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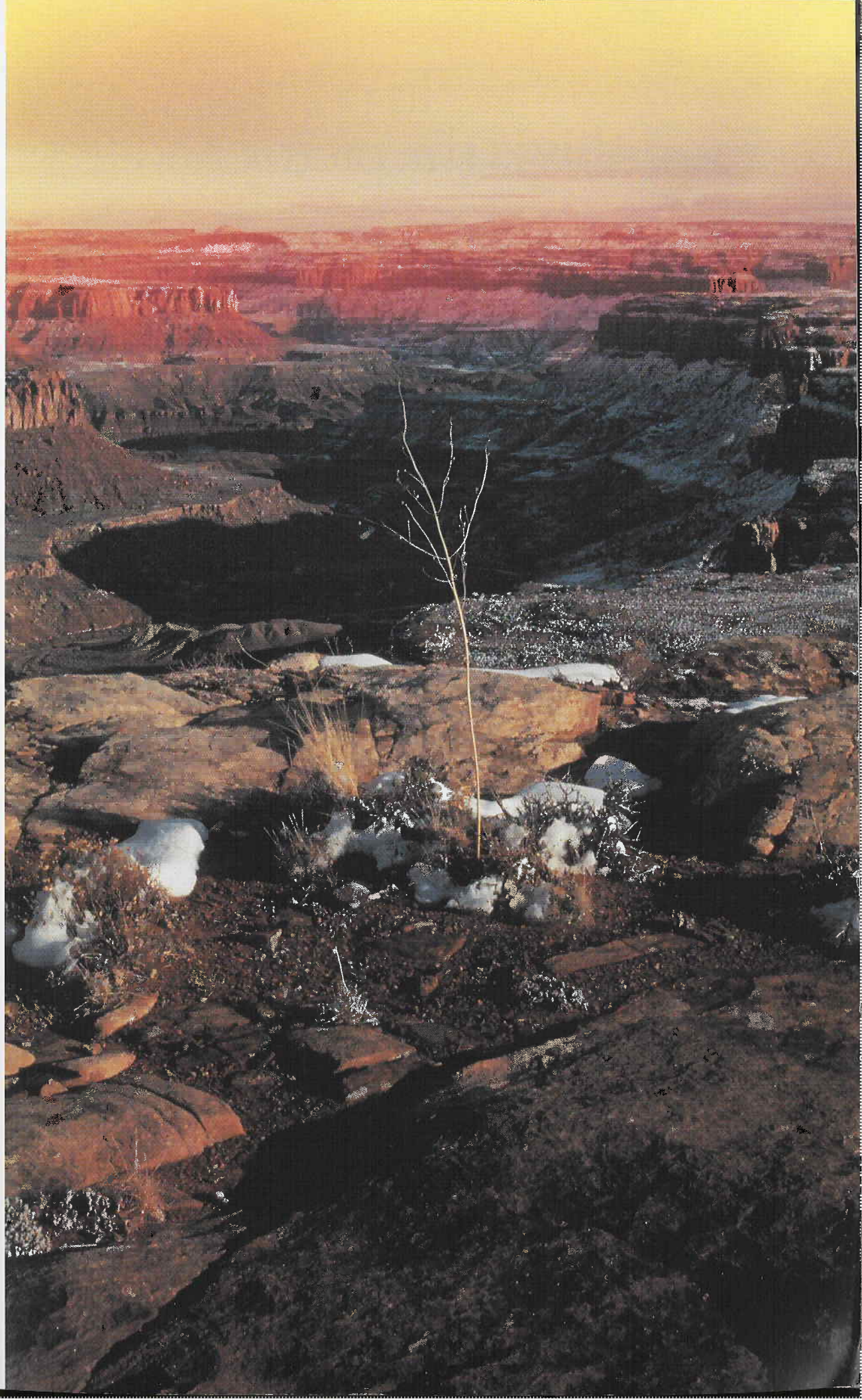

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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

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: Overlooking Dirty David River from Burr Point (near Hanksville, Utah) by Kent M. Barry, Assistant Attorney General, Child Protective Division, Provo, Utah.

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Utah Bar JOURNAL

Volume 13 No. 3
March 2000

Letter to the Editor

Dear Editor:

At the last Bar Commission meeting, two members of the task force charged with examining election of Bar Commissioners and the President reported to the Commission. The task force mentioned that they would also recommend abolishment of the *ex officio* members and one of the public members of the Commission, because the Commission is "unwieldy." This recommendation came as a complete surprise to Women Lawyers of Utah (WLU), one of nine *ex officio* members.

WLU believes that the Commission should not adopt this recommendation, made without input from the affected groups or public comment.

Women comprise less than 20% of the Bar, and still confront discrimination and difficult choices not faced by others. Moreover, while a few individual women have won election to the Commission, as a group women remain under-represented at the top of the profession. Having even a non-voting seat on the Commission provides an opportunity to listen and be heard that would not otherwise exist.

WLU understands that Bar President Charles Brown will recommend that the Minority Bar and the Young Lawyers Division maintain their *ex officio* seats, with other *ex officio* members placed on an "advisory committee." WLU believes the Commission should reject this proposal as well.

An "advisory committee" without official status as a Commission Member cannot bring the meaningful interaction that comes with *ex officio* membership. Members of the Bar are welcome to sit in on Bar Commission meetings; relegating the *ex officio* members to an advisory committee would give them nothing more than all members of the Bar already have.

The Bar created *ex officio* memberships to ensure that groups traditionally under-represented in the power structure of the Bar be included in the deliberative process. That decision should not be reversed without appropriate input and thoughtful deliberation, and for a better reason than the size of the commission.

Sincerely,
The Board of Directors
Women Lawyers of Utah

The Utah Bar Journal

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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 Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar 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.

Cover Art

Members of the Utah State Bar who are interested in having their photographs of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Esq, Regence BlueCross BlueShield of Utah, 2890 East Cottonwood Parkway, Mail Stop E70, Salt Lake City, Utah 84121, (801) 333-5691. Send a print, transparency, or slide of each scene you want to be considered. If you would like your photograph returned, enclose a self-addressed, stamped envelope.

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.

Submission of Articles for the Utah Bar Journal

The *Utah Bar Journal* encourages Bar members to submit articles for publication. The following are a few guidelines for preparing your submission.

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.

2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.

3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.

4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.

5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.

6. Citation Format: All citations should at least attempt to follow *The Bluebook* format.

7. Authors: Submit a sentence identifying your place of employment. Photographs are discouraged, but may be submitted and will be considered for use, depending on available space.

The Future of Our Profession: The Impact of MDPs and E-Commerce

by Charles R. Brown

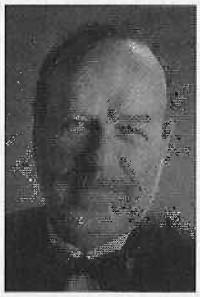
In previous President's Messages I have mentioned the ABA sponsored "Seize the Future" Conference. Recent events confirm the importance of the issues discussed at that conference. In November of 1999 the Big 5 accounting firm of Ernst & Young announced the formation of a law firm in Washington D.C. under the name of McKee Nelson Ernst & Young LLP. Messrs. McKee and Nelson are nationally known tax attorneys who joined with Ernst & Young in forming the new firm. In January the *Wall Street Journal* announced that America Online, a company only 15 years old, is acquiring Time/Warner, a company founded by Henry Luce in 1923, for a price of $156 billion. If that does not convince skeptics that the trend away from traditional forms of business towards E-Commerce is real, nothing will. As a profession, we can spend time now preparing for radical change or we can sit back and hope the storm dissipates. It will not.

Two primary issues are involved in a discussion of the future. Those are Multi-Disciplinary Practice (MDPs) and E-Commerce. To date, MDPs have been defined as "one-stop shopping for professional services." This has usually involved accountants providing quasi-legal services through the lawyers they employ. However, it is much broader than that. The deregulation of the banking and insurance industries last year has generated a great deal of momentum towards the providing of quasi-legal services by financial services companies.

Another emerging issue involves the general shifting of traditional legal services into non-lawyer hands. An example of this is a Utah company which provides negotiation services for debtors in non-bankruptcy financial disputes. They advertise results in about two weeks with a track record of 30-80% reduction in debt amounts. The number of similar non-lawyer businesses offering negotiation and mediation services is expanding rapidly. Lawyers may have a difficult time competing with those types of services and results.

E-Commerce will have an even greater impact on our profession. The ability of clients to pursue solutions to legal problems in cyberspace has the potential to substantially reduce or, in some cases, completely eliminate the market share of many lawyers. Clients can and will start looking to Internet-based solutions for their legal needs. For example, it is now possible to complete on-line generation and collaboration of documents. (See www.legaldocs.com for on-line document assembly tools and www.docspace.com for on-line document collaboration.) On-line legally binding signatures for documents is also available. We should expect to see broader implementations of this beginning in the next few months. (See www.usertrust.com for legally binding digital signatures and review www.iLumin.com for on-line signing applications.) We are not talking about a 5 to 10 year window. These changes are happening now.

This "double punch" of MDPs and E-Commerce mandates that our profession respond promptly and make some difficult decisions. An initial decision (driven from the ABA level) has focused on ethical rules and whether lawyers can and should participate in MDPs. An emerging view on this issue is that our rules, in some instances, may be a bit archaic and somewhat irrelevant, and that they leave us at a competitive disadvantage. Should we change our rules .... and how can this be accomplished efficiently without abandoning our core values? Should our energies be better spent elsewhere? We are awaiting further guidance on this from our MDP Task Force (www.utahbar.org/html/mdptaskforce.html) and the ABA (www.abanet.org/cpr/ mdpfinalreport.html).



What will this rapidly changing environment mean for lawyers? It will certainly alter two fundamental concepts of practice. Those are the way lawyers deliver services and the way lawyers earn compensation for those services.

Delivery of Legal Services

Lawyers sell information and advice. Clients can and will start obtaining legal information directly (via the Internet). The value of this information will depend on how well it is combined with legal advice. Lawyers should start identifying ways to participate in this new infrastructure. A first step would be to educate our clients that the primary product we provide them is our judgment and analytical skills. Even though we may be less involved in providing information we can remain involved in advising them how to best utilize that information in an analytical fashion.

Compensation Issues

The revenue stream for the legal profession, as in other businesses, is moving towards the Internet. Lawyers' profit margins currently depend heavily on the providing of legal information. Even though this "information" must be integrated with advice, clients will be drawn to the more affordable and readily available legal information on the Internet. What may lawyers do to participate in these revenues?

Those who have studied these issues in depth have recommendations on what will be necessary to remain competitive. Lawyers must adopt more creative billing methods and move away from the billable hour. We should more fully utilize available document generation/assembly tools. We must become more comfortable with and fully utilize the Internet. We should learn to leverage the use of legal assistants and other non-lawyer personnel. We must learn about and understand the value of technology tools. Finally, we must focus even more on client service and client satisfaction.

The issues of MDP and E-Commerce will not go away. However, lawyers are unique in their ability to solve difficult problems creatively. Our task will be to integrate our traditional roles into this new world. The Bar will exercise its best efforts to assist its members in this task by providing information and some guidance, but it is essential that all of us remain fully informed and adaptable on these issues. Lest we forget, dinosaurs always become extinct.

Correction . . .

In the January, 2000 issue of the *Utah Bar Journal,* under Utah State Bar Group Services heading, the telephone number listed for West Group was wrong. The correct phone number is 1-800-762-5272.We regret any inconvenience this error may have caused.

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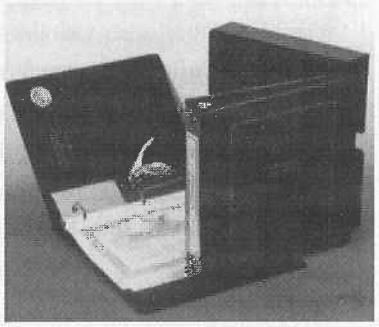

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The Fallacy of Using Screens, Walls, Cones of Silence, and Other Methods to Avoid Conflicts of Interest

by Charles A. Gruber

A common misconception among attorneys is that conflict of interest problems can be avoided by unilaterally "walling off" or "screening" the attorney with the conflict, while allowing other attorneys in the firm to represent a client whose interests are adverse to those of a former client of the walled off attorney. Such conflicts arise, for example, when Attorney B moves from one firm to another, and the attorneys in the new firm want to represent, or indeed already represent, a client whose interests are adverse to those of one of Attorney B's former clients.

How the Rules of Professional Conduct Address Conflicts of Interest and the Role of Screening in Resolving Them

An attorney's conflict of interest is imputed to all the other attorneys in the same firm.[1] Rule 1.10(a) (Imputed Disqualification: General Rule) of the Utah Rules of Professional Conduct provides that while "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . ." In conflict situations in private practice, the so-called "cone of silence" and other screening procedures such as walls or screens are not identified or even mentioned in the Rules and will not, in and of themselves, resolve the firm's imputed conflict of interest.

Rule 1.11(a)(1) (Successive Government and Private Employment) mentions "screening" an attorney. The rule prevents an attorney from representing a private client in connection with a matter in which the attorney "participated personally and substantially as a public officer or employee," unless the government agency consents after consultation. Nevertheless, conflicts arising from Attorney B's government employment aren't imputed to other attorneys in Attorney B's new firm provided that:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

See Rule 1.11(a), Utah R. Pro. Conduct.[2] Thus, a firm may represent a client even though one of its attorneys has a conflict of interest arising from her previous representation of a government agency. Other than this situation, however, there are no other situations in which an attorney in a firm can simply be "screened" and thereby avoid having his conflict of interest imputed to other firm members. This means that client waiver of the conflict is *always* necessary when a conflict situation arises concerning non-government clients.

Thus, when the interests of a former client and a firm's existing or prospective client are adverse, the firm must obtain the former client's consent before undertaking or continuing the current representation. *See* Utah R. Pro. Conduct 1.9(a). Likewise, when an existing client's interests are directly adverse to those of another client,[3] the firm must obtain each client's consent. *See* Utah R. Pro. Conduct 1.7(a). In each case, the consent must be given "after consultation." *See* Utah R. Pro. Conduct 1.7(a), 1.9(a).

