Table of Contents

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

MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Easter sunrise service atop Hidden Peak, Snowbird, Utah, looking toward the Pfeiferhorn Peak, April 1990. Taken by first-time contributor Lynda Rolston Krause, Sandy City Attorney's Office.

The *Utah Bar Journal* is published monthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others, $45.00; single copies, $5.00. For information on advertising rates and space reservation, call or write the Utah State Bar offices.

Utah Bar JOURNAL

Volume 14 No. 9
December 2001

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the 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 or members of the Legal Assistants Division of the Bar who are interested in having photographs they have personally taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their print, transparency, or slide, along with a description of where the photograph was taken to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, 2890 East Cottonwood Parkway, Mail Stop 70, Salt Lake City, Utah 84121. Include a pre-addressed, stamped envelope for return of the photo and write your name and address on the back of the photo.

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.

The Utah Bar Journal

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

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 Sayings of D. Frank Wilkins

by Scott Daniels

The real joy of serving on the Bar Commission comes in the friendships and associations that develop. Judge D. Frank Wilkins is one of the truly remarkable people I have known. As I sat with him at Commission meetings, I frequently marveled at his eloquent statements. After I served about three years, I began to record his sayings as best I could. I deeply regret that I didn't start writing them down sooner. Let me share a few of my favorites:

We sometimes have to stand as individuals against an oceanic wave.

We are cast into the cauldron of seething controversy.

When as a Commission we exercise our core functions we must do so with deliberation and strength, unencumbered, unweakened and unattenuated by other concerns. We must not be too compliant with other authority, and I believe that with the deepest stirrings of my heart.

As Cochise used to say, "let's think on it."

As Jack Webb used to say on Dragnet, "just the facts, ma'am."

I'm beginning to be a stick-in-the-mud even by my own standards, but I'm not an ethnocentric nerd.

Lawyers at their best use superior language. At their best they adopt excellent manners. At their best they pursue high principle. At their very best they infuse the substance of justice with uplift.

If I appear to be scolding, I'm not. Or, if I am, I'd rather you didn't know it.

Our guiding principle ought to be a sense of self-satisfaction. That sounds arrogant; I think it is not. We ought not to worry too much about perception of the public. If we can get the public on our side, we ought to because that's the sensible thing to do. But at the end of the day, it's a sense of "oughtness", a sense of self-satisfaction that matters.

This is a true story. And, if it's not, it's a good story.

The Bar Commission should speak for the lawyers. Let the Judicial Council speak for the judges. We shouldn't be controlled by what the judges want. We should stand together, but not too close. We shouldn't go loose arms around each other with Dorothy down the yellow brick road.

We look out of different portholes.

Sometimes, we don't have to be concerned with absolute purity. Medium purity will do.

I ask the Commission to revisit this with an open mind, and I might even revisit it with an open mind myself, although you might doubt that and so do I.

That cactus would be hard to swallow.

When the wind blows, the tree must bend.

If you don't like my peaches, don't shake my tree. You get part of the cherries, pits, skin, etc.

Judge Wilkins is one of the last of the old school of flowery oratory. He is good friend, a wise mentor, a formidable opponent and most of all, a real gentleman.

INS v. St. Cyr:[1] *The Supreme Court and Draconian Congressional Criminal-Immigration Laws*

by Hakeem Ishola

On April 24, 1996, former President Clinton reluctantly signed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), and thereafter the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") on September 30, 1996. Both enactments, hereinafter referred to as the "new law," wrought significant changes in immigration law,[2] particularly as it relates to criminal aliens.[3] These punitive laws included the expansion of the term "aggravated felony" to encompass garden variety crimes like simple theft and vehicular burglary, which the states have traditionally regarded as "misdemeanors." Moreover, Congress made retroactive the "aggravated felony" definition, such that the term now applies to specified crimes regardless of when the conviction was entered (INA § 101(a)(43)). An alien who committed a misdemeanor crime in 1960 when the term "aggravated felony" was not even in the Act, becomes deportable after the new law because the crime is now defined as a felony nearly four decades later. Other punitive aspects of the new law include Immigration and Naturalization Service's ("INS") right to detain in custody aliens who have committed specified crimes without the possibility of a hearing to determine whether they could be released on bond pending deportation proceedings;[4] the retroactive and prospective elimination of all forms of relief, including §§ 212(c) and 212(h) relief,[5] to convicted aggravated felons regardless of family ties and demonstrated rehabilitation (*See* INA § 240(a); the definition of "conviction" to reach traditional inconclusive criminal dispositions such as pleas in abeyance(*See* INA § 101(a)(48)); granting low-level INS officers the ability to solely reinstate prior deportation orders;[6] and the elimination of judicial review for criminal aliens who have administratively been ordered removed from the United States (*See* INA § 242(a)(2)(C)).

In *St. Cyr II,* the Supreme Court on June 25, 2001, joined the lower courts in striking down two of the most draconian aspects of the new law – one purporting to divest federal courts of *all* jurisdiction to review issues relating to aliens convicted of crimes, and the other attempting to retroactively apply the new law to prior criminal conduct by eviscerating former INA § 212(c) relief.

Enrico St.Cyr, a lawful permanent resident since 1986, pleaded guilty in 1996 to a charge of selling a controlled substance in violation of Connecticut law. That conviction, without doubt, rendered him deportable/removable from the United States. Under pre-new law, St. Cyr would have been eligible in an administrative deportation proceeding before an immigration judge for relief from deportation under §212(c).[7] But removal proceedings were not commenced against him until April 10, 1997, after the new law came into effect. Therefore, the Attorney General interpreted the new law as divesting her of jurisdiction or discretion to grant such relief to St.Cyr.

St. Cyr then filed a habeas corpus action contending that the restrictions on § 212(c) relief in the new law do not apply to proceedings brought against an alien who pleaded guilty to a deportable crime before the law came into effect. The District Court granted the habeas, rejecting the Government's procedural claim that the new law divested it of habeas corpus jurisdiction, and its substantive defense that, even if jurisdiction exists, the new law retroactively apply to bar St. Cyr's § 212(c) application. On appeal, the United States Court of Appeals for the Second Circuit affirmed.[8] Because of the importance of the issues raised and conflicts among the circuits, the Supreme Court granted certiorari and affirmed the Second Circuit.

On the question whether the new law divested federal district courts of habeas jurisdiction, Justice Stevens, writing for the

HAKEEM ISHOLA is an attorney and consultant in Salt Lake City, Utah, with an emphasis in criminal and immigration laws, including appeals and habeas corpus petitions.

Court, first canvassed the historical background of § 212(c) relief, noting that the history "is relevant to our appraisal of the substantive and procedural issues raised by the Government." Justice Stevens then considered whether the new law, as the Government argues, indeed bars federal courts from habeas review of St. Cyr's substantive § 212(c) claim. After examining in detail the new law, Justice Stevens concluded, like the overwhelming majority of the circuit courts,[9] that none of the statutes revokes federal courts' habeas jurisdiction under § 2241. In reaching that conclusion, Justice Stevens noted that the Government had failed to overcome the strong presumption in favor of judicial review of administrative actions and the long-standing common law rule requiring Congress to make clear its intent to repeal habeas jurisdiction which, "[a]t its historical core, . . . has served as a means of reviewing the legality of executive detention."

With respect to the substantive retroactivity claim, Justice Stevens applied the famous *Landgraff* analysis[10] and the age-old presumption against retroactive legislation:

> [This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, "the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[11]

Based on this presumption, the Court has held that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." (*Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208 (1988)).

Turning to the issue before it, the *St. Cyr II* Court noted that aliens entering into plea agreements both in state and federal courts give up numerous constitutional rights in exchange for prompt sentencing and the expectation that they would be eligible upon conviction for § 212(c) relief. The Court cited as an example, *Jidenowo v. INS,* 224 F.3d 692, 699 (7th Cir. 2000), where the alien entered into extensive plea negotiations with the Government to make sure he received less than five years imprisonment to avoid a statutory bar on § 212(c) relief.

Accordingly, Justice Stevens had no problem concluding that the new law eliminating § 212(c) relief attaches a new disability to transactions already past for aliens who had pleaded guilty to deportable offenses and with expectations that they would be eligible for such relief:

> We find nothing in the new law unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like Respondent, whose convictions were obtained through plea agreements, and who notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.

Prior to *St. Cyr II,* courageous federal district and appellate judges all over the country have reined in some draconian aspects of the new law. For example, the courts have found unconstitutional on due process and excessive bail grounds the application of the no-bond hearing statute to lawful permanent resident aliens who have been convicted of specified crimes;[12] they have declared unconstitutional on equal protection grounds the amended § 212(h) waiver statute which grants eligibility to non-lawful permanent resident aliens but denies it to lawful permanent residents;[13] and they have found that jurisdiction exists to review claims brought by criminal aliens notwithstanding the new law.[14] Tremendous credit, however, goes to Senior District Judge Jack Weinstein who, in his enviable, pioneering, scholarly one-hundred page decision in *Mojica*[15] held that habeas corpus remains available to convicted aliens to test the legality of a removal order, and that retroactive application of the new law to bar section 212(c) relief for aliens whose criminal conduct predated its advent would raise serious constitutional concerns.

But for *Mojica* and lower court cases like it, the INS would have effectively succeeded in stripping thousands of permanent resident aliens of the opportunity to seek relief to which the Supreme Court four years later believed they were constitutionally entitled. Unfortunately, in spite of the commendable efforts by these district court judges, numerous permanent resident aliens, particularly those unable to be effectively represented or who were denied immediate stay of deportation due to the slow wheels of justice, were expeditiously removed by the INS from the United States. Only time will tell whether the INS' efficient but unlawful removal efforts will go unchecked.[16]

What makes *Mojica* important is not just its timing – delivered some four years ago when most urgently needed and before the Supreme Court took the mantle in *St. Cyr II* – but also its intel-

lectual underpinnings and unflinching defiance of accepted norms when others took pride in pooh-poohing its irrefutable rationale.[17] Thus, notwithstanding *St. Cyr II,* Judge Weinstein's analysis in *Mojica* would continue to guide immigration practitioners on subsidiary retroactivity issues left unanswered in the former,[18] having laid down the groundwork for other substantive issues to be resolved. As of August 1, 2001, *Mojica* has been cited close to one hundred and fifty times by the courts alone.

