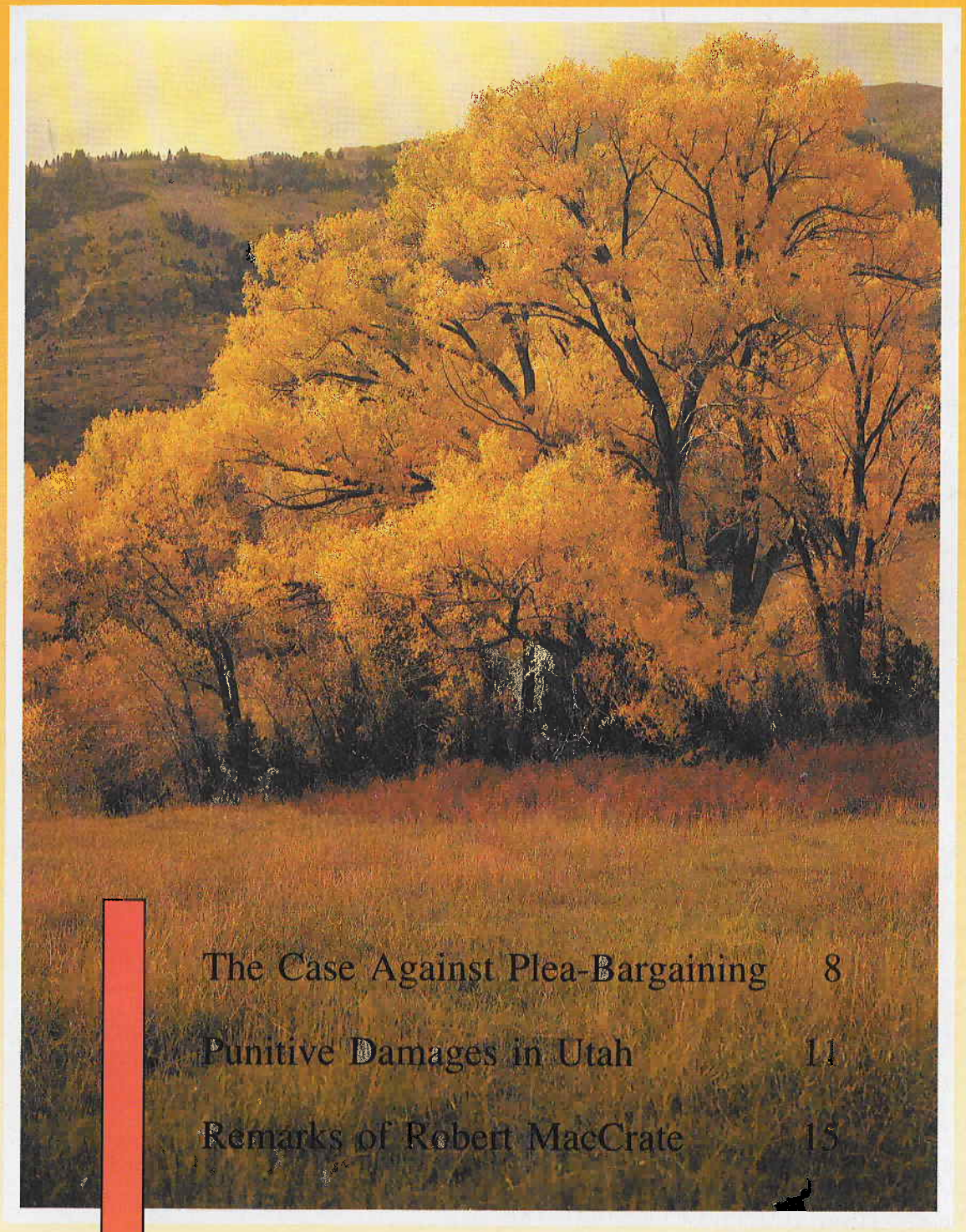
UTAH BAR JOURNAL

Vol. 1, No. 3 November 1988



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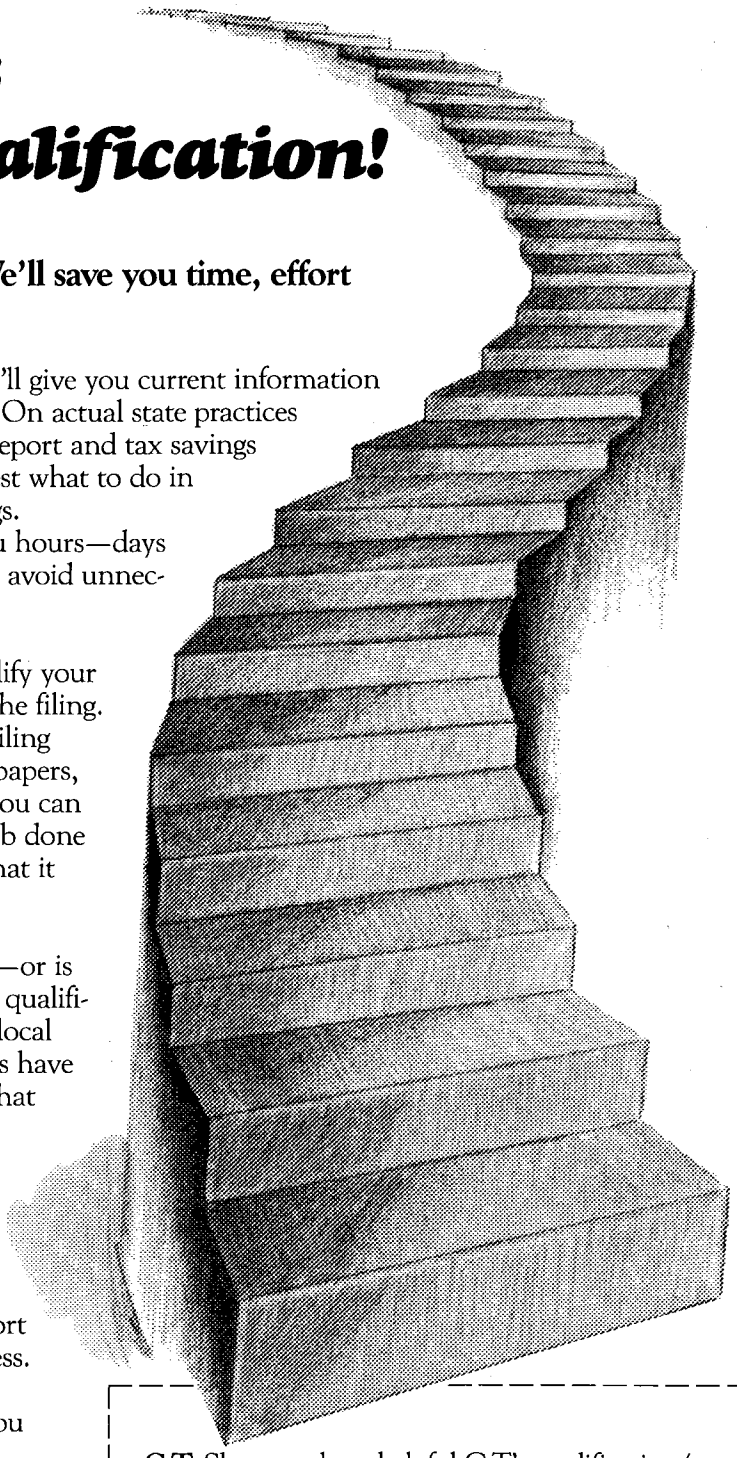

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Cover: "Autumn Cottonwoods," Joe's Valley in Manti-LaSal National Forest, Utah, by Chris P. Wangsgard, a partner in the firm of VanCott, Bagley, Cornwall & McCarthy.

The Utah Bar Journal is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $20; Single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

President, Executive Director and
Utah Bar Journal Editor

Re: New Law and Justice Center & **Utah Bar Journal**.

Gentlemen:

With completion of the new Law and Justice Center and publication of the new **Utah Bar Journal**, our bar has finally become one of the progressive bar associations in this country.

I commend you and everyone involved for two jobs very well done.

Very truly yours,

George M. McCune

Editor:

What's the problem with the disciplinary system of the Utah State Bar?

Why have there been four (4) different Bar Counsels to handle discipline during 1986-1988? Such a turnover seems to indicate a serious malfunction.

Why did Jo Carol Nesset-Sale recently resign?

Utah's attorneys are entitled to a vigorous and professional disciplinary system. The public will allow attorneys to be self-regulating only if the Utah State Bar does a strong credible job.

The membership is entitled to a complete and detailed report as to the status of Bar Counsel and the status of the disciplinary system. I'm tired of being in the dark.

C. Dane Nolan
Attorney at Law

Editor:

I am disturbed that the Utah Board of Bar Commissioners voted to join as *amicus* on behalf of the Wisconsin Bar Association in the appeal of *Levine v. Wisconsin State Bar*, in which the federal trial court found the concept of an integrated bar unconstitutional as a violation of an attorney's first amendment right not to associate.

I, for one, am uncomfortable with mandatory membership in an integrated bar, especially where the Bar takes political and ideological positions contrary to the feelings of the majority of its involuntary members. I value my membership in the Bar, but I wish it were voluntary.

Sincerely,

Bradley H. Parker
Attorney at Law

Re: Utah Bar Journal

Editor:

I received my copy of the first, all-new *Utah Bar Journal* this week. I was very pleased with the quality of the publication, both in terms of content and appearance. I thought the balance of Bar news, case summaries, and topical articles was about right. The articles were timely and well-written.

I know how much work goes into a publication of that caliber. Congratulations on an excellent first issue.

Very truly yours,

Judge Gregory K. Orme
Utah Court of Appeals

Continued publication of the Utah Bar Journal *at the present quality, frequency and size (number of sections, departments and articles) will depend upon maintaining the current level of revenues from advertising. Continuing this level logically will depend upon the resulting patronage given to the advertisers. Accordingly, the Bar Journal Committee and Editorial Board strongly solicit and encourage your support of the advertisers and their products and services, especially at this nascent stage of the* Bar Journal. *Any commendation or expression of approbation you could convey to advertisers would ultimately benefit the maintenance of a quality publication.*

Editor

$.25 a Day—Can You Afford It?

This message is directed only to those who have not contributed to the Utah Law and Justice Center. If you have contributed, feel free to turn the page and read something else. If you haven't given, the following facts and figures may just convince you that a contribution would be in order. So, please, read on!

Five years ago, under the leadership of Stephen Anderson, your Bar Commission decided to undertake a rather large and novel project—a project designed to serve Utah lawyers and judges and Utah citizens; a project which was the first of its kind in the nation; a project aimed at letting the public know that Utah lawyers and judges are committed to improving our system of justice and providing new avenues for citizens to more speedily and economically resolve disputes. A great number of Utah lawyers have given their own hard-earned dollars to support that project and construct a facility which would house programs to simplify the resolution of disputes between Utah citizens.

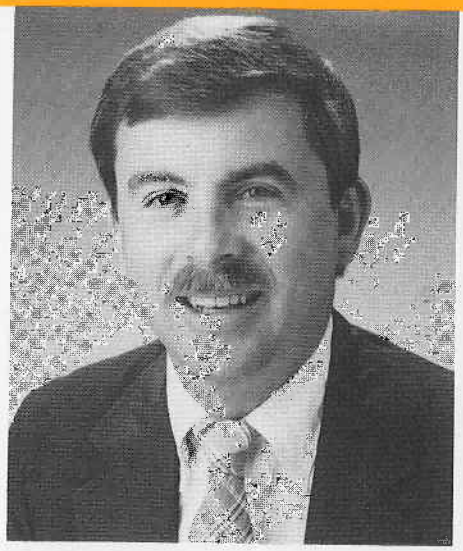
Five years ago, that project was a dream. Today, it is a reality. It exists and is operating because more than 1,200 of our members reached into their pockets and gave dollars to get the project under way and completed. Take a minute and consider who has given:

Total cost of Utah Law and Justice Center	$3,200,000
Private Contributions	750,000+
The Eccles Foundation	
The Michaels Foundation	
Mr. O.C. Tanner	
The Dumpke Foundation	
Contributions from Utah Lawyers and Judges	1,150,000
Sale Proceeds of 425 E. 100 S. Bar Building	237,000
Bar Reserves	250,000+
Loan for Balance	800,000

The $800,000 would not have to be borrowed had the lawyers who have not yet given each pledged the token sum of $.25 a day for the next three years. Think of it—a $3.2 million project totally paid for with only that little additional commitment from the members of our Association who have yet to give.

Twenty-five cents a day from our remaining lawyers would not only pay off the loan, but would provide extra monies to further fund programs which call the center home. It also would have the effect of eliminating payments to service the debt, thereby providing additional funds which could be used to expand and improve services and programs which benefit Utah lawyers and judges, as well as other Utah citizens.

As I was writing this message, I started to think what $.25 a day may mean to each of us in terms of financial sacrifice.



Kent Kasting

Consider the following. $.25 is:

- ½ the cost of a newspaper (.50)
- ½ the cost of a soft drink (.50)
- ⅓ the cost of a cup of coffee (.75)
- ⅚ the cost of a doughnut (.30)
- 1/10 the cost of a hamburger and fries (2.50)
- ½ the cost of a pack of gum (.50)
- ½ the cost of a bus ride (.50)
- 30 minutes at a Salt Lake City parking meter (.25)

I think if we're honest with ourselves, $.25 a day for three years doesn't amount to very much at all, and that doesn't even take into account the tax benefits you get from any contribution made.

As I said earlier, this message is directed only to those Utah lawyers and judges who haven't made a pledge to the Utah Law and Justice Center. My request is that you consider giving at least $.25 a day for the next three years—that's only $91.25 per year, or a little over $7.00 per month.

The readers of this message, I believe, will fall into three categories:

1. Those who have, over the past five years, always had the good intention of making a contribution and have just not gotten around to it.
2. Those lawyers who have been admitted to the Bar during the last five years, and simply have not been asked to give.
3. Those who have questioned the merits of the project, thinking it either wouldn't get off the ground or, if it did, it would serve no useful purpose.

To those in the first category, let me just remind you that your financial support is needed and you would do a service to the public, the courts and the Bar if you were to take a moment and fill out a pledge and send it to the center at 645 S. 200 E., Salt Lake City, UT 84111-3834. Remember, $.25 a day is not very much any way you "cut it."

To those lawyers in practice under five years who haven't been asked to give, let me be the first to make the request of you. As I said, this project is the first of its kind in the nation. It's designed to explore and implement forms of Alternative Dispute Resolution (ADR) and it is directly aligned with and related to our ethical commitment to make justice available to all citizens and assist in striving to achieve a more fair, orderly, and just society. Please demonstrate your commitment to these goals by also filling out a pledge card.

To those disbelievers who fall into the third category, I can only tell you that your doubts have been proven wrong. We now have a Law and Justice Center that is in full operation. It's being used by lawyers and judges and members of the public on a daily basis. Its Citizens' Policy and Programs Advisory Board is hard at work making plans and recommendations for the center's future programs and projects. National authorities on Alternative Dispute Resolution (ADR) are astounded that a Bar the size of ours could successfully complete a project of such magnitude. If you don't believe me, take a minute and go to the center and ask for a tour. I'm certain if you do, you'll like what you see and you'll want to be able to say that you are a part of and involved in the Utah Law and Justice Center.

On the chance that some of our members who have given dollars to the center did not take advantage of my suggestion at the beginning of this message that they need not read on, let me simply say thanks from me, from Bar Staff and from members of the Commission and the Law and Justice Center Committee for your support and willingness to see the project through to completion.

Finally, to all Utah lawyers and judges, I invite you to use the center. It was conceived and designed to meet your needs, as well as to serve the citizens of Utah, and it is there for you to use.

Thanks for your continued interest and support. Utah has a Bar Association of which each of its members can indeed be proud.

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In consideration of similar pledges by other members of the Bar, I pledge the sum of $ _____.

Which I will pay as follows: (1) Full payment enclosed in the amount of $ _____

(2) In annual installments due on or before October 1:

1989 $ _____ 1990 $ _____

1991 $ _____ 1992 $ _____

☐ Check enclosed

☐ Credit Card Amount $ _____

MasterCard # _____

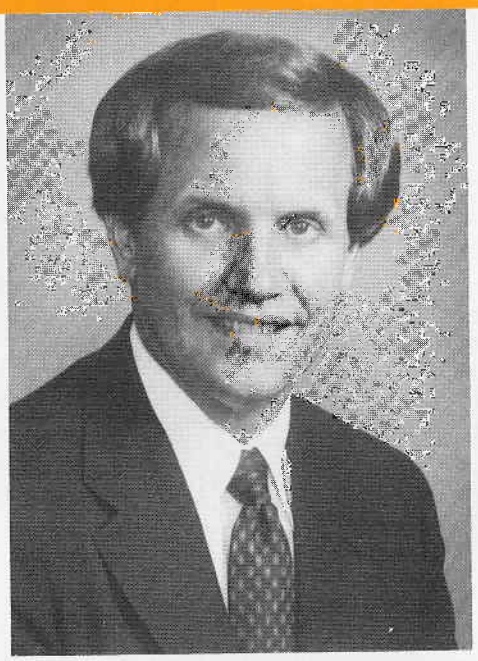
Expires _____

VISA # _____

Expires _____

SIGNATURE _____

Please complete, clip and mail this card with your pledge to the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, UT 84111. Telephone (801) 531-9077.