Moreover, even if the client consents to the representation, confidentiality must be maintained. *See* Utah R. Pro. Conduct 1.9(b) ("A lawyer who has formerly represented a client in a matter shall not thereafter: . . . (b) Use information relating to the representation to the disadvantage of the former client . . . ."); Utah R. Pro. Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client . . . unless the client consents after consultation."). Screening, or walling off, the conflicted attorney from work on the case might be a "good mechanism" for preserving client confidentiality. *See* ABA Formal Op. 90-358.

CHARLES A. GRUBER is an Assistant Counsel with the Utah State Bar's Office of Professional Conduct. The views expressed in this article are the author's, and not necessarily those of the Utah State Bar's Office of Professional Conduct.

Some Practical Advice

Conflict of interest complaints against an attorney usually are raised in one of three contexts: a motion to disqualify, an ethics complaint to the Utah State Bar's Office of Professional Conduct, or a client's malpractice action alleging a breach of the attorney's loyalty and fiduciary duty. Although none of the three is pleasant, the potential financial repercussions, especially of the malpractice action and to a much lesser degree of the motion to disqualify, can be enormous. What are some practical considerations in dealing with conflict of interest situations and how can a screening procedure help preserve client confidentiality and avoid positions adverse to the client?

First and foremost, the attorney and the firm must have a system for identifying conflicts quickly, and once a conflict has been discovered, it must be addressed immediately. The longer an attorney or firm procrastinates in either identifying the conflict or in failing to address it, the more harm there is likely to be to the client involved. In turn, this increases the damages the attorney is likely to face in a malpractice action, increases the fees to be disgorged after the firm is disqualified, and increases the severity of the sanction in an attorney discipline matter.

If you suspect there is a conflict, carefully review Rule 1.7 (Conflict of Interest: General Rule), Rule 1.8 (Conflict of Interest: Prohibited Transactions) and Rule 1.9 (Conflict of Interest: Former Client). The Rules' somewhat ambiguous language must be interpreted objectively, and this caveat holds true when reviewing Comments and the cases mentioned therein. Apply the most aggressive reasonable person standard you can imagine, because that's the standard the jury will apply in the malpractice action. Judges may be more lenient in a motion to disqualify hearing-to some extent this is probably because the opposing party is trying to disqualify the other party's attorney of choice-but juries in malpractice lawsuits view conflict of interest issues more harshly. See Model Utah Jury Instruction 7.49 ("The relationship between an attorney and a client is a fiduciary relationship of the very highest order. Because of the attorney's professional responsibilities and the confidence and trust which the client may legitimately place in the attorney, the attorney must adhere to a high standard of honesty, integrity and good faith in protecting the interests of the client."). The objective standard is also the standard used in disciplinary cases, and any ambiguity in the language of the rules will not save the attorney from being disciplined for unethical conduct.

The best risk management advice, if you think there's a conflict of interest, is simply to decline the representation or withdraw from any representation that raises a conflict. This is because a conflict of interest will never just go away-it's the proverbial ticking time bomb, and it *will* explode at some point. Indeed, the Office of Professional Conduct routinely advises attorneys to decline representation not just when there is an actual conflict, but when it is reasonably foreseeable that a conflict will develop.

Once a conflict is identified, if you prefer not to decline or withdraw from the representation, you must determine whether the client can consent to the representation. Bear in mind that not all conflicts *can be* waived, even if the client is willing.[4] The Comments following Rule 1.7 state that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Remember that clients who today want to have you as their attorney and are happy to waive all conflicts are the same clients who are the angry plaintiffs in the malpractice action, who cannot understand how you could ever have taken their money when you were so disloyal to them, and who testify that if the conflict had been more fully explained, they never would have chosen you as their attorney. Whom do you think the jury of non-lawyers will believe, and for whom do you think they will feel sympathy?

If you conclude the conflict can be waived, you must obtain the client's consent. No amount of "screening" will resolve the conflict without the client's consent after consultation. Although not explicitly required by Rule 1.7 or Rule 1.9, it's good risk management to put the waiver in writing, with an admonition to the clients to get an independent legal evaluation, and then to have the clients sign the waiver. This doesn't make the lawyer "bullet proof," but it's some solace to have it as an exhibit at the trial in the malpractice action, and it may help your case in a disciplinary proceeding.

Protecting Confidentiality Through Screening Procedures

Assuming the client waives the conflict, at that point a screening procedure may be a useful risk management tool for protecting client confidences. Keep in mind that merely because a client consents to your representation of another client with interests adverse to her own doesn't mean the risk is gone. Consequently, how you go about screening the attorney with the conflict is important.

Various court cases and ABA Formal Opinions suggest the necessary components for effectively screening a disqualified

attorney: (1) she does not participate in the representation; (2) she does not discuss it with any member of the firm; (3) she testifies that she has not revealed confidential information; (4) she has no access to the pertinent files and documents; (5) she does not share in the fees from the matter. *See e.g. Delaware River Port Auth. V. Home Ins. Co.,* 1993 U.S. Dist. LEXIS 6749 (E.D. Penn. 1993); *see also Nelson v. Green Builders, Inc.,* 823 F.Supp. 1439 (E.D. Wis. 1993) (elements for evaluating effectiveness of screen include size and divisions of law firm, likelihood of contact between lawyers, existence of rules preventing access to files and fee sharing); *Hunter Dougles, Inc. v. Home Fashions, Inc.,* 811 F.Supp. 566 (D. Colo. 1992) (firm not disqualified because effective screen in place).

There is also a screening mechanism known as the "cone of silence," which consists of an agreement by the lawyer not to share the confidences of former clients with the new firm members. There is no wall or screen, and the new firm takes no active steps to protect client confidences. Courts in some jurisdictions accept this measure, but others do not. *Compare Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co.,* 632 F.Supp. 418, 428 (D. Del. 1986), cert. denied, 492 U.S. 907 (1989) (prefers "cone of silence" because lawyers should be credited with integrity) *with Atari Corp. v. Seagate Technology,* 847 F.2d 826 (Fed. Cir. 1988) (rejecting "cone of silence" because it doesn't protect clients as well as a wall would protect them).

Be aware that the "cone of silence" method is not as widely used as a wall or screen, and may not be sufficient assurance for your client. Whichever method you select, be sure to explain it to the client, preferably in writing, then rigorously adhere to it and document that you have done so.

Conclusion

Lawyers live and practice law in a world of "competing considerations", as described in the Comments to Rule 1.10.[5] We're trained to be clever in our interpretation of case law, statutes, and rules. But when it comes to analyzing a conflict of interest and in adopting screening devices to resolve conflicts of interest, we should temper our cleverness and insure that from an objective point of view our resolution of the conflict is indeed reasonable and preserves client confidentiality. With that in mind, client waivers and an effective screening procedure can be useful tools in helping to resolve conflicts of interest.

[1] Readers should be aware that there are two Ethics Advisory Opinions concerning the application of Rule 1.10 to the Utah Attorney General's office and the Guardian ad Litem's office. *See* Utah Ethics Advisory Op. Nos. 142, 98-09.

[2] Note that Rule 1.12 (Former Judge or Arbitrator) has similar language regarding judges and arbitrators moving to private practice.

[3] This can arise, for example, when Attorney B brings existing clients to her new firm.

[4] For example, attorneys may not represent both parties to a divorce, even if that is their wish. *See* Utah Ethics Advisory Op. No. 116.

[5] The Comments following Rule 1.10 address the problem of lawyers moving between firms, but they suggest a useful analysis for other conflict of interest situations. The Comments point out that there are "competing considerations" in looking at conflict situations created when a lawyer moves between firms: client loyalty; the client's opportunity to have the lawyer of choice; lawyers' freedom to move between firms, which is basically the economic freedom to maximize business opportunities for themselves. The Comments note that, historically, competing interests were resolved either by a "per se" rule of disqualification or an "appearance of impropriety" standard. The modern trend is a functional analysis with two guideposts: preserving client confidentiality and avoiding positions adverse to the client. These are the pillars of client loyalty that are so rigorously protected by the Rules of Professional Conduct.

Succession Planning: Crucial Preventive Medicine

by Steven G. Johnson

An area of practice often ignored by attorneys is that of risk and crisis management. Attorneys advising businesses of any size can play an important role in identifying potential problems, assisting in drafting crisis management plans, and training officers, directors and management staff to prepare for and deal with problems that could arise in the business.

One aspect of crisis management that many business owners tend to avoid is preparation of a succession plan for key company personnel. Usually companies have advance notice of changes that must be made with key personnel–an employee approaches retirement age, a prolonged illness requires an employee to spend less time in the office, and so forth. But heart attacks, strokes, auto accidents, unexpected ailments, recreational accidents, or a crucial employee's unanticipated resignation or termination can instantly affect a company. In particularly sad situations, an accident may claim several key employees at one time, which can devastate the company.

In any of these situations, the company will likely feel a great loss, even with an effective leadership succession plan. If there is no such plan, the company may experience corporate disorganization, loss of corporate opportunity, negative press coverage, loss of customer or market share, and low employee morale. These problems may continue for a long time, even after the lost employees are replaced.

In early 1996, a prominent Salt Lake company lost several key employees in a tragic accident. The company had no succession plan. Despite an ongoing cross-training program, it took many months for replacement personnel to be appointed, and then many months after that for the new management to learn the business and the market and to become effective. Counselors were brought in to assist employees through the difficult grieving process. Said one supervisor, "You can't imagine until you've gone through it how devastating that can be . . . . My employees were falling apart at the seams." Employees felt a great weight taken off their shoulders when the replacement personnel were finally appointed. In the meantime, though, potential business opportunities were lost and company direction struggled.

Although a succession plan would not have completely avoided the tragedy and its negative impact on the remaining employees, it could have made it easier for the company to pick up the pieces and get back to its day-to-day business.

The timing of serious illnesses, deaths, accidents and other sudden losses is unpredictable. This uncertainty necessitates advance preparation of a company succession plan. Following is a list of factors to consider in advising your business clients regarding such plans.

1. You should advise your clients to establish a list of positions that require successors, accounting for both short- and long-term needs. Identify anyone whose departure from the business today would negatively affect the company, or who would be difficult to replace. This would include officers, the director of sales and marketing, data processing manager, research and development director, controller, and so forth. Possible future directors who can capably fill in the remaining term of a director who for some reason is no longer able to serve should also be identified.

2. Clients should identify all employees who show potential for advancing into these key positions. This may include a search outside the company for prospective employees. (Keep your eyes open at trade meetings.)

3. Assist your clients in establishing an evaluation process for all such employees and others thought to be successors for each key job.

4. Advise your clients to set up a ranking system of succession for each position: who is first successor?, who is second?, and so on.

Steven G. Johnson is director of legal and administrative services for Norbest, Inc.

5. If there is a position without a likely successor, the business should determine how it would fill the position (temporary successor, external hire, and the like). The company should consider what resources are available to help in hiring from outside the company.

6. You can help your clients by assisting in preparing thorough job descriptions for each position in the company. Appropriate job descriptions are useful to comply with the Americans with Disabilities Act, and make good business sense from a training standpoint.

7. Some employees have significant knowledge and experience that they possess only in their heads. No one in any organization should have all the information for a particular job. Advise your clients that this information should be shared so the company will not be at a loss if the employee leaves. The business should have all key personnel prepare a packet of resources, lists of contacts, vendors with whom they have an ongoing relationship, and so on–everything their successor would need to know about their position if something happened to them on the way home tonight.

8. Encourage your clients to train potential successors so they are knowledgeable about all aspects of the job they might assume. Not only does this help develop the succession plan, but it also gives the required backup during vacations or other extended absences.

9. Strongly encourage your clients to never allow all key personnel to take the same flight, automobile, or other mode of transportation when out of the office on business trips.

10. For all the good it is worth, caution key employees against participating in unsafe activities during non-business hours. Advise people to be careful.

11. Suggest that your clients research trauma and counseling centers to find one that could adequately assist employees in coping in the event of a company employee's death.

12. Businesses should cross-train key employees in other responsibilities. This will assure needed backup and give the employees a greater understanding of the entire company.

13. As an attorney, you can be most helpful to your clients by assisting in preparing a formal written succession plan. The company should have it ratified by the board of directors. You can offer to explain it to all key personnel.

14. Review the plan with the company on a periodic basis. Make it part of the company crisis or risk management plans so that it is frequently updated as circumstances change.

15. You may encounter resistance from certain key personnel, particularly in a family-owned or closely held business. They may feel you are trying to shove them out the door, and may be uncooperative in the succession planning process. Help them understand that succession planning is something all companies should do. The cross-training and other training associated with the plan will be valuable to the company. Lending institutions and insurers will be pleased that the company is better prepared for future contingencies. Shareholders will take comfort that their investment will be cared for even after the current management leaves. Tell them about instances in which a good company succession plan could have saved another business significant grief, such as AT&T, which spent a significant amount of time looking for a new CEO, and lost market share and opportunities for deals, and Disney, which struggled for years to find a replacement for Walt.

After the loss of a key employee, encourage the client to evaluate the successor's performance in the new capacity. Suggest that the company consider bringing in a former employee to train the successor. A retired executive, if available, may prove very helpful. The company should determine whether additional people must be hired to fill positions vacated by the advancing employees, and have trauma counselors available to assist employees who may be distressed with the loss. Encourage your client to update its succession plan, adding employees or others to the succession list to replace those who filled vacancies.

Remind your clients that in some circumstances it might be best not to tell the prospective successors they're being considered for a key position–this may help the morale of others. And the client may discover that the person it thought would make a good successor has not turned out to be such a good employee. One bank CEO passes a sealed envelope to the board of directors each year, explaining his choice of a successor. He believes that people and circumstances change, and that if you have made a mistake you can fix it without considerable embarrassment. But you can still pursue cross-training and evaluation as part of the succession plan.