St.Cyr II, like *Chada*[19] almost two decades ago, has ramifications far beyond the immigration context and will for decades to come be a check on legislatures' retributive excesses on unpopular groups, for no longer could a Dick Armey act as if individuals who may have offended him in grade school ought now be vilified by the overpowering machinery of the State. But *St. Cyr II*'s immediate effects for immigration law purposes are also far-reaching. While Enrico St. Cyr's case involved an alien who pleaded guilty to a deportable offense prior to the advent of the new law, § 212(c) does not require a guilty plea as a condition precedent to seeking the relief. Thus, undoubtedly, immigration advocates will continue to press the courts to take *St. Cyr II* to its most logical conclusion – to find that an alien whose relevant criminal conduct predated April 24, 1996 should be eligible for § 212(c) relief, regardless of when the conviction occurred. This compelling argument is based on the idea that it is the date of reprehensible conduct, not the guilty plea or conviction date, that triggers the availability of § 212(c) relief.[20]

Accordingly, subsidiary issues to be vigorously litigated in federal courts within the next decade[21] include the application of *St.Cyr II*'s retroactivity holding to aliens who: (1) were convicted after trial prior to AEDPA;[22] (2) pleaded guilty to deportable crimes after April 24, 1996, when AEDPA came into effect eviscerating § 212(c) relief but before September 30, 1996, when IIRIRA came into being and resurrected it narrowly as cancellation of removal; (3) pleaded guilty after IIRIRA but whose conduct preceded AEDPA;[23] (4) had not met the seven year continuous residency requirement at the time AEDPA came into effect;[24] (5) had served more than five years in prison prior to AEDPA;[25] (6) have been deported, either administratively or through the courts, as a result of erroneous findings that they were barred from seeking § 212(c) relief;[26] and (7) were administratively "reinstated" after previous deportation or removal orders.[27]

Federal criminal courts should also brace up for § 2255 motions[28] from aliens who have been convicted of illegal reentry after deportation,[29] where the underlying deportation order erroneously denied them the ability to seek § 212(c) relief or were denied the relief as a matter of discretion without the benefit of administrative or judicial review.[30] Suppose also, for example, that post-new law, an alien was found to be an "aggravated felon" as a result of having been convicted of a state felony DUI for which the predicate misdemeanors were committed pre-new law. Would this alien be subject to removal and ineligible for § 212(c) relief? Suppose further that this alien was removed from the United States but then returns. Would he then be subject to prosecution for illegal reentry after deportation under INA § 276?

There are no easy answers to these questions, but one hopes the courts and practitioners would be ready to tackle them as they have adequately done to date.

1 121 S.Ct. 2271, 150 L.Ed 2d 347, 2001 U.S. Lexis 4670 (2001) (*"St.Cyr II"*).

2 *See* Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.,* as amended, hereinafter "the Act"or "INA."

3 This author predicted in 1997 that certain vindictive and retroactive (ex post facto) aspects of the new law would not survive court scrutiny. *See* Ishola, *Of Convictions and Removal: The Impact of New Immigration Law on Criminal Aliens,* 10 *Utah Bar Journal* 18 (August 1997) (hereinafter "Ishola, Of Convictions and Removal.").

4 *See* INA § 236(c). During the same week in which *St. Cyr II* was rendered, the Supreme Court also decided a slightly different question in *Zadvydas v. Davis,* 2001 U.S. Lexis 4912 (June 28, 2001), and concluded that the INS could not in comport with the Constitution indefinitely detain the so-called "lifers," aliens with serious criminal convictions who have been ordered removed but would not be accepted by their countries of origin, thus "serving life imprisonment" in INS custody. *Zadvydas* overruled cases such as *Ho v. Greene,* 204 F.3d 1045 (10th Cir. 2000), which had upheld the INS to the contrary.

5 *See* former INA § 212(c), repealed by AEDPA § 440(d), providing, with several exceptions not relevant here, that "[a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." On the other hand, INA § 212(h), as amended by IIRIRA, makes the relief available to non-lawful permanent resident alien aggravated felons, but denies it to lawful permanent resident aliens who have been convicted of an aggravated felony. *See* INA § 212(h). *But see infra* note 13 and accompanying text for a case finding this distinction by Congress infirm under the Equal Protection Clause.

6 "Reinstatement" is a rather truncated administrative process whereby the INS – without affording an opportunity to see an immigration judge – determines whether an alien found in the United States had previously been deported and should now summarily be removed. *See* INA § 241(a)(5).

7 Under pre-new law, administrative efforts to expel an alien from the United States were referred to as deportation proceedings. After the new law, these proceedings are referred to as removal. *See generally* Ishola, *Of Convictions and Removal, supra* note 3, at 19.

8 *St. Cyr v. INS,* 229 F.3d 406 (2d Cir. 2000) (*"St. Cyr I"*). *See also Mahedo v. Reno,* 226 F.3d 3 (1st Cir. 2000). *But see Morales-Ramirez v. Reno,* 209 F.3d 977 (7th Cir. 2000).

9 *See,e.g., Jurado-Gutierrez v. Greene,* 190 F.3d 1135 (10th Cir. 1999); *Goncalves v. Reno,* 144 F.3d 110 (1st Cir. 1998). *But see LaGueere v. Reno,* 164 F.3d 1035 (7th Cir. 1998).

10 *Landgraff v. USI Film Products,* 511 U.S. 244, 266 (1994) (noting that retroactive statutes raise special concerns because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."). The *Landgraff* analysis posits that the first step in determining whether a statute has an

impermissible retroactive effect "is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." The standard for finding such unambiguous direction is a demanding one. If there is any ambiguity then the Court will find that the statute does not apply retroactively. The second step of *Landgraff* is to determine whether the statute produces an impermissible retroactive effect, i.e., takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraff,* 511 U.S. at 246.

11 *Landgraff,* 511 U.S. at 265-66 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

12 *See Martinez v. Greene,* 28 F.Supp. 2d 1275 (D.Colo. 1998) (Judge Babcock declaring INA § 236(c) unconstitutional on its face); *Insixiegnmy v. Kirkpatrick* (D.Utah 1999) (Judge Campbell declaring INA § 236(c) unconstitutional as applied to a lawful permanent resident); *Makoni v. Branch* (D.Utah 2001) (Judge Kimball declaring section 236(c) unconstitutional as applied to lawful permanent residents) (appeal pending as of August 1, 2001). *But see Kwon v. Comfort,* 2001 U.S. Dist. Lexis 7649 (D.Colo. 2001) (finding section 236(c) constitutional).

13 *See Jankowski v. INS,* 138 F. Supp. 2d 269 (D.Conn. 2001).

14 *See,e.g., Ho v. Greene,* 204 F.3d 1045, 1052 n.4 (10th Cir. 2000) (holding that INA 236(e) does not bar habeas challenge to indefinite detention by so-called "lifers," aliens with serious criminal convictions who could not be removed because their countries of origin would not accept them), *overruled on other grounds, Zadvydas v. Davis,* 2001 U.S. Lexis 4912 (June 28, 2001); *Insixiegnmy v. Kirkpatrick* (D.Utah 1999) (finding that jurisdiction exists to challenge INS detention of criminal alien without the possibility of a hearing before a neutral immigration judge). However, the courts are split on whether the new law abolished circuit review of criminal aliens' removal order. *Compare Yang v. INS,* 109 F.3d 1185, 1192-93 (7th Cir. 1997) (jurisdiction exists to determine whether an alien is deportable on the grounds alleged by the INS), *with Berehe v. INS,* 114 F.3d 159, 161 (10th Cir. 1997) (no jurisdiction even to review whether the person is deportable on the grounds specified by the INS). It appears that the Supreme Court in *Calcano-Martinez,* 121 S.Ct. 2268, 2001 U.S. Lexis 4671, settles the score, at least with respect to reviewability of criminal aliens' substantive claims, by holding that Congress in § 242(a)(1) unmistakably strips the federal courts of appeal of jurisdiction, but that habeas review remains available in the district courts).

15 *Mojica v. Reno,* 970 F. Supp.130 (E.D.N.Y. 1997) (holding that petitioner Mojica was in proceedings when AEDPA was enacted based on his detention and parole at the port of entry and that AEDPA should not be interpreted retroactively to bar § 212(c) relief for aliens convicted prior to its enactment), *aff'd Henderson v. Reno,* 157 F.3d 106 (2d Cir. 1998), *cert. denied,* 119 S.Ct. 1141 (1999).

16 *See,e.g., Fuller v. INS,* 144 F. Supp.2d 72 (asserting habeas jurisdiction after alien was erroneously "deported" due to court's clerical error, and remanding matter to BIA to review alien's § 212(c) claim; Court also hinted at possibility of ordering alien's return under the All Writs Act, 28 U.S.C. § 1651(a) should circumstances warrant it). The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

17 *See,e.g., Richardson v. Reno,* 180 F.3d 1311 (11th Cir. 1999) (an unusually arrogant and restrictive interpretation of the jurisdiction-stripping provisions in INA § 242, which makes the Eleventh Circuit the Rodney Dangerfield of immigration law, having twice now been rebuffed by the United States Supreme Court for missing the mark on what issues Congress intended to divest the courts of jurisdiction), *overruled on other grounds, St. Cyr II,* 121 S.Ct. 2271.

18 *See infra* text accompanying notes 21 *et seq.*

19 *INS v. Chada,* 462 U.S. 919 (1983) (eliminating the concept of Congressional veto of executive decisions as unconstitutional under Art. 1, § 7 of the Constitution, which requires that legislation be approved by both Congressional Houses and presented to the President for approval). It has been stated elsewhere that *Chada* was responsible for invalidating over 200 federal statutes. See Ailenikoff and Martin, *Immigration Policy and Process* 537 (West 1987); *see also* Elliot, *INS v. Chada: The Administrative Constitution, The Constitution, and the Legislative Veto,* 1983 S.Ct. Rev. 125, 156-60.

20 *See,e.g., Pottinger v. Reno,* 51 F. Supp. 2d 349 (E.D.N.Y. 1999); *cf. Kaiser Aluminum v. Bonjorno,* 494 U.S. 827, 855 (1990) (The "principle that the legal effect of *conduct* should ordinarily be assessed under the law that existed when the *conduct* took place has timeless and universal human appeal.") (Scalia, J., concurring) (emphasis added). *But see Landgraff,* 520 U.S. 939, 947-48 (focusing on both relevant primary and secondary conduct).