Alternative Dispute Resolution (ADR)

With the dedication of the Utah Law and Justice Center on September 7, 1988, a new era was ushered into Utah and one which will undoubtedly affect lawyers for many years to come. In 1983, the then president of the Utah State Bar, Stephen H. Anderson, had the foresight to not only find a way to fund a new home for the Utah State Bar, but to also construct a facility for Alternative Dispute Resolution (ADR). With the building now operational, it has surprised me, as well as many other fellow lawyers, to discover the many opportunities available to resolve disputes short of litigation. It now appears that Utah will serve as a model state for the implementation of ADR, and therefore, a brief background as to what has occurred to date seems appropriate.

In December 1986, the Utah Judicial Council appointed a task force on Alternative Dispute Resolution to assess the desirability of establishing ADR programs in Utah. That committee submitted a draft report and recommendation in March 1988 and concluded that the development and implementation of ADR techniques should not be justified as an alternative to an ailing system of justice but rather that ADR remedies must include techniques which would strengthen the system and concluded that ADR could be an important tool in our system of justice. Because ADR is relatively new to most Utah lawyers, that commission addressed existing court programs, government agency programs, publicly funded programs and private programs and identified the following:

A. *Court Annexed ADR Programs:*
   1. Domestic Relations Commissioners.
   2. Juvenile Court Commissioners.
   3. Bail Commissioners.
   4. Traffic Referees.
   5. Mental Health Commissioners.
   6. Small Claims Court.
   7. Divorce Mediation.
   8. Diversion of Juvenile Court Status Offenders.

B. *State Administered ADR Programs:*
   1. Department of Business Regulations Pre-Litigation Medical Malpractice Panel.
   2. Department of Business Regulations Consumer Protection Agency.
   3. Industrial Commission of Utah.

C. *Other Publicly Funded ADR Programs:*
   1. Utah Legal Services, Inc.
   2. Community Counseling Center.

D. *Private ADR Programs:*
   1. American Arbitration Association.
   2. Better Business Bureau.
   3. Western Arbitration Association.

This Committee also addressed a variety of options for use by judges, lawyers and litigants in resolving disputes that frequently result in civil litigation. Among those discussed were pre-trial and settlement conferences that are familiar to most Utah lawyers. It also identified a somewhat new concept titled "Summary Jury Trial and Mini Trial Procedure" which utilizes ADR processes and will undoubtedly be implemented more in the near future. The Committee also addressed domestic relations mediation, neighborhood dispute resolution programs, and Juvenile Court diversion programs.

After having identified the existing programs available, or lack thereof, there arose a need to identify how to best implement existing programs as well as anticipated programs and to how best utilize the UCLJ building and the staff. In July 1988, Supreme Court Justice Michael D. Zimmerman and University of Utah Professor of Law, John K. Morris, appeared before the Utah Bar Commission to submit a report of the Utah Law and Justice Center Program Development Committee titled "The Mission of the Utah Law and Justice Center." That Committee emphasises that the Utah Law and Justice Center is an independent non-profit corporation, with the building itself standing as a commitment by the lawyers of Utah to public service. This Com-

mittee studied various programs that utilized the ADR approach and made certain recommendations in which the Bar and the UCLJ can best assist the general public, recognizing the need to benefit the entire community. That report made the following recommendations:

1. That a full-time salaried staff be implemented, separate and distinct from the staff of the Utah State Bar.
2. That a substantial community involvement including many non-lawyers was necessary. To accomplish that end, a permanent planning committee was recommended with significant community representation and appropriate ethnic diversity.
3. That a screening and referral system be adopted. This recommendation has now been implemented in the form of a "Tuesday Night Bar" which allows the public to consult with volunteer members of the Bar to determine if they in fact have a legal problem and, if they do, to direct them to the appropriate place to seek assistance.
4. That because lawyers in particular and the public in general have very little training in mediation techniques (as compared to binding arbitration), mediation training be implemented. To initially address that recommendation, a one-day seminar will be held on November 3, 1988, at the UCLJ on ADR and it appears that at least 250 persons will be in attendance.
5. That in addition to mediation training, the UCLJ also implement negotiation training to be taught as a basic principal, in a similar fashion to that which has been taught in the law school curricula for the past 10 years.
6. That arbitration also be taught at the UCLJ. Many lawyers have used binding arbitration for years, and this recommendation recognizes the need to have quality personnel involved in that process.
7. That the UCLJ coordinate with established programs such as the American Arbitration Association, the Better Business Bureau and the Western Arbitration Association.
8. That the physical facilities of the UCLJ provide for lawyer ADR including the areas of mini-trials, summary jury trials, private judging and expanded settlement processes under Rule 16 of the Federal Rules of Civil Procedure.
9. That because there already exists different types of community based dispute resolution process (with their adequacy and success difficult to measure), the Planning Committee further study the desirability of establishing a community resolution center at the UCLJ.
10. That in the event domestic relations mediation is implemented by the legislature, the UCLJ also be involved in training those mediators and providing the physical facilities to accomplish the same.
11. The Committee also addresses the need to provide a listing or referral service for ADR providers, that steps be taken to make sure that ADR becomes a statewide concept and is implemented in that manner as compared to becoming a Wasatch Front service, and that funding of the recommended projects be addressed immediately. It is hoped that government grants might be available initially to offset the major costs involved.

In an attempt to address both of these very thorough reports, the UCLJ Board of Trustees, which is comprised of the Executive Committee of the Utah State Bar, had in place prior to the dedication of the UCLJ the recommended Policies and Programs Advisory Committee. This 13-member committee is comprised of the following members, with Gerald R. Williams, Professor of Law from BYU, serving as its initial Chair: Irene Fisher, Jinna H. Kelson, Rev. Canon Bradley S. Wirth, Jodie L. Bennion, Professor John Morris, Andrew L. Gallegos, Robert E. Gallegos, Tyrone Medley, Attorney Robert Merrill, Sen. Frances Farley, Pastor France Davis and Rep. Haze Hunter.

The ultimate goal is to deliver ADR technology to those in need and to supplement the judicial system in resolving disputes. Ultimately, resources and programs will be available to both lawyers and lay personnel for Alternative Dispute Resolution. The Policy and Programs Committee is therefore presently seeking community and lawyer input as to how best to address the programs and concerns outlined in this report, and therefore your comment on any matter involving ADR is earnestly solicited. Please feel free to direct your comments to myself, as USB liaison to the Committee, or to any of the Committee members themselves in care of the UCLJ, 640 S. 200 E., Salt Lake City, UT 84111-3834.

By Hans Q. Chamberlain

The Case Against Plea-Bargaining

By Judge Robert F. Owens
Ninth Circuit Court

"This is going to be a reaction game," said the emcee. "I'll say a word and you'll show your reaction to it, whether positive or negative, by putting your thumbs up or down." The audience waited expectantly.

"PLEA-BARGAIN!"

Hands immediately shot forward, and all thumbs were down except for two people.

"We seem to have two lawyers in our audience today," commented the emcee.

I believe this story accurately gauges the almost universal public antipathy toward plea-bargaining. I have yet to meet a man on the street who had a good word to say about it.

Most lawyers do defend the practice, and either pooh-pooh the public criticisms ("They don't understand the problem"), or they trot out the familiar arguments in favor, revolving around crowded court calendars and lack of resources to try all criminal cases, and assuming no other alternatives.

I've already signaled my own bias on this issue. It is interesting that although lawyers pride themselves in being good at persuasion, their arguments in favor of plea-bargaining have never washed with the average citizen. Year after year, the gulf in attitude remains. Is it because the case for plea-bargaining is a weak one? I think it is, and will give my reasons.

A disclaimer first. I will not be advocating an absolutist position that we should ban all plea-bargaining. In certain cases it is justified, but it should not become the norm as it has today. This article will also not express any opinion on the plea-bargains in certain highly publicized cases, but will deal with the general practice of plea-bargaining as a sort of pervasive addiction in our justice system. Or to change the figure of speech, if plea-bargaining is the flea market of our justice system, as I believe it is, we may make some room for it but should not turn over our shopping centers to it.

The media provides a high and often cloudy window on the courts. A durable comment is that the run of mill cases, comprising the main work of the courts, are seldom covered. It is in such cases, the traffic, check and drug cases, the theft and burglary, that we should look to really study plea-bargaining. This is the school that produced it, and the arena arguably most important, affecting the lives of the most people.

A CLEAN SWEEP OF PLEA-BARGAINS

Several years ago a claim of trial experience led me to examine the felony prosecution files in a rural county for a 12-month period. The result was surprising. Of the 34 felony cases bound over to the district court in that year, not a single one went to trial. As I recall, a few were dismissed, but all the rest were disposed of by plea-bargaining. The "trial experience" claimed by counsel in those cases in reality was only plea-bargaining experience. The standard argument for plea-bargaining—that courts could not accommodate all the trials which would result without it—rings hollow when no cases are tried at all.

BACKROOM JUSTICE

So what is wrong with plea-bargaining all those cases? Didn't it save time and money? Possibly, except that our system has promised justice. Let's look at the product with the eyes of a quality controller.

First we should note that for a whole year in every serious criminal case in that county, the important decisions as to guilt or innocence, and if guilty, what grade of offense, were made by a prosecutor and defense attorney, neither of whom had been elected or appointed by the people to make such decisions for society.

A criminal trial has safeguards evolved over many centuries to arrive at the truth. These include rules of evidence, cross-examination of witnesses, confrontation, and testimony under oath, with the decision being made by a judge elected and trained to do so, or by a representative jury drawn from the community.

Plea-bargain decisions, on the other hand, are made by attorneys, often newly out of law school, who may view criminal practice as only a temporary steppingstone to a more lucrative civil practice. As stated, they have no statutory mandate to take over the adjudicatory function of the courts, nor do courts have any basis for abdicating this important function. If society had chosen this way to dispose of its criminal litigation, lawyers would not be needed for that purpose. Insurance adjusters with a few weeks' training could perform the same function at less cost. It is clear, however, that society has rejected plea-bargaining.

CUTTING OUT THE HIGHER COURTS

Secondly, plea-bargains are essentially non-reviewable by the appellate courts. A Supreme Court sits as a presumably wise overseer at the top of the litigation pyramid, carefully examining the transcribed record, patiently pointing out errors—but mainly for those cases which went to trial. Looking over their shoulders are the law professors, and the grist for their mill is also mainly cases tried and appealed. In a plea-bargained case, review is severely limited to such things as severity of sentence or motions to withdraw plea.

The effect is that a large proportion of the action in the criminal justice system is carved out, and shielded from the oversight of the appellate courts. The law guiding plea-bargain decision is never examined by

an appellate judge, as jury instructions would be, nor is the evidence produced or recorded, except in the original police reports. This results in the anomaly that the few cases which go to trial ride first class all the way, as far as procedural safeguards are concerned, but that other cases, just as important intrinsically, are herded into the third class coaches with no conductor to complain to about injustices. A system of justice can accommodate such anomalies, as long as they remain anomalies. It is when they become the norm that justice suffers.

ARE THE BARGAINERS BIASED? WHO KNOWS?

The third objection relates to the human element. In the typical plea-bargained case, the critical decision as to what a defendant is guilty of, if anything, and how serious it is, is made in the minds of two lawyers who privately reach agreement with each other. Their evaluation of the evidence, their understanding of what law applies, and the real reasons for the decision are locked in the heads of those lawyers. The decision which results from this process is essentially "unreviewable," which means it can't be analyzed for correctness, as has been stated.

In a jury trial, jurors are quizzed as to relationships and possible biases which might improperly affect their decisions, so it is only fair to examine the factors which might have an improper influence on plea-bargaining attorneys. Since such influences are seldom admitted, even to oneself, the list that follows is based on my own impressions and previous experience as a prosecutor, defense attorney and judge. With computerized court records now emerging, I suspect that sophisticated analyses may soon become possible which might confirm these impressions statistically. We still can never know for certain in a particular case, however, what factors may have warped judgment.

A. WORKLOAD. An attorney with a heavy caseload awaiting trial may tend to plea-bargain cases more readily to obtain relief. In practice, this would mean willingness to offer reduced charges, like an overstocked store putting goods on sale.

B. PERSONAL PLANS. A typical scenario is a DUI case which the court sets for trial on a date for which an attorney was making vacation plans. Such calendar conflicts tend to trigger plea-bargaining for reasons unrelated to the strength or weakness of the case.

C. SYMBIOSIS. Particularly in rural counties, the same attorneys tend to be involved against each other in case after case. Patterns of cooperation may develop (always agreeing to each other's requests for postponement) which can carry over into the plea-bargaining process. In its most virulent form, this cooperative pattern could take the form of the prosecutor always being willing to reduce charges, whether his case is strong or weak, and the defendant's attorney being willing to twist his client's arm to plead to something so the prosecutor can list it as a conviction without the trouble of a trial for either. Quid pro quo takes over from truth-seeking or even case evaluation.

Obviously such an arrangement between attorneys would not be consciously or expressly made, because that would violate legal ethics. The danger is in the tendency: in the valley of plea-bargaining one should fear that evil, because it is the low ground to which conduct would naturally tend to flow unless restrained.

D. FEAR OF OPPONENT OR TRIAL. The prospect of a public trial is stressful, particularly if one is not prepared or feels he or she is no match for the opponent. Settling the case privately by plea-bargaining is pleasurable by comparison, and frees the morning for golf. This difference in emotional impact will affect the attitudes of attorneys, who are, after all, human beings. Confronted with a stressful situation, like a nervous Nellie reaching for her tranquilizer, the attorney reaches for the phone to ask, "What'll your client take?" and both obtain relief. Unfortunately, another effect also occurs: ever-increasing reliance on the palliative in future situations.

The seductive siren of plea-bargaining also has a proposition to make directly to the courts. To the trial judge who feels that appeals and reversals may be interpreted as reflecting on his or her ability, plea-bargaining offers protection by reducing the pool of cases which could produce appeals. And to the busy appellate courts themselves, she tenders the prospect of reduced caseloads. From bottom to top in the criminal justice system she serves interests—all except the public interest.

E. POLITICAL OR RELIGIOUS CONSIDERATIONS. The boast of our law and system of justice is that it plays no favorites, and many of our court procedures are designed to effectuate that promise. In the dark cellar of plea-bargaining, however, the disease-organisms of bias or preference can flourish undetected. This is not to say that attorneys do not generally display integrity in this regard by acting responsibly, but the line is blurry, and the potential for stepping over it is ever-present, particularly if the defendant is not an important person and the media hasn't noticed the case.

F. UNDERPREPARED TO BARGAIN. By analogy to personal injury case settlements, a plea-bargain, to be a "quality" settlement of a criminal case, should be in the context of an accurate prediction of the result if the case had gone to trial. This would suggest it be done by experienced trial attorneys (or their equivalent) who had thoroughly prepared their cases. Because of the profit motive in civil cases, adequate preparation is usually done. Failure to prepare will be measurable in dollars, which both talk and carry a big stick. In criminal cases, however, there is no similar inducement to adequately prepare the case beforehand, nor is lack of preparation readily apparent from the plea-bargain itself. My impression is that in misdemeanor courts, most plea-bargains are made on the basis of police reports, without talking to witnesses or victims, and are given a much lower degree of competence and attention than is displayed in trying a case. At a public trial, pride produces preparation, because ineptness would show. If this analysis is correct, the criminal justice system is running at two levels: quality decisions at the trial level, with perfunctory dispositions at the plea-bargain level, which may comprise the majority of cases. The cases at both levels are equally important, and no good reason justifies this differential in attention given to them.

GOAL: SLAP EVERY WRIST—OR GET AT THE TRUTH?

The effectiveness of any justice system is ultimately tested, not by number of convictions or number of cases handled, but by the quality and accuracy of individual case judgments, a standard which is very hard to measure independently of the system itself. Does it convict and punish the guilty and identify and free the innocent? As its humane component, does it resolve the margin-of-error cases in favor of innocence? No system can promise perfection in this regard, but we hope our American system of criminal justice approaches it as closely as humanly possible.

I think about those 34 felony cases mentioned earlier, and wonder what the result would have been if all had gone to trial, and thus had had the benefit of the best vehicle our society has developed to arrive at truth in a fair way. From past experience, we could predict that 50 percent to 75 percent would have been convicted of the original charge or an appropriately proven lesser charge with a relatively small danger that an innocent person had been found guilty. Of the balance which would be found not guilty, some would probably in fact be guilty but the case against them would not

Is this good? Should we rate our prosecutors simplistically by their percentage of convictions, and not ask of what charge, and even more importantly, how convicted? Whatever the percentage, when those convictions result from a rampant plea-bargaining legal culture, two concerns present themselves.

A. THE PARTIALLY PARDONED GUILTY. As to those pleading guilty to a reduced charge, who are in fact guilty of a greater offense, a wrong message has been sent to them by society. Instead of being called to account for what they did and fully feeling the disapproval of society, they were allowed to plead guilty to less than what they did, in a game in which they bargained with the state, as one nation bargains with another. Moral values give way to tactics. "If you will relabel and reduce my offense, I won't put you to the trouble of a trial." The process of determining guilt is to an extent trivialized; the defendant is legitimized as an equal bargaining partner with the state, and any judgment pronounced on him or her will be correspondingly less effective in deterring future misdeeds.

