes of lawyers have a true appreciation for the challenges involved in trying to properly balance these four factors. In my struggle to find the right balance, I am grateful for many good examples of lawyers and judges in our community who consistently manage to keep the right perspective and balance.

As we consider whether our work as lawyers facilitates rather than hinders the pursuit of truth and just results, I suggest that we think about candor and conveying a true impression. Candor can be a disarming and refreshing quality. Clients pay for it, juries need it, judges expect and appreciate it and opposing counsel are startled by it. Candor in negotiation sessions and attorneys' conferences can avoid misunderstanding down the road and eliminate needless expense in trying to pierce through to the other side's true position.

Barbara Walters when interviewing Griffin Bell, Attorney General in the Carter administration, told him that he had developed a great reputation for candor in Washington and asked him to explain why. His answer was that he could not explain it. "People ask me questions and I just answer them. Only in Washington do they call that candor."

Not only does candor require one to speak directly and frankly, it also requires that one not mislead another. This is sometimes hard for an attorney to do because she speaks as a fiduciary representative of a client, not for herself. She must safeguard attorney-client communications, protect and promote the client's interests and respect the client's wishes. Notwithstanding those ethical and professional constraints, lawyers sometimes choose to convey a false impression in those things they are permitted to say.

President Clinton raised the point when he acknowledged that he did not volunteer information and that his public comments and silence gave a false impression. Simply stated, one is dishonest or deceptive if one consciously tries to convey an impression or understanding that is different from what that person knows or believes the truth to be. Robert Louis Stevenson in "Truth of Intercourse" stated that "[i]t is possible to avoid falsehood and yet not tell the truth." "To tell the truth," he wrote, "rightly understood, is not to state the true facts, but to convey a true impression."

The public, juries, most witnesses and many clients are not trained in the law and are not prepared to consider fine legal distinctions, particularly if the distinctions are made in the minds of the lawyers and are not called to their attention. Judges and fellow lawyers are trained to make those distinctions, but they should not be required to constantly be on guard and probe to assure that they have correctly understood. The integrity of our legal system and public confidence and trust in it demand that conveying true impressions is the only acceptable standard, not just a lofty goal.

# *Manifest Destiny*

*by Michael Konik*

*Ed. Note:* This article is being reprinted with permission of the author. Mr. Konik is also the author of the book *The Man With the $100,000 Breasts and Other Gambling Stories.*

The article first appeared in *Sky* Magazine in Oct, 1998. It is being reprinted with permission from *Sky* Magazine, Pace Communications, Inc., Greensboro, North Carolina.

Earl Flowers can read. He can read this sentence. He can read every word on this page. If he does not immediately recognize one of them, he can sound it out phonetically, or, if it's completely unfamiliar, he knows how to use a dictionary to teach himself.

When Earl reads out loud – when he reads a story to an interested listener, for instance – he reads with feeling and passion. When a sentence ends with an exclamation point, he reads with even more feeling and passion than usual. When he sees quotation marks in a story, he knows it usually means a character is talking, and he proudly displays this knowledge by changing his speaking voice to a higher octave.

The stories Earl reads are not merely words on a page. They spark his imagination, and he usually has something thoughtful to say about what he has learned.

I mean, the man can *read.*

I tell you this because less than two years ago, when he was 44, he couldn't. He knew the alphabet, and he could maybe fake his way through a fourth-grade-level text, but job applications, road directions, bedtime stories for his grandchildren – those were all beyond his grasp.

But Earl decided to change all that.

When Earl went to his local library in Los Angeles, he told the interviewer from LARP (the Library Adult Reading Project) that the main reason he wanted to learn to read was so that he might understand the Bible better. He was – and still is – a pastor at his church, the New Directions Christian Center in Los Angeles, and he could not fully experience the one text that filled his life with joy and purpose.

Never mind my dyslexia, Earl told the people from LARP. Never mind my lack of schooling. I want to learn. Teach me, because I want to learn.

Since what Earl did was in no way related to saving people from a burning building or standing in front of onrushing government tanks, his decision may not seem like the bravest gesture you've ever heard of. But sometimes the greatest act of courage is to stand before the mirror of our heart and admit to ourselves, to the world, the secrets that we desperately do not want to acknowledge. In Earl's case, he had to look at his life, filled with a loving wife and grown children and an appreciative congregation, and acknowledge that he could not do something most American adults take for granted. He had to say, "I am 44. I have owned businesses and raised children and become a man of God. But I cannot read."

I want you to know about Earl because he is a brave and inspiring soul. I hope you will want to meet someone like him, someone who wants a teacher, and that you will help make that person's dreams come true.

When I met Earl, I had just completed training, administered through LARP, that would enable me to be a volunteer literacy tutor for adults. The course, taught over two consecutive weekends, covers everything from sensitivity training to how to use the *Laubach Way to Reading* textbooks, books that for decades have been the most reliable method for coaching those who are unable to read. Having a school-teacher mother who taught me to read at a young age, not to mention working my entire adult life as a writer, I treasured the gift of words, of stories that lived on pieces of paper. And I wanted to share that gift.

I did not view my volunteerism as charity. I do not particularly like charity. I especially do not like it when writing a check becomes an easy substitute for doing something more useful. I told the people at LARP, who pair each tutor with a single client, that I wanted a fiercely motivated student, someone who wanted to help himself or herself as badly as I wanted to give my time. That was my chief criterion. Subordinately, I told LARP that I would prefer to teach a person of color. Here is Los Angeles, post-riots, post-O.J., many of my liberal friends talk about building bridges, about reaching out to the "minority community," as they say. But the truth is, about the only contact most of my white friends in Hollywood have with blacks and Hispanics is when members of the "minority community" are checking them out at the grocery store or watering their emerald lawns.

Earl, I quickly ascertained when we met, was just the student I had hoped for. Born in the Central American country of Belize in 1950, he had the wherewithal to emigrate and build a life in America. He was smart – you don't successfully skate through life lacking reading skills unless you're terribly clever – and he had an almost evangelical zeal to succeed. This, I learned, was no accident: Earl told me at our first meeting, at the local library, that he was a deeply religious man, a born-again Christian, and the reading abilities he hoped to develop would be used to spend many happy hours with his Bible.

I told him that with hard work we could make that happen together.

Earl smiled broadly, "I've been prayin' for this day," he said in his lilting accent as he glanced skyward. "Praise God, I've been prayin' for it. Thank you, Jesus."

I asked Earl if there was anything he wanted to know about me, anything at all.

He wanted to know why I had chosen to be a volunteer reading teacher, why I would give up two afternoons a week for someone I didn't even know. I told him my motives weren't entirely selfless, that I expected I would feel very proud and satisfied if I could help someone learn to read.

*"Sometimes the greatest act of courage is to stand before the mirror of our heart and admit to ourselves, to the world, the secrets that we desperately do not want to acknowledge."*

Earl nodded thoughtfully, but I could see he wanted to ask something else: "And I was also wonderin': What religion are you?"

I told him I was Jewish.

"Ah, I thought so," he said. "I don't think I've ever really known a Jewish person before. Just remember, Jesus loves you."

Earl and I did not immediately become close friends. I did not immediately confide in him that I was going through the shattering pain of a divorce. He did not immediately reveal to me the scars of being abandoned as a young child and having to live for a time in a horse stable with nothing but the clothes on his back. But over time, as he learned to trust me and I learned the most effective ways to communicate the idiosyncrasies of written English, we became a team: Triumphs and failures were *ours,* not solely his or mine. Whenever Earl made in important breakthrough – recognizing certain consonant clusters, mastering the silent "e," identifying root words – you couldn't tell who was proudest, the smiling student or his beaming teacher. And when Earl successfully read his first story, a one-page affair about a father and son taking a fishing trip, our eyes both welled with tears. "Earl," I said, resting my hand on one of his broad shoulders, "you read that story. You did it."

He nodded his head in wonder and exclaimed, "I did it. Praise God, I did it."

The next time we met, a week later, Earl stood up from his chair to greet me, as was his custom, and said, "Hello, my brother." He has called me that ever since. And every time he does, I feel a bolt of love – the love born of a profound friendship – pulse through me.

One day, shortly after demonstrating his newly acquired proficiency, Earl opened his black briefcase, the one in which he kept a calendar prominently listing his appointments for "school," as he called our lessons, and handed me two tickets. "I want you to have these, my brother," Earl said. "I want you to be there."

The tickets were for the New Directions Christian Center's annual celebration banquet, where, Earl told me, he had been selected to read his church's mission statement. "I was wonderin', could we practice this a little?" he asked, showing me a one-page, businesslike document espousing the church's goals for the coming year. This was far past fourth- or even eighth-grade stuff.

The banquet was in two weeks. "Let's start practicing right away," I said. Earl made his initial attempt, while I took notes, compiling a list of words and phrases we needed to work on. It was nearly 40 items long.

I asked Earl to read the mission statement at home at least 10 times a night. And every time he stumbled on a word, I wanted him to write it down and practice that word. "You can do it, my brother," I told him.

"Praise God, I know I can," Earl said.

A week later, Earl's list of problem words had shrunk to 20. And three days later, it was four or five.

On the night of the banquet, I arrived at Earl's church. Looking over the evening's program, I saw that, following a series of testimonials and singing performances and "words of encouragement," my friend Pastor Earl Flowers would be delivering the keynote address, the mission statement. A wave of stage fright washed over me, even though I was only there to listen. Knowing the most important people in Earl's life would be in

the audience, I tried to imagine what must be racing through his mind – years of self doubt? paralyzing fear? – and realized he would probably say a silent prayer and then simply do the best he could. And that everything would be all right because of his beliefs.

I could barely breathe.

After the singing and testifying, moments before Earl's introduction, his wife, Marcy, leaned over to him and whispered, "You sure you want to do this? I can do it for you."

Earl said, "I can do this. Praise God, I can do this."

And he did. He stood before his congregation and he read that mission statement. Every word of it.

To the assembled crowd, it sounded like just another man reading just another speech. To me, though, it was Olivier doing Hamlet, Domingo singing Verdi. It was poetry. It was living affirmation that anything in this world is possible. Because Earl Flowers could read.

Not long ago, Earl arrived at our weekly lesson and told me he had passed his test to become an American citizen. "All these years you've been living here and you're not a citizen?" I asked.

He laughed and pointed out, "Well I would've been, my brother, but I couldn't read the test. It's funny, 'cause actually that test was *easy,* praise God. I got 24 out of 25!" Then Earl took my hand in his and said, "Ah, Mike, I want to thank you for what you've done. You're my angel. I've been prayin for this, and God sent you to me."

One day, not too long from now, thousands of people will fill a government building in downtown Los Angeles, people from Asia and Africa and Europe, people of all hues and native languages, people with myriad biographies. They will raise their right hand and repeat after an appointed official, and they will be sworn in as citizens of the United States. Shouts of joy will echo throughout the auditorium, and more than a few tears will surely be shed. Pride will shine in the air, like so many stars.

And on that fine day, when thousands of immigrants from distant lands will legally call the United States their home, nobody will be prouder to be an American than a white, Jewish man who has lived in the land of opportunity all his life.

# *Trying Your Case to Win on Appeal*

*by Debra J. Moore*

In the midst of a trial we were handling together, a talented trial lawyer once told me, "I try my cases for the trial court, not for the appellate court." After handling primarily civil appeals rather than trials for the last five years or more, I still agree with that advice. I also noticed, however, that my colleague had a solid record of winning cases both at trial and on appeal. Only rarely are the two goals incompatible. Well-prepared trial lawyers know how to try their cases to maximize the chances of affirmance if they win at trial and to minimize the chances of reversal if they lose.

Knowing how to protect the trial record and to preserve error is even more important today than when my mentor tried his first case. As their dockets have grown, appellate courts have become increasingly strict in applying the requirements for preserving error. This strict approach is particularly pronounced at the intermediate level of appeal, where the most crowded dockets are found. A few suggestions for preserving error in the Utah trial courts are presented below.

**1. KNOW HOW TO RAISE A SUBSTANTIVE ISSUE**

The key to preserving a substantive issue for appeal is providing the trial court a meaningful opportunity to rule on the issue. Providing such an opportunity requires more than asserting a claim or defense in a complaint or answer, and making "nominal references" to the issue at a hearing. *Mills v. Brody,* 929 P.2d 360, 364 (Utah Ct. App. 1996) (declining to address estoppel defense raised in answer and mentioned at hearing, when party failed to provide trial court with any legal authority). See also *State v. Yoder,* 935 P.2d 534, 543 n.6 (Utah Ct. App. 1997) (declining to address state constitutional argument). Rather, a party must satisfy three requirements:

(1) the issue must be raised in a timely fashion;
(2) the issue must be specifically raised; and
(3) a party must introduce supporting evidence or provide relevant legal authority.

*Hart v. Salt Lake County Comm'n,* 945 P.2d 125, 130 (Utah Ct. App. 1997), *cited with approval in Badger v. Brooklyn Canal Co.,* 1998 WL 372137, *3 (Utah 1998). The purpose of these three requirements is to "put[] the judge on notice of the asserted error and allow[] the opportunity for correction at that time in the course of the proceeding." *Borberg v. Hess,* 782 P.2d 198, 201 (Utah Ct. App. 1989). To asses the second and third requirements, the court of appeals sometimes applies a "level of consciousness" test, declining to review issues that were not brought to the trial court's "conscious awareness or attention." *State v. Brown,* 856 P.2d 358, 361 (Utah Ct. App. 1993) (declining to review constitutional over breadth challenge when defendant failed to bring issue to the trial court's "conscious awareness or attention"); *see also Mills v. Body,* 929 P.2d at 364. Failure to raise an issue to the level of the trial court's consciousness may preclude review even when the record contains some supporting evidence. *Lebanon & Assoc. v. Rebel Enterprises,* 823 P.2d 479, 483-84 (Utah Ct. App. 1991) (declining to address mitigation of damages defense when party mentioned defense in pleading and elicited supporting trial testimony, but did not articulate at trial contractual duty to mitigate damages").

To be sure, the "plain error" doctrine may, in some narrow circumstances, allow appellate review of a substantive issue that was inadequately raised in the trial court. *See, e.g., State in Interest of R.N.J.,* 908 P.2d 345, 349-52 (Utah Ct. App. 1995) (reviewing whether trial court applied correct standard of proof in granting petition to voluntarily terminate adoptive father's parental rights under "plain error" doctrine). Challenges to the court's subject matter jurisdiction may also be raised for the first time on appeal. *Id.* at 347 (reviewing whether trial court had subject matter jurisdiction). In seeking affirmance of the ruling below, the appellee may have more leeway to raise issues not previously advanced in or addressed by the trial court. *See State v. Heaton,* 958 P.2d 911, 916 (Utah 1998) (stating court "may affirm a trial court's decision on any reasonable legal basis, provided that any rationale for affirmance finds support in the record."). But resort to such doctrines is no substitute

*Debra J. Moore is an Assistant Attorney General in the Civil Appeals Section of the Litigation Division of the Utah Attorney General's Office.*

for properly raising the issue at the first opportunity. *See, e.g., State v. Rudolph,* 349 Utah Adv. Rep. 11, 13-14 (Utah, July 31, 1998) (rejecting contention that court should review jury instruction under "plain error" doctrine).

Of course, no attorney intentionally fails to raise an issue in reliance on the plain error doctrine. Often, however, the chance to timely raise an issue is only fleeting. To avoid inadvertently sacrificing meritorious issues for appeal, become familiar with the requirements for preserving substantive issues before that chance arrives and passes.

**2. KNOW HOW TO REQUEST OR OPPOSE JURY INSTRUCTIONS**

The same basic principles of timeliness, specificity and support apply to the preservation of error in jury instructions, with some adaptations to the specific context. Objections to jury instructions are untimely unless they are made *before* the jury retires for deliberations. *See Jones v. Cyprus Plateau Mining Corp.,* 944 P.2d 357, 360 (Utah 1997) (citing *Nielsen v. Pioneer Valley Hosp.,* 830 P.2d 270, 275 (Utah 1992)); *see also* Utah R. Civ. P. 51 ("If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict."). The primary purpose of such objections is to provide the trial court with a meaningful opportunity to correct any error, not "simply to lay the foundation for possible reversal by the losing party if that eventuality occurs, as sometimes seems to be assumed." *Nielsen v. Pioneer Valley Hosp.,* 830 P.2d 270, 273 (Utah 1992).

*"To avoid inadvertently sacrificing meritorious issues for appeal, become familiar with the requirements for preserving substantive issues before that chance arrives and passes."*

The timeliness requirement may put counsel at odds with a trial judge who insists on the "more efficient" practice of leaving counsel to lodge objections with the court reporter after the jury has retired. Making such a record may be a waste of breath, unless counsel has also timely placed a specific and well-supported objection to the practice on the record before the jury has retired. *But see Nielsen,* 830 P.2d at 272 (declining to enjoin appeal because of irregularity by the trial court in receiving objections to jury instructions after jury retired).

To satisfy the specificity requirement in objecting to jury instructions, provide the trial judge with an alternative instruction or wording. A general objection that an instruction misstates the law will almost certainly fall short. *See Jones,* 944 P.2d at 359. However, "textbook" examples may not be required and the Utah Supreme Court has recognized that such objections are made "under the stress and pressure of a trial." *Nielsen,* 830 P.2d at 273.

**3. KNOW HOW TO CHALLENGE EVIDENTIARY RULINGS**

Rule 103(a) of the Utah Rules of Evidence governs the preservation of error in the admission and exclusion of evidence. The erroneous admission of evidence is generally waived unless a "timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Rule 103(a)(1). The erroneous exclusion of evidence is generally waived unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Rule 103(a)(2).

Under Rule 103(a)(1), a vague objection to the admission of evidence may suffice if the trial judge shows that he or she understands the basis of the objection. *See State v. Seals,* 853 P.2d 862, 875 (Utah 1993) (holding trial judge's ruling that statement was admissible as prior consistent statement showed that objection that rule did not allow parties to admit statement rebutting their own evidence was apparent). Otherwise, counsel must timely state the specific ground of objection asserted on appeal. Again, to satisfy the specificity requirement, an objection must provide the trial court the "opportunity to consider and rule on" the issue. *See State v. Rangel,* 866 P.2d 607 (Utah Ct. App. 1993) (holding counsel's objections generally referring to witness exclusion rule and to fact that counsel "ha[d] that issue on appeal," although timely, were too vague to preserve due process challenge to witness exclusion rule allowing victim to testify after remaining in courtroom during trial, while third objection referring to "due process concerns" was both untimely and too vague). To provide the trial court an adequate opportunity to rule, the objection must state *all* the grounds relied upon. *See State v. Mickelson,* 848 P.2d 677, 686 (Utah Ct. App. 1992) (holding objection to admission of testimony on ground that too much time had expired between occurrence of event and utterance of statements offered as excited utterance insufficient to preserve challenge to testimony based on the mental capacity of the declarant); *State v. Eldridge,* 773 P.2d 29, 35 (Utah 1989) (holding objection based on victim's reliability).

Preserve the erroneous exclusion of evidence with an offer of proof. The value of a good offer of proof, however, goes beyond merely preserving error. As illustrated by the recent decision in *Astill v. Clark,* 956 P.2d 1081 (Utah Ct. App. 1998), a successful offer of proof should also establish that the error is reversible. In *Astill,* the court reversed a judgment for the defendant in a personal injury case arising from an automobile collision because the trial court improperly excluded the rebuttal testimony of the plaintiff's accident reconstruction and automobile repair experts. In holding that the exclusion of the testimony was both erroneous and prejudicial, the court relied extensively on the detailed proffer of the two experts' testimony. The *Astill* decision demonstrates that in addition to satisfying the technical requirement of specificity, a successful proffer will also show how exclusion of the evidence will harm the party's case. For practical tips on the offer of proof, see Francis J. Carney's excellent article in the Spring 1995 edition of *Voir Dire* magazine. Francis J. Carney, "The Offer of Proof", 1 *Voir Dire* 22 (1995).

**4. KNOW HOW TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE**

Continue to keep an eye on preserving error once the verdict is in. In a jury trial, a motion for judgment notwithstanding the verdict alone will not preserve the issue of sufficiency of the evidence for appellate review. Rather, a motion for a directed verdict is generally required. Utah R. Civ. P. 50(b) ("a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict"); *First General Services, Inc. v. Perkins,* 918 P.2d 480, 487 (Utah Ct. App. 1996) (reversing order granting j.n.o.v. for attorney fees when movant made no direct verdict motion on attorney fees issue before moving for j.n.o.v.); *but see Hansen v. Stewart,* 761 P.2d 14, 15 n.1 (Utah 1988) (reviewing denial of motion for j.n.o.v. when opposing party did not raise on appeal issue of failure to make directed verdict motion). In case tried to the bench, on the other hand, the appellant may challenge the sufficiency of the evidence without having specifically raised the issue before the trial court. Utah R. Civ. P. 52(b); *ProMax Development Corp. v. Mattson,* 943 P.2d 247, 256 (Utah Ct. App. 1997).

**5. KNOW HOW TO CHALLENGE A DEFAULT JUDGMENT**

Knowing how to proceed when you didn't try the case and your client has simply defaulted can also be critical. Normally, a direct appeal from a default judgment will be dismissed. *State v. Sixteen Thousand Dollars United States Currency,* 914 P.2d 1176, 1178 (Utah Ct. App. 1996). Instead of appealing the judgment directly, a party must first file a post-judgment motion raising all the claims of error. Then, an appeal may be taken either from the ruling on the post-judgment motion if a Rule 60(b) motion was filed, or from the judgment directly, if a proper Rule 59 motion was filed. A direct appeal is appropriate only when a default judgment is entered as a sanction against a party who has appeared and had an opportunity to present argument to the trial court.

As explained by the court of appeals in *Sixteen Thousand Dollars,* the requirement of a post-judgment motion in this context, "is a natural corollary of the general rule that we will not consider issues raised for the first time on appeal." 914 P.2d at 1178-79. Post-judgment motions challenging default judgments also serve the "interests of judicial economy and orderly procedure" by requiring parties "to crystallize issues prior to appeal and . . . clarify standards" of appellate review. *Id.* at 1179.

The stress and pressure of a lengthy trial may sometimes make preserving error seem like the last thing you need to worry about. Once the verdict is in, however, all of your "blood, sweat and tears" may be futile, if you haven't successfully brought issues critical to the outcome of the case to the trial court's attention when any mistake could have been corrected. By familiarizing yourself with the rudiments of preserving error before you even give you opening statement, your trial victories will remain secure and your losses vindicated.

# Employment Law Dilemmas: What to do When the Law Forbids Compliance

*by Steven C. Bednar*

## I. INTRODUCTION

The 1990's have seen the passage of significant employment legislation. The Americans With Disabilities Act, the Civil Rights Act of 1991, the Family and Medical Leave Act, the Uniformed Services Employment and Re-Employment Rights Act, and most recently the Health Insurance Portability and Accountability Act, have all recently appeared in an already dense constellation of employment-related legislation. Congress, state legislatures, and the courts have now created a complex galaxy of employment laws which not only overlap, but frequently impose confusing and sometimes conflicting obligations. As the obligations and prohibitions on employers increase, the path of legal compliance becomes precariously narrow. In some instances, there is no path left at all. In these situations, employers find themselves in double-bind dilemmas – the "Catch 22's" of the law. The action necessary to comply with one law invites a violation of another.

This article reviews several examples of situations where compliance with one employment regulation enhances the risk of violating another. In many instances, the problem is created by the existence of an employment statute which specifically authorizes conduct which is prohibited by the common law or another statute. Now, more than ever, human resource managers and employment law attorneys are required to view the world of employment regulations with a broad perspective that understands that caution in one area of employment law may constitute carelessness in another. As human resource managers slow down to carefully navigate the traffic of congested employment laws in front of them, they must realize that the greatest vulnerability is being hit from behind.

## II. THE QUAGMIRE OF COMPETING EMPLOYMENT REGULATIONS

The text below reviews several employment statutes and common law obligations of employers which create conflicting and sometimes incompatible obligations. A review of the general statutory or common law scheme of each area of regulation is beyond the scope of this article. The materials are limited to a brief discussion of the competing requirements between statutes or between a particular statute and the common law and suggestions as to how to remain on the narrowing path of compliance.

*Steven C. Bednar, Esq. is a partner in the law firm of Manning Curtis Bradshaw & Bednar, LLC where he practices employment law and represents several major Utah employers. Mr. Bednar advises employers with respect to federal and state employment regulation and has litigation experience involving wrongful termination, negligent hiring, retention and supervision, non-competition agreements, employee privacy issues, all Title VII protected classes, the ADEA, FLSA, FMLA, ADA and employment-related state law tort claims. Mr. Bednar graduated magna cum laude from the J. Reuben Clark Law School at Brigham Young University where he served on the Editorial Board of the B.Y.U. Law Review and was a member of the Order of the Coif. After graduation, he served as a judicial clerk to the Honorable Pierce Lively, United States Court of Appeals for the Sixth Circuit. He is an experienced speaker on topics such as wrongful termination, employee privacy, workplace violence, employment-related torts, employee handbooks, wage and hour law, non-competition and confidentiality agreements, employment arbitration and the ADA. Mr. Bednar has several publications on employment-related topics and has authored a 160-page employer's manual entitled* EMPLOYMENT LAW DESK REFERENCE MANUAL: SUMMARY OF FEDERAL AND STATE REGULATION *(2d ed. 1995), which includes chapters summarizing federal employment statutes, the Utah Labor Code, wrongful termination law, and employee privacy law.*

**A. Title VII Restrictions on Criminal Background Checks vs. Negligent Employment Torts**

Title VII of the Civil Rights Act of 1964[1] imposes significant restrictions on an employer's ability to use criminal background information in the hiring process. These restrictions arise from the fact that disqualification based upon the existence of a criminal record tends to have a disparate impact on one or more of the classes protected under Title VII. In contrast, the common law imposes a duty to exercise care to ensure against hiring an applicant whom the employer knows or should know may engage in violent or injurious conduct. Failure to exercise the required degree of care in hiring, which often requires an evaluation of criminal background information, can result in liability for negligent employment. Employers are thus faced with the dilemma of discharging their common law obligation to gather necessary background information without violating the statutory restrictions of Title VII as to how such information is used.

*1. Ensuring Compliance With Title VII's Restrictions*

Title VII restricts the use of criminal background information in the hiring process. For example, an *arrest* is not conclusive of any wrongdoing. Therefore, absent a strong showing of "business necessity," considering an arrest record in connection with an application for employment violates Title VII.[2] Most Equal Employment Opportunity Commission ("EEOC") decisions acknowledge the possibility of a "business necessity" defense. However, this defense has been rejected in each of the numerous reported decisions in which it has been asserted. Even an employee bonding requirement has been rejected as a "business necessity" justifying a conviction-based disqualification of a minority applicant.[3] As a result, consideration of an arrest record in the hiring process is, as a practical matter, illegal per se.

It should be noted, however, that inquiring into an arrest record on an employment application does not itself violate Title VII. An employee who fails to disclose an arrest may be validly disqualified based upon falsification of information on the application.[4] However, the practice of inquiring into arrest records on an employment application is a dangerous one because if an arrest is disclosed, it requires the employer to explain why it required disclosure of the arrest if such information is immaterial to the employer's hiring decisions.

Title VII does not prohibit an employer from requiring job applicants to disclose criminal *convictions,* whether *misdemeanor or felony.* However, as applied by the EEOC, Title VII does not permit a criminal conviction to serve as an *automatic* bar to employment. To satisfy Title VII, a conviction-based disqualification must be justified by "business necessity."[5] The "business necessity" standard is applied more leniently in the context of convictions as opposed to arrests. To determine if this standard is satisfied, EEOC decisions require the following factors to be considered: (1) the job-relatedness of each conviction; (2) the nature of the conviction; (3) the number of convictions; (4) the facts surrounding each offense; (5) the length of time between the conviction and the employment decision; (6) the applicant's employment history before and after the conviction; and (7) the applicant's efforts at rehabilitation.[6] Of these factors, job-relatedness is the most critical.[7] EEOC decisions illustrate that the job-relatedness inquiry focuses on whether the job position applied for presents an opportunity for the applicant to engage in the same type of misconduct which resulted in the applicant's conviction.

*"The existence of a duty to conduct a criminal background check varies depending on the nature of the job at issue."*

*2. Negligent Employment Torts: Satisfying Common Law Obligations*

Under Utah law, an employer may incur liability for negligent employment when (i) the employer knew or should have known that its employees posed a foreseeable risk to third parties, including fellow employees; (ii) the employee did indeed inflict such harm; and (iii) the employer's negligence in hiring, supervising, or retaining the employee proximately caused the injury.[8] In a negligent employment claim, the most important element in determining whether an employer breached its duty of care in hiring is the element of foreseeability. An employer who fails to obtain information in the hiring process which would have disclosed that a risk of injurious conduct by the employee was foreseeable may incur liability for negligent hiring if the type of harm which would have been foreseen is realized. Thus, an employer must make reasonable efforts to ensure that it does not hire an applicant who the employer knows *or should* know has a propensity to violence or other misconduct. In many instances, "reasonable efforts" include such things as a criminal background check.

The existence of a duty to conduct a criminal background check varies depending on the nature of the job at issue. For example, a job in which an employee will have regular contact with customers or fellow employees may require more careful

pre-employment screening than a job in which an employee will have little or no contact with third parties.[9] In determining whether a criminal background check is required to discharge an employer's common law obligation, the practice of obtaining criminal background checks in the particular industry involved is relevant.[10]

*3. Title VII vs. Negligent Employment: What To Do.*

The statutory restrictions of Title VII limiting the use of criminal background information on the one hand and the common law obligations relating to negligent employment torts on the other creates a narrow path of compliance for employers. The following suggestions should be considered in traversing this narrow path.

- Require disclosure of ALL *convictions* on employment applications – do not limit the inquiry to felony convictions.
- Carefully consider the "job-relatedness" of any conviction before disqualifying the applicant.
- If you are a "Qualifying Entity" under Utah Code Ann. §53-5-202(7), obtain consolidated criminal history record information from the Law Enforcement and Technical Services Division. Qualifying entities include businesses that involve: (1) national security interests; (2) care, custody or control of children; (3) fiduciary trusts over money; or (4) vulnerable adults.
- If you hire someone with a conviction, whether misdemeanor or felony, avoid circumstances which create a risk of the type of harm foreseeable from the information known.

*"To determine the permissibility of considering credit information, the obvious place to look is the Fair Credit Reporting Act, which specifically allows employers to obtain a 'consumer report' for 'employment purposes.'"*

**B. Fair Credit Reporting Act vs. Title VII**

Employers frequently find credit information helpful in evaluating job applicants. To determine the permissibility of considering credit information, the obvious place to look is the Fair Credit Reporting Act, which specifically allows employers to obtain a "consumer report" for "employment purposes." On the other hand, Title VII has been construed to prohibit what the Fair Credit Reporting Act allows.

*1. The Fair Credit Reporting Act*

The Fair Credit Reporting Act ("FCRA")[11] specifically allows a consumer reporting agency to furnish a consumer report to an employer who "intends to use the information for employment purposes."[12] "Employment purposes" expressly includes using the consumer report "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."[13] Importantly, the FCRA also requires an employer to advise job applicants whenever employment is denied "either wholly or partly because of information contained in a consumer report" from a consumer reporting agency.[14] When this occurs, the employer must furnish the applicant with the name and address of the consumer reporting agency.[15] Thus, obtaining a credit report on a potential employee is *permissible*, so long as the disclosure requirements of the FCRA are satisfied. Violation of the FCRA gives rise to a private cause of action and allows recovery of actual damages, punitive damages and attorney's fees.[16]

*2. Title VII's Restrictions*

In apparent contradiction to the FCRA, the EEOC consistently construes Title VII as prohibiting evaluation of job applicants' credit histories in connection with hiring decisions because considering credit information has a disparate impact on women and minorities. EEOC decisions regarding this practice are not numerous; however, the prohibition has been consistently recognized. The prohibition has been recognized and applied even in the context of job positions where personal integrity is at a premium, such as bank tellers.[17] Even more importantly, EEOC decisions have not required plaintiffs to provide specific data regarding the proportion of minorities and Caucasians with poor credit records in the area from which the employer draws the work force. Rather, the existence of a disparate impact is deemed present based upon nationwide Census Bureau figures establishing that the percentage of the population with poor credit history is greater among minorities than among whites. Thus, credit reports to distinguish among job applicants would likely be found to violate Title VII.

Additionally, it should be noted that the Utah Industrial Commission's regulations specifically prohibit inquiry into a job applicant's credit history. Regulation R560-2-2, which constitutes the Commission's Pre-employment Inquiry Guide specifically states as follows:

> It is generally prohibited to inquire as to bankruptcy, car ownership, rental or ownership of a house, length of residence at an address, or past garnishment of wages as poor credit rating have a disparate impact on women and minorities.

*3. FCRA v. Title VII: What To Do*

The interaction between the FCRA and Title VII creates a dangerous result: compliance with the FCRA's disclosure requirement is a virtual concession that Title VII has been violated. On the other hand, failure to notify an applicant that consideration of a credit report impacted the hiring decision results in a statutory violation of the FCRA. The following suggestions should be considered:

- Employers should not obtain personal credit reports to evaluate individuals for employment or promotion without an opinion from employment counsel that a valid "business justification" exists.
- When such an opinion is rendered, the employer should confirm that employment counsel's malpractice premiums are current.

**C. Utah Drug and Alcohol Testing Statute vs. the ADA**

The design and implementation of any drug and alcohol testing policy must conform with the Utah Drug and Alcohol Testing Act (the "Utah Act").[18] The Utah Act is generous with respect to the conditions under which testing may occur and protective to employers with respect to immunities provided when the specified procedures of the Act are followed. However, the Utah Act specifically authorizes employers to engage in conduct which is prohibited by the Americans With Disabilities Act ("ADA"). Some of the tensions which exist between the Utah Act and the ADA are discussed below.

*"The Utah Act permits drug testing of prospective employees and does not limit testing to 'illegal drugs.'"*

*1. Pre-employment Alcohol Testing*

The Utah Act specifically authorizes "an employer to test employees or prospective employees for the presence of drugs or alcohol . . . as a condition of hiring or continued employment."[19] In contrast, alcoholism is a protected disability under the ADA. The ADA does exempt from its protective aegis an "applicant who is currently engaging in the illegal use of drugs,"[20] but does not allow discrimination based upon the legal use of alcohol. The ADA does allow an employer to prohibit the use of any alcohol "at the workplace,"[21] and requires that employees not be under the influence of alcohol at the workplace. However, the ADA does not permit *pre-employment* alcohol testing. Under the ADA, a pre-employment alcohol test is an impermissible "medical examination." Under the ADA, a "medical examination" is only permitted after a conditional offer of employment has been extended and only when all entering employees in the same job category are subject to the examination.[22] Including alcohol testing as part of a routine applicant screening program violates the ADA.

*2. Drug Testing*

The Utah Act permits drug testing of prospective employees and does not limit testing to "illegal drugs." Thus, under the Utah Act, an employer who obtains raw data from its testing agent does not risk a violation of the Utah Act. In contrast, the ADA restricts pre-employment drug testing to "illegal drugs." As a result, employers must exercise great caution to ensure that information received from a drug testing service is limited to illegal drugs for which the applicant does not have a valid prescription. Any information beyond this would constitute an impermissible medical examination under the ADA. For example, a Utah employer who discovers in the context of pre-employment drug screening that an applicant has AZT in his or her system does not risk a violation of the Utah Act. However, obtaining such information would constitute a violation of the ADA.

*3. Requirement of a Written Testing Policy*

The Utah Act requires that testing must be carried out "within the terms of a written policy which has been distributed to employees and is available for review by prospective employees."[23] Many Utah employers fail to make the important distinction between a drug and alcohol abuse policy and a *testing* policy. A policy which prohibits employees from coming to work under the influence of drugs or alcohol does not permit an employer to conduct testing. In order to conduct drug or alcohol testing, the employer must have a specific *testing* policy which incorporates the procedural protections of the Utah Act.[24] Failure to adopt such a testing policy not only results in a forfeiture of the immunities provided by the Utah Act, but may subject the employer to liability. In contrast, the ADA does not require that drug or alcohol testing be conducted pursuant to a written policy. In this situation, conduct which would be permissible under the ADA is specifically prohibited by the Utah Act.

*4. Return to Work Agreements*

The Utah Act allows an employer wide latitude in designing discipline for an individual who fails a drug or alcohol test. Included among the employers options are (1) a requirement that the employee enroll in a rehabilitation or counseling program, which may include additional drug or alcohol testing as a condition of continued employment; (2) suspension of the employee with or without pay; (3) termination of employment;

(4) refusal to hire a prospective employee; or (5) other disciplinary measures in conformance with the employer's usual procedures.[25] Many employers design specific "Return to Work Agreements" pursuant to which an employee who has tested positive for drugs returns to work. These agreements are designed to ensure that the employee remains free from the influences of drugs or alcohol over a specified period, and frequently will include imposition of counseling requirements and testing at more frequent intervals. Though expressly permitted by the Utah Act, this practice is likely violative of ADA. The ADA exempts from its protections only individuals who are "*currently* engaging in the illegal use of drugs."[26] An individual who is participating in a rehabilitation program and who is no longer engaging in illegal drug use is within the ADA's protection. As a result, an employer who takes advantage of the privilege in the Utah Act of requiring employees undergoing rehabilitation to submit to a Return to Work Agreement risks a discrimination claim under the ADA.

*3. Utah Drug and Alcohol Testing vs. the ADA: What To Do.*
Given the tensions that exist between the Utah Act and the ADA, the following suggestions should be considered:

- Coordinate closely with the entity who performs drug testing to ensure that *pre-employment* testing results are limited to illegal drugs for which the individual does not have a valid prescription.
- Employers should not conduct pre-employment tests for alcohol.
- *Post-employment* results should be limited to alcohol and illegal drugs for which the individual does not have a prescription.
- Exercise caution when implementing a Return to Work Agreement. Once an individual begins rehabilitation, imposition of such a return to work agreement may violate the ADA.

*"An individual who is participating in a rehabilitation program and who is no longer engaging in illegal drug use is within the ADA's protection."*

**D. Americans With Disabilities Act vs. Common Law Liability Related to Workplace Violence**

As the incidents of workplace violence continue to increase, employers are experiencing increasing apprehension as to how to obtain information predictive of individual acts of violence in the workplace without violating the ADA and how to discharge their common law obligations related to workplace violence. Again, an employer's restrictions with respect to obtaining and acting on relevant information under the ADA and its obligation to discharge common law obligations conflict.

*1. Restrictions Under the ADA*
The ADA protects individuals with a physical or *mental* impairment that substantially limits one or more major life activities.[27] Mental, emotional and psychological disorders included within the protective aegis of the ADA include depression, paranoia, bipolar disorder, anxiety disorders, schizophrenia and personality disorders.[28] The ADA's reasonable accommodation requirements apply to individuals impaired by these conditions. When combined with certain personality orientations, some psychological disorders present an increased risk of violent behavior. However, predictions of violent behavior, even by skilled mental health professionals, are unreliable at best.[29] This fact places employers in a difficult position. In order to remove a qualified individual with a disability from the protection of the ADA, the individual must present a "direct threat" to the health or safety of the individual or others in the workplace.[30] According to EEOC guidelines, the risk presented by the individual must be supported by evidence which is specific, objective, significant and current.[31] A remote risk or threat is inadequate. As a result, it is difficult to classify an individual with a mental disability within the "direct threat" exception. Taking adverse employment action against an individual who cannot be classified within the exemption creates a risk of liability for discrimination under the ADA.

*2. Common Law Liability Related to Workplace Violence*
Employers must be aware of at least two sources of liability for incidents related to workplace violence. The first area involves the negligent employment torts of negligent hiring, negligent retention and negligent supervision. An employer's duties with respect to negligent employment have been previously discussed (see Section II. A.). When a threat of workplace violence is perceived, an employer's need to obtain an individualized assessment of the risk of violence created by an employee is pitted against the ADA's restrictions on conducting a "medical examination" during employment.

The problem for employers is that the threshold for common law liability for the violent acts of employability is "foreseeability."[32] Yet, under the ADA, the "direct threat" exception does not apply unless the risk of harm is specific, objective, significant and current. Violence is typically "foreseeable" long before it is specific, objective, significant and current. As a result, "foresee-

ability" for purposes of common law liability arises well before the individual presents a "direct threat" under the ADA. Here, the intersection of common law obligation and statutory restriction is precarious.

A second area of potential liability relates to the breach of a duty to warn prospective employers who desire reference information on individuals with a known propensity for violence. Again, the two bodies of law work at cross-purposes. The disclosure of false or private information creates a risk of a claim for defamation, public disclosure of private facts, or invasion of privacy.[33] Yet, employers are becoming increasingly subject to suits and liability for *failure* to disclose information which would have put a prospective employer on notice that an applicant presented a risk to the prospective employer.[34] The passage of the Utah Employee Reference Immunity Act, which became effective May 1, 1995, offers immunity to employers who provide information to a prospective employer when reference information is solicited by a prospective employer. However, this statute is itself a two-edged sword because the provision of limited immunity for providing reference information arguably enhances an employer's obligation to convey information rather than to merely provide a neutral reference.

*3. ADA vs. Workplace Violence: What To Do*

Considering the numerous tensions that exist between the ADA and issues surrounding workplace violence, the following suggestions should be considered:

- Carefully assess all available information which can be permissibly obtained regarding the existence of a mental or emotional impairment.
- Determine whether there is a disclosed or known ADA covered condition.
- Determine whether there are obvious symptoms of an ADA covered condition.
- Carefully assess the risk of violent conduct by conducting an individualized risk assessment.
- Is there a known history of violence?
- Are there any specific threats?
- Is there any evidence of alcohol or drug use?

**CONCLUSION**

The proliferation of employment regulations has created numerous situations of unavoidable peril for employers. Employment laws no longer exist as individually wrapped sticks of gum that may be discretely analyzed. More than ever, human

resource managers and employment counsel are in the position of having to be familiar with and view the entire spectrum of employment regulations when providing counseling or advice. The web of employment regulation is interconnected, conflicting, and sometimes creates mutually incompatible obligations. Human resource managers confront a frustrating maze where each answer creates a new problem. The current state of affairs is aptly captured by a popular quote from Linus, the well-known friend of Charles Schultz' Charlie Brown:

> We have not succeeded in answering all of life's problems. Indeed, we have not completely answered any of them. Our answers seem to have created a whole new set of questions. In many ways, we feel we are as confused as ever, but we believe we are confused at a much higher level and about more important things.

[1]42 U.S.C. § 200e-1 *et seq.*

[2]*Gregory v. Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds,* 472 F.2d 631 (9th Cir. 1971).

[3]*See* EEOC Decision No. 74-92 (1974).

[4]*See Jimerson v. Kisco Co.,* 404 F. Supp. 338 (D.C. Mo. 1975), *aff'd,* 554 F.2d 1008 (8th Cir. 1975).

[5]*See* EEOC Decision No. 80-28 (1980).

[6]*See* EEOC Decision Nos. 81-15 (1981); 77-30 (1978); 78-110 (1977); 77-3 (1976); 75-199 (1975); and 75-108 (1974).

[7]*See* EEOC Decision No. 80-20 (1980).

[8]*Retherford v. AT&T Comm. of the Mountain States, Inc.,* 844 P.2d 949, 973 n. 15 (Utah 1992); *see also C.C. v. Roadrunner Trucking Company, Inc.,* 823 F. Supp. 913, 922 (D. Utah 1993).

[9]*See, e.g., J. H. by D.H. v. West Valley City,* 840 P.2d 115, 125 (Utah 1992) (city must hire and maintain police officers with "demonstrated mental fitness and integrity" because the officers are given "such a high degree of authority" and "regularly have one-on-one contact with private citizens").

[10]*See, e.g., Stone v. Hurst Lumber Co.,* 386 P.2d 910, 911 (Utah 1963) (plaintiff presented no evidence that it was necessary or *customary* to make a more detailed investigation for the type of work for which the employee was hired); and *C.C. v. Roadrunner Trucking, Inc.,* 823 F. Supp 913, 923 (D. Utah 1993) (defendant trucking company did not need to conduct a criminal background check on its drivers, in part because it is not the general practice in the trucking industry to perform such checks).

[11]15 U.S.C. § 1681a *et seq.*

[12]15 U.S.C. § 1681b(3)(B). Amendments to FCRA which took effect on October 1, 1997 require an employer to obtain authorization from a job applicant or employee before requesting a credit report.

[13]15 U.S.C. § 1681a(h).

[14]15 U.S.C. § 1681m(a).

[15]15 U.S.C. § 1681m(a).

[16]15 U.S.C. § 1681n.

[17]*See* EEOC Decision No. 72-1176 (February 28, 1972).

[18]Utah Code Ann. ("U.C.A.") § 34-38-1 *et seq.*

[19]U.C.A. § 34-38-3.

[20] 42 U.S.C. § 12114(a).

[21]29 C.F.R. § 1630.16(b).

[22]*See* 42 U.S.C. § 12112(d).

[23]U.C.A. § 34-38-7.

[24]For a description of the required procedures, see Utah Code Ann. § 34-38-6.

[25]U.C.A. § 34-38-8.

[26]42 U.S.C. § 12210(a) (emphasis added).

[27]42 U.S.C. § 12102(2)(A).

[28]*See* EEOC Enforcement Guidelines: Psychiatric Disabilities and the ADA (March 25, 1997).

[29]*See* The Psychotherapist's Calamity: Emerging Trends in the *Tarasoff* Doctrine, Bednar, S. 1989 B.Y.U. L. Rev. 1, 261.

[30]42 U.S.C. § 12113(d).

[31]*See* EEOC Enforcement Guidelines: Psychiatric Disabilities and the ADA (March 25, 1997).

[32]*See C.C. v. Roadrunner Trucking Co. Inc.,* 823 F. Supp. 913 (D. Utah 1993).

[33]For a discussion of Utah law summarizing standards governing privacy torts, *See Cox v. Hatch,* 761 P.2d 556 (Utah 1988).

[34]Utah Code Ann. § 34-42-1 *et seq.*

# FABIAN & CLENDENIN

A Professional Corporation

Is pleased to announce that

**David J. Lyon**
**and**
**Gary R. Henrie**

have joined the Firm as shareholders
and that

**Jon C. Martinson**
**John D. Dunn**
**Scott M. Petersen**
**Matthew L. Anderson**
**and**
**Todd C. Emerson**

have joined the Firm as associates
and that

**THOMAS A. SHAFFER**
**and**
**SCOTT R. SABEY**

have become of counsel to the Firm.

**Fabian & Clendenin, P.C.**
215 South State, Twelfth Floor
Salt Lake City, Utah 84111
Telephone: (801) 531-8900

Members of the Firm

George D. Melling
Warren Patten
M. Byron Fisher
Stanford B. Owen
Peter W. Billings
Thomas Christensen, Jr.
David J. Lyon
Daniel W. Anderson
Gary E. Jubber
Rosemary J. Beless
W. Cullen Battle
Kevin N. Anderson
Norman J. Younker
Michele Mitchell
John E.S. Robson

Douglas B. Cannon
Douglas J. Payne
Robert Palmer Rees
Diane H. Banks
P. Bruce Badger
Gary R. Henrie
John (Jack) D. Ray
Douglas R. Brewer
Robert A. Garda
Jon C. Martinson
John D. Dunn
Scott M. Petersen
Matthew A. Anderson
Todd C. Emerson

Of Counsel:
Ralph H. Miller
Thomas A. Schaffer
Scott R. Sabey

# Nutty About Notaries or Time Well Spent: Notary Workshop

*by Mary H. Black, Certified Legal Assistant*

If it has been a while since you were commissioned as a notary public, or if you are considering becoming a notary, attending a notary workshop might well be the best four hours of CLE you've spent recently. Inattention to observing formalities and specificity in performing acts under the Notary Code could subject a notary to civil and criminal liability or administrative penalties.

When I was originally commissioned back in the late 1980s, all I needed to do to become a notary was take a simple true-false "self-test" . . . which conveniently provided the letter-answers when you turned the page upside down. Today, you need a couple of people to vouch for your character, and the test requires written foundation for each correct true-false answer . . . and the answers are not provided on the application. You must score 23 out of 24 correct answers to pass the test.

Approximately every month, Fran Fish, Notary Public Administrator of the State of Utah Division of Corporations, Notary Public Section, conducts a Notary Workshop at the State Office Building Auditorium. About 100 of us who are nutty about being notaries attended the June workshop. A bound forty-three-page workbook included the entire Notary Code as of May 1, 1998. Section by section, Fran read the exact wording of the statute and the accompanying commentary, and answered real-life questions from her audience.

Fran throws in a few anecdotes and interesting facts. Did you know there are over 30,000 notaries in Utah? Did you know early Romans empowered notaries with authority to perform marriages, and the notary was further required to witness the consummation of the marriage they had performed? Did you know the number of notaries in Japan is fixed at no more than 525, that they must be male, and he cannot receive a commission until the age of 50 and must resign from the commission at the age of 70? Did you know that in Nebraska, a candidate for notary must obtain the endorsements of twenty-six people certifying as to the candidate's character?

Four types of notarizations are authorized in Utah: acknowledgments, jurats, copy certification of non-recorded documents, and performing the oath/affirmation ceremony. A proper notarization includes verifying signer identification and screening the document for description and completeness, making journal entries, and completing the notarial certificate.

If you keep a notarial journal, use it for every notarial act you perform. Every notary should keep a detailed notarial journal, although Utah is one of the few states not requiring that notaries maintain journals. The National Notary Association states that a journal "is the notary's best protection for a 'bad' notarization" and is "good evidence that the notary routinely exercised great care and diligence when performing services." The journal must be a bound book with numbered pages, not a looseleaf-type binder. Section 46-1-14 specifies the information to be recorded: Date and time of day of signing; type of notarial act; description of the document or proceeding; signature and printed name and address of each person for whom a notarial act is performed; evidence of identity for each such person, being either "personally known," identified by a "credible witness," or identified with proper documentation; and the fee, if any, charged for the notarial act. The discretionary use of the "notes" line contains substantiating information. For example, when notarizing documents relating to court proceedings, I routinely note the abbreviated case name and docket number to which the document applies.

You risk having corroborating documents thrown out of court if you do not perform an oath ceremony when required. Swearing an oath means just that. A signer *must* raise his or her hand and answer the notary's question: "Do you swear the contents of

*Mary H. Black is a Certified Legal Assistant providing independent contractor legal support services in Salt Lake County.*

this document are true, so help you God?" or "Do you affirm that the contents of this document are true?" Fran referred to a judge in Millard County who customarily throws out DUI informations upon ascertaining that the Utah Highway Patrol department notary did not perform the oath ceremony. Make sure you note in your journal having performed the oath ceremony, and *have your note initialed* by the oath taker.

The National Notary Association reminds notaries that refusal to complete the notarial act is justified "only if the notary is uncertain of a signer's identity, willingness, or general competence, or has a good reason to suspect fraud. Notaries should not refuse to serve anyone . . . because the person is not a client or customer."

Notaries with an embosser are encouraged to use this symbol of their office, *in addition* to the mandatory notarial stamp. If a document contains more than one page, the seal embosser should be used in a corner of each page.

If you are foolish enough to throw away your expired notary stamp without destroying the seal, Fran says, "Pray no one finds it who'll use it." You are responsible.

"The foregoing document" does not provide an adequate description of the document being notarized when the notarial language appears as a loose certificate. The page can too easily be attached to another document. Replacing that phrase with the name of the document – "The foregoing Affidavit of Jane Doe was subscribed to . . . " – doesn't take long and reduces the risk of the notary being liable for signing a fraudulent certificate.

Notaries are not responsible for accuracy or legality of documents, but to certify the identity of signers. However, under common law, a notary *should not* notarize a blank document, such as an uncompleted boilerplate form, or a blank sheet of paper, even though "signers" appear before the notary public. The document must contain text committing the signer in some way. So, although notaries public are not responsible for accuracy, they are responsible for glancing through a document to ascertain whether it contains blank spaces or other irregularities which might lead to fraud, and to make sure the signers have entered into agreements knowingly and willingly. The notary should point out the blanks as areas of risk to the signer; the signer may then make his or her own decision how to handle this situation, including the possibility of lining through the blanks.

Notaries may not give legal advice. This means the notary public may not add or replace a certificate to a document prepared by an attorney. (Duties, of course, overlap for a notary who is a secretary or paralegal following her attorney's instructions.) A non-lawyer cannot prepare a certificate to attach nor advise that the certificate is missing. A notarial certificate must be provided by the preparer or receiver of the document, not the notary.

Special laws apply to notarization of documents sent to foreign countries or states (including cases involving adoptions). Here, a notary's signature and seal may need a Certificate of Authentication or an *Apostille*. This service is provided by the Lieutenant Governor's Office.

Of course, never, *never* notarize a document where the signer hasn't appeared before you. A known third party's claim that a spouse signed a document, or a phone call with a familiar voice on the other end, does not fulfill the appearance requirement, and the notary sets herself up for potential liability.

According to the workbook, "A notary will not be excused for not reading the notarial certificate carefully before filling it out and signing it." If the certificate is inaccurate and damage is thereby sustained, a notary is not only liable to the person who sustained damage but is also liable to be criminally or civilly prosecuted, in that he signed a false and fraudulent certificate.

The notary's bond *protects the public,* not the notary. A notary may obtain errors and omissions coverage to protect against her own honest mistakes.

Line through inapplicable words or unused lines or portions of lines in a notarial certificate. If you make a mistake when completing the certificate, line through the mistake, initial and make your correction. This same rule applies for the venue.

The certificate of a foreign language document must be in English. The Notary Division maintains a list of multilingual interpreters and notaries.

A notary cannot certify copies of documents obtainable from a recorder or custodian of public records. Copies of documents such as birth and death certificates, deeds, medical records, school transcripts, articles of incorporation, et cetera, must be notarized by the recorder or custodian of those documents.

If a signer's identity is proved to the notary through a credible witness, it is required that the witness personally knows both the signer and the notary. The notarial journal is completed as to both the credible witness and the signer.

If asked by an "attorney in fact" to notarize a document, the notary must review and make note of reviewing the *original* Power of Attorney, and must ask the signer "Is the person who signed this Power of Attorney still living?"

"Satisfactory evidence" of identity now requires at least two forms of identification. One should be issued by a federal or state government, listing the individual's photograph, signature, and physical description (such as a driver's license); and the other form of identification may be issued by any banking institution or business or governmental entity, showing at least the individual's signature. Student or employer identification cards are acceptable as *secondary* forms of evidence.

There were also suggestions regarding notarizing documents for senior citizens or minors and documents containing a "signature by mark," and reasons for document rejection by recorders (e.g., never use "white out").

If any information contained in this article came as a surprise to you, perhaps it is time for a notarial refresher course.

To attend a workshop, contact Fran Fish, Notary Public Administrator, Department of Commerce, Division of Corporations and Commercial Code/Notary Office, (801) 530-6078. In addition to the State Office Building Auditorium, workshops are held at various locations throughout Utah.

## *Discipline Corner*

**RESIGNATION WITH DISCIPLINE PENDING**

On September 30, 1998, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline concerning Steven Brad Jacobs. The Petition for Resignation with Discipline Pending was tendered pursuant to Rule 22 of the Rules of Lawyer Discipline and Disability.

On December 31, 1997, the Office of Professional Conduct opened an investigation based on information from the California Bar regarding disciplinary measures imposed by the Supreme Court of the State of California against Jacobs. On December 10, 1997, the Supreme Court of the State of California entered an order accepting the voluntary resignation with disciplinary charges pending of Steven Brad Jacobs.

On August 21, 1996, an attorney filed a disciplinary complaint against Jacobs with the California Bar on behalf of Jacob's former client. In November 1994, the client, who lost his foot and part of his leg while working for the railroad, in anticipation of receiving a large personal injury settlement, consulted with Jacobs for the purpose of constructing a family trust. At Jacob's direction, an SS-4 was prepared for a limited partnership, but was not properly filed until February 16, 1995. On December 5, 1994, the client's family limited partnership entered into a contract with the law offices of Steven B. Jacobs for the purposes of managing the family financial affairs. Robert Eon Marshall, identified as the firm's paralegal and C.F.O., Trust Department, executed the document on behalf of the firm.

Jacobs employed Marshall knowing that he was an ex-convict who pled guilty to counterfeiting $300,000 and served time in prison for the counterfeiting and for the unauthorized practice of law. Other allegations regarding Marshall's trustworthiness were noted as well. Marshall embarked on a scheme over approximately the next eight months to defraud the client of his funds. The complaint and discovery documentation demonstrated that Jacobs knew that Marshall was a felon and that he had served time in prison for crimes involving fraud and deceit, and both Jacobs and Marshall benefited from misrepresentations made to the client, and the misuse of the client's funds. On June 27, 1997, Jacobs submitted his resignation to the California Supreme Court pursuant to Rule 960, Resignation of Members of the State Bar with Disciplinary Charges.

Jacobs violated Rule 22(a) (Duty to Notify Disciplinary Counsel of Discipline) of the Rules of Lawyer Discipline and Disability when he failed to notify the Utah State Bar of the Disciplinary Resignation in California.

**INTERIM SUSPENSION**

On October 28, 1998, the Honorable William A. Thorne, Third Judicial District Court, entered an Order of Discipline: Interim Suspension, suspending Kim David Olsen pending the outcome of disciplinary proceedings. The Order was entered pursuant to Rule 19, Rules of Lawyer Discipline and Disability ("RLDD").

Olsen was convicted of multiple counts of Fraudulently Obtaining a Controlled Substance, a third degree felony and Escape from Official Custody, a class B misdemeanor. These convictions reflect adversely on Olsen's trustworthiness or fitness as a lawyer within the meaning of Rule 19, RLDD.

**ADMONITION**

On September 1, 1998, an attorney was admonished and placed on probation by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 1.15 (Safekeeping Property) 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 October 8, 1997, the OPC received notification from the attorney's bank that a check had been presented for payment on the attorney's trust account and that it had caused an overdraft in the trust account. Previous to this notification, the OPC had received another notification from the bank stating that checks presented on August 13, 1997; August 14, 1997, and August 18, 1997, had caused an overdraft in the attorney's trust account.

At the OPC's request, the bank forwarded copies of checks written by the attorney on his trust account which indicated that the attorney had written checks for his personal or business use.

During the time of the overdrafts in his trust account the attorney charged flat fees for his legal services. The attorney considered that these flat fees were earned upon receipt of the fee. The attorney maintained a trust account because he thought he was required to maintain one.

The attorney mistakenly thought that since he was charging flat fees, he could put the earned fee into his trust account and then write checks for personal or business use. The attorney mistakenly and unnecessarily continued to deposit his earned fees into his trust account. In addition, the attorney also deposited monies received from sources unrelated to his legal work into his "trust account." The attorney did not accept retainers from clients to be billed against but only charged flat fees for the services the clients requested. The attorney in his ignorance of the requirements of Rule 1.15 of the Rules of Professional Conduct to maintain a separate account for client funds, operated his trust account as if it were a general operating account. At the times that the attorney wrote checks for his personal or business use, there were no client funds in his trust account.

After review of the attorney's bank records, it did not appear to the OPC that the attorney either intentionally or unintentionally misappropriated client funds. It appeared that the attorney simply failed to maintain a trust account separate from his business operating account.

The following mitigating factors were considered in the settlement:

- absence of prior record;
- absence of a dishonest or selfish motive;
- timely good faith effort to rectify the consequences of the misconduct involved;
- remorse;
- cooperative attitude toward proceedings;
- inexperience in the practice of law; and
- good character and reputation.

**ADMONITION**

On October 16, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 3.3 (Candor Toward the Tribunal), and 8.4(c) and (d) (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.

The Office of Professional Conduct received two orders from the Utah Court of Appeals addressing the attorney's handling of a criminal appeal. One order established that the trial court appointed the attorney to represent a client in his appeal to the Court of Appeals. The mailing certificate indicated that a copy of the order was forwarded to the attorney. The clerk of the Court of Appeals sent a letter to the client and the attorney advising them that the attorney had been appointed to represent the client and that a brief was due. On July 30, 1996, the Court of Appeals dismissed the case due to the client's failure to file a brief. A copy of the dismissal order was sent to the attorney. The client requested information from the Court of Appeals regarding the status of his case and stating that he had requested information from the attorney numerous times and had not received a response. Included with the request was a letter from the attorney to the client dated June 21, 1996, disclaiming knowledge of his appointment to represent the client but agreeing to review the court file and pursue any appropriate motion. The Court of Appeals held an Order to Show Cause hearing requesting the attorney show cause why he had not represented the defendant in the appeal. The attorney appeared and advised the Court that he had a substantial conflict of interest representing the client. He claimed he verbally advised the Eighth District Court of the conflict, and had been advised by the clerk of the Eighth District Court that the matter would be remedied. The attorney acknowledged his oversight in failing to take appropriate action to set aside the appointment, and failing to advise the Court of Appeals of his conflict of interest. The Court ordered that the attorney provide a sworn statement detailing his conversations with the Eighth District Court. The attorney failed to file the statement timely.

The Court concluded that the attorney had either neglected his obligations in the client's appeal and/or had made misrepresentations to the court regarding his failure to represent his client and that the attorney's conduct fell below the objective standard of reasonableness, prejudiced the client's appeal and constituted ineffective assistance of counsel. The Court ordered that the attorney pay a fine of $500 to the court, and discharged him as counsel for the client.

The OPC determined that the Court imposed sanctions against the attorney were sufficient to warrant consideration as a mitigating factor within the meaning of Rule 6.3 of the Standards for Imposing Lawyer Sanctions, and thus, chose not to pursue public discipline against the attorney.

# *Utah State Bar Ethics Advisory Opinion Committee*

**OPINION NO. 98-06**

Approved October 30, 1998

*Issue:* Members of a county attorney's office have requested an advisory opinion concerning conflicts between (1) attorney-client relationships between a county attorney and county officers and (2) statutory duties of a county attorney under Utah Code Ann. §17-5-206 to institute suits to recover or retrain unlawful payments of county funds.

*Opinion:* If a current attorney-client relationship exists between a county attorney or a deputy county attorney and a person who may be a defendant in an action under Utah Code Ann. §17-5-206 to recover or restrain unlawful payments of county funds, the attorney with such an attorney-client relationship may not ethically participate in such an action, whether by way of investigation, evaluation, filing, prosecution, direction, supervision, or otherwise.[1] The rules of imputed disqualification of Utah Rules of Professional Conduct 1.10 do not apply to the office of a full-time county attorney, so that individual county attorneys or deputy county attorneys who are free from conflicts in the matter may participate in actions under §17-5-206, provided that appropriate screening procedures are established and maintained. Past representations by individual members of a county attorney's office must be evaluated for conflicts under the provisions of Rule 1.9.

[1]Several relevant issues cannot be decided in this opinion because they are substantive issues of law whose determination is outside the scope of this Committee's duties. See Rules of Procedure for Ethics Advisory Op. Com. of the Utah State Bar §§ I, III(b)(3) and IV(a). These issues are outlined in § G of this Opinion.

**OPINION NO. 98-08**

Approved September 11, 1998

*Question:* May a law firm wholly own an accounting-practice subsidiary that is staffed by employees other than the firm's lawyers and would perform services for the lawyer's clients and others?

*Response:* Yes, although the law firm will be subject to the Utah Rules of Professional Conduct with respect to the provision of these law-related services in certain circumstances.

**OPINION NO. 98-09**

Approved October 30, 1998

*Issue:* Is the Office of the Guardian ad Litem sufficiently similar to the Attorney General's Office to render it a "government agency" within the meaning of the Utah Rules of Professional Conduct and if so, does Rule 1.10 concerning imputed disqualifications, apply to the Office of the Guardian ad Litem? Does Rule 1.11, "Successive Government and Private Employment," apply to the Office of the Guardian ad Litem?

*Opinion:* Both rules apply to the Office of the Guardian ad Litem. For purposes of Rule 1.10 the Office of the Guardian ad LItem is a "firm," but the Office of the Guardian ad Litem's government sponsorship and statutory duties also make that office a "government agency" for Rule 1.11 application. Under the Rules, the terms "firm" and "government agency" are not mutually exclusive and, in certain cases – as with the Office of Guardian ad Litem – both terms apply. Application of Rule 1.10 and Rule 1.11 serves to maintain confidentiality without unduly hampering the Office of the Guardian ad Litem from performing its duty to protect the best interests of children through hiring qualified attorneys.

**OPINION NO. 98-10**

Approved October 2, 1998

*Issue:* Is it ethical for an attorney to serve as member of the board of directors of a client corporation?

*Opinion:* The Utah Rules of Professional Conduct do not prohibit an attorney from serving as a member of the board of directors of a client corporation. However, to avoid ethical violations, an attorney who undertakes a dual role as director and counsel for a corporate client should take adequate precautions both before and during the relationship.

Before a lawyer undertakes the dual role of corporate director and attorney, he must comply with several ethical obligations: (a) determine whether the responsibilities of the two roles may conflict; (b) advise and consult with the client concerning this determination and of the risks of dual service; and (c) decline service as a director if it would create a conflict of interest or compromise the lawyer's independent professional judgment.

A lawyer who has undertaken the dual role of corporate director and attorney must comply with similar ethical obligations during the existence of the dual role: (i) continue to determine whether the responsibilities of the two roles are in conflict on particular matters; (ii) advise and consult with the client concerning these determinations and of the risks of dual service; (iii) recuse from participation in board decisions where participation would present a conflict; (iv) exercise reasonable care to protect the corporation's confidential information; and (v)

resign service as a director and, if necessary, as counsel if continued service would create a conflict of interest or compromise the lawyer's independent professional judgment.

**OPINION NO. 98-11**
Approved October 30, 1998

*Issue:* In a lawsuit against a Utah county, brought by the heirs of a decedent whose medical bills were paid (in part) by the State of Utah's Medicaid program after the decedent had been in the county's jail facility, what are the ethical considerations that govern a medical cost-recovery retainer agreement among the heirs, their attorney and the State's Office of Recovery Services (ORS)?

*Opinion:* The attorney representing ORS may request the heirs and their attorney to execute a retainer agreement that precludes the heirs attorney from acting adversely to ORS and provides that ORS will be paid first from any recovery from third parties as a condition for ORS's contributing to the heirs' attorneys' fees and costs. Whether the heirs' attorney may execute such a retainer agreement depends on whether the attorney can satisfy the conflict-of-interest requirements of Rule 1.7(b).

## *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. Seventy-seven opinions were approved by the Board of Bar Commissioners between January 1, 1988 and October 30, 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.

## *Thank You from the Minority Law Caucus*

The Minority Law Caucus would like to thank all of the sponsors that made our 8th annual golf tournament a successful fundraising event. The proceeds from the tournament will go toward funding need and merit based scholarships for University of Utah College of Law students.

This event was made possible through the support of a number of sponsors. The Minority Law Caucus would particularly like to thank the tournament's primary sponsor, Van Cott, Bagely, Cornwall & McCarthy. Also, the Minority Law Caucus would like to recognize Browne Financial Services and Timothy Allen for their generosity.

The prizes awarded at the tournament were all donated by local business. These prize sponsors include Deer Valley Resort, Salon Cearune, Rub Club, Cineplex Odeon Cinemas, Time Out Associates (Stephanie Mizke), T.J.I. Friday's (Mark Merril), Arcal Golf Corporation, Wingers Restaurant, The Game Keeper, Beach Graffiti, Atkinson Performance Incorporated, and Terran Edwards of Golf-in-a-Round.

## *Public Announcement*

Please be advised that the satellite offices of the Attorney General in St. George have combined and relocated to:

192 East 200 North, Suite 200
St. George, Utah 84770
Telephone: (435) 634-2480
Facsimile: (435) 656-2453

Located at this new address are the offices of Paul F. Graf of the Division of Child and Family Support and Robert M. Smith, Jr., of the Child Protection Division.

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

Dec 17 Workman's Compensation Claims & Defenses

Reservations in advance to Connie (USB) (801) 297-7033.

## Membership Corner

# UTAH STATE BAR ADDRESS CHANGE FORM

**The following information is required:**

- **You must provide a street address for your business and a street address for your residence.**
- **The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.**
- **If your residence is your place of business it is public information as your place of business.**
- **You may designate either your business, residence or a post office box for mailing purposes.**

***PLEASE PRINT**

**1. Name** _____ **Bar No.** _____ **Effective Date** _____

**2. Business Address – Public Information**

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (if any) _____

**3. Residence Address – Private Information**

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (if any) _____

**4. Mailing Address – Which address do you want used for mailings? (Check one) (If P.O. Box, please fill out)**

_____ Business _____ Residence

_____ P.O. Box Number _____ City _____ Zip _____

**Signature** _____

## *NEWS RELEASE*

November 24, 1998

The Utah State Bar has presented W. Eugene Hansen with its Distinguished Service Award for his exemplary professional career. At the annual dinner of past presidents of the Utah State Bar held November 20, 1998, in Salt Lake City, Hansen was recognized for his leadership to the Utah State Bar, his example of professionalism and his worldwide humanitarian service. Mr. Hansen served as President of the Utah State Bar during 1979 and 1980.

Many of the past presidents of the Utah Bar were present for the event, including James E. Faust, now second counselor in the First Presidency of the Church of Jesus Christ of Latter-Day Saints. Past Bar Presidents, Carmen E. Kipp and Ray R. Christensen, spoke in tribute to Hansen. Current President of the Utah Bar, James C. Jenkins, presented Mr. Hansen with a crystal tablet recognizing his distinguished service.

Hansen, a native of Garland, Utah, was recently granted emeritus status as a General Authority of the Church of Jesus Christ of Latter-Day Saints after serving 10 years as a member of the First Quorum of the Seventy. Prior to his service as a church leader, he had practiced law for over 30 years and was recognized throughout the state for his courtroom skills and success. He is a graduate of Utah State University and the University of Utah. A veteran of the Korean conflict, Mr. Hansen also served 30 years in the U.S. Army Reserve. He and his wife, Jeanine, are parents of six children.

## *Law Day Run and CASA Program Celebrate a Gift*

The Court Appointed Special Advocates program ("CASA") of the Utah Guardian ad Litem Office has received a donation of approximately $1400 in proceeds from the annual Law Day Run, which is in its 17th year of sponsorship by the Utah State Bar Law Day Committee and various law firms. In mid-October, CASA Coordinator Susan McNulty joined Chief Justice Richard Howe; Dan Becker, Court Administrator; Ray Wahl and Adam Trupp of the Juvenile Court Administrator's at a presentation of the Law Day Run funds by Ken Hansen and Dave Westerby, organizers of the Law Day Run, Mary Tucker, chair of the Law Day and Law-Related Education Committee and Richard Dibblee, Assistant Executive Director of the Bar.

*L-R: Dan Becker, Kent Hansen, Susan McNulty, Dave Westerby, Chief Justice Howe, Mary Shea Tucker and Adam Trupp; photo by Ray Wahl**L-R: Dan Becker, Kent Hansen, Susan McNulty, Dave Westerby, Chief Justice Howe, Mary Shea Tucker and Adam Trupp; photo by Ray Wahl*

CASA is a non-profit organization that trains community volunteers who are appointed by a judge to gather information and speak up for abused and neglected children in court. In Utah, there are abused and neglected children under court supervision, dedicated CASA volunteers who each spend on average from 10-15 hours a month to help them. CASA volunteers come from all professions and educational backgrounds. They are trained in courtroom procedure, social services, the juvenile justice system and the special needs of abused and neglected children.

The Law Day Run, also known as the 5K Bob Miller Run in honor of a later member of the law firm of Richard, Brandt, Miller & Nelson, is one of many activities sponsored by the Law Day and Law-Related Education Committee of the Utah State Bar and is held annually the first weekend in May. This year, the Run received generous sponsorship from the following law firms and groups to defray race costs and make possible the CASA donation.

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

## *Utah State Bar – Litigation Section's Trial Academy 1998*
## *Part Six: "Summation, Trial Motions and Special Verdicts"*

This biennial program of demonstration and lectures by judges and experienced lawyers is a useful introduction for the novice trial lawyer into the mysteries of trial practice. The focus is on practical hands-on information and in giving the answers that cannot be found in the books.

The sixth session of the six-part Trial Academy will be held on **Wednesday, December 16, 1998 from 6:00 p.m. to 8:00 p.m.** at the Utah Law & Justice Center. The topics covered for this session include:

- The basics of effective closing argument
- MUJI special verdict forms: traps for the unwary?
- The trial motions you *may* make and those you must make
- Demonstration of differing styles in summation
- Post-trial motions that might save your case
- What to do if the jury comes in against you
- Arguing damages effectively
- Objectionable closing argument
- And much more!

Two hours of CLE/NLCLE credit will be granted. The cost is $25 for Litigation Section members and $35 for non-members. Pre-registration is strongly recommended, to register, send your payment, along with a copy of this ad, your name and bar number, to: UTAH STATE BAR, CLE DEPT., 645 S. 200 E., #310, SLC, UTH 84111. Questions: call Connie Howard, CLE Coordinator, at (801) 297-7033.

## *Invitation to Join Women Lawyers of Utah*

Women Lawyers of Utah is a non-profit organization composed mainly of women attorneys, but open to all attorneys and law students in the state of Utah, dedicated to providing opportunities for women lawyers to develop and advance their careers and to further the cause of women in Utah generally.

Membership benefits include a quarterly newsletter and periodic mailings to keep you informed of events of interest to women, as well as reduced costs for several social and educational events sponsored by WLU, such as our upcoming Brown Bag lunch CLE "Straight Talk From the Bench."

**DECEMBER 10, 1998 – Holiday Social** – To benefit Legal Aid and Legal Services – Featured Speaker: Stewart Ralph – 5:30-7:30 p.m. – Urban Bistro, 216 E. 500 So., SLC

**FEBRUARY 18, 1999 – NOON – Brown Bag Seminar –** Topic: Succeeding as a Woman Advocate – Location TBA

**MARCH 18, 1999 – 6 PM – Dinner Social** at Thanksgiving Point with Women Lawyers of Utah County

**APRIL 22, 1999 – Spring Fireside** with Justice Durham – Location and time TBA

**MAY 20, 1999 – NOON – WLU Annual Meeting** at Law & Justice Center

### *Membership Application*

Any person who is a graduate of or a student at an accredited law school or a member of the Utah State Bar is eligible for membership in WLU. At present, we have approximately 250 members. The benefits of membership include a quarterly newsletter, social gatherings and a vote on important issues. Mail this form and your check to: WLU, P.O. Box 932, Salt Lake City, UT 84110.

Name: _____

Telephone (home or office): _____

Mailing Address (home or office): _____

Law School & Year of Graduation: _____

Utah State Bar No.: _____

Area(s) of Practice: _____

**DUES SCHEDULE:**

In practice for less than 3 years: $25.00; In practice for 3 or more years: $35.00; Law Students: $10.00

# 1998 Independent Auditors' Report

Deloitte & Touche LLP

Suite 1800
50 South Main Street
Salt Lake City, Utah 84144-0458

Telephone: (801) 328-4706
Facsimile: (801) 355-7515

## INDEPENDENT AUDITORS' REPORT

Board of Commissioners
Utah State Bar:

We have audited the accompanying statement of financial position of the Utah State Bar (the Bar) as of June 30, 1998, and the related statements of activities and of cash flows for the year then ended. These financial statements are the responsibility of the Bar's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, such financial statements present fairly, in all material respects, the financial position of the Bar as of June 30, 1998, and the change in its net assets and its cash flows for the year then ended in conformity with generally accepted accounting principles.

Our audit was conducted for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplemental schedules listed in the table of contents on page 1 are presented for the purpose of additional analysis and are not a required part of the basic financial statements. These schedules are the responsibility of the Bar's management. Such schedules have been subjected to the auditing procedures applied in our audit of the basic financial statements and, in our opinion, are fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole.

Deloitte & Touche LLP

August 28, 1998

Deloitte Touche Tohmatsu International

# UTAH STATE BAR

## STATEMENT OF FINANCIAL POSITION
## JUNE 30, 1998 (COMPARATIVE TOTALS FOR 1997)

| ASSETS | 1998 Unrestricted | 1998 Temporarily Restricted | 1998 Total | 1997 Total |
|---|---|---|---|---|
| CURRENT ASSETS: | | | | |
| Cash | $ 901,742 | $290,907 | $1,192,649 | $1,657,013 |
| Receivables (net of allowance for doubtful accounts of $2,000) | 29,426 | | 29,426 | 29,264 |
| Prepaid expenses | 33,397 | | 33,397 | 23,446 |
| Total current assets | 964,565 | 290,907 | 1,255,472 | 1,709,723 |
| PROPERTY: | | | | |
| Land | 633,142 | | 633,142 | 633,142 |
| Building and improvements | 2,109,149 | | 2,109,149 | 2,109,149 |
| Office furniture and equipment | 567,721 | | 567,721 | 558,388 |
| Computer and computer software | 458,558 | | 458,558 | 363,846 |
| Total property | 3,768,570 | | 3,768,570 | 3,664,525 |
| Less accumulated depreciation | (1,520,988) | | (1,520,988) | (1,328,159) |
| Net | 2,247,582 | | 2,247,582 | 2,336,366 |
| TOTAL | $3,212,147 | $290,907 | $3,503,054 | $4,046,089 |
| **LIABILITIES AND NET ASSETS** | | | | |
| CURRENT LIABILITIES: | | | | |
| Current portion of note payable to Utah Law and Justice Center | $ 35,000 | | $ 35,000 | $ 35,000 |
| Accounts payable and accrued liabilities | 317,279 | $ 6,020 | 323,299 | 347,170 |
| Interfund advance | 13,915 | (13,915) | | |
| Deferred revenue | 151,395 | 9,021 | 160,416 | 366,489 |
| Total current liabilities | 517,589 | 1,126 | 518,715 | 748,659 |
| NOTE PAYABLE TO UTAH LAW AND JUSTICE CENTER | 483,314 | | 483,314 | 526,481 |
| Total liabilities | 1,000,903 | 1,126 | 1,002,029 | 1,275,140 |
| COMMITMENTS AND CONTINGENT LIABILITIES (Notes 5, 6, and 7) | | | | |
| NET ASSETS: | | | | |
| Unrestricted | 2,211,244 | | 2,211,244 | 2,563,928 |
| Restricted: | | | | |
| Bar section funds | | 203,010 | 203,010 | 191,037 |
| Client security fund | | 86,771 | 86,771 | 15,984 |
| Total net assets | 2,211,244 | 289,781 | 2,501,025 | 2,770,949 |
| TOTAL | $3,212,147 | $290,907 | $3,503,054 | $4,046,089 |

See notes to financial statements.

# UTAH STATE BAR

## STATEMENT OF ACTIVITIES
## FOR THE YEAR ENDED JUNE 30, 1998 (COMPARATIVE TOTALS FOR 1997)

| | 1998 | | | |
|---|---|---|---|---|
| | Unrestricted | Temporarily Restricted | Total | 1997 Total |
| REVENUE: | | | | |
| License fees | $1,805,110 | | $1,805,110 | $1,766,561 |
| Services and programs | 371,705 | | 371,705 | 292,280 |
| Meetings | 283,198 | | 283,198 | 259,225 |
| Bar examination fees | 171,616 | | 171,616 | 174,201 |
| Bar section funds and client security fund | 27,619 | $226,824 | 254,443 | 188,546 |
| Interest income | 91,330 | 3,802 | 95,132 | 97,216 |
| Postage, mailing, and other services | 200,575 | | 200,575 | 144,031 |
| Utah Law and Justice Center property management | 134,627 | | 134,627 | 133,073 |
| Net assets released from program restrictions | 197,866 | (197,866) | | |
| Total | 3,283,646 | 32,760 | 3,316,406 | 3,055,133 |
| EXPENSES: | | | | |
| Licensing | 30,603 | | 30,603 | 30,231 |
| Services and programs | 577,693 | | 577,693 | 526,964 |
| Meetings | 232,785 | | 232,785 | 243,651 |
| Bar examination | 135,800 | | 135,800 | 124,399 |
| Bar section funds and client security fund | 197,866 | | 197,866 | 215,430 |
| Office of Professional Conduct | 715,445 | | 715,445 | 674,320 |
| Contributions | 196,000 | | 196,000 | |
| General and administrative | 711,056 | | 711,056 | 597,213 |
| Committees | 171,908 | | 171,908 | 113,732 |
| Utah Law and Justice Center property management and interest | 277,911 | | 277,911 | 302,399 |
| Public education | 33,927 | | 33,927 | 42,587 |
| Commission education/training | 83,901 | | 83,901 | 65,451 |
| General counsel | 89,178 | | 89,178 | 104,105 |
| Computer and MIS support | 62,805 | | 62,805 | 19,407 |
| Other | 69,452 | | 69,452 | 28,823 |
| Total | 3,586,330 | | 3,586,330 | 3,088,712 |
| CHANGE IN NET ASSETS | (302,684) | 32,760 | (269,924) | (33,579) |
| NET ASSETS, BEGINNING OF YEAR | 2,563,928 | 207,021 | 2,770,949 | 2,804,528 |
| TRANSFER TO CLIENT SECURITY FUND | (50,000) | 50,000 | | |
| NET ASSETS, END OF YEAR | $2,211,244 | $289,781 | $2,501,025 | $2,770,949 |

See notes to financial statements.

# UTAH STATE BAR

## STATEMENT OF CASH FLOWS
## FOR THE YEAR ENDED JUNE 30, 1998 (COMPARATIVE TOTALS FOR 1997)

| | 1998 | 1997 |
|---|---|---|
| CASH FLOWS FROM OPERATING ACTIVITIES: | | |
| Change in net assets | $ (269,924) | $ (33,579) |
| Adjustments to reconcile change in net assets to net cash provided by (used in) operating activities: | | |
| Depreciation | 192,829 | 201,821 |
| Changes in assets and liabilities: | | |
| (Increase) decrease in accounts receivable, net | (162) | 10,125 |
| (Increase) decrease in prepaid expenses | (9,951) | 12,438 |
| Increase (decrease) in accounts payable and accrued liabilities | (23,871) | 50,377 |
| Increase (decrease) in deferred revenue | (206,073) | (63,591) |
| Net cash provided by (used in) operating activities | (317,152) | 177,591 |
| CASH FLOWS FROM INVESTING ACTIVITIES - | | |
| Purchase of property | (104,045) | (159,675) |
| CASH FLOWS FROM FINANCING ACTIVITIES - | | |
| Payments on note payable | (43,167) | (24,324) |
| NET DECREASE IN CASH | (464,364) | (6,408) |
| CASH AT BEGINNING OF YEAR | 1,657,013 | 1,663,421 |
| CASH AT END OF YEAR | $1,192,649 | $1,657,013 |
| SUPPLEMENTAL DISCLOSURE: | | |
| Interest paid | $ 54,832 | $ 58,268 |

See notes to financial statements.

# UTAH STATE BAR

## NOTES TO FINANCIAL STATEMENTS
## FOR THE YEAR ENDED JUNE 30, 1998

### 1. ORGANIZATION

The Utah State Bar (the Bar) is an organization created in 1931 by the laws of the State of Utah. The Bar was integrated by court order on June 30, 1981 and was incorporated as a 501(c)(6) organization on June 24, 1991. Members of the Bar are all attorneys licensed under the laws of the State of Utah. The Bar is exempt from federal and state income taxes.

## 2. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

*Fund Accounting* - The assets, liabilities, and fund balances of the Bar are reported in self-balancing funds. The unrestricted fund is used for the general operations of the Bar. The temporarily restricted funds are used to account for the operation of funds segregated for the various Bar sections and the client security fund. Certain temporarily restricted funds have been reduced by an overhead charge from the unrestricted fund to defray the costs of administering these funds. The overhead charge is recorded as an interfund transfer.

*Property* - Property is recorded at cost. Depreciation is provided using the straight-line method over the following estimated useful lives:

| | |
|---|---|
| Building and improvements | 25 years |
| Office furniture and equipment | 5-7 years |
| Computer and computer software | 5 years |

*Deferred Revenue* - License fees are assessed in June for the following fiscal year. All license fees collected prior to the fiscal year end are recorded as deferred revenue.

*Use of Estimates in Preparing Financial Statements* - The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

*Income Tax Status* - On June 24, 1991, the Bar incorporated as a 501(c)(6) organization and has received a determination letter from the Internal Revenue Service exempting the Bar from federal and state income taxes.

*Reclassifications* - Certain reclassifications have been made to the 1997 statements to agree with classifications adopted in 1998.

## 3. UTAH LAW AND JUSTICE CENTER

In 1984, the Bar incorporated a tax-exempt entity known as the Utah Law and Justice Center (the Center) for the purpose of acquiring and maintaining a building facility to be used to promote legal and judicial education, studies to improve the legal system, and legal services for the poor in the State of Utah. The financial statements of the Center have not been included in the Bar's accompanying financial statements.

The building of the Center was owned 50% by the Bar and 50% by the Center. During the year ended June 30, 1993, the Bar entered into an agreement with the Center to purchase the Center's 50% interest in the land, building, and improvements and the Center's furniture and equipment for $1,143,375. The purchase price was established based on an independent appraisal of the building and management's estimate of the fair value of the furniture and equipment. The transfer of the Center's interest occurred October 19, 1994. As stated in the agreement, the Bar's consideration consisted of cancellation of a receivable from the Center of $425,000 and a note payable to the Center for $718,375 (see Note 4).

The Bar leases office space and meeting rooms to the Center at the rate of $7,700 per month. This lease will terminate upon the Bar's repayment of the note payable to the Center as described below. During the year ended June 30, 1998, the Bar's revenue resulting from this agreement was $134,627. The Bar incurred $277,911 of expenses relating to the maintenance of the Law & Justice Center building including interest on the note issued in the purchase of the property (see Note 4).

The Center provided rooms and catering for continuing legal education courses at a cost to the Bar of $49,480 during fiscal year 1998 of which $16,332 is included in services and programs and $33,148 is included in restricted funds.

## 4. LONG-TERM DEBT

The Bar issued a promissory note to the Center for $718,375 bearing interest at 10% in order to acquire the Center's property (see Note 3). The note is collateralized by the Center's previous 50% ownership of the property. Interest expense on the debt totaled $54,832 in fiscal year 1998. Principal payments on the note payable equal amounts paid by the Bar to subsidize the Center's future operating losses. At June 30, 1998, the amount remaining on the note was $518,314 with $35,000 in the current portion (based on the Center's 1999 fiscal year budget) and $483,314 in long-term debt.

## 5. PENSION PLAN AND OTHER EMPLOYEE BENEFIT PLANS

The Bar participates in the American Bar Retirement Association Master Money Purchase Pension Plan, which is a defined contribution plan. The Bar contributes 10% of the compensation of all plan participants. Employees who have completed one year of service with the Bar and have attained the age of 21 are eligible to participate. Contributions to the plan were approximately $90,000 for the year ended June 30, 1998.

The Bar also sponsors a 401(k) defined contribution plan and a Section 125 cafeteria plan. All contributions to these plans are made by the participants and there is no direct expense to the Bar.

## 6. CLIENT SECURITY FUND

On October 30, 1983, the Bar received approval from the Utah Supreme Court to collect up to $10 per attorney per year to accumulate a client security fund in the base amount of $100,000 to indemnify the public against losses incurred as a result of lawyers' misappropriation of clients' funds. Claims against the fund are limited to $10,000 for each claim and to $25,000 per lawyer during any calendar year. The balance in the restricted Client Security Fund was $86,771 at June 30, 1998.

## 7. CONTINGENT LIABILITIES

As of June 30, 1998, the Bar was involved in various lawsuits in the normal course of its operations. The Bar's management believes the outcome of these lawsuits will not have a material adverse effect on the Bar's financial statements.

In April 1997, the Bar Commission voted to contribute up to $250,000 for furnishing of conference rooms in the Scott M. Matheson Courthouse (the Courthouse) in Salt Lake City, Utah. Local business people had pledged to match the Bar's contribution. During 1997, a member of the Bar filed a petition with the Utah Supreme Court objecting to the Bar's proposed contribution. During 1998, the Supreme Court ruled on this petition concluding that the Bar had the discretionary right to make such a contribution. During 1998, the Bar made a contribution of $196,000 to the Courthouse and credited license fees of $54,000 to those attorneys who elected not to participate in the contribution.

* * * * * *

# UTAH STATE BAR

## SCHEDULE OF ACTIVITY OF TEMPORARILY RESTRICTED FUNDS FOR THE YEAR ENDED JUNE 30, 1998

| | Balance July 1, 1997 | Add: Revenue and Transfers | Add: Interest Income | Deduct: Expenses | Deduct: Overhead Charge | Balance June 30, 1998 | Net Increase (Decrease) |
|---|---|---|---|---|---|---|---|
| **Bar Section Funds:** | | | | | | | |
| Administrative law | $ 6,359 | $ 1,830 | | | $ 366 | $ 7,823 | $ 1,464 |
| Appellate practice | 10,432 | 2,367 | | $ 2,148 | 400 | 10,251 | (181) |
| Banking | 13,551 | 1,140 | | 33 | 228 | 14,430 | 879 |
| Bankruptcy | 2,381 | 4,081 | | 3,965 | 683 | 1,814 | (567) |
| Business law | 13,710 | 4,647 | | 3,460 | 867 | 14,030 | 320 |
| Collection law | 1,208 | 695 | | 288 | 139 | 1,476 | 268 |
| Constitutional law | 1,721 | 730 | | | 146 | 2,305 | 584 |
| Construction law | 4,860 | 2,040 | | 31 | 415 | 6,454 | 1,594 |
| Corporation counsel | 6,139 | 6,743 | | 3,724 | 833 | 8,325 | 2,186 |
| Criminal law | 4,227 | 1,652 | | 1,781 | 324 | 3,774 | (453) |
| Education law | 5,573 | 1,502 | | 584 | 261 | 6,230 | 657 |
| Environmental law | 7,443 | 9,706 | | 8,176 | 1,041 | 7,932 | 489 |
| Estate planning | 10,903 | 12,409 | | 8,086 | 1,364 | 13,862 | 2,959 |
| Family law | 7,897 | 14,822 | | 15,244 | 1,657 | 5,818 | (2,079) |
| Franchise | 765 | 280 | | | 57 | 988 | 223 |
| Governmental | 6,838 | 3,040 | | 560 | 608 | 8,710 | 1,872 |
| Intellectual property | 4,504 | 7,993 | | 5,902 | 731 | 5,864 | 1,360 |
| International law | 1,982 | 1,251 | | 1,011 | 222 | 2,000 | 18 |
| Labor and employment law | 9,234 | 4,175 | | 3,465 | 753 | 9,191 | (43) |
| Legal assistants division | 2,041 | 8,184 | | 4,798 | 1,344 | 4,083 | 2,042 |
| Litigation law | 32,333 | 27,441 | | 23,363 | 4,878 | 31,533 | (800) |
| Military law | 1,480 | 1,364 | | 1,243 | 100 | 1,501 | 21 |
| Real property | 8,364 | 15,066 | | 12,304 | 1,851 | 9,275 | 911 |
| Securities | 21,555 | 4,324 | | 7,853 | 776 | 17,250 | (4,305) |
| Solo, Small Firm and Rural Practice | | 2,995 | | 1,700 | 453 | 842 | 842 |
| Tax | 5,261 | 8,461 | | 7,419 | 1,100 | 5,203 | (58) |
| Young lawyers | 276 | 28,000 | | 26,230 | | 2,046 | 1,770 |
| Total | 191,037 | 176,938 | | 143,368 | 21,597 | 203,010 | 11,973 |
| **Client Security Fund** | 15,984 | 99,886 | $3,802 | 32,901 | | 86,771 | 70,787 |
| Total | $207,021 | $276,824 | $3,802 | $176,269 | $21,597 | $289,781 | $ 82,760 |

# UTAH STATE BAR

## SCHEDULE OF SERVICES AND PROGRAMS REVENUE AND EXPENSES FOR THE YEAR ENDED JUNE 30, 1998

| | Bar Journal | Lawyer Referral | Continuing Legal Education | Lexis and Member-ship Programs | Tuesday Night Bar | Pro Bono | Total |
|---|---|---|---|---|---|---|---|
| REVENUE | $ 90,103 | $ 34,275 | $ 237,661 | $ 9,666 | | | $ 371,705 |
| EXPENSES: | | | | | | | |
| Program | 43,631 | | 159,175 | | | $ 2,297 | 205,103 |
| Salaries and benefits | 7,505 | 32,549 | 51,451 | 486 | $ 2,662 | 76,361 | 171,014 |
| General and administrative | 150,450 | 15,876 | 13,425 | 1,245 | 1,258 | 19,322 | 201,576 |
| Total | 201,586 | 48,425 | 224,051 | 1,731 | 3,920 | 97,980 | 577,693 |
| EXCESS (DEFICIENCY) OF REVENUE OVER EXPENSES | $(111,483) | $(14,150) | $ 13,610 | $ 7,935 | $(3,920) | $ (97,980) | $(205,988) |



# UTAH STATE BAR

## SCHEDULE OF MEETINGS REVENUE AND EXPENSES FOR THE YEAR ENDED JUNE 30, 1998

| | Annual Meeting | Mid-Year Meeting | Total |
|---|---|---|---|
| REVENUE | $ 183,412 | $ 99,786 | $ 283,198 |
| EXPENSES: | | | |
| Program | 103,126 | 43,710 | 146,836 |
| Salaries and benefits | 26,247 | 10,248 | 36,495 |
| General and administrative | 32,427 | 17,027 | 49,454 |
| Total | 161,800 | 70,985 | 232,785 |
| EXCESS OF REVENUE OVER EXPENSES | $ 21,612 | $ 28,801 | $ 50,413 |

# *Young Lawyer Profile – Jay T. Jorgensen*

*by Todd Weiler*

Things have not always come easily for Jay Jorgensen. After applying to the University of Chicago School of Law, he did not get in. During his first year of law school at BYU, he ran for 1L class representative—and lost. In his second year of law school, he aspired to be named to a board position on the *Brigham Young University Law Review.* He wasn't. During his third year, he applied for a clerkship position with the U.S. Supreme Court. He didn't get it.

Although success has not come easy, Jay's hard work and persistence paid off last summer when the Salt Lake Tribune reported, "Rehnquist Picks Utahn as Law Clerk."[1] That Utahn was none other than Jay, who will begin clerking for the chief justice in the fall of 1999. Jay is the ninth[2] graduate of BYU's J. Reuben Clark Law School to have clerked for the U.S. Supreme Court since 1976. The University of Utah College of Law has also sent three[3] of its graduates to such distinction.

Jay grew up on a cattle ranch in Ioka, Utah – just outside of Roosevelt. (His resume still touts his experience since birth as a cattle hand, which has proven to be a great conversation piece.) While serving a Spanish-speaking LDS mission in Texas, he was paired with a young elder from Provo, Utah, named Michael S. Lee. Jay and Mike formed a bond that would endure well beyond the Texas border.

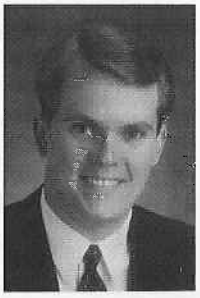
After returning to Utah, Jay became a staff assistant in Senator Bob Bennett's Salt Lake City office. He answered phones, attended meetings, made presentations, and traveled with the senator during two-and-a-half years of his undergraduate education. When Mike Lee decided to run for BYU student body president, Jay became his campaign manager (and eventually served as his vice president). When Jay applied to law school, he turned to Mike's father, Rex E. Lee, for a letter of recommendation.

Jay spent his summers during law school working with the firms of Stoel Rives, Kimball Parr, and Kirkland & Ellis. After graduating from law school *summa cum laude,* Jay spent a year clerking for Judge Samuel Alito, Jr. of the Third Circuit Court of Appeals. During his clerkship, Jay helped convince Judge Alito that Mike Lee should replace him. Jay and Mike are the only clerks Judge Alito has hired from BYU during his eight years on the bench. Having passed the Utah Bar Exam, Jay is working as an associate with Stoel Rives in Salt Lake City until he begins his clerkship.

Jay explains that applying for a U.S. Supreme Court clerkship is a multi-year process in which almost no one is successful on their first attempt. Each justice hires individually, and on their own schedule. Jay applied to all nine justices, because they get offended if you don't.

Although there are no written guidelines, former clerks told Jay that successful candidates usually graduated as one of the top three people in their respective classes. They must have good journal experience, and must provide a published article as a writing sample. Successful candidates will also provide letters of reference from two or three law professors who essentially say that in all their years of teaching, this candidate is the best they have seen. Perhaps the most important reference is from a state supreme court justice or a federal appellate court justice for whom the candidate has already clerked.

While speaking with former clerks, Jay learned that Chief Justice Rhenquist usually conducts a "personality interview" with about 15 candidates to determine which ones will "click" in his office. Chief Justice Rhenquist spent about 15 minutes chatting with Jay about Arizona, BYU, cattle ranching, and tennis. Jay's pleasant experience interviewing with Chief Justice Rhenquist – who once slept on the Vernal courthouse lawn[4] as a young man – was in sharp contrast to his combative debate with Justice Scalia and his clerks.



Jay was informed by clerks that he had better be familiar with every legal deci-

sion, law review article and book ever authored by Justice Scalia. Justice Scalia and his clerks quizzed Jay for several hours regarding his opinions on the following: the *Slaughterhouse* cases; Justice Scalia's worst decision; Justice Scalia's decision with the greatest impact on society; why Justice Scalia once lost a majority opinion based on a single footnote; and endless questions dealing with constitutional analysis, substantive due process, and textualism.

Jay was told that Justice Scalia enjoys debating with clerks who know a lot about that which they are discussing. Although Jay would have enjoyed debating with Justice Scalia and staff for a second round of interviews, he was pleased to receive an offer from Chief Justice Rhenquist three days later.

Although Jay has laid a foundation for a very successful legal career, he considers his greatest accomplishment to be his family. Jay married his wife, Melissa, after his first year of law school. They now have two daughters. Jay claims the best advice he received in law school was from Dean Kathy D. Pullins, who told him his family counted for more than school, and that no client was worth exchanging for his children. Jay maintains that following that advice has brought him the most happiness.

[1]The Associated Press, "Rehnquist Picks Utahn as Law Clerk", *The Salt Lake Tribune,* August 11, 1998, at B7.

[2]Those graduates include Monte Stewart (class of 1976, clerked for Justice Burger), Eric Anderson (class of 1977, clerked for Justice Powell), Kevin Worthen (class of 1982, clerked for Justice White), Michael Mosman (class of 1984, clerked for Justice Powell), Von Keetch (class of 1987, clerked for Justice Burger), Denise Lindberg (class of 1988, clerked for Justice O'Connor), Karl Tilleman (class of 1990, clerked for Justice Burger), Stephen M. Sargent (class of 1994, clerked for Justice Rehnquist), and Jay T. Jorgenson (class of 1997, to clerk for Justice Rehnquist).

[3]Those include Michael D. Zimmerman (class of 1969, clerked for Justice Burger), David Campbell (class of 1979, clerked for Justice Rehnquist) and Thomas B. Green (class of 1980, clerked for Justice Burger).

[4]The Associated Press, "Rehnquist Picks Utahn as Law Clerk", *The Salt Lake Tribune,* August 11, 1998, at B7.

# *What is the Unauthorized Practice of Law?*

*by Sandra L. Steinvoort*

The "unauthorized practice of law" is a term all bar members are familiar with but is an activity many members do not precisely understand. Many might be surprised to learn that there is a Utah statute which prohibits non-lawyers from practicing law and that Utah law also specifically prohibits lawyers from assisting in the unauthorized practice of law. This article deals with the current State of Utah law in regard to these activities.

**A. THE UTAH STATUTORY PROHIBITION ON THE UNAUTHORIZED PRACTICE OF LAW.**

Utah has long had a statutory prohibition in place against the unauthorized practice of law. Utah Code Annotated 78-51-25 specifically prohibits non-lawyers from both practicing law or holding themselves out as licensed to practice law. This statute does not make the practice of law a crime but provides that such activity can be halted by injunction. Interestingly, this statute also provides the accused the right to a trial by jury.

**B. THE UTAH SUPREME COURT'S DEFINITION OF THE UNAUTHORIZED PRACTICE OF LAW.**

Though Utah has long had a statutory prohibition against the unauthorized practice of law, the Utah Supreme Court has only recently begun to specifically define what activity is actually prohibited. This area of law had little case development in Utah from 1944 to 1996. The reason, presumably, being that everyone seemed to have understood what the term "practice of law" meant. However, with time and the increasing cost of securing legal representation or advise, clever alternatives began to appear - often in the classified sections of local newspapers. One such case was Benton Peterson.

In 1994, Mr. Petersen resided in Manti, Utah and prepared pleadings for third parties. He also admitted that he would research issues for clients and would be willing to draft a will if

*Sandra L. Steinvoort is an Assistant Attorney General in the Litigation Section of the Utah Attorney General's office and the current chairperson of the Utah State Bar Unauthorized Practice of Law Committee. She received her B.S. and J.D. degrees from the University of Utah and her L.L.M. degree from the College of William and Mary in Virginia.*

*Prior to joining the Attorney General's office, she was associated with Kipp & Christian, P.C. where she, together with Carman Kipp and Greg Sanders, represented the Utah State Bar in pursuing injunctions against individuals who practiced law without a license. Mr. Sanders and she were trial and appellate counsel in the Benton Petersen case.*

necessary. Mr. Petersen was not an attorney in Utah nor any other state for that matter. He had never attended law school and was a former radio disc jockey. His education in law had been obtained through a Pennsylvania correspondence course which he had successfully completed and which had provided Mr. Petersen with a variety of pleading forms.

The majority of Mr. Petersen's clients were indigent women seeking a divorce. Manti does not have a legal aid service, and Mr.Petersen was the next best thing. His pleadings were distinct in many ways; the same poor quality typewriter was used for all of the clients, the opposing party frequently signed a *nolo contender* plea, and the child support requested did not conform with the Uniform Child Support Guidelines. Mr. Petersen's activities were reported to the Unauthorized Practice of Law Committee of the Utah State Bar which investigates such complaints.

Mr. Petersen contended he never held himself out to the public as a lawyer, none of his clients thought he was a lawyer, he did not advise the clients and he merely prepared documents pursuant to the clients' requests and instructions. Therefore, according to Mr. Petersen, he was not engaged in the *practice of law.*

*The practice of law* - a term even the Utah Supreme Court had chosen not to specifically define in the past - is what brought this case to a jury trial in Third District Court in 1995. The only Utah case discussing the unauthorized practice of law was *Nelson v. Smith.*[1] In *Nelson,* the Supreme Court stated: "The practice of law, though impossible of exact definition, involves the carrying on the calling of an attorney usually for gain and consists of giving advice, as such, acting in a representative capacity and rendering services to other."[2]

It would seem to most that advising an individual for a fee how to adjudicate his legal rights - and Mr. Petersen did charge for his services - would be the practice of law and therefore, prohibited by the statute.

Mr. Petersen disagreed and argued that he did not advise clients; he simply prepared the pleadings on their behalf; he provided a typing service. The clients selected the forms and he prepared them based upon their instructions. At trial, the evidence demonstrated that Petersen assisted clients in selecting the forms and prepared them based upon information he solicited from them. This distinction meant that Petersen was substituting his judgment for that of the client and the client was relying on his decisions.

The jury concluded that Mr. Petersen had violated UCA §78-51-25 and the court enjoined him from practicing law without a license. Mr. Petersen appealed, arguing, in part, that the statute was overbroad and therefore unconstitutional. The Supreme Court disagreed and found the statute constitutional and that Mr. Petersen had carried on the calling of a lawyer by allowing his clients to rely upon his advice and judgment in selecting and preparing forms.

Just one year prior to the *Petersen* decision, the Supreme Court had decided *Utah State Bar v. Sorensen*[4] or otherwise known as the "Public Adjuster" case. Here, the Supreme Court held that third party adjusting was the practice of law and therefore could only be engaged in by attorneys licensed in Utah. The court also stated that what constituted the practice of law would be determined on a case by case basis; apparently, laying the ground work for the *Petersen* decision.

**C. LAWYERS' DUTIES IN RELATION TO THE UNAUTHORIZED PRACTICE OF LAW.**

Bar members should be aware that the unauthorized practice of law affects lawyers as well and is not limited in its effect on non-lawyers such as Benton Petersen. Indeed, Utah Rule of Professional Conduct 5.5 specifically provides that lawyers have an ethical duty not to assist non-lawyers in practicing law.[5] Such inappropriate activity by lawyers could potentially include both failing to report a violation of the Utah statute prohibiting the unauthorized practice of law and actively helping a non-lawyer to practice law. The precise limits in these areas is something that would be determined on a case by case basis by the Utah State Bar Office of Professional Conduct.

**D. THE BAR'S ROLE IN PROHIBITING THE UNAUTHORIZED PRACTICE OF LAW.**

The Bar does not prosecute the unauthorized practice of law, but is empowered to initiate litigation to stop it. It does not have paid investigators or a screening panel to review complaints. Instead, the Bar relies upon its members to volunteer their time to serve on the Unauthorized Practice of Law Committee of the Utah State Bar. These volunteer attorneys investigate complaints, contact victims and witnesses, draft cease and desist agreements and on occasion, prepare memoranda for review by the Board of Bar Commissioners to approve formal legal action.

Some have criticized the Bar for pursuing these cases and believe the Bar is engaged in "turf protection." Nothing could be further from the truth. The Bar's motivation in monitoring the practice of law is to ensure that individuals receive correct legal advise and if not, provide a forum for redress. This forum does not exist for the client of a paralegal who fails to complete

some part of a divorce; there is no fee arbitration for unlicenced lawyers and if a non-lawyer fails to make a promised appearance at an arraignment on behalf of a criminal client, the client has no where to turn when an arrest warrant is issued for him. All of these illustrations have actually occurred in cases in which I represented the Bar in pursing injunctions against non-attorneys. The Bar's commitment to prevent the unauthorized practice of law is one of public service and not one of economics.

**E. HOW INDIVIDUAL LAWYERS CAN COMBAT THE UNAUTHORIZED PRACTICE OF LAW.**

There is much that individual lawyers can do to assist in decreasing the extent of the unauthorized practice of law. The first step lawyers can take is to provide reasonably priced legal services as well as pro bono services for those individuals who simply cannot afford legal services. There has been a recent upsurge in the unauthorized practice of law by non-lawyers who misguidedly seek to fill the need for reasonably priced legal services. This upsurge includes accountants and financial planners drafting estate and business plans, disbarred and suspended lawyers continuing their practice, and social workers and family mediators drafting pleadings. There is an urgent need for lawyers to address this gap by evaluating the cost of the services they are providing to clients and by volunteering with legal services organizations. Currently, lawyers are in demand to take the time to sit on committees and to accept cases with organizations such as Legal Aid Society or Legal Services.

In addition, the Utah State Bar currently needs additional volunteer lawyers to investigate and litigate unauthorized practice of law cases by joining the unauthorized practice of law committee. The time commitment is flexible and consistent committee volunteer service of approximately five hours per month is always appreciated and accepted. If you think you may be interested in serving on the Committee, please contact the Utah State Bar.

[1] 154 P.2d 634 (Utah 1944)

[2] *Id.* at 637.

[3] *Board of Bar Commissioners v. Petersen,* 937 P.2d 1263 (Utah 1997).

[4] 905 P.2d 867 (Utah 1995).

[5] Rule 5.5(b) of the Rules of Professional Conduct states: "A lawyers shall not assist any person in the performance of activity that constitutes that unauthorized practice of law."

# Be the Best That You Can Be

*Talk by Senior Federal Judge J. Thomas Greene*
*at Admission Ceremony for Recent Law Graduates as New Members of Utah State Bar*
*Capitol Rotunda, Salt Lake City*
*October 20, 1998*

Recently the *Business and Society Review* solicited responses from a group of legal scholars to the question whether the legal profession is on the trash heap. The Dean of the National Law Center at the George Washington University acknowledged "troublesome and fundamental alteration" in the ways attorneys operate these days, lamenting that many lawyers have "forgotten or ignored the elements that made the practice of law a 'profession,' characterized by a high degree of integrity and collegiality." After further discussion of the public's low esteem of lawyers and the poor state of the legal profession because of failure of many lawyers to live up to expected standards by engaging in "ruthlessness and vicious partisanship," he concluded that:

> In the final analysis, lawyers must ignore the barbs of others and dedicate themselves to playing by the rules. It is not easy, but it is possible. If we fail, society will be much worse off than it is today. In our country lawyers have been the catalysts to unprecedented industrial and social progress. Our nation cannot afford to lose their talents.

The challenge to all of us, but particularly to you budding new attorneys, is to be true professionals and to be the best that we can be.

An excellent summary of the values included within the professional tradition is set forth in a recent issue of the Emory Law Journal. Those interrelated values constitute the essence of professionalism. Each is related to the other, but all combined together present a profile of professionalism. The six enumerated values are:

1. Rendition of excellent services to a client.
2. Responsibility in given circumstances to say "No" when delivering advice.
3. Concomitant responsibility to explain why such unwanted advice is given.
4. Civility and respect for other lawyers and their work.
5. Commitment to accountability for services rendered.
6. Assisting in the distribution of legal services to persons who cannot afford the services of a lawyer.

Let's examine these values more closely.

*First* – the ethic of excellence in rendering legal services.

This is the central concept in professionalism. Second rate services are not acceptable. This is so whether the client is fee-paying, pro bono, a private person or a private or public entity. The pursuit of excellence must not be subordinated to any other activity. This is not easy, especially in the environment of today. Increasingly, the complexity of the law requires more and more time and effort to achieve "mastery" of virtually any area and subject of law practice. So although you have passed the bar, you must commit to keep up your study of the ever changing law, procedurally and substantively. Don't just try to get by; do not let pressures of any kind cause you to prepare and file documents which are not first rate and represent work of which you are justly proud; do not rest on your laurels even though right now you may be more informed and full of legal knowledge than most of us. If you don't maintain continuing legal education, one day you will wake up and discover as some of us have that most of your knowledge has been repealed or

*Judge J. Thomas Greene was appointed as U.S. District Court Judge in 1985 by President Ronald Reagan. He received his BA in Political Science* magna cum laude *from the University of Utah in 1952 and his JD in 1955 from the University of Utah College of Law.*

replaced by new rules and new legal principles. Don't forget that the "law is a jealous mistress." The kind of legal work you do must pass the test of producing the best work you are capable of doing.

*Second* – the ethic of professional independence as it relates to the responsibility to say "no."

This has to do with giving advice which a client would rather not hear. This is always difficult, sometimes painful and economically dangerous. But forthright acknowledgment of the limits of the law is extremely important. I once had an important client who in exasperation said to me, "Don't tell me what I can't do – tell me how I can do what I want to do." The problem is that sometimes what a client wants to do is legally inadvisable. In that situation, the client needs to know the pitfalls, the legal minefield, the risks involved. The net result may be that the client will have to proceed if at all on the basis of business judgment notwithstanding adverse legal advice. However, the client is well served by receiving such forthright and honest advice – and the lawyer is much better of having given it even though on occasion the client will look elsewhere. The lawyer should never in effect become the client's slave. Professional independence is an extremely important part of the concept of professionalism.

*Third* – the responsibility to say "Why."

Legal professionals esteem, defend and in fact revere our system of law and the rule of law in our society. So, we must be ready to explain the reasons which underlie advice given and tough decisions concerning the scope and limits of the law. If lawyers show that they understand, respect and scrupulously abide by the law, others will understand and respect its importance in the proper resolution of disputes.

*Fourth* – civility and respect for other lawyers.

In the introductory statement to the "Standards for Civility in Professional Conduct" adopted this year by the Federal Bar Association, the following observation is set forth underscoring the need for adoption of such voluntary standards of civility:

> Sadly, too many among us at both the bench and the bar do not "do the right thing" in our relationships with each other – and we do not even care whether anyone is watching. Too many among us reflect, in our relations with each other, the tension – even hostility – that typically characterizes the relations between our clients; their disagreements become ours. Too many of us have such a view of the process of resolving legal disagreements being a campaign of war that we are willing to do anything – and everything – to win, with the necessary assumption that winning constitutes justice done.

Truly professional lawyers not only respect and uphold the law, but also show respect to the law's practitioners. This means treating each other with courteousness. The public's respect for the law is fundamentally related to attitudes and respect for lawyers. In conversations with clients, lawyers should constrain themselves from undercutting and bad mouthing fellow practitioners. Courteousness, forbearance and the showing forth of respect are all contagious. This doesn't mean that legitimate criticism is wrong, but it does mean that principles of civility should be followed.

*Fifth* – financial accountability and justification of charges for services rendered.

Clients are entitled to know how that lawyer's fees are accounted for and that charges made for services rendered are fair. This stems from the ethic of providing excellent services. Lawyers' billing records should be complete and adequately detailed so that any explanation and full accountability should never be difficult. All should be able to account fully and promptly upon request. I've never been able to relate to the claim by some lawyers who must submit justification to the court for an award of attorney fees that the research and trouble of preparing a detailed billing should justify substantial additional fees. This is not much of a problem where lawyers provide fully detailed statements as a matter of course anyway. More and more business clients and salary paying employers are scrutinizing time spent and charges made by lawyers. Justification and accountability for services rendered should equally be available to pro bono clients and for community service. Ready accountability and explanation of charges is an essential element of professional law practice.

*Sixth* – helping to provide legal services to those unable to pay.

Public service is often provided by lawyers in the form of pro bono legal service. This stems from the moral duty to assist in the distribution of legal services more widely in our society. But direct and personal pro bono services may not always be practicable. However, employers and law firms can lend support by adoption of enabling policies in order to encourage associates and employees who are interested in providing legal services to indigents to provide such directly. Such interested lawyers should be encouraged and financially rewarded, not penalized, for being willing to become involved in pro bono activities. The

providing of pro bono services is voluntary rather than required. Members of the bar should not be coerced or shoved into providing public service type legal assistance. Of course, traditional individual freedom to choose should always be maintained. But it is in the finest tradition of our profession to facilitate directly or indirectly at no cost or at reduced rates the more widespread availability of legal services to those who have no means or limited means to afford such services.

Another dimension of professionalism in the practice of law, which I would like to mention, is that it should be performed "in the spirit of public service," recognizing that it is a privilege with certain strings attached. Relative to the public service component, year ago Dean Roscoe Pound said that the practice of law should be performed

> in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

Concerning the practice of law as a privilege, Justice Cardozo once said that the license to practice law is "a privilege burdened with condition." Practicing law is a privilege in part because it constitutes the pursuit of a learned art. It is burdened by a fiduciary duty to clients and other duties to the court and to the public which must be discharged in accordance with high ethical standards. The learned art of practicing law requires knowledge, understanding and application of rules of law.

Thank you for your attention. Let's all commit to make the values of professionalism a part of our practice. This is the way, fellow lawyers, for your and for me and all of us to be the best that we can be.

## New Mealey's Publication for Litigators and In-House Counsel to be Available Exclusively on LEXIS-NEXIS

As the result of an agreement announced between LEXIS-NEXIS and Mealey Publications, Inc., a new and innovative online publication targeted to litigators and in-house counsel will be developed by Mealey and made available exclusively on the LEXIS®-NEXIS® services.

This new publication will provide news impacting litigation practice, insights from legal experts, and articles addressing pointers and practice tips on trial preparation and practice.

Slated for availability in early 1999 exclusively on the LEXIS-NEXIS services, the publication will feature only original material, including articles authored by judges and prominent trial attorneys in addition to interviews with legal experts.

The publication will also provide continuing coverage of breaking stories on trials and important decisions as they happen and will be available in the Litigation and Legal News libraries on the LEXIS-NEXIS services.

## LEXIS-NEXIS and EmplawyerNet Launch Online Legal Recruiting Services

LEXIS-NEXIS and EmplawyerNet™ have released a new service that enables law firms to do more of their recruiting through use of the World Wide Web.

EmplawyerNet for Law Firms, available at www.emplawyernet.com and through the LEXIS®-NEXIS® Career Center at www.lexis.com, allows recruits and legal employers to complete the initial stages of the recruiting process online and enables interested candidates to make anonymous inquiries into the firm.

The service includes an "electronic recruiter" function for law firms to monitor a database of thousands of candidate profiles and resumes. If the information contained in the profiles meets a firm's specific recruiting criteria, it is electronically forwarded to the firm. reducing the administrative burden on recruiting directors.

Law students, lawyers and paralegals can use the service to access a firm's resume, review its listings in the Martindale-Hubbell® Law Directory and National Association of Law Placement directory and obtain other information about the firm's practice and clientele.

# AMERICAN CLASSIC
# CORPORATION KITS

AMERICA'S BEST VALUE
FREE SOFTWARE
VALUED AT $21.95


## CORPORATION KIT INCLUDES

- Binder in classic, marbled burgundy, leather-look vinyl; D-shaped rings; with matching slipcase
- By-laws and minutes and resolutions pre-printed
- Corporate engraved seal with pouch
- 25 custom-printed stock certificates
- 25 stock transfer ledger sheets
- 6 index tabs - mylar reinforced
- Tax forms – latest requirements
- General use corporate forms
- **FREE *EasyWay*** corporate kit software
  - Conveniently tailored corporate by-laws
  - Customized minutes
  - Computerized stock transfer ledger sheets
  - BONUS - 15 extra corporate legal forms on disc

## LIMITED LIABILITY COMPANY KIT

- Binder in classic, marbled burgundy, leather-look vinyl; D-shaped rings; with matching slipcase
- LLC name in gold on binder
- Articles of organization, operation agreement, minutes - all pre-printed
- 25 custom printed membership certificates
- 25 membership transfer ledger sheets
- 6 index tabs - mylar reinforced
- LLC engraved seal w/pouch
- Tax forms – latest requirements
- **FREE *EasyWay*** LLC software

One of the most complete on the market

**24-HOUR IN HOUSE COMPLETION ON ALL KITS**
***Quality Guaranteed Workmanship***

CORP USA INC
CORPORATE KITS & MORE

**PHONE TOLL FREE 1-800-586-2675 or FAX 1-800-586-2685**
**Phone 1-801-292-5537 or FAX 1-801-292-5688**
640 No. Main, Suite 2167 • North Salt Lake, UT 84054

UTAH LAW AND JUSTICE CENTER

## UTAH LAW AND JUSTICE CENTER

### QUALITY MEETING SPACE

AVAILABLE FOR PROFESSIONAL, CIVIC AND COMMUNITY ORGANIZATIONS

THIS MODERN FACILITY PROVIDES ANY STYLE OF SEATING ARRANGEMENT AND FEATURES:

REASONABLE RATES

CENTRAL DOWNTOWN LOCATION

AUDIO-VISUAL EQUIPMENT

COMPLETE CATERING

PERSONAL ATTENTION

FREE ADJACENT PARKING

REGISTRATION AREA

DAY OR NIGHT

**FOR INFORMATION AND RESERVATIONS, CONTACT:**
THE UTAH LAW AND JUSTICE CENTER COORDINATOR
(801) 531-9077

# Second District Court Commissioner David S. Dillon

*by Ramona R. Mann*

Family is central to the life of Commissioner David S. Dillon, both at home and professionally. As a domestic commissioner in the Second District, he works with family matters. At home, he delights in his role as father of five children and husband of attorney Sherene Dillon.

Born in Norfolkshire, England, where his father served in the U.S. Air Force, Commissioner Dillon grew up in Ohio. He attended Ohio University and the J. Reuben Clark Law School, where he met and wed Sherene Terry.

After a stint in the Salt Lake County Attorney's office and in private practice with Maddox & Snuffer, Dave worked as a public defender in Third District Juvenile Court with Rilling & Associates. He had a practice in family law which was expanded when he joined the Guardian ad Litem office in 1994.

After several years as a GAL, he served for a year as a Second District Court Judge Pro Tem, then returned to the GAL office for a year. When the position of domestic commissioner was established in the Farmington Department of the Second District Court, Dave applied for and won the post. He also serves on the Family Law Executive Committee and chairs the Quick Court Committee.

He believes people are well served by the newly required mediation for civil cases, especially in family matters. When the parties craft their own solutions, they like the settlement better, they accept the settlement better, and the follow the settlement better.

As commissioner, Dave enjoys problem-solving, challenging issues, intellectual stimulation, and his colleagues on the bench. His special concern in domestic disputes is the effect on the children, and he takes care to emphasize his concern to the parties who come before him. He's impressed with the caliber of lawyers who appear in his courtroom.

While being a commissioner can be lonely at times, he rarely has time to be lonely at home. Aside from his normal father's duties, such as helping with homework, attending games, coaching kid's baseball and basketball, and sharing the responsibilities for discipline, he loves to take his children on weekly one-on-one "dates."

His other interests include hiking, camping, and golfing. He has a burgeoning interest in nature photography and hopes one day to see one of his nature photographs on the cover of the Utah Bar Journal. He and his family love the outdoors, especially the national parks. So far, Dave has visited 88 national parks, from Cape Cod to Olympia. In 1998 the Dillon family hit 11 national parks; they chalked up 20 last year. The Dillons' goal for next summer is to hike to the floor of the Grand Canyon.

Commission Dillon says, "The most important thing in the world to me is my family." As commissioner, Dave is able to use his talents to assist other families with their concerns.

# Case Summaries

*by Daniel M. Torrence*

***W.B.J. v. STATE***

353 Utah Adv. Rep. 11 (Utah Ct. App., Oct. 1, 1998). Attorneys: Mary C. Corporan for Salt Lake City; Jan Graham for W.B.J., a minor.

W.B.J., a minor, was found guilty of possession of marijuana and drug paraphernalia. Prior to trial, the juvenile court judge determined that the minor and his family were not indigent, and thus denied the minor's request for court-appointed counsel. In reaching this decision, the court focused primarily on "VA comp/disability" income of $174 per month received by the minor's mother, but without further information as to the source or duration of the income, or its availability for W.B.J.'s defense. On appeal, the defendant argued the juvenile court erred in finding that he was not indigent and in denying him counsel.

The Utah Court of Appeals affirmed the conviction. The Court noted that minors are not constitutionally entitled to counsel. However, Utah law provides that juvenile defendants who are indigent must be provided counsel whether or not incarceration is a possible punishment. (U.C.A. 78-3a-913(1)(a)). However, the Court of Appeals held that because W.B.J. never asserted his emancipation, he was unemancipated, and, as such, he was part of a domestic unit, and the juvenile court was correct in considering the resources of W.B.J.'s parents. Finally, the Court ruled that, in the absence of constitutional error even if W.B.J. were statutorily entitled to counsel, he failed to demonstrate on appeal the likelihood of a different result at trial, and thus the conviction would stand.

In a strongly-worded dissent, Presiding Judge Davis characterizes the majority opinion as a "strained" interpretation of United States Supreme Court decisions and Utah law.

***ARCHULETA v. HUGHES***

353 Utah Adv. Rep. 17 (Utah, October 2, 1998). Attorneys: J. Kelly Walker and Richard K. Glauser for Archuleta; Donald C. Hughes, pro se.

Archuleta was injured in an auto accident and retained attorney Donald Hughes. Hughes settled her claim against the other driver's insurer, including $2,400 for unpaid medical expenses. Hughes' fee included one-third of the unpaid medical expenses. Archuleta sued Hughes for negligence and malpractice because Hughes submitted her unpaid medical expenses to the third party insurer (and took a fee there from), rather than submitting them to her own insurance company as a Personal Injury Protection (PIP) claim.

During discovery, the trial court denied motions by Archuleta to add a cause of action for breach of contract and to compel discovery of Hughes' trust account statement. At trial, the judge refused Archuleta's request to instruct the jury regarding Hughes' responsibility for the acts of his representative who assisted in settling the claim. The jury found in Hughes' favor, and the Court of Appeals upheld the verdict. On appeal to the Utah Supreme Court, Archuleta argued, inter alia, that Hughes violated the Rules of Professional Conduct and committed malpractice by (a) failing to submit her medical bills to her PIP carrier and (b) taking a fee from the medical expenses.

The Utah Supreme Court ruled that The Rules of Professional Conduct are not designed to create a basis for civil liability. The issue of whether Hughes committed malpractice was properly decided by the jury based on existing negligence standards. Hughes' conduct may nevertheless have been unethical. Retainer agreements should state that: (a) the insured can submit PIP claims directly without the attorney's assistance, and (b) the attorney will take a fee from all recoveries including those that could have been submitted to the PIP carrier but were not. (Even these precautions may be insufficient: a Utah State Bar Ethics Advisory Opinion states that "in virtually all cases" it would be unethical to collect a fee on amounts collected from a client's PIP carrier.)

***FISHBAUGH v. UTAH POWER & LIGHT, SALT LAKE CITY CORP., RONALD GIBSON, AND UNISYS***

353 Utah Adv. Rep. 20 (Utah, October 2, 1998). Attorneys: L. Rich Humphreys and Phillip S. Ferguson for Fishbaugh; David A. Westerby and Bryan H. Booth for appellees.

Fishbaugh was using a downtown crosswalk at night when he was struck by a car driven by Gibson (Unisys was Gibson's employer). The streetlights, which were not working at the time, were owned by the City and maintained by UP&L. The trial court granted summary judgment for UP&L and the City, finding that, although both owed a duty to Fishbaugh to maintain the lights, there was no evidence of negligence. The case went to trial against Gibson and Unisys and the jury found in favor of Fishbaugh. Meanwhile, Fishbaugh, UP&L, and the City appealed the judge's summary

judgment decision to the Utah Supreme Court.

The Supreme Court held that a municipality has no duty to light its streets, nor to maintain those lights it installs. It does, however, have a duty to keep its streets reasonably safe and warn of dangerous conditions, and this may include the lighting of peculiar conditions. Although the Court does not characterize this as a departure from precedent, this holding effectively overrules *Richard v. Leavitt,* 716 P.2d 276, 278 (Utah 1985), which held that, having once elected to illuminate traffic, "a municipality has a duty to maintain those devices . . . ."

Thus, the district court erred in finding a general duty by the City to maintain its streetlights in the absence of a hazardous condition. The Court further stated that even assuming a hazardous condition and a duty to maintain the lights, there was no evidence as to how long UP&L and the City had notice of the lights being out. Without such evidence, Fishbaugh could not prove a failure to repair within a reasonable time and could not prove negligence. Therefore, the district court correctly entered summary judgment in favor of the City and UP&L.

The Supreme Court also found it within the district court's discretion to deny Fishbaugh's motion to amend the complaint forty-four days before trial after the trial date had already been continued twice.

***WILSON, ET AL, v. VALLEY MENTAL HEALTH***
353 Utah Adv. rep. 28 (Utah, October 6, 1998). Attorneys: James C. Hansen for plaintiffs; Kendall P. Hatch and Kevin D. Swenson for defendant.

Ronnie Kilgrow had been receiving treatment for schizophrenia at Valley Mental Health ("Valley") for about nine months. In response to his asking a police officer for a gun to protect himself from "people following him," Kilgrow was taken to Valley Mental Health, interviewed, and released. During the interview, he did not threaten violence against anyone. Upon leaving Valley Mental Health, Kilgrow went to the house of his ex-wife, Jayleen Kilgrow, strangled her, and attempted to strangle his son. Kilgrow plead guilty and mentally ill to manslaughter and aggravated assault.

Jayleen's parents, the Wilsons, sued Valley Mental Health. Third District Judge David S. Young granted summary judgment for Valley Mental Health, finding Valley Mental Health had no duty to protect Jayleen. The Wilsons appealed to the Utah Supreme Court.

The Court first noted that Utah statutory law only imposes a duty to warn on a therapist when an actual threat of physical violence is made against a specific or reasonably identifiable victim. (U.C.A. 78-14a-102(1)). Prior Utah case law has expanded this duty and held that a special relationship exists and a therapist owes a duty when "a defendant knew of the likely danger to an individual or distinct group of individuals or when a defendant should have known of such danger."

Finding prior case law to be inconsistent with the statute, the Court overruled a long line of cases including *Rolling v. Petersen,* 813 P.2d 1156 (Utah 1991), and *Higgins v. Salt Lake County,* 855 P.2d 231 (Utah 1993). In so doing, the Court narrowed the duty of a therapist to only that specified in U.C.A. 78-14a-102(1): to warn only if the patient communicates an actual threat of physical violence against a reasonably identifiable person. The broader case law duty applies only to persons not qualified as therapists and whose treatment is not overseen by a therapist as defined by the statute.

## *Legal Assistant Reception*

A reception and dinner recognizing more than 100 legal assistants in Utah who have achieved the CLA credential will be held February 26, 1999, at the Alta Club in Salt Lake City, Utah. The first legal assistant successfully completed the CLA examination in 1984 and since that time more than 100 others have attained this standard of professional competency.

The credential is one of the standards being considered for the Legal Assistant Division by the Bar Commission. Attaining the credential requires that qualified legal assistants successfully complete a comprehensive two-day examination and periodically submit evidence of continuing legal education. The program is offered by the National Association of Legal Assistants, Inc., and is administered by the National Certifying Board for Legal Assistants which is made up of legal assistants who have achieved the CLA Specialty designation, attorneys and legal assistant school program directors. Recognition of the program is nationwide, with nearly 10,000 legal assistants holding the credential.

Utah legal assistants who have achieved this standard are employed in private law firms, government agencies and private corporations throughout the state. These legal assistants will be recognized for their contributions and commitment to the legal profession through having achieved this professional standard.

For further information concerning this dinner and reception, call Marilu Peterson CLA-S at 328-4981 or Sanda Kirkham CLA at 263-2900.

# Wilson Yellowhair Takes Helm of DNA Legal Services

DNA People's Legal Services' Board of Directors chose Wilson Yellowhair as the organization's new director at its June 1998 meeting. Mr. Yellowhair is a member of the Navajo Nation who was born into the Tó Aheedlínii (Water Flow Together) clan, and born for the Tó Áhani (Near the Water) clan. His maternal grandfather's clan is Tó Dich'íi'nii (Bitter Water), and his maternal grandfather's clan is Tl'izí Laní (Many Goats). A former sergeant in the United States Marine Corps., Mr. Yellowhair has over eighteen years of legal experience and has dedicated his career to serving the legal needs of the Navajo people. Before being chosen to lead DNA, he was the organization's Director of Tribal Advocacy. His prior jobs include directing the Navajo Nation Labor Commission and working as a tribal court advocate at the Navajo Nation Department of Justice, the Office of the Prosecutor, and the Navajo Legal Aid and Defender Services. Mr. Yellowhair has also worked for DNA in the past as a tribal court advocate.

DNA is a nonprofit law firm that has, since 1967, provided low-income people living on and near the Navajo Nation and Hopi Reservation with comprehensive free legal services in areas which include family law, consumer law, public entitlements and civil rights. DNA's central office is located in Window Rock, Arizona. Its service area includes much of Northeastern Arizona, Northwestern New Mexico, and Southeastern Utah and encompasses seven distinct Native American reservations. DNA provides services to low-income residents of this service area regardless of race. The organization's primary goal is to maintain a level of decency in the lives of those affected by poverty. Since its inception, DNA has pursued an aggressive program of advocacy for the disadvantaged and actively promoted community legal education.

The Utah Bar Foundation has awarded DNA with a $25,000 grant to provide free legal services to low-income residents San Juan County, Utah. San Juan County is Utah's poorest county, with more than 36 percent of its residents living in poverty. DNA's goal for this project is to successfully address the severe shortage of legal assistance available to low-income people in Southeastern Utah. Funds from this grant will be used to pay a portion of the salaries for one attorney and one tribal court advocate stationed in DNA's Mexican Hat, Utah, office. Mr. Yellowhair wishes to express his sincere appreciation to the Utah Bar Foundation for supporting DNA's efforts to address the legal needs of low-income Utah residents.

For more information contact DNA's Mexican Hat office at (435) 739-4205 or DNA's Central office at (520) 871-4151.

## West Group Releases Trademark Practice Throughout the World

West Group announces the releases of Trademark Practice Throughout the World, an authoritative guide to managing and controlling international trademark portfolios. The new treatise provides a wealth of information for domestic and international trademark attorneys to help clients expand and protect their products and services beyond U.S. borders.

Many companies are moving into the international market, and the complex legal issues surrounding this shift require attorneys to have extensive knowledge of international trademark laws. Trademark Practice Throughout the World offers a wealth of information for attorneys, with easy-to-use materials that guide the practitioner through procedures and concepts that a trademark client will encounter while filing and enforcing marks. The guide presents proven strategies for filing marks internationally, with options to best suit individual client needs.

Trademark Practice Throughout the World also explains how to clear mark internationally and offers instruction on how to protect marks in an international environment with "how to" guidance on searching methods and techniques, the basis of the law in each country, reasons to file, examination of applications, choosing a mark, and licensing.

# *Introducing the*

## NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC.™

# CONSUMER REGIONAL DIRECTORIES

NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC.™

**CONSUMER DIRECTORY ORDER FORM**

*(please print)*

Please send me the following NAELA Regional Directory(ies) at $15 each or two for $25:

Northeast Region. Number of Copies: _____

Southeast Region. Number of Copies: _____

Midwest Region Number of Copies _____

West Region Number of Copies: _____

**TOTAL** *(one for $15 or two for $25):* $ _____

I have enclosed a check in the amount of $ _____ to cover the cost.

Please bill my VISA/MC Number _____

Expiration Date _____

Signature _____

Name _____

Address _____

City _____

State _____

Zip _____

Phone _____

Fax _____

To order, make check or money order payable and send to:

**NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC.™**
1604 N. COUNTRY CLUB RD., TUCSON, AZ 85716-3102 • 520/881-4005
520/325-7925 FAX • 520/326-2467 TDD • WWW.NAELA.ORG

*Looking for an elder law attorney in your area? Now you can easily and conveniently do so with the NAELA Consumer Directories!*

- ✔ Listing more than 3,500 members of the National Academy of Elder Law Attorneys by the following regions of the United States:
- **Northeast:** Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, West Virginia.
- **Southeast:** Alabama, District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia.
- **Midwest:** Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, North Dakota, Nebraska, Oklahoma, Ohio, South Dakota, Texas, Wisconsin.
- **West:** Alaska, Arizona, California, Colorado, Hawaii, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, Washington, Wyoming.
- ✔ Members are listed alphabetically within the states for easy reference.
- ✔ Experience registry codes are included for identification of areas of expertise.
- ✔ Elder law attorneys certified by the National Elder law Foundation are clearly identified.
- ✔ The directory is available to consumer for $15.00 each or two for $25.00.

*NAELA was formed in 1988 to enhance the quality of legal services available to older persons in the United States. Members of NAELA are attorneys who have demonstrated experience and training in working with the legal problems of older Americans. NAELA currently has more than 3,500 members across the United States.*

**ETHICS: "WHY BAD THINGS HAPPEN TO GOOD LAWYERS"**

Date: Friday, December 11, 1998
Time: 9:00 a.m. to 5:00 p.m. *(Registration begins at 8:30)*
Place: Utah Law & Justice Center
Fee: $187.50
CLE Credit: 6 HOURS

**NATIONAL PRACTICE INSTITUTE: "EVIDENCE FOR THE TRIAL LAWYER"**

Date: Friday, December 11, 1998
Time: 9:00 a.m. to 5:00 p.m. *(Registration begins at 8:00)*
Place: Utah Law & Justice Center
Fee: $195.00 before 12-4-98; $205.00 after, special rates for groups available
CLE Credit: 7.5 HOURS

**TRIAL ACADEMY 1998: PART VI: "SUMMATION, TRIAL MOTIONS AND SPECIAL VERDICTS"**

Date: Wednesday, December 16, 1998
Time: 6:00 p.m. to 8:00 p.m. *(Registration begins at 5:30)*
Place: Utah Law & Justice Center
Fee: $25.00 for litigation section members; $35.00 for non-members
CLE Credit: 2 HOURS CLE/NLCLE

**PROCRASTINATORS VIDEOS: CREDIT FOR CLE SELF-STUDY (NOT NLCLE APPROVED)**

Date: December 30, 1998
Time: 8:30 a.m. to 12:00 p.m. & 1:00 p.m. to 4:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 per session

**LAW AND ECONOMIC SOCIETY: MAXIMIZING THE VALUE OF INTELLECTUAL PROPERTY – RICHARD HOFFMAN, PRICEWATERHOUSECOOPERS**

Date: Thursday, January 7, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1 HOUR

**ALI-ABA SATELLITE SEMINAR: "1999 UPDATE: THE CLEAN WATER ACT"**

Date: Thursday, January 21, 1999
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 Regular Registration
$125 Government Employees
*(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

*Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 297-7033, 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 Connie Howard, CLE Coordinator, at (801) 297-7033.*

## 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.

**ALI-ABA SATELLITE SEMINAR: "TWO MERGERS & ACQUISITIONS MINI-COURSES; 1) PROTECTING THE M&A DEAL: NEGOTIATING 'WALK RIGHTS,' 'LOCKUPS,' AND OTHER DEALS, AND 2) FINANCIAL AND ACCOUNTING PROVISIONS IN ACQUISITION AGREEMENTS"**

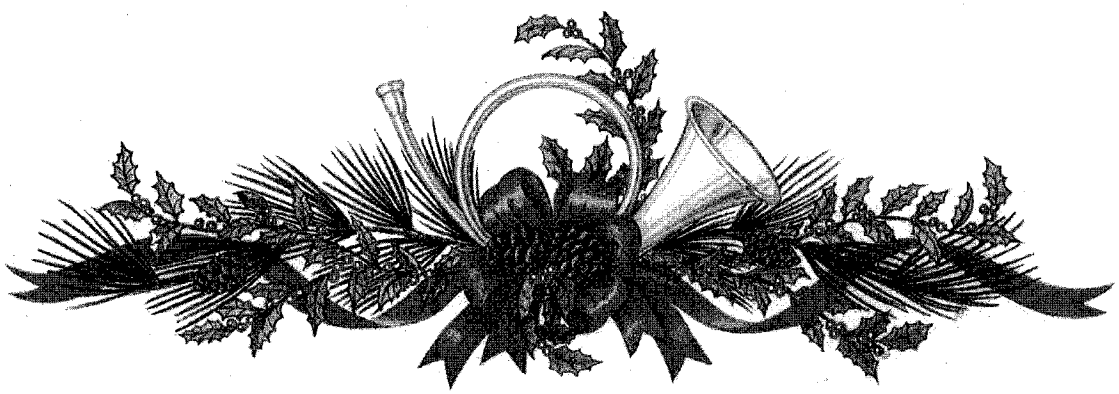
Date: Thursday, January 28, 1999
Time: 10:00 a.m. to 11:30 a.m. and 12:00 p.m. to 1:30 p.m.
Place: Utah Law & Justice Center
Fee: $125.00 per program or $195 for both;
$65/95 for government employees;
$25/40 for students
*(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 1.5 HOURS per program

**LAW AND ECONOMIC SOCIETY: THE LAW AND ECONOMICS OF CONSTRUCTION CLAIM DAMAGES – PAUL FICCA, ARTHUR ANDERSON**

Date: Thursday, March 11, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1 HOUR

**"FOR WHATEVER FLOATS YOUR BOAT: TITLE ISSUES OF TITANIC PROPORTION"**

Departure: February 8, 1999
Return: February 12, 1999
Fee: $835.00 for cruise and CLE; $440 for Guest *(To register, please call Connie Howard @ 297-7033)*
CLE Credit: 12 HOURS



# HAPPY HOLIDAYS!

*from*

*The Utah State Bar*

# 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.

## BOOKS FOR SALE

**UTAH CODE:** Completely updated Utah Code, in mint condition, $475.00 Contact Dave Patterson, (801) 298-7200.

## POSITIONS AVAILABLE

**Corporate Counsel:** A Utah County corporation is seeking corporate counsel with three to five years of litigation experience. Applicants must be a member in good standing with the Utah State Bar or be able to become a member within a six-month period. Excellent written, verbal and oral skills are required. Send resume and cover letter to: Attn: Legal Recruiter, P.O. Box 447, Payson, Utah 84651.

Growing Salt Lake City law firm of seven attorneys is seeking attorney to fill associate position. Must have 3-4 years corporate and transactional experience. Competitive salary. Bonus opportunities. Fringe benefits including health, disability and 401K. Please submit resumes to Confidential Box #59: Attention Maud Thurman, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

Salt Lake City Business and estate planning firm seeks attorney with 2-3 years business and estate planning experience. Position involves significant client contact and excellent written and verbal communication skills are required. Inquiries will be kept confidential. Please send resume and references to: Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #60, Salt Lake City, Utah 84111.

A.V. Rated St. George law firm seeks litigation/trial attorney with 2-3 years experience. Strong credentials, writing skills and references required. Inquiries will be confidential. Send resumes or inquiries to Personnel Department, 134 North 200 East, Suite 300, St. George, Utah 84770, or fax to (435) 628-3275. Contact Curtis Jensen @ (435) 628-3688 or cjensen@snowjensen.com.

**ATTORNEY:** Corporate Counsel needed with at least 2+ years experience. Will handle a variety of matters with emphasis on corporate law and oil and gas. Requirements include JD and a license to practice in Utah. Salary flexible in accordance with experience and credentials. Health insurance and stock option included. Please send resume to EuroGas, Inc. in care of P.O. Box 45561, Salt Lake City, Utah 84145-0561.

LOGAN LAW FIRM SEEKS ASSOCIATE WITH 2-5 YEARS EXPERIENCE. IMMEDIATE OPENING. BASE SALARY + incentive. Excellent law school record and writing ability required. Areas of practice: Litigation, tax, business law and family law. Send resume to Olson & Hoggan P.C. Attn: Miles Jensen P.O. Box 525 Logan, Utah 84323-0525

## POSITIONS SOUGHT

**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) 994-2675.

**AVIATION ATTORNEY:** Let me assist you with that aviation case. Twenty years experience in Aviation Law. Chief, Aviation Law, U.S. Air Force. Commercial Pilot, Multi & Single Engine Certified Flight Instructor. Experience includes: Air crash investigations, claims & litigation, pilot disciplinary actions. Aviation business disputes. Wendell K. Smith, 275 East 850 South, Richmond, UT 84333, (435) 258-0011.

CIVIL – COMMERCIAL LITIGATION ASSOCIATE: Three-year associate, currently licensed in Florida, relocating to Salt Lake City by year's end. Will be sitting for February 1999 Bar Exam. Experience includes products liability, personal injury defense, PIP/BI/UM defense, med-malpractice, Title VII claims, and worker's compensation. Leaving top litigation firm. Contact: Holly B. Platter, 530 Harbor Drive N., Indian Rocks Beach, FL 33785. (727) 595-2658.

## OFFICE SPACE / SHARING

"Class A office sharing space available for one attorney with established small firm. Excellent downtown location, two blocks from courthouse. Complete facilities, including conference room, reception area, library, telephone, fax, copier. Excellent opportunity. Please call Larry. R. Keller or A. Howard Lundgren @ (801) 532-7282.

Space to share with other attorneys in downtown Ogden – 1/2 block from the District & Federal Courthouses. Will remodel to suit. Contact Heather @ (435) 621-6119.

Office space available for one or two attorneys one block from Matheson Courthouse. Receptionist, copier, fax and telephone system available. Call (801) 575-7100.

**Exchange Place Historical Bldg.,** located half block from new courts complex, has 844 sq. ft. office space, includes reception area, small conference room for $975.00 month, and a 480 sq. ft. space for $750.00a month, and 350 sq. ft. space for $380.00. Receptionist, conference room, fax, copier and library are negotiable. Parking available. Contact Joanne Brooks @ (801) 534-0909.

**SHARE OFFICE SPACE** with two established attorneys. Walk to State and Federal Courthouses. Judge Building, Third South and Main. Office overlooks Third South. Copier, fax conferences room, secretarial desk. Call Steve @ (801) 554-8252.

Small law firm downtown with deluxe office space for one attorney. Facilities include private office, receptionist, conference room, limited library, fax, copier, telephone system, kitchen facilities. Call Lori @ (801) 532-7858.

**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. Call (801) 539-8515.

Deluxe office space for one attorney. Share with three other attorney's. Includes large private office, reception area, parking immediately adjacent to building, computer networking capability, law on disc, fax, copier, telephone system. Easy access in the heart of Holladay. Must see to appreciate. 4212 Highland Drive. Call: (801) 272-1013.

## SERVICES

**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.

**SEXUAL ABUSE-CHILD ABUSE/DEFENSE: IMPEACH** child's out-of-court testimony. **IDENTIFY** sources of error with interviewer questioning, bias, props, and procedures. **ASSESS** statement reliability and contamination. **DETERMINE** origin of allegations and alternative hypotheses. Bruce Giffen, M.Sc. Evidence Specialist. American Psychology-Law Society. (801) 485-4011.

We are a finance company willing to lend money to plaintiffs in personal injury lawsuits so they can support themselves while they are waiting for trial or a better settlement. Please call Delaware Funding @ (801) 532-6545.

***Environmental Law Committee Brown Bag Lunch***

Date: January 14, 1998 at 12:00 p.m.

Location: Kirton & McConkie
60 East South Temple, #1800
Salt Lake City, Utah

Topic: Environmental Law Committee Brown Bag Planning Meeting.

# Get To Know Your Bar Staff

**SUMMER SHUMWAY**

"An old soul in a young body . . ." Summer Shumway epitomizes maturity in the workplace at the Utah State Bar. What most people do not realize is that she is only 21 years of age. Summer began working for the Bar 2 years ago. She was originally hired as a receptionist, but it was quickly realized that her computer talents and delightfully fresh personality would be a great addition to the administrative offices. She provided much needed help with computer support, where she now resides as the content editor of the Bar's Web site.

This native Utahn is currently pursuing an English major and a music minor from Westminster College. Her schooling fits in nicely with her hobbies and talents. Summer currently plays the guitar and saxophone and would like to explore new musical instruments if she could find the time. Summer makes every second count. If she is not at school or working she is spending time with her husband, Tracy of 1 1/2 years. That would be a full load for most people, but "Super Summer" also finds time to read Shakespeare, watercolor and go boating and camping with her husband and friends. Summer enjoys all outdoor activities; she lives her life the way many wish they could. She works hard and plays hard, achieving and maintaining a high standard of excellence in both realms. This is attributable to Summer's passion for life, she injects her witty, charming personality into everything that she does. Summer has just been certified to teach English as a Second Language, in order to help those challenged by language barriers. If you haven't had the pleasure of getting to know Summer, you should do yourself a favor and get to know this hard-worker.

**CAROL STEWART**

Carol is Deputy Counsel in the Office of Professional Conduct. She earned a Bachelor of Arts degree in history from the University of California at Berkeley in 1981. She earned her Juris Doctorate from the University of Southern California in 1984.

Carol began her legal career as an associate in a mid-sized law firm in Los Angeles working in civil litigation. In 1988, she accepted a position as a Senior Litigator with the State Bar of California in the Office of Trial Counsel where she supervised the investigation of client complaints and prosecuted disciplinary cases on behalf of the California Bar.

Carol was admitted to the Utah Bar in May of 1995 after relocating to Salt Lake City. She worked as a consultant to the Office of Professional Conduct, Utah State Bar ("OPC") before coming on board to serve as Deputy Counsel.

Carol's latest "pet project' is Rosebud (pictured), a one-year old English Springer Spaniel.

# *DIRECTORY OF BAR COMMISSIONERS AND STAFF*

## BAR COMMISSIONERS

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

**Charles R. Brown**
*President-Elect*
Tel: 532-3000

**John Adams**
Tel: 323-3301

**Theresa Brewer Cook**
Tel: 578-8554

**Scott Daniels**
Tel: 583-0801

**Sharon Donovan**
Tel: 521-6383

**Calvin Gould**
Tel: 544-9308

**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)

***Brian W. Jones**
President, Young Lawyers Division
Tel: 594-8177

***H. Reese Hansen**
Dean, Law School,
Brigham Young University
Tel: 378-6383

***Marji Hanson**
Women Lawyers Representative
Tel: 378-4276

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

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

***Scott M. Matheson, Jr.**
Dean, Law School,
University of Utah
Tel: 581-6571

***Charlotte L. Miller**
Immediate Past President
Tel: 269-1532

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

***Narda Beas-Nordell**
Minority Bar Association
Tel: 495-7446

***Steven M. Kaufman**
Representative to Judicial Council
Tel: 394-5526

## 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

Maud C. Thurman
*Executive Secretary*
Tel: 297-7031

Katherine A. Fox
*General Counsel*
Tel: 297-7047

**Access to Justice/Pro Bono Department**
Toby J. Brown
*Administrator*
Tel: 297-7027

*Pro Bono Coordinator*
Tel: 297-7049

**Continuing Legal Education Department**
Toby J. Brown
*Administrator*
Tel: 297-7027

Connie Howard
*CLE Coordinator*
Tel: 297-7033

Marie Gochnour
*Section Support*
Tel: 297-7032

**Technology Services**
Toby J. Brown
*Administrator*
Tel: 297-7027

Lincoln Mead
*Manager Information Systems*
Tel: 297-7050

Summer Shumway
*Web Site Coordinator*
Tel: 297-7051

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

Sadie Eyre
*Admissions Assistant*
Tel: 297-7025

**Bar Programs & Services**
Christine Critchley
*Bar Programs Coordinator*
Tel: 297-7022

Monica N. Jergensen
*Conventions*
Tel: 297-7024

**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**
Juliet Alder
*Law & Justice Center Coordinator*
Tel: 297-7030

**Consumer Assistance Coordinator**
Jeannine Timothy
Tel: 297-7056

**Lawyers Helping Laywers**
Tel: 297-7029

**Receptionist**
Marie Van Roosendaal (Mon., Tues. & Thurs.)
Kim L. Williams (Wed. & Fri.)
Tel: 531-9077

**Other Telephone Numbers & E-mail Addresses Not Listed Above**

Bar Information Line: 297-7055
Web Site: www.utahbar.org

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

Member Benefits: 297-7025
E-mail: ben@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

Shelly A. Sisam
*Paralegal*
Tel: 297-7037

## *REMINDER*
## *Mandatory Continuing Legal Education Compliance*

Pursuant to Rule 5 Rules And Regulations Governing Mandatory Continuing Legal Education attorneys who are on the even year compliance cycle are required to file a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by January 31, 1999. The "Certificate of Compliance" shall include the completion of all accredited continuing legal education ending with the preceding 31st day of December.

The general Mandatory Continuing Legal Education requirement is twenty-four (24) credit hours of approved Continuing Legal Education per two-year period. plus three (3) credit hours of approved ETHICS, for a combined twenty-seven (27) hour total.

New Lawyers are required to complete the following: a) a one day New Lawyers Continuing Legal Education seminar which is given annually; b) twelve (12) credit hours of approved live NLCLE workshops that are sponsored by the Utah State Bar; and c) twelve (12) credit hours of approved continuing legal education.

Attorneys are required to maintain their own records as to the number of hours accumulated. The attached "Certificate of Compliance" shall include all programs that have been attended that satisfy the Continuing Legal Education requirement, unless you have received an exemption from the Utah State Board of Continuing Legal Education.

Should you have questions regarding the legal education requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator, at (801) 531-9077.

*In Memory of*

# GORDON KIRK JENSEN

*(1957-1998)*

**Partner and Friend**

*There are so many things I wanted still*
*To do – so many things to say to you . . .*
*Remember that I did not fear. It was*
*Just leaving you that was so hard to face.*
*We cannot see Beyond, but this I know:*
*I loved you so – 'twas heaven here with you.*

We'll miss you Gordy

**LEHMAN, JENSEN & DONAHUE, L.C.**
Salt Lake City, Utah

# 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.

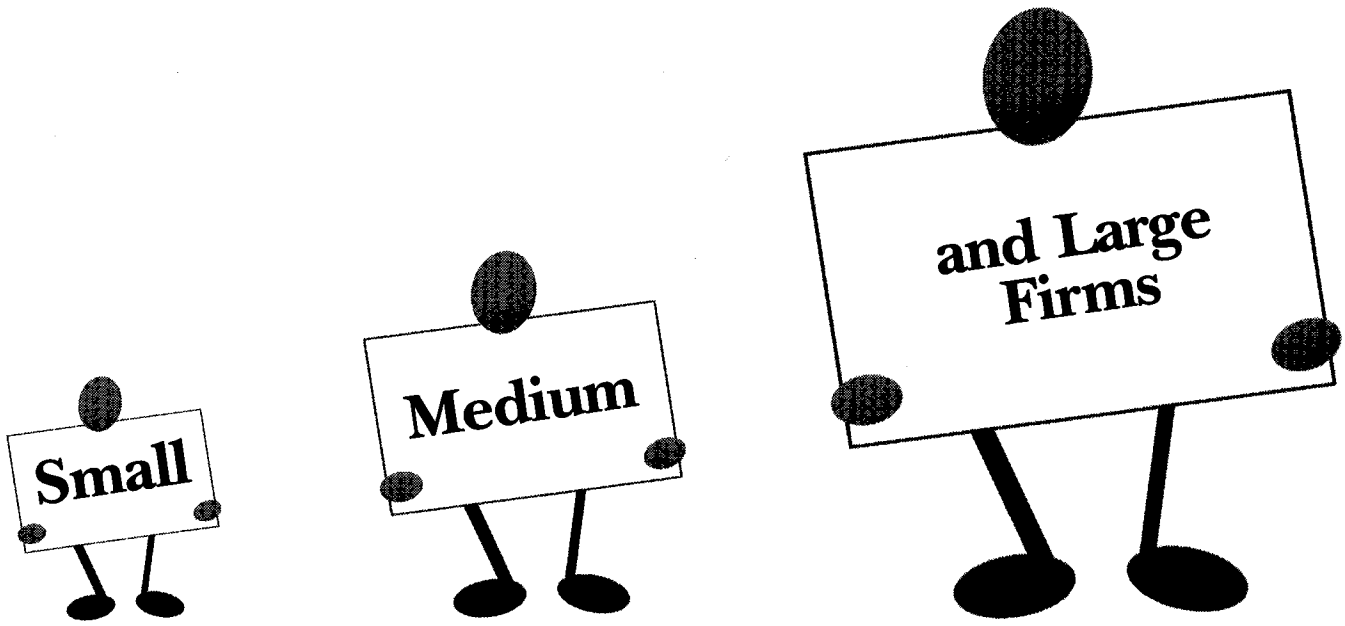
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

**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.




# The Best Solution for All Law Firms

As the law firm administrator, you do whatever it takes to find the best professional liability insurance for your law firm.

Well, your job just got easier.

Now you can choose experience, quality and financial strength that are greater than any other company.

Pick us, and you have the best combination of responsive, proven and fair claim handling, the most unique coverage options, competitive pricing – and more.

- ***We're here for you:*** For 25 years, firms have relied on our underwriters.
- ***We protect firms:*** Over 25,000 small, mid-size and large law firms trust us to insure and defend them.
- ***Your best choice:*** More bar associations endorse us than any other insurance company.
- ***Strength for you:*** Westport has the highest ratings: AAA by Standard & Poor's (claims-paying ability), and A++ by A.M. Best (top financial strength).
- ***Reduce your overhead:*** Firms insured with Westport have full access to the Business Services program, a range of excellent products and services at special, low GE negotiated prices.

Endorsed by the Utah State Bar

Utah State Bar

Program Administrator:

CONTINENTAL INSURANCE AGENCY, L.L.C.

1-801-466-0805

**Westport**

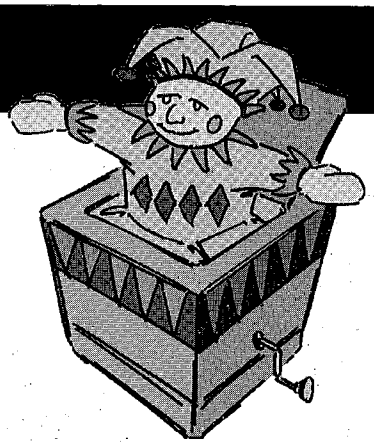
*A GE Capital Services Company*

*Westport Insurance Corporation*
*Incorporating Coregis Lawyers Programs*
*www.coregis-westport.com*

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

MR. WILLIAM D. HOLYOAK
PARSONS BEHLE & LATIMER
201 SOUTH MAIN STREET, SUITE 1800
P. O. BOX 45898
SALT LAKE CITY UT 84145

BULK RATE
U.S. POSTAGE
PAID
SALT LAKE CITY, UT
PERMIT NO. 844



# With MVP, Ease of Use keeps popping up.

## LEXIS®-NEXIS® just got easier for solos and small law firms in Utah.

Whether you're a PRO or a novice, with LEXIS-NEXIS MVP it's easier than ever to use the power of your computer to conduct your legal research. Offering you more flexibility and more affordability than any other online legal research program, MVP allows you to mix and match the state, federal and specialty materials you use most. With MVP's easy-to-use features, you can ...

- **IMMEDIATELY ASSESS** the key points of law and factual issues of the cases you find – from actual language used by the court – with new Core Terms ... an alternative to headnotes!
- **LINK QUICKLY** to relevant federal and state cases, statute sections and law reviews outside of your flat-rate library, from virtually any jurisdiction, at no additional charge.
- **ACCESS ON THE INTERNET** through an easy-to-use browser interface.

Predictably priced for solos and small law firms, LEXIS-NEXIS MVP gives you more coverage and more current, comprehensive information — all for one flat monthly rate!

**MVP Utah**
$100*/month

Includes unlimited access to:

- UT Caselaw from 1945
- UT Code Annotated (current and archived)
- UT Court Rules
- UT Administrative Files
- UT UCC Filings
- UT Bankruptcy Filings
- UT Regional News
- UT Journals and Law Reviews
- UT Martindale-Hubbell® Listings
- And more!

PLUS, add unlimited use of the premier citation service — **SHEPARD'S® Citations** or state Deed Transfers and Property Records to your MVP Utah library — all for an additional low monthly flat rate.

A MEMBER SERVICE OF
UTAH STATE BAR ORGANIZED 1931
DISCOUNTS AVAILABLE!

MVP

**Easier Than Ever.**
**No Hidden Costs. No Surprises.**
**1-800-356-6548 ask for ext. 1198**
www.lexis.com

**YEAR 2000 COMPLIANT**
**Upgrade Now!**
**1-800-925-9265**

* Price quoted is for one attorney. Additional charge applies to each attorney in the firm. Note: State and local taxes not included. Some restrictions may apply. Prices subject to change. LEXIS and NEXIS are registered trademarks of Reed Elsevier Properties Inc., used under license. The INFORMATION ARRAY logo is a trademark of Reed Elsevier Properties Inc., used under license. SHEPARD'S is a registered trademark of Shepard's Company.


LEXIS·NEXIS®
A member of the Reed Elsevier plc group