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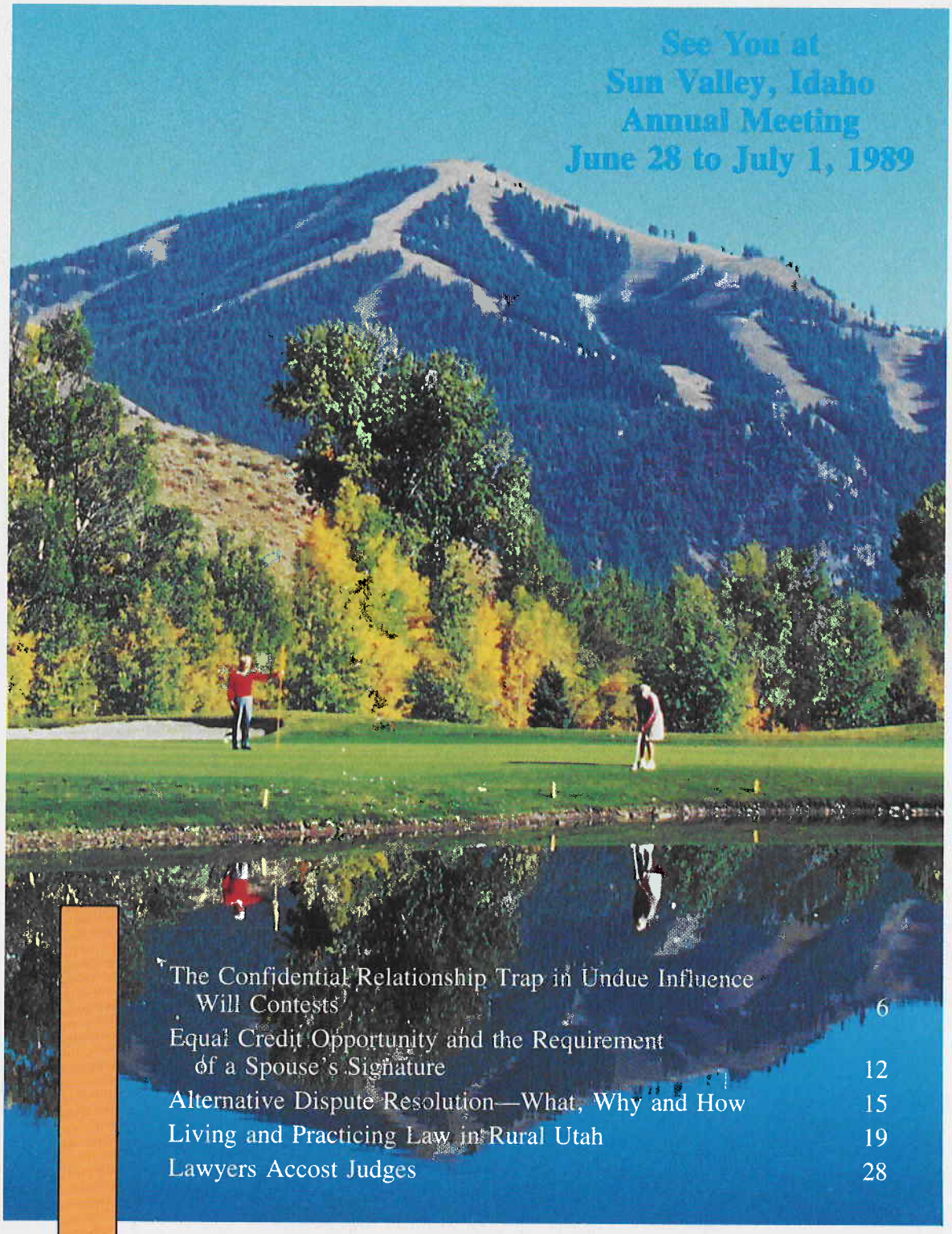

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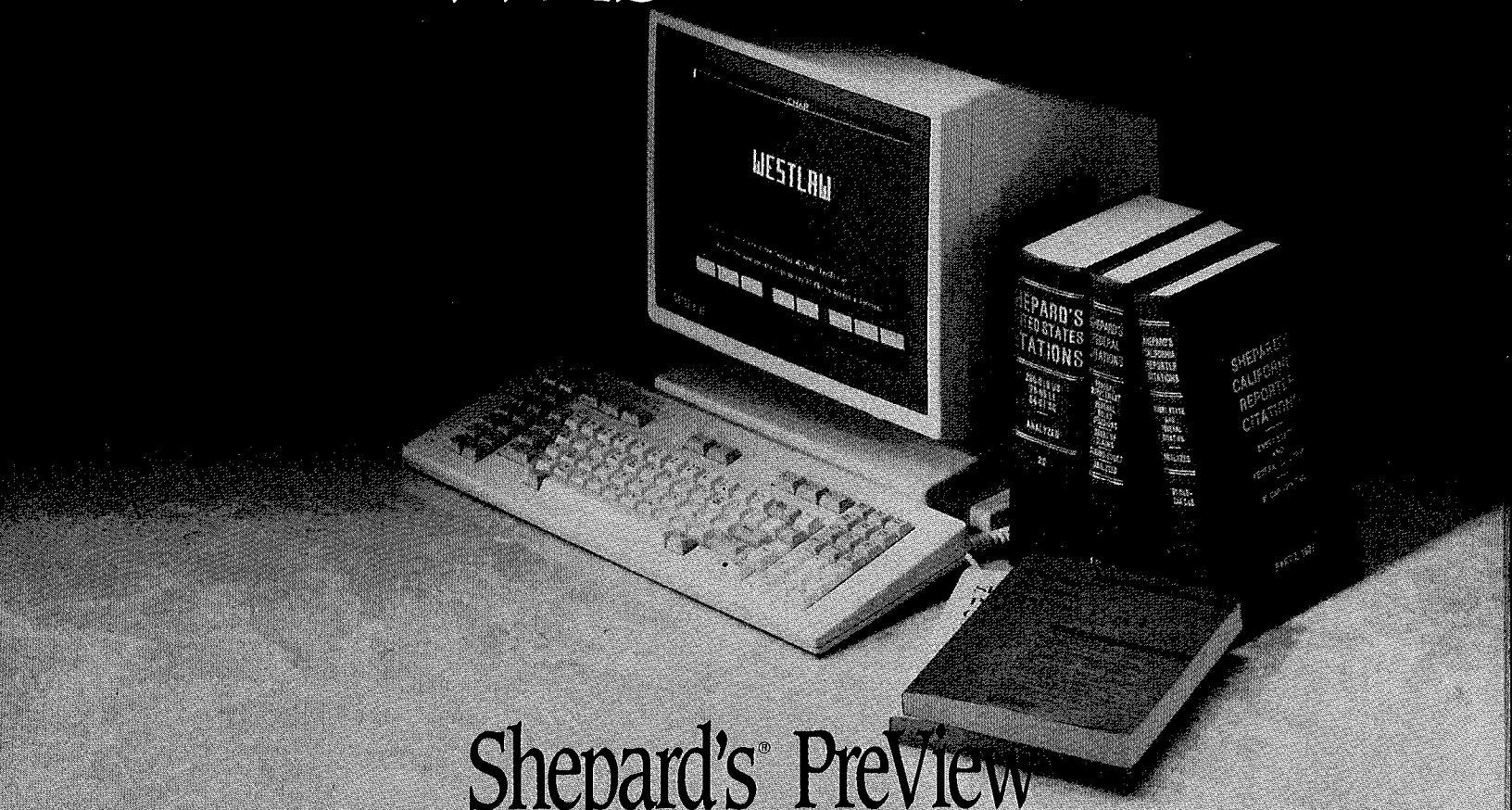

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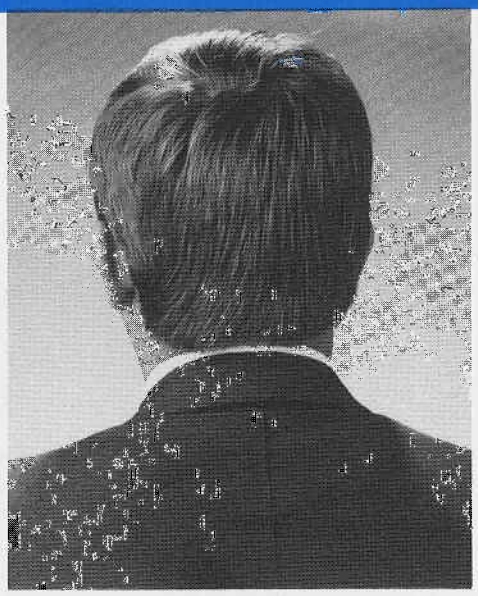


So Long and Thanks From Your Head Bartender
(Reflections of a Soon-to-Be-Has-Been)

By Kent M. Kasting, President

They say one picture is worth a thousand words. Well, maybe my picture which accompanies my last President's message says it all. In a very short time I'll be joining the ranks of the "has-beens." As Norm Johnson once so sagely observed, pretty soon it won't be "Hello, Mr. President," but rather "Oh, there goes old what's his name." That being the case, I thought that before I'm stripped of rank, it would be nice to say a few words about our Bar Association and the many, many talented people who give countless hours and extraordinary talent to the profession and the principles it stands for.

YOUR BAR ASSOCIATION

This year I've had the opportunity to travel a little bit and participate in national and regional meetings of Bar Associations. I've been able to meet and become acquainted with the presidents of Bar Associations throughout the nation. I've compared projects, programs and problems of other Bars with what we do and have here in Utah. As your President, I can assure each of you that the Utah State Bar Association takes a back seat to no one. It is an association of which you as members can be proud. It is a leader among bar associations and it is setting examples other states are following. Our Bar has programs that have been operational for years that other states are just beginning to consider. Our Bar is at the forefront in exploring and addressing new issues facing the legal profession. Utah is a recognized leader in ADR and apprenticeship programs and I can assure you that no one has a facility that can compare to the Utah Law and Justice Center.

The reason our Association is so strong is because of the many lawyers and judges who freely give their time, their ideas, their money and their talent to their Association in order to maintain and improve the legal profession and the things it does for the overall benefit of society.

As a soon-to-be-has-been, I'd just like to say thanks to each of you for making your Bar Association an Association of which I've been proud and privileged to be the President.

YOUR BAR COMMISSION

As President, I've also had the opportunity to chair some long and tedious Bar Commission Meetings and I can only tell you that the 15 people who serve with me on that Board are better than the very best. They not only spend one full day a month in Commission meetings, but they are chairing and serving on any number of subcommittees, grievance panels and special projects; all of which require expenditures of hours and hours of time. They spend this time without pay and certainly without much recognition. They do so because they want to serve you and the profession as best they can.

For example, this year Anne Stirba and Jim Davis have worked countless hours in revising and updating bar policies and procedures—a boring and thankless but nonetheless very necessary task. Stewart Hanson faithfully chairs the 7:30 a.m. Budget and Finance Committee meetings each month and he never misses a 5:30 p.m. Executive Committee meeting. Judge Pam Greenwood, as chair of the Bar Commission's Litigation subcommittee, liaison with Bar Counsel's office, and a member of the Budget and Finance Committee is at the Law and Justice about as much of the time as Steve Hutchinson.

Randy Dryer has served you well as the Commission's Representative on the Judicial Council's Judicial Performance Evaluation Subcommittee. You'll soon be seeing a Judicial Evaluation Form that Randy played a significant role in developing.

In his spare time, Jim Holbrook has put together a Code of Professional Courtesy which I hope the Commission will have adopted by the time you read this message.

Jackson Howard and Jim Clegg have

traveled throughout the state this year in their free time, at their own expense, seeking input from all our members to make certain that representation on the Commission is fair and properly apportioned and that our election process is the best one for us.

Jeff Thorne, our newest Commissioner from Logan who replaced Judge Low in December, already is serving on subcommittees and panels and making many trips to and from Logan each month to fulfill his Commissioner responsibilities. Then there are those five invaluable ex-officio members who, even with no vote, faithfully attend Commission meetings and serve on just as many subcommittees as anyone else.

Reed Martineau, your immediate-past president, ABA State Bar Delegate, Judicial Council Representative, and Judicial Conduct Commission Member has stamina and commitment that I could never hope to match. After his vigorous year as president, I thought he might want a rest—I was wrong!

And then there is Norm Johnson, your ABA Delegate. The wisdom, pragmatism and social responsibility he brings to the Commission is unmatched—a more decent and caring person you'll never find.

I also can say the Young Lawyers are well represented on the Commission by their President, Jerry Fenn. His input and leadership in the area of new projects for the Bar as well as the Young Lawyers Section is refreshing and certainly has been welcome.

Finally, our law school deans, Ned Spurgeon and Bruce Hafen, have shattered the image that law professors live and work in ivory towers. Their practical contributions and suggestions have been "right on the money" in so many instances.

I hope that you can tell that I really admire those people with whom I've served during my two terms on the Commission. I always will treasure those associations. Perhaps I also should take this opportunity to dispel a myth about the Bar Commission that may exist in the minds of a few of our members. If you think the Bar Commission is simply a group of big firm lawyers or a "bunch of good old boys and girls," you're wrong. Each Commissioner has his or her own personal philosophies and principles and they stand by them. During my time on the Commission, I think almost every Commissioner has had a motion die for lack of a second *and I know* every Commissioner has had motions seconded only as a matter of courtesy. There always are 6 to 5 votes and I still can't figure out any alignment between Commissioners; they each vote their conscience and try to do what they believe is the right thing to do. Simply put, being on the Commission is challenging, great fun and worth every minute you put into it. I would urge anyone who has an inclination to run for the Commission—to do it!

YOUR PRESIDENT ELECT

I've known Hans Chamberlain for about seven years. This year, in spite of the distance between his home in Cedar City and Salt Lake City, he's managed to keep his law practice going, serve on the Executive Committee and be actively involved as liaison for program and policy development for the Law and Justice Center and serve on its Board of Trustees, and serve on a number of other Committees. In addition, any time I've asked him to help me out this year, he's readily consented and the job has gotten done immediately. Not only is he a dedicated worker, a good lawyer and just a nice person, he also is probably going to be the best-dressed President the Utah Bar has ever had not to say he's had much of an act to follow in that category. He will be a superb president and I know he's looking forward to serving you and receiving from each of you your comments, suggestions, and help in making the Utah Bar even better than it is now.

YOUR BAR STAFF

Last, but by no means least, I must report to you that your Bar Staff, now consisting of 22 dedicated people working hard to serve 5,000 lawyers, is the best in the business. Steve Hutchinson, your Executive Director, has put together a staff of individuals that work long hours, with little recognition, to serve your needs and improve our profession. I can't say enough good things about those people at the Bar Office that I've had the good fortune to work with. I just wanted to go on record publicly with my thanks to Steve, Barbara, Chris, Paige, Lois, Michele, Diane, Kaesi, Sydnie, Toni and everyone else at the Bar for their help and good work.

YOUR SOON-TO-BE-HAS-BEEN

This year has been the best year I've had practicing law. I have not practiced that much law, but I have done something I wouldn't trade for the world. If any of you have an inclination to be Bar President, I can only say "shoot for it," because its worth it. It's worth it because you have the privilege of meeting, knowing and associating with so many fine, wonderful people all trying in their own way to do something a little extra for society and for our profession. Something constructive, not destructive. Something worthwhile. Something for which no return is expected other than personal satisfaction received for the efforts voluntarily expended. Someone once said "any jackass can kick down a building, it takes carpenters and craftsmen to build one." I'm grateful for the chance of being able to know and work with so many carpenters and craftsmen.

So long and thanks to each of you for your continued support of our Bar Association.

The Confidential Relationship Trap in Undue Influence Will Contests

By Charles M. Bennett

It is rare today to find a will contest alleging undue influence where the contestant does not also allege that the beneficiary of the decedent's will had a confidential relationship with the decedent. Based on numerous reported decisions, attorneys for contestants generally must feel that alleging a confidential relationship enhances their client's chance of success. However, in Utah, the confidential relationship issue serves as a trap for contestants. Instead of increasing a contestant's chance for success, arguing that the decedent had a confidential relationship with a beneficiary only obscures the crux of the case: was the will procured through undue influence?

To demonstrate how I reach this conclusion, we will first examine what burden of proof[1] the contestant must meet when there is no allegation of a confidential relationship; we will then examine the effect of a confidential relationship on the contestant's burden; next we will examine what must be shown to establish a confidential relationship; and finally we will examine what is likely to transpire in the trial of the case of a jury.[2]

THE CONTESTANT'S BURDEN OF PERSUASION WHERE THERE IS NO CONFIDENTIAL RELATIONSHIP PROVED

Although there have been numerous reported opinions in Utah on undue influence in will contests, it remains somewhat unclear whether the contestant's burden of persuasion is met by a preponderance of the evidence, clear and convincing evidence or something in between.[3] Decisions in other jurisdictions are split between a preponderance of the evidence and clear and convincing evidence, with a few interesting aberrations.[4] The better reasoned conclusion is that the contestant's burden of persuasion is proof by a preponderance of the evidence.

UTAH CASE LAW

In 1917, the Utah Supreme Court addressed the contestant's burden of persuasion in *In Re Hansen's Will*.[5] There, the district court had ruled prior to trial that the proponent of the will had the burden to prove lack of undue influence. On appeal, the Supreme Court quoted with approval 1 *Schouler on Wills* Sect. 239 as follows:

> The burden of proving fraud or force in the procurement of a will . . . lies upon those who contest the instrument; and anything which imputes heinous misconduct to a party concerned and interested in its execution ought to be fairly established by a preponderance of the evidence. As to undue influence, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it [i.e., the contestant].[6]

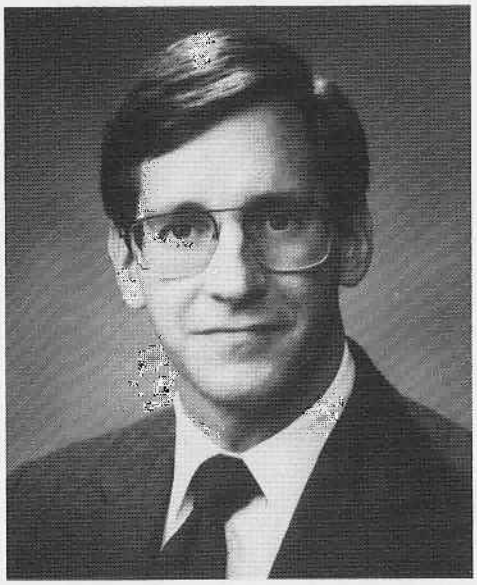
Although the Supreme Court did not expressly state that the contestant's burden of persuasion in an undue influence will contest was by a preponderance of the evidence, the logic of its decision leads only to that conclusion.

THE REQUIREMENT OF SUBSTANTIAL PROOF

However, beginning with its 1938 decision in *In Re Goldsberry's Estate*, the Utah Supreme Court issued four opinions which, although citing *In Re Hansen's Will*, added the concept that, to succeed, the contestant must adduce *substantial* evidence of undue influence.[7]

> [T]here must be an exhibition of more than influence or suggestion, there must be *substantial proof* of an overpowering of the testator's volition at the time the will was made, to the extent he is impelled to do that which he would not have done had he been free from such controlling influence, so that the will represents the desire of the person exercising the influence rather than that of the testator.[8]

While it can certainly be argued that the use of "substantial proof" means more than a preponderance of the evidence,[9] none of the decision used the words "clear and convincing." Moreover, the use of "substantial proof" may simply reflect that "[t]he courts have recognized that the trend in recent years to reject wills upon the ground of undue influence which is supported



CHARLES M. BENNETT is a partner in the Salt Lake City law firm of Callister, Duncan & Nebeker. For the past 11 years, Mr. Bennett's main areas of practice have concentrated on probate litigation, probate and estate planning. He received his B.A. degree from the University of North Carolina, his J.D. degree from the University of Utah and his LL.M. degree (Estate Planning) from the University of Miami. He has served on numerous committees for the Utah and American Bar Associations. Mr. Bennett presently is the chair of the Legislation Committee of the Utah Bar's Estate Planning and Probate Section of the Utah State Bar. He also is chair of the Tape Committee of the Litigation Section. He currently is the Utah state reporter for the American Bar Association's Real Property, Probate and Trust Section's committees on Significant Current Legislation (Probate) and Significant Current Decisions (Probate). Mr. Bennett is a frequent speaker before professional and civic groups on estate planning, probate and other related topics.

chiefly by evidence of a frivolous, speculative, and inconclusive character, should be checked."[10] Indeed, these cases were more concerned with defining the elements necessary to establish undue influence rather than the standard of evidence necessary to meet the contestant's burden of persuasion. For instance, the Court in *In Re George's Estate*, after stating "substantial proof" was necessary, went on to say:

> The mere existence of undue influence, or an opportunity to exercise it, is not sufficient; such influence must be actually exerted on the mind of the testator. . . and it must result in the making of testamentary dispositions which the testator would not otherwise have made.[11]

Moreover, in *In Re Bryan's Estate*, the Court specifically noted that

> [N]o precise quantity of influence can be said to be necessary and sufficient in all cases, as the amount necessarily varies with the circumstances of each case, and especially does it vary accordingly as the strength or weakness of mind of each testator varies, the amount of influence necessary to dominate a mind impaired by age, disease or dissipation being obviously less than that required to control a strong mind.[12]

Thus, based on will contest cases alone, the contestant's burden of persuasion should be proof by a preponderance of the evidence.

DEED CONTESTS INVOLVING UNDUE INFLUENCE

The concept of undue influence is not unique to will contests. Contestants can avoid inter vivos transfers by showing undue influence. Since the majority of the cases deal with actions to set aside real property conveyances, these cases are commonly referred to as deed contests.

While the law respecting the burden of persuasion of undue influence in will contests is unsettled, the law with regard to deed contests is clear: the contestant to the deed must establish undue influence by clear and convincing evidence.[13] This burden rests upon the general proposition that "one who asserts the invalidity of a deed [regardless of the basis] must so prove by clear and convincing evidence."[14]

Some courts have analyzed undue influence using both will contest and deed contest cases.[15] If the issues are in fact interchangeable, then arguably, the "substantial proof" requirement in *In Re George's Estate* is the equivalent of "clear and convincing evidence" in the deed contest cases.

THE BURDENS OF PERSUASION IN A DEED CONTEST ARE DIFFERENT FROM THOSE IN A WILL CONTEST

In analyzing the impact of a confidential relationship, Utah's appellate courts have used opinions in will contests as authority in deed contests and vice versa.[16] However, these cases simply show that the determination of whether a confidential relationship exists is identical in will contests and deed contests. That, however, does not necessarily mean that in the absence of a confidential relationship the burden of persuasion in undue influence cases is the same in both instances. In fact, because a successful claim has a dramatically different effect in deed contests from will contests, the burden of persuasion should be different.

> A contestant to a deed must establish undue influence by clear and convincing evidence.

POLICY CONSIDERATIONS FAVOR A GREATER BURDEN OF PROOF IN DEED CONTESTS THAN IN WILL CONTESTS

A deed is effective upon delivery, without notice to interested persons.[17] Deeds rarely, if ever, show undue influence upon their face. Third parties may rely upon a recorded deed long before parties injured by undue influence learn of the injury. Thus, as stated above, *any* attack on a deed requires persuasion by clear and convincing evidence. For instance, the Utah Court of Appeals recently addressed the contestant's burden of persuasion in a deed contest based on the allegation that the grantor was incompetent to execute the deed: "Mental incompetency must be established by clear, cogent, satisfactory and convincing evidence."[18]

On the other hand, before a will is effective to transfer assets to persons exercising undue influence, generally the will must be admitted to probate, after notice to all interested persons.[19] The probate code protects the rights of third parties regardless of the outcome of the will contest.[20] And while Utah law requires clear and convincing evidence to attack a deed on the grounds of the grantor's incompetency, will contestants can establish incompetency by a preponderance of the evidence.[21]

A WILL CONTESTANT'S BURDEN SHOULD BE THE PREPONDERANCE STANDARD

As a result, the public policy favoring the validity of deeds does not apply when the law examines the validity of a will. It follows from this distinction that a will contestant should not be required to prove undue influence by clear and convincing evidence. Indeed, the will contestant's burden should not be any greater than a preponderance. A will contestant rarely has direct evidence of the beneficiary's undue influence. As the Utah Supreme Court observed:

> In a case of this sort, it is not usually possible to procure direct evidence of statements and conduct which one accused of undue influence has used on the decedent. One of the two is dead; the other cannot be expected to give evidence against himself. The usual way is to give the surrounding circumstances from which deductions may be made.[22]

In a similar vein, the Missouri Supreme Court said:

> The courts of Missouri have long judicially recognized the basic psychological fact that a person intent upon exerting undue influence in the execution of any aim, including gain by testamentary bequest, will do so in as subtle, furtive, indirect and elusive a manner as possible. . . . As a rule undue influence is not proclaimed from the housetop, but is hidden like a candle beneath a bushel and concealed like fraud and deception, only appearing through carelessness and unguarded openings.[23]

On the other hand, when a will contestant seeks to prove undue influence through circumstantial evidence, there is always the danger that the evidence presented consists only of suspicion, opportunity and the contestant's offended sense of justice. Accordingly, the Supreme Court's reference to "substantial proof" is properly interpreted to be a requirement that the evidence establish undue influence by the beneficiary directed at the testamentary act.[24] As long as the evidence adduced bears on this central question, the weight to be given the evidence is for the jury.[25] And the jury should

be instructed that the contestant's burden of persuasion is proof by a preponderance of the evidence.

THE CONTESTANT'S BURDEN OF PERSUASION WHERE A CONFIDENTIAL RELATIONSHIP IS PROVED

Unlike the problem in determining the will contestant's burden of persuasion where no confidential relationship is present, the Utah Supreme Court has given a definitive opinion upon the burden of persuasion in an undue influence case where a confidential relationship exists. In *In Re Swan's Estate*, the Supreme Court held:

> After careful study and consideration we conclude that this presumption [*i.e.*, the presumption arising when a confidential relationship is established] shifts the burden onto the confidential adviser of persuading the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he has the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidant; that he made complete disclosure of all material information available and took no unfair advantage of his superior position than that he exerted fraud or undue influence to obtain the benefits in questions.[26]

Unfortunately, subsequent statutory developments cast considerable doubt upon the validity of this holding today.

SECTION 75-3-407 OF THE UTAH UNIFORM PROBATE CODE

Effective July 1, 1977, Utah adopted the Utah Uniform Probate Code.[27] Sect. 75-3-407 sets forth what burdens of proof proponents and contestants must bear in will contests.[28] After providing that proponents have the initial burden of establishing due execution, etc. and that contestants have the initial burden of establishing incapacity, undue influence, etc., Sect. 75-3-407 provides: "Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." Since the contestant has the initial burden of proof on the existence of a confidential relationship and on the existence of undue influence in the execution of the will,[29] Sect. 75-3-407 effectively overrules the holding of *In Re Swan's Estate* that the presumption created by a confidential relationship shifts the burden of persuasion to the proponent of the will.

THE ADOPTION OF RULE 301 OF THE UTAH RULES OF EVIDENCE DOES NOT AFFECT THIS CONCLUSION

Effective September 1, 1983, the Supreme Court adopted new rules of evidence for Utah. Although patterned after the Federal Rules of Evidence, the Utah Rules took several departures from the Federal Rules.[30] Rule 301 was one of those departures.

Utah Rule 301 provides that, in civil cases, "unless otherwise provided by statute," a presumption shifts the burden of persuasion to the party against whom the presumption works. That party must then prove the non-existence of the presumed fact. Rule 301 of the Federal Rules of Evidence provides that the presumption vanishes once evidence is adduced rebutting the facts which support the presumption or the presumed fact itself. The Utah Supreme Court in *In Re Swan's Estate* specifically discussed the possibility of adopting the Federal Rules approach to the presumption arising from a confidential relationship and rejected it.[31]

> "The practical effect of not shifting the burden of proof is to make the existence of a confidential relationship meaningless."

Utah Rule 301 applies only when "not otherwise provided by statute." Although Sect. 75-3-407 does not expressly address presumptions, it makes no exceptions to its rule that parties bear the ultimate burden of persuasion when they have the initial burden of producing evidence.

THE EFFECT OF SECT. 75-3-407 ON IN RE SWAN'S ESTATE

Thus, after the passage of Sect. 75-3-407, *In Re Swan's Estate's* holding that a confidential relationship shifts the burden of persuasion is overruled.[32] Logically, a confidential relationship should still be recognized and given some effect. However, the practical effect of not shifting the burden of proof is to make the existence of a confidential relationship virtually meaningless.

In *In Re Swan's Estate*, the Supreme Court explained this practical problem as follows:

> [Past decisions of the court have held that] the presumption [of undue influence] 'raises a suspicion which ought to appeal to the vigilance of the court. . . . and that the court will cautiously and carefully examine into the circumstances which were attendant upon their execution, and will scan with a scrutinizing eye the evidence offered to procure their probate; . . . but such precautions are of no avail if the burden of persuasion is not on the confidential adviser and the court of last resort holds, as do those cases, that the [contestant] must produce detailed evidence of facts and circumstances indicating . . . undue influence.[33]

Since Sect. 75-3-407 now prohibits the shifting of the burden of persuasion to the proponent, at best *In Re Swan's Estate* can only shift to the proponent the burden of producing evidence on the question of undue influence. As a result, Sect. 75-3-407 makes the *Swan* confidential relationship presumption the same as a presumption under Rule 301 of the Federal Rules of Evidence. While this *seems* to give a meaningful role for a confidential relationship in undue influence cases, in fact it does not.

The contestant's problem is that it is exceptionally easy for the proponent of the will to present rebuttal evidence. The proponent can adduce evidence on *either* the allegation of a confidential relationship *or* the allegation of undue influence.[34] For instance, assume the contestant presents evidence of conduct by the beneficiary which on its face shows total domination of the decedent. The beneficiary can testify that the decedent was in control and the beneficiary simply did what the decedent told the beneficiary to do. While this may be improbable and illogical, it is direct evidence on the matter, and it rebuts the contestant's evidence.

Thus, the only time a confidential relationship will be of value to the contestant under this analysis is when the proponent has *no* evidience to rebut either the claimed confidential relationship or the claimed undue influence. It is hard to imagine such a case, and if one did exist, that it would go to trial. Note that even a relationship that is conclusively presumed to be a confidential relationship—attorney/client for instance—will not effect the instructions to the jury if the beneficiary adduces evidence the beneficiary did not unduly influence the decedent. Having done so, the court will

instruct the jury that the burden of persuasion is on the contestant.

Based on this interpretation of Sect. 75-3-407, the contestant receives no benefit from alleging a confidential relationship.[35]

THE CHLOE ALLEN ESTATE LITIGATION

In 1984, the Third District Court had to deal with this specific issue on the *Chloe Allen Estate*.[36] The case was a standard will contest where the contestant alleged undue influence and confidential relationship. Prior to trial, the court agreed to decide the effect of Sect. 75-3-407 on *In Re Swan's Estate*. The contestant's position was that Sect. 75-3-407 did not effect *In Re Swan's Estate* and that if a confidential relationship were proven, the burden of persuasion would shift to the proponent of the will. Without explanation, the court ruled:

> For the contestant. . . to establish a violation or violations of a confidential relationship sufficient to raise a presumption which shifts the burden of persuasion, the burden is his to establish such confidential relationship with the decedent by a preponderance of the evidence."[37]

While the reference to the contestant establishing "a violation. . . of a confidential relationship" is somewhat confusing, the court apparently agreed with the contestant that a confidential relationship shifted the burden of persuasion as held in *In Re Swan's Estate*.

Whether the *Chloe Allen Estate* decision represents persuasive authority is questionable. In particular, the court went on to rule that the existence of a confidential relationship was a question of law upon which the Court would rule prior to instructing the jury.[38] This runs contrary to Supreme Court decisions which hold that the existence of a confidential relationship is normally a question of fact.[39] Conceivably, the court analyzed the effect of Sect. 75-3-407 as set forth above and came to the conclusion that the legislature could not have intended to legislate the doctrine of confidential relationships out of will contests. While strict legal reasoning would seem to compel a different conclusion, on a policy level, the court's decision makes sense.[40]

EVEN WHEN A CONFIDENTIAL RELATIONSHIP SHIFTS THE BURDEN OF PERSUASION, IT IS QUESTIONABLE WHETHER THE CONTESTANT IS BENEFITED

Except when confidential relationships are presumed by law,[41] even if a confidential relationship would shift the burden of persuasion to the proponent of the will, the contestant may be better served by not trying to obtain that benefit. To explain why, let's examine what must be proved to establish a confidential relationship under Utah law.

THE ELEMENTS OF A CONFIDENTIAL RELATIONSHIP

The Supreme Court has described a confidential relationship in these terms:

> The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.[42]

Even if a confidential relationship would shift the burden of persuasion, the contestant may be better served by not trying to obtain that benefit.

This seemed reasonable enough until the Supreme Court embellished the concept in *Von Hake v. Thomas*.[43] In that case, Von Hake, 82 years old and distressed over the possible loss of his ranch at a foreclosure sale, asked Thomas to help "save" Von Hake's ranch. Allegedly, Thomas agreed to purchase the ranch at a foreclosure sale and then jointly develop the ranch with Von Hake as recreational property. Thomas denied any such agreement. Von Hake alleged both constructive and actual fraud. The trial court ruled for Von Hake on both theories.

On appeal, the Supreme Court affirmed the finding of actual fraud, but held that the evidence did not establish a confidential relationship between Von Hake and Thomas, and, therefore, there was no basis for constructive fraud. The Court stated:

> The law presumes that one ordinarily makes his or her own judgments, however imperfect, and acts on them; it does not readily assume that one's will has been overbourne by another. *Therefore, the law does not lightly recognize the existence of a confidential relationship.*
>
> Although Von Hake was 82 years old and distressed. . . and Thomas clearly induced Von Hake to believe that he was interested in "saving" the ranch, those facts alone did not require Thomas to act as a fiduciary toward Von Hake. *No evidence suggests that Von Hake so trusted Thomas that Thomas was able to substitute his will for Von Hake's.* The parties had no long-established relationship of trust. . . , nor was Thomas' relationship to Von Hake on that traditionally imposes a fiduciary duty, such as an attorney/client relationship.[44]

While this decision can be ciriticized as illogical,[45] it creates difficult problems for a contestant intent on proving a confidential relationship. Proponents will be quick to point out that a confidential relationship is not "lightly recognize[d]." In addition, even though a beneficiary gained enough confidence to defraud a decedent, that is not sufficient to establish that the beneficiary was capable of substituting the beneficiary's will for that of the decedent, and, therefore, not sufficient to establish that there was a confidential relationship. Finally, absent a relationship that traditionally imposes a fiduciary relationship, a long-established relationship of trust is a prerequisite for finding a confidential relationship. Undue influence cases often involve a short-term relationship during a time when the transferor is exceptionally susceptible to pressure.[46]

Accordingly, a confidential relationship should be extremely difficult to prove.

WHAT HAPPENS AT TRIAL

Assume that the contestant's facts are *very* good—domination, influence, long-established relationship and presumably a moral duty (but something short of a relationship that is conclusively presumed to be confidential). The contestant's allegation of the confidential relationship is a factual issue that the contestant must establish by the preponderance of the evidence. How is the jury instructed on this issue?

JURY INSTRUCTIONS

Based on U.R.E. Rule 301, if the jury finds that there is a confidential relationship, the court should instruct the jury that the burden is on the proponent of the will to prove there was no undue influence.[47] In *In Re Swan's Estate*, the Supreme Court said

that the confidential adviser had "the burden of convincing the fact finder . . . that . . . he acted perfectly fairly; that he made complete disclosure of all material information available and took no unfair advantage of his superior position."[48] It would be error for the Court to instruct the jury based on this language. The confidential advisor can be less than perfectly fair and completely candid without unduly influencing the decedent. The real question is whether the beneficiary, whether a confidential advisor or not, substituted the beneficiary's desires for those of the decedent.[49]

Accordingly, a proper instruction would state:

> If you find a confidential relationship existed between the decedent and the beneficiary, then the proponent of the will must establish by a preponderance of the evidence that the will was not the result of undue influence. If the proponent does not meet this burden, then you should enter your finding that the will was the result of undue influence.
>
> If you do not find a confidential relationship existed between the decedent and the beneficiary, then the contestant must establish by a preponderance of the evidence that the will was the result of undue influence. If the contestant does not meet this burden, then you should enter your finding that the will was not the result of undue influence.[50]

In addition, the court will also give a jury instruction on confidential relationships patterned on *Van Hake v. Thomas*. As interpreted by the Supreme Court in *Von Hake v. Thomas*, a confidential relationship is very closely aligned with the ultimate issue of undue influence. As a result, the possibility of confusion will be very high.

CLOSING ARGUMENTS AND THE EFFECT ON THE JURY

Before receiving the court's instructions, the jury will hear final arguments where counsel for the contestant and the proponent will argue about whether the evidence is sufficient to establish a confidential relationship and the effect of that determination upon the case. Counsel will also argue about whether there was undue influence.

Practically speaking, the jury will be left with the impression that there are two issues that are being tried and that the contestant must win both issues. It is difficult to imagine a jury deciding that there was no confidential relationship, but there was undue influence.

AVOIDING THE CONFIDENTIAL RELATIONSHIP TRAP

As a result, I believe contestants should consider simply avoiding the confidential relationship trap altogether.[51] It adds a significant burden to the case without providing a significant benefit in return. Moreover, the contestant only drops the issue of whether or not there is a confidential relationship. The factual basis for the relationship is still proper evidence from which the jury can infer undue influence.

> The essential elements of undue influence have been held to be a susceptible testator, another's opportunity to exert it, a disposition to do so for an improper purpose, the fact of improper influence exerted or attempted, and the result showing the effect of such influence.[52]

The contestant can carefully develop each of the facts underlying the confidential relationship to show that the maker of the will was susceptible to influence, that the beneficiary had the opportunity to exercise undue influence and that the beneficiary had a disposition to do so for an improper purpose. The contestant has a cleaner case and a jury focused on the issue at hand: was there undue influence (and not did the beneficiary have a confidential relationship with the decedent)? While the contestant gives up the possibility of shifting the burden of proof to the proponent, in most cases, this is a small price to pay in light of the confusion trying to prove a confidential relationship will cause.

CONCLUSION

It makes little, if any, sense for will contestants to fight the confidential relationship battle. After *Von Hake v. Thomas*, an instruction to the jury explaining what must be found to establish a confidential relationship is bound to cause confusion and increase the contestant's burden. Even if a confidential relationship is held by the trial court to shift the burden of persuasion to the proponent of the will, the contestant runs the serious risk that the jury will require the contestant to win two issues, not one.

The only exception to this advice would be where the trial court decides that a confidential relationship will shift the burden of persuasion and where the relationship between the decedent and the beneficiary is one where the court will conclusively presume a confidential relationship. In that limited situation, the court should instruct the jury that the proponent has the burden of proof. Otherwise, the contestant is best advised to marshall the facts of the case, including those showing a confidential relationship, with the goal of showing undue influence.

[1] In this article, burden of proof is used expansively to include all elements embodied in that concept. The burden that any party may have at any point in a trial to produce evidence on a particular factual issue is called the burden of producing evidence. This burden can shift from party to party during the trial as evidence is adduced. The ultimate risk of failing to persuade the trier of fact on any issue is called the burden of persuasion. Only one party bears this burden. *See Koesling v. Basamakis*, 539 P.2d 1043, 1046 (Utah 1975).

[2] This article is limited to jury trials. A similar argument can be made that contestants should avoid the confidential relationship trap in bench trials as well. I believe that the conclusions reached in this article will also apply to many bench trials. This conclusion is based on the general observation that simple theories and straightforward arguments lead to better results in all trials.

[3] There is no question that the contestant has the initial burden of producing evidence on the issue. U.C.A. Sect. 75-3-407 (1978).

[4] *Compare Peterson v. Peterson*, 432 N.W.2d 231 (Neb. 1988) (preponderance of the evidence) *with White v. White*, 655 P.2d 1173 (Wash. App. 1982) (clear and convincing evidence) *with First National Bank of Appleton v. Nennig*, 285 N.W.2d 614 (Wisc. 1978) (contestant must establish four elements, three of the four by clear and convincing evidence, and, if so, then fourth may be established by only slight evidence).

[5] 50 Utah 207, 167 P. 256 (1917).

[6] *Id.* at 215-16, 167 P. at 259.

[7] *In Re Bryan's Estate*, 82 Utah 390, 407, 25 P.2d 602, 608 (1933); *In Re Goldsberry's Estate*, 95 Utah 379, 392-396, 81 P.2d 1106, 1112 (1938); *In Re George's Estate*, 100 Utah 230, 234, 112 P.2d 498, 499-500 (1941); *In Re Lavelle's Estate*, 122 Utah 253, 259, 248 P.2d 372, 375-376 (1952).

[8] *In Re Lavelle's Estate*, 22 Utah at 259, 248 P.2d at 375-376 (emphasis added; footnotes omitted).

[9] *See* 94 C.J.S. *Wills*, Sect. 251 (1956).

[10] 79 Am. Jur. 2d *Wills*, Sect. 479 at 613 (1975) (footnote omitted).

[11] *In Re George's Estate*, 100 Utah at 234, 112 P.2d at 500, *quoting In Re Goldsberry's Estate*, 95 Utah at 392-396, 81 P.2d at 1112.

[12] 82 Utah at 407, 25 P.2d at 610.

[13] *Bradbury v. Rasmussen*, 16 Utah 2d 378, 385, 401 P.2d 710, 715 (1965).

[14] *Richmond v. Ballard*, 7 Utah 2d 341, 355, 325 P.2d 839, 849 (1958), *quoting Northcrest, Inc. v. Walker Bank and Trust Co.*, 122 Utah 268, 271, 248 P.2d 692, 693 (1952).

[15] *Brug v. Case*, 600 P.2d 710, 713 (Wyo. 1979).

[16] *See Johnson v. Johnson*, 9 Utah 2d 40, 337 P.2d 420, 422 (1959) (deed contest); *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985) (deed contest); *Webster v. Lehmer*, 742 P.2d 1203, 1206 (Utah 1987) (deed contest); and *Estate of Jones v. Jones*, 759 P.2d 345, 347 (Utah App. 1988) (will contest).

[17] *Kresser v. Peterson*, 675 P.2d 1193, 1194 (Utah 1984) (deed valid upon delivery, whether actual or constructive); *Gregerson v. Jensen*, 669 P.2d 396, 398 (Utah 1983) (deed valid as to parties and those having actual knowledge even though not recorded, interpreting *Utah Code Ann.* Sect. 57-1-6 (repealed 1988); *Utah Code Ann.* Sect. 57-3-2 (1988) has comparable provisions).

[18] *Anderson v. Brinkerhoff*, 756 P.2d 95, 100 (Utah App. 1988).

[19] Where the total estate of the decedent is less than $25,000 in value, title to personal property can be obtained by affidavit without the necessity of probating the decedent's will. *Utah Code Ann.* Sect. 75-3-1201 (1988).

[20] *See Utah Code Ann.* Sect. 75-3-801 *et seq.* (1978) (re creditor's claims against estate); Sect. 75-3-605 (1983) (re creditor's right to demand bond).

[21] *Matter of Estate of Kessler*, 702 P.2d 86, 88 (Utah 1985). It has also been suggested that the presumption someone does not part with valuable property without consideration applies to inter vivos, but not testamentary, transfers. Whitman and Hoopes, "The Confidential Relationship in Will Contests," 124 *Trusts and Estates* 53 (February 1985). This would be an additional reason for different burdens of persuasion in will contests and deed contests.

[22] *In Re Hanson's Estate*, 87 Utah 580, 594, 52 P.2d 1103, 1110 (1935).

[23] *Salisbury v. Gardner*, 515 S.W.2d 881, 885 (Mo. 1974).

[24] *In Re Bryan's Estate*, 82 Utah at 411-12, 25 P.2d at 610.

[25] *Id.*

[26] *In Re Swan's Estate*, 4 Utah 2d 277, 293, 293 P.2d 682, 693 (1956).

[27] *Utah Code Ann.* Sect. 75-8-101(1) (1978).

[28] *Utah Code Ann.* Sect. 75-3-407 (1978).

[29] *In Re Holten's Estate*, 17 Utah 2d 29, 31, 404 P.2d 27, 29 (1965).

[30] *Compare generally*, Federal Rules of Evidence 101 et al. (P.L. 93-595, Sect. 1, 1975, as amended) *with* Utah Rules of Evidence 101 et al. (effective September 1, 1983); *compare* Federal Rules of Evidence Rule 301 *with* Utah Rules of Evidence Rule 301.

[31] *In Re Swan's Estate* 4 Utah 2d at 283-293, 293 P.2d at 687-693.

[32] On July 1, 1985, a new Judiciary Article of the Utah Constitution became effective. *Utah Constitution*, Article VIII (1985). Now Article VIII, Sect. 4 provides: "The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state." Arguably, *Utah Code Ann.* Sect. 75-3-407 (1978) is unconstitutional. At the time of its enactment, the legislature was not prohibited from adopting rules of evidence. When new Article VIII, Sect. 4 became effective, July 1, 1985, it invalidated all statutory rules of evidence and procedure. *See Carmel v. Carmel*, 282 So.2d 9 (Fla. 1973) (Florida Supreme Court held similar Florida Constitutional provision invalidated statutory rules of procedure). However, the better position is that the exclusionary provision in Utah Rules of Evidence Rule 301 (1983) ("not otherwise provided for by statute") constitutes an "adoption" of the statutory rule of evidence by the Supreme Court. *See The Florida Bar Re Emergency Amendments to Florida Rules of Probate and Guardianship Procedure*, 460 So.2d 906 (Fla. 1984) (based on similar Florida Constitutional provision, Florida Supreme Court enacted a transition rule adopting all procedural aspects of the Florida Probate Code).

[33] *In Re Swan's Estate*, 4 Utah 2d at 292, 293 P.2d at 692.

[34] *In Re Swan's Estate*, 4 Utah 2d at 293, 293 P.2d at 693; *White v. Palmer*, 498 P.2d 1401, 1406 (Okl. 1971).

[35] *Tuttle v. Pacific Intermountain Express Co.*, 121 Utah 420, 428, 242 P.2d 764, 769 (Utah 1952) (under prior Utah law that presumption vanishes when evidence is adduced rebutting presumption, "if the required burden is satisfied [by the party against whom the presumption would work] the presumption disappears and the facts must be established from the evidence the same as if no presumption were ever involved and it is not proper in such case to even mention in the instructions the existence of such presumption." Note that House Conference Committee Report No. 93-1597 on Federal Rule 301 states that the Federal Rule allows a judge to instruct the jury that it may infer existence of the presumed fact; the problem with this is that the judge is then commenting on the weight to be given the evidence. In any event, relying solely on the presumption would allow a contestant to withstand a motion for a directed verdict). *See generally*, Cleary, *McCormick on Evidence*, Sect. 345, West (2nd Ed. 1972).

[36] *Estate of Chloe Allen*, Third District Court, Probate No. 81-895.

[37] "Order Respecting Burden of Proof," *Estate of Chloe Allen*, Probate No. P-81-895, dated April 17, 1984.

[38] *Id.* at 2-3; if this were correct, it would solve the problem.

[39] *Webster*, 742 P.2d at 1206; *Von Hake*, 705 P.2d at 769; *Blodgett v. Martsch*, 590 P.2d 208, 302 (Utah 1978).

[40] *See also Estate of Jones*, 759 P.2d at 347. In dicta, Utah Court of Appeals states proof of confidential relationship shifts burden of persuasion to will proponent citing *Baker*, 684 P.2d at 637 (deed contest); this is likewise questionable authority since issue before Court of Appeals was whether father-daughter relationship was conclusively presumed to be confidential and court failed to discuss Sect. 75-3-407. In any event the way to resolve this problem is to amend Sect. 75-3-407. Accordingly, I am proposing to the Estate Planning and Probate Section of the Bar the following amendment:

> . . .[Beginning after third sentence] *Except in cases where a presumption is operable, [p]*arties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. *Where one or more presumptions are operable,*
> *the ultimate burden of persuasion shall be determined*
> *in accordance with the Utah Rules of Evidence. . . .*

[41] The law presumes some relationships to be confidential, such as the attorney-client relationship. *Webster*, 742 P.2d 1208 (J. Durham, concurring in result). The only other relationships which, arguably, Utah law recognizes are parishioner-priest and trustee-beneficiary. *In Re Bryan's Estate* 82 Utah at 408, 25 P.2d at 609 (parisioner-priest); *Blodgett*, 590 P.2d at 302 (trustee-beneficiary; dicta); *c.f. Estate of Jones*, 759 P.2d at 347-348 (holding parent-child is not such a relationship, overruling earlier dicta to that effect).

[42] *Von Hake*, 705 P.2d at 769; *Bradbury*, 401 P.2d at 713.

[43] *Von Hake*, 705 P.2d at 769-770.

[44] *Von Hake*, 705 P.2d at 770 (emphasis added).

[45] To defraud someone, there must be a conscious desire to gain the confidence of that person. Indeed, to "con" someone has its derivation in gaining "confidence" as a means of defrauding innocent parties. Von Hake's trust that Thomas' promises were true should be sufficient to meet *that* element of a confidential relationship. Justice Durham in her concurring opinion in *Webster v. Lehmer* warned against the "drastic consequence" any attempt to expand the concept of a confidential relationship would have on normal contractual relations. *Webster*, 742 P.2d at 1208. At best, the drastic consequence is a shift in the burden of persuasion. Where the elements of a confidential relationship are present, this hardly seems to be a drastic consequence, and indeed is the better policy. *In Re Swan's Estate*, 4 Utah 2d at 283-293, 293 P.2d at 687-693.

[46] *See e.g., Estate of Jones*, 759 P.2d at 348 (decedent moved in with daughter in Salt Lake City two months before he entered a California hospital for cancer surgery; daughter traveled to California, drafted a power of attorney for father to sign, then modified the power of attorney to name herself executor and sole beneficiary and had father sign at the hospital; trial court found no confidential relationship; affirmed on appeal on narrow issue that father/daughter relationship was not conclusively presumed to be confidential)

[47] *Bongiovi v. Jamison*, 718 P.2d 1172, 1176 (Idaho 1986).

[48] *In Re Swan's Estate*, 4 Utah 2d at 283-293, 293 P.2d at 693.

[49] *In Re Lavelle's Estate*, 22 Utah at 259-262, 248 P.2d at 375-378.

[50] *See generally, California Jury Instructions Civil (BAJI)* Sect. 12.01 (7th Ed. 1985) (burdens of proof in will contests generally); *BAJI* Sect. 12.17 (effect of a confidential relationship).

[51] If the contestant has great evidence of a confidential relationship and little, if any, evidence of undue influence, that would apparently be a good situation for seeking to prove the existence of a confidential relationship, hoping to shift the burden of persuasion to the proponent of the will. However, after *Von Hake v. Thomas*, it would be difficult to have a strong case on confidential relationship and not also have a strong case on undue influence.

[52] 94 C.J.S. *Wills*, Sect. 224 (1956).

Equal Credit Opportunity and the Requirement of a Spouse's Signature

By W. Clark Burt

BACKGROUND AND POTENTIAL LIABILITY

The Equal Credit Opportunity Act (ECOA) and its supplement, Regulation B, which apply to all persons and entities who in the ordinary course of business regularly participiate in the decision of whether or not to extend credit (15 U.S.C. Sect. 1691(a)), make it unlawful for a creditor, *in any aspect of a credit transaction*, to discriminate against an applicant on the basis of, among other things, sex or marital status. (15 U.S.C. Sect. 1691; 12 C.F.R. Sect 202.4.) Discrimination against an applicant need not involve an actual denial of credit; discrimination occurs any time a creditor treats an applicant less favorably than other applicants. (12 C.F.R. Sect. 202.2(n).) Although failing to expressly mention guarantors, the ECOA and Regulation B apply to applicants and guarantors alike. (Federal Reserve Board Letter, July 29, 1976, 5 C.C.H. Consumer Credit Guide ¶ 42,083.)

A creditor failing to comply with the ECOA or Regulation B (except for failure based on good faith conformity with any official rule, regulation, or interpretation by the Federal Reserve Board or official staff) is liable to the aggrieved party for actual damages, punitive damages not greater than $10,000 (but limited for total recovery in a class action to the lesser of $500,000 or 1 percent of creditor's net worth), and court costs and reasonable attorney's fees (if applicant is successful). (15 U.S.C. Sect. 1691; 12 C.F.R. Sect. 202.1.)

To prevent credit discrimination based on sex or marital status, Regulation B provides detailed guidelines regarding when a creditor can require the signature of an applicant's spouse or other person on a credit instrument. (12 C.F.R. Sect. 202.7(d).) The following procedure provides step-by-step guidelines for compliance with Regulation B's provisions regarding the signature of an applicant's spouse or other person.

COMPLIANCE PROCEDURE

I. *Establish Non-Discriminatory Standards of Creditworthiness.* A creditor is free to establish its own standards of creditworthiness provided that they do not violate the ECOA and Regulation B. (Interpretive Staff Letter of the Comptroller of the Currency, September 14, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,096.) Examples of standards that a creditor *cannot* establish are:

(1) A blanket policy of requiring execution of the obligation by all co-owners of property that has been pledged (for secured credit) or relied upon for creditworthiness (for unsecured credit); (2) a blanket policy of excluding jointly owned assets from consideration in evaluating applications. (Federal Reserve Board Letter, March 1, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,084.)

II *Determine Key Variables in Application.* The key variables for purposes of Regulation B are:

A. *Type of Application.* Single or joint.

B. *Type of Credit Requested.* Secured or unsecured.

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C. *What Will Be Pledged (As Security) or Relied Upon (to Establish Creditworthiness) By Whom.* Income, property, or both by applicant(s) or non-applicant(s).

D. *Type of Ownership of Any Property Pledged or Relief Upon.* Single or joint ownership in joint tenancy, tenancy in common, community property.

E. *Location of Any Property Pledged or Relied Upon.* Utah, non-community property state other than Utah, community property state.

F. *RESIDENCE OF APPLICANT.* Non-community property state or community property state.

III. *PROCEED WITH APPLICANT(S) BASED ON KEY VARIABLES.*

A. *JOINT APPLICANTS.* The creditor can require the signatures of all joint applicants (whether or not they are husband and wife) on the obligation and on any other credit instrument. (12 C.F.R. Sect. 202.7(d)(1); Cragin v. First Federal Savings and Loan Assoc., 5 C.C.H. Consumer Credit Guide ¶ 97,223 (U.S. Dist. Ct. Nev., 1980).)

B. *Individual Applicant Relying Solely Upon Own Income to Establish Creditworthiness.* If the applicant qualifies on the basis of his or her income alone, the creditor cannot require the signature of the applicant's spouse or other person on the obligation or any other credit instrument. (See 12 C.F.R. Sect. 202.7(d).)

C. *Individual Applicant Relying on the Separate Income of Another Person.* The creditor can require the signature of the other person on the obligation and any other instrument reasonably believed by the creditor to be necessary to make the income available to pay the debt in the event of default. (12 C.F.R. Sect. 202.7(d)(5), n. 10.)

D. *Individual Married Applicant for Unsecured Credit Who Resides in a Community Property State or Relies for*

Creditworthiness on Community Property Located in Such a State. The creditor may require the signature of the applicant's spouse on any instrument reasonably believed by the creditor to be necessary, under applicable state law, to make the community property available to satisfy the debt in the event of default, *provided* that applicable state law denies the applicant power to control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness, *and provided* that the applicant does not have sufficient *separate* property to qualify for the amount of credit requested without regard to community property. (12 C.F.R. Sect. 202.7(d)(3).) *NOTE:* Utah's proximity to most of the eight existing community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) may well result in some of your applicants either residing in a community property state or relying on property located in a community property state. In such a case, you should first ascertain whether or not applicant has sufficient *separate* property to qualify. If so, you can extend credit based on that. If not, you will then have to analyze the law of the particular community property state in question to determine if that law allows applicant sufficient control of the community property to qualify on that basis. If so, you can extend the credit on that basis. If not, you may require the spouse's signature on any instrument you reasonably believe necessary to make the community property available to satisfy the debt in the event of default.

E. *Individual Applicant Pledging or Relying on Jointly Owned Property Located in a Non-Community Property State.* The creditor should proceed according to the following:

1. *Determine Value to Creditor of Applicant's Interest.*

a. *Generally.* The first step in determining whether or not such an applicant meets the established standards of creditworthiness is to determine *the value to the creditor* of the applicant's interest in the property pledged as security or relied upon for creditworthiness. (Federal Reserve Board Letter, March 1, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,084.) In making this evaluation, a creditor may consider the following factors: law of the state in which the property is located; the form of ownership of the property; the property's susceptibility to attachment, execution, severance, and partition; the cost of an action to realize upon the property; and any other factors that may diminish the value to the creditor of the applicant's interest in the property. (*Id.*; 12 C.F.R. Sect. 202.7(d).) Depending on the particular state in question, the cumulative effect of these factors may well be to yield a value to the creditor that is somewhat less than the applicant's fractional ownership interest.

b. *For Property Located in Utah.* An examination of the above list reveals the following factors that a creditor should consider in determining the value to the creditor of the applicant's interest in *Utah property:*

(1) *Adverse Possession by Co-tenant.* With regard to property owned in a *tenancy in common*, Utah law has long allowed adverse possession by a co-tenant against the other co-tenant(s). (Matthews v. Baker, 155 P. 427 (Utah 1916).) While the chance of such an occurrence is usually remote, if such adverse possession by an applicant's co-tenant *does* occur it would entirely wipe out the applicant's interest in the tenancy in common. A creditor may factor in this potential risk by adjusting downward the applicant's interest in property held in a tenancy in common. A reasonable adjustment would take into account both the small likelihood of such an occurrence as well as the devastating economic impact if such an event actually occurred.

Analyze the community property law to determine if the applicant has sufficient control of the property to qualify.

(2) *Partition Diminishing Value of the Whole.* Utah law allows partition of property owned in joint tenancy of tenancy in common. (Utah Code Sect. 78-39-1.) From an economic standpoint, such partition may on occasion yield a number of parcels whose combined value is less than the value of the entire initial parcel. This potential decrease in value of the applicant's interest may be factored in by a creditor evaluating the amount realizable of the applicant's interest in property that is owned in either a joint tenancy or a tenancy in common and that is subject to yielding several parcels upon partition.

(3) *Right of Survivorship.* As with American law in general, Utah law recognizes the right of suvivorship among joint tenants in a joint tenancy. In the event of the death of an applicant who obtained *unsecured* credit by relying for creditworthiness on property held in a joint tenancy, such a survivorship feature would, of course, wipe out all of applicant's interest in the property by preventing it from passing to applicant's estate. Accordingly, this risk may be factored in by a creditor when an individual applicant for *unsecured* credit relies on property held in joint tenancy to establish creditworthiness. (There is no such risk, however, with regard to *secured* credit, for the very act of encumbering the individual joint tenant's interest in the property severs the joint tenancy and creates instead a tenancy in common. *Jolley v. Corry*, 671 P.2d 139, 140 (Utah 1983); *Belnap v. Walker Bank & Trust Co.*, 627 P.2d 47, 48 (Utah 1981); *Nelson v. Davis* 592 P.2d 594, 596 (Utah 1979); *Tracy-Collins Trust Co. v. Goeltz,* 301 P.2d 1086, 1090 (Utah 1956); 48A C.J.S. *Joint Tenancy* Sect. 17.)

(4) *Homestead Exemption.* Utah law (Utah Code Sect. 78-23-3 through Sect. 78-23-5) allows the exemption (with certain exceptions) of a "homestead" from judicial lien, levy, execution or sale up to a specified amount. The exemption may be claimed by means of the statutorily prescribed procedure any time *before* execution of the property. A married person may not give a security interest in or to any portion of property *previously declared* as homestead property except with the signature of the spouse. (Despite the exemption, where two individuals—not family members for purposes of the statute—own property as either joint tenants or tenants in common, a creditor of either individual, *subject to that individual's rights to claim the exemption*, may obtain a levy and sale, and may subsequently have the property partitioned or the individual's interest severed). This statutory shelter may accordingly be factored in to adjust downward the value to the creditor of the applicant's interest in potential homestead property.

(5) *Other Factors.* From a practical standpoint, several other factors may diminish the value to the creditor of the applicant's interest in the property. One such factor, in the case of *unsecured*

credit, is the possibility of further incurrence of debt. A second factor is the possibility of a decline in the property's fair market value. A third factor is the legal expenses and costs of actually realizing on the security. A fourth factor is the delay in realizing upon the security that legal action would necessarily entail.

Using the above listed and any other relevant factors, a creditor may make appropriate adjustments in evaluating the value to the creditor of the applicant's interest in the property.

2. *Evaluate Creditworthiness of Applicant.* Having established its nondiscriminatory standards of creditworthiness, and having determined the value to the creditor of the applicant's interest in the property pledged or relied upon, the creditor may now determine if the applicant meets the standards of creditworthiness for the credit requested.

a. *Applicant Doesn't Meet Standards: Obtain Additional Party.* If the applicant, based on the value to the creditor of the applicant's interest in the property, does not meet the creditor's standards of creditworthiness, the creditor may request that applicant obtain a cosigner or guarantor on the *obligation.* While the applicant's spouse *may* serve as the additional party, the creditor cannot require such. If applicant obtains a *co-signer* who is also a co-owner with applicant of the property pledged or relied upon, the creditor may obtain the signature of such cosigner on any credit instrument that creditor reasonably believes is necessary to make such property available to satisfy the debt in the event of default. (12 C.F.R. Sect. 202.7(d)(1) and (5).)

b. *Applicant Meets Standards: Evaluate Amount Transferable.* If the applicant, based on the value to the creditor of the applicant's interest in the property, meets the creditor's standards of creditworthiness, the creditor must next determine if applicant, under state law, will be able to *transfer* that interest (or a lesser interest still sufficient to qualify) *without the signature* of a co-owner of the property.

(1) *Sufficient Amount Transferable: Can't Require Other Signature.* If the applicant can make such a transfer on applicant's own signature, the creditor cannot require the signature of any co-owner of the property on any instrument. (Interpretive Staff Letter of the Comptroller of the Currency, October 27, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,100.) In *Utah*, because the interest of any co-owner of property (whether in a joint tenancy or tenancy in common) is both legally transferable and partionable, a creditor *cannot* require the signature of any such co-owner on any instrument.

(2) *Sufficient Amount Not Transferable: Reasonable Belief Necessary to Require Other Signature.* If, however, applicant *cannot* make such a transfer without the signature of a co-owner of the property (as may be the case outside of Utah), the creditor can require the signature of any co-owner on instruments reasonably believed necessary to make the property pledged or relied upon available under state law to satisfy the debt in the event of default.

(a) *Secured Credit: Can't Require Other Signature on Obligation.* In the case of *secured credit*, such instruments would not include the *obligation* itself, but may include any other instrument reasonably believed necessary to create a valid lien, pass clear title, waive inchoate rights, or assign earnings. (12 C.F.R. Sect. 202.7(d)(4); Interpretive Staff Letter of the Comptroller of the Currency, October 27, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,100.)

(b) *Unsecured Credit: May Require Other Signature on Obligation, Depending on State Law.* In the case of *unsecured credit*, such instruments may *(depending on the requirements of state law)* include the obligation itself. (12 C.F.R. Sect. 202.7(d)(2); Interpretive Staff Letter of the Comptroller of the Currency, October 27, 1977, 5 C.C.H. Consumer Credit Guide ¶ 42,100.)

SUMMARY OUTLINE OF COMPLIANCE PROCEDURE

I. *Establish Non-Discriminatory Standards of Creditworthiness.*
II. *Determine Key Variables in Application.*
III. *Proceed With Applicant(s) Based on Key Variables.*
A. *Joint Applicants.*
B. *Individual Applicant Relying Solely Upon Oown Income to Establish Creditworthiness.*
C. *Individual Applicant Relying on the Separate Income of Another Person.*
D. *Individual Married Applicant for Unsecured Credit Who Resides in a Community Property State or Relies for Creditworthiness on Community Property Located in Such a State.*
E. *Individual Applicant Pledging or Relying on Jointly Owned Property Located in Such a Non-Community Property State.*
1. *Determine Value to Creditor of Applicant's Interest.*
2. *Evaluate Creditworthiness of Applicant.*
a. *Applicant Doesn't Meet Standards: Obtain Additional Party.*
b. *Applicant Meets Standards: Evaluate Amount Transferable.*
(1) *Sufficiant Amount Transferable: Can't Require Other Signature.*
(2) *Sufficient Amount Not Transferable: Reasonable Belief Necessary to Require Other Signature.*
(a) *Secured Credit: Can't Require Other Signature on Obligation.*
(b) *Unsecured Credit: May Require Other Signature on Obligation Depending on State Law.*

Alternative Dispute Resolution—What, Why and How

By Kimberly L. Curtis

The jargon that has been associated with my field—the initials "ADR," compound nouns like "minitrial"—to lawyers everything must sound so terribly sociological. If one can get beyond jargon, the opportunities for lawyers in assisting clients in the use of alternative dispute resolution (ADR) are substantial. Litigation is time consuming, expensive, and frustrating, both to counsel and especially to clients who sometimes feel they have little control over the process. A negotiated settlement is always preferable, but often is hard to come by. The big gap that exists between this rock and hard place is alternative dispute resolution (ADR) which provides a range of options between litigation and a negotiated settlement. This article is intended to assist lawyers in identifying the advantages of various commonly used ADR mechanisms.

KIMBERLY L. CURTIS is the director of the American Arbitration Association's (AAA) Utah office. The Salt Lake City office offers arbitration, mediation, education, training and election services throughout the state.

Ms. Curtis has been with the American Arbitration Association since 1985. Prior to her appointment as director, she served as tribunal administrator and regional coordinator of the AAA's Insurance Dispute Resolution Program in the Denver Regional Office.

She is currently a member of the Utah Society of Association Executives and the Legal Advisory Committee of the Utah Association of General Contractors.

Ms. Curtis is a graduate of Elmira College in New York and has received her masters degree in Judicial Administration from the University of Denver College of Law.

DEFINITIONS

A surprising number of individuals use the words "mediation" and "arbitration" interchangeably when there are significant differences between the two. The following brief summaries of mediation, arbitration and the minitrial processes may be useful.

Mediation involves an attempt by the parties to resolve their dispute with the aid of a neutral third party. The mediator's role is advisory. The mediator may offer suggestions and point out issues that the parties might have overlooked, but resolution of the dispute rests with the parties themselves. Mediation is frequently used in domestic relation cases, multiparty environmental disputes and insurance disputes involving personal injury and property damage claims. Called the "sleeping giant" of dispute resolution, mediation has the potential for much greater use in the business context.[1]

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. The award of the arbitrator is legally enforceable in all 50 states, the District of Columbia, and Puerto Rico, subject to limited review by the courts. Arbitration is less formal than a court trial. Many of the costly procedures associated with formal court processes can be eliminated in arbitration. The arbitrators chosen by the parties are often business people with expertise in a particular field. Arbitration is flexible. Since arbitration is a creature of contract, it can be tailored to meet the specific needs of the parties, e.g., scope, venue, remedies, qualification of the arbitrator, and time frames. In most instances, the hearings and awards are private, eliminating undesirable publicity. This helps to preserve goodwill and positive working relationships. In some cases, parties provide that the award will be advisory only. Major users of arbitration include the construction, securities, insurance, high-technology and franchising industries. Arbitration is also frequently used to resolve disputes in the sale and purchase of commodities and manufactured goods, corporate and partnership relations, individual employment contracts, patent and license agreements,and real estate matters.[2]

The **minitrial** is a structured dispute resolution method in which senior executives of the disputing parties meet in the presence of a neutral advisor and, after hearing presentations from counsel and sometimes experts, on the merits of each side of the dispute, attempt to formulate a voluntary settlement. If the executives are unable to arrive at an agreement, the neutral advisor may be asked to prepare a written opinion setting forth the strengths and weaknesses of the parties' positions and the likely litigated outcome.[3] The process has been used with particular success in large corporate disputes. Executives skilled in business operations and objectives are often able to reach innovative resolutions that would be beyond the power of the court to impose, or that lawyers might not identify.

Of the three ADR processes outlined above, arbitration is by far the most widely used ADR procedure. The remainder of this article will focus on the arbitration process.

A recent dispute which dramatically illustrated the advantages of arbitration involved the International Business Machines Corp. and Fijitsu Ltd. of Japan. At issue was Fijitsu's copying of software that made its computers compatible with IBM machines. Under a 1983 licensing agreement, Fijitsu agreed to pay IBM for the rights to produce the software, but the companies could not agree to specific terms. After considerable litigation, the dispute was referred to binding arbitration by the American Arbitration Association (AAA). Pursuant to the arbi-

trators' award, Fijitsu must pay IBM a total of $833.2 million for past and future use of its programs. In return, IBM must "allow Fujitsu a reasonable opportunity to develop and maintain its IBM-compatible software and assure its customers who are dependent upon such software that they risk no disruption."[4] The use of arbitration to resolve the long-running dispute avoided lengthy and costly litigation over copyright infringement. What made the dispute even more complex were the often disparate copyright laws of the U.S. and Japan. The arbitrators, in their decision, concentrated on public policy concerns, in effect abandoning both nations' copyright schemes. The arbitrators' final orders, instructions, rules, and standards constitute the applicable intellectual property law between the two companies for the period defined by the arbitrators, notwithstanding copyright decisions of the U.S. or Japanese courts or previous agreements between the two companies.

ARBITRATION CLAUSES

The majority of arbitration clauses in general commercial contracts follow the language suggested by the AAA:

"Any controversy or claim arising out of, or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered may be entered into any court having jurisdiction thereof."[5]

While the AAA's Rules have been carefully designed and developed over many years, there are instances when it may be necessary to go into substantial detail to accommodate the parties' objectives. For instance, you may wish to specify the location where the arbitration hearings are to take place, the time within which a party may request arbitration after the occurrence of the controversy, and the scope of remedies available to the arbitrator, e.g. attorneys fees, interest, liquidated damages.

Even where an arbitration clause has been omitted, it is still possible to have recourse to arbitration when a dispute arises. The lawyers may agree on the following general language suggested by the AAA.

> "We the undersigned parties, agree to submit to arbitration under the Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator and that a judgment of the court having jurisdiction may be entered upon the award."[6]

One advantage of resorting to the AAA is that the arbitration clause becomes self-executing. By giving authority to an impartial administrator, the parties avoid having to go to court to compel arbitration.

ARBITRATION UNDER AAA RULES

Arbitration under an arbitration provision in a contract is initiated in the following manner:

(a) The initiating party shall, within the time period, if any, specified in the contract(s), give written notice to the other party of its intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested. The arbitration clause should be quoted in full (may be attached separately if more convenient). Include date of the document.

(b) Shall file at any office of the AAA three copies of the notice and three copies of the arbitration provisions of the contract, together with the appropriate administrative fee is provided in the Administrative Fee Schedule of the rules. It should be noted that pursuant to the Commercial Arbitration Rules, arbitrators allocate or apportion administration fees as part of their award.[7]

The arbitrators' awarded IBM $833.2 million for past and future use of its computer programs by Fujitsu, which avoided lengthy and costly litigation.

Parties to any existing dispute may commence an arbitration by filing at any office of the AAA three copies of a written submission to arbitrate under the appropriate AAA Rules, signed by the parties. The AAA will supply *Demand for Arbitration* or *Submission to Arbitration* forms free of charge on request but arbitration may also be initiated through ordinary correspondence, provided that all of the information identified above is included.

Upon receipt of the above referenced initiating papers and administrative fee, the Association assigns the case to a staff member, who, from that point on, is at the disposal of the parties, expediting administration and assisting all sides in procedural matters until the award is rendered.

SELECTION OF THE ARBITRATOR

Unless the parties have indicated another method, the AAA follows this system for selecting the arbitrator:

1. Upon receiving the Demand for Arbitration or Submission to Arbitration, the AAA submits to each party an identical list of proposed arbitrators to resolve the controversy. In drawing up the list, the AAA is guided by the nature of the dispute and its complexity. Biographical data on each arbitrator accompanies the list.

2. Parties are allowed 10 days to study the list, cross off any names objected to, and number the remaining names in the order of preference. If the case is being administered under the expedited provisions of the rules, parties are allowed seven days to study a list of five proposed arbitrators, cross off two names on a peremptory basis, and number the remaining names in order of preference.

3. When these lists are returned to the Association, AAA compares indicated preferences and makes note of the mutual choices. Where parties are unable to find a mutual choice on a list, additional lists may be submitted upon the request of both parties or at the discretion of the AAA.

4. If the parties cannot agree on an arbitrator, AAA will make an administrative appointment. No arbitrator whose name was crossed off by either party will be appointed.

PREPARATION FOR THE HEARING

The AAA consults the parties to determine a mutually convenient day and time for the hearing and communicates this information to the arbitrator, who makes the date official. By providing for AAA administration, the parties relieve the arbitrator of the burden of moving the case forward and limits opportunities for inappropriate exparte communication between the arbitrator and the parties.[8] By limiting exparte communication with the arbitrator, AAA rules avoid the danger that one side will offer arguments or evidence that the other has no opportunity to rebut.

Document and information exchange can be facilitated through an administrative conference or a preliminary hearing with the arbitrator. Both the administrative conference and the preliminary hearing are provided for under Rule 10 of the Commercial Arbitration Rules (CAR).[9] Besides the exchange of information, the administrative conference or preliminary hearing can also provide a means of expediting the proceedings by the filing of pre-hearing statements in advance of the hearing which

typically include, a statement of the issues, a list of witnesses and exhibits to be introduced, and any legal authorities the parties wish to bring to the attention of the arbitrator(s).

Additionally, the administrative conference or preliminary hearing can provide an opportunity for counsel to reach an agreement on other trial efficiencies, including the need for a court reporter, who goes first, and how much time shall be given to the case. Lawyers may also use the conference as an opportunity to explore settlement.

There is little substantive difference in time and manner spent preparing for arbitration than any other preparation involving a case being readied for trial.

1. Assemble all documents and papers that you will need at the hearing. Always make photocopies for the arbitrator and the other party. Pre-hearing discovery may be available pursuant to the Utah Arbitration Act.[10] A checklist of documents and exhibits will be helpful toward your orderly presentation.

2. Interview all of your witnesses. Whenever possible, live testimony should be used to back up documentary proof. It is important to note that one need not lay a foundation for the admissibility of documents because of the relaxed rules of evidence in arbitration. It is always helpful to the arbitrator if the lawyers can stipulate to as many facts as possible, and on as many issues as feasible.

THE ARBITRATION HEARING

The arbitrator must provide a fair hearing, giving both parties sufficient opportunity to present their respective evidence and arguments. The AAA rules provide that "the arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."[11] The fact that the rules of evidence are not strictly applied does not mean that all evidence is given equal weight or that irrelevant or repetitious evidence will be accepted by the arbitrator.

There are many reasons why technical evidentiary rules are not suitable in arbitration. First, arbitration is intended to be an informal procedure. Second, the rules of evidence are essentially rules of exclusion. They were developed to prevent a jury from hearing or considering prejudicial or unreliable testimony and exhibits. In arbitration, however, a sophisticated person, selected by the parties for technical knowledge and good judgment, hears the case; such a person should be able to disregard evidence that is not helpful, relevant or reliable. Third, there may be a therapeutic value in allowing the parties to vent their feelings, or to "get things off their chest," even if the testimony has little probative value.

The moving party (claimant) proceeds first with its case, followed by the respondent. This order may be varied, however, when the arbitrator thinks it appropriate. The "burden of proof" is not on one side more than on the other. Each party must try to convince the arbitrator of the correctness of its position. No hearing is closed until both parties have had an opportunity to present their full case.

Parties should present their case to the arbitrator in an orderly and logical manner. This usually includes the following steps:

1. An opening statement that briefly describes the controversy and indicates what is to be proved. Such a statement helps the arbitrator understand the relevance of testimony to be presented.

2. A discussion of the remedy sought. This is important because the arbitrator's remedial power is conferred by the agreement of the parties. Each party should try to show that the relief it wants can be granted within the arbitrator's authority.

3. An orderly introduction to witnesses to clarify the nature of the controversy and to identify relevant documents and exhibits. Cross-examination of witnesses can be revealing, but each party should plan to establish its own case through the direct testimony of its own witnesses.

4. A closing statement, which should include a summary of evidence and arguments and a refutation of points made by the opposition. The arbitrator will give both sides equal time for a closing statement. This occasion should be used to summarize the relevant facts and to emphasize the issue and the decision the arbitrator is being asked to make.

After both sides have had an equal opportunity to present their evidence, the arbitrator will declare the hearing closed. Under Rule 41 of the AAA CAR, the arbitrator has 30 days within which to render the award, unless the agreement provides otherwise. If the case was administered under the expedited provisions the arbitrator has 14 days within which to render an award.

THE ARBITRATION AWARD

Arbitrators have the authority to grant any relief which is just, equitable, and within the terms of the agreement of the parties.[12] By referring the issues to an arbitrator, the parties have agreed to a final and non-appealable award.

Arbitrators are not required to write opin-

ions explaining the reasons for their decisions. The arbitrators are professionals in specific fields or industries appointed because of their expertise to decide the case, not judges skilled and trained in technical opinion writing. As a general rule, AAA commercial awards consist of a brief direction to the parties on a single sheet of paper. Since arbitrator's awards are not reviewable on the facts or the law, requiring findings of fact or conclusions of law may not be appropriate. In some cases, both parties will request an opinion. Then the AAA has no objection. Ultimately, parties look to an arbitrator for a decision, not an explanation.

WHAT TO DO AFTER THE AWARD

If the award is in your favor, celebrate, then request that your adversary comply with the award. If the losing party voluntarily performs persuant to the terms of the award, it is not necessary to seek any confirmation. In cases of noncompliance, the winning party may move for a judgment confirming the award pursuant to the Utah Arbitration Act.[13]

There are three general categories under which awards may be vacated: (1) arbitrator misconduct, such as corruption, fraud, or bias, (2) a showing that the arbitrators exceed their authority, or (3) the failure to meet statutory requirements of due process. Included within the latter category are awards that contravene public policy.

Utah arbitration law provides grounds for modifying an award. The court or arbitrator may modify the award if: (1) there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or (2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) the award is imperfect in a matter of form, not affecting the merits of the controversy.[14]

These narrow statutory grounds result in relatively few motions to vacate or modify arbitration awards.

CONCLUSION

Lawyers should be sensitive to the appropriate uses of mediation, the minitrial process, and arbitration as a means of resolving client's problems. Whether a case involves differences in business, commerce, or government, these techniques are designed to resolve disputes quickly, fairly and inexpensively. Zealous advocacy requires nothing less.

FOOT NOTES

[1] Copies of the American Arbitration Association's Commercial Mediation Rules can be obtained by contacting any office of the AAA or the Salt Lake City office at 645 S. 200 E., Suite 203, Salt Lake City, UT 84111 (801) 531-9748.

[2] For more information on the arbitration Process, see: Coulson, Robert, *Business Arbitration: What You Need to Know*. New York: American Arbitration Association, October 1987; Domke, Martin. *Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration)*. Rev. ed. by Gabrial M. Wilner. Wilmette, Ill.: Callagham & Co., 1984. Has 1987 Cumulative Supplement.

[3] For more information on the minitrial process, see: Pantle and Peterson, "The Private Minitrial: Another Settlement Technique," 14 The Colorado Lawyer 990 (June 1985); American Arbitration Association Minitrial Procedures (effective July 1986); Fine, *CPR Legal Program Minitrial Worksheet* (Center for Public Resources, 1985).

[4] The arbitrators' Mnookin and Jones issued an opinion explaining their decision in detail. Copies of the arbitrators' Opinion as well as the Instructions and Standards are available from the AAA.

[5] American Arbitration Association. Commercial Arbitration Rules: (As Amended and in Effect September 1, 1988).

[6] Id at 4.

[7] Sect. 6, AAA CAR.

[8] Sect. 29, AAA CAR.

[9] Sect. 10, AAA CAR states that "At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings.

In large or complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, the arbitrators, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute.

With the consent of the parties, the AAA at any stage of the proceeding may arrange a mediation conference under the Commercial Mediation Rules, in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation."

[10] Utah Code Ann., 78-31a-8(2)(b).

[11] Sect. 31, AAA CAR.

[12] Sect. 43, AAA CAR.

[13] Utah Code Ann., 78-31a-12

[14] Utah Code Ann., 78-31a-13, Modification of award by arbitrators; 78-31a-15, Modification of award by court.

Living and Practicing Law in Rural Utah

By Elizabeth Joseph

I used to live in the big city. I used to practice law there. I even handled a few "big" criminal cases—cases that made the front page of the B section of the *Salt Lake Tribune* anyway.

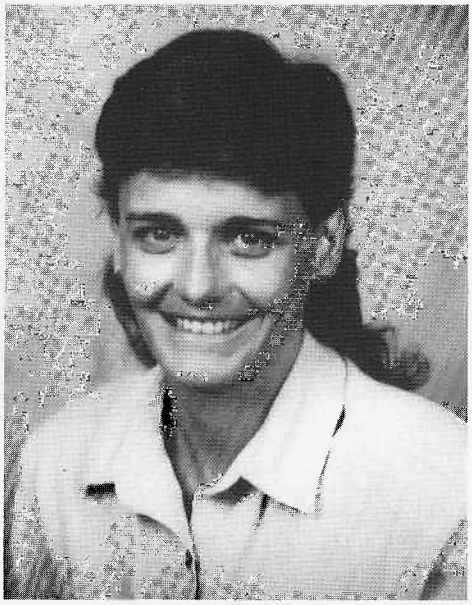
I dreamed of being a hot shot criminal defense attorney—and I ran a divorce clinic to pay the bills. Because, I told myself, criminals with money won't hire you until you're famous from representing criminals without any.

But one day I just came home. Burned out on the 18-hour days, the daily scramble to cover overhead, the six default divorces every morning of the week.

Home is the high desert of southern Utah. About as southern as you can get. Arizona is a tumbleweed-throw away. Lake Powell is my office window view.

I worried about being bored. Or worse—broke.

Bored has not been a problem. Broke is, well, relative.



ELIZABETH JOSEPH is a 1974 graduate of the University of Montana and a 1979 J.D. graduate of the University of Utah.

Joseph is a former Kane County public defender and currently serves as Kanab City public defender and Big Water municipal attorney. She is also executive editor of the Big Water TIMES, a bimonthly newspaper serving Kane County. She maintains a solo practice in Big Water.

THE CLIENTS

Being a solo legal practitioner in a rural area is a lot like being a country doctor. You are always "on call." People lie in wait for you at the post office, at the community softball game, and will even chase you down when you're out enjoying the scenery with a leisurely afternoon stroll. "Hey, Eli," they always being, "I have this problem I was hoping you could give me a little advice about. . ."

There is no such thing as a "little advice" let me assure you, and I have become good at avoidance techniques. I now walk after dark, and I volunteered to coach the softball team thinking I would look suitably preoccupied. That hasn't worked so well. First basemen and umpires, even runners, hit me up for advice while I am base coaching.

I don't mind it so much really. Most of the inquirers I value as friends. And they're decent and fair; conversations always end with "How much do I owe you?" I straighten up from the car bumper I've been leaning on, brush off the grease, and reply, "That's okay, catch you next time."

But instead they catch me. They tell me I'm "people" as in, "You're people, you'll understand." Usually I do, and usually it's no fun breaking it to them that notwithstanding the fact the cop that stopped them for speeding forgot to give them their Miranda rights before writing them a ticket, it's unlikely they can beat the ticket *or recover a million dollars in a civil suit.*

My experience is probably not that much different from lawyers in cities when it comes to their neighborhoods. The fact that when I talk to my doctor, half the call is about my medical problems and half is about her legal problems may be more common than I appreciate.

But there are some things I know are unique to my rural situation. Last week as municipal attorney ("town" attorney sounds too podunk even for me), I prosecuted a town councilman's son. That was the least of it. The councilman is also my first baseman. He's also one of my oldest and dearest friends. The son in question I have known since he was in diapers. Of course, the judge is my center fielder—and an old and dear friend.

We managed. We managed quite professionally, in fact. Everybody just exchanged hats at the door and ran it down like they would downtown.

There is one thing in particular I like accomplishing in this setting and that is giving people a chance to know a lawyer in an informal and neighborly way. Most of them live in this unforgiving climate because there is some element of tough old bird in them. Tough old birds, as a general rule, intensely dislike lawyers just on principle, not necessarily because they have had a bad experience with one.

They tell me so a lot. While I appreciate their disclaimer that I'm "different," I know I'm not. But I also know that it's part of the ethic. Tough people don't go around applauding the essential niche we legal eagles inhabit in the environment. Instead, I have to listen to every lawyer-is-a-shyster joke invented, and it's important to them that I at least smile when they tell them to me.

I don't have to wear nylons and high heels to the office and that's a real plus. Pavement and sidewalks have not been invented where I live so Levis and tennis shoes are considered more than acceptable.

And even when somebody goes to the trouble to make an appointment to see me, which is very rare, we just as often sit in the lawn chairs in front of my house to discuss what's on their minds as retire to the regulation office I was careful to secure in case the president of Standard Oil ever stops by to retain me.

THE COLLEAGUES

Three participating and one retired attorney live in my county. One is the county attorney, the other is the ex-county attorney, the other I am. Among us, we only lug down about 50 percent of the local legal business. Lawyers from St. George and an occasional big shot from Salt Lake garner the rest.

But even at that, I find myself time and time again dealing with the same attorney on the other side of the case. Obviously so in criminal cases. After awhile, things get fairly predictable. The local cops fit into the same profile. You know the police chief is going to scream bloody murder if you try to deal on a DUI, but if the case is one of his two patrolmen's, you've got a chance.

The County Attorney appears to have the same aversion to the formal office setting as I do. We do most of our negotiating and deal-cutting in the parking lot of the courthouse.

Our clients enjoy a huge advantage because of the attorneys' familiarity with one another. For example, I can say with confidence on a divorce case, "They'll never go for that," having been over "that" before with the opposing attorney. My client is saved the expense and fee time of my making a phone call to find out what I already know.

Dealing with only a few judges helps in that regard. "He'll never go for that" with reference to a certain judge is also something that can be said with confidence. It makes for a lot more settled cases and less game-playing. My clients get a realistic view of their chances up front because of my familiarity with judges' predilections.

None of us are much impressed or swayed by some of the weighty issues that seem to preoccupy our big city brethern and sisters. Our district judge finds himself apologizing to me on the record for calling me by my first name in court, and I don't appreciate whatever uproar up north causes him that discomfort. I regard it as an advantage to my clients that I am on a first-name basis with the judge. (Of course, I don't call him "Don.")

A couple of months ago, a jury was kept waiting for several hours while a long law and motion calendar was wrapped up. Judge Tibbs happens to be one of the more solicitous magistrates when it comes to jury service, and he was understandably anxious to get the show on the road. A criminal matter of mine was one of the last on the calendar and we were all hustling along as best we could. In the rush, the judge slipped and referred to me as "Elizabeth," stopped, then explained to the audience that he needed to correct that or he might get in trouble for sex discrimination.

When I turned to leave the courtroom, I was glad it was not a trial of mine coming up because there was real hostility in some of those potential jurors' eyes. They had to be thinking that I had threatened the judge with a lawsuit. Most of them call me by my first name; why the ding dang heck couldn't the judge?

That's one of the reasons we think differently out here in the sticks.

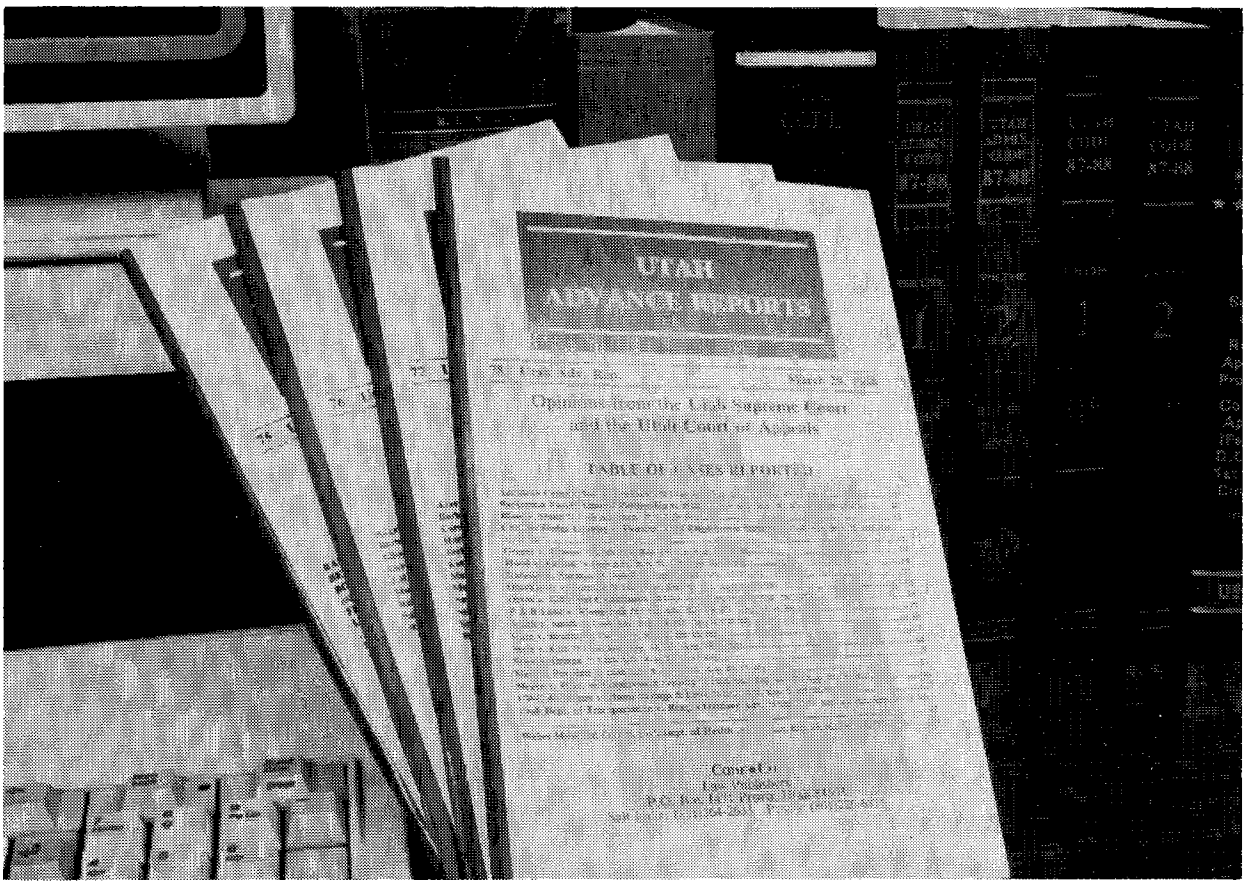
Jury selection can get pretty comical in our small county. A good half of selection time is taken up with jury candidates reciting their various relationships, often blood, with the involved attorneys and sometimes the defendants. But 98 percent of the time they say they can put that aside and 100 percent of the time they do.

All in all, it's a lifestyle and practice I highly recommend. People don't blink when I tell them I'm semiretired even though by conventional standards I'm some 30 years away from doing that respectably. Why else would I be scratching out a living in this beautiful red sand that fills up our shoes and eyes?

The only time I really question my decision is during the 60-mile drive I have to make to get to court. It has become horrifically boring. In winter, it gets horrifically dangerous. But then I think about our judges who make the "circuit," driving many more miles than I.

Judge Tibbs has figured out how to alleviate the boredom. He pores over maps seeking obscure but scenic alternative routes to get home on. We all worry when he launches off on one of those excursions, glad at least that he has a radio in his car. And when talk of "redistricting" comes up, which might cut down some of the distance he has to travel, he holds his breath hoping it won't happen.

He likes the rural "practice," apparently, as much as I.



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Bar Commission Highlights

The Board of Bar Commissioners met at the Utah Law and Justice Center for its regular monthly meeting on March 31, 1989. During the day long meeting, the Bar Commissioners took the following actions:

1. Approved the minutes of the February 17 meeting.

2. Received a report of President Kasting and the Executive Committee on various matters, including the upcoming Bar Leadership Training Conference, meetings with local bar associations, recent Letters to the Editor of daily newspapers, and the continuing increase of utilization of the Utah Law and Justice Center. Approved a resolution authorizing the Executive Committee to respond timely to Letters to the Editor on topics of concern to the Bar.

3. Reviewed a proposal from the Litigation Section for proposed rule changes and approved a resolution authorizing the section to petition the Supreme Court Rules Committee for changes as set forth in its memorandum.

4. Received a report by the Professional Liability Insurance Committee and Bayly, Martin and Fay officials, including a semi-annual report on claims experience in the Bar-sponsored Professional Liability Insurance Program. The committee further reported the successful initiation of a new disability insurance program and noted the pending renewal of the Blue Cross/Blue Shield Health and Accident Insurance Program.

5. Approved appointments of Bar members to state agency advisory committees.

6. Received a report of the Executive Director, noting recent developments in California litigation on Bar lobbying, the upcoming Annual Meeting of the American Inns of Court to be held in Salt Lake City, activity on pending grant applications on behalf of the Utah Law and Justice Center for research activities and a review of proposed changes in the pending petition for Mandatory Bridge the Gap. Approved a motion to adopt changes in the proposed rules taking into account suggestions received from law school faculty and students.

7. Approved a resolution to include the option of contributions to Utah Legal Services in the following year licensing form.

8. Received the monthly report of the Admissions Department, acting on the findings of a grievance petition, noting the resignations from the Bar of two members and approving representation at the National Conference of Bar Examiners meetings to be held in April. Approved the results of the February Student Bar Exam and Attorney Bar Exam.

9. Received report of the Office of Bar Counsel, the public matters for which are reported elsewhere in this issue and approved five private reprimands.

10. Received a report on pending litigation noting the successful conclusion of the *Krogh* litigation and *Neerings* matter. It was determined that an updated litigation status report would be published in the next available issue of the *Bar Journal.*

11. Received a report of the Client Security Fund Committee and approved four claims, denied one claim and deferred action on an additional claim.

12. Received report by the Lawyers Helping Lawyers Committee reviewing a proposed motion and memorandum for filing in the Supreme Court to create a rule on confidentiality. Approved a resolution authorizing the filing of the motion and memorandum in the Supreme Court.

13. Reviewed proposed rules of procedure for the Ethics Advisory Opinion Committee and approved a resolution adopting the proposed rules as a set of interim rules of procedure with the proposed rules to be published in the *Bar Journal* for comment and final action to be taken thereon following a period of comment.

14. Reviewed and approved Ethics Opinion 91 to be reported elsewhere in the *Bar Journal.*

15. Reviewed and approved a proposal for the appointment of special bar counsel to litigate unauthorized practice of law cases due to the workload in the Office of Bar Counsel.

16. Received a status report on the Mid Year and Annual Meetings from the Associate Director.

17. Received a report from the Young Lawyers Section, noting in particular the section's grant application to the ABA regarding an upcoming Bill of Rights Action Conference and noting the commencement of the section's new "People's Law Course" being provided through the Salt Lake City School District.

18. Received the monthly report of the Budget and Finance Committee, acting to ratify the action of the Executive Committee regarding a study of ownership questions for the Law and Justice Center as part of the annual audit.

19. Authorized Bar Counsel to undertake enforcement of the Bar's subrogation rights in conjunction with the payment of Client Security Fund claims.

20. Reviewed and appointed committee to further review the applications of nearly 150 persons who had applied for nomination to the MCLE Board. Adopted a process for final determination of the nominations to be submitted to the Supreme Court.

21. Approved a resolution to appoint Mary Corporon to the Child Support Guidelines Advisory Committee.

