YOUNG LAWYERS SECTION OF THE UTAH STATE BAR

BARRISTER

October-December 1987

Judges and Journalists in Salt Lake City:

Project Shows Dialogue Can Improve Their Working Relationship

Randy L. Dryer and Scott M. Matheson Jr.***

Fifty-one federal and state judges (not including justices of the peace) preside in Salt Lake City. At the federal level, Salt Lake City is the site for a Tenth Circuit judge, four district court judges, two bankruptcy court judges, and two magistrates. The state judges sit on the Utah Supreme Court, the Utah Court of Appeals, the district court (general jurisdiction), the circuit court (limited jurisdiction), and the juvenile court. Two daily newspapers, two wire services, five television stations, and numerous radio outlets are located in Salt Lake City, and all cover the courts and legal issues. As such, isn't it about time that judges and journalists sit down and get better acquainted?

In our community, casual observation suggests that the relationship between the bench and press has often been adversarial. Moreover, press coverage of the courts has been relatively meager, because judges and journalists talk with each other so rarely. However, a few years ago a group of Salt Lake City judges and journalists participated in a private dinner for an evening of off-the-record discussion about judging and news reporting. The participants all were enthusiastic about the event, and left with a better understanding of what judges and journalists do and of their working relationships. In fact, the event was so successful that the Salt Lake County Bar Association decided to sponsor a series of dinners for all judges and journalists working in the Salt Lake City area. To this end, we recently coordinated a Salt Lake County Bar Association project suggesting that the time is now, because the news media is the critical link between the public and the judiciary.

A series of dinners involving small groups of these judges and journalists was organized during the first three months of 1987. The purpose of these gatherings was to foster better understanding between the bench and the press, particularly concerning their working relationship and how the public can be better informed about the legal system. Judges did not discuss matters pending before them, and all participants agreed to consider the conversations privileged. Seventeen dinners were held involving over 100 participants. All but two judges were able to attend.

Before the first dinner was scheduled, survey questionnaires were sent to judges and journalists in Salt Lake County to sample attitudes concerning news coverage of the legal system and the working relationship between judges and journalists. Of the 53 judges surveyed, 38 (72 percent) responded. Of the 83 journalists surveyed, 58 (70 percent) responded.

The dinners and surveys produced some interesting results. We would like to first report some of the survey results and then turn to our experiences at the dinners.

SURVEY RESULTS

The Need for Better Understanding

A basic premise underlying this project was that judges and journalists were uncertain about what each group does and

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how they should interact. Seventy-eight percent of the judges reported they did not have a clear understanding of how they should interact with the press. About half of the journalists said they also lacked such an understanding, though 84 percent of them had experience in covering the legal system. Sixty-eight percent of the judges and 73 percent of the journalists agreed that judges have little understanding about how journalists do their jobs. Similarly, 81 percent of the judges and 72 percent of the journalists agreed that journalists have little understanding about how judges do their jobs. Both judges (76 percent) and journalists (84 percent) agreed that journalists have a better understanding of the criminal process than the civil process.

Further, 50 percent of the judges and 64 percent of the journalists believed the media provides insufficient coverage of our legal system. Moreover, 90 percent of the judges and 81 percent of the journalists said that the judiciary is the least understood branch of government. However, only a minority of judge and journalist respondents blamed this lack of understanding on the media. In this connection, Ken Verdoia, Senior Producer for Public Affairs at public television station KUED, has observed that the survey confirms that the "majority of journalists are woefully unprepared about legal issues and the players. There is a critical need for greater understanding. We cannot treat the courts like a story (about a) fire or police activity."

Job Performance

A number of questions on the survey asked the judges and the journalists to evaluate themselves and each other. On media coverage of legal issues, the journalists generally gave the local media high marks for objectivity and fairness and below average marks for thoroughness. Likewise, the judges generally gave the media average ratings for objectivity and fairness and below average for thoroughness. Two-thirds of the judges were critical of the media's sensitivity to privacy interests and, interestingly enough, 76 percent of the journalists gave the media an average or below average rating on this issue. In this regard, Mr. Verdoia has suggested that "when it comes to the public's right to know versus the right to privacy, most journalists will give precendence to the former, and that isn't always correct."

