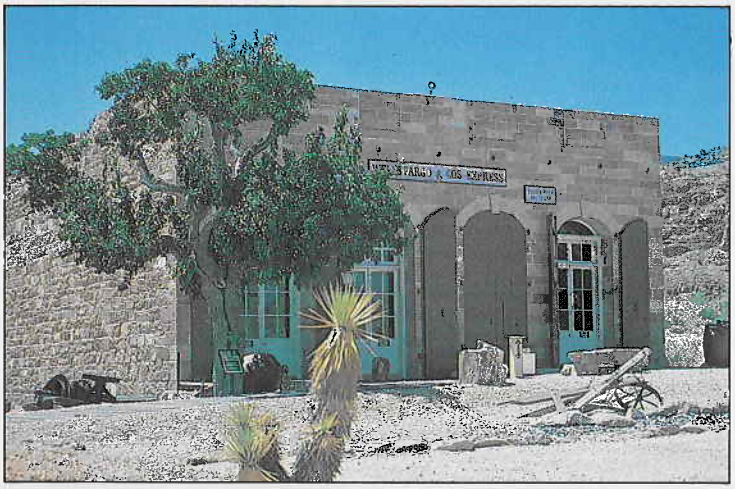
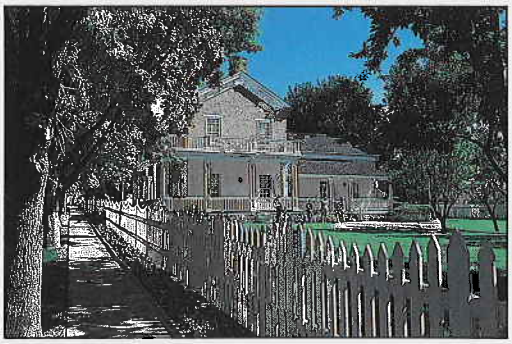
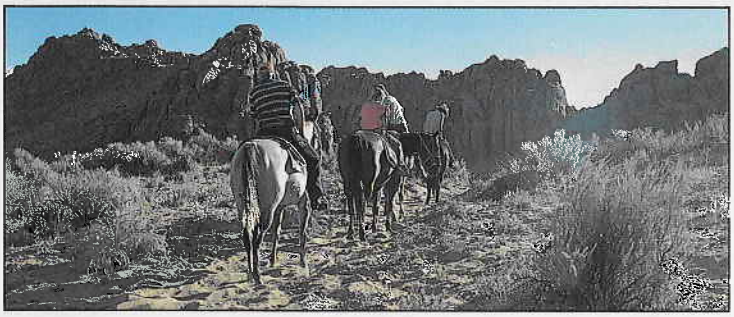
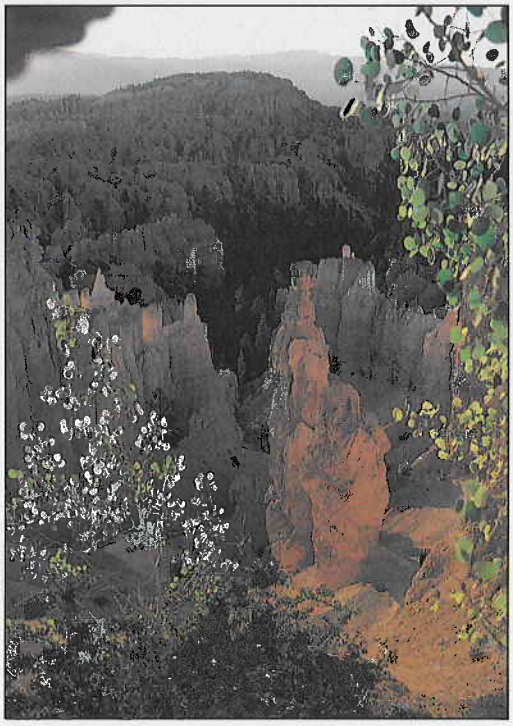
UTAH BAR JOURNAL

Vol. 2, No. 3 March 1989









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Developments in Bankruptcy Law and Procedure in Utah 10

The 10 Most Common Ethical Pitfalls for Young Lawyers 16

Justice Robert LeRoy Tucket, 1905-1988 20

Privileges in Utah Law 34

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

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COVER: Photos of Brigham Young's home and Southwest Horseride by Ron Hill. Canyon and Silver Reef photos courtesy of Creative Marketing Directions, Inc.

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

LETTERS

Editor:

Judge Owens (Robert F. Owens, "The Case Against Plea Bargaining," November 1988) addresses a very real problem concerning the public perception about plea bargaining and some very real problems with that practice itself. However, I differ with some of the judge's observations.

I wonder if a good deal of the problem with the public misconception about plea bargaining isn't lawyers' faults, not, as the judge suggests, because a good case can't be made, but because a significant number of lawyers demagogue about this practice to the press and at public gatherings. How often has plea bargaining abuse been the political battle cry of someone seeking to be elected as a prosecutor and, when elected, there is no appreciable diminution in the practice in that office because the candidate knew there was no significant problem to begin with?!

Now, referring directly to the article, under the heading "Backroom Justice" is the statement that neither the prosecutors nor the defense attorneys have been elected or appointed by the people to make the decisions of guilt or innocence for society. The article goes on to explain that a judge is elected and trained to make those decisions or a jury, of course, should do so. This raises the question: How is a judge more elected than a prosecutor? Judges in Utah are appointed by an elected governor. . .are judges more trained than prosecutors or defense attorneys? The article then objects to appellate review being cut out by the process. But isn't the lack of need for appellate review an asset rather than a deficit?

The third objection in the article is that this "critical decision as to what a defendant is guilty of, if anything, and how serious it is, is made in the minds of two lawyers who privately reach agreement with each other." This is just not the case. There is a third mind that is critical; it's the accused. He knows better than any jury or judge what really happened. While the concerns raised about the pressures on him from his attorney are real, that seems a small negative compared to the opportunity to make that decision for himself. Are judges and juries needed to protect the accused from his own attorney? What a strange idea!

The final suggestion of the article I would like to take exception to is that the prosecution should only offer a bargain if there are problems proving his case. If that were the standard, could defense council ever recommend accepting an offer knowing that the prosecution has acknowledged such a weakness?

I acknowledge every weakness and concern expressed by Judge Owens that exists in the system; we can do better and should. Both sides in the criminal justice system with the reminding of the bench need to be more alert and diligent in avoiding those pitfalls. However, I don't believe these personal weaknesses and indiscretions are systematic. The system or practice is sound; the participants are its weakness and the weakness of any system.

More trials will not make better justice.

Don Sperry Redd
Attorney at Law
Layton, Utah

Editor:

While the new *Utah Bar Journal* has the trappings of a more professionally done publication than the old *Bar Letter*, I offer a couple of criticisms:

1. Timeliness. The December edition of the *UBJ* reported the minutes of the September 23 Commission meeting. The two-and-a-half- to three-month delay makes much information outdated, i.e., the November *UBJ* acclaimed Chris Fuller as Young Lawyer of the Year and reported that he was at a firm which he had, in fact, left *three months* earlier.
2. Format. The Discipline Corner is buried within the "State Bar News," this month languishing on a page headed by "Partnership Diskettes." Discipline should be the Bar's most important function and deserves separate, unequal treatment. Re: Ethics Opinion 90—All prior state ethics opinions have been real legal opinions, with rationale and citations. It is odd that this highly debated issue is reduced to a "minute entry" opinion. It deserves more.

On a matter of content, I note that the Bar has filed an *amicus* brief on behalf of the Wisconsin Bar, which does not want to lose its integrated status. Such an act is equivalent to legislative lobbying, for which the Bar has been criticized, prompting, I believe, its substantial curtailment until the Utah Supreme Court decides the matter, a Bar member having formally challenged such lobbying. The concern is that in an integrated Bar, neither dues nor association name should be used to pursue public action and legislative goals that are not supported by *all* members. It seems inappropriate for our Bar to have "lobbied" the Seventh Circuit Court of Appeals in this matter, where many Utah lawyers supported the deintegration decision rendered by the district court, a decision, incidentally, now reversed.

Jo Carol Nesset-Sale

The staff of the Utah Bar Journal *realizes timeliness is a problem. But since we must work within deadlines, the problem, for the most part, is beyond our control. To illustrate why the minutes of the September 23 Bar Commission meeting were in the December issue (and why minutes will always appear in an issue two months later): When the September 23 meeting was held, the October issue of the* Journal *was already at the printer. The* Journal *committee had already met (about a week prior) to plan the November issue and the deadline for the November issue had passed for all materials except classified ads. When the* Bar Journal *Committee received the minutes of the September 23 meeting, it was the middle of October and the time of the planning meeting for the December issue. If the Bar Commissioners were to meet at the beginning of the month and get minutes to the* Journal *by the 15th of the month, the news of that meeting could appear in a month-earlier issue than is now possible. The* Bar Journal *staff, however, does not schedule the Commissioners' meetings.*

As to comments on format: The format of the Journal *is new and far from perfect, but we're working on it and, hopefully, improvements will continue.*

Editor

LETTERS *(continued on page 32*

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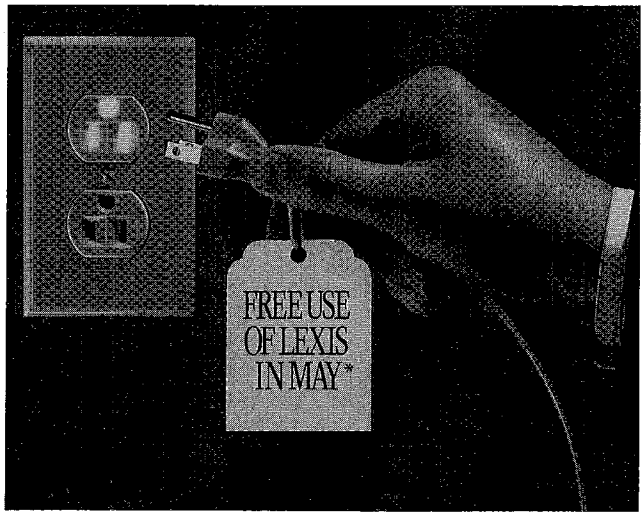

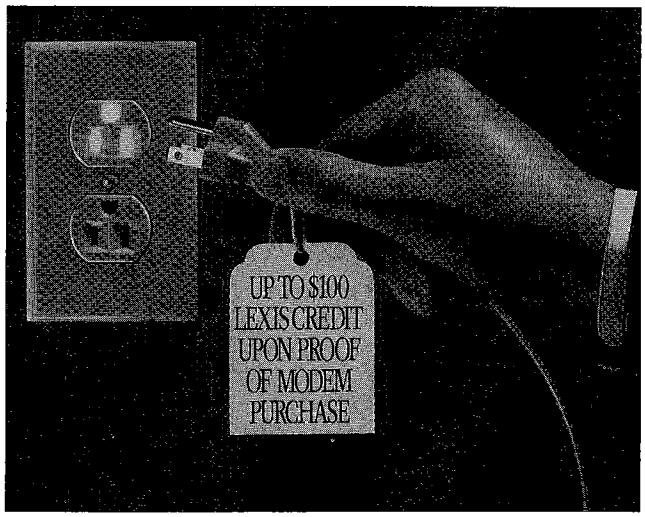

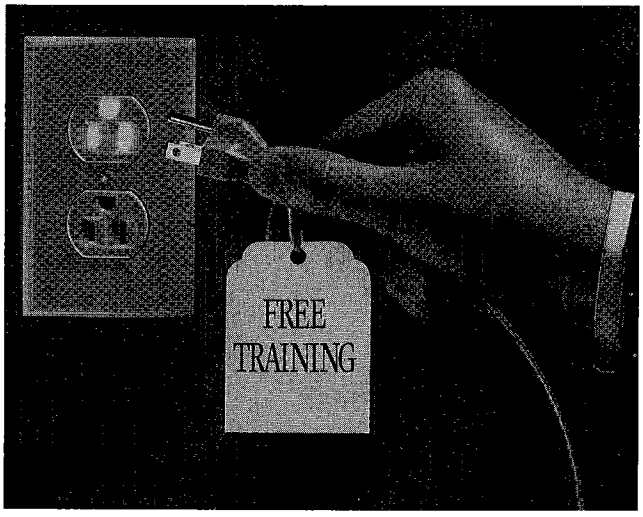

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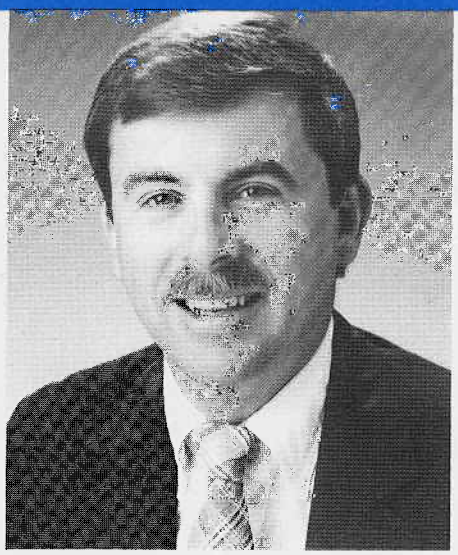
PRESIDENT'S MESSAGE

So Help Me God!



Kent Kasting

As I am sure we all know, the practice of law and the legal profession continues to be regularly and systematically assaulted as "the not so honorable profession" by the press and the public. In addition, our profession is being subjected to pressures from within, which attempt to change its character from that of a true profession to that of a business with profit and return on investment being the primary goal. It is common knowledge that law firms' requirements of minimum monthly billables increase annually and have reached a point where there is little time to do anything but work. More than ever, firms are eliminating credit for public service, pro bono and Bar work. Lawyers are narrowing their field of vision, focusing only on specialized areas of the law and the amount of fees billed and collected each year. I believe this new approach with the accompanying emphasis on dollars harms our profession from within.

Approximately three years ago, I wrote a Bar Commissioner's message about the Attorneys' Oath we all took when we were admitted to the Bar. Since the time that message appeared in the old *Utah Bar Letter*, membership in our association has grown by about 1,000 or more lawyers (we now number 5,000). I thought it would be appropriate to once again remind every lawyer and judge of the solemn promises each of us made when we were admitted to the practice of law and took the Attorneys' Oath.

First, let me remind you of just what an "oath" is:

> Oath—Webster's Dictionary defines an oath as a solemn formal calling upon God or a god to witness to the truth of what one says or to witness that one sincerely intends to do what one says.

Why don't each of you take a minute and read the oath that each of us swore to be bound by:

> I do solemnly swear: I will support the Constitution of the United States and the Constitution of the State of Utah, and I will discharge the duties of Attorney and Counsellor at Law with fidelity;
>
> I will maintain the respect due to courts of justice and judicial officers;
>
> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;
>
> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
>
> I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge or approval;
>
> I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation or a party or witness, unless required by the justice of the cause with which I am charged;
>
> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.
>
> SO HELP ME GOD.

These lofty statements sound good, but what do they really mean in relation to the modern day practice of law? I believe the practical application of the oath which we all have taken goes something like this.

> I do solemnly swear:
>
> (1) I will recognize and adhere to our basic constitutional principles that individuals are presumed to be innocent until proven guilty and that every citizen is entitled to the procedural rights and protections provided in our constitutions;
>
> (2) I will serve faithfully each of my clients, advise them carefully and tend to the matters entrusted to me with care, common sense and speed. In other words, I will return telephone calls, I will meet deadlines, I will do what I say I'm going to do in an expeditious manner, and I will look out for my client's long-term as well as short-term interest.
>
> (3) I will always act in a dignified and respectful manner when appearing before any court or administrative body so that no one can ever say that I have nothing but the utmost regard for our judicial system.
>
> (4) If I am a judge, I will recognize that lawyers, too, are officers of the court and deserve the same respect that they are required to give the court.
>
> (5) I will work to solve my client's problem in as speedy and economical way as possible.
>
> (6) I will not file an answer to a complaint if I know my client has no defenses.
>
> (7) I will not pursue a client's claim if I know that it has no merit, but might be settled for nuisance value.
>
> (8) I will not counsel a client to hide or secrete assets.
>
> (9) I will not tolerate a client who indicates he is going to lie or distort the truth.
>
> (10) I will always speak the whole truth when dealing with the courts without exaggerating or underemphasizing.
>
> (11) I will never discuss a client's case unless required to do so in the course of representing the client and will carefully guard all of the information conveyed to me by the client.
>
> (12) I will not talk about causes or matters at home, at social functions or anywhere else, except in the line of my duty.
>
> (13) I will charge a fair fee.
>
> (14) I will never "pad" hours nor perform unnecessary tasks which may increase the bill but not benefit the client.
>
> (15) I will not disparage or castigate another party or counsel.
>
> (16) I will refrain from "mud-

slinging," name calling and being self-righteous.

(17) I will try to solve my client's problems with the least amount of pain being imposed on parties, witness and counsel.

(18) I will help the poor with their legal problems.

(19) I will not turn away cases simply because my retainer cannot be met.

(20) I will never tolerate improper motives by clients.

SO HELP ME GOD.

My request to each of you is that we all reaffirm the promises we made so that our profession will be strengthened from within to meet and successfully defeat the challenges and assaults so often made against us.

Appointments to Bar Committees

Dear Colleagues:

Elsewhere in this *Bar Journal* is an invitation for you to request an appointment to a Bar standing committee. I urge you to accept this invitation. The service of lawyers to the public, the courts and other lawyers in committee work goes a long way to making our profession healthy and strong. Without your efforts and participation, little could be accomplished by the organized Bar to improve the interests of justice or the quality of practice in Utah. The work is often long. There is little, if any, tangible recognition for your labors. And yet you may find, as I do, that there is genuine pleasure and reward in doing professional work with fellow lawyers. The intangible benefits are great and, certainly, your efforts benefit our legal world.

THE APPOINTMENT PROCESS

Every year, questions are raised about how one goes about being appointed to a standing committee. Because of the importance we place on committee work, I thought it might be helpful to use this opportunity to explain the appointment process.

First, it is the policy of the Bar to involve as many people as possible in committee work. There is plenty of work to go around, and the Bar constantly seeks effective, hard-working lawyers.

Second, the Bar's president-elect, with the approval of the Bar Commission, appoints committee chairs and members. To that end, it has been the practice for the past several years for the president-elect to establish an ad hoc "committee on committees" (a name likely to evoke a few smiles). Typically, this committee is comprised of individuals of different ages, backgrounds and legal practices to ensure the greatest possible input into the process.

