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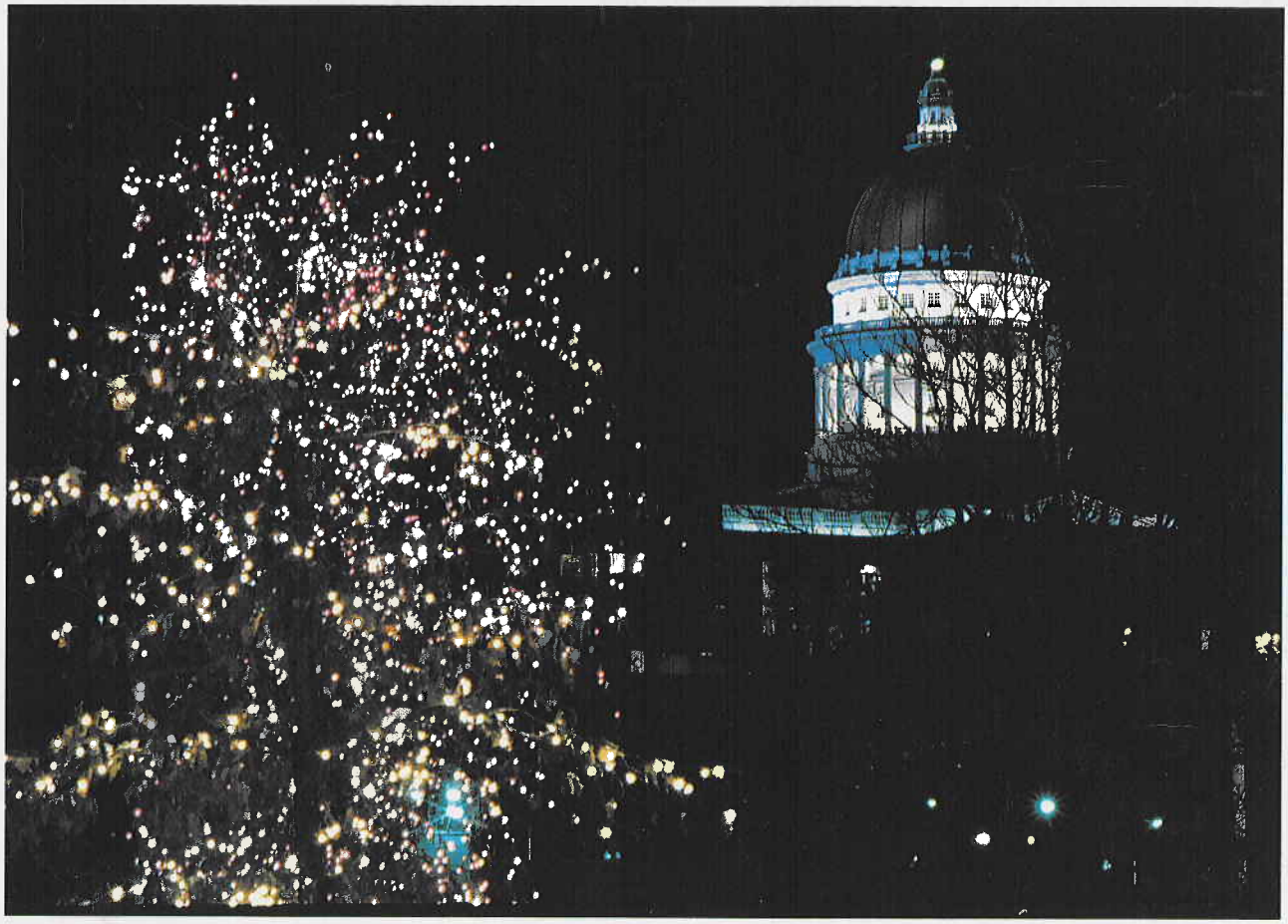

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Belly Up To The Bar

A Warm Welcome to the New Members of Our Association

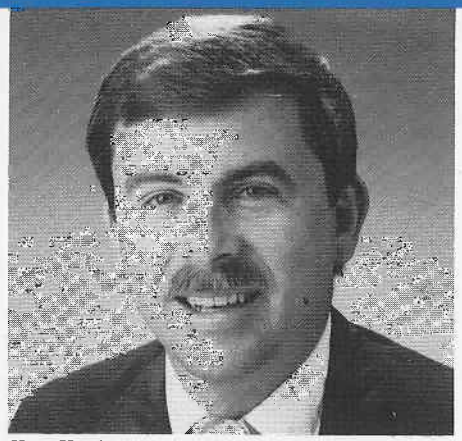
by Kent Kasting

In October, I had the good fortune of making a motion to the Utah Supreme Court and the United States District Court for the Admission of 122 new lawyers as members of the Utah State Bar. By the time you receive this issue of the *Journal,* those new lawyers will have been practicing a couple of months. As President of the Utah Bar, I would like to warmly welcome each of those individuals into our Association.

If you are one of the new admittees, this message is about you and for you. It is also, however, directed to all the practicing members of our Association because as our membership grows so does our responsibility, as seasoned veterans, to become more a part of the professional growth of new lawyers.

Our Bar Association must take the lead in providing guidance to assist new lawyers in bridging the gap from law school to practice. As experienced practitioners, I believe we have a duty to assist and assimilate those new practitioners who have chosen Utah as the place where they wish to pursue their profession—especially women and minorities who now represent 41 percent of law students in law schools nationally. We must actively and affirmatively make these new lawyers aware that we are available to offer assistance and guidance on questions with which they are faced in their first years of practice. In this way, the practicing bar becomes a mentor; the relationships and respect between practitioners are strengthened and the overall quality of the practice of law in Utah is improved. The establishment of an informal mentor relationship benefits not only the new lawyer, but also the organized Bar and the profession as well.

The Bar should strive to assist the new lawyer in his or her professional development, and such projects as Judge Tom Greene's pilot Post Law School Apprenticeship Program and the availability of assistance through the Stewart Hanson, Sr. Society are clear and positive examples of the Bar's willingness to assist new lawyers. To all practitioners, I urge you to become



Kent Kasting

involved and support these programs and to make it known that you are willing to consult with and assist new lawyers with answers to questions of which they may simply not be certain. However, the ultimate responsibility for professional growth is a personal one which rests upon the shoulders of the individual lawyer, be he or she a new admittee or a practitioner of many years.

Therefore, I make the following observations about entrance into and continued advancement within the practice of law.

A couple of years ago, Judge David Winder of the United States District Court for the District of Utah spoke to an audience of new admittees and stressed the extreme importance of striving to develop an exemplary reputation as a lawyer among judges, colleagues and clients. A lawyer's reputation is made in the early years of practice and that reputation, be it good or bad, is the reputation you most likely will have throughout your career. Lawyers, judges, clients and the public will begin sizing you up in terms of integrity, competence, diligence, fairness, judgment and independence from the first day you begin to practice. If your pursuit of those qualities is mediocre, then so, too, will be your reputation as a lawyer.

Each of you has expended great effort and money to become a lawyer, to be trained in logical thought, equity and advocacy. From the first days of your practice, use that training and your talents wisely to represent your clients fairly and to protect and preserve our system of justice. If the talents each of you has are not used in the most honorable of ways, your clients will suffer, our legal profession will suffer and you and your reputation will suffer.

I often ponder the question I would think you, likewise, seek an answer to: How does one become an outstanding lawyer? First, and foremost, it takes simply hard work. It takes great amounts of time. It places physical and mental demands on you that are difficult to describe to anyone who has not personally experienced those stresses. It requires you to "roll up your shirt-sleeves, get at it and stay at it."

Second, it requires the realization that service to people should be the product of your hard work and efforts, and the monetary return which you receive should be the by-product of your efforts—an appropriate and justifiable by-product, but nonetheless, a by-product.

Third, it requires that you, at all times, keep in perspective your role as a zealous advocate of your clients' causes, bearing in mind your duty to advise wisely and treat all people with whom you deal with dignity, respect and understanding. Hand in hand with that is the very important requirement that you, in all your dealings, are gentlemen and gentlewomen. If you stray from the high standards of gentility, you tarnish your reputation and that of our profession.

Admittedly, the practice of law is demanding. Therefore, it requires that you continuously strike a balance between working hard as a lawyer, family responsibilities, time for yourself, time for your profession and time for your society. In achieveing that balance, I urge you to support and become actively involved in your Bar Association. Become involved in the political process—run for the legislature, the school board, or other political office. Join civic groups and share with them the talents you have acquired. Direct your efforts not only to making a living, but also to improving the society in which we live for your own benefit, your family's benefit and the benefit of those to follow.

In a nutshell, get and stay involved in all that is related to the practice of law, not just winning cases and billing hours. The personal rewards you receive will exceed your highest expectations. Avoid apathy like the plague, and be a participant in the process, rather than a spectator. Remember what Abraham Lincoln said in 1855 about becoming a lawyer:

> If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already.

Welcome to the practice of law. Welcome to the Utah Bar. I wish each of you much success and I offer to you the services of our Bar Association to assist you in becoming that "outstanding lawyer" that we all strive daily to be.

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COVER: Photograph of the Utah State Capitol at Christmastime, by M. Gordon Johnson of Sandy, Utah.

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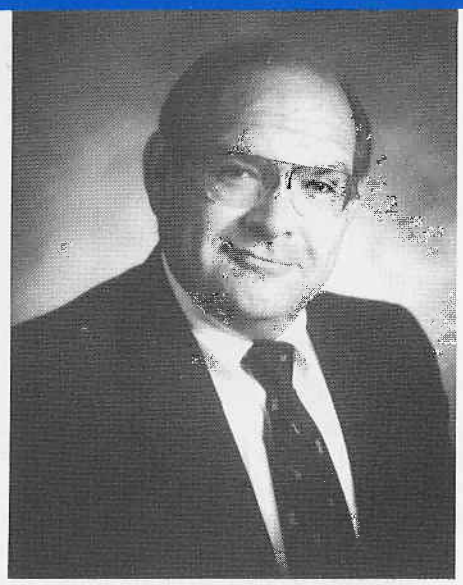


James Z. Davis

Problem Makers or Problem Solvers

Over the past several years, one of the most difficult problems faced by the legal profession has been its deteriorating public image, indeed, an image that is deteriorating even among lawyers themselves.

In spite of herculean efforts on the part of Bar Associations and individual lawyers on local, state and national levels, the image of the profession continues to deteriorate. For example, there are virtually no other professions, trade organizations, or groups of virtually any nature that have gone so far as lawyers to attempt to serve the public interest and make the very real, substantive contributions to the public interest. Notwithstanding popular public (and sometimes lawyer) misconception, lawyer discipline far exceeds that of virtually any other group or profession, whether self-imposed or publicly regulated. In addition, lawyers can point with pride to such things as mandatory continuing legal education, *pro bono* work, interest on lawyer's trust accounts programs, the client security fund, a free arbitration procedure, and community leadership at every level. Yet both public and self esteem among lawyers continues to be among the lowest of all callings. Indeed, the cover topic in the November 1988 ABA *Journal* deals with the problems of the image of lawyers.

Many of the writings on the subject in recent years attempt to identify the problems of lawyers' poor image in various ways, such as lack of professionalism, no sense of obligation to the bar or our system of justice, motivated by greed and self interest, and so on.

The articles in the November 1988 ABA *Journal* tend to be consistent with the conclusions made by most of those observing the problem of the deteriorating image of the legal profession. Unfortunately, the *Journal* articles perpetuate the notion that lawyers engaged in the representation of the "downtrodden", sometimes minorities, sometimes other "public interest" matters, and almost always at some perceived economic sacrifice, are characterized as those who "find self satisfaction" and those who are "making a difference" and "doing someone some good." Lawyers who are more economically successful and choose to represent those who are less than downtrodden are perceived to, for some reason, contribute to the poor image of lawyers regardless of the service they render their clients, their sense of fairness and dedication to the profession, and the time they devote to the profession. The suggestion rings loud and clear: The image of lawyers will not improve unless and until a significant number of our profession dedicate themselves to the downtrodden, and social issues generally.

It may well be, however, that the image of lawyers will not and, indeed, cannot be improved no matter what we do (including devoting more time to correcting social injustice), absent a much more fundamental change than that suggested by many, if not most, students of the issue.

I suggest we change to becoming problem solvers rather than problem makers. One of the most fundamental social goals is the ability of the members of our society to co-exist peacefully and resolve disputes in a peaceful, civilized manner.

The change I suggest, however, requires a re-examination of the role of the adversary system as a problem solving mechanism, or at least a new definition of zealous advocacy. Ambrose Bierce, an American journalist, has been quoted as saying, "A lawsuit is a machine which you go into as a pig and come out of as a sausage." Litigation is probably the activity of lawyers most commonly identified with the profession. Lawyers have been accused of advancing their own objectives by litigating, abusing the deposition process, attacking witnesses, increasing billable hours, raising issues that should not be raised and making frivolous and nonmeritorious claims in the hope of extracting a settlement. All too often, in the litigation process, one or more of the allegations are true. Sadly, one or

more of these allegations may be true because, quite simply, these kinds of tactics all too often work and work well. Few lawyers would suggest that the adversary system demands anything less of them than a zealous pursuit of their clients' objectives within the boundaries of the Rules of Professional Conduct and professional courtesy. The adversary system, which, in our jurisprudence, has been touted as the most effective way to arrive at the truth is, by itself, an extremely damaging process in many, if not most, types of cases; and it has the effect of frequently creating many more problems than it was ever envisioned that the system would solve.

Problem solving and genuine concern for a just and equitable result is not the exclusive province of lawyers involved in so-called "public interest" pursuits. It should be every lawyer's goal, and it should not be abandoned because of an overly restrictive definition of zealous advocacy. Former Chief Justice Burger said in a presentation to the Americn Law Institute in 1986, "The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client. To accomplish that is the true role of the advocate." Lawyers who are frequently characterized as greedy and concerned only with the interests of themselves and their wealthy clients, are in a uniquely strong position to enhance the image of the profession by styling themselves as problem solvers, rather than problem makers. The ripple effect of a problem solving approach by members of our profession who represent powerful elements of our civilization may well be much more far reaching than the efforts of those currently perceived as problem solvers and having the public interest at heart.

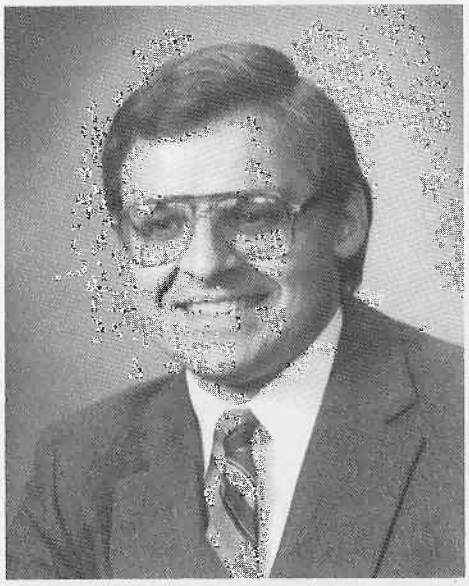
If the legal profession is dedicated to problem solving, rather than problem making, our image problem will take care of itself.

Supreme Court Rejects Lost Opportunity Costs: Timbers and Its Impact Upon Bankruptcy Practice in Utah

by Ronald W. Goss

Since enactment of the 1978 Bankruptcy Code, the issue of whether an undersecured creditor is entitled to receive lost opportunity costs from a Chapter 11 debtor as a measure of "adequate protection" has been the subject of extensive litigation and commentary. The term "lost opportunity costs" refers to the value which a secured creditor would realize if he had an amount equal to the value of his collateral and was able to reinvest those proceeds at current market rates. The term "adequate protection" refers to any of the various means (usually periodic cash payments) used to preserve the value of a secured creditor's collateral during the pendency of the debtor's backruptcy case.

Between 1984 and 1987, the controversy had produced a conflict among the Courts of Appeal. The Ninth Circuit, in *In re American Mariner Industries, Inc.*, 734 F.2d 426 (9th Cir. 1984), held that an undersecured creditor was entitled to compensation for the delay in enforcing its rights during the interim between filing the bankruptcy petition and confirmation of the plan of reorganization. The Fourth Circuit adopted the *American Mariner* rationale in 1985 in *Grundy National Bank v. Tandem Mining Corp.*, 754 F.2d 1436 (4th Cir. 1985). Lower courts in other jurisdictions were divided between those which held as a matter of law that compensation was not authorized under the Bankruptcy Code and those which held that it must be allowed. The Eighth Circuit declined to follow *American Mariner* and, instead, looked for a middle ground. In *In re Briggs Transportation Co.*, 780 F.2d 1339 (8th Cir. 1985), the court held that adequate protection was a flexible concept, and compensation for lost opportunity costs *may* be granted to an undersecured creditor depending on the circumstances of the case. The court offered little guidance as to what circumstances would be appropriate for allowing such payments. The Eighth Circuit refused to expressly hold that payments were required by the Bankruptcy Code.



RONALD W. GOSS graduated from Colorado State University in 1975 with a Bachelor of Arts degree, and from the University of Utah College of Law in 1982. He served as Law Clerk to the Honorable Glen E. Clark, Chief United States Bankruptcy Judge, District of Utah, from 1984-1986. Mr. Goss currently practices bankruptcy law with Van Cott, Bagley, Cornwall & McCarthy.

In *In re Timbers of Inwood Forest,* 793 F.2d 1380 (5th Cir. 1986), *panel opinion reinstated,* 808 F.2d 363 (5th Cir. 1987), *cert. granted,* 107 S. Ct. 2459 (1987), a three-judge panel of the Fifth Circuit rejected the lost opportunity cost concept of *American Mariner.* After an *en banc* rehearing, the panel opinion was reinstated together with a supplemental majority opinion. The United States Supreme Court granted certiorari on the adequate protection issue.

On January 20, 1988, the conflict in the circuits was resolved when the decision of the Supreme Court in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.,* _____ *U.S.* _____, 108 S. Ct. 626, 98 L. Ed. 2d 740, was handed down. Speaking for a unanimous Supreme Court, Justice Scalia concluded that Congress did not intend for undersecured creditors to receive post-petition interest on their collateral to assure adequate protection under Sect. 362 (d)(1) of the Bankruptcy Code.

In *Timbers,* the debtor's only asset was an apartment project, which secured a $4.36 million debt. After filing its Chapter 11 petition, the debtor paid the secured creditor, a bank, all of the net operating income from the project. Nevertheless, the bank filed a motion for relief from the automatic stay under Sect. 362 (d)(1) of the Bankruptcy Code, based upon lack of adequate protection. The value of the project was found to be somewhere between $2.65 and $4.25 million. It was, therefore, undisputed that the bank was an undersecured creditor. Nonetheless, the bank contended that it was entitled to adequate protection payments equal to its prospective return from reinvestment of the collateral's liquidation value at current market rates.

The *Timbers* decision begins with an examination of the Bankruptcy Code's provisions dealing with the rights of secured creditors. The Court found that a construction of Sect. 362 (d)(1) that would allow undersecured creditors to receive post petition interest would change the meaning of Sect. 506 (a), which defines the amount of a secured creditor's claim, by altering the proportions of the claim that are secured and unsecured. Section 362 (d)(2), which permits relief from the automatic stay where (i) the creditor is undersecured, and (ii) the collateral is not necessary to an effective reorganization, would also be rendered

meaningless since the second requirement would be unnecessary. Such a construction would also be contrary to Sect. 506 (b), which allows post-petition interest payments to an *oversecured* creditor only.

The Court then turned to the bank's argument that the phrase "indubitable equivalent" in Sect. 361 (3) of the Bankruptcy, which also appears in Sect. 1129 (b)(2)(A)(iii) concerning confirmation of a plan of reorganization, was intended by Congress to provide undersecured creditors with post-petition interest. The Court rejected the bank's argument, stating that a secured creditor is not entitled to the *immediate* realization of the "indubitable equivalent" of its collateral, "but only upon completion of the reorganization." Finally, the Court found no basis for interest payments to undersecured creditors in light of Sect. 726 (a)(5) of the Code, which allows payment of post-petition interest on unsecured claims in the rare case when a Chapter 7 debtor proves solvent.

The holding of *Timbers* generally is consistent with the approach to adequate protection adopted by the United States Bankruptcy Court for the District of Utah in *In re Alyucan Interstate Corp.*, 12 B.R. 803 (Bankr. D. Utah 1981), and *In re South Village, Inc.*, 25 B.R. 987 (Bankr. D. Utah 1982). In those early Code cases, the court recognized the limited role of adequate protection in a Chapter 11 case. A determination of adequate protection merely preserves the status quo of a secured creditor's position and permits the case to proceed towards the ultimate goal of reorganization. In *Alyucan,* Judge Mabey wrote:

> [T]he adequate protetction vouchsafed creditors in Chapter 11 is interim protection, designed not as a purgative of all creditor ailments, but as a palliative of the worst: re-organization, dismissal, or liquidation will provide the final relief. During this interim, the policies favoring rehabilitation and the benefits derived from the stay should not be lightly discarded.

In a carefully reasoned and scholarly opinion, Judge Mabey held in *South Village* that adequate protection for lost opportunity costs was not allowable under the Bankruptcy Code. Despite occasional efforts by undersecured creditors to urge adoption of *American Mariner,* both Judge Clark and Judge Allen have remained steadfast in their adherence to *South Village. Timbers* clearly has laid those arguments to rest.

However, it is not the holding but the dicta of *Timbers* that portends changes in relief from stay practice in Utah. While holding that undersecured creditors are not entitled to compensation under Sect. 362 (d)(1) for the delay in foreclosing on their collateral, the *Timbers* decision contains expansive dicta regarding relief from stay practice under Sect. 362 (d)(2). Justice Scalia writes at some length about the meaning of the phrase "necessary to an effective reorganization," and stated:

> What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization with a reasonable time."
>
> The cases are numerous in which Sect. 362 (d)(2) relief has been provided within less than a year from the filing of the bankruptcy petition. And while the bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan, see 11 U.S.C. Sect. 1121 (b), (c)(2), even within that period lack of any realistic prospect of effective reorganization will require Sect. 372 (d)(2) relief.

