Utah Bar JOURNAL

Calvin E. Thorpe
May 22, 1938 – March 6, 1999

Volume 12 No. 4
April 1999

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

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: Calvin E. Thorpe – Editor, *Utah Bar Journal* 1988-1999.

Members of the Utah State 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.

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Letters to the Editor

Dear Editor:

I applaud Michael Hutchings' and Gerald Smith's article on the increasing, but ignored, problem of crime in Utah, especially in areas of rape and larceny. Telling the truth about Utah's low incarceration rate and the resultant increases in crime are truths people do not want to hear.

It is never popular to be a "Jeremiah" whose warnings to ancient Israel went unheeded because they were experiencing material prosperity. Similarly, our state has experienced significant prosperity and politicians and government officials do not want to hear truths which point to unpleasant societal ills. This attitude has resulted in grossly insufficient funding for correctional officer salaries, programs, and prison construction.

However, while it is true that we need to incarcerate more violent felons for longer periods of time, we must also not forget the almost universally-acknowledged root problem of increased crime: the decay of the traditional family. While building prisons on one hand, we need to equally ensure that our laws, rules, policies, and government funding build strong families. The most glaring question posed, however, from the article is, where are the leaders that will boldly tackle these herculean tasks?

Frank D. Mylar, J.D., M.B.A.

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 532-1234 or write, *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

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 of each letter if and when a letter is rejected.

Thanks Cal

by James C. Jenkins

Cal Thorpe is an imposing man. In physical stature, he was much larger than most folks. In terms of life's accomplishments, he was also great. Cal was a successful student, scientist, athlete, teacher, counselor, husband and father, businessman, citizen, volunteer, and much more; and, he had a big heart.

We have all been shocked to learn that on Saturday, March 6, 1999, Cal and his wife, Pat, while returning home from the mid-year meeting in St. George, were both killed in a traffic accident near Nephi. They had gone to St. George to make sure there were pictures of the mid-year meeting for the next *Bar Journal*. I had last spoken with Cal after the Friday night dinner at the Dixie Convention Center. Our topic was one of his favorites – the *Utah Bar Journal*.

For over 10 years, Calvin E. Thorpe has been editor of the *Bar Journal*. Largely at his direction, the *Bar Journal* has been the voice of the Utah State Bar. It is published nearly every month, and it is recognized not only in Utah, but nationally as a quality professional publication. Cal would not have had it any other way. He dedicated hours every month to assure the quality of the *Bar Journal*, and its quality is even more impressive when one considers that the *Bar Journal* is produced by a committee of unpaid volunteers.

Each of us can thank Cal for this continuing and tangible way of identifying with our profession – the *Utah Bar Journal*. He has left big shoes to fill; he will be missed.

In Memory of Calvin E. ("Cal") Thorpe 1938-1999

Cal Thorpe, the editor of the *Utah Bar Journal* and a partner in the law firm of Thorpe, North & Western died in an auto accident on Saturday, March 6th. He was returning home from the Mid-year Bar meeting in St. George. He will be missed terribly by those fortunate enough to know him.

Cal was raised in Springville and attended Springville High School. His name is in the school's basketball Hall of Fame. Throughout his life he remained connected to Springville. He continued to return there to cheer on the Springville High School teams, having attended his last game there a few days prior to his death.

Cal earned a bachelor's degree in physics from Brigham Young University, where he also played basketball. He went on to earn a Master of Science degree at the University of Pennsylvania. He completed a graduate study program at Bell Telephone Laboratories before earning his law degree at Seton Hall University. He was a founding member of Thorpe, North & Western and was a member of the U.S. Patent Bar.

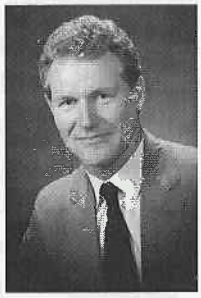
His personal interest in basketball continued as an adult. He coached youth basketball teams and played regularly with ward teams. He volunteered to serve as coach and player which allowed him to decide when he went out of a game. As a coach he rarely put himself out, but fouls often took care of that for him.

He contributed to his community and wanted to see orderly development. He helped found the Sandy City Chamber of Commerce and served as its chairman. He received the Sandy Total Citizen Award and was a member of the Sandy City Planning Commission. His service on the Planning Commission lasted for nine years, which included tenure as Chairman. He was instrumental in community planning, in the community transportation plan and in drafting sign ordinances for Sandy City. He received the Citizen Planner Award, and was a member of Sandy City's first beautification committee. He served for eight years as a director of the Salt Lake Metropolitan Water Board, having been appointed to that position by Sandy City. Sandy City Mayor Tom Dolan said about Cal: "He was one of the modern day founders of what Sandy City is today. He helped immensely to move the city ahead. He was an advisor to former mayors and myself. He was irreplaceable. He will be greatly missed."

Cal was an adjunct professor for the University of Utah, where he organized and taught a class in intellectual property law for engineers and scientists. He also taught at Brigham Young University.

Members of the Bar know him best for his work as editor of the *Bar Journal*. Cal served as a member of the *Journal* committee for 16 years, including 11 years as editor. Randy Romrell, associate editor and one of the founders of the *Bar Journal* in 1973, recalls the following about Cal's leadership:

> "Immediately after he assumed the role of editor, Cal significantly increased the size and involvement of the committee. This committee spent many hours in meetings in the former bar offices discussing the mission of the *Journal*, and the goals and objectives we should pursue. In law school I had written a paper about the purpose of bar journals, based on comprehensive study I had done of other states' journals. At the initial meeting, Cal distributed a copy of my paper to the committee and brought a sampling of journals for us to consider. It was important to him that we draw on the experience of other states, blended with our own good ideas, in producing the best and most helpful publication we possibly could.
>
> He had a gift for encouraging discussion and participation of all the members. With tact and humor he skillfully led the group to a consensus, made assignments, and followed up. The result was an attractive 8½ x 11 format, new layout, new cover design (featuring photographs of Utah scenes taken by members of the Utah Bar), and an entirely new direction in terms of articles, departments, and features. Cal was a champion of the practical, how-to-do-it articles, as opposed to the more esoteric articles found in traditional law reviews. He was always on a quest for excellence and improvement, as evidenced by the updated journal design introduced last year. Under Cal's leadership the *Journal* has become a publication of which we may all be justly proud, probably the best of any of the states. And for those of us who have been privileged to work closely with him, he made it a lot a fun!"



Under his leadership the publication increased in quality, content and circulation. His leadership and influence among members of the *Bar Journal* staff and committee gained him respect and appreciation while he served which makes this loss all the greater. He carried the responsibilities as editor with a grace and nonchalance that belied the effort it took. Under his direction, despite the pressures of meeting monthly deadlines, the committee functioned in a congenial and efficient joint effort. There was never any bickering or dispute despite the opportunity this pressure afforded the strong personalities involved in the effort. The focus on the job to be done and the friendly way in which it all got done was because of Cal's guiding hand.

As Bar President James C. Jenkins put it: "Cal was extremely dedicated to the *Bar Journal*. He was a 'hands-on' editor. He was protective of the publication, including its cover and each article. He kept a close eye on how it fit together each month. He met frequently each month with the *Bar Journal* staff and committee to make the publication work. And it is all the more remarkable because his service was voluntary and unpaid. It will be extremely difficult for anyone to measure up to Cal's dedication to the *Journal*, the Committee and the Bar."

Cal was always interested in the individual. He would frequently inquire about how you were doing, how your family was, or how a particular child was doing. And he meant it. He was genuinely concerned about people and loved serving the youth of his church ward. He would often take teenagers aside, listen carefully to them, and offer his assistance. He got their attention. He earned their respect. He gave them the benefit of his considerable wisdom, which oftentimes involved just listening. But he could also be a skilled interviewer and had a tendency to ask disarming questions that penetrated to the heart of the matter. This was true when guiding youth, when addressing friends, when serving in Church responsibilities and when practicing law.

Cal also had a sense of humor. Maud Thurman, Bar staff liaison for the *Bar Journal*, commented on Cal's humor: "He loved to tease. He did it 'tongue in cheek' and I think some misunderstood that. I would say: 'Here comes the king, let me roll out the red carpet' and Cal would say 'Alright, I'll step back and wait for you to get that done.' He had the gift of gab, knew so many members of the community, and kept up on their lives. He also liked playing matchmaker. Single young women would be told by Cal that a particular young man was interested in her and was going to call her. Then he would call the young man and ask if he had called her. He would explain that she was expecting him to call and that he had better do it or it would make Cal look bad. Cal attended more than a few weddings that he had originally set in motion."

Former Judge Michael Hutchings recalled an incident involving his own son. Cal and Judge Hutchings were in the same church ward. Judge Hutchings' son had declined an advancement in the priesthood to the surprise and consternation of his parents. After several months of concern and quiet nudging of the son, he finally indicated his willingness to go forward with the advancement. Just after this, Cal mentioned to Judge Hutchings how appreciative he was that his son had finished the basketball season with his quorum instead of advancing to another quorum and team. Judge Hutchings, upon learning of Cal's contribution to this delay in priesthood advancement, asked Cal if he thought it was right to delay such an event for basketball. Cal responded: "You have to iron your priorities out. Which is more important, priesthood advancement or winning a basketball tournament?"

After *Bar Journal* committee meetings, on more than one occasion, he would inspect Denver Snuffer's Harley Davidson as he contemplated the necessity of acquiring one himself. He wondered if his Pepperwood neighbors would object to another noisy machine rumbling through the neighborhood. After being reminded there were judges who rode Harleys, Cal responded: "Yes, but judges don't worry about being good neighbors."

He was given a baseball cap by grateful young men he had coached, with "CAL" inscribed on it. He appreciated that they had taken the time to get his name inscribed on it. When told it was from the University of California at Berkley, he said: "Well, I'm willing to share my name with them."

Cal was a consummate professional. He specialized in patents involving electrical engineering. His clients included Sarcos Inc. and Evans & Sutherland Computer Corp. When asked about being a partner with Cal, Wayne Western said: "We were together for over twenty years. It was wonderful. I trusted him. I never checked up on him or had to check on him. I never questioned what he did, he pulled his share and we 'shared and shared alike' as partners. He was trusted and trusting of others." Commenting on Cal's personal traits, Wayne observed: "He had a sense of humor you just had to know. Cal was the most unique person I have ever met. He was one of a kind. Just like Frank Sinatra, he did it his way."

His work as a patent attorney required careful drafting and editing. Wayne Western commented that "Cal loved to edit things. He would go through a junior associates' best work and

still find something to edit and improve." These skills were suited to his role on the *Utah Bar Journal*. Former Utah Supreme Court Justice D. Frank Wilkins commented that "Cal was excellent at his responsibilities at the *Journal* and in seeing it go out each month. It was such an enormous task, but his easy-going appearance and grace did not reveal all the work he did."

Commenting on Cal's ability as a manager over the *Bar Journal*, Justice Wilkins stated: "He moved with dispatch and with a sense of humor. He accomplished as much each meeting as I've seen in any committee of the Bar, but in a surprisingly short period. The warmth and cordiality of the *Bar Journal* Committee was a reflection on Cal and his pursuit of excellence."

The auto accident in which he died took the life of his wife, Patricia ("Patsy") also. These two were high school sweethearts married thirty-eight years. The couple is survived by daughters Amber, Jill and Linda Thorpe, all of San Francisco; son Mark and his wife, Jamie, of Florida; son Mike and his wife, Laura; and son Craig, all of Salt Lake City.

As best put by Justice Wilkins: "This was a great loss to the Bar and an unspeakable loss to his friends and family." We will miss Cal. And a grateful Bar acknowledges his long, selfless and effective service.

"Wouldn't Take Nothing for My Journey Now"

by Theresa Brewer-Cook

As a new public member of the Bar Commission, I had a great deal of reservation and anxiety about writing this article. I had reservations because I am not a lawyer; I had anxiety because I don't write like a lawyer. Initially, I wanted to write about either the Child Abuse Database or the Racial and Ethnic Task Force. Instead, I decided that as the "new kid on the block" I would give you a brief overview of my seven months experience as a Commissioner

During these seven months, one of the most important things I have learned (as so eloquently stated by Maya Angelou) is that "human beings are more alike than unalike and what is true anywhere is true everywhere." As simplistic as this sounds, think about it a minute – are we really as different as we think we are? We may have different lifestyles and cultural backgrounds, but do we not want the same for the good of the whole?

As the Commission strives to achieve that good, controversy on a few issues has evolved, but is it not controversy that allows us to share our perceptions? Is it not an opportunity for creativity and innovation? Is it not this same type of innovation from which *And Justice For All, Equal Access to Justice,* and the *Racial and Ethnic Task Force* have evolved?

Despite criticism, the Commission's strong leadership, commitment and responsiveness to the needs of the members will continue to nurture an environment of growth and well-being. Moreover, continued support and input from the members is an integral part of the Commission remaining stead-fast in facilitating the Bar's mission of seeking ". . . a justice system that is understood, valued, respected and accessible to all." Understanding this mission has led me to more closely analyze the historical issues of our country; to integrate and apply those issues to our present structure, and to prepare for a future of greater solidarity.

As I close, I take this opportunity to thank those who supported my nomination and appointment to the Commission. I want to also express heartfelt gratitude to my most distinguished colleagues for their respect, support and encouragement. You are a fantastic group of lawyers and non-lawyers blessed with compassion, wisdom, and a great sense of humor! Like Maya, I say to you, "Wouldn't take nothing for my journey now!"

Role, Ritual and Civility in Litigation

by Gary L. Johnson

I.

> Civility assumes that we will disagree; it requires us not to mask our differences but to resolve them respectfully.[1]

I enjoy the company of lawyers. Nowadays, I know that sounds like the punch line to a joke, but it is true. I particularly enjoy the company of other trial lawyers. Lawyers are an eclectic group. Our backgrounds range from accounting and psychology to engineering, political science and medicine. While we are all trained in law school, however, to "think like lawyers," we are not necessarily trained how to act the part.

As lawyers, we are part of a common, historical enterprise. Quite simply, through our daily professional activities, we create and continue the common law and the interpretation and application of statutes. It is the results of our work that produce, more and more, the rules of conduct by which individuals govern their behavior in both the public and private spheres. Sometimes we fail to collectively appreciate the contributions that all of us make – including our opposing counsel in every case – to this collective enterprise in which we are engaged. The common law is not some abstract principle to be debated in law school classrooms, it is a living dialectic played out in every courtroom and conference room where lawyers carry on their trade.

This article is intended to present a program or approach for maintaining civility and professionalism that is based as much upon my observation of other, better lawyers, as it is my own experience. When I first started to practice law, I had the opportunity and privilege of having my nose bloodied by some of the finer trial lawyers in our state. I learned more from those experiences than just technical, legal knowledge. This article is, in part, a tribute to those senior members of the Trial Bar who have been both my adversaries and teachers.

II.

> The complexity of a model is not required to exceed the needs demanded of it.[2]

The premise of this article is not a complicated one. It rests upon certain fundamental propositions. The first is that as lawyers, we are playing a particular role in civil society. That role calls for certain types of behaviors and embodies certain prescriptions and prohibitions.

The second proposition is that in order to facilitate and enhance those aspects of the lawyer's role that embody civility and professionalism, what I call "lawyer rituals," can play a strong supporting part. Although we have occasion in our private lives to utilize ritual to solemnize and seal certain relationships and behaviors, we tend to forget its importance in our professional life. Finally, I submit that it is important that we understand and acknowledge that civility is an important behavioral trait of the lawyer's role and one that must be actively reinforced. The scope of this analysis is admittedly narrow. First, we will briefly examine how roles and rituals interact in our professional life.

III.

> The terms *role category* and *position* refer to a grouping of persons whose behavior is subject to similar expectations. The person in the role category is referred to as the *role player* or *actor*.[3]

All of us occupy positions in the major institutional social structures that organize civil society. These institutional structures include family groups, religious organizations, social groups, occupational groups, etc. For each of the positions that any one of us hold in any of these social institutions, there is an appro-

Gary L. Johnson obtained his law degree from the University of Utah in 1984, where he was a Leary Scholar, received the American Jurisprudence Award in Administrative Law and the University's Garr Cutler Energy Award, and was the Editor-in-Chief of the Journal of Contemporary Law. *He is a member of Defense Research Institute, the American Bar Association and the Utah State Bar. Mr. Johnson has published numerous articles ranging in subject matter from decommissioning nuclear reactors to the enforceability of exculpatory clauses in hazardous recreational activities contracts.*

Gary is a shareholder and director at the Salt Lake City law firm of Richards, Brandt, Miller & Nelson where his practice emphasizes products liability, insurance and corporate law, including jury and bench trials.

priate "role" or a certain constellation or repertoire of expected behaviors.

Each one of us lives not acting out only one role, but enacting a number of roles that determine our behavior in relation to different individuals in different situations. Some of the roles that we play throughout our life are determined at our birth: e.g., gender roles. Other roles that make up our life, e.g., occupation or religious affiliation, can result from individual achievement or random chance.

Examine your own life: on any single day each one of you reading this article may act the role of lawyer, parent, sibling, child, lover, rotary club member, employee or boss. Each of these roles have associated with them certain – and probably different – expectations. Role expectations are behaviors that are associated with a specific role position or category. It is not my own idiosyncratic view of lawyering that civility and professional conduct is a "role expectation" for the role category of lawyer. Rule 3.4 of the Utah Rules of Professional Conduct contain six prohibitions on behaviors of lawyers, all of which can be categorized as addressing the civility issue. (It would have been more helpful for all of us if the language had been couched in positive admonitions, but the clear intent of the rule is obvious from its reading.)

". . . [W]e need to bring our role behaviors in line with the role expectations that are relevant to the role category of lawyers."

Role behaviors are the behaviors of an actor in a role category that are relevant to expectations for that role.[4] One of the purposes of this article is to remind us that we need to bring our role behaviors in line with the role expectations that are relevant to the role category of lawyers. None of us should engage in any conduct during a deposition that we would not want our trial judge to directly witness. None of us should obstruct the questioning of another lawyer in a deposition any more than we would want that lawyer to obstruct our questioning of a witness. None of us should schedule depositions or hearings without consulting other counsel. These are simple behaviors that are the role expectations of a professional and civil lawyer. The question is how do we reinforce those behaviors.

IV.

> It is in some sort of ceremonial form – even if that form be hardly more that the recitation of a myth, the consultation of an oracle or the dedication of a grave – that the moods and motivations which sacred symbols induce in men and the general conceptions of the order of existence which they formulate for men meet and reinforce one another. In a ritual, the world as lived and the world as imagined, fused under the agency of a single set of symbolic forms, turns out to be the same world . . . .[5]

When acting our roles as lawyers, we are often subject to what is known as "role conflict." One of the role expectations I have is to vigorously and zealously advocate the cause of my client. At the same time, there are the role expectations of civility and professionalism that, when they come clashing against the zealous advocate role, occasionally result in an intra-role conflict between competing – if not somewhat incompatible – expectations.