B. THE INNOCENT, UNJUSTLY CONVICTED. The greater concern arises at the other end of the spectrum. It is probably true that many defendants guilty in fact, but who might not have been convicted, can be conned into pleading to some lesser offense. With a permanently injured victim in a coma, and a key witness who has moved to Maine, a prosecutor may be forgiven for feeling that a plea by the defendant to attempted simple assault, a class C. misdemeanor, is better than nothing at all. This reasoning is valid if the prosecutor knows the defendant is guilty, but has a weak case. The potential for grave injustice arises with a defendant who may be in fact innocent, but is pressured to plead guilty to a lesser charge by his own attorney simply because he is conditioned to plea-bargain, and wants something to offer to the state. "I believe you when you tell me you're innocent," he will say, throwing a sop to his clients self-respect. "But the state does have some evidence, and you run a risk of going to the state prison if the jury believes it. Take the misdemeanor!"

Does this happen, that the innocent have a higher likelihood of being convicted of something in a plea-bargaining culture? Through the years I've heard the allegation over and over from defendants before me for sentencing who, in trying to explain away prior convictions, claimed that though innocent, their lawyer made them plead guilty. Even allowing for a degree of lying and self-serving (the majority of criminal defendants are said to be sociopathic to one degree or another) still I have often had the feeling there was a basis to the allegation.

SENTENCING: DO JUDGES GIVE PLEA-BARGAINERS A BREAK?

Plea-bargaining, as a routine device to handle prosecution of crime, warps not only the determination of guilt or innocence, but also can affect, or appear to affect, sentencing in at least two ways.

The first way can be characterized as the aura of good will which typically envelopes the defendant who agreed to a plea-bargain. Both attorneys may be relieved and gratified in the outcome, and the prosecutor may be more likely to recommend lenience, than with a defendant who dragged him through a trial. The judge may feel the same way, not having heard the gory details from the mouths of bandaged witnesses in court. I'm sure judges try to be evenhanded in sentencing and not consider whether the judgment of guilt resulted from trial or plea-bargain, but I know as a fact that some attorneys have advised their clients otherwise—that the judge would go easier on them if they agreed to a plea-bargain.

The second effect is that a criminal record is created which could be misleading in future cases where it is considered. Before the judge for sentencing stands a well-dressed, middle-aged man. His rap sheet shows several recent convictions in another state for "attempted reckless driving." The judge knows that's nonsense: How can anyone "attempt" to drive recklessly, particularly this solid citizen? He will deduce that the prior convictions were plea-bargained down from drunk driving, and that there is probably an alcohol problem. But why should judges have to second-guess rap sheets in order to make good sentencing decisions? A spade should be called a spade.

LIMIT PLEA-BARGAINS; OVERLOAD COURTS?

Would the courts be inundated with more cases than they could handle if plea-bargaining were tightened up? My own experience as a prosecutor and now as a judge would indicate that it would not be a serious or permanent problem. In shifting from a lenient to a restrictive regimen, one would expect some increase in trials, but this is not bad—it's what courts are for. As attorneys are required to overcome their habituation to the plea-bargain process, and as the new process gains credibility, I would predict an interesting evolution would occur. Defendants would either plead guilty to the original charge in some cases, or the prosecutor will move to dismiss if the case proves to be weak. The cases that would end up going to trial would be those that should be tried. Also, prosecutors would be less likely to overcharge in the first place, with the motive of using reduction as leverage for bargaining. The whole system will thereby become more honest, and the public will understand it better and distrust it less.

Several years ago the state of Alaska, responding to public frustration, outlawed plea-bargaining altogether. Such a Procrustean approach is not appropriate for Utah, in my opinion. There is a place for plea-bargaining in the criminal justice system, but it should play a restricted role. If the prosecutor has charged appropriately, and has a strong case, he or she should stand pat on the charge, and not reduce just to avoid trial, or just because the defendant has a clean prior record. If, however, he has strong reason to believe the defendant in fact guilty, but will have problems proving his case in court, a proper case for plea-bargain is presented. Even then, in larger prosecutors' offices, a mechanism for independent in-house review and approval would be recommended, to make sure the plea-bargaining is being done for the right reasons. This would enhance the credibility of the plea-bargain decision when it is later submitted to a judge for approval. In the absence of such internal supervision, judges should readily exercise their statutory power (Criminal Rule 11) to review and approve plea-bargains—and disapprove when appropriate—rather than simply automatically rubberstamping whatever the attorneys have agreed upon.

Brecht, in his poignant conclusion to Three Penny Opera, writes,

> "All see those who sit in light;
> The ones in darkness drop from sight."

Notwithstanding the floodlight of attention given to plea-bargaining in the few big cases which produce disquiet in the public, the nurturing ground and substantial locus of the practice are really in the thousands of little cases sitting out there in the dark. The appellate courts don't see them, law schools don't see them, the media and therefore the public don't see them, and those within the system, for a variety of reasons, also do not "see" them—as a problem, at least.

I submit that any illumination of this topic will lead to a recognition that changes are needed, though one may safely predict that many within the system will resist change. Habits are hard to reform, particularly those that afford the type of gratification which plea-bargaining does. Among the various causes for popular dissatisfaction with the justice system, the reform of present plea-bargaining practices commends itself as a good place to start. The situation has festered long without much remedial attention. It's time we treated it and thereby conveyed to the public their justice system is working fairly and forthrightly, and that we have the willingness to hear their concerns and to make needed changes.

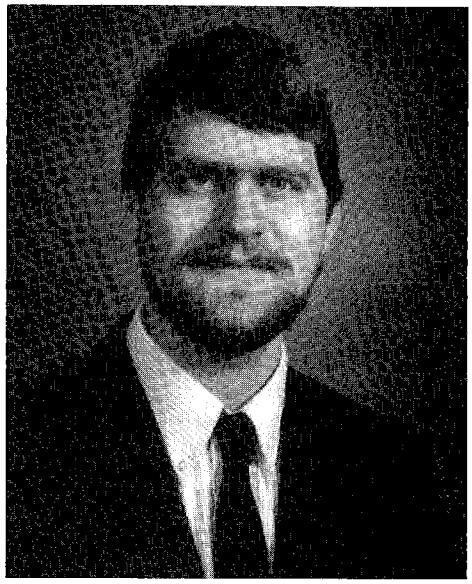
Punitive Damages in Utah

By David R. Black

Recent cases in Utah have elevated the issue of punitive damages to one of primary interest to civil attorneys and their clients. In one case a jury awarded $10 million in punitive damages against a soft drink bottling company where the plaintiff sustained an eye injury from a bottle cap. While this amount was subsequently reduced by the trial judge, the amount of the verdict has raised questions in the Utah legal community about the propriety of punitive damage awards. Concerns regarding punitive damages have also been raised nationally.

The United States Supreme Court heard arguments last year that punitive damages should be declared unconstitutional on the grounds that an award of punitive damages violates the Eighth Amendment and the Due Process Clauses of the United States Constitution. The Eighth Amendment prohibits the imposition of excessive fines. The case of *Bankers Life Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988) arose out of the insurer's refusal to pay a claim filed under an accidental bodily injury policy. At trial, plaintiff was awarded $20,000 on the insurance policy and $1.6 million in punitive damages. The Mississippi Supreme Court affirmed the verdict and defendant appealed. The U.S. Supreme Court held that the defendant did not properly raise its challenges to the size of the punitive damages award in the Mississippi Supreme Court. The Court ruled that defendant's vague appeal to constitutional principles did not preserve its Contract Clause or due process claim. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.* at 1650.

Justice O'Conner, in a concurring opinion with Justice Scalia, offered future litigants a glimpse of how this issue might be treated should it come before the Supreme Court. Justice O'Conner writes: "Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause." *Id.* at 1655. Justice O'Conner points out that in the past the Supreme Court has forbidden the award of punitive damages on the grounds that the punitive damages are not measured against an objective standard. Justice O'Conner cited two such instances. Punitive damages may not be awarded in defamation suits brought by private plaintiffs or in unfair representation suits brought against unions under the Railway Labor Act. *Id.* (citations omitted).



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Mississippi law required that an award of punitive damages be made only on a finding that a common law tort be committed with a willful and intentional wrong or for such gross negligence and reckless negligence equivalent to such a wrong. Justice O'Conner faults the Mississippi standard which commits solely to the jury's discretion the determination of the amount of punitive damages and compared it to criminal sentencing.

The Concurrence concludes:

> This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequence of violating a given criminal statute."

quoting *United States v. Batchelder*, 442 U.S. 114, 123, *Id.* at 1656 (1979). These constitutional concerns were raised in *Bankers Life* because nothing in Mississippi law warned appellant that by commiting a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damage award. *Bankers Life* at 1656.

Locally, both houses of the Utah legislature reviewed bills in the 1988 General Session which sought to cap the amount of punitive damages, as well as narrow the legal standard by which the damages could be awarded. Senate Bill No. 115 and House Bill No. 230 would have limited an award of punitive damages to $500,000 or $800,000, respectively. In each bill the sponsors provided that some or all of the punitive damages, after an award of attorneys' fees, would be remitted to the state treasurer and credited to the General Fund or State School Fund. Both bills would have expressly lim-

ited the award of punitive damages to cases in which defendant engaged in knowing, intentional and malicious acts where a high degree of danger was apparent. This language would have narrowed the scope of the punitive damage standard in Utah. A finding that defendant had merely a reckless disregard or indifference toward the rights of others would have been held insufficient to support an award of punitive damages. Neither bill passed this year.

The Utah Supreme Court articulated this state's current standard for punitive damages most recently in *Johnson v. Rogers*, 90 Utah Adv. Rep. 3 (1988). The Court reiterated the standard it adopted in both *Atkin Wright & Miles v. Mountain States Tel.*, 709 P.2d 330, 337 (Utah 1985), and *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106 (Utah 1985). Under these court rulings, punitive damages may be awarded if the plaintiff proves that the defendant's conduct was willful and malicious *or* that it manifests a knowing and reckless indifference and disregard toward the rights of others. In addition, the plaintiff must prove that an award of punitive damages is appropriate under the circumstances. *Johnson v. Rogers*, at 4 (citations omitted). Plaintiff must establish that an award of punitive damages will clearly accomplish a public objective not otherwise accomplished by the award of compensatory damages. Punitive damages may only be awarded in exceptional cases. *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1186 (Utah 1983). Punitive damages are meant to serve the interest of society, not by enhancing a compensatory damage award, but by punishing and deterring outrageous and malicious conduct not likely to be deterred by other means. *Synergetics v. Marathon Ranching Co.*, at 1106 (Utah 1985).

The trier of fact must first determine that the standard for an award of punitive damages has been met, and that the case is one for which an award of punitive damages is appropriate. The trier of fact must also fix the amount of punitive damages. It must be noted in light of Justice O'Conner's concurrence in *Bankers Life* that the amount of an award of punitive damages in Utah is left to the sound judgment of the jury as related to the circumstances of the individual case. The Utah Supreme Court recognizes a restraint of reasonableness in these awards, however. *Elkington v. Foust*, 618 P.2d 37, 41 (Utah 1980).

The Utah Supreme Court has ruled that the fact finder should consider several factors in determining the amount of punitive damages to be awarded. The factors include: "the nature of the alleged misconduct, the extent of the effect of the misconduct on the lives of the plaintiff and others, the probability of future recurrence of such misconduct, the relationship between the parties, the relative wealth of the defendant, the facts and circumstances surrounding the misconduct and the amount of actual damages awarded." *Synergetics*, at 142, citing *First Security Bank v. J.B.J. Feedyards*, 653 P.2d 591, 598-99 (Utah 1982).

The Utah Court of Appeals opened the door for the award of punitive damages against a drunk driver in a newsworthy opinion last year. In *Biswell v. Duncan*, 742 P.2d 80 (Utah App. 1987), Judge Judith Billings reviewed the history of punitive damages in Utah and reasoned that nothing barred an award of punitive damage in such a case under the proper circumstances. If plaintiff can show that the defendant motorist acted with a reckless disregard for the rights of others and that the driver's intoxication contributed to the cause of the accident, punitive damages were recoverable. *Id.* at 85. The Court opined that driving after voluntarily drinking to excess could be found to demonstrate a reckless indifference or disregard toward the rights of others sufficient to allow the trier of fact to consider an award of punitive damages. *Id.* The Court went on to add that the imposition of punitive damages in a civil action does not constitute double jeopardy in a case where the same conduct could be punished criminally as well. *Id.* at 87. The Court was persuaded that "the constitutional immunity from double jeopardy is limited to criminal proceedings." *Id.*

This year the Utah Supreme Court decided two cases involving punitive damages and drunk driving on the same day. Both *Johnson v. Rogers*, 90 Utah Adv. Rep. 3 (1988), and *Miskin v. Carter*, 90 Utah Adv. Rep. 19, 20 (1988), coupled the "knowing and reckless disregard" standard with the stated purposes of punitive damages to deter outrageous conduct. The Court reviewed the punitive damages cases of Utah in *Johnson v. Rogers*, and following the logic of *Biswell*, determined that no reason existed to exclude drunk driving from the categories of outrageous conduct which are eligible for the imposition of punitive damages. *Id.* at 5. Plaintiffs, the Johnsons, appealed the trial court's granting of summary judgment to co-defendant Newspaper Agency Corporation ("NAC"). The trial court dismissed plaintiffs' claims for punitive damages arising out of the wrongful death of their 8-year-old son. Their son was killed when NAC's employee Rogers lost control of the company's truck while driving under the influence of alcohol. The trial court found that no actual malice existed, and on that ground granted NAC summary judgment. The trial court also found as a matter of law that Utah did not recognize vicarious liability for punitive damages. First, the court noted that the trial court had misconstrued Utah law on the imposition of punitive damages. *Id.* at 3. The court enunciated the correct standard that allows punitive damages in the case where plaintiff can prove reckless indifference to the rights of others. The court then considered several facts key in its decision that the punitive damages in drunk driving case could go to the jury. Defendant Rogers had consumed a large quantity of alcohol immediately prior to reporting to work as a truck driver, giving him a blood alcohol level of .18 percent. Rogers admitted to being a "heavy" problem drinker prior to the accident and that he had a prior conviction of driving under the influence in Oregon. *Id.* The court concluded that these facts, if proved to a jury, would certainly be sufficient to support a finding of knowing and reckless disregard for the safety of others. *Id.*

In *Miskin v. Carter*, 90 Utah Adv. Rep. 19 (1988), appellant, injured in a car collision with a drunk driver, appealed the trial court's granting of summary judgment to the defendant. Defendant moved for a judgment that the facts of the case were insufficient to support an award of punitive damages. The trial court agreed. *Id.* at 20. In light of the standard adopted that day in *Johnson v. Rogers*, the Supreme Court ruled that the trial court did not err in ruling that the facts in *Miskin* did not warrant an award of punitive damages. The court added that the determination of an award of punitive damages in a case like this required a balancing of factors.

> Under some circumstances, the manner in which a vehicle is operated, when considered in light of the degree of intoxication and the driver's past behavior patterns, may warrant punitive damages. But we emphasize that nothing in *Biswell* or *Johnson* should be read to suggest that the mere presence of a .08 percent blood alcohol level, combined with nothing more than negligent conduct, is sufficient to put the issue of punitive damages before a jury in a personal injury suit arising from a motor vehicle accident.

Miskin v. Carter at 20.

Johnson v. Rogers also defined the Utah standard for vicarious liability of an employer for punitive damages. *Johnson* at 6. Defendant Rogers caused the accident com-

plained of while in the employ of co-defendant NAC. Plaintiffs sued both defendants for compensatory and punitive damages. The trial court granted NAC's motion for summary judgment, ruling that Utah did not recognize vicarious liability for punitive damages. *Id.* at 3. After discussing several approaches to vicarious liability on the part of an employer, the Utah Supreme Court reversed that decision. The defendants did not argue on appeal the legitimacy of vicarious punitive damages. *Id.* at 7. The court opted for the doctrine set forth in Restatement (Second) of Agency Sect. 217C and the Restatement (Second) of Torts Sect. 909. The Supreme Court adopts the "complicity rule" which limits vicarious punitive damages to those situations where wrongful acts were committed or authorized by a managerial agent or were committed by an unfit employee who was recklessly employed. *Id.*

The Supreme Court reversed the trial court's summary judgment to the defendants and stated that in view of the facts, plaintiffs were entitled to a jury verdict on the question of whether NAC authorized the act or whether the employee was recklessly employed. *Id.*

An examination of other recent Utah cases reveals that not all punitive damage awards arise out of the high profile personal injury action. Awards of punitive damages in a business context are becoming more prevalent. The United States District Court heard a case last year which raised the issue of punitive damages in a business transaction. In *Gen. Bus. Mach. v. Nat. Semiconductor Datachecker*, 664 F. Supp. 1422 (D. Utah 1987), the Court denied defendant's motion to strike a claim for punitive damages arising out of the termination of an exclusive distribution agreement. Plaintiffs based its tort claim on the alleged breach of a fiduciary duty, running between the manufacturer and its exclusive distributor in the state of Utah. The Court found that plaintiff had raised issues of material facts and refused to dismiss the cause of action. The Court stated that a franchise relationship may give rise to a fiduciary duty if the placement of trust and reliance in the relationship is clear. *Id.* at 1426. Punitive damages could be awarded in such a case where an independent tort can be proven. *Id.* It is important to note that no cause for punitive damages exists in the case of breach of a contract without an independent tort. *Id.* p. 1424. See also *Highland Const. Co. v. Union Pacific R. Co.*, 683 P.2d 1042, 1049 (Utah 1984).

The size and scope of the cases do not necessarily determine whether an award of punitive damages is appropriate. Punitive damages have been awarded in small cases involving modest sums of money. In *O'Brien v. Rush*, 744 P.2d 306 (Utah App. 1987), the Utah Appellate Court affirmed an award of punitive damages against an automobile mechanic in favor of the plaintiff who had been charged premium prices for used parts, overcharged for poor workmanship, and subjected to a lien on her automobile for non-payment of charges under payment terms to which she had not agreed. In *O'Brien*, the plaintiff was awarded $1,900 in actual damages and $1,000 in punitive damages. The Appellate Court called this "exactly the type of case" which called for the award of punitive damages. *Id.* at 309. The Appellate Court looked at the "totality of the circumstances" surrounding the events in concluding that the trial court's award of punitive damages was entirely proper. *Id.*

Punitive damages arose in the context of a business transaction in *Synergetics v. Marathon Ranching Co., Ltd.* 701 P.2d 1106 (Utah 1985). The case involved the exchange of an oceangoing sailboat for real property in Canada. The plaintiffs filed an action alleging that the transaction was founded on fraud, misrepresentation, and deceit. *Id.* at 1108. The plaintiffs succeeded in securing a default judgment against defendants and being awarded damages in the amount of $452,000. Further, the plaintiffs introduced affidavits apprising the court of the factors set forth in *First Security Bank v. J.B.J. Feedyards*, at 598-99, entitling them to punitive damages. Plaintiffs' affidavits were uncontested, and the court ruled that sufficient evidence existed for an award of $200,000 in punitive damages based on the plaintiffs' affidavits. *Id.* at 113.

Not all recent decisions have acted to broaden the scope of the punitive damage award. Utah courts have sought to limit the award of punitive damages in some contexts. Most importantly, no award of punitive damages may be made unless the plaintiff also proves entitlement to compensatory damages. *Atkin Wright & Miles*, at 337. Secondly, the award of punitive damages must bear some reasonable relation to the actual damages. *Synergetics*, at 1113. The courts have not offered any formulas for the reasonableness of punitive damage awards. However, in *Synergetics*, plaintiff was awarded $452,000 in compensatory damages and $200,000 in punitive damages. The Utah Supreme Court stated that "[G]iven the inverse ratio of actual damages to punitive damages, this Court cannot say that the damages were excessive." *Id.* at 1113. In *Bundy v. Century Equipment Co.*, 692 P.2d 754, 760 (Utah 1984), the Utah Supreme Court found that punitive damages were excessive where the award of punitive damages exceeded the award of actual damages by 11.72 times.

Most recently in *Van Dyke v. Mountain Coin Machine Distributors*, 88 Utah Adv. Rep. 14 (1988), the Utah Supreme Court further refined its ruling in *Bundy*. Plaintiff Van Dyke brought an action against the defendant for breach of contract and an abuse of process. The jury awarded $250 in actual damages and $37,000 in punitive damages. Defendant appealed, on among other grounds, that the award of punitive damages was excessive. *Id.* at 15. The court set forth the general requirements that a trial judge, in reviewing a jury's award of punitive damages, should consider the following facts: The relative wealth of the defendant, the relationship between the parties, the probability of future misconduct and the amount of actual damages. The court agreed with the *Bundy* standard but held that a larger multiple of actual damages could appropriately be awarded as punitive damages. The Court found a large award appropriate in this case where the jury found the actions of the defendant were motivated by vindictiveness and ill will. In addition, the court noted a strong likelihood that the wrong complained of would recur. However, the court also found the jury award excessive. Therefore, the court reduced the punitive damage award to $12,500, a ratio to actual damages of 50 to 1. *Id* at 17.

The Utah Supreme Court ruled that punitive damages do not survive the death of a tort feasor. The estate of an individual responsible for the wrongful death of the plaintiffs' mother could not be assessed punitive damages. Two of the justifications for punitive damages are to punish the wrongdoer and to deter similar conduct in the future. Neither of these justifications was applicable in the case of a tort feasor no longer living. *Matter of Estate of Garza*, 725 P.2d 1328, 1330 (Utah 1986).

The standard for an award of punitive damages in Utah appears to be firmly established. The *Johnson v. Rogers* case cements the standard adopted in earlier Utah Supreme Court decisions. Future Utah cases should be watched to see if any changes in the standard of punitive damage awards are made which reflect Justice O'Conner's concerns about due process. Both the United States Supreme Court and future legislative sessions should be watched closely for any developments affecting the legal standard or the right to these damages.

REMARKS OF ROBERT MACCRATE

Immediate Past President
American Bar Association

Dedication of Utah Law and Justice Center
Salt Lake City
September 7, 1988

Recently United States District Judge J. Thomas Greene told a group of young Utah lawyers as they began their lives in the law: "None of us ever 'arrive' in the practice of law, it is a continuing journey. We lawyers. . . will always be on the way."

Indeed it is a continuing journey, not only for those who practice law but for all those who join in the trek to make reality of our country's promise of equal access to justice.

There are, however, important mile markers along the way: the adoption of some reform or the creation of a new institutional resource that mark progress on that journey.

It is such a salient marker that we gather here to celebrate today. I suggest that in the years to come the creation of the Utah Law and Justice Center will be seen not only as a marker of progress but as the genesis of a new direction in the continuing journey to provide justice under law to all.

For generations "the journey" has been both the metaphor and the reality of the Utah experience. It is appropriate on this significant occasion to pause and reflect for a few minutes on how you have reached this marker along your way.

The earliest recorded major journey into Utah was that of the Spanish exploration party in 1776, the year the Declaration of Independence was signed. But it was not until the 1840s that the westward movement of American settlers reached this land. In the 1850s the Utah Territory was, of course, a way station for those drawn by gold to California. Far more significant to the making of Utah was the journey begun in 1830 in my native state of New York by Joseph Smith and his followers which reached Salt Lake City after the greatest travail only on July 24, 1847, led by Brigham Young.

The ultimate goal of that remarkable Mormon odyssey which ended 140 years ago was the Provisional State of Deseret which continued to provide a competing vision of the millennium for the Territory of Utah right through the 1860s following the Compromise of 1850 and the federal act granting territorial status.

In the new territory, however, there appears for a time to have been a concerted effort to do away with the legal profession. Thus we find the territorial legislature providing that all courts in the Utah Territory must hear any person chosen to prosecute or defend a case and, moreover, that no person should receive payment for rendering such representative service.

At the same time the territorial authorities developed what has been described as "a veritable fortress of home rule" to distance themselves from federal authority. Central to this development was legislation giving original jurisdiction in all civil and criminal cases to the territorial probate courts, placing effective control within the territory rather than with the federally established district courts that were the embodiment of the national government's presence. Moreover, the territorial legislature created the offices of territorial attorney general and marshal to serve in the probate courts while making the United States district courts dependent for their appropriations of funds upon the territorial legislature.

Thus as we follow the journey of law and justice in the Utah Territory into the 1870s and '80s, we sense a continuing tension between Utahn home rule and federal authority which was only gradually accommodated into our general federal system.

But it was in the early 1880s that a young Utahn, destined to make a major national contribution to the law, joined his sometime-miner-"jack-of-many-trades" father in the practice of law in Provo under the style of "Sutherland and Son." George Sutherland as an infant had been brought by his parents from England to Utah and spent his childhood principally in mining camps in Utah and Montana. Put to work at the age of 12, he worked successively in a clothing store, a mine recorder's office and for an express company. He attended public school in Salt Lake City and later Brigham Young Academy and then spent 15 months as a forwarding agent for contractors building the Rio Grande Western Railway before traveling east in 1882 to study law at the University of Michigan Law School.

In March 1883, at the age of 21, George Sutherland was admitted to the bar in Michigan before returning later in the year to Utah where he was duly admitted before the territorial courts. Practice with his father in Provo was that of the American frontier in the 1880s. He accepted any case he could get, civil or criminal, and traveled by horseback to appear before various territorial courts and through mountain passes to remote justices of the peace.

George Sutherland's journey in the law led him to move to Salt Lake City in 1893 where he became one of the founding members of the Republican Party in Utah. When Utah achieved statehood in 1896, he was admitted to practice before the U.S. District Court for the District of Utah and later that year was elected to the Utah State Senate. From there George Sutherland moved first to the U.S. House of Representatives and then for two terms in the U.S. Senate. There he helped frame the 17th Amendment to the U.S. Constitution for the direct election of Senators and introduced and championed the "Susan B. Anthony Resolution" which became the 19th Amendment granting women suffrage, one of the salient markers on the American journey of law and justice.

It is not surprising to find that it was while George Sutherland was president of the American Bar Association in 1916 and 1917 that the first woman was elected to membership in the Association. This was the

redoubtable Mary Lathrop from neighboring Colorado who, fearing a blackball, had rejected invitations to apply for ABA membership until George Sutherland was its president.

From 1922 to 1938 Mr. Justice Sutherland served on the United States Supreme Court with distinction and good humor, authoring 295 majority opinions, many in the landmark cases of those years. He argued that the law should be flexible, not fixed, and continue to grow on that endless journey of justice.

It is in such a tradition we gather today to acknowledge the placing of another marker on the journey of law and justice, fully mindful of the necessity, for those concerned with the quality of justice for all, to respond in creative ways to new challenges and emerging needs in an ever-changing society.

The credit for this Law and Justice Center, for its imaginative concept and for its creative execution reside here in Utah, with the State Bar and community leaders who have brought the center into being. But we in the American Bar Association take pride in the fact that the Association has served as a catalyst for change and that we have helped stimulate the search for new means of dispute resolution and the opening of greater access to justice to which this center is dedicated.

It was in 1976 that the ABA joined with the Judicial Conference of the United States and the Conference of Chief Justices of the 50 states in sponsoring a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, a subject addressed 70 years earlier by the great American legal scholar, Roscoe Pound.

At the 1976 conference, Chief Justice Warren E. Burger stated that we had not really faced up to whether there are other mechanisms and procedures outside of the judicial system to meet the needs of society and individuals. He challenged us to seek the most satisfactory, the speediest and least expensive means of meeting the legitimate needs of the people in resolving disputes.

An ABA Task Force took up the challenge and the ideas articulated at the 1976 Pound Conference. This led to the creation of an Association Committee on Alternative Means of Dispute Resolution, which is today an important ABA standing committee evaluating nationwide the broad array of dispute resolution activities, promoting the institutionalization of successful programs and through its staff serving as a clearinghouse and resource center for all interested in pursuing alternative dispute resolution projects. In addition, within the ABA today, there are 23 separate alternative dispute resolution committees actively pursuing the development of new mechanisms and procedures.

The American Bar Association has a continuing commitment to facilitating dispute resolution and to the creative and problem-solving role of the law and the lawyer beyond the arena of litigation, which makes participation in this dedication ceremony so meaningful for me.

I was pleased to learn that President Kent Kasting will be going to Chicago to attend tomorrow and Friday the ABA dispute resolution workshop for bar leaders. He will be an especially welcome participant in that workshop, bringing to bar leaders from around the country word of the Utah Law and Justice Center and your plans for its utilization.

The Utah Law and Justice Center presents a vital opportunity to study alternatives, to examine them in an appropriate setting, and to see how well they fulfill their purpose. It provides an opportunity to make certain that in our efforts to institutionalize techniques for the earlier and less costly resolution of disputes, we do not permit such alternatives to become second-class justice for those on the other side of the tracks, that we truly understand their relationship to the courts and the justice system, that we do not close doors to judicial vindication of basic rights nor compel a weaker party to submit without protection to superior bargaining power.

As Judge Greene said of the practice of law, it is indeed a continuing journey. Our American quest for more perfect justice is also a journey, one begun some 200 years ago with the signing of a document that established a government of laws. That quest continues.

It is a privilege to be with you today to participate in the dedication of this facility, the first of its kind in the nation. You have not only built for the future of Utah, but you have provided an inspiring model for others. It serves as a proud marker of progress on the journey of law and justice and fills me with excitement for the future of law and justice in our land.

Thank you very much.

Highlights of the August 26 Bar Commission Meeting

The meeting of the Bar Commission of August 26 was held at the J. Rueben Clark College of Law in Provo, Utah. In actions taken, the Commission:

A. Approved minutes of the July 21 meeting.
B. Received a report from the Executive Committee including information of the activity of the Board of Trustees of the Law and Justice Center in preparation for the dedication of the building, disposition of various administrative items by the President and/or Executive Committee and appointment of Robert S. Campbell to the Executive and Judicial Compensation Commission as the state bar representative.
C. Considered information developed on the pending tax initiatives and voted to actively oppose all three tax initiatives, based upon information provided by the judiciary on the impact of such initiatives on the judicial system in Utah, with the President to communicate the Bar's position opposing the initiatives to the membership and to the public.
D. Received the Admissions Report and approved the results of the July bar examination. Appointed a grievance hearing panel to review any appeals which might be filed, reinstated a member who had been suspended for non-payment of dues, discussed the policy question regarding expungement of records of administrative suspensions and referred the question to the Policies and Procedures Committee for its review and recommendation.
E. Received the Discipline Report, acted on discipline matters and requested Bar Counsel to prepare proposed revision to Rule 7.3 on targeted mail solicitations.
F. Received report on legislative affairs from Travis Bowen, legislative liaison. Mr. Bowen reported activities of the legislative interim committees. Commissioner Hanson reported on the activities of the Tort and Insurance Industry Reform Task Force. Reviewed recent developments in pension plan cases removing the exemption of certain pension plans, which developments will receive further study and consideration.
G. Received the monthly report of the Budget and Finance Committee. Authorized the Executive Committee to negotiate a line of credit to more effectively respond to seasonal cash flow needs. Authorized a new administrative policy to impose late fee charges of 1½ percent per month on various services and space fees charged by the Bar.
H. Reviewed the status of litigation pending against the Bar, including the dismissal of certain cases in Federal courts and the affirmation of an Administrative Law Judge ruling in favor of the Bar and the case alleging wrongful discharge wherein the Board of Review reiterated the finding of the termination for just cause based on insubordination.
I. Appointed a committee to review the process for the selection of persons to receive Bar awards.
J. Determined that it will study the possible promulgation of a code of professional courtesy as has been adopted in numerous other jurisdictions.
K. Received a report of the Executive Director summarizing recent meetings in Toronto as part of the ABA Annual Meeting.
L. Received a preliminary report from the Bar Commission's Representation Study Committee regarding their review of the districting process and a proposed questionnaire for the membership to be used in conjunction with several regional meetings with Bar members to discuss governance and structure issues.

Bar Dues Notice

The 1989 Bar Licensing and Membership Dues forms will be mailed on November 1. You will notice that dues are slightly higher than last year and that this reflects the third and final incremental increase as approved by the Supreme Court in 1986 for the 1987-89 dues cycles. We will appreciate your return of the completed license form and dues payment as early as possible. If you have any questions concerning your dues form or licensing status, please call our Licensing Clerk at the Bar Office.

Discipline Corner

ADMONITIONS:

1. An attorney was admonished for violating DR 1-102(A)(6) for conduct adversely reflecting on the attorney's fitness to practice law for inappropriately substituting the attorney's will and decision-making authority for that of the client in the settlement of the client's case.

PRIVATE REPRIMANDS:

1. An attorney was privately reprimanded for violating DR 6-101-(A)(3) and Rules 1.1 and 1.3 of the Rules of Professional Conduct for failing to exercise reasonable diligence and promptness in representing a client by failing to file an appellee's brief with the Utah Court of Appeals for a period of 14 months after the briefs were due and after the attorney had received an extension of time in which to file the brief.

PUBLIC DISCIPLINE:

1. Phil L. Hansen was placed on Interim Suspension from the practice of law by the Utah Supreme Court on July 28, 1988, said interim suspension continuing until the pending formal complaints have been resolved. The Supreme Court by that order is permitting Mr. Hansen to continue representation of clients whose cases were currently active at the time the Interim Suspension was imposed.

REINSTATEMENTS:

1. Jerry V. Strand was reinstated to the practice of law effective September 6, 1988.

CLARIFICATION;

The Charles M. Brown Jr. who is on disability suspension as noted in the August/September *Bar Journal* is *not* Charles R. Brown of the firm Hunter & Brown, Charles C. Brown of the firm Brown, Smith & Hanna or Charles S. Brown of the firm Watkiss & Campbell.

Direct Mail Solicitation Permissible

The U.S. Supreme Court in *Shapero v. Kentucky*, No. 87-6 (U.S. June 14, 1988), recently struck down as unconstitutional Rule 7.3 of the Rules of Professional Conduct. Traditionally direct communication, by mail, to a specific individual concerning a specific cause of action or legal matter has been prohibited. The Court in *Shapero* held that such a prohibition violates an attorney's first amendment right of free speech. Consequently, attorneys may send direct solicitation letters to specific individuals. However, the rules of professional conduct requiring truthfulness and accuracy in content of those letters still apply. The U.S. Supreme Court also left open the door for State bar associations to fashion rules requiring submission to the Bar of direct solicitation letters for review of the content prior to mailing. The Board of Bar Commissioners, through Bar Counsel, will be submitting a proposed rule change to the Utah Supreme Court which will be consistent with the *Shapero* decision.

It should be noted that direct person-to-person solicitation is still prohibited.

If you have any questions regarding direct mail solicitation, please contact the Office of Bar Counsel at 531-9110.

Bar Foundation Appoints Steve Nebeker to Board of Trustees

Salt Lake City Attorney Steve Nebeker has been appointed a Trustee of the Utah Bar Foundation to fill the vacancy created by the Honorable J. Thomas Greene Jr., who recently resigned from the Foundation's Board of Trustees. A partner in the law firm of Ray, Quinney & Nebeker, Steve Nebeker will serve the remainder of Judge Greene's term on the Foundation's Board of Trustees. Judge Greene served continuously as a Trustee since 1972 and is a past president of the Foundation.

Bar Foundation's *Legal Briefs* Will Air on KUED Channel 7

The Utah Bar Foundation's series of informational mini-programs titled *Legal Briefs* will again air on KUED Channel 7 beginning Saturday, October 15, 1988, at 5:55 p.m. The 13-part series will be run weekly at that time for 26 weeks immediately following the consumer advocacy program "Fight Back," hosted by David Horowitz. *Legal Briefs* is designed to educate the public about basic legal situations, such as jury duty, small claims court, hiring a lawyer, and traffic court, as well as specific areas of law such as divorce, wills and trust, contracts, and real property. The series is hosted by Third District Court Judge J. Dennis Frederick and features various members of the Bar.

Depositions to be Destroyed

All depositions on cases filed 10 years ago or earlier in the Third District Court will be destroyed beginning January 1, 1989, because of the inadequate storage space in the court.

It is possible that some of these depositions may be on open cases, therefore lawyers should check their files and reclaim any depositions they need.

It is important lawyers reclaim depositions before January 1. For more information, contact Craig Ludwig at 535-5111.

Claim of the Month

ALLEGED ERROR OR OMISSION

The insured attorney failed to timely file a personal injury action.

RESUME OF CLAIM

The insured represented an elderly brother and sister who were injured in an automobile accident. He was retained by them approximately one month after the accident.

During the time between the insured's retention by the claimants and the expiration of the statute of limitations, the insured became ill and required surgery and hospitalization for an extended period of time. He hired an attorney as an independent contractor to manage his office while he was away. The attorney hired was not the person listed on the application. While the insured was in the hospital, this attorney failed to timely file the action.

When the insured returned from the hospital, the hired attorney represented that all matters had been taken care of expeditiously. The insured took him at his word and did not learn of this error until he was reviewing his entire caseload prior to retirement. As a further complication, the hired attorney passed away shortly after the claim was tendered to the carrier.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

This claim might have been avoided if the insured had properly prepared for his time away from his office. This would have included preparation of a list of upcoming filing deadlines as well as other items which required particular care. Proper preparation would also entail his having a person whom he knows and trusts to take over his caseload. In the instant claim, he hired an attorney from another part of the state to cover for him in his absence. This was not the person listed in his application for insurance, with whom it is presumed a working

relationship had already been forged.

Finally, this is an illustration of the absolute need to double check and maintain control of files. Attorneys should never take for granted the fact that work has been performed properly or timely by another attorney.

Environmental Considerations in Natural Resource and Real Property Transactions

On November 16 and 17, 1988, the Rocky Mountain Mineral Law Foundation is sponsoring a two-day Special Institute on Environmental Considerations in Natural Resource and Real Property Transactions in Denver, Colorado.

This Institute will provide a comprehensive analysis and evaluation of environmental considerations involved in the purchase and sale or lease of natural resource and other real properties.

Registration fees include comprehensive course materials, two hosted luncheons, a hosted reception and coffee breaks.

For additional information, contact the Rocky Mountain Mineral Law Foundation at (303) 321-8100.

Utah Endowment for the Humanities Sponsors Lecture Series

The Utah Endowment for the Humanities, in cooperation with the University of Utah Department of Philosophy and College of Law, the Utah State Bar, and other professional groups, is sponsoring a Lecture Series on Ethics and the Professions Today.

The series will address such questions as: What are the most pressing issues facing the professions today? Do the professions face common problems? Are the professions locked in conflict? Can professionals learn from each other and work together? Programs in November and December include: November 10, 1988—Ethics and the Legal Profession; November 17, 1988—Current Issues in Medical Ethics; December 1, 1988—The Professions Today: Common Problems or Conflicts?

Geoffrey C. Hazard, Sterling Professor of Law, Yale Law School, and Executive Director of the American Law Institute, will act as Reporter at the November 10 lecture. He was one of the chief architects of the new Model Rules of Professional Conduct.

Utah Code Available in Computerized Form

An agreement between CodeCo Legal Publishers of Orem, Utah, and Electronic Text Corporation (ETC) brings the full text of a state's code to personal computers for the first time. ETC has released a computerized version of the Utah Code for use with ETC's PC-based text indexing and retrieval program, WordCruncher.

WordCruncher helps attorneys quickly locate references within the Code. When a user needs to review the text of a specific section (i.e., "Title 78, Chapter 14, Section 3), WordCruncher quickly accesses that section of the statutes. Using WordCruncher's full text retrieval features, a user may also search for a word, phrase, or combination of words and phrases using all the standard search criteria including Boolean connectors, proximity and order statements.

For example, an attorney who wishes to conduct research on "mechanic's or materialman's liens," but does not know every location that phrase exists in the Code, may simply type in the phrase. WordCruncher will then display all occurrences of the phrase "mechanic's or materialman's liens" in context. The attorney may then browse through the list on the screen and retrieve the full text of the appropriate references.

Depending on hardware configurations, WordCruncher and many word processors, including WordPerfect, can be co-resident in the system. For instance, if WordPerfect and WordCruncher are running under WordPerfect Library, the user can simply toggle between WordCruncher and WordPerfect. Once the desired data has been retrieved from a text, it may be manipulated in any number of ways. Retrieved information can be printed immediately, imported into a word processor, saved as a DOS text file, or placed in a temporary file such as WordPerfect Library's Clipboard provides.

The Utah Code requires 27 megabytes of available hard disk space. The data is presently distributed on floppy disks. ETC and Iomega Corporation of Roy, Utah, have reached an agreement enabling Iomega to sell the data on their Bernoulli Cartridges as part of their recently announced Bernoulli Collection. ETC plans to release the data on compact disks in the near future.

The Utah Code can be ordered from Electronic Text Corporation at (801) 226-0616 or purchased from authorized dealers.

Utah Bar Foundation Publishes Cliff Ashton's History of the Federal Judiciary in Utah

The Utah Bar Foundation is pleased to announce that Clifford Ashton's history entitled *The Federal Judiciary In Utah* has been published in hardbound form and is now available for purchase at a cost of $15.00. Cliff's many years of experience as a trial attorney and his well-known skill as a raconteur give him a unique perspective on the history of Utah's Federal Judiciary. The book chronicles the federal judges from the early pioneer days of the State of Deseret, through the religious and political turmoil of the Utah Territory, to the controversial era of Judge Willis Ritter. The publication of this interesting book has been made possible by the generous contributions to the Foundation by Calvin and Hope Behle and the C. Comstock Clayton Foundation. Copies may be purchased by completing the attached form and mailing it to the Utah State Bar Office together with your check made payable to the Utah Bar Foundation in the amount of $15.00 for single copies. There is a discounted price for orders of multiple copies: 10-24 volumes at $12.50 each, more than 25 volumes at $10.00 each. Price includes postage and handling.

'The Federal Judiciary In Utah'

by Clifford Ashton

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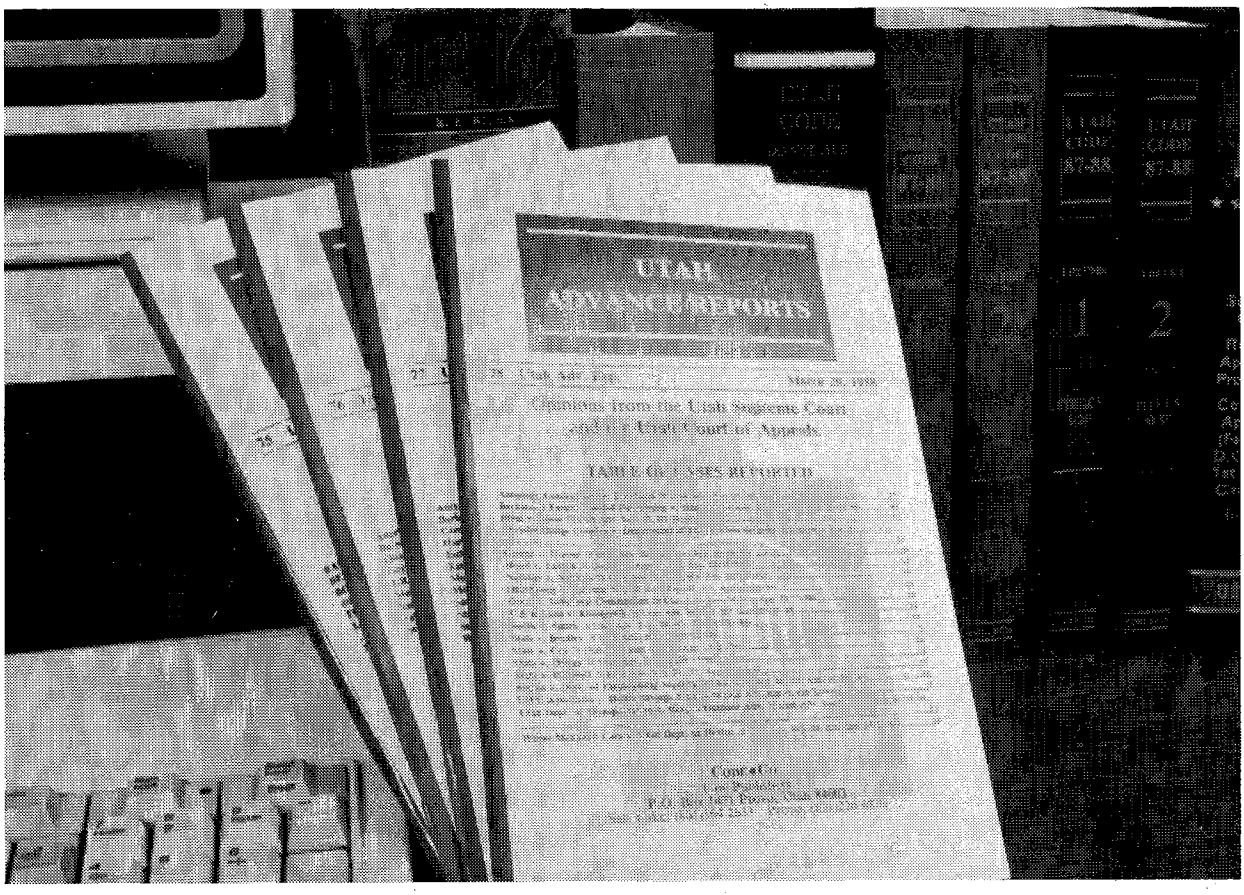

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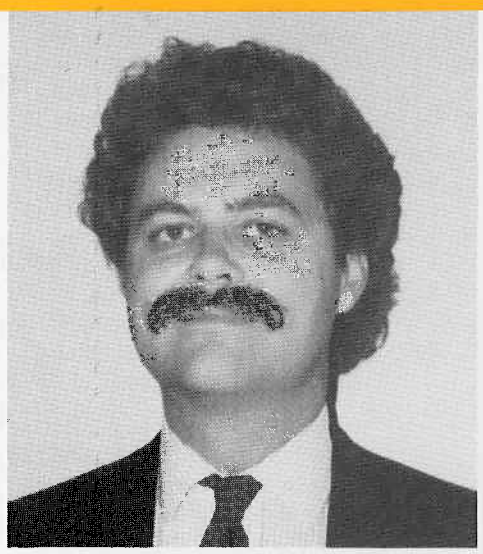
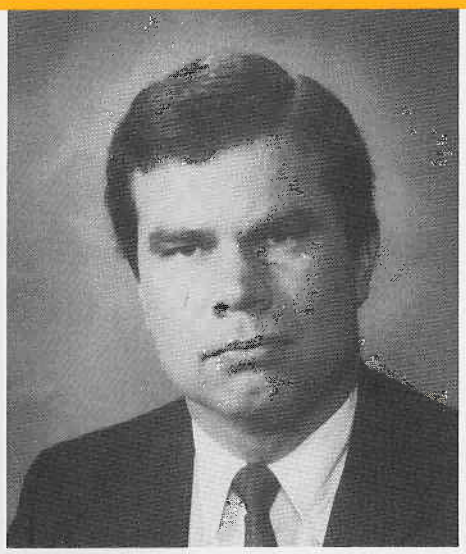
CASE SUMMARIES

By William D. Holyoak and Clark R. Nielsen



William D. Holyoak



Clark R. Nielsen

STANDARD FOR IMPOSING AND VICARIOUS LIABILITY FOR PUNITIVE DAMAGES; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The parents of a child killed when a truck jumped a curb and struck the child and his father, who were standing on a Salt Lake City sidewalk, brought an action for wrongful death, physical injuries to the father and emotional distress to both parents. The driver of the truck was delivering newspapers at the time of the accident and was under the influence of alcohol. Plaintiffs proffered considerable evidence of aggravating circumstances concerning the accident, the driver's employment and conditions in the driver's workplace.

The trial court granted summary judgment to the driver and his employer on plaintiffs' claim for punitive damages, but denied summary judgment to defendants on plaintiffs' claim for emotional distress.

The trial court held that "evil intent," "actual malice," or "malice in fact" was required for an award of punitive damages. The Supreme Court, in its main opinion written by Justice Durham, held that this ruling misconstrued its case law, wrongfully relying on a standard applied by the Court in a false imprisonment case. The Court stated:

> The standard for punitive damages in non-false imprisonment cases is thus clear: they may be imposed for conduct that is willful and malicious and that manifests a knowing and reckless indifference and disregard toward the rights of others.

The Court rejected defendants' arguments that punitive damages should not be awarded in drunk driving cases or where the defendant has already been punished criminally for his actions. The Court concluded that the facts alleged by plaintiffs "would certainly be sufficient to support a finding of knowing and reckless disregard for the safety of others" and consequently concluded that the trial court had incorrectly awarded summary judgment to defendant on the issue.

The Court then considered an issue of first impression in Utah: the vicarious liability of an employer for punitive damages. After noting four different rules applied by different courts, the Court adopted the so-called "complicity rule" of the Restatement (Second) of Torts. That rule "limits vicarious punitive damages to those situations where wrongful acts were committed or specifically authorized by a managerial agent or were committed by an unfit employee who was recklessly employed or retained." Again, the Court concluded that there had been sufficient allegations by plaintiffs to meet this standard and, consequently, to avoid summary judgment on the issue. Justice Durham further stated that plaintiffs were entitled to present this issue to a jury. In a partially concurring opinion, written by Justice Zimmerman and joined by Chief Justice Hall and Justice Stewart (thereby making it the view of a majority of the Court on the issues it addressed), the three justices agreed that the Restatement standard should apply, but concluded that the trial court should determine upon remand whether sufficient evidence existed to send the case to the jury on this issue.

The final issue before the Court was whether a cause of action for negligently inflicted emotional distress exists and, if it does, under what circumstances. The Court noted that as recently as 1982 it had stated summarily that "it is well established in Utah that a cause of action for emotional distress may not be based upon mere negligence." *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982). Discounting the cases relied upon in *Reiser*, the Court "addressed the question anew." The Court noted that it had not found any jurisdiction in the United States which barred all recovery for the negligent infliction of emotional distress.

The Court noted that three major tests have been applied by the courts: the "impact" test, which requires that the plaintiff sustain a physical impact that causes the emotional distress; the "zone of danger" test of the Restatement (Second) of Torts, which does not require an impact, but does require plaintiff to have been in danger of an impact; and the so-called *Dillon* test (based on a California case), which requires the plaintiff to be located near the accident, that the emotional trauma result from witnessing the accident and that plaintiff be closely related to the victim. Concluding that the instant case satisfied each of the three tests, Justice Durham, while indicating sympathy for the *Dillon* rule, declined to adopt a particular rule, but merely affirmed the trial court's denial of summary judgment to defendants on the issue. The three concurring justices (and thus the Court) were not content to affirm on the issue without selecting a standard. They selected the Restatement, or zone of danger, rule. *(Johnson v. Rogers*, 90 Utah Adv. Rep. 3 (August 25, 1988).)

PIERCING THE CORPORATE VEIL OF A SUBSIDIARY

Against a muddled procedural background, the Utah Court of Appeals discussed the law relating to piercing the corporate veil of a subsidiary to get to the assets of its parent. Salt Lake City Corporation sued a corporate contractor and its parent, seeking to recover the cost of repairing and completing work done pursuant to a public construction contract. The only basis for liability against the parent was a "piercing" or "alter ego" theory.

The Court of Appeals noted that the Utah Supreme Court has adopted the following two-prong test to determine when dis-

regarding the corporate entity is justified:

> [I]n order to disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice or an inequitable result would follow.

Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979). The Court of Appeals noted that the first prong of the test has been referred to as the "formalities requirement" and the second prong as the "fairness requirement." The court also noted that "[a] key feature of the alter ego theory is that it is an equitable doctrine requiring that each case be determined upon its peculiar facts."

The court then reasoned:

> In the parent-subsidiary situation, the central focus of the formalities prong is "the degree of control that the parent exercises over the subsidiary and the extent to which the corporate formalities of the subsidiary are observed." Barber, *Piercing the Corporate Veil*, 17 Williamette L. Rev. [371,] 397 [1981].
>
> One commentator has listed 11 factors relevant to deciding whether the parent exercises "the necessary control" over its subsidiary. *Id.*. . . . Six are pertinent to the present case: (1) "the parent corporation owns all or most of the capital stock of the subsidiary"; (2) "the parent corporation finances the subsidiary"; (3) "the subsidiary has grossly inadequate capital"; (4) "the parent corporation pays the salaries and other expenses or losses of the subsidiary"; (5) "the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest"; and (6) "the formal legal requirements of the subsidiary are not observed." *Id.* at 398.

In a footnote the court quoted from the Barber law review article again as follows:

> [T]he adequacy of [a] corporation's capitalization looms large in [a] court's evaluation of the unfairness prong. A leading commentator on corporate law has emphasized the importance of this element in piercing situations:
>
> It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege. Barber, *Piercing the Corporate Veil*, 17 Williamette L. Rev. at 386 (quoting H. Ballantine, *Ballantine on Corporations*, 303 (1946)).

The undercapitalization factor is thereby particularly important, serving double duty both as a factor in determining whether the formalities requirement is met and as a central focus in the analysis of the fairness requirement. *(Salt Lake City Corp. v. James Constructors, Inc.*, 90 Utah Adv. Rep. 62 (Ct. App. September 7, 1988).)

STANDARD OF REVIEW AND CIRCUMSTANTIAL EVIDENCE

The Supreme Court (J. Durham) affirmed defendant's second degree murder conviction in a divided decision. The victim's body was found near Beaver, Utah. Defendant had been seen with her several hours earlier in Las Vegas, and in Mesquite, Nevada. Defendant and the victim had left their Las Vegas apartment where they lived together two weeks earlier. Based upon this, and other circumstantial evidence, the trial judge disregarded defendant's alibi testimony. The Supreme Court applied Utah R. Civ. P. 52(a) as the proper standard of appellate review and held the evidence sufficient to sustain the verdict. The majority opined that under this standard, the appellate tribunal is less deferential than previously to the factual determinations of the trial judge and the likelihood of reversal of a bench trial was greater than a jury trial. If the clear weight of the evidence does not support the verdict, then it will be reversed even if no defense is presented. The defendant may also obtain reversal if the court otherwise is convinced that a mistake has been made, regardless of the weight of the evidence.

The dissenting opinion of Justice Stewart challenges, for the first time, the application of Rule 52(a) and *State v. Walker*, 743 P.2d 191, 193 (Utah 1987), in the review of criminal convictions from a bench trial. The dissent objects to the use of a "clear-weight-of-the-evidence" test in reviewing the sufficiency of evidence and argues that this first element of the majority's test erroneously "balances" or "weights" the evidence to ascertain the "clear weight." Secondly, the "clear and firm conviction" standard necessary to reverse a conviction is wholly subjective and disregards the standard of proof at trial—beyond a reasonable doubt. In its review of the evidence, the dissent urges that there is no probative evidence that defendant killed the victim. *State v. Goodman*, 91 Utah Adv. Rep. 3 (Sup. Ct. September 9, 1988).

ADEQUACY OF RECORD ON APPEAL

In a *per curiam* decision, the Supreme Court affirmed defendant's aggravated robbery and theft convictions. Defendant appealed the trial court's refusal to grant a continuance of his trial because of his inadequate preparation. The Supreme Court found no abuse of discretion because the record on appeal was inadequate to support defendant's continuance request. An appellant has the responsibility to provide an adequate record that specifically supports the contentions on appeal. *State v. Linden*, 90 Utah Adv. Rep. 22 (Sup. Ct. August 26, 1988).

PRESERVATION OF PUTATIVE FATHER'S RIGHTS BY ACKNOWLEDGMENT

In a detailed analysis of past cases regarding the rights of putative fathers, the Court of Appeals (J. Billings) held that a putative father may legally preserve his parental interest in his illegitimate child either by compliance with the paternity statute, Utah Code Ann. Sect. 78-30-4(3) (1987), or by public acknowledgment under Sect. 78-30-12, prior to the filing of a petition for adoption by a third party. The acknowledgment statute, Utah Code Ann. Sect. 78-30-12 (1987), and the paternity statute, Sect. 78-30-4(3), are not mutually exclusive but are alternative means available to establish and maintain any constitutional right of parenthood. Public policy does not favor termination of a unwed father's right after he has developed a long-standing relationship over several years with his daughter and is prevented by the mother from learning of the daughter's planned adoption. *In Re T.R.F.*, 90 Utah Adv. Rep. 36 (Ct. App. August 30, 1988).

Utah's New Judicial Council

By Judge Gregory K. Orme

While the most publicized aspect of the new judicial article[1] was authorization for an intermediate appellate court, the most innovative may be establishment of the Judicial Council.

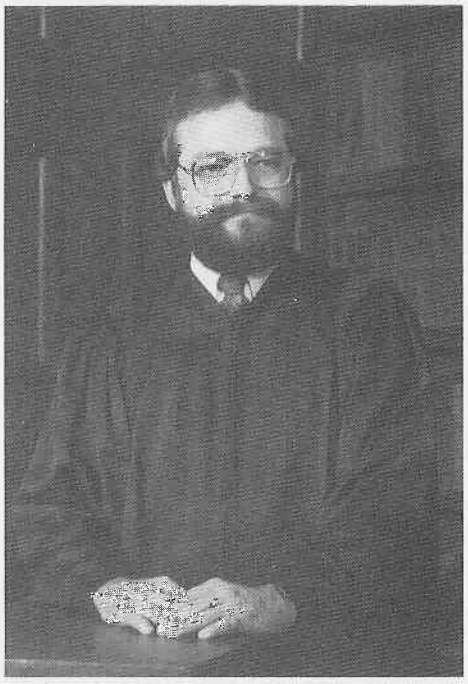
> A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges, and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.

Utah Const., Art. VIII Sect. 12.

Although other states have judicial councils of some type or other—and Utah had a legislatively created advisory body of that name going back to 1973 or so—Utah's "new" Judicial Council is unique by reason of its status as a constitutional body.

The Council was envisioned as a kind of board of directors for the Utah judiciary. The only constitutional limitation on the rule-making power of the Council is in Sect. 4, which vests the Supreme Court with the power to adopt rules of procedure, of evidence, for the management of the appellate process, for the utilization of retired judges and judges pro tempore, and governing the practice of law. Utah Const., Art. VIII Sect. 4.

Implementing legislation has fixed membership on the Judicial Council as follows: the Chief Justice (by constitutional provision, the presiding officer), a Supreme Court justice, a Court of Appeals judge, three District Court judges[2], two Circuit Court judges, two Juvenile Court judges, and two justices of the peace. Utah Code Ann. Sect. 78-3-21(1) (1987). A Bar representative serves as a non-voting member, *Id.*, and the Chief Justice may vote only to break a tie. *Id.* (2)(a). Except for the Bar representative and Chief Justice, members are elected by their peers, *see Id.* (1), and serve three-year terms. *Id.* (2)(b).



Judge Orme graduated from the University of Utah, magna cum laude, in 1975 with a Bachelor of Arts Degree in political science. He obtained his law degree, with high honors, from The National Law Center, George Washington University, in 1978. He was appointed to the Utah Court of Appeals in 1987 and serves as that court's Judicial Council member. He is a member of the executive council of the Utah State Bar's Administrative Practice Section, chair of its Constitutional Bicentennial Committee, and a member of its Courts and Judges Committee.

The implementing legislation more precisely defines the Council's responsibilities. "The council is responsible for the development of uniform administrative policy for the courts." *Id.* (3). The Council is charged to "establish and assure compliance with policies for the operation of the courts, including uniform rules and forms for practice," *Id.* (3)(a), and to prepare an annual report on the courts. *Id.* (3)(b). The Council is directed to establish judicial competence standards and a "formal program for the evaluation of judicial performance." *Id.* (4). The Council is also directed to develop operational, personnel, and facilities standards for the courts. *Id.* (5). Other legislation has vested the Council with additional responsibilities. *See, e.g.*, Utah Code Ann. Sect. 78-7-25(2) (1988) (Judicial Council to establish procedure for trial court reporting on matters not decided within 60 days); Utah Code Ann. Sect. 76-3-301.5 (1988) (Judicial Council to set uniform fine schedule); Utah Code Ann. Sect. 78-3-11.5(1) (1988) (Judicial Council to administer state district court system).

How does this new "board of directors" for the judicial branch of government operate and who serves on it?

The Council averages monthly meetings of one day or so. Its agenda is set in advance by the Council's Management Committee, which also serves as a kind of executive committee for the Council. The Council has a Liaison Committee that is responsible for the judiciary's relations with the Legislature, the executive branch, and the press

and public. A Long-Term Planning and Policy Committee is responsible for coordinating the Council's planning activities and the promulgation and publication of council policies.

Current membership on the Council, with committee assignment, is as follows: Chief Justice Hall (Management); Justice Zimmerman (Liaison); yours truly (Management); District Judges Hanson (Management), Frederick (Liaison), and Roth (Planning); Juvenile Judges Bachman (Liaison) and Keller (Planning); Circuit Judges Grant (Planning) and Bean (Management); and Justices of the Peace John Yardley[3] (Liaison) and Peggy Acomb (Liaison). Reed Martineau (Liaison) is currently the Bar representative, continuing a tradition of having the immediate past president of the Bar serve a one-year term on the Council.

The Council's meetings are open to the public, although seating for interested persons has not proven to be a problem, except for at the Council's unusually well-publicized deliberations on the child support guidelines.

While one's parochial interests cannot always be suppressed, council members see their mission—as council members—to be the efficient, effective, and economical operation of the judicial branch of government rather than the advancement of their particular level of court and its agenda. Council members accordingly do not make presentations to the Council. Nor do they purport to "speak for" their colleagues, although they will often convey, for informational purposes, their sense of what their colleagues' attitude or position is on a particular issue. Indeed, a "board of directors" model fairly characterizes how the Judicial Council functions. Each member, following discussion, votes his or her conscience based on what he or she thinks is best for the judiciary as a whole. The debate and compromise which precedes voting on a motion usually results in a consensus, but divided votes are not uncommon. The Council, like a good board of directors, tries to concern itself with policy issues, leaving Court Administrator Bill Vickrey and his able staff to implement those policies and manage day-to-day operations.

The Council's most ambitious undertaking to date has been the review of duplicative and inconsistent local rules, standing orders, administrative directives, and the like, with an eye to adoption of a well-organized, integrated Code of Judicial Administration. That effort has been in process for months, but is now complete. The Code will be published by The Michie Company and will include the subjects previously covered by the Uniform Rules of Practice as supplemented by various local rules, plus rules governing the Council's procedures, the judiciary's personnel policies, and a host of other matters.[4] All administrative rules promulgated by the Supreme Court, such as those dealing with pro tem judges and the Rules of Professional Conduct, will also be included in the Code. The Code's purpose is not the addition of another tier of rules, but rather the consolidation of several tiers of rules and policies into a single, easy-to-use volume. It should prove indispensable to practitioners as well as judges and court personnel.

The Council's successful legislative initiatives include unified court boundaries, *see* Utah Code Ann. 78-1-2.1 (1988), and state funding of the district courts. *See* 1988 Laws of Utah ch. 152 (codified in Utah Code Ann. Sect. 78-3-11.5 *et seq.*)

The Council's most productive work will probably be in the realms of long-range planning and growth management. The Council's task forces on Gender & Justice, Alternative Dispute Resolution, and Child Support have already made important contributions. Its master plan on data processing is being implemented, with automation of all trial courts to be completed within the year. Linkage to law firms and agencies is down the road another two years or so. A meaningful Judicial Performance Evaluation program is shaping up, and the completion of facility master plans should ensure that the construction and expansion needed to keep up with the growth in our state—and to improve on the quality of justice delivered—will be coherent and effective.

The most important aspect of the Judicial Council's existence and effectiveness is more elusive. While state judiciaries have enjoyed independence in the narrow sense of being able to dispose of cases coming before them without interference, they have not typically enjoyed the degree of independence which characterizes a separate branch of government.[5] Independence in the constitutional sense can be achieved only through the acquisition and responsible exercise of more control—by the judiciary—over the judicial budgetary process, judicial personnel matters, judicial facility planning, data processing for the judiciary, etc. Such independence promotes a strong, modern, and responsive court system. Only through an effective vehicle like the Judicial Council can such independence be realized.

[1] *Utah Const., Art. VIII (approved by general election November 6, 1984, effective July 1, 1985).*

[2] *No other level of court has more than two judges on the council. An "extra" seat for the District Court reflects the importance of that court as the state's court of general jurisdiction, and is also a product of history. Utah's "old" Judicial Council was largely a creature of the District Court, which had an overwhelming majority of its members. Prior to 1981, when the Chief Justice was so designated, a district judge even presided over the council.*

[3] *As with any group, informal assignments are also important. Judge Yardley serves as the Council's resident humorist and raconteur. When you see John, ask him to tell you about the guy who fishes Panguitch Lake with dynamite.*

[4] *The Code of Judicial Administration will contain rules,* inter alia, *on utilization of interpreters, accounting for fees, destruction of court records, court commissioners, bail schedules, transfer of cases, use of senior judges, law and motion practice—even on the use of signature stamps. Some variation will still exist between courts (and among jurisdictions) in such matters as law and motion practice. However, all such local variations will be set forth in the Code of Judicial Administration, organized under the heading "Local Rules."*

[5] *Attitudes reflect values. During my time on the Council, I have had informal discussions with, and heard formal presentations by, any number of Legislators and others in state government. In discussing budgetary and other such matters, most habitually lump the courts in with "the other agencies." The courts, "like all the other agencies," must live with a certain percentage budgetary cut; the courts, "like all the other agencies," must observe a particular personnel hiring freeze. As important as the agencies of the executive branch are, the courts, as an independent branch of state government, are on a constitutionally different footing from "all the other agencies." That fact deserves more recognition than it has received in the past.*

Job Service Publications Available From University Law School

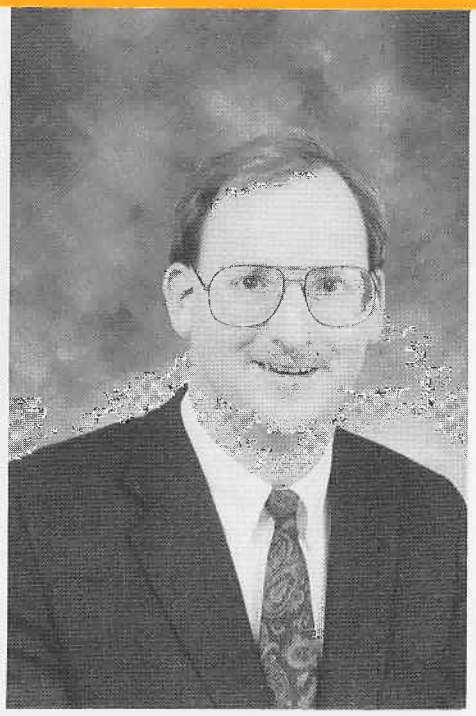
The Legal Career Services Office at the University of Utah College of Law provides two monthly publications to assist in securing employment. The Job Reviews contains legal and legally related employment opportunities listed with the LCS Office. The Bulletin Board Summary provides a brief summary of all government, judicial, fellowship, teaching, internship, summer study, graduate study, public interest, writing competition, special areas, minority and non-traditional opportunities listed with LCS.

Each publication costs $5 for a six-month subscription. If you would like to subscribe, please send your check to:

University of Utah College of Law
Legal Career Services Office
Salt Lake City, UT 84112

LCS also invites you to list employment and other appropriate law-related opportunities with its office. For more information, call Francine Curran at 581-5418.

President's Report



The Young Lawyers Section of the Utah State Bar offers an opportunity for young lawyers to have substantive and positive experiences in law-related public service and in the organized Bar. Many members of the Section are participating in projects and activities of the Section. I believe this is based on a commitment to the profession that transcends pure self-interest. The commitment of service to the Bar and public is not an easy one, however, given the enormous pressures of day-to-day practice. It is easy to become so focused on the challenges of practice that we fail to pursue opportunities for law-related public service or opportunities for service to the profession through the organized Bar.

The Young Lawyers Section is just one of the vehicles through which you can serve the public and the Bar. The Section always needs more attorneys to participate. Even if you only have a few hours a month that you can make available, the Section can give you opportunities to get involved. As you can tell by perusing the list of committees and projects that follows, there are numerous ways to get involved in the Section. Strong committees are the backbone of this organization. I want to express my appreciation to the committee chairpersons and vice-chairpersons named below for their tremendous efforts.

The Law-Related Education Committee is continuing this year its successful library lecture series titled "Law School for Non-Lawyers" at the Salt Lake City main library and its in the class programs for elementary and secondary school students on the law. The Committee has completed an update on Utah law for a high school textbook titled "Utah Street Law." The Committee is also preparing a legal information pamphlet for graduating high school students to be titled "Stepping Out." This pamphlet will be published later this year. The chairperson of the Law-Related Education Committee is Richard Van Wagoner and the vice-chairperson is Mark Webber.

A special project of the Law-Related Education Committee is the Law for the Clergy project. The Law for the Clergy project will produce a non-denominational pamphlet on legal issues commonly faced by clergy; e.g., priest/penitent privilege, clergy malpractice, etc. In addition, workshops and seminars for the clergy will be held to discuss the sensitive topics covered by this pamphlet. This project is chaired by Blake Ostler.

The Membership Support Network Committee will continue with its noon brown bag lecture series for young lawyers. This committee will provide additional support for members of the Section through organizing CLEs, a partnership survey and a sole practitioner outreach program. The chairperson of this committee is Nick Hales and the vice-chairperson is Mark Egan.

The Community Services Committee is chaired by David Little. The vice-chairperson is Todd Zagorec. This committee will continue to coordinate the traditional Sub for Santa program and the blood drive. Last year the committee started a tutoring program in local elementary schools which will be continued this year. The Community Services Committee is also initiating two new programs this year: a voter registration and turnout program and a victim-witness assistance program.

The Law Day Committee will continue its law day fairs with emphasis on expansion to areas outside of Salt Lake City. The committee will also organize radio and public television programs during law week and will prepare public service messages on the law. The chairperson of this committee is Rich Hamp and the vice-chairperson is James Hyde.

The Needs of Children Committee will continue and expand its program titled In re Kids and will make presentations on children's rights to community groups. In addition, this committee is planning a program to educate teachers about their rights and responsibilities in reporting child abuse. This committee is chaired by Sandra Sjogren. The vice-chairperson is Mark Bettilyon.

The Needs of the Elderly Committee will, by means of writing columns in newsletters and presentations in senior citizens centers, educate senior citizens about their legal rights. Moreover, the committee will continue distribution of its Senior Citizens Handbook published a little over a year ago. The chairperson of this committee is Keith Kelly and the vice-chairperson is Lisa Yerkovich.

The Lawyers Compensation Survey Committee will continue to prepare and coordinate the annual survey on lawyer compensation. Greg Skordas is the chairperson of this committee and Charlotte Miller is the vice-chairperson.

The Publications Committee will coordinate the publishing of the Barrister segment of the *Utah Bar Journal* which replaces the stand alone Barrister publication. Stanford Fitts is the Chairperson of this committee and Noland Taylor is the vice-chairperson. They will also be members of the *Utah Bar Journal* staff.

The Publicity Committee chairperson is Larry Laycock and the vice-chairperson is Christopher Hall. Their committee will be responsible for publicizing Section events and coordinating press coverage of any projects undertaken by the Section.

The Awards Committee will make recommendations on the Young Lawyers of the Year Award and the Liberty Bell Award given by the Section every year. In addition, this committee will coordinate the Section's participation in the ABA Young Lawyers Division Award of Achievement competition. Sharon Sonnenreich is the chairperson of this committee and JoAnne Shields is the vice-chairperson.

The Bridge the Gap Committee will assist in developing programs for new attorneys and will be responsible for involving new attorneys in the Young Lawyers Section. In connection with these responsibilities, the committee will assist in Bar admission ceremonies. David S. Christensen is the chairperson of this committee and Kim Luhn is the vice-chairperson.

The Tuesday Night Bar Committee will assist the senior Bar and Bar staff in the Bar's new Tuesday Night Bar legal intake program at the Law and Justice Center. This program will provide an opportunity for numerous attorneys to provide legal information to the public and to assist members of the public in obtaining counsel. Cecilia Espenoza is the chairperson of this committee and Mary Duffin is the vice-chairperson.

Justice Oliver Wendall Homes once said: "The great thing in this world is not so much where we stand, as in what direction we are moving." I believe that the Section is building on the foundation laid by so many, including Cecelia Espenoza, John Adams, Paul Durham and Stuart Hinckley, and is moving forward. I encourage more members of the Section to join with us.

1987-88 Lawyer's Compensation Survey

By Gregory G. Skordas

In early 1988 the Lawyers' Compensation Survey was sent to all members of the Utah State Bar. Of the over 4,500 members of the Bar, 575 responded to the questionnaire. Seventeen percent of the responses were from attorneys who are women and 83 percent were from attorneys who are men. This compares with the 16 percent/84 percent difference in 1985-86, the 14 percent/86 percent difference in 1984 and the 10 percent/90 percent difference in 1983. The highest percentage of women responding have been in practice two years or less (nearly 30 percent).

BENEFITS

The following chart indicates the percentage of attorneys responding which receive the indicated benefits. Attorneys who classified themselves as self-employed are not included in determining the percentages. The question asked was, "Does your employer pay *any* portion of the benefits?

Benefit	Percentage of Attorneys Who Receive the Benefit
Bar Dues	89%
Health Insurance	88%
CLE Conferences	82%
Life Insurance	73%
Disability Insurance	69%
Liability Insurance	68%
Dental Insurance	55%

PRIMARY AREAS OF PRACTICE

This year, a new question was asked the respondents regarding primary areas of practice. Each respondent was asked to indicate two areas of specialty. Fifty-five different areas of practice were given by the respondents with the top 10 listed below.

Primary Area of Practice	Percentage of Attorneys
Litigation	16%
Business/Corporate Law	14%
Real Estate/Property	8%
Personal Injury (not including insurance defense	6%
Criminal (prosecution and defense)	6%
Domestic/Family Law	6%
Bankruptcy	5%
Commercial Law	4%
Energy/Natural Resources	3%
General Practice	3%

The surveyors took some liberties in this category. Attorneys listing divorce, domestic or family law were grouped together. Also, most attorneys who practice insurance defense listed themselves primarily as litigators while plaintiff's attorneys generally were more specific and would indicate products liability, or other areas. Judges, law clerks, military attorneys and administrators were not included in this portion of the survey. Several attorneys listed their primary area of practice as civil law and criminal law which may also tend to skew the accuracy of this portion of the survey.

YEARS OF PRACTICE

Of those responding, 15 percent have been practicing law two years or less, 16 percent indicated three to four years of practice, 21 percent have been practicing five to six years, 15 percent have practiced seven to 10 years, 14 percent have been practicing 11 to 15 years and 19 percent have been practicing 16 years or more.

Responses indicating ½ years were rounded to the nearest lower number. Some attorneys simply noted the year of graduation or admission to the bar. Since the survey was mailed in early 1988, graduates from classes of 1985, 1986 and 1987 were placed in the two years or less category.

FORMAT 1st Line: 1987-88 Salaries (not including bonus)
2nd Line: (Percent of Total Responses)
3rd Line: 1987-88 Bonus

TYPE OF PRACTICE	YEARS OF PRACTICE: 2 or less	3-4	5-6	7-10	11-15	16+	Total
Self-Employed	14,400 (2) 0	39,300 (2) 0	51,300 (2) 0	52,200 (3) 0	84,000 (1) 0	63,200 (5) 0	47,200 (14)
Firm 2-14	27,700 (5) 1,700	41,700 (5) 2,600	62,200 (3) 4,000	59,500 (6) 2,200	125,000 (2) 0	79,200 (6) 900	59,100 (26)
Firm 15-35	38,600 (1) 400	37,800 (2) 1,800	50,900 (3) 12,200	N/A (0) —	60,000 (1) 10,000	192,500 (1) 95,000	65,800 (8)
Firm 36 +	41,600 (4) 1,100	45,500 (1) 6,000	65,400 (6) 5,700	69,300 (2) 3,800	62,800 (2) 70,000	143,600 (3) 1,200	71,400 (17)
Corporate	36,500 (1) 6,000	42,500 (1) 4,500	38,200 (2) 1,100	52,100 (4) 600	68,800 (5) 900	77,000 (1) 23,000	55,600 (13)
Government	25,900 (3) 0	32,300 (5) 0	31,000 (6) 0	40,000 (1) 0	48,200 (4) 0	53,000 (5) 0	38,600 (23)
Total	30,300 (15)	38,300 (16)	49,700 (21)	56,400 (15)	68,100 (14)	82,100 (19)	54,700 (100)
1985-86 Totals (approx.)	28,100	37,000	41,800	57,700	66,000	73,800	51,400

TYPE OF PRACTICE

Fourteen percent of those responding consider themselves self-employed, 26 percent work for small firms of less than 15 attorneys, 8 percent are employed by medium-sized firms of 15 to 35 attorneys, 17 percent are with large firms of more than 35 attorneys, 13 percent placed themselves in the corporate counsel class, and 23 percent are government lawyers. Government lawyers included organizations that receive government funds such as legal aid, legal defenders, etc. No class of attorneys is listed in the accompanying chart unless at least four responses were received from that class. For example, attorneys with seven to 10 years of practice working for firms of 15 to 35 attorneys had so few responses that no salary is indicated on the chart.

SELF-EMPLOYED ATTORNEYS

About a dozen attorneys noted that they were both self-employed and worked for a firm. The surveyors took the response to mean that either these respondents were engaged in office-sharing arrangements or were autonomous in their dealings with their associates. In either case, for the purpose of the survey they were considered self-employed only if there was some indication that they contributed something toward overhead expenses such as staff, rent, etc.

On the average, the self-employed attorney pays $40,000 per year for overhead expenses. This constitutes approximately 41 percent of his or her total gross receivables actually collected. Thirty-eight percent of the self-employed attorneys pay at least one-half of the amount they collect each year toward overhead. One attorney from this group actually claimed a net loss for the year of about $10,000.

Not surprisingly, this group also had the most to say about the large number of attorneys joining the legal profession each year and competition for clients. They also complained the most about collecting money and billing clients.

ACCURACY OF THE SURVEY

Responses from 575 attorneys represents about 12 percent of the total Bar population. Statistically the response rate is sufficient to provide an accurate survey when viewed as a whole. However, within a certain class of attorneys four to eight responses or 1 percent of the total surveyed should probably not be relied upon too extensively. Furthermore, in certain groups of attorneys, the salary actually decreases with more years of practice, which is almost certainly not correct.

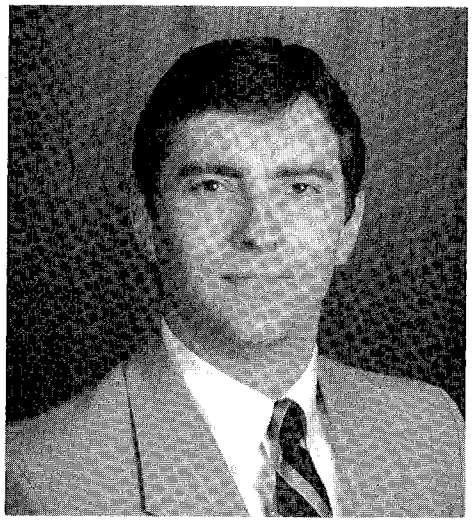
A problem arises when a respondent's salary is extremely low, such as when an attorney worked part time or only a few months of the year. Since all responses received were included, those unusual salaries can skew the sample. Encouragingly, most responses from attorneys working in law firms and government agencies were extremely close, often 15 to 20 responses would be within 10 percent of one another. For this reason, those responses are believed to be more responsive than those from self-employed attorneys and corporate counsel where responses varied by more than 100 percent on occasion.

COMMENTS

One problem from which the survey suffers is handling the variety of information needed to analyze the salaries of solo practitioners. This year, some concerns were addressed, but the space constraints create difficulties for requesting more specific information. Most attorneys are unwilling to spend more than a few minutes completing the questionnaire.

The surveyors solicit any responses, comments, suggestions or complaints with this year's results.

PRESS RELEASE



Christopher C. Fuller Named Utah Young Lawyer of the Year

The Young Lawyers Section of the Utah State Bar Association has named Christopher C. Fuller, 36, an associate in the firm of Snow, Christensen & Martineau of Salt Lake City, as Utah Young Lawyer of the Year. This award is presented annually by the Young Lawyers Section to an outstanding lawyer who is less than 36 years of age, or, if older than 36, has practiced law in the state for five years or less, and who has achieved a commendable degree of professional competence and ability, has demonstrated professional integrity and high ethical standards, has been involved in service to the profession, including involvement in Bar activities and other efforts on behalf of young lawyers, and who is involved in community service, both as a lawyer and as a citizen.

Mr. Fuller graduated cum laude in 1976 from Brigham Young University with a degree in Psychology and minors in Physical Education, History and English. Mr. Fuller graduated from the University of Utah College of Law in 1984, where he was a William H. Leary Scholar and Articles Editor for the *Journal of Contemporary Law/Journal of Energy Law and Policy.*

Mr. Fuller's extensive Bar involvement has included membership in the Young Lawyers Section Executive Council, membership in the Law-Related Education and Law Day Committee and active involvement in the American Bar Association and its Young Lawyers Division (ABA/YLD), in which Mr. Fuller has served as Membership chairman for Utah. He has also served as an Executive Committee Member for the ABA/YLD, Alternative Dispute Resolution Committee, the ABA/Law Student Division Representative for the University of Utah College of Law and chairman of the Utah Young Lawyers Section Standing Committee on Public Relations. In 1987, Mr. Fuller co-chaired the Utah State Bar Young Lawyers Section Ad-Hoc Committee on Fund Raising for the Utah Law and Justice Center and also served as co-chair for the Law-Related Education and Law Day Committee. Mr. Fuller is the founder and coordinator of the Bob Miller Memorial Law Day Run. He has received many awards and distinctions, including the ABA Law Student Division Silver Key Award in 1984 and the Bronze Key Award in 1983.

Chris' community involvement includes service as a speaker for the Utah Law-Related Education Project Speakers Bureau for Junior and Senior High Schools, participation in "Meet a Lawyer Fair" at Crossroads Mall in connection with the Utah State Bar Young Lawyers Section Law Day activities, volunteer work at South High School, teaching English as a second language and service as a judge for the Utah Junior and Senior High School Mock Trial Program. Chris has also served the community by coaching teen basketball and softball programs and by serving as Zone chairman for the Boy Scouts of America Sustaining Membership Enrollment.

Chris is currently serving as a District Commissioner for the Sunrise District, Great Salt Lake Council, Boy Scouts of America and has served as a Scoutmaster.

Chris is a native of Baker, Oregon, where he attended Baker Senior High School from which he graduated in 1969. He is married to Carolyn Gwen Lay of Baker, Oregon.

Special thanks to the Young Lawyers Section Award Committee for their work in making this difficult decision.

Proposed Bylaw Changes

The Executive Council of the Young Lawyers Section, in its April meeting, approved proposed revisions in the Bylaws of the Young Lawyers Section which are herein submitted to the Section membership for a vote. A ballot is enclosed with this issue of the *Utah Bar Journal.* Amendments to the Bylaws require a two-thirds vote of the members of the Section returning ballots.

The following substantive changes are proposed. First, it is proposed that the Bylaws be changed to give the Section Officers the authority to establish and execute the policies and programs of the Section. The current Bylaws vest this power in the Executive Council. In view of the fact that the Section Officers are elected by and accountable to the members of the Section

while the Executive Council members are appointed by the Officers, it is proposed that final responsibility for the direction of the Section be vested in those persons elected by and accountable to the Section membership. In connection with this philosophical change, it is proposed that a provision be added to the Bylaws that the Officers shall regularly report to the Executive Council their policies, actions and expenditures. It is also proposed that the Executive Council shall coordinate and execute the programs and affairs of the Section under the direction of the Officers of the Section. The Executive Council may include all committee chairpersons and it is also proposed that the Executive Council include the ABA District Representative when that person is a member of the Utah Young Lawyers Section.

Second, it is proposed that the provisions on removal of Officers be changed to require a two-thirds vote of the members of the Section voting in the immediately preceding election rather than a two-thirds vote of the Executive Council. Since the Executive Council is appointed by the Officers, this appointed body may be reluctant to remove for cause those who appointed them.

Third, it is proposed that the limitation on the number of members on the Executive Council be abolished. The Bylaws currently provide that no more than 15 people may serve on the Executive Council. The elimination of this ceiling is proposed to give the Officers greater flexibility and to allow more committee chairpersons to sit on the Executive Council.

Fourth, it is proposed that the Bylaw provision that the Treasurer shall prepare a budget to be submitted to the Board of Bar Commissioners be changed. The Treasurer will now submit a budget to the Officers of the Section, who will in turn submit a budget to the Board of Bar Commissioners.

An overwhelming majority of the Executive Council approved these changes. The Executive Council and the Officers urge the members of the Section to return the enclosed ballot and to vote in favor of these Bylaw changes. If you would like to obtain a copy of the Section's Bylaws, with the proposed changes included, or if you would like further information before casting a ballot, please contact Jerry Fenn, 10 Exchange Place, P.O. Box 45000, Salt Lake City, UT 84145. Jerry's telephone number is 521-9000.

BALLOT
UTAH STATE BAR
YOUNG LAWYERS SECTION
BYLAW CHANGES

Shall the Bylaws of the Young Lawyers Section of the Utah State Bar be revised as follows:

1. Shall the Section Officers be given authority to establish and execute the policies and programs of the Section with the requirement that they regularly report to the Executive Council their policies, actions and expenditures?

   Yes ☐ No ☐

2. Shall the Executive Council have the duty to coordinate and execute the programs and affairs of the Section under the direction of the Officers of the Section?

   Yes ☐ No ☐

3. Shall the ABA District Representative be a member of the Section Executive Council when that person is a member of the Utah Young Lawyers Section?

   Yes ☐ No ☐

4. Shall the limitation on the number of members of the Executive Council be eliminated?

   Yes ☐ No ☐

5. Shall the provision on removal of Officers be changed to require a two-thirds vote of the members of the Section voting in the immediately preceding election rather than a two-thirds vote of the Executive Council?

   Yes ☐ No ☐

6. Shall the Treasurer submit a proposed budget to the Officers of the Section, who will in turn submit a budget to the Board of Bar Commissioners?

   Yes ☐ No ☐

Please return your ballot to the Utah Young Lawyers Section, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, within 10 days of receipt of this issue of the *Utah Bar Journal.*

Computers Simplify Recruiting at U of U College of Law

By Jacquita W. Corry, Assistant Dean
Legal Career Services and Alumni Relations

To better facilitate the University of Utah College of Law's employment programs, the Legal Career Services Office (LCS) has developed a unique computer system referred to as RIMS—Recruitment Information Management System.

The two-year-old system enables us to produce a professional packet of student resumes, verified transcripts, and a grade-distribution chart that maps the performance of each class in each semester. The packet also contains a list of all students who have submitted resumes, organized by geographical preference for use by each branch office of a firm. This packet is sent to all employers who participate in recruiting on campus in the fall and spring, and to employers who agree only to receive and review students' resumes.

RIMS has been well received by employers. They often comment on the efficiency of prescreening student applicants on the basis of the RIMS presentation. The consistent organization of common information makes it easier and quicker to compare performance and to decide whom to interview.

This program also makes it possible for the LCS Office to serve a wider range of employers and to give them access to a well-ordered recruiting process in the spring as well as fall. Local employers interview on Saturdays in the fall, which allows outside recruiters to interview weekdays on campus in September and October. A questionnaire is sent to participating employers after each session asking for a report on interviews, offers and acceptances of employment. This assists employers in tracking their hiring histories with our law school and helps them determine their future recruiting strategies.

RIMS HELPS STUDENTS WITH RESUMES

RIMS gives students access to a convenient and inexpensive computer system at the law school. They control the contents and format of their resumes. Many students prepare the first draft on computers that interface with the LCS system. The LCS Office encourages use of a one-page resume preferred by employers, but students may adapt their resumes to their own requirements.

For $6, a student can have his or her resume entered into the RIMS system and receive a printed original. The resume in the data file is maintained throughout the student's three years of law school and beyond; updates and changes are made for an additional fee.

RIMS allows students to present or withhold grade information. A student who does not wish to submit a full transcript, can submit only his or her grade point average. The accompanying grade-distribution chart shows the employer the approximate range of the student within the class of the applicant. A student's third option is to submit a resume only, with no information regarding law school grades. An inclusive GPA is not figured for the first-year class following the first semester, since first-year students do not receive a final grade in most classes until the end of the year. However, tentative first-semester grades and course medians are provided. This fall only 26 students sent resumes with no grade information, four sent only their GPAs, and 166 (85 percent) sent verified transcripts.

All employers who participate in the recruiting season on and off campus are entered in the RIMS data file. The fall list of employers includes those hiring second- and third-year students; employers hiring first-year students are included in the spring.

Students can view the names of participating law firms on computer screens in the law school's student computer lab. The computer selection process is very simple—even a student with no computer experience can make choices in a few minutes. Students may submit resumes to any number of employers for a fee of $.25 each.

Since implementation of RIMS, a larger percentage of the student body has chosen to participate in on- and off-campus recruiting. Statistics for fall 1988 reveal that 49 percent of the third-year class and 51 percent of the second-year class chose to submit resumes through the RIMS program. Fewer third-year students participate since increasing numbers of first- and second-year students are permanently employed following summer clerkships. More people further down in each class are being interviewed than ever before, and more than one-third of each class finds permanent employment through the RIMS-programmed recruiting.

A total of 9,953 student resumes were sent to employers this fall. Almost 7,250 went to on-campus recruiters, 76 of whom were out-of-state employers.

The number of participating employers has increased steadily since RIMS was implemented. The 1987-88 season brought more than 150 recruiters to the campus. This year 105 employers participated in the fall season alone. The size, specialties, and geographical representations of employers have broadened, offering students expanded opportunities.

BYU Law School Establishes New Masters Program

The BYU Law School recently took a major step to enhance its status as a center for the study of comparative law. The American Bar Association approved the offering of a new master of comparative law degree by the Law School.

"The implementation of this new post-graduate program designed for foreign-trained lawyers will allow us to develop new ties with lawyers and law firms all over the world," according to Professor James H. Backman, the faculty adviser for the program. "Our juris-doctor students will be able to rub shoulders with lawyers trained in foreign legal systems, and our MCL students will be able to learn about the American legal system in the unique BYU environment."

The accreditation process by the American Bar Association included a site visit and evaluation by a team chosen by the ABA from other law schools. After their on-site evaluation visit the members of the ABA team concluded that BYU, probably more than any other law school in the country, was equipped to offer a graduate program for foreign lawyers. Citing the abundance of foreign language skills possessed by members of the student body, the visitation team concluded that available support systems for foreign students were outstanding.

Students enrolled in the master of comparative law program will receive the MCL degree on completion of a minimum of 24 credit hours earned during at least two semesters in residence following completion of legal training in their home country. Participants will take a special introduction to American law course with other MCL students. All other courses will be selected from the standard Law School curriculum.

"By utilizing our standard course offerings as the foundation for the MCL program we will be able to provide comparative insights throughout the curriculum," Backman added. "Further, by limiting the enrollment in the MCL program to no more than eight students per year we can ensure that the program participants receive the individual attention that this new educational experience will require."

Although approval from the American Bar Association was received only in late May, four students were able to complete the application process for the fall semester 1988. The four students currently enrolled in the program are from Japan, the Peoples Republic of China, Cameroon and Canada.

STATE BAR CLE CALENDAR

ALTERNATIVE DISPUTE RESOLUTION
Principles, Techniques and Strategies

Presented by a top-rate faculty, this live program will include substantive presentations, workshops and complete reference materials. Topics will include commercial and consumer arbitration, mediation and negotiation. Skills in being the arbitrator or mediator, and in dealing with arbitrators and mediators will be emphasized. Includes luncheon.

Date: November 3, 1988
Place: Utah Law and Justice Center
Fee: $35.00
Time: 8:30 a.m. to 5:00 p.m.

ACCOUNTING FOR LAWYERS
A live via satellite program on essential accounting principles and procedures, this program will be especially useful for small firm practitioners and new attorneys. Further information is available through the CLE Department.

Date: November 15, 1988
Place: Utah Law and Justice Center
Fee: $160.00
Time: 8:00 a.m. to 3:00 p.m.

ERISA BASICS PART I: A PRIMER ON ERISA ISSUES
A two-day live via satellite program on the Federal Employee Retirement Income Security Act, providing a threshold knowledge of the Act and applicable regulations. This program is essential for a general practitioner as well as a lawyer working in pension or labor law. Includes recent case law of special interest and practice techniques. Program presented in two parts on dates indicated.

Date: December 1, 1988
Place: Utah Law and Justice Center
Fee: $135.00 For One Day and $250 For Both Days
Time: 10:00 a.m. to 2:00 p.m.

ERISA BASICS PART II: A PRIMER ON ERISA ISSUES
Date: December 8, 1988
Place: Utah Law and Justice Center
Fee: $135.00 For One Day and $250.00 For Both Days
Time: 10:00 a.m. to 2:00 p.m.

GRAPPLING WITH THE GOVERNMENT IN BANKRUPTCY COURT
A live via satellite program covering the peculiarities of litigation with the government in Bankruptcy Court and the development of effective strategies for litigators and general practitioners. Prevent being embarrassed or costing your client money due to unfamiliarity with the special prerequisites of litigation against the government.

Date: December 6, 1988
Place: Utah Law and Justice Center
Fee: $160.00
Time: 8:00 a.m. to 3:00 p.m.

PERSONAL ESTATE AND TAX PLANNING FOR THE SMALL-BUSINESS OWNER
A live via satellite program covering new tax ramifications essential to the personal estate planning and tax planning needs of small-business owners and their counsel.

Date: December 13, 1988
Place: Utah Law and Justice Center
Fee: $160.00
Time: 8:00 a.m. to 3:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Nov. 3	Alternative Dispute Resolution	L & J Center	$35
☐ Nov. 15	Accounting for Lawyers	L & J Center	$160
☐ Dec. 1	ERISA Basics Part 1: A Primer on ERISA Issues	L & J Center	$135 For 1 Day $250 For Both Days
☐ Dec. 6	Grappling With the Government in Bankruptcy Court	L & J Center	$160
☐ Dec. 8	ERISA Basics Part 2: A Primer on ERISA Issues	L & J Center	$135 For 1 Day $250 For Both Days
☐ Dec. 13	Personal Estate and Tax Planning for the Small-Business Owner	L & J Center	$160

Registration and cancellation policies: Please register in advance. Those who register at the door are always welcome, but cannot always be guaranteed complete materials on seminar day.

If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. For most seminars, refunds can be arranged if you cancel at least 24 hours in advance. No refunds can be made for live programs unless notification of cancellation is received at least 48 hours in advance.

Total fee(s) enclosed $ _____

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CLASSIFIED ADS

For information concerning classified ads, please contact Paige Holtry at the Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, or phone 531-9077.

POSITIONS SOUGHT

Licensed Utah attorney seeks opportunity to associate with established attorney or firm in an office share or association situation. I am just starting out in solo practice, but have over two years of litigation experience. Also willing to discuss working on your overflow or other arrangements as may be needed. For further information, please contact the Utah State Bar.

POSITIONS AVAILABLE

Expanding estate planning and tax firm is seeking a full-time attorney with 0-3 years' experience. Send resume to Mitton and Burningham, 36 S. State, Suite 1200, Salt Lake City, UT 84111.

State Farm Insurance Company seeks a qualified attorney for associate house counsel position in the Murray area. Applicants must be admitted to the Utah Bar. One to three years' experience is preferred. Litigation experience is highly desirable. Send resume and salary requirements by November 30, 1988, to Richard K. Spratley, at 4551 Atherton Drive, Salt Lake City, UT 84123. EEO/M-F.

Nine-lawyer downtown law firm with litigation and commercial law practice is seeking an associate with 2-5 years' experience. Send resume to Utah State Bar, 645 S. 200 E., Box H, Salt Lake City, UT 84111.

Gordon R. Hall, Chief Justice of the Utah Supreme Court, has announced the opening of the application period for a judicial vacancy in the Second Circuit Court. This vacancy will result from the appointment of Judge Stanton M. Taylor to the District Court bench. The Second Circuit includes Weber, Davis and Morgan counties. *Applications must be received no later than 5:00 p.m., November 14, 1988*, at the Office of the Court Administrator, 500 E. 230 S., Suite 300, Salt Lake City, UT 84102. Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Susan H. Clawson, Personnel Manager, at the Office of the Court Administrator. Application packets will then be forwarded to prospective candidates and must be received no later than 5:00 p.m., November 14, 1988.

OFFICE SPACE AVAILABLE

330 E. 400 S. Attorney wanted to share large office suite with two other attorneys. $300 per month. Utilities and telephone system included. Free parking. Receptionist, copier, word processor and library available. Call 322-5556.

Hintze, Brown, Faust, Blakesley and McPhie, an association of sole practitioners, has office space available for an attorney with an established practice. Our offices are located at 3450 S. Highland Drive, Suite 301. A receptionist and the use of conference and storage areas are included. If interested, please contact Dave Wayment at 484-7632.

Share nice office with South Ogden law firm. Referral work, flexible arrangements possible. 479-4777.

Furnished office; overhead expense can be covered by conducting legal research, make court appearances, etc. Good opportunity to build law practice. Need attorney with 5 years' legal experience. Snow and Halliday, 261 E. 300 S., Salt Lake City, Utah 84111. Contact John Spencer Snow, 364-4940.

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Need to fill a legal assistant position? Call Job Bank, Joy Nunn, 521-3200. Job Bank is a service to the legal community by the Legal Assistants Association of Utah (LAAU). No fees are involved.

BOOKS FOR SALE

Complete set of current Utah Code books. Please make offer—call 355-0137.

For sale. Complete set Pacific Digest 2nd, Brown and Blue Volumes, complete with current pocket parts. Best offer. Call 566-7737.

Must sell 1 complete and updated set of Rabkin and Johnson current legal forms with tax analysis. Contact Jules Weaver at 359-3500.

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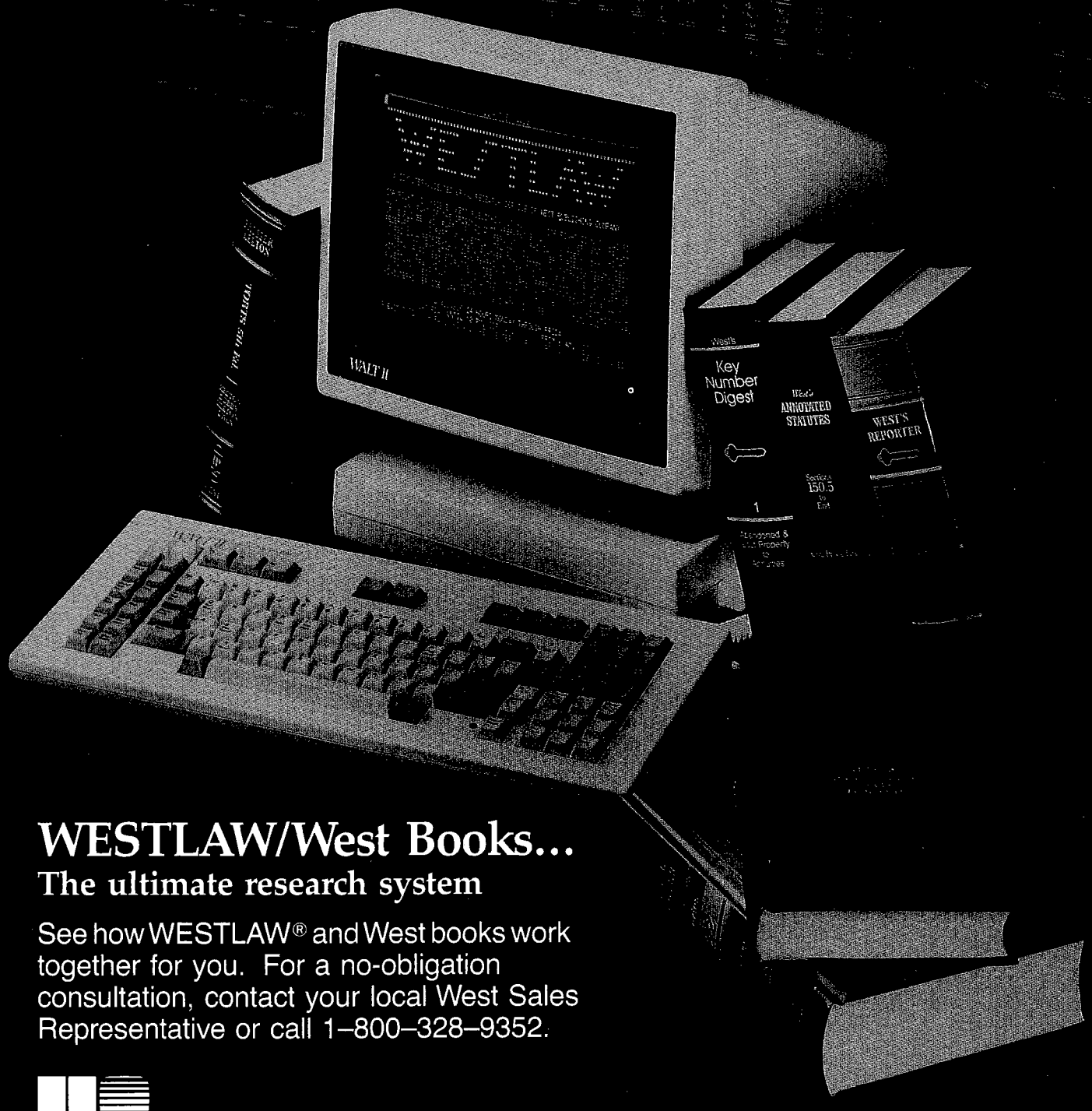

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