As legal counsel, you should take the opportunity to advise your business clients of the need for succession planning. This an important part of any thorough crisis or risk management plans, and can assist clients in what would otherwise be a very difficult time.

When Can I Retire?

by Lawrence R. Barusch

Early Distributions From Retirement Plans

It's another cold, gray day with the usual frustrations and vexations of practicing law. Once again, though, the market is up. Across the State, forty- and fifty-something lawyers consider the ever-increasing sums in their qualified retirement plans ("Plans") and individual retirement accounts ("IRAs") and contemplate early retirement.

You may be wondering whether distributions from the Plan maintained by your employer or the IRA into which you rolled distributions from other Plans are your ticket out of here. The good news is that tax law permits practically any distribution a reasonable person could wish. The bad news is that limitations on annual contributions and restrictions on investments imposed by the Employee Retirement Income Security Act of 1974 ("ERISA") usually prevent employees from accumulating enough money to retire young. Some folks make enough money outside Plans to permit them to retire. They should finance the early years of their retirement with those outside funds, letting the funds inside their Plans continue to earn tax-deferred income.

Thus, few need to think about early distributions. Still, people wonder. This article tries to answer a few of their questions.

The Ten Percent Penalty Tax

First ask, "does my Plan permit early retirement?" This can only be answered by reading the terms of the Plan, but most lawyers assume that if their Plan doesn't permit early retirement, amendments will do the trick. The big concern is usually the ten percent tax on early distributions imposed by Section 72(t). *See* Internal Revenue Code of 1986 (the "Code"); 26 U.S.C. *et seq.* The tax does not apply to distributions made by reason of death or disability or in years after the recipient attains age fifty-nine-and-one-half. We are concerned here with able-bodied folks of a lesser age.

If you are over fifty-five years old and separate from service (that is, retire) there is no penalty tax on distributions. If there is a large distribution, however, it almost always turns out to be better planning to roll most or all of it into an IRA to avoid unnecessarily accelerating the regular income tax.

Generally the way to avoid the penalty tax is to take "substantially equal payments" over your life or the joint lives of you and your spouse. No penalty is imposed as long as the distribution formula is not modified before the later of the fifth year after commencement of distributions or the year in which you attain age fifty-nine-and-one-half.[1] After the expiration of this period, you are free to withdraw as much or as little as you choose until you reach age seventy-and-one-half, when the minimum distribution rules begin.[2] But if there is a modification before the permitted time, all amounts distributed up through the date of modification, plus interest, become subject to the tax.[3]

Substantially Equal Payments

The Internal Revenue Service (the "Service") provides three ways to calculate the amount of the payment.[4] The first uses the method from the minimum distribution rules. First, determine your age and that of your spouse. Then find an "expected return multiple" (roughly, but not exactly, life expectancy[5]) from tables.[6] The multiple will be larger for a joint life than it is for a single one. The first year's distribution will be the reciprocal of the multiple, times what is then in the account. For example at age fifty, the multiple is 33.1 so 3.1% of the balance would be distributed. If a joint life is used and both are fifty, the multiple is 39.2 and 2.6% would be distributed. You must make an irrevocable choice at the outset. You may decrease the multiple by one each year (giving an annuity over a life expectancy determined as of the date of commencement). Alternately you may use the appropriate multiple from the table for subsequent years (32.2 at age fifty-one rather than 33.1 - 1 = 32.1) based on then-attained ages (giving an annuity based on your actual life or lives). In either case the reciprocal of the multiple is applied to the then current balance in the Plan or IRA from year to year. The reciprocal increases with time and since distributions are small, the balance in the fund is likely to increase, so that the amount distributed increases with time.

This method usually permits an initial distribution for a married person of less than three percent. Theoretically this is desirable. We want just enough from the IRA to meet our needs, leaving the rest to grow on a tax-deferred basis. But most attorneys want more, which leads us to methods two and three.

LAWRENCE R. BARUSCH is a shareholder of Parsons Behle & Latimer, where he is Chair of the Tax Section.

The second alternative involves selecting a life expectancy, for you or you and your spouse, and using a reasonable interest rate to compute a fixed payment over that expectancy, similar to computing a level payment on a mortgage. The life expectancy is based on the multiples discussed above. If the interest rate is eight percent and the period at age fifty is 33.1 years, the payment is 8.69% of the initial balance and does not change from year to year.[7]

The third method is to compute the payment using an annuity table and a reasonable rate of interest. Using the UP 1984 Mortality Table,[8] and eight percent interest rate, the initial distribution at age fifty would be about nine percent.

Reasonable Interest

As of January 2000 the federal long-term interest rate, computed on an annual basis, was 6.45%.[9] The long-term rate applies to obligations with maturity longer than nine years. Given a life expectancy of more than thirty years at age fifty, it seems reasonable to suppose that the long-term rather than the short-term or mid-term rate is the appropriate benchmark. For certain valuation purposes, the Code uses 120% of the federal mid-term rate,[10] which in January 2000 was 7.47%. The federal rate, however, represents a risk-free rate. By diversifying investments, as in a mutual fund, a higher rate could be obtained with an acceptably low risk. Eight percent seems defensible and, in view of the absence of reported litigation in this area, a nine percent rate, though aggressive, would probably not be challenged. Using method 3, this permits a distribution of ten percent of the original balance each year.

Why Not More?

Clever lawyers reading this piece have doubtless thought of irrefutable arguments for yet higher distributions. The trouble is that when one looks at actual investment performance, one finds that once distributions exceed four or five percent there is a distressing tendency to run out of money before death, often much before death[11]. Suppose we start at age fifty with a million dollars and take out $100,000 at the beginning of the year but the market declines twenty-five percent. The balance is $675,000. The second year we take out another $100,000, leaving $575,000. The market increases twelve percent, so our balance goes to $644,000. After taking out $100,000 at the beginning of year three, the balance is $544,400. Another twelve percent increase and $100,000 payment leaves $610,000 after the year four distribution. Suppose the market continues to increase twelve percent every year. After a dozen years the

account will be gone even though in eleven out of twelve years the earnings were twelve percent. The participant gets to go back to work at age sixty-three, having not practiced in a dozen years.[12]

Most people, on reflection, will choose distributions between four and six percent of their balances. Those with confidence in their investment abilities might go to eight percent. They will recognize that after five years and reaching age fifty-nine-and-one-half they can increase their expenditures if the funds are there.

Four to six percent of the retirement plan balance of a fifty-something year old doesn't pay much college tuition or go far toward maintaining the lifestyle to which you may have grown accustomed. Most of us need to continue paying Bar dues and keeping up with CLE.[13]

[1] I.R.C. § 72(t)(4).

[2] I.R.C. §§ 401(a)(9), 408(a); 26 C.F.R. 1.401(a)(9)-1 (proposed).

[3] I.R.C. § 72(t)(4).

[4] Notice 89-25, 1989-1 C.B. 662 Question and Answer 12.

[5] A life expectancy for a person of age X might be the time it takes for half of a group of people of age X to die. The multiple is a number that, multiplied by an annual annuity payment gives you the total amount expected to be received. In principle you could determine this amount by determining the total amount a group of Q people of age X would receive as annuities and then dividing by Q and the annual payment. In a normal distribution of this type the mean is greater than the median. A few people will live a very long time, so the total annuity amount received will be larger than the product of life expectancy and X. That is, the expected return multiple is longer than life expectancy. This is not merely technical; don't plan on living the full amount of your expected return multiple!

[6] Reg. 1.72 -1 Tables V and VI. For a single life the multiples for ages forty-five to fifty-five are respectively: 37.7, 36.8, 35.9, 34.9, 34.0, 33.1, 32.2, 31.3, 30.4, 29.5, 28.6.

[7] For annual interest rate *I* and life expectancy *N* from the tables referred to in footnote 6, the annual annuity amount is $\mathbf{I/(1-(1+I)^{-n})}$. You can perform this computation on a financial calculator, or put the formula into a computer spread sheet.

[8] This table was cited in Notice 89-25. Somewhat more current data (based on the 1990 census) is found in Table 90 CM Regs. 20.2031-7T. The new mortality statistics result in an 8.9% payout assuming an 8% interest rate and a 9.6% payout assuming a 9% interest rate. The slight reduction in payout is consistent with lengthening life expectancy.

A crude way of using mortality data to determine this result is determine the number of people alive at a given age. Divide this number by two. Determine (using extrapolation between ages) the age where this many people are alive. The difference in the two ages becomes the life expectancy to be used in the formula given in footnote 8. While enrolled actuaries may cringe, this method of determining a reasonable life expectancy is likely to be acceptable to the Service.

Beginning at age 45, and to three significant digits, here is the mortality data from Table 90 CM: 941, 938, 935, 931, 928, 924, 919, 914, 909, 903. Beginning at age 55: 896, 889, 882, 874, 865, 855, 845, 833, 822, 809. Beginning at age 65: 795, 781, 765, 749, 732, 714, 694, 673, 651, 629. Beginning at age 75: 604, 580, 554, 527, 499, 471, 441, 411, 380, 349. Beginning at age 85: 318, 289, 256, 227, 198, 170, 145, 121, 98.8, 79.5.

[9] Revenue Ruling 2000-1, January 2000.

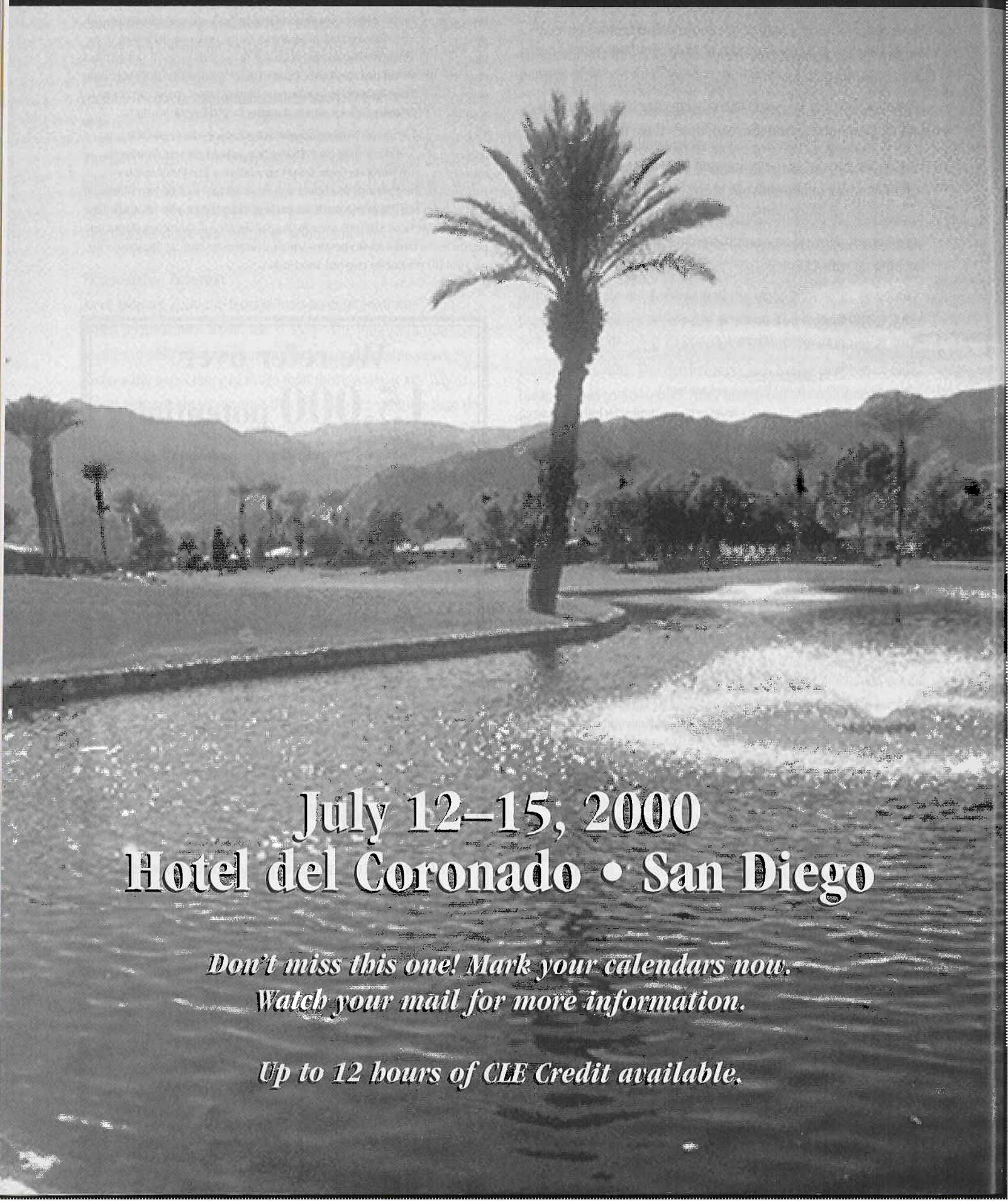
[10] I.R.C. § 7520(a)(2) (applicable to valuing annuities generally under the Internal Revenue Code).

[11] Philip L. Cooley, Carl M. Hubbard and Daniel T. Walz, Retirement Savings: Choosing a Withdrawal Rate That Is Sustainable, AM. ASS'N INDIVIDUAL INVESTORS J., Feb. 1998. These authors conclude that no matter how you mix debt and equity, if you take out ten percent, you have an even chance of running out of money in less than thirty years. If you hope to increase your return over the years to maintain after-inflation buying power, the odds are worse.

[12] Suppose at the end of each year we leave in the prior year's balance, plus enough to cover inflation plus two or three percent as a rainy day fund, and spend the rest. In bad years we dip into the rainy day fund. In good years we buy cars, remodel houses, go on trips, and make gifts to children and grandchildren. In bad years we don't. This permits a pretty even lifestyle (we don't need a new car every year) while preserving the purchasing power of the account. We might hope to increase distributions as investment acumen is acquired. But this strategy is not a permitted strategy for avoiding the penalty tax.

