

# BARRISTER

SEPTEMBER/OCTOBER 1986

## SOME COMMON PROBLEMS OF APPELLATE ADVOCACY

*Justice Michael D. Zimmerman*

*This article is the second in a two-part series on appellate advocacy by Justice Michael D. Zimmerman of the Utah Supreme Court.*

In the last article, I described the administrative and decisional machinery of the Court as it affects parties to an appeal. I also gave some general suggestions that should be followed in presenting any matter to an appellate court. These suggestions can best be summarized as a commandment, "Know your audience."

What is written here is not intended to contradict that commandment, but to build upon it. In this article, I will discuss some specific problems often

encountered by appellate advocates. This list is certainly not exhaustive, but if you can avoid all these problems you will be ahead of most lawyers appearing before us.

### Be Candid

Lack of candor is a most devastating problem for an advocate. No matter how good your mastery of the law and the facts, and no matter how fine your style, if the judges do not trust you, your clients will occasionally suffer. As Judge Winder stated at a recent swearing in of new Bar admittees, a good reputation takes a long time to earn and very little time to lose.

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*Paul M. Durham*

## PRESIDENT'S REPORT

*Paul M. Durham*

The Young Lawyers Section of the Utah State Bar is alive and kicking! Three years ago it was languishing at death's door with only four officers and minimal programming. Today it has four officers and a nineteen-person Executive Council with fourteen fully staffed committees addressing concerns such as bridging the gap between law school and law practice, child advocacy, the Bicentennial of the U.S. Constitution and the needs of the elderly, to name a few. A great deal of credit for this revitalization goes to Cecelia Espenosa and John Adams, past president and immediate past president of the Section, whose personal dedication and commitment to the goals of the Section have given national attention to the Utah Young Lawyers Section.

At the Annual Meeting of the American Bar Association in New York City last month, I was privileged to receive, on behalf of the Section, two First Place Awards in the ABA Young Lawyers Award of Achievement Competition. These awards represent national recognition of the outstanding

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*Utah Supreme Court Justices*



## CALENDAR OF EVENTS

### September

22 Hearing on Rules of Professional Conduct (2:00 p.m., Utah Supreme Court)

### October

1 YLS Executive Council Meeting (noon, Utah State Bar Office)

7 Swearing in Ceremony for new admittees to the Utah State Bar (12:15 p.m., Capitol Rotunda)

17-18 Bridge-the-Gap Seminar

31 *Barrister* Material Contribution Deadline

### November

5 YLS Executive Council Meeting (noon, Utah State Bar Office)

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If an appellate attorney accurately states the trial court's findings, the evidence presented at trial, and the law, and does a generally creditable job, the judge may not remember the attorney's name at all. It might take five good jobs before that lawyer is recalled as someone upon whom the judge can rely.

On the other hand, when an attorney just once in the brief or oral argument misstates the facts or the law and that misstatement comes to the Court's attention (as it almost always will, either through the efforts of opposing counsel or those of the Court), that lawyer's name will almost certainly stick in the judge's mind. From then on, that lawyer's statements of fact and law will be viewed with a jaundiced eye. Stretching the facts or the law is a recipe for instant infamy.

### Know The Standard of Review

Another common problem is for an advocate to take an appeal, write a brief and argue the case, all without recognizing what an appellate court will and will not consider on appeal. It is surprising to me how often this happens.

Perhaps we should have the following engraved in stone over the door of the Supreme Court Clerk's office: "Know your standard of review." A number of cases would never be appealed if this commandment were followed, and many which are properly appealed would be better presented.

In this regard, the most common fallacy is to assume that we are a second trial court—that an appeal is like a new trial. We do not retry facts. The standard of appellate review applicable to findings of fact made by a judge sitting alone or by a jury has been stated often and should be well known: where a factual issue was in dispute below, the appellate court presumes that the finder of fact resolved all questions of credibility and drew all inferences in favor of the prevailing party and against the losing party; therefore, we will not overturn a finding of fact unless it

lacks any substantial record support.

A party seeking to overturn a finding of fact bears a heavy burden in briefing the matter. We will not search the record for support for the findings made below. Rather, the appellant must marshal all the record evidence in support of any challenged finding and then explain why it does not provide substantial support for that finding.

Accordingly, the parties to an appeal must either take as correct all factual findings of the court below and all evidence supporting those findings and attack the ruling as a matter of law, or they must demonstrate that a pivotal factual finding is without support. It is surprising how often this simple premise is ignored. Attorneys constantly base their fact statements on evidence favorable to their position and ignore the factual findings of the trial judge or jury.

I suppose that lawyers ignore the expressed or implicit findings of trial courts because they want to win so much. I certainly can sympathize. Lawyers think that things really are as their client's evidence demonstrated, so they are greatly tempted to state the facts the way they should have been found.

This is a temptation lawyers will succumb to if they are not conscious of the standard of review. The worst thing that can happen to an attorney at oral argument is to argue the facts and then be asked the embarrassing question, "But didn't the trial judge find just the opposite of that?" Where the evidence was conflicting, there is no satisfactory response to that question.

Taking on bad facts can be tough. If it is tough, it may mean you should not have filed an appeal in the first place. If you cannot live with the facts as the judge or jury found them and cannot show that the findings are without support, perhaps you should forego the appeal and tell your client to just pay the judgment.

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## Zimmerman

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### Be Sure All The Necessary Materials Are Before The Court

As I mentioned in my previous article, it is common for members of our Court to take the briefs home to prepare for oral argument. At home we do not have the record and we do not have an extensive law library. All we have is what is in the briefs. That is a useful perspective for lawyers to have when considering how to put a brief together, because you should not assume that someone reading your brief will go beyond its four corners.