In this district, both the bankruptcy court, in *In re Koopmans,* 22 B.R. 395 (Bankr. D. Utah 1982), and the district court, in *In re Sunstone Ridge Associates,* 51 B.R. 560 (D. Utah 1985), explicitly rejected that standard and held that Sect. 362(d)(2) did not impose a "feasibility" test. Under the *Koopmans-Sunstone Ridge* "necessity" test, property is necessary to an effective reorganization "whenever it is necessary, either in the operation of the business or in a plan, to further the interests of the estate through rehabilitation or liquidation." *See Koopmans,* 22 B.R. at 407. Those cases hold that a debtor is not obliged to show that a reorganization is feasible in addition to showing that the secured creditor's collateral is necessary to that reorganization. Under those decisions, the bankruptcy court was willing to give the debtor the benefit of every doubt, especially at an early stage in the reorganization case, and not speculate about its successful performance under a hypothetical plan.

At least one bankruptcy court has refused to follow this dicta, *see In re Rassier,* 85 B.R. 524, 529 (Bankr. D. Minn. 1988), but the trend has been to embrace it fully. *See, e.g., Matter of King,* 83 B.R. 843, 847 (Bankr. M.D. Ga. 1988); *In re Diplomat Electronics Corp.,* 82 B.R. 688, 693 (Bankr. S.D.N.Y. 1988). Recent bench rulings suggest that the Utah bankruptcy judges have adopted the *Timbers* dicta and relegated *Koopmans-Sunstone Ridge* to, at most, a presumption in favor of debtors during the early months of a reorganization case.

UTAH'S CHILD SUPPORT GUIDELINES

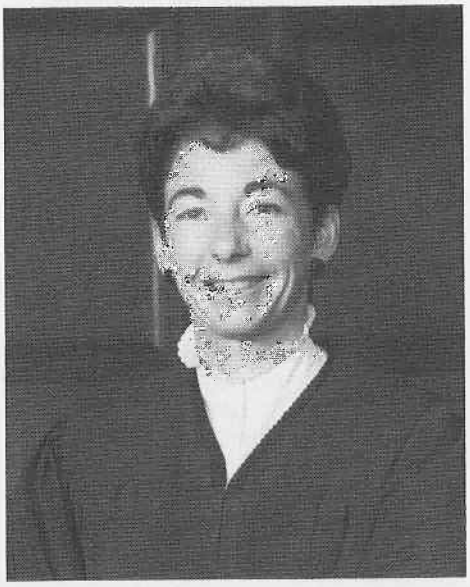
by Judith M. Billings
Chair of The Judicial Council's Task Force
on Child Support Guidelines

The Utah Child Support Task Force was created by the Judicial Council as a result of a recommendation from the Board of District Judges. The Task Force was asked to examine current procedures for establishing child support awards and to make recommendations for the implementation of child support guidelines for use in Utah's courts and administrative agencies involved in setting child support. The Task Force's inquiry was limited to the setting of child support and thus necessarily excluded other important areas of family law including custody and visitation.

Members of the task force were appointed by Utah Supreme Court Chief Justice Gordon Hall and included trial judges, domestic relations commissioners, lawyers, members of the legislature, recovery services personnel, family law professors, economists, and representatives of public interest groups. After its formation in the spring of 1987 the Task Force met regularly and solicited input from a wide range of sources. The Task Force heard testimony from many parents at a public hearing in Salt Lake City and from invited experts including trial judges and family law lawyers. The Task Force further conducted a detailed survey of district court judges and family law lawyers as to the propriety of having uniform child support guidelines and the characteristics of such guidelines. One hundred percent of the judges and lawyers responding, recommended the adoption of uniform child support guidelines based upon the cost of raising children.

The Task Force spent many hours reviewing child support guidelines which have been adopted in other states. Currently forty seven of our sister states have adopted uniform child support guidelines. The committee also read extensive scholarly materials on the subject.

As part of its work, the committee reviewed many economic studies on the status of children in divorced families. A 1985 national study estimated that 26.6 billion dollars in child support would have been due in 1984 if awards were based on either of two existing, well accepted guidelines. By comparison a census bureau study indicated that only 10.1 billion in child support was reported to be due and only 7.1 billion was actually collected. These figures demonstrate that there was a compliance gap of 3 billion, but more important, an adequacy gap of more than 15 billion. Further, a recent U.S. Census Bureau study reported the mean child support order in 1983 was $191.00 per month for 1.7 children. One authoritative study indicated an order of $191.00 for 1.7 children is equivalent to only 25 percent of the average expenditure on children in a middle income household. This average child support award is less than the $273.00 required under 1984 federal guidelines to maintain the same 1.7 children at poverty level.



JUDITH M. BILLINGS has been a judge on the Utah Court of Appeals since its creation in 1987. She previously was a judge in the Third District Court for four years. Billings received her law degree from the University of Utah in 1977 and was a partner in the law firm of Ray, Quinney & Nebeker before her appointment to the bench. She is past chair of the Judicial Council's Utah Child Support Task Force and currently serves as Chairman of the National Association of Women Judges Task Force on Child Support Guidelines. She is also a member of the Judicial Council Committee on Judicial Performance Evaluation.

The committee also heard extensive testimony from parents paying and receiving child support about unnecessary and unfair variation in awards. The committee was persuaded that the obligors' perception of inequitable treatment may contribute to existing compliance problems.

Finally, the committee reviewed materials which indicated that the experience of states with guidelines has shown that guidelines can improve the efficiency of adjudication.

Based upon its review of the literature the committee was persuaded that there was a need for guidelines. Generally the deficiencies in the traditional case by case method can be summarized as 1. a shortfall in the adequacy of awards when compared to the true costs of rearing children, 2. inconsistent orders resulting in inequitable treatment of parties in similarly situated cases, and 3. inefficient adjudication of child support awards.

After determining that a uniform child support guideline should be implemented in Utah, the Task Force focused on the purpose of such guidelines. The committee determined that we wished to formulate guidelines which would lead to predictable levels of child support, be simple to apply, and reflect the duty of both parents to support their children commensurate with their ability. We further hoped to protect children as much as possible from the adverse economic consequences of family breakup or non-formation.

The committee formulated proposed child support guidelines and implementing schedules and presented them to the Board

of District Judges and the Judicial Council for preliminary approval subject to public hearings in March 1988. The Guidelines were then distributed through local bar associations and public agencies throughout the state. Task Force members attended the following public hearings in order to receive comment and critique of the Guidelines.

March 31—Price ..... 5:30 - 7:30 p.m.
April 4—Brigham City ..... 5:30 - 7:30 p.m.
April 6—Orem..... 5:30 - 7:30 p.m.
April 13—St. George ..... 5:30 - 7:30 p.m.
April 14—Richfield..... 5:30 - 7:30 p.m.
April 18—Salt Lake City .. 5:30 - 10:00 p.m.

The public interest demonstrated a need for the judiciary to listen to the public in this important area of family law. The Task Force heard comments from judges, lawyers and custodial and non-custodial parents. Much of the testimony focused on related issues such as custody, denial of visitation, updating of awards and problems with collection. The Task Force also requested and received written comment. We received and reviewed more than 200 letters from interested individuals and organizations.

As a result of the public comment, the Task Force substantially revised the Proposed Guidelines. The major changes included: 1 The Guidelines would not apply to existing orders, 2. future second families of non-custodial parents would be considered in any modification of a child support order set under the Guidelines, 3. the amount of child support provided in the schedules was reduced from 5-20 percent depending on income levels with the greatest reduction at the high income level, 4. the guidelines do not apply in joint custody cases.

The Task Force presented its final report to the Utah Judicial Council on June 27, 1988 at a public meeting. The Task Force not only presented the Guidelines but also made recommendations based upon its yearlong study of related family law areas which needed study. These included: 1. perceived gender bias in the awarding of child custody, 2. enforcement of visitation, 3. collection of child support, 4. use of child support payments, 5. access to the court system, 6. updating child support awards.

I have never served with a more public spirited or harder working group of citizens.

Groups which endorsed the Guidelines and encouraged their implementation included the Utah State Bar, the Board of District Judges, the Utah Court of Appeals, the Legal Aid Society, Utah's Governor's Commission on the Status of Women, Utah Psychological Association, Women Lawyers of Utah, Phoenix Institute and Utah Children. The Guidelines were adopted by the Judicial Council in June 1988 with slight modification to be effective October 1, 1988.

As a result of the public interest generated by the public meetings, the Interim Judiciary Committee of the Legislature began studying the Judicial Council's action at its July and August 1988 meetings. As a result, this committee requested the Judicial Council to either delay implementation of the Guidelines until the Legislature could consider the matter at the next legislative session, or to make the guidelines advisory rather than presumptive. The Judicial Council considered this request in August 1988 and voted to implement the Guidelines effective November 1, 1988 but to change the Guidelines from presumptive to advisory. However, worksheets calculating the appropriate amount of child support under the Guidelines must still be presented to the judge in every case.

The Guidelines generally do the following:

1. The Guidelines apply to all cases including stipulated and default matters.
2. The scheduled child support amount is based upon actual economic data as to what it costs to raise a child in a poor, middle and upper income family. This basic amount is then divided between both custodial and non-custodial parent so that each contributes to the required amount based upon their percentage of income.
3. Gross income is used but the schedules have been adjusted for average federal-state tax. The Guidelines also allow subtraction of previously ordered and paid child support and alimony. Historical income is to be considered if possible, requiring one year of W-2's and two years of tax returns. The guidelines also define what gross income is in a self-employment situation. The guidelines only apply up to the amount of $10,000 of income per month.
4. The guidelines provide different levels of support for different ages of children (0-6) (7-15) (16-18).
5. There is an add-on basic child support needs for child care expenses and a credit is given for medical/dental insurance premiums paid.
6. There is special provision for adjustment of awards in split custody and extended visitation situations.

The following are sample Utah Child Support Guidelines forms, schedules and sample work sheets for sole custody.

"CHILD SUPPORT GUIDELINES"

1. **Guidelines Advisory:** The guidelines are advisory to the court. Final orders in all cases shall be made at the discretion of the court based upon the facts of the individual case.
2. **Worksheets Mandatory:** Two worksheets and a child support schedule are included in the guidelines packet. The worksheets represent sole custody and split custody situations. THE APPLICABLE WORKSHEETS MUST BE COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS AND SUBMITTED TO THE COURT WITH SUPPORTING FINANCIAL VERIFICATION. Child support is determined by calculating: a. The parties' available income; b. The child support need; c. The child support obligation. The schedule lists amounts of combined adjusted gross income.
3. **Application:** The guidelines apply to all cases, not just those that are litigated, including divorce, separation and paternity. They apply regardless of the gender of the custodial parent.
4. **Application to Existing Orders:** THE ADOPTION OF THESE GUIDELINES AND ANY CONSEQUENT IMPACT ON EXISTING CHILD SUPPORT ORDERS DOES NOT CONSTITUTE A SUBSTANTIAL CHANGE OF CIRCUMSTANCES TO INDEPENDENTLY ALLOW MODIFICATION OF AN EXISTING ORDER. Petitions for modification of existing child support orders in place on October 30, 1988 will be considered on a case-by-case basis. Courts have continuing jurisdiction to modify child support orders under circumstances amply described by present case law to advance the welfare of the child when there is a material change in circumstances. In determining requested modifications of support orders entered prior to the effective date of the guidelines, the court will consider the totality of the present circumstances of the parties and avoid modifications which would work undue hardship on the parties or any children presently dependent thereon.
5. **Second Family Obligations:** Natural born or adopted children from a second family of the noncustodial parent whose child support obligation was set after the adoption of these guidelines will not be considered to lower an existing child support award. However, in any modi-

fication proceeding brought by the custodial parent of the first family to raise child support, all natural born and adopted children of the noncustodial parent will be considered in determining whether the award should be increased. In applying the guidelines, the court may use the schedule reflecting the total number of natural and adopted children the noncustodial parent is supporting.

6. **Taxes and Social Security:** Mandatory state and federal taxes and social security deductions have been used in setting award amounts using estimates of after tax income compiled by the U.S. Bureau of the Census. There is no separate computation of these amounts since the deductions are built into the basic child support need figures used in the schedules.
7. **Tax Exemption:** The basic child support need figures were further adjusted reflecting the assumption that the custodial parent would receive the tax exemptions for all children. If the custodial parent relinquishes the tax exemptions, this could be grounds for an adjustment in the basic award.
8. **Default:** In a default hearing, the moving party is required to bring to court a completed child support worksheet, financial verification and an Affidavit indicating either: 1. That the amount of child support requested meets at least the minimum level of support required under the guidelines, or 2. That the amount of child support requested does not meet at least the minimum level of support required under the guidelines. If the required documentation of income is not available, the court may accept a verified representation of the defaulting party's income by the moving party based on the best evidence available. The evidence shall be in affidavit form and may only be received into evidence after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure.
9. **Uncontested Hearings:** In an uncontested hearing, the moving party is required to come to court with a completed child support worksheet, financial verification and an Affidavit indicating either: 1. That the amount of child support agreed upon meets at least the minimum level of support required under the guidelines, or 2. That the amount of child support agreed upon does not meet at least the minimum level of support required under the guidelines.
10. **Joint Physical Custody:** Joint physical custody, because of its factual complexities, is better handled on a case-by-case method. The sole custody worksheet should generally be used unless the children spend 35 percent of overnights with the secondary custodial parent. Evidence indicates that it costs more to rear children under a joint custody arrangement. Generally an amount equal to 50 percent of the support award, as determined by using the guidelines, should be added to determine the total costs of support necessary in such situations. This total cost would then be divided between the parents based upon the percentage of time the child spends in each household.

INSTRUCTIONS FOR COMPLETING WORKSHEETS

Sole Custody

(See Sample Worksheet on Page 11)

A. INCOME

1. *Gross Monthly Income of Each parent.* (Enter in whole dollars on worksheet lines 1a and 1b). Only the income of the natural parents of the child is used to determine support.

a. *Gross income definition:* Gross income includes income from any source except as may be excluded elsewhere in the guidelines and includes, but is not limited to, income from salaries, wages, commissions, royalties, bonuses, rents, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, subsidies received by reason of employment, and disability insurance benefits. Additionally, business expense account payments for items such as meals, automobile expenses and lodging should be included to the extent that they provide the recipient parent with something he or she would otherwise have to provide.

Specifically excluded are the following: alimony awarded in the instant case; Aid to Families with Dependent Children and other similar welfare benefits being received by a parent; and benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid and food stamps, or General Assistance.

b. *Self Employment:* Gross income from self-employment or operation of a business is defined as: Gross receipts minus minimum necessary expenses required for self-employment or business operation. In general, income and expense from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. This amount will ordinarily differ from a determination of business income for tax purposes. Specifically, only those expenses necessary to allow the business to operate at a reasonable level should be deducted from gross receipts.

c. *Verification:* Gross income, whenever possible, should first be computed on an annnual basis and then recalculated to determine the average gross monthly income. Suitable documentation of current earnings must be provided and should include year-to-date pay stubs and employer statements. Documentation of current earnings should be supplemented with copies of the last three years of tax returns to provide verification of earnings over time. Historical earnings will be used to determine whether an underemployment or overemployment situation exists.

d. *Imputed Income:* Where a hearing has been held and a finding made by the judge that either parent is voluntarily underemployed or unemployed earning capacity should be imputed to that parent based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community. If one parent has no recent work history, income will be imputed at least at the federal minimum wage for a forty-hour work week. Before a greater income is imputed, the judge should enter specific findings of fact as to the evidentiary basis for the imputation.

Exceptions: Income should not be imputed if any of the following conditions exist:

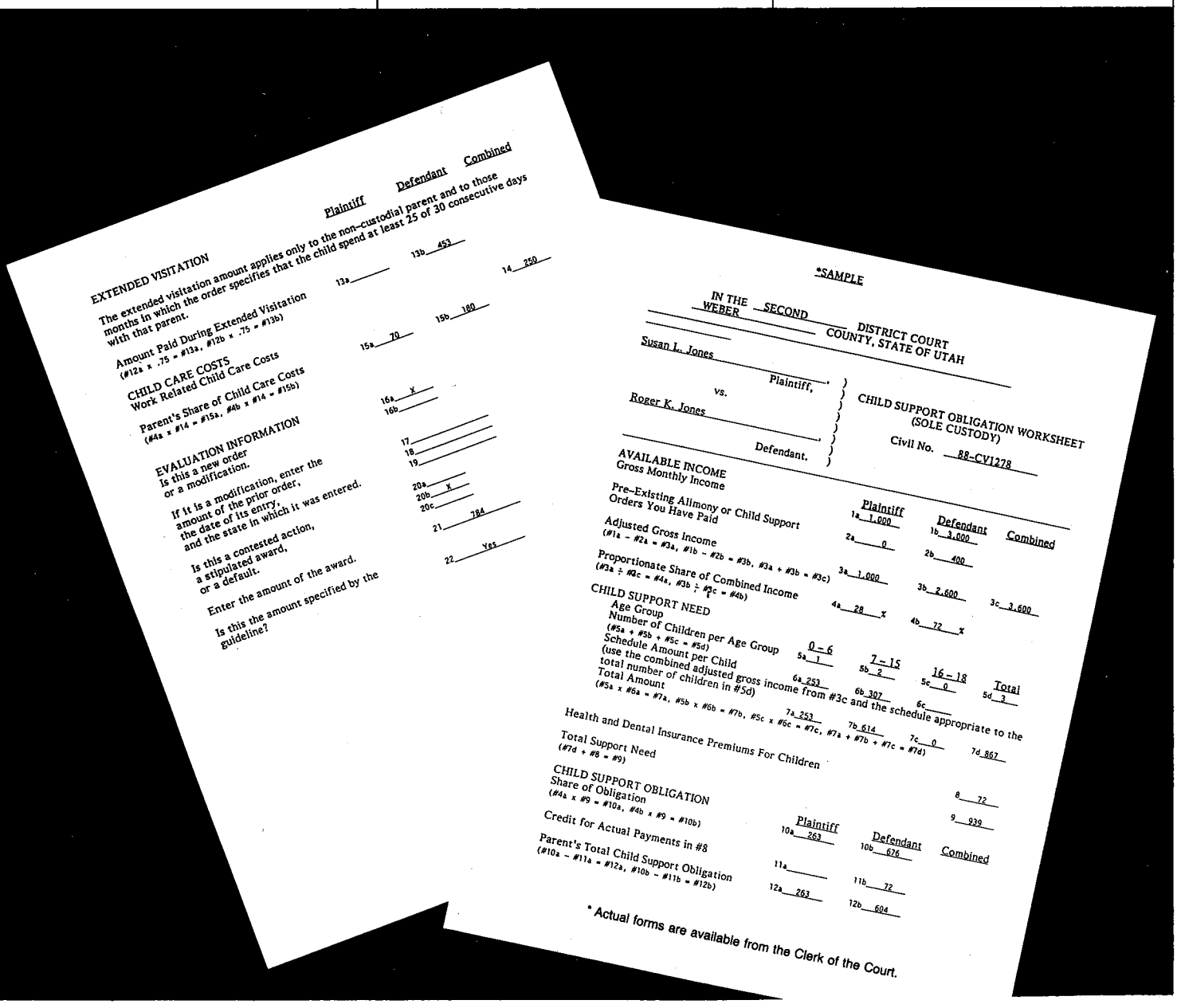
1. The reasonable costs of day care for the parties' minor children approach or equal the amount of income the custodial parent can earn;
2. A parent is physically or mentally disabled to the extent where he or she cannot earn minimum wage;
3. A parent is engaged in education or retraining to establish basic job skills; or
4. Unusual emotional and/or physical needs of the child require the custodial parent's presence in the home.

e. *Child's Income:* The earnings of a child who is the subject of a child support award should not be considered income to either parent for purposes of the guidelines. However, Social Security benefits received by a child will be credited as child support to the parent upon whose earning record it is based. Other unearned income of the child may be considered as income available to the custodial parent depending upon the circumstances of each case.

2. *Pre-Existing Child Support and/or Alimony Orders.* (Enter in whole dollars on worksheet, lines 2a and 2b) Child support previously ordered and actually paid for children of a prior relationship and/or alimony previously ordered and actually paid is deducted from gross income. Proof of payment of such child support and/or alimony should be required before the deduction is allowed. Payments on child support arrearages will not be deducted from gross income.

3. *Adjusted Gross Income.* (Worksheet, lines 3a, 3b, and 3c) Subtract from line 1 any figures entered on line 2 for each parent. The totals 3a, and 3b, are then added to reach 3c: the combined adjusted gross income of the parties.

4. *Proportionate Share of Combined Income.* (Worksheet, lines 4a and 4b) The figures entered on lines 3a and 3b are each divided by the figure on line 3c to determine each parent's proportionate share of combined income: lines 4a and 4b. Round to the nearest whole number.



EXTENDED VISITATION — Plaintiff / Defendant / Combined

The extended visitation amount applies only to the non-custodial parent and to those months in which the order specifies that the child spend at least 25 of 30 consecutive days with that parent.

Amount Paid During Extended Visitation (#12a x .75 = #13a, #12b x .75 = #13b) — 13a ____ 13b 453

CHILD CARE COSTS
Work Related Child Care Costs — 14 250

Parent's Share of Child Care Costs (#4a x #14 = #15a, #4b x #14 = #15b) — 15a 70 15b 180

EVALUATION INFORMATION
Is this a new order or a modification? — 16a X 16b ____

If it is a modification, enter the amount of the prior order, the date of its entry, and the state in which it was entered. — 17 ____ 18 ____ 19 ____

Is this a contested action, a stipulated award, or a default? — 20a ____ 20b X 20c ____

Enter the amount of the award. — 21 784

Is this the amount specified by the guideline? — 22 Yes

*SAMPLE

IN THE SECOND DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

Susan L. Jones, Plaintiff,
vs.
Roger K. Jones, Defendant.