21 To say these issues may not be resolved for a decade is certainly not an exaggeration, for it took the United States Supreme Court almost five years to resolve only a few of numerous AEDPA and IIRIRA issues. For another example of relentless decade-long pursuit of justice by immigration advocates, see *LULAC v. INS,* 956 F2d 914 (9th Cir. 1992) (which in the year 2001 is still attempting to resolve protracted litigation involving the 1986 amnesty laws), *vacated sub nom, Reno v. Catholic Social Services,* 113 S.Ct. 2485 (1993) .

22 §212(c) on its face makes no distinction between an alien who "rolls over" for the Government and enters a guilty plea, as opposed to one who steadfastly maintains her innocence and takes the Government to trial but only to be found guilty. They are both "convicted" for criminal law and immigration purposes, *see, e.g.,* INA § 101(a)(48) (defining "conviction"), and there is no compelling Government interest to distinguish between an alien who copped a plea and one who went to trial, except that the Government wishes to reward the former for making its job easier. *See,e.g., Francis v. INS,* 532 F.2d 268 (2d Cir. 1976) (finding exclusion-based § 212(c) relief applicable on equal protection grounds to similarly situated aliens in deportation proceedings); *Jankowski v. INS,* 138 F.Supp. 2d 269 (finding constitutional error on equal protection grounds the distinction between aggravated felon non-lawful permanent resident aliens and aggravated felon lawful permanent resident aliens for § 212(h) waiver purposes. *But see generally Lawrence v. INS,* 2001 U.S. Dist. Lexis 10058 (S.D.N.Y. 2001) (alien convicted after trial not eligible for § 212(c) relief pursuant to *St.Cyr II*); *Lara-Ruiz v. INS,* 241 F.3d 934, 945 (7th Cir. 2001) (same, pre-*St. Cyr II* decision); *United States v. Herrera-Blanco,* 232 F.3d 715, 719 (9th Cir. 2000) (same); *Bensusan v. Reno,* 225 F.3d 653 (table), 2000 WL 1058978 (4th Cir. 2000) (same). A case raising a similar issue is pending in the Utah federal district court. *See Parra-Hermosillo v. Branch* (D.Utah 2001) (Judge Jenkins).

23 *See,e.g., Domond v. U.S.INS,* 244 F.3d 81, 84-86 (2d Cir. 2001) (elimination of § 212(c) relief may be applied retroactively where crime occurred before its effective date but conviction upon plea came after effective date).

24 *See Asad v. Reno,* 242 F.3d 702 (6th Cir. 2000).

25 *Copes v. McElroy,* 2001 U.S. Dist. Lexis 10255 (E.D.N.Y. 2001).

26 *See,e.g., United States v. Andrade-Partida,* 110 F. Supp.2d 1260 (N.D. Cal.2000) (granting alien criminal defendant's motion to dismiss indictment on the grounds that exhaustion requirements of § 276(d) cannot bar collateral review of deportation matter where alien was not informed of his right to appeal underlying deportation order); *Fuller v. INS,* 144 F. Supp.2d 72 (asserting habeas jurisdiction after alien was erroneously "deported" due to court's clerical error).

27 The United States Court of Appeals for the Ninth Circuit recently expressed serious constitutional due process doubt as to the validity of the reinstatement statute and its application by the INS. However, the court declined to find the statute unconstitutional, but concluded that it does not apply to aliens who reentered the United States before IIRIRA's effective date. *See Castro-Cortez v. INS,* 239 F.3d 1037 (9th Cir. 2001).

28 *See* 28 U.S.C. § 2255 (authorizing suits by prisoners in federal custody to challenge sentence imposed in violation of the Constitution or laws of the United States).

29 *See* INA § 276, 8 U.S.C. § 1326; *see also Almendarez-Torres v. U.S.,* 119 S.Ct. 1215 (1999) (upholding the strict liability nature of the statute).

30 *See Andrade-Partida,* 110 F. Supp.2d at 1260 (granting alien criminal defendant 's motion to dismiss on the grounds that exhaustion requirements of § 276(d) cannot bar collateral review of deportation matter where alien was not informed of his right to appeal); *United States v. Fermin-Rodriguez,* 5 F. Supp. 2d 157 (S.D.N.Y. 1998) (where alien unlawfully removed despite automatic stay while case on appeal, he was not deported within the meaning of the statute); *but compare United States v. Muro-Inclan,* 249 F.3d 1180 (9th Cir. 2001) (stating that defendant may have been denied the opportunity to seek § 212(c) relief, but found that defendant did not show that he was prejudiced by that denial).

Utah's DNA Actual Innocence Bill

by C. C. Horton II

This year, the Utah Legislature quietly passed SB 172, "Post-conviction DNA Testing," sponsored by Senator Lyle Hillyard. It was a major piece of legislation, and created a mechanism for people wrongfully convicted of felonies to seek exoneration through DNA technology. In this article I will discuss the background of how the bill came into existence and explain the key features of the new law.

In early 2000, Professor Lionel Frankel of the University of Utah College of Law set up a meeting with the Attorney General's Office to discuss the formation of a new project called the "Rocky Mountain Innocence Project," which had recently been organized for the purpose of reviewing cases of prison inmates who assert their innocence. The project's goal was to seek ways to exonerate the innocent through DNA analysis of evidence collected at the time of the crime that was still available for testing.

When we met with Professor Frankel and other founding members of the Rocky Mountain Innocence Project, we told them we would be glad to support what they were trying to accomplish, since we had a mutual interest in insuring that anyone who had been wrongly convicted be exonerated. After that meeting, we took the issue to the Statewide Association of Public Attorneys, recommending that the DNA actual innocence issue be studied and that legislation be proposed to assist in the effort.[1]

Over the summer, we studied other states' laws and legislative proposals. What we wanted to achieve was a balanced approach that would give the truly innocent every opportunity to be exonerated, while not creating a mechanism which would be abused by the guilty. We noticed that some states limit post-conviction DNA testing to certain categories of felons, such as death row inmates, or inmates in general. We decided that a broader approach was better, allowing all convicted felons to seek relief. While casting a wide net as to who could petition for DNA testing, we also incorporated into the bill certain disincentives for the guilty who might seek to abuse the process.

After several re-writes, we had a bill which we felt struck the right balance, and we forwarded a copy to Professor Frankel to get input from the Innocence Project. After receiving back a supportive letter from Professor Frankel, we contacted Senator Hillyard, who agreed to sponsor the legislation. The bill passed the 2001 Legislative Session without opposition, and went into effect in May of this year.

The new provisions are found in UCA 78-35a-301 through 304. Here's how the law works:

A person who has been convicted of a felony may at any time petition the trial court that entered the judgment of conviction against him for DNA testing if he asserts his actual innocence under oath and alleges certain things in the petition. One of the things the person must allege is a theory of defense, not inconsistent with theories previously asserted at trial, which the DNA testing would support. Once the petition is filed, prosecutors, law enforcement officers and crime lab personnel have a duty to cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence. If the court finds the petition sufficient, it orders the DNA testing. If the person is in prison and unable to pay, the state pays for the costs of testing.

If the DNA test result comes back favorable to the person, the State may stipulate that the conviction be vacated, or may request a hearing and attempt to demonstrate that, despite the apparently exonerating evidence, the person is actually guilty. Since the focus of the new law is on exonerating the truly innocent, the statute provides that the State may present evidence and argument against judicial exoneration if it does not believe that the person is innocent of the convicted crimes and of any lesser included offenses.

This issue of judicial exoneration is one the committee debated at some length. In many other states, a favorable DNA result might result in vacating a defendant's conviction, but not bar retrial if the prosecutor elects to go forward with the case. We felt that in cases where the defendant was able to clearly demonstrate his actual innocence through DNA evidence, vacating the conviction was not enough. We wanted a more affirmative finding of actual innocence, one that would bar re-trial and result in automatic expungement of the person's conviction. Therefore, the statute provides that the judge may vacate the conviction with prejudice and expunge the conviction in cases in which the defendant can demonstrate

C. C. HORTON is a career prosecutor with the Utah Attorney General's Office. He is presently Division Chief of the Criminal Division.

actual innocence by clear and convincing evidence.[2]

While wanting to give wide opportunity for exoneration to the actually innocent, we did not want the new procedures to be an invitation for abuse by those "who had nothing to lose" by asserting their innocence and seeking the testing on the off-chance it would benefit them. As a result, we built in a number of disincentives for the guilty. They include being assessed the costs of the testing if the result comes back unfavorable to the defendant, and having the Board of Pardons and Parole informed that the DNA testing confirms the defendant's guilt despite his sworn assertion of innocence.

Also, by filing the petition, the defendant acknowledges that his DNA will be entered into law enforcement DNA databases, and that the filing of the petition constitutes the person's waiver of any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison.[3] This approach might arguably be harsh as applied to the rare instance in which the defendant is innocent of one offense but has committed others which he has not been tied to until the DNA testing that he requests be performed. However, we wanted to avoid the scenario in which an inmate walks out of prison a free man, having been exonerated by DNA testing, when that same testing establishes his guilt as to other offenses for which he can no longer be prosecuted. Since the goal is the exoneration of the truly innocent and there is no time limitation for applying for that exoneration, this seems like a balanced approach.

No system is perfect, and, although our system of justice has a number of safeguards designed to prevent the conviction of an innocent person, we can't be assured there are not any innocent people serving time in prison for crimes they never committed. To those people and others who have been convicted of felonies they never committed, there is now the possibility of exoneration through DNA testing. We hope that this new statute will be an effective mechanism to help in those rare but compelling cases when innocent people live through the nightmare of being accused and then convicted of crimes they did not commit.

[1] We use the term "actual innocence" to differentiate this concept from a finding of "not guilty" at trial, which only means that the fact finder had a reasonable doubt as to guilt. Actual innocence refers to cases in which affirmative evidence surfaces following a conviction which establishes that the person did not commit the crime.

[2] In cases where the DNA evidence is favorable to the defendant and undermines the outcome of the trial but doesn't rise to the level of clear or convincing evidence of innocence, the defendant may still petition the court for a new trial under the provisions of Utah Code §78-35a-104(1)(e) based on a theory of newly discovered evidence.

