UTAH BAR JOURNAL

Vol. 2, No. 5 May 1989

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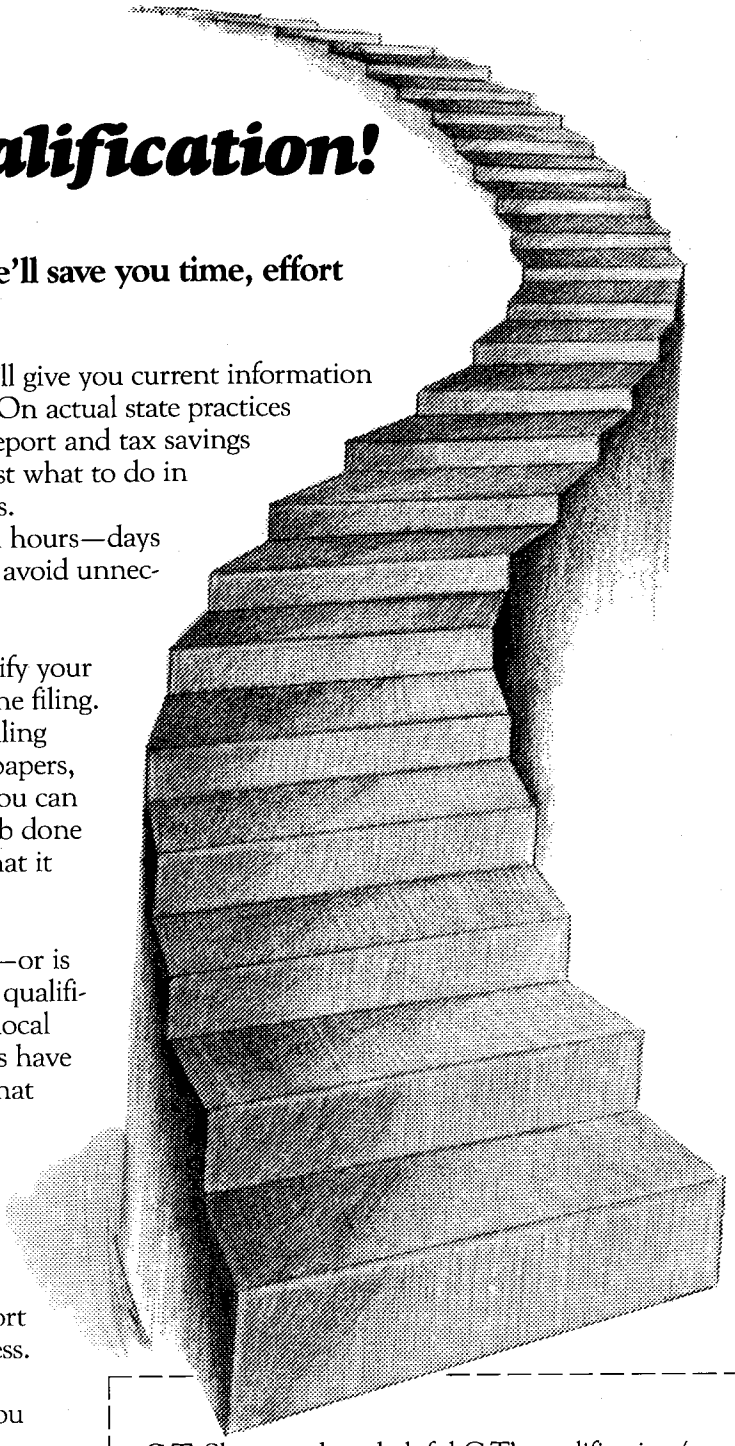

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COVER: Our thanks again to Chris Miles, an art major at the University of Utah, for this month's cover art work (he also provided the artwork for the February 1989 issue). The cover illustrates an experience between a lawyer and pro bono client.

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.

Submission Requirements and Deadlines

Questions about deadlines and submission of materials for the *Journal* are regularly received by the *Journal* staff. The answers to those types of questions are discussed below.

DEADLINES IN GENERAL

Each issue of the *Utah Bar Journal* usually hits the stands (so to speak) the first part of the month. However, the articles, materials and ads in that issue were in the office from five to six weeks earlier. The period between the deadline for materials and their appearance in print is unfortunately, but unavoidably, long and has created some confusion among our readers.

In order for material to appear in the *Utah Bar Journal*, the deadlines must be met. It should also be remembered that the *Journal* is not published in July or August.

ARTICLES, LETTERS

The deadline for articles, stories, letters, pictures, etc., is six weeks before the beginning of the month of publication. For example, articles and other stories for the September issue should be in the hands of the *Journal* staff by the 15th of July.

Anyone who is planning to submit an article, however, should keep in mind that submission by the deadline does not guarantee publication. *Journal* staff members often discuss upcoming articles several months in advance and may not have space for an unexpected (but welcome) submission on the 15th. Therefore, anyone planning to submit an article for which timing of publication is critical should discuss it with the editor (Cal Thorpe) or one of the articles editors (Leland S. McCullough Jr. or Glen W. Roberts).

CLASSIFIED ADS

Classified ads should be submitted at least four weeks before the month of publication. Taking the example of the September issue again: the deadline for classified ads would be the end of July.

Classified ads should be submitted to Paige Holtry, Utah State Bar Office, 645 S. 200 E., Salt Lake City, UT 84111. Ms. Holtry should also be contacted for rate information.

DISPLAY ADS, LAW FIRM ANNOUNCEMENTS

Space reservations for ads that are camera ready must be made by the 5th of the month prior to the month of publication (August 5 for the September issue, for example). If the ad is not camera ready, the deadline is five days earlier, the 1st of that month.

For rate and additional deadline information about lawyer and law firm announcements, please contact Paige Holtry at the Bar Office, (801) 531-9077. Shelley Bauder should be contacted for rate and deadline information about display ads. She may be reached at 2232 Foothill Drive, #F205, Salt Lake City, Utah 84109; phone, (801) 328-4102.

SUBMISSION OF ARTICLES

The *Bar Journal* is always anxious to receive articles from readers. All articles submitted will receive serious consideration for publication.

Articles should be on topics of general interest. Because the staff works on issues several months in advance, as pointed out above, authors are encouraged to discuss their work with the editor and/or the articles editors to make sure it would not be a duplication of something already submitted or planned.

Manuscripts should be typed, double spaced and accompanied by brief biographical information and a photograph of the author (preferably 3-by-5-inch, black and white). The length of articles must be reasonable and appropriate for the topic. Brief articles, as well as humorous ones, are welcome. Articles may be cut by the *Journal* editors, but cuts that are substantial or which could affect the overall impact of the article will not be made before the author is consulted. Punctuation, spelling and style will be edited by the *Journal* staff as needed.

If an article has been previously published elsewhere, the submission must be accompanied by a statement that includes the name and type of publication it was in, when it was published and any other information that would affect the editor's decision concerning publication in the *Utah Bar Journal*.

LETTERS TO THE EDITOR

The Bar Commissioners have adopted a policy concerning publication of letters to the editor.

In brief, the policy requires letters to be typed, double spaced, signed by the author and not more than 200 words in length. Letters may not be obscene, defamatory, advocate or oppose a candidate for office, solicit business or subject the Bar to civil or criminal liability. Letters will be published in the order in which they are received. No one person shall have more than one letter published every six months.

The policy was published in its entirety in the August/September 1988 issue of the *Journal*. Additional information is also available from the Bar office or the *Journal* editor.

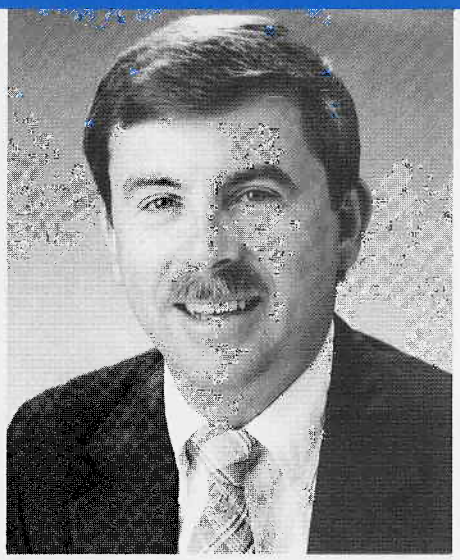
COVER ART

Journal readers are also invited to submit artwork for *Journal* covers. Both photographs and drawings will be considered.

Submission of work that has intrinsic value or is one-of-a-kind should be discussed with the editor prior to submission.

By Nann Novinski-Durando

Are We Having Fun Yet?



Kent Kasting

Now days I am hearing more than ever, lawyers who are saying "the practice of law just isn't any fun anymore"; or "it's getting harder to practice law these days"; or "the practice of law is a lot less fun now than when I started"; or "I'll get that miserable *#@"; or "I sure wish I was doing something else"; or "I sure am glad I am getting close to retirement, I can't take this anymore."

I am hearing those statements so often that I am starting to wonder whether or not the complexion, makeup and character of our profession has deteriorated to a level that the only thing we now have to look forward to is sleepless nights; fights with our opponents, partners, associates, clients, judges and spouses; and nice paychecks that we don't have the time to spend or enjoy because we're at the office 12 hours a day, six days a week.

If by chance you have had similar feelings, let's do some serious soul searching. Have we as lawyers and judges lost our focus as to what the legal profession is about? Have we gotten out of balance? Are we too wrapped up in the billable hours that we forget that to be a good lawyer, we not only have to use our legal skills to serve clients and make a living, but we also have to make certain that we have adequate time in our daily schedules to spend with our family, to devote to civic, Bar and charitable work and also have a little time left each day for us to do whatever in our sole discretion we may want to do?

In my humble opinion, the best lawyers in our profession have not been the ones who have won every case and use whatever tactics are necessary to come out on top, but rather they are those lawyers who have worked hard to achieve a balance in their personal and professional lives. That balance has then allowed them to be meaningfully involved in a variety of activities which focus on the overall improvement and advancement of our profession and society. In striking that balance and striving to maintain it, I believe it is those lawyers and judges who are looked upon as leaders. Throughout history, lawyers always have been considered leaders of society. Leaders not only because of their educational skills and talents, but because traditionally lawyers have been able to deal with almost every type of situation with which they are confronted in a reasonable, objective and dignified manner. Again, in my humble opinion, one truly cannot be a leader unless he or she is a well-balanced individual capable at all times of seeing *and* understanding "the big picture."

Enough pontificating. Now back to the original question I started with—Are we having any fun yet? If your answer to that question is an honest "no," then I have some suggestions that might change that for you.

First, let's not take ourselves so seriously. By that I mean I think it is fair to say that we are all pretty equal in talent and ability, and that we take the facts that are given to us and do the best we can with those facts and the applicable law to solve our client's problems. Do we really have to make a federal case out of every matter that we're involved in? I say no! As Robert Heinlein once said, "Take your job seriously, but not yourself." If we do not follow that advice, the "fun level" of practicing law is not going to be very high.

Second, let's not lose our senses of humor. A good story or a joke can do much to break the ice before dealing with a difficult question. Likewise, ending serious negotiations on a lighter note can do much to settle the dust and keep relationships with your opposition friendly, cordial and long lasting.

Third, by all means socialize with other lawyers and judges. We are members of a wonderful, decent, caring profession. Remember, Shakespeare's perceptive comment about good lawyers when he said "adversaries in law strive mightily but eat and drink as friends." It's no crime to go to lunch with a lawyer who is not in your firm or who may even be your opponent on a case. Further, it might even be fun to play a round of golf with him or her, or do any other thing you might have a common interest in outside the practice of law. Who knows, there may even be an opportunity to discuss with your opponent possible ways of resolving the dispute in which you are both involved. Too often I see lawyers making enemies of other lawyers by unnecessarily taking hard line positions, by making derogatory and sometimes untruthful statements about the integrity of an opponent and by simply being obnoxious. There should be no room for that type of behavior in our profession and it certainly makes practicing law not very much fun for those who have to deal with that type of lawyer. Gentility and civility do much to maintain and improve professionalism whereas hostility does much to disable and destroy it.

Fourth, give your time and talent freely to your profession. By that I mean get involved in Bar activities—both committee work and socializing. Have you ever been to an Annual or Mid-Year meeting? Have you ever worked on a Bar committee? If not, why not? Sure, those things take time away from the office, but they also mean the opportunity to meet and become friends with other lawyers and judges and to experience a change of pace and perhaps a bit of rest and relaxation. Who knows, you might find those activities to be a welcome diversion from the day to day grind of the busy law practice.

Fifth, I don't think there's anything wrong with simply being friendly. Are you the type that doesn't speak unless spoken to? Do you go out of your way to say hello to other members of the Bar; to engage in casual conversation with other members of your profession? If you don't, that may be one of the reasons why you might not be having any fun practicing law these days.

I suppose there are any number of other things we as lawyers and judges can work on to achieve a better balance in our professional lives. But the real fact is, if we simply continue to complain about the rigors of the profession and fail to take affirmative action along some of the lines I've suggested, I can guarantee that we won't have very much fun practicing law.

Admittedly, the practice of law is not getting any easier these days, but I believe there is much each of us can do as stewards of the legal profession to make the experience of practicing law a bit more pleasant and a little less stressful.

Are you having fun yet? If not, why not?

COMMISSIONER'S REPORT

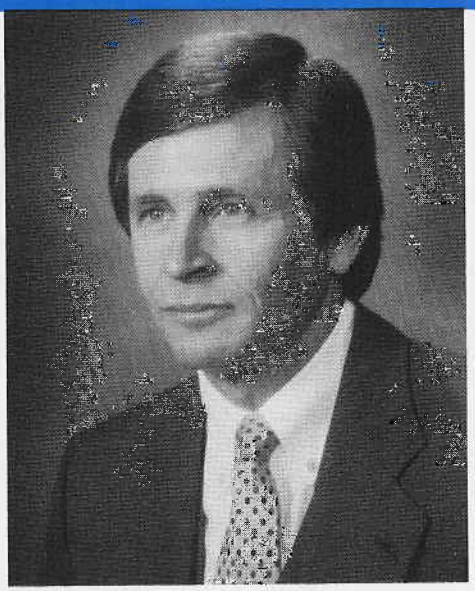
Kudos to Judge J. Thomas Greene and his Committee on Post-Law School Practical Training for what may be the most significant contribution in recent memory toward improving the future quality of Utah's legal practice. The committee recently concluded a three-year study of the need, desirability and practicality of providing post-law school skills training for new law graduates. Many of the Committee's recommendations have been approved by the Commission and are awaiting adoption by the Utah Supreme Court. If approved, the recommendations promise to have a significant and long-term impact on the future of legal practice in Utah.

THE COMMITTEE

The Committee was organized in 1985 under the leadership of then Bar President Norm Johnson who believed that better practical training of new lawyers was needed and that the organized bar should play a role in providing such training. The Committee found that "the legal profession is virtually the only one of the so-called 'learned professions' [viz., accounting, architecture, law and medicine] to permit its new members to pass directly from their academic programs to full-fledged practitioner status with no further training." An initial nine-person steering committee was selected which, in turn, chose a Committee of the Whole comprised of over 50 practicing attorneys, judges, legislators, law professors and law students, representing a variety of diverse backgrounds and viewpoints. After an exhaustive study of the issue, including an analysis of what practical skills training programs are already in existence in other states and other countries, the committee issued a formal, written report to the Board of Bar Commissioners in early 1989.

THE "BRIDGE THE GAP" PROGRAM

The Committee made two basic recommendations. The first was that the State Bar should institute a mandatory instructional program, known as "Bridge the Gap," which would emphasize practical skills development for the new lawyer. This proposal was approved in concept by the Board of Bar Commissioners and a specific program was incorporated as a part of the mandatory continuing legal education petition proposed by the Commission and now pending before the Utah Supreme Court. The Bridge the Gap program is designed to



compress into a single year considerable practical instruction and training that is not emphasized in law school and that would otherwise take many graduates three to five years to learn. Hopefully, the Bridge the Gap program will help shorten the learning curve for new lawyers and enable them to better serve their clients and their employers.

THE APPRENTICESHIP PROGRAM

The Committee's second recommendation is somewhat more controversial in that it requires a commitment of time and resources from experienced members of the Bar. The Committee recommended the establishment of an "apprenticeship" program whereby new law graduates would be assigned to an experienced practitioner who would act as a mentor for the apprentice for a defined period of time. This recommendation was approved on an experimental, voluntary basis by the Bar Commission and the apprenticeship program recently completed a first year pilot program. In the first apprenticeship program, 17 apprentices were placed in 13 large, medium and small law firms geographically dispersed throughout Utah. Apprentices were paid stipends of varying amounts, approximately equaling one-half of the respective firm's standard compensation for law clerks. It was contemplated that the apprentice would spend approximately 50 percent of his or her time doing billable work for clients with the balance of the time to be spent in various observational and training experiences. The apprenticeships lasted for three months, beginning in August 1988. By all accounts, the pilot program was an unqualified success and the program has been authorized to continue for another year. In fact, one law firm had several associates participate as apprentices. Additional mentors and law firms are now being sought to participate in the program this coming fall. If interested in participating, you should contact Steve Hutchinson at the Law and Justice Center.

MANDATORY OR OPTIONAL?

One additional note: The Committee felt so strongly about the importance of practical training for new lawyers that it preferred adoption of a *mandatory* Bridge the Gap and apprenticeship program. As adopted by the Commission, the Bridge the Gap program is mandatory for all Bar applicants unless they have significant legal practice in another state. Making the apprenticeship program mandatory is more problematical. Given the number of students who graduate from law school each year and who seek admission to the Bar, a mandatory program most likely would necessitate some type of obligatory participation on the part of lawyers already admitted to the Bar, perhaps through amendment of the ethical rules to impose a duty upon all lawyers to serve as a mentor. The Committee ultimately concluded that a voluntary, pilot apprenticeship program would be a necessary prerequisite to making any final recommendation as to whether the program should be mandatory or voluntary. Whether or not a mandatory program would be desirable and whether you personally would favor such a program, the issue most likely will need to be addressed in the near future. I would urge all members of the Bar to inform themselves about, and participate in, the apprenticeship program.

We all owe our heartfelt appreciation and thanks to Judge Greene and his Committee for their diligent efforts in seeking to maintain and improve the quality of our profession.

By Randy L. Dryer

Pro Bono Helps Those in Need

By Jeanie E. Lesh

Here they go again, asking me to help. Why me? I have enough problems, I have plenty of work to do, not just with clients but keeping my practice in order. I never see my kids. Can someone really need my time more than I do?

WHO ARE THE CLIENTS?

While asking lawyers to do pro bono work, it is important to understand who the clients are who are the beneficiaries of the help. The need for volunteer lawyers is great because the numbers of low income people are great as well. There are more than 202,000 low income people in Utah in 1989. And it is estimated that there are at least 2,000 homeless people in Salt Lake City daily who may not be counted in any statistics. Most of these "people" are children in single-parent households. The federal government defines poverty by the amount of money a family has per year. For example, a single mother with two young children must live on $737 per month. Other people are poor because of disabilities. A single person who has been disabled must live on only $217 per month. Obviously if such a person has a legal problem, he or she cannot afford to pay a lawyer. And legal help can often be the instrument which can lift a person above the poverty level or keep them from sinking below it.

And the help is not always only financial. A woman client in Kanab who got a divorce with the help of a pro bono lawyer wrote, "Thank you for all the help. One year ago I was a frightened, lonely, down woman. Today, I have a great job and my future looks good. If I had not received your help, I could not have obtained a divorce. I did not have $450 and could see no way to get it. Thanks again." We also receive positive feedback from attorneys who provide the help. Seeing your work make a real difference in someone's life can make you feel very good about being a lawyer.

WHAT IS THE NEED?

The American Bar Association estimates that 23 percent of the population requires legal assistance each year. This would mean that 46,460 of Utah's low income people would need legal help within a given year. Assuming that they are unable to pay a lawyer, what resources are available to them? Utah Legal Services has four statewide offices in Salt Lake City, Ogden, Provo and Cedar City. They also operate the Senior Citizen Law Center which is only in Salt Lake City. The Utah Volunteer Lawyers Project is funded by Legal Services Corporation as well. In Salt Lake County, low income people with domestic legal problems can turn to the Legal Aid Society, and handicapped people, within certain guidelines, can obtain help from the Legal Center for the Handicapped. A limited number of people with civil rights problems get help from the American Civil Liberties Union. Criminal cases are handled by the Legal Defenders. The Utah State Bar provides free legal advice to people under the Tuesday Night Bar program and low cost advice under the Lawyer Referral program. Even with all of these resources, literally thousands of people go unserved each year. The Utah Volunteer Lawyers Project is a way for private attorneys to become involved in helping low income people with civil legal problems.

JEANIE E. LESH has been the Private Bar Coordinator at Utah Legal Services since 1984. She is a native of New York and received a B.A. in English from Tufts University in 1968. She is a member of the National Association of Pro Bono Coordinators.

WHY SHOULD I HELP?

Last August, the American Bar Association approved a 50-hour per year minimum pro bono service standard. This amounts to one hour per week. The ABA resolution also encourages law firms to count this time toward billable hour requirements as well. A pro bono resolution has recently been passed by the Utah State Bar Commissioners. Recently, the law firm of Fabian and Clendenin in Salt Lake City decided to adopt the ABA standard of 50 hours per lawyer per year for their firm as a whole. There is an article in this issue about how this decision was reached at Fabian and Clendenin.

WHY THE UVLP?

The Utah Volunteer Lawyers Project (UVLP) is an arm of Utah Legal Services, funded by the federal Legal Services Corporation. In 1981, President Reagan, in an effort to involve the private sector in volunteerism, required the Legal Services Corporation to spend 10 percent of its basic field grants on private attorney involvement in pro bono work. This was later raised to 12.5 percent. This was the impetus for the Utah Volunteer Lawyers Project to be formed in 1981. The theory was that money needed to be spent to administer the work of volunteers and to coordinate and solicit the help of the private bar to volunteer to help low income people. Since, at the same time, funds were being cut to public agencies who serve low income people, this was an opportune time to begin such a project. The need was great and other resources were drying up.