CHILD SUPPORT OBLIGATION WORKSHEET (SOLE CUSTODY)
Civil No. 88-CV1278

AVAILABLE INCOME — Plaintiff / Defendant / Combined

Gross Monthly Income — 1a 1,000 — 1b 3,000

Pre-Existing Alimony or Child Support Orders You Have Paid — 2a 0 — 2b 400

Adjusted Gross Income (#1a - #2a = #3a, #1b - #2b = #3b, #3a + #3b = #3c) — 3a 1,000 — 3b 2,600 — 3c 3,600

Proportionate Share of Combined Income (#3a ÷ #3c = #4a, #3b ÷ #3c = #4b) — 4a 28 x — 4b 72 x

CHILD SUPPORT NEED — 0 - 6 / 7 - 15 / 16 - 18 / Total

Age Group
Number of Children per Age Group (#5a + #5b + #5c = #5d) — 5a 1 — 5b 2 — 5c 0 — 5d 3

Schedule Amount per Child (use the combined adjusted gross income from #3c and the schedule appropriate to the total number of children in #5d) — 6a 253 — 6b 307 — 6c ____

Total Amount (#5a x #6a = #7a, #5b x #6b = #7b, #5c x #6c = #7c, #7a + #7b + #7c = #7d) — 7a 253 — 7b 614 — 7c 0 — 7d 867

Health and Dental Insurance Premiums For Children — 8 72

Total Support Need (#7d + #8 = #9) — 9 939

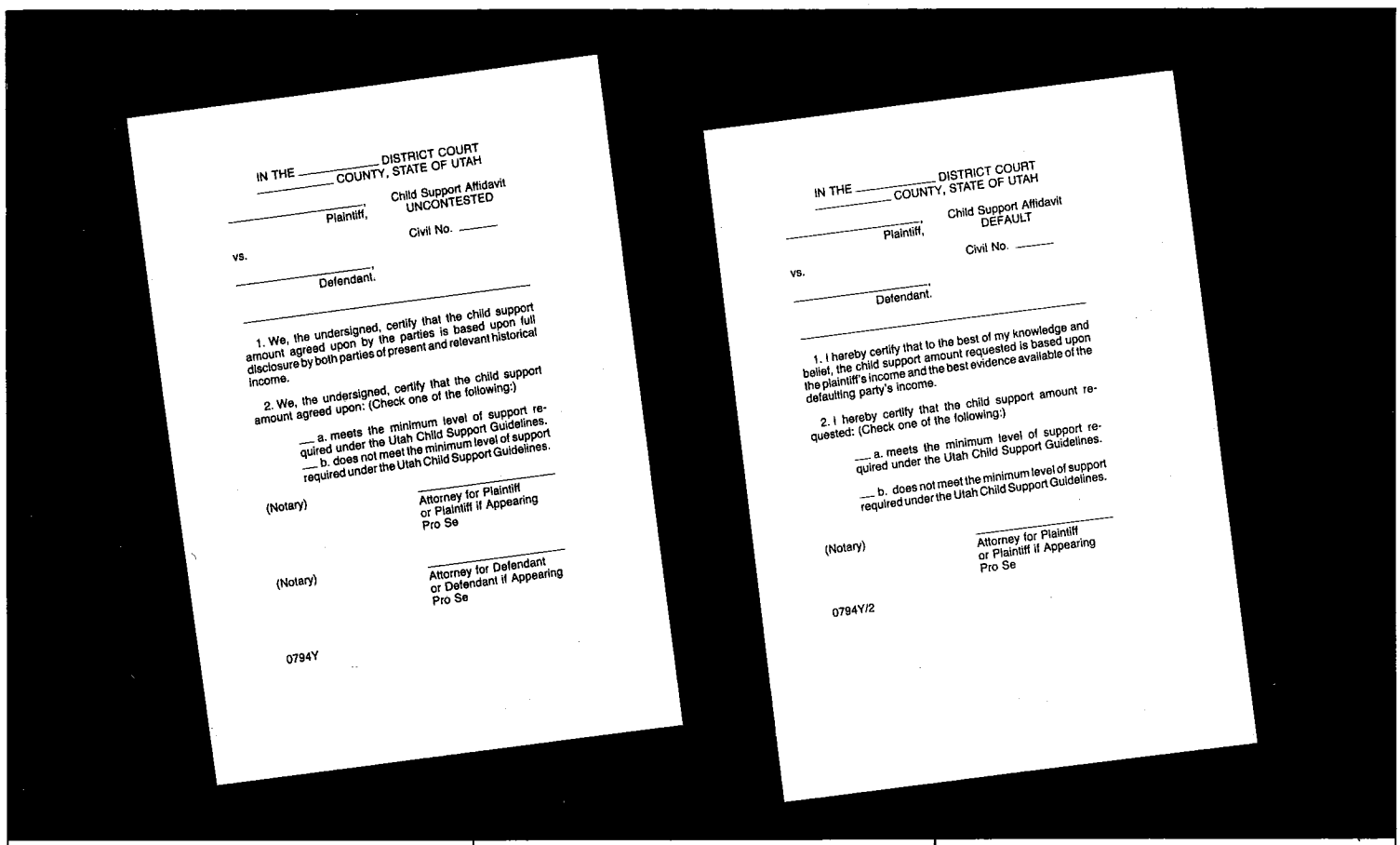
CHILD SUPPORT OBLIGATION — Plaintiff / Defendant / Combined

Share of Obligation (#4a x #9 = #10a, #4b x #9 = #10b) — 10a 263 — 10b 676

Credit for Actual Payments in #8 — 11a ____ — 11b 72

Parent's Total Child Support Obligation (#10a - #11a = #12a, #10b - #11b = #12b) — 12a 263 — 12b 604

* Actual forms are available from the Clerk of the Court.



IN THE _____ DISTRICT COURT
_____ COUNTY, STATE OF UTAH

_____, Plaintiff,

vs.

_____, Defendant.

Child Support Affidavit
UNCONTESTED

Civil No. _____

1. We, the undersigned, certify that the child support amount agreed upon by the parties is based upon full disclosure by both parties of present and relevant historical income.

2. We, the undersigned, certify that the child support amount agreed upon: (Check one of the following:)

__ a. meets the minimum level of support required under the Utah Child Support Guidelines.

__ b. does not meet the minimum level of support required under the Utah Child Support Guidelines.

(Notary)

Attorney for Plaintiff
or Plaintiff if Appearing
Pro Se

(Notary)

Attorney for Defendant
or Defendant if Appearing
Pro Se

0794Y

IN THE _____ DISTRICT COURT
_____ COUNTY, STATE OF UTAH

_____, Plaintiff,

vs.

_____, Defendant.

Child Support Affidavit
DEFAULT

Civil No. _____

1. I hereby certify that to the best of my knowledge and belief, the child support amount requested is based upon the plaintiff's income and the best evidence available of the defaulting party's income.

2. I hereby certify that the child support amount requested: (Check one of the following:)

__ a. meets the minimum level of support required under the Utah Child Support Guidelines.

__ b. does not meet the minimum level of support required under the Utah Child Support Guidelines.

(Notary)

Attorney for Plaintiff
or Plaintiff if Appearing
Pro Se

0794Y/2

B. CHILD SUPPORT NEED

To determine the child support need, the number of children per age group are listed on the worksheet lines 5a, 5b, and 5c. The total number of children is entered on line 5d. The child support obligation is determined by use of the Schedule appropriate to the total number of children. The Schedule amount per child is listed by age group on lines 6a, 6b, and 6c. To determine the schedule amount, the combined adjusted gross income from line 3c is used with the schedule appropriate to the total number of children in line 5d. A total amount of child support need is entered on lines 7a, 7b, and 7c. Those figures are obtained by multiplying lines 5a times 6a to reach 7a; lines 5b times 6b to reach 7b, lines 5c times 6c to reach 7c; and adding 7a plus 7b plus 7c to reach 7d.

1. *Adjustments.* (Enter in whole dollars on worksheet, line 8)

a. *Health and Dental Insurance Premiums for Children:* (Enter whole dollars on worksheet, line 8)

The costs incurred for the child's portion of the insurance premium(s) should be added to the basic child support need. The parent who can obtain the most favorable medical/dental and optical insurance coverage for the benefit of the minor children at the lowest cost should generally be ordered to do so. If economically beneficial to the minor children, both parents should be ordered to provide such insurance. The costs incurred for the child's portion of the insurance premium(s) will be allocated in proportion to income. Those non-covered routine medical and dental expenses will be borne by the custodial parent. Routine expenses include routine office visits, physical examinations and immunizations.

b. *Total Support Need (Worksheet line 9):* This figure is obtained by adding lines 7d and 8.

C. CHILD SUPPORT OBLIGATION

To determine each parent's share of the child support obligation, their proportionate share of combined income (lines 4a and 4b) are multiplied by the total support need on line 9. The figure is entered for each parent on lines 10a and 10b.

A credit is then given for actual payments made by either parent for health and dental insurance premiums for the children (line 8). This credit is entered on lines 11a and 11b as appropriate.

The total child support obligation for each parent is then calculated by subtracting the credit on lines 11a and 11b from the parents' share of the child support obligation on lines 10a and 10b. The amounts are entered on lines 12a and 12b.

D. OTHER

1. *Extended Visitation.* This amount applies to the non-custodial parent and to those months in which the order specifies that the child spend at least 25 or 30 consecutive days with that parent. The amount entered on line 12a and 12b, as appropriate, is multiplied by .75 percent to reach a final amount of child support due from the non-custodial parent during an extended visitation month. The figure is entered on line 13a or 13b, as appropriate.

2. *Work-Related Child Care Costs.* The reasonable costs of child care expenses actually incurred should be entered on line 14. The child care costs considered are child care costs to allow the custodial parent to work. To determine each parent's share of the work-related child care costs, their proportionate share of combined income (lines 4a and 4b) are multiplied by the work-related child care costs on line 14. The figure is entered for each parent on lines 15a and 15b.

CHILD SUPPORT SCHEDULE

1 Child — State of Utah — 5/12/88

Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18	Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18
0-50	10	12	14	3100	357	431	500
100	19	22	26	3200	368	444	515
150	27	32	37	3300	379	457	529
200	34	41	47	3400	390	470	544
250	41	49	56	3500	401	483	559
300	44	53	62	3600	411	496	574
350	46	57	67	3700	422	508	588
400	49	61	73	3800	433	521	603
450	55	68	81	3900	442	532	616
500	61	76	90	4000	450	543	628
550	67	83	98	4100	461	555	643
600	74	91	107	4200	471	568	657
650	80	99	116	4300	482	580	671
700	87	107	125	4400	492	593	686
750	93	115	134	4500	503	605	700
800	100	122	143	4600	513	617	714
850	106	130	152	4700	523	630	729
900	113	138	161	4800	534	642	743
950	119	145	169	4900	544	655	757
1000	125	153	178	5000	555	667	771
1050	131	160	186	5100	565	679	785
1100	138	167	195	5200	575	691	799
1150	144	175	203	5300	585	704	814
1200	150	182	212	5400	596	716	828
1250	156	189	220	5500	606	728	842
1300	162	197	228	5600	616	740	856
1350	168	204	237	5700	626	752	869
1400	174	211	245	5800	636	764	883
1450	180	218	253	5900	646	776	897
1500	186	225	261	6000	657	789	911
1550	192	232	269	6200	677	813	939
1600	198	239	278	6400	697	836	966
1650	204	246	286	6600	717	860	994
1700	210	253	294	6800	737	884	1021
1750	215	260	301	7000	757	908	1048
1800	218	263	306	7200	776	931	1075
1850	220	267	310	7400	796	955	1102
1900	223	271	315	7600	816	978	1129
1950	228	277	323	7800	835	1002	1156
2000	234	284	331	8000	855	1025	1183
2100	246	298	347	8200	874	1048	1209
2200	257	312	362	8400	894	1071	1236
2300	268	325	378	8600	913	1094	1263
2400	280	339	393	8800	937	1121	1293
2500	291	352	409	9000	956	1144	1319
2600	302	365	424	9200	975	1167	1346
2700	313	379	439	9400	994	1190	1372
2800	324	392	454	9600	1013	1213	1398
2900	335	405	470	9800	1032	1236	1424
3000	346	418	485	10,000	1051	1258	1450

These schedules are to be used with the Child Support Obligation Worksheet. Award amounts have been adjusted to compensate for federal and state tax withholding and FICA of each gross income level and the allocation of dependency exemptions to the custodial parent.

CHILD SUPPORT SCHEDULE

3 Children — State of Utah — 5/12/88

Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18	Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18
0-50	7	8	9	3100	219	266	310
100	13	15	17	3200	226	274	319
150	18	21	24	3300	233	282	329
200	23	27	31	3400	239	290	338
250	27	33	38	3500	246	299	347
300	31	37	43	3600	253	307	356
350	34	41	47	3700	260	315	366
400	36	44	52	3800	266	323	375
450	39	48	56	3900	273	330	384
500	42	51	61	4000	278	337	392
550	44	55	65	4100	284	344	400
600	47	58	69	4200	290	351	408
650	50	62	73	4300	296	358	417
700	52	65	77	4400	302	366	425
750	55	69	82	4500	309	374	434
800	59	74	88	4600	315	382	443
850	63	79	93	4700	322	389	452
900	68	84	99	4800	328	397	461
950	72	89	104	4900	335	405	470
1000	76	93	110	5000	341	412	479
1050	80	98	115	5100	347	420	488
1100	84	103	121	5200	354	428	496
1150	87	107	126	5300	360	435	505
1200	91	112	131	5400	367	443	514
1250	95	117	137	5500	373	451	523
1300	99	121	142	5600	379	458	531
1350	103	126	147	5700	386	466	540
1400	107	131	153	5800	392	473	549
1450	111	135	158	5900	398	481	557
1500	114	140	163	6000	405	488	566
1550	118	144	168	6200	417	503	583
1600	122	149	173	6400	430	518	600
1650	126	153	178	6600	442	533	618
1700	129	158	184	6800	455	548	635
1750	133	162	188	7000	467	563	651
1800	136	165	192	7200	479	577	668
1850	138	168	196	7400	492	592	685
1900	141	172	200	7600	504	607	702
1950	143	175	204	7800	516	621	719
2000	146	178	208	8000	528	636	735
2100	151	185	216	8200	540	650	752
2200	156	191	224	8400	552	664	768
2300	163	199	233	8600	564	679	785
2400	170	208	243	8800	578	694	803
2500	177	216	253	9000	591	710	821
2600	184	225	262	9200	604	725	838
2700	191	233	272	9400	616	740	854
2800	198	241	281	9600	628	754	870
2900	205	250	291	9800	640	768	887
3000	212	258	300	10,000	652	782	903

These schedules are to be used with the Child Support Obligation Worksheet. Award amounts have been adjusted to compensate for federal and state tax withholding and FICA of each gross income level and the allocation of dependency exemptions to the custodial parent.

CHILD SUPPORT SCHEDULE

5 Children — State of Utah — 5/12/88

Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18	Combined Adjusted Gross Income ($)	Support Amount ($ per Child) Age Group 0-6	7-15	16-18
0-50	6	7	8	3100	157	192	225
100	10	12	14	3200	162	198	232
150	14	17	20	3300	167	204	239
200	18	22	25	3400	172	210	245
250	22	26	30	3500	177	216	252
300	25	30	34	3600	182	222	259
350	27	33	38	3700	186	227	265
400	30	36	42	3800	191	233	272
450	32	39	46	3900	196	239	278
500	34	42	49	4000	200	244	285
550	37	45	52	4100	204	249	291
600	39	48	56	4200	209	254	297
650	41	50	59	4300	213	259	303
700	43	53	62	4400	217	265	309
750	45	56	65	4500	221	270	315
800	47	58	69	4600	226	275	321
850	49	61	72	4700	230	280	327
900	51	64	75	4800	235	286	333
950	53	66	78	4900	239	291	339
1000	55	69	82	5000	244	297	346
1050	58	72	85	5100	249	302	352
1100	60	75	89	5200	253	308	358
1150	63	79	93	5300	258	313	365
1200	66	82	97	5400	262	319	371
1250	69	85	101	5500	267	324	377
1300	72	89	105	5600	271	330	384
1350	75	92	109	5700	276	335	390
1400	78	96	112	5800	281	340	396
1450	80	99	116	5900	285	346	402
1500	83	102	120	6000	290	351	408
1550	86	106	124	6200	299	362	421
1600	89	109	128	6400	307	372	433
1650	92	112	132	6600	316	383	445
1700	94	116	135	6800	325	394	457
1750	97	119	139	7000	334	404	469
1800	99	121	142	7200	343	415	481
1850	101	124	145	7400	351	425	493
1900	103	127	148	7600	360	435	505
1950	105	129	151	7800	369	446	517
2000	107	132	154	8000	377	456	529
2100	111	137	160	8200	386	466	540
2200	115	142	166	8400	395	476	552
2300	119	147	172	8600	403	486	564
2400	123	152	178	8800	412	497	576
2500	127	156	184	9000	422	509	589
2600	131	162	190	9200	431	520	601
2700	137	168	197	9400	441	531	614
2800	142	174	204	9600	449	541	626
2900	147	180	211	9800	458	551	637
3000	152	186	218	10,000	466	561	648

These forms will be printed in Code Co and will be available in the clerks office at all district courts. The State Court Administrators office will conduct educational seminars on the Child Support Guidelines for bar members in October or November 1988.

The Judicial Council established a standing committee to monitor and review the implementation of the Guidelines including three district court judges, one domestic relations commissioner, one Court of Appeals judge, one attorney appointed by the Utah State Bar specializing in domestic law, one representative of Recovery Services, two non-lawyer citizen representatives, one to represent custodial and one to represent non-custodial parents. This committee will collect data to see if judges are following the Guidelines and if not the reasons for deviation.

Hopefully the result of this effort will be the setting of more uniform and equitable child support orders in the courts of Utah.

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The unqualified success of the Utah State Bar's Lawyer Referral Service is attributable to the broad based interest, enthusiasm and involvement of the bar. Over 500 attorneys in active private practice currently participate. Our program has received national recognition and is used as a model in other states. As LRS's caseload grows, new attorneys are needed in every area of the state. New members are always welcome. Fill out and return the form below. Lawyer Referral NEEDS you now!

Utah State Bar
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Name _____ Telephone _____

Address _____

City _____ State _____ Zip _____

MAIL TO:

Utah State Bar
Lawyer Referral Service
645 So. 200 East
Salt Lake City, Utah 84111

Bar Commission Meeting Highlights

At its regularly scheduled meeting of September 23, 1988, the Board of Bar Commissioners acted on the following items. A complete set of minutes of each Commission meeting is on file and available for inspection at the Office of the Executive Director.

1. Approved the minutes of the August 26 meeting with amendment.
2. Received the report of President Kasting regarding various executive actions taken during September. President Kasting described his meetings with other state bar associations and the ABA Conference on Bar-Related ADR Programs where he had attended and presented information on the Utah Law and Justice Center.
3. Received the report of President-Elect Chamberlain on the organizational meeting of the Utah Law and Justice Center Policies and Progams Advisory Committee and the election of Professor Gerald R. Williams as committee chair. A utilization schedule for the Center was also reviewed.
4. Received the report of the Executive Director highlighting the successful Law and Justice Center dedication events and the overwhelmingly positive responses received from community leaders, citizen groups and national bar leaders; noted publication of the new Utah Bar Journal; reviewed construction and financial status of new building; received update on implementation of apprenticeship program; received detailed report on ABA and related meetings held in Toronto; and reviewed pending implementation of the Tuesday Night Bar Program.
5. Received monthly report of Bar Counsel, acting on various disciplinary matters; introduced Toni Marie Sutliff, new Associate Bar Counsel; discussed proposed rule changes, and reviewed proposed Ethics Opinion #90 (reported elsewhere in this issue).
6. Received report of Legislative Affairs Committee, focused primarily on the status of the Tax Initiatives and on the Tort and Insurance Industry Reform Task Force. Authorized Needs of Children Committee to publicly oppose the Tax Initiatives, based upon the negative impacts on the juvenile justice system, and to disseminate to the public factual information on the issues.
7. Received annual statistical report on professional liability claims against members insured within the Bar-endorsed plan. Commission recognized the need for greater programmatic effort in claims avoidance and repair and loss prevention generally as part of the CLE effort.
8. Approved payment of a $10,000 claim against the Client Security Fund, as recommended by the Client Security Fund Committee. Authorized assessment as provided by the Client Security Fund Rule.
9. Appointed Stanley Litizzette as a Bar representative on the Seventh District Judicial Nominating Commission.
10. Received report on the Judicial Oversight Committee's pending judicial pool project. Reaffirmed earlier action to defer the Bar pool pending a determination of the effectiveness of the judicial pool project.
11. Received monthly report of the Budget and Finance Committee. Audit preparations, the development of a cost allocation system and finalization of arrangements for a line of credit were discussed.
12. Received Admissions Report, approving the reinstatements of Richard E. Harris and Paul Flammer. Approved applicants to sit for the October attorney's bar examination. Discussed further the scoring requirements of the Multi-State Bar Examination.
13. Received a litigation status report, noting recent actions of the courts favor able to the position of the Bar. Reviewed the status of the *Levine* case appeal in Wisconsin, wherein the Utah State Bar is one of 17 state bar associations participating in an amicus capacity.
14. Received an interim report of the committee on bar commission districting, with a survey pending for distribution to the general membership.
15. Recevied a report of the committee on protocol for bar awards, approved a recommended method of opening up the award process to receive nominations from the general membership (see article elsewhere in this issue).
16. Appointed Reed Martineau to succeed Robert Campbell as chair of the Legal Net Committee.
17. Approved a proposal for consulting services on artwork selection and procurement by Life Designs, a division of Wallace Associates.

Federal Bar Association

On October 7, the Utah Chapter of the Federal Bar Association held its annual dinner banquet. The guest speaker was the Honorable Harold G. Christensen, formerly a senior partner at Snow, Christensen and Martineau and recently confirmed as Deputy Attorney General of the United States. Mr. Christensen spoke enthusiastically of life in Washington and candidly of the political realities of the confirmation process.

The Chapter also installed its new officers for 1988-1989. They are: Christine Fitzgerald Soltis, President; Kevin Anderson, President Elect; Samuel Alba, Vice President; Tena Campbell, Secretary/Treasurer; and Scott A. Call, Membership.

In November, the Utah Chapter sponsored a "Tour of the Federal Courthouse" for all new admittees to the Utah State Bar. This practical mini-seminar consisted of question and answer sessions with the Clerk of the United States District Court, the Clerk of the Bankruptcy Court, representatives of the U.S. Attorney's Office, the U.S. Marshall's Office, and the U.S. Probation's Office. The admittees also met with members of the federal judiciary. The tour was free of charge.

Future plans include a Christmas social in December for FBA members and the federal judiciary. Members will be contacted as to the specific date and period.