Third, an invitation to request a committee assignment is printed in the *Bar Journal*. This *Bar Journal* invitation is accompanied by a form to be filled out and sent in. Those who forget or neglect to use the form can write or even telephone to express their desire for a committee appointment. Contacts can be made to Steve Hutchinson, Paige Holtry (both at 531-9077), President-elect Hans Chamberlain (586-4404) or any Bar Commissioner (commissioners' telephone numbers are at the front of the Bar Directory).

The standing committees are listed in the front of the Bar Directory. They are as follows:

Advertising
Alternative Dispute Resolution
Bar Examiner Review*
Bar Examiner Committee*
Bar Journal
Character and Fitness*
Client Security Fund*
Continuing Legal Education
Courts and Judges
Delivery of Legal Services
Disciplinary Hearing Panel*
Ethics Advisory Opinion
Ethics and Discipline*
Fee Arbitration
Law Related Education and Law Day
Lawyer Benefits
Lawyer Referral Service Advisory
Lawyers Helping Lawyers
Legal Economics
Legal/Medical
Legislative Affairs
Needs of the Elderly
Needs of Children
Needs of Women and Minorities
State Bar Securities Advisory
Unauthorized Practice of Law

**Denotes committees with terms of office.*

Fourth, those requesting appointment are asked to give at least three standing committee preferences. The committee on committees attempts to recommend placement of lawyers in order of their respective preferences. Occasionally, it may be impossible to place someone in any of that person's stated preferences. In this situation,

the committee recommends placement where there is the greatest need, and the lawyer is contacted for approval of the committee assignment.

In stating your preferences, keep in mind that some of these committees have designated terms of office. Committees with terms of office have limited openings for new committee members in any given year, and appointment opportunities are, therefore, limited.

Fifth, *every person for whom the Bar has received an appointment request is appointed to a committee.* All of those involved in the appointment process take great care to make sure that every lawyer who has expressed an interest receives an appointment.

Sixth, the Bar Commission strives to approve committee appointments at the Commission's March meeting. Notices to lawyers of committee appointments are sent out after this time.

COMMITTEE REAPPOINTMENTS

Lawyers who wish to be reappointed to a committee on which they presently serve should contact their respective committee chair or any of the individuals listed above.

LATE APPOINTMENTS

Lawyers who desire to become involved in committee work but, for some reason, miss the opportunity to request an appointment, need not sit out a year. Even after the appointment process has concluded, those wanting to get involved can contact Steve Hutchinson, Hans Chamberlain or any Bar Commissioner about the possibility of a committee appointment. The Bar will do its best to accommodate all who are interested.

WE APPRECIATE YOUR WORK

The legal profession far surpasses every other profession in terms of the time, resources and effort its members donate to serve the public and improve itself. I believe lawyers have a right to feel good about our collective efforts to make our legal world a better place to be. Those who labor in committees have visions of how things can be better and accomplish worthy goals earn the respect of their colleagues and deserve our appreciation. I hope you will be counted among these folks this year.

Anne M. Stirba

Developments in Bankruptcy Law and Procedure in Utah

By Elizabeth Dalton

The U.S. District Court and Bankruptcy Court of Utah have recently rendered several decisions regarding bankruptcy law and procedure. These decisions serve to clarify the bankruptcy law in Utah and eliminate much of the procedural confusion attending motions to withdraw the reference, motions for change of venue, jury trials, contempt proceedings and motions for sanctions under Bankruptcy Rule 9011.

Motions to Withdraw the Reference—In re American Community Services, Inc., 86 Bankr. 681 (D. Utah 1988):

In response to *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress redefined the jurisdictional scheme of the federal bankruptcy system in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Amendments"). The 1984 Amendments provide that the bankruptcy court functions as a non-Article III unit of the district court. 28 U.S.C. Sect. 151. The district court is vested with original and exclusive jurisdiction over all bankruptcy cases and original and concurrent jurisdiction over all civil proceedings arising under the Bankruptcy Code. 28 U.S.C. Sect. 1334(a)-(b). Nevertheless, the district court may refer bankruptcy cases or proceedings to the bankruptcy court in the district. 28 U.S.C. Sect. 157(a). In the District of Utah, the district court has issued a General Order of Reference, dated July 10, 1984, which refers all bankruptcy cases and proceedings to the bankruptcy court. *See* Rule B-105 of the District Court Rules of Bankruptcy Practice and Procedure ("Local Rules").

Section 157(d) of Title 28 enables the district court to withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court. Consistent with 28 U.S.C. Sect. 157(d), Bankruptcy Rule 5011(a) provides that a motion for withdrawal of a case or a proceeding shall be heard by the district court after the motion is properly filed and transferred to the district court by the bankruptcy court. In regard to all proceedings commenced in or removed to the bankruptcy court, Local Rule B-106(1) requires that the party seeking to withdraw the reference file an application in the bankruptcy court. Thereafter, a bankruptcy judge will sign an order transmitting the motion to the district court for a decision. *See generally, Assmus v. Southmark Corp.*, 82 Bankr. 587 (D. Utah 1988).

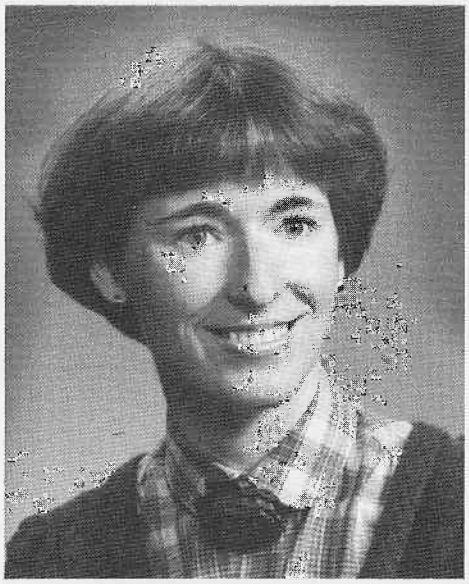
Section 157(d) of Title 28 specifically requires that motions to withdraw the reference be timely made by a party. Local Rule B-106(2) and (3) establish when a motion to withdraw the reference of an adversary proceeding is "timely" brought by a party. Section 157(d) allows the court to withdraw the reference on its own motion but does not require that the court's own motion be timely made. Conceivably, the court could withdraw the reference of a case or adversary proceeding at any time if "cause" is shown. *American Community Services*, 86 Bankr. at 685.

In *American Community Services*, Judge Winder concluded that a permissive withdrawal of the reference from the bankruptcy court is generally appropriate when the interest of judicial economy would be served or when a party has a right to a jury trial. In any event, a permissive withdrawal of the reference is within the sound discretion of the court and predicated upon "cause" shown on a case by case basis. *Id.* at 686; *see also Holland American Ins. Co.* v. *Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985).

In *American Community Services*, the court, on its own motion, permissively withdrew the reference of an adversary proceeding from the bankruptcy court. The court determined that "cause" to withdraw the reference under 28 U.S.C. Sect. 157(d) was apparent. The defendant had a right to a jury trial in a non-core proceeding and had not consented to the bankruptcy court's entry of a final judgment. *American Community Services*, 86 Bankr. at 691. Accordingly, the court instructed the clerk to transfer the adversary proceeding to the district court for a final adjudication.

Change of Venue Motions—In re Retirement Inn at Forest Lane, Ltd., 83 Bankr. 795 (D. Utah 1988):

In *In re Retirement Inn*, the district court, sitting *en banc*, implemented a new procedure for change of venue motions relating to bankruptcy cases or proceedings. The district court supplemented and revised its General Order of Reference so as to provide that a motion for a transfer of venue of a



ELIZABETH DALTON is an associate at the law firm of Kimball, Parr, Crockett & Waddoups and specializes in bankruptcy law. In 1988, she served as a law clerk to Judge David K. Winder, U.S. District Court for the District of Utah. In the spring of 1987, she worked as an extern at the U.S. Bankruptcy Court for the District of Utah. She graduated from the University of Utah School of Law in 1987 and received a bachelor of arts degree in English from the University of California at Los Angeles in 1982. While in law school, she served as an editor for the Utah Law Review *and graduated with the distinction of Order of the Coif. In 1986, she received a Marriner S. Eccles fellowship. Elizabeth Dalton has previously published articles in the* Utah Law Review.

bankruptcy case or proceeding shall be heard initially by a bankruptcy judge.

Once the motion is submitted, the bankruptcy judge shall file with the district court a report and recommendation outlining proposed findings of fact and recommendations for the disposition of the motion. The bankruptcy court shall serve forthwith a copy of the report and recommendation on the parties to the proceedings. Within 10 days of being served with a copy of the report and recommendation, a party may serve and file with the district court objections to the report prepared in the manner provided for in Bankruptcy Rule 9033(b). If objections are filed, the district court shall make a *de novo* review of all matters relating to the transfer of venue motion in the manner prescribed by Bankruptcy Rule 9033(d). This new procedure is similar to the procedure followed by the U.S. Magistrate pursuant to 28 U.S.C. Sect. 636(b). *See generally, Retirement Inn*, 83 Bankr. at 799-800.

In *Retirement Inn*, the district court transferred a bankruptcy case to the Northern District of Texas, Dallas Division. The court determined that transferring the case would promote the efficient and economic administration of the estate. The major asset of the bankruptcy estate was real property located in Dallas. Moreover, a majority of the creditors having the largest claims were located in Dallas. These and other factors persuaded the court to transfer venue of the bankruptcy case pursuant to 28 U.S.C. Sect. 1412.

Jury Trials—In re American Community Services, Inc., 86 Bankr. 681 (D. Utah 1988):

The question of whether a bankruptcy judge can conduct a jury trial has been the subject of considerable controversy. After carefully reviewing the history of jury trials before the bankruptcy court, Judge Winder concluded that bankruptcy judges can conduct jury trials but only in a narrow set of circumstances. *American Community Services*, 86 Bankr. at 686-90.

The question of whether a bankruptcy judge can constitutionally conduct a jury trial only arises in cases where a right to a jury trial exists. Under seventh amendment analysis, a right to a jury trial exists if the action involves rights and remedies traditionally enforced in an action at law rather than in an action in equity or admiralty. *Id.* at 690 (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 374-75 (1974)). Parties are not entitled to a jury trial concerning matters which are equitable in nature. Because bankruptcy courts are inherently courts of equity, core proceedings should be decided by a bankruptcy judge rather than a jury. *Id.* at 688 n.13 (citing *Katchen v. Landy*, 382 U.S. 323 (1966)).

In *American Community Services*, the court observed that the adversary proceeding concerned a breach of contract dispute which the bankruptcy court had determined was a non-core proceeding. In addition, the defendant had not consented to having the bankruptcy court enter a final judgment. The court concluded that the adversary proceeding involved "legal" rather than "equitable" issues and that, therefore, the defendant had a right to a jury trial. Accordingly, the court held that the bankruptcy court did not have the authority to preside over a jury trial in this adversary proceeding wherein the parties had not consented to having the bankruptcy court enter a final judgment. *Id.* at 691. Thus, a bankruptcy judge is only constitutionally permitted to preside over a jury trial of a non-core proceeding if a right to a jury trial exists, and the parties have consented to having the bankruptcy court enter a final judgment.

Contempt Proceedings—In re Skinner, 90 Bankr. 470 (D. Utah 1988):

The scope of a bankruptcy court's contempt power has been hotly debated among several courts. *Skinner*, 90 Bankr. at 475 n.3.; *see also Matter of Miller*, 81 Bankr. 669 (Bankr. M.D. Fla. 1988); *and cf. In re Sequoia Auto Brokers, Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987). In *In re Skinner*, the court clarified the reach of a bankruptcy judge's contempt power in the context of a violation of the automatic stay.

In *Skinner*, Judge Winder observed that all courts have inherent contempt powers to enforce compliance with their orders. *Skinner*, 90 Bankr. at 475 (citations omitted). The most important power of a court is its contempt power which is necessary in protecting "the due and orderly administration of justice and in maintaining the authority and dignity of the court." *Id.* (quoting *Railway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980)).

Although bankruptcy courts possess inherent contempt powers, Congress has limited the bankruptcy court's contempt powers in the past. *See generally Miller*, 81 Bankr. at 673-76. Nevertheless, the current version of the Bankruptcy Code implicitly recognizes the inherent contempt powers of the bankruptcy court in Sect. 105(a). *Skinner*, 90 Bankr. at 476. Sect. 105(a) authorizes the bankruptcy court's issuance of "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. Sect. 105(a).

In addition, the Supreme Court has adopted and Congress has approved Bank-

ruptcy Rule 9020, effective August 1, 1987. As currently amended, Bankruptcy Rule 9020 authorizes a bankruptcy judge to summarily adjudge a civil or criminal contempt committed in the judge's presence. Bankr. Rule 9020(a). Regarding civil or criminal contempt committed outside the courtroom, the bankruptcy judge can determine and enter a contempt order that will become final if not timely objected to. Bankr. Rule 9020(b). Bankruptcy Rule 9020, as amended, has no certification requirements and thus recognizes the inherent powers of the bankruptcy judge to determine civil or criminal contempt. However, Rule 9020(b) permits the parties to object to the bankruptcy court's contempt order regarding a contempt committed outside the courtroom and, thus, gain a right to a *de novo* review by the district court of the contempt proceedings.

The Advisory Committee noted in regard to the 1987 amendment to Bankruptcy Rule 9020 that the rule recognizes that a bankruptcy judge may not have the power to punish for a contempt. *See* 1987 Advisory Committee Note. Indeed, by its General Order of Reference, the Utah District Court has not referred to the bankruptcy judges the power to punish for a civil or criminal contempt by imprisonment. Local Rule B-105(c). As a result, bankruptcy judges in this district cannot render a final order imposing a term of imprisonment for the purpose of punishing a contempt of court. However, the bankruptcy court may certify the facts of a criminal contempt to the district court which can impose a term of imprisonment. Local Rule B-113.

In *Skinner*, Judge Winder concluded that 11 U.S.C. 105(a) and Bankruptcy Rule 9020 recognize the inherent contempt powers of a bankruptcy judge. *Skinner*, 90 Bankr. at 477. When appropriate, a bankruptcy judge can impose contempt sanctions in order to protect the orderly administration of justice and to maintain the dignity of the court. *Id.*

The *Skinner* case involved the sale by a credit union of a repossessed vehicle of a Chapter 7 debtor in violation of the automatic stay. The credit union had received notice of the debtors' bankruptcy filing at its post office box prior to the sale of the debtors' vehicle. However, it appeared that no employee of the credit union had actually read the bankruptcy notice until after the sale.

The bankruptcy court found a violation of the automatic stay under 11 U.S.C. Sect. 362(h) which requires a finding of "willfulness." The bankruptcy court imposed sanctions under Sect. 362(h) to compensate the debtors for their actual losses, including attorney's fees. On review, the district court determined that the evidence did not show a "willful" violation of the stay as required under Code Sect. 362(h) and thus reversed the bankruptcy court's decision. *Skinner*, 90 Bankr. at 474-75. Nevertheless, the district court determined that civil contempt sanctions were appropriate for not only the sale of the vehicle but also for the credit union's failure to restore the status quo after realizing it had violated the automatic stay. The district court remanded this matter to the bankruptcy court with instructions to impose civil contempt sanctions against the credit union.

Alter Ego Claims—ANR Limited Inc. v. Chattin, 89 Bankr. 898 (D. Utah 1988):

Whether a creditor or the bankruptcy trustee has standing to bring an alter ego claim against the debtor is another controversial subject. *Cf. Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987) *with In re Ozark Restaurant Equipment Co.*, 816 F.2d 1222 (8th Cir. 1987); *see also Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987); *In re R.H.N. Realty Corp.*, 84 Bankr. 356, 360 (Bankr. S.D. N.Y. 1988); *In re Vermont Toy Works, Inc.*, 82 Bankr. 258, 300-09 (Bankr. D. Vt. 1987); *In re Morgan-Staley Lumber Co., Inc.*, 70 Bankr. 186 (Bankr. D. Or. 1986); *In re Western World Funding, Inc.*, 52 Bankr. 743 (Bankr. D. Nev. 1985).

Recent decisions should save time, expense and frustration.

After reviewing these decisions and fundamental bankruptcy policies, Judge Winder concluded that an alter ego claim is property of the bankruptcy estate. *ANR*, 89 Bankr. at 904. Nevertheless, the court distinguished an alter ego claim from a personal claim of a creditor. The court observed that generally creditors have standing to bring actions against corporate insiders who have specifically harmed the creditor. *Id.* at 902.

In *ANR*, a creditor had filed a complaint alleging claims based on alter ego, theft, conversion and misrepresentation against a debtor's corporate officers and directors. The court concluded that the creditor lacked standing to bring its alter ego claim because the trustee had not formally abandoned such a claim. However, the court determined that the creditor had standing to bring its personal claims for theft, conversion and misrepresentation. *Id.* at 905. Accordingly, the court dismissed the creditor's alter ego claim.

Post-Petition Transfers—In re By-Rite Distributing, Inc., 89 Bankr. 906 (D. Utah 1988):

In *By-Rite*, the district court addressed whether the post-petition payment of checks, delivered pre-petition to the payee, constituted a voidable post-petition transfer under 11 U.S.C. Sect. 549(a). Judge Sam agreed with the bankruptcy court's conclusion that a transfer of the checks occurred when the checks were paid by the bank. The district court concluded that the payment of the checks in question constituted post-petition transfers of estate property which were avoidable under 11 U.S.C. Sect. 549(a).

On November 2 and November 6, 1984, By-Rite Distributing, Inc. ("By-Rite"), a gasoline retailer, issued checks to Van Dyk Oil Company, Inc. ("Van Dyk"), its wholesale supplier, as advance payment for the purchase of gasoline. Van Dyk did not intend to extend credit to By-Rite. On November 8, 1984, By-Rite filed a petition under Chapter 11 of the Bankruptcy Code. Thereafter, on November 13 and 19, 1984, the debtor's bank paid the checks. On October 15, 1985, the case was converted from a Chapter 11 reorganization to a Chapter 7 liquidation.

On November 12, 1986, nearly two years from the dates the checks were cashed, the trustee filed a complaint to recover the two checks as post-petition transfers under 11 U.S.C. Sect. 549(a). Van Dyk filed a motion to dismiss on the grounds that once a check is honored, the time of payment relates back to the time the check was delivered. Therefore, payment was made prior to commencement of bankruptcy and more than two years before filing of the complaint to recover the checks. Consequently, payment occurred beyond the two-year statute of limitations as set forth in 11 U.S.C. Sect. 549(d).