[13] To close with an up-beat footnote, suppose at age fifty you have $2,000,000 in your retirement plan and elect to take out $100,000 (five percent) per year. Suppose the market goes up ten percent per year. At age sixty you'll have $3,430,000 in your retirement plan and can then (not before, remember the tax!) increase your withdrawal to $172,000 a year. This works well if (a) you have $2,000,000 in your IRA at age fifty, (b) you can get by on $100,000 a year for the next decade, (c) the market yields a ten percent return (and it doesn't have too sharp a downturn too soon, as discussed in the text) and (d) inflation isn't too bad. Good luck!

2000 Annual Convention



July 12–15, 2000
Hotel del Coronado • San Diego

Don't miss this one! Mark your calendars now.
Watch your mail for more information.

Up to 12 hours of CLE Credit available.

Make the Annual Convention in San Diego a family trip . . .

Club USA

Your Membership To Adventure!

Become a Club USA member today! Enjoy special savings to the Anheuser-Busch Adventure Parks® as well as hotel, rental car and special vacation packages.

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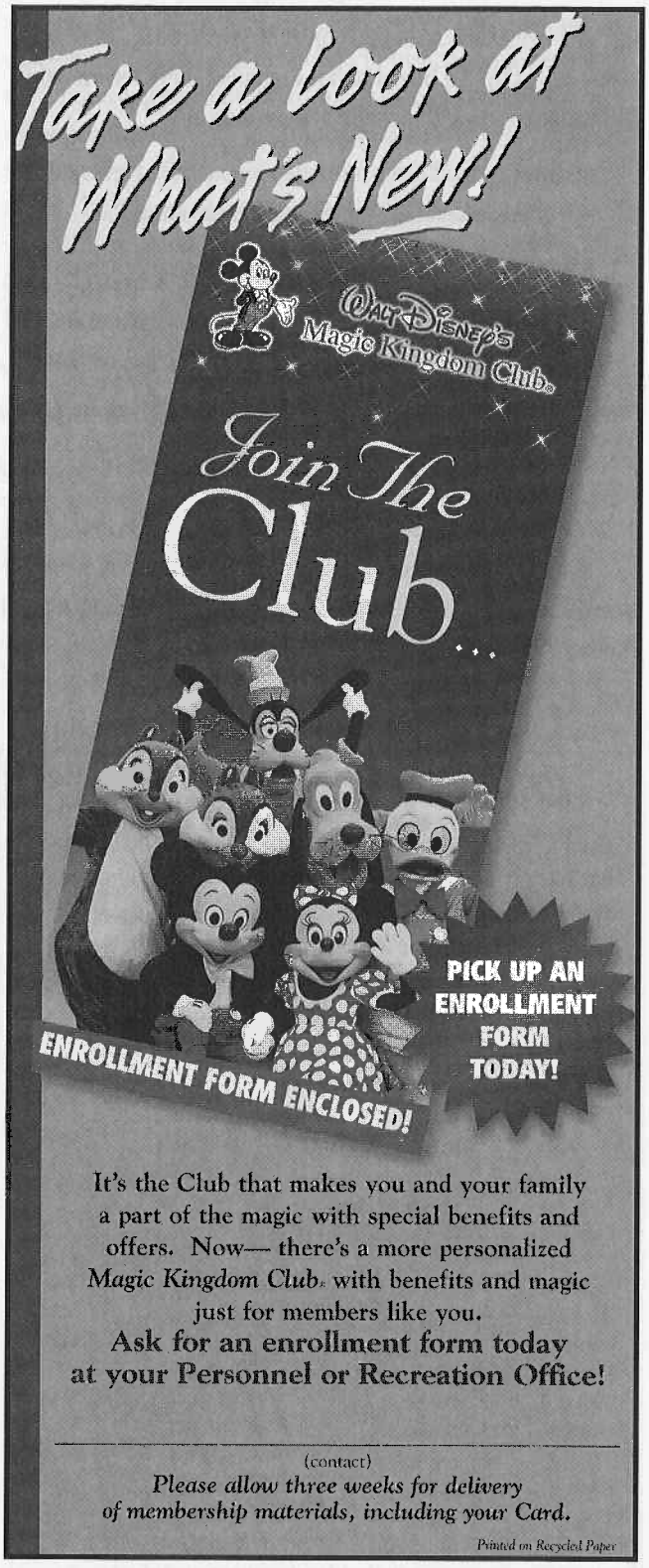

For discount tickets for these attractions call: Maud Thurman at 297-7031

Commission Highlights

During its regularly scheduled meeting January 28, 2000, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. After review and discussion, the Commission approved the minutes of the December 3, 1999 meeting as amended.

2. Stuart W. Hinckley was recognized for his service to the Bar.

3. Charles R. Brown gave a report on the lunch with Section Chairs, Annual and Mid-Year Conventions, Long Range Planning, and the Commission retreat to be held May 5 and 6th in Moab.

4. Scott Daniels gave a report on the Judicial Council.

5. Paul T. Moxley reported on the ABA.

6. Sherrie Hayashi was the recipient of the Raymond S. Uno Award and Kathy Pullins was the recipient of the Dorathy Merrill Brothers Award.

7. The ADR By-Laws were approved.

8. Legal Assistant Division report was given by Sanda Kirkham.

9. Gus Chin reported on the Minority Bar.

10. Carol Stewart reported on Women Lawyers.

11. David Bird and John T. Nielsen gave the Legislative Relations Report.

12. Joel Marker reported on the Client Security Fund.

13. Young Lawyers Division Report was given by Mark Quinn.

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

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has produced a compendium of ethics opinions that is available to members of the Bar in hard copy format for the cost of $20.00, or free of charge off the Bar's Website, www.utahbar.org, under member benefits and services. 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 the current calendar year.

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, Suite 310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill nine vacancies for lawyers and one vacancy for a public member 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, 2000

RFP Issued for Access to Justice Project

"Centralized intake" is a key recommendation of the Access to Justice Task Force. Disabled persons and low-income Utahns who need legal help could more easily find that help if a single point of contact were available to them. As well, any resident would benefit from having ready access to such information as how to acquire a domestic protective order in any county in Utah, especially on a weekend or at night. Any internet "portal" could provide these services, facilitating person-to-person assistance during business hours, and furnishing an easy way for attorneys to review the details of prospective legal problems before accepting a pro bono referral.

A Request For Proposal (RFP) has been posted on the Bar's web page (www.utahbar.org) to launch this project. The United Way of the Greater Salt Lake Area provided $30,000 in seed money to develop the RFP. The Bar participated in its development, along with the Access to Justice Foundation and the fundraising collaboration "And Justice For All", made up of the Legal Aid Society, the Disability Law Center, and Utah Legal Services. The goal is not only to provide greater access to legal help for every Utahn, but to make it simple for every charitable provider of legal assistance in Utah – organizations and individual attorneys alike – to provide that help to qualified individuals.

Scott M. Matheson Award

In 1991, the Law-Related Education and Law Day Committee of the Utah State Bar presented the first annual Scott M. Matheson Award. Currently, the committee is accepting applications for the 2000 Award.

PURPOSE: To recognize a lawyer and a law firm who have made an outstanding contribution to law-related education for youth in the State of Utah.

CRITERIA: Applications will be accepted on behalf of individuals or law firms who have:

1. Made significant contributions to law-related education for youth in the State of Utah.

2. Voluntarily given their time and resources in support of law-related education, such as serving on committees, reviewing or participating in the development of materials and programs, or participating in law-related education programs including the Mentor Program, Mock Trial Program, Conflict Management Program, Judge for a Day, or other court and classroom programs.

3. Participated in activities which encourage effective law-related education programs in Utah schools and communities, such programs having increased communication and understanding among students, educators, and those involved professionally in the legal system.

APPLICATION PROCESS: Application forms may be obtained from and submitted to:

Scott M. Matheson Award
Utah State Bar
Law-Related Education and Law Day Committee
645 South 200 East, Suite 101
Salt Lake City, Utah 84111
Phone: 322-1802

All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Applications must be postmarked no later than April 15, 2000.

Past honorees include

	Attorney	Law Firm
1991	Gregory G. Skordas	Van Cott, Bagley, Cornwall and McCarthy
1992	Barry Gomberg	Fabian and Clendenin
1993	Kevin F. Smith	Ray, Quinney and Nebeker
1994	Kim M. Luhn	LeBoeuf, Lamb, Greene and MacRae
1995	Gordon K. Jensen	Utah Attorney General's Office
1996	Kevin P. Sullivan	Richards, Caine and Allen
1997	Steven L. Garside	Utah County Public Defender Association
1998	Mark W. Dykes	Weber County Attorney's Office
1999	A. Robert Thorup	Utah State and Federal Judiciary

Bar Commission Candidates

President-Elect

SCOTT DANIELS

I am a candidate for President-elect of the Utah Bar Association. Since I am the only candidate for President-elect this year, I will feel a deep sense of rejection if I am not elected. In any event, I want to take this opportunity to define what I hope to accomplish as President-elect, and President of the Utah State Bar.

The Utah State Bar, as every lawyer knows, is an integrated Bar, meaning you have to join if you want to practice law. This form of organization is advantageous to us because we control admissions, discipline and standards, whereas every other profession and trade has to deal with the Department of Professional Licensing in the executive branch of the State Government. The disadvantage of an integrated Bar is that lawyers cannot express dissatisfaction with the organization by simply not joining and not paying dues. Other professional organizations, such as the Medical Association, must constantly seek to make membership meaningful, or the members just drop out.

As a result of the fact that lawyers have to pay their dues and join whether they like the way the organization is being run or not, integrated Bars sometimes become detached from the needs of their members. Members can't quit, but they just don't choose to participate.

As I look at the lists of lawyers who serve on Committees and in Sections and in various Pro Bono and law related projects, I am astounded at the huge number of hours, which are voluntarily donated to the profession and the community. But as I look at these names, it appears that most of them fit a common profile. Conspicuously missing are large numbers of lawyers from rural areas, from solo or small firm practice, government lawyers, and lawyers of color.

No doubt there are numerous reasons why these lawyers are not involved in greater numbers. I'm sure, however, that there is one primary reason: activity in the Bar does not offer sufficient fulfillment or advantage to these lawyers to justify the investment in time and money that is required.

I hope, as President-elect and ultimately as Bar President, to find ways to make Bar activity more meaningful and attractive to these lawyers. The organized Bar is a powerful force for good in our community, and it can even be more effective if all of our members choose to contribute.

Third Division Candidates

DAVID R. BIRD

I am seeking your support as a Bar Commissioner for the Third District. I am a shareholder at Parsons Behle & Latimer where I have practiced Natural Resources and Governmental Relations law since graduating from BYU Law School in 1977. I have been actively involved in the Utah Bar since my admission, serving on many committees and panels. I was privileged to serve as chair of the then Energy and Natural Resources Section in 1988-89. I have served on the Bar's Governmental Affairs Committee since 1979 and have served as its chair for the past 10 years. In that position, I have worked closely with many lawyers and past Bar Commissions.

During my career I have been actively involved in many business and trade associations and believe that Bar members have an important part to play in the economic, political and social affairs in our State. Too many people hold our profession in disdain. If elected I will continue to strengthen understanding and ties between Bar members and the business and political communities and raise awareness of the contributions of the members of the Utah State Bar.

I would be pleased to serve on the Bar Commission and solicit your support.

NANCI SNOW BOCKELIE

Utah lawyers are a diverse lot, with many views and philosophies. The Commission has the often difficult task of serving all those views. I seek election to represent the Third Division because I believe that my diverse practice background and ability to build consensus will allow me to make a unique contribution to the Bar.

Since graduating from the U of U College of Law, order of the Coif, in 1985, my practice has taken me from the large firm of Davis Polk & Wardwell in New York City to my own solo practice in Salt Lake. In between I practiced with a medium sized firm in Newport News, Virginia and the Salt Lake firms of Giauque Crockett Bendinger & Peterson, P.C. and Moxley Jones & Campbell L.C.

I have been active in Bar and community affairs throughout my career, and currently serve as President of Women Lawyers of

Utah. This position has provided me the opportunity to attend a few Commission meetings. Through this opportunity, I realized by seeking election I could more fully contribute to the Commission and the future of the Utah State Bar. I ask for your vote to enable me to make this contribution.

DANE NOLAN

Last year I was elected to fill the final year of a vacated seat on the Utah Bar Commission. To my knowledge I am the first person of color to hold an elected seat and what I've tried to do is to bring a different voice, a unique perspective, to the Commission. I've fought for:

- Inclusion of multiple viewpoints and backgrounds into the decision making process
- Increased responsiveness of the Commission to membership concerns
- Better communication with members
- Privacy rights of lawyers
- A restrained discipline process
- A focus on getting lawyers ready to practice law in the 21st century
- Conservative and responsible financial policies

Also, as a governmental lawyer I can represent and advocate for government lawyers. As an attorney who works in the criminal law field, I can represent and advocate for criminal law and small firm lawyers.

Within the next three years, given current projections for revenues and expenses, there is going to be great pressure to raise Bar membership dues. Compared to lawyers nationwide, we already pay a high fee for the privilege of practicing law. My view is that a dues increase is out of the question. Please vote for me. Thank you.

The lawyers and staff of

Snow, Christensen & Martineau

mourn the loss of their colleague and friend

JIM CLEGG

(1939-2000)

- Member Utah State Bar (1966-2000)
- President Salt Lake County Bar Association (1982-83)
- Commissioner Utah State Bar (1988-94)
- President Utah State Bar (1993-94)
- Trustee Utah Bar Foundation (1994-2000)
- President Utah Bar Foundation (1998-99)
- Fellow American College of Trial Lawyers (1997-2000) (State Chairman 1992-93)
- Cowboy (1939 -)

We will miss him.

Fourth District Candidate

RANDY S. KESTER

Uncontested Election . . . According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

Randy S. Kester is running uncontested in the Fourth District and will therefore be declared elected.