Every year since then, the UVLP, under the auspices of Utah Legal Services, has solicited private attorneys to sign up on our pro bono panel to take civil cases for low income people thoughout the state. The first year, about 10 percent of the Utah State Bar members signed up and this has grown steadily until, in 1989, we have about 675 attorneys signed up statewide or about 19 percent of the 3,500 active Utah State Bar members. This is slightly above the average of 15 percent of attorneys signed up with established pro bono programs nationwide.

Of course, there are other ways that attorneys provide pro bono services to clients besides the UVLP. Individuals often help friends and relatives with legal problems. Attorneys also volunteer to help other nonprofit legal agencies in the state such as the Legal Aid Society of Salt Lake, The Legal Center for the Handicapped and the American Civil Liberties Union. Many attorneys provide legal advice as well as board membership to nonprofit civic and arts groups. Participation in the IOLTA program (Interest on Lawyers Trust Accounts) also helps low income people since the money is granted to several of the agencies listed above for special projects. Each person must choose what type of service he or she would like to provide, to suit his or her own personal needs and to fulfill the code of ethical responsibility that has been encouraged.

HOW DOES THE UVLP WORK?

Just to give you an idea how a client would get to you, here is how the system works. All clients are first screened for financial eligibility by an intake worker. Once it has been determined that the client has a meritorious legal matter within our priorities, one staff member in each office seeks a volunteer attorney's assistance for the client. The ULS staff member will send copies of all documents, intake notes and referral memos, which may have been written by a staff member, to the volunteer attorney. The client is informed of the volunteer attorney's name, address and phone. It is the client's responsibility to phone the attorney's office to establish the first appointment. No fees for the volunteer attorney's services are charged to the client.

ULS malpractice insurance covers volunteer attorneys while representing referred clients. The limits of the policy are $300,000. Reimbursement for some out of pocket expenses is available. As with all federal funding, some paperwork is required, so volunteers are asked to fill out and return initial intake forms as well as closing memos. The UVLP also provides free or very low cost training to our pro bono panel in selected areas of the law such as domestic, Social Security and Medicare. This will be of particular interest starting in 1990 when the Utah State Bar continuing legal education rule comes into effect. UVLP also offers practice manuals and co-counseling for attorneys who would like to work on new types of cases.

To sign up for the UVLP pro bono panel of attorneys, please fill out the facsimile sign-up card below and mail to Jeanie Lesh, UVLP, 124 S. 400 E., Salt Lake City, UT 84111.

Please include me on the UTAH VOLUNTEER LAWYERS PROJECT panel of attorneys.

NAME _____
FIRM _____
FIRM CONTACT PERSON _____
ADDRESS _____
_____
PHONE _____
Special Requests: _____
_____

I will be available to give Community Education Presentations.
YES ☐ NO ☐
I will act as Guardian/Conservator or property manager.
YES ☐ NO ☐

Foreign language capability?
YES ☐ NO ☐ If YES, what language? _____

I am willing to handle # client referrals per year in the areas checked below:

☐ simple wills
☐ probate
☐ insurance
☐ health
☐ immigration
☐ consumer
☐ family Law
☐ landlord/tenant
☐ public benefits (e.g. SS, Medicaid)
☐ property law
☐ tort defense
☐ bankruptcy (filing fee paid)
☐ protective services (Guardianship/Conserv.)
☐ other (specify) _____
_____

Lawyers' Obligations

By Scott M. Matheson

As lawyers, we work hard, we serve our clients well and, hopefully, we are all engaged in earning a good living in the practice of the law. And that is as it should be. A major portion of our lives is dedicated to our profession and usually to provide better opportunities for our families than we had for ourselves. All of this is commendable.

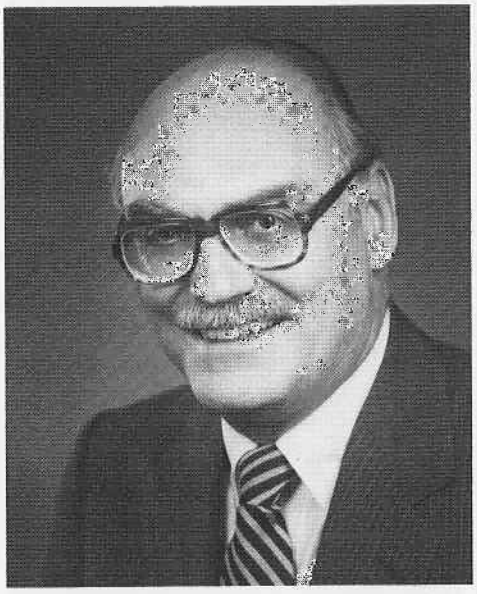
But none of us should forget that we did not make it to where we are on our own. Basically, we arrived at our lofty station in life through the commitment of resources and support from parents, spouses, relatives, teachers and interested friends. That being the case, we owe something back, not just to our supporters and ourselves, but to our legal system as well.

In my view, lawyers have two basic obligations: What we owe to ourselves as practitioners, and what we owe to our profession. It is critical to think about those obligations now because lawyers by tradition and practice have a habit of postponing decisions and commitments.

First, what do lawyers owe themselves after the sacrifice of law school and preparation to become a lawyer? The answer: more sacrifice. We know by the very nature of the law that preparation and hard work are the only legitimate roads to legal success. Edward Bennett Williams, one of the great trial lawyers of our time, tells the story of a drunkard in New York City who was draped around a lamp post. A man in black tie and tails walked by carrying a violin case. The drunkard asked him, "How do you get to Carnegie Hall?" The musician replied, "Practice, my friend, practice."

What Williams meant was that success in the law is preparation. Really tedious, intense preparation. Williams described that type of commitment as the "awful training" required of lawyers.

Accordingly, if we, as lawyers, wish to redeem the promise of legal training, then a lifetime commitment to the "awful training" that Mr. Williams describes is required. What's more, we will have to do it throughout our legal careers. We owe that to ourselves if we truly want to be lawyers. I assure every lawyer in Utah that there is no escape, even if you are gifted.



MR. MATHESON presently is a member of the Board of Directors of Parsons, Behle and Latimer of Salt Lake City. He graduated with honors in political science from the University of Utah and received his law degree from Stanford University. He is a past president of the Utah State Bar, a Utah State Bar delegate to the ABA House of Delegates and chairman of the special ABA Committee on Youth Education for Citizenship. He served as governor of the state of Utah from 1977 to 1985 and as chairman of the National Governor's Association in 1982-83.

I do not say this to depress. There is great virtue as well as satisfaction in hard work and self-sacrifice. But there is more to the story. In the May 19, 1986, issue of the *New Republic*, an article by a Chicago attorney describes the disillusionment of his generation of the 1960's and 1970's law school graduates.

The article begins: "Many of my friends, if they are still in legal practice, now hate it. 'The world's most over-rated job,' one of them says." Later on, the same author says: "You wonder about the point of it all. You pour your life into some corporate catharsis, which you are paid to turn into your own, and years from now you will look back and ask, why did I fling so much of my life into that?"

We must continue to ask ourselves that question now so that we will have a good answer to it later. Clearly, we owe ourselves a full commitment to realize our professional potential, but we must also answer the question of why we are flinging ourselves into the practice.

Remember that before we graduated from law school, we were educated, we were talented and we had a variety of interests. Remember also that it is a fundamental right to pursue satisfaction outside of the practice.

I raise this point because I am anxious to have lawyers think seriously about their lifetime of work at a point where they can do something constructive about it. Let me put it another way: Thirty years from now, our mortgages will likely be paid, some of our children will attend and graduate from law school, and we will probably have more income and security than the vast majority of our fellow citizens. All of that will, of course, be gratifying. But I hope, for each of our sakes, that when we ask ourselves what it was we spent most of our waking hours worrying about over those 30 years, we will have a satisfying answer.

Second, I want to turn to the second obligation because the satisfying answer I just mentioned may depend on how we discharge our debt to our profession.

I said earlier that we have not made it on our own. We owe much to our family and our friends as well as to the American legal tradition. We have heard and will continue to hear platitudes about pro bono work, public interest law, service to the Bar and giving professional time to the public good. All of these activities are very important. But I think that the most important thing is not how we discharge our debt to the profession; it is our understanding of why that debt exists.

It is easy to forget or ignore this question when we are responsible for litigating a portfolio of 35 personal injury lawsuits, administering scores of estates or advising businesses or labor unions on the intricate facets of employee-management relations. It is even easy to take comfort that we are serving our profession by acting as competent counsel. But that is not enough.

That was not enough for Judge J. Thomas Greene, James B. Lee or Judge Michael D. Zimmerman, and it is not enough for the rest of us. These men have sacrificed for the legal profession, and so should we. It may not be a welcome message that after law school the sacrifice has just begun. But talk to any of the persons I have just mentioned, and they will tell you that the sacrifice was well worth it and they would do it again.

I am not going to prescribe how we should discharge our debt to the legal profession. That is a very personal decision. I should say, however, that this is a different kind of debt—no matter how much you pay it back—it never goes away. Serving on a Bar Committee, taking a pro bono case or contributing to a Utah Legal Services project, we can do all of those things, and our obligation remains. It will remain throughout every lawyer's career.

I have been talking about the obligation to ourselves and service to the profession as if they were distinct notions. Of course, they are not. They are all part of realizing our promise as lawyers.

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

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

'The Federal Judiciary In Utah'

by Clifford Ashton

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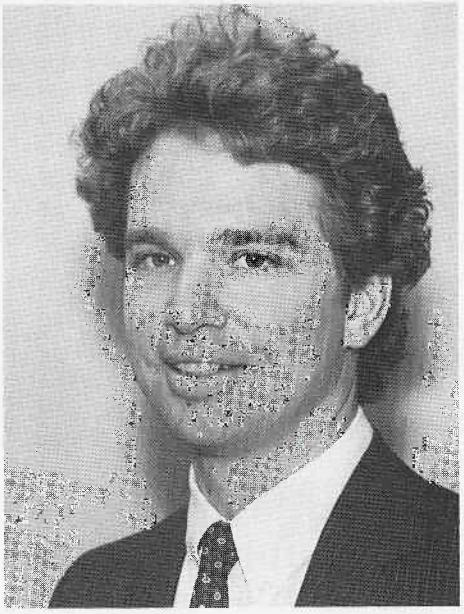
The Utah Anti-Discrimination Act—Time for a Tune-Up

By Jathan W. Janove

The Utah Anti-Discrimination Act, Utah Code Ann. Sect. 34-35-1 *et seq.*, ("UADA"), which protects Utahns from several categories of job discrimination, was the subject of attention during the past legislative session. In House Bill No. 393 ("HB 393"), the Utah Legislature amended the Act to prohibit discrimination based on "pregnancy, childbirth or pregnancy related conditions." A Senate bill which would have amended the UADA's hearing procedures and remedies was not reported out of committee. However, the Utah Anti-Discrimination Division of the Industrial Commission ("UADD") currently plans to seek passage of these amendments in the next legislative session. In the meantime, the agency may engage in administrative rule-making concerning the statute's adjudicative procedures, remedies and/or treatment of pregnancy. This article explores issues raised by contemplated rule-making activity as well as the continuing need for amendments to resolve questions of the scope of protection afforded pregnant workers and the need to reconcile inconsistent statutory provisions concerning the hearing process and remedies available to victims of unlawful discrimination.



JATHAN W. JANOVE received his law degree from the University of Chicago in 1982. He is a shareholder and director of Fabian and Clendenin, P.C., and specializes in employment law, primarily representing employers. In public hearings held by the Industrial Commission, he served on a panel of lawyers addressing issues pertaining to pregnancy discrimination. Since that time, he has participated; in an informal working group of attorneys, commissioners and commission employees evaluating possible statutory and regulatory changes in state employment discrimination law. However, the views he expresses in this article are not necessarily shared by the Industrial Commission or others in this group.

PREGNANCY DISCRIMINATION

During public hearings on pregnancy discrimination held last October, the Industrial Commission was urged to adopt regulations and/or seek legislation which would create affirmative duties for employers to accommodate pregnant employees. These duties would include making facilities at work more accessible to or usable by pregnant workers and modifying job responsibilities, hours of work or working conditions to comport with their limitations. Also proposed were maternal or parental leaves of absence requiring employers to give employees a minimum number of weeks off for pregnancy or childbirth while guaranteeing their jobs upon return with no loss of seniority or health benefits during their absence.

However, HB 393 stops well short of such proposals. This legislation simply adds pregnancy to the list of the UADA's protected classes. In this respect, the amendment resembles the federal Pregnancy Discrimination Act of 1978 ("PDA"), which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sect. 2000(e) *et seq.* ("Title VII") by defining sex discrimination to include "pregnancy, childbirth or related medical conditions." 42 U.S.C. Sect. 2000e(k).

As construed by federal courts, the PDA does not generally require employers to implement affirmative action measures for pregnant employees. Rather, they are required not to treat such employees unfavorably in comparison to nonpregnant employees. If an employer's policy and practice does not include accommodating or assisting nonpregnant employees with temporary disabilities or physical problems, the employer will not have to provide assistance to a pregnant employee who might be experiencing similar limitations.

If HB 393 is construed like the PDA, there probably will be no significant change in the law affecting Utah employees. The PDA already applies to Utah employers who have 15 or more employees. The UADA's provisions likewise apply only to employers of the same size. HB 393 does, however, provide a statutory mandate for the UADD to make administrative rulings on pregnancy claims. Having an express statutory declaration against pregnancy discrimination will also enable the agency to engage in administrative rule-making on this subject.

However, UADD rule-making could be subject to court invalidation if the agency promulgates rules which go beyond the PDA in imposing affirmative obligations on employers. Although neither the PDA nor federal court decisions construing it control questions of interpretation of the UADA, the Utah Legislature has consistently incorporated into state law developments under Title VII and related federal laws. In addition, both the Utah Supreme Court and the UADD have relied on federal court interpretations of Title VII in resolving questions of the state statute's meaning. *See, e.g., University of Utah v. Industrial Commission of Utah*, 736 P.2d 630 (1987). An existing UADD regulation states that it "shall be the practice" of the agency to rely on United States Supreme Court case law in interpreting the UADA where the federal law "closely parallels" the Utah statute and "state law interpretation is nonexistent." RF486-1-3(c).

It could be argued that HB 393 allows for broader pregnancy protections than the PDA. Although the state law follows its federal counterpart in identifying the class of individual protected against job discrimination, it does not contain the PDA's additional language stating that pregnant employees must be "treated the same" as employees "not so affected but similar in their ability or inability to work." 42 U.S.C. Sect. 2000e(k). This federal statutory language underscores the point that the PDA is not intended to authorize affirmative action, but is simply a guarantee of equal treatment, whether that treatment is fair or harsh. The absence of such language in HB 393 arguably could allow the UADD to place affirmative duties of accommodation on Utah employers through its rule-making and adjudicatory functions.

On the other hand, the UADA contains language of its own suggesting that the Act does not contemplate affirmative action. Sect. 34-35-6(1)(a)(i) provides in part that protections against discrimination apply only to persons "otherwise qualified." This term is defined to require that the employee possess the "ability . . . disposition to work . . . and other job-related qualifications required by an employer for any particular job." This language appears to exceed even the PDA and Title VII in negating affirmative action for employees who, without accommodation, would not be otherwise qualified as defined.

However, this section of the UADA is not without ambiguity. The language defining "otherwise qualified" addresses only circumstances in which a person is applying for a job as opposed to what often is the case with a pregnant employee, i.e., she first holds the job and then becomes pregnant. Furthermore, the section includes protection against "handicap" discrimination, and its federal counterpart, which can be found in the Rehabilitation Act of 1973, 29 U.S.C. Sect. 701 *et seq.*, has been held to include affirmative employer obligations to accommodate handicapped employees. The UADD has since adopted regulations paralleling federal regulations which specify such affirmative obligations.

Justifying affirmative duties for employers of pregnant workers under the UADA's existing reference to handicap would probably not be appropriate. Under the Rehabilitation Act of 1973, handicap has not generally been considered to include employees who are pregnant or who suffer from childbirth complications. These conditions have been likened to temporary disabilities as opposed to conditions that substantially limit the employee's "major life activities" such as walking, seeing, hearing, speaking or breathing. The Utah Supreme Court does not appear inclined to give an expansive interpretation to the term "handicap." *See, Salt Lake City Corp. v. Confer*, 674 P.2d 632 (1983). Moreover, HB 393 itself suggests that the Legislature did not equate pregnancy with handicap; otherwise, the pregnancy amendment would have been superfluous. Finally, even with respect to employees who would fall within the definition of handicap, the language in Sect. 34-35-6(1)(a)(i) limiting the Act's protections to otherwise qualified employees may pose obstacles to the creation of affirmative rights of accommodation even for employees who are indisputably handicapped.

The analogy to handicap laws and regulations does not seem entirely apt. Accommodating an employee with a permanent physical limitation by making work facilities accessible or by modifying job responsibilities may ultimately prove cost-justified for the employer. In exchange for a one-time modification and/or expense for a particular individual, the employer may receive years of productive service from a handicapped employee who, due to the employer's accommodation, may be less likely than other employees to leave his employment and waste the employer's investment in him. By contrast, accommodating pregnant employees may prove more burdensome for an employer because the changes will have to be made repeatedly, without any predictable sequence or schedule and with a greater risk of disruption and inefficiency in the workplace. Also, an employee who is no longer pregnant may be less likely to remain with a particular employer than a handicapped worker who has a continuous and permanent need for the adjustments the employer has already made on his behalf.

Parental leaves of absence need to be addressed by the legislature.

This is not to say that affirmative duties of accommodation for pregnant employees are necessarily unworkable or unjustified. Rather, it may be that employers will need greater latitude and flexibility in determining whether and to what extent accommodation of pregnant workers is feasible than would be permitted under handicap laws.

In any event, whether the UADA should exceed the PDA by creating affirmative duties for employers or by requiring them to grant maternal or parental leaves of absence is a policy matter that needs to be addressed by the Legislature. The respective costs and benefits of parental leave and handicap-type obligations can then be debated. HB 393 does not appear to have delegated these policy issues to the UADD to resolve. It would thus seem appropriate that these issues be addressed when amendments to the Act's hearing procedures and remedies are raised in the next legislative session. The UADA should then be clarified to express the Legislature's intent as to the protections afforded pregnant as well as handicapped employees.

ADMINISTRATIVE HEARINGS: APA v. UADA

Procedures for investigating and making findings of employment discrimination under state law presently resemble those under Title VII. Like its federal counterpart, the UADA permits but does not require evidentiary hearings. Whether the administrative finding results from informal or formal adjudicative proceedings, the losing party is entitled to *de novo* review in district court. Sect. 34-35-8. *Cf.* 42 U.S.C. Sect. 2000e-5. The similarity in state and federal review procedures helps preserve the state agency's work-sharing arrangement with the Equal Employment Opportunity Commission ("EEOC"). These arrangements create "deferral" state agencies to which the EEOC delegates responsibility for investigating discrimination charges under both state and federal law. Deferral states then receive compensation from the federal government for the charges of discrimination they process to resolution or otherwise close.

However, Utah's enactment in 1987 of the Administrative Procedures Act, Sect. 63-46(b)-1 *et seq.* ("APA"), clouds the issue of what administrative procedures are appropriate for resolving complaints of employment discrimination. The APA provides for two alternative forms of adjudicated proceedings:

1. Informal proceedings or hearings which resemble the UADA's procedures in that judicial review is *de novo* in the district court;

2. Formal hearings with evidentiary and procedural rules similar to those used in courts. Judicial review of formal agency proceedings is in the Court of Appeals and/

or the Utah Supreme Court. The standard of review is deferential, allowing the agency's decision to stand unless, for example, it is not supported by substantial evidence or is arbitrary and capricious.

The APA provides that an agency may "by rule" designate certain categories of adjudicative proceedings to be conducted informally. However, "all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally." Sect. 63-46(b)-4(2). UADD regulations, which were promulgated prior to the 1987 APA, allow formal hearings to be scheduled on an *ad hoc* basis without apparently making categorical designations. R486-1-3(a). Thus, it could be argued that all proceedings under the UADA must be by formal hearing with only deferential appellate review to follow.

Because the UADA states its own administrative procedures, and because these procedures were not amended by the Legislature which passed the APA, it could be argued that the latter statute does not control. However, Sect. 63-46(b)-1(1) states that the APA applies to proceedings of every agency of the state of Utah "except as otherwise provided by a statute superseding provisions of this chapter *by explicit reference to this chapter.*" (Emphasis added.) the UADA contains no reference to the APA.

The Industrial Commission plans to resolve this potential controversy by seeking corrective amendments to the UADA, bringing it in conformity with the APA. The agency also is inclined to promulgate a rule granting both employees and employers the right to a formal adjudicative hearing. The results of this hearing would be appealable first to the Industrial Commission and then to appellate court as provided in the APA.

The desire for formal hearings stems from the agency's perception that under present procedures, it is not as effective as it should be in resolving charges of discrimination and in enforcing the rights of victims of unlawful discrimination. Concern has been expressed that the informal investigatory process combined with *de novo* district court review slows down the process, making prompt settlements unlikely, impoverishing out-of-work employees and allowing recalcitrant employers too much maneuvering room to avoid the consequences of their actions. By establishing formal administrative hearings and eliminating *de novo* review, the Commission believes that it can abate these problems.

Although there is substance to the agency's assessment of the existing problems, its proposed solution may unfairly increase an employer's cost of terminating unproductive employees. Under the present system, when a charge of discrimination is filed, employers typically make an *ad hoc* decision as to whether legal counsel should be brought in. Particularly in cases where the charge appears to be without merit, the employer often avoids the cost of legal representation and responds to the charge himself. He can take comfort in the fact that if he mishandles the response or there is otherwise an adverse determination, he will still be entitled to *de novo* review in district court and the opportunity largely to start over with counsel's assistance. *See, University of Utah v. Industrial Commission of Utah*, 736 P.2d 630, 633-634 (1987) (the district court is entitled to "supplement the record, create an entirely new record, or elect to do a combination of these. . . . The findings of the Commission are superseded by the findings of the district court, and no particular deference need be given to the former.")