The bankruptcy court decided that the transfers occurred on November 13 and 19, 1984, when the checks were paid by the debtor's bank. Accordingly, the bankruptcy court concluded that the trustee's complaint to recover post-petition transfers was filed within the statute of limitation of Sect. 549(d) and was meritorious because transfers occurred after the petition was filed. Van Dyk's motion to dismiss was denied and judgment was entered against Van Dyk for the amount of the checks, $19,058, plus interest.

After reviewing the pertinent case law on the subject, the district court relied on U.C.C. Sect. 3-409, adopted in Utah, to determine that a check is transferred when it is paid by the bank. *See also In re Wilson*, 56 Bankr. 74, 76 (Bankr. E.D. Tenn. 1985). Consequently, when the checks were paid, property of the By-Rite estate was disbursed in payment of a pre-petition debt.

After fixing the dates of transfer and determining that no exception under Sect. 549 applied, the district court concluded that the payment of the checks constituted post-petition transfers of estate property avoidable under Sect. 549. Moreover, the court concluded that the limitation period did not expire prior to the filing of the trustee's complaint.

Secured Claims—In re Cossey, No. 88-NC-033J (D. Utah September 6, 1988):

In re Cossey affirmed the bankruptcy court's decision to preclude a secured creditor from setting aside a confirmation order and modifying a plan of reorganization. In *Cossey*, a creditor leased certain equipment to the Cosseys who later became Chapter 13 debtors. The lease was secured by the equipment and by a trust deed on the Cosseys' home.

The debtors' Chapter 13 plan provided that the leased equipment would be surrendered to the creditor and that any deficiency would become an unsecured claim. The amount of any deficiency was apparently to be determined at the confirmation hearing from testimony establishing the fair market value of the property. The creditor never filed any objection to the Chapter 13 plan.

After the plan was filed but before it was confirmed, the debtors and the creditor entered into a stipulation by which the debtors agreed to return the equipment to the creditor and agreed to a modification of the stay to allow the creditor to sell the equipment and apply the proceeds to the amounts due. In March 1985, the bankruptcy court approved the stipulation and modified the stay.

In April 1985, the creditor filed a proof of claim describing its claim as an unsecured claim for $34,976.54, apparently the full amount of its claim, without any reduction to reflect the disposition of the equipment. Attached to the proof of claim were copies of the lease and trust deed, indicating that the claim was a secured claim—not an unsecured claim as indicated. The debtors never objected to the proof of claim.

On July 18, 1985, after a confirmation hearing that the creditor did not attend, the bankruptcy court entered an order confirming the plan. The order provided that the collateral securing the obligation to the creditor was "to be surrendered in full satisfaction of the obligation." The creditor apparently did not receive a copy of the order but was aware that the plan had been confirmed and that its claim was being treated as unsecured by at least the time of the second disbursement under the plan, in October 1985. Subsequently, in May 1986, the creditor filed a complaint to set aside the order of confirmation and to modify the plan to show that the creditor was secured and held a valid lien against the debtors' property.

In *Cossey*, Judge Jenkins observed that an order confirming a Chapter 13 plan is res judicata as to all issues that were or could have been decided at the confirmation hearing. *See, e.g., In re Evans*, 30 Bankr. 530, 531 (Bankr. 9th Cir. 1983); *In re Russell*, 29 Bankr. 332, 335 (Bankr. E.D.N.Y. 1983); *Citizens Fed. S & L Ass'n v. Rose*, 15 Bankr. 164, 165 (Bankr. S.D. Ohio 1981); *In re Lewis*, 8 Bankr. 132, 137 (Bankr. D. Idaho 1981). Indeed, the court concluded that implicit in the order of confirmation was a finding that the value of the equipment was equal to the creditor's claim. The bankruptcy court could only confirm the debtors' plan if it met the requirements of Sect.

1325(a)(5). The debtors' plan could only have met the requirements of Sect. 1325(a)(5) if the value of the equipment was at least equal to the creditor's claim. The creditor never filed any objection to the plan, did not appeal the order confirming the plan and did not argue on appeal that the plan did not qualify for confirmation under Sect. 1325.

Judge Jenkins concluded that the bankruptcy court correctly dismissed the creditor's complaint. However, the effect of the order of confirmation was not, as the bankruptcy court suggested, to avoid an otherwise valid lien by operation of law. Rather, it was to preclude the creditor from now challenging, by collateral attack, the bankruptcy court's implicit valuation of the surrendered collateral. The creditor's lien did not survive confirmation of the plan because the underlying claim was satisfied.

The district court's decision does not alter the rights of secured creditors. Secured creditors of a Chapter 13 debtor do not have to file a proof of claim in order to preserve their liens. However, if a secured creditor elects to file a proof of claim, the secured creditor should not ignore the plan's treatment of the claim and the confirmation hearing where valuation issues are decided.

Bankruptcy Rule 9011 Sanctions—In re Hatch, 93 Bankr. 263 (Bankr. D. Utah 1988):

In *In re Hatch*, a defendant in an adversary proceeding was served a summons and complaint, initiating a fraudulent conveyance action, more than 120 days after the complaint was filed by the trustee. In response to the defendant's motion to dismiss, the trustee made certain statements in her responsive pleading in an attempt to show "good cause" for the delay. Aware of the impending statute of limitations, the trustee stated that she filed the complaint and other similar complaints based upon summary information without the ability to document the claims. Subsequent to filing the complaints, the trustee stated that she attempted to determine which adversary proceedings could be proved by the evidence available. *Hatch*, 93 Bankr. at 264.

While the bankruptcy court granted the motion to dismiss based on the trustee's failure to serve process in a timely manner, the court expressed a deeper concern regarding the statements asserted by the trustee. The bankruptcy court found that the trustee's statements indicated a Bankruptcy Rule 9011 violation. Based on that finding, the court imposed sanctions of attorney's fees and costs incurred by the defendant since the filing of the adversary proceeding.

The opinion by Judge Allen contains a careful and thorough analysis of Bankruptcy Rule 9011. Judge Allen notes that "Bankruptcy Rule 9011 is virtually identical to Rule 11 of the Federal Rules of Civil Procedure." *Hatch*, 93 Bankr. at 266. Consequently, cases interpreting Rule 11 are also applicable to Bankruptcy Rule 9011. *Id.*

The court further noted that when there is a violation of Bankruptcy Rule 9011, the court is required to impose an appropriate sanction on the attorney, client or both. In analyzing its responsibility under this rule, the court emphasized that the rule contains a mandatory directive that the court "shall" impose an appropriate sanction. *Id.* In addition, the court observed that such a sanction need not be limited to attorney's fees and costs. *Id.*

In addition, the court stated that the signer's conduct is to be judged as of the time the pleading is signed. *Id.* (citation omitted). The standard which the courts have imposed is one of objective rather than subjective good faith. *Id.* In applying this standard, the court will inquire into whether it was reasonable for an attorney so situated to file such a document. *Id.*

After discussing the appropriate standard and applicable case law, the court determined that the complaint was filed before the facts necessary to support the complaint were actually within the knowledge of the trustee or her attorney. The court further concluded that the complaint was improperly filed to toll the statute of limitations contained in 11 U.S.C. Sect. 546(a)(1). After finding these violations of Bankruptcy Rule 9011, the court ordered that sanctions be imposed. *Id.* at 268.

CONCLUSION

Because of the marked increase in bankruptcy petitions filed in the past few years, the Utah District Court and Bankruptcy Court are addressing several important procedural as well as substantive issues under the Bankruptcy Code for the first time in this district. Attorneys who practice before the bankruptcy court should review these decisions in order to save time, expense and unnecessary frustration.

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The 10 Most Common Ethical Pitfalls for Young Lawyers

by Carol Nesset-Sale

As an introduction to the most frequent complaints against lawyers, I would note that the eight years I spent as a public defender reinforced my belief that at some critical moments in people's lives, attorneys can make a difference. For me, it was when people were charged with crimes. That may be true for some of you today if you are prosecutors or defense lawyers. It is also true when you represent institutional clients, people in institutions, small businesses and those many individual clients who come to you for services. You are expected to make a difference when clients bring you their problems.

We can keep small matters small by competently taking care of them. We can let matters fester until they become enormous problems for the clients and ultimately for ourselves. *You* are the best protection that you have against ever appearing as a respondent in a discipline proceeding. When you do your job well, the likelihood is very small that you will be complained of.

During the year and a half I served as Bar Counsel, I found certain kinds of complaints appearing over and over among the many hundreds of complaints filed. Perhaps bringing those to your attention now increases your sensitivity to those areas and permits you to take corrective action, where needed, to serve your clients better and to avoid complaints.

THE MOST COMMON PITFALLS

1. The failure to communicate. It is such an important and significant failing that in the new rules of conduct it has its own new rule, Rule 1.4. The old Code of Professional Responsibility didn't have a separate canon on communication, so it was alleged as neglect. If we could get lawyers to return phone calls, to initiate phone calls, to send periodic status reports to clients and to explain to clients in those reports why they have taken the action that they have taken, it would cut our work load at least by one-third. Some lawyers seem to expect that clients ought to give them a $1,000 retainer and over the next six months never hear from the lawyer again. Rule 1.4 now codifies your duty to reasonably communicate to your client. Some attorneys' communication is limited to sending clients a copy of all the pleadings, thereby concluding they have done their job. However, when the pleading is received by a non-lawyer who has no idea of the pleading's significance, reasonable communication has not occurred. A cover letter of explanation is needed.

JO CAROL NESSET-SALE was Salt Lake Legal Defender from 1978-1986 and Utah State Bar Counsel from 1987-1988. Currently with firm of Haley and Stolebarger, she is a member of the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct and the Utah Supreme Court Advisory Committee on Criminal Procedure.

Other clients don't understand why you haven't returned any of their 47 phone calls made in the last 60 days. Some clients do have unreasonable expectations about how quickly calls are returned. Ordinarily, clients have a right to have their calls promptly returned. If you communicate with your client, the Bar Counsel's work load would substantially diminish.

2. The second most frequent complaint is simply neglect of the legal work entrusted to the lawyer. Now codified in Rule 1.3, it is the old Canon 6. Before the change from the code, neglect (lack of diligence) was the most frequent allegation we ever made against lawyers. Once we had an attorney appear before us who had been given money to file a lawsuit; yet four to five months later, he had done nothing. His response to the screening panel was, "I don't know what neglect is. If it is sitting on a matter for 60 or 90 days or longer, if that's neglect, well, that's neglect." He said he was going to put a sign up on the door of his office that said: "I take care of civil matters when I get around to them." That would at least be a fair disclosure so that a client could not later complain that the civil work hadn't been timely done.

Most of the complaints we get are in civil law because it is very difficult to ignore a criminal matter which is initiated by the government. There are arraignments, preliminary hearings and trial settings. Those cases get moved along, and it is difficult to ignore clients who are in jail. However, when you are given money to initiate action in a civil matter, you are more tempted and more vulnerable to letting it stay at the bottom of the pile in your desk. Too often attorneys come before the screening panels and say, "It's true that I forgot about this case. My tickler system wasn't working very well. . . my secretary quit. . . what can I say—I'm sorry."

Regular communication with your client will make it very difficult to neglect or forget about a client problem.

3. Fee disputes arising from the lack of a written fee agreement. We refer a number of folks to the Fee Arbitration Committee of the Bar, a free service for lawyers and clients. If the attorney and client consent to make it a binding arbitration, it is a very economical, satisfying way of resolving fee disputes. Rule 1.5 does require that all contingent fee arrangements with clients be in writing. Even when a written agreement is

not required, written documentation of the work done is important. We have some attorneys who send a total bill for 80 hours of work, yet have not with particularity described the work they did or the time breakdown of work that was done. Consequently, no client could properly evaluate the reasonableness of the bill. Especially in divorce or criminal cases, one fee may be set for all of the services to be rendered. Even then, whether a divorce for $2,500 or a drug case for $5,000, there needs to be a reasonable relationship between the amount or value of work done and the fee that is charged because it is still unethical to charge or to attempt to collect an excessive fee (1.5).

Needless reviews of a client's file or "make work" correspondence, for instance, are evidence of unethical fee gouging practices, as unprofessional as charging a naive client $10,000 for a matter that prudent lawyers would do for $2,000. In fee matters, clients complain because they don't know when the meter starts running. Perhaps the attorney's initial conversation with the client suggests that unless the lawyer takes the case, the client is not going to be charged. Some of you may have an understanding that you are going to make a few calls, check into it, and you will let them know if you'll take the case. You may or may not anticipate charging them for the time and phone calls or the time of the initial meetings. You need to let the potential client know at the beginning of the first meeting the fee arrangement.

I would recommend that in any case other than one in which minimal work is done (i.e., writing a letter to a landlord) with a minimal fee involved, that a written fee agreement be used. It is a protection for you and the client. The client knows when the fee starts accruing and the rate he or she is being billed. Included in that agreement ought to be a statemen describing the work the lawyer will do and the date by which it will be completed, if possible. State whether an appeal is included in the fee. Telling the client not to worry about the fee, that you and he will "work something out," is not an acceptable fee agreement. You have a duty to give the client fee information so he can decide whether to hire you.

4. A fourth problem is the failure to know when you are in over your head. You have to know your limitation. We have a number of complaints from folks who entrusted a matter to a lawyer and the lawyer just didn't know what to do, so did nothing. Embarrassment prevented the lawyers from calling the clients and disclosing their plight. Instead, they ended up explaining the situation to a disciplinary panel.

The Stewart Hansen Society is a resource that may help. A call to the Bar will refer you to a lawyer experienced in that area of law who has volunteered through the Society to provide limited assistance to lawyers who have questions on a particular kind of legal matter.

When you are approached by a potential client who wants to hire you to do work you've never done before, I suggest telling them that it's a new area for you and while you'd like to do it for them, you won't charge them for time spent becoming familiar with that area of law, only billing once you know how to proceed in such a case. That kind of disclosure would make a client feel very good about you in most cases, that you are an attorney who is honest, who is eager to learn this area and who is being candid about his current limitations. The would-be client might say, "Listen, I really would like to have somebody who has done this before." That's a fair response, too. While you no longer must be a zealous advocate, as in the Code, you must be competent.

5. Another common complaint results from misrepresenting who you are. If you office share, you can't have stationery, an office sign or a Yellow Page listing that says Smith & Jones, Attorneys-at-Law. You are not partners, and under Rule 7.5, it is a violation to take action which represents to others or infers to the consumer that you are a partnership when you are not. Sole practitioners need individual stationery. You can't say "Smith & Jones, an association, not a partnership" or "An association of attorneys." There is good disciplinary case law around the country that says that is not a clear enough disclosure to persons who are not lawyers.

6. There are really three things that the new rules require that you give to clients and to the courts and to other attorneys with whom you deal: Courtesy, Candor and Competence. A sixth basis of complaint is dishonesty or a lack of candor. Unfortunately we do have lawyers who lie to clients and say, for example, that a divorce complaint has been filed when it hasn't. The client calls the clerk's office and learns otherwise. We have had lawyers who have made up case numbers and trial dates and then had to explain to the client why the non-existent trial date in a non-existent case got bumped. These are people who don't take to heart Merlin Lybbert's First Law of Holes: "When you're in one, stop digging." Many attorneys would make whatever ethical violation they have committed so much less serious if they would admit the foul-up to the client. If a client calls you on a matter you had forgotten, try saying: "Mrs. Smith, I am so sorry. I completely forgot about it. What would you like me to do? Would you like all of your money back? Would you like me to proceed?" With most clients, you would have an understanding response, unless you really delayed things and caused harm to them, but the minute the attorney starts lying there is almost nothing you can do to ever rehabilitate the attorney-client relationship. If you start lying to opposing counsel or to the court, you are certainly in areas that are going to subject you to public discipline and the real likelihood of suspension and loss of your license. Finally, the lawyers who unfairly take advantage of clients by, for example, making the client pay new filing fees where the lawyer filed the case in the wrong court are either intentionally dishonest or have no sense of fairness. They may be headed for real trouble.

7. The seventh one is the lack of caring. There is not a duty really to care anymore. So I can't say this is an ethical complaint as much as a criticism that attorneys could avoid. We still have the attorneys' oath that says you will abstain from having an offensive personality, but you can't require attorneys to be pleasant and to be courteous. Complainants have described lawyers who have told them that they are slime, or who hang up the phone on them, or who usher them out the door with obscenities. Nevertheless, in an isolated episode, that's not something that ordinarily is going to be actionable.

These Rules of Professional Conduct set forth minimum levels of performance. I hope that you will not be satisfied with that minimal standard, that you will not conduct yourself so you barely avoid being disciplined. I hope that you will treat others as you want to be treated. We have had attorneys who learned at 9:00 a.m. that a 2:00 p.m. hearing was continued, but who made no attempts to have the client notified, figuring that the client would find out when he got there. That's unsavory; it says to your client, "You are not important. Your money is important, but as a person you are not important." The same message is given when you fail to keep an office appointment with a client. Crises do occur, but a message of regret left with the receptionist helps. A male attorney who suggests to his female client in a divorce case that she should use her "assets" in working out an amicable resolution with her husband, from whom she is separated, has perhaps crossed the line between unsavory behavior and behavior actionable in discipline.

8. We have problem eight with solicitation advertising. Advertising can be a good thing, especially for young attorneys or new law firms, for persons who may have

unusual expertise or who are new to the community. If the advertisements are not deceptive or misleading or designed to be deceptive and misleading, they can provide valuable information to consumers regarding services, experience and fees. Rules 7.2 and 7.3 now permit targeted mailings to persons who may actually need legal services, although persons in emotionally vulnerable situations may not be contacted.

9. The failure to perceive conflicts of interest. An attorney who thinks she can represent the biological mother and the adoptive mother has probably not thought about all the possible conflicts. The rules do permit clients to consent to many potential conflicts, but there is a caveat that says that the attorney must reasonably believe that she can well represent both interests. I would argue that in an adoption case, neither client consent nor the attorney's perception of the case can overcome the conflicts. Representing both sides of a divorce action is extremely difficult to do even with appropriate written disclosures and written consent of clients.