Fifth District Candidate

Uncontested Election . . . According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

V. Lowry Snow is running uncontested in the Fifth District and will therefore be declared elected.

V. LOWRY SNOW

I have enjoyed being a lawyer in Southern Utah for the past 20 years. A good share of that time has been spent as a solo practitioner or as a partner in a two-attorney office. I now practice in a small firm setting. I understand many of the needs and concerns of lawyers practicing in rural Utah, especially as they relate to our Bar membership.

I was recently appointed to serve on the Utah Supreme Court Task Force, which undertook a study of the current issues related to Bar governance. As part of that process we heard from several past and present Bar leaders, and I gained a greater appreciation of the role and function of our Bar. I do not pretend to understand in detail the business of the Bar, but I believe I can serve our Division membership by making certain that current and long range objectives remain inclusive and relevant to the needs of lawyers in the eastern and southern reaches of the state. The Bar serves an important regulatory function, but it should also attempt to serve the needs of all of its members. I would be honored to serve as a responsive and accessible Commissioner.

Salt Lake County Bar Association Website

The Salt Lake County Bar Association is pleased to announce their new website at:

www.utahbar.org/bars/slcbar/

This site will offer information on:

- SLCBar events
- CLE opportunities
- the Bar & Bench newsletter, and
- public service information pamphlets

Check it out today!

19th Annual Bob Miller Memorial Law Day Run/Walk

Mark your calendar for
29 April 2000 at 8:00 a.m.
at the U of U Law School parking lot.

What's new?

New team competition focus –
who can recruit the most
runers, walkers and sitters.

Sitters? Yes, we have a new Chaise Lounge Division this year. No excuses for anybody now. Watch for details next month.

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 of Change** _____

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

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by Daniel M. Torrence

HIGHWAY CHECKPOINTS/CRIMINAL LAW

State of Utah v. DeBooy, 2000 UT 32, Utah Supreme Court Case No. 981172, filed February 4, 2000. Appealed from Seventh District, San Juan County, the Honorable Lyle R. Anderson.

Attorneys: Jan Graham, Att'y Gen., Joanne Slotnick, Norman Plate, Asst. Att'ys Gen., Craig Halls, Monticello, for plaintiff; Rosalie Reilly, Monticello, for defendant.

Henry DeBooy threw a Kleenex from his car as he approached a highway checkpoint. Upon reaching the checkpoint, officers questioned him about drugs and asked to search his car. The auto search led to a felony charge of possession of a controlled substance, as well as possession of illegal fireworks and littering. The trial court denied DeBooy's motion to suppress the evidence. DeBooy entered a conditional guilty plea and preserved his right to appeal the suppression issue. On appeal, DeBooy argued that the highway checkpoint violated his constitutional rights against unreasonable search and seizure. The State argued that the checkpoint was properly authorized by Utah Code, and that the checkpoint statute is constitutional.

Utah Code § 77-23-101 *et seq* allows highway checkpoints if (1) the police submit a written plan to a magistrate describing, among other things, the purpose of the checkpoint, including the inspection or inquiry to be conducted; and (2) the magistrate makes an independent judicial determination that the plan (a) appropriately minimizes the effects on the motorist, including the driver's delay, intrusion, fear, and anxiety, and (b) also minimizes the officers' discretion in conducting the stop.

First, the Court reasoned that littering, by itself, does not create reasonable suspicion of possession of contraband. Littering only becomes suspicious when approaching a police checkpoint. Thus, for the search of DeBooy's auto to be legal, the checkpoint must be legal.

The Court reviewed the history of constitutional challenges to highway checkpoints and notes that those ruled constitutional by the U.S. Supreme Court in landmark decisions were specifically tailored to search for illegal aliens or drunk drivers and involved very brief initial stops. In such situations, the Supreme Court employs a balancing test that weighs the state's interests and the checkpoint's effectiveness against the intrusions upon the individual.

Here, in contrast, the San Juan County checkpoint was far more intrusive. It authorized police to inspect car and driver for a laundry list of possible violations involving license plates, registration certificates, insurance certificates, driver's licenses, seat belts, child restraints, alcohol violations, controlled substance violations, vehicle equipment violations, and commercial vehicle regulations. The Court reasoned that when many legal violations are searched for, the purpose of the checkpoint becomes less a highway safety measure, and more a pretext to stop all vehicles to search for any and all violations of the law. This generalized stop and search occurs without any individualized suspicion of a crime having been committed, much less probable cause.

Also troubling to the Court was the total lack of guidelines for the officers. For example, while inspecting for "vehicle equipment violations," car "A" might have only its headlights checked, while car "B" would be subjected to a full diagnostic exam. The Court ruled that such unbridled discretion is inherently unreasonable under the federal and state constitutions.

However, the Court saw no need to rule the checkpoint statute unconstitutional. Instead, the magistrate authorization of checkpoints must be "narrowly tailored and limited to inquiries directly linked to promoting safe use of the highways." A magistrate may not "uncritically accept" the State's purpose for the checkpoint. Instead, the magistrate must (a) scrutinize the State's purpose to determine if it is valid, and (b) scrutinize the checkpoint plan to ensure each aspect of the checkpoint is necessary using the criteria set forth in the statute.

Here, the State did not meet its burden of demonstrating why it was necessary to search for equipment violations at a sobriety checkpoint and failed to provide any guidelines as to what such a search should entail or how it should be conducted. Because these decisions were left entirely to the discretion of the officers in the field, this unbridled discretion violated the checkpoint statute as well as the Fourth Amendment, and article I, section 14 of the Utah Constitution.

Dissent. In dissent, Justices Howe and Russon reasoned that although the magistrate's order authorizing a checkpoint to detect vehicle equipment violations could conceivably be overly broad if an officer unreasonably detained a motorist while conducting an extensive search for equipment violations, that was not the case here. Here, the questioning and search were done quickly and without the unreasonable delay that might take place if an extensive investigation of equipment violations was made. The defendant must be judged on the facts of this case, not on the "worst case" scenario posited by the majority opinion. Justice Russon also wrote separately to disagree with the majority's apparent ruling that vehicle checkpoints with multiple purposes are unconstitutional. He states that the problem with the checkpoint plan in the instant case was not that it listed several purposes, but that not all of its purposes were independently valid.

PERSONAL INJURY/DRAMSHOP ACT

Gilger and Montoya v. Hernandez, 2000 UT 23, Utah Supreme Court Case No. 980031, filed January 28, 2000. Appealed from Third District Court, Salt Lake County, the Honorable Sandra N. Peuler.

Attorneys: David R. Maddox, Sandy, for plaintiffs; Lewis B. Quigley, Clifford J. Payne, Salt Lake City, for defendant.

In September 1995, Melissa Hernandez had a party at her home. She charged her guests five dollars for all the beer they wanted. During the party, she served beer to inebriated guests, including twenty-year-old Jason Martinez. In the course of the evening, Martinez threatened to injure other guests with a gun or knife he said he had with him. Nevertheless, Hernandez continued to provide him with beer and refused to call the police, even though other guests urged Hernandez to do so. As the evening wore on, some of Hernandez' guests escorted Martinez out of Hernandez' home, where Martinez stabbed and seriously wounded guests Brandon Gilger and Robert Montoya. Although Hernandez knew of the stabbing, she refused to call for emergency aid to assist Gilger and Montoya and even grabbed the phone from a guest who was attempting to call for help. Eventually guests were able to use a neighbor's phone to summon an ambulance.

Gilger and Montoya sued, alleged that (A) Hernandez was negligent "per se" for serving alcohol to minors, including Jason Martinez, in violation of Utah Code Ann. §§ 32A-12-203; (B)

Hernandez had a "special relationship" with her guests, including plaintiffs, that imposed a tort duty of reasonable care on her which she breached by:

(i) failing to properly supervise the party;

(ii) refusing to call police when Martinez threatened other guests with physical violence;

(iii) refusing to summon an ambulance after Martinez stabbed the plaintiffs; and

(iv) preventing other guests from summoning emergency aid.

The trial court dismissed their complaint for failure to state a claim upon which relief may be granted. Gilger and Montoya appealed.

On appeal, both parties agreed that under the version of the Dramshop Act in place in September 1995, the Act did not impose liability upon social hosts who serve beer to minors. This was because the Act held liable only persons who provided "liquor," and the definition of "liquor" did not include beer. The issues on appeal were: (a) was there a pre-existing common law liability for social hosts who serve alcohol to minors, and (b) did the Dramshop Act pre-empt it?

Without specifically answering the first question, the Utah Supreme Court holds that even if there were common law liability for social hosts who serve beer to minors, such liability would be pre-empted by the Dramshop Act.

In making this determination, the Court uses a pre-emption model developed by United States Supreme Court for determining when a federal statute pre-empts a state statute. This model looks first for "language in the statute revealing an explicit legislative intent to pre-empt common law." If none is found, the court should look to the statute's "structure and purpose" for any implicit, pre-emptive intent. This could be shown by a scheme of regulation "so pervasive" as to leave no room for common law to supplement it; or an "irreconcilable conflict" with the common law.

The Court finds the Dramshop Act does not expressly pre-empt the common law insofar as social hosts serving beer are concerned. However, the Act's "structure and purpose" and its overall comprehensive scheme of regulation suggests a purpose and intent to pre-empt inconsistent common law. Therefore, plaintiffs' common law claims based on Hernandez as a social host alcohol provider were properly dismissed.

The Court next addresses Gilger and Montoya's negligence claims. To prevail in a negligence claim, Gilger and Montoya must show, among other things, that Hernandez owed them some duty of care. With limited exceptions, a person has no affirmative duty to control the conduct of another. Under certain circumstances, however, a "special relationship" may be found that will impose a duty.

Gilger and Montoya argued that as a result of the "special relationship" existing between themselves and Hernandez as host, she had duties to (1) act reasonably to control Martinez, (2) protect Gilger and Montoya from Martinez, (3) call for help when injury occurred, and (4) not interfere with others attempting to call for help.

The Court ruled that a general duty between a social host and her guests would be "realistically incapable of performance" in the usual circumstances. Moreover, there is nothing inherent in the host-guest relationship that makes a guest particularly dependent upon the host for protection when threatened by another guest. For these reasons, the Court concludes that no special relationship exists between a social host and a guest that imposes on a social host a duty either to control one guest or to protect another when one threatens to injure the other.

The Court then addressed whether a special relationship arises when the guest falls ill or suffers serious injury at the host's abode, such that would give rise to a duty to provide or summon emergency aid. While not outlining the precise scope of such a duty, the Court holds that where a guest falls ill sufficiently or is injured so as to lack the ability to summon aid for himself, a host has a duty to take reasonable steps to secure such aid. The facts alleged by Gilger and Montoya are enough to create a jury question on this issue.

The final issue for the Court was whether Hernandez could be held liable in negligence for actively preventing another guest from using her phone to summon an ambulance for Gilger and Montoya. In such a situation, where the defendant negligently prevents another from receiving aid, the defendant may be liable even without a host-guest relationship.

In summary, the Court affirmed in part, reversed in part, and remanded for further proceedings.

Dissent. Justice Durham disagrees with the majority's preemption analysis.

She addresses four questions regarding the Dramshop Act:

1. Is there a third-party common law cause of action against commercial vendors of alcohol? Although a majority of the Court concluded that such cause of action did not exist in

Adkins v. Uncle Bart's Inc., 2000 UT 14 (2000), she believes two cases decided before the enactment of the Dramshop Act indicate that a third-party common law cause of action against commercial vendors may exist.

2. Is there a third-party common law cause of action against social hosts who provide alcohol to guests? The majority declines to undertake the analysis and decides that, even if such a cause of action exists, it is pre-empted by the Dramshop Act. Justice Durham believes the Dramshop Act does not indicate an intention be a comprehensive ordering of all the liability questions arising from the provision of alcohol by social hosts. Thus, the Court should engage in an independent analysis of whether a common law cause of action ought to co-exist with the Dramshop Act.

3. Does the Dramshop Act pre-empt a third-party common law cause of action against social hosts? Justice Durham believes the limited goals and narrow remedies of the Dramshop Act indicate that the legislature did not intend for the Act to provide the sole remedy against alcohol providers when third parties are injured by intoxicated guests.

4. Do the comparative fault principles of the Liability Reform Act apply to Dramshop Act cases? Justice Durham concludes that, because the Dramshop Act does not seek to accomplish the same purposes as the Liability Reform Act, the Liability Reform Act's comparative fault principles do not apply to the Dramshop Act.

CIVIL RIGHTS/LANDLORD TENANT LAW

Malibu Investment Company v. Sparks, 2000 UT 30, Utah Supreme Court Case No. 980199, filed January 31, 2000. Appealed from the Third District, West Valley, the Honorable Matthew B. Durrant.

Attorneys: James R. Boud, Troy K. Walker, Sandy, for plaintiff; Russell A. Cline, Michael Crippen, Salt Lake City, for defendant.

In July 1994, Kathy Sparks purchased a mobile home located at Malibu's Byde-A-Wyle Haciendas Mobile Home Park (the "Park"). The lease required Sparks to abide by the Park's rules and regulations. From the beginning, Sparks resided at the Park with her two daughters. In December 1996, one of Sparks' daughters gave birth to a baby boy. The Park manager knew Sparks' grandchild was living there. In March 1997, the Park adopted new rules and later served Sparks with two notices of rules violations. Both referred to numerous violations of Park rules related to the repair and maintenance of her mobile

home. Sparks neglected to cure all of the violations and neglected to obtain a variance. Additionally, the Park said she was violating a rule by having "more than one family" living together. Malibu filed a complaint seeking to evict Sparks. Sparks defended by contending that she did not breach her lease. In the alternative, Sparks alleged that she was excused from complying because the eviction notices were (1) unconscionable, (2) a breach of contract, (3) a breach of the implied covenant of good faith and fair dealing, and (4) a violation of the state and federal fair housing acts.

Malibu and Sparks moved for summary judgment. The trial court granted summary judgment in favor of Malibu, concluding that the alleged fair housing violations were no defense to the eviction action. The trial court denied Sparks' motion for summary judgment, concluding that Sparks lacked standing and that her arguments were meritless.