[3] Note that waiving statutes of limitations is permissible in jurisdictions such as Utah, which analyze the statutes not as jurisdictional but rather as defenses to prosecution. *James v. Galetka,* 965 P.2d 567 (Utah Ct. App. 1998). In states which follow the jurisdictional analysis, such a waiver of statutes of limitations would not be effective.

Justice Court, Fair and Legal

by Joseph M. Bean

In the August/September 2001 issue of the *Utah Bar Journal,* there was an article (editorial?) regarding an attorney's experience in a justice court. The attorney began by lamenting the fact that he could not simply obtain a dismissal for his client over the telephone. He further lamented that he was forced to go to a justice court to, of all things, actually prove the facts of his case. Imagine. With "spittle forming at [his] lips" and his dander upped, he entered the courtroom. The attorney also assumed an "inherent resentment against an attorney being in a justice court."

After reminding the reader of his thirty years of experience in law, the attorney waxed acrid about his inability to have evidence admitted. Ultimately, the attorney admitted, tongue in cheek, that justice prevailed and that he was able to obtain a dismissal.

Perhaps, what is needed is a new approach to justice courts by attorneys in general. It may be true that some justice court judges resent the presence of an attorney in a justice court. There may be some reasons for it. The attitude that some attorneys have when they come into a justice court may be detrimental to the judicial process.

It is amazing to see the change in demeanor and attitude of attorneys who are new to our local municipal justice court when they come to realize that I am an attorney serving my community as a part-time justice court judge. At times, it is the difference between night and day. I perceive much more respect and I do not hear as many of the comments such as "Well, in district court we always . . ." They know that I know what goes on in district court.

The fact is that most attorneys respect the justice courts as well as the judges that preside over them. There are some, however, that fail to understand the nature and purpose of the justice court. Some attorneys even try to take advantage of the fact that the judge may not be a member of the bar and that many young attorneys "cut their teeth" as a prosecutor in a justice court. Justice courts are like snowflakes – you won't find any one just like another. Old judges, young judges, old prosecutors, young prosecutors, law school graduates, lay persons. The thing that is consistent is the fact that justice court judges strive to improve and increase their legal knowledge every day. The Justice Court Judges Association is very active in training and educating judges throughout the state.

May I suggest a few tips for practice in a justice court:

1. **Try to overcome your resentment of calling a non-attorney judge "Your Honor."** Most judges sense it. Get over the fact that the Utah Constitution allows for a layperson to determine a legal issue. Justice court judges in general work very hard to learn their niche in the law. Most justice court judges know more about traffic law than attorneys will ever know. Do you ever remember being taught traffic and misdemeanor law in law school?

2. **If there is an area of the law that you know more about than a justice court judge, do what you do with a district court judge – educate them in a respectful way.** Many justice court judges realize that they do not know everything about the rules of evidence, search and seizure, etc. They also know when they are being patronized or when an attorney is being condescending.

3. **Don't assume that the city or county is only after revenue.** When I was hired by the municipality that I work for, the mayor and city manager emphasized that they did not want the court to be revenue driven. I believe that most municipal and precinct courts are the same.

JOSEPH M. BEAN was appointed as the municipal justice court judge for Syracuse City in 1993. He is a partner in the law firm of Bean & Smedley located in Layton, Utah, where he engages in general practice/litigation issues.

4. **You are not in a district court.** Even so, most justice courts will try to observe the rules of evidence and procedure as best they can. Remember that the small claims courts use "simplified" rules of evidence and procedure by determination of the Utah Supreme Court. Remember also that there is an emphasis for less formal "Community Courts" where the focus may be more remedial than punitive in nature.

5. **Justice court judges work very hard to obtain and maintain their legal knowledge.** Justice court judges have a very high requirement for continuing legal education hours – more than double the requirement for attorneys annually. The judges take their continuing legal education very seriously and they have organized education conferences three times per year. In addition, local district groups organize their own continuing education to supplement the state organization.

There are many things that an attorney can do to improve the relations between the bar and the Justice Court Judges Association. Writing negative articles or editorials in the *Utah Bar Journal* isn't one of them. Statistics show that people will encounter the justice system more often through a justice court than through district courts. The demeanor and conduct of attorneys in the justice courts should send a message to our clients that they need to respect all aspects of the justice system.

2002 Mid-Year Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2002 Mid-Year Convention. These awards honor publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, January 18, 2002.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

NOTICE:

The Board of Bar Commissioners has voted to make a number of modifications to the Rules of Lawyer Discipline and Disability. Redline copies are accessible on the Bar's web site (www.utahbar.org) or at the Bar office. A petition seeking the Utah Supreme Court's approval will be filed by December 31st but commentary will be accepted until January 31st.

Any member wishing to comment on the proposed changes may either e-mail rulecomments@utahbar.org or send a letter to the Bar's Executive Offices with their comments. All member input will be provided to the Court.

Increase in pro hac vice Filing Fee

Effective November 1, 2001 the Utah Supreme Court approved a $100.00 increase in the pro hac vice fee. Under Rule 11-302 the filing fee, which is administered by the Bar, will be $175.00 per out-of-state attorney appearance per case. Please contact Phyllis Yardley at 297-7057 if you have questions or visit the Bar's web site at *www.utahbar.org* for copies of the rule, application and instructions.

Notice of Petition for Reinstatement to the Utah State Bar by Steven Brantley

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Reinstatement "Petition") filed by Steven Brantley in *In re Brantley,* Third District Court, Civil No. 990908003 on November 12, 2001. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Reinstatement to the Utah State Bar by Larry Gantenbein

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Reinstatement ("Petition") filed by Larry Gantenbein in *In re Gantenbein,* Third District Court, Civil No. 010902863 on November 19, 2001. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Readmission to the Utah State Bar by Mark H. Tanner

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Readmission ("Petition") filed by Mark H. Tanner in *In re Tanner,* Seventh District Court, Civil No. 949705968 on October 12, 2001. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

ANNOUNCEMENT: Position on Ethics Advisory Standing Committee of the Utah Judicial Council

A vacancy exists for an attorney from either the Bar or a college of law on the Ethics Advisory Standing Committee of the Utah Judicial Council. This committee is responsible for providing opinions on the interpretation and application of the Code of Judicial Conduct to specific factual situations. Please refer to Rule 3-109, Code of Judicial Administration, for more information about the committee. Attorneys interested in serving on the committee should contact Brent Johnson, Administrative Office of the Courts, P.O. Box 140241, Salt Lake City, Utah 84114-0241 (578-3817) by December 21, 2001.

"AND ETHICS FOR ALL" CLE

The Government Lawyers Subcommittee of the "AND JUSTICE FOR ALL" Campaign will host an Ethics CLE Seminar on Friday, January 11, 2002 at the Law and Justice Center, 645 South 200 East, Salt Lake City. This will be a half-day CLE session, registration begins at 8:30 am. The session is from 9:00 am – 12:00 pm. The pre-registration fee is $95 and $105 at the door. 3 Hours Ethics CLE credit. Proceeds will benefit the "AND JUSTICE FOR ALL" Campaign (which supports civil legal aid to disadvantaged Utahns).*

*Please note that there will be a penalty for attorneys who use this CLE to count toward the 2000-2001 reporting cycle.

Notice to all Utah State Bar Members: Private Guardian ad Litem Training Program

Utah Code Annotated Section 78-7-45 allows District Court judges to appoint private attorneys to represent the best interests of minor children in any district court action in which the custody or visitation of a minor is at issue. Such appointments will likely occur more often in highly contested cases. Unless the court finds a party to be impecunious, the court must assess all or part of the attorney Guardian ad Litem fees, court costs, and paralegal, staff, and volunteer expenses against the parties in a proportion the court determines to be just. In order for interested attorneys to be eligible for court appointment as a private Guardian ad Litem, they must, among other things, 1) apply to the Utah Guardian ad Litem's Office for inclusion; 2) be a member in good standing with the Utah State Bar; 3) file permission and ginger prints for screening by the FBI an BCI; 4) be screened against the DCFS Child Abuse Database and the like data base of any state in which the appointee has resided; and 5) complete the initial and continuing training requirements established by the Office of the Guardian ad Litem. Attorneys interested in becoming eligible for appointment as a private Guardian ad Litem will have the opportunity to complete the necessary requirements at any one of the training courses being scheduled in each of the judicial districts. These training courses will involve six weekly, evening classes (usually Tuesday or Wednesday evenings), and include such topics as the role of the Guardian ad Litem; the process of appointment; understanding child development and the stress of divorce on children; interviewing children; investigating possible child abuse; the trauma of domestic violence on children; custody evaluations; settlement tools; ethical concerns; etc.

Attorneys interested in attending a training course in any of the district locations must register at least five days prior to a scheduled course, by sending or faxing a letter to the Guardian ad Litem Training Coordinator, indicating their intent to attend and whether they need a course schedule sent or faxed back to them. The below scheduled dates (other than 2nd District) are subject to change. Interested attorneys may contact the Training Coordinator for updated information.

Please direct any questions or registration correspondence to:

Craig M. Bunnell, Esquire
Guardian ad Litem Training Coordinator
450 South State Street, N31
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Message: (801) 578-3829
Fax: (801) 578-3843
Email: craigb@email.utcourts.gov

The 2001-2002 training schedule is as follows:

October / November 2001
2nd District (Layton):
Tuesday/Wednesday evenings starting October 30th

January / February 2002
3rd District (Salt Lake):
Tuesday evenings starting January 9th

4th District (Provo):
Wednesday evenings starting January 10th

February / March 2002
5th District (St. George):
Tuesday evenings starting February 19th

6th District (Richfield):
Wednesday evenings starting February 20th

April / May 2002
1st District (Logan):
Tuesday evenings starting April 9th

June / July 2002
In-Service workshops (Salt Lake, Layton, Provo): TBA

August / September 2002
8th District (Roosevelt or Vernal):
Tuesday evenings starting August 13th

7th District (Price or Moab):
Wednesday evenings starting August 14th

Discipline Corner

RESIGNATION PENDING DISCIPLINE

On September 21, 2001, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of Ralph W. Curtis.

The Office of Professional Conduct ("OPC") notified Curtis of its investigation into allegations made against him and requested that he provide a written response thereto. Curtis failed to respond in writing to the OPC's requests for information.