Most especially, do not assume that the reader will have ready access to the record. We have only one copy, and it is highly unlikely that anyone other than a law clerk will look at it before argument and the initial conference on your case. Your brief should be a reference document in which all things necessary to an understanding of your case and position are presented.

That the Court wants briefs to be intelligible standing alone, without supporting assistance from the record or the law library, is evidenced by Rule 24(f) of our new rules of appellate procedure. We now require that each appellant's brief have an addendum containing any portions of the record necessary to an understanding of the appeal.

For example, if the court below entered findings and conclusions or a memorandum opinion, it must be in the addendum. In addition, if the applicable statutes, rules, and regulations critical to your case are too extensive to be easily set out in your brief, they too should be in the addendum.

Carefully preparing an addendum is not a sterile exercise. For example, a recent case before us turned largely on certain provisions of a highway contract and the regulations of the Department of Transportation relative to bidding. The briefs were sophisticated and scholarly, but none contained the relevant contract documents or the text of the relevant rules. Not only do I not have such rules at home, we do not even have them at the Supreme

Court law library. As a result, oral argument was largely wasted because counsel argued over material that was not in the briefs. If you want the judges to know something at oral argument, it had better be in the brief.

As I said in the previous article, your goal should be a brief that can be read through once and understood. Obviously, that goal cannot be achieved if understanding requires digging into the record or searching out a critical code section in the statute books. You want your brief to be *the* reference piece, *the* document to which a judge or law clerk will refer for an understanding of the case and the arguments. Such a brief must be self-contained and include an adequate addendum.

### Request Oral Argument

Many attorneys do not request oral argument. The Court sends out notices when your case is calendared for disposition and invites you to ask for oral argument. If you do not request it, we will decide the case without argument. Approximately forty percent of the time, counsel does not ask for oral argument. I do not understand the reason for failing to request oral argument. My advice is to always argue.

Almost thirty percent of our cases are decided without argument through per curiam opinions. Cases that are calendared for possible oral argument have been screened for per curiam treatment and rejected. This means that someone thinks the case is not governed by settled precedent. If the Court does not think that the proper resolution of the case is plain beyond doubt, how can you?

### Welcome Questions During Oral Argument

Oral argument is an attorney's one chance to find out what the judges are thinking and to correct any misconceptions they may have. In the trial court, you have an ongoing opportunity to appraise the judge's thought processes and adjust your case accordingly. The trial judge may

rule on motions before trial, and you interact with the judge throughout trial.

In an appellate court, you have a written dialogue with your opposing counsel in the briefs, but you have no dialogue with the Court except for whatever occurs during oral argument. At argument you appear before the Court for twenty minutes. When argument is over, you have no more input or control over the decision-making process—you cannot correct misconceptions; you cannot persuade; you cannot do anything to influence that process. Therefore, the thing you want most at oral argument is questions.

Many attorneys think that questions are a nuisance because they interfere with counsel's getting through his or her prepared outline. In a recent oral argument, counsel had a written argument he read like a speech. While he was reading, a member of the Court asked a question. Counsel replied, "I am sorry. I have a lot of material to cover, and I wish you would let me finish my presentation." I suggest that he did not understand that he was there to listen, too.

Failing to welcome questions is the worst thing you can do. A question is a window into the judge's mind, an opportunity to converse with the judge about an issue. Those chances are very rare in appeals; you should welcome every question, even if you must sacrifice your speech. A judge's question may not seem terribly important to you, but it may turn out to be the pivotal issue in the case.

Be anxious to get questions. Some counsel, either at the beginning or end of argument, will ask, "Are there any questions?" This strikes me as a good practice.

### Do Not Read Your Argument

This point should be obvious. If the aim of argument is to answer questions, to highlight what you think are your strongest points, then you want to engage the Court, to make contact with the judges. The fastest way to turn oral argument into a sterile exercise is to stand before the Court, look down at the podium and read a speech. The effect on the listener is like a sleeping pill.

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## Zimmerman

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### Limit Your Assignments of Error

When raising points on appeal there is a great tendency to throw in every conceivable issue, hoping that one will catch the Court's fancy. An example is the tendency of every criminal appeal to assert that there is insufficient evidence to support the conviction, when most turn on credibility questions.

Be sparing in the issues advanced on appeal. There is not safety in numbers; in fact there is a tendency for your good arguments to get lost among the chaff.

Hard as it is, be selective. Remember that there is a strong presumption against reversing the trial court, so pick only the strongest points for your appeal.

### Limit Your Presentation at Oral Argument

Attorneys should remember that only about two to three points can be presented persuasively in twenty minutes. No matter how many points you have raised on appeal, limit your presentation to the two or three most important. When you stand up, tell the Court that the remainder are adequately covered in the brief. This does not indicate weakness, but a recognition that oral argument and the briefs serve different purposes.

If you have only one or two points in your oral presentation, and they can be adequately covered in less than twenty minutes, recognize that fact and sit down. Nothing causes judges' eyes to glaze over faster than for someone with a rather simple point to go on for twenty minutes when five would do. The effect of too much talking is much the same as too many points on appeal: it obscures the merit of your position.

Finally, limit your oral presentation by omitting a long, detailed factual narrative. Remember, the judges have seen the briefs and are familiar with the facts. Describe them sufficiently to orient the Court and remind it of the nature of the matter, then proceed to the merits. Judges can become impatient if you spend ten minutes giving a stale recitation of the facts, telling them what they already know, when they want to hear about the merits.