10. The last complaint I would make is that not enough attorneys take to heart Rule 8.3, which is your duty to report violations of the rules. Mistakes are not ordinarily actionable in discipline. Patterns of neglect, callous indifference, intentional kinds of misconduct are. The new rules narrow your responsibility to report by limiting mandatory reporting to matters that raise substantial questions about a lawyer's honesty, trustworthiness or fitness as a lawyer other respects. You have a duty to write Bar Counsel a letter and say, "Pursuant to Rule 8.3, I hereby report..." More and more attorneys are reporting misconduct and judges, bound by that same rule, are beginning to report misconduct. Yet there is a great deal of trial misconduct that is never reported.

You owe it to your colleagues, to our profession and to the community of clients who depend on us to report your peers who are either unable or unwilling to keep our standards. Your failure to comply with this rule is an ethical violation for which you may be subject to discipline.

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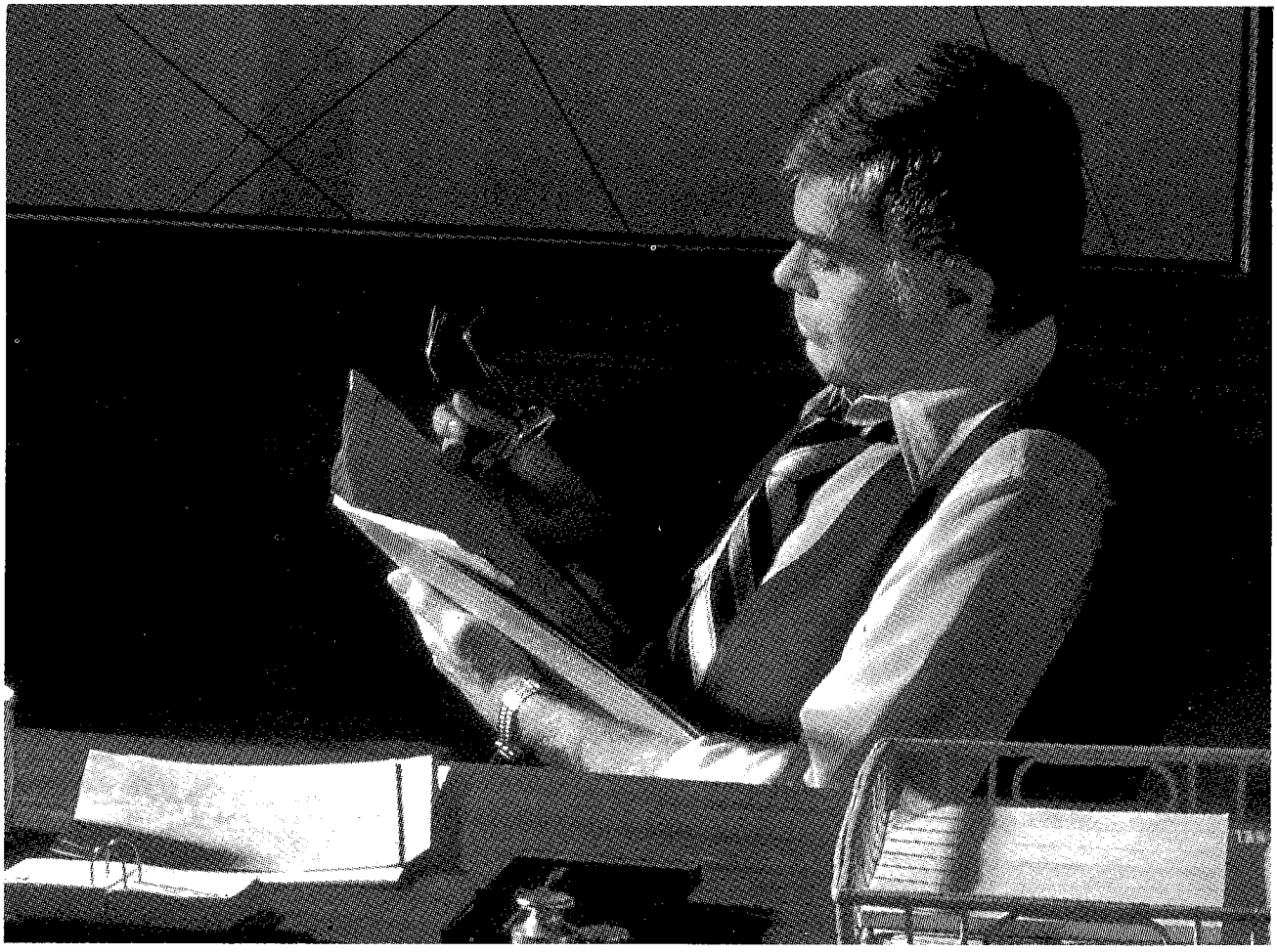

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Robert LeRoy (Roy) Tuckett 1905-1988

By Justice J. Allan Crockett, Retired

In the rich heritage of our law are the lengthened shadows of many valiant souls who clung devotedly to its ideals: to seek the truth, to apply reason and to do justice.

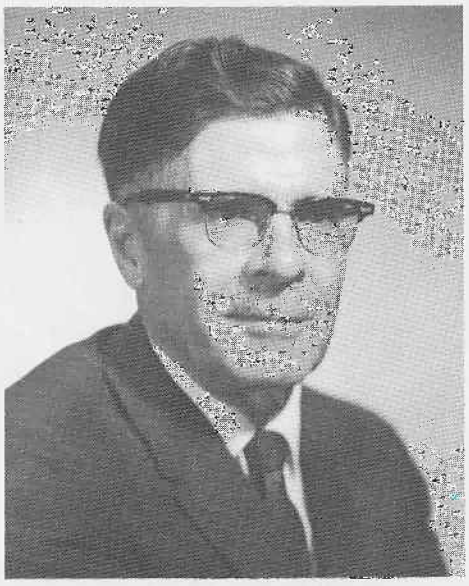
Adapted from Lord Mansfield

It is highly likely that no justice who has served on our Court has had a wider or more varied experience, particularly in the judicial field, than Justice Tuckett. He served in each of our courts of our system existing at the time: the Juvenile Court, the Provo City Court, as judge advocate in the Army, in the Fourth District Court and in the Supreme Court of our state.

He was born May 12, 1905, in Santaquin, Utah, to James A. and Arminta Smith Tuckett. There, along with his six brothers and sisters, he spent his boyhood and youth. During his growing up, he engaged in the usual boyhood activities and sports. He was serious minded and well behaved; and he was unusually faithful and diligent in doing his share of the varied tasks in such a family and in working at numerous jobs available in that farming community.

After graduating from the eighth grade in Santaquin, he attended and completed high school in the neighboring larger town of Payson.

In his early youth, he decided he wanted a career in law, and throughout his lifetime, he continued with admirable zeal and persistence toward that objective. In the most literal sense, he worked his way through law school. After completing high school, he worked as a common laborer in the Eureka Standard Mine to earn money to attend college, where he also worked part time. When money ran short, he returned to work at the mines to recoup his finances and return to school. It seems almost unbelievable, but I quote the exact words of his brother, Earnest: "He returned and worked a year at a time as a common laborer in the mines, seven days a week, with no Sundays or holidays off," so he could earn and save enough to go back to school. Through this experience, he intimately associated and rubbed shoulders with laboring people, so he knew their thinking, attitudes and habits, which later fused into and was an important part of his legal and judicial work.



Hon. Robert LeRoy Tuckett

He graduated from the University of Utah Law School (now called College of Law) in June 1931 and began his practice of law in Provo. In 1935-36, he served for two years as assistant Utah County attorney. He was appointed as Juvenile Judge in Provo on June 1, 1937, and served there until November 30, 1938.

Meanwhile, he and Elda Perry were married November 1, 1938, in Provo. They became parents of two children, son Robert P. Tuckett and daughter Terrie T. McIntosh, both now successful adults with families of their own.

He resigned his juvenile judgeship to accept an appointment as Provo City judge commencing January 1, 1939, and continued in that position until he resigned effective January 26, 1942, to answer his call to active duty in the Army. This was occasioned by the fact that he had taken courses in ROTC at the University. He was commissioned successively as a second lieutenant, first lieutenant, captain and major. During his tenure there, he acted as judge advocate at Ft. Lewis, Washington. When the war ended, he received an honorable discharge from that service and returned again to Provo to practice law.

A noteworthy and outstanding characteristic of Justice Tuckett was his reserved and unassuming personality. He sought no publicity nor glory for himself. His shyness and modesty made him an apt personification of the aphorism: "Humility, that old sweet root, from which all other virtues shoot."[1] Consistent with his being a private, introverted person, he was extremely reticent about extending his confidence to others; and his wife and family affirm that this was true, even with them. But as to those who pierced the shell of his outer reserve, he was compassionate and understanding, and quite willing to freely discuss his ideas and his philosophy. He possessed a wry sense of humor. Accused of being a philosopher, he would rejoin with something like the fairly well-known quip: "You know a philosopher is a man who talks about things he doesn't seem to understand very well; and makes it seem like it's your fault."

In the fall of 1948, he was elected a district judge and took office January 1, 1949, and served there continuously for 17 years until 1966, when he was appointed to the Supreme Court.

In performing his duties as a district judge, he believed in and scrupulously adhered to what many regard as one of the most cardinal of virtues for judges: the principle of judicial restraint. He had the equanimity and assurance of mind to accept and apply the law as it had been properly established: by constitutions, legislation and judicial decisions, resisting any personal predilection or desire to change it to suit his own liking as to what he thought it ought to be.

He was not particularly talkative, either on or off the bench. He seemed to be totally committed to the idea that "I am seldom embarrassed by things I do not say." He had the uncanny faculty of knowing what not to say, and when not to say it, and the patience to let others speak their piece.

A major foundation of his thinking was his breadth of vision and depth of perception to see the whole of society as a great complexity of competing units, and his further insight to see that there is value in perceiving the separate competing parts and their relationship to one another. The major ones of which are: on the one hand, oneself (and perhaps his family) competing with the rest of society; and on the other hand, the whole of society competing with him. These interests, though in competition, are necessarily interrelated and dependent upon each other. The important fact is that there exist some reasonably accommodative balance between them.

When this fails, the result is undue oppression and deprivation of individuals which compels so many of our people to dwell in want and unproducing poverty. It is hardly open to question that this and other economic motivations contribute largely to the development of the maladjusted, the anti-social and criminally inclined individuals who fail or refuse to see the desirability and necessity of conforming their conduct within the rules and think they can cheat society. It is for this group that the greatest efforts and expense of law enforcement and the administration of justice are incurred.

In treating those difficulties, he exercised both wisdom and compassion with a view to making substantial contribution in his judicial work. He had a firm conviction that to attempt to control force is usually not very effective, and is often counterproductive; and that a better method is to resort to communicating knowledge and the use of reason and persuasion. We clearly saw and tried to show them the ultimate desirability of conformity, in accordance with the aphorism: "If you are on the right side of the law, the law is on your side." Nevertheless, though in some instances he may have been regarded as strict, he acted with dignity and decorum, realizing that a supreme test of virtue is to have power and not abuse it. In helping such miscreant individuals, he insisted that the ultimate in kindness in the long run is the courageous imposition of what fair and reasonable minds see as the requirements of justice, which it is better to see with a free mind, not cluttered up with old cliches and prejudices, and has "learned" so much that is not necessarily so that it has to be "unlearned."

In June 1966, Justice Lester A. Wade died, leaving a vacancy in the Supreme Court. Because of Judge Tuckett's unquestioned integrity and his many years of faithful and capable service in the judiciary, the governor called him into his office and, in the presence of others, requested Judge Tuckett to accept an appointment to the Supreme Court. The judge countered that he was quite contented and happy as a district judge in Provo, where he had his home, his family and his friends, and had no desire for such an appointment. However, after some discussion and it appearing that it would fit into the governor's plans with respect to other appointments, Judge Tuckett accepted his proffer. He later explained that he did so because he did not want to selfishly stand in the way of the advancement of others.

In responding to an inquiry as to his comparison of the work on the Supreme Court with that of his prior judicial experience, he wrote the thought common to many judges: "The work on this Court consists of reading, researching, reasoning and writing decisions. They are published in permanent volumes, and so it is all, including our mistakes, made public and permanently preserved. While the work is very interesting and in a sense satisfying, it is less personal and lacks the vitality of human interest in more frequent and closer contact with court personnel, lawyers and the public by a judge of the trial court."

The desire and necessity of brevity in this biographical sketch precludes any survey of individual cases. But it is appropriate to make some general observations about his ideas and his judicial work. As his opinions will show, he was conscientious, diligent and methodical. His custom was to avoid prolixity of and meandering of any kind; his plan was to state the case, analyze the controversy and go directly to the decisional points. Indeed, in the main he followed the old but valuable advice to "have a good beginning, and a good ending, and get the two as close together as possible."

He left with us quite the measure of a man, as a lawyer, a soldier and a judge. In our ever-changing world, nothing seems more enduring than memories. By the brightness of his mind, the extent of his knowledge, and his undeviating adherence to fundamental and accepted principles, he made his significant contribution to our law and the administration of justice and he brought enlightenment to those whose lives he touched, which will continue to do so and expand down the continuum of time. Whatever else may be said, that legacy of memory and influence on our lives remains with us. In that sense, it is immortal; and it deserves to be recorded and preserved.

Though he was never much given to make a display about it, he was always a true American patriot. He had full knowledge and appreciation of the sources and the values of the liberties which are assured in our democracy, which he felt his bound duty to protect. Yet he did not have any illusion as to its oftimes declaimed "perfection." This in his toleration of the sometimes facetiously made remark that "Democracy is the worst form of government, except any other you can think of."[2] Quite aware that it has faults and shortcomings, he correctly viewed it as an ongoing expression of the people in attempting to deal with ever-arising problems. He realized that though it is less than perfect, it has within it the means of the endless process of striving toward remedying its faults and supplying its deficiencies.

As a thoughtful person, he was also sensitive that, correlated to the above, we have lagged behind in our efforts toward economic democracy; that there has existed and continues to exist serious and troublesome problems relating to the disparity in the ownership and control of the wealth and power by the few, as compared to the production and consumption by the many; and that this is one of the perennial unsolved puzzles for our most resourceful and courageous minds to work on.

His ideas about religion are also a distinguishing part of his personality. Though raised in a small town with the background of the dominant religion here in Utah, his parents were not particularly active religionists, nor of the same faith. In accordance with his freedom of thought and detachment of spirit, he chose not to fall supinely into an inherited religion as so many do. He affiliated with none. He even indulged his sense of humor about that sensitive subject. He would attend church only when the situation required it. Upon being questioned as to why, he responded, "Well, you have to listen to so much repetitious [slightly colorful words omitted] jargon,"

much of which did not impress him as being of any great interest or concern.

When walking away from a funeral in which the speaker had said the deceased was needed on "the other side" and was even now doing the work of the Lord, Judge Tuckett observed: "Needed worse than taking care of his dependents here; and working already. I didn't think they were that shorthanded; and I thought they would give him at least a two-week vacation."

In the summer of 1976, he decided and gave notice of his retirement on August 31, saying: "The court calendar will be cleared by September, leaving a successor a clean slate." His action was based in part because he would reach the mandatory retirement age of 72 the next May. After his retirement, he was able to spend more time with his family, including his grandchildren, and at his favorite recreation of golf. Health problems caught up with him, and he passed away February 7, 1988.

Justice Tuckett made no pretense of knowing definite answers to the problems of human fate. He accepted the fact that we are here, and that we have a right to be here, likely for some purposes, the principal ones being to live a life of moral rectitude; and to perform some useful service to those who are here with us; all of this more in deeds than in words. He felt more kinship and mental contentment with minds of the compass that recognize that from our little planet, which seems to be on the outer edge of the great abyss of the universe, we grope for light and knowledge; and we get but a glimpse into an incalculably vast and apparently limitless cosmos, the nature and extent of which is to us incomprehensible.[3]

He had no disagreement with the statement of the sage: "To be in doubt may be uncomfortable, but to be positive is ridiculous." He found that frame of mind, even though fraught with inscrutable mystery, to be more satisfying than that of others of a different point of view, which permits them to declare with earnest fervency that they know all of the answers with unquestioning certainty.[4]

It has been written that one of the most severe tests of the nobility of a man's character is the manner in which he faces and deals with the inevitable finality of his life. Measured by that standard, Justice Tuckett is entitled to a very high rating. According to those who were with him during his final days, he maintained admirable courage, dignity and resignation. He patiently persevered as one "with an unfaltering trust" reminiscent of the thought: "Nothing in his life better became him than the manner of his leaving it."[5]

Written for the Court by
J. Allan Crockett, Retired Justice

J. ALLAN CROCKETT was admitted to the Bar in 1931. He later served as assistant to County Attorney Harold E. Wallace. In 1940, he was elected district judge of the Third Judicial District, where he served for 10 years until he was elected in the fall of 1950 to a 10-year term on the Utah Supreme Court and then was re-elected to two more successive terms, a total of 30 years on that court, eight years of which he was chief justice. His judicial career is a matter of public record, which, together with his decisions, anyone further interested may read.

[1] *Thomas Moore; Loves of Angels.*
[2] *This pithy remark was first heard by the writer from the late great western historian Dale Morgan.*
[3] *See* Essays on Humanism, *Albert Einstein.*
[4] *Shakespeare, Measure for Measure, act II, scene 2 ". . . Man proud man, Drest in a little brief authority, Most ignorant of what he's most assured of. . ."*
[5] Cf. *Shakespeare, McBeth, act 1, scene IV.*

Bar Commission Highlights

At its regularly scheduled meeting of December 16, 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. Held an informal meeting with lawyer-legislators.

2. Approved the minutes of the November 18 Bar Commission meeting.

3. Received the report of President Kasting regarding various executive actions taken during December, with discussion of the recent decision of the Seventh Circuit Court of Appeals in *Levine*; reviewed proposed policies to be adopted with regard to the administration of the Law and Justice Center meeting spaces; considered various administrative appointments; and discussed the pending petition for Mandatory Continuing Legal Education. President Kasting noted that he and the Executive Director had met with the Uintah Basin Bar Association.

4. Received a report of the Executive Director noting the positive response and successful visitation of the ABA President-Elect Stanley Chauvin and other key ABA staff members; discussed certain proposed lawyer benefit programs; noted the continuing development of the Tuesday Night Bar Program; and noted the joint efforts of the Bar and the Salt Lake County Bar in the development of a habeas corpus appointee training project.

5. Received the monthly report of the Litigation Oversight Committee regarding developments in ongoing litigation.

6. Received a report and appearance by Salt Lake County Bar President Michael Hansen and the Honorable Ronald Boyce, U.S. Magistrate, who presented information and discussion on the habeas corpus appointee matters, and discussed the development of a training program and possible legislative actions to be taken, if appropriate, after further study.