Curtis failed to provide competent representation to clients in violation of Rule 1.1 (Competence); failed to abide by clients' decisions concerning the objectives of representation in violation of Rule 1.2(a) (Scope of Representation); failed to act with reasonable diligence and promptness in representing his clients in violation of Rule 1.3 (Diligence); failed to keep clients reasonably informed about the status of their matters and failed to promptly comply with reasonable requests for information in violation of Rule 1.4(a) (Communication); failed to explain matters to the extent reasonably necessary to enable clients to make informed decisions regarding representation in violation of Rule 1.4(b) (Communication); charged excessive fees in violation of Rule 1.5(a); represented a client when the representation was materially limited by Curtis's own interest in violation of Rule 1.7(b) (Conflict of Interest: General Rule); failed to hold property of clients or third persons in his possession in connection with a representation separate from his own property in violation of Rule 1.15(a) (Safekeeping Property); failed to promptly notify clients or third persons upon receiving funds or other property to which the clients or third persons had an interest in violation of Rule 1.15(b) (Safekeeping Property); failed to take steps to the extent reasonably practicable to protect clients' interests upon termination of representation in violation of Rule 1.16(d) (Declining or Terminating Representation); failed to respond to the OPC's lawful demands for information in violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters); violated the Rules of Professional Conduct in violation of Rule 8.4(a) (Misconduct); engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) (Misconduct); and engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d) (Misconduct).

RESIGNATION PENDING DISCIPLINE

On September 21, 2001, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of Michael J. Glasmann. In the Petition for Resignation Pending Discipline, Glasmann admitted that he violated Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct.

During the course of presiding over a criminal case as a judge, Glasmann failed to initially disclose that he had had an intimate relationship with the criminal defendant.

ADMONITION

On September 25, 2001, the Honorable L. A. Dever entered an Order of Discipline: Admonition and Probation admonishing an attorney for violation of Rules 1.3 (Diligence) and 8.4(a) and (c) (Misconduct) of the Rules of Professional Conduct. The attorney was also placed on private probation for a period of one year.

The attorney was retained to represent two clients in an adoption matter. On several occasions the attorney misrepresented to the clients that court dates were set in the adoption matter. The attorney later advised the clients that the court dates were canceled for one reason or another. Thereafter, the clients contacted the court and learned that the adoption matter had not been filed by the attorney. The attorney admitted to the clients that the attorney procrastinated in the work on their file, did not complete their work in a timely manner, and made material misrepresentations to them regarding the status of their case during the course of the representation. The attorney apologized to the clients, returned their retainer fee, and suggested they file a complaint with the Bar.

Aggravating factors include: prior record of discipline and substantial experience in the practice of law.

Mitigating factors include: timely good faith effort to make restitution and to rectify the consequences of the misconduct involved; cooperative attitude towards the disciplinary proceedings; and remorse.

ADMONITION

On October 18, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 1.5(b) (Fees) of the Rules of Professional Conduct.

The attorney was retained to represent a client in a criminal matter. Prior to being retained in the criminal matter, the attorney had not regularly represented the client. Although the attorney charged the client fees in excess of $750, the attorney failed to communicate in writing the basis or rate of the fee.

Mitigating factors include: cooperation with the Office of Professional Conduct.

ADMONITION

On October 18, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rule 1.15 (Safekeeping Property) of the Rules of Professional Conduct.

The attorney and a client signed a doctor's lien whereby the attorney agreed to withhold funds from any settlement involving the client and directly pay the funds to the doctor to cover the amount owed by the client. Thereafter, the attorney received a settlement check on the client's behalf but failed to withhold funds owed to the doctor pursuant to the attorney's obligation under the lien before forwarding the funds to the client.

Mitigating factors include: cooperation with the Office of Professional Conduct.

ADMONITION

On October 30, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The attorney knowingly failed to respond to the Office of Professional Conduct's reasonable requests for information concerning an informal complaint filed against the attorney.

Twelfth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

The holidays are a special time for giving and giving thanks.
Please share your good fortune with those who are less fortunate.

SELECTED SHELTERS:

The Rescue Mission
Women & Children in Jeopardy Program
Volunteers of America Utah Detox (non-profit alcohol & drug detox center)

WHAT IS NEEDED?

CASH!!! cash donations can be made payable to the shelter of your choice, or to the Utah State Bar. Even a $5 donation can buy a crate of oranges or apples.

new or used winter and other clothing: for men, women & children
boots, gloves, coats, pants, hats, scarves, suits, shirts, sweaters, sweats, shoes

housewares: bunkbeds, mattresses, cribs, blankets, sheets, books, children's videos, stuffed animals, toys

personal care kits: toothpaste, toothbrushes, combs, soap, shampoo, conditioner, lotion, tissue, barrettes, ponytail holders, towels, washcloths, etc.

all types of food: oranges, apples, grapefruit, baby food, formula, canned juices, canned meats, canned vegetables, crackers, rice, beans, pasta, peanut butter, powdered milk, tuna fish
(please note that all donated food must be commercially packaged and should be non-perishable.)

DROP DATE:

Friday, December 21, 2001 • 7:30 am to 6:00 pm
Utah Law & Justice Center rear dock – 645 South 200 East • Salt Lake City
Volunteers will meet you as you drive up.

If you are unable to drop your donations prior to 6:00 pm, please leave them on the dock near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm and to coordinate the collection for the drop. If you are interested in helping please contact:
Leonard W. Burningham: (801) 363-7411 • Toby Brown: (801) 297-7027

Thank You!

Education for Justice in Utah

by Justice Christine M. Durham, Utah Supreme Court

> A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools . . . .

Section 147, Constitution of North Dakota

The foregoing language from the constitution of North Dakota reflects a long and deeply-held American value: the notion that education for citizenship is a necessary and critical obligation of democratic government – necessary to its survival and critical to its success. The theoretical origins of all public education in the United States derive from this fundamental idea that the basis of our polity is a literate, informed, politically functional electorate. The constitutions of all fifty states contain some sort of guarantee of the right to a free public education provided by state government. *See* e.g. Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law,* 18 J.L. & EDUC. 93 (1989).

There is reason to believe that public education has to some extent lost sight of this most central of its purposes, understandably so in the critical struggle to ensure the development of the "basic" skills required for literacy, communication, math, and science. Recent research demonstrates that few Americans have even a rudimentary grasp of constitutional principles dealing with individual rights and the operation of federal, state and local governments. For example, a random survey conducted by the National Constitutional Center showed that Americans are amazingly uninformed about the Constitution. Although nearly 90% of those surveyed said that the Constitution was "important" to them and that they were "proud" of it, over 80% admitted that they knew only "some" or "very little" about the Constitution or its contents. *See* National Constitution Center, Telephone Survey of 1,000 U.S. Citizens Nationwide (visited June 15, 2000) http://www.constitutioncenter.org/sections/news/8b4asp). In fact, only 6% could name the four rights protected by the First Amendment and 24% could not name even one. *See id.* Over 60% could not name all three branches of the federal government and less than 50% knew the number of senators in Congress. *See id.* Four out of five surveyed did not know the number of amendments to the Constitution and one out of every six believed that the Constitution established America as a "Christian" nation. *Id.*

Although such lack of familiarity with the Constitution and federal government (presumably matched by ignorance of state and local government) is alarming, even more disturbing is the research that shows that many Americans have lost trust and confidence in politics, the civil and criminal justice system, and the rule of law itself. *See* "Arizona State Court Citizens' Survey: The Public Prospective" (1997); "Public Awareness of the Courts in Iowa" (1996); "Doing Utah Justice" (1991). For example, in 1999 a group compiled research from Utah and nine other states regarding the public's understanding, confidence, and perception of their local court system. *See* "Report of the Special Task Force on Court/Community Outreach," February 9, 1999. The research concluded: "most often less than half the public has a generally positive opinion of its local court system" and "15 to 25 percent have a generally negative overall opinion of their court system." *Id.* at 5. Specifically in Utah, the research showed that 70% of Utahns believe the court system needed "some reform." *Id.* at 58.

Fueled by such reports of distrust of and unfamiliarity with government, there is a growing perception that many Americans are ill-equipped by our public education system to solve problems without violence, to undertake civic responsibility and cooperation, and to make reasoned judgments about public policy. Some have suggested that public education actually compounds the problem by teaching courses on civics and government that convey an unrealistic view of American democracy. *See* Ryan Blaine Bennett, *Safeguards of the Republic: the Responsibility of the American Lawyer to Preserve the Republic Through*

Law-Related Education, 4 ND J.L. Ethics & Pub Pol'y 651, 665-66 (2000). Inadequately designed courses and out-dated materials can foster misunderstanding, cynicism, and skepticism about government, because students perceive dissonance between that which they are taught in the classroom and what they see on television, on the street, and in the real world. *See id.*

These and related concerns have been addressed in diverse ways by numerous public institutions and private citizens in Utah – most notably by educators, lawyers, judges and tireless volunteers devoted to the principle that "law-related education" must be supported and encouraged in our schools and our communities. Law-related education is a national movement aimed at improving the "citizenship skills and attitudes of American youngsters by providing them with an understanding of law, the legal process and the legal system." American Bar Association, Special Committee on Youth Education for Citizenship, Law-Related Education in America: Guidelines for the Future, 1437. The number and scope of such law-related educational projects and materials currently or historically available in our state (and nationally) is extraordinary. These programs and materials have been developed and implemented by the Utah Law-Related Education Project,[1] numerous individual school district administrators and teachers, a number of lawyers' groups at the state and local level, and representatives of the judicial branch, especially judges and staff in the juvenile courts. Recent examples include: (1) a statewide Mock Trial Program where more than 1,200 junior and senior high school students on 85 mock trial teams try a sample criminal case about child abuse or other topics important to students; (2) a Salt Lake Peer Court, composed entirely of young people, which holds young offenders accountable through dispositions that may include community service, truancy classes, or conflict resolution workshops; (3) a program in which students at local law schools teach courses in Salt Lake and Utah county high schools on individual rights, criminal justice, law in everyday life, and other topics; (4) a mentor program involving attorneys from Ogden to Provo who describe and discuss law-related concepts such as conflict resolution and mediation with elementary, junior, and high school age students; and (5) a Truancy Court project involving the juvenile court and a number of school districts.