Sparks appealed both (1) the trial court's granting of summary judgment for Malibu on its eviction claim, and (2) the court's finding of no triable issue of fact on Malibu's alleged violations of the fair housing acts.

The purposes of the Utah Mobile Home Park Residency Act (the "MHPRA") are twofold: providing park owners with speedy and adequate remedies against residents who violate the terms of their tenancy; and second, to protect park residents from actual or constructive eviction by park owners.

The MHPRA allows mobile home park owners to promulgate rules related to the "health, safety, and appropriate conduct" of residents and to "maintenance and upkeep" of the park. It also provides a procedure for enforcement. As long as the rule deals with these issues, the park owner may enforce the rule by serving a notice that sets forth the violation and the time within which the resident may cure the problem. If the resident fails to cure, the park owner may terminate the lease and commence eviction proceedings.

Here, Sparks was cited for various violations related to repair and maintenance; she admitted that she neither cured the violations nor requested a variance. Under these facts, the Utah Supreme Court rules that these violations satisfied the statute because they were related to the "health, safety, and appropriate conduct" and to "maintenance and upkeep." The MHPRA permits park owners to demand strict compliance, so even substantial compliance still subjected Sparks to eviction.

Sparks' bad faith defense was based on evidence that Malibu singled her out for eviction despite many mobile homes in the Park being in similar or worse condition. In a somewhat circular argument, the Court rules this bad faith argument irrelevant because Malibu's eviction proceedings were "proper under the lease and the MHPRA."

Regarding Sparks' Fair Housing claims, the Court notes that, under both the Federal Fair Housing Act and the Utah Fair Housing Act, it is unlawful to discriminate against any person renting property because of, among other things, "familial status." This generally refers to housing discrimination because a child lives with a parent or legal guardian. A plaintiff may recover under this portion of the Fair Housing laws by successfully alleging either of two theories.

Under a "disparate treatment" theory, the plaintiff must show that the landlord has intentionally treated the plaintiff differently from other persons or groups.

A plaintiff can show disparate treatment through one of two methods. The "direct method" requires a plaintiff to show an action that is explicitly, facially discriminatory. The defendant must then show that it would have taken action against the plaintiff anyway. The Court found Sparks has failed to establish an intent to discriminate and failed to refute Malibu's valid justifications for her eviction.

The "pretextual" method requires the plaintiff to show that the defendant's purported justification for an allegedly discriminatory action is merely a pretext for discrimination. If the landlord presents multiple good faith justifications for an eviction, the tenant must show that the justifications are merely a pretext for discrimination. Otherwise, any alleged discrimination is immaterial.

The Court held that, because Malibu set forth multiple justifications for evicting Sparks and she failed to show the justifications were pretextual, Sparks could not prove Malibu's purported justifications were pretextual.

Under a "disparate impact" theory, the plaintiff must show an apparently neutral policy results in a discriminatory effect.

The Court held that Sparks failed to show a "disparate impact" because she pointed to no general policy of Malibu that caused a differential impact on a particular group or class of people and also because case law established that a single act is insufficient to constitute a disparate impact.

In short, the Court upheld the granting of summary judgment in favor of landlord Malibu and the denial of all Sparks' Fair Housing claims. (The Court notes that it did not consider whether

Malibu's one-family rule and the seven-day notice are "statements indicating discrimination" on the basis of familial status (a §section 3604(c) claim) because the issue was not raised in the trial court.)

Dissent. In a lengthy dissent, Justice Durham argues that material facts are in dispute that preclude summary judgment. Basic principals of federal and state fair housing law require that a landlord cannot rely upon other alleged lease violations as a basis for eviction until after the discrimination claim is adjudicated. Here, Malibu's seven-day notice was facially discriminatory. It stated: "You are violating Rule 7 #3 because you have more people living in the home than you are registered with. ...You must cure this by removing evry body [sic] except for you & your 2 daughters." Taken in the light most favorable to Sparks, the notice shows intent by Malibu to evict Sparks because her grandchild was living with her.

Regarding Sparks' disparate treatment claim, Justice Durham cites case law establishing that when direct evidence is used to show that a discriminatory housing decision was made, the burden shifting analysis is inappropriate. Here, the notice constitutes direct or circumstantial evidence from which a jury could infer that Malibu intended to evict Sparks because of the presence of her grandchild. Any supposed "good-faith justifications" for Sparks' eviction are thus irrelevant.

Furthermore, even if a burden-shifting analysis were used, Sparks has countered some of Malibu's justifications with testimony that contradicts the assertions regarding her "numerous" and/or "unregistered" guests. Summary judgment should not have been granted with regard to the seven-day notice because both Malibu's intent and the underlying violations are disputed.

The majority relies on Sparks' admission of several maintenance violations as "dispositive" on the issue of summary judgment. What the majority ignores, according to Justice Durham, is that requiring Sparks to cure the maintenance violations before litigating whether the notice was discriminatory would force her to spend her scarce resources making repairs and then possibly be evicted anyway (if the seven-day notice were found to be legal).

Justice Durham also disagrees with the Court's refusal to consider Sparks' section 3604(c) claim. She points out that there

have been numerous occasions in which the Court has reached an issue notwithstanding its being presented for the first time on appeal. This is especially true when the matter is of "sufficient public concern," such as the area of housing discrimination. Because section 3604(c) prohibits making a housing rental notice indicating any familial status limitation or preference, the seven-day notice here clearly raised an issue of fact.

The seven-day notice also arguably violated Utah landlord-tenant law by not specifying whether the "everybody" required to move out referred to her grandson or other alleged house guests. Thus, this notice was vague and lacked specific information as to how Sparks could remedy the situation. Under these circumstances, the landlord's notice may not have complied with basic landlord-tenant law or the MHPRA.

Furthermore, Justice Durham argues, inasmuch as housing is one of the basic necessities of life, the termination of a lease is an event requiring strong safeguards to protect tenants from losing their homes without adequate opportunity to cure. This is especially true in the context of a mobile home park, where tenants often lack the means to adequately defend their rights.

COMPARATIVE NEGLIGENCE/DRAMPSHOP ACT

Martinez and Durrant v. Red Flame, Inc. 2000 UT 22, Utah Supreme Court Case No. 980094, filed January 28, 2000. Appealed from the Second District, Farmington, the Honorable K. Roger Bean.

Attorneys: Bryan L. McDougal, Sandy, for Durrant and Martinez; Scott W. Christensen, Jason M. Kerr, Salt Lake City, for Red Flame.

Martinez drove drunk allegedly warmed by alcohol provided by Red Flame. His girlfriend, Durrant, was injured. She settled with Martinez's insurer and released all claims against Martinez. She also sued Red Flame under the Dramshop Act.

Red Flame tried to file a third-party complaint against Martinez to offset its own liability by apportioning Martinez's comparative fault. The trial court held that, under the Dramshop Liability Act, principles of comparative fault were inapplicable as between an intoxicated driver and a provider of alcohol. Red Flame then filed a separate action against Martinez, and the two cases were consolidated and assigned to a different judge. Martinez moved to dismiss the complaint, and the trial court granted the motion based on the "law of the case" doctrine. The Supreme Court reviewed that order on interlocutory appeal.

The "law of the case doctrine" prevents one district court judge from overruling another district court judge of equal authority. There are several exceptions to this rule, such as an intervening change in circumstances, a change in the relevant law, or when the first ruling was clearly erroneous and will infect the subsequent proceedings with error.

Here, none of these exceptions apply. The first judge, Judge Dawson, relied on clear language in prior case law to the effect that comparative fault does not apply where dramshop liability is at issue. When the second judge, Judge Bean, was asked to address the issue, nothing had changed. The Court therefore affirms Judge Bean's ruling based on the law of the case doctrine.

However, the Court also examines the merits of the underlying issue, and concludes that the Dramshop Act is subject to the dictates of the comparative fault statute. The mere fact that the Act prescribes a form of strict liability rather than traditional negligence does not exclude it from application of the comparative fault statute.

In so ruling, the Court overrules *Reeves v. Gentile,* 813 P.2d 111, 116 (Utah 1991).

Reeves conclusorily held that principles of comparative fault were not applicable as between different dramshops contributing to the same injury, but were applicable as between dramshops and plaintiffs. *Reeves* did not address the question of apportioning fault between dramshops and intoxicated persons causing injuries, nor did it provide any reasoning suggesting which of its two competing rationales would govern that question. Moreover, to the extent *Reeves* based its holding upon the premise that strict liability cannot be included in comparative fault calculations, that holding is rebutted by the plain language of the comparative fault statute and the Court's subsequent decisions.

Thus, if Red Flame now brings a motion to allocate Martinez's fault, Red Flame may be entitled to apportion Martinez's proportionate share of fault to offset its own liability under the Dramshop Act.

Concurring opinion. Chief Justice Howe reluctantly concurs. He believes the intent of the Dramshop Act as originally enacted was to make dramshops liable without regard to the fault of the intoxicated person and he agrees with Justice Durham that the Dramshop Act was intended to be both punitive and regulatory as well as compensatory to injured third parties. However, he feels constrained by the language of the Liability Reform Act, which diluted the Dramshop Act and abolished joint and several liability.

Dissenting opinion. Justice Durham dissented.

PROFESSIONAL NEGLIGENCE

Steiner Corp. v. Johnson & Higgins of California, et al, 2000 UT 21, Utah Supreme Court Case No. 9981732, filed January 28, 2000. On certification from the United States District Court for the District of Utah, the Honorable J. Thomas Greene.

Attorneys: Peter W. Billings, Jay B. Bell, John E. S. Robson, for plaintiff; David A. Greenwood, Lisa R. Petersen, and Robert A. Lewis, San Francisco, for defendants; Louis A. Craco, Richard L. Klein, Kristin Branson, New York City, and Gary F. Bendinger, Milo Steven Marsden, Salt Lake City, for amicus American Institute of Certified Public Accountants.

Steiner Corporation sued Johnson & Higgins ("J&H"), an actuarial firm, for professional malpractice and breach of contract. It alleged that J&H improperly handled aspects of Steiner's employee retirement plan. Following a bench trial, the trial court entered judgment in favor of Steiner on one of its claims, but rejected Steiner's primary claim of professional malpractice by J&H.

Both parties appealed and the United States Court of Appeals for the Tenth Circuit affirmed in part, reversed in part, vacated in part, and remanded. On remand, the trial court again ruled in J&H's favor on Steiner's claim of professional malpractice, finding that plaintiff Steiner was sixty percent negligent in

(1) creating the benefit plan which it alleged J&H had mishandled;

(2) failing to consult a lawyer regarding the plan; and

(3) failing to act even with the knowledge that the plan was problematic.

Steiner again appealed, arguing the trial court erred in finding Steiner's negligence comparatively greater than that of J&H. The Tenth Circuit again reversed and remanded for a determination of causation and damages. On remand, the trial court certified the following questions to the Utah Supreme Court:

Whether the negligent acts of a plaintiff in causing or contributing to the situation that the plaintiff hired a professional to resolve can be the basis for a comparative or contributory negligence defense, and

Whether a plaintiff's negligent acts in causing or contributing to the situation the plaintiff hired a professional to resolve can be considered in determining causation and damages.

The defenses of comparative and contributory negligence are sometimes available to tort defendants as a means of decreasing their liability. Plaintiffs cannot be held to be contributorily negligent unless their negligence is causally connected to their injury. Thus, a client may be injured if a professional fails to fulfill his responsibilities to him. For a client to be contributorily negligent, his negligence must relate or contribute to the alleged injury caused by the professional stemming from the professional relationship.

The Utah Supreme Court notes that other courts have barred contributory negligence defenses based on the plaintiff's actions taken before obtaining the services of a professional. These cases have a common thread: each reached its conclusions by focusing on the injury for which relief was sought in the case rather than on the condition for which the plaintiff sought professional help.

In applying this reasoning, the Court concludes that a pre-existing condition that a professional is called upon to resolve cannot be the cause, either proximate or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties. To decide otherwise would allow professionals to avoid responsibility for the very duties they undertake to perform. A doctor, for example, might be able to avoid liability for negligently treating an injured person because the patient negligently had run a traffic light and was injured.

Here, the "injury" sustained by Steiner was the "loss of the opportunity to change the formula" of its employee retirement plan. J&H committed malpractice by failing to give advice and provide cost estimates in a timely manner, causing Steiner to lose the opportunity to change the formula. The negligent acts of Steiner preceded the omission by J&H and therefore did not relate to the injury alleged to have been caused by J&H's negligence.

The second certified question was whether a plaintiff's negligent acts in causing or contributing to the situation that the plaintiff hired a professional to resolve can be considered in determining causation and damages. The Court holds that the same analysis applies equally to this question. Only when the negligence of the plaintiff is "causally connected" to the injury can the damages awarded to the plaintiff be reduced proportionately.

DUE PROCESS/CRIMINAL LAW

State v. Bennett, 2000 UT 25, Utah Supreme Court Case No. 980072, filed January 28, 2000. Appealed from the Third District, Tooele Department, the Honorable Tyrone Medley.

Attorneys: Jan Graham, Att'y Gen., Joanne C. Slotnik, Asst. Att'y Gen., Salt Lake City, and John Kelly West, Tooele, for plaintiff;

David J. Angerhofer, Salt lake City, for defendant.

In October 1991, Eugene Reed Bennett went to trial on charges of sodomy and rape of a child. Just prior to the first day of trial, Bennett received the clothing he had been wearing when he was booked into jail a few months earlier. Because Bennett had gained weight while incarcerated, his pants tore when he put them on. For the first day of trial, Bennett wore the only other clothing available to him, a blue jumpsuit, clearly marked with the label "Tooele County Jail" stenciled in block letters across the back. Bennett wore the jail jumpsuit during jury selection and the first part of his trial. The court did not inquire why Bennett was dressed in this manner, and Bennett's attorney did not request a postponement or continuance until civilian clothing could be obtained. On the second day of trial, Bennett's mother brought civilian clothing, which he wore. The jury convicted Bennett of two counts of sodomy on a child and one count of rape of a child.