7. Received the monthly admissions report including a hearing on a petition for authority to take the Bar exam notwithstanding the petitioner's non-attendance at an ABA-accredited law school as required by the Rules of Admission. After considering all of the materials presented on behalf of the petition and full consideration thereof, the Bar Commission voted to deny the petition.

8. Received the monthly report of the Budget and Finance Committee, including discussion on the need for study of various further financing options for the debt service on the center. A committee was appointed to explore bonding options. After discussion and review of the committee's report on budget projections for the balance of the fiscal year, the Board adopted an amended budget for the current fiscal year and commended the committee and staff for its efforts in so effectively managing the fiscal affairs of the Bar during an extremely tight budget period.

9. Received the monthly report of the Legislative Affairs Committee and appearance by its chair with most of its discussion thereon focused on the support for legislative attempts to increase judicial salaries.

10. Received a report by the Associate Director on plans for the Mid-Year Meeting of the Bar in St. George.

11. Received a report by Past President Martineau, liaison to the Judicial Council, on the activities of the Judicial Council, including the analysis of pending legislation by various committees and the continuing development of the judicial performance evaluation process.

12. Considered and approved publication of an unsolicited article for the *Bar Journal.*

13. Received the monthly report of Bar Counsel, acted on various discipline matters (some of which are reported elsewhere in this issue); reviewed summary of the caseload in the Office of Bar Counsel and took under advisement a proposed ethics opinion; appointed Joan Pappas White to the disciplinary panel to fill a vacancy.

Bar Commission Elections

Pursuant to the Rule (C)5 of the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for one member of the Board of Commissioners from the First Division, one member from the Second Division and three members from the Third Division. Applicants must be nominated by written petition of 10 or more active members of the State Bar residing in the division from which the election is to be held. Nominating petitions may be obtained from the Bar Office on or after March 13 and completed petitions must be received no later than April 15. Ballots will be mailed on or about May 1 with balloting to be completed and ballots received by the Bar Office by 5:00 p.m. on June 3.

If you have questions concerning this procedure, please contact Barbara Bassett, Associate Director, at the Bar Office 531-9077 or 1-800-662-9054.

1989 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1989 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to the Board of Bar Commissioners, % Stephen Hutchinson, Executive Director, Utah State Bar, Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, UT 84111, no later than March 20, 1989. The award categories include:

1. Judges of the Year for each of the appellate, district, circuit and juvenile court levels.

2. Distinguished Lawyer for Service to the Bar.

3. Lawyer of the Year for exemplary achievement and in recognition of one whose professionalism and lawyering skills are outstanding.

4. Pro Bono Lawyer of the Year.

5. Pro Bono Law Firm of the Year.

Law and Justice Center

During the month of December, the Law and Justice Center held approximately 70 meetings with over 1,000 individuals participating. For information on reserving space for depositions, arbitrations, mediations or other various meetings, please contact Kaesi Johansen, 531-9077.

Lawyer Referral Service and the Tuesday Night Bar

Service to the Profession and the Community are brought together by the Lawyer Referral Service and the newly instituted Tuesday Night Bar held at the Law and Justice Center. Most members of the Bar are familiar with the Lawyer Referral Service, however, they may not be familar with the Tuesday Night Bar. It is a program sponsored by our Bar association and the Utah Law and Justice Center in cooperation with several affiliated organizations.

It provides a comprehensive referral service for consumers based upon an initial assessment of the legal problem of the individual. In the past, all calls to the Bar Association requesting legal assistance were given to the Lawyer Referral Service and then referred out to an attorney. However, it became clear that many of the callers did not need an attorney or could not pay for an attorney's services. These individuals can now be seen by attorney volunteers at the Tuesday Night Bar.

An individual with a problem will be able to talk to an attorney who will listen to their problem, assess the nature of the situation and make a recommendation or referral to an attorney or appropriate agency for additional help. There is no cost to the public, thus providing a much needed service to low-income people in our community. People are seen on an appointment only basis, thus enabling the staff at the Law and Justice Center to schedule the right number of attorneys on a given night.

Since the program began in October, attorney volunteers have helped almost 100 people. The general response from both the attorneys and the public has been very favorable. The majority of questions asked concern landlord tenant, paternity, consumer, custody, wills and property dispute. While detailed legal advice is not given, the public benefits by being directed to the solution or they understand their situation does not warrant further legal action.

When the individual shows up for their appointment on Tuesday Night, they are given a client information sheet which they fill out before seeing an attorney. They are requested to describe the nature of the problem and disclose whether they are currently represented by an attorney and the name, if any, of the opposing attorney. Additionally, they provide financial information which is used to determine eligibility for Legal Aid and Legal Services help or for the newly formed Modest Means Panel of the Lawyer Referral Service.

After discussing the matter with an attorney, they can be referred to the Lawyer Referral Service to obtain the name of an attorney for further assistance, the Better Business Bureau for Mediation, Legal Aid, Legal Services or Consumer Credit Counselors. However, many problems are resolved by the volunteer attorney during the consultation.

An additional service is the formation of a Modest Means Panel of Attorneys as part of the Lawyer Referral Service. The attorneys on that panel will be asked to represent selected clients on a reduced fee basis. Guidelines have been established and the individuals eligible to receive legal service under this program will be screened for financial need at the Tuesday Night Bar.

Attorneys on this panel will provide a service to the public assisting the individual whose income is insufficient to afford an attorney's normal hourly rate but who makes too much to qualify for Legal Aid or Legal Services. The Delivery of Legal Services Committee, which developed the guidelines for this program, did not find any other State Bar Association offering such a reduced fee panel. At the same time, they "concluded that there is a class of people who have a need for legal services but have just enough income not to qualify for assistance from Legal Aid or Legal Services, Inc., but do not realistically have the resources to retain a private attorney." *Report of Utah State Bar Commission* August 9, 1988, by Delivery of Legal Services Committee.

It has always been the aim and purpose of the Lawyers Referral Service to provide a service to the public in selecting and obtaining an attorney and a vehicle for attorneys to obtain clients. It is hoped one of the benefits of the Tuesday Night Bar will be greater service to the public in those areas where they do not need an attorney and only need "Legal First Aid," a referral to an administrative agency or small claims court and at the same time provide the attorney members on the various panels of the Lawyers Referral Service with more cases of substance.

Attorneys are needed to participate in each of these programs. Some areas of the state do not have any attorney members of the Lawyer Referral Service Panel. As a result, in those locations the Bar is unable to give referrals. Your participation and input is important to the success of these programs. You are requested to sign up or call the Bar with your suggestions and comments about the Tuesday Night Bar, the Lawyer Referral Service and the new Modest Means Panel.

Solicitation: Rule Change

By order of the Utah Supreme Court dated December 19, 1988, the court made the following amendments to Rule 7.2(a) and 7.3 of the Rules of Professional Conduct:

7.2(a) Subject to the requirements of Rules 7.1 *and 7.3*, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written *or recorded* communication.

7.3(a) A lawyer may not solicit, in person, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "in person" includes in person and telephonic communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

7.3(b) A lawyer may not solicit, by mail or other written communication directed to a specific recipient concerning a specific cause of action, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship under the following circumstances:

1. The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

2. The person has made known to the lawyer a desire not to receive communications from the lawyer.

3. The communication involves coercion, duress or harassment.

These changes are made to comply with the recent U.S. Supreme Court decision of *Shapero v. Kentucky*. The changes permit targeted mailing while still maintaining the prohibition against in-person solicitation. Any questions regarding the rule change may be directed to the Office of Bar Counsel, 531-9110.

New Officers for the Legal Assistants Association of Utah (LAAU)

The Legal Assistants Association of Utah (LAAU) elected officers for 1989 at a recent business meeting held at the Law and Justice Center. Brent Scott was elected to a second term as President of the association. Mr. Scott is a legal assistant employed by Equitable Life & Casualty Company. Mr. Scott will be assisted by Vice President Kaye D. Bateman, who is employed by Watkiss & Campbell. Deanna Spillman, Robert DeBry & Associates, will serve as Secretary, and Kathryn Packard, Strong & Hanni, will serve as Treasurer. LAAU is a non-profit association which was organized to support the professional, educational and social interests of legal assistants throughout Utah. It operates and functions through various committees whose elected chairs are Marilu Peterson, CLA, Jensen & Lewis Education; Carol Elggren, CLA, US West Communications, Public Relations; Ellen Arnett, Kipp & Christian, Membership; and Carole Miller, Energy Mutual Insurance Company, Ethics.

Government Law Section Sponsors Conference

The Government and Politics Legal Society of the J. Reuben Clark Law School at Brigham Young University and the Government Law Section of the Utah State Bar will hold the Seventh Annual Conference on State and Local Government at the Provo Excelsior Hotel on Friday, March 24, 1989.

Co-sponsors are: the law firm of Ballard, Spahr, Andrews & Ingersoll, Salt Lake City, the Utah League of Cities and Towns, the Utah Association of Counties, Common Cause, and the Statewide Association of Prosecutors.

Program brochures and registration forms will be mailed to members of the Bar and others in the near future. For further information, contact Carolyn Stewart, Government and Politics Legal Society, Brigham Young University Law School, 348 JRCB, Provo, UT 84602, 378-6384.

DISCIPLINE CORNER

ADMONITIONS

1. An attorney was admonished for violating Rule 1.3 for neglect in failing to file the appropriate documents for the court's signature for a period of approximately six months after conclusion of the trial; the sanction was mitigated due to the attorney's acknowledgment of the misconduct and the fact that it was an isolated incident.

PRIVATE REPRIMAND

1. An attorney was privately reprimanded for violating Rule 1.3 for neglect in failing to file timely Docketing Statements and/or appellate briefs with the Tenth Circuit Court of Appeals in two separate cases, and for violating Rule 8.4(d) for conduct prejudicial to the administration of justice for failure to respond to the Tenth Circuit's Orders to Show Cause in those two matters, for failure to respond to the Notice of Complaint issued by Bar Counsel and for failure to appear before the Screening Panel.

2. For handling a criminal matter without appropriate criminal defense experience, and for failing to delineate clearly his separate duties as attorney and ecclesiastical counselor, an attorney was privately reprimanded for violating DR-6-101(A)(1) and DR-5-101(A) for handling a matter he is not competent to handle and for accepting employment when his judgment was likely to be adversely affected by his church affiliation.

3. An attorney was privately reprimanded for violating Rule 1.2(a) for failure to abide by a client's decisions and failure to consult with the client by filing an inaccurate Answer to a divorce complaint after failing to discuss said Answer with his client.

PUBLIC REPRIMAND

1. Ray Stoddard was publicly reprimanded for violating DR-6-101(A)(3) for neglect and DR-1-102(A)(6) for conduct adversely reflecting on his fitness to practice law, by failing to inform his client of the trial date and failing to appear for trial, resulting in a default judgment being entered against his client; and failing to file a lawsuit for over two and a half years after being retained to do so.

SUSPENSION

1. On December 19, 1988, Edward D. Flint was suspended from the practice of law for a 30-day period and placed on probation for six months for violating DR-1-102(A)(5) for conduct prejudicial to the administration of justice by threatening, coercing or intimidating a witness.

Jack Rabbit Bar Will Meet in Utah

For the first time in history, Utah will host the 1989 Annual Meeting of the Jack Rabbit Bar Association. Scheduled for Snowbird on June 2 to 4, this annual conclave of the 25-year-old organization brings together lawyers, judges and bar leaders from North and South Dakota, Montana, Wyoming, Idaho, Nevada and Utah. The current leader or "Chancellor" is Bert L. Dart of Salt Lake City. Chancellor Dart explained that the Jack Rabbit Bar is a unique and informal gathering of attorneys from states with common socio-economic and professional environments. Sharing time is unstructured but productive and the collegiality factor is very high, noted Chancellor Dart. He anticipates approximately 100 members of the Jack Rabbit Bar will attend the meeting this summer and encourages Utah lawyers and judges to consider attending.

All interested in attending this convention should call Chancellor Dart or Barbara Bassett at the Bar offices.

1989 Bob Miller Memorial Law Day Run

The 1989 Bob Miller Memorial Law Day Run is scheduled for April 29, 1989. The course will remain the same and begin at Pioneer Trail State Park, "This is the Place" monument. Despite a great deal of agitation for change in the rules for law firm team composition, last year's rules will remain in place. Preregistration is $8 and day-of-registration is $10. T-shirts to all finishers. If you have any questions, please contact Gary L. Johnson at Richards, Brandt, Miller & Nelson.

Notice to Federal Practitioners

The United States Court of Appeals recently adopted the following policy regarding affirmance or enforcement without opinion:

> Because of its heavy work load and in recognition of its fundamental obligation to decide cases in a just and timely manner, the court, in its discretion, may affirm or enforce without opinion a judgment or order of a trial court or agency, if the court determines that an opinion would have no precedential value and that any one of the following circumstances is dispositive of the matter submitted to the court for decision: 1. a judgment of the district or tax court is based on findings of fact that are not clearly erroneous; 2. the evidence in support of a jury verdict is not insufficient; 3. the order of an administrative agency is supported by substantial evidence on the record as a whole; or 4. no error of law appears. See 10th Cir. R. 36.1.

Children's Services Society Offers Post-Adoption Counseling Services

The Children's Service Society of Utah is now offering counseling for six months following adoption to birth mothers who place their babies privately through attorneys. The fee is $500 for both group and individual counseling provided during the six-month period. Counseling will focus on loss, grieving and separation issues, with the purpose of enabling the young woman to come to terms with her adoption decision. Adoptive parents will receive extensive background information on birth mothers. Bimonthly reports from adoptive parents will be used to assure the birth mother that her child is fine and adoption was the right thing to do. All information will be exchanged through attorneys and will be non-identifying. For more information, contact Pam Wacker at 355-7444.

Notice to the Bar and the Public

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100-702, that was signed by the President on November 19, 1988, amended the removal and diversity provisions of title 28, United States Code, as follows:

REMOVAL BONDS: Effective November 19, 1988, removal bonds have been abolished. Section 1446(d) of title 28, United States Code, which required the bond to be posted when the removal petition was filed, was repealed by the above-cited 1988 Act. Although the Act did not strike out a reference to the bond in section 1446(e), it is clear that the removal bond requirement no longer exists. The Act also changed the term "petition for removal" to "notice of removal."

DIVERSITY JURISDICTION: Effective May 18, 1989, the amount-in-controversy requirement for diversity of citizenship jurisdiction will increase from $10,000 to $50,000. Section 201(a) amends 28 U.S.C. 1332(a) to increase the amount. The new minimum dollar amount will apply to all diversity cases filed on or after that date.

If you have questions, please contact the Office of the Clerk, United States District Court for the District of Utah.

Update on the 1989 Annual Meeting of the Utah State Bar

Members of the Bar are encouraged to start planning now to attend the Annual Meeting of the Utah State Bar which will be held this year in Sun Valley, Idaho, from June 28 through July 2, 1989. Annual Meeting Chairman Michael Mazuran has indicated that the Annual Meeting Committee has put together a program which provides exceptional CLE, helpful handouts and forms, plenty of opportunity for socializing and free time for members of the Bar and their families to enjoy the Sun Valley area.

The first general session of the Annual Meeting will begin at 8:00 a.m. on Thursday, June 29, 1989. That session will feature, among other things, the Litigation Section Showcase. The Litigation Section program committee has assembled a meaty program of outstanding speakers and subjects to assist practicing attorneys to maximize their success in litigation. That afternoon, a variety of sporting events and activities have been scheduled, including the first annual President's Cup Golf Tournament, tennis, volleyball, fly fishing, trap shooting and other exciting activities. The evening allows free time to explore Sun Valley and surrounding areas and their related night spots.

On Friday, June 30, various sections have scheduled breakfasts to begin the day and a Super CLE session will be held followed by the awards luncheon and section breakout sessions in the afternoon. The Franchise Section, Probate and Estate Planning Section and Young Lawyers Section are all preparing presentations that should be of interest to attending members of the Bar. Friday evening, Annual Meeting attendees will enjoy a barbecue cookout at Trail Creek together with a great program of country music and other activities.

Saturday's events on July 1 will begin with the annual Fun Run followed by a morning general session on "Managing Your Practice and Enhancing Profitability"; an outstanding program featuring helpful solutions to many concerns affecting all lawyers will be presented. The program features outstanding participants in our legal community who will present, among other things, information regarding pension and profit sharing for lawyers, efficient office administration and handling personnel, and other topics to assist lawyers in achieving an organized and profitable practice. The afternoon has been left as open time for individual and family activities. The evening's activities feature an ice show and buffet at the Sun Valley Lodge. On Sunday morning, July 2, an early morning brunch is available at Sun Valley for interested Bar members prior to check-out time.

The foregoing represents only a sample of the activities and program that will be waiting for Bar members at the Annual Meeting in Sun Valley. Each of you are encouraged to circle the dates of June 28 through July 2, 1989, and plan now to attend.

American Blind Lawyers Offers Services

The American Blind Lawyers Association, which assists law students, lawyers, judges and other legal professionals in meeting the special challenges created by visual impairment, is seeking assistance in identifying law students or legal professionals who might benefit from the association.

According to Stephen Speicher, President of ABLA, the association "acquaints courts, law school admissions offices, Bar examiners and the Bar in general with the many ways in which visually impaired persons can go beyond mere coping to a successful career in law."

Where special needs appear to create conflicts with established practice (such as use of tape recorders in court), the association advises concerning possible solutions.

"We share war stories, practice techniques and information about the latest adaptive technology," Speicher said.

Persons who are visually impaired or know others with needs addressed by the association are asked to contact Stephen Speicher at 500 Centerstone, 100 N. 12th Street, Lincoln, NE 68508, (402) 475-8355.

Law Day Committee Seeks Volunteers

The Law Related Education and Law Day Committee of the Utah State Bar is in desperate need of volunteers to man fair booths, act as coaches, judges and other participants in the mock trial competition, to act as speakers, hosts or hostesses and to provide other important volunteer services for the upcoming Law Day activities. Please contact Bryan A. Larson at 521-4135 if you can assist in the worthwhile community projects for Law Day.

Claim of the Month

ALLEGED ERROR AND OMISSION

Plaintiff alleges conflict of interest in real estate projects.

RESUME OF CLAIM

The Insured became a partner in various real estate projects with the plaintiff whereby the Insured would provide the financing and the plaintiff would develop the property for a percentage interest after the property was sold. All agreements and contracts were completed through the Insured's firm.