In late January, the Utah Chapter will sponsor its annual legal seminar. This year, the seminar will focus primarily on advance criminal issues but will include discussions of the problems faced by the civil practitioner representing clients under grand jury investigation. Details of the seminar will be published in the next issue of the Utah Bar Journal.

All members of the Utah State Bar are invited to join the Utah Chapter of the Federal Bar Association. **For membership information,** please contact Scott Call, 530-7424.

Model Law Firm Partnership Agreements Available On Diskettes

A law firm partnership agreement can be prepared in minutes with a word processing diskette produced by the ABA's Economics of Law Practice Section (ABA/ELPS). The diskette is based on the best-selling monograph "Model Partnership Agreement of the Small Law Firm." The model agreement, geared specifically for small firms, contains provisions for profit distribution based on a formula keyed to business origination and work production. Also included are sections on organization and administration, withdrawal, retirement, expulsion, disability or death of a partner; and capital and drawing accounts. The diskette can be purchased separately or with the accompanying monograph. To order, contact ABA Order Fulfillment, Dept. 511, 750 N. Lake Shore Drive, Chicago, Illinois 60611; or for further information call (312) 988-5555.

Claim of the Month

ALLEGED ERROR OR OMISSION

The Insured attorney failed to bring a third-party action against the state on a theory of negligent design of a roadway upon which his client had been severely injured in an automobile collision. The Insured did not implead the state because of his good faith belief that the roadway was not negligently designed, that the accident was caused entirely by a drunk driver and, consequently, there was no predicate for bringing such an action. The Insured, however, failed to obtain an investigator's report to corroborate his belief and failed to advise client in writing that he did not intend to pursue the state.

RESUME OF CLAIM

The Insured represented the victim of an automobile crash. Client had pulled his car over to the side of state roadway and was standing behind his automobile when a speeding drunk driver struck the parked car in the rear, crushing the victim's legs between the cars.

The drunk driver was underinsured and otherwise assetless. The Insured obtained policy limits as well as monies from state uninsured motorist fund for his client. The proceeds did not adequately compensate the victim for his injuries. Client subsequently retained another attorney who sued the Insured for failure to proceed against the state in a timely fashion.

Since the Insured's failure to obtain an independent investigation and to advise his client in writing of the limitations of his representation was below the acceptable standard of care, and since the client's injuries were extremely severe and the E&O carrier did not wish to risk an adverse jury verdict, the carrier paid the policy limits.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

When the Insured agreed to represent the client he should have *made clear in writing the exact nature and scope of his representation*: whether he would pursue only the driver or include third-party defendants as well. If he did not intend to pursue third-party actions, he should have clearly so stated and advised client to seek another attorney for that purpose.

If Insured promised to pursue all possible parties, he should have obtained an independent investigator's assessment of the state's potential liability in this case. He should also have filed a timely Notice of Claim, as is generally required by municipalities, even while awaiting the outcome of the investigation, in order to protect his client's rights.

DISCIPLINE CORNER

ADMONITIONS

1. An attorney was admonished for violating Rule 7.5 for using a letterhead which implied or stated that the individuals were in a partnership when in fact no partnership existed.

2. An attorney was admonished for representing individuals on appeal in matters where the attorney had acted as administrative law judge without proper consent from all parties in violation of Rule 1.12(a).

3. For neglecting a probate matter for over a year, an attorney was admonished for violating DR6-101(A)(3).

4. An attorney was admonished for violating DR1-102(A)(5) for engaging in conduct prejudicial to the administration of justice by participating in circumstances that created the appearance that the attorney and/or his client was attempting to improperly influence the testimony of a key witness.

5. For failing to adequately communicate with a client by repeatedly failing to respond to telephone calls and to answer the client's questions an attorney was admonished for violating Rule 1.4.

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violating DR6-101-(A)(3) for neglecting a legal matter by failing to file a divorce complaint for a period of seven months after being retained and then failing to timely serve the complaint once it had been filed.

2. For failing to file a divorce complaint for seven months and then failing to file the divorce complaint for an additional two months after the client paid filing fees and for failing to timely serve the client's spouse with the divorce complaint, an attorney was privately reprimanded for violating DR6-101(A)(3).

DISBARMENTS

Robert Ryberg was ordered disbarred from the practice of law in the State of Utah by the Utah Supreme Court effective October 3, 1988, for violating the following disciplinary rules: DR1-102(A)(4) (engaging in conduct involving fraud, dishonesty, deceit or misrepresentation); DR2-106(A) (charging or collecting illegal or clearly excessive fee); DR6-101(A)(2) (handling a matter without preparation adequate in the circumstances); DR6-101(A)(3) (neglecting a legal matter entrusted to him); DR1-102(A)(3) (engaging in illegal conduct involving moral turpitude); DR9-102(B)(3) (failing to maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and rendering appropriate accounts to his clients regarding them and by receiving money from a client in the course of professional business and failing to pay or deliver the same to the person entitled to it within a reasonable time); Rule 2, Section 4(1) conviction of a felony involving moral turpitude.

ETHICS OPINION NO. 90

After receiving many thoughtful comments from members of the Bar, the Board of Bar Commissioners at its Commission Meeting on September 23, 1988, voted to adopt Ethics Opinion No. 90 as follows: Surreptitious tape recordings by attorneys of conversations is not unethical.

The Board of Bar Commissioners appreciated the input by the members of the Bar in this matter.

Needs of the Elderly Committee Sets Brown Bag Luncheon Schedule

On Wednesday, September 21, 1988, at the new Law and Justice Center in Salt Lake City, the Needs of the Elderly Committee hosted its first "brown bag" luncheon meeting on the 1988 changes to Utah's Guardianship Statute. The speaker was Louise York of the Court Administrator's Office. Major changes highlighted in the discussion included the new definition paragraph, the elimination of the guardian ad litem, reporting forms, and penalties for improper accounting to the court.

On Thursday, October 20, 1988, Ken Surfass, Corporate Counsel for Equitable Life & Casualty Insurance Company, addressed brown bag luncheon participants regarding the new federal Medicare legislation signed into law by President Reagan on July 1, 1988, which drastically changes Medicare coverage. Mr. Surfass also discussed legislative proposals regarding long term care insurance.

Finally, on Tuesday, November 22, 1988, Robert Bradley of VanCott, Bagley, Cornwall & McCarthy presented a well received overview of Medicaid impacts on estate planning.

Upcoming "brown bag" luncheons to be hosted by the Needs of the Elderly Committee are as follows:
January—Consumer Protection; February—Living Wills—Planning for Disability; March—Home Health Care and Nursing Home Care; April—How to Counsel the Older Client (to be conducted by a gerontologist); May—Panel Discussion on Age Discrimination.

For details on any of these events, please contact Ken Surfass, 521-2500, or Toni Marie Sutliff, 531-9110.

The Utah State Bar Teams Up With National Car Rental

National Car Rental and Utah State Bar have joined forces to provide members special car rental rates and/or discounts, convenient worldwide service and exciting innovations that add fun to business and pleasure and travel.

Utah State Bar members can show their membership card or National Car Rental identification card at the time of rental to get their special rates or discounts off National's business rates on daily rentals, and a five (5) percent discount on weekend, weekly, monthly and holiday rates. A National Car Rental identification card can be obtained by contacting Ms. Paige Holtry, Bar Programs Administrator, at the Utah State Bar, 645 S. 200 E., Salt Lake City, Utah, 84111-3834, **(WATS)** 1-800-662-9054.

National's special rates for Utah State Bar members are as follows and include 100 free miles per day on local rentals, all additional miles and for all miles on one-way (intercity) rentals charged at 30 cents per mile:

E—Economy	$39.00
M—Midsize	$40.00
F—Fullsize	$41.00

The above rates are subject to a rate differential charge in certain cities and surrounding areas, including their airport, downtown, suburban and sublocations as follow:

$5.00 Cities	$10.00 Cities
Boston, MA	Manhattan
Chicago, IL	LaGuardia
Hartford, CT	JFK
Philadelphia, PA	Newark Airport
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Detroit, MI	
New York, New Jersey	
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Emerald Aisle, National's exciting new customer service feature for Emerald Club members, is the fastest way to get from the runway to the freeway! Thanks to the latest in technology, National customers can go straight to their cars and bypass the counter altogether. This brand new service was launched at O'Hare and LaGuardia on March 17 and is rolling out nationwide in the coming months.

National Car Rental features General Motors vehicles. Linked with its worldwide affiliates, National's global network spans 120 countries and territories with over 4,000 locations.

Tenth Circuit Court Sets 1989 Terms

The 1989 Terms set for the United States Court of Appeals for the Tenth Circuit have been set as follows:

January Term (Denver)	January 17-20
March Term (Denver)	March 6-10
May Term (Denver)	May 8-12
July Term (Denver)	July 10-14
September Term (Oklahoma City)	September 25-29
November Term (Denver)	November 13-17

Readers are also reminded that the Judicial Conference of the Tenth Circuit has been scheduled for September 6-8, in Santa Fe, New Mexico.

ABA Solicits Nominees for 1989 Pro Bono Publico Awards

Nominations are open for the 1989 Pro Bono Publico Awards, conferred annually by the American Bar Association.

The awards were created in 1984 to recognize the public service contributions of thousands of lawyers across the nation. Eligibility is restricted to lawyers who do not make their living delivering legal services to poor persons, but who either directly provide such services on a volunteer basis, or create or organize systemic improvements that increase access to justice for poor persons.

Nominations will be taken by the Standing Committee on Lawyers' Public Service Responsibility until March 1, 1989. Both individual lawyers and law firms may be nominated. Awards will be presented during the 1989 Annual Meeting in Honolulu, Hawaii, August 3-10.

Nominations should be addressed to Dorothy Jackson, Staff Assistant to the ABA Standing Committee, at 750 N. Lake Shore Dr., Chicago, IL 60611. Ms. Jackson, at (312) 988-5766, also can provide additional details.

Depositions to be Destroyed

All depositions on cases filed ten years ago or earlier in the Third District Court will be destroyed beginning January 1, 1989, because of 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 1st.

For more information, contact Craig Ludwig at 535-5111.

Young Lawyer Section Utah State Bar Annual "Sub-For-Santa" Project

"We again remind the legal community of the needs of the disadvantaged during the holiday season. We need everybody's help," said Brian M. Barnard in announcing this year's opening of the annual Utah State Bar YOUNG LAWYER SECTION "Sub-for-Santa" project in conjunction with *The Salt Lake Tribune*. As a clearinghouse, *The Tribune* program matches those with some to share at Christmastime with less fortunate families needing help. *The Tribune's* program began fifty-seven years ago to assure that needy children in Salt Lake are not forgotten at Christmas.

"This is an opportunity to help and to be directly involved with a family at home," Project Coordinator Barnard stated, "we want the legal community to directly participate. Donating money helps, but seeing the face of a child at Christmas that would have gone without except for the Sub-for-Santa program really brings the message home."

This program helps meet some very immediate and often temporary hardships of our neighbors."

"It's great that the legal community can reach out, give something to those in need and see the wonderful results. Last year several larger Salt Lake law firms were able to sponsor as many as five families."

Members of the Young Lawyer Section will be contacting Salt Lake area attorneys to answer any questions regarding the program and to encourage them to call *The Tribune* Sub-for-Santa program (237-2830 to sign up and sponsor a family (or two).

Each interested law firm and/or attorney is asked to designate a person to coordinate the project and work with the Young Lawyer Section and *The Tribune* to select a family, purchase gifts and groceries and deliver them before Christmas.

"In 1987 *The Tribune* helped more than two thousand children enjoy Christmas. With the help of the legal community and the Young Lawyer Section, we aim to reach more families and children this year," said Barnard.

For small law firms that cannot sponsor a family, the Section again encourages contributions to help *The Tribune* itself respond to families seeking aid, and fill in where sponsors cannot be found. Monetary contributions payable to "Sub-for-Santa" should be sent to "Sub-for-Santa", Young Lawyer Section, Attn: Brian Barnard, 214 E. 500 S., Salt Lake City, Utah 84111-3204

Questions regarding this Young Lawyer Section project should be referred to Brian M. Barnard, 328-9532

Nominations Now Being Accepted for 1989 Mid-Year Meeting Awards

Now is your opportunity to submit nominations for the 1989 mid year meeting awards of the Utah State Bar, and recognize those who have distinguished themselves or who have made exemplary contributions to the Bar. This is a time members of the Bar have to acknowledge those individuals, sections and committees who have made special contributions to the public and the Bar. There are many individuals who deserve special recognition, but without your nominations, some may be overlooked when the Board of Bar Commissioners vote on recipients for the awards at their January meeting. Careful attention should be given to the following definitions when submitting nominations.

Distinguished Non-Lawyer for Service to the Bar Award—this award is given to one or more non-lawyers who, over a period of time, have served or assisted the legal profession or the Utah State Bar in a significant way. Recent recipients of this award have included Bonnie Miller and Byron Harward.

Distinguished Lawyer in Public Affairs Service Award—this award recognizes members of the Utah State Bar who have served the Bar in the public in the capacity of elected public office and have significantly advanced the needs of the legal profession and the public through distinguished public affairs service. Recent past recipients of this award include A. Dean Jeffs and Lyle W. Hillyard.

Distinguished Section Award—this award is given annually to one or more Bar sections which have the most outstanding programs and activities for their members and the membership at large during the year. Recent past awards of this category have been given to the Securities Section and the Energy and Natural Resources Section.

Distinguished Committee Award—this award is given annually to one or more standing committees of the Utah State Bar which have had the most outstanding programs and contributions to the membership and public at large during the year. Recent past awards of this category have been given to the Legislative Affairs Committee and the Law Related Education and Law Day Committee.

Distinguished Lawyer Posthumous Award—this award is given posthumously to an attorney who gave long and valuable service to the Utah State Bar over a significant period of time. It is intended to honor the memory of those whose long term commitment to Bar services and the legal profession was exemplary. Recent recipients of this award include A. Pratt Kesler and Louis E. Midgley.

Distinguished Lawyer Emeritus Award—this award is given to attorneys who have given long and valuable service to the Utah State Bar over a significant period of time. It is intended to recognize long term commitment to Bar services and significant contributions to the legal profession. Calvin Behle and Judge J. Allen Crockett are recent recipients of this award.

A nomination letter should be sent to Stephen F. Hutchinson, Executive Director, Utah State Bar, Utah Law and Justice Center, 645 South 200 East, Salt lake City, Utah 84111 no later than January 15, 1989.

BYU Law School Conducts First Annual Alumni Banquet

The BYU Law School Alumni Association conducted its First Annual Law School Alumni Banquet on Friday, October 7, 1988 at the Little America Hotel in Salt Lake City, according to the Banquet Chairman, Judge Michael L. Hutchings.

The featured speaker for the event was

Professor Rex E. Lee, the George Sutherland professor of law at BYU, and former Solicitor General of the United States. Rex Lee also was the founding dean of the law school which began in the fall of 1973.

Rex Lee's speech included discussion of the formation of the law school. He also amused the 450 guests by sharing with them some humorous and interesting events associated with choosing a faculty, constructing a law school building and recruiting students in order to form the law school.

Anna Mae Goold was honored for her tenure as the first law school placement director. She recently retired this year after over a decade of service to numerous law school graduates.

Also honored was the late Woody Deem, a retired professor of criminal law, who recently passed away in September. Woody Deem was one of the first law professors to introduce the video tape into the classroom to record students' oral presentations. He will be remembered by all associated with him also for his dramatic wit and personal interest in his students. Recently the law school announced the formation of an endowed chair entitled, "The Woodruff J. Deem Professorship in Law." Over $75,000 has already been raised from alumni contributions.

Lew Cramer, a graduate of the law school's first graduating class of 1976, was honored as the "Outstanding Alumnus of 1988."

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, and Honorable David M. Ebel, Circuit Judges.

Settlement Conference

General Order

In order to promote settlement in appropriate cases, the court adopts the following procedural requirements:

In all civil proceedings, not seeking relief from criminal convictions, within 10 days after notice that the matter has been set for oral argument, or after notice that the court intends to submit the matter on the briefs, counsel for the appellant/petitioner shall initiate a conference with counsel for the appellee/respondent with respect to prospective settlement of the issues on appeal. Such conference may be conducted by telephone. Within 10 days after this mandatory settlement conference, counsel for appellant/petitioner shall serve and file a "Report of Settlement Conference" setting forth the occurrence and date of the settlement conference and the results thereof, i.e., whether or not settlement was achieved, and, if not, whether further settlement negotiations are contemplated.

Failure of counsel for the appellant/petitioner to initiate and report on such conference, or refusal of counsel for the appellee/respondent to engage in such conference, may be grounds for discipline under the court's Plan for Attorney Disciplinary Enforcement.

Robert L. Hoecker
Clerk

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.

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by Clifford Ashton

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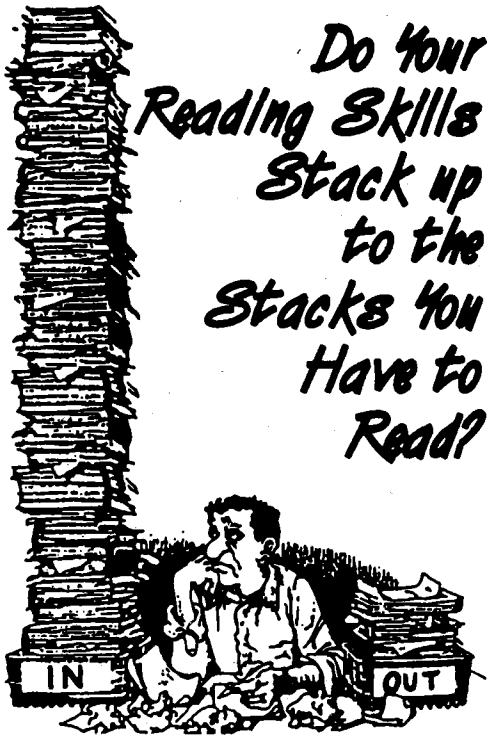

OBJECTIVE: increase reading rate and comprehension in technical materials by a factor of at least 100 percent.

This Utah State Bar class is legal reading specific, but the skills learned and the materials you take with you may be one of the best overall investments of time and a little money that you will ever make.

CONTACT: Sydnie Kuhre
Law and Justice Center, 531-9077.
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Utah State Bar
1989 MID-YEAR MEETING
March 16-18
St. George, Utah

Utah State Bar

1989 ANNUAL MEETING

June 28–July 1

Sun Valley, Idaho

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Rethinking the Purpose of the Juvenile Court

By Arthur G. Christean

"From its inception in Cook County, Illinois in 1899, the juvenile court has been the subject of great controversy; but the disputes about its nature and its effectiveness have never been more pronounced than they are today."[1]

Editorial Note: *This article is an edited version of a working paper presented by the author to the Board of Juvenile Court Judges in April 1987 in connection with legislation then pending seeking to modify the purpose clause of the Juvenile Court, Section 78-3a-1, UCA. H.B.10, which passed during the 1988 General Session. The legislature repealed and reenacted this section; and it became effective July 1, 1988. It contains many of the features discussed in this article. Other issues discussed such as the use of detention for conduct which would be criminal if committed by adults, the separate status of the juvenile court, and restoration of the jurisdictional distinction between delinquency and neglect or abuse have yet to be addressed by the legislature.*

I. INTRODUCTION

The above quote from a 1971 publication illustrates how the matter of the purpose or nature of the juvenile court has been a matter of dispute from its birth. This has been true in Utah as well, particularly in view of the state's history and strong commitment to child welfare. Thus the words of Section 78-3a-1, the so called "purpose clause" of the juvenile court, take on a significance and symbolism all out of proportion to the actual language. Revision becomes, as it has during spirited discussions over the past several years, a reexamination of the soundness of the original premise of the juvenile court. Often the matter is cast in terms of a debate between then merits of the "medical model" vs. the "justice model."

A full description of the evolution and current meaning of these terms is not possible here. However, for the purpose of this discussion the *"medical model"* will refer to the predominant view of the juvenile court nationally and in Utah during most of its history up to the last two decades, that the basic purpose of the court was to provide rehabilitative services to meet the needs of children and families in a judicial forum; and that the accomplishment of this purpose was to be achieved through diagnosis and treatment rather than punishment. In addition, the court's aims were to be pursued in a non-stigmatizing, therapeutic environment. The *"justice model"* will refer to a view of the juvenile court which challenges most of the assumptions on which the traditional view was based and which holds that the basic purpose of the court is to do justice first and rehabilitation second; that doing justice means in general terms for the juvenile court to resolve cases in like manner to other courts by the application of legal principles and statutes to facts determined by procedures which meet the requirements of due process; and that in delinquency cases it means the imposition of appropriate sanctions with due regard to the diminished capacity of juvenile offenders. Naturally few juvenile courts can be placed entirely at one end of the spectrum or the other with most falling somewhere in between.

ARTHUR G. CHRISTEAN is a judge in the Third District Juvenile Court. He previously was a judge in the Fifth Circuit Court from 1978 until his appointment to the juvenile court in 1984. Christean received his law degree from the University of Utah in 1960 and was a deputy Utah state court administrator and juvenile court administrator until his appointment to the bench. He is currently a member of the Board of Juvenile Court Judges, the Judicial Evaluation Committee and the Utah State Commission on Criminal and Juvenile Justice.

Divergence of opinion about the purpose of the court in Utah and the administrative difficulties this posed in the past is revealed in a 1971 report to the Board of Juvenile Court Judges:

> "Despite such progress our districts continue to differ, sometimes sharply, over philosophy, programs, and basic court functions. . . .
>
> "This lack of shared goals in our juvenile court system and ambivalence about the viability of the original juvenile court *parens patriae* philosophy, creates a number of difficult problems from the management aspect of the court system. . . ."[2]

The current debate, or more appropriately, the old one with different judges, was again before the Board of Juvenile Court Judges at various times during the period 1982-1986. This renewed controversy was stimulated by reports of national trends and statutory changes in the juvenile codes of other states. In addition, there were indications of similar concerns by members of the Utah legislature. Illustrative of this was a letter sent to all juvenile court judges by a member of the legislature in April 1986 requesting a response on the applicability to Utah of the views contained in a highly critical article by Alfred Regnery, the former Director of the Federal Office of Juvenile Justice and Delinquency Prevention, entitled "Getting Away With Murder." This request, by virtue of the issues it raised, invited if not compelled comment on the matter of the basic purpose of the juvenile court. Most judges elected to respond with individual letters, some of which were quite lengthy.