By contrast, under the UADD's desired rule, the employer would be less likely to avoid the cost of legal representation in the administrative forum. When faced with a formal hearing conducted with rules and procedures used in the courts, the outcome of which is subject to deferential appellate review, employers may feel it necessary to hire attorneys to respond to all charges. These concerns will be heightened by the fact that formal administrative hearings may result in findings of fact or law that will be deemed binding in subsequent state or federal court proceedings. *See, e.g., University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

> Is it fair that costs and fees are rarely assessed against employees?

Accordingly, if formal adjudicative proceedings under the APA are to be used for UADA discrimination charges, there should be an initial agency investigation to determine if charges have sufficient evidentiary support to justify the expense of a formal hearing. If the charges have substantial support, the formal hearing/appellate review process under the APA can be initiated. If not, the charge should be dismissed by the UADD. The employee would then have to file a lawsuit in district court if he wished to pursue the matter.

It also may be appropriate to impose a filing fee on the party who elects a formal hearing. Currently, it costs an employee nothing to file a charge or to have an administrative hearing on it, whether or not the charge has any merit. The imposition of a filing fee may effectively cull charges which warrant a hearing from those that do not. Although a provision awarding the prevailing party his costs and reasonable attorney's fees is also probably wise, the reality is that costs and fees are rarely assessed against employees. Such a provision, therefore, cannot be expected to deter frivolous claims. Employers have observed that they have no objection to UADA requirements or UADD investigations; however, it does not seem fair to them that a disgruntled employee can file a meritless charge because it costs him nothing yet may cost the employer a great deal even if its position is ultimately vindicated.

REMEDIES

The UADA is silent concerning the relief to be awarded a victim of employment discrimination. Sect. 34-35-7.1(5) simply states that in addition to issuing a cease and desist order, the UADD may "provide relief to the charging party." By contrast, Title VII authorizes injunctive relief, including reinstatement and back pay. 42 U.S.C. Sect. 2000e-5(d). (An employer's recovery of attorney's fees is allowed only in cases where the plaintiff's claim is deemed "frivolous, unreasonable or groundless.") *See e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

The UADD maintains that such relief is also authorized under the state statute despite its silence. This position may be necessary in light of the agency's deferral agreement with the EEOC and the fact that the federal agency is required to terminate such an agreement with any state which cannot provide "effective enforcement" of employee rights. 42 U.S.C. Sect. 2000e-8(b).

In most instances, the silence of the UADA on remedies will not be material because discrimination charges under state law are normally filed under Title VII and the latter statute's remedies will be available. Nevertheless, it seems appropriate for the Utah Legislature to amend the UADA to include relief provisions paralleling Title VII's. Needless litigation on the existence of state remedies may be avoided. Also, such an amendment would preserve the compatibility of Title VII and the UADA necessary for the continuation of the

UADD's deferral agreement with the EEOC.

Express specification on remedies is also appropriate in light of Sect. 34-35-7.1(11): "The procedures contained in this Section and Sect. 34-35-8 are the exclusive remedy under state law for employment discrimination because of race, color, sex, age, religion, national origin or handicap." This provision was enacted to avoid the phenomenon of employees combining common law contract and tort claims with discrimination charges in order to obtain greater damages. An example of this would be an employee claiming she was terminated because of her sex and then asserting that the sex discrimination constituted breach of an express or implied contract with her employer, breach of the implied covenant of good faith and fair dealing, and tortious wrongful discharge. The employee would seek not only back pay and attorney's fees provided under Title VII, but also damages for emotional distress, consequential economic damages and punitive damages. In some states, seven-figure verdicts have been awarded to discharged employees through the use of these common law theories. In states permitting it, the ability of an employee to bootstrap common law tort and contract claims onto a discrimination claim has created potentially ruinous financial consequences for employers and has largely eliminated the ability to estimate potential damages which is needed for evaluating out-of-court settlements.

The salutary purpose of Sect. 34-35-7.1(11) should be reinforced by eliminating potential confusion arising from its making UADA remedies exclusive when none are stated. State courts should be empowered to grant relief as appropriate in the form of back pay, injunctive relief, litigation costs and reasonable attorney's fees. In light of the fact that the APA appears to govern procedures under the UADA, relief should be specified in order to avoid the possible pitfall contained in Sect. 63-46(b)-17(a)(a) of the APA, which states that in review of adjudicative proceedings, "the court may award damages or compensation *only to the extent expressly authorized by statute.*" (Emphasis added.)

Amending the UADA to provide relief recognized under Title VII will thus harmonize the APA with the UADA and federal law with state law. Most importantly, it will strengthen the exclusive remedy provision of Sect. 34-35-7.1(11). As a result, victims of unlawful discrimination will have fair and reasonable recourse for their wrongs while employers will be able to avoid potentially devastating and uninsurable losses that bear no reasonable relation to their actions.

CONCLUSION

The proposed changes to the UADA discussed in this article are not meant to be exclusive and do not embrace all of the proposals or suggestions that have been made to the Industrial Commission. Because these and other rule-making or legislative changes are currently being considered, interested persons should contact members of the Commission or the Director of the UADD, John A. Medina, to express their opinions. I would also be interested in hearing any such opinions or suggestions and would endeavor to see that they were given attention by the Commission or possibly members of the Legislature.

1988-89 Cases Affecting State and Local Government

By Richard S. Dalebout
Prepared for
Brigham Young University
J. Reuben Clark Law School
State and Local Government Conference
March 24, 1989

(Research for this paper was done by Richard Stapler, a law student at the J. Reuben Clark Law School)

This article reviews selected decisions of the United States Supreme Court, the Utah Supreme Court and the Court of Appeals of Utah which affect state and local governments. The period reviewed is February 1, 1988, through March 1, 1989.

SUMMARY

The cases are reviewed by topic. The first topical category focuses on the First Amendment and contains five cases, four by the United States Supreme Court and one by the Utah Supreme Court. These cases examine a local law prohibiting discrimination in private clubs, a state statute regulating the display of sexually explicit materials which are accessible to juveniles, a local ordinance prohibiting the solicitation of sexual conduct, a local ordinance regulating newsracks for the sale of newspapers and a local ordinance prohibiting the picketing of individual residences.

The second category focuses on the Commerce Clause and includes two cases in which the United States Supreme Court applied tests described in *Complete Auto Transit, Inc. v. Brady*[1] to state taxation of enterprises in interstate commerce.

The third category contains three United States Supreme Court cases relating to 42 U.S.C. Sect. 1983 liability. The first case defines which public officials have final policy-making authority which will expose a municipality to liability. The second case focuses on the inadequacy of policy training as a cause of action. The third case deals with whether state court judges should have absolute immunity for their administrative acts.

The fourth category deals with government taking or damaging private property. In this category is a United States Supreme Court case examining a local rent control ordinance and a Court of Appeals of Utah decision examining city construction of a curb, gutter and sidewalk on city property, which eliminated parking on private property.

The fifth category contains three Utah zoning cases. Two of the cases involve application of the Utah Supreme Court decision in *Chambers v. Smithfield City*[2] that a board of adjustment, and not a city legislative body, is the proper appellate forum for a person aggrieved by a zoning decision. The last case involves a determination of when a mobile home is "occupied," and for that reason illegally used in a city.

The sixth category of cases is labelled Potpourri because it is a collection of six widely different cases affecting state or local governments. The cases in this category deal with federal tax limitations on the issuance in "bearer" form of state and local government bonds, federal pre-emption in relation to state regulation of businesses involved in the interstate transmission and storage of natural gas, federal pre-emption in relation to the taxation and regulation of petroleum, application of state workmen's compensation and safety rules to workers employed in federally owned facilities, state utilities regulations as a constitutionally prohibited "taking" and the surcharge pooling required by the Utah Public Service Commission's Lifeline program.

Last are some observations about the drafting of legislation to avoid constitutional and other challenges, which observations are drawn from the cases discussed herein.

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FIRST AMENDMENT

In 1985, New York City amended its "Human Rights Law" in relation to discrimination in "public" clubs. Under the amendment, a club is "public" if it has more than 400 members and regularly sells goods or services to nonmembers. Benevolent organizations and religious organizations are exempted from coverage. In *New York State Club Ass'n v. City of New York,*[3] the United States Supreme Court held that the amended law was not facially invalid because it was capable of being applied with-

out violating protected rights of expression and association. Nor was it overbroad in prohibiting protected rights; any problem of that kind could be handled on a case-by-case basis.

Virginia v. American Booksellers Ass'n. Inc.[4] is an apparent outgrowth of *Ginsberg v. New York* (1968),[5] in which the United States Supreme Court upheld restrictions on the *sale* of materials that are "harmful to juveniles." In *Virginia*, a state statute made it unlawful to *display* materials that are "harmful to juveniles" in such a way that "juveniles may examine and peruse" those materials. The Court could not discern from the statute: (1) what materials are prohibited as harmful to juveniles, nor (2) is a bookstore owner required to prohibit juveniles from examining the prohibited materials, or is it sufficient for a bookstore owner to step forward and stop a juvenile who is observed examining the prohibited materials. In an effort to find a "narrowing construction" that would avoid a conclusion overbroad or vague, the Court certified the two questions above to the Virginia Supreme Court for interpretation.

In *Provo City Corp. v. Willden,*[6] a municipal ordinance prohibited the solicitation of a broad range of sexual conduct. Admitting that his solicitation of homosexual sex would be prohibited by a properly drawn ordinance, the appellant nevertheless claimed, and the Utah Supreme Court agreed, that the ordinance was overbroad and criminalized protected behavior such as a man suggesting to his wife, during a stroll through a public park, that the two of them go to their home and engage in sexual intercourse. The Court concluded that the plain language of the ordinance prevented any narrowing interpretation that would limit the scope of the prohibition to solicitation of unlawful sexual conduct.

In *City of Lakewood v. Plain Dealer Publishing Co.,*[7] the United States Supreme Court invalidated a permit system by which newsracks for the sale of newspapers were allowed to be placed on public property. The principal objection to the ordinance was that permits could be refused at the discretion of the mayor, and there were no standards controlling the mayor's decision. Left undecided were whether an outright ban on newsracks on public property would be constitutional, or whether some form of permit system, with standards, would be constitutional.

In *Frisby v. Schultz,*[8] a municipal ordinance (which grew out of the activities of anti-abortion protesters who were picketing the residence of a physician who performed abortions) prohibited picketing "before or about the residence or dwelling of any individual." The United States Supreme Court applied *Perry Education Ass'n v. Perry Local Educators' Ass'n*[9] and viewed the public streets in front of the residence as a public forum. The constitutional standards for an enforceable "content-neutral" ordinance are (1) that the ordinance be "narrowly drawn to serve a significant government interest, and (2) that the ordinance "leave open ample alternative channels of communication." The Court found that the *Perry* standards had been met and upheld the ordinance.

COMMERCE CLAUSE

In *D.H. Holmes Co. Ltd. v. McNamara,*[10] the United States Supreme Court assessed the validity of a use tax imposed by the State of Louisiana on catalogs designed and printed in New York, Atlanta, Boston and Oklahoma City for a Louisiana department store, 82 percent of which were distributed in Louisiana. The Court upheld the tax against a claim that it violated the Commerce Clause. The Court noted that interstate commerce should pay its fair share of state taxes. The Court went on to hold that the following standards from its *Complete Auto* (1977)[11] decision had been met: (1) does the taxed activity have a substantial nexus to the state, (2) is the tax fairly apportioned, (3) does the tax discriminate against interstate commerce and (4) is the tax fairly related to benefits provided by the state.

In *Goldberg v. Sweet,*[12] the United States Supreme Court assessed the validity of an excise tax by the state of Illinois on telecommunications service. The tax was 5 percent of the gross charge of an interstate telephone call originating or terminating in Illinois. The statute allowed a credit to a taxpayer who could prove payment of a tax on the same telephone call in another state. The Court concluded that the *Complete Auto* test (described above) had been met and upheld the validity of the tax.

Vague or ambiguous statutes and ordinances encroach on protected rights.

SECT. 1983 LIABILITY

In *City of St. Louis v. Praprotnik,*[13] a former municipal employee sued under 42 U.S.C. Sect. 1983 claiming he was laid off in retaliation for his exercise of First Amendment rights as part of repeated civil service appeals. Central to the employee's claim against the City was whether the actions of his supervisors represented official policy. The United States Supreme Court held that the policy of a city is established by those who have final policy-making authority under *state law.*[14] *Holding that the supervisors of the employee did not have final* policy-making authority, the Court reversed. The Court did not rule on whether, in fact, any First Amendment rights were violated.

In *City of Canton, Ohio v. Harris,*[15] it was claimed that the plaintiff's rights under the Due Process Clause of the Fourteenth Amendment were violated when she was not given necessary medical care while in police custody. Under city regulations, a police shift commander (who had only first aid training) had sole discretion to determine when a detainee required medical care. The Court held "that the inadequacy of police training may serve as the basis for Sect. 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

In *Forester v. White,*[16] a state court judge was sued for discrimination in relation to the discharge of a female probation officer over whom he had administrative authority. The United States Supreme Court held that a judge has absolute immunity in relation to judicial acts, but not in relation to administrative acts.

TAKING OR DAMAGING OF PRIVATE PROPERTY

In *Pennell v. City of San Jose,*[17] a city rent control ordinance was challenged on the basis that certain "hardship" provisions therein constituted a "taking" of the property of landlords in violation of the Fifth and Fourteenth Amendments. The principal point of contention was a "tenant hardship" provision. The ordinance allows a landlord to automatically raise the annual rent of a tenant in possession by 8 percent. If the landlord wishes to raise rent more than 8 percent, the tenant is entitled to a hearing at which factors related to the landlord's costs, the condition of the rental market and *hardship to the tenant* are considered. The landlords argued that tenant hardship has nothing to do with fair rent and is merely

subsidized housing for the poor and thus an unconstitutional "taking." Noting that to date no landlord had actually been denied a rent increase because of tenant hardship, the Court found an insufficient factual basis to decide the "taking" issue and saved that issue for resolution on a case-by-case basis. (The Court also held that the decision-making process of the ordinance was reasonable and not a denial of Due Process, and that distinguishing landlords with hardship tenants has a rational basis, for which reason there was no Equal Protection violation.)

In *Three D Corp. v. Salt Lake City,*[18] the city constructed curb, gutter and sidewalk on city property, where none had been before. The result was to alter access to adjacent, privately owned, commercial properties, and reduce the number of parking spaces in front of those properties. These events called into play Article II, Sect. 1 of the Utah Constitution, which provides that "private property shall not be taken or *damaged* for public use without just compensation." The Court of Appeals of Utah reversed the trial court and held that governmental action of the type described above, not amounting to a physical taking, which substantially impairs a right appurtenant to property or otherwise causes a peculiar injury, gives rise to a cause of action.

ZONING

In *Davis County v. Clearfield City,*[19] the Court of Appeals of Utah applied *Chambers v. Smithfield City*[20] and disapproved the prescribed method of zoning appeals in Clearfield City. Under the Clearfield zoning ordinance, a planning commission denial of a conditional use permit was appealable to the city council. The Court reiterated the Utah Supreme Court holding in *Chambers* that *UCA* Sect. 10-9-9 provides that a board of adjustment is the exclusive forum for city zoning appeals.[21] Thereafter, on appeal to the district court from an adverse decision of the city council, an extraordinary writ (mandamus)[22] was an appropriate form of relief; the "plenary action for relief" described in *UCA* Sect. 10-9-15 did not apply because that form of relief applies to appeals from a board of adjustment.[22]

In *Scherbel v. Salt Lake City Corporation,*[24] the Utah Supreme Court applied its *Chambers* decision to a city operating under council-mayor form of government. The Court held that resolution of zoning disputes is an executive function,[25] the proper forum for which is a board of adjustment. The appellant, however, was not entitled to relief from the courts because the applicable zone classification was changed while his application was pending before the city, and his right to approval under the previous zone classification had not vested.[26]

Salem City v. Farnsworth[27] was a criminal action to punish the prohibited use of an "occupied" trailer house within Salem City. The word "occupied" was not defined in the zoning ordinance, and the evidence was that the trailer house was being used for storage, but no person was residing in it. The Court of Appeals of Utah stated that "undefined words in a zoning ordinance must be given their plain and ordinary meaning." Based thereon, the Court held that a trailer house was not "occupied," within the meaning of the zoning ordinance, because it was not inhabited by humans.

POTPOURRI

In *South Carolina v. Baker,*[28] the United States Supreme Court upheld Sect. 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which eliminates the federal tax exemption for interest earned on long-term state and local government bonds, if the bonds are not issued in "registered" form. Historically, such bonds have been issued in "bearer" form, which is easily adaptable to tax evasion schemes. The new requirement was held not to violate either the Tenth Amendment or the "doctrine of intergovernmental tax immunity."

> Careful drafting of detailed standards can avoid unbridled discretion by officials.

In *Schneidewind v. ANR Pipeline Co.,*[29] the Michigan State Public Service Commission had attempted, pursuant to statute, to regulate certain long-term securities issued by affiliated Delaware corporations which were engaged in the interstate transmission and storage of natural gas. The United States Supreme Court held that provisions of the Natural Gas Act of 1938 pre-empted the field of transportation or sale of natural gas in interstate commerce, to the exclusion of state law.

In *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.,*[30] the Puerto Rico Department of Consumer Affairs had adopted an excise tax and price regulations in relation to petroleum. The United States Supreme Court held that petroleum allocation and pricing provisions in the Emergency Petroleum Allocation Act (adopted by Congress in 1973) had expired. The police powers of the states are not superseded (pre-empted) by federal statutes unless there is a clear expression of intent to do so. Hence, with the expiration of the federal provisions, the Puerto Rican excise tax and price regulations were enforceable.

In *Goodyear Atomic Corporation v. Miller,*[31] an employee of a private corporation under contract with the Department of Energy to operate a federal nuclear production facility was injured during the course of his employment. The worker applied for, and received, state workmen's compensation. Thereafter, he applied for an additional benefit allowed under state law in cases where a worker's injury is caused by an employer's violation of state safety regulations. The Supremacy Clause prohibits state regulation of workers at federal facilities without the consent of Congress. In 40 U.S.C. Sect. 290, Congress allows application of state "workmen's compensation laws" to workers at federal production facilities. The United States Supreme Court held that, in its historical context, the language of Sect. 290 was broad enough to include, within reason, all of the compensation schemes (including the award based on a safety violation) related to workmen's compensation.

In *Duquesne Light Co. v. Barasch,*[32] the United States Supreme Court faced a claim by two state-regulated Pennsylvania electric utilities that a rate structure imposed on them amounted to a "taking" in violation of the Fifth Amendment. The utilities had invested large sums of money in preliminary work on some nuclear generating plants, the plans for which were thereafter cancelled. Pennsylvania law required that rates be fixed without including the cost of planned but uncompleted generating facilities in the rate base. The Court denied the claim, noting that the financial integrity of the companies had not been compromised and held that in relation to state-regulated utilities a constitutional taking occurs only when the allowable rate structure is so "unjust" as to be confiscatory.

In *Mountain States Tel. & Tel. Co. v. Public Service Commission of Utah,*[33] the Utah Supreme Court examined a "Lifeline" program ordered by the Public Service Commission of Utah. Under the order, a statewide surcharge was placed on telephone service with the proceeds being placed in a pool to pay for the Lifeline

program. Mountain Bell claimed that it had fewer Lifeline customers than did other telephone companies, and, thus, Mountain Bell customers would be subsidizing the customers of other telephone companies. Mountain Bell claimed, and the Court agreed, that the statutory powers of the Public Service Commission to regulate public utilities are not broad enough to empower it to order the challenged pooling arrangement.

SOME OBSERVATIONS

Sixteen out of the 20 decisions (80 percent) reviewed above involve the meaning or enforceability of statutes or ordinances. In the process of reviewing these statutes or ordinances, the courts asked questions such as: what is the meaning of the measure; did the adopting body have authority to enact the measure; does the measure conform to applicable law; does the measure accomplish the intended purpose; does the measure encroach on protected rights; or, are there standards to protect against abuses. The answers the courts got to these questions bring into focus the skill with which the various measures were crafted. The skill used by the draftsmen of these measures suggests the following observations about the draftsman's part in the legislative process:

1. Where a controlling statute or regulation gives relatively clear direction, follow it. An example on this point is the application of *UCA* Sect. 10-9-9 (as amended by HB 76) to municipal boards of adjustment. A draftsman should take care to follow restrictions on zoning appeals and not give the legislative body the "right" to hear unauthorized appeals.

2. Where regulation or control is permitted, don't try to go too far. There are several positive examples on this point: one of the reasons the New York anti-discrimination law and the San Jose rent control ordinance survived challenges may be that each focused tightly on the identified problem. And the draftsmen of these measures seem to have been very calculating in how far regulation could extend before reaching the boundary line of unenforceability. Likewise, in the Illinois tax on interstate telephone service, the draftsmen were careful to allow a credit to a taxpayer who had already paid a tax on the subject service.

3. Where appropriate, use standards to avoid unbridled discretion. The detailed standards in the New York anti-discrimination law and the San Jose rent control ordinance clearly were major factors in helping those measures survive constitutional challenge. In contrast, the lack of standards and the unbridled discretion given the Mayor in *City of Lockwood* in administering permits for newsracks was the reason that measure failed. A note of caution is found in the anti-picketing ordinance in *Frisby v. Schultz*, wherein the ordinance survived, in part, by virtue of a "content-neutral" obsolute ban on picketing, instead of an attempt to merely limit activity with the use of standards.

4. Draft carefully. Good work always stands out. Carefully drawn legislation succeeds on the merits and by its quality gives the Courts a level of comfort, which increases the prospect that the Courts will not invalidate the measure. (Compare the drafting decisions made by the municipal attorney in *City of Lakewood* with the drafting decisions made by the municipal attorney in *Frisby v. Schultz*. These drafting decisions were a major factor in the first ordinance failing on appeal, and the second ordinance succeeding on appeal.)