The plaintiff is demanding damages for amounts that are due as a result of breach of contracts and agreements in the real estate dealings with the Insured as well as for damages in failing to properly represent him as an attorney.

HOW CLAIM MAY HAVE BEEN AVOIDED

Attorneys often do not isolate their private business ventures and their law practice. Even if another member of the firm handles the legal proceedings, the plaintiff can later allege a conflict of interests.

If an attorney is in business with a client, the best safeguard is to refer them to another law firm to represent their interests.

YOUR BLOOD or YOUR MONEY!!!

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

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

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

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

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

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

Young Lawyer Section
I.H.C. Blood Drive Endowment
% BRIAN M. BARNARD, Chairman
214 E. Fifth S.
Salt Lake City, UT 84111-3204

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

Notice of Election of Trustees

Notice is hereby given in accordance with the bylaws of the Utah Bar Foundation that an election of two trustees to the Board of Trustees of the Foundation will be held at the annual meeting of the Foundation to be held in conjunction with the 1989 Annual Meeting of the Utah State Bar in Sun Valley, Idaho, on June 28 through July 1, 1989. The two trustee positions which are up for election are currently held by David E. Salisbury and Stephen B. Nebeker. The term of office is three years.

Nomination may be made by the general membership of the Foundation by submission of a written nominating petition identifying the nominee, who must be an attorney duly licensed to practice in Utah, and signed by not less than 25 attorneys who are also duly licensed to practice law in Utah. Petitions should be mailed to the Utah Bar Foundation, 645 S. 200 E., Salt Lake City, UT 84111, so as to be received on or before April 15, 1989. Copies of the form of nominating petition may be obtained by contacting Kay Krivanec at the above address.

The election will be conducted by secret ballot which will be mailed to all members of the Foundation on or before May 28, 1989.

First row, left to right: Earl Tanner, Calvin Behle and Hon. J. Thomas Greene Jr. Second row: Ellen Maycock, H. Michael Keller, Richard C. Cahoon, John Lowe, Joe Novak and LaVar Stark. Not present for picture: Elder James E. Faust, Scott Matheson, Harold Christensen, Stephen B. Nebeker, Hon. George W. Latimer, David E. Salisbury, Hon. Norman H. Jackson and William O'Connor Jr.

Trustees Gather

On December 13, 1988, the Utah Bar Foundation celebrated the 25th anniversary of its incorporation by hosting a luncheon at the Alta Club for past and present Trustees. Cal Behle and Earl Tanner, two of the original incorporators, reminisced about the beginnings of the Foundation. Cal Behle explained that the idea of incorporating a bar foundation was first conceived in the 1930s, but postponed because of World War II. The idea finally came to fruition on December 13, 1963, when Calvin Behle, Earl Tanner and Junius Romney incorporated the Utah Bar Foundation. These same incorporators, together with James E. Faust and Charles Welch, served as the Foundation's first Trustees. Cal Behle told the party that the original goals of the Foundation were to improve the image of attorneys and to help the community.

Richard Cahoon, President of the Utah Bar Foundation, then addressed the Trustees and reported on the current status and financial condition of the Foundation and how the original goals had been successfully pursued. The past trustees were impressed with the success of the Foundation's IOLTA program and the substantial grants made by the Foundation to various law-related public projects. Each of the Trustees was presented with a copy of Clifford Ashton's book, *The Federal Judiciary in Utah*, which had been published under the Foundation's Judicial History Project and funded, in large part, by contributions from Cal and Hope Behle.

1989-1990
Utah State Bar
Request for Committee Assignment

I. Instructions to Applicants: All applicants for committee assignment will be assigned to a committee, with every effort made to assign according to choices indicated. Service on a Bar committee includes the expectation that members will regularly attend meetings of the committee. Meeting frequency varies by committee, but averages one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside the Salt Lake area are encouraged to participate in committee work. Many committees can accommodate to travel or telephone conference needs and much committee work is handled through correspondence, so it is rarely necessary for such members to have to expend large amounts of time traveling to and from meetings. Any questions may be directed to: Paige Holtry, Bar Programs Administrator, at 531-9077.

II. Applicant Information

Name _____

Address _____

_____

Telephone _____

Most Recent Committee Assignments _____

_____

For each committee requested, please indicate whether it is your first, second or third choice and/or whether it is for reappointment (R). For example:

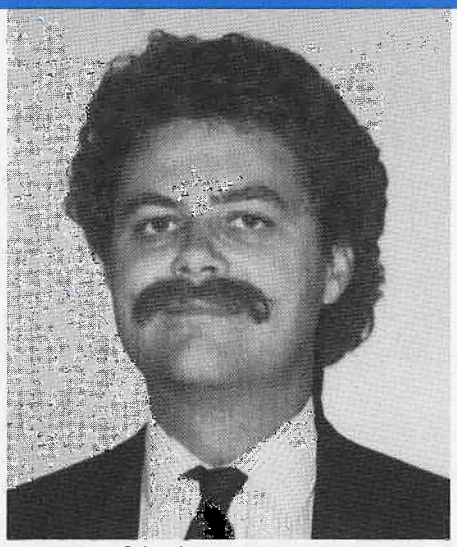
2 Bar Journal
1 R Character and Fitness

_____ Advertising
_____ Alternative Dispute Resolution
_____ Bar Examiner Review
_____ Bar Examiners
_____ Bar Journal
_____ Character and Fitness
_____ Client Security Fund
_____ Continuing Legal Education
_____ Courts and Judges
_____ Delivery of Legal Services
_____ Disciplinary Hearing Panel
_____ Ethics Advisory Opinion
_____ Ethics and Discipline
_____ Fee Arbitration
_____ Law Related Education
_____ Lawyer Benefits
_____ Lawyer Referral Service
_____ Lawyers Helping Lawyers
_____ Legal Economics
_____ Legal/Medical
_____ Legal Net
_____ Legislative Affairs
_____ Needs of Children
_____ Needs of the Elderly
_____ Needs of Women and Minorities
_____ State Securities Advisory
_____ Unauthorized Practice of Law
_____ Professional Liability Insurance
_____ Tuesday Night Bar

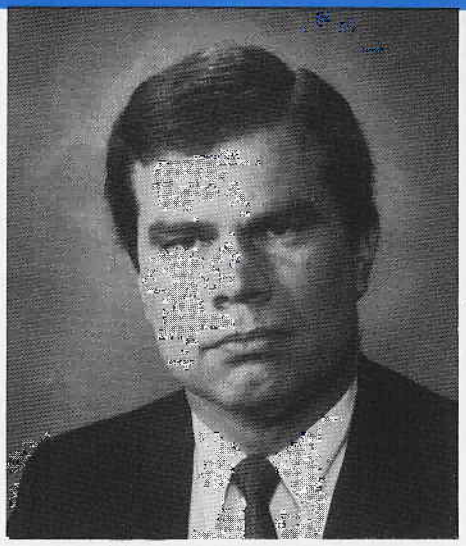
Please return this form to Paige Holtry, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111 by March 15, 1989.

CASE SUMMARIES

By William D. Holyoak and Clark R. Nielsen



William D. Holyoak



Clark R. Nielsen

POLICE ENTRAPMENT; EFFECTIVE ASSISTANCE OF COUNSEL

The Utah Supreme Court (J. Durham) affirmed Colonna's conviction of aggravated robbery, rejecting his claim that he was entrapped to commit the offense by a participating undercover officer. Defendant claimed that the crime would not have occurred but for the officer who provided defendant drugs, alcohol and transportation. Because Sect. 76-2-303(2) excludes entrapment as a defense to "threats of bodily injury" and the aggravated robbery included such threats, there was no entrapment in this case. The Supreme Court refused to condone the unorthodox conduct of the undercover officer in encouraging defendant's criminal activities, but held that the conduct was not so outrageous in this case as to "shock the conscience" or violate due process of law. While declining to adopt a New York court test for entrapment, the Utah Court also declined to expound upon the statutory elements of the defense in Utah Code Ann. Sect. 76-2-303(1).

Defendant's claim of ineffective assistance of counsel was also rejected by concluding that even if counsel failed to object to objectionable material, the outcome of the trial was not reasonably likely to have been different.

State v. Colonna, 97 Utah Adv. Rep. 20 (Sup. Ct. 12/13/88).

MURDER, SECOND DEGREE, AND JURY INSTRUCTIONS

Defendant's second degree murder conviction was affirmed by the Utah Supreme Court in a lengthy opinion discussing the propriety of several jury instructions (J. Stewart). First, jury unanimity as to which of the statutory mens rea elements defendant possessed is not required for a second degree murder conviction. Also, jury instructions given on second degree murder and manslaughter were properly patterned after the statutory language of the respective offenses in Utah Code Ann. Sect. 76-5-203 and 205(1).

The element of "depraved indifference to human life" requires an objective evaluation of the risk defendant created under the facts and circumstances of the case. "Depraved indifference means an utter callousness toward the value of human life and a complete and total indifference as to whether one's conduct will create the requisite risk of death." The court also discussed the difference between reckless manslaughter and "depraved indifference," as applied in several recent Utah decisions.

The contention of ineffective assistance of counsel because an expert witness who had consulted with the defense was allowed to testify for the prosecution was also rejected. *State v. Standiford*, 98 Utah Rep. 43 (Utah Sup. Ct., 12/30/88).

Note: A claim of the ineffective assistance of counsel is raised in a growing number of cases. It is one of the most frequently raised issues on appeal, but is almost always held to be without merit under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Frame*, 723 P.2d 401 (Utah 1986); and *State v. Lovell*, 758 P.2d 909 (Utah 1988).

MINIMUM MANDATORY SENTENCING FOR CHILD ABUSE

The minimum mandatory sentence in Utah Code Ann. Sect. 76-5-406.5 does not violate the equal protection clauses of the U.S. and Utah Constitutions and is not cruel or unusual punishment. Defendant was convicted of child sodomy. At sentencing, defendant presented evidence that a treatment program was a more desirable alternative to a mandatory prison sentence. The Utah Supreme Court (J. Durham) affirmed the sentence, holding that defendant's equal protection rights were not violated by Sect. 76-5-406.5 which permits a "parental" class of offenders to be eligible for sentence suspension or parole.

Nor does the statute impose a sentence which, in relation to the crime committed, shocks the moral sense of a reasonable person. Therefore, there is no cruel and unusual punishment. *State v. Bastian*, 97 Utah Adv. Rep. 10 (Sup. Ct., 12/09/88).

Note: Minimum mandatory sentencing laws have consistently survived challenges under the equal protection clause, cruel and unusual punishment clause and separation of powers doctrine. *State v. Bishop*, 717 P.2d 261 (Utah 1986). Mandatory sentencing schemes have also been upheld as not vague or arbitrary so as to deny due process of law, or as an infringement on the powers of the Judiciary or of the Board of Pardons. *State v. Bell*, 754 P.2d 55 (Utah 1988); *State v. Egbert*, 748 P.2d 558 (Utah 1988); *State v. Shickles*, 760 P.2d 291 (Utah 1988). *See also State v. Egbert*, 748 P.2d at 561-67 (J. Durham and J. Zimmerman, dissenting) for discussions of judicial sentencing guidelines in mandatory sentence cases.

RIGHT TO PUBLIC TRIAL

A trial closure order by the trial judge violated the accused's right to a public trial when the order was unsupported by any evidence and findings of fact that would justify an except to the right granted by Art. 1 Sect. 12 of the Utah Constitution. *State v. Crowley*, 98 Utah Adv. Rep. 22 (Sup. Ct. 12/22/88) (J. Durham).

RIGHT TO COUNSEL

A criminal accused is not entitled to confer with his counsel during a brief recess of the trial during which he was testifying. So held

the U.S. Supreme Court (J. Stevens) in a 6-3 decision. When a defendant becomes the witness, he has no constitutional right to advise from his lawyer while he is testifying. *Peery v. Leeke*, U.S. Supreme Court, No. 87-6325, 57 U.S.L.W. 4075 (1/10/88).

NAME CHANGE—BEST INTEREST OF CHILD

The plaintiff Hamby appealed from a refusal of the trial court to allow a change of surname for her children. After Hamby and Jacobsen were divorced, Hamby resumed her premarriage name, but the trial court refused to allow the children to adopt the "Hamby" surname instead of "Jacobsen."

The Utah Court of Appeals (J. Greenwood) reversed and concluded that the evidence did not support the conclusion that the children's retention of the "Jacobsen" surname was in their best interests. The appeals panel observed the errosion of the "longstanding social convention" naming children with the father's surname. Relying upon *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986), the court refused to impose a rebuttable presumption in favor of the father's name. The children's best interests is the "paramount consideration in determining whether the name should be changed."

In determining the children's "best interests," the court considered the respective parent-children relationships, potential embarassment or inconvenience to the children, the length of time a name had been used, parental motivations and a possibility of insecurity or lack of identity. Although the court's language is unclear as to whether it considered the "best interests of the child" to be a factual determination or legal conclusion, the court reviewed both the facts and the legal conclusions in deciding that the proffered evidence below did not support the factual findings and that certain findings did not support the legal conclusions drawn therefrom. *Hamby v. Jacobsen*, #880026 (Utah Ct. App., 1/24/89).

LETTERS

(continued from page 4)

Editor:

The Utah Supreme Court recently appointed an Ad Hoc Committee to study the rules of integration of the Utah State Bar. An in-depth review of the nature and structure of the Bar has been needed for some time. Since the Bar's integration in 1931, no one has examined the philosophical underpinnings of the organization.

The Utah State Bar attempts to function with three conflicting roles: a public agency *v.* a compulsory membership organization *v.* a private voluntary association.

As a private voluntary organization, it has a strong claim to freedom from government intervention; as a public agency, it must be held accountable for its actions to the public at large; and as a compulsory membership organization, it is subject to the scrutiny of its captive members.

Can these conflicting roles be reconciled? How can the rights of the public and of compulsory members be protected by the organization? How can ideals of professionalism be served when membership is mandatory?

Should not this topic and these questions be considered in a broad and open debate on the pages of the *Utah Bar Journal*?

Brian M. Barnard
Attorney at Law

We welcome letters on the subject.

Editor

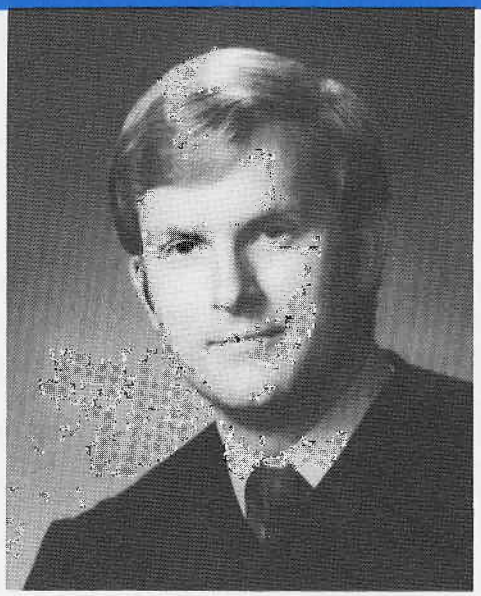
ANNOUNCEMENT AND INVITATION

The Utah Supreme Court has approved the Bar's petition to adopt Mandatory Continuing Legal Education in Utah, to be effective December 31, 1989. Utah now becomes the 35th state to have approved MCLE. The petition was granted conditioned on the following:

1. That the program become effective December 31, 1989.
2. That the Bar solicit applications for the 15-member state board, with a view toward achieving a broad-based, representative board, and to thereafter present the applicants to the Court for appointment.
3. That the duly constituted board promptly provide to the Court for approval a concise set of rules and regulations governing the administration of the program.
4. That members of the Judiciary be exempted from the program, but in turn be required to satisfy a like continuing educational program to be coordinated and administered by the Judicial Council.

Accordingly, the Board of Bar Commissioners is now soliciting applications for nomination to the 15-member state board which will administer the MCLE program. The Board will handle program accreditation, oversee certification procedures and implement the specific rules and regulations governing the program. Staff support will be provided by the Bar.

You are invited to apply for nomination for appointment to the MCLE Board by submitting a letter of application, current resume and any additional information you wish to include. Address your application to the Board of Bar Commissioners, % Stephen F. Hutchinson, Executive Director, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111. Applications are due on March 15, 1989. For further information, please call Stephen F. Hutchinson at 531-9077.



Privileges in Utah Law

By Judge Michael L. Hutchings

On April 13, 1983, the Utah Supreme Court adopted the new Utah Rules of Evidence. These rules became effective for use in Utah state court proceedings on September 1, 1983. With a few but significant exceptions, the Supreme Court adopted recommended rules drafted by the Utah State Bar Rules of Evidence Advisory Committee (hereinafter referred to as the Advisory Committee).

In the area of evidentiary privileges, however, the Court did not accept the recommendations of the Advisory Committee and instead promulgated Rule 501 which states:

> "Privileges are governed by the common law, except as modified by statute or court rule."

The Advisory Committee note to Rule 501 gives an explanation of the historical background to promulgation of Rule 501:

> The committee recommended a substantial revision of the privileges to be applied by the courts, and that all statutory provisions to the contrary be superseded. The Supreme Court declined to adopt this recommendation indicating that it was "disposed to delete Article V. 'privileges' from the proposed rules and thus leave the current statutory privileges in full force and effect." The Court decided instead to invite the legislature to address such statutory additions, deletions or modifications.

Every Utah trial lawyer and judge is regularly presented with evidentiary privilege issues. Privileges apply not only to court proceedings but also to discovery. *See* Rule 26(b)(1) U.R.C.P.

The Utah law on privileges is not well defined due to a combination of four factors. First, the more recognized privileges overlap in their scope and breadth and are often articulated in more than one place, i.e., in common law court decisions, state statutes, Utah and United States Constitutions and court rule. Second, there exists a lack of report case decisions construing privileges. Third, the reported case decisions often do not clearly identify the holding of the case as being grounded in a statute, rule, constitutional provision or in the common law. Often, there are differences in the language of the various privileges articulated in statute, common law, rule and constitution. Fourth, the legislature has not yet considered the issue of privileges in a comprehensive manner. It has promulgated, in a piecemeal fashion, extensive statutory privileges and has classified as confidential numerous communications made to, or records in the possession of, government and private agencies and individuals.