As a result of the composite responses of the judges and other pressures, legislation was sub-

mitted during the 1987 General Session of the legislature seeking to modify Section 78-3a-1, of the Juvenile Court Act. The Board of Judges requested that this important change in the statutory mission of the court be postponed until after the judges collectively and court staff could carefully consider it. The bill was tabled and at the conclusion of the 1987 session the subject was included as one of the items for interim legislative study.

II. BRIEF ANALYSIS OF THE PRESENT CLAUSE (78-3a-1)

The wording of the present Section, even though it is in a single paragraph, can for convenience of analysis, be divided into three (3) parts.

The first portion after the prefatory words "It is the purpose of this act" consists of the following:

> "...to secure for each child coming before the juvenile court such care, guidance, and control, preferably in his own home, as will serve his welfare and the best interests of the state; to preserve and strengthen family ties whenever possible; to secure for any child who is removed from his home the care, guidance, and discipline required to assist him to develop into a responsible citizen."

This could be referred to as the child welfare and family preservation portion, or in other words the legislative expression for the state of Utah of the *parens patriae* doctrine. It is similar to juvenile court language in many other states. It has a common origin dating to the beginnings of the juvenile court movement at the turn of the century with the creation of the first juvenile court in Illinois in 1899 and the contemporaneous efforts of Judge Ben Lindsey in Colorado. It is similar to language in the Standard Juvenile Court Act of 1959 (6th Ed.), after which the Utah Juvenile Court Act of 1965 was patterned, except that it is somewhat broader and includes the phrase "to preserve and strengthen family ties whenever possible" which is not found in the Standard Act. Also the words "to *secure for each child coming before the court*" were substituted for "to the end that each child coming before the court shall receive,...." as found in the Standard Act. Whether this was done to emphasize that the juvenile court in Utah was to have a greater responsibility for family preservation and child welfare than the drafters of the Standard Act thought necessary is not known. The changes are however worthy of note.

The second portion consists of the following:

> "...to improve the conditions and home environment responsible for his delinquency;"

This could be referred to as the environmental causation of juvenile delinquency portion. It is a classic statement of the deterministic view which has dominated the juvenile court movement during most of this century and which supports in large measure the "medical model." Implicit in this language is the belief that the juvenile court has both the means and the know-how to "cure" the conditions which "cause" delinquency.

The third and final portion consists of the following:

> "...and, at the same time, to protect the community and its individual citizens against juvenile violence and juvenile lawbreaking."

This could be referred to as the social control portion. This language is not found in the Standard Act of 1959 and was added to the 1965 Utah Juvenile Court Act reflecting even at the date a growing concern for justice, accountability and consequences. No doubt the drafters had in mind the deterrent effect of juvenile court orders in delinquency cases. Yet the language is so broad and imprecise it seems to assume as entirely appropriate that the juvenile court should have near total responsibility for delinquency prevention and control to *"protect the community,"* much as a public health agency has a responsibility to protect the citizenry against disease. Its words seem to contemplate for the juvenile court an expansive law enforcement burden in addition to its judicial duties.

Conspicuous by its absence is any mention whatsoever of language pertinent to the court's *judicial* responsibilities. Words such as "justice," "accountability," or "due process" are not present. Such an omission tends to obscure or overlook the core function of the juvenile court as a court of law and not merely a coercive social agency attached for administrative convenience to the judicial branch of government.

It has been asserted by some that the present clause has served the court well and that there is no need to modify it. It is the purpose of this paper to present a contrasting view and to attempt to demonstrate why there is a compelling need to revise or eliminate it altogether if agreement on its content cannot be reached; and that to do so is both appropriate and healthy; and that revision will not threaten efforts at rehabilitation or compromise efforts directed towards helping redirect the lives of young people as far as the law and the resources available to the court will permit.

It is fair to say however that his kind of change in the phraseology and priorities of the court's policy statute is not merely a matter of image improvement, public relations, or cosmetic "housekeeping." It has never been represented as such. Rather, it has to do with concerns about the fundamental nature of the court and whether the present statutory language is seriously deficient in expressing it. It is also important to acknowledge that while justice and rehabilitation are not mutually exclusive, some of the ideas and values which support the traditional juvenile court medical model are not compatible with a justice model.

III. SYNOPSIS OF EVENTS LEADING TO THE UTAH JUVENILE COURT ACT OF 1965

While the development of the juvenile court in Utah had its origins in territorial days, the basic shape of the court was fairly well established by 1905. The 1907 act contained most of the basic features associated with juvenile courts elsewhere in the nation.[3] The Utah court was attacked on constitutional grounds and upheld in the famous decision of *Mill vs. Brown*[4] That early decision is interesting for reasons pertinent to this discussion in that it contains some highly prophetic cautionary language by Justice Frick about the dangers of excessive informality in the zeal to meet the needs of children by utilizing "common sense justice."[5] It is also noteworthy that the juvenile court code was placed in the judicial code at this early date and not the public welfare or child welfare code. Also, there was no "purpose clause" as such but rather a statutory construction section with language typical of other states as follows:

> "The provisions of this chapter shall be construed in accordance with the provisions in Sect. 4052, to-wit: that the care, custody and discipline of the child shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable any delinquent child shall be treated, not as a criminal, but as misguided, and needing aid, encouragement and assistance."[6]

The essential features of the juvenile court code remained unchanged until 1931 when a new code was adopted patterned after the 1929 Model Act. Of significance, the "construction" clause omitted by the entire juvenile court code was placed in the child welfare code. Also, the 1907 Act and its successors, had maintained separate chapters for delinquency and neglect. This pattern was abandoned in the 1931 Act and both were combined in the same Act, thus blurring the distinction between juveniles as offenders and children as victims in need of protection. This "one pot" jurisdictional approach remains to this day. Many of the sections in the present code are found in this 1931 Act with slight modifications. This development is mentioned here primarily to indicate the basic shift in perception of the court as more of a child welfare agency than as a court of law and as a prelude to the next important change.

In 1941, for reasons now somewhat obscure and presumably as part of a governmental reorganization measure, the juvenile court code was modified to provide that operation and "control" of the court would be by the State Department of Public Welfare. No one seemed then or for several years thereafter to be concerned about the basic and flagrant violation of the state's constitution which this arrangement represented. This positioning of the juvenile court as a part of the State Welfare Department expressed as clearly as possible the legislative, and presumably the public view of the court as a child welfare agency with judicial powers. Thus, no "purpose" or statutory construction clause was deemed necessary. The purpose of the "court" was now clearly set by what it had become and where it had been placed in state government. Case handling practices were put in place in those early years which remained until the 1965 Act. Some remnants of those years in terms of habits (and old forms!) are with us yet.

As more fully described in another short article published in the Juvenile Court Handbook,[7] this arrangement continued until 1963 when a bill was introduced in the Utah legislature to separate the court from the Welfare Department.

It is interesting to note that many of the same type of arguments against change at that time are being advanced now in opposition to a modification in section 78-3a-1, namely that to do so will "legalize the court"; threaten the special rehabilitative philosophy of the court; and that the basic problem is not a clear policy about what the court is but a matter of lack of resources. So strenuous was the opposition to change in that year that the bill was defeated by a very close vote. Yet the victory was short-lived as later in the same year the Utah Supreme Court resolved the question of the juvenile court's basic nature by declaring that it was a court of law and a part of the judicial branch of government; and that the statutory scheme for Department of Welfare control was unconstitutional however well intentioned it may have been. [8] This decision cleared the way for the enactment of the Juvenile Court Act of 1965.

IV. THE JUVENILE COURT ACT OF 1965

The 1965 Act was described by one national leader in the juvenile justice field as the most significant piece of juvenile justice legislation that year.[9] It anticipated many of the requirements of due process the U.S. Supreme Court would require of all juvenile courts nationally two years later. It is in the 1965 Act that the present "purpose clause" first makes its appearance. The Utah Act, while essentially following the Standard Act as mentioned previously, made some significant modifications indicative of a modest compromise with the treatment model dominant at the time, including the following:

—Inclusion of the "public protection" phrase in the purpose clause as mentioned above.

—The addition of language permitting imposition of fines and restitution.

—Inclusion of a contempt powers section.

—Specific enumeration of dispositions rather than the two basic dispositions of probation or state custody as found in the Standard Act and federal guidelines.

—Specific mention of rights to counsel, appeal and transcript on appeal.

Notwithstanding the foregoing modifications, the Utah 1965 Act was and remains essentially to this day fundamentally a treatment model code. Some of the reasons why this is so, in the author's opinion, are as follows:

—General adherence in language and structure to the Standard Act of 1959 with its heavy orientation to treatment as the basic purpose of the juvenile court.

—The absence of any language expressing "justice," "accountability," "due process" or recompense to victims as legitimate functions of the court.

—Continuation of the 1931 code arrangement of combining delinquency and neglect jurisdiction.

—The total absence of any short term detention authority as a disposition requiring total reliance on the court's contempt powers.

—The absence of any express provision regarding the privilege against self incrimination and confrontation rights. (These were covered later in Rules of Procedure.)

The Utah Act, along with its counterparts elsewhere, reflected the basic treatment point of view and "mind set" of the mid-1960s. This perception of the juvenile court can be seen from a few representative quotes from a "Standards" document published by the federal government in 1966 which contains in the "Forward" the statement that it "...presents a general consensus of the thinking and experience of many outstanding persons in the social and legal professions..." about the nature of the juvenile court.[10] Statements such as the following are illustrative:

> "The essential philosophy of the court handling children's cases has been called "individualized justice." This in essence means that the court selects a disposition through which the *needs of the child* can best be met...and that its purpose is remedial and to a degree preventative, rather than punitive."
>
> "...the consequences of such misconduct, however should result in *individualized treatment*...."
>
> "The situation has, indeed, changed in the past 66 years. The principle that a child involved in delinquency is *in need of treatment rather than of retributive punishment*, for instance, is far more widely accepted today."[11] (Emphasis added).

Also very revealing of the orthodoxy of the time is the fact that as of that date the federal office producing such "Standards" and the one responsible for national juvenile justice programs was titled the Children's Bureau in the Department of Health, Education and Welfare. The current title of this office is the Office of Juvenile Justice and Delinquency Prevention in the Department of Justice.

Consistent with the concepts expressed above, this 1966 "Standards" document makes no recommendations whatever for the imposition of fines or restitution and recommends very few specific dispositions. Nor does it contain any language pertaining to the victims of juvenile crime. Rather it favors probation, making a child a "ward of the state," i.e. state custody, or commitment to state institutions where "the needs of the child can be met" as the basic dispositional approaches. There is almost a total absence of any discussion of sanctions or penalties for violation of court orders. That growing concerns about due process and justice were only grudgingly recognized and looked on more as a hindrance to the court's basic obligation to do what it saw fit to meet the child's needs, can be gleaned from this revealing statement which is typical of the pre-*Gault* era of the jurisprudence of good intentions:

> "In recognizing the importance of maintaining a balance between protecting the individual's legal rights, and protecting the public's legal rights, any suggestion must be avoided of a return to a mechanized, routine application of an "automatic justice"...which would deny one of the most vital functions of a specialized court—that of giving the authoritative support needed to assure to all children the help, care and treatment they need...."[12]

V. DEVELOPMENTS SINCE 1965

One of the most compelling reasons for reconsidering the purpose of the juvenile court is the dramatic change in the judicial landscape which has occurred since 1967. This year marked the landmark decision in the case of *In re Gault*[13]. The juvenile court in the United States would never be quite the same type of public institution thereafter. It was preceded by the *Kent* case in 1966[14] which marked the first case in over 60 years to reach the U.S. Supreme Court involving a constitutional challenge to the operation of juvenile courts. Following the decision in *Gault*, other juvenile court procedural shortcomings were addressed in a series of cases [15] all of which made it abundantly clear that the juvenile court, whatever its structural placement in a state's judiciary, must meet certain basic constitutional requirements.

The reaction to these decisions, particularly *Gault*, was swift in coming. Less than two months after the decision was announced, the National Council of Juvenile Court Judges, reacting to the stern criticism in the opinion to the effect generally that good intentions were a poor substitute for regular legal procedure and due process, passed a resolution stating somewhat critically that "...these two decisions have left unresolved more questions than they have resolved." The National Council, dominated by judges fearful that the Constitution and lawyers were incompatible with its philosophic priority of rehabilitation, had sought to file an *amicus curiae* brief in the Supreme Court presenting the juvenile court philosophy but failed to do so because the committee it appointed to this task could not agree "upon the principles of juvenile court law to be expounded, or the philosophy to be presented."[16] Thus, even at this time, during the heyday of the "treatment model" the leading body of juvenile court judges could not agree on the content of the philosophy which they saw seriously threatened and which had for decades been taken for granted as the cornerstone of the system.

While the impact on Utah was not as great as other states owing to the inclusion of many basic rights in the 1965 Act, these historic decisions changed fundamentally the perception of the juvenile court as an American institution and Utah could not and has not remained unaffected. Because all of these decisions were rendered *after* the passage of the 1965 Juvenile Court Act in Utah, it is only possible to speculate what changes in the shape of the Act they might have made had they occurred before. It seems safe to

assume however, that the hand of those legal representatives on the committee which helped in the preparation of the legislation during that year would have been considerably strengthened and that there may well have been other changes in emphasis away from the prevailing medical orientation.

In addition to the debate over the purpose of the juvenile court which has been going on over the past 20 years since *Gault*, there has also been a companion debate over the nature of delinquency and its "causes." By the mid-1960s the theories of the causation of delinquency had been the subject of extensive research. So much so that even at that time absorbing and understanding it was a challenge to even the most competent scholars let alone interested laymen. The President's Crime Commission Report published in 1967 attempted to make sense of all this material yet with limited success. The upshot was that there no longer was any coherent theory or set of ideas to explain delinquency. Each theory had its adherents and opponents but the confusion and lack of credibility of any one theory tended most professionals towards a "multiple causation" approach and the line of thinking that there is no single explanation for delinquency or any other social problem. As one author of the time stated "there are nearly as many 'causes' as there are individuals who have studied the problem."[17]

Having such a theory, or non-theory, really offered little or no help to those in the front lines of the juvenile justice business. As a review of the literature in 1968 revealed:

> "...conceptual ambiguities and confusion dominate the field. The fact that many writers come out with multiple causation, i.e. a convergence of many factors, is not much help. The trouble is...that to affirm multiple causation is to affirm nothing. Multiple causation, *as a theory*, does not facilitate the deduction of any hypotheses that are of any practical consequence at all. It is impossible to test...."[18]

Thus by the late 1970s and early 1980s this state of disillusionment led to the general perception still current today in some circles, that "nothing works" in juvenile rehabilitation. This view, in perhaps its most pessimistic form, is represented by the widely reprinted article of Alfred Regnery mentioned above.[19]

Other writers, scholars, and researchers, too numerous to mention, have pointed to the weaknesses and need for reforms in the juvenile justice system over the past 20 years. Virtually all have predicted greater involvement of lawyers and more emphasis on legal rights—in short the juvenile court is more of a court of law and less as a social clinic. Typical of such is the set of "directions" of a respected former Denver juvenile court judge and writer published in 1976:

> "1. That the juvenile court is a court, and law and lawyers will play an increasingly more powerful role in the juvenile court of the future.
>
> 2. The movement to narrow the court's jurisdiction will continue...."[20]

Indeed the last decade has seen other states, such as Washington, reject entirely the original premise of the juvenile court and move to a determinate sentencing system. Others have clarified their juvenile codes, added what might be termed "justice model" features and separated delinquency and neglect jurisdiction.

Probably the most extreme rejection of the original medical model of the juvenile court is that contained in a recently developed "model code" known with anything but affection in juvenile court circles as the ALEC Code.[21] Space does not permit a discussion of the controversial features and shortcomings of this proposed code. It is merely mentioned here as another example of the widespread disenchantment with the juvenile court in its traditional trappings.

Undoubtedly, one of the most thorough and impressive recent works on the subject of the purpose and role of the juvenile court is that by Nevada Supreme Court Justice Charles Springer. In his recently published monograph, he traces the origins of the juvenile court movement and its heavy dependence on the philosophies of "hard determinism." His work is too extensive to quote at length here, but of the 13 or so pages which he

REFERENCES

[1] *Hahn, Paul H.*, The Juvenile Offender and the Law, *Criminal Justice Text Series, W.H. Anderson Co., 1971, p. 266.*

[2] *Report to the Utah Board of Juvenile Court Judges, Arthur G. Christean, Administrator, October 1971, pp. 8-9.*

[3] *Zeigler, Judge E.F.*, History of the Utah Juvenile Court, *Utah Juvenile Court Handbook, 1986, pp. 224-231.*

[4] Mill v, Brown, *31 Utah 473, 88 P. 609 (1907).*

[5] *Ibid., page 615.*

[6] *Compiled Laws of Utah, 1907, section 720x22.*

[7] *Christean, Judge Arthur G.*, The Events Leading to the Establishment of Utah's Independent Juvenile Court, *Utah Juvenile Court Handbook, 1986, pp.232-234.*

[8] In re Woodward, *14 Utah 2nd 331, 384 P2d 110. p. 113.*

[9] *Winters, Glenn R.*, The 1965 Juvenile Court Act of Utah, *Utah Law Review, Vol 9(1964-1965), pp.509-517.*

[10] *Standards for Juvenile and Family Courts, Children's Bureau, 1966, Publication Number 437, p.iii.*

[11] *Ibid., pp. 1-3.*

[12] *Ibid., p.4.*

[13] In re Gault, *387 U.S. 1, 87 S.Ct. 1428 (1967).*

[14] Kent v. U.S., *383 U.S. 541, 86 S.Ct. 1045 (1966).*

[15] *See, e.g.*, In re Winship, *397 U.S. 358, 90 S.Ct. 1065 (1970) requiring beyond reasonable doubt standard;* McKeiver v. Penn., *402 U.S. 528 (1971) juries not required; and* Breed v. Jones, *95 S.Ct. 1979 (1975) double jeopardy.*

[16] *Rubin, H. Ted*, The Eye of the Juvenile Court Judge, *included in THE JUVENILE JUSTICE SYSTEM, Malcolm W. Klein, ed. Sage Publications, p. 136.*

[17] *Vedder, 1963, quoted in Master's Thesis, Arthur G. Christean, Graduate School of Social Work, University of Utah, 1968, p. 9.*

[18] *Ibid., p. 15.*

[19] *Regnery, Alfred S.*, Getting Away With Murder, *Policy Review, No. 34, Fall 1985.*

[20] *Rubin, H. Ted*, The Courts, *Institute for Court Management, Goodyear Publishing Co. Inc., 1976, p.82.*

[21] *A proposed Model Juvenile Court Code, drafted by the American Legislative Exchange Council (ALEC), an organization of state legislatures. This code was rejected by resolution of the National Council of Juvenile and Family Court Judges, July 1986.*

[22] *Springer, Charles F., Vice Chief Justice, Nevada Supreme Court*, Justice for Juveniles, *published by OJJDP, 1986, pp.11,13-14.*

[23] *Ibid., p. 44.*

[24] *See for example the modifications to section 78-3a-16 and 78-3a-16.5 during the period 1971 through 1985.*

[25] *See section 78-3a-22; cf. 77-7-18-21.*

[26] *See sections 78-3a-39(7) and 78-3a-54. Restitution programs now exist in each juvenile court district.*

[27] *See section 78-3a-25 as amended in 1981 and 1986.*

[28] The Impact of Juvenile Court Intervention, *National Council of Crime and Delinquency, January 1987, p. 8.*

[29] *In the first draft of the NCCD report under the Chapter presenting recommendations, the following language is found on page 150:*

> *What emerges is the portrait of a very conventional model of clinical social work applied to probation. However, Second District probation staff lacked the specific training and clinical skills to deliver high quality social work services...."*

In the final draft this paragraph was eliminated in its entirety and only the following observation is found on page 74 describing probation services:

> *...As noted earlier, however, the Utah Second District Juvenile Court historically has directed probation efforts towards individual counseling....*

[30] *The closest structural companion to Utah is the Denver Juvenile Court which serves the City and County of Denver and is constitutionally required to be a separate court. See Colorado Constitution, Article VI. Sec. 15. Hawaii, Delaware, New York, North Carolina, and the District of Columbia all have full or partially independent family courts. They differ substantially from Utah however in terms of structure and jurisdiction and from each other.*

[31] *See General Statutes of Connecticut, Title 46b section 46b-1 and 46b-120 et seq. The change appears to have taken effect July 1, 1978.*

[32] *Winters, supra p. 514.*

[33] Legislative Drafting Guide for Juvenile and Family Courts, *Children's Bureau, HEW, Publication No. 472, 1969, p. 6.*

[34] *ABA "Standards Relating to Court Organization," 1974, See Standards 1.10, 1.11, and 1.12 and related commentary.*

[35] *For example the new facilities in Cedar City and St. George and particularly noteworthy is the new facility in Price, in which all three trial courts share a common "Director of Court Services.*

[36] Major Issues in Juvenile Justice Information and Training, *Academy for Contemporary Problems, Columbus, Ohio; Published by the Office of Juvenile Justice and Delinquency Prevention, 1981, "The Legal Literature on the Issue of Court-Operated Social Services," p. 26.*

[37] *Ibid. page 17.*

[38] *See for example* In the Matter of Seven Minors, *664 P.2d 947 (Nev. 1983). Utah has already made some of the changes suggested in this case and no longer follows exclusively the "amenability to treatment" criteria.*

devotes to the subject of the origins and evolution of juvenile court philosophy, the following samples are worth highlighting:

"Under such a theory of scientific determinism there was no "ought," and it was ridiculous to speak of punishment *for* an act because the act was not within the actor's control. There was no point in using punishment as a deterrent because it could not be established scientifically that deterrence worked. The only remaining alternative was to find out, again scientifically, what the external causes for behavior were and to manipulate these causes in such a way as to change the behavior in a manner acceptable to society. The medical analogy is immediately evident—we diagnose the behavioral problem; then we *treat* criminals, we do not punish them...."

"The social determinists, "the nurturists," also took the position that crime does not involve personal moral responsibility and asserted that crime is the product of social organization and social conditions. The social therories of Karl Marx are a key example. Marx believed that the elimination of capitalistic exploitation would result in the disappearance of crime...."