If specific facts are critical to your appeal, they are best discussed when you deal with the issue to which they pertain. If they are recited at the beginning of your presentation, the judges are not likely to appreciate their relevance.

### Put Most Important Material At The Beginning Of Oral Argument

The first few minutes of oral argument are the most important. After

that, the judges' minds may start to wander. So put your biggest issue first, while you have everyone's attention. Also, if you save it for last you may run out of time before you get to it.

This is also another reason for cutting your fact statement to the bare essentials. You might even consider first introducing your two or three main points before giving the fact statement. If the judges are first oriented to your issues, they will be better able to relate the facts to those issues.

### Conclusion

There are numerous articles on the subject of effective written and oral advocacy. I do not suggest that anything said here cannot be found in any number of sources. However, from watching oral arguments for almost two years now, it is plain that many otherwise capable lawyers have never stepped back and considered what they are trying to accomplish on appeal and how best to reach that goal.

Sometimes in the press of preparing a brief or readying yourself for oral argument, reflection seems a luxury for which you do not have time. Make time. A carefully tailored brief or oral presentation is far more likely to result in success than one that simply throws the whole matter at the Court and hopes the judges will sort it out.

Budget. The biggest challenge facing the Finance Committee this year is the planned expansion of activities sponsored by the Section. Budgetary considerations, fiscal policy, and fund raising will be crucial factors in the future success of the Section and the Finance Committee will use creativity, ingenuity, and experience to help provide the strongest possible fiscal base for the Young Lawyers Section in the upcoming year.

### COMMUNITY SERVICES/CHILD ADVOCACY COMMITTEE REPORT

The Community Services Committee is chaired by Kimberly Hornak and comprised of young lawyers interested in performing services for the Salt Lake community. In recent years this

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## COMMITTEE REPORTS

The Executive Council is the governing body of the Young Lawyers Section, with control and supervision over the affairs of the Section. The Executive Council establishes and executes the general policy, programs, and activities of the Section. The committees chaired by members of the Executive Council, as described in the Announcements & Events section, implement those policies, programs and activities. In this and upcoming issues of the *Barrister*, the committee responsibilities and plans will be summarized and highlighted for your review and information. If you would like to participate, contact the person designated in your area of interest.

### FINANCE COMMITTEE REPORT

Frank Pignanelli serves as Treasurer and as Chairman of the Finance Committee for the Young Lawyers Section. As Treasurer, Frank is required to apply a complete budgetary analysis and review to the financial procedures of the Section so as to increase its efficiency and fiscal strength.

The Finance Committee last year, also chaired by Frank, was able to work with the other Section committees to hold costs down, thereby providing funds for additional projects. Frank will apply this successful formula to the financial outline for the 1986-1987 Young Lawyers Section

good stuff

# PRACTICE POINTERS

## PREPARING ARTICLES OF INCORPORATION

William D. Holyoak

A variety of factors should be considered in deciding the state of incorporation for a new corporation. If you decide to form a Utah business corporation, the applicable requirements for the articles of incorporation are located primarily in section 16-10-49 of the Utah Business Corporation Act ("UBCA"). In preparing the articles of incorporation in accordance with section 16-10-49, here are a few items to consider:

1. *Name.* While Utah law does not require that a designation of limited liability, such as "Corp." or "Inc.," be a part of a Utah corporation's name, it is a good practice to use such a designation so that third parties dealing with the corporation will be aware of its corporate status. To avoid filing articles with a name that is not available, you should consider reserving the name by filing an application with the Utah Division of Corporations and Commercial Code (the "Corporations Division"). Corporate names can be reserved in this way for 120 days.

2. *Purposes.* Although the UBCA does not state that a specific purpose must be included in articles of incorporation, the Corporations Division rejects articles that do not contain a specific purpose. General purpose language should also be included, to give the corporation the flexibility to engage in different lines of business than initially contemplated.

3. *Authorized Shares.* Enough shares of common stock should be authorized to enable the corporation to issue additional shares without having to seek shareholder approval. Some states base their fees for qualification as a foreign corporation and for franchise taxes on the number of authorized shares. Consequently, you should not authorize shares well in excess of the corporation's

reasonably anticipated needs.

4. *Par Value.* While the concept of par value has little current meaning, care must be taken in assigning a par value to avoid certain pitfalls. For the reasons set out below, a low par value, perhaps \$.01 or \$.001, is preferred. First, the consideration received for shares must be at least equal to their par value. A "low par" stock gives the corporation flexibility in fixing a price for its stock. Second, some states base their fees for qualifying as a foreign corporation and for franchise taxes on the stated value of the corporation's common stock (authorized shares multiplied by par value), and some of these states will impute a high par value when the stock is no par. Thus, a low par stock gives the best result here. Third, in allocating the consideration paid for stock between stated capital and capital surplus, unless varied by the board of directors, the portion of the consideration received equal to the stock's par value is allocated to stated capital and the balance is capital surplus. (All of the consideration for no par stock is allocated to stated capital.) Since dividends can only be paid out of capital surplus, a corporation will usually want as much of its paid-in capital to be surplus as possible. Again, low par stock achieves the preferred result.

5. *Pre-emptive Rights.* Under the UBCA, a shareholder has pre-emptive rights unless they are limited or denied in the articles of incorporation.

6. *Cumulative Voting.* Under the UBCA, cumulative voting is not allowed in the election of directors unless otherwise provided in the articles of incorporation.

7. *Partial Liquidations.* The UBCA provides that a corporation may distribute to its shareholders a portion of its assets in partial liquidation, but only upon approval of two-thirds of the outstanding shares or if so provided in the articles of incorporation. This authority should be given in the articles of incorporation so that the board can partially liquidate if it desires

without obtaining the approval of a super-majority of the shareholders.

8. *Registered Agent.* The UBCA now requires that the registered agent named in a corporation's articles of incorporation sign the articles of incorporation or an attached acknowledgement.

9. *Execution and Filing.* The articles must be signed and verified by at least three incorporators, who must each be at least 18 years old, and the original and one copy must then be filed along with a fee of \$50 with the Corporations Division, located on the second floor of the Heber M. Wells Building, 160 East 300 South, Salt Lake City, Utah.

## SERVICES & INFORMATION

### LOCATING INDIVIDUALS

Attempting to locate an individual for service of process or to obtain information regarding assets can be time-consuming and expensive. The following services and sources, however, may be of assistance:

1. The Polk Directory Desk at the Main Branch of the Salt Lake City Library (363-5733) is helpful if you have a telephone number for an individual or corporation and wish to obtain a residential or business office address.

2. The Department of Motor Vehicles' Information Desk will run a check of the vehicles registered to an individual and his/her address for \$1.00.

3. The County Recorder's Office will tell you if an individual or corporation owns property in that County, the address and value and the name of any lienholders.

4. The U. S. Postal Service will provide a physical address if a route and box or post office box number is known for the cost of \$1.00 per request.

# ANNOUNCEMENTS & EVENTS

## YOUNG LAWYERS RECEIVE RECORD NUMBER OF APPOINTMENTS TO BAR COMMITTEES

Last spring the Executive Council of the Young Lawyers Section adopted a goal to have increased representation of young lawyers on the committees and sections of the Utah State Bar. This effort, spearheaded by immediate Past-President John Adams, included a Brown Bag Luncheon in April 1986, at which the President and the President-Elect of the Utah State Bar discussed opportunities for service on the committees and sections of the Utah State Bar. A record number of appointments of young lawyers has been made to Utah State Bar committees and sections for the 1986-1987 year. In fact, virtually every person who filled out an application to serve on a Utah State Bar committee or section received his or her first or second choice of appointment. We expect the increased participation and perspective of young lawyers on the committees and sections of the Utah State Bar to have a significant impact.

## LEADERSHIP OF THE YOUNG LAWYERS SECTION

The Young Lawyers Section recently announced the new officers for 1986-1987. Paul M. Durham, Van Cott, Bagley, Cornwall & McCarthy, is President of the Section. Stuart W. Hinckley of Watkiss & Campbell, is President-Elect, and Chairman of the Long-Range Planning Committee. Also elected were Robin L. Riggs, Secretary, and Frank R. Pignanelli, Treasurer. Mr. Riggs serves as Executive Director of the Utah Constitution Commission and is an attorney with the Office of Legislative Counsel and Research. Mr. Pignanelli is an associate with Gustin, Adams, Kastings & Liapis, is Chairman of the Section's Finance Committee, and is currently running for the Utah State Legislature.

Also serving the Young Lawyers Section, by appointment to the Section's Executive Council (together with the Committee Chair assignments for each), are:

Hope Eccles -- Liaison with the Utah State Bar Committee on Post-Law School Pre-admission Practical Training.

Clark B. Fetzter (Howell, Fetzter & Hughes) -- Bridge-the-Gap;

Christopher C. Fuller (Snow, Christensen & Martineau) -- Public Relations;

Enid Greene (Ray, Quinney & Nebeker) -- Awards;

Kimberly Hornak (Asst. Utah Attorney General) -- Community Services/Child Advocacy;

Guy P. Kroesche (Van Cott, Bagley, Cornwall & McCarthy) -- Publications/Barrister;

Joel G. Momberger (Van Cott, Bagley, Cornwall & McCarthy) -- Continuing Legal Education/Brown Bag Luncheons;

Merrill F. Nelson (Kirton, McConkie & Bushnell) -- Needs of the Elderly;

Jill A. Niederhauser (Clerk to Judge David K. Winder) -- Bicentennial of the Constitution;

Gregory G. Skordas (Public Defenders) -- Lawyers Compensation Survey;

Asael T. Sorenson (Purchasing Department, LDS Church) -- Law Related Education;

James W. Stewart, Jr. (Jones, Waldo, Holbrook & McDonough) -  
- Bicentennial of the Constitution; and

Michael N. Zundel (Jardine, Linebaugh, Brown & Dunn) -- Law Day.

Also serving on the Executive Council are John A. Adams, immediate Past President of the Young Lawyers Section, and Cecilia M. Espenosa, as ABA Young Lawyers Division Liaison.

Each of the officers and members of the Executive Council is committed to further the goals of the Young Lawyers Section. As such, we look forward to an exciting, eventful and productive year.

## FALL BRIDGE-THE-GAP SEMINAR FOR ALL NEW ADMITTEES TO THE BAR

On Friday and Saturday, October 17 and 18, 1986, the Bridge-The-Gap Committees of the Senior Bar and the Young Lawyers Section will cosponsor the Fall Bridge-The-Gap Seminar, so named because the presentations help to span the gulf between new admittees' academic preparation and the practical aspects of legal practice. New admittees of the Bar and third-year law students particularly are invited, but other interested attorneys are welcome.

Topics for the first day are Bar organizations -- services and opportunities to serve, commonly encountered ethical problems, dealing with clients, and dealing with lawyers. On the second day, seminar attendees will visit five courts -- Federal Court, Bankruptcy Court, State District Court, State Circuit Court and State Supreme Court -- to hear judges give advice on advocacy and courtroom demeanor and to learn procedures in the clerks' offices.

Location for the first day is the University of Utah College of Law, Moot Court Room. Fees are \$25 for third-year law students, \$40 for all others; \$60 after October 10. Information and registration forms are available through the Utah State Bar Office, CLE Administrator.

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## Announcements & Events

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### FIRST NO-BROWN-BAGGER FEATURES YOUNG LAWYERS

The CLE Brown Bag Committee is pleased to announce that the first Brown Bag Seminar of the year will feature an encore performance of the Young Lawyers Comedy Hour. The show was first presented at the annual meeting in Sun Valley and was extremely well received despite frigid temperatures. Former YLS President John Adams is still chuckling over the "60-Minutes" interview with Judge Jenkins. This is an opportunity to catch a hilarious lampoon of the legal community, all in good-natured fun, and meet other lawyers in a relaxed atmosphere.

The date and time of the Comedy Hour will be announced shortly, as soon as contract negotiations with skit performers are completed.

For further information, contact Joel G. Momberger, Van Cott, Bagley, Cornwall & McCarthy, Suite 1600, 50 South Main Street, Salt Lake City, Utah 84144, 532-3333.

### GET INVOLVED

If you are interested in contributing to the *Barrister*, working on a committee of the Young Lawyers Section or obtaining further information, contact any member of the Executive Council or the *Barrister* Editorial Committee.

The Young Lawyers Section the is involved in a number of projects, of which benefit Utah and the legal community. This issue of the *Barrister* and the next will feature Committee Reports which describe the activities planned by each Committee (see the "Committee Reports" section of this *Barrister*). The Section encourages anyone interested in participating in these projects to contact the person listed in the Announcements & Events section of this *Barrister* for more information regarding specific projects.

# COMMENTARY

### CASES IN POINT

Joel G. Momberger

In 1985, an inmate at the Utah State Prison named Walter J. Wood committed suicide. The author has never met Mr. Wood, but the legacy of lawsuits he left in the Federal Courts lives on.

The most notable contribution by Mr. Wood was a 1985 lawsuit he filed against the Utah State Prison and others. The subject matter of the lawsuit was alleged civil rights violations occasioned by the prison permitting Mr. Wood to escape. The allegations of the Complaint include the following:

a large, heavily armed contingent of prison personnel and police dpts. [sic] utilizing helicopters, horses, dogs and various vehicles, began to search for me and two other inmates immediately south and west of the prison, which culminated in my voluntary surrender 12 hours later. During this time period, because of extreme fear of being shot to death, I was forced to swim several irrigation canals, attempted to swim across a raging "Jordan River" and exposed myself to innumerable bites by many species of insects. At one point, I heard a volley of shotgun blasts and this completed my anxiety.

Mr. Wood sought \$30,000,000 in damages.

In keeping with the spirit of Mr. Wood's Complaint, this column will in future editions of the *Barrister* include excerpts from other interesting and unusual cases, including excerpts from the following cases:

-The famous case of *Transamerica Insurance Company v. Barnes*, 505 P.2d 787, wherein Justice Callister, writing for the Court, made the following erudite observation: "Equity will not relieve one who could have relieved himself;"

-The case of the Seattle business student, Mark Hagen, who sued a 2 year old for \$200 on a claim that the young tyke backed a tricycle into Hagen's 1976 Porsche;

-The celebrated case of *United States ex rel. Gerald Mayo v. Satan & His Staff*, 51 F.R.D. 282, wherein the Court held as follows:

We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The Complaint contains no allegations of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant, there is an unofficial account of a trial in New Hampshire where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the pre-eminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

In concluding this first column, we leave you with the following definition credited to LaMar Hunt, owner of the Kansas City Chiefs football franchise, as reported in the Bergen County, New Jersey record: "the best description of utter waste would be a bus load of lawyers to go over a cliff with three empty seats."

Any contributions or suggestions for this column would be gratefully and graciously acknowledged and appreciated by the author, Joel G. Momberger, Van Cott, Bagley, Cornwall & McCarthy, Suite 1600, 50 South Main Street, Salt Lake City, Utah 84144.



# WORTH NOTING

## ABA LIAISON

The Utah State Bar Association's Young Lawyers Section is an affiliate of the American Bar Association Young Lawyers Division. The Section was represented at the ABA Annual Meeting by Cecilia M. Espenoza, District Representative, and Paul M. Durham, President. The annual meeting was held in New York City on August 7-10, 1986.

The Affiliate Outreach Project (AOP) awarded affiliates for activities and projects in the Award of Achievement Competition. In the I-C category (affiliates under 3,000), the Utah Young Lawyers Section was awarded a first place in both the Comprehensive and Single Project competition. The single project

recognized was the Lawyers Compensation Survey compiled by Greg Skordas, Legal Defenders Association. The Comprehensive application outlined all of the activities undertaken by the Section in the 1985-1986 Bar Year. Nationally, other Young Lawyer Bar leaders were impressed

## FIRM COMPOSITION SURVEY

The following list includes the Utah law firms that have 20 or more lawyers, Utah, including attorneys hired from the Class of 1986. The numbers were obtained from Martindale-Hubbell and an informal survey of each of the firms listed below:

with the development of our Section.

Representation on the Executive Council of the ABA/YLD is shared between Utah and Nevada every other year. The Utah term held by Cecilia M. Espenoza ended at the conclusion of the Annual Meeting. Kathleen England, Las Vegas, was elected to the position until the conclusion of the 1988 Annual Meeting.

Ms. Espenoza has been appointed to the Membership Support Network Team of the American Bar Association and will continue to act as the Utah liaison to the ABA/YLD. "As liaison, I will be providing resource and contact with the ABA for the Utah Young Lawyers Section" said Ms. Espenoza. In this year she hopes to increase local involvement in the ABA/YLD and the appointment process.

Yellow  
Pages

	Partners	Associates	Of Counsel	Total	
1 Van Cott, Bagley, Cornwall & McCarthy	45	27	6	78	76
2 Ray, Quinney & Nebeker	37	21	2	59	60 53
3 Jones, Waldo, Holbrook & McDonough	31	23	4	58	49
4 Parsons, Behle & Latimer	31	22	1	54	50
5 Snow, Christensen & Martineau	36	16	0	52	55
6 Kirton, McConkie & Bushnell	33	8	2	43	46
7 Callister, Duncan & Nebeker	22	19	0	41	49
8 Prince, Yeates & Geldzahler	21	10	3	34	36
8 Watkiss & Campbell	24	8	2	34	43
10 Fabian & Clendenin	20	12	0	32	35
10 Larsen, Kimball, Parr & Crockett	18	12	2	32	40
12 Nielsen & Senior	19	8	2	29	30
13 Fox, Edwards, Gardiner & Brown	18	8	1	27	—
14 LeBoeuf, Lamb, Leiby & MacRae	5	18	1	24	ind. lawyers not listed
15 Richards, Brandt, Miller & Nelson	12	10	0	22	18
16 Hansen & Anderson	12	8	0	20	19
16 Holme Roberts & Owen	7	11	2	20	16
16 Suitter, Axland, Armstrong & Hanson	12	8	0	20	18

Christensen Jensen & Powell  
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# LEGISLATIVE NEWS

## UTAH CONSTITUTIONAL REVISION COMMITTEE

In Utah, only the Legislature can place constitutional amendments on the ballot. Recommendations for changing the Utah Constitution, however, can be made by any person or group of persons and legislators themselves. However, the majority of the significant revisions that have been recommended over the past eight years have been made by the Utah Constitutional Revision Commission, a bipartisan commission comprised of 16 citizen and legislative members. This year, the commission has recommended the revision of the Education Article. It will appear as Proposition 3 on the ballot in November.

Proposition 3, the Education Article Revision, attempts to resolve three constitutional issues. The first issue is the governance and structure of education in the State of Utah. The present Constitution states only that education (including institutions of higher education) shall be governed by an elected board of education and higher education. In 1969 the Legislature passed a statute creating the State Board of Higher Education (now the State Board of Regents) to govern higher education even though there was no apparent constitutional authority to do so. The State Board of Education challenged the statute, which was narrowly upheld in 1973 by the Utah Supreme Court. Since then there has been speculation that the Court may overturn the 1973 decision. Thus, the Constitutional Revision Commission has initiated Proposition 3 to amend the Constitution to provide for two separate systems and governing boards.

The second issue addressed by the committee involves school fees. The current Constitution guarantees that all "common schools" (grades 1-8) shall be free. This has been interpreted by the education community to prohibit the levying of any fee for any school-related purpose in those grades. While Utah courts have not interpreted the word "free," some other states' courts have interpreted

the term to mean an absolute prohibition against all fees, even those paid for extracurricular activities. Still other courts have interpreted "free" to mean only that basic classroom activities are free. Therefore, in order to avoid future uncertainty, Proposition 3 has been drafted to allow for the imposition of fees in the secondary schools, leaving open the possibility of levying fees for extracurricular activities.

Another significant change proposed involves public support of religious schools. The current Constitution prohibits any public support "in aid of" religious schools. This could be interpreted to prohibit even cooperative arrangements between public and religious schools (i.e., rental of facilities). In Proposition 3, the Constitutional Revision Commission recommends that only "direct support" of religious schools be prohibited. This would allow for such cooperative arrangements while still prohibiting funding of religious schools with tax dollars.

For further information on the ballot issues or on the Utah Constitutional Revision Commission, contact Robin L. Riggs, Executive Director—436 State Capitol, Salt Lake City, Utah 84144 (533-5481).

### FROM THE EDITORS' DESK

The Barrister is published by the Young Lawyers Section of the Utah State Bar. Contributions to the Barrister are invited, but the editors reserve the right to select the material to be published. Deadlines for submitting material are October 31, 1986; March 27, 1987; and June 12, 1987. Please submit materials to the Editor-in-Chief, Guy P. Kroesche, Van Cott, Bagley, Cornwall & McCarthy, Box 45340, Salt Lake City, Utah 84145.

## YOUNG LAWYERS SECTION UTAH STATE BAR (1986-1987)

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## President's Report

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programs and community services provided by the Section during the past year. Both awards were granted in Division I-C, which considers the programs of all ABA young lawyer affiliates in the United States having less than 3,000 members.

The Section received the First Place Award in the Single Project Category for its Lawyers Compensation Survey Project. This project has been a mainstay of the Section for a number of years. Greg Skordas of the Executive Council has directed this project over the past several years and will continue to chair this project this year. Greg deserves a great deal of credit for this award. Last February at the mid-year meeting of the ABA in Baltimore, he presented a workshop on how to structure a compensation survey. In connection with Greg's presentation, a pamphlet was prepared which has been distributed among young lawyers sections nationwide, and now serves as a model for similar projects in other states.

The Section also received the First Place Award in the "Comprehensive" category, which covers all of the projects undertaken by the Section during the 1985-1986 year. These include the Meet-A-Lawyer Project, the Library Lecture Series, the presentation of the Liberty Bell Award, the Sub-for-Santa Project, the Blood Donor Drive, the Child Advocacy Project, the High School Speakers Bureau, the Mock Trial Competition, the Bridge-the-Gap Project, the Brown Bag Lecture Series, the preparation of a Long-Range Plan for the Section, the Lawyers Compensation Survey, the By-Laws Revision Project, the Outstanding Young Lawyer Award, the *Barrister*, and the Rocky Mountain Outreach Project.

I was greatly honored to receive these awards on behalf of the Utah Young Lawyers Section, and specifically on behalf of the 1985-1986 Executive Council and all of you who served on committees and volunteered your time to improve your profession and your community. These awards give our

Section substantial national recognition with the ABA Young Lawyers Division, and they demonstrate the commitment and dedication of the young lawyers in this state to important concerns which go beyond the almighty billable hour. I know of no other profession in the State of Utah, whether it be medicine, accounting, architecture, or any other, in which the young professionals are engaged in such a variety of volunteer service to their profession and to their community.

If you are one of the many young lawyers who has been involved during the past year, congratulations. If not, now is a great time to become involved. Your involvement does not need to take a lot of time. For example, you could volunteer a couple of hours a year or a couple of hours a month to speak to high school groups, senior citizens groups, or other audiences about basic legal topics. Or, you could volunteer some time to judge a mock trial competition, to work on a Sub-for-Santa Project, to help with a blood drive, to author an article for the *Barrister*, or to do any one of a hundred other things. The main thing is, GET INVOLVED! Believe me, your involvement will make you feel good about yourself and will give you even greater pride in being a lawyer.

In closing, just a word about this edition of the *Barrister*. It has a new look and some new contents to better serve you and to reflect the exciting vitality and growth of the Young Lawyers Section over the past couple of years. This is your publication, and I hope you are as happy with its improved quality as I am. We have endeavored to make the *Barrister* more professional, more readable, more informative, and more helpful in improving your legal skills and knowledge. If you have any suggestions for its further improvement, please feel free to contact me or Guy Kroesche, Editor-in-Chief of the *Barrister*. Also, if you are not involved with the Section and you would like to become involved, please contact me or any other member of the Executive Council (listed on page 6 of this *Barrister*) regarding your area of interest.

Paul M. Durham  
President  
Young Lawyers Section

## IN MEMORIAM

Fellow young lawyer Lawrence K. Hurless passed away May 2, 1986, as a result of heart failure following a determined battle with cardiomyopathy. Larry was admitted to the Utah State Bar in 1985 and worked for the law firm of Dart, Adamson & Parken. The officers and Executive Council of the Young Lawyers Section express their condolences to Larry's wife and family.

The Larry K. Hurless Foundation has been created to assist in the payment of Larry's medical expenses. All young lawyers are encouraged to contribute individually to that Foundation. You may send your contributions to the Larry K. Hurless Foundation, c/o Dart, Adamson & Parken, 310 South Main Street, #1330, Salt Lake City, Utah 84101.

Larry is remembered as a warm and witty human being. He was the chief architect of the Young Lawyers Section skit presented at the Utah State Bar Annual Meeting in Sun Valley in July 1986. Although he did not live to see the skit performed, his wife carried on as one of the actors in the skit.

The Young Lawyers Section skit was so well-received in Sun Valley that the Young Lawyers Section is presenting excerpts of it at the next Brown Bag, the date and time of which will be announced.



## Committee Reports

(continued from p. 4)

committee has participated in a Sub-for-Santa program and a blood drive. This year the committee plans to continue with these projects as well as continue with some new programs. New projects include a book drive for local libraries and a Legal Information Pamphlet on nonprofit legal agencies. The committee also plans to commence a program entitled "Not Just at Christmas," which will involve young lawyers working with homeless children.

The Child Advocacy Committee is a subcommittee of the Community Service Committee. This year the Child Advocacy Committee is commencing a new project which will make professionals available in the areas of child abuse, juvenile law and domestic law to speak to various community organizations.

If you would like to become involved in these projects, or for further information or new ideas for projects, please contact Kimberly K. Hornak at the Attorney General's Office, 533-7650.

## LAW RELATED EDUCATION COMMITTEE REPORT

The Chairman of the Law Related Education Committee is Asael T. Sorensen, Jr. The major objective of the Committee is to educate the general public about the law and the legal profession by supporting ongoing legal education programs. The Committee expects to provide young lawyers with opportunities to give service which will benefit the public and enhance the image of the legal profession.

A primary goal of the Committee is to update the Practical Law in Utah manual, a supplement to the nationwide Street Law course book in use by high schools in the state. The Utah supplement is published by the Utah State Office of Education and the young lawyers will volunteer their time in performing research and writing the update. Another goal of the Committee is to compile lists of volunteers for participation in the Mock Trial Program, Speakers Bureau, and other education-related projects. If you would like to participate as a speaker or a mock-trial judge, please contact Asael ("Ace") Sorensen, 533-7650.

## POST LAW SCHOOL/ PRE-ADMISSION PRACTICAL TRAINING COMMITTEE REPORT

The Senior Bar committee is reviewing possible alternative educational systems in an attempt to better prepare new members of the bar for the practical aspects of a law practice. The consensus of the committee is that new admittees to the bar lack many practical skills.

In an effort to correct these deficiencies, the committee is currently examining a system that combines a mandatory apprenticeship program with an expanded Bridge-the-Gap type of seminar program. The apprenticeship program would involve the placement of proposed bar admittees with judges and law firms for a specified period of time. The seminar component of the program would provide exposure to practical aspects of law that are usually not available in law schools. This program would be expanded both in terms of time and scope and would also be mandatory.

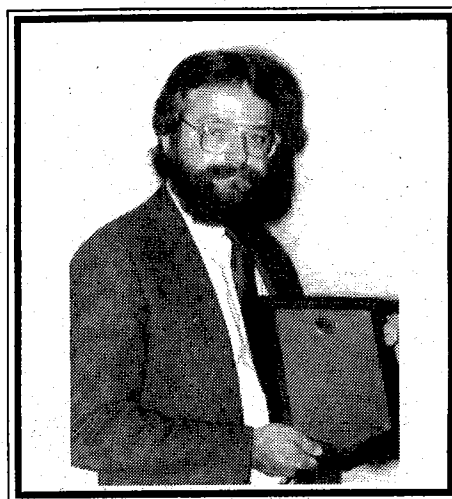
Hope Eccles, as the liaison for the Young Lawyers Section to the Senior Bar Committee, will keep the Section current on the proposals the committee is considering. In addition, all Section members that are on the committee will serve on a Section committee designed to better determine and present Section views to the committee as a whole. As the most recent graduates and bar admittees, young lawyers are in a unique position to contribute to this committee. For further details contact Ms. Eccles at 272-9651.

## LAW DAY COMMITTEE REPORT

The Young Lawyers Section Law Day Committee will organize several community education activities during Law Week, April 27 through May 2, 1987. Committee sponsored activities will include the Law Day Information Fair, sometimes referred to as Meet-A-Lawyer, held in the Crossroads Mall, and a five-part public library lecture series. The Information Fair and lecture series are

designed to increase the public's awareness and appreciation of their rights, obligations, and opportunities under the legal system; provide an opportunity for young lawyers to give meaningful service to the public and enhance the public image of the bar and the judiciary. Other means of reaching out to the public through television and radio are also being explored by the Committee.

Present members of the Committee are: Michael N. Zundel, Chairman; Harry Caston; Tad D. Draper; and John K. Johnson. Young lawyers interested in participating on the Committee or in Law Day activities should contact Mike Zundel at 532-7700.



Gregory K. Orme

## OUTSTANDING YOUNG LAWYER AWARD

Gregory K. Orme was honored in Sun Valley at the 56th Annual Meeting of the Utah State Bar by receiving The Outstanding Young Lawyer of the Year Award. Mr. Orme is a shareholder in the law firm of Van Cott, Bagley, Cornwall & McCarthy. He received his juris doctor degree from George Washington University.

The Young Lawyers Section presents the Outstanding Young Lawyer of the Year Award annually to a deserving young lawyer who has achieved a commendable degree of professional skill and integrity, and provided outstanding service to the community and the Utah State Bar.

## EDITORS' COLUMN

Over the past few years we have seen the *Barrister* improve in content and appearance. The improvements have enabled the *Barrister* to become a valuable informational source for the Utah young lawyer. In that vein, the *Barrister* has gained the respect of the senior members of the Utah State Bar. That respect, in part, has resulted in increased responsibility and participation in Bar activities for the Young Lawyers Section.

As this issue of the *Barrister* indicates, we are continuing to improve the content and appearance of the *Barrister*. Most noticeable, obviously, is the change in the appearance of the *Barrister*, a change intended to match the progress of the Young Lawyers Section. Needless to say, we hope the improved appearance of the *Barrister* will meet with your approval and catch the attention of, at least, the Utah legal and business communities.

As noted, the content of the *Barrister* has improved significantly over the past few years. We do not intend to lose any ground in that respect at this juncture. To that end, we have endeavored

to gather legal and related materials similar or better in substance to those in past issues of the *Barrister*. Further, we intend to make the *Barrister* more consistent, accessible and, perhaps, entertaining. The "table of contents," "calendar of events," "practice pointers," "commentary," and "committee reports" are intended to meet that goal. We expect to provide similar, if not identical, content categories in future issues of the *Barrister*. (Any changes in format and content are, of course, subject to the whim of the *Barrister* Editorial Committee and the veto of the President of the Young Lawyers Section.)

The *Barrister* provides young lawyers an opportunity to contribute to the growth and influence of the Utah State Bar as a whole. In the effort, we welcome your support, assistance and contribution. Upcoming issues of the *Barrister* are expected to be published as follows (Publication Date/Contribution Deadline):

1. November 17 (October 31);
2. February 2 (January 16);
3. April 13 (March 27); and
4. June 29 (June 12).

We have enjoyed working on this issue of the *Barrister*, even though gathering the necessary information and materials, not to mention bringing this issue to print, often seemed an insurmountable task. We hope that you appreciate the changes and, as we do, look forward to future issues of the *Barrister*. We (together with all of you) hope to explore, contribute and experiment with the Utah legal environment and growth. As indicated, new names, faces and concerns, as well as exciting opportunities, await us.

*Barrister* Editorial Committee  
Young Lawyers Section  
Utah State Bar

Many thanks to all who contributed to the publication of this first edition of our new *Barrister*. Only the concerted efforts of the *Barrister* Editorial Committee and outside contributors made this possible.

Guy P. Kroesche  
Editor-in-Chief

Young Lawyers Section of the Utah State Bar

# BARRISTER

SEPTEMBER/OCTOBER 1986

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