These privileges and confidentiality provisions of the law are significant because they define what information is available to litigants through discovery and what evidence is admissible in court. The cumulative effect of Utah's myriad of privileged and confidential communications and records laws is undeniable: there is much potential evidence in the hands of private and government agencies and personnel that is not discoverable nor admissible in court.

It is the purpose of this article to merely identify, and in a few instances briefly comment upon, the various evidentiary privileges and types of records and communications which presently may be inadmissible in discovery and in Utah court proceedings. Time and space limitations do not allow for a complete evaluation of this

MICHAEL L. HUTCHINGS is currently serving his sixth year as a Third Circuit Court Judge in Salt Lake City. He is a member of the Editorial Board of the Utah Bar Journal *and a member of the Board of Circuit Court Judges. In 1988, he was named Circuit Court Judge of the Year by the Utah State Bar Association.*

Judge Hutchings was admitted to the Utah State Bar in 1979. He graduated with honors from Brigham Young University with a bachelor's degree in 1976 and a juris doctorate degree in 1979. While in law school, he was a member of the Law Review. In 1979, he became associated with the law firm of Senior & Senior. In 1980, he became city prosecutor for the newly incorporated West Valley City—Utah's second largest city.

Judge Hutchings is married to the former Terry L. Marks. They are the parents of four children.

important yet little known area of the law.

It is my hope that this attempt at publishing a comprehensive list of privileges will assist the bench and Bar in better understanding the present expansive state of the Utah law of privileges.

PRIVILEGES PURSUANT TO COURT RULE

1. *Attorney Work Product Privilege.* The attorney work product privilege is articulated in Rule 26(b)(3) of the Utah Rules of Civil Procedure and protects discovery or disclosure of an attorney's work product. That rule states in pertinent part ". . . the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

2. *Court Interpreters.* Court interpreters involved in attorney client communications are granted a privilege. *See* Rule 14.4, Rules of Practice in the District and Circuit Courts.

3. *Disciplinary Proceedings Before the State Bar Association. See* Rules VI and X, Procedures of Discipline of the Utah State Bar.

4. *Sealed or Confidential Court Documents or Judicial Records. See* Rules 4-202, 203, 204 and 207, Code of Judicial Administration.

5. *Records of the Juvenile Court*, Rule 38, Juvenile Court Rules of Practice. *See also* 78-39-44(3) U.C.A.

6. *Privileges in the 1971 Utah Rules of Evidence.* The question is sometimes asked, "Are the privileges articulated in the 1971 Utah Rules of Evidence still in force?" The 1971 Rules contain some privileges not otherwise found in Utah law and numerous modifications to the privileges stated elsewhere in Utah law.

Some attorneys have successfully argued in favor of giving effect to the privileges in the 1971 Rules. They reason that the Utah Supreme Court intended to leave the complete status quo of the law of privileges existing in 1983 in full force and effect when it promulgated Rule 501 of the new Utah Rules of Evidence. Rule 501 states: "Privilege is governed by common law except as modified by statute or *court rule*" (emphasis added). They point out that the 1971 Rules of Evidence are court rules that were in effect when the Supreme Court promulgated Rule 501 and thus have not been repealed.

These proponents cite two main reasons underlying the Supreme Court's rejection to the Advisory Committee's recommendations regarding privileges. These reasons were its reluctance to repeal the physician-patient privilege and limit the husband-wife privilege. *See* Boyce and Kimball, *Utah Rules of Evidence 1983*, 1985 Utah L. Rev. 63, 96. Proponents correctly point out that the physician-patient and husband-wife privileges in the 1971 Rules (*see* Rules 23(2), 27 and 28 of the 1971 Utah Rules of Evidence) contain some important provisions not found in the physician-patient privilege statute, Sect. 78-24-8(4) U.C.A., nor in the husband-wife privilege provisions found in Article 1, Sect. 12 of the Utah Constitution and Sect. 78-24-8(1) U.C.A. Since the Supreme Court was concerned about preserving these two privileges, proponents argue that it could not have intended to significantly narrow these privileges by wholly repealing the 1971 Rules.

In the case of *Hofmann v. Conder*, 712 P.2d 216, 23 Utah Adv. Rep. 29 (Utah 1985), former Third District Court Judge Dean Conder ruled on the admissibility of statements Mark Hofmann allegedly made to his attorney in the presence of a hospital nurse. The issue of the attorney-client privilege arose in court argument. Judge Conder ruled that the privilege was not violated and allowed admission of Mr. Hofmann's statements. Judge Conder grounded his ruling on the attorney-client privilege statute found at Sect. 78-24-8(2) U.C.A. *and Rule 26 of the 1971 Rules of Evidence.* Interestingly, the alleged statements made by Mark Hofmann to his attorney were made in 1985—two years after Rule 501 of Utah's new Rules of Evidence was promulgated. The Supreme Court reversed Judge Conder's decision but did not clearly identify whether its decision was based on the common law, the attorney-client privilege statute or Rule 26 of the 1971 Rules of Evidence.

In 1986, the Utah Supreme Court gives guidance to resolution of this issue in a footnote in the case of *State v. Nielsen*, 727 P.2d 188, 43 Utah Adv. Rep. 13 (Utah 1986). In footnote 5 of that opinion, Justice Zimmerman, writing for a four judge majority, states that the privileges found in the 1971 Rules of Evidence have been repealed. The comments of Professors Ronald Boyce and Edward Kimball, both members of the Advisory Committee, also appear to be in accord with this position. *See* Boyce and Kimball, *supra*, at 96.

CONSTITUTIONAL PRIVILEGES

7. *Legislative Debate Privilege.* Article VI, Sect. 8 of the Utah Constitution articulates a privilege afforded to members of the legislature "for words used in any speech or debate in either house, they shall not be questioned in any other place."

8. *Husband-Wife Privileges.* This privilege is recognized by constitution, by statute and by common law. Article I, Sect. 12 of the Utah Constitution contains this language: "a wife shall not be compelled to testify against her husband, nor a husband against his wife. . ." This privilege is also stated verbatim in the Utah Code of Criminal Procedure in Sect. 77-1-6(2)(d) U.C.A. This constitutional privilege gives one spouse the right not to be compelled to testify over objection against an accused spouse in a criminal trial.

The husband-wife privilege is expanded by Sect. 78-24-8(1) U.C.A. to include communications made between spouses during marriage. Certain exceptions also apply. The statute states:

> A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor for the crime of deserting or neglecting to support a spouse

or child, nor where it is otherwise specifically provided by law.

The legislature has, however, declared the husband-wife privilege to be inapplicable to proceedings under the Uniform Reciprocal Enforcement of Support Act (Sect. 77-31-22 U.C.A.) and the Uniform Civil Liability for Support Act (Sect. 78-45-11 U.C.A.).

9. *Confidential Informant.* The Utah Supreme Court declared this privilege "to exist as a matter of due process." *See State v. Nielsen, supra,* at 17. Disclosure of the identity of a confidential informant will be permitted where the "disclosure is essential to a fair determination of the issues." In order to prevail in its motion, the defense must show that disclosure is "material and essential" to the defense. The trial judge must weigh three factors in determining whether to order disclosure of the identity of a confidential informant: 1. "the defendant's need for disclosure in order to prepare a defense"; 2. "the potential safety hazards to the persons involved"; and 3. "the public interest in preserving the flow of information from informants." *Id.* at 16.

10. *Privilege Against Self-Incrimination.* The privilege against self-incrimination is articulated in the Fifth Amendment to the United States Constitution: "No person shall... be compelled in any criminal case to be a witness against himself..." This privilege "protects an accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature..." *Schmerber v. California,* 384 U.S. 757, 761 (1966).

The Utah Constitution has its own privilege against self-incrimination found in Article I, Sect. 12: "The accused shall not be compelled to give evidence against himself..." The Utah Supreme Court in the case of *American Fork City v. Crossgrove,* 701 P.2d 1069, 1075; 11 Utah Adv. Rep. 18, 22 (Utah 1985) interpreted the Utah privilege of self-incrimination to apply only to those situations where the state seeks evidence of "a testimonial or communicative nature." In *Crossgrove,* the Utah Court overruled its more expansive interpretation of the Utah Constitutional privilege of self-incrimination first articulated in the case of *Hansen v. Owens,* 619 P.2d 315 (Utah 1980).

Two Utah statutes also contain a privilege against self-incrimination, but these statutes do not provide any greater protection to the accused than the United States or Utah Constitutional provisions. Sect. 77-1-6(2)(c) U.C.A. contains the Utah Constitutional privilege language verbatim. Sect. 78-24-9 U.C.A. states "a witness...need not give an answer which will have a tendency to subject him to punishment for a felony..."

STATUTORY PRIVILEGES

11. *Privilege Against Self-Infamy.* The privilege against self-infamy is found in Sect. 78-24-9 U.C.A. which states that a witness need not "give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed."

12. *Attorney Client Privilege.* This privilege exists at common law and also by statute. Sect. 78-24-8(2) U.C.A. states:

> An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice.

13. *Clergyman's Privilege.* The clergyman's privilege is a statutory privilege also recognized at common law. Sect. 78-24-8(3) U.C.A. states: "A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any communication made to him in his professional character in the course of discipline enjoined by the church to which he belongs."

14. *Public Officer's Privilege.* This is commonly referred to as a state's secrets privilege. It is found at Sect. 78-24-8(5) U.C.A.:

> "A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

15. *Grand Jury Privilege.* Sect. 77-11-10 U.C.A. contains a limited privilege against disclosure of a statement made by a grand juror and any other person while present at a grand jury proceeding. However, how a particular grand juror voted is absolutely privileged.

16. *Physician-Patient.* Sect. 78-24-8(4) U.C.A. contains Utah's physician-patient privilege. This statutory privilege only applies to civil actions and states: "A physician or surgeon cannot without the consent of his patient be examined in a civil action, as to any information acquired in attending the patient which is necessary to enable him to prescribe or act for the patient."

17. *Pharmacist-Customer.* Sect. 58-17-16 contains a limited privilege prohibiting pharmacists from releasing information about a customer's medical prescriptions.

18. *Osteopathic Medicine Privilege.* There is substantial question as to whether osteopaths have a separate privilege or whether they fall within the physician-patient privilege. This question is raised by Sect. 58-12-7(3) U.C.A. which states that "unprofessional conduct" includes an osteopath's "willfully betraying or disclosing a professional secret, or violating a privileged communication..."

19. *Speech Pathologist and Audiologist Privilege.* The legislature granted an unlimited evidentiary privilege to speech pathologists and audiologists in Sect. 58-41-16 U.C.A.

20. *Privilege for Interpreters for Hearing Impaired Persons.* The legislature has granted a limited privilege to interpreters for hearing impaired persons. Sect. 78-24a-10 U.C.A. states "if a hearing impaired person communicates through an interpreter to any person under such circumstances that the communication would be privileged and the person could not be compelled to testify as to the communications, this privilege shall also apply to the interpreter as well."

21. *Statements Made to Sexual Assault Counselors.* A sexual assault counselor privilege found at Sect. 78-24-8(6) U.C.A. states "a sexual assault counselor... cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication...." The definition of a "sexual assault counselor" is found in Sect. 78-3c-3 U.C.A. and means "a person who is employed by or volunteers at a rape crisis center...."

22. *Licensed Certified Social Worker-Patient Privilege.* Sect. 58-35-10 U.C.A. grants a privilege to licensed certified social workers from disclosing any information which they may have acquired from persons consulting with them in their professional capacity.

23. *Licensed Psychologist-Patient Privilege.* The licensed psychologist-patient relationship is to be accorded the same benefit as communications made between attorney and client. This privilege also applies to "any information acquired in the course of his professional services in behalf of the client." *See* Sect. 58-25-8 U.C.A.

24. *Marriage and Family Therapist Privilege.* This privilege is found in Sect. 58-39-10 U.C.A. Any communication between the therapist and the person treated is privileged and confidential. Thereafter, certain limited and defined exceptions to this privilege are articulated.

25. *Communications Made to Counselors in Premarital Counseling.* Sect. 30-1-31 U.C.A. authorizes county commissions to organize a mandatory premarital counseling program for all persons previously divorced or who are 19 years of age or younger. The commissioners can order completion of this counseling program to be mandatory before granting a marriage license to the appli-

cants. In counties where the program is in effect, "any information given by a marriage license applicant to his counselor is confidential and may not be released..." See Sect. 30-1-37 U.C.A.

26. *Communications Regarding a Petition for Reconciliation of a Marriage.* Sect. 30-3-17.1 U.C.A. grants a privilege for all communications made to domestic relations counselors pursuant to a petition for conciliation of a marriage. *See also* Sect. 30-3-16.6 U.C.A.

27. *Communications Between Persons and Communication of the News Media for Purposes of Libel and Slander Laws. See* Sections 45-2-3 to 10 and 76-9-506 U.C.A.

28. *Drug and Alcohol Test Results of Employees of Private Enterprise. See* Sect. 34-38-13 U.C.A.

29. *Health Records.* See Sections 26-25-1 *et. seq.*, and Sections 26-3-7 to 10 U.C.A.

GOVERNMENT RECORDS AND COMMUNICATIONS TO GOVERNMENT OFFICERS

There are numerous statutes wherein communications to governmental officers and the records of those communications are privileged and are not subject to disclosure in court proceedings. Some privileges are more limited and others are quite broad. The following is a listing of statutes declaring governmental records or communications to government officers to be partially or fully privileged.

30. *Information Classified as "Confidential Data" or "Private Data" Pursuant to the Archives and Records Services and Information Practices Act.* The "Archives and Records Services and Information Practices Act" found in Sect. 63-2-59 U.C.A. *et. seq.* provides for the formation of the State Records Committee which has responsibility to classify records kept by state public officers under state law or in the transaction of state business. This is an important catch-all statutory scheme to address privileges not addressed in other state statutes. If the State Records Committee classifies otherwise discoverable and admissible records as "confidential data" or "private data," they shall not "be used other than for the stated purposes nor shall it be disclosed to any person other than the individual to whom the data pertains, without express consent of that individual..." *See* Sect. 63-2-85.4(4) U.C.A.

31. *Reports to Driver License Division on Mentally or Physically Impaired Drivers.* Sect. 41-2-201(5) U.C.A. states that information in the possession of driver license division "relating to physical, mental or emotional impairment [of drivers] is confidential."

32. *Motor Vehicle Accident Reports Sent to the Department of Public Safety.* Sect. 41-6-40 U.C.A. states that accident reports submitted to the Department of Public Safety "by operators or owners of vehicles involved in accidents or by garages are without prejudice to the reporting individual and are for the confidential use of the department..." and further states that "[w]ritten reports forwarded under this section may not be used as evidence in any trial, civil or criminal, arising out of an accident..." The section allows, however, for disclosure of some basic accident information involving date, time, location, names of parties and witnesses, etc.

33. *Information Supplied to the Board of Oil, Gas and Mining by Mining. See* Sections 40-8-8 and 13(2) and 40-10-8 U.C.A.

34. *Reports to the Division of Water Rights. See* Sect. 73-22-6(1)(c) U.C.A.

35. *Information Obtained by the Judicial Conduct Commission. See* Sect. 78-7-30(3) U.C.A.

36. *Information Obtained by the Commissioner of Financial Institutions. See* Sect. 7-1-802 and 301(6) U.C.A.

37. *Information Gathered in College Disciplinary Proceedings. See* Sect. 76-8-708 U.C.A.

38. *Information Obtained by the State to Determine Energy Policy Under the Governor's Emergency Powers. See* Sect. 63-53a-4. U.C.A.

39. *Financial Information in Possession of the Commissioner of Financial Institutions. See* Sect. 78-27-45 through 50 U.C.A. *See* also Sections 7-5-6 and 7-7-12 U.C.A.

40. *Utah State Hospital Records. See* Sect. 64-7-50 U.C.A.

41. *Local and State Tax Records. See* Sections 59-1-403 and 59-10-545, 59-11-114, 59-7-158, 59-12-19, 59-2-206, 59-2-705 U.C.A.

42. *Inquiries Made to the Missing Registry. See* Sect. 76-26a-4 U.C.A.

43. *Records of Information Obtained by the Division of Corporations and Commercial Code. See* Sect. 16-10-131 U.C.A.

44. *Sex Offender Registration Information. See* Sect. 77-27-21.5(12) U.C.A.

45. *Court or Birth Records of Adoption. See* Sections 78-30-15 through 19 U.C.A.

46. *Court and State Records of Adult Protective Services. See* Sect. 62A-3-311 U.C.A.

47. *Information Obtained by the State Ombudsman for the Elderly. See* Sect. 62A-3-207 and 208 U.C.A.

48. *Civil Anti-Trust Information Obtained by the Attorney General Pursuant to the Issuance of a Civil Investigative Demand. See* Sect. 76-10-917(8) U.C.A.

49. *Child Abuse Records. See* Sect. 62A-4-513.

50. *Information Obtained by the Utah Conservation and Research Foundation. See* Sect. 63-4-8 U.C.A.

51. *Identity of Persons Investigated by the Department of Financial Institutions. See* Sect. 70C-8-103 U.C.A.

52. *Identity of Persons Investigated by the Division of Consumer Investigation. See* Sect. 13-11-7 U.C.A.

53. *Identity of Confidential Informants Reporting School-Related Controlled Substances Abuse. See* Sect. 78-3e-2 U.C.A.

54. *Information Obtained by the Divisions of Corporations and Commercial Code. See* Sect. 16-10-131 U.C.A.

55. *Attorney-Client Privilege Before the Crime Victims Reparations Board. See* Sect. 63-63-15 U.C.A.

56. *Records of the State Medical Examiner. See* Sect. 26-4-17 U.C.A.

57. *Reports Made Regarding Unprofessional Conduct of Physicians. See* Sect. 58-12-43(5) U.C.A.

58. *Records of the Industrial Loan Corporation. See* 7-8a-16(4) U.C.A.

59. *Records of the State Insurance Commissioner. See* Sect. 31A-16-109 U.C.A.

60. *Records Regarding a Patient's Involuntary Hospitalization. See* Sections 62a-12-247 and 64-7-50 U.C.A.

61. *Trade Secrets Communicated to the Industrial Commission. See* Sect. 35-9-14 U.C.A.

62. *Welfare and State Financial Records. See* Sections 62a-4-113 and 62a-9-125 U.C.A.

63. *Employment Information in the Possession of the Office of Recovery Services. See* 62A-11-107 U.C.A.

64. *State Employees' Personnel Files. See* Sect. 67-18-5 U.C.A.

65. *Public Service Commission Investigations of Accidents. See* Sect. 54-4-16 U.C.A.