"The legal community has successfully resisted the complete takeover by the positivists in their attempts to displace a system of law with what has been called the "therapeutic state." We still have a system of laws rather than of men in our criminal justice system, but great inroads have been made by the positivists in the area of corrections and in areas involving mental incompetence and juveniles...."

"...Whenever possible, however, the positivistic-deterministic doctrine has accreted itself to our system of criminal justice...Worst of all, it has given confusion and contradition to our juvenile "justice" system.

On paper and in doctrine the juvenile court system is clearly based on the positivistic-deterministic principles outlined above. Whereas the adult system still preserves the essense of justice, the juvenile system is, theoretically at least, bound completely to a social defense system that denies personal, moral responsibility as non-existent and absurd. Personal guilt, individual accountability and punishment for wrong conduct is rejected by the language and philosophy of the juvenile justice system.[22]

On the need to revise "purpose clauses," Justice Springer offers the following:

"The Purpose Clause. Much confusion and contradiction in juvenile court legislation can be cured by giving careful attention to the purpose or policy clause.

"The general purpose of the juvenile court is to do justice. This means that the "the best interest of the child" can no longer be stated as the alpha and omega of the justice system...."

"Properly includable in a purpose clause is a statement to the effect that the best interest on the child is also a proper consideration, and that rehabilitation and deterrence are not irreconcilable with justice; they are important, but secondary, purposes and functions of the juvenile court."[23]

Utah has undergone changes like other juvenile courts, although it has been an evolutionary process rather than a dramatic shift. Some changes have been specific and obvious, such as those fully incorporating the decisions of the U.S. Supreme Court mentioned above. Others have been more subtle modifications in practice and emphasis. In the former category are the following:

1. The narrowing of jurisdiction over "status" offenses and the creation of local youth service agencies to handle such matters prior to juvenile court intervention.[24]

2. Increased use of summary processes such as citations and bail forfeiture in handling minor offenses such as traffic, alcohol possession, and fish and game violations in the same manner as adult courts along with the adoption of formal bail and fine schedules.[25]

3. Increased concern with accountability through assessment and collection of restitution and the development of specific programs and staff to handle the same indicating far greater concern for victim's rights than was the case in prior years.[26]

4. Increased tendency to adopt and follow "articulable" criteria and guidelines in regard to many decisions such as detention, out-of-home placement of children, certification, and commitment-to-youth corrections.

5. Specific provision for direct filing of serious felony offenses in the adult courts bypassing the juvenile court entirely.[27]

6. More formal prosecution of cases and use of defense attorneys; increased use of "plea bargains" in similar fashion to adults courts.

7. Significant organizational integration within the judiciary and decreased emphasis on the need to be different in all ways from adult courts. Specific examples:

a. The Juvenile Court made a part of the Judicial Council and subject to its direction. Non-voting representative added. (1983)

b. The impact of the new Judicial Article with juvenile court judges selected and retained like other judges modifying the previous policy of more than 70 years. Juvenile court judges given two representatives on the Judicial Council and made full voting members. (1985)

c. Restoring the juvenile court code to the Judicial Code chapter of the Utah published statutes rather than the Public Welfare chapter where it had been previously since 1931. (1977)

d. Co-location of state administrative staff offices (circa 1980) and co-location with adult trial courts in newly constructed court facilities across the state.

e. Increased sharing of jurisdiction with the district courts in child custody matters and provision for certification of cases from district court to juvenile court so that juvenile court orders in such cases become effective as district court orders. (1985)

In the category of more subtle but significant changes are the following:

1. Increased concern with proportionality of dispositions with regard to youth involved in the same criminal episode.

2. Increased use of sanctions such as fines or work hours and commitment to detention for violation of court orders by use of the court's contempt powers.

3. Increased formality in court proceedings with judges wearing robes, opening and closing court sessions, and having uniformed bailiffs all in similar fashion to adult courts.

4. Greater reliance on the official delinquency record in determining dispositions and decreased concern with environmental and life situation factors beyond the control of the court.

5. Growing tendency in some juvenile court districts to use adult court terminology such as "sentences" instead of dispositions and "warrant of arrest" instead of pick-up order indicating a shift away from the euphemistic language which has been a feature of the juvenile court from its inception.

6. Increased recognition of the deficiencies and shortcomings of state substitute (foster) care arrangements.

7. Greater emphasis on the control and sanctioning aspects of probation and less reliance on the therapeutic and counseling aspects.

8. Greater tendency to acknowledge the "public protection" or justice function of the juvenile court by seeking authority (unsuccessfully) in three legislative sessions to use detention as an undisguised sanction and increased recognition of the justification for disclosure of juvenile records in adult court proceedings.

Finally, as a further example of a significant development in the overall debate is the recently

completed National Council on Crime and Delinquency study of the effectiveness of Juvenile Court intervention in the Second District Juvenile Court in Salt Lake County. In the first Chapter of the Center's report is found this statement which reaffirms the point made in the first page of this paper, namely that:

"...what we are witnessing is a fundamental debate over the most appropriate role for the juvenile justice system...."[28]

As the staff of the NCCD, themselves, expressed it at a meeting with juvenile court judges and other officials in February 1987, the nature of the debate has changed and is no longer cast in terms of "curing" delinquency, the frame of reference for the medical or treatment model, but whether instead juvenile court intervention helps reduce it—whether things get better.

The specific findings on this study clearly point to the need for the Second District to reassess its long-standing approach to probation services, especially in light of declining resources. For example, the findings clearly do not support the thesis that "intensive" probation yields superior results to other forms of probation. Further, the study does not support substantial increases in probation staff and it is not particularly complementary of the traditional "social work" model used in the Second District.[29] Thus, while the overall study is presented in very positive terms, it has some serious implications for the delivery of probation services and suggests changes. Whether this will occur remains uncertain as commitment to the clinical model within Salt Lake County has been very strong in the past.

As the forgoing shows, the trend away from the original treatment model of the juvenile court is unmistakable. Yet the "purpose" section, and supporting language in other parts of he code, do not reflect this. We are then left to ask why there is resistance to such a modification; particularly one which seeks to reflect the present state of jurisprudential reality and apparent public policy expectations of reasserting he traditional priority of justice as appropriate and necessary for the juvenile court in common with all other courts. That is the subject of the next part of this paper.

VI. ANALYSIS OF THE OBJECTIONS TO THE PROPOSED REVISION

Probably the heart and core of the resistance to modification of the present purpose clause and any related portions of the juvenile court code is that it threatens the special philosophy, "ethic," or "social consciousness" which, it is said, distinguishes the juvenile court from adult courts and justifies its separate existence. A few observations on the questions of philosophy first; then the related matter of the need for separateness.

It should be noted at the outset, that the words "treatment," "rehabilitation," or "individualized justice," which many claim represent the very essence of the juvenile court, do not even appear in the present purpose clause. Their absence has never seemed to inhibit the operation of the court or the assumption that the ideas these words represent govern its policies. It is the addition of language that clearly sets forth the priority of the court's *judicial* responsibilities that somehow creates apprehension. For example, some have asserted that the present statute does not need to be amended to include the word "accountability" and that the present section's language does not discourage its application. Yet this kind of term does have very significant meaning and denotes an important value in the total linguistic package of the section. It is not a "magic" word, as some have pejoratively referred to it, but a very fundamental one, as it is extremely doubtful any child can be "rehabilitated" from delinquent behavior if not held accountable for that behavior.

The juvenile court is the only court in the judicial branch of state government which has, as a part of its enabling act, an express statement of social policy. As such, it is far broader than even the abortive and misnamed "Family Court Act" in title 30 of the Utah Code. That act did have a purpose clause, reciting the public policy objective of "preserving and protecting family life and the institution of matrimony...." However, it did not seek to put that entire burden on the divorce court, but rather attempted to help accomplish that goal, theoretically at least, by *"providing the courts with further assistance for family counseling,..."* etc. A fairly modest effort (unsuccessfully it turned out) to attach counseling services to the court to help achieve a stated public policy goal of preserving marriages. The juvenile court's policy statute is quite a different matter in that it does not even mention the court's judicial function or that services are to be subordinate to it.

Indeed, no court, other than the juvenile court, has ever been expected to operate in accordance with a set of supra-legal ideas and values. As illustrative of this, an examination of virtually any book or document over the past 70 years dealing with juvenile courts will have a portion prominently treating the subject of the "Philosophy of the Court." Yet, by oath, a judge's first duty is to the law and the constitution. Characterizing any other court as operating in accordance with a "philosophy" rather than the law would not be tolerated. A humanitarian or "scientific" philosophy, however compelling, should not be, or appear to be, the dominant force to which juvenile judges owe allegiance and a controlling influence in judicial decisions, or else the law runs the risk of being subverted. Further, creating public expectations of judges to do so, tends to blur the distinction between upholding fundamental principles and merely doing that which is pleasing in the judge's own eyes, however plausible the justifications that what is done is in the child's best interest.

The marriage between the law and behavioral sciences represented by the original creation of the juvenile court has been an uneasy one over the years, and especially so, during the last 20. In some states it could be said the divorce has already taken place, while in others, the relationship is in a period of pre-divorce conciliation. But nowhere is the strain in the relationship more evident than in the difficult, if not outright inconsistent expectation, that a court be governed not only by sworn dedication to the law and dictates of justice, but by the doctrines of a special philosophy of rehabilitation as applied to young offenders. Not only is the content of this special philosophy uncertain—meaning different things to different judges and staff persons at different times—but its supporting scientific assumptions have been largely eroded over the last several decades as illustrated above in the discussion about the theories of delinquency causation. Thus, rather than serving as a beacon light of special support for those in the system who must deal with the problems of children who violate the law, and families in crisis, it often becomes, instead, a source of contention and estrangement between the doubters and the "true believers" in *parens patriae* and all it has come to represent. Implicit in the commentaries of many critics of the juvenile court, like the above referenced article of Mr. Regnery, is that such attachment to the medical model, with its perceived ineffectiveness and "slap-on-the-wrist" outcomes, whether well-founded or not, constitutes one of the primary reasons for the claimed continuing disrepute of the juvenile court system in this country.

Turning to the objection that any tampering with the basic purpose language will tend to weaken the justification for the juvenile court's separate existence, the first comment to be made is that this position seems to imply that in Utah at least, preservation of the special qualities and characteristics of the juvenile court requires a separate, specialized court. And further, that these unique features are fragile requiring constant care and nurturing which only a specialized court can provide. There is no question that historically this has been the predominant Utah view. But whether there continues to be broad based public support for this "separate but equal" position is open to serious question.

It cannot be seriously argued that Utah is the only state in the United States which has accepted and attempted to incorporate the traditional features of the juvenile court, with its accompanying beliefs about the purpose of the court, in its judicial system. Yet why is it that in Utah a separate, specialized, independent juvenile court is required to preserve these special qualities that has not been needed in any other state? Utah stands alone. No other state in the nation operates its juvenile court as Utah does.[30] Those supporters of our present system are fond of saying that we are a "model" and indeed other observers do complement us. And it is also true much has been accomplished in years past owing in some measure to the independent status of the juvenile court in Utah. Yet it is significant that in the 22 years since the 1965 Act was passed, modeled as it was after the Standard Act, not one other state has followed the Utah "model." The one other state that was similar, Connecticut, has abandoned its Utah like structure and merged its juvenile court with its court of general trial jurisdiction.[31]

If imitation is the sincerest form of flattery, Utah is consistently being "damned by faint praise."

Glenn Winters, in his article about the significance of the Juvenile Court Act of 1965

referred to above, made this interesting prediction:

"One day Utah too will have a fully unified state judiciary like Puerto Rico's with all individual tribunals as units of the single statewide court of justice. When that day comes, Utah's juvenile court judges will be district court judges equal in every way to other district court judges and simply *serving in a juvenile court division* which will be organized and operated just as their state independent court now functions."[32] (Emphasis added)

Historically, the reasons advanced for an organizationally separate juvenile court have been one or more of the following:

—The juvenile court deals with a jurisdictional subject matter which requires specialization.

—Juvenile court judges should be selected by a special process assuring a higher degree of sensitivity to children's needs and should not rotate to other courts.

—Juvenile court judges and staff are distinguished by a commitment to rehabilitation not present in adult courts.

—Juvenile court judges and staff have better training than adult courts.

—The juvenile court has a greater range of options available to it in dealing with children's cases than does the adult court.

—The nature of juvenile court proceedings are *sui generis*, being neither criminal or civil even though designated as civil, and provide for more flexibility and informality than adult courts.

—The juvenile court has a service arm directly attached to it, i.e., probation and intake.

—Juvenile courts are so "unique" and different from adult courts that their flexibility and special role would be seriously jeopardized if combined with adult courts.

—Juvenile court records enjoy special confidentiality which would be compromised if joined with adult courts.

—The juvenile court will is better able to "plead its case" for a share of public resources as an independent court as opposed to a division of an adult court.

Most of these reasons for an independent juvenile court, even though there may be intuitive judgments about them, are not empirically supportable. As the years have passed, substantial changes in perception about the "unique" nature of the juvenile court has occurred and a growing recognition across the country that to preserve those features about the court that are deemed essential, a separate, independent status is not required. On the contrary, as early as 1969, the "model" or recommended pattern has been for the juvenile court to abandon the push for separateness and to become a part of the court of general trial jurisdiction.[33] This has been the recommendation of the American Bar Association since 1974.[34] Even in Utah we are moving towards "de facto" consolidation as new court facilities are constructed.[35]

The argument that attachment of social services to the court as a justification for separate status has also undergone significant change. A recent article reviewing this subject divides the general attitudes and views into two distinct periods. The first, from 1899 to the 1950s held that social services were necessary to the broadened power and authority of the new juvenile courts. In this early view what made juvenile courts unique was that they had such broadened powers and had services to deal with the problems of children and their families. Thus, during this period juvenile courts were understood to be inextricably linked to the services they provided children.

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Although this earlier view still prevails in some states or in the legal literature, it now shares space with another perspective which has taken center stage in recent years, and which began to appear with some regularity in the 1950s. Central to this newer perspective is the notion that juvenile courts are unique only because they deal with children. It is no longer the broadened powers or services that makes them special courts. Rather than being the central aspect of a juvenile court's power, services are activities that can now be understood and analyzed independent of their traditional association with juvenile courts. Simply put, this newer perspective treats services as activities which are not essential to the exercise of juvenile court powers but are complementary to it.[36]

Indeed, this realignment of the place of social services in the juvenile court structure is one of the most important reasons supporting the proposed "purpose" modification. Such a realignment to incorporate features of a justice model for the juvenile court in Utah certainly does not mean the court will be abandoning all concern for rehabilitation as some have feared. It will however be of help in reaffirming that social services which are attached to the juvenile court be properly regarded as an arm or appendage to the court rather than the other way around. Restoring this balance is important in view of the fact that it is beyond dispute that the juvenile court is first and foremost a court of law and it is the judges who are answerable to the electorate for the way it operates.

Further, recent reviews of adult courts practices have noted some interesting changes, many of which seem to borrow from juvenile courts. For example, adult courts now practice "intake" and prosecutorial diversion, procedures previously unique to juvenile courts. This is one reason supporting a growing consensus that "...as courts become more procedurally alike, there is less rationale for keeping them jurisdictionally separate."[37] The author's experience as a circuit court judge certainly supports this perspective.

Another line of reasoning advanced for the "separate but equal" position is that the juvenile court system is dedicated to rehabilitation and "individualized justice," which are qualities not found in the adult criminal justice system. This argument, which at times seems to imply that the juvenile court has a superior moral purpose to the adult system, misperceives a substantial part of the function of adult courts and adult corrections official "philosophy." In this regard it is worth examining the key statutes governing adult corrections. Section 77-18-1 in the Code of Criminal Procedure governing placement of offenders on probation provides, among other items as follows:

(d) participate in available *rehabilitation programs;* (Emphasis added.)

Section 64-13-6, setting forth the purpose of adult corrections, provides as follows:

(3) provision of *rehabilitation opportunities* to assist the criminal offender in functioning as a law abiding and productive member of society;

(4) *individualized treatment* of the offender.... (Emphasis added.)

It is interesting to observe that the phrase "individualized treatment," claimed by some to be the exclusive province of the juvenile court, is not found at all in the juvenile court code, nor indeed in the code sections creating youth corrections, but instead is found in the purpose clause of adult corrections. An additional anomaly is that youth corrections, an executive branch agency like adult corrections, has no purpose clause at all in its enabling act and related sections,[38] but the phrases closest to the presumed purposes of the agency are found instead in the Juvenile Court Act, namely section 78-3a-1, the subject of this article.

Also, many of the perceptions about the function and purpose of adult criminal courts that creep into the juvenile justice system are often misplaced. Comments that the adult court system is only concerned with punishment, "mechanized" justice, or legal "technicalities" at times find their way into juvenile justice literature and discussions. Our state Supreme Court has commented on such matters as the following two brief quotes will illustrate:

A criminal proceeding is more than an adversarial contest between two com-

peting sides. It is a search for truth upon which a just judgment may be prediced. *State v. Carter*, 707 P 2d 656 (Utah 1985).

In a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to implicate him. To that end, the State in vigorously enforcing the laws, has a duty not only to secure appropriate convictions, but an even higher duty to see that justice is done.... *State v. Jarrell,* 608 P. 2d 218 (Utah 1980).

Aside from all the foregoing, some will yet respond that there is no reason to reexamine our purpose or to change if we are doing a good job. In other words, the popular phrase "if it ain't broke, don't fix it." To those persuaded by this view, only the decision of an appellate court, state or federal, should be cause to reexamine the court's raison d'etre. If appellate challenge is accepted as the only valid measure of obsolescence of the present statutory definition of juvenile court purpose, revision will be a very long time coming. Policy clauses, standing alone, seldom set forth specific rights and duties of such a nature to serve as grounds for appeal.

One measure to which some weight should be attached as to whether the present purpose of the juvenile court in Utah is in need of repair, is the collective views, even if not unanimous, of those reasonably well-informed persons who are serving in or involved with the juvenile court system. Of these it is of considerable significance that most of the current members of the Board of Juvenile Court Judges support change; a majority of the Directors of Court Services support change; and significant members of the legislature and legal community support change. It is probably much closer to the truth to say that rather than having served us well, our statutory statement of policy about the purpose of the juvenile court has become badly outdated—events and public opinion have simply left it behind.

Finally, it is asserted that tampering with the present statutory language might lead to misinterpretation and abuse. To this it can only be said there never has been or never will be a significant piece of legislation that does not run such a risk. There is no way possible to prevent human beings from doing irrational things or engaging in frivolous litigation. Even with the wording of the present section skillful lawyers could construct a legal theory for a "right to treatment" cause of action or base a claim for damages against the state for loss of injury for which the state was accountable owing to its failure to "protect the community against juvenile violence." Such contingencies, based as they are on human fallibility, should not deter us from doing that which ought to be done.

VII. CONCLUSION

This paper has been written in an effort to elaborate and analyze the problems associated with the proposed modification of the basic purpose of the juvenile court. It has also attempted to show why that effort should be strongly supported.

In summary, the present statutory policy statement governing the public's expectations for the juvenile court in Utah is seriously deficient and should be modified or replaced for the following reasons:

1. *An overbroad mandate.* It sets forth goals and objectives which transcend or exceed the appropriate constitutional function of the judiciary and appear to thrust the juvenile court into the domain of the executive branch of government. Further, the amount of governmental power and authority which the juvenile court would have to possess to attempt to attain the broad interventionist goals stated in the present language would exceed anything acceptable to the citizens of this state.

2. *Inadequate resources.* The present language of the statute imposes on the juvenile court responsibilities to cure a variety of social ills which the court never has had and never will have the financial or human resources to accomplish. Budget constraints of the past few years give clear signals this is not going to change and if anything will force a reconsideration of the amount and nature of services the court can realistically provide. Budget austerity may well compel a reassessment of the costs of a specialized juvenile court and whether the state can continue to afford it.

3. *Inappropriate attachment to a special "philosophy".* The present language places the court in a position of commitment to or obligation towards theories of dubious validity about the nature and causes of delinquency. By taking a position in apparent support of the deterministic nature of human behavior, as one phrase in the present section clearly does, the court seems to be obliged to give allegiance to this school of thought and its current supporters regardless of how discredited its underlying assumptions have become. It is very doubtful this position reflects the majority views of the people of this state.

4. *Public confusion about the role of the juvenile court.* The present section, born in an era when the treatment model of the juvenile court was in vogue nationally and in Utah, tends to perpetuate the public perception of the juvenile court as having a predominantly social rather than judicial function and contributes to the professional isolation of the court.

The proposed modification of section 78-3a-1 is only a modest first step in the direction of a "justice model" for Utah's Juvenile Court. While some may have concerns about the technical language to be included in any modification of the section, or related modifications throughout the rest of the juvenile code, this should not prevent this important piece of business from going forward.

It is beyond the scope of this paper to discuss the full implications of what a move to a "justice model" would mean. Only a few of the more significant items can be listed. Some likely results would be:

—A reduction in the amount and nature of the social information collected for court dispositions.

—A complete reassessment of the confidentiality of juvenile court records and the circumstances under which release to the news media and use in adult court proceedings should occur.

—Abandonment of much of the euphemistic language that prevails in juvenile court proceedings.

—Redefinition of the role and expectations of social services attached to the juvenile court.

—Reexamination of Intake in the juvenile court and many of the prosecutorial functions it now performs.

—Clarification of the standards for certification to adult criminal courts of youth charged with felonies.[39]

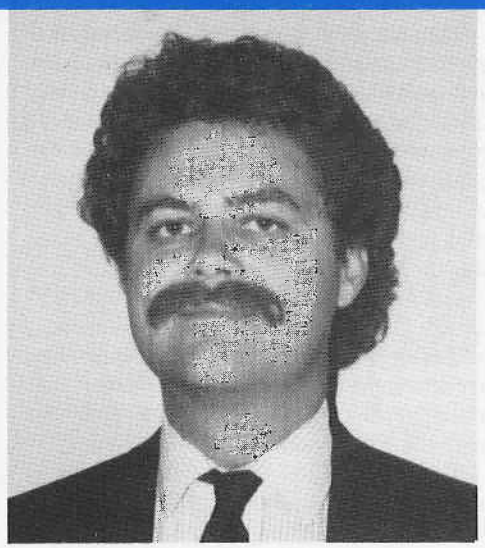
—Recognition of the legitimacy of sanctions (punishment), including the use of detention as a disposition for behavior which would be criminal if committed by adults.