A behavioral tool that can be employed by lawyers to address these competing role expectations is ritualized behavior. Ritual in its cultural context is a pattern of significations, symbols and behaviors. Ritual allows us to symbolize the system of socially approved relations between individuals in groups.[6]

Among the many functions of ritual, the one I want to emphasize here is the distance ritualized behaviors can provide between the actor and the immediate emotional content of the act. I submit that the use of certain traditional phrases or stylized conduct can help to manage the emotional content of the adversary situation. For example, in a deposition, always refer to the opposing attorney as "counsel" or "counsel for the defendant," etc. Even if you were classmates with the lawyer or attended his or her wedding, do not call the opposing attorney by his or her first name. Failure to use the ritualized phrase, "counsel," closes the distance between those sets of behaviors that you engage in as a lawyer and the personal emotional content that often erupts in the adversary situation. When I use the ritual phrase: "counsel, do not prompt the witness," it is not a personal attack on the individual sitting across the table from me; it is the clash, the combat, of two role playing advocates.

Ritual behavior allows us to, in a sense, transcend the immediacy of the situation and plug it into a more profound set of experience and meanings. My use of ritual in the practice of the law is, admittedly, a pragmatic one. I always ask permission to approach the bench when I submit an exhibit, whether at trial or in motion practice. At trial, I always instruct my clients to rise when the jury comes in or the judge takes the bench. I always begin argument by acknowledging the presence of opposing counsel and the opposing party, if present. And, when I always

say: "May it please the Court," before beginning argument, I have occasionally received surprised looks from trial judges.

I do these things because they are conscious reminders that, for me, the law is more than just a business. What I do is part of an admirable tradition. It is the cumulative effect of all of these little ritualized behaviors that allows me to be part of something more than just billing hours and marketing for new clients.[7]

If I had my way, we would all have to wear wigs and formal robes when we appeared in court. It is through the use of these "lawyer rituals" that we can reinforce the role expectations of civility and professionalism when confronted with the very real and legitimate competition of the role expectation of zealous advocacy. The use of lawyer rituals is a way of calling ourselves to a behavioral affirmation of civility and professionalism by reconnecting ourselves to the great traditions of the common law.

Our role as lawyers is grounded in the public realm. Historically, there have been – and arguably should be – different rules that govern public behavior from private behavior. Public behavior is a matter, first, of action at a distance from the self, an exposition of meaning through the use of commonly understood signification. The public realm is not merely, however, the objectification of certain visual or verbal principles, but it is also a geographic realm that stands in distinction to the private realm. The geography of the law is – and should be – confined to our offices, courtrooms and conference rooms.

"The guidelines . . . are meant to provide us with a framework so that we can hold ourselves to a higher standard."

It is as great a mistake to take home the role of lawyer as it is to personalize events in the legal geography of our profession. Again, reliance upon lawyer rituals, such as the addressing of opposing attorneys as "counsel" instead of by their first name, or asking permission to approach a witness, whether in a deposition or at trial, reinforces within each of us that we are playing a role as lawyer, and that in that role we can vigorously affirm and advocate the interests of our clients while in fierce combat with another lawyer, who is also acting a role. After the battle is over, after we leave the public geography of legal advocacy, we can resume our roles as friends, relatives, colleagues, etc. Employing lawyerly rituals helps us do this.

V.

In psychoanalysis nothing is true except the exaggerations.[8]

These ruminations on what promotes civility and professionalism in our day-to-day practice are, unfortunately, not an accurate description of how I always conduct myself. As many of you are aware, I have my good days and my bad ones. Several years ago one of my children was diagnosed with certain health problems, and for many months I was not a particularly pleasant lawyer to be around. We all experience those types of situations, and we must all be willing to forgive and forget the occasional breach of civility that inevitably results from human beings acting as lawyers, rather than computers or robots doing the job.

Regardless of the jokes that you hear on late night television, we are part of an honorable profession with a great history. If you doubt that, read through a copy of Holmes' *The Common Law*, Cardozo's *The Nature of the Judicial Process* or Lord Erskine's defense of Thomas Pain and you will quickly realize that we, as the shepherds of the common law, bear a great responsibility.

Although a tremendous deal has been written about the decline in civility and professionalism in the contemporary practice of the law, little has been done about it. The American Bar Association Section of Litigation, however, adopted what is called the "Guidelines for Conduct," in 1995. The guidelines are aimed primarily at litigators but have application for all aspects of the practice of law. The Guidelines for Conduct address not just lawyer's interactions with each other, but also the lawyer's relationship with the judge and the lawyer's relationship with clients and witnesses.

The Guidelines for Conduct are attached as an appendix to this article. The guidelines are aspirational in nature. The guidelines are not intended to serve as a basis for litigation or for sanctions or penalties, but are meant to provide us with a framework so that we can hold ourselves to a higher standard. I bring them to your attention to encourage dialogue within the Bar on their use.

VI.

Any kind of community is more than a set of customs, behaviors or attitudes about other people. A community is also a collective identity; it is a way of saying who "we" are.[9]

How we behave in our daily interactions as lawyers defines who we, as a legal profession, are and will be in the future. Are we merely technicians who are instruments to carry out the will of our clients or are we truly "professionals," required to exercise moral and ethical judgment in representing our clients?[10] The debate about whether the practice of the law is just a "business" or a true "profession" has been going on for a hundred years

and will continue to be debated. If we wish to maintain our public status as a profession, however, it requires us to do more than pay lip service to our traditions.

Our profession has no choice but to respond to large scale market forces which are restructuring how we provide services to our clients. How we interact with each other, though, is a function of daily behavior, of cumulative acts of civility or incivility. Each of us, through our promotion of one set of role expectations or another, either reinforce or tear down the civil aspect of our profession. To maintain the proper balance between civility and advocacy requires an effort that we must exert each hour of each day as we go about the practice of the law.

As I go about my business of trying lawsuits, I do not expect any of you to act in a saint-like manner. Try to do as I say, however, and not necessarily as I do. If I am having a bad day, give me another chance. I will do the same for you.

[1]Stephen L. Carter, *Civility*, p. 132 (1998).

[2]Brian Silver, *The Ascent of Science*, p. 79 (1998).

[3]Paul Secord and Carl Backman, *Social Psychology*, p. 404 (2d ed. 1974) (emphasis in original).

[4]Secord and Backman, *supra*, at p. 405.

[5]Clifford Geertz, *The Interpretation of Cultures*, p. 112 (1973).

[6]See generally, E.R. Leech's discussion of the role of ritual in *Political Systems of Highland Burma*, pp. 10-16 (1954).

[7]It is a painful truth that billing more hours and bringing in more business are now the hallmarks of the successful lawyer. The single minded pursuit of these goals, however, can leave us not just unable to see the forest for the trees, but rather so close to the bark that we cannot tell if it is deciduous or conifer.

[8]Theodore Adorno, *Minimia Moralia*, p. 49 (E.F.N. Jephcott trans., Verso 10th ed. 1997) (1951).

[9]Richard Sennett, *The Fall of Public Man*, p. 222 (1976).

[10]Before you too hastily answer this question for yourself, I suggest you read Rule 2.1 of the Utah Rules of Professional Conduct along with the comment to that Rule.

Appendix

GUIDELINES FOR CONDUCT OF THE SECTION OF LITIGATION OF THE AMERICAN BAR ASSOCIATION

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, thereby achieving the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We encourage judges, lawyers and clients to make a mutual and firm commitment to these Guidelines.

We support the principles espoused in the following Guidelines, but under no circumstances should these Guidelines be used as a basis for litigation or for sanctions or penalties.

Lawyer's Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.

5. We will not lightly seek court sanctions.

6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstances or local customs.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.

12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain unfair advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.

16. We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

19. We will take depositions only when actually needed. We will not take depositions for the purposes of harassment or other improper purpose.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.

22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.

24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information, or for any other improper purpose.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken.

30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

31. Nothing contained in these Guidelines is intended or shall be construed to inhibit vigorous advocacy, including vigorous cross-examination.

Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.

2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

5. We will not knowingly misrepresent, mischaracterize, misquote, or mis-cite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

These Guidelines are modeled on the Standards for Professional Conduct adopted by the Seventh Circuit Court of Appeals applicable to lawyers practicing within that Circuit.

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"Is That a Fact?" – Evidence and the Trial Laywer

by Honorable Bruce S. Jenkins

Ed. Note: The following was a speech given at the Evidence Seminar, sponsored by National Practice Institute and Utah State Bar, December 11, 1998.

I am happy to participate with Professor Rossi to talk with you and think with you about the subject of evidence, and particularly, evidence in the courtroom. Some of my clerks are admirers of Professor Rossi – one, I think, a fugitive from his law school – and all are so high on him as a presenter, that when I was asked to help a little with this institute program, I didn't have the courage to say "no," although in my more mature years I am getting better at saying "no." My clerks really thought I could learn something if I came, and quite frankly, I thought I could, too.

So, here I am.

And it is *evident* – e-*vid*-ent – *vid*, like the vid in video, from *videns*, to see – it is evident, plain to see, that I am here to talk about *evidence*, that which is plain to see and, quite frankly, to talk about some things which are not so plain, and indeed are not seen, but which are still called evidence, and are used as proof in the courtroom to resolve problems contending parties are unable to resolve for themselves.

As we have viewed the struggles of the House Judiciary Committee these past few weeks, I am oh, so thankful for the court structure, the rationality of the court process, and the relative calm of the courtroom. The struggles of the House Committee contrast the cumulative experience of the courts (now well over two hundred years in this country) with the relative inexperience of the House Committee in gathering information. The Committee *investigates* – "searches into so as to learn the facts" – doing so without calling a single fact witness and without agreement even as to the criteria for the umbrella term "impeachable offense." They do so with what appears to be almost a "genetic pre-disposition" preventing any member from asking a question without a four-and-a-half minute "preface," statement of position, or "observation."

The committee process highlights the fact that the three great departments of government go about their work in different ways, and as the French commentator observed about the differences between men and women, "*vive le difference.*"

The end product of what we as lawyers and judges do in court – findings, judgment, dispute resolution – are generally accepted by the American people because of the respect for the process which we follow in arriving at a result, in reaching a legal conclusion.

I like to think that the process is rational, fact-driven, value-rich, and respected for the integrity of its participants – lawyers, judges, citizens-jurors, witnesses – and the willingness of all to take the necessary time to *think*. Thinking is a professional duty

Honorable Bruce S. Jenkins received his Bachelor of Arts from the University of Utah in 1949, magna cum laude. *He received his Juris Doctor from the University of Utah College of Law in 1952. At age 31 was appointed a member of the Utah State Senate and was twice re-elected by wide margins. During that time he was Minority Leader of the Utah State Senate, and was elected President of the Utah State Senate. Appointed Bankruptcy Judge, United States District Court, District of Utah in 1965, and thereafter twice reappointed. Nominated as United States District Judge in 1978 by President Jimmy Carter and confirmed by the United States Senate. Became Chief Judge, December 20, 1984. Assumed present status as United States Senior District Judge on September 30, 1994. In 1987, he was appointed by Chief Justice of the United States as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System and was reappointed in 1989. Former member, Judicial Council, Tenth Circuit. Former member, Council of Chief Judges, Tenth Circuit. Past President of Federal District Judges Association, Tenth Circuit. Secretary and member of Executive Committee, Federal Judges Association, a nationwide association of nearly 800 federal trial and appellate judges.*

He is married to Margaret Watkins. They are the proud parents of 2 girls and 2 boys.

He is an interested photographer, a student of history and language, and a collector of books.

each lawyer owes his client, the court, and himself. An essential part of the litigation process is thought.

I like to tell students of law with a particular interest in litigation that before they ever come to court, they should answer to their own satisfaction the following simple (*simple* – not *easy*) questions:

1. *Is* there a problem?
2. *What* is the problem?
3. *Whose* problem is it?
4. *What* do you want the court to do about the problem?
5. *How* do you want the court to do it?
6. *Why* do you want the court to do it?

If your client really has a problem, and you define with precision what the problem is, and you tell and show the court what the problem is and what help you want, and why, then you can in good conscience send a bill for results achieved or services performed, and rejoice in the peacefulness of the process you took to the courtroom and not the streets.

Although upwards of 90 to 95% of civil cases settle or are resolved before a formal trial proceeding ever starts, a jury seated, opening statements given, and witnesses called, all cases have the potential to "go to trial" and thus all of us need to be acquainted with the manner in which we can "make evident" to the fact finder the justness of our client's position when our 1-in-10 case does indeed to to trial.

"'[The lawyer] must . . . assemble the information, make sense of it, select the essential, discard the irrelevant . . . and put the rest together so that it forms a developing dramatic narrative . . .'"

While disputed, unclear, or unsettled *legal* propositions may be "the problem" which brings you to court for help, today we are *not* talking about those problems except indirectly.

Today we are talking about factual matters, the gathering and organization and presentation of factual information to the court and fact finders. Thus we are talking about evidence in general and our adopted rules of evidence in particular. We are talking about the minor premise in our legal syllogism of rules-facts-result.

Evidence is factual information given and received in a court proceeding to help a judge or jury resolve a dispute of fact.

Factual information may be presented by agreement, without contest, or it may be contested, disputed, subject to a different perspective, a different version, a different vision of what happened, a different picture of the world.

Each of us looks at the world through a different nervous system. Our eyes, ears, tastebuds, nerve pathways, sensors, recording devices are similar, but all different. We record our sensations differently. We recall and relate them differently. Some of us do a better job than others in picking up sensations from the outside world and placing such in our memory bank.

We present information in court through witnesses. A *witness*, from *witan* (to know), is somebody who knows something. He is present in court to tell us what he knows about factual matter which is in dispute. Our rules indicate that it is preferable for a person who is a primary source, one who himself has picked up "what happened" through his own nervous system, to tell us what he has experienced, to tell us what he knows.

In a courtroom setting we want witnesses to tell us what they know. We optimistically have them swear to tell the truth. A witness testifies. We are concerned with how he knows and the limitations found in language itself in his telling us what he saw, heard, or did. And we test what he knows through examination to arrive at some way of evaluating how reliable his information is.

Much of litigation involves a post-event reconstruction of history. We are concerned with knowing enough about "what happened" to see if it is appropriate to apply a legal proposition and evaluate fault and thus assign responsibility.

An incident of brawling at Second South and Main, or a slip and fall, or a traffic accident, or a killing is as much an event in history as Washington crossing the Delaware, or John Kennedy being shot in Dallas. We can learn a lot from historians about how to gather and present information. Let me read some advice from Barbara Tuchman, a fine historian, talking to those who are interested in her craft, but talking as well to all of us:

> The writer of history [substitute lawyer], I believe has a number of duties, . . . The first is to distill. He must do the preliminary work for the reader [substitute fact finder], assemble the information, make sense of it, select the essential, discard the irrelevant – above all discard the irrelevant – and put the rest together so that it forms a developing dramatic narrative . . . To offer a mass of undigested facts, of names not identified, and places not located, is of no use to the reader and is simple laziness on the part of the author . . . *To discard the*

unnecessary requires courage and also extra work, as exemplified by Pascal's effort to explain an idea to a friend in a letter which rambled on for pages and ended, "I am sorry to have wearied you with so long a letter but I did not have time to write you a short one."

I want to take time to discuss with you the nature of fact. We often talk about facts and love to say "the facts are," or "the undisputed facts are," but no one much talks about a more basic question, which is "what is a fact? What is a fact?"

One of my purposes today is to sensitize you to what is evident – plain to see: that fact one is not the same as fact two or three or four, and that while many things are similar, similar does not mean identical.

I do this to emphasize what you really already know. Much like Ebenezer Scrooge (and I call upon him in the spirit of the season), Christmas past is not Christmas present, nor Christmas future. Fact past, is not fact present, is not fact future. How to offer proof of each presents different challenges. While live witnesses can tell us what they experienced in yesterday's traffic jam at Second South and Main Street, what can a live witness tell us about Washington crossing the Delaware? And if no live witness is available and subject to the rigors of cross examination, then *who* can tell us and have us believe what we are told?

"'Even if an event is not controversial, it will have been seen and remembered from different angles of view by different observers.'"

Barbara Tuchman, the historian, acknowledges we can never be sure of what really happened because we were not there. She emphasizes that she uses material from primary sources only – the memories, the letters, the historic records of witnesses, of people who know because they were there. Bias in a primary source is to be expected, she says. She corrects it by reading another version. She cautions, "Even if an event is not controversial, it will have been seen and remembered from *different angles of view by different observers.* If the event is in dispute, one has an extra obligation to examine both sides." Hitler and Churchill would write different versions of World War II.

I want to emphasize again that it is important to focus on those facts genuinely in dispute, where versions compete and a finding or verdict is required. We also do well to differentiate types of facts in dispute so that proof suitable to those facts can be presented.

For example, let me take something simple that everyone can see. I have here in my hand, a green apple. It has one of those labels on the outside which says "Granny Smith, New Zealand." I can see, touch, feel and taste the apple. A juror or judge can see, touch, feel, and taste the apple.

I say, "This apple came from New Zealand."

I am asked, "How do you know that?"

I say, "It has a label which says 'New Zealand.'"

But what is it that I *know*? I see the label. I have experience seeing other labels. Based on my experience with labels, I infer that this apple actually came from New Zealand.

Then my wife laughs, "I took the New Zealand label and put it on a Washington apple."

My inference was wrong. There is a difference between an experience and an inference. But, is an inference a fact? In court, we at least act as though it is.

Someone asserts, "There are seeds in that apple." Well, this is Christmas present, and we can readily find out. We can cut open the apple and sure enough, we can experience seeds. "There are indeed seeds in that apple."

It is a fact that there are seeds in my Granny Smith apple. We *verified* it (we "made it true").

We saw that which was *evident*. I can tell what I saw.

I want to emphasize that verification (slicing the apple) is but one form of proof.

It is not our only form of proof.

My friend now asserts, "There were seeds in yesterday's Granny Smith apple." He wasn't there when I had lunch. I had my apple a day; I threw the core away, and didn't look to see if there were seeds. If the question for a jury is whether or not there were seeds in yesterday's apple, that is a *different* question of fact than if there are seeds in today's apple, and if nobody can be found who looked, a question of fact subject to a different kind of proof.

That question becomes the subject of the apple expert, who studies apples (particularly Granny Smith apples), and based on his wealth of experience, his Ph.D. – and his fee – opines that "There were indeed seeds in yesterday's apple."

But the "fact" he talks about is a different kind of fact than the fact we saw when we opened up today's apple. We ask him how he knows, and he acknowledges that he does not *know* for sure, but instead he *infers, concludes, opines*. We want to then

know the basis of his opinion, how he infers what he infers. He tells us of his vast experience of looking at apples older than yesterday's apple.