66. *Certain Public Service Commission Proceedings. See* Sect. 54-3-21(4).

67. *Records of the Division of Securities. See* Sect. 61-1-83 U.C.A.

68. *Records of the State Bureau of Hazardous Waste. See* Sect. 26-14-9.5 U.C.A.

69. *Geologic and Financial Records of the Division of State Laws and Forestry. See* Sect. 65A-1-10 U.C.A.

70. *Records of the State Retirement Office. See* Sect. 49-1-403 U.C.A.

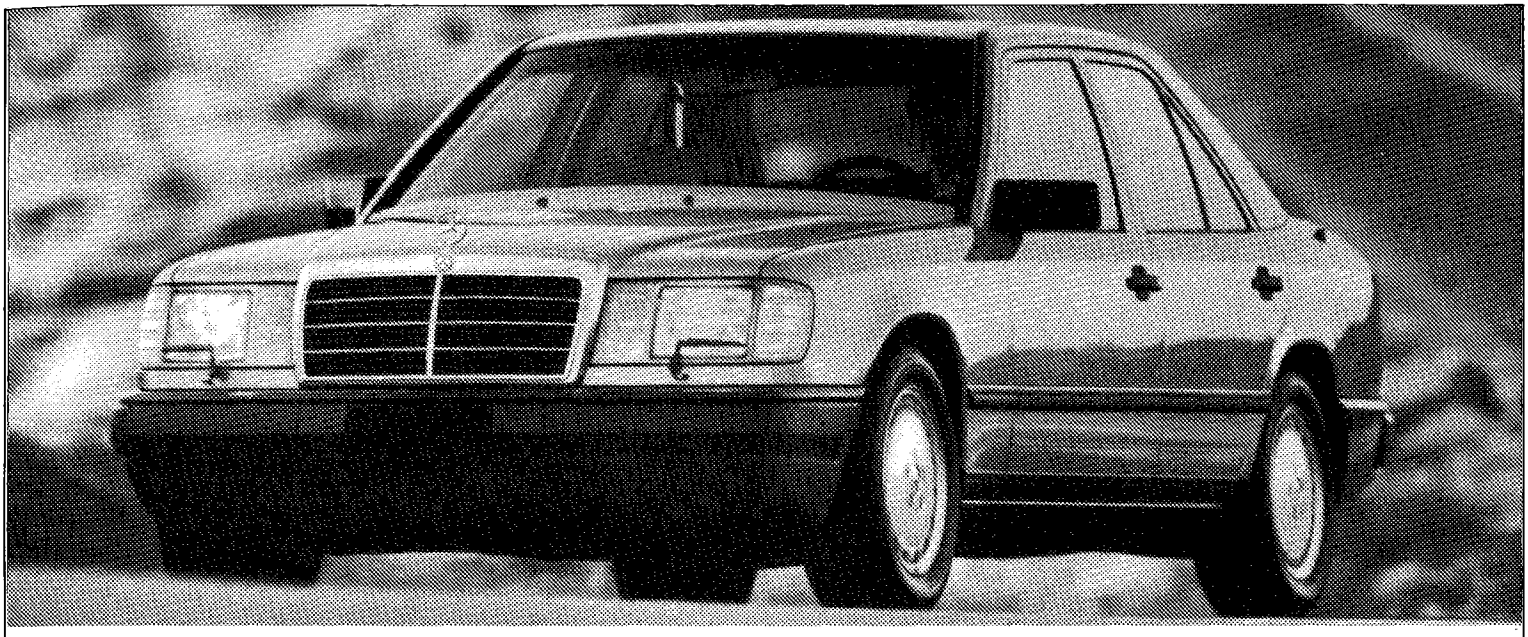
71. *Records of State Regulated Trust Companies. See* Sect. 7-5-6 U.C.A.

72. *Personally Identifiable Salary Information of Employees of State Colleges and Universities. See* Sect. 53B-24-205 U.C.A.

73. *Personally Identifiable Information Obtained by the State Office of Rehabilitation. See* Sect. 53A-24-107 U.C.A.

CONCLUSION

I have attempted to make a comprehensive listing of privileges in Utah law. Seventy-three privileges are identified as existing by constitution, common law, statute and court rule. Even more probably exist as a result of the classification authority given to the State Records Committee. The law of privileges is yet largely undefined. Many questions remain unresolved.



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UNIVERSITY OF UTAH COLLEGE OF LAW LIBRARY OFFERS SERVICES TO THE BAR

The University of Utah College of Law Library is the largest and oldest public law library in the state. The current modern and spacious building was constructed in 1981 and is joined to the College of Law by a courtyard atrium.

The collection contains 210,000 volumes plus another 70,000 volume equivalents of microforms; it includes an estimated 72,000 titles of books, subscriptions, microforms and audiovisual materials. The main floor of the library contains sets of federal and state court reports and statutes, legal periodicals and finding tools such as ALRs, digests, Shepards citators and indexes. Treatises, looseleaf and other special subject services and government documents are located on the second floor; the computerized library catalog called "UNIS" (located at the entrance to the library) should be consulted to find the call number for items located on the second floor.

Although established primarily to support the academic programs of the College of Law, the library is used extensively by the bench and Bar, the university community, several paralegal programs from across the Wasatch Front and the general public.

The amount of use of the library by attorneys and judges is difficult to measure, but we do know that it is substantial. In a survey of College of Law alumni last summer, 60 percent of the respondents stated that they used the Law Library "frequently" or "sometimes." Further, there is significant use by law clerks, law firm librarians, paralegals and runners working for attorneys and judges.

Among the many services the Law Library offers to attorney patrons are:

**Access to the Collection.* Access to the collection is open and attorneys may come in to do research.

**Check out of Materials.* Many of the treatises and texts may be checked out for up to two weeks upon presentation of a current Utah State Bar card (however, primary source materials such as statutes and court reports, and also periodicals and multivolumed treatises and looseleaf services may not be checked out).

**Reference Assistance.* Reference assistance is available between 9:00 a.m. and 5:00 p.m. Monday through Friday (reference librarians cannot undertake research projects for attorneys; however, if such assistance is required, contact the Legal Career Services office at 581-5418 to retain a law student researcher).

**Westlaw Searches.* Westlaw searches may be performed by or for attorneys at a charge of $3 per minute (rates are subject to change). Because law students get first priority at the Westlaw terminals, it is helpful to call in advance to reserve Westlaw time, particularly if reference librarian assistance is needed to perform the search.

**Photocopying.* Eight photocopy machines are located in the library, and they are heavily used; $.10 copies may be made with coins or copy cards purchased from the Law Copy Center in the basement of the law school; for non-urgent needs, the library staff will photocopy and mail requested materials to attorneys; the charge is $1 per citation (which includes the first two pages) and $.10 per page for additional pages, plus postage (allow three to four days for receipt of requested items).

**Telefax.* The Law Library has recently purchased a telefax machine and is exploring possibilities of a FAX service to attorneys. Right now we will FAX on a limited basis at a charge of $1 per page, and we hope to expand this service in the future.

**Publications Information.* Information about legal publications or how to contact certain publishers may be obtained from the Law Library acquisitions department.

Even as the Law Library is proud of the services it offers to attorneys and is continually monitoring use in an effort to respond to attorney needs, we are also conscious of limitations on what we can do for the Bar. Some of the very practical problems that we have considered are:

**Parking.* Parking is a major problem on campus, especially when the university is in session. Unfortunately, we are not in a position to offer more parking to our attorney patrons; options for weekday parking at this time include on-street parking near the law school, using meters in the parking lot behind the library or purchase of a visitors' day pass ($1.50 from Parking Services or from the Law Library circulation desk).

**Photocopying Facilities.* The availability of photocopying facilities, though recently upgraded, can still be erratic, particularly in the evenings and on weekends when service personnel are not available, and also at times when the machines are in heavy use. We continue to work with the University Copy Center, which provides copy services, to try to remedy this problem.

**Staffing.* Staffing of library services in circulation and reference is not at an optimal level. We depend very heavily on undergraduate students on the work study program, working under supervision most of the time, to staff the circulation desk. We cannot provide reference service by professionally trained staff in the evenings or on weekends. Attorney users in need of special assistance should call or come in between the hours of 9:00 a.m. and 5:00 p.m. on weekdays.

**Funding.* Funding for the library collection is inadequate. In the alumni survey referred to above, many respondents commented on outdated materials and lack of depth in the collection in certain areas. We are trying to maintain a comprehensive collection that will service the needs of law students and faculty, and also the bench and Bar, on a funding base that ranks near the bottom of a comparison with peer law schools. In recent years, the law school administration has increasingly emphasized the library in its fund-raising efforts, and we have been gratified by the support for the library shown by many alumni and friends. The prospect is bleak for increased legislative support for the library in the near future, however, and therefore these private contributions will continue to be critical to the Law Library's future growth.

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HOURS OF SERVICE

Spring and Fall Semesters:
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Summer Term:
Monday through Thursday 8:00 a.m. to 8:00 p.m.
Friday 8:00 a.m. to 6:00 p.m.
Saturday 9:00 a.m. to 5:00 p.m.
Sunday 12:00 to 8:00 p.m.

The library is closed on New Year's Day, Memorial Day, Fourth of July, Pioneer Day, Thanksgiving Day and Christmas Day. Closings on other days will be posted in advance.

PHONE NUMBERS

Acquisitions	*581-7213*
Administration	*581-6594*
Circulation and Reference	*581-6438*

STATE BAR CLE CALENDAR

VEHICLE COLLISION LITIGATION

A live via satellite seminar. Vehicle collision cases continue to comprise the largest component of personal injury litigation in the United States. Most trial lawyers are called upon at some time to advise or represent clients in connection with an auto accident. The panelists will discuss all aspects of the trial of an auto accident case and provide insight into insurer evaluation for settlement and trial. The impact of insurance coverage disputes upon the defense of an auto accident case and emerging trends in related areas such as the seatbelt defense and the imposition of punitive damages will also be topics of discussion.

Date: March 30, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

THE ART OF JURY PERSUASION: INSIGHT AND IMAGINATION IN CREATING AND PRESENTING THE THEORY OF THE CASE

A live via satellite seminar. The powerhouse in every successful case is the theory of the case. The theory embodies the advocate's insight and imagination. The theory dictates everything the advocate does, from jury selection through closing argument. The art of jury persuasion approaches several facets of advocacy from the viewpoint of the theory of the case. From around the country five experienced teachers of trial advocacy have explored the vital, governing role that theory plays in successful litigation. They will discuss and demonstrate the advocacy skills involved in closing argument, expert witness testimony, depositions and discovery. In addition, recent decisions of the United States Supreme Court affecting the law of evidence will be analyzed.

Date: April 4, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

DEALING WITH NEW AND CURRENT PENSION REGULATIONS; CONSIDERATION FOR ELECTING THE SECTION 4980A GRANDFATHER

A live via satellite seminar. This program deals with critical considerations and responsibilities in administering pension plans, with emphasis on compliance under these regulations. There are a number of long-awaited U.S. Treasury regulations which are anticipated for release in time for this program; Department of Labor regulations may be released as well. Of immediate concern will be the need to make a decision regarding whether or not to use the grandfather provisions under Section 490A, an election to be made in filing 1988 individual income tax returns whether due on April 17, 1989, or a later date permitted by extension. Topics may be shifted to allow for coverage of unanticipated new developments. The program is designed for experienced practitioners, certified public accountants, actuaries and plan administrators.

Date: April 6, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

WILL DRAFTING TECHNIQUES

A live via satellite seminar. This program reviews selected aspects of will drafting and provides guidance from a panel of experienced attorneys with diverse expertise. It offers practice techniques for lawyers who draft wills either on a regular or occasional basis. Among the topics to be covered are drafting bequests and devises, discretions, tax clauses, generation-skipping tax provisions, qualified terminable interest trusts (QTIPS) and lawyers drafting their own wills. Study materials will include sample will clauses and practice aids.

Date: April 13, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

THE TAX CONSEQUENCES OF WORKOUTS, CHAPTER 11 REORGANIZATIONS AND BANKRUPTCY LIQUIDATIONS—A PRACTICAL GUIDE THROUGH THE MAZE

A live via satellite seminar. Practitioners guiding debtors and creditors through bankruptcy reorganizations must be concerned with two different types of rules. The first deals with collection issues and the status of state and local taxing authorities as creditors of the estate. They also involve the responsibilities of the trustee and debtor to file tax returns and pay taxes. The second set of issues arises from the debtor as a continuing taxpayer. Will mere adjustment of debts create new tax liabilities, and how are the debtor's post bankruptcy liabilities affected by changes in ownership? These rules have always been complicated, but the burden on practitioners has become particularly intense because during this decade they have changed so often. This program will be of special benefit to commercial and bankruptcy lawyers and professionals, including trustees, engaged in business reorganization and bankruptcy practice.

Date: April 18, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

HAZARDOUS WASTE AND SUPERFUND: THE LATEST DIRECTIONS AT EPA

A live satellite seminar. This seminar will include in-depth coverage with key EPA and Justice Department officials of EPA's latest policies under the "Superfund" program and the Resource Conservation and Recovery Act. The program will feature interviews and detailed discussions about EPA's directions in these programs under the new administration. Emerging hazardous waste policy and legislative issues also will be discussed. Government officials and experienced private practitioners will discuss strategies for settling hazardous waste site cleanup actions, including *de minimis* settlements, mixed funding, municipal settlements and trends in cleanup technologies. Participants will discuss EPA's increased use of streamlined site assessment and cleanup procedures as well as the growing use of administrative orders to achieve rapid cleanups.

Date: April 27, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

COMPUTER LAW

Watch for detailed information in the April *Bar Journal.*

Date: May 9, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

COUNSELING BUSINESS CLIENTS ON COMPLEX INSURANCE ISSUES

Watch for detailed information in the April *Bar Journal.*

Date: May 23, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ March 30	Vehicle Collision Litigation	L & J Center	$135
☐ April 4	The Art of Jury Persuasion: Insight and Imagination in Creating and Presenting the Theory of the Case	L & J Center	$160
☐ April 6	Dealing With New and Current Pension Regulations; Considerations for Electing the Section 4980A Grandfather	L & J Center	$135
☐ April 13	Will Drafting Techniques	L & J Center	$135
☐ April 18	The Tax Consequences of Workouts, Chapter 11 Reorganizations and Bankruptcy Liquidations—A Practical Guide Through the Maze	L & J Center	$160
☐ April 27	Hazardous Waste and Superfund: The Latest Directions at EPA	L & J Center	$135
☐ May 9	Computer Law	L & J Center	$160
☐ May 23	Counseling Business Clients on Complex Insurance Issues	L & J Center	$160

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

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

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CLASSIFIED ADS

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

POSITIONS SOUGHT

Attorney with severe hearing loss (does hear with the use of an aid) seeks position with large firm or government entity doing primarily research, drafting of pleadings, memoranda, briefs and other legal documents, and other legal work where acute hearing is not essential.

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Appellate attorney needed. Responsible for researching and drafting appellate briefs and otherwise representing criminal defendants in the appellate process. Send resume and writing samples to F. John Hill, Director, Salt Lake Legal Defender Association, 424 E. 500 S., Suite 300, Salt Lake City, UT 84111.

Managing attorney in the Salt Lake City office of Utah Legal Services. At least five years of 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. Member of Utah State Bar, or to take next exam. One-day, all-essay exam.

Managing attorney in Ogden office of Utah Legal Services, Inc. Commitment to high quality legal services for the poor. Previous Legal Services' experience is preferred. At least three years of experience as an attorney; particularly interested in attorneys with a strong litigation background and management skills. Must be willing to work collectively with other staff in evaluating and handling cases. Member of Utah State Bar or willing to take next exam.

Large Denver law firm seeks associate lawyer with less than four years of experience to practice in estate planning, probate and taxation. Excellent academic credentials required. Send resume to: David Thomas III, 4582 S. Ulster Street, Suite 700, Standford Place 3, Denver, CO 80237.

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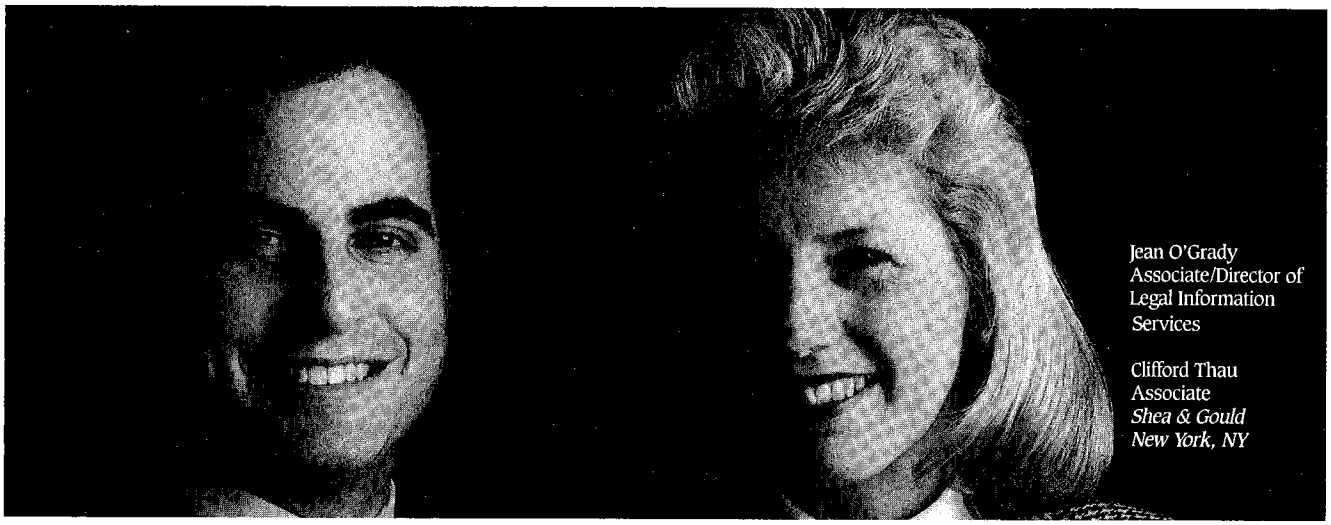

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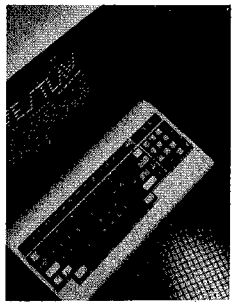

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