—Statutory restoration of the jurisdictional distinctions between delinquency and neglect.

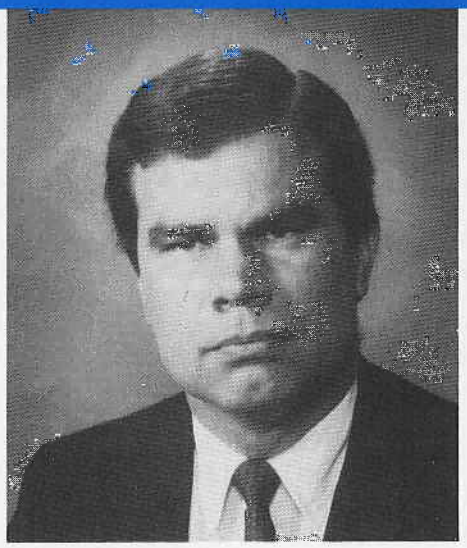
In arguing in favor of the proposed modification of the juvenile court policy statute, effort has been made to point out that such a change does not mean abandonment of concern with rehabilitation nor does it diminish the dedication of judges and court staff to helping young people become responsible citizens in every way possible within the court's power. It does mean that such efforts must be properly balanced with justice, due process, and accountability and that the law should clearly say so. It is timely and appropriate that the Utah legislature address this issue.

CASE SUMMARIES

By William D. Holyoak
and
Clark R. Nielsen



William D. Holyoak



Clark R. Nielsen

DIVORCE
Disposition of Property Given to One Spouse During Marriage

During the course of a lengthy marriage, a husband received from his parents 10 percent of the stock of a closely held corporation. The couple's divorce gave the Utah Supreme Court an opportunity to discuss the status of a gift received by one of the spouses during a marriage. The Court noted that there is little statutory guidance in the area, the relevant provision stating: "When a decree of divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties." Utah Code section 30-3-5. The Court also noted that "property" is not defined in the divorce code. After discussing and distinguishing prior precedent and case law from other jurisdictions, the Court held as follows:

> We conclude that in Utah, trial courts making "equitable" property division pursuant to section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it [citation omitted] or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse [citation omitted]. An exception to this rule would be where part or all of the gift or inheritance is awarded to the nondonee or nonheir spouse in lieu of alimony as was done in [a prior case]. The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality [citation omitted]. However, in making that division, the donee or heir spouse should not lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance.

Justice Zimmerman, in a concurring opinion joined by Justice Durham, wrote separately to explain his view that one spouse's rights to property received during a marriage should not prevent an equitable property award. He explained his understanding of the reach of the Court's opinion as follows:

> Where possible, interests of parties in their separate property, such as those described by Justice Howe, should be honored. For this reason, the rules articulated today, like those generally applicable to separate premarital property, may limit somewhat the trial court's initial flexibility to allocate property of a marriage in a fashion so as to provide an entirely equitable portion to each party. But if, after an attempt is made to pay due deference to each party's claim to particular pieces of property by reason of their source, the court finds that it is unable to fashion a division of assets and awards of alimony and child support that will be just and equitable for both parties and the children, then it is free to ignore those claims in the greater interest in a just and equitable decree.

Mortensen v. Mortensen, 89 Utah Adv. Rep. 7 (August 16,1988).)

FAILURE TO FILE NOTICE OF PATERNITY

On the heels of *T.R.F. 90 Utah Adv. Rep. 36,* the Court of Appeals (J. Garff) rejected a putative father's attempt to prevent the adoption of his illegitimate baby after his failure to comply with the filing provisions of the paternity statute, Section 78-30-4. The father failed to file a notice of paternity or to otherwise show that it was impossible or that he was prevented from filing the notice. Equal protection does not require that a putative father be treated equally or in the same manner as the unwed mother of the illegitimate child. The court also rejected the claim that the termination of putative parental rights when the father fails to comply with the paternity statute violates due process. If he fails to come forward within a reasonable time, he has no parental rights to abandon.

However, the court did find that the state's enforcement of its paternity statute and the judicial termination of parental rights constitutes "state action" for purposes of establishing a civil rights claim. The district court's decision was reversed on this issue. *Swayne v. LDS Social Services,* 91 Utah Adv. Rep. (Ct. App. September 15, 1988).

CONSENT TO ADOPTION

The appellate court (J. Jackson) reversed the district court's order setting aside an infant adoption. The baby's natural mother had convinced the trial court to set aside the adoption because her previous consent and relinquishment for adoption were not knowingly given. The panel concluded that in view of the unequivocal language of the written consent, and the mother's consent in

open-court, there was insufficient evidence that her medical or emotional condition prevented her from giving a knowing and voluntary consent. The court noted the presumption of regularity in an adoption consent given in open court. Because there was no testimonial evidence heard by the trial judge, appellate review was not limited to the "clearly erroneous" standard of Rule 52(a), Utah R. Civ. P. The appellate panel considered itself equally capable as the trial judge to evaluate the filed affidavits upon which the judgment was based. *In Re Infant Anonymous,* 90 Utah Adv. Rep. 43 (Ct. App. September 1, 1988).

ROADBLOCK STOP AND SEIZURE

A roadblock search, resulting in defendant's arrest and conviction for drunk driving, was reversed because of the state's failure to defend the appeal. In a case of first impression in Utah challenging a roadblock search, the Court of Appeals (J. Davidson) declined to enunciate the permissible parameters for valid law enforcement roadblocks. The panel noted the state's failure to file any brief or to request oral argument. The roadblock was held to be merely a pretext for an illegal stop. [Other roadblock cases are still awaiting appellate review in the wake of an apparent increase of the use of roadblocks by rural law enforcement agencies to enforce motor vehicle, brand inspection DUI and drugs laws.] *State v. Joe,* 91 Utah Adv. Rep. (Ct. App. September 20, 1988).

DETERMINATION OF WHETHER AN INSURANCE AGENT ACTS ON BEHALF OF THE INSURED OR THE INSURER

A landlord leased a tavern to a tenant. The parties obtained insurance on the premises' contents from the two insurance companies. Landlord secured the insurance through an independent insurance agent with whom he had previously done business. The insurance policy was issued in a confusing manner, suggesting the insured was the landlord and tenant as partners or as a corporate entity. In any event, the written policy did not make the landlord-tenant relationship clear.

The tenant contacted the insurance agent in early November 1979 and informed him that she planned to discontinue operating the tavern at the end of November and requested cancellation of the insurance policy. Without the landlord's knowledge or consent, the insurance policy was cancelled as of the end of November. The tavern was not closed then, however, and, at the end of December 1979, it was fire bombed and the contents were extensively damaged.

The landlord contacted the insurance agency concerning coverage for his losses and was notified that the insurance on the tavern had been cancelled at the end of November. Coverage was denied and the landlord sued the insurance companies, who in turn impleaded the insurance agent. The trial court found that the insurance agent was not the agent of the insurance companies but was the agent of the landlord and tenant and therefore, the insurance companies were entitled to rely on the insurance agent's representation that the tenant had authority to cancel the policy without the signature of or notice to the landlord.

Considering the appropriate statutory provisions and general principles of agency, the Supreme Court concluded that the independent agent was not acting as agent for the insurance companies but as a broker acting as the agent of the landlord and tenant. In support of the conclusion, the Court noted that the agent was not a licensed agent of the insurance companies that wrote the insurance, although he was for other insurance companies, and the insurance agent did not have an ongoing relationship with the insurance companies.

The landlord also lost his argument that he should have been permitted to amend his complaint to add the independent insurance agent as a defendant. Even though the agent had been brought into the action as a third-party defendant by one of the insurance companies at the time of the initial complaint, the Court concluded that the nature of the claims against the agent by the insurance company were not comparable in theory or in damages sought to those of the landlord against the agent. Therefore the Court concluded that the amended complaint did not relate back to the original complaint and was therefore barred by the statute of limitations. *Vina v. Jefferson Insurnace Co.,* 91 Utah Adv. Rep. 32 (Ct. App. Sept. 21, 1988).

LIABILITY OF INSURER TO ONE INSURED FOR LOSS CAUSED BY INTENTIONAL ACT OF OTHER COINSURED

A wife and her husband purchased a home in Salt Lake County in 1968. A homeowners insurance policy was obtained and was in force at all applicable times. The couple divorced in 1976, and the wife was awarded the home. The couple remarried in 1978 and the husband moved back into the house. The wife filed for a second divorce in November 1982. At that point, the trial court issued a temporary restraining order ordering the husband to vacate the house never to return. During this entire period, title to the home remained in the husband-and-wife name, as joint tenants, and the homeowners insurance policy named both as insureds.

In July 1983, before any final decree in the second divorce action, the husband deliberately started the house on fire, resulting in his arrest for arson. The next day, he returned to the premises with a gun and held his son hostage for a short time. The police were called and fired tear gas in an attempt to get him out. When they entered the house, they found the husband unconscious. He died shortly thereafter.

The trial court found that the wife had no control over the actions of her husband and that none of the exceptions in the homeowner policy for neglect, fraud or similar activities prevented her from recovering under the policy.

On appeal, the insurance company argued primarily that judgment in favor of the wife was improper because her loss was caused totally by the intentional conduct of her coinsured husband. The Supreme Court disagreed, finding that "[we]hen the responsibility or liability for the fraud is separate rather than joint, an insured's fraud cannot be attributed or imputed to an innocent coinsured."

The insurance company then argued that if the wife was not responsible for the intentional conduct of her husband as a coinsured under the insurance policy, then she should only be able to recover for one-half of the damage to the home, constituting her insured portion thereof. The trial court had, however, concluded that the husband had a nominal economic interest in the property in light of the earlier divorce decree. The Supreme Court agreed and affirmed the trial court's judgment in favor of the wife for the entire loss. *Error v. Western Home Insurance Co.* 92 Utah Adv. Rep. 15 (Sept. 28, 1988).

IN PERSONAM JURISDICTION—ABSENCE OF MINIMUM CONTACTS

A dentist from Mississippi came to Salt Lake City to find a place to live during his residency program. The dentist negotiated with two brothers, who ultimately sold him a condominium subject, according to the dentist, to an obligation to repurchase the condominium at the end of the residency if the dentist had been unable to sell it himself. Unable to sell the condo, the dentist attempted to invoke the buy-back provision, but was informed by one of the brothers that he was unaware of it, and that, at most, it obligated a related corporate entity and that

it would not be honored.

Upon his return to Mississippi, the dentist sued the brothers and related entities and, after their failure to appear, obtained a default judgment. The dentist then filed a notice of the default judgment in Utah's Third District Court. That court, upon a motion made by the Utah defendants, set the judgment aside.

The Utah Supreme Court assumed that the Mississippi long-arm statute was broad enough to apply to this fact situation for the purpose of determining whether the exercise of jurisdiction in this case satisfied constitutional due process requirements. The dentist argued that the Utahns:

> had sufficient minimum contacts with the state of Mississippi to confer jurisdiction by reason of the following claims: 1. The contract negotiations were conducted by mail and telephone between Mississippi and Utah. 2. Plaintiff executed the contract in Mississippi. 3. Partial payment was mailed from Mississippi. 4. Plaintiff suffered loss while a resident of Mississippi.

After discussing relevant authority, the Court concluded:

> In the instant case, defendants did not solicit the sale of the property. Rather, it was plaintiff who initiated the negotiations by telephone after personally inspecting the property in Utah. The contract of sale was to be performed solely in Utah, and the fact that part payment was received from Mississippi is, in this case, insufficient to fulfill minimum contact requirements. Defendants did not visit Mississippi, nor did they deliberately engage in "significant activities" or purposefully create "substantial connection," continuing relationships, and obligations with Mississippi residents to give defendants a fair and reasonable warning that their activity would subject them to Mississippi's jurisdiction. Indeed, the only contact defendants had with the state of Mississippi was limited to the facts surrounding a contract entered into with one of its residents. And under the facts of this case, that contact was not sufficient to satisfy the minimum contacts criteria required to confer in personam jurisdiction. Additionally, it appears that except for plaintiff, all of the parties and potential witnesses to the contracts and acts that allegedly occurred reside in Utah. Forcing plaintiff to litigate in Utah would not disadvantage his "interest in obtaining convenient and effective relief." (footnotes omitted).

Concluding that the Utahns' contacts with Mississippi were insufficient to support in personam jurisdiction under the due process clause, the Supreme Court concluded that the judgment entered against the Utahns' was null and void and appropriately set aside by the trial court. (*Bradford v. Nagle,* 92 Adv. Rep. 31 (Sept. 30, 1988)).

PRESUMPTION OF JOINT OWNERSHIP OF PROPERTY IN A MARITAL PARTNERSHIP

The Supreme Court (Justice Durham) reversed an allocation by the Court of Appeals of a substantial amount of cash between the surviving husband and the estate of his deceased wife. The money was found by the husband in a roasting pan in the couple's kitchen, after his wife's death. Both had made financial contributions to the operation of the household. Refusing to award the money to the wife's estate, the Court of Appeals had opined that the burden of proving ownership was improperly placed upon the husband because the estate, as claimant, failed to initially establish a prima facie case of ownership. (See *Estate of Gorrell v. Gorrell,* 740 P.2d 267, 268 (Ct. App. 1987). Ignoring the issue of the initial burden of proof, the Supreme Court treated the marital relationship as a partnership wherein resources are pooled and expenses shared. Absent proof of actual ownership by either party, the property is rebuttably presumed to be owned equally by husband and wife, as tenants in common. *Estate of Gorrell,* 95 Utah Adv. Rpt. ____ (Sup. Ct., Nov. 8, 1988).

ABANDONMENT AS GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

Termination of a father's parental rights was reversed by the appeals court (J. Bench) because the evidence at trial was insufficient to show, clearly and convincingly, that the father had abandoned his children by failing to contact them in only eight months and provide more than "an insignificant amount" to their support. *State, in the Interest of T.E. v. S.E.,* 92 Utah Adv. Rep. 45 (Ct. App. 9/28/88).

PREJUDICIAL ERROR AND INSUFFICIENCY OF INDICTMENT IN "RICE" REVERSES CONVICTION

The Utah Supreme Court (J. Zimmerman) reversed the conviction of an Ogden convenience store owner, indicted under "RICE," Utah's racketeering statute, for drug trafficking. The vagarities of the indictment and bill of particulars did not provide sufficient notice of the charges against him to allow him to prepare a defense at trial. The court articulated the application of the "harmless error" rule in Rule 30, Utah R. Crim. Proc. When the prosecutor has, by error, impended the ability of the accused to prepare a defense, the burden to prove that the error was harmless is upon the prosecutor. Although the burden generally rests upon the defendant, the burden is shifted when the defendant's argument of impairment "rings sufficiently true." This burden remained unsatisfied by the state and the error was concluded sufficiently prejudicial to require reversal and demand for a new trial. J. Stewart concurred but separately cautioned against the use of juror interrogatories or special verdicts in "RICE" cases as suggested by the majority opinion. *State v. Bell,* 92 Utah Adv. Rep. 22 (Sup.Ct. 9/30/88).

NOTICE

Notice is given that the United States Court of Appeals for the Tenth Circuit proposes to amend the Rules of Court which were adopted on November 18, 1986. The effective date for the proposed amendments is January 1,1989.

Copies of the final draft of Rules of Court, as amended, are available for inspection at the following locations:

Office of the Clerk
United States District Court
for the District of Utah
204 U.S. Courthouse
350 S. Main Street
Salt Lake City, Utah

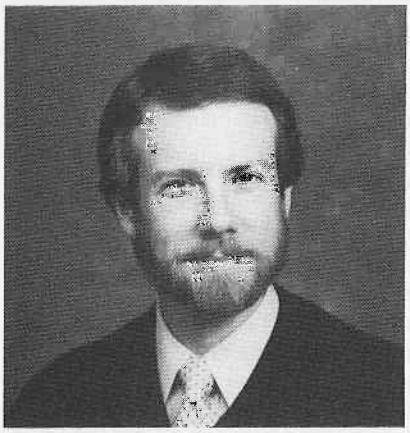
Utah Bar Association
645 S. 2nd E.
Salt Lake City, Utah 84111

Written comments regarding the proposed amendments should be sent promptly to:

John K. Kleinheksel
Chief Staff Counsel
United States Court of Appeals
U.S. Courthouse
1929 Stout
Drawer 3588
Denver, Colorado 80294

The court's present rules are published in United States Code Annotated (Title 28-United States Court of Appeals-Rules). To be considered, written comments must reach the court no later than December 15, 1988.

Professional Standards Versus Personal Ethics: The Lawyer's Dilemma



Michael D. Zimmerman[1]

During the past three years, you have acquired many of the skills that are necessary for the practice of law. However, you have not been taught how to use those skills in an ethical manner. Let me define my terms. I am not using the term "ethical" to describe what is permitted or required by the formal rules of conduct that specify a lawyer's professional duties. Rather, I am using the term "ethical" in its more general sense—the study of standards of right conduct, how human beings ought to act toward each other. In other words, you have not been taught how to reconcile your role as a lawyer with your role as an ethical human being.

While in law school, you have been trained to see legal problems apart from their ethical content. I do not fault your professors for that. It was necessary to make you "think like a lawyer." And I, too, followed the same pattern when I was a professor here. It is important that you learn to think about legal problems analytically, to see all sides of a problem and to recognize that whether something is legally possible is quite a different question from whether it is ethically proper. Your professors necessarily stripped you of a certain innocence and freed you from many of the value-laden preconceptions you brought with you to law school, because those preconceptions would have prevented you from effectively dealing with issues you will encounter in practice.

But as a result of that training, you have become accustomed to the value-neutral analytical mode of thinking. Many of you have forgotten the dissonance you experienced early in your law school career between your pre-law school ethical self and the value-neutral legal way of looking at things. I want to reawaken your awareness of that dissonance. That awareness is healthy; indeed, I think it is essential to your becoming a good lawyer while remaining a decent human being. For only by being acutely aware of this dissonance can you confront what I think is one of the principal moral dilemmas faced by lawyers: the place of personal ethics in the adversary system. It is in this context that the conflict between your professional standards of conduct and your personal ethics becomes most clear. For the role of an adversary, as it is commonly conceived and defined by the profession, may justify you in doing—may even command you to do—things that your own personal sense of ethics would never permit.

Let me give you an example of a situation illustrating the tension between professional standards of conduct and personal ethics. It is taken from a reported case that arose in Minnesota in 1962.[2]

A youth named Spaulding was badly injured in an automobile accident. He sued the driver of the car in which he was riding for damages. The driver's lawyer had a doctor examine Spaulding. The doctor discovered a life-threatening aortic aneurysm that was apparently caused by the accident. Spaulding's own doctor had not discovered the problem. Spaulding offered to settle the case for $6,500. The driver's lawyer apparently realized that if Spaulding knew of the aneurysm, he would demand much more. The driver's lawyer did not disclose the existence of the aneurysm, and the case was settled for $6,500. The driver's counsel never told Spaulding of the aneurysm, even after the settlement was consummated. The driver's lawyer in the *Spaulding* case was acting properly within his role as an advocate. The Minnesota Supreme Court said that the lawyer had no professional duty to disclose the existence of the aneurysm to Spaulding because Spaulding and the lawyer's client were adversaries. Indeed, not only would the lawyer have no duty to disclose the information, under the present American Bar Association's Model Rules of Professional Conduct, unless his client authorized its release, the lawyer would be bound by the code of the profession to keep that information a secret.

The *Spaulding* facts are most troubling. It is hard enough to accept the fact that the driver's lawyer was professionally correct when he did not tell Spaulding of the aneurysm before the settlement. But I suspect that most people find it morally inexcusable that the lawyer remained silent after the case had settled, leaving Spaulding's life at risk.

Yet the general position of the profession is that the driver's lawyer was not morally accountable for what might have happened later. As one respected scholar put it, "When acting as an advocate for a client . . . a lawyer is neither legally, professional, nor morally accountable for the means used or the ends achieved."[3]

This lack of moral accountability is grounded in theory on the claim that the adversary system is morally good, so those serving it may assume that if they fulfill their roles properly according to its rules, the system will produce moral results. This is what I will refer to today, in the words of David Luban, as the "adversary system excuse" that frees lawyers from moral responsibility for their acts.

Let us examine the source of this ethically troubling claim for amorality—the adversary system model—as well as the assumptions on which it is based. A dispute arises

between two parties, each of whom claims to be entitled to some relief under the law. Each party hires a lawyer. The lawyers investigate the facts, gather the evidence, and present it to a neutral third party—either judge or jury. In so doing, each lawyer strives to persuade this third party that his or her client's version of the facts is true and that his or her client is entitled to all that the law allows. In this effort, the lawyer is not to make moral judgments about the correctness of his or her client's cause or the justness of the result sought; the lawyer is to be an instrument of the client, and the lawyer's efforts to win are limited only by the bounds of the law and by any applicable standard of professional conduct. Under the model, it is assumed that the neutral party, be it judge or jury, will perceive the true state of the facts from the differing versions of both counsel. Once the facts have been found, the third party will then properly apply the law to the facts.

What are the consequences of lawyers permitting themselves to be assigned a role that requires them to subordinate their personal ethical values to the rules of the adversary system, to become amoral instruments of their clients? I think the consequences are several. First, the failure of individual lawyers to confront the ethical contradictions this role forces upon them is the reason for much of the ambivalence many lawyers develop toward their careers. Second, and perhaps more important, many lawyers are less effective in meeting the real needs of their clients because they see their role as limited to being a tool of their clients. This also means that lawyers conduct themselves at times toward other lawyers in a less than constructive manner, even outside the litigation context. Third, those who adhere rigidly to the requirements of the advocate's role as defined by the model and use it to avoid ethical responsibility for their acts are the cause of much of the criticism the profession draws from the public today. And finally, aside from the purely practical consequences, there is the moral issue. Consider the following quotation:

> [E]very man is, in an unofficial sense, by being a moral agent, a judge of right and wrong, and an Advocate of what is right. . . . This general character of a moral agent, he cannot put off, by putting on any professional character. . . . If he mixes up his character as an Advocate, with his character as a Moral Agent. . . he acts immorally. He makes the Moral Rule subordinate to the Professional Rule. He sells to his Client, not only his skill and learning, but himself. He makes it the Supreme Object of his life to be, not a good man, but a successful Lawyer.[4]

This was written by an Englishman 143 years ago, but it sounds familiar to all of us today.