Christmas present, Christmas past. How about Christmas future? What future consequence flows from past or present events? Perhaps we can best point out differences by asking "Are there apples in those seeds?"

We can test that proposition by planting them and nurturing and watering them, but as a practical matter, the jury can't wait that long. So, again, the expert who has experience and opinions based upon what he has studied, tells us that when planted, about 75% of seeds will germinate, and that if well-tended after a passage of 7 to 10 years, 90% of those will bear fruit. Thus, in his opinion, the *probabilities* are, more likely than not, that "there are apples in those seeds." Again, a different kind of fact with a different kind of proof – in this instance, statistical probability.

While I've taken a few minutes to suggest differences in kind of historical facts, I want to take a few minutes to contrast another category of fact. I am talking about scientific fact. (Just for fun, you should know that the word science in its earliest form simply meant knowledge. Our rules of evidence deal with the transfer of knowledge in the courtroom from one head to another. Sometimes the knowledge is scientific.)

"[T]here are levels of knowledge and levels of certainty."

It is common wisdom in the world of science that scientific fact can be verified – made true, replicated – like punching a key on the typewriter. Given a fact repeatable to the point and with such accuracy it becomes what is called a scientific law, it makes no difference who is the observer, in which geographic location, or within what cultural history.

How people treat one another is an entirely different story. How do we verify a single human event? As to an event, the observer, the geographic location, the cultural history, may be very important.

The verification process for the proposition "Washington crossed the Delaware" is a different process than the verification process for the proposition that "there are seeds in that apple."

The verification process for the assertion that "God is love" is not the same as the verification process for asserting water is made up of two parts hydrogen and one part oxygen.

The verification process for the assertion that James Earl Ray shot Martin Luther King is not the same as the verification process for asserting the Y chromosome of Thomas Jefferson is the same as the Y chromosome of the great grandson of one of his slaves.

Let me ask you the simple question: "When were you born?"

Now let me ask, "How do you know?"

Well, how *do* you know what you know? Indeed how does anyone know? This is a particularly pertinent question, not just in the examination of the garden variety witness who relates what he saw, or heard, or felt, or tasted, or recorded with any of his sensory apparatus, but in determining whether the so-called expert is worth listening to, or whether his opinion can be helpful in resolving a disputed question of fact. In making inquiry of an expert, "How do you know?" remains a very fundamental question.

In asking, we should be sensitive to the fact that there are levels of knowledge and levels of certainty. We find this roughly recognized in our practical requirements of levels of certainty a jury must have in reaching a verdict: preponderance, clear and convincing, beyond a reasonable doubt.

We distinguish between our own hands-on experience and our power to test, to duplicate, to replicate, and to demonstrate. We note the difference between what we know directly and what we deduce or infer. That itself is distinguishable from what somebody else has told us, either directly or through books, or historic documents, or tradition, or myth. So when we use the word "know" we must be conscious of the level of factual concreteness we are talking about.

Another example, drawn from personal experience: a tax case; failure to file a tax return. The factual assertion was, "Judge, God told me not to file my tax return." Defendant – witness – claimed that as a personal experience, a personal direction. In spite of a genuine question as to jurisdiction and a whole passel of implicit assumptions, we let him present the assertion, not with reference to the asserted event, but with reference to his intent. The local jury didn't buy the story, and I suggested to the defendant that he take it up with God the next time he saw him.

Yet with what level of certainty or concreteness can we ever *know* the experience or state of mind of another?

As to facts we cannot see, we depend heavily upon inference, and the probative force of any inference depends upon our own logical reasoning and our own experience. Indeed, where infer-

ences are concerned, logic and experience prove to be our most reliable yardsticks.

Judge Stephen Anderson, writing for the Tenth Circuit, has observed that

> The line between "reasonable inferences" and mere speculation is impossible to define with any precision. However, the Third Circuit has effectively described the process of distinguishing between reasonable inferences and impermissible speculation: "The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts."

(*Sunward Corp. v. Dun & Bradstreet*, 811 F.2d 511, 521 (10th Cir. 1987) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 895 (3rd Cir.), *cert. denied*, 454 U.S. 893 (1981)).)

Even more than an expert's credentials, a showing that an experience of logical probability supports an inference drawn by a witness genuinely assists the court in choosing between competing inferences.

As for credentials, beware of those who claim to know more than they know. In a moment of sleeplessness I went downstairs in my house and began suffering through the informercials available at that time of night. One intrigued me. It was sponsored by an association which called itself the American Association of Certified Psychics, and its message was touting the process of certified psychics, and badmouthing all psychics not certified. If certified, purportedly one was worth listening to as to her special connection with the other side, or her special way of knowing.

Seek the factual footing for the inference.

In the future, litigation will explode in the area of intellectual property, and particularly in the biological sciences, and the novelty of such things as a patented mouse, a clone, a sequence, a method. Yet the battle of the experts may simply turn on different inferences drawn from the same factual base.

Intimately tied up with science will continue to be the problem of causation. You recall the Franklin aphorism, "For want of a nail the shoe was lost, for want of the shoe, the horse was lost, for want of the horse, the rider was lost, for want of a rider the battle was lost, for want of the battle, the war was lost and all for the want of a nail." How far back should we reach to fix cause or to place responsibility? Proof of causation requires more than merely "reasoning from sequence to consequence, that is, assuming a causal connection between two events merely because one follows the other." (*Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 116 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).)

Moreover, questions of causation reach beyond fact into the realm of public policy. Causation in law is not the same as causation in fact, and may reflect a public policy decision as much as a factual determination. For example, as to one exposed to radiation who develops cancer, the radiation source may be assumed, deemed, found to be the legal or "proximate cause" on the theory that those who created the risk ought to assume the burdens associated with the risk as well. Based upon a policy choice, the disputed question becomes "who created the risk?" Rather than "what caused the cancer?"

". . . [W]hen describing . . . use the language of description, not the language of judgment or evaluation."

Matters of policy often find expression in the placement of burdens of proof. Such things are implicit as to who has to prove, or who has to disprove, and those are questions of policy, not questions of disputed fact, but they direct how we go about explaining our view of what is evident, what is plain, or measurable, or inferred, and how that relates to the world of reality.

When we offer proof of a claimed fact which is in dispute, we also have to make sure we are talking about a fact – a *fact* – which is in dispute. That requires the most exacting examination by you so that you are sure that is a fact, and not something else which is in dispute. For example, judgments, evaluations, often take the form of factual assertion. When a prominent U.S. Senator asserts of the President of the United States, "He is a jerk," it appears to be a factual assertion, but in reality it is a form of judgment, and may tell us more about the speaker than it does about the President.

All I am suggesting is: when *describing*, whether by statement of counsel or through the use of witnesses, use the language of *description*, not the language of judgment or evaluation. You may be seeking judgment or evaluation from the court, but that is not the presentation of information, the factual proof.

A simple example, is a conversation which took place at a pre-trial conference:

Judge: "Tell me what happened?"

Counsel: "My client was sexually harassed."

Judge: "Tell me what happened?"

Counsel: "I told you judge, my client was sexually harassed."

Judge: "I still don't know *what* happened?"

Counsel (quietly to his paralegal): "He never will."

Sexual harassment has a pejorative sound, but it is a mixed term; it purports to describe, but for the most part it *evaluates*. The phrase tells the court nothing about the facts of the event or events which supposedly allow one to make the evaluation that the plaintiff was indeed "sexually harassed."

Counsel did not distinguish between a narrative of "what happened" and the characterization or evaluation of "what happened." The words may well embrace "what happened," but they do not describe "what happened." They lack the specifics, the details, the event.

Levels of factual knowledge are not the same thing as personal judgments – good, bad, right, wrong – nor are they descriptions of concepts – democracy, virtue, family values – all of which are matters of endless dispute and eternal debate.

Words are meaningless absent an agreement upon criteria. When we talk "facts," no matter at what level, we work hard to get behind the word to see what is, or what was. When we talk of judgments and concepts, we need agreed criteria to make sure we are talking about the same thing.

In my bookish meanderings I came across an exchange which illustrates part of our challenge. It is between the Red Queen, the White Queen and Alice, and is found in Lewis Carroll's *Through the Looking Glass*. Here the Red Queen asked of Alice: "Can you answer useful questions?" She said. "How is bread made?"

"I know *that*!" Alice cried eagerly. "You take some flour –."

"Where do you pick the flower?" the White Queen asked. "In the garden or in the hedges?"

"Well it isn't *picked* at all," Alice explained. It's ground –."

"How many acres of ground?" said the White Queen. "You mustn't leave so many things out!"

Like Alice, politicians, spin doctors, pundits, single or special interests, retained "expert" witnesses, and even some lawyers and judges, are often eager to answer questions whether they are useful or not, and whether they understand them or not, and in their eagerness are vulnerable to the admonition of the White Queen, "You mustn't leave so many things out."

What do you mean? How do you know? How do we make sure that judges and juries get the message as well as the word, that the message intended and conveyed is received, and can be relied upon? We must make sure we are using the same criteria – the same "flour," or the same "ground" – so that we are not like Alice and the Red and White Queens, talking, but not connecting, conversing, but not communicating.

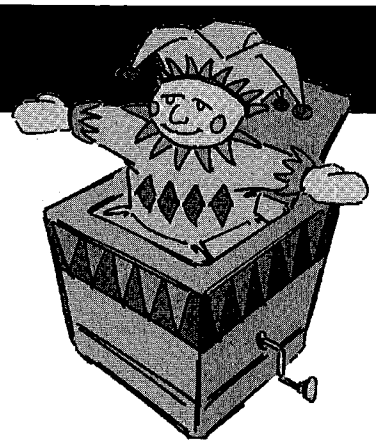
As I have observed in times past, the most useful exercise before coming to court to ask the court for help is to have found the Red Queen's *useful* question for judicial decision, and once in court, stating it in such a precise and simple way that any judge can understand.

Another useful Red Queen question to ask yourself about evidence is "Does this information help the fact finder resolve the disputed fact question?"

To find the answer, define with precision the fact in dispute and know the competing versions. Recognize the levels of abstraction and the need to be contesting on the same level. Be aware of the differing kinds of fact and the differing methods of verification of facts past, present, and future. Distinguish between an observed fact, however measured, and an inferred fact, however measured. Are you disputing observed facts, or are you disputing competing inferences? Remember that burdens of proof, whatever the measure – preponderance, clear and convincing, beyond a reasonable doubt – are matters of public policy and are not themselves questions of fact, but that they may demand or obviate the need to present facts.

In a courtroom setting, our legal process of information gathering and presentation has worked well in this country for more than two hundred years. Indeed, it is a model admired throughout the world.

The way of the courtroom is the peaceful way, the rational way, the way of doing the best you can with what is available to work with so that a decision relating to a real question may be made – not as a means of forever pronouncing universals, but a way of settling disputes, of being scientific, of gathering and organizing information and being civilized, rational in the best of senses, and answering the Red Queen's useful questions as to what is evident, plain, useful, probable, and what is more likely than not.



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Commission Highlights

During its regularly scheduled meeting of December 4, 1998, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the October, 1998 meeting as amended.

2. Keith E. Taylor was appointed to the Judicial Conference of the United States.

3. Van Mackelprang was appointed to the Justice Court Standards Standing Committee.

4. Grant Clayton and Don Roney reported on the Member Benefits Committee.

5. James B. Lee and Paul T. Moxley gave ABA Representatives report.

6. James B. Lee reported on the status of "And Justice for All" campaign.

7. David R. Bird & John T. Nielsen reported on the Governmental Relations Committee.

8. Dennis V. Haslam gave a report on Access to Justice Foundation.

9. Mark Buchi reported on the Unauthorized Practice of Law Committee and concerns arising from competition by other professionals who are not bound by the same professional rules as lawyers.

10. Ethics Advisory Opinions 98-12, 98-13, 98-14 were approved.

11. Debra Moore gave a report on changes to the Rules of Integration and Rules of Professional Conduct.

12. There was a review of the Legal Assistants Division Guideline proposal and also notice of the first one hundred legal assistant's recognition dinner to be held in May.

During its regularly scheduled meeting of January 29, 1999, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the December 4, 1998 meeting.

2. Follow up reports were given on Equal Administration of Justice Committee, the Long Range Planning Committee, and the Governmental Relations Legislative phone schedule.

3. There was a review of the "And Justice for All" contribution letter and the Commission authorized the creation of committees to encourage *Pro Bono*.

4. Schedules for the Mid-Year meeting and the May retreat were reviewed.

5. Statements from President-Elect candidates were given to the Commission.

6. Requests for contributions to the Access to Justice Foundation and a Client Security Fund increase were considered.

7. Review of amendments to Bylaws and Rules of Integration regarding the election of the President-Elect.

8. Ethic Advisory Opinions 98-15 and 99-01 were approved.

A full text of minutes of these and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

1999 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1999 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than Thursday, April 29, 1999. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Young Lawyer of the Year
4. Distinguished Section/Committee
5. Distinguished Non-Lawyer for Service to the Profession
6. Advancement of Women in the Legal Profession
7. Advancement of Minorities in the Legal Profession

Discipline Corner

DISBARMENT

On February 19, 1999, the Utah Supreme Court issued an opinion reversing the Third District Court's suspension of Byron L. Stubbs, and stated that disbarment was the appropriate sanction for Stubbs's misconduct.

The Utah State Bar appealed a Third District Court order suspending Stubbs from the practice of law for three years. On July 26, 1996, Stubbs pled guilty to one count of communications fraud, a class A misdemeanor. The guilty plea was based on Stubbs's participation in a scheme to defraud the State through the preparation of a letter on behalf of his client, Tool Design, Engineering and Manufacturing (Tool Design). The letter Stubbs prepared contained false representations regarding the status of environmental remediation efforts on a piece of property Tool Design owned. Stubbs knew the statements contained in the letter were false and he knew his client intended to send the letter to the State to facilitate the scheme to defraud. Additionally, during the Bar's investigation, Stubbs lied to the Bar and to the trial court.

The District Court concluded that Stubbs made false statements of material fact when he aided his client in committing a fraudulent act against the State, made false statements of fact to representatives of the engineering company in charge of the remediation efforts, and failed to rectify the consequences of his client's criminal act. Although the District Court held that disbarment was the presumptively appropriate sanction for Stubbs's misconduct, it concluded that the mitigating circumstances outweighed the aggravating circumstances and justified a reduction in the level of discipline.

The Supreme Court found that "the factors relied upon by the trial court in this case do not, in fact, mitigate against disbarment." Specifically, the Court rejected Stubbs's inexperience in the practice of criminal and environmental law as a mitigating factor and stated that "[g]reater experience . . . would not have taught Stubbs anything more about honesty than he should know after thirty-five years of practice." The Court also rejected Stubbs's remorse at trial and evidence of his good character as mitigating factors. Finally, the Court rejected the District Court's conclusion that Stubbs's conduct represented an isolated incident, rather than a pattern of misconduct.

Although the Court recognized Stubbs's lack of disciplinary history, the absence of a selfish motive, and the imposition of other penalties as mitigating factors, they were not sufficiently significant to reduce the presumptive discipline of disbarment.

To see a full copy of this decision visit the State Court's website at http://courtlink.utcourts.gov/opinions/index.htm.

RESIGNATION WITH DISCIPLINE PENDING

On January 18, 1999, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of Pamela D. Parkinson. In the Petition for Resignation with Discipline Pending, Parkinson admitted that she violated Rules 1.8 (Conflict of Interest), 1.15 (Safekeeping Property), 4.1 (Truthfulness in Statements to Others), and 8.4 (Misconduct) of the Rules of Professional Conduct.

During representation of a client and her minor daughter in an action against certain persons and entities for alleged child abuse of the minor daughter and representation of the client in several business ventures, Parkinson entered into various inappropriate agreements with the client. Parkinson at one point convinced the client to sign over custody of her minor child to Parkinson and then refused to allow the client to see her daughter. Parkinson additionally entered into business agreements with the client. In one agreement Parkinson took $25,000 from the client to invest in a business venture in Idaho. Parkinson and the client were to be partners in the venture. Parkinson was to place the money in her trust account. When the client later demanded a refund of the $25,000, Parkinson refused. Parkinson has failed to refund the client's $25,000.

SUSPENSION

On January 22, 1999, the Honorable Michael G. Allphin, Second Judicial District Court, signed an Order of Discipline suspending Blaine P. McBride from the practice of law for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The suspension was stayed and McBride was placed on two years supervised probation. McBride was also ordered to attend the Utah State Bar Ethics School and was ordered to pay restitution to two clients. The Order of Discipline was based on a stipulation between McBride and the Office of Professional Conduct ("OPC").

McBride moved his office and failed to notify the Bar and several clients of his new telephone number and address, and was dilatory in responding to requests for information from clients and the OPC. Combined with his clients' inability to reach

McBride regarding their matters. McBride failed to diligently represent several clients, failed to perform, and failed to return unused portions of the clients' retainers when they obtained new counsel or fired him.

There were extenuating mitigating factors which warranted a suspension held in abeyance in this matter.

PUBLIC REPRIMAND

On January 20, 1999, the Honorable J. Dennis Frederick, Third Judicial District Court, entered an Order of Reprimand of James I. Watts for violating Rule 1.7 (Conflict of Interest) of the Rules of Professional Conduct. The order was based on a stipulation between Watts and the Office of Professional Conduct.

The Bar received a complaint from an estranged husband in a divorce action in which Watts was representing the complainant's wife. The complaint alleged that during Watts's representation of the complainant's wife, Watts engaged in sexual relations with the client. Prior to the representation Watts and the client had not been personally or physically involved.

At some time during the representation and while the client was in Watt's office, he asked the female client out on a social date. During the representation, the female client and Watts spent the weekend together and had sexual relations. Thereafter, Watts and the female client continued to see each other socially. After the relationship became sexual, Watts withdrew as counsel for the female client.

Watts acknowledged and admitted the wrongful nature of the relationship with the client and fully cooperated with the Office of Professional Conduct. Watts's absence of a prior record, remorse for his actions, and cooperation with the OPC were considered as mitigating factors.

ADMONITION

On February 2, 1999, an attorney was admonished by the Chair of the Ethics and Discipline Committee for violating Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

The OPC received a complaint from clients of the attorney alleging that the attorney represented them in several legal matters including a zoning/nuisance matter concerning horses near their house, a house purchase and improvement matter, and other matters. The complainants alleged that the attorney had taken a retainer in the horse matter and had failed to competently and diligently represent them or communicate with them concerning the representation.

In his representation of the clients, the attorney failed to:

- provide competent representation and did not have the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary in representing them;
- consult with them as to the means his representation should be pursued;
- act with reasonable diligence and promptness in representing them;
- keep them reasonably informed about the status of the representation and failed to explain the representation to the extent reasonably necessary to enable the clients to make informed decisions regarding the representation.