On appeal, Bennett asserted that his appearance in jail clothing violated his right to due process. The State's position on appeal conceded that following a prior Utah Supreme Court decision, *Chess v. Smith,* 617 P.2d 341 (Utah 1980), would require reversal and urged the Court to overrule *Chess.* In *Chess,* a defendant was tried in jail clothing even though he had objected to his attorney but his attorney had failed to convey that objection to the court. The Utah Supreme Court in *Chess* held that a defendant is entitled to appear at trial in civilian clothing unless the defendant affirmatively waives that right.

Declining to overrule *Chess,* the Utah Supreme Court reversed Bennett's conviction.

Concurring opinions. Justice Zimmerman concurred, and chided the State for "ignoring the fact that we do not lightly overrule our prior opinions." He writes that the Court will not overrule prior cases unless it is "clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." He concludes that "the only solid reason I can find for the State's taking the extraordinary step of seeking an overruling of *Chess* is a concern that the evidence against defendant is overwhelming and the State does not want us to reverse the conviction. But such a result-oriented approach is not a legitimate basis for overruling a prior decision of this court. Reversals are part of the price we pay for having a system of law, rather than a system of *ad hoc* results. If the evidence is so strong, there is no reason to think that if the defendant is tried again, the same result would not be reached."

Justice Durham also concurs, but writes at length to explain that she would ground the result not on federal due process requirements, but instead on the Court's inherent supervisory power. Using this power, the Court may presume prejudice "in circumstances where it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice."

Dissent. District Judge Lyle R. Anderson has no quarrel with the outcome of *Chess.* He writes that the actual holding of *Chess* went beyond what the reasoning supported, and adopted a rule mandating reversal in every case where a defendant stands trial in jail clothing, unless an on-the-record inquiry shows an intelligent and conscious decision to stand trial in jail clothing.

He believes the result is that, although virtually every trial judge knows that defendants have the right to trial in street clothes, virtually no trial judge knows that an on-the-record inquiry must establish a conscious and intelligent decision to waive this right. In short, he would overrule *Chess* to the extent that it purports to require more than a showing of prejudice.

PRINCE, YEATES & GELDZAHLER

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Labor & Employment Law ◆ Litigation
Real Estate ◆ Tax

Utah Bar Foundation Hires New Executive Director

The Trustees of the Utah Bar Foundation have selected as a new Executive Director, Staci Makris-Souvall, to replace long time employee, Zoe Brown, who recently retired. For approximately one decade, Staci has worked in the Third District Court, private law firms, and the State of Utah. Staci merges the disciplines of History, H and R Block Tax School, Paralegal Certifications, and most recently her studies at the University of Utah, Executive Master of Public Administration (M.P.A.) to face the challenges of augmenting the Trustees' management of a non-profit organization. In terms of short-term goals, Staci believes: "the first part of the millennium will be touted as a decade of service – countervailing the excesses of the 1980-early 1990's. Firm administrators, small firms and solo practitioners should insure the trust funds they contribute to yield a reasonable return. If each attorney maximizes his or her incremental contribution, and finds new ways to contribute, the Foundation can accomplish more for the indigent and educational programs of Utah." In an era of dwindling federal and state resources for most organizations, private sources have been forthcoming to replenish funds – but the momentum must be continued. Operations of the Foundation will be computerized with electronic spreadsheets. Long-term goals include increasing public awareness of the impact and residuum from Foundation grants, and locating alternative sources of income for the Foundation to supplement the IOLTA interest currently generated. Questions or comments regarding the establishment of an attorney/firm trust fund or the Utah Bar Foundation generally should be directed to her.

"The Trustees are delighted to have been able to hire someone with Staci's outstanding background and qualifications. Her energy and creativity will help the Foundation better fulfill its mission in the coming years", said Foundation President Randy Dryer.

2000 IOLTA Grant Application Procedures

Organizations seeking a Utah Bar Foundation 2000 grant may obtain an application form from the Utah Bar Foundation office listed above. The deadline to submit applications for 2000 grant(s) is May 31, 2000. The application consists of a financial budget supported by a narrative proposal not to exceed eight pages. The trustees prefer grant applications, which specifically describe the purpose of the request, and how the funds are to be used. Those receiving grants must agree to report the use of the funds.

The Utah Bar Foundation was organized in 1963 as a non-profit charitable corporation. All licensed members of the Utah State Bar are automatically members of the Foundation and can make direct contributions and/or participate in the interest on Lawyers Trust Account (IOLTA) Program that generates funds for grants. A seven member Board of Trustees administers these funds and awards grants annually to community agencies that support legal services to the disadvantaged, improve the administration of justice, support law-related education and other law-related purposes. In 1998, $325,333 was awarded, for a combined grant total of 2.5 million since 1985.

Utah Bar Foundation Trustee Election

NOTICE IS HEREBY GIVEN, in accordance with the bylaws of the Utah Bar Foundation, that an election of two trustees to the Board of Trustees of the Foundation will be finalized at the annual meeting of the Foundation held in conjunction with the 2000 Utah State Bar in San Diego, California. Each position is assigned a three-year term.

Nominations may be made by any member of the Foundation (every attorney licensed to practice law in the State of Utah is also a member of the Foundation) by submission of a written nominating petition identifying the nominee, who must be an active attorney duly licensed to practice law in Utah. Petitions must be signed by at least twenty-five attorneys who are also duly licensed to practice law in Utah.

Petitions should be mailed to the Utah Bar Foundation, and must be received on or before April 30, 2000. Nominating petition forms can be picked up at the Foundation office or requested by telephone. The election will be conducted by secret ballot mailed to all active members of the Foundation or or before May 31, 2000. Winners of the election will be announced at the Bar's annual meeting.

Legal Assistants Division

by Kay D. Hanson, CLAS

At the request of the Board of Bar Commissioners of the Utah State Bar, the Legal Assistant Division of the Utah State Bar researched the issue of legal assistant/paralegal activity in other states. We visited web sites, made telephone calls and studied articles. This is what we found.

There is **no** mandatory regulation of legal assistants/paralegals.

There are four states (California, Florida, Louisiana and Texas) that have state specific tests available but these are taken on a voluntary basis. In California and Texas, legal assistants/paralegals must pass the National Association of Legal Assistant's exam (the CLA), before they can take the state test. The following is a breakdown of activity in other states with regard to legal assistants/paralegals:

State	Guidelines	Definition	Bar Membership	State Exam	Other
Alabama					
Alaska		✔	✔		
Arizona		✔	✔		
Arkansas					
California	✔	✔	✔	✔	
Colorado	✔	✔	✔		
Connecticut	✔	✔	✔		
Delaware					
Florida	✔	✔	✔	✔	
Georgia	✔	✔			
Hawaii	✔				
Idaho	✔	✔	✔		
Illinois	✔	✔	✔		
Indiana		✔			
Iowa	✔				
Kansas	✔	✔	✔		
Kentucky	✔	✔			creating state test
Louisiana	✔			✔	
Maine*	✔	✔			
Maryland					
Massachusetts		✔			
Michigan	✔	✔	✔		
Minnesota	✔	✔	✔		
Mississippi	✔	✔			
Missouri	✔	✔	✔		
Montana					
Nebraska		✔	✔		
Nevada		✔	✔		
New Hampshire	✔	✔			
New Jersey	✔		✔		
New Mexico	✔	✔	✔		
New York	✔		✔		
North Carolina	✔	✔	✔		
North Dakota	✔	✔	✔		
Ohio		✔	✔		
Oklahoma	✔	✔			
Oregon	✔	✔			
Pennsylvania	✔	✔			
Rhode Island	✔	✔	✔		
South Carolina	✔	✔			
South Dakota	✔	✔			
Tennessee		✔	✔		
Texas	✔	✔	✔	✔	
Utah	✔	✔	✔		
Vermont					creating state test
Virginia	✔	✔	✔		
Washington	✔	✔			
West Virginia	✔	✔			
Wisconsin		✔	✔		
Wyoming					
District of Columbia					

*Legal assistants cannot use this designation if they do not meet the definition of a legal assistant. $1,000 fine.

AND JUSTICE FOR ALL

On February 24, 2000, lawyers across the State announced their commitment for the 2000 "AND JUSTICE FOR ALL" campaign. The campaign is a collaborative effort of the Disability Law Center, Legal Aid Society of Salt Lake and Utah Legal Services to secure a stable, legal profession-based, source of funding for civil legal services to the poor and people with disabilities. The exciting goal announced by Alan Sullivan is to have 2000 attorneys donating to the campaign in 2000. This means we need to increase the number of attorneys that are giving by 800 attorneys.

In its inaugural year, the 1999 "AND JUSTICE FOR ALL" campaign successfully raised $410,000 to ensure equal justice for all Utahns. These funds have allowed the agencies to serve more citizens in need than ever before–but thousands still go without assistance. The George & Dolores Doré Eccles Foundation has pledged a $100,000 challenge grant for the Campaign to help in obtaining the goal of getting 2000 Utah attorneys to donate to the "and Justice for all" campaign in 2000.

Another exciting development in the Campaign is the matching gift of $25,000 from the Dr. W. C. Swanson Family Foundation in Ogden. This gift will be used to stimulate gifts from small firms and solo practitioners, especially from the northern region of the State.

In order to achieve these goals, the Campaign relies on the volunteer leadership of Leadership Committee Members. Serving as Campaign Chair is Alan Sullivan–Snell & Wilmer. Other committee members are: Craig W. Anderson–Salt Lake County Attorney's Office; Michele Ballantyne–University of Utah Office of General Counsel; Mark K. Buchi–Holme Roberts & Owens; Richard Burbidge–Burbidge & Mitchell; Jeffery Fillmore–Parsons Behle & Latimer; Paul F. Graf–Utah Attorney General's Office, St. George; David R. Hamilton–Smith, Anderson, Knowles, Hamilton & Mansfield; Reese Hansen–J. Reuben Clark School of Law; Jim Holtkamp–LeBoeuf, Lamb, Greene, & McRae LLP; James C. Jenkins–Olson & Hoggan; David J. Jordan–Stoel Rives; Gary L. Johnson–Richards, Brandt, Miller & Nelson; Neil Kaplan–Clyde Snow Sessions & Swenson; Bruce N. Lemons– Holland & Hart; Ralph R. Mabey–LeBoeuf Lamb Greene & MacRae; Brent V. Manning–Manning, Bradshaw, Curtis & Bednar; Steve Marsden–Giaque, Crockett, Bendinger & Peterson; Scott M. Matheson, Jr.–University of Utah; Ellen M. Maycock–Kruse, Landa & Maycock; Charlotte L. Miller–IOMEGA; Debra J. Moore–Utah Attorney General's Office; John T. Nielsen–Intermountain Health Care; Michael P. O'Brien–Jones, Waldo, Holbrook & McDonough; Martin N. Olsen–Olsen & Olsen; Clayton J. Parr–Parr, Waddoups, Brown, Gee & Loveless; Dorothy C. Pleshe–Callister Nebeker & McCullough; Richard A. Rappaport–Cohne Rappaport & Segal; Mark Robinson–Robinson & Seiler; Janet Smith–Ray, Quinney & Nebeker; Stephen D. Swindle–Van Cott, Bagley, Cornwall & McCarthy; Peggy A. Tomsic–Berman & O'Rorke and Elizabeth A. Whitsett–Huntsman Corporation

An attorney's contribution to "AND JUSTICE FOR ALL" will meet all or a portion of his or her obligation under Rule 6.1 of the Utah Rules of Professional Conduct. The suggested contribution is the dollar equivalent of two billable hours. All donations are fully tax deductible. Checks should be made payable to "AND JUSTICE FOR ALL", 225 South, 200 East, Suite 100, Salt Lake City, Utah, 84111.

Thank You!

I would like to thank the members of the Bar Examiners, Bar Examiners Review, and Character and Fitness Committees for volunteering their time for the February bar examination. Your time and efforts were very much appreciated.

Thank you again,
Darla C. Murphy
Admissions Administrator

. . . that 319 new lawyers (270 law students and 49 out-of-state lawyers) were admitted to the Bar in 1999

. . . that Bar membership grew 2,051 (40%) over the last ten years, from 5,102 to 7,153 lawyers now licensed to practice law in Utah

Did You Know. . .

. . . that recent surveys show the practice demographics of Utah lawyers as:

Solo Practitioners	20%
Government Practice	19%
Firms of 2-5 Lawyers	15%
Firms of 6-25 Lawyers	13%
"Other"	12%
Firms of 26+ Lawyers	11%
Corporate Counsel	10%

. . . that the geographic distribution of Utah's lawyers on January 1, 2000 is:

First District	114
Second District	493
Third District	4,185
Fourth District	594
Fifth-Eighth Districts	302
Out-of-State	1,465
TOTAL	7,153

CLE Calendar

DATES	TITLE	PLACE, TIME, CLE CREDIT, PRICE
3-9 thru 11-00	**Utah State Bar Mid-Year Meeting**	Dixie Center, St. George, Utah; $180.00 before 2/11; $210 after 2/11; 9.5 Hrs. CLE (2 ethics/3NLCLE and Salt Lake Co. Bar Film)
3-16-00	**ALI-ABA: 1) Retirement Plan Distribution Fundamentals for Estate Planners; 2) Financial Planning and the Practice of Law**	Law & Justice Center: 10:00 a.m.-12:00 p.m.; 2 hrs CLE; Program 2) 12:30 p.m.-2:00 p.m.; 2 hrs CLE; $125 per program or $195 if registering for both. To register: 1-800-CLE-NEWS or on www.ali-aba.org.
3-23-00	**Employment Law: The Hire/Fire Mire (and Other Messy Stuff)**	Law & Justice Center: 5:30-8:30 p.m.; 3 hrs CLE/NLCLE; $40 YLD, $55 all others.
3-28-00	**ALI-ABA: Hot Issues in Employment Law & Litigation**	Law & Justice Center: 10:00 a.m.-2:00 p.m.; 4 hrs CLE; $165; to register: 1-800-CLE-NEWS or on www.ali-aba.org.
3-29-00	**Trial Academy 2000: Part II Opening Statements**	Gore Auditorium, Westminster College: 6:00-8:00 p.m.; 2 hrs CLE/NLCLE; $30 YLD, $40 Litigation Section Members, $50 nonmember per seminar. **For six part series:** $150 YLD, $200 Litigation Section Members, $250 non-members.
3-30-00	**ALI-ABA: Health Plans, HIPAA, and COBRA Update**	Law & Justice Center: 10:00 a.m.-2:00 p.m.; 4 hrs CLE; $165; to register: 1-800-CLE-NEWS or on www.ali-aba.org.
3-31-00	**Estate Planning: Exploring the Charitable Remainder Trust & Irrevocable Trust**	Law & Justice Center: 9:30 a.m.-3:00 p.m.; 6 hrs CLE; $110.
4-6-00	**PLI: Copyright & Trademark Law for the Nonspecialist; Understanding the Basics"**	Law & Justice Center: 9:00 a.m.-3:00 p.m.: $299; 6 Hrs. CLE. To register: 1-215-243-1601
4-6, 7, & 8-00	**ADR Symposium: Partisanship, Partnership & Peace: The Role of the Third Side**	Law & Justice Center: Workshops April 6, 2000. 6.5 Hrs. CLE, $125, $110 for the Mediation-Advocacy Workshop for ADR Section Members – Symposium April 7 & 8, 2000, 15 hrs CLE (up to 3 in ethics) $200 before 3-31-00, $225 after 3-31-00 plus $15 for MCLE fees. Includes Ury Lecture. Additional lecture ticket $20 each.

For current seminar information and registration, access our Website at *www.utahbar.org/cle.*

REGISTRATION FORM

Registration for each seminar must be received at least 2 days prior to ensure availability. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis, plus a 25% late charge unless otherwise indicated.

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard ☐ AMEX Card No. _____

Exp. Date _____

DATES	TITLE	PLACE, TIME, CLE CREDIT, PRICE
4-17-00	**Law & Economics: Anti-Trust and the Microsoft Case**	Law & Justice Center: 1.5 hours, $35, 12:00 p.m.–1:30 p.m. Craig Romaine, Economist, Charles River Associates, Washington, D.C.
4-20-00	**Real Property Annual Practice Seminar**	Law & Justice Center: 4 Hrs. CLE; Price TBA; 8:00 a.m. – 12:00 p.m.
4-20-00	**Primer: What To Do When Your Client Has Fallen and Can't Get Up**	Law & Justice Center: 3 Hrs. 5:30–8:30 p.m. CLE/NLCLE; $40 YLD, $55 other. Door registrants add $10.
4-21-00	**Collection Law First Annual Practice Seminar**	Law & Justice Center: 4 Hrs. CLE; Price TBA; 8:00 a.m. – noon
4-23-00	**ALI-ABA: Annual Spring Employee Benefits Law & Practice Update**	Law & Justice Center: 10:00 a.m. – 2:00 p.m.: $165; 4 Hrs CLE. To register: 1-800-CLE-NEWS or on www. ali-aba.org.

NATIONAL CLE CONFERENCE

In cooperation with the Utah State Bar
Co-Sponsored by
ABA Criminal Justice Section, Utah Prosecution Council
Utah Association of Criminal Defense Lawyers

March 30-31, 2000, Park City, Utah

THURSDAY, MARCH 30, 2000

8:00 a.m. **DNA Evidence** – *Barry Scheck,* NY, NY

10:15 a.m. **Utah Legislative Update** – *Paul Boyden,* Exec. Dir., Statewide Assn. of Public Attorneys, SLC, UT; *Jim Housley,* Chair, SWAP Legal Affairs Comm., SLC, UT; *Richard Mauro,* private practice, SLC, UT; *Michael Sikora,* private practice, SLC, UT

12:15 p.m. **Lunch** – Guest Speaker

1:45 p.m. **Search & Seizure** – *Marian Decker,* AG's Office; *Joan Watt,* Legal Defenders, SLC
Mental Health Issues – *Creighton Horton,* AG's Office; *Mark Moffat,* private practice
Juvenile Justice – *Pat Nolan,* Cache County Attorney; *Lynn Donaldson,* private practice

4:00 p.m. **Ethics Panel – *Moderator:*** *David Rudolph,* Chapel Hill, NC; ***Panelists:*** *Hon. Lynne Abraham,* DA, City of Philadelphia, PA; *Hon. David Blackwell,* Emery County Att., Castle Dale, UT; *Kenneth Brown,* private practice, SLC, UT; *Hon. Lynn Davis,* Fourth District Court, Provo, UT; *Peter Neufeld,* private practice, NY, NY

FRIDAY, MARCH 31, 2000

8:00 a.m. **Topic Pending** – *Hon. Michael Johnson,* Concord, NH

10:00 a.m. **Separate Meetings**
Utah Prosecution Council – *Hon. Ronald Boyce,* U.S. Magistrate Judge
UACDL – *Hugo Rodriguez,* Miami, FL; *Charles Illsley* WVC Police Clan. Labs; *Bruce Lyons,* Ft. Lauderdale, FL
ABA – *Committee Meetings*

4:00 p.m. **Expert Witness** – *Jerry Goldstein,* San Antonio, TX

SEMINAR REGISTRATION

Name: _____

Address: _____ City: _____ State: _____ Zip: _____

Amount Enclosed: _____ Bar Number: _____ Tel. Number: _____

Public Defender or attorney in practice less than five years, UACDL Members: $170
Private Practice Attorneys, UACDL Members: $200

CLE 20 hrs. including 2 ETHICS

Registration for the Prosecution Council, Contact Marilyn, at (801) 366-0202
Registration for ABA members, Contact Sherrill Klein, at (202) 662-1512

Questions: Call Amy Carlson, Exec. Dir., (801) 364-6474
**UACDL, P.O. Box 510846, SLC, UT 84151*

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: 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. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

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.

FOR SALE

Copier for sale – Minolta Model #5320, 35 CPM, 20 bin sort, staple, duplex and much more. Excellent condition, has received regular maintenance under service contract. 30 day warranty, service contract available, will deliver. $2,950. Call Carol at 521-6661.

CJS and USCA, both sets complete and up to date. Make offer. Complete updated sets BNA Business Monographs, 32 Volumes, and BNA Environment Reporter, 14 volumes. Make offer. 801-975-4720. All sets must go.

POSITIONS AVAILABLE

Internet Opportunity – Internet based legal document preparation site with plans on expanding and developing state specific documents. Attorneys in various areas of specialization desired to review and incorporate local statutes. Benefits include internet presence with your personalized banner ad for your state and increased referrals. For more information please see our site at http://Legaldocs.com and look under Attorney Information.

Salt Lake City law firm seeks associate for its general litigation practice. Applicants should have 2-4 years litigation experience and a strong academic background with demonstrated research and writing abilities. Send confidential resume to David McGrath at Parry Anderson & Mansfield, 60 E. South Temple, Suite 1270, Salt Lake City, UT 84111.

CORPORATE/SECURITIES – One of Utah's largest commercial law firms is seeking an attorney with at least six years of experience in corporate finance, securities registration and regulation, mergers and acquisitions and general business transactions to join an active and expanding corporate and securities practice. Must be able to assume significant responsibility for transactions and client relationships. Superior academic and transactional experience required. Competitive pay and excellent benefits. Send resume to: Recruitment Director, P.O. Box 11019, Salt Lake City, Utah 84147.

ERISA ATTORNEYS – Smith & Downey, a national law firm, with a practice limited to human resources law, seeks an experienced ERISA attorney to open and manage or co-manage its Salt Lake City office. See "Professional Job Opportunities" at www.smithdowney.com.

Salt Lake Legal Defender Association is currently updating its trial and appellate attorney roster. If you are interested in submitting an application, please contact F. John Hill, Director, for an appointment at (801) 532-5444.

During the month of March, the District Attorney's Office for Salt Lake County will be formally requesting applications for one open position in the Litigation Division of the Office. This position requires experience in civil rights, trial and appellate work and specifically requires a minimum of 5 years civil rights experience in State and Federal court. Applicants must be licensed in Utah and the Federal courts including the 10th Circuit Federal Court. Salary ranges from $51,000 to $65,000 based upon experience. Interested applicants should contact the Salt Lake County Personnel Department @ 468-2351 for more information, or contact the District Attorney's Office @ 468-3300.

During the month of March, the District Attorney's Office for Salt Lake County will be formally requesting applications for entry level attorney positions in the civil and criminal areas. Beginning salary $40,000 plus benefits. Interested applicants should contact the Salt Lake County Personnel Department @ 468-2351 for more information, or contact the District Attorney's Office @ 468-3300.

ESTATE PLANNING ATTORNEY – Prestigious Salt Lake City law firm is seeking an experienced Estate Planning attorney. Send resume to Christine Critchley, Confidential Box #78, 645 South 200 East, Salt Lake City, UT 84111.

Four partner AV firm in Pocatello, Idaho seeks associate with 0-5 years experience for personal injury and insurance defense litigation/misdemeanor criminal prosecution. Salary and partnership potential commensurate with experience and ability. Send resume to Thomas J. Holmes, P.O. Box 967, Pocatello, ID 83204, Phone: (208) 232-5911. Fax: (208) 232-5962.

Salt Lake Firm seeking full time Attorney with two to five years experience in Estate and Business Planning. Job description: Organize, supervise and review Business and Estate planning documents. Send a resume to Utah State Bar Box No. 45, 645 South 200 East Suite 310, Salt Lake City, UT 84111.

OFFICE SPACE/SHARING

Tired of paying rent? Tired of rent increases? Build your own equity! Rent to own or own now. Seller financing available. Ideal for 8 to 12 attorneys. 5,500 square feet. 5th Floor, 68 South Main Street, Salt Lake City, Utah 84111. TRAX access to State and Federal Courts. Phone 801-521-3800.

OFFICE SPACE/WEST VALLEY LOCATION–Established attorneys seek attorney to share space. Features include two conference rooms, reception area, parking, fax machine, copier, kitchen, library, utilities included, secretarial space and telephone hookups available, swimming pool on premises–$500/month. Please call 801-967-5500.

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

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Date of Activity CLE Hours Type of Activity**

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

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through self-study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

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

Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a **$50.00** late fee.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:** _____

Regulation 5-103(1) — Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.

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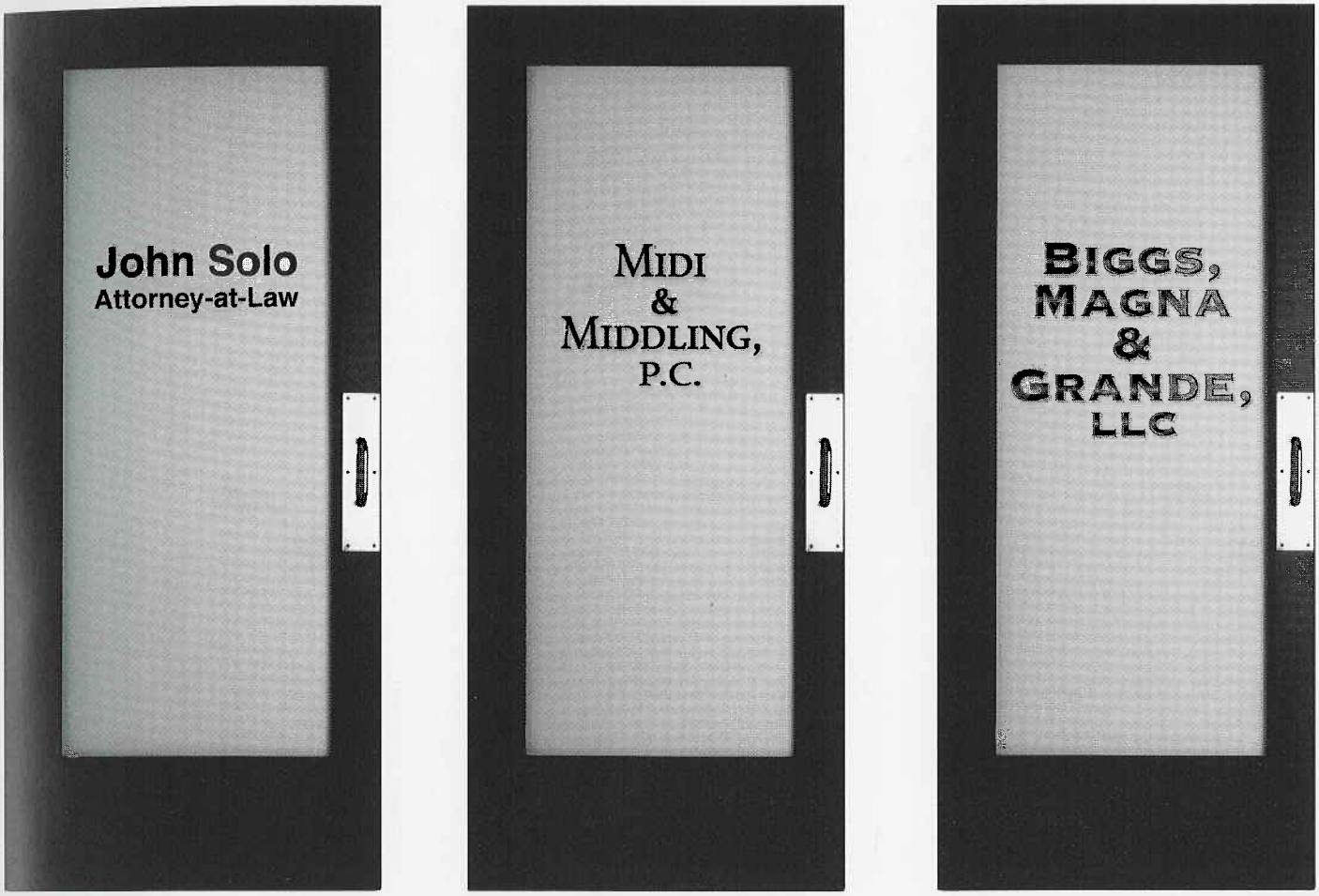

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