The people who have sustained these efforts are remarkable for their energy and dedication, and the students who have had experience with them are fortunate. What has become increasingly apparent, however, is that efforts like these continue to be fragmented, dependent on random opportunity, and available to only a few of our children. Moreover, it remains the case that there is no systematic, coherent program for ensuring that every child educated in Utah's public schools acquires the knowledge and skills necessary to function effectively as a citizen and a voter. The Utah Law-Related Education Project points out that such programs must include a blend of content and strategy, enabling students to learn substantive information about law, the legal system, and their rights and responsibilities in ways that promote cooperation, critical thinking, and positive interaction between young people and adults. Law-related education promotes legal literacy, emphasizing civil, criminal and constitutional themes. It offers practical information about how the law affects lives, and it explains concepts underlying our system of constitutional democracy like federalism and separation of powers. It does not deal with "frills" in the educational sense – it targets the core of what we educate our children *for,* namely, participation in the American way of life. There is certainly no argument that it should replace or supercede basic reading, writing and math skills, but there is a strong argument that it should be co-equal in its centrality to the educational process.

Given the fact that this kind of law-related education is at the heart of the original purpose of public education – in fact, one of its *raisons d'être* – a conversation has begun about ways to bring together the myriad resources already available in Utah in a comprehensive, coordinated way. The goal, as it is currently envisioned, would be integration of appropriate law-related curriculum and materials throughout elementary and secondary education in every school district in Utah.

During the past year, an informal "consortium" has come together to consider ways in which members of the justice system might support public education in Utah. Participants are: (1) the Utah judicial branch, with the support of its governing body, the Judicial Council, the Administrative Office of the Courts, and the courts' Outreach Committee; (2) the Utah State Bar through its lawyer volunteer programs and its staff; and (3) the Utah Law-Related Education Project, with its years of experience and extensive programs and materials. The consortium has identified "Education for Justice" as its purpose and has defined it as education about: (1) the U.S. constitutional system of government (federalism, allocation of government power, separation of powers); (2) the rule of law in a free society (constitutional rights, due process and equal protection); (3) citizenship competency skills (informed participation in the democratic process,

communication and problem-solving, dispute resolution and violence prevention, and cultural competency – the capacity to deal with difference in a pluralistic society); and (4) the American legal system (legislative and administrative lawmaking, state and federal courts, the adversary system of justice, juvenile proceedings, and judicial administration).

On June 1, 2001, I had the opportunity on behalf of the Education for Justice Project to propose to the Utah State Board of Education an informal partnership between the consortium and the Department of Education. We represented to the Board that our consortium can provide multi-level support for the design and delivery of education for justice in the elementary and secondary schools of the state. Specifically, we offered: (1) the subject-matter expertise of our lawyers, judges, and staff for curriculum development, lesson planning, and teacher training; (2) the many resources we are aware of and have already developed, such as project materials, videos, grant monies, existing programs like mock trials, and our information about national law-related education programming; and (3) our volunteers (attorneys, judges, court staff, State Bar staff) to give assistance in the courthouse and the classroom to the teachers whose primary responsibility it will be to make the learning happen.

The members of the Board of Education responded to our ideas with enthusiasm and passed a motion reflecting that the Board "considers this a valuable priority in terms of its mission for public education, and that the Board is supportive of a collaborative effort with the Consortium in the future." Minutes of the meeting of the State Board of Education and State Board for Applied Technology Education (June 1, 2001). The Director of the Utah Law-Related Education Project, Kathy Dryer, has been asked to consult with the Social Studies advisory committee currently undertaking a major revision of the Core Curriculum for grades 6-12, and we are collaborating with the curriculum director for the Jordan School District on pilot programming for middle school teachers and students in that district. Our vision is of a future where every Utah child, not just the fortunate few, has developmentally appropriate experiences with law-related education each year from kindergarten through graduation, where every school in the state has a working partnership with its community's courts, judges and staff, and where every teacher has the support he or she needs to help prepare our children for their roles as citizens and defenders of the rule of law in a constitutional democracy.

At the Annual Judicial Conference in September of this year, Utah's judges were asked to consider specific ways in which they could increase their efforts to educate the public about the justice system and the courts. Likewise, Utah's lawyers were encouraged at their annual convention in July to increase their commitment to public service and pro bono work. The Education for Justice Project should provide us in the legal profession with an unparalleled opportunity to serve our communities today, and to contribute to the preservation of the rule of law in the future.

[1] The Utah Law-Related Education Project was established as a pilot program in the Salt Lake City schools in 1974 by Scott M. and Norma Matheson and J. Thomas and Kay Green. It has been housed in the Utah State Bar's Law and Justice Center since 1989, and is partially supported by the Utah Bar Foundation. Its current programs include a Mock Trial program, mentor programs and a Mentor Handbook used by volunteer attorneys working in the schools, law school seminars where law students are trained to teach high school students about practical legal concepts, a Court Tour program, the Salt Lake Peer Court Project, and a Youth-at-Risk project in collaboration with youth services agencies in Salt Lake County and elsewhere.

Paths to Mediation, with Sample Clauses

by Diane H. Banks

The topic of the ADR Section Annual Meeting September 25, 2001 was the judicial referral of cases to mediation. Although some disputes find their way to mediation voluntarily, others end up in mediation through judicial referral, or as a result of a mediation clause in the documents governing the relationship of the parties. This article offers a reason to make mediation compulsory, as well as a sample mediation clause to help the parties insert that "velvet glove" into documents affecting their transactions.

Detractors of compulsory mediation argue, and often firmly believe, that mediation is effective only if both parties submit voluntarily to mediation. They quickly conclude that compulsory mediation is ineffective and note that the highest settlement rates are for voluntarily submitted disputes. Indeed, in the ideal mediation context, both parties believe the dispute can be resolved through facilitation by a mediator and the settlement rate is surprisingly high. The American Arbitration Association ("AAA") reports that 85-90% of their mediated cases settle. The perhaps shocking news for the nay-sayers, is, however, that a high percentage of compulsory mediations also settle. For example, mandatory arbitration of cases in the Tenth Circuit Court of Appeals nets a 40% settlement rate, in the Utah Court of Appeals for 1998 through 2000 the settlement rate was over 50%.

Most document drafters acknowledge the possibility of a future controversy and include an attorneys fees clause somewhere in the boilerplate of the document. The foregoing statistics suggest that a clause requiring mediation may also be well advised. The provision must be tailored, however, to the demands of particular parties or situations. Just as a good drafter appreciates the serious error in using any standard substantive provision without meeting the needs of the particular context, the drafter should also tailor the more traditional "boilerplate" provisions, including dispute resolution provisions. Customizing the provision will probably reduce the likelihood of a dispute in implementing the mediation process. Nevertheless, a form provision such as the following may provide a starting point.

> Any and all disputes arising out of or related to this agreement or the parties' performance hereunder shall be submitted to mediation before a mutually-acceptable mediator prior to initiation of arbitration, litigation or any other binding or adjudicative dispute resolution process. The parties shall: (i) mediate in good faith; (ii) exchange all documents which each believes to be relevant and material to the issue(s) in dispute; (iii) exchange written position papers stating their position on the dispute(s) and outlining the subject matter and substance of the anticipated testimony of persons having personal knowledge of the facts underlying the dispute(s), and; (iv) engage and cooperate in such further discovery as the parties agree or mediator suggests may be necessary to facilitate effective mediation. Mediator, venue, and related costs shall be shared equally by the parties. Venue of the mediation shall be the state of Utah. In the event the parties are unable to agree upon a mediator, the mediator shall be appointed by a court of competent jurisdiction. This provision shall be specifically enforceable according to its terms, including but not limited to an action to compel mediation. The prevailing party in any action to enforce in whole or in part this mediation clause shall be entitled to reimbursement of attorneys fees and costs incurred in said action.

Although the first sentence of the clause accomplishes the desired end of mandating mediation, it does not resolve any of the questions of how to choose the mediator, what documentation to exchange prior to the mediation, where the mediation should take place or other questions specific to the particular contract.

DIANE H. BANKS is a shareholder with the law firm of Fabian & Clendenin where her practice focuses on real property and commercial transactions. She is also an adjunct professor at the University of Utah College of Law teaching Real Estate Document Drafting.

It is not uncommon to actually name the mediator in this clause, making it far easier to initiate the mediation process in the event a controversy arises. In short, a more inclusive clause facilitates the process. In the event the parties are increasingly adversarial at the time the dispute arises, it will be invaluable to have agreed on the basic parameters in advance. The clause may name the administrator for the mediation and any particular mediation rules to be followed such as the Commercial Mediation Rules of the AAA.

In other situations, the parties may not have agreed in advance to mediation and wish to craft the clause to submit the controversy to mediation after it has arisen. The parties may not be able to agree on the controversial issues, but may be capable of agreeing to the basic framework to be used for the mediation. The foregoing clause provides at least some ideas for those parties.

Another consideration is whether to include an arbitration provision, turning the clause into a "med-arb" clause. To accomplish that result, one can tack on something as brief as "Any unresolved controversy or claim arising from or relating to the contract or breach thereof shall be settled by arbitration." The AAA suggests the following:

> If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.

As with mediation clauses, the arbitration portion of the provision may include the administration of the arbitration, any particular rules to be followed, the parties' determination of how the arbitrator (or arbitration panel) is to be selected, any particular experience required for the arbitrators, or even the ultimate question to be arbitrated. For example, in one very protracted and heavily negotiated transaction, the parties included the following in the arbitration clause for the employment agreement: the sole question for the arbitrator is "Has the Executive committed an act which would allow the Company to terminate Executive's employment with the Company for cause". There were then two pages of instructions about how the arbitrators would be selected and the standard for review of the facts to be undertaken by the panel, as well as specific guidelines for submission of the controversy and fact-finding.

Allow your client to take advantage of all the benefits of mediation by including a mediation or med-arb clause in contracts you draft. Use everything available to resolve disputes as quickly and economically as possible.

Message From the Chair

by Deborah Calegory

Happy Holidays from the Legal Assistant Division. What a great time of year this is. A chill is in the air . . . football games are everywhere you turn . . . and lots of goodies to share!

I want to thank everybody that attended the 1/2 day CLE sponsored by the LAD in late September. The turnout was great. It is your participation that makes these events worthwhile for everyone. We will keep you posted of upcoming CLE events.