On the competence of judges, 87 percent of the judges and 58 percent of the journalists ranked the judiciary as above average. Conversely, 78 percent of the journalists and 56 percent of the judges agreed that journalists are competent and professional in the way they cover the legal system. Jan Thompson, court reporter for the *Deseret News*, thinks these perceptions may be based on judge's lack of appreciation for what it takes to be an effective journalist and on journalists' lack of appreciation for how difficult it is to be a competent judge. As for the latter, "Journalists see just the tip of the iceberg in terms of what judges do," she said. Mr. Verdoia thinks the journalists were too generous in their self-assessment: We still have many miles to go before we can say the press is responsible in reporting about what is happening in America's courtrooms."

Judge-Journalist Working Relationship

How judges and journalists should interact was the major topic of discussion at the dinners, and the survey questionnaire attempted to address this issue. Only 13 percent of the judges responded that their experiences with the media have been negative ones. However, based on the foregoing, this may be the product of little contact with the press, because most journalists (77 percent) reported that judges are generally not available for comment or interviews before or after judicial proceedings. Most judges (71 percent) said that a judge should never grant an interview with the press or respond to press inquiries concerning a matter pending before that judge. Fifty-six percent of the journalists disagreed with this view. Obviously, varying understanding of the ethical and practical restraints on judges helps to explain these results.

Utah Supreme Court Justice Michael Zimmerman suggests another reason for the lack of unfavorable press/judicial interaction. Based on his experience at the dinners, he was struck with "the degree of deference and reverence that news reporters give judges." He thought this could be "counterproductive" and urged journalists "not to treat judges with such great reverence and occasionally introduce themselves and ask judges questions." Scott Daniels, Chief Judge of the Third District Court of Salt Lake County, has further observed that "journalists are frightened of judges and judges are frightened of journalists. Journalists seem afraid to call judges. However, if a journalist calls, I feel that I have to measure every word. Nonetheless, getting together and becoming better adquainted is very positive."

Journalists have their own perspective. About three-fourths of the journalists

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reported that they feel comfortable asking a judge to explain legal terms or theories, the basis of the court's ruling, or the significance of the court's ruling. Eighty-one percent of the journalists agreed that journalists would do a better job reporting on court proceedings if judges would be more inclined to explain what is going on, and 66 percent of the judges concurred in that view. *Salt Lake Tribune* reporter Paul Rolly explained that "judges I know personally will talk with me because they know and trust me. I've had problems with the ones I don't know. They are understandably concerned about prejudicing a case."

Specific Policy Issues

The survey results concerning a limited number of specific policy questions were that 80 percent of the judges favored the creation of a local press council where persons aggrieved by inaccurate or biased press reports could seek relief. Almost 50 percent of the journalists supported this proposal.

Forty-one percent of the judges favored expermimentation with television cameras in the trial courts. (In Utah, television cameras are only allowed in the Supreme Court on an experimental basis.) Ninety-three percent of the journalists supported this approach.

Almost half of the judges felt that the press should be restricted from conducting post-verdict interviews with jurors. Eighty-nine percent of the journalists opposed any such restricton.

Points of Disagreement

In addition to the varying responses mentioned above, the survey produced polar reaction on several matters. For example, 84 percent of the judges agreed and 67 percent of the journalists disagreed with the following statement: "If a news story can be reported in either a straightforward manner or a sensational manner, most journalists would choose the latter." Similarly, 55 percent of the judges agreed and 93 percent of the journalists disagreed with this statement: "Most journalists are less interested in reporting the truth than in reporting an interesting story." Finally, 84 percent of the judges agreed and 83 percent of the journalists disagreed that "the media poses a potentially powerful threat to the objectivity and fairness of the jury system."

THE DINNERS

The dinners were held in a private room in a local restaurant and each lasted at least three hours. The absence of judicial robes and reporter notepads seemed to encourage discussion on a variety of topics, such as access to judges for interviews, pretrial publicity, media evaluation of judges, competitive and deadline pressures on journalists, and ways to improve media coverage of the legal system. For the most part, the dinners were cordial, though, occasionally, frustrations were vented on both sides.

The dinners produced some valuable suggestions to improve relations between the bench and press and to improve media coverage of the legal system. Most dinner participants lamented reporters' insufficient knowledge about the law. In this connection, in response to a suggestion from Utah Supreme Court Justice Daniel Stewart, discussions already were underway between the Salt Lake County Bar and the State Court Administrator's Office to organize an annual "legal school" for journalists. Justice Stewart's idea is that judges and lawyers should lecture on court structure, procedure, legal terminology, and other legal issues to assist journalists in better reporting on the judicial system. Although clearly not a substitute for formal legal training, many reporters and editors have indicated that this program should improve media understanding and journalistic techniques in covering the courts. In addition, Justice Zimmerman suggested that the dinner program needs follow-up for any long-term benefits to accrue. Beyond the legal school, he supports further organized efforts to foster professional working relationships between judges and journalists.

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PRESIDENT'S REPORT

*Stuart W. Hinckley**

The Young Lawyers Section of the Utah State Bar continues to receive recognition for outstanding achievement. The Young Lawyer Division of the American Bar Association recently recognized the Section's accomplishments with a second place award for the overall activities of the Section, with a certificate of performance for the "Senior Citizen Legal Handbook" that the Section published, and a special recognition award for the improvements made to the *Barrister*.

This is the second consecutive year that the Section has been recognized by the Young Lawyers Division of the American Bar Association with awards of achievement. This continuing recognition illustrates the significant progress the Section has made under its recent past presidents—namely, Cecilia M. Espenoza, John A. Adams and Paul M. Durham. All of these past presidents are to be commended for developing the Section into an organization that effectively fulfills its two primary objectives of supporting its memebers in the practice of law and of delivering law related community service.

In addition to the awards of achievement the Young Lawyer Division of the American Bar Association has recognized the leadership skills of some of the Section's leaders. Recently, two of the Section's leaders participated as seminar leaders at Young Lawyers Division of the American Bar Association conferences. In addition, Guy P. Kroesche has been invited to attend the midyear meeting of the American Bar Association to instruct young lawyers from throughout the nation on how to publish a newsletter the quality of the *Barrister*. This invitation is a compliment to Guy and the past and present members of the *Barrister* Editorial Committee (Wayne D. Swan, David B. Thomas, Barbara K. Berrett, David R. Black, T. Patrick Casey, Susan Domm, William D. Holyoak, Cheryl Keith, Mark J. Morrise, and Sue Vogel) for upgrading the *Barrister* and continuing to publish a quality product.

This recognition illustrates the vitality of the Section, which depends primarily on your support for its success. I urge all young lawyers to participate in the Section's activities. To those who do, I can promise professional satisfaction.

**Mr. Hinckley is a 1983 graduate of the J. Reuben Clark Law School, Brigham Young University, and is Chief of the Human Resources Division of the Utah Attorney General's Office.*

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Several practical suggestions also were made at the dinners. For example, judges recommended that journalists should introduce themselves to judges, so that a professional working relationship can be established. On the other hand, journalists encouraged judges to advise the media when erroneous reporting on legal issues occurs, to improve journalists' legal understanding and to facilitate more accurate coverage in the future.

Perhaps the most important outcome of the dinners was almost unanimous recognition that, occasionally, it is worthwhile for judges and journalists to discuss their jobs with each other. In at least this regard, the dinners helped to demystify each group's respective work. Judges learned some of the constraints that affect journalists, and journalists gained greater appreciation for the demands on judges.

As Federal District Judge J. Thomas Greene put it, "I think it is very valuable in that we almost universally have spoken a different language to each other. Getting together to understand each other's point of view is very good." And as *Salt Lake Tribune* reporter Paul Rolly observed, "The dinners gave the judges an understanding that reporters are poeple they can work with. The dinners have increased familiarity between judges and journalists, and that alone will enhance communication."

**Randy L. Dryer is a partner in the Salt Lake City law firm of Parsons, Behle & Latimer and was the President of the Salt Lake County Bar Association for 1986-87.*

***Scott M. Matheson Jr. is Associate Professor of Law at the University of Utah and serves on the Executive Committee of the Salt Lake County Bar Association.*

ANNOUNCEMENTS AND EVENTS

YLS/Salt Lake Tribune Sub-for-Santa

"We will again this year remind the legal community of the needs of the disadvantaged during the holiday season. We need their help," said Brian M. Barnard in announcing the start of the annual Utah State Bar Young Lawyers Section and The *Salt Lake Tribune* "Sub-for-Santa" project. As a clearinghouse, the *Tribune* program matches those able to share with less fortunate families needing help at Christmas. The *Tribune's* program began 56 years ago to assure that needy children in Salt Lake City are not forgotten at Christmas. "This is an opportunity to help and to be directly involved with a family at home," Mr. Barnard, Young Lawyers Section Project Coordinator, stated. "We want the legal community to directly participate. Donating money helps, but nothing compares to seeing the face of a child at Christmas that would have gone without but for the Sub-for-Santa program," said Mr. Barnard. "Our world continues to have problems and people in our community suffer adversity. Humans have been unable to solve the world's problems. The need for this program reminds us of that. The legal community through this program helps with some very immediate and often temporary hardships of neighbors."

Members of the Utah Young Lawyers Section have been contacting Salt Lake City area law firms to answer any questions regarding the program and to encourage them to call the *Tribune* Sub-for-Santa program (237-2830) and sponsor one or more families. However, additional contributions are still needed in any amount and at any time during and after the Christmas season. "In 1986 the *Tribune* helped more than 900 families, and more than 2,000 children. With the help of the legal community and the Young Lawyers Section, we aim to help more families and children this year," said Mr. Barnard.

Monetary contributions payable to "Sub-for-Santa" should be sent (and any questions directed) to "Sub-for-Santa", Young Lawyers Section, Attn: Brian M. Barnard, 214 East 500 South, Salt Lake City, Utah 84111-3204 (328-9531).

LEGISLATIVE NEWS

Death, Taxes and Legislation

*Robin L. Riggs**

For most people, December is a time for celebrating and enjoying the festive holiday season with family and friends. For Utah legislators and their staff, however, December marks the beginning of their busiest time of the year.

Since the Utah Legislature begins its annual General Session on the second Monday in January, December is the time for ending interim committee studies, channeling research into proposals for legislation, and drafting bills. Just as death and taxes are inevitable, legislative drafters quickly realize that so, too, is legislation.

Since 1985, when the Utah Legislature began meeting in annual 45-day General Sessions (it used to meet in 60-day General Sessions in odd-numbered years and 20-day Budget Sessions in even-numbered years), legislators have asked for over 900 bills to be drafted each year. Almost 700 of those are actually filed and numbered as bills and resolutions. Over 60 percent of that total each year is drafted *after* December 1.

As of the end of November, 1987, about 440 bill requests have been placed for the 1988 General Session. This leaves about 500 left to draft, if 1987 is typical. All indications are that this year will not be appreciably different in the number of bills filed.

Of course, not all bills become law. Usually about 300 of the 900 requested actually pass. The following is a sampling of legislation being proposed for the 1988 General Session.

Commutation of Sentences: A proposal to change the Utah Constitution to remove the commutation powers from the Board of Pardons has already been reviewed and rejected by the Judiciary Interim Committee. However, the issue may resurface during the session. Any proposed change to the Utah Constitution must be approved by a two-thirds vote of the Legislature before it can be placed on the ballot.

Joint Custody: A bill will probably be introduced to legislatively recognize joint custody as an option of the court in appropriate divorce cases. This is an attempt to correct discrimination that may occur against fathers in custody cases.

Tort Damage Limitations: Legislation may be introduced to limit damage awards in tort actions and restrict the filing of tort claims.

Income Tax Reform: Amendments to the state income tax system may be proposed to complete the state reform begun in 1987 and to reflect changes enacted by the 1986 federal tax reform. The proposal to change Utah's income tax to a flat or single rate may be included as part of the continuing reform. However, legislators may feel less inclined to approve further tinkerings with the system in light of the proposed tax initiatives calling for significant tax rollback.

Frivolous Lawsuits: Legislation has already been introduced to require the court to award attorney fees to a prevailing party if the action was not brought or defended in good faith.

Trial by Jury in Paternity Actions: Legislation has already been introduced to provide a right to a jury trial in actions to determine the paternity of a child.

Once the General Session starts on January 11, 1988, these and other bills are thrown into the legislative hopper. No one can accurately predict which 300 will survive the political process, but if you want to see for yourself how it all works, visit the State Capitol in January and February. But don't come in March. The session will be over and some of us will be celebrating Christmas.

**Mr. Riggs is a 1982 graduate of the J. Reuben Clark Law School, Brigham Young University, and is Associate General Counsel for the Utah Legislature.*

YOUR BLOOD or YOUR MONEY!!

As part of its continuing community service efforts the **YOUNG LAWYERS SECTION** has agreed to co-sponsor an annual high school blood drive program with Intermountain Health Care in Salt Lake County.

The year-long contest between high school students will increase blood donations among the younger population and hopefully secure regular donors for the long-term future. The high school that donates the most blood receives a scholarship given, at the school's discretion, to a student who participated in the program.

The Young Lawyers Section has agreed to help fund the annual scholarship.

This is an opportunity for lawyers to serve the community and to increase the public's awareness that **LAWYERS CARE!**

Even if you haven't contributed blood in the Young Lawyers Section regular blood drives, you can now aid its blood drive programs through a small contribution to this scholarship fund. If every attorney in the state contributes **only one dollar,** an endowment can be established and the scholarship permanently funded! **JUST ONE DOLLAR!**

Please send your donation of **one dollar** ($1) to:

Young Lawyer Section—
I.H.C. Blood Drive Endowment
% BRIAN M. BARNARD, Chairman
214 East Fifth South
Salt Lake City, Utah 84111-3204

If you have questions or suggestions, please call Brian Barnard, Chairman, Blood Drive (328-9532).

WORTH NOTING

YLS RECEIVES 1986-87 SECOND PLACE AWARD OF ACHIEVEMENT FOR ITS COMPREHENSIVE PROJECT APPLICATION

The Awards and Achievement Committee of the Young Lawyer Division of the American Bar Association recently awarded the Utah State Bar Young Lawyers Section a Second Place Award for its Comprehensive Project Application. The National Awards Committee complimented Utah's Young Lawyer Section on its successful completion of numerous projects and its "excellent job of balancing projects providing service to the public and service to the bar." The Awards Committee encouraged the Utah Section to continue to expand and diversify its projects because "all appear to be good and needed projects."

The Young Lawyers Section congratulates all those who have contributed to the success of the Section's 1986-87 projects, and thanks you for your dedicated service to the public and the bar.

EDITOR'S COLUMN FOLLOW-UP

*Sue Vogel**

In the August-September 1987 issue of the *Barrister*, Sue Vogel reported, in the Editor's Column, an unimpressive turnout for the Tast Force on Gender and Justice's public hearing last July at the University of Utah. Subsequent to that initial hearing, the Task Force held a second hearing on September 16, 1987, at the Art Barn in Salt Lake City, Utah. The response was gratifying, with over 15 lawyers testifying about gender bias in the Utah court system.

Those who still refuse to acknowledge that gender bias exists in the Utah court system should take a look at the recent opinion of the Utah Court of Appeals (written by Judge Davidson) in *Marchant v. Marchant*, 66 Utah Adv. Rep. 45 (Sept. 18, 1987). In that case, the court reprimanded the Sixth District trial court (Judge Tibbs) for blaming a broken marriage upon the wife's taking a job outside the home and befriending a male colleague. The appeals

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CIVIL RIGHTS ASSISTANCE PROJECT

As you know, U.S. Magistrate Ronald Boyce regularly assigns pro bono civil rights cases on behalf of Utah prisoners to young lawyers. Often, such lawyers are unprepared for the vagaries of a civil rights case. As such, Mr. Chase Kimball has proposed to establish a limited library of books and forms, including sample pleadings, briefs, motions and discovery related materials, to assist young lawyers in their representation of Utah prisoners in civil rights cases. The library will become part of the federal courthouse library, which has donated shelf space for the project.

To assist in this effort, Mr. Kimball will require the support and contribution of Utah lawyers. Accordingly, any books, documents or other materials relevant to civil rights claims, as well as a small filing cabinet to hold the sample pleadings and other documents, are needed to complete the library.

For information generally or regarding donations, please contact Mr. Chase Kimball at 566-4000 or 485-9060.

Follow-Up

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court further criticized the court's attempts to justify the husband's physical abuse of the wife. With respect to the trial court's findings supporting its award of custody to the father, the court of appeals found them "flavored with bias against divorced women, an urban environment, and women who pursue other than the traditional role of homemaker."

Only when instances of gender bias like this come to the attention of the rest of the judiciary, the Bar and the public, can the education process begin to exorcise the attitudes that cause and foster gender bias. There should be no room in our judicial system for judges and others who do not believe that the fundamentals of equality apply uniformly to people of different races, religions or gender, or to people who merely choose to live their lives differently than others might expect.

**Ms. Vogel is a 1983 graduate of Hastings Law School, is associated with Jones, Waldo, Holbrook & McDonough, and is an Associate Editor of the* Barrister.

SECOND ANNUAL FIRM COMPOSITION SURVEY

For the second year the *Barrister* staff has compiled information concerning law firms that have 20 or more lawyers in Utah. The totals are based on entries in telephone directories and conversations with lawyers at each firm. Last year's numbers are included in parentheses for comparison.

	Partners/ Shareholders	Associates	Of Counsel	Total	
1. Van Cott, Bagley, Cornwall & McCarthy (1)	46	28	7	81 (78)	57
2. Jones, Waldo, Holbrook & McDonough (3)	33	28	4	65 (58)	51
3. Ray, Quinney & Nebeker (2)	38	21	2	61 (60)	62
4. Snow, Christensen & Martineau (5)	37	19	2	58 (52)	64
5. Parsons, Behle & Latimer (4)	31	19	2	52 (54)	60
6. Callister, Duncan & Nebeker (7)	24	21	3	48 (41)	50
7. Kirton, McConkie & Bushnell (6)	38	8	2	48 (43)	79
8. Watkiss & Campbell (tied for 8)	26	16	3	45 (34)	57
9. Kimball, Parr, Crockett & Waddoups (tied for 8)	21	19	2	42 (32)	50
10. Prince, Yeates & Geldzahler (tied for 8)	22	14	1	36 (34)	61
11. Fabian & Clendenin (tied for 10)	21	13	0	34 (32)	62
12. Leboeuf, Lamb, Leiby & MacRae (14)	7	22	0	29 (24)	24
13. Nielsen & Senior (12)	18	5	4	27 (29)	67
14. Richards, Brandt, Miller & Nelson (15)	14	9	4	24 (22)	58
15. Hansen & Anderson (tied for 16)	10	10	1	22 (20)	45
16. Suitter, Axland, Armstrong & Hanson (tied for 16)	15	5	0	20 (20)	75
17. Christensen, Jensen & Powell (not on last year's list)	12	7	1	20	60

1987 LAWYER COMPENSATION SURVEY

Please take a few minutes to complete the following anonymous questionnaire, to assist in providing an accurate Lawyer Compensation Survey for 1987. When completed, please tear the questionnaire from the *Barrister*, fold, staple and mail it; the address is provided on the reverse side of this questionnaire. The results will be published in the April edition of the *Barrister*, which is mailed to all members of the Utah State Bar.

AGE _____ SEX _____ RACE _____ YEARS OF PRACTICE _____

TYPE OF PRACTICE:

SELF-EMPLOYED _____
MED. FIRM (15-35 attys) _____
CORPORATE _____
OTHER (Explain) _____

SMALL FIRM (less than 15 attys) _____
LARGE FIRM (more than 35 attys) _____
GOVERNMENT (include organizations that receive government funds _____

PRIMARY AREAS OF PRACTICE (SPECIALTY):
1. _____ 2. _____

HOURS WORKED PER WEEK _____ HOURS BILLED PER WEEK _____
HOURLY BILLABLE RATE _____

GROSS PAY FOR 1987 _____ (INCLUDE AUTO ALLOWANCE, IF ANY, BUT NOT BONUS).
SELF-EMPLOYED ATTORNEYS SHOULD DEDUCT FROM THEIR GROSS PAY ANY AMOUNT THEY CONTRIBUTE TO PROVIDE BENEFITS FOR THEMSELVES, SUCH AS HEALTH INSURANCE.

BONUS FOR 1987 _____

BENEFITS PROVIDED BY EMPLOYER: INDICATE "YES" IF EMPLOYER PAYS FOR ANY PORTION OF THE BENEFITS. SELF-EMPLOYED ATTORNEYS SHOULD INDICATE IF THEY PROVIDE THE BENEFIT.

	YES	NO		YES	NO
HEALTH:	_____	_____	DISABILITY:	_____	_____
DENTAL:	_____	_____	BAR DUES:	_____	_____
LIFE:	_____	_____	CLE CONFERENCES:	_____	_____
LIABILITY:	_____	_____			

SELF-EMPLOYED ATTORNEYS:
GROSS ANNUAL RECEIVABLES ACTUALLY COLLECTED _____
ANNUAL OVERHEAD EXPENSE (STAFF, RENT, ETC.) _____

ATTORNEYS EMPLOYED WITH FIRMS:
AVERAGE ANNUAL HOURS BILLED BY INDIVIDUAL ATTORNEYS AT YOUR LEVEL IN YOUR FIRM _____
NUMBER OF PRO BONO HOURS ALLOWED TO BE CREDITED TOWARD BILLABLE HOURS _____

COMMENTS: _____

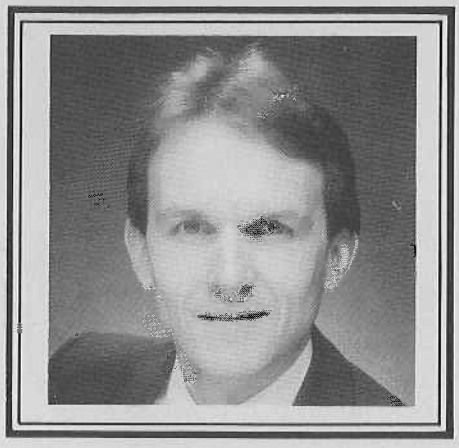
(FOLD HERE)

Place
Stamp
Here

Utah State Bar
425 East 100 South
Salt Lake City, Utah 84111

(FOLD HERE)

COMMENTARY



THE LAW OF ARTIFICIAL LIMBS AND STANDING TO SUE

Loren D. Israelson

The following article first appeared in the Journal of Tortious Living, a not-so-scholarly journal that once circulated within the walls of the J. Reuben Clark School of Law, Brigham Young University. The Journal has kindly consented for the Barrister *to reprint this pioneering piece of legal chicanery.*

In *Hines v. Morrow*, 236 S.W. 183 (1921), the law of standing to sue took on new meaning. Despite the fact that the plaintiff didn't have a leg to stand on, he was granted standing to sue. The relevant portion of the record is quoted herein:

> We pulled around and when we got in front of Womble's car he took one end of the rop and tied it into the front spring of his car. . . The foot that slipped in the hole was my right foot, the artificial foot. Well, I started to fall, and by that time the truck was moving, and I grabbed the back end of the truck, and it pulled up and in some way the rop wrapped around my leg and crushed it and broke it off. . . I grabbed the back end of the truck, and by that means it pulled my foot out and the rope caught the other one and tore it off.

The dispositive factor in *Hines* was the weighty evidence showing how the plaintiff had been roped into helping free the automobile. Although sounding in tort for damages, relief was granted as a matter of equity.

At even earlier junctures than *Hines*, courts were faced with the difficult if not volatile issue of whether to allow a plaintiff to sue despite an obvious lack of standing. The most famous and illustrative case on point, *Ahab v. Dick*, Ct. of Exchequer, Spring Assized (1824), denied the plaintiff, a sea captain, damages for tortious mayhem,[1] where it appeared on the face of the complaint that the plaintiff lacked standing. The court was apparently not impressed by the plaintiff's showing that his wooden leg was genuine Brazilian oak with a 10-year warranty.[2] The bench acknowledged the validity of the plaintiff's claim but adhered to the strict common law doctrine—*de sitimus non curat lex* (the law does not concern itself with sitters).[3] By applying this rule in a rather wooden fashion, the plaintiff was left to his own devices.

Following this questionable precedent, later decisions expanded the doctrine to include wheelchairs, crutches, walkers, and in one jurisdiction, even elevator shoes. *See Otis v. Red Wing*, 264 N.E. 419 (1901). However, the same court later overruled *Otis* in *P.F. Flyer v. Schlick*, 305 N.E. 109 (1910), finding that where shoe size is the sole issue, the law will favor the party seeking standing.

The large class of persons affected by such restrictive rules have not taken this lying down. Innovative plaintiffs have effectively circumvented this problem by emphasizing the liberal construction of the Federal Rules of Civil Procedure. Applying Rule 19(a)(2)(i),[4] a party lacking standing may effect a joinder with an unencumbered party where feasible, thus meeting the threshold requirements to sue in federal court. Essentially, this created a mere stand-in-third party, but to date the federal courts ahve adopted Professor Moore's standard[5] of review and have allowed such joinder.

In an unusual medical malpractice case, *Garbanzo v. Nelson*, 308 R.I. Reports 238 (1951), the plaintiff's knees were inadvertently locked into a sitting position during a routne torn ligament operation. Relying on a *res ipsa loquitur* theory, the plaintiff sued the team of doctors as "joint" tortfeasors.

The courts are still divided on this important issue, and the law is still developing in many jurisdictions. However, we, as lawyers, cannot sit around waiting for this issue to resolve itself. Rather, we should periodically examine the latest decisions and keep our foot in the door on the law of artificial limbs and standing to sue.

[1]See, e.g., A Historical View of Common Law Remedies for Tortious Harpooning and Related Injuries, 41 Naval Academy L. Rev. 145 (1963). See also In re Long John Silver, 82 eng. Reports 21, Q. B. (1647).

[2]Note the development in the law of mechanical limbs in Rust, Splinters and Other Factors Affecting Warrantability of Artificial Limbs, 2 Utah L. Rev. 324 (1968)

[3]Note that the later doctrine of *de minimum non curat lex* (the law does not concern itself with trifles) is merely a cheap imitation of this original doctrine.

[4]For a complete and incredibly boring analysis of the Federal Rules of Civil Procedure, see, generally, WRIGHT, MILLER & ALLEN, What the Federal Rules Mean to Me, Journal of Civil Drivel (Oct. 1972) (first and only issue).

[5]Professor Moore is reported to have said that under notice pleading theory, "A party can puke on a piece of paper and call it a legitimate pleading." This would seem to be a controlling principle here.

EDITOR'S COLUMN

*Cheryl Keith**

"'Priest' at aircrash site probably a solicitor for an attorney." "Attorneys rush to foreign disaster area to engage business." "Fewer baby doctors due to soaring malpractice rates caused by increased litigation." These are a few of the headlines that have graced literary (and not so literary) publications in recent years and exemplify that attorneys do not often receive "good press" in the media. Rarely can one find anything written in praise of attorneys, while perceived abuses by attorneys generally are prominently displayed. Moreover, some have become wealthy telling others how to avoid lawyers. In fact, a perusal through any general bookstore reveals titles that suggest attorneys are no better than insurance salesmen, car dealers or the AIDS virus. And, for those of us new to the profession and struggling to make a worthwhile and significant contribution, such accusations seem unwarranted and, in

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most cases, unfair.

It would probably also be unfair to accuse the media generally of being biased against attorneys. Attorneys acknowledge that the nature of their practice lends itself to criticism and good "bad" news. Attorneys work within a system that allows tactics that often seem outrageous to the general public. For example: Utahns in favor of capital punishment were probably angry at the lawyers who participated in Pierre Dale Selby's extended (13-year) appeal process and the system that supported the effort; Oliver North's attorney was the target of significant criticism for directing his client to refuse to testify without some form of prosecutional immunity; and some even blamed the National Football League strike on attorneys. In high profile cases, the media often focuses almost as much attention on the attorneys involved as on the principal players. Further, the attorneys frequently are portrayed as the real villains.

The latest contribution to the sport of "lawyer bashing" is *The Terrible Truth About Lawyers* by Mark McCormack (a non-practicing attorney now in business). McCormack portrays attorneys as self-interested individuals who benefit at the expense of their clients. Among the "terrible truths" presented in the book, McCormack asserts that attorneys breed a need instead of feed a need, charge too much, take too much time to do anything and, along the way, overly complicate matters. He also claims that most attorneys only do "high-level research and make-work paper-shuffling." He posits that the longer a legal dispute or matter continues, the less it is worth, except to the attorneys involved. Consequently, he suggests ways to possibly avoid attorneys or, if that is not possible, ways to make them more accountable to their clients.

Perhaps some attorneys are, as McCormack apparently believes, oddly proud of being generally disliked and avoided. Perhaps some attorneys encourage litigation when the best interest of the client and reasoned judgement require a settlement. Perhaps some lawyers have established creative billing techniques, *i.e.*, two or more clients are charged for a single piece of work or clients are billed for services that were not actually rendered. Perhaps some attorneys use dubious methods to solicit business. However, to suggest thereby that the legal profession as a whole is untrustworthy and wasteful is unfortunate. As in any profession, there are always the few that give a bad name to the many. The hope is that attorney abuses are not as widespread as suggested by McCormack.

Attorneys—young, old and prospective—have heard the criticism many times. Such criticism is unlikely to stop. Yet, whether due to inertia, finances, intellectual satisfaction, social pressures, political ambitions, choice (personal or otherwise), or desire to change or improve the legal system and the reputation of lawyers, the ranks of attorneys continue to swell. And, as the number of attorneys increases, a corresponding increase in "lawyer bashing" is expected. However, if attorneys are reminded to (and do) make efforts to be honest, effective and efficient in service to their clients, the public perception of the legal profession may improve. In this effort, attorneys should remember that most attorneys learn by example and experience and that the actions of training attorneys carry great weight. As such, attorneys should act in a manner that serves the best interests of the client, the legal profession and the community.

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Young Lawyers Section of the Utah State Bar

BARRISTER

October-December 1987