Given the obviously undesirable consequences of the adversary system excuse for amoral conduct, can the theoretical justifications offered in support of the claims for the adversary system's moral authority withstand scrutiny? I think not. Time does not allow me to address more than one of these arguments. Let us consider the one probably most commonly used.

The claim is made that unless each party is served by a zealous advocate who is free of any ethical responsibility for his or her actions, the adversary system will not function properly because clients may be deprived of adequate representation. I accept this argument, but only in the context of criminal prosecutions. There it is true that if the defense lawyer is to make moral judgments about the results of successful representation of a client, rather than zealously pursuing victory, then many of those charged with crimes would be defenseless. When the full might of the State is arrayed against the individual in an attempt to deprive him or her of life or liberty, it is proper for a lawyer to act in the sole interest of the client without regard for the consequences of victory.

But I do not think the validity of this justification rests on anything inherently moral in the adversary system. Instead, the justification is political in nature. It should always be difficult for the State to deprive anyone of life or liberty. Although we might not like to acknowledge it, the criminal defendant stands as a surrogate for us all in an unequal contest with the State.

This justification for the moral authority of the adversary role is, however, limited to criminal cases. It does not extend to civil litigation between private parties, much less to nonlitigation settings. In the context of civil litigation, the necessity for an advocate freed of ethical constraints is not nearly so clear. The goal of the adversary system in civil litigation is to determine the true state of the facts and give the parties that to which they are entitled under the law. But any observer of the system will concede that in civil litigation, the adversary system does not always live up to its goal. It is not uncommon for lawyers, like anyone else in any other line of work, to be of unequal skill or diligence, or for their clients to have unequal economic resources to sustain the battle, or for the neutral party to be less than perfect in insight or knowledge of the law. Under these circumstances, it is hard to understand how the goal of determining truth and giving the parties that to which the law entitles them is served by adding a requirement for an amoral advocate. Such an advocate may only make the natural inequalities worse. For example, Spaulding did not receive damages for the aneurysm because the workings of the adversary system kept the pertinent information from him and from the court that approved the settlement. To the extent that the system fails to discover the truth or permits one party to take more or less from the other than is rightfully due under the law, the system cannot claim that its results are proper in any grand moral sense, and the justification for amoral conduct by lawyers is lost.

If you take the time to examine other justifications offered for the supposed moral authority of the adversary system, you will find them similarly deficient.[5] But even if the adversary system could carry the claims for moral authority laid upon it, it would not apply to much of what lawyers do outside the actual courtroom context. At least 90 percent of all civil cases are settled by negotiations between the parties; many other disputes are resolved without even contemplating litigation. Because the neutral judge or jury so necessary to the integrity of the adversary system model is absent from the processes that lead to these dispute resolutions, it is hard to understand how one can seek ethical shelter for acts done in these contexts by invoking the adversary system model.

I can only conclude, then, that the adversary system model lacks the moral authority the legal community usually assigns to it and that it certainly cannot warrant use of the adversary system excuse in many of the situations in which it seems to be commonly relied upon. Therefore, except when defending persons charged with crimes, I do not think you can legitimately take comfortable refuge behind the adversary system excuse to avoid the tough ethical issues you will confront in practice, and you cannot avoid moral responsibility for the choices you make for yourself and your clients.

I thought it was necessary for today's audience to address the claims of moral authority made for the adversary system. However, I frankly doubt very much that many lawyers have consciously thought about the problem and have affirmatively adopted the posture of an amoral technical only after having been persuaded by the strength of these claims. Yet I think any lawyer will acknowledge that lawyers often behave as though they have accepted these claims, as though they are sheltered by the

adversary system excuse in virtually all they do. So how does this notion that the system frees lawyers from moral responsibility for their acts become so thoroughly ingrained in lawyers and the legal culture? For the answer, I think we must look to the law school and the first years of practice.

When I first entered law school, I thought that the education I was receiving was narrowing, was forcing me to think of my problems and all relationships between people only as various manifestations of legal principles. It also seemed odd to train myself to argue one position and then another with equal ease and without any substantial reference to what was just or fair. But after a while, the relativity of truth and the ability to separate personal ethics from legal analysis became second nature to me, as it is supposed to in law school. I assume that most law students go through the same process. And during that process, they learn to separate personal ethical judgments from legal judgments. This mode of thinking is a necessary tool for a lawyer. But it should be obvious that it creates a natural environment for the adversary system excuse.

So, we now have a law school graduate, already inclined to a certain analytical schizophrenia when ethical and legal issues become intertwined, who then moves into practice. How does that graduate learn to grapple with the ethical dilemmas presented by the adversary system? In my experience, most new lawyers do not sit down and deeply contemplate the ethical problems presented by the advocate's role, and the subject is not covered in any formal post-graduate education or training. Instead, any learning on the subject will be picked up almost subconsciously from the legal culture. Young lawyers take their cues, as I did, from other lawyers and from the pressures of practice. And both inevitably push you toward the shelter of the adversary system excuse. That is because the view that the lawyer is an amoral instrument is quite comfortable to those faced with the difficult issues and heavy pressures of the practice of law. Gradually, this attitude settles into place. Before long, the new graduate has unconsciously accepted the adversary system excuse and has incorporated it into his or her personality.

At this point, you may be rather discouraged. It may sound like I have been describing a virulent disease that permeates the legal culture, one from which there is no escape. There is no questions that at least in its minor manifestations, the disease is widespread. But in its major forms, it is rather limited. Moreover, because it seems to be contracted subconsciously in most cases from the lawyer's surroundings, it may be escaped by *thinking*. And that is the way good lawyers have escaped it over the years, by being sensitive to the ethical implications of what they do and by thinking and talking the issues over with others, including their clients. You can do the same.

Although I cannot tell you how to resolve all the difficult questions you will face, there are some concrete suggestions I can give to assist you. First, watch out for the little problems. The questions of life and death, such as in the *Spaulding* case, would prompt any lawyer to think of larger ethical issues. But the smaller and more mundane issues encountered day to day may not. And I think that, over time, that is where lawyers often get led astray. The pressures to do what will help you win are great, both from within and from without. Hold those pressures at bay long enough to let yourself think about the ethical issues.

My second suggestion is to seek good role models. There are plenty of these in practice, men and women of integrity and principle who do resist the cultural pressures of the profession to become amoral instrumentalities. Look for lawyers who are respected for their fairness and integrity in dealing with others, lawyers who seek not to satisfy their own egos but to solve clients' problems. Listen to comments about the quality of a lawyer's "judgment." My own experience is that those with reputations for good judgment are those who are true to their ethical selves, who transcend their role as an instrument and who become positive moral agents. Watch and learn from those people.

My third suggestion is to rely on your own good judgment. Do you remember how I described the dissonance that I, and probably many of you, felt when we first had to put aside our personal ethical judgments in law school to learn how to analyze legal issues? Remember that feeling now, and recapture the awareness of the dissonance. Now that you have learned the methods of legal thinking and analysis, refamiliarize yourself with those personal ethical standards you set aside three years ago. Integrate your newly found talents and powers into your larger ethical system.

In time, you will become more sure of your judgments and more aware of ethical issues when they present themselves. There will be few easy answers, but you will be a better lawyer for making the effort to remain true to yourself. And, ultimately, you will serve your clients better. Clients, after all, usually look to their lawyer for cues as to what they can and should expect from the legal system and their lawyer. Give them the proper message, raise the ethical issues with them, and you will find it relatively infrequent that a client persists in asking for something that you are uncomfortable doing. With awareness, you will be able to avoid unthinking reliance on the adversary system excuse.

For those of you who may be wondering, Spaulding did survive. A doctor discovered the aneurysm while Spaulding was undergoing an induction physical.

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[1] *I want to thank my law clerks, Robert L. Flores and Phyllis J. Vetter, for their assistance in preparing these remarks. Little originality is claimed for their content. The following materials were of assistance in my preparation, and I recommend them to the reader. Flynn,* Professional Ethics and the Lawyer's Duty to Self, *1976 Wash. L.Q. 429; D. Luban,* The Adversary System Excuse, *in The Good Lawyer, Lawyers' Roles and Lawyers' Ethics (D. Luban ed. 1983); Menkel-Meadow* Toward Another View of Legal Negotiation: The Structure of Problem Solving, *31 U.C.L.A. L. Rev. 754 (1984); Morris,* Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients, *34 U.C.L.A. L. Rev, 781 (1987); Simon,* The Ideology of Advocacy: Procedural Justice and Professional Ethics, *1978 Wis. L. Rev. 29; Wasserstrom,* Lawyers as Professionals: Some Moral Issues, *5 Hum. Rts. 1 (1975). I especially want to acknowledge reliance on Chapter 4 of David Luban's fine book for the ideas and terminology used in describing the adversary system excuse, as well as for the reference to the* Spaulding *case and the quotations from William Whewell and Murray Schwartz.*

[2] Spaulding v. Zimmerman, *263 Minn. 346, 116 N.W. 2d 704 (1962).*

[3] *Schwartz,* The Professionalism and Accountability of Lawyers, *66 Cal. L. Rev. 669, 673 (1978),* quoted in *Luban,* supra *n.2, at 84.*

[4] *1 W. Whewell,* The Elements of Morality, Including Polity, *at 258-59 (London, John W. Parker, 1845),* quoted in supra *n.2, at 84.*

[5] See, e.g., *Luban,* supra *n.2, at 93-117.*

Justice Michael D. Zimmerman has been a member of the Utah Supreme Court since 1984. He received his law degree from the University of Utah in 1969 and served as a law clerk to U.S. Supreme Court Chief Justice Warren E. Burger for one year. He was an attorney with the law firm of Watkiss & Campbell from 1980 until his appointment to the bench and he also served as an adjunct professor at the University of Utah College of Law from 1978 to 1984. He is currently a member of the Utah Judicial Council, the Judicial Council's Alternative Dispute Resolution task Force and is vice-chair of the Judicial Council's Gender and Justice Task Force. He was named Appellate Court Judge of the Year for 1988 by the Utah State Bar.

(Justice Zimmerman gave the commencement address at the University of Utah College of Law on May 21, 1988. The Barrister *is pleased to present a slightly edited version of his remarks.)*

STATE BAR CLE CALENDAR

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 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 for one day and $250 for both days
Time: 10:00 a.m. to 2:00 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
Time: 8:00 a.m. to 3:00 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
Time: 8:00 a.m. to 3:00 p.m.

DESIGNING AND ADMINISTERING PENSION PLANS TO MEET THE NEW REGULATORY REQUIREMENTS

A four-hour video program providing just what practitioners need to know in response to the plethora of final, proposed, and tentative regulations being issued by the U.S. Treasury Department and the Department of Labor. Specimen plan provisions will be examined to illustrate how to implement changes required by recent legislation and regulations. In addition, faculty panelists will offer guidance in planning for 1989, especially featuring Section 401(k) plans; integration rules; Retirement Equity Act provisions; Section 411(d)(6) optional benefits and Section 401(a)(26) requirements for disposing of plans which do not satisfy applicable coverage rules.

Date: January 9, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 8:00 a.m. to 12:00 p.m.

BAD FAITH INSURANCE LITIGATION

A live via satellite program demonstrating litigation techniques and a substantive update of the case law in this emerging area of the law. Presents material as a working knowledge for both insurance defense counsel and plaintiffs counsel.

Date: January 19, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

ESTATE PLANNING FOR THE ELDERLY

As the population ages the market for estate planning and other legal services the elderly will continue to expand rapidly. General practitioners and others interested in adding estate planning for the elderly to their practice repertoire will be interested in this estate planning course which covers recent techniques and legal ramifications of particular interest to elderly clients.

Date: January 26, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

JOINT VENTURES

A live via satellite course covering essential drafting techniques and counseling considerations for handling joint ventures successfully. Cover all the basis and avoid potential malpractice claims with the information and techniques discussed in this course.

Date: February 9, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

MERGERS AND ACQUISITIONS

A live via satellite course for the business law practitioner and securities lawyers involved in medium and larger scale corporate mergers and acquisitions.

Date: February 14, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

CONSTRUCTION CONTRACTS LITIGATION

A live via satellite program covering case law and litigation strategies in construction contract cases. Contract interpretation, party identification, development and use of documentary evidence and expert witness will be featured.

Date: February 23, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

THE UCC IN REVIEW: AN ANALYSIS OF THE MOST RECENT DEVELOPMENTS IN ARTICLES 1, 2, NEW 2A, 3, 4, 5, 8 and 9.

A live via satellite program covering a thorough update on UCC developments. This will be especially for practitioners who have not had occasion to handle UCC matters in recent years and involves an article analysis an application of the UCC for todays practitioners.

Date: February 28, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 to 3:00 p.m.

FRANCHISE SECTION SEMINAR

Date: TBA
Place: Utah Law and Justice Center
Fee: TBD
Time: 8:30 a.m. to 12:30 p.m.

The Franchise Section of the Bar will produce this seminar on the fundamentals of franchising for general practitioners. The seminar will cover basic franchise topics including all laws, trademark law, antitrust law, disclosure laws and franchising from the perspectives of the franchisor and franchisee. Faculty presentations and materials will be supplemented with ample discussion and registrant participation.

SPECIAL NOTE

We are pleased to announce that an addition has been made to the CLE videotape library. The tape is entitled "An Attorney's Approach to Avoid Malpractice" and is provided by P.L.U.M., our Bar endorsed professional liability insurance underwriters. This tape may be borrowed from our CLE video library, by contacting the CLE department.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Dec. 1	ERISA Basics Part I: A Primer on ERISA Issues	L & J Center	$135 or $250
☐ Dec. 6	Grappling With Government in Bankruptcy Court	L & J Center	$160
☐ Dec. 8	ERISA Basics Part II: A Primer on ERISA Issues	L & J Center	$135 or $250
☐ Dec. 13	Personal Estate & Tax Planning For the Small Business Owner		
☐ Jan. 9	Designing & Administering Pension Plans to Meet the New Regulatory Requirements	L & J Center	$135
☐ Jan. 19	Bad Faith Insurance Litigation	L & J Center	$135
☐ Jan. 26	Estate Planning for the Elderly	L & J Center	$135
☐ Feb. 9	Joint Ventures	L & J Center	$135
☐ Feb. 14	Mergers & Acquisitions	L & J Center	$160
☐ Feb. 23	Construction Contracts Litigation	L & J Center	$135
☐ Feb. 28	The UCC In Review: An Analysis of the Most Recent Developments in Articles 1, 2, New 2A, 3, 4, 5, 8 and 9	L & J Center	$160

CLASSIFIED ADS

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

POSITIONS SOUGHT

"Experienced paralegal would like to relocate to the Salt Lake area. Thirteen years experience in litigation and collections. Six years management experience."

POSITIONS AVAILABLE

Large Las Vegas, Nevada law firm looking for an associate attorney with two to three years of legal experience in the business and commercial law area to deal with growing Japanese clientele. Must be able to understand and speak the Japanese language fluently. Must also be a member of the Nevada Bar or willing to take the Nevada Bar examination in July, 1989. Excellent academic credentials required. Salary DOE. Send Resume and writing sample to Attorney R. Vaughn Gourlty, Beckley, Singleton, Delanoy, Jemison and List, chtd. 411 East Bonneville Avenue, Las Vegas, Nevada 89101.

Court Commissioner, Fourth District Court, Provo. The court commissioner will be responsible for hearing cases and recommending written orders to the judges on mental health and domestic relations cases. The commissioner will also provide assistance in the Fourth District Juvenile Court. The court commissioner will provide a less formal forum than a regular court hearing for discussion of issues, which should facilitate a more positive and timely resolution of legal matters. Main offices will be located in Provo. Assistance will also be provided to Second and Third District Courts. **Applications should be submitted by DECEMBER 16, 1988** to Susan Clawson, Personnel Manager, Office of the Court Administrator, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102. The application should include a courts application form and a resume and must be submitted by 5:00 p.m. December 16, 1988.

Gordon R. Hall, Chief Justice of the Utah Supreme Court has announced the opening of the application period for a judicial vacancy in the First District Court. This vacancy will result from the retirement of Judge VeNoy Christoffersen. **Applications must be received no later than 5:00 p.m., December 16, 1988**, at the Office of the Court Administrator, 500 East 230 South, Suite 300, Salt Lake City, Utah 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 at the above address. Application packets will then be forwarded to prospective candidates and must be received no later than 5:00 p.m., December 16, 1988.

Associate needed for small firm in Orem, Utah. Some experience preferred, though not necessary. Some guaranteed income plus work provided.

Managing Attorney in the Salt Lake City office of Utah Legal Services. At least five years experience as an attorney; preference for Legal Services background or comparable experience. Must have demonstrated management/supervision skill. Particularly interested in attorneys with a strong background in public benefits, family and/or juvenile law. Trial experience plus. Send resume to: Anne Milne, Director, Utah Legal Services, Inc., 124 South 400 East, 4th Floor, Salt Lake City, Utah 84111.

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

FURNITURE AND BOOKS FOR SALE

Office and reception room furniture and accessories; ten antique oak Globe-Wernicke bookcase sections; Up-to-date American Jurisprudence 2d, Rabkin and Johnson Current Legal Forms and Utah Code Annotated. Contact Max D. Lamph, 2564 Washington Blvd., Ogden, Utah, phone 399-5885.

Four sets of Utah Code Ann. (1953, as amended), complete and up-to-date, excellent condition. Tracy Richards 363-3300.

BOOKS WANTED

Pacific Digest and Pacific Reporter to date. Call Paul Colton (801) 776-0533.

OFFICE SPACE AVAILABLE

330 East 400 South. Attorney wanted to share large office suite with two other attorneys. $300.00 per month. Utilities and telephone system included. Free parking. Receptionist, copier, word processor and library available. Call 322-5556.

Furnished office available, including secretarial desk and equipment. Access to library facilities. Snow & Halliday, 261 East 300 South, Suite 350, Salt Lake City, Utah. Contact John Spencer Snow, 364-4940.

Attractive office and location in Salt Lake City with other well-established practitioners. $440.00 per month also includes reception services, photocopying, conference room and parking. Secretarial, FAX and telex services are available, together with some overflow work, if desired. Call us at 487-7834.

Group of nine attorneys in Salt Lake seeks one or two other attorneys with client base to associate in office sharing arrangement. Excellent location close to courts. Good library, conference room, receptionist and facilities. Any reasonable arrangement considered. Contact Julian Jensen at 531-6600, 311 South State, Suite 380.

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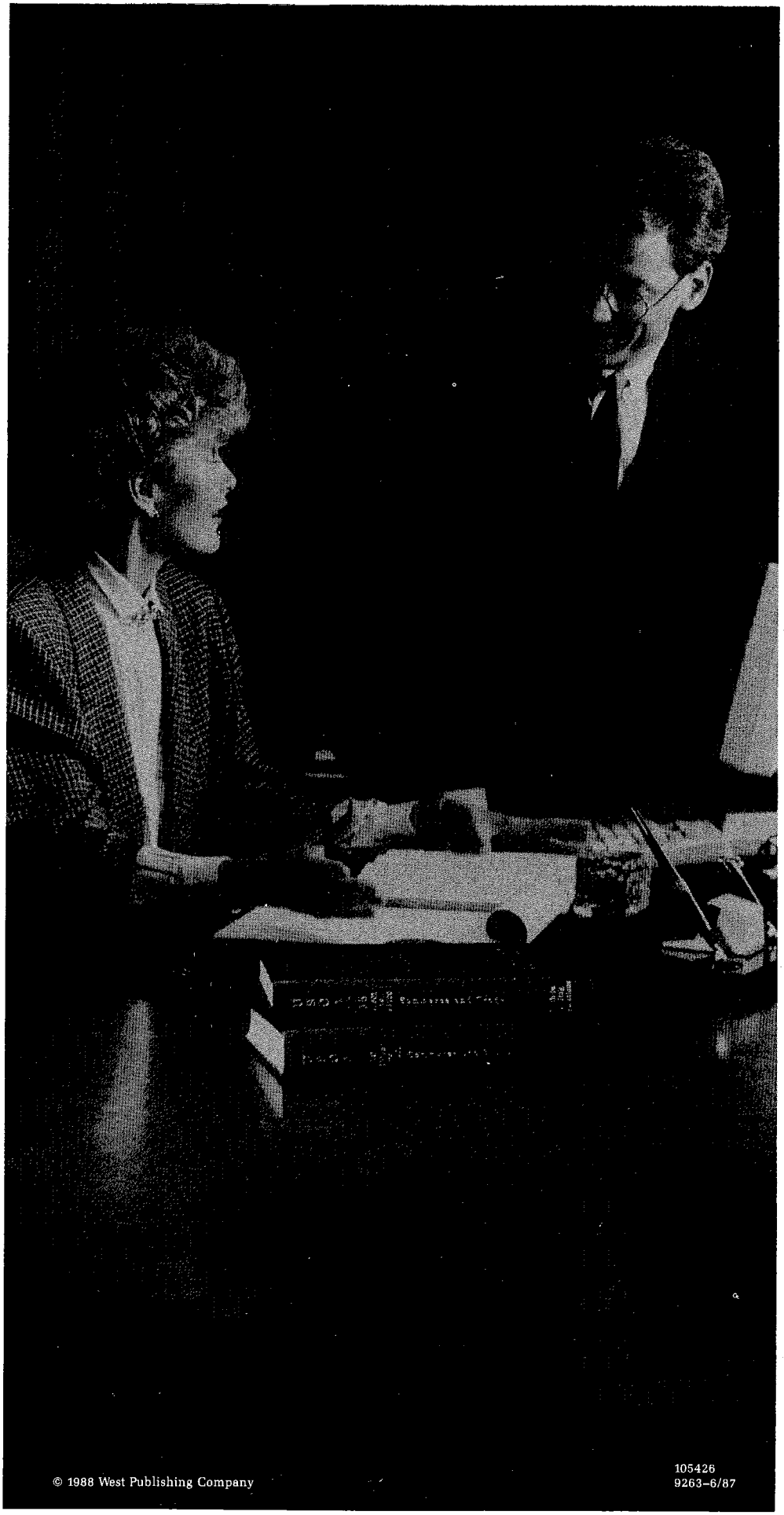

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