The LAD is in the process of compiling a current membership directory and hopes to send it out during December. Sort of a "gift" from the LAD. I know that I use my membership directory all the time, so I am looking forward to an updated version. I hope all of you find the directory useful, as I do.

The outpouring of help to those families of the victims of the September 11 attacks has been more than ever expected. What a great example Americans set for the rest of the world when it comes to caring for those around us. In light of the September 11 tragedy let us be extra giving during the holidays this year.

Don't forget that local charities need your help. Contribute to a food bank, pick a name off an angel tree and contribute to that child, or locate a less fortunate family in your area and see that Santa truly does make his rounds. Let's continue the spirit of giving and cooperation long after the holidays are over. It is little acts of charity and kindness that keep on giving year after year after year.

This is also a good time of year to reflect on goals accomplished and to resolve to work on items that need change. Let's all take some time to assess ourselves rather than judge others and try to make changes that will better us as individuals.

AND JUSTICE FOR ALL
2001 New Partners Campaign

The "AND JUSTICE FOR ALL" Campaign is very pleased to announce that four new civil legal services providers will receive $21,000 in grants in 2001. "These programs were selected because they help meet the "AND JUSTICE FOR ALL" mission of providing direct civil legal assistance to all Utahns, especially those who face barriers due to income, disability, age, geographic area, or ethnicity," said John Beckstead, President of the Board of Trustees of "AND JUSTICE FOR ALL."

The mission of "AND JUSTICE FOR ALL" is to increase access to civil legal aid for the disadvantaged throughout Utah by creating and sustaining resources to support civil legal services; sharing and consolidating resources so that services are delivered in a more efficient manner, enabling the agencies to serve additional clients; and strengthening the individual beneficiary agencies and the distinct roles they play in the delivery of civil legal services.

More than 2,000 Utah attorneys have made a commitment to equal access to justice through their support of the "AND JUSTICE FOR ALL" Campaign, enabling the Disability Law Center, Legal Aid Society of Salt Lake, and Utah Legal Services to assist nearly 7,000 additional impoverished and disabled people throughout Utah over the last three years. Yet, in spite of this support, every year thousands of eligible clients receive limited or no assistance with critical legal problems due to the lack of public resources.

In order to fill the gaps in the provision of legal services, and to meet the increasing need, "AND JUSTICE FOR ALL" is expanding its support to new partner beneficiary programs in 2001, in the continued effort to create equal access to justice for all people in Utah:

DNA – People's Legal Services will utilize Campaign funds to provide free legal services regarding housing, consumer, and environmental concerns to Navajos living within the Navajo Reservation in Utah.

Immigration Legal Services of Holy Cross Ministries will dedicate Campaign funds to provide free immigration legal assistance to low-income and ethnically-diverse populations in rural areas of Utah such as Ephraim, Wendover, Logan, and Summit County.

The Multi-Cultural Legal Center will utilize Campaign funds to protect the legal and civil rights – particularly in matters involving employment and housing discrimination – of Utah's racial and ethnic minorities through litigation, advocacy, public education, and public policy development.

The Senior Lawyer Volunteer Project will use Campaign funds to provide free legal assistance to low-income, mainly elderly, Utah residents, using the services of retired and active pro bono attorneys and other trained volunteers. Volunteers provide assistance with estate planning, preventing financial exploitation and physical abuse, and planning for disability, incapacity, and death.

"AND JUSTICE FOR ALL" is kicking off its fourth annual campaign in 2002 under the leadership of Brent Manning of Manning, Curtis, Bradshaw & Bednar. The continued support of the private bar is crucial to more than 20,000 of Utah's neediest individuals and families each year – people who, without the generosity of the state's legal community, would go without representation in matters involving domestic violence, abuse and neglect of adults and children, family law, housing, SSI/SSDI benefits, and access to education, health care, and disability services.

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. Donations are tax deductible. Contributions can be made by VISA, MasterCard or by check made payable to "AND JUSTICE FOR ALL," and remitted to 225 South, 200 East, Suite 200, Salt Lake City, Utah, 84111.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
12/07/01**	**Last Chance CLE: Employment Law.** 11:00 am–1:00 pm. (lunch provided) $40 YLD members, $55 others. Michelle Mitchell, John Robson, Scott M. Peterson, Jon C. Martinson, Robert A. Garda. ***Change of information.*	2 NLCLE/CLE
12/12/01	**Intellectual Property in Cyberspace: Internet Law 2001.** Professor William W. Fisher, Harvard Law School; Professor David G. Post, Temple University Beasley School of Law; H. Dickson Burton, Trask Britt; John Morris, Snell & Wilmer. 9:00 am–5:00 pm. $199 before December 1, after $230.	7
12/12/01	**ADR Academy Part III: Ethical Issues in Mediation.** 5:30–6:45 pm. $30 YLD, $40 ADR Section, $50 others each session.	2 NLCLE/CLE
12/13/01	**Litigation Deposition Workshop: What you Need to Know.** Presenters: Richard Burbidge, Francis J. Carney, Thomas Karrenberg, Collin King and Willis Orton. Topics include: mechanics of deposition, video depositions, preparing your client, using exhibits, use of depositions at trial, Rules of Procedure, and more! 5:30–8:30 pm, $40 for YLD, $55 all others.	3 NLCE/CLE
12/14/01	**Ethics: (sponsored by Lawyers Helping Lawyers)** Program Introduction Scott Daniels, Utah State Bar President; Rule 8.3 and Utah's Program, Richard G. Uday, Utah's LHL Director; Michael Sweeney, Director of Oregon's Attorney Assistance Program; Statistics and Success Stories, Dr. Lynn D. Johnson; Spotting and dealing with stress, pressure and drug and alcohol dependencies, closing comments, Utah Supreme Court Chief Justice Richard C. Howe. 1:00–4:00 pm. $60, $75 at the door.	3 Ethics
12/17 & 18/01	**Immigration Alternatives: Asylum, Withholding, Convention Against Torture, Violence Against Women Act, Nicaraguan & Central American Refugee Act, Cancellation, Late Amnesty, V & U visas.** Sponsored by Utah Chapter of the American Immigration Lawyers Association, The Office of Utah Attorney General. 8:30 am–5:00 pm each day. Full agenda available on-line at www. utahbar.org/cle. AILA and Paralegals $75, Non-Profit AILA & BIA Reps., $50, New Lawyers $100, All others $150.	17 (6 hrs NLCLE)
12/18/01	**Technology 4 Attorneys:** 9:00 am–4:30 pm (lunch on your own). $120 pre-registration, $150 at the door. Learn software practice pointers for a variety of widely used products in the industry. No sales pitches included, just practical advice from a practicing attorney. Presenter: Kreis, Boise Idaho.	7.5
12/27/01	**Procrastinator's Video Replay.** 9:00 am–3:00 pm, $25 per credit hour. We will be showing Bar semininars offered on-line with our host Affinity Learning. 6 hours self-study credit only.	6 hrs self-study credit only
01/09/02	**ADR Academy Part IV: Tactics of Opening Statements.** 5:30–6:45 pm. $30 YLD, $40 ADR section, $50 others each session.	2 NLCE/CLE
01/11/02	**Last Chance for Ethics:** Sponsored by the Government Law Section for the and Justice for All campaign. 9:00 am–12:00 pm.	3 Ethics
01/17/02	**Estate Planning Workshop: Wills and Trusts.** 5:30–8:30 pm. $45 YLD, $60 all others.	3 NLCE/CLE

REGISTRATION FORM

Pre-registration recommended for all seminars. 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.

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 _____

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

House for Sale. Tired of commuting downtown? Move into elegant rambler in Salt Lake Country Club area at 2306 South 2300 East, 4800 square feet, huge main floor master bedroom suite, updated 2000, large spacious floorplan, cherry and granite kitchen, Thermador appliances, refinished white oak floors, recessed lighting, plantation shutters, crown molding, new paint, tile, mudroom, main floor laundry, large living room, family room, fireplace, informal dining room, guest bath, screened deck. Finished walk-out basement, full kitchen, two large family rooms, three bedrooms, 3/4 bath, fireplace, incredible storage under two-car garage. Mature landscaping, fenced backyard, enclosed courtyard. Available immediately. $479,500. Jim Ivins 661-8820 or Matt 661-8833.

Solid Maple 75x37 " Double-Pedestal Desk, center drawer, two writing slides, several drawers each side. Matching double-pedestal Credenza 74x21" with center cabinet storage, several drawers each side. Early American furniture built like a rock. $795. Call Dave 801-466-4229. Local delivery in Salt Lake City negotiable.

POSITIONS AVAILABLE

Looking for an opportunity to either partner or associate with someone with strong marketing skills who has Estate Planning background (helpful) or desire to change to EP. I'm strong in technical skills and client relations. Send resume to: Attorney, PO Box 652, Farmington UT 84025.

Medical malpractice plaintiff firm seeks part-time associate for Holladay office to assist with case evaluation, drafting of pleadings, medical-legal research, and contacting experts. Medical experience preferred. Flexible hours and telecommuting opportunities available. Salary negotiable. Send resume and references to: attorney@networld.com or fax (801) 424-4243.

Attorney – Cedar City Dynamic disability civil rights law firm seeks attorney with a background in public interest law for Cedar City office. Prefer 3-5 years experience assuring the civil and human rights of people with disabilities. Significant general legal experience is a minimum requirement. Excellent benefits package. Submit resume and letter of application to: Disability Law Center, 455 East 400 South, Suite 410, Salt Lake City, UT 84111. Equal Opportunity Employer.

The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2002. To qualify each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association, 532-5444.

OFFICE SPACE/SHARING

Office: Attorney office in existing law office suite. Work area for secretary included $425. Second office available $275. Conference room, kitchen facilities, etc. Other amenities furnished. 7321 South State Street. **Clayton Fairbourn 942-2780.**

Office for Rent: Large reception area, 3 offices, conference room, eating area, supply room $1,350. Ample parking. Approx. 1300 square ft. 7321 South State Street. **Clayton Fairbourn 942-2780.**

Law firm in historical Salt Lake Stock and Mining Building at 39 Exchange Place has three office spaces available, $500 to $850. Receptionist, conference room, fax, copier, law library, parking, and kitchen included. DSL connection is optional. Also available is 844 square ft. suite includes small conference room and reception area, $750. Contact Joanne or Marcy @ 534-0909.