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[1] 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).
[2] 714 P.2d 1133 (Utah 1986).
[3] 487 U.S. , 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988).
[4] 484 U.S. , 108 S.Ct. 636, 98 L.Ed.2d 782(1988).
[5] 390 U.S. 629, 643, 88 S.Ct. 1274, 1282, 20 L.Ed.2d 195 (1968).
[6] 100 Utah Adv. Rep. 7 (1988).
[7] 486 U.S. , 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).
[8] 487 U.S. , 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).
[9] 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).
[10] 485 U.S. , 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).
[11] 430 U.S. at 274.
[12] 488 U.S. , 109 S.Ct. 582, 102 L.Ed.2d 607(1988).
[13] 485 U.S. , 108 S.Ct. 915, 99 L.Ed.2d 107(1988).
[14] Query: is the status of an employee as a final policymaker to be determined as a matter of law, or by a jury? *See*, 108 S.Ct. at 925: ". . . certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself."
[15] U.S. , S.Ct. , 1989 WL 14966 (No. 86 1088, decided Feb. 20, 1989).
[16] 484 U.S. , 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).
[17] 485 U.S. , 108 S.Ct. 849, 99 L.Ed.2d 1 (1988).
[18] 752 P.2d 1321 (Utah App. 1988).
[19] 756 P.2d 704 (Utah App. 1988).
[20] 714 P.2d at 1133.
[21] The 1989 Utah Legislature (HB 76) amended Sect. 10-9-9 to provide that the legislative body of a municipality may, by ordinance, provide that the legislative body may hear appeals relating to conditional use permits.
[22] Utah R. Civ. P. 65B(b)(3).
[23] *See Xanthos v. Board of Adjustment* 685 P.2d 1032 (Utah 1984) ("plenary action for relief" discussed).
[24] 758 P.2d 897 (Utah 1988).
[25] *See Martindale v. Anderson*, 581 P.2d 1022 (Utah 1978).
[26] *See Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (vesting of rights in relation to a zone change discussed).
[27] 753 P.2d 514 (Utah App. 1988).
[28] 485 U.S. , 108 S.Ct. 1355, 99 L.Ed.2d 542 (1988).
[29] 435 U.S. , 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).
[30] 485 U.S. , 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988).
[31] 486 U.S. , 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988).
[32] 488 U.S. , 109 S.Ct. 609, 102 L.Ed.2d 646 (1988).
[33] 754 P.2d 928 (Utah 1988).

Bar Commission Highlights

At its regularly scheduled meeting on February 17, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. Received a report of the Lawyer Benefits Committee by Randon Wilson, Chair; approved a disability insurance program of Standard Insurance Company for endorsement; reviewed preliminary data on a member FAX program; and discussed the administration of the Blue Cross, Blue Shield Program.

2. Approved the minutes of the January 27 meeting with minor amendments.

3. Received the Executive Committee report, including reports on Bar representatives' presentations at the ABA Mid-Year meetings; noted upcoming presentations to be made at the Western States Bar Conference; appointed Keith Chiara to the Board of Trustees of DNA-Peoples Legal Services; and acted on various administrative inquiries.

4. Received the Executive Director's Report noting the filing of three research grant requests for the Law and Justice Center; reviewed the increased consumer use of the Tuesday Night Bar; accepted for study a proposal by the Administrative Practice Section for new membership categories; reviewed materials regarding further development of pro bono legal services efforts; and discussed suggested enhancements to the annual Bar Directory.

5. Received the Admissions Report, approving petitions related to the MPRE exam and a reinstatement following suspension for dues nonpayment; considered and approved a report of the Character and Fitness Committee on a petition for readmission; and noted status of pending petition for proposed changes to Bar exam rules.

6. Received the Discipline Report, acting on pending private and public discipline matters as reported elsewhere in this issue; and reviewed the annual report of the Office of Bar Counsel.

7. Received the report of the Legislative Affairs Committee by Roger Sandack, Chair, and Travis Bowen, Legislative Liaison. Reviewed status of bills regarding child support guidelines, judicial review of administrative agency rulings, products liability, punitive damages, rules of criminal procedure, pro bono counsel immunity and others.

8. Received the report of the Associate Director on plans for the Mid-Year and Annual Meetings.

9. Met for a working luncheon with the Utah Supreme Court.

10. Reviewed the status of pending litigation.

11. Received the report of ABA Delegate Norman Johnson regarding actions taken by the ABA House of Delegates at its Mid-Year Meeting in Denver.

12. Received the report of the Ethics Advisory Opinion Committee by Patricia Christensen including proposed rules of procedure for the committee; adopted a policy, pending further action on the rules, that no ethics opinions would be issued in response to requests where the issues involve pending litigation.

13. Received the report of the Young Lawyers Section by Jerry Fenn, Young Lawyers Section President, noting Young Lawyers Section representation at recent and future ABA meetings; and acknowledged the Section's development of its Community School Program.

14. Reviewed space development needs and proposals for the undeveloped areas of the Law and Justice Center, approving further development of the space subject to certain financial arrangements being accomplished.

15. Received a report on MCLE and the invitations to Bar members to apply for nomination to the MCLE Board.

16. Reviewed a committee report on alternative methods of filling vacancies on the Bar Commission, electing to preserve present provisions of the Bylaws.

17. Reviewed the report on the Apprenticeship Project, including a minority report and acted to repeat the program in the fall of 1989.

A full text of the minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 4.2 by communicating by letter with an opposing party whom the attorney knew was represented by counsel.

2. For the inappropriate manner in which the attorney handled a client's divorce hearing; specifically, the attorney had attempted to postpone the hearing solely for the attorney's own convenience and was admonished.

3. An attorney was admonished for violating Rule 1.4(a) by failing to communicate adequately with the client regarding court orders or actions taken and for failing to respond adequately to the client's requests for status reports and information.

PRIVATE REPRIMAND

1. For violating DR 6-101(A)(3) for neglect of a legal matter, an attorney was privately reprimanded for failing to monitor the entry of a judgment against the client, failing to inform the client as to the status of the entry of the judgment, and failure to file a timely appeal after express direction to do so by the client.

PUBLIC REPRIMAND

1. Anthony M. Thurber was publicly reprimanded for engaging in conduct prejudicial to the administration of justice in violation of DR 6-102(A)(5), by paying the net proceeds of a settlement directly to his client in violation of the client's earlier assignment of those proceeds to a bank and the client's earlier instructions that Mr. Thurber should honor the assignment, and for presenting defenses and testimony in a subsequent lawsuit in an attempt to avoid liability for his actions, which the trial and appellate courts chose to reject.

SUSPENSION

1. On March 2, 1989, the Utah Supreme Court entered an order of interim suspension suspending Gerald Turner from the practice of law during the pendency of his appeal of his conviction of bankruptcy fraud in violation of 18 U.S.C. Sect. 152.

Bar Lobbying Policy and Rebate Notice

At its October 28, 1988, meeting, the Board of Bar Commissioners adopted the following resolution of policy on the matter of legislative advocacy:

1. Legislative activity of the Utah State Bar Association may be as broad as the legitimate purposes and objectives listed in its bylaws:
a) to cultivate and advance the science of jurisprudence; to promote improvement of judicial procedures, the courts and the administration of justice; . . . [and]
b) to recommend to the Legislature and other public bodies the enactment or change of laws in the public interest, and to oppose those laws or changes in laws not in the public interest.

2. Decisions concerning which bills to support or oppose shall be made by the Board of Bar Commissioners on a two-thirds vote of the Commission.

3. Recommendations for positions on legislation shall come to the Board of Bar Commissioners from its Legislative Affairs Committee in consultation with other interested committees and sections of the Bar.

4. Any member of the Utah State Bar who dissents from any legislative position taken by the Board of Bar Commissioners may apply for a proportionate rebate of his/her dues; such application may be made in writing to the Executive Director of the Utah State Bar in May of each year. The dissenter need not identify the particular positions with which he/she disagrees; members shall be notified of his/her right to apply for such a rebate.

Adopted October 28, 1988.

Pursuant thereto, the Board now reports that the following legislative issues were lobbied with the Bar Commission position noted:

1. Judicial Salaries: **FAVORED** increases consistent with the Report of the Citizens Advisory Committee on Executive and Judicial Compensation for state judiciary. **FAVORED** proposed increases in federal judges' salaries.

2. Child Support Guidelines: **FAVORED** the guidelines as adopted by the Judicial Council.

3. Judicial Review of State Agency Rules: **OPPOSED** SB223 due to the untenable burden on appellate courts it would have created.

4. Partial Immunity for Pro Bono Counsel: **FAVORED**.

5. Tax Initiatives A, B and C: **OPPOSED**.

Members who wish to obtain a partial rebate of their dues in proportion to the dollar expenditures by the Bar in the 1988-89 legislative affairs activities (which include direct lobbying and nonadvocacy, impartial research assistance to the legislative and executive branches) may submit a letter request to the Executive Director. The amount of the rebate, based upon a budget of $18,000 and a membership of approximately 5,100, is set at $3.53.

Peddle With the Mayor and Raise Money for the Homeless

Last year, a number of Utah attorneys rode in the Mayor's bike ride to raise money for the homeless shelter. Lawyers are invited once again to join the Citibank Century—A Recreational Bike Ride on Saturday, May 20. The proceeds will benefit the homeless project at 210 Rio Grande Street in Salt Lake City.

The event features one ride for all abilities. Participants may ride 25 miles, 62 miles or 100 miles, depending on personal preference.

Registration is between 7:00 a.m. and 9:00 a.m. on the day of the event at the location of the start of the ride, but preregistration by mail is advised. Forms are available from Lynne Zimmerman in the Mayor's office.

The ride will begin at 350 N. Redwood Road.

All cyclists are welcome. The $15 per person entry fee covers the cost of the ride, snacks, lunch, rest stops and a T-shirt.

Utah State Bar's 59th Annual Meeting Scheduled for Sun Valley on June 28 to July 1

The beautiful resort of Sun Valley will be the location for the 1989 Annual Meeting. Your Committee has planned a schedule which will give you maximum time to enjoy tennis, golf, swimming, fishing, shooting and dining, combined with a very informative and substantive meeting program.

The Continuing Legal Education seminars alone should make this meeting "a must" for many Utah attorneys. Three additional presentations will make this a most memorable Annual Meeting. You'll hear from The Hon. Harold G. Christensen; Deputy Attorney General of the United States, James W. McElhaney, author and Professor of Trial Practice and Advocacy; and Gary Kinder, author and legal writing expert.

According to Michael J. Mazuran, Chairman, rooms have been blocked at Sun Valley Resort for members of the Bar. For those wishing to stay in neighboring Ketchum, information on accommodations is available through your travel agent or by calling toll-free 1-800-635-1076.

The organized tournaments and sporting events have some new twists this year designed to make them more fun and more "rewarding." For example, the First Annual President's Cup Golf Tournament features a scramble format with teams divided into four skill levels. The low team score will win, and there will be additional prizes for longest drive and closest to the pin.

For those shooting trap, tickets will be provided for winning each round, and a drawing will be held at the conclusion for a shotgun valued at $2,000. The winner of the fishing tournament will also be richly rewarded with a cane rod, according to Larry Weiss who is coordinating the two events.

There will also be tennis, volleyball and a fun run.

The 1989 Annual Meeting Committee is Michael J. Mazuran, Chair, Hon. Timothy J. Hanson, Larry R. Keller, Neil R. Sabin, Kent Scott, Joanne C. Slotnik, Kathryn H. Snedaker, Loren E. Weiss, Kent M. Kasting (Commission Liaison), Stephen F. Hutchinson and Barbara R. Bassett.

The Committee urges all Bar members to plan now to enjoy a relaxed family vacation in Sun Valley in conjunction with the Bar's Annual Meeting this June.

Sun Valley Sports Events

By Hon. Timothy Hanson

If you haven't given much thought to the Annual Meeting in Sun Valley this year, or if you thought about it and figured you might as well work, think about it again. Not only will the Annual Meeting be educational (the organizing committee chaired by Mike Mazuran has put together some exciting and informative sessions), but the sports activities figure to be nothing short of fantastic. The best part is, you don't have to be a world class fly fisherman, internationally famous trapshooter or scratch golfer to garner the top prizes.

For starters, Scott Wangsgard, together with the good offices of Ducks Unlimited, has put together a trap and skeet combination shoot at the Sun Valley Gun Club that will not only test skill in shotgun proficiency, but will provide a lot of fun. Space limits full description of the shoot, but suffice it to say that it will be a team, timed shoot at both skeet and trap targets. Team work and agility in reloading will be as important as being a top shooter. A little luck on the final drawing won't hurt either. Tickets will be given for each clay target hit, and each ticket will be good toward the grand prize drawing. The grand prize is a presentation model Ducks Unlimited engraved Browning model A5 Sweet Sixteen, valued in the area of $2,000.

There will be other prizes as well in such categories as high and low scores. If a chance at the Ducks Unlimited Browning shotgun was not enough to entice you to participate, the modest registration fee will include a Ducks Unlimited membership as well as the 12-gauge ammunition used during the shoot. Copies of the shooting layout, rules and a look at photos of the grand prize can be had by contacting either Scott Wangsgard at 967-5500 or the author at 535-5677.

If the shooting event doesn't tweak your interest, consider the fly fishing. Larry Weiss and Rocky Rognile have organized the annual fly fishing tournament into a spectacular event. Grand prize drawing tickets will be issued with the entry fee, and also awarded in relation to catch. So, like the shooting event, those who may not be the most ardent and proficient anglers have a good chance at the grand prize. That prize is nothing less than a limited edition R.L. Winston fly rod known as "Tom Morgan's Favorite Rod." It will be signed and numbered in a deluxe case. The grand prize will also include a commemorative print by Paradise Valley, Montana, artist Russell Chatham. Additional prizes will go to the tournament winner (most inches of fish caught) as well as runners-up in that category. Prizes for the biggest fish, biggest fish story, and the like will also be awarded. The proceeds of the event will be donated to the Utah Trout Foundation, and used to maintain and improve cold water fisheries in Utah. Rocky and Larry advise that volunteers are needed to assist in running the tournament, and if you or someone in your family can assist, call Rocky at 355-6677 or Larry at 532-3555.

The Annual Meeting Committee has not neglected the golfers. The First Annual President's Cup Golf Tournament will be played in a scramble format. Players will be divided into four skill levels based upon handicap or average score for 18 holes, with one player being selected from each level to form the teams. The men's regular and ladies' tee boxes will be used for the tournament. A scramble format will be used, supplemented by special rules to add interest and fun for all. Low team score for 18 holes wins the tournament. Registration fees for the tournament will include green fees, golf cart and individual trophies for the winning team. In addition, there will be prizes for closest to the pin and longest drive in both men's and women's categories. Interested golfers may indicate their preferred foursomes, which will be honored as much as possible. Participants may also simply enter the tournament and will be paired with other players from various skill levels.

Ron Nehring is in charge of and will be organizing the fun run for the runners among us. Ron advises that while his run is still in the latter stages of organization, it will be a true fun run. There will be a shorter run for kids and old fat people, particularly judges over the age 55 who are attempting to influence Ron to create a special class. There will be prizes in all categories, encouraging broad participation. Ron also advises that he intends to have a longer and challenging run for those serious runners. Finally, Ron advises that he will do his running himself and promises not to bring his horse.

At the time this article is written, tennis and volleyball tournaments are still in the planning stages, and I am therefore unable to report in any detail on those sports. Looking at the effort that has gone into shooting, fishing, golf and running, I can only anticipate that tennis and volleyball will be equally as fun and as challenging.

So, whatever your reason, continuing education, vacation with the family, stress reliever, winning one of the outstanding prizes, or if you just want to embarrass the judge on the trap field, block out June 28 through July 1 and be in Sun Valley. If you haven't already sent in your registration materials, do so at your earliest convenience. This year's Annual Meeting promises to be one of the best.

Claim of the Month

ALLEGED ERROR AND OMISSION

Plaintiff alleges failure to make a necessary filing with the Internal Revenue Service when liquidating a corporation resulting in adverse tax treatment to the liquidation.

RESUME OF CLAIM

The Insured was engaged to liquidate a corporation. The Insured understood that the representation was limited to preparation of all documents required for filing and achievement of a corporate liquidation under State law. The Insured was advised by the client that an independent accountant had been retained for the purpose of tax advice, the preparation of and the filing of required tax documents, including the required notice of liquidation with the Internal Revenue Service. The required notice of liquidation was not filed with the Internal Revenue Service with the result being adverse tax treatment to the liquidation. The client later claimed that the Insured was engaged to liquidate the corporation and to file the required notice of liquidation with the Internal Revenue Service.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

While it might be considered to be standard of practice when preparing a corporate dissolution to also prepare and file all necessary tax documents, the Insured was clearly retained for a limited purpose. Therefore, the Insured might have avoided this claim by preparing a specific retainer agreement or confirmation of retention letter to the client explaining the exact and limited representation for which the Insured was retained.

Bar Commission Seeks Comments on Proposed Pro Bono Policy

At its meeting in St. George on March 17, 1989, the Bar Commission approved a motion adopting the following policy resolution as proposed Bar policy on pro bono responsibilities of Utah lawyers, providing that the proposed policy be first published in the *Bar Journal* and that comments be solicited from Bar members for consideration prior to final action on the policy. **Members are invited to review the proposed policy and to submit written comments to the Bar Commission, % Stephen F. Hutchinson, Executive Director, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111. Comments must be reviewed no later than June 6 for consideration by the Board at its June 16 meeting.**

RESOLUTION

The Utah State Bar recognizes that there is a large number of low income residents of Utah who are unable to obtain legal help. Increased *pro bono* participation by private attorneys in Utah would significantly expand the availability of civil legal services to Utah's low income population. In keeping with the recent American Bar Association recommendation, the Utah State Bar urges all attorneys to devote at least 50 hours per year to pro bono and other public service activities that serve those in need or improve the law, the legal system or the legal profession.

Public interest areas may include such activities as the following:

1. Poverty law. Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel, including appointment by the courts in *habeas corpus*.
2. Civil rights including civil liberties law. Legal representation involving a right of an individual which society has a special interest in protecting.
3. Charitable organization representation. Legal service to, or service on the boards of committees of, charitable, civic, governmental and educational institutions in matters which further their organizational purposes.
4. Administration of Justice and Law Reform. Activity, whether under Bar association auspices in the form of committee work or otherwise, which is designed to improve the law, the legal system or the legal profession, increase the availability of legal services or otherwise improve the administration of justice.
5. Promote public education awareness and understanding of the law.

The Utah State Bar also urges all law firms and corporate employers to promote and support the involvement of associates and partners in *pro bono* and other public service activities. The Bar urges law firms to consider such options as counting all or a reasonable portion of their time spent on these activities, toward their billable hour requirements, or by otherwise giving actual work credit for these activities.

World's Business Lawyers to Stage Biggest Debate on the Legal Implication of 1992

The biggest debate ever on the business and legal implications of a single common market will be held in Stasbourg this year by the International Bar Association's Sections on Business Law and General Practice. It is likely to be attended by more than 2,500 lawyers and their guests from around the world.

The SBL's Ninth Biennial and the SGP's Fifth Biennial conferences will run from the opening ceremony at the Congress Center on Monday, October 2, until the closing sessions on Friday, October 6. M. Jacques Delors, President of the European Commission, has agreed to address the conference.

Some of the issues to be discussed at the conference, which will have more than 100 sessions and 500 speakers, include: The future of the ECU—borrowing and lending in the ECU; Bilateral negotiations with "Fortress Europe" American and Asian viewpoints.

For further details on the conference, please contact the Legal Education Department at the IBA, 2 Harewood Place, Hanover Square, London W1R 9HB, telephone (01) 629 1206 telex 8812664, FAX (01) 409 0456.

Recent Pro Bono Developments

In the November 1988 issue of the Salt Lake County Bar's *Bar and Bench* publication, President J. Michael Hansen called for support among Utah lawyers and pro bono service standards on a voluntary basis.

As an example, the law firm of Fabian and Clendenin adopted a pro bono policy allowing firm members up to 50 hours annually of pro bono or other public service activities to be counted toward billable hour requirements. According to Anne Milne of Utah Legal Services, Inc., Fabian is the first area firm to endorse such a policy.

The ABA's Young Lawyers Division sponsored a national resolution, arguing that a renewed commitment to pro bono work is necessary. As private law firms' billable hour requirements have increased, the practical ability of lawyers to become involved with public service work has decreased, resulting in an insufficient number of lawyers available to help the poor.

Lawyers for the Arts Seeks New Members

Utah Lawyers for the Arts is seeking new members who are willing to provide occasional free legal assistance to artists and arts organizations that meet certain income criteria. Volunteer lawyers generally will be assigned no more than one or two matters per year. The types of cases referred include: questions concerning incorporation, drafting of recording contracts, first amendment litigation, licensing of designs, questions regarding copyright, trademark and royalties, and simple contractual matters. Members will receive ULA's quarterly newsletter, have access to ULA's library on art law, and be invited to lectures and seminars sponsored by ULA on art and legal topics. Membership fees are $15 for students, $20 for attorneys who have practiced for fewer than five years and $30 for attorneys who have practiced for five or more years. For membership applications or additional information, please call Sue Vogel at Jones, Waldo, Holbrook & McDonough, 521-3200.

Mock Trial Attorney Coaches and Judges Recognized

The following members of the Utah State Bar volunteered their time and talents to be attorney coaches in the 1989 Tenth Annual Statewide Mock Trial Competition sponsored by the Bar's Law Related Education and Law Day Committee (Beth Whitsett and Chris Fuller, co-chairpersons) and the Utah State Office of Education's Law Related and Citizenship Education Project (Nancy N. Mathews, Director).

More than 100 other members of the Bar, including President Kent Kasting, members of the Bar Commission, the Bar Foundation, the judiciary and 50 members of the Utah State Office of Education, including members of the Utah State Board of Education, also generously volunteered their time in judging the more than 70 trials.

The parents and teachers of the more than 700 junior and senior high school students who participated, as well as the students themselves, gained a new perspective and respect for the law and lawyers as the result of the outstanding efforts of these fine attorneys.

School	Attorney Coach
Bryant Intermediate	Lisa Adams
Central Middle	Doug Durbano
Central Davis Jr.	Olga Bruno
Churchill Jr.	Carolyn Skuzeski
	Kevin Smith
J.E. Cosgriff	George Hunt
	Paul Moxley
	Dan Sanford
Evanston Middle	Roger Cowan
Hillcrest Jr.	Scott W. Reed
Highland Middle	Kevin Richards
Hillside Jr.	Lee Dever
	Carolyn Nichols
Kaysville Jr.	Felshaw King
Kennedy Jr.	Bob Wright
Midvale Middle	Tad Draper
Millcreek Jr.	Ralph Mabey
	Steve Rupp
	Terry Cathcart
	Randall Benson
Mont Harmon Jr.	John E. Schindler
Mound Fort Middle	Robert Froerer
Mueller Park Jr.	Diane Wilkins
	Dean Becker
Northwest Intermediate	Knute Rife
	Dwight Epperson
Oquirrh Hills	Joe Joyce
Our Lady of Lourdes	Jeff Oritt
Rowland Hall/St. Mark's	Patrick Casey
South Davis Jr.	Steven Vanderlinden
St. Vincent	Joe Gallegos
Vernal Jr.	Harry Souvall
West Lake Jr.	Rich Rose
	Debbie Bonmark
American Fork High	Dennis C. Wilson
Ben Lomond High	Ted K. Godfrey
Bonneville High	Randy Richards
East High	Mark Gaylord
Highland High	Bruce Badger
	Jodi Feuerhelm
	Kevin Anderson
Kearns High	Glen Cook
Layton High	Laura DuPaix
	Glen Cella
Logan High	Tom Willmore
	Marlin Grant
Mountain Crest High	Hon. Gordon Low
Mt. View High	Thomas Scribner
North Summit High	Bruce Savage
Ogden High	Marty Custen
Orem High	Gary Kuhlman
Olympus High	Warren Driggs
	Greg Skordas
Pleasant Grove High	Bret Jenkins
Provo High	Michael Mack
Rowland Hall/St. Mark's	John Morris
	Harry Caston
Richfield High	Richard Chamberlain
Sky View High	Larry E. Jones
South Summit High	Gerry D'Elia
Uintah Basin Area Voc.	Roland Uresk
Viewmont High	Michael D. Neilsen
Washington High	Kelly Cardon
	Carl Ericson
Woods Cross High	Scott Christensen

35th Annual Rocky Mountain Mineral Law Institute

The Rocky Mountain Mineral Law Foundation is sponsoring the 35th Annual Rocky Mountain Mineral Law Institute in Snowmass, Colorado, on Thursday, Friday and Saturday, July 20 to 22, 1989.

The 35th Institute offers the combined expertise of 26 outstanding speakers, all experienced practitioners in natural resources law. Presentations will address a variety of practical legal and land problems associated with the exploration for and development of oil and gas, hard minerals and water on both public and private lands. A new half-day Environmental Session has been added to this year's Institute.

This Institute will be of interest to lawyers and landmen as well as to corporate management, governmental representatives and university faculty.

For additional information, contact the Foundation at (303) 321-8100.

Formal Ethics Opinion: Letterhead

On January 27, 1989, the Board of Bar Commissioners adopted the following formal ethics opinion dealing with the application of Rule 7.5(d) to the wording of letterhead for attorneys who office share but are not in any formal partnership. Questions regarding the opinion may be directed to the Office of Bar Counsel, 531-9110.

ISSUE

What kinds of common letterhead may properly be used by solo practitioners who office share but are not partners?

OPINION

It is unethical for solo practitioners who office share but are not partners to use common letterhead that in any way implies that they are partners. Letterhead that reads "A, B and C, An Association of Solo Practitioners," or "A, B and C, Independent Practitioners," without disclaimer of partnership status, is ethically improper.

ANALYSIS

The parties requesting this opinion are solo practitioners sharing office space. They have used common letterhead that lists their names as follows: "A, B and C, Attorneys at Law." They now propose to add an explanatory phrase, "Association of Sole Practitioners." They request an advisory opinion as to whether the letterhead "A, B and C, Attorneys at Law, Association of Sole Practitioners," is permissible under the Utah Rules of Professional Conduct.

Utah Rule of Professional Conduct 7.5(d) controls the use of letterheads: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." The Comment to Rule 7.5 further explains: "With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners may not denominate themselves as, for example, 'Smith and Jones,' for that title suggests partnership in the practice of law." DR 2-102(c) of the Utah Code of Professional Responsibility formerly provided: "A lawyer shall not hold himself out as having a partnership with one or more other lawyers or professional corporations unless they are in fact partners."

The American Bar Association has advised lawyers in an office sharing arrangement to exercise care to maintain both the substance and the impression of an independent practice. This usually includes the

use of separate pleadings, business cards, telephone listings and letterheads. *See* ABA Formal Opinion 310 (6/20/63). *See also* Connecticut Bar Informal Opinion 85-2; Illinois Bar Opinion 764 (1/12/82); Michigan Bar Informal Opinion CI-1039 (9/10/84) and CI-1044 (11/14/84); Philadelphia Bar Opinion 86-82 (6/19/86); Washington Bar Opinion 178 (9/84).

In dealing with the public, a solo practitioner may very easily create the impression of a professional association which does not in fact exist. Clients may rely, in important ways, on these misleading impressions. For example, they may expect the sole practitioners to bear the joint and several liability of partners, *see* ABA Formal Opinion 115 (8/27/34); to have the prestige of a partnership, *see* ABA Formal Opinion 106 (3/9/1934); and to rely on the shared expertise, information and resources of members of the partnership.

The use of a common letterhead is misleading if it simply lists the names of solo practitioners who are office sharing without indication of the nature of their relationship. Common letterhead is impermissible without an adequate disclaimer that a partnership or professional association does not exist; in this opinion, we take no position about whether common letterhead for solo practitioners is ever permissible. No disclaimer is adequate unless it is clear, simple and unequivocal to the public as a whole. For example, "a legal association" was found to be an inadequate disclaimer by the California Bar. *See* California Bar Opinion 1986-90. "Law Offices/Smith, Brown & Jones/Individual Practitioners, not a partnership" was found by the Pennsylvania Bar to imply that a professional partnership existed. *See* Pennsylvania Bar Opinion 85-100 (8/23/85). The term "Association" is not an adequate disclaimer; members of the public cannot be expected without further explanation to understand an "association" or an "association of sole practitioners" is not a partnership. *See In re Sussman* 241 Or. 246, 405 P.2d 355 (1965) Furthermore, the phrase "Association of Sole Practitioners" connotes a formal, established professional organization, not mere office sharing.

The use of common letterhead by attorneys who share offices but are not partners is therefore ethically improper when it does not clearly state that the individuals listed are independent, solo practitioners and that the office sharers are not a partnership or a professional association. Letterhead that reads "A, B and C, An Association of Sole Practitioners," or "A, B and C, Independent Practitioners" does not clearly state that the office sharers are not a partnership or a professional association, and is therefore ethically improper.

Effective January 27, 1989

Utah State Bar Presents Seven Awards at Conclusion of 1989 Mid-Year Meeting

The Utah State Bar announced seven awards for distinguished service by individuals, sections and committees at the Mid-Year Meeting in St. George. The awards were presented by Bar President Kent M. Kasting. Recipients were selected on the basis of achievement; professional service to clients, the public, courts and the Bar; and exemplification of the highest standards of professionalism.

DISTINGUISHED LAWYER EMERITUS AWARD

D. RAY OWEN JR.

D. Ray Owen was admitted to the Utah State Bar in 1940 following graduation from the University of Utah College of Law. He served as editor of the *Utah Bar Bulletin* and was instrumental in the origination of the *Utah Bar Journal*. He served as Editor-in-Chief of the *Journal* from 1973 until last year. Mr. Owen is also recognized for his generosity in giving his extensive law library to the Utah Law and Justice Center.

DISTINGUISHED LAWYER IN PUBLIC SERVICE AWARD

K.S. CORNABY

K.S. Cornaby is a member of the Salt Lake City law firm of Jones, Waldo, Holbrook & McDonough. He is a Utah State Senator and has served as majority leader of the Senate. He studied International Law at the University of Heidelberg for three years and received a J.D. degree from Harvard Law School in 1966. Mr. Cornaby is active in many community affairs, currently serving as a board member for KUER Public Radio, Blue Cross and Blue Shield of Utah, University of Utah Graduate School of Social Work Advisory Board and the Salt Lake Convention and Visitors Bureau.

DISTINGUISHED NON-LAWYER AWARD FOR SERVICE TO THE BAR

ROBERT L. STAYNER

Robert L. Stayner is a certified public accountant licensed in Utah and California. He is a shareholder in Stayner, Fitzgerald, Vance & Call in Salt Lake City. Mr. Stayner is a 1955 graduate of the University of Utah. He has served the legal profession as a director of Legal Aid Society from 1978 to 1984, and as a long-standing, active member of the Bar's Unauthorized Practice of Law Committee and the Fee Arbitration Committee. Mr. Stayner is chairman of the Friends of the University of Utah Libraries and past president of Bonneville Kiwanis.

DISTINGUISHED LAWYER POSTHUMOUS AWARD

ALBERT J. COLTON

Albert J. Colton was director and president of the Salt Lake City law firm of Fabian and Clendenin, and was also Canon Chancellor at St. Mark's Cathedral and Chancellor of the Episcopal Diocese of Utah. Mr. Colton obtained law degrees from Yale Law School and Balliol College, Oxford, England, which he attended as a Rhodes Scholar. He served for three years as chairman of the Utah State Bar Examiners. Mr. Colton also served on the boards of the Utah Endowment for the Humanities, St. Mark's Hospital and the Salt Lake Area Chamber of Commerce.

DISTINGUISHED SECTION AWARD

YOUNG LAWYERS SECTION

During the past year, the Young Lawyers Section has conducted many successful law-related public service projects including Law School for Non-Lawyers, a legal information series; numerous in-school guest lectures for elementary and secondary schools; legal information booths in malls during Law Day; and presentations at senior citizen centers. The Section has also produced a Senior Citizens Handbook. The Section has assisted the Bar in providing pro bono legal services through the Tuesday Night Bar.

DISTINGUISHED COMMITTEE AWARD

BAR JOURNAL COMMITTEE

The *Bar Journal* Committee designed and publishes the new *Utah Bar Journal* which consolidates in one publication the *Bar Letter, Utah Bar CLE*, the former *Bar Journal* and the *Barrister*. Members of the *Bar Journal* Committee are Calvin E. Thorpe, chairman, David B. Erickson, Stanford P. Fitts, M. Karlynn Hinman, William D. Holyoak, Hon. Michael L. Hutchings, Kevin P. McBride, Leland S. McCullough Jr.,

Margaret R. Nelson, Clark R. Nielsen, Nann Novinski-Durando, Glen W. Roberts, Randall L. Romrell, Larry A. Steele, Douglas A. Taggart and Hon. Homer F. Wilkinson.

SPECIAL AWARD FOR DISTINGUISHED COMMITTEE IN EXTRAORDINARY AND HISTORICAL ACHIEVEMENT

POST LAW SCHOOL PRACTICAL TRAINING COMMITTEE

The Post Law School Practical Training Committee was formed three years ago under the direction of the Hon. J. Thomas Greene. Fifty members developed and implemented a pilot apprenticeship program and expanded the Bridge the Gap program. The program is currently being considered for adoption by the Utah Supreme Court.

Notice to the Bar and Public

On March 16, 1989, the Judicial Council voted to rescind its ratification of Rule 6-402 of the Code of Judicial Administration effective immediately. Rule 6-402, as adopted, provided that where a female party was designated in the pleadings to a divorce action by a surname other than her husband's, she should also be designated by an AKA using her husband's name. The original purpose for the rule was to assist clerks in separating divorce matters from other types of civil cases and calendaring them accordingly.

Since the rule's adoption, however, court clerks and court executives have developed other procedures for identifying divorce proceedings which are more reliable. These procedures include a requirement that attorneys complete a cover sheet describing the type of action being filed or identify the matter as a divorce proceeding either expressly or by a letter designation in the caption of the pleading. Given these improved procedures and the questionable assistance of the rule, the Judicial Council voted to rescind it effective immediately and to notify all district court clerks that the rule would no longer be enforced.

If you have any questions concerning the Judicial Council's action or the proper procedure to follow, please contact Carlie Christensen at the Administrative Office of the Courts, 533-6371.

NOTICE

The Utah State Bar now has a new FAX machine—you can access our office via FAX #531-0660.

Mid-Year Meeting Highlights

CASE SUMMARIES

By Clark R. Nielsen

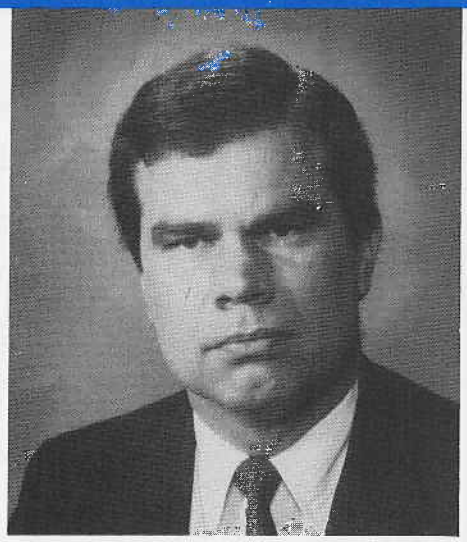
WATER AND STATE ENGINEER, CHANGE OF APPLICATION, PERMANENT v. TEMPORARY CHANGE

In a rare interpretation of Utah's water resources statutes, the Utah Supreme Court reversed a summary judgment rejecting judicial review of a water change application. The court held that the state engineer's office must investigate and consider the public use and impact of a change application on the same basis as required for an appropriation application under Utah Code Ann. Sect. 73-3-7 to Sect. 73-3-13. Also, under Sect. 73-3-7, any "interested person" may protest a change application, not just a water user or holder of vested rights. The case was remanded for a trial court review of a change of point of diversion granted by the state engineer to the Salt Lake County Water Conservation District. The state engineer had refused to consider a protest to the change by a downstream property owner, who alleged that the proposed structures and improvements would cause flooding and have a detrimental impact on the public welfare. *Bonham v. Morgan*, 102 Utah Adv. Rpt. (12/23/89).

UNIFORM CHILD CUSTODY JURISDICTION ACT—TERMINATION OF PARENTAL RIGHTS

California is the best and most convenient forum to determine child custody and parental rights under the Utah Code Ann. Sect. 78-45C-3(1), when the child's mother traveled to Utah only for her child's birth and California officials had evaluated the parents over a period of years, administered placement programs and were already involved in dependency hearings with the parents.

A petition alleging dependency of the newborn child had been filed in both Utah and California. Utah Family Services delivered the baby to California officials after the mother had left the baby in the Utah hospital. The sole purpose of the mother coming to Utah for her baby's birth was because she believed Utah had "more favorable custody laws." Although California was not the baby's "home state," under the U.C.C.J.A., it was the state with which the child and its family had stronger ties and a substantial connection. Even though W.D. had not lived in California, his physical presence was not a prerequisite for custody jurisdiction. The parents' connections with



Clark R. Nielsen

California and their continuing and past involvement with California authorities made that state the most appropriate forum in the best interests of the child. Dismissal of the Utah proceeding was affirmed.

Judge Orme concurred but opined that a stay of the Utah proceeding would have been preferable to its dismissal. Because Utah also had jurisdiction, dismissal was not required. A stay would have permitted the Utah court to monitor any developments or changes in the case and make certain that the best interests of the child were met.

In Re W.D., 103 Utah Adv. Rpt. 26 (Ct. App., 3/8/89) (J. Davidson).

ADOPTION, PUTATIVE FATHER'S RIGHTS

The Utah Supreme Court has granted certiorari in *Swayne v. L.D.S. Social Services*, 761 P.2d 932 (Utah App. 1987), an adoption decision by the Court of Appeals (J. Garff), rejecting the putative father's attempt to set aside an adoption. *Swayne* was summarized in the December 1988 *Bar Journal*.

EVIDENCE RULE 403, PROBATIVE v. PREJUDICE

In overturning a second degree murder conviction for a new trial, the Utah Supreme Court (J. Howe) held that portions of defendant's letter to the victim's father were so repulsive and offensive that their prejudice outweighed the probative value of the limited relevant statements in the letter. *State v. Mauer*, 103 Utah Adv. Rpt. 3 (2/28/89).

DIVORCE—PROPERTY DISTRIBUTION VALUATION OF CLOSELY HELD GOODWILL BUSINESS

In *Sorenson v. Sorenson*, 102 U.A.R. 14 (Ct. App. 2/10/89) (Judge Billings), an appellate court panel, albeit divided, held that divisible marriage assets included the goodwill associated with the closely held professional business of the husband. Goodwill is a summation of all the special advantages which are not otherwise identifiable in a going business or concern. A large portion of the value in a professional practice is its goodwill and reputation. The panel affirmed the trial court's valuation of the goodwill element of the husband's dental practice, based upon the length of time of the professional's practice, business location, number and age of patients, profitability of the business, accounts receivable and transferrability of the profits to a new prospective buyer. Although goodwill may reasonably range from 15 percent to 80 percent of the gross receipts of the business, the goodwill in this case was 34 percent as calculated by wife's expert.

Judge Billings explained that valuing goodwill is not the same as valuing a professional degree or license which is not marital property. Goodwill can be sold or marketed in conjunction with the sale of assets or a business. A professional degree is personal to its holder and is nontransferrable.

Goodwill is also distinguished from the capacity to generate future earnings. To consider future earnings would be, in effect, "double counting, as earning capacity is also utilized in determining an appropriate alimony award." Goodwill in a going professional concern continues even after the ability to produce future income ceases through retirement or death.

The court deferred to the trial judge's calculation of goodwill based upon the wife's expert witness who had sold and appraised several dental practices in the Salt Lake area in recent years. A valuation of goodwill must be supported, first, by a finding that goodwill exists and, second, how the relevant factors relate to the value established. The fact that goodwill may be difficult to value should be preclude its recognition as a marital asset.

Judge Jackson vigorously dissented, characterizing the creation of "good will" as another new property judicial technique to solve inequities in divorce property distributions. He challenged the conclusion

that goodwill exists: "In a professional practice, goodwill can exist in the business, but not in the individual practicing the profession. A large professional business can have substantial goodwill." To the contrary, a sole practitioner has "limited opportunities" for goodwill in a small professional practice. The dissent argues that traditional alimony awards offer the best methods to achieve equity in divorce. *Sorenson v. Sorenson*, 102 Utah Adv. Rpt. 14 (Ct. App. 2/10/89).

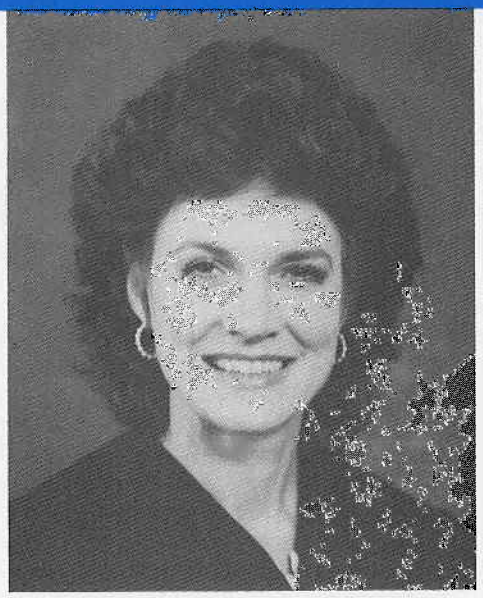
DIVORCE, PROPERTY DISTRIBUTION, VALUATION OF A PROFESSIONAL CORPORATION

The same panel of the Court of Appeals (J. Jackson) affirmed the trial court's valuation of a husband's interest in his dental clinic based upon evidence of recent transfers of stock in the corporation. These transfers excluded any value for goodwill, as did the husband's ownership interest. He had already sold his goodwill and had no right to share in it.

Judge Jackson recognized that, under *Sorenson*, goodwill may be present in both the professional corporation and the solo practice, but that no "goodwill" was present in this case. The valuation of the husband's interest in his dental practice was affirmed, based upon a finding of the credibility of his expert witness who had valued the stock. A valuation by husband's expert, based upon the capitalization method, was rejected at trial. The wife's expert's opinion of a $154,000 value was rejected because it erroneously assumed defendant's income would increase by a fixed percentage each year.

Alimony and child support awards were reversed and remanded because of a lack of supportive fundings relative to the economic needs of the wife and children. The awards had been supported only by a finding of the husband's ability to pay. *See Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985) and *Higley v. Higley*, 676 P.2d 379, 382 (Utah 1983).

Johnson v. Johnson, 103 Utah Adv. Rpt. 22 (Ct. App. 3/8/89).



Important Revisions in Utah's Justice Courts

By Judge Peggy Acomb

For many people, the notion of appearing in a Justice of the Peace Court conjures mental images of a provincial, uneducated, ill-trained judge in cahoots with the mayor and the town sheriff to the detriment of any outsider who might venture into their territory. Over the years, war stories of strange occurrences in JP courts have been told over lunches and at dinner parties. The humor of these stories has been lost on the leaders and membership of the Utah State Justice of the Peace Association. This group, in response to some legislative pressure, urged that body to form a Task Force to study the Justice of the Peace system in Utah and make recommendations for any changes necessary to upgrade and modernize it. We have always felt the system was a good one and we have been willing to make changes in order to accomplish certain goals. The ultimate goal of Justice of the Peace in the state of Utah has been twofold: First, to provide the people of the state with a court system which, while informal, still provides all the constitutional guarantees necessary; second, to assist the other levels of the court by handling the minor matters within our jurisdiction helping to reduce the overload faced by those courts. The recent passage of Senate Bill 10 will help further those goals.

THE HISTORICAL PERSPECTIVE

Historically, JPs in Utah were a part of the initial governmental structure, which was part of the Mormon Church. Ultimately, when statehood arrived, this system of justice was provided for in the Constitution of Utah. The desire of the people to maintain this constitutional court was affirmed in 1984 when the Judicial Article was amended. The people of early Utah felt strongly about providing for some local control over governmental processes which directly affected them. This has been one of the real strengths of the JP system. Municipal JPs have been appointed by their mayors and town councils every four years. County JPs have been elected in a popular election every four years. In about 1976, the Legislature prohibited partisan political campaigns for JPs. After that time, all JPs were prohibited from participating in any partisan political activity, as the judges of other levels of the courts. This mixed blessing resulted in county JPs needing to run popular elections without any party support and at the same time being governed by the Judicial Canons relative to elections, a difficult task at best.

When the JP courts were first established, their jurisdiction was $299 and/or six months in jail. This jurisdiction was maintained until 1985, when HB 100 was passed raising the jurisdiction to $1,000 and/or six months. At the same time, the Small Claims jurisdiction was raised to $1,000. Raising this jurisdiction was certainly another step toward bringing our courts into the 20th century. However, with this increased power also came concerns of increased abuses of that power. And indeed, aren't we

JUDGE PEGGY ACOMB currently sits as a Justice Court judge in Salt Lake County's Fourth Precinct. She is one of two Justice Court representatives on the State Judicial Council. Prior to this assignment, she served as the Chairman of the Governing Board of Judges for the Justice Courts and as the President of the State Association of Justice of the Peace. She has also served as Legislative Representative for that group for a number of years and as Education Director. Judge Acomb has served on the bench for 10 years. She attended the University of Utah and graduated from the Utah State Police Academy. She is married to John Acomb, and together they have five children.

more likely to look for abuses of power when the judge is conducting court in his living room with his wife as the clerk of the court? These have been fairly common practices until the last 15 years or so, when judges have, for the most part, moved into adequate courtrooms. In the major metropolitan areas and in some of the larger or more progressive rural areas, the Justices of the Peace have been provided adequate training, clerical help, support services (prosecutors and indigent defense council). However, in many more areas, these things have not been provided. Judges in some areas have been expected to conduct trials with only the police officer and the pro se defendant present. Then he would proceed to docket the case himself, receive the fines and issue any supplemental paperwork necessary in the case. A court cannot function properly when the judge must act out all the parts. They may tend to forget which hat they are wearing at any given time.

TODAY'S VIEW

So, in today's Justice of the Peace court on one hand you may still find the problems and biases which existed 50 years ago. Or you may find a court which is meeting the goals of quality service to both the public and the judiciary. The passage of Senate Bill 10 will help bring all of the courts to the desired level of performance.

In 1986, the Representative from Tooele introduced a bill in the Legislature which would have effectively eliminated all Municipal Justices of the Peace. She was concerned about duplication of services in courts with overlapping jurisdictions, the judge-shopping by law enforcement officers and lack of competency of some judges. After negotiations, the leadership of our state association became more substantially aware of serious problems. We pledged to work with any committee the Legislature might create to make a complete examination of the Justice of the Peace system. Hopefully, such a study would result in changes that would lay to rest the overworked, stereotypical image of JPs. With large amounts of staff support from the Office of the Court Administrator (Vickery, Gibson and York), the Commission on Criminal and Juvenile Justice established the first Justice of the Peace Task Force in 1987. It was comprised of members of city and county governments, legislators, law enforcement. The Supreme Court, Circuit Court and Justice Courts were represented, along with prosecutors, defense attorneys and educators.

Hearings were held over a period of many weeks and a broad spectrum of public and private representatives were given an opportunity for input. The Task Force was finally able to draft legislation, based on compromises from every element, which it presented to the 1988 Legislature, where it failed. Another task force was commissioned. Under the expert guidance of Senator K.S. Cornaby. Further studies were undertaken and now compromises made. Another bill was prepared for presentation at the 1989 session. This time, Senate Bill 10 passed, opening the door for the Justice Courts of Utah to begin functioning within the framework of the total judiciary, providing those services which will best serve the citizens in a manner which satisfies the demands of justice.

WHAT'S IN THE BILL?

Let me introduce you to the Justice Courts of the State of Utah. Effective July 1, 1989, we will no longer be called Justice of the Peace Courts. Though this change may appear to be largely cosmetic, I can assure you that the other changes are more fundamental. The judges will be called Judges of Justice Courts. Most of the changes in the bill are found in Title 78, some in Titles 77, 21 and 20.

One of the fundamental changes in the bill is for the purpose of addressing the problem of judge-shopping by police officers. In the past, cases were taken to the "nearest, most accessible" court. Because of the vagueness of this language, the officers wound up taking cases to those judges who were likely to rule in their favor for reasons other than merit. There was a judge in Salt Lake County who provided soft drinks and beef jerky 24 hours a day, hoping to encourage them to bring cases to him. The "nearest, most accessible" language has been eliminated. Jurisdiction/venue issues have been resolved between Justice Courts based on geography or territorial jurisdiction. If a case occurs within the territorial boundaries of a precinct or municipal court, then it must be taken to that court. There is no longer any overlapping of jurisdiction of Justice Courts. Jurisdiction with the Circuit Court is concurrent except for traffic matters. All Title 41 violations (traffic cases) are within the exclusive jurisdiction of the Justice Court, except DUI and reckless driving.

Justice Courts will no longer handle any juvenile cases involving alcohol, DUI, reckless driving, leaving the scene or fleeing. These will be heard in Juvenile Court. All juvenile traffic cases will come to the Justice or Circuit Court.

The civil jurisdiction of the Justice Courts has changed. The only civil jurisdiction provided in SB 10 is in the Small Claims Court with a limit of $1,000. Practically, the number of civil cases filed in Justice Courts has been so small that this is a logical "housekeeping" change. Small Claims jurisdiction is concurrent with the Circuit Court.

Prior to the passage of this legislation, officers were able to cite a defendant with a class A misdemeanor to the Circuit Court and a class B misdemeanor arising out of the same incident to the JP Court. For example, a class A driving on revocation charged at the same time as a class B DUI would be sent to two different courts. From now on, the case must be sent to the court with the highest jurisdiction and a single governmental entity will be required to prosecute the case and bear the costs.

Justice Courts will no longer handle preliminary hearings in areas where Circuit Courts are available. Justice Court judges will no longer be able to transfer cases on their own motion. Only the prosecutor or defense attorney, based on disqualification of the judge or lack of jurisdiction, will be able to move for transfer of the case. This will require each city, town or county with a Justice Court to hear the Small Claims cases properly filed there, as well as those cases where a jury demand is made.

These jurisdictional changes are of obvious interest to defense counsel. However, prosecutors will need to make sure their cases are being filed in the proper court as well.

In many cases, there is a perception of competence (or lack of competence) which is facilitated by the physical appearance of the courtroom and the mechanics of how the court operates. Some of you have heard the horror story of the rural northern Utah JP whose neighbor approached him in his corral to discuss a Small Claims matter. The discussion became heated and the JP threatened the neighbor with contempt. The neighbor challenged the ability of the judge to hold him in contempt since they were not in court, so the judge promptly called court into session and proceeded to find his neighbor in contempt and require certain penalties of him.

Consistent with the desires of all the Justice Court judges in Utah, some fairly stringent standards for court functioning have now been codified. Because there has been a recent trend to establish many new JP Courts for revenue purposes only, the Judicial Council now is charged with the responsibility of setting standards for the creation and certification of new Justice Courts. This will require the governmental entity requesting a court to provide certain basic services. The court itself must be in an appropriate public facility and it must be open for regularly set hours which must be

posted in a conspicuous place. The city or county must provide a clerk of the court, and training for both the judge and the clerk, as well as sufficient legal resource books as needed by the judge.

Those areas requiring the court to hold trials in criminal and traffic matters without prosecutors and indigent defense counsel will need to make a change as those are now statutorily required.

Another new aspect allows county attorneys to deputize city prosecutors to handle state cases in municipalities. County attorneys are currently charged with the responsibility to prosecute state cases in Municipal Courts. This change will allow city prosecutors to handle those cases and alleviate some of the workload crunch for the county. The revenue share between the city and the county will remain the same.

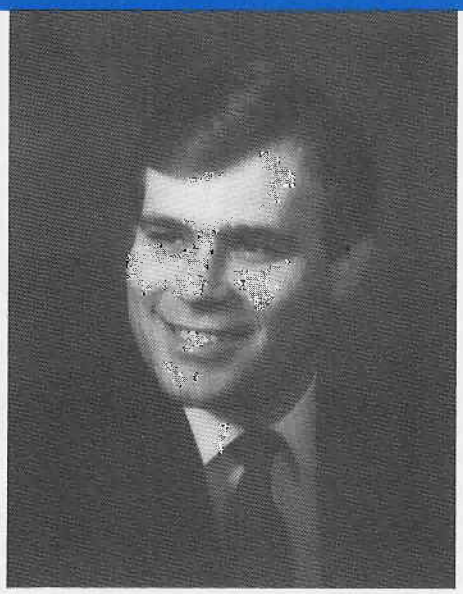
It is important to remember, at this point in time, that in Utah pursuant to both statute and case law, jury trials are to be granted in misdemeanor cases where jail sentences may be imposed. Senate Bill 10 provides that all provisions of law relative to juries, jurors and witnesses which apply in the District Court also apply in the Justice Court.

Now that we have dealt with the important issues of jurisdiction and court operation, we should turn to the most important aspect of the Justice Court, the judge. I suppose that much can be said both pro and con about the wisdom of having non-lawyer judges. There are some non-lawyer judges who are not competent. There are many more who are very competent. The fact remains that our constitution provides for courts not of record which allow non-lawyer judges who will not be required to be admitted to the practice of law. So let's take these non-lawyer judges and train them and require them to function on a professional level which will meet our original goals of service to the public and the judiciary. Many of the requirements in SB 10 are mandatory to the extent that the judge may lack jurisdiction to hear cases if they are not fulfilled. Some are mandatory to the extent of removal from office.

Prior to assuming office, a new judge must attend an orientation conducted by the Judicial Council. All Justice Court judges must annually attend continuing education which is conducted by the Judicial Council, or provide adequate proof of an acceptable substitute. County judges will be standing for retention election and will be subject to the same Performance Evaluation as the judges of the Circuit and District Courts. Municipal judges will still be appointed by mayors, city managers, town councils. Someday we hope to see these judges free from this inappropriate political pressure. But for now, the process must remain.

Another step toward increasing professionalism and attempting to improve the perception of fairness of the courts is to place limitations on the secondary employment which may be held by part-time judges of Justice Courts. These judges may not hold any office or employment including contracting for services in any justice agency of state government or any political subdivision of the state including law enforcement, prosecution, criminal defense, corrections or court employment. They may not own or be employed by any business which regularly litigates in Small Claims Court. Justice Court judges who are attorneys may not appear as an attorney in any criminal matter in a federal, state or Justice Court or appear as an attorney in any Justice Court or in any juvenile case involving conduct which would be criminal if committed by an adult.

I was asked to write this article for the purpose of educating the members of the Bar as to the information contained in Senate Bill 10, so that as you appear in Justice Courts you will be able to function within the framework of the new law. We have appreciated the strong support given us by Chief Justice Hall, the Office of the Court Administrator and the judges of other levels of courts. This legislation is our commitment to you that we are concerned about the legally correct and fair administration of justice. We are the people's courts. We want to serve you.



1989 Legislative General Session Review

By Rep. H. Craig Moody
Majority Leader, Utah House of Representatives,
and Robin L. Riggs, Associate General Counsel, Utah Legislature

Submitted to the *Utah Bar Journal*, March 23, 1989

As the 1989 General Session of the 48th Legislature of the state of Utah began, the majority of the legislators set forth three top priorities: (1) full funding of the growth in education; (2) passage of a spending/tax limitation; and (3) reduction in state taxes. By the time the session had adjourned, most of these priorities had been met.

Overall spending from Utah's General Fund increased approximately $100 million, with about half going to education. Teachers' salaries, the state's contribution to teachers' medical costs and the weighted pupil units were significantly increased.[1]

Spending and tax limitations were passed that tied spending increases to the rate of inflation and population growth.[2] The spending limitation may be exceeded only by a vote of the people or by at least two-thirds of the members of both the House and the Senate.

The House and the Senate could not agree on a tax reduction, however. Although the House passed a quarter cent sales tax reduction and an income tax reduction, the Senate failed to pass either proposal.[3]

But tax and spending policies were not the only issues discussed on the hill. By the time the session ended, a record 1098 bills and resolutions were drafted, 782 were introduced and 343 passed. Four of these were vetoed. In addition to the matters of general concern mentioned above, the 48th Legislature also passed several bills that are of special concern to members of the Utah State Bar. A few of them are summarized below.

TORT REFORM. The Tort and Insurance Reform Task Force (the "task force") created in 1988 by the Legislature studied several proposals relating to the issue of punitive damages.[4] However, only two bills passed. "Punitive Damages Amendments"[5] permits punitive damages to be awarded "only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." This limitation does not apply if the claim arose out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated. Evidence of the tortfeasor's financial condition is not admissible until liability for punitive damages has been determined. Under the same bill, 50 percent of any punitive damages in excess of $20,000 is payable to the state General Fund after payment of attorneys' fees and costs.

Another task force proposal passed by the Legislature is "Products Liability Statute of Limitations."[6] It repeals the statute of repose contained in Utah's Product Liability

REPRESENTATIVE MOODY graduated from the University of Utah in 1975, having majored in political science. He is presently a real estate broker and owner of Moody and Assoc., real estate and property management company. He has served in the Utah House of Representatives since 1982 and is presently the House Majority Leader. He has also served as Utah Republican Party Chairman, House Rules Chairman and state delegate to the National Republican Legislators Association.

Act[7] that was declared unconstitutional by the Utah Supreme Court in 1985.[8] The task force had proposed that the faulty statute of repose be replaced with extensive provisions limiting liability under certain circumstances. However, the bill that was passed only establishes a two-year statute of limitations from the time both the harm and its cause should have been discovered. Although not all of the proposals of the task force were passed, the life of the task force itself was extended until December 31, 1989.[9]

FAMILY LAW. A proposal regarding the visitation rights of noncustodial parents was also enacted. The bill[10] provides that when a noncustodial parent has a visitation right by court order and the custodial parent denies visitation by not informing the noncustodial parent of the address of the child, the noncustodial parent may file an order to show cause why the visitation right should not be enforced or custody transferred to the noncustodial parent. The noncustodial parent may petition the court to issue a subpoena duces tecum requiring the Office of Recovery Services to provide current addresses of the custodial parent and children, if available. Any noncustodial parent with a charge pending or conviction of child or spouse abuse is not permitted to petition the court for this service.

The Legislature, as expected, enacted a statewide child support schedule with guidelines for the courts and established a rebuttable presumption in favor of the guidelines set by the federal Family Support Act of 1988.[11] Although such guidelines are currently in place,[12] the state would have lost federal funding if it had not established, by October 1, 1989, the rebuttable presumption that the guidelines are applicable absent a specific court finding to the contrary.[13]

In addition, the Legislature passed a bill eliminating the requirement that a child support order be reduced to an administrative or judicial judgment before it is enforceable as a lien against real property.[14]

Finally, a bill was passed that changes the functions of court commissioners to include hearing matters of divorce annulment, separate maintenance, child custody and spouse abuse.[15] The bill also authorizes the court commissioner to impose sanctions against those in contempt of the commissioner.

PROBATE. "Probate of Wills and Estates"[16] permits courts to distribute property by the laws of intestacy if no will is probated within three years. "Notice to Creditors of a Decedent"[17] requires notification of known or reasonably ascertainable creditors of an estate.

PRO BONO LIABILITY. "Limited Pro Bono Liability"[18] limits the liability of attorneys assigned by a court to provide representation for indigent defendants charged with criminal offenses if the attorney provides the service at no cost or substantially reduced cost without gross negligence or willful misconduct.

ATTORNEY'S LIEN. "Attorney's Lien Amendments" requires a written employment agreement between an attorney and client before an attorney's lien is binding.[19]

PAYMENT BOND LITIGATION. "Payment Bond Litigation"[20] provides that the prevailing party is awarded reasonable attorneys' fees in payment bond litigation. The bill also eliminates the requirement that an action be brought in district court.

DRIVING UNDER THE INFLUENCE. The Legislature enacted a "Uniform Commercial Driver's License Act" that implemented, among other things, more restrictive blood alcohol concentration levels for commercial vehicle operators driving a commercial vehicle under the influence of alcohol.[21] The new level is .04 percent of more concentration of alcohol in the blood.

UNIFORM DETERMINATION OF DEATH. The Legislature also enacted a uniform determination of death statute.[22] The bill states that an individual is dead "who has sustained either: (a) irreversible cessation of circulatory and respiratory functions; or (b) irreversible cessation of all functions of the entire brain, including the brain stem. . ."

CREDIT AGREEMENTS. A bill was passed providing that credit agreements are void unless written and signed by the creditor and debtor.[23] Under the same bill, a signed credit application constitutes a signed agreement if the creditor does not obtain an additional signed credit agreement from the debtor when granting the credit application. The debtor must be given notice that the written document constitutes the final agreement between the debtor and the creditor.

CRIMES. The Legislature passed several bills amending existing criminal statutes or enacting new ones. Those that amend existing laws include a bill that amends the definition of victim consent regarding sexual offenses,[24] one that amends the definition of an element of sexual offense against a child,[25] one that expands the definition of theft to be a third degree felony,[26] and one that increases the penalty for arson from a class A misdemeanor to a third degree felony if the damage caused exceeds $1,000 but not $5,000, from a class B to class A misdemeanor if the damage caused exceeds $250 but not $1,000, and from a class C to class B misdemeanor if the damage caused is $250 or less.[27] A bill was passed that also establishes the new crime of laundering money to conceal illegal activity.[28] It requires that currency transactions of $10,000 or more be reported by all persons engaged in a business or trade as provided in the bill.

CRIMINAL PROCEDURE. Several bills passed relating to criminal procedure. Among these are bills that revise the subpoena powers of prosecutors in conducting criminal investigations so as to be consistent with standards recently set forth by the Utah Supreme Court,[29] establish a 30-day limit for filing a motion to withdraw a guilty or no contest plea,[30] require the state to pay for evaluations to determine mental competency in criminal evaluations,[31] permit a misdemeanant up to 10 days' credit for good behavior for every 30 days served or two days' credit for every 10 days served at the discretion of the custodial authority,[32] establish a "Psychiatric Security Review Board" to oversee persons found not guilty by reason of insanity and guilty and mentally ill,[33] require peace officers to notify the Bureau of Criminal Identification when an arrest is made based on a criminal warrant and requires the courts and the Board of Pardons to provide information to the bureau on warrants of arrest or commitment within one day of any modification of them,[34] allow courts to impose both a fine and incarceration when it finds a juvenile in contempt,[35] and provide that if the aggregate maximum term of sentences for more than one offense exceeds 30 years, the maximum sentence is considered to be 30 years.[36]

Another bill enacted by the Legislature[37] repeals, on July 1, 1990, the rules of criminal procedure enacted by the Legislature and amends other sections referring to these rules. This was done because the Utah Constitution gives the Supreme Court the authority to enact rules of criminal procedure rather than the Legislature.[38] A committee is established by the bill to review the rules being repealed to determine which of them should be reenacted by the Supreme Court and which provisions should remain in code as statute. Recommendations of the committee are to be reported to the Legislature's Interim Judiciary Committee and the Utah Supreme Court no later than October 1989.

COURTS AND JUDGES. A bill was passed[39] that revises the justice court system. It provides for the jurisdiction and operation of justice courts and the appointment, training and compensation of justice court judges. Another bill was passed that increases juror and witness per diem to $17 and makes changes in the fee procedures and responsibilities of court

clerks.[40] Finally, the Executive and Judicial Compensation Commission had recommended that judicial compensation be raised by increasing the salaries for associate justices of the Supreme Court from $64,000 to $80,000 per year.[41] However, because of money constraints, the Legislature instead raised associate justice salaries to $69,000 beginning July 1, 1989, and to $75,000 beginning January 1, 1990.[42] Other judges' salaries will be proportionately increased based on the percentage schedule set forth in statute.[43]

At the end of each session, the Legislature adjourns "sine die," which literally means "without day" but is interpreted in the legislative sense to mean "without assigning a day for a further meeting."[44] Some have said that this legislative session was rather boring. But to legislators, that is good news. It is usually an indication that most of the important work of making state policy was taken care of and there will be no need to "assign a day for a further meeting" on most matters. The majority of the members of the Bar, and Utah citizens in general, can take comfort in knowing that the 1989 General Session of the Utah Legislature has indeed adjourned "sine die."

[1] "Appropriations Act," H.B. 386, 48th Leg., 1989 Gen. Sess.; "Appropriation Act II," S.B. 251, 48th Leg., 1989 Gen. Sess.; and "Funding School Finance," S.B. 261, 48th Leg., 1989 Gen. Sess.
The "weighted pupil unit" is the basic funding unit for public education in Utah. It is assigned a dollar value based on available revenues, the number of students in the system, plus a number of other factors. The weighted pupil unit is designed to assure uniform and equal funding of education throughout the state. The dollar value assigned is then increased or decreased each year by the Legislature.
[2] "State Government Spending Limitations," H.B. 270, 48th Leg., 1989 Gen. Sess.
[3] "Sales Tax—Rate Decrease," H.B. 36, 48th Leg., 1989 Gen. Sess., Dec. 20, 1988, Draft (Office of Legislative Research and General Counsel); "State Income Taxes," H.B. 379, 48th Leg., 1989 Gen. Sess., Feb. 22, 1989, Draft (Office of Legislative Research and General Counsel).
[4] OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL, INTERIM STUDY COMMITTEE REFERENCE BULLETIN, REPORT FOR THE 1989 GENERAL SESSION, at 20 (1989).
[5] "Punitive Damages Amendments," S.B. 24, 48th Leg., 1989 Gen. Sess.
[6] "Products Liability Statute of Limitation," S.B. 25, 48th Leg., 1989 Gen. Sess.
[7] UTAH CODE ANN. Sect. 78-15-1 et seq.
[8] *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).
[9] "Extension of Tort and Insurance Reform Task Force," S.B. 231, 48th Leg., 1989 Gen. Sess.
[10] "Recovery Services—Visitation Rights," H.B. 295, 48th Leg., 1989 Gen. Sess.
[11] "Statewide Child Support Guidelines," H.B. 203, 48th Leg., 1989 Gen. Sess.
[12] Utah Code of Judicial Administration, Rule 4-904.
[13] 42 U.S.C.S. Sect. 667(b), as amended by P.L. 100-485 (1988).
[14] "Enforcement of Child Support Order," H.B. 410, 48th Leg., 1989 Gen. Sess.
[15] "Court Commissioner Amendments," H.B. 255, 48th Leg., 1989 Gen. Sess.
[16] "Probate of Wills and Estates," H.B. 283, 48th Leg., 1989 Gen. Sess.
[17] "Notice to Creditors of a Decedent," S.B. 20, 48th Leg., 1989 Gen. Sess.
[18] "Limited Pro Bono Liability," H.B. 216, 48th Leg., 1989 Gen. Sess.
[19] "Attorney's Lien Amendments," H.B. 225, 48th Leg., 1989 Gen. Sess.
[20] "Payment Bond Litigation," S.B. 3, 48th Leg., 1989 Gen. Sess.
[21] "Commercial Driver License Act," H.B. 180, 48th Leg., 1989 Gen. Sess.
[22] "Uniform Determination of Death," S.B. 229, 48th Leg., 1989 Gen. Sess.
[23] "Statute of Frauds Amendments," S.B. 141, 48th Leg., 1989 Gen. Sess.
[24] "Consent of Victim Amendments," S.B. 146, 48th Leg., 1989 Gen. Sess.
[25] "Sexual Offense Against a Child Amendments," S.B. 131, 48th Leg., 1989 Gen. Sess.
[26] "Penalties for Theft," H.B. 84, 48th Leg., 1989 Gen. Sess.
[27] "Arson Penalties," S.B. 50, 48th Leg., 1989 Gen. Sess.
[28] "Money Laundering Act," S.B. 46, 48th Leg., 1989 Gen. Sess.
[29] "Subpoena Powers," S.B. 117, 48th Leg., 1989 Gen. Sess.
[30] "Withdrawal of Guilty Plea Amendments," S.B. 81, 48th Leg., 1989 Gen. Sess.
[31] "Competency Examination of Criminal Defendants," H.B. 108, 48th Leg., 1989 Gen. Sess.
[32] "Misdemeanor Time Served Amendment," H.B. 137, 48th Leg., 1989 Gen. Sess.
[33] "Psychiatric Security Review Board," S.B. 59, 48th Leg., 1989 Gen. Sess.
[34] "Statewide Warrants Collection," H.B. 59, 48th Leg., 1989 Gen. Sess.
[35] "Juvenile Detention Amendments," S.B. 180, 48th Leg., Gen. Sess.
[36] "Criminal Sentencing Amendments," S.B. 212, 48th Leg., 1989 Gen. Sess.
[37] "Revision of Rules of Criminal Procedure," H.B. 5, 48th Leg., 1989 Gen. Sess.
[38] UTAH CONST. art. VIII, Sect. 4
[39] "Justice Court Revision," S.B. 10, 48th Leg., 1989 Gen. Sess.
[40] "Juror and Witness Fees," H.B. 322, 48th Leg., 1989 Gen. Sess.
[41] OFFICE OF THE GOVERNOR AND STATE OFFICE OF PLANNING AND BUDGET, EXECUTIVE BUDGET—FISCAL YEAR 1990, at 34 (1988).
[42] "Appropriation Act II," S.B. 251, 48th Leg., 1989 Gen. Sess.
[43] UTAH CODE ANN. Sect. 67-8-2 (Supp. 1988).
[44] BLACK'S LAW DICTIONARY 1242 (5th ed. 1979).

The Homeless People of Utah Need Your Help

Despite general economic prosperity, the plight of the homeless remains bleak. However, through the generosity of the community, a shelter for the homeless has been constructed at 210 Rio Grande Street in Salt Lake City to address the problem.

The shelter accommodates approximately 400 people, offering separate housing for families, men and women. Case management workers assist shelter residents in locating jobs and permanent housing. In addition, the shelter provides a small playground and a classroom for the children. Although the shelter is off to a good start, its success remains dependent on the continuing generosity and kindness of those who are more fortunate.

The shelter is in desperate need of volunteers to help with adult education and intake work, which involves initial contacts, bed assignments and orientation. These needs can be met by Bar members as well as spouses, law firm staff and others who have a desire to assist. Volunteers can choose the hours they will work, what services they will perform and the amount of time they will donate.

The shelter also has pressing need for bunk beds, laundry soap, toiletry items, personal computers (for case management and intake), and other equipment and furnishings. Ongoing funding is required for employment, housing and mental health services, prescription drugs and general operating expenses. Individual practitioners or firms can address these needs by providing specific items or making cash donations.

The Community Services Committee of the Young Lawyers Section has arranged with the shelter to coordinate the contributions of time, property and money by members of the Bar. If you or your firm are interested in helping the homeless or have questions as to how you can help, please contact Cy Castle (328-1666), Todd Zagorec (535-1136) or Dave Little (521-5800). Your help will make a difference.

Preparing and Delivering Effective Opening Statements

By David W. Slagle

"Ladies and Gentlemen of the Jury, we have what is called an opening statement, which means that I have an opportunity to explain what this case is all about..."

The attorney who begins his opening statement like this might just as well have said, "I *had* an opportunity," because a good part of it just evaporated. The lawyer who begins, "We think the evidence in this case will show..." has just subliminally told the jurors that he really is not quite sure what is about to happen and does not quite know what the evidence will prove.

The opening statement is the beginning of the trial. Discovery is over. Motions, depositions, interrogatories and pleadings are past. The jury is in the box, sworn and waiting. It is time for the opening statement, that crucial element which conveys the case's first impression, determines the rhythm of the trial and often foreshadows its outcome.

THE OPENING STATEMENT AS ART

Trial advocacy is an art practiced in its most subtle form in the opening statement. The art begins with the first words to the jury. The attorney has only a few moments to present his theory of the case, demonstrate his mastery of the facts, show his leadership and honesty and convince each juror of his client's position. The rest of the trial—the direct examination, the cross-examination and argument—derives from the art of the opening statement.

Much of the opening statement's importance is centered around a rule—a basic law—known as the rule of primacy. The rule of primacy teaches that what is heard first tends to be the most difficult to dislodge. The first spoken words have greater significance to the listener than the words which follow. The goal of the plaintiff's lawyer is to take full advantage of the law of primacy. Conversely, the duty and obligation of the defense lawyer is to neutralize that law.

The typical opening statement is delivered by an attorney who learned the art by watching and listening to another attorney and, more often than not, that unwitting teacher had not developed the skill and art of making opening statements. Unfortunately, most opening statements are thrown together almost as an afterthought, even by attorneys who pride themselves as being good litigators. Hollow, cliche words and phrases are often used with very little thought about their content or effect. This should not be. The opening statement is a vital element of trial—perhaps more important than the summation. Thorough preparation, considerable care and thought, and hours of rehearsal should go into the preparation of the art.

A study was published some years ago reporting that the final determination of the jurors agreed with their tentative opinions formed after the opening statement in more than 80 percent of the cases. The study confirms what many trial lawyers have long suspected—that once jurors make up their minds, it is difficult to change them. For this reason alone, opening statements should never be waived.

DAVID W. SLAGLE was born in Salt Lake City, Utah, January 25, 1944. He attended Dartmouth College beginning in 1962 and then transferred to the University of Utah. He obtained his J.D. from the University of Utah Law School in 1968. While in law school, he served as an assistant editor on the Utah Law Review.

Mr. Slagle is a member of the Salt Lake County Bar Association and the Utah State Bar Association. He is a member of the Litigation Section and the Malpractice Section of the American Bar Association and is also a member of the Litigation Section of the Utah State Bar Association. Mr. Slagle is a member of the Defense Research and Trial Lawyers Association and has served as the State Chairman since 1979. He is a member of the International Association of Insurance Council and the American Society of Law and Medicine. He is an Advocate member of the American Board of Trial Advocates.

Since graduating from law school and joining the law firm of Snow, Christensen & Martineau, Mr. Slagle has been involved in the full-time practice of law, primarily in the area of trial and litigation practice. For the past 15 years, a substantial portion of his practice has been devoted to the defense of medical malpractice litigation. He is admitted to practice in the United States Supreme Court, the Court of Appeals for the Tenth Circuit, and all local and state courts.

IMPORTANT PRINCIPLES

Irving Younger, in his trial techniques book, lists three important principles of trial practice regarding opening statements. These three principles are:

First, never waive the opening statement. The opening statement is too important to forego. If you have a "no defense" case, develop the art of saying something without saying anything.

Second, rarely, if ever, reserve the opening statement. This applies primarily to defendants. You must remember that you are trying the case to the jury and not to the judge. You must defuse and neutralize the rule of primacy.

Two basic reasons insist that you do not reserve the opening statement. First, the jury expects a contest between two sides. If one side offers an opening statement, the jurors expect the other side to do the same thing. The jury could hold the lack of symmetry against you and become resentful. Second, the jury might sense a lack of certainty. Jurors will recognize, most undoubtedly, that the defendant has reserved the opening because it wants to hear the plaintiff's side of the case first. This lack of certainty leads to a lack of trustworthiness.

The third principle which Mr. Younger emphasizes is the importance of listening to your adversary's opening statement. A promise of proof which is not fulfilled provides your opposition with fertile ground for closing argument.

GUIDELINES FOR AN EFFECTIVE AND PERSUASIVE OPENING

No one among us is—or should be—wise enough or perhaps foolish enough to try and teach the style which should be used in delivering an opening statement. Style is individual; style depends upon the lawyer, his character, his personality and his individuality. Those among us who have at-

tempted to mimic the style of other lawyers whom we admire end up doing just that, we mimic. Although mimicry may convey an acceptable opening statement, that is not the goal. The goal is to convey ourselves to the jury. The goal is to convey a unique, individual, personal style and art.

Although no one should teach a specific style, we can provide guidelines for developing and delivering an effective and proven opening statement. These guidelines will help you prepare an effective and persuasive opening statement.

1. *Prepare your opening statement in advance.* As a general rule, nothing in the courtroom can or should be completely extemporaneous. The opening statement must be prepared and rehearsed in advance.

2. *Know your case.* It goes without saying that you must have total knowledge of your case. You must know your case intimately and in every detail. There is nothing about the case which you should not know.

3. *Deliver the opening statement without notes.* The jurors expect you to know your case, they expect a performance and they expect you to know your lines. Talk to the jury. Even though the opening statement must be prepared and rehearsed in advance, you still need to talk to the jury. The jury does not want to be the target of a speech which is read.

If you are reading from notes or from a written speech, it is difficult to establish essential eye contact. Although you have rehearsed your opening statement, you do not want it to appear to be rehearsed. You want to communicate trustworthiness. You should aim for a natural delivery which conceals the fact that you have rehearsed and possibly memorized your opening statement.

4. *The opening statement should be simple, clear and organized.* The opening statement you have prepared should be short, concise, clear, direct and in plain English. The opening statement should have a beginning, a middle and an end; it should have an organized flow.

When you deliver your opening, do not engage in lifeless, dull recitation of each witness's testimony. The jury is not ready to be buried in evidentiary detail. That which is important will be lost in a morass of minutia. Allow the jury the joy of discovery during the evidence. A simple narrative allows the relevant connections to be made because they will occur naturally during the storytelling process. A tedious prediction of who will testify to what fact is not necessary. Only where one witness's testimony is of major significance is it wise to mention to what fact the witness will testify.

As with almost everything that you do in the presence of the jury, you should follow the familiar adage to concentrate on quality, brevity and simplicity.

5. *Use the opening statement to convey a theme.* The goals of quality, brevity and simplicity can be attained by giving your case a theme in your opening statement. Create a theme which is carefully defined and artfully articulated. Do not be too quick in getting to your points; start on your theme, finish on your theme and never wander too far from it. You are the storyteller by profession and the story of any trial begins with the opening statement. Accordingly, the first opening paragraph of that opening statement should develop the theme of the case and disclose your overall position in capsule form. Here are two examples:

> Counsel for the owner of the business that burned began his opening statement: "Members of the jury, the case you will hear and decide involves the refusal of an insurance company to live up to its promise. Mr. Jones entered into an agreement with the company, paid his premiums to purchase insurance, to protect him from this type of loss. He faithfully paid his premiums for some 10 years. Now that his plant, all that he has worked for these 10 years, has been destroyed in a horrible accidental fire, the insurance company has refused to honor its promise."
>
> The lawyer for the insurance company may well have her theme also, and it might go as follows: "Members of the jury, this case is not about contracts, it is about arson. The deliberate burning of a building for the purpose of collecting the proceeds of an insurance policy. The only question is whether that man deliberately fired his plant. We contend that he did, and we offer evidence to prove it."

So often an attorney begins his opening statement with words such as: "What I say here in my opening statement is not evidence in the case, but only intended as a guide or road map to what will follow." Just as fatal is the lawyer who apologizes for taking the valuable time of the jury to listen to a tedious case. Or how about the lawyer who apologizes to the jury because they have to sit in a gloomy courtroom. How many missed opportunities does it take before the entire case is lost? Establish a theme in your opening statement and use that theme to carry your case through trial.

6. *Do not say anything you cannot prove.* You are not going to fool the jury. You are not going to fool your opponent. You must be trustworthy. Promises made in the opening statement which are not kept by you during the trial are a goldmine for your opposition. You must be able to prove everything you say you are going to prove. You must pay close attention to what your adversary claims her proof will be. If there is some doubt as to whether you can prove something in your case, a motion in limine before the trial may be appropriate.

7. *Admit the problems in your case to the jury.* Defuse the time bomb. For example, dealing with a pre-existing injury can be trickly. If you, as the plaintiff's attorney, attempt to conceal the pre-existing condition, the jury may get the impression that the whole case is a fraud. Here is an example for handling such problems:

> "Ladies and gentlemen, every one of us probably knows or at least knows of someone who has been able to overcome a great handicap in life. The kind of handicap that would have stopped a lesser man or woman. This case is about a man like that—a man who had managed to overcome the crippling effects of an industrial accident and had begun to once again lead a normal and happy life, only to have his last chance taken from him by a young woman who was driving a car and was just too preoccupied to bother with a turn signal."

Although the defense should touch upon the weak points of the case in opening statement, it must be careful not to make unnecessary admissions. To overlook or ignore a weakness of your case is to provide an opportunity for your opponent to magnify the impact.

8. *Help the jury absorb the information.* Remember that even the simplest case contains a complicated story. The jury must absorb a vast amount of information. You have taken months, perhaps years, to absorb this information. The jury must do it in a few short days. Help the jury to understand who are the parties, which lawyer represents which side, what the case is all about and what each side contends.

9. *Your style is important.* Whatever your individual style, you must project confidence and a positive tone. Opening statement is rarely the setting to use large, emphatic or frequent gestures. You should, however, appear cool, competent and unflappable. You do not want the jurors to begin to wonder why you "protest so loudly." Often, silence in the courtroom is

the most potent device. You may want to use silence to attract and hold the jury's attention during your opening statement.

10. *If possible, leave something unfinished.* The aim of your opening statement is to orient the jury to the case. If you can leave the jury and your opponent a little bit in the dark, and if you are reasonably confident that this strategy will not blow up in your face, a hint at the existence of some piece of evidence or logical deduction without further discussion may well be appropriate. This sense of anticipation, this flavor of suspense will give the jurors something to watch for.

11. *Use language carefully.* During your preparation, devote time and effort to choosing the right word, the right phrase and the right sentence. The use of the right word requires many of your professional and personal skills and experience. Use of the right word accomplishes, in that perfectly subtle manner, the creation of the proper subconscious mood or feeling that no amount of colorful oration or emotional appeal can bring off.

12. *Relate to the daily life of the jurors.* Examine, if possible, the backgrounds of your jurors and the setting from which your jury is drawn. Your analogies, comparisons and terminology should be selected with this in mind. Experiences in school, parenting, driving the car and other everyday behavior are widely shared. You must relate to the jury and to the affairs of their daily life.

13. *Do talk about dollars or do not talk about dollars?* Many experts in the art of advocacy insist that damages must be discussed by counsel for the plaintiff in a civil damage suit. They say that unless the jurors are advised from the beginning of the general nature or the specific nature of the demand, and unless that theme is built upon throughout the trial, they will be shocked and possibly dismayed when the demand is made in summation. Other experts believe that although the opening statement is good point for the plaintiff to set establishing liability, it is usually not a good place to discuss the amount of damages sought, particularly in personal injury cases where the plaintiff is seeking a large award. Convincing jurors that the plaintiff should receive, for example, $200,000, $300,000 or $500,000 takes time, and even talking about that amount of money with them before they have seen the justification for it is dangerous.

Most defense lawyers are of the opinion that if the plaintiff does not discuss dollars in the opening statement, then the defense should not discuss dollars. There is no clear answer to the question of whether to discuss damages in the defendant's opening if the plaintiff has broached the subject.

From a defense standpoint, the decision of whether to address damages in opening is fraught with pitfalls. The difficulty and danger of discussing damages in opening statements stems from defense counsel's lack of control over the presentation of the damages issue. No attorney wants to appear to have belittled the injury of any person; this is dangerous even in closing argument. Damages is a very risky subject to approach when the witness and the opposing lawyers will have an opportunity to retaliate. By avoiding a detailed discussion of damages, you provide less of a target for the plaintiff.

On the other hand, the defense counsel in opening statement can take advantage of the amount of money damages being requested; the defendant can hardly be faulted for pointing out the large figures being sought and subtly allow the jurors at the beginning to conclude that the plaintiff may be greedy. However, most of the general goals of the defendant's opening statement are more advantageously pursued by focusing on the liability issue.

14. *Effectively use demonstrative aids.* The use of demonstrative aids during opening can be very effective. Obviously, if you are going to use an aid, such as an exhibit that is going to be introduced at trial, you either need to have a stipulation concerning the admissibility of the exhibit or it had better be something that you are fairly certain will be admitted without strenuous objection. You may want to discuss the admissibility of the exhibit with the judge in chambers before the trial begins.

15. *Stress the importance of keeping an open mind.* The defense must stress the importance of the jury withholding any mental decision until after the case has been presented. Try to obtain that commitment from the jury during the opening. This is a further attempt to neutralize the rule of primacy. You do not want the jurors to make a mental commitment to the plaintiff during the plaintiff's direct case.

16. *Finish with your theme.* As a guideline, conclude your opening with your theme. Every opening statement should have a beginning, a middle and an end. Have firmly in mind the content, tone, inflection and delivery of the close of your opening. A strong conclusion is essential to the tone and aura you want to establish. By finishing with your theme of the case, your closing will virtually compose itself for you.

OTHER CONSIDERATIONS

A number of considerations may arise during the presentation of the opening statements. One of these considerations is to make sure your opening statement is recorded. In some courts and in some jurisdictions, opening statements are not customarily recorded. If at all possible, insist on the opening being recorded. A transcript of your opponent's presentation or a portion of it is very inexpensive and may be useful before the end of trial. It may be highly useful during summation.

Another consideration is the "motion for judgment on the opening statement." Although there is no code of procedure which recognizes it, case law everywhere recognizes the motion for judgment on the opening statement. At the conclusion of opposing counsel's opening statement, you want to make such a motion.

The essence of the motion is similar to a directed verdict. You tell the judge that the opening statement is an outline of your adversary's position. You argue that even if the adverse party proves everything which is said in the opening statement, it still would not constitute a prima facie case and that you are therefore entitled to judgment as a matter of law.

Although it is doubtful whether many judges would grant this motion in a liberal judicial climate of today, it certainly may be used to give your adversary a moment or two of sheer terror.

A third consideration is what constitutes "argument" and when you should raise objections during opposing counsel's opening. "Argument" has been so loosely defined in judicial decisions that its precise parameters are hazy, at best. The trial judge has wide discretion in regulating the opening. To the trial judge, argument is defined more by tone than by content. How something is said may be more important than what is said.

Although permitted, objections during the opening statement are rare—probably for fear of antagonizing the jury. However, the following areas have been held to be improper argument during opening statements.

1. *The assertion of material which counsel knows or should know is inadmissible at trial.* Although technically not argument, and as improper in summation or closing as in opening and probably as unforgivable, counsel is never permitted to argue his case from inadmissible evidence or facts for which no proof has been presented.

2. *The assertion of facts for which no proof will be offered.* If a lawyer is intent on

(continued on page 41)

President's Report

At the Mid-Year Meeting of the Utah State Bar in St. George, the Young Lawyers Section was named Section of the Year by the Bar. The Section officers thank the Bar for this award. This award belongs to the scores of attorneys who volunteer their time and talents to numerous projects undertaken by the Section. While it is not the prospect of public recognition that motivates these attorneys, this acknowledgment by the Bar is nevertheless appreciated.

Contribution of time and talents to Bar and public service without thought of monetary remuneration is in the highest tradition of our profession. The Bar has a long tradition of commitment to public service. This commitment continues to be demonstrated by many members of the Utah State Bar, including members of the Young Lawyers Section, whose involvement in public service projects transcends selfishness and personal gain. I know other young attorneys, however, who have a desire to participate in pro bono and public service activities, but yet do not get involved. As best as I can tell, this is apparently because of pressure they feel to meet billable hour requirements or perceptions about their firm's lack of support of non-billable activities. Unfortunately, this is not the case of only a few individuals, but rather reflects a disturbing trend in the profession. I have set forth below proposals to deal with this problem. These ideas are neither new nor original. I believe, however, that they merit renewed serious considerations by law firms. My observations are based on an assumed premise that law firms are committed to giving something back to the profession through pro bono and law-related public service. If that is not the case, in my opinion, it should be the philosophy of every responsible firm. While the following proposals focus on the law firm setting, similar proposals can be adapted to other working environments as well.

In today's competitive environment, the focus of many law firms is on increasing or maintaining profitability. While a law firm should appropriately place strong emphasis on how much an attorney bills and collects during the year, contributions by members of a firm to pro bono activities, Bar work and law-related public service should not be swept aside in the tendency to look only at the bottom line.

Young attorneys are particularly vulnerable to the pressures of an increased emphasis on billing and collections. In recent years, spiraling salary increases have resulted in significantly increased billable hour requirements. This cycle significantly impacts the time an attorney has available for pro bono and public service projects. As increasing salaries put pressure on the attorney to bill more, other things like family, community service, pro bono activities and Bar work suffer as the attorney works longer hours. When faced with ever-increasing billable requirements, many young attorneys feel they have no option but to buckle under and bill. The burden of high firm expectations and the fear of falling short keeps some attorneys from participating in pro bono and public service activities.

The legal system cannot afford to ignore the interests of lawyers who want to participate in pro bono and public service while earning a decent living and enjoying job security. Commitments to pro bono and public service activities without an impact on firm productivity are difficult. Since it is the last dollars billed that generate the most profit (as overhead and salaries are covered), it is an understandable reflection of the profit motive for firms to want to squeeze that last marginal dollar from young associates.

A commitment by law firms to pro bono and public service will likely result in a loss of profits. Even so, I am convinced that most firms want their attorneys to engage in pro bono and public service and recognize that contributions to the firm and profession can be measured in ways other than simply how much money an attorney collected during the year. Unfortunately, this attitude is not always clearly conveyed to associates. Supportive attitudes of senior firm management toward public service are in some cases not translated into concrete policies which provide reassurance to associates that they will not be penalized for spending time on pro bono and public service activities. Where firms don't have a system in place to track and report time spent in pro bono and public service activities, associates may be concerned that such service will be overlooked when their performance is reviewed.

What, then, can be done to promote pro bono and public service activities by associates? First, law firms should consider establishing a written policy of encouraging associates to spend time on a regular basis in pro bono and law-related public service. Second, this policy should be institutionalized by a system of reporting time spent in such activities. Finally and most importantly, firms should consider giving partial or full credit toward the billable hours requirement for time spent by attorneys in pro bono and public service activities. For example, giving 50 to 100 hours credit a year toward the billable hours requirement would send a signal that the firm highly values pro bono and law-related public service.

Another area that firms should consider examining is the method of compensating associates. In many firms, associates may be expected to march in a lock step compensation system that does not recognize individual interests and commitments to community service. Law firms should consider flexible compensation systems that permit the individual associate to determine his or her salary within acceptable productive ranges while reflecting the attorney's commitment to non-billable activities. Is it heretical to suggest that some attorneys, if given the option, would be willing to earn less money and bill fewer hours, provided they did not suffer adverse employment consequences, in order to have time to spend on a cause to which they are committed? Of course, timely servicing the firm's clients and productivity considerations place parameters on such flexibility. I believe that law firms will benefit in the long run from flexible compensation arrangements for associates through significantly increased job satisfaction, less burnout and greater diversity. The profession will also benefit from the increased level of public service that should result.

These proposals and others should be considered by law firms to promote a continuing commitment to public service which has been the hallmark and legacy of this profession.

Jerry D. Fenn
Young Lawyers Section President

Utah Bar Foundation Grant Enables More Minority Students to Attend CLEO Institute

This past summer, the Utah Bar Foundation awarded a $5,500 grant to assist the University of Utah College of Law in hosting the Council on Legal Education Opportunity Institute (CLEO). The purpose of the CLEO Summer Institute is to prepare minority and disadvantaged students for success in law school by improving their academic skills, particularly their writing skills; help them develop effective study techniques; and encourage self-confidence in their ability to succeed in the study of law. A subsidiary goal of the program is to determine if the students are capable of succeeding in a regular law school program. These goals are pursued in a rigorous and intellectually challenging but supportive program in which the students study legal materials using the case method.

Several minority students admitted to the CLEO Institute held this past summer at the University's law school did not qualify financially for participation in CLEO, but nevertheless stood to gain valuable experience from auditing the program. In order to preserve a favorable faculty/student ratio, the College of Law sought and was subsequently awarded a $5,500 grant from the Utah Bar Foundation to enable the school to add a section of legal writing to the CLEO program. The funds provided by the Foundation allowed the program to accommodate nine additional minority students as auditors.

The CLEO Summer Institute runs for six weeks every summer and law schools in the region alternate hosting the program. Students attend 12 hours of class each week plus additional individual meetings with teaching assistants and writing instructors. Last summer, two substantive courses were taught—one on landlord-tenant law and the other on the law of governmental immunity from tort liability.

Social activities, talks and visits to other campuses were also included in last summer's program. Activities of this nature serve to demonstrate to students that there are opportunities in law for qualified minority members and that minorities are both needed and wanted in the legal profession. The social events were also designed to strengthen the sense of community within the group and to foster a sense of cooperation and group effort. This spirit has continued in the regular law school program and should help the students succeed in law school.

The grant from the Utah Bar Foundation, though used primarily to fund an added legal writing section, was also used to pay the costs of several of the social events and activities.

Grant Applications Due May 31

The Utah Bar Foundation is now accepting applications for grants.

Grant applications must be consistent with one or more of the following purposes of the IOLTA Program:

1. Promote legal education and increase knowledge and awareness of the law in the community.
2. Assist in providing legal services to the disadvantaged.
3. Improve the administration of justice.
4. Serve other worthwhile law-related public purposes.

Applications are considered by the Board of Trustees annually and must be received on or before May 31 for consideration in July of that year.

Applications for grants may be obtained from Kay Krivanec, Utah Bar Foundation, 645 S. 200 E., Salt Lake City, UT 84111.

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.

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

STATE BAR CLE CALENDAR

COMPUTER LAW: CURRENT TRENDS AND DEVELOPMENTS

A live satellite seminar on the constant changes and developments in computer hardware, software and services which have led to the development of a body of law also in a state of constant change to govern the purchase, sale and use of computer hardware and software. This program is designed for lawyers familiar with the application of traditional legal concepts to the purchase and use of computer systems. This program calls for an understanding of basic computer technology. This program should be of interest to attorneys and advisors who counsel corporations that produce, supply, distribute, develop and purchase computer hardware, software and computer-related packages.

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

CORPORATE COUNSEL SECTION LIVE SEMINAR

The Corporate Counsel Section of the Utah State Bar presents a half-day seminar on matters of daily concern for those attorneys working for or representing corporate clients. The seminar will focus on three areas addressing ethical and practical concerns.

Corporate Conflicts—Who do you really represent? Disciplinary and practical views.

The Corporate Attorney-Client Privilege—How do you protect it? Some practical advice.

The Multistate Corporation—Are you practicing without a license? Disciplinary and practical perspectives.

This program is recommended for all attorneys working for or representing corporations and is designed to provide a basis for assessing the ethical and practical concerns of representing a Utah corporation. Course materials will be available.

Date: May 10, 1989
Place: Utah Law and Justice Center
Fee: $35
Time: 7:30 a.m. to 12:00 p.m.

DEALING WITH THE S.O.B. LITIGATOR

A four-hour live satellite seminar studying the unfair, abusive and unethical tactics of the "S.O.B." litigator causing concern among those monitoring the ethical standards of the Bar. More immediately, they pose a challenge to those opposing the S.O.B. in the litigation process. Sometimes, litigators who play "hardball" pursue victory at any cost and engage in conduct designed to frustrate, obstruct, harass and delay the litigation process and try to cast their conduct as "zealous advocacy." How do you deal with this sort of behavior without lowering your own ethical standards or jeopardizing your case or client?

This satellite seminar has been developed to address that question in a practical way. Attendees at the program will view dramatized pretrial and courtroom scenes illustrating hard-to-counter S.O.B. tactics. Following each scene, a panel of experienced litigators will offer expert advice on how to prevent or counter this behavior. This program will cover the discovery, settlement and trial process.

Date: May 11, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

A COMPREHENSIVE SEMINAR ON FAMILY LAW

The Family Law Section is presenting a full-day, comprehensive, live seminar featuring leading family law practitioners. Topics will include effective financial arrangements with clients; improving the effectiveness of the initial interview; strategies in the use of expert witnesses; handling bankruptcy-related concerns; tax pitfalls in alimony, child support, property division and pension treatment; exhibits and demonstrative evidence at trial; practice before domestic relations commissioner; Utah divorce case law update.

Date: May 12, 1989
Place: Utah Law and Justice Center
Fee: $65
Time: 8:00 a.m. to 5:00 p.m.
A box lunch may be ordered for an additional $6.50.

BASICS OF CLOSE CORPORATION ACQUISITIONS AND DIVISIONS

This is a live satellite seminar on the basics of corporate, tax, securities and accounting principles applicable to acquisitions and divisions of close corporations. The purpose of this program is to provide the nuts and bolts of basic acquisition concepts which are applicable to small businesses. The discussion will cover the practical issues of related agreements; due diligence; representations and warranties; indemnity, holdback and contingent payments; and attorneys' opinions. Sample document clauses will be included in the accompanying study materials to be distributed to registrants the day of the program.

Date: May 18, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

COUNSELING BUSINESS CLIENTS ON COMPLEX INSURANCE ISSUES

A live satellite seminar. Too many business attorneys sweep insurance law issues aside, forced to rely on the insurance industry itself to assure adequate client protection because of their lack of familiarity with the legal issues. Nationally prominent insurance experts will teach you how to recognize insurance issues.

- How to determine proper types and limits of coverage and insurers.
- How to handle terminations and nonrenewals.
- How to handle disputes with insurers.
- How to handle insurance issues when your client's customer, vendor or insurer is in bankruptcy.
- How to expand your practice by providing insurance legal checkups. Who should attend? Corporate law specialists, in-house counsel, mergers and acquisitions counsel, insurance lawyers, creditors' rights counsel, litigators, legal malpractice lawyers and attorneys wishing to expand their business practice.

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

PRACTITIONER'S GUIDE TO ENVIRONMENTAL ISSUES IN REAL ESTATE TRANSACTIONS

A live satellite seminar. Environmental law and the law governing commercial real estate transactions have become inextricably intertwined. No longer can commercial real estate and business practitioners ignore the wide-range effect of environmental laws and regulations upon their everyday activities and those of their clients. This program will target and examine the key environmental law issues and transactional dilemmas being faced by real estate and business lawyers across the nation, and offer guidance to commercial practitioners.

Date: May 25, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

REPRESENTING FAMILY BUSINESSES: TAX, OPERATIONAL, ESTATE PLANNING AND SUCCESSION PROBLEMS

A live satellite seminar. A program directed toward family businesses that have much in common with any program focusing upon closely held businesses. Family businesses have all the problems of any closely held business and, for that reason, the morning section of the program, focusing upon taxes, estate planning, employee benefit planning and the sale of a business, will be of interest to any practitioner working with closely held corporations. Family businesses, however, have an additional dynamic—the impact of the business upon the family and of the family upon the business. While this resonance exists throughout the life cycle of the business, it is heightened when issues of succession arise—when the business is to be passed from one generation to the next. At this point, three possibilities exist: the business can fail, it can be sold or it can be retained within the family. Failure is a sad but not infrequent outcome. It is one that planning seeks to avoid and, thus, the program will look to how a successful transfer can be made—either within the family or to an outsider. Often, this takes the collaborative effort of attorneys, financial experts, management consultants and family or systems therapists. Speakers from each of these disciplines will deal with the role they play and the techniques they use to assist in the transfer of the business from one generation to the next. The program will close by focusing upon the litigation that can ensue when an acceptable plan is not developed.

Date: June 6, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

JOINT VENTURES

A live satellite seminar. The purpose of this program is to provide counsel and other professional business advisors with an understanding of the potential uses for the commercial joint venture and of the various problems and considerations which must be addressed in connection with the negotiation and implementation of such an arrangement. Included among the matters to be discussed in this program are:

- What are the principle issues that should be addressed in the joint venture agreement and the ancillary agreements?
- What are the principle federal income tax considerations relating to the formation and implementation of the joint venture?
- What are the relevant antitrust concerns with respect to the formation and operation of the joint venture?
- How should intellectual property be handled, ones made available to the joint venture by the venturers and ones developed by the joint venture.
- What is the potential impact of creditors' rights laws upon the arrangements among the joint venture and its participants?

Date: June 15, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

LEGISLATION AS A REMEDY

Have you been frustrated in your practice of law because of an ambiguous, unfair or archaic law? Plan to attend a seminar presented by the Utah State Bar in conjunction with the Office of Legislative Research and General Counsel, and learn more about the legislative process, how to make positive changes in the law and how you can use legislation to resolve recurring problems with the law.

In this seminar, a Utah legislator will review the legislative process. Legislative counsel will present an overview on how to draft legislation and a panel of experienced lobbyists will answer your questions and describe how to successfully shepherd a bill through the Legislature. This seminar includes an excellent handbook.

Date: July 13, 1989
Place: State Capitol, Room 403
Fee: $30
Time: 1:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ May 9	Computer Law: Current Trends and Developments	L & J Center	$160
☐ May 10	Corporate Counsel Section Seminar	L & J Center	$35
☐ May 11	Dealing with the S.O.B. Litigator	L & J Center	$135
☐ May 12	A Comprehensive Seminar on Family Law	L & J Center	$65
☐ May 18	Basics of Close Corporation Acquisitions and Divisions	L & J Center	$135
☐ May 23	Counseling Business Clients on Complex Insurance Issues	L & J Center	$160
☐ May 25	Practitioner's Guide to Environmental Issues in Real Estate Transactions	L & J Center	$135
☐ June 6	Representing Family Businesses: Tax, Operational, Estate Planning and Succession Problems Planning	L & J Center	$160
☐ June 15	Joint Ventures	L & J Center	$135
☐ July 13	Legislation as a Remedy	State Capitol Room 403	$30

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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.

OPENING STATEMENTS

(continued on page 37)

losing his client's claims in a court of law, he will tell the jury about proof that he does not intend to prove.

3. *The injection of personal opinion as to the merits of the case or the credibility of the witnesses.* The opinion of counsel is universally thought to be improper in opening statements. Opinions should be reserved for the summation where they properly belong. This does not mean that the skilled advocate should not imply or suggest through his opening that he has strong and well-founded opinions.

4. *The drawing of inference from the facts.* This is clearly within the purview of final argument. In fact, it is the purpose of summation. The proper opening will present the facts in a narrative that requires no comment until summation.

5. *Blatant appeals to prejudice.* The real test here is in drawing the line between persuasion—which is a proper attempt to impact the minds of the jurors and what we all strive for in presenting our client's cause—and prejudice. A fact of trial is that all evidence is prejudicial to either your case or your adversary's case, or it would not be offered. Legal prejudice is different. Legal prejudice involves trying to obtain a verdict on facts not in evidence or on passion, anger or confusion of the issues. It is improper argument to appeal to outrage or sympathy.

6. *Argument of the law.* Generally, in this jurisdiction, counsel are not allowed to argue the law. They are allowed in summation to interpret the court's instructions within close parameters. To attempt to define, for the jury, the law in the case in your opening statement would be invading the province of the judge and may be hazardous to your client's cause in the event the judge instructs the jury to the contrary at the conclusion of the evidence.

The product of the skilled advocate is more perspiration than inspiration. Painstaking preparation yields dividends. The eloquence of the winner's closing argument is appropriate during the immediate revelry. If, however, the rationalizations of the jurors are, as suggested, really the by-product or the justification for a decision based on a general tone or feeling for the entirety of the case, or an inclination which was subtly or subliminally suggested from an earlier point, then the advocate who gives his best on closing argument may have waited too late.

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 AVAILABLE

Director of newly formed father's rights organization, UTAH FATHERS AND CHILDREN TOGETHER (Utah Fact), seeks legal assistant work concerning legal issues confronting noncustodial parents. Expert assistance involving intentional infliction of emotional distress, interference with court ordered visitation as a tort action, alienation of affection between parent and child, and loss of consorting. Six years' experience preparing points and authorities, trial memorandum and appellate briefs. Leave message at Law and Justice Center for Dennis Donithorne, Director of UTAH FACT. Statistics available concerning gender favoritism of women in custody decisions rendered by judges in the Second, Third and Fourth District Courts.

NEED TO FILL A LEGAL ASSISTANT POSITION? CALL JOB BANK, JOY NUNN, 521-3200. JOB BANK IS A SERVICE TO THE LEGAL COMMUNITY BY THE LEGAL ASSISTANTS ASSOCIATION OF UTAH (LAAU). NO FEES ARE INVOLVED.

Attorneys needed for volume referrals. Consumer club will direct its members to attorneys providing services to our members at 10 to 25 percent below your usual fee. Send resumé and cover letter indicating what benefits you can provide our member to Helpline, P.O. Box 16254, Seattle, WA 98116.

Legal Reference Librarian, University of Utah College of Law Library. Requirements: JD and MLS or substantial legal research experience (including Lexis/Westlaw); an aptitude for and interest in legal reference work and microcomputer applications in libraries, strong interpersonal skills. This position will involve provision of reference service (manual and computer) to library patrons as a member of a team of three reference librarians. This a one-year position with a possibility of becoming permanent. Saturday/Flex schedule. For further information, call Rita Reusch or Lee Warthen, 581-6594. Applications from women and minority candidates are encouraged.

American Stores Company, the nation's largest food and drug retailer, seeks attorney with at least three years' experience to work with its General Counsel in Salt Lake. Candidate should have excellent academic credentials. Experience required in one or more of the following areas: major litigation, employment law, ERISA, insurance, securities law and corporate finance. This is an opportunity to work on significant projects with a major corporation. Some travel will be required. Salary commensurate with qualifications. Excellent benefits. Send resumé to Kathlene W. Lowe, Vice President, American Stores Company, 19100 Von Karmen, Suite 500, Irvine, CA 92715. Confidentiality assured.

BOOKS FOR SALE

Pacific Reporter 2nd (volumes 1-757), up to date.

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Contact Bryce Bryner, Price, Utah, 637-2150.

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OFFICE SPACE AVAILABLE

Sublease: Deluxe office space. Scalley & Reading, 261 E. 300 S. 1,770 square feet, reception area, five private offices, two staff offices, conference room, recently remodeled. Contact Howard Kent or Thom Sayer at Salt Lake Investment Company, 521-4238.

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OFFICE SPACE SOUGHT

OFFICE SHARE: Four-year attorney desires to share Salt Lake City office with experienced business/tax attorney. Office must have access to complete tax library, including CCH/Ph, BNA, BTA, TC, USTC and IRS releases. Prefer secretary, receptionist, copy machine, phone system and overflow work. Contact V.K. Simpson, 4502 W. Manhatten Drive, Salt Lake City, UT 84120.

Three attorneys with secretary seek affordable offices with access to library. Would consider office suite arrangement. Also seeking used office dividers. Call mornings. Candace, 486-9638.

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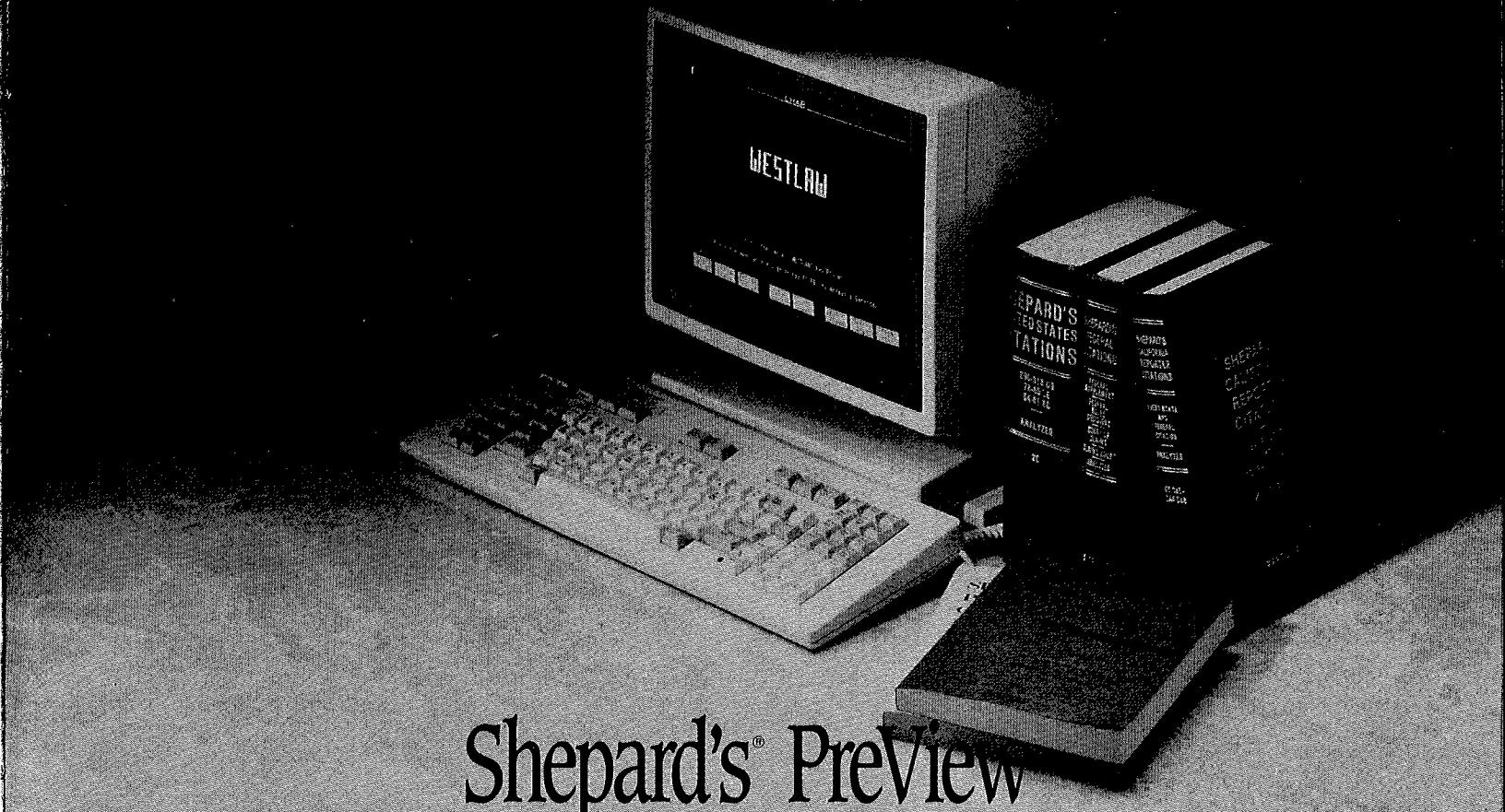

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