The attorney also failed to timely respond to requests from the Bar concerning the complaint, and failed to timely produce documents requested by the Bar, in violation of Rule 8.1 (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

On November 19, 1998 a Screening Panel of the Ethics and Discipline Committee heard the matter and determined that an admonition was appropriate discipline for a violation of Rules 1.1, 1.2, 1.3, 1.4, 8.1 and 8.4(a) and (d) of the Rules of Professional Conduct.

Mailing of Licensing Forms

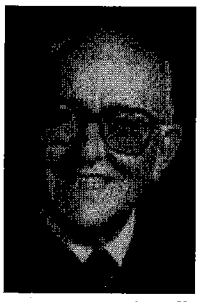
The licensing forms for 1999-2000 will be mailed during the last week of May and the first week of June. Fees are due July 1, 1999, however fees received or postmarked on or before August 2, 1999 will be processed without penalty.

It is the responsibility of each attorney to provide the Bar with current address information. This information must be submitted in writing. Failing to notify the Bar of an address change does not relieve an attorney from paying licensing fees, late fees, or possible suspension for non-payment of fees. You may check the Bar's web site to see what information is on file. The site is updated weekly and is located at www.utahbar.org.

If you need to update your address please submit the information to Arnold Birrell, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834. You may also fax the information to (801) 531-0660.

Candidates for the Utah State Bar President-Elect 2000-2001

The following Bar Commissioners have announced their intention to run as President-Elect of the Utah State Bar for the 2000-2001 year. At its April 30, 1999 meeting, the Board of Bar Commissioners will be voting to select the President-Elect candidate who will stand for retention election by the entire Bar membership. Please forward any comments you may have to your Bar Commissioner. A list of all Bar Commissioners is found at the back of this *Bar Journal.*



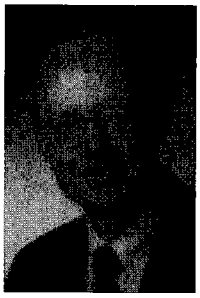
D. FRANK WILKINS

In the latter part of December, 1998, I announced my candidacy for President-Elect, Utah State Bar.

The years on the Commission have been precious, bracing and rewarding for me, and I am generally very proud of the Commission's and staff's unflagging work and accomplishments. However, I believe performing this Commission's primary, traditional and meritorious tasks of attention to admissions, professional conduct, and professional excellence has receded somewhat. I suggest a reason: too much energy, time and resources of the Utah Bar Commission, officers, and Bar staff have been and are committed to projects which may well be socially commendable but which strain our other core/traditional functions. Should we, for example, do our part in the tragedy of diminished legal funding and services for the poor? Of course, but with an acknowledgment of the *limitation* of our abilities and resources, and with a rededication to our traditional roles.

Respectfully, I suggest an obligation exists for this Commission to heighten its efforts to promote the general welfare of the *attorneys* in this Bar.

I invite you to talk with me about these matters, and other ones of mutual interest and devotion we share.



DAVID NUFFER

The most important part of this message is what is on your mind right now. Please call me at (435) 674-0400; e-mail at david.nuffer@snedws.com; fax to (435) 628-1610 or write to P.O. Box 400, St. George, 84771. It is always good to hear from Bar members!

Now to tell you what I think we can work on together if I am elected Bar President:

The Bar and lawyers are in for some exciting challenges in the next few years. The world is changing around us in ways that may change what we do. As recently as January when a Texas federal court declared that computer assisted legal forms were the authorized practice of law, we see these issues arising around us. Powerful forces will shape the future.

The Bar needs to be one of these powerful forces in order to represent all lawyers well. Attorneys are generally respected members of their communities, firms, office and agencies. The Bar's reputation needs to match the fine reputation of individual lawyers and advocate for the profession. The Bar can enhance its respect in the state legislature; with the Governor; and with the state Judicial Council. This will only happen if the Bar adheres to fundamental, sound principles as it develops a strategy to manage change.

We will have many opportunities for new ways to implement the profession's tradition of excellent client service and protection:

The legal profession is changing:

- There is more diversity within the profession. Increasing gender and cultural diversity opens new opportunities as lawyers relate better to clients and fellow professionals.
- Many lawyers are not in firms. We need to change methods of supporting lawyers. Lawyers need more relevant Bar resources, including on-line practice resources for those in all types of law related employment.

Other providers are entering the marketplace:

- Large institutions; other professions; para professionals and even computer programs present competition but also open new economic arenas. Each new provider must also be supported by lawyers.

The legal service market is changing:

- Consumers demand more immediate, economic services. This creates new opportunities for non traditional delivery of services.
- Linguistic and social diversity require new skills to meet broadened markets.
- ADR and other consumer driven services open new uses for legal skills.

Our interface with the public is changing:

- The public is more uncomfortable with the adversarial reputation of lawyers while warming to the new problem-solving approaches lawyers innovate.

- As public confidence wanes in traditional institutions and national characters, individual lawyers can change general public impressions.

Technology:

- The acceleration of change through technology creates new opportunity for training those of us who are less familiar with the new developments, and new legal issues arise.
- Technology provides new ways of delivering services to Bar members and brings us closer together.

In this dynamic environment, *strategic* and *early* action with the long term view in mind will make our actions more effective, and enhance the Bar's respect. Clear intention must precede the ounce of prevention which prevents a pound of cure. We also need the power of consensus on emerging issues.

Those with foresight have predicted what we may see. We have the insight and advice of:

Commission on Justice in the 21st Century
Futures Commission
Task Force on the Management and Regulation of the Practice of Law
Long Range Plan
(see http://www.utahbar.org/doc_arch/LRP/long.htm)

With these resources, and member input, the Bar will be able to meet and exceed expectations in the future. The Bar should be each lawyer's most indispensable and practical resource, regardless of type of employment, area of practice, gender or national origin. Each of us can help others gain insights. Senior lawyers with skills and traditions and junior lawyers with their sense of the current environment can work together in improving the profession and the Bar. I would like the opportunity to do my part as Bar President. Please contact your Bar Commissioner and express your views on this election.

David Nuffer lives in St. George. He and his wife Lori have seven children, 3.5 of whom are home on any given day. The 13 lawyer firm he is with has an office in Salt Lake as well. He served as a member of the Supreme Court Special Task Force on the Management and Regulation of the Practice of Law in 1990-91 and has been a Bar Commissioner since 1994. Active in technology and ADR issues, his practice includes real estate and litigation.

New Services on the Utah State Bar Web Site

by Lincoln Mead

WEB MAIL FOR THE UTAH STATE BAR

The Utah State Bar is ready to roll out a web based e-mail service to the members of the Utah State Bar and is looking for volunteers to help test and refine the service. This service will allow bar members to remotely access e-mail using public web access kiosks in libraries, schools, and hotels even if they do not currently have permanent Internet access. If you would like to take a test drive of the system you can go to the web address; http:/207.173.21.11/exchange and in the log on window type barguest and hit enter. You will see a password and logon window. In the Account Name type barguest and in the password type barguest again and hit ENTER. (It is STRONGLY recommended that you are using Internet Explorer 4.0 or later to use this service.) If you would like to participate in this program please visit the Utah Bar Web Site at http://www.utahbar.org and click on the Web Mail pilot program link. If you do not have Internet access but are interested in participating please contact Lincoln Mead at (801) 297-7050 and an account will be created for you. The Utah State Bar MIS team would like to thank Microsoft for donating the software that has made this pilot possible.

ONLINE LICENSING FOR BAR MEMBERS – VOLUNTEERS NEEDED

The Utah State Bar is expanding its Online Licensing program that was successfully started last year. If you are interested in participating please contact Lincoln Mead via e-mail at webmaster@utahbar.org or by phone at (801) 297-7050. The goal of this program is to reduce time, expense, man power and paper in the Utah Bar's licensing process.

FAMILY COURT PROPOSAL FORUMS

The Utah State Bar is hosting a viocemail and web-based forum on the topic of a Utah Family Court system. You may call (801) 297-7036 and leave a voice mail or you may go online by going to the Utah State Bar Web Site at http://www.utahbar.org and clicking on the Family Court Proposal Link. It will take you to a summary of the report, provide you a link to the complete report and a link to the web based discussion forum. Regardless of which method that you choose to voice your opinion or concern please leave your name and Bar Number.

Notice of Petition for Readmission

On February 12, 1999, Richard B. Johnson filed a Verified Petition for Readmission to Utah Bar, Civil Number 990400441, the Honorable Fred D. Howard, Fourth Judicial District Court, presiding. Pursuant to Rule 25 (Reinstatement Following a Suspension of More Than Six Months; Readmission) of the Rules of Lawyer Discipline and Disability, the Office of Professional Conduct ("OPC") hereby gives notice of the petition. Any individuals wishing to express opposition to or concurrence with the petition should file notice of their opposition or concurrence with the District Court within thirty days of the date of this publication.

On March 26, 1992 the Utah Supreme Court entered an Order of Disbarment against Richard B. Johnson, a Provo attorney. Mr. Johnson was disbarred for continuing to practice law in violation of the Court's previous Order placing him on suspension for six (6) months. The Court found that during the period of his suspension Mr. Johnson accepted new clients, negotiated retainer fees, provided legal advice to both new and existing clients, held himself out to the public as one authorized to practice law, received compensation from his law firm, and represented to new clients that although it was necessary for another attorney of the firm to be his "mouth piece" he would be the principal attorney and would continue to do the legal work. The Court rejected Johnson's argument that he could not comply with the Order of Suspension because he did not understand what constituted the practice of law.

Notice of Ethics & Discipline Committee Positions for Non-Lawyers

The Bar is seeking interested non-lawyer volunteers to fill one vacancy and four newly-created positions on the Utah State Bar Ethics & Discipline Committee. The Ethics & Discipline Committee is divided into four panels which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint shall be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court upon recommendations of the Bar Commission. Please send resume to John C. Baldwin, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 no later than May 1, 1999.

Notice of Petition for Readmission

On March 12, 1999, Jerald N. Engstrom filed a Verified Petition for Readmission to Utah Bar, Civil Number 990901905, the Honorable Stanton M. Taylor, Second Judicial District Court, presiding. Pursuant to Rule 25 (Reinstatement Following a Suspension of More Than Six Months; Readmission) of the Rules of Lawyer Discipline and Disability, the Office of Professional Conduct ("OPC") hereby gives notice of the Petition. Any individuals wishing to express opposition to or concurrence with the Petition should file notice of their opposition or concurrence with the District Court within thirty days of the date of this publication.

On October 14, 1992 pursuant to a Stipulation to Disbarment the Utah Supreme Court entered an Order of Discipline: Disbarment against Jerald N. Engstrom, an Ogden attorney. On January 31, 1991, Engstrom was convicted in the United States District Court, Central Division, District of Utah, of five counts of Misapplication of Funds by a Bank Officer. On May 22, 1992, the United States Court of Appeals, Tenth Circuit affirmed the conviction.

The facts as reported by the appellate court indicate the following:

The conviction arose when Engstrom became involved with a group of people who were forming a corporation called Double J Express Western Inc. ("Double J") to purchase the bankrupt IML terminal in 1984. Engstrom was told by his superiors at Commercial Security Bank ("CSB"), where he was a vice president and general counsel, that CSB's money was not to be involved in the transaction and Engstrom was to have no personal interest in the transaction. There was evidence indicating that Engstrom was a director of Double J and was to be the general counsel for Double J. Engstrom denied he had an ownership interest in Double J and he also testified he never served as a director of Double J. The transaction was facilitated through CSB. Engstrom represented to the IML Bankruptcy Trustee that funds totaling $250,000 had been deposited in CSB by Double J when in fact no such funds were deposited. This ultimately caused Engstrom to deliver a CSB check in the amount of $256,712.67 to the IML Bankruptcy Trustee. There were four other IML-related fund misapplications by Engstrom. Specifically, Engstrom sent CSB checks to Texas banks while simultaneously depositing checks made to CSB by a person named Ed Harper. Engstrom knew the Ed Harper checks were worthless. CSB ultimately lost the total sum of $2,081,712 from the IML transaction.

Position Vacancy Announcement – Deputy Clerk

United States District Court for the District of Utah – Office of the Clerk

150 U.S. Courthouse • 350 South Main Street
Salt Lake City, Utah 84101-2180

The Office of Clerk is seeking applications for the position of Deputy Clerk. The position is a Judicial Salary Plan Classification Level 24, with an annual starting salary of $23,903 to $29,900 depending on experience and qualifications. Incumbent may convert to full-time permanent status after successful completion of six-month probationary period and successful performance review. This is a federal government position with potential for upward mobility.

Initial Assignment: Serve as generalist clerk, reviewing and accepting new case filings and pleadings; receipting filing fees; copying court documents; responding to inquiries concerning legal process and case information and completing data entry and case maintenance. Act as liaison between the court, counsel, litigants, the public, and court-related agencies. The position requires basic understanding of and familiarity with computers/data entry, the ability to type at the rate of 45 corrected words per minute, and the initiative to accomplish assigned work independently and accurately within time limits for completion. Applicants should be well groomed and professional.

Minimum Requirements: Applicants must have a minimum of three years administrative experience in government or private sector which provided a thorough understanding of office administration procedures, automated records-keeping systems and organization of high-volume paperflow. Preference will be given to applicants who have experience in data entry in complex information processing systems. A bachelor's degree may be substituted for clerical experience. The position requires the ability to type at the rate of 45 net words per minute and to work independently and accurately within time limits specified for completion; submission of a record of typing ability is required. Applicants should have working knowledge of WordPerfect for Windows and Windows 95. Applicants should have good communication and interpersonal skills.

Qualifications: Prior court- or law-related experience in an automated environment highly desirable.

Application Procedure: Interested applicants who meet the qualifications should prepare a cover letter and Application for Judicial Branch Federal Employment (AO-78) and submit them with relevant supporting documentation and references to the address listed below. AO 78 Forms are available for pickup at the address listed below from 8:30 a.m to 5:00 p.m. Monday-Friday. Position to be filled asap. Submit application packets to:

United States District Court for the District of Utah
Office of the Clerk of Court
Attn: Intake
Room 150, Frank E. Moss U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

EQUAL OPPORTUNITY EMPLOYER

1999-2000 Utah State Bar Request for Committee Assignment DEADLINE – May 15, 1999

When the Utah Supreme Court organized the Bar to regulate and manage the legal profession in Utah, it defined our mission to include regulating admissions and discipline and fostering integrity, learning, competence, public service and high standards of conduct. The Bar has standing and special committees dedicated to fulfilling this mission. Hundreds of lawyers spend literally thousands of hours in volunteer services on these committees.

Many committee appointments are set to expire July 1, 1999. If you are currently serving on a committee, please check your appointment letter to verify your term expiration date. If your term expires July 1, 1999, and we do not hear from you, we will assume you do not want to be reappointed, and we will appoint someone to take your place. If your term expires in 2000 or 2001, you do not need to reapply until then. If you are not currently serving on a committee and wish to become involved, please complete this form. See bottom of this page for a brief explanation of each Committee.

Committee Selection

Applicant Information

Name _____ Bar No. _____

Office Address _____ Telephone _____

Choice	Committee Name	Past Service On This Committee?	Length of Service On This Committee?	Are you willing to Chair the Committee?
1st Choice	_____	Yes / No	1, 2, 3, 3+ yrs.	Yes / No
2nd Choice	_____	Yes / No	1, 2, 3, 3+ yrs.	Yes / No
3rd Choice	_____	Yes / No	1, 2, 3, 3+ yrs.	Yes / No

☐ **Check here if you have NEVER served on a Bar Committee**

ADDITIONAL COMMENTS (to include qualifications, reason for serving and other past committee affiliations)

_____

_____

_____

For 68 years, the Utah State Bar has relied on its members to volunteer time and resources to advance the legal profession, improve the administration of justice, and to serve the general public. The Bar has many outstanding people whose talents have never been tapped.

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside Salt Lake are encouraged to participate in committee work.

COMMITTEES

1. Advertising. Makes recommendations to the Office of Bar Counsel regarding violations of professional conduct and reviews procedures for resolving related offenses.

2. Alternative Dispute Resolution. Recommends involvement and monitors developments in the various forms of alternative dispute resolution programs.

3. Annual Meeting. Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.

4. Bar Examiner. Drafts and grades essay questions for the February and July Bar Examinations.

5. Bar Examiner Review. Reviews essay questions for the February and July Bar Exams to ensure that they are fair, accurate and consistent with federal and local laws.

6. Bar Journal. Annually publishes ten monthly editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.

7. Character & Fitness. Reviews applicants for the Bar Examination to make recommendations on their character and fitness for admission to the Utah State Bar.

8. Clients Security Fund. Considers claims made against the Clients Security Fund and recommends appropriate payouts for approval by the Bar Commission.

9. Courts and Judges. Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.

10. Delivery of Legal Services. Explores and recommends appropriate means of providing access to legal services for indigent and low income people.

11. Fee Arbitration. Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.

12. Government Relations. Monitors pending or proposed legislation which falls within the Bar's legislative policy and makes recommendations for appropriate action.

13. Law Related Education and Law Day. Helps organize and promote law related education and the annual Law Day including mock trial competitions.

14. Law & Technology. Creates a network for the exchange of information and acts as a resource to Bar members about new and emerging technologies and the implementation of these technologies.

15. Lawyer Benefits. Review requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, term life insurance and other potentially beneficial group activities.

16. Lawyers Helping Lawyers. Provides assistance to lawyers with substance abuse or other various impairments and makes appropriate referral for rehabilitation or dependency help.

17. Legal/Health Care. Assists in defining and clarifying the relationship between the medical and legal profession.

18. Mid-Year Meeting. Selects and coordinates CLE program topics, panelists, and speakers, and organizes appropriate social and sporting events.

19. Needs of Children. Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.

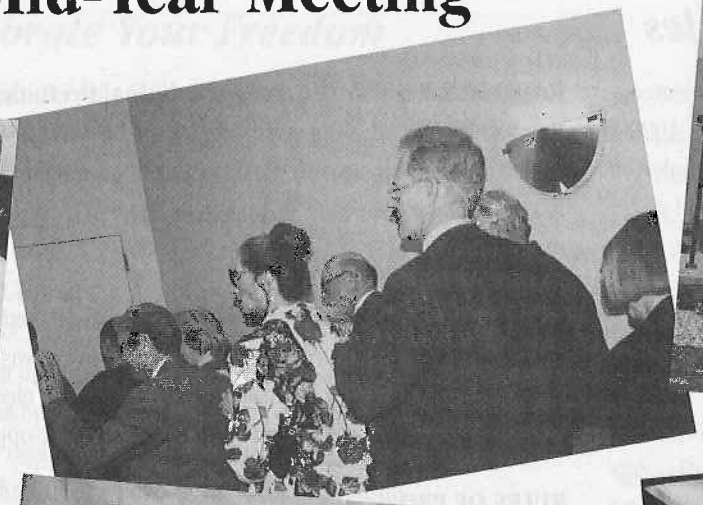
20. Needs of the Elderly. Assists in formulating positions on issues involving the elderly and recommending appropriate legislative action.

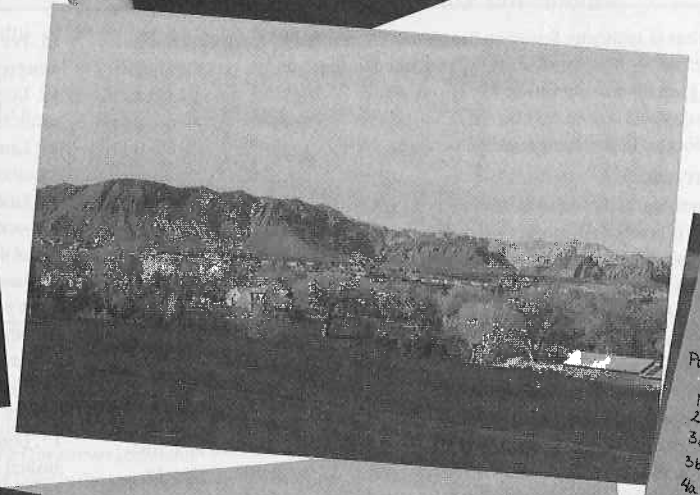
21. New Lawyers CLE. Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New Lawyer CLE requirements.

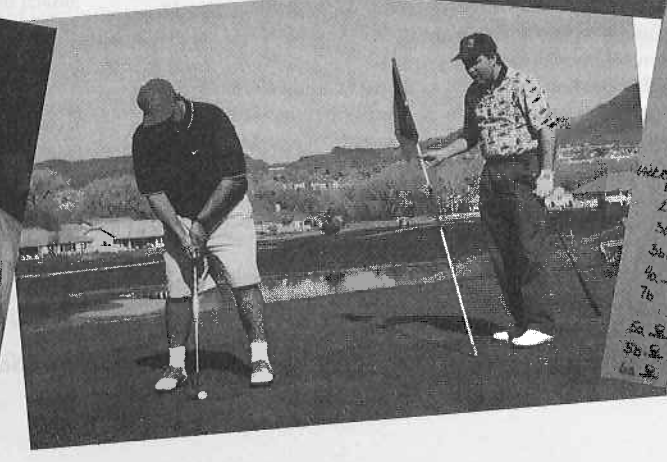
22. Unauthorized Practice of Law. Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

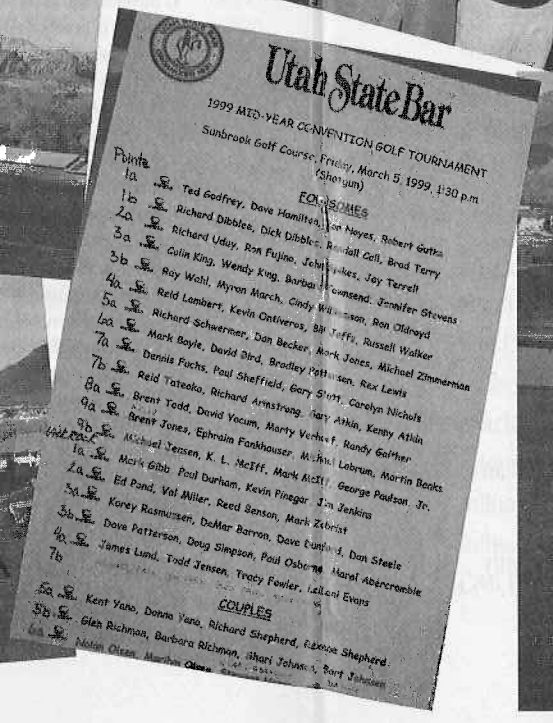
DETACH & RETURN to Charles R. Brown, President-Elect, 645 South 200 East, Salt Lake City, UT 84111-3834

People and Scenes of the 1999 Mid-Year Meeting









Utah State Bar

1999 MID-YEAR CONVENTION GOLF TOURNAMENT

Sunbrook Golf Course, Friday, March 5, 1999, 1:30 p.m.
(Shotgun)

Points

FOURSOMES

1a Ted Godfrey, Dave Hamilton, Tom Noyes, Robert Gutke

1b Richard Dibblee, Dick Dibblee, Randall Gell, Brad Terry

2a Richard Udoy, Ron Fujino, John Hughes, Jay Terrell

3a Colin King, Wendy King, Barbara Townsend, Jennifer Stevens

3b Ray Wahl, Myron March, Cindy Robinson, Ron Oldroyd

4a Reid Lambert, Kevin Ontiveros, Bill Toffs, Russell Walker

5a Richard Schwermer, Dan Becker, Mark Jones, Michael Zimmerman

5b Mark Boyle, David Bird, Bradley Pettersen, Rex Lewis

6a Dennis Fuchs, Paul Sheffield, Gary Stott, Carolyn Nichols

7a Reid Tateoka, Richard Armstrong, Mary Atkin, Kenny Atkin

7b Brent Todd, David Yocum, Marty Verhaal, Randy Gaither

8a Brent Jones, Ephraim Fankhauser, Michael Lebrum, Martin Banks

8b Michael Jensen, K. L. McIff, Mark McIff, George Paulson Jr.

9a Mark Gibb, Paul Durham, Kevin Finegar, Jim Jenkins

9b Ed Pond, Val Miller, Reed Benson, Mark Zobrist

10a Korey Rasmussen, DeMar Barron, Dave Dunford, Don Steele

10b Dave Patterson, Doug Simpson, Paul Osborne, Hazel Abercrombie

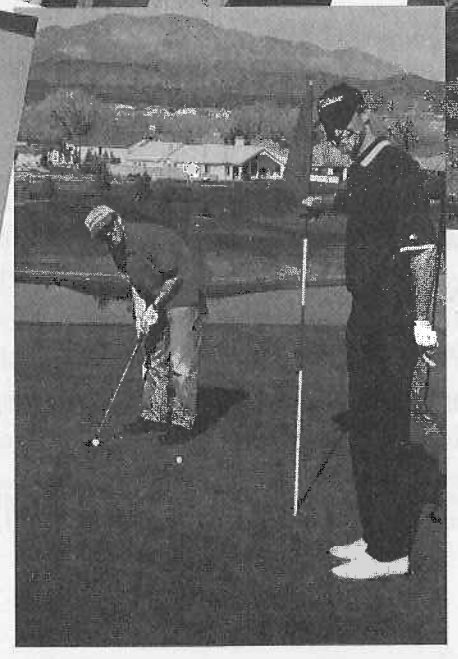
11a James Lund, Todd Jensen, Tracy Fowler, Leland Evans

11b

COUPLES

5a Kent Yano, Donna Yano, Richard Shepherd, Renee Shepherd

5b Glen Richman, Barbara Richman, Shari Johnson, Bart Johnson



Notice of Amendments to Rules

The following rule changes have been adopted by the Supreme Court or Judicial Council with an effective date of April 1, 1999 (unless otherwise noted). The information is intended to alert Bar members to changes that may be of interest and is not an inclusive list of all changes made. Further information may be found in the following sources:

- Code-Co. Web Site: *http://www.code-co.com/*
- *Intermountain Commercial Record*
- *Pacific Reporter Advance Sheets*
- *Utah Court Rules Annotated* (1999)
- Utah State Courts Web Site: *http://courtlink.utcourts.gov/rules/*

RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers. Requires notice of hearing scheduled five days or less from the date of service to be served by delivery or other method of actual notice.

Rule 6. Time. Changes period for which intermediate weekend days and legal holidays are not counted from seven to eleven days.

Rule 77. District courts and clerks. Removes paragraph (d) concerning fees.

RULES OF CRIMINAL PROCEDURE

Rule 2. Time. Changes period for which intermediate weekend days and legal holidays are not counted from seven to eleven days.

Rules 7. Proceedings before magistrate.† Amends to recognize consolidation of district and circuit courts and to recognize that provisions governing preliminary examinations may exist elsewhere in rule or statute.

Rule 26. Appeals. Repeals because substance covered in the Rules of Appellate Procedure and statute.

RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right: when taken. Amends to reflect repeal of Rule of Criminal Procedure 26.

RULES OF JUVENILE PROCEDURE

Rule 37. Protective orders. Makes technical amendments and removes provision which limited rule to petitions for protective orders filed under the Cohabitant Abuse Act.

RULES OF EVIDENCE

Rule 1101. Applicability of rules. Amends to reflect adoption of Rule 1102.

Rule 1102. Reliable Hearsay in Criminal Preliminary Examinations. Adds new rule defining "reliable hearsay" and stating that reliable hearsay is admissible at criminal preliminary examinations.

CODE OF JUDICIAL CONDUCT

Canon 5. A Judge Shall Refrain from Political Activity Inappropriate to the Judicial Office. Amends provision governing candidates for judicial office in a retention election or reappointment process who have drawn active public opposition.

RULES OF PROFESSIONAL CONDUCT

Rule 4.2. Communication with Persons Represented by Counsel.†† New version of rule adopted.

CODE OF JUDICIAL ADMINISTRATION

Rule 4-202.08. Fees for records, information, and services. Changes public on-line service fees.

Rule 4-501. Motions. Amends to limit availability of hearings to motions that would dispose of action or any claim.

OTHER CODE OF JUDICIAL ADMINISTRATION RULES

Rule 3-108. Judicial assistance.

Rule 3-111. Performance evaluation for certification of judges and commissioners.

Rule 3-306. Court interpreters.

Rule 3-414. Court security.

Rule 4-110. Transfer of juvenile traffic cases from District and Justice Courts to the Juvenile Court.

Rule 4-202.02. Records classification.

Rule 4-207. Expungement and sealing of records.

Rule 4-405. Juror and witness fees and expenses.

Rule 7-102. Duties and authority of Juvenile Court Commissioners.

Rule 7-301. Intake.

Rule 7-304. Probation supervision.

Rule 7-307. Use of money in the restitution fund.

†Amendment reflecting court consolidation was approved as an emergency rule and currently is in effect.

††This rule was approved as an emergency rule and is currently in effect.

Celebrate Your Freedom

In recognition of the 50th Anniversary of the United States Air Force Department of the Judge Advocate General (JAG), Hill Air Force Base is hosting the official Law Day event for the Utah State Bar for 1999, entitled "Celebrate Your Freedom" on Friday, April 30th. According to Captain David Frakt, an Air Force JAG and Chair of the 1999 Law Day Planning Committee, "This year's ABA theme 'Celebrate Your Freedom' is a perfect match with what the Air Force JAG Department is all about. The US Air Force has been absolutely central to preserving our nation's freedom over the past 50 years and JAGs play a pivotal, though often unheralded, role in the Air Force's mission."

This year's Law Day celebration will take place on Friday, April 30. A full slate of activities are planned, including special tours of Hill Air Force Base, a golf tournament at the beautiful Hill AFB Golf Course, and several Continuing Legal Education seminars (approved for state CLE credit). The main event of the day will be a luncheon featuring a prominent keynote speaker. The luncheon, to be held at the Hill AFB Officer's Club, will also feature a special military drill and ceremony presentation by the Hill AFB Honor Guard. The cost of the luncheon will be $12.

According to Colonel James Sutton, Hill's Staff Judge Advocate and the host of the event, "This will be a unique opportunity for members of the Bar to learn about the fascinating law practices of the civilian and military attorneys serving their country in the United States Air Force. It will also be a rare chance to get a behind-the-scenes look at Hill Air Force Base." Tour participants will get an up-close glimpse at some of the high-tech aircraft and missile operations not generally seen by the public. For example, some tour groups will explore a missile launch silo. One and two hour tours will be offered. Golfers will also get a birds-eye view of Hill's flying operations from the Hill AFB Country Club, an 18-hole championship course situated on a bluff overlooking the flightline and the Great Salt Lake. The course is normally closed to the public.

Three CLE seminars are planned. Two 2-hour seminars will run simultaneously in the morning – one for criminal lawyers and one for civil practitioners. The criminal law seminar will focus on evidentiary issues and recent developments in criminal practice. The civil law seminar will focus on how civil lawyers interact with the military on legal matters, whether representing military clients or in disputes with the military or individual military members. Topics will include the Soldiers' and Sailors' Civil Relief Act, the Uniformed Services Former Spouse Protection Act, the Military Claims Act, garnishment of wages and involuntary child support allotments from military members. The third CLE seminar will be a one-hour joint session on Ethics. CLE seminars will be only $5 each. According to Captain Frakt, "we haven't finalized our speaker's list, but we are lining up some very dynamic people for our CLE seminars and our luncheon keynote speaker. I guarantee participants will not be disappointed."

The event is co-sponsored by the Office of the Staff Judge Advocate – Ogden Air Logistics Center, the Military Law Section, the Law-Related Education and Law Day Committee of the Utah State Bar and the Federal Bar. Registration will be accepted until April 19th. For further information or to register for the event please contact Captain David Frakt at (801) 777-7441 or via electronic mail at fraktd@hillwpos.hill.af.mil.

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 January 29, 1999. 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 1999.

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 checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Christine Critchley
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

ANNOUNCEMENT OF
JUDICIAL VACANCY
APRIL 14, 1999

ANNOUNCING:

That applications are now being accepted for two positions for juvenile court judge. One juvenile court judge position is in the First District (Box Elder, Cache and Rich Counties). One juvenile court judge position is in the Seventh District (Carbon, Emery, Grant & San Juan Counties).

The vacancy on the First District Juvenile Court bench and Seventh District Juvenile Court bench are the result of recent legislation

Completed application forms must be received by the Administrative Office of the Courts no later than ***5:00 p.m., Friday, May 14, 1999.***

TO OBTAIN APPLICATION FORMS AND INSTRUCTIONS:

Copies of forms required in the application process and instructions are available from the Administrative Office of the Courts. Forms and instructions also are available in the following word processing formats:

ASCII Text; WordPerfect 5.x; WordPerfect 6.x; Microsoft Word 5.x; Microsoft Word 6.x.

To obtain the forms and instructions in a word processing format, provide a return Internet E-Mail address or a 3.5" disk to Marilyn Smith at any of the following:

Internet E-Mail: marilysm@courtlink.utcourts.gov
Courts Web Site: Courtlink..utcourts.gov/jobs

FAX: (801) 578-3968

Administrative Office of the Courts
Attention: Marilyn Smith
450 S. State
P.O. Box 14021
Salt Lake City, Utah 84114-0241

When requesting forms and instructions in a word processing format, include the requested format. The application form, waiver forms, and instructions are available in all of the above formats to subscribers of the Utah State Court Bulletin Board.

SELECTION PROCESS:

Utah law requires the Judicial Nominating Commission to submit three nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the governor's selection. To obtain the procedures of Judicial Nominating Commission and the names of Commission members call (801) 578-3800.

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's courts in general, or the First or Seventh Dist. Juvenile Court, submit a written statement no later than June 11, 1999 to the Administrative Office of the Courts, Attn: First Judicial District Nominating Commission.

continued on next page

Terms of Employment:

A. Benefits:

Salary as of July 1, 1998 is $93,600 annually • 20 days paid vacation per year • 11 paid holidays • $18,000 term life insurance policy (with an option to purchase $200,000 more at group rates) • Choice of five Medical and Dental Plans. Some plans paid 100% by the state, others requiring a small employee contribution.

Retirement Program: Judges are able to retire at any age with 25 years service; at age 62 with 10 years service; or at age 70 with 6 years service. Retirement amount is calculated on the basis of years of service and an average of the last 2 years of salary. Judges receive 5% of their final average salary for each of their first 10 years of service. 2.25% of their average salary for each year from 11 to 20 years of service, and 1% of their final average salary for each year beyond 20 years to a maximum of 75%.

B. Judicial Retention:

Each judge is subject to an unopposed, nonpartisan retention election at the first general election held more than 3 years after the appointment. To be retained, a judge must receive a majority of affirmative votes cast. This means that newly appointed judges will serve at least 3 years, but not more than 5 years prior to standing for their first retention election.

Following the first retention election, trial court and appellate judges appear on the retention ballot every 6 years. Supreme Court Justices stand for retention every 10 years.

C. Performance Evaluation:

All sitting judges undergo a performance review after the first year in office and biennially thereafter. Judges not up for retention election can use the performance review results (which are confidential) as a guide for self-improvement. Judges up for retention election are subject to Certification Review by the Judicial Council. Prior to the election, the Council publishes in the voter information pamphlet whether the judge met or failed to meet the following evaluation criteria:

- Compliance with case delay reduction standards.
- No public sanctions by the Judicial Conduct Commission during the term of office and not more than 1 private sanction during the final 2 years of the term of office.
- Completion of 30 hours of approved judicial education each year.
- Self Certification that a judge is physically and mentally able to serve, and complies with the Code of Judicial Conduct and Administration.
- A satisfactory score on the certification portion of the Council's Survey of the Bar.
- For District Court Judges a satisfactory score on the certification portion of the Council's Survey of jurors.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Marilyn Smith in the Administrative Office of the Courts, 450 S. State St. P.O. Box 140241, Salt Lake City, Utah 84114-0241. (801) 578-3800. Application packets will be forwarded to prospective candidates.

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 (optional) _____

3. Residence Address – Private Information

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

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 _____

All changes must be made in writing. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834: Attention: Arnold Birrell, Fax Number (801) 531-0660.

State Criminal Case Procedures

by Randall Allen

This is an attempt to acquaint new lawyers with basic state criminal procedures.[1] A simple question-and-answer format is used.

WHAT ARE THE MAIN STEPS IN THE PROCESS?

• The filing of the Information, which contains counts alleging the specific crimes committed by the defendant. *See* U.R. Crim. P. 5.

• Initial appearance, at which the defendant is presented with the Information, and the right to counsel is discussed; the court will appoint counsel for indigent defendants facing a reasonable probability of incarceration. Bail may be addressed by the defendant as well. A misdemeanor defendant may be arraigned and enter a plea. A felony defendant will not be arraigned, but will have a preliminary hearing date scheduled, unless he or she waives the preliminary hearing and enters a plea to the district court. *See* U.R. Crim. P. 7.

• Preliminary hearing (felonies only), where the state must show probable cause in order for the case to be "bound over" for trial.

• Arraignment before the district court (felonies only), where the Information is again presented and the defendant enters a plea. *See* U.R. Crim P. 10.

• Pre-trial conference. *See* U.R. Crim. P. 13.

• Motions may be filed, argued and decided at various times from arrest to trial.

• Sometimes a review hearing or status conference will be set if the litigants need time before moving immediately to the next step in the process, or if a resolution is anticipated.

• Trial. *See* U.R. Crim. P. 5.

• Sentencing. This may sometimes take place at the same time as the entry of a misdemeanor plea, if the court does not wish to have a pre-sentence report prepared, though the defendant has a right to be sentenced not less than 2 nor more than 45 days after a plea or verdict. *See* U.R. Crim. P. 22.

WHAT ARE THE FIRST FEW PLEADINGS A DEFENSE ATTORNEY ROUTINELY FILES WHEN THE CASE BEGINS?

• Notice of Appearance.

• Discovery Motion (requesting the prosecutor turn over all relevant information).

• Motion to Reduce Bail and Request for Hearing.

• Request for Jury Trial.

WHAT ARE THE DEFENDANT'S BASIC RIGHTS?

• The right to counsel.

• The right to remain silent, including the right to prevent silence from being used against the defendant at trial.

• The right to have exculpatory evidence turned over by the prosecution.

• The right to confront and cross-examine adverse witnesses, and to compel the attendance and testimony of favorable witnesses.

• The right to trial by an impartial jury.

• The presumption of innocence, with conviction only where the jury unanimously finds the state has proven guilt beyond reasonable doubt.

HOW CAN THE DEFENDANT GET OUT OF JAIL DURING THE PENDENCY OF THE CASE?

• Sometimes defendants are not arrested but are merely summoned to appear. *See* U.R. Crim. P. 6.

Randall Allen is an associate with Kirton & McConkie. He practices in civil and criminal litigation

• If the defendant has been arrested, a bail amount will have been set either in the arrest warrant or by the court shortly after a warrantless arrest.

• There are a few circumstances in which the defendant can be held without bail. *See* U.C.A. § 77-20-1(1).

• A defendant, or someone on his behalf, can simply pay the bail amount with cash, cash equivalent, or sometimes by credit card.

• If cash or cash equivalent is not available, a real property bond may be posted in lieu of bail.

• Finally, the defendant can deal with a bail bondsman, who will post a bond to cover the bail after being paid a percentage of the total amount, usually 10 percent, which will be kept by the bondsman as a fee for the posting of the bond. The bondsman will often also require some type of security agreement designating collateral to cover the bond amount if the defendant fails to appear.

• Defense counsel can move to reduce the bail. The court will consider various factors including flight risk and danger to the community. The motion can be argued either at a hearing scheduled with the court and noticed up to the prosecution, or sometimes at the next hearing set in the case. *See* U.C.A. § 77-20-1(4).

• If at the time of the hearing for reduction of bail, the defendant has already bailed out, and the court reduces the bail amount, the defendant can move to have the difference in amounts released and returned.

• Bail reduction is not the only option; release on the defendant's own recognizance without bail is also a possibility in some cases.

• One key to facilitating bail reduction or release on the defendant's own recognizance is securing the approval of Pre-trial Services to have the defendant supervised during the pendency of the case. An early telephone call and arrangement for a PTS interview with the defendant is helpful. Sometimes pre-arrest PTS contact can result in an arrangement where the defendant is booked then released immediately to PTS.

See Code of Judicial Admin. Rule 4-612; U.C.A. § 77-20-1 *et seq.*

WHAT DISCOVERY TOOLS ARE AVAILABLE TO THE DEFENSE?

• Private investigation of facts; using a third-party to interview witnesses may be wise so as to avoid defense counsel becoming a witness.

• Request for Discovery; the prosecution is required to disclose evidence in its possession according to standards of U.R. Crim. P. 16.

• Questioning at preliminary hearings; the scope of questioning is sometimes limited by the court to focus the hearing on whether probable cause exists.

• Subpoenas for production of documents and evidence; this is used to obtain items not in the possession of the prosecution. Witnesses can be subpoenaed to testify at preliminary hearing or trial, but cannot normally be subpoenaed to give testimony on other occasions, except as allowed under U.R. Crim. P. 14.

• Interrogatories.

WHAT ARE COMMON PRETRIAL MOTIONS?

• Motion to Reduce Bail. *See* U.C.A. § 77-0-1.

• Motion to Suppress; this is appropriate when the state's actions in obtaining evidence violated constitutional search and seizure safeguards.

• Motion to Sever; this is appropriate when trial of one defendant or count with another defendant or count would be unfair or prejudicial. *See* U.C.A. § 77-8a-1.

• Motion to Exclude Eyewitness Testimony; this is appropriate when eyewitness testimony is not sufficiently reliable. *See State v. Ramirez*, 817 P.2d 774 (Utah 1991); *State v. Nelson*, 950 P.2d 940 (Utah Ct. App. 1997).

• Motion to Dismiss; this may be appropriate in various circumstances (i.e. double jeopardy, challenge to constitutionality of statute, etc.).

WHAT IS THE PROCESS FOR RESOLVING MOTIONS?

• Motions must be made in writing, except where made at a hearing or at trial as the court may permit.

• Motions should include supportive legal argument and citation, and may be supported by affidavit or other evidence presented at a hearing on the motion. Often, defense counsel will be asked at an early hearing to specify what motions he or she intends to raise, and the court will set dates for filing the motion, for the state to respond, and for a hearing. *See* U.R. Crim. P. 12.

WHAT ARE THE VARIOUS WAYS CASES ARE RESOLVED SHORT OF TRIAL?

• Dismissal.

• Pretrial diversion.

• Plea in abeyance. *See* U.C.A. § 77-2a-1 *et seq*; 77-18-1.

- Plea to reduced charge.
- Plea to highest charge with other charges dismissed.
- Straight plea.

The state may also promise to make various recommendations at sentencing.

A defendant may plead no contest rather than guilty only with the consent of the court. *See* U.R. Crim. P. 11(c).

When entering a plea, defense counsel must advise the defendant of the rights he or she is forfeiting and the potential sentence. Some courts require submission of a document called the "Statement of Defendant"; forms are available in most courts which require this. *See* U.R. Crim. P. 11.

WHAT BASIC TASKS SHOULD DEFENSE COUNSEL HAVE COMPLETED BEFORE TRIAL BEGINS?

- Give required notices; common examples include:
  - Expert witness notice. *See* U.C.A. § 77-17-12.
  - Alibi defense notice. *See* U.C.A. § 77-14-2.
  - Mental state defense notice. *See* U.C.A. § 77-14-3 and 4.
  - Entrapment defense notice. *See* U.C.A. § 77-14-6.
- Desired voir dire questions, jury instructions, and verdict forms should be prepared and submitted to the court according to schedule set at the pre-trial conference.
- Any anticipated legal arguments should be made ready.
- Opening argument should be prepared.
- Anticipated questions for witnesses should be prepared.
- Closing argument should be preliminarily prepared.
- Witnesses should be under subpoena.
- Arrangements for presentation of physical evidence should be made.
- If the defendant is incarcerated, arrangements should be made to have street clothes provided and the defendant's appearance otherwise taken care of.

HOW MANY JURORS WILL THERE BE?

- For capital felony trials, 12.
- For all other felony trials, 8.
- For Class A misdemeanors, 6.
- For all other misdemeanors, 4.

All verdicts must be unanimous. *See* Utah Constitution, Art. 1, Sec. 10.

WHAT IS THE BASIC PROCESS OF TRIAL?

- Jury voir dire and selection.
  - Usually the court will ask numerous general questions of each of the panel members; then the prosecutor and defense counsel will be allowed to ask some follow-up questions. Each judge has a different approach.
  - Then arguments for dismissal for cause will be heard and decided by the court.
  - Then the peremptory strikes will be made one-by-one alternating between the sides. Each side is entitled to 10 peremptory challenges in capitol cases, 4 in other felony cases, and 3 in misdemeanor cases. *See* U.R. Crim. P. 18.
- Initial jury instructions and reading of the information.
- Opening statements.
- State case; the prosecution presents witness testimony and physical evidence.
- Defense case; if the defense desires, it may present witness testimony and physical evidence.
- Rebuttal testimony. The court has discretion to allow rebuttals by each side to follow the other side as necessary.
- Jury instructions are read aloud.
- Closing argument. The prosecution goes first, then the defense, then the prosecution is allowed a rebuttal.
- Deliberation.
- Verdict.

WHAT IS THE SENTENCING PROCESS?

- For some misdemeanors, the court will impose sentencing at the time the plea is entered if the defendant waives his/her right to delay it.
- For other misdemeanors and for felonies, the court will order AP&P (Adult Probation and Parole) to prepare a pre-sentence report and will set a sentencing hearing about six weeks out.
- The pre-sentence report summarizes the facts, reflects the input of the state personnel, the victims and the victims' family, and the defendant and the defendant's family, reveals the defendant's criminal history, and makes a sentencing recommendation.
- At the sentencing hearing, the prosecution and the defense both have an opportunity to present statements; evidence may

also be presented, though it is usually done by proffer.

HOW CAN A DEFENSE ATTORNEY ASSIST THE DEFENDANT IN THE SENTENCING PHASE?

• Suggest to the defendant ways that he or she can begin making amends and making positive changes. Examples include letters of apology, monetary restitution, classes and therapy.

• Impact the pre-sentence report by preparing the defendant for when he or she fills out the questionnaire and has the interview with AP&P, making sure he or she does not minimize or excuse behavior, but takes responsibility and apologizes. Talk with the AP&P investigator who prepares the report to make sure that any favorable facts are conveyed and that any incorrect, unfavorable information is corrected or explained. Letters of apology and support can be directed to the investigator and included in the report as well. Remember that this report will be used not only for sentencing but for any parole proceedings as well and thus should contain any helpful or mitigating information and documentation.

• Defense counsel may submit a document entitled "Statement in Mitigation" to the court prior to sentencing in which legal or factual arguments and positions are set forth and mitigating factors and sentencing options are discussed.

• Defense counsel, as well as the defendant, may make statements at the hearing. Written documents or statements helpful or supportive for the defendant may be submitted to the court at the hearing as well. The state, the victims, and the victims' family will also be given an opportunity to address the court.

WHAT ARE THE SENTENCING OPTIONS AVAILABLE TO THE COURT?

State court judges have wide discretion in crafting sentences. Sentences may include the imposition of fines and restitution, jail or prison terms, probation, and other items.

Fines:

• The following maximum fines may be imposed for a felony:
  • 1st or 2nd degree: $10,000.
  • 3rd degree: $5,000.

• The following maximum fines may be imposed for a misdemeanor:
  • Class A: $2,500.
  • Class B: $1,000.
  • Class C: $750.

• The court will also add an 85% surcharge on fines, and may order monetary restitution to victims.

• A fine may be imposed on each criminal count.

See the Code of Judicial Administration, Appendix C (Uniform Fine/Bail Schedule) for non-binding fine guidelines.

Jail:

• For a felony, the court may sentence a defendant to a prison term but suspend that sentence and impose various other punishments including a jail term of up to one year.

• For a misdemeanor, the court may sentence the defendant to a jail term but suspend all or part of that sentence and impose various other punishments including probation.

• The maximum jail term for a misdemeanor is as follows:
  • Class A: 1 year.
  • Class B: 6 months.
  • Class C: 90 days.

• Jail sentences are for a fixed number of days, but the court may grant a review hearing during the term to consider early release.

• Jail sentences may be imposed on each criminal count and may be ordered served concurrently (at the same time) or consecutively (one after the other).

Prison:

• The prison term for a felony is as follows:
  • 1st degree: 5 to life.
  • 2nd degree: 1-15 years.
  • 3rd degree: 0-5 years.

• A prison sentence is for an indeterminate term, with the parole board empowered to decide when during that term the defendant may be paroled.

• Prison terms may be increased by gun or gang enhancements.

• Some felonies carry special minimum mandatory prison sentences.

• Prison sentences may be imposed on each count and may be ordered served concurrently or consecutively.

Probation:

• Probation may be set to begin at the time of sentencing or after completion of a jail sentence. Release from prison is called "parole" rather than "probation" and is governed by the Parole Board.

• Probation may be informal, in which case the defendant is not strictly supervised and simply completes the terms and reports this directly to the court. Probation may also be formal, in which case the defendant is supervised, usually by AP&P, and

has various terms and conditions which will be enforced by a probation officer.

• Probation may include a wide variety of terms including payment of fines and restitution, completion of classes and counseling, various forms of supervision, abstinence from alcohol and drugs with testing, completion of education, work requirements, measures to make amends to victims, etc.

There are other sentencing options available to courts (i.e. electronic monitoring, home confinement; *see* U.C.A. § 77-18-1).

See the Code of Judicial Administration, Appendix D (Utah Sentence and Release Guidelines) for non-binding sentencing guidelines; *see also* U.C.A. § 77-18-1 *et seq.* and 19-1 *et seq.*

HOW CAN I GET MORE INFORMATION?

• Utah Rules of Criminal Procedure.

• Code of Judicial Administration; *see especially* Rule 4, Article 6 - Criminal Practice.

• Utah Criminal Code, Title 76.

• Utah Code of Criminal Procedure, Title 77.

• Trial Handbook for Utah Lawyers, by David W. Scofield.

• Ask questions of prosecutors and defense counsel. Most are willing to take a minute to answer a question.

• Attend CLE seminars.

• Check websites such as www.justice.state.ut.us (miscellaneous information on the Utah justice system), www.nysda.org (Clearinghouse of Criminal Defense Information), and www.law.indiana.edu (Virtual Law Library, Criminal Law and Evidence - provides links to many criminal law web sites).

[1]This article does not explain juvenile, city, or justice court procedures.

Wayne Owens to be Featured Speaker at May 3, 1999 Law Day Luncheon

On May 3, 1999 at noon, the Young Lawyer's Division of the Utah State Bar will hold the annual Law Day luncheon at the Little America Hotel in Salt Lake City. All members of the Utah State Bar are invited to attend the luncheon. Members may register for the Law Day Luncheon by filling out a card which they will receive in the mail in advance of the luncheon. The speaker at this year's luncheon will be the Honorable Wayne Owens.

In January 1993, after having served in Congress for eight years representing Utah's Second Congressional District, Wayne Owens became Vice-Chairman of the Center for Middle East Peace and Economic Cooperation and in February 1995, he became President.

While in Congress, Mr. Owens, as a member of the Foreign Affairs Committee, chose to concentrate his committee efforts on the Middle East. He visited the region virtually every three months over the last five years of his service in Congress, usually accompanied by his friend, New York and Florida businessman S. Daniel Abraham. In 1989, Congressman Owens and Mr. Abraham organized the Center for Middle East Peace and Economic Cooperation, the purpose for which was to support and promote the peace process, and to help build economic interaction between Israel and her Arab and Palestinian neighbors.

Traveling together, the two of them established a working relationship with almost all of the leaders in the region, including Jordan's King Hussein, Egypt's President Mubarak, Israel's Prime Ministers Shamir, Rabin, Peres and Netanyahu, Palestinian Authority President Arafat, Qatari Emir Shekh Hamad bin Khalifa Al-Thani, and Syria's President Asad. They have also worked with other Arab leaders in Saudi Arabia, Kuwait, Oman, UAE, Tunisia, Bahrain, Algeria and Yemen.

Prior to his service in the Congress, over a period of a dozen years, Mr. Owens worked on the staffs of three United States Senators: Frank Moss of Utah, Robert Kennedy of New York and Edward Kennedy of Massachusetts. He has practiced law in Utah and Washington, D.C. and has also given six years of full-time service for The Church of Jesus Christ of Latter-Day Saints (Mormons). In 1980 he was appointed by President Jimmy Carter to the National Commission on Resource Conservation and Recovery Board, and in 1994 by President Bill Clinton to the Utah Reclamation Mitigation and Conservation Commission. He is Chair of the Southern Utah Wilderness Alliance and a member of the boards of Defenders of Wildlife and The International Crisis Group. He is also a member of the Utah State and United States Supreme Court Bars.

He is married to the former Marlene Wessel of Great Neck, New York. They are the parents of five children and grandparents of eight.

LAD Education Opportunities

The following are upcoming educational opportunities for members of the Legal Assistants Division:

All Legal Assistants Division members are invited to attend an upcoming seminar sponsored by Legal Secretaries International Inc. This group is not affiliated with the Utah State Bar or the Legal Assistants Division, and no CLE credit will be offered, but the seminar is inexpensive and the topic should be of interest to members of the Division:

YEAR 2000 – ARE YOU READY?
HOW TO VACCINATE YOURSELF FROM
THE Y2K MILLENNIUM BUG

According to Marsha Gibler of Legal Secretaries International, Inc., the seminar will be a comprehensive, three-hour presentation covering problems associated with Y2K. This workshop is designed to assist members of the legal profession in addressing potential problems, including professional liability issues, office systems in the year 2000, docketing concerns, ticklers and statutes of limitations, software and hardware compliance, tips and suggestions for advising clients, tips and suggestions for office and home, and Y2K resources.

The speaker for the seminar will be Dee Crocker, Practice Management Advisor, Oregon State Bar Professional Liability Fund. The seminar will take place on Saturday, April 24, 1999, from 8:30 a.m. to Noon at the Shilo Inn, 206 South West Temple, SLC. There will be a charge of $25.00 for the seminar. For more information, please contact Marsha Gibler, PLS at 801-250-7283.

Interested in becoming a member of the Legal Assistants Division? Contact Connie Howard at the Utah State Bar, 531-9077, for membership materials. The Legal Assistants Division welcomes your participation, and also welcomes ideas, suggestions and volunteers for speakers and topics for brown bag seminars.

1999 Annual Meeting

Mark your calendars now for the Legal Assistants Division 1999 Annual Meeting, which will be held Friday, June 19, 1999, in Salt Lake City. This year's Annual Meeting promises to be quite an event, with great speakers and topics, vendor displays, lunch and prizes, in addition to Division business and voting. Watch for more information in the *Bar Journal* in coming months. See you there!

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Chief Justice Richard C. Howe

by Lloyd R. Jones

A career that began in the Chief Justice chambers of the Utah Supreme Court fifty years ago has come full circle. Chief Justice Richard C. Howe began his legal career in 1949 clerking for Chief Justice James H. Wolfe after graduating from the University of Utah Law School in 1948. In April 1998, the Chief Justice was elected by his colleagues to a four year term as Chief which caps a career full of private service to his community in private practice in Murray and public service to his State as a member of both the legislative branch and later as a Supreme Court justice. He has been described as a true gentleman who exercises sound judgment.

Chief Justice Howe did not always intend to practice law or to become a justice on the highest court of the State. Rather, growing up in rural Salt Lake County, he gravitated to farming and horticulture. His early judging duties were in high school agricultural competitions in which he had to determine the best produce among several offerings. It was not until he took a required commercial law class at Granite High School did his heart turn towards a career in law.

"I had no idea what lawyers did or what law was about, and up to that point, I really didn't care," he recounted with a good-natured chuckle. "When I took this commercial law class it really excited me. And to excite a high school boy it has to be something really good."

The Chief Justice sat back and, with a smile, remarked that the switch to law was a wise choice because he learned that fruit farmers are often wiped out by a late frost and have to go without an income for a year. He paused, and smiled again. "Of course even the law is risky because you never know if your clients are going to pay you."

Upon graduation from law school, the Chief competed among several candidates for a judicial clerkship with Chief Justice Wolfe by writing a draft opinion on a probate case. He was awarded the clerkship and it was during this time that Chief Justice Howe determined that he would also like to become an appellate judge some day.

"I loved to go to the library and read cases and think about them and come back and write opinions about them. In the back of my head I thought some day I'd like to be on the Supreme Court."

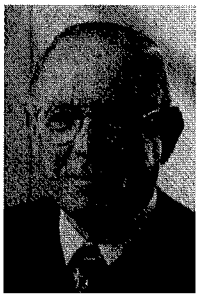
His dream was realized when Governor Scott M. Matheson appointed him to the Supreme Court in 1980.

Justice Howe said that once he made the decision to go into law, he always wanted to practice in a small firm in Murray City for a variety of reasons. His cousin Glen Howe, an attorney in Murray, and an uncle, David Moffat, a Supreme Court justice, both impressed him. Moreover, there were not many attorneys in Murray.[1] So, after graduation, he bought some land, built an office and practiced "down by Murray Park" for 26 years.

"I kind of liked doing it on my own," he recalled.

Still, solo practice, even in the good ol' days, was no cake-walk. Vacations required careful planning. The Chief Justice recalled that any time he planned a vacation he would work extra hours for a week or two preceding the time he planned to leave with his family. Nonetheless, "I'll be darned if the day before you left, in the mail, here would come a motion for summary judgment that had to be heard and all hell would break loose and all of your clients would call."

Over the span of fifty years, he has seen a lot of changes in law, both in his capacity as a legislator and member of the Bar. In years past, because of the smaller number of lawyers in Utah, relationships between attorneys were a lot more congenial. However, having more lawyers also has its upside, because it creates more competition and the good lawyers rise to the challenge.



Regarding the judiciary, the Chief Justice has also noted some changes. He observed that the judges have become more "consumer friendly." He views this as a positive change from the former position of judges as aloof dispensers of judicial decisions.

The Bench now does more that just decide cases. In divorce cases, the courts get involved with custody evaluations made by social workers and psychologists. At the Matheson Courthouse, there is a drug court in which the judge takes a proactive role working with drug addicts to turn them around and get them out of the system. In the Juvenile court there is a tobacco court trying to cure kids of the tobacco habit. The small claim courts' jurisdiction was expanded and it allows people to take their problems before judges pro tem. The Chief Justice is pleased that judges have more of an attitude of service to the people. Courts are not merely sitting back and are more flexible and responsive to the needs of their "consumers," Utah citizens.

However, the Chief Justice has concerns about the legal system, which he first stated in his address to the Bar in Sun Valley in July 1998. He pointed out that the wealthy and corporate America can afford to pay legal fees. On the other end of the socio-economic scale, those who fit within certain financial guidelines or suffer from disabilities can qualify for legal service from organizations such as Legal Services, Legal Aid, Legal Defenders and the Legal Center for People with Disabilities. However, he is concerned that someone like a school teacher who is involved in a divorce, particularly if it involves litigation and appeal, cannot afford to pay attorney fees.

"Courts are . . . more flexible and responsive to the needs of their 'consumers,' Utah citizens."

"I would like to see legal services for everybody," he declared.

He is quick to state that he understands that lawyers have expenses and families to support and that overhead in today's law firm is a far cry from the day when "a typewriter, some carbon paper and a secretary" were pretty much the only operational costs of law practice. However, he urges the Bar to accommodate people with medium incomes so that they are not left out.

The Chief Justice is content with his role both as Chairman of the Utah Judicial Council and as Chief Justice of the Utah Supreme Court. He relishes his interaction with judges from all levels of the judiciary, from justice court justices to his colleagues on the Supreme Court. He sees his role to assist judges through continuing education, training and supporting new appointees. The Judicial Council is working constantly to "look at ways to better serve the people." The Council also handles minor complaints about judges by providing counseling to the judges.

On the Supreme Court, the Chief Justice views his role as sort of a facilitator, to get cases through the system.

"We are always aware that people are waiting on us for decisions." He commented that generally, when a case is appealed, it adds a year to the process. To avoid keeping people "in limbo" too long, while their matter is being considered by the appellate courts, the Chief Justice urges his colleagues to be better organized and efficient in producing opinions. He also stated that the Court has an excellent support staff and law clerks.

On the rare occasion when he is not working, the Chief Justice still enjoys gardening. The rest of the Supreme Court is the recipient of the bounty of his harvest. He enjoys traveling with his wife and family. He has traveled to Japan, the Holy Land, Europe and just returned in October from a cruise to the Greek Isles and Turkey where he purchased a Turkish rug that now graces the floor of his office.

When the Chief Justice is not reading briefs, case law and administrative reports, he enjoys reading about Utah history. His great grandparents walked halfway across the country to come to Utah, a decade after the Brigham Young's initial entry into the Salt Lake Valley. His Utah roots are apparent from the Utah landscapes on his office walls to the Granite "Farmer" statuette looking over his desk from the window sill.

Utah public service has been in the family since the beginning. His great grandfather was in the Territorial Legislature and a County Selectman and his father served as a county commissioner. His brother served in Congress. Before his appointment to the Supreme Court, the Chief Justice served for 18 years in both of Utah's legislative chambers. He compares being a lawyer to being a doctor and a legislator. Although people make jokes about lawyers, he finds that people are very happy with their own lawyer because of the service they provide in times of need and he declared, "I've always been proud to be a lawyer." His legacy as Chief Justice may well be summed up with his parting comment, "I've passed through this world not trying to be a trouble maker but a trouble solver."

[1]He recalls only two attorneys in Murray when he began his practice — Wendall Day, who had taken over his cousin Glen Howe's practice and Doug Allen, who was also a mortician at Jenkins Soffe Mortuary, where he established a thriving probate and estate planning practice.

Book Review

by Betsy Ross

Many thanks to Cal for the opportunity to write these book reviews. As I remember it, it was his idea to introduce book reviews into the *Utah Bar Journal*, and it was his flexibility that allowed the kind of reviews we've had. (Though he would often reiterate, "Every third review should have something to do with the law.") So it is with gratitude that I offer this month's reviews – a compilation of books read recently and recorded in my journal, all of which I think have "something to do with the law" in the sense, as I argued with Cal, that law draws on, and in return, influences, every aspect of our humanity. I hope you agree, Cal.

November, 1998, Finished reading *A Lesson Before Dying* by Ernest J. Gaines. It is a simple story – no great literary talent, but an important message, the gist of it in this quote:

> "We black men have failed to protect our women since the time of slavery. We stay here in the South and are broken, or we run away and leave them alone to look after the children and themselves. So each time a male child is born, they hope he will be the one to change this vicious cycle – which he never does."

This in the context of yet another black man sentenced to death, whose mother wants to turn him into a "man" before he dies. And in the meantime, there are interesting relationships developed, particularly between blacks and whites. Gaines describes a time when blacks were required to call whites "Mr." or "Mrs." The exception is the relationship that develops between Grant Wiggins, the black teacher given the job to "educate" the prisoner, and the white jail deputy, Paul. It is a sweet taste of humanity in an otherwise acrid representation of society.

December, 1998. Just finished *Do They Hear When You Cry?*, a memoir by Fauziya Kassindja, an African woman who fled Togo and came to America seeking asylum to escape the female genital mutilation she was set to undergo. It was a sobering story of the treatment given refugees while awaiting asylum decisions.

January, 1999. Finished *Hanna's Daughters* by Marianne Fredriksson, A story of three generations of women. Her theme in this quote, "Nothing's ever comprehensible, she thought to herself. But in small things, we can have an inkling." In many ways it is a very simple book – from the voice itself, often in first person and primarily of uneducated classes, to the message. It makes one think about the relationship between the generations, personality traits passed down, traits adopted in reaction to the generation before – all without notice, without perspicuity. Things and people taken for granted in a whirl of self-absorption that we call growing up. Do we know who our mothers were? Or, as Fredriksson writes of a daughter speaking of her mother, "I wasn't interested in you as a person, only as my mother." This book says, keep your heart open to the small things.

February, 1999. Finished *The River Midnight* by Lillian Nattel, a Canadian writer. It is the story of a village in Poland in the late 1800s – a "shtetl." Nattel employs an intriguing structure, introducing a character, following his or her story, then abandoning it to take up another character. Each character's story is begun at different points in time, not chronological, so you will meet a familiar character at some point in the new character's story, retelling the familiar character's story – adding to it, sounding it out with another's perspective. It is much like adding one instrument to another in an orchestral piece until you have a full harmonic convergence.

The characters themselves are compelling: Misha, the unconventional midwife who will not marry, in fact divorces Hayim after six months and aborts, with her herbs and potions, their child. And Hayim, the artist water-carrier, who can see others so well, so compassionately.

Nattel also introduces the Traveler and Director, who are messengers of God, and have roles to play in helping others develop, which development has lessons for us: Berekh the rabbi, who perhaps was not courageous in his convictions, learns a lesson of atonement:

> Traveler: "Every man can atone," he says quietly.
> Berekh: "How can he? The past cannot be changed. Such a man, though he atones all his life cannot erase one minute of pain and suffering."

"God in Heaven," the Traveler snaps, "a person atones all of his life, and you're telling me it's useless?" . . . . "But," the Traveler continues, "such a man hears the call of the ram's horn not only on the Day of Atonement, but every day. Awake, always ready to make amends by acting on behalf of others. Always alert lest he fall asleep again. . . . How fortunate are the friends of such a man. How lucky are those who know him. They'll always have someone to turn to in time of need, a man who won't look down on them for their sins, knowing his own."

I love that lesson of compassion, and the acknowledgement of the sinner's pain and eschewal of the self-righteous.

There are many stories and Jewish traditions captured and passed on in this novel. One addresses a question with which all believers must surely struggle, and a point non-believers use to justify their position: How could a just and merciful God allow so much pain in the world. Nattel answers it with this folktale about the Ba'al Shem Tov:

"He was wandering in the forest when he saw an old woman gathering wood. She was so hunchbacked she could barely walk, and yet she pulled a little boy in a small cart. The little boy had no legs. He was sucking on a dirty old rag, his eyes big in his hungry little face, and he made not a single sound. Finally the Ba'al Shem Tov cried out in anguish, 'Eternal One, You see the afflictions of Your children, whom You created with Your own hands, why do You not do something for them, I beg of You?' He waited and waited for an answer while the trees shook and the wind howled, until at last a voice came from the heavens. The voice said, 'My child, I have. I created you.'"

To Cal: Thanks for letting me share these thoughts and reviews over the past seven years.

Case Summaries

by Daniel M. Torrence

MORSE V. PACKER

361 Utah Adv. 20 (Utah, January 22, 1999). Lynn Packer, pro se plaintiff/appellant; Timothy M. Willardson, then Michael S. Eldrege for Defendant/Appellee.

Morse sued Packer, a free-lance reporter, for defamation arising out of a story Packer was investigating and writing for the *Private Eye Weekly*. Packer won a motion for summary judgment and then argued for Rule 11 sanctions against Willardson, which was denied.

On appeal, the Supreme Court noted that courts are required to describe the offending conduct on the record when *imposing* Rule 11 sanctions. Similarly, when *denying* sanctions, a trial court must put the same type of findings in the record, so that the appellate courts may apply the appropriate standards of review. The case was remanded for an order from the trial court explaining its rationale denying sanctions.

OXENDINE V. OVERTURF

361 Utah Adv. Rep. 23 (Utah, January 22, 1999). C. Michael Lawrence for Plaintiff/Appellant; James E. Morton, Peter C. Collins, and Tara L. Isaacson for Defendants/ Appellees.

Ms. Gay Overturf died due to the negligence of the University of Utah Medical Center. Her husband, represented by James Morton, brought suit as the personal representative of her heirs. The deceased's mother, Thelma Oxendine, wished to have Morton represent her interests as well, but Morton declined and Oxendine hired C. Michael Lawrence. Morton and the Medical Center settled the case without notifying Lawrence. Oxendine then sued her co-heirs and Morton for contribution and breach of a third-party beneficiary contract, based upon the settlement agreement. The trial court granted summary judgment for defendants and Oxendine appealed.

The Supreme Court noted that the Utah Code and case law provide that when a personal representative brings a wrongful death action, he does it for the benefit of all statutory heirs. Therefore, Oxendine had a claim against Overturf for failing to represent her interests, but may not bring a contribution action against the co-heirs.

Oxendine also argued that Morton had a duty to protect her interests because the settlement was intended to benefit the statutory heirs, including her. Historically, an attorney could not be held liable to a non-client absent fraud, collusion, or privity of contract. However, the modern trend is to abandon privity requirements in attorney negligence and malpractice cases. The main inquiry in cases alleging attorney liability to non-clients is whether the contracting parties clearly intended the third party to receive a separate and distinct benefit from the contract. Thus, in most cases, the personal representative's attorney will have a fiduciary duty to represent the interests of all statutory heirs. However, in wrongful death cases, an exception exists when a conflict arises between the heirs or between an heir and the personal representative.

Here, a conflict developed between the heirs, Morton told Oxendine this, and Oxendine hired her own attorney. Given these facts, Oxendine knew she could not rely on Overturf's attorneys to represent her interests and she is precluded from suing them directly.

STATE V. JAMES

361 Utah Adv. Rep. 49 (Utah Ct. App., January 28, 1999). D. Bruce Oliver for Defendant/Appellant; Tony C. Baird for Plaintiff/Appellee.

Trooper Kendrick got a tip from a citizen that a pick-up truck was driving recklessly. Tracing the owner using the truck's license plate number, Kendrick got the owner's name (James) and address and drove there. A truck matching the description was just pulling into the driveway. Trooper Kendrick pulled in behind the truck, walked up to the truck and opened the driver's door. Inside the truck was an open beer container. James failed a sobriety test. Meanwhile, James' passengers were becoming unruly, so Kendrick called for backup. While he was doing so, James went inside his house. Kendrick and another trooper went into the open garage, knocked on the house door, and threatened to come inside for James if he wouldn't come out. James came back out,

failed another sobriety test, and was arrested for DUI and the open container.

James sought to suppress all evidence, arguing (1) no reasonable suspicion for the stop; (2) illegal search; and (3) lack of probable cause and exigent circumstances to enter his garage to arrest him. First, the Court of Appeals noted the well-settled rule that opening a car door is a "search." Such a warrantless search is only allowed when there is (1) probable cause to arrest or (2) reasonable suspicion the suspect is dangerous. Here, the State waived both grounds by not arguing them. Thus, the exclusionary rule requires the suppression of the evidence unless: (1) an exception to the exclusionary rule applies, or (2) the introduction of the evidence was harmless error.

The only exception to the exclusionary rule argued by the State was the "inevitable discovery exception," which states that improperly obtained evidence will not be excluded when the State can prove the evidence would inevitably have been discovered by lawful means. The lawful means must be in the form of an independent investigation. Factors to weigh in determining if an investigation is "independent" include (1) whether it was already underway, (2) whether it involved different officers, and (3) the closeness in time of the two investigations.

Here, there was no independent investigation, so the inevitable discovery exception to the exclusionary rule does not apply. Because all the evidence obtained by the Trooper was tainted and was critical, James' conviction was reversed.

Manning, Curtis, Bradshaw & Bednar Contributes Time and Money

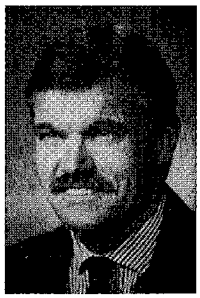
One of the most significant contributions received thus far to date for the "AND JUSTICE FOR ALL" campaign, comes from the nine member firm of Manning, Curtis, Bradshaw & Bednar. This two-year old firm gave an equivalent of $750 per attorney – a total of $20,000 over the next three years.

Brent Manning attributes the firm's philanthropy to an underlying understanding of the need for civil legal services in our community. "Our commitment grows out of our experience in the *Goodnight* case. Utah Legal Services attorneys saw a situation where a huge injustice was going on, but they were hamstrung by Congress to do anything about it. We took on the case pro bono. As a result of that case, 5,000 people who were denied Social Security benefits will have a chance at a fair evaluation."

The case of *Goodnight v. Apfel* was filed by ULS in 1992 against the Social Security Administration and the Utah Disability Determination Services. It alleged that the defendant's internal policies were causing the improper denial of disability benefits to a class of Utah residents suffering from physical and mental impairments. Conservative estimates have put the value of the settlement at $22 million. Manning sees the case as justice – even more than money – being denied. "People were being wronged every day in that system. It was a typical overworked bureaucracy – as a response to overwork, people were cutting corners. As a result, people were getting hurt. I'm glad we could help."

While the entire community benefits from the work of the Disability Law Center, Legal Aid Society and Utah Legal Services, Manning believes that attorneys should be the first to contribute. "Everyone is entitled to quality representation – and lawyers are uniquely responsible for making sure that happens because we have a monopoly and reap the benefits of the legal system. We have an obligation to share – and not just financially. You don't make partner here if you don't take pro bono cases." The firm's attorneys represent families in adoption proceedings, help members of the Tibetan community and "what ever needs to be done that comes to our attention."

For Manning, Curtis, Bradshaw & Bednar the campaign offers a way to express their appreciation to their colleagues who work in the nonprofit sector. "These are terrific lawyers who are dedicated as they can be and they don't get a lot of recognition. We who reap the benefits of our profession need to appreciate what these lawyers do for people every day."



Brent V. Manning

A SEMINAR **MUST**

"ACCOUNTING FOR LAWYERS"

7.5 HOURS OF CLE
APRIL 23, 1999 • 8:00 a.m. – 5:00 p.m.
LAW & JUSTICE CENTER
$196.25 FOR UTAH BAR MEMBERS ($206.25-DOOR)
$206.25 FOR NON UTAH BAR MEMBERS ($216.25-DOOR)
TO REGISTER CALL 1-800-328-4444
SPONSORED BY: THE UTAH BAR &
NATIONAL PRACTICE INSTITUTE

The Bob Miller Memorial Law Day 5K Run/Walk

Saturday, May 1, 1999, 9:00 AM

Fitness . . . and Justice for all

REGISTRATION:

Pre-registration: Mail or deliver to Kirton & McConkie, 1800 Eagle Gate Tower, 60 East South Temple Street, P.O. Box 45120, Salt Lake City, Utah 84145-0120. **Limited to first 500 entries.** Entries must be received by Thursday, April 29th.

Day of Race Registration and T-Shirt Pick-up: 8:00 a.m. - 8:45 a.m. at the parking lot located at the Law School on the University of Utah Campus (South Campus Drive). Call 321-4864 to determine if day-of-race registration is available.

Fee: Early registration $15.00; day-of-race registration $18.00.

Contributions above the registration fee are encouraged. Make out a separate check or money order payable to "and Justice for all."

Awards to:

- the top three finishers in individual race categories (male and female)
- the firm with the greatest number of individual contributions

OTHER PRIZES

T-shirts for all registrants

Special Appearance: The Justice Squad (you won't believe it!)

Course: Start at Research Park, finish at the University of Utah Law School

Details regarding course and race day events will be provided by mail to each registered participant

---

THE 1999 BOB MILLER MEMORIAL LAW DAY 5K RUN/WALK

Registration Form

Name _____ Age (on May 1, 1999) _____

Address _____ Zip _____

Phone _____ Law Firm (if applicable) _____

Age Group: _____

In consideration of the privilege of participating in this race, I hereby release from all liability the sponsors and organizers of this race, the USATF and USATF-Utah and all volunteers and support people associated therewith, for any injury, accident, illness or mishap that may result from participation in the race.

Signature of Participant: _____

Date: _____

Signature of Parent (if participant is a minor): _____

Age Groups:	
Men:	Women:
under 10	under 10
10-13	10-13
14-18	14-18
19-25	19-25
26-32	26-32
33-40	33-40
40+	40+
50+	50+
60+	60+
70+	70+

T-Shirt size (circle one):
Adult sizes

M L XL XXL

ENCLOSED:

☐ $15.00 early registration, payable to "Law Day Run/Walk"

☐ $ _____ my charitable contribution to the "and Justice for all" campaign - payable to "and Justice for all." Attorneys are encouraged and challenged to contribute the charge for two billable hours. Funds benefit clients of Utah Legal Services, Salt Lake Legal Aid Society, and Disability Law Center. **Thank you.**

Mail registration and check to:
LAW DAY RUN/WALK
c/o Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple Street
P.O. Box 45120
Salt Lake City, Utah 84145-0120

USATF NOTICE: Athletes who participate in this competition may be subject to formal drug testing in accordance with USA Track & Field Regulation 10 and IAAF Rule 55. Athletes found positive for banned substances, or who refuse to be tested, will be disqualified from this event and will lose eligibility for future competitions. **SOME OVER-THE-COUNTER MEDICATIONS CONTAIN BANNED SUBSTANCES. INFORMATION REGARDING DRUGS AND DRUG TESTING MAY BE OBTAINED BY CALLING THE USOC HOT LINE AT 1-800-233-0393.**

Current Donors to the "AND JUSTICE FOR ALL" Campaign Since the Jan. 27th Kick-off Event

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Law Day 1999
"Celebrate Your Freedom"

In honor of the 50th Anniversary of the US Air Force JAG

Friday, April 30th, Hill AFB

- *Luncheon*
- *CLE Seminars*
- *VIP Tours*
- *Golf Tournament*

Sponsors: Military Law Section and Law-Related Education and Law Day Committee of the Utah State Bar

Call (801) 777-7441 to register or for further information

LEXIS-NEXIS Introduces Integrated Citations Service

New SHEPARD'S® Gives Legal Researchers Unprecedented Capabilities

LEXIS-NEXIS has defined the capabilities of its next-generation SHEPARD'S® Citations Service, a product that will make legal citations research – the process of determining whether a selected case is good law and finding related cases – faster, easier and more comprehensive.

"With the new version of SHEPARD'S, legal researchers can go beyond the traditional ways of using citations services to yield new research possibilities," said Nick Emrick, senior vice president and general manager, LEXIS Online Publishing. "The SHEPARD's Citations Service is already the standard among legal researchers. We are now raising that standard to an unprecedented level of speed, reliability and ease-of-use."

ALI-ABA SATELLITE SEMINAR: COPYRIGHT & TRADEMARK LAW FOR THE NONSPECIALIST – UNDERSTANDING THE BASICS

Date: Thursday, April 8, 1999
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 6.0 HOURS

This is a Practicing Law Institute program, MCLE Fees are not included with your registration fee. Please bring to the seminar a check in the amount of $9.00 if you want CLE credit for the program.

CORPORATE COUNSEL SECTION ANNUAL SPRING SEMINAR

Date: Thursday, April 22, 1999
Time: 7:30 a.m. to 1:00 p.m.
(Registration and Continental Breakfast begins at 7:30 a.m. and lunch at noon is included)
Place: Utah Law & Justice Center
Fee: $50.00 for members of Corporate Counsel; $65.00 for non-members
CLE Credit: 4.0 HOURS

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

NLCLE WORKSHOP AND PRIMER: ESTATE PLANNING

Date: Thursday, April 22, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

ALI-ABA SATELLITE SEMINAR: BANKRUPTCY FIRST DAY ORDERS: THE BEGINNING OR END OF THE CASE?

Date: Thursday, April 22, 1999
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 ($85.00 for government employees, $50.00 for students)
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4.0 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. ***Registration is not considered final until payment is received.***

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.

*** NEW PROGRAM * – NATIONAL PRACTICE INSTITUTE: ACCOUNTING FOR LAWYERS**

Date: Friday, April 23, 1999
Time: 9:00 a.m. to 5:00 p.m. (8:30 a.m. registration and continental breakfast)
Place: Utah Law & Justice Center
Fee: **NOTE CHANGE IN PRICING:** $195.00 for all Utah State Bar members ($205.00 at the door) All others $206.25 ($216.25 at the door). To register by credit card call 1-800-328-4444 or FAX to 1-612-349-6561 or send check to National Practice Institute, 701 Fourth Avenue South, Suite 800, Minneapolis, MN 55415-1634
CLE Credit: 7.5 HOURS

ALI-ABA SATELLITE SEMINAR: HOW TO DRAFT, ENFORCE AND NEGOTIATE TRADEMARK, COPYRIGHTS, AND SOFTWARE LICENSING AGREEMENTS

Date: Thursday, May 6, 1999
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 6.0 HOURS

FAMILY LAW SECTION ANNUAL PRACTICE SEMINAR

Date: Friday, May 7, 1999
Time: 8:30 a.m. to 4:30 p.m. **(NOTE TIME CHANGE)**
Place: Utah Law & Justice Center
Fee: $115.00 for members of Family Law Section; $125.00 for non-members
CLE Credit: 7.5 HOURS includes ONE-HALF HOUR IN ETHICS
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

ALI-ABA SATELLITE SEMINAR: ANNUAL SPRING ESTATE PLANNING PRACTICE UPDATE

Date: Thursday, May 13, 1999
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $155.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 3.0 HOURS

ALI-ABA SATELLITE SEMINAR: ESTATE PLANNING FOR DISTRIBUTIONS FROM QUALIFIED PLANS AND IRAS

Date: Thursday, May 20, 1999
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $155.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 3.0 HOURS

LAW AND ECONOMICS SOCIETY: THE LAW AND ECONOMICS OF SPORTS WITH ROBERT TOLLISON, PH.D., DEPARTMENT OF ECONOMICS, UNIVERSITY OF MISSISSIPPI

Date: Thursday, May 20, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1.0 HOUR
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

LABOR AND EMPLOYMENT SECTION FIRST ANNUAL PRACTICE SEMINAR

Date: Tuesday, May 25, 1999
Time: 8:00 a.m. to 12:00 p.m. (registration begins at 8:00 a.m. with continental breakfast)
Place: Utah Law & Justice Center
Fee: $50.00 for members of Labor and Employment Section; $65.00 for non-members
CLE Credit: 4.0 HOURS (including 1 hour in ethics)
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

ALI-ABA SATELLITE SEMINAR: ACQUIRING PRIVATELY-HELD COMPANY: NEGOTIATING THE KEY PROVISIONS OF THE ACQUISITION AGREEMENT

Date: Tuesday, May 25, 1999
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4.0 HOURS

ALI-ABA SATELLITE SEMINAR: 1999 HEALTH LAW UPDATE

Date: Thursday, May 27, 1999
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4.0 HOURS

NLCLE WORKSHOP AND PRIMER: CRIMINAL LAW

Date: Thursday, May 27, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers

CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

ALI-ABA SATELLITE SEMINAR: ERISA FIDUCIARY RESPONSIBILITY ISSUES UPDATE

Date: Thursday, June 3, 1999
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 4.0 HOURS

LAW AND ECONOMICS SOCIETY: MERGERS IN HIGH TECH INDUSTRIES WITH DUNCAN CAMERON, ECONOMIST, PRIVATE PRACTICE LECG, LOS ANGELES

Date: Tuesday, June 8, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1.0 HOUR

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

NEW LAWYER MANDATORY SEMINAR

Date: Friday, June 11, 1999
Time: 8:00 a.m. to 12:00 p.m.
Place: Westminster College, Gore Auditorium
(Note change of location)
Fee: $40.00
CLE Credit: *Fulfills New Lawyer Ethics Requirements*

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111. *All New Lawyers in Utah are required to attend one Mandatory Seminar during their first compliance period.*

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

Date: Thursday, June 17, 1999
Time: 9:00 a.m. to 3:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 5.0 HOURS

NLCLE WORKSHOP AND PRIMER: TAX LAW

Date: Thursday, June 24, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

Utah State Bar

ANNUAL MEETING
DATES: June 30 - July 3, 1999
PLACE: Sun Valley, Idaho

Utah State Bar

ANNUAL SECURITIES LAW SEMINAR
DATES: August 20 - 21, 1999
PLACE: Snow King Lodge, • Jackson Hole, Wyoming

NLCLE WORKSHOP AND PRIMER: SECURITIES LAW

Date: Thursday, August 26, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration beings at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

NLCLE WORKSHOP AND PRIMER: FAMILY LAW

Date: Thursday, September 23, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

NLCLE WORKSHOP AND PRIMER: LAW OFFICE MANAGEMENT

Date: Thursday, October 21, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE

To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

ETHICS OPINION DIALOGUE: AN ACTUAL APPLICATION TO ETHICS OPINIONS

Date: Friday, October 29, 1999
Time: 9:00 a.m. to 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $45.00
CLE Credit: 3.0 HOURS CLE/NLCLE ETHICS

NEW LAWYER MANDATORY SEMINAR

Date: Friday, November 5, 1999
Time: 8:00 a.m. to 12:00 p.m.
Place: TBA
Fee: $40.00
CLE Credit: *Fulfills New Lawyer Ethics Requirements*
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111. *All New Lawyers in Utah are required to attend one Mandatory Seminar during their first compliance period.*

LAW & TECHNOLOGY UPDATE: THE LATEST IN TECHNOLOGY AND SOFTWARE DEMONSTRATIONS

Date: Tuesday, November 9, 1999
Time: 8:30 a.m. to 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $60.00
CLE Credit: 4.0 HOURS CLE
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

NLCLE WORKSHOP AND PRIMER: LITIGATION

Date: Thursday, December 16, 1999
Time: 5:30 p.m. to 8:30 p.m. (sign-in and door registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division; $60.00 for nonmembers
CLE Credit: 3.0 HOURS CLE/NLCLE
To Register: send your name, bar number and registration fee to 645 S. 200 E., S.L.C., UT 84111.

Visit our website www.utahbar.org/calendar/ **for updated information.**

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words — $35.00 / 51-100 words — $45.00. 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 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

Pacific Reporter - First and 2nd, Complete set; Excellent condition; $1,500.00; Call Susan Kaercher @ 801-237-0256.

FOR SALE

Phone system.12 line capacity. 21 extensions. $1,000.00. Call Susan at 801-375-3000.

POSITIONS AVAILABLE

Salt Lake City firm seeks attorney with 5-8 years general corporate and transactional experience. Some securities experience a plus. Inquiries will be kept confidential. Please send resume to Christine Critchley, Utah State Bar, 645 South 200 East, Confidential Box #63, Salt Lake City, Utah 84111.

Administrative Specialist needed to support both our Sr. Counsel and Director of Intellectual Property Law. Must have at least five years of administrative experience, preferably in a law firm or corporate legal department, excellent grammar, composition and interpersonal communication skills, as well as ability to handle telephone inquiries professionally. Must be proficient with Microsoft Office, Windows, Windows 97, Microsoft Word, Excel, and PowerPoint. Individual must have potential and desire to learn to become back-up support for Corporate Intellectual Property Paralegal. Associate degree preferred. Send resume to:

Cordant Technologies Inc.
Attn: Human Resources
15 West South Temple, Suite 1600
Salt Lake City, Utah 84101

E-Mail: hr@cordanttech.com (MS Word format please) Fax: 801-933-4012, Equal Opportunity Employer M/F/D/V

ASSOCIATE: Litigation firm with emphasis in employment and civil rights litigation seeks associate with trial experience. With resume include list of cases tried including case name, court, and docket number. Must be a current member of the Utah State Bar. Send resume to: Christine Critchley, Utah State Bar, 645 South 200 East, Confidential Box #52, Salt Lake City, Utah 84111.

UNIVERSITY OF UTAH COLLEGE OF LAW invites applications for an entry-level teaching position in the Legal Methods Program for the 1999-2000 academic year. Legal Methods faculty teach first-year students legal reasoning, research, writing and other practice skills such as interviewing, counseling, negotiation and oral argument. Other responsibilities may include participation on faculty committees or other University service. Requirements include a J.D. degree and one-two years legal practice experience (which may include a judicial clerkship). Applicants should have a serious interest in teaching legal methods, excellent academic credentials, and demonstrated proficiency in legal reasoning and writing. Prior teaching experience is a plus. The position is non-tenure track, offers a renewable, academic contract and excellent benefits.

The University of Utah is an Equal Opportunity/Affirmative Action employee and encourages applications from women and minorities and provides reasonable accommodation to the known disabilities of applicants and employees.

Send letters of interest, resume, law school transcript, a short legal writing sample and the names of three references to Professor Robert Flores, Search Committee Chair, University of Utah College of Law, 332 South 1400 East Front, Salt Lake City, Utah 84112-0730. Application screening will begin April 1 and the position will remain open until filled.

CORPORATE COUNSEL: Iomega, a 1.7 billion-dollar corporation, is seeking a qualified individual for a Corporate Counsel Position. Successful candidate must be a business-oriented lawyer with the ability to support marketing and product matters. The position reports to the Associate General Counsel. The successful candidate will have a law degree and 3-5 years legal experience, preferably in a technology company. Qualified

candidates may submit resumes to:

Iomega Corporation, Attn. Human Resources
1821 West Iomega Way
Roy, Utah 84067
Fax: 801-332-4469
Email: belleau@iomega.com

Iomega is an Equal Opportunity Employer

LEGAL TECHNICAL WRITER: Iomega, a 1.7 billion-dollar corporation, is seeking a qualified individual for a Legal Technical Writer. Successful candidate must be able to review packaging, manuals, advertising, and other marketing and website materials for legal and trademark guideline compliance. Must have outstanding writing/editing, English, and Grammar skills. English or related degree with technical writing and paralegal experience required. Qualified candidates may submit resumes to:

Iomega Corporation, Attn. Human Resources
1821 West Iomega Way
Roy, Utah 84067
Fax: 801-332-4469
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MCLE Administrator
297-7035

Member Benefits: 297-7025
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Professional Responsibility and Ethics — **Required: a minimum of three (3) hours**

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Program Title
_____
Date of Activity CLE Hours Type of Activity**

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Date of Activity CLE Hours Type of Activity**

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Date of Activity CLE Hours Type of Activity**

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**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.

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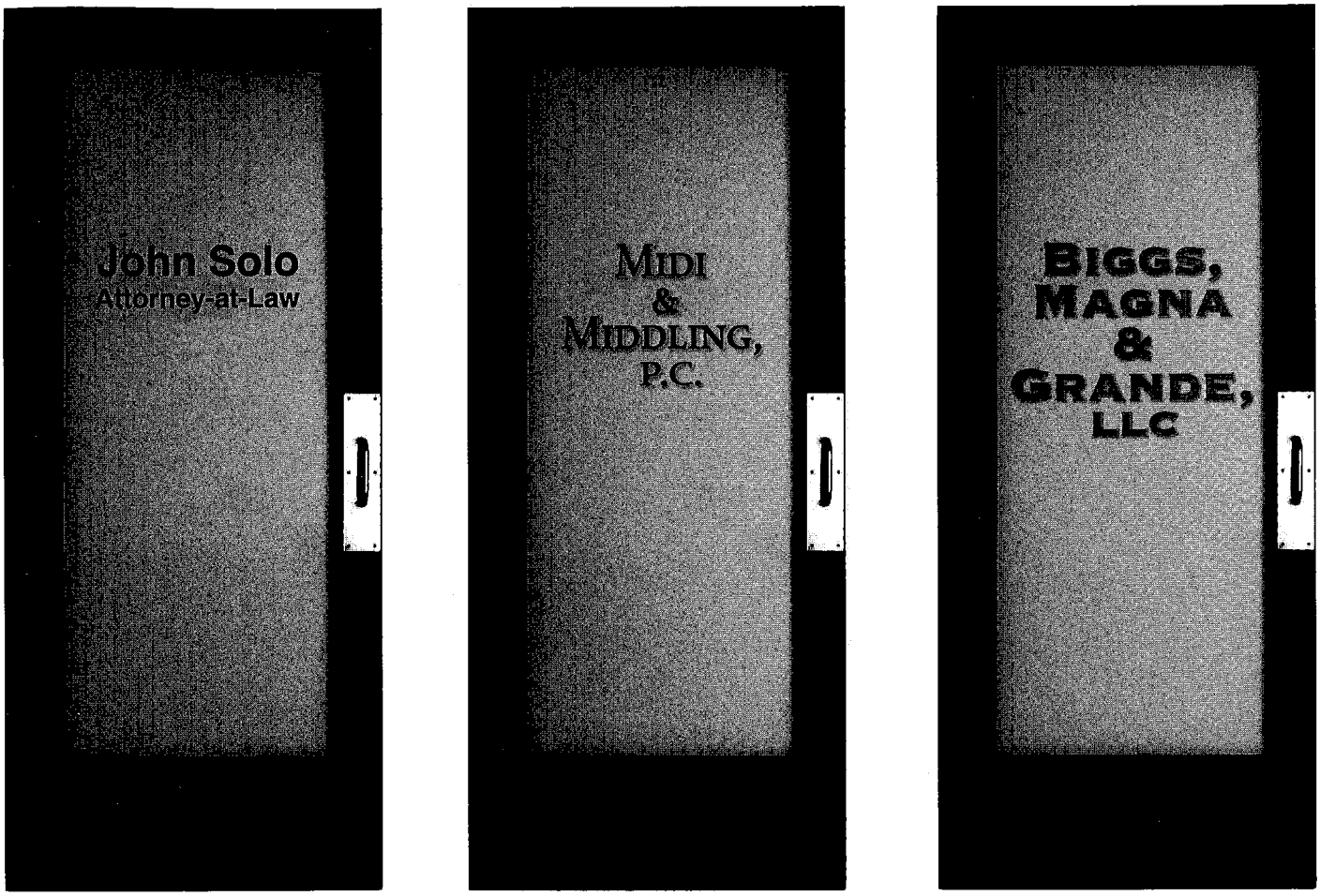

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