Creekside Office Plaza, located on NW corner of 900 East and Vanwinkle Expressway (4764 South) has several executive offices located within a small firm, rents range from $600-$1200 per month, includes all amenities. Contact: Michelle Turpin @ 685-0552.

OFFICE SPACE. Located downtown. Fax, copier, conference room. $500/mo. Please call for appt. to see. Penni 521-3464.

SERVICES

ADULT RAPE – CHILD ABUSE EVIDENCE Forensic Analysis of allegations and video recorded statements. Determine consent issues. Detect false allegations of rape. Forensic interviewing. Identify investigative bias and errors. Assess criteria for court's admission of recorded statement evidence. Bruce Giffen, D. Psych. Evidence Specialist. American Psych-Law Society. 801-485-4011.

TURN ESTATE VEHICLES INTO CASH – Car Buyers of Utah (CB of U) buys cars, trucks and vans. Liquidate estate vehicles and turn them into cash quickly! CB of U provides another option to collect fees on services rendered. Use our services for personal vehicles as well. Most professionals do not want to spend a lot of time showing vehicles to multiple potential buyers who may or may not be qualified to purchase, especially when they can sell the vehicle in just one phone call. Call us to see if we are a match for you. (801) 485-5111; e-mail Jodi@carsold.com.

LANGUAGE – CTC CHINESE TRANSLATIONS & CONSULTING Mandarin and Cantonese. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 942-0961, Fax: (801) 942-0961. E-mail: eyctrans@hotmail.com.**Estate Planning:** Online estate planning and business planning information is now available at www.utahestateplanners.com. Services provided for individuals, businesses and attorneys. Fixed fee and independent contractor relationships available. For more information, contact pchristensen@utahestateplanners.com

LUMP SUMS CASH PAID For Remaining Payments on Seller-Financed Real Estate Notes & Contracts, Business Notes, Structured Settlements, Annuities, Inheritances In Probate, Lottery Winnings. Since 1992. *www.cascadefunding.com.* **CASCADE FUNDING, INC. 1 (800) 476-9644.**

COURT ORDERED CUSTODY EVALUATIONS. John D. Perovich, Psy. D., a licensed clinical psychologist, provides expert court ordered custody evaluations and comprehensive psychological services from his main office in Layton and satellite offices in Salt Lake and Tooele. 1454 North Hillfield Road, Suite 1, Layton, UT 84041. Phone (801) 593-9145 Fax: (801) 593-6033.

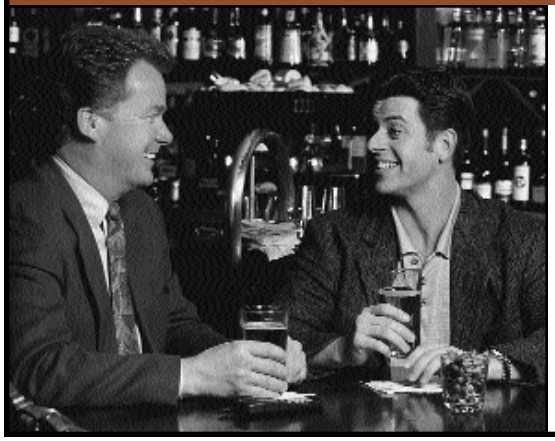
Automation Services. Improving your productivity can reduce your response time and increase your bottom line. For more information, go to www.pscllc.com or contact Joe at jbrubaker@pscllc.com or (801) 699-6796.

Endurance Solutions LLC "By Endurance We Conquer" Our company was formed to provide computer support and development services exclusively for Wasatch Front Medical, Dental and Legal businesses. We are specifically organized to serve independent offices. We provide premier support, day or night, and have a variety of low cost plans to choose from. For more information or to schedule a consultation, call: (801) 573-8232 or email info@endurancesolutions.com.

Private Investigator Bill Essex. Twenty years' experience investigating criminal, civil, administrative, and employee misconduct cases. Masters Degree in Criminal Justice Administration and graduate of the FBI National Academy. Adjunct Faculty B.Y.U., Weber State, Salt Lake Community College, and Utah P.O.S.T. Academy. Phone: (801) 244-8252 – FAX (801) 679-0987 – email: wildblisx@yahoo.com

FIDUCIARY LITIGATION: WILL AND TRUST CONTESTS; ESTATE PLANNING MALPRACTICE AND ETHICS: Consultant and expert witness. Charles M. Bennett, 77 W. 200 South, Suite 400, Salt Lake City, UT 84101; 801 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.**Med-mal Experts, Inc.** We're fast, easy, safe. Referral to board-certified medical expert witnesses; money back satisfaction GUARANTEE. Powerful medical malpractice case merit analysis by veteran MD specialists, $500 flat rate. Shop around – you won't find a better deal. 888-521-3601.

Did you hear the one about the lawyer who walked into a bar . . .



and signed up for the Pro Bono Project

No, it's not funny. But the need for Utah attorneys who are willing to do pro bono work is no laughing matter. The need is very real – and we need your help.

For more information, or if you would be willing to participate in the Utah State Bar's Pro Bono Project, please contact:

Charles Stewart, Utah State Bar Pro Bono Coordinator
(801) 297-7049 • crstewart@utahbar.org

Membership Corner

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

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

***PLEASE PRINT**

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

2. Business Address – <u>Public Information</u>

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

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

3. Residence Address – <u>Private Information</u>

Street Address _____ Suite _____

City _____ State _____ Zip _____

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

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

_____ Business _____ Residence

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

Signature _____

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

DIRECTORY OF BAR COMMISSIONERS AND STAFF

BAR COMMISSIONERS

Scott Daniels
President
Tel: 583-0801

John Adams
President-Elect
Tel: 532-1500

David R. Bird
Tel: 532-1234

Nancy Snow Bockelie
Tel: 536-5200

Gus Chin
Tel: 535-7992

N. George Daines
Tel: 435-753-4000

Denise Dragoo
Tel: 257-1900

Karin S. Hobbs
Tel: 983-1300

Randy S. Kester
Tel: 801-489-3294

Felshaw King
Tel: 543-2288

Robert K. Merrell, CPA
Public Member
Tel: 583-4939

C. Dane Nolan
Tel: 531-4132

D'Arcy Dixon Pignanelli
Public Member
Tel: 328-2282

V. Lowry Snow
Tel: 435-628-3688

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

***Nathan Alder**
President, Young Lawyers Division
Tel: 355-3431

***Charles R. Brown**
State Bar Delegate to ABA
Tel: 322-2516

***Deborah Calegory**
Legal Assistant Division Representative
Tel: 435-674-0400

***Marlene Gonzalez**
Minority Bar Association
Tel: 486-1183

***Mary Gordon**
Women Lawyers Representative
Tel: 363-5678

***H. Reese Hansen**
Dean, Law School,
Brigham Young University
Tel: 801-378-6383

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

***Debra J. Moore**
Judicial Council
Tel: 366-0132

***Paul T. Moxley**
ABA Delegate
Tel: 521-5800

***David Nuffer**
Immediate Past President
Tel: 435-674-0400

UTAH STATE BAR STAFF

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

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

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

Ronna Leyba
Utah Law & Justice Center Coordinator
Tel: 297-7030

Maud C. Thurman
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

Phyllis Yardley
Assistant to General Counsel
Tel: 297-7057

Access to Justice/Pro Bono Department
Charles R.B. Stewart
Pro Bono Coordinator
Tel: 297-7049

Continuing Legal Education Department
Connie Howard
CLE Coordinator
Tel: 297-7033

Jessica Theurer
Section Support
Tel: 297-7032

Samantha Myers
CLE Assistant
Tel: 297-7051

Technology Services
Lincoln Mead
Manager Information Systems
Tel: 297-7050

Samantha Myers
Web Site Coordinator
Tel: 297-7051

Admissions Department
Joni Seko
Admissions Administrator
Tel: 257-5518

Christie Abad
Admissions Assistant
Tel: 297-7025

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

Monica N. Jergensen
Conventions
Tel: 463-9205

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

Joyce N. Seeley
Financial Assistant
Tel: 297-7021

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

Consumer Assistance Coordinator
Jeannine Timothy
Tel: 297-7056

Lawyers Helping Lawyers
Tel: 579-0404
In State Long Distance: 800-530-3743

Receptionist
Rebecca Timmerman
Tel: 531-9077

Other Telephone Numbers & E-mail Addresses Not Listed Above

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

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

Member Benefits
Connie Howard
297-7033
E-mail: choward@utahbar.org

Marion Eldridge
297-7032
E-mail: benefits@utahbar.org

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

Billy L. Walker
Senior Counsel
Tel: 297-7039

Kate A. Toomey
Deputy Counsel
Tel: 297-7041

Diane Akiyama
Assistant Counsel
Tel: 297-7038

Charles A. Gruber
Assistant Counsel
Tel: 297-7040

Renee Spooner
Assistant Counsel
Tel: 297-7053

Gina Tolman
Paralegal
Tel: 297-7054

Ingrid Westphal Kelson
Legal Secretary
Tel: 297-7044

Rosemary Reilly
Legal Secretary
Tel: 297-7043

Amy Yardley
Clerk
Tel: 257-5517

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah Law and Justice Center
645 South 200 East, Salt Lake City, UT 84111-3834
Telephone (801) 531-9077 Fax (801) 531-0660

For Years _____ and _____

Name:			**Utah State Bar Number:**			
Address:			**Telephone Number:**			
Date of Activity	**Program Sponsor**	**Program Title**	**Type of Activity (see back of form)**	**Ethics Hours (minimum 3 hrs. required)**	**Other CLE (minimum 24 hrs. required)**	**Total Hours**
			Total Hours			

Explanation of Type of Activity

A. Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study

No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line cle programs. Regulation 4(d)-101(a)

B. Writing and Publishing an Article, Self-Study

Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Regulation 4(d)-101(b)

C. Lecturing, Self-Study

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

D. Live 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 fifteen (15) hours must be obtained through attendance at live continuing legal education programs. Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b) and (c) above of this Regulation 4(d)-101 may not exceed twelve (12) hours during a reporting period.

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 5-101 – Each licensed attorney subject to these continuing legal education requirements shall file with the Board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

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. In addition, attorneys who fail to file within a reasonable time after the late fee has been assessed may be subject to suspension and $100.00 reinstatement 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 Regulation 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. The attorney shall retain this proof for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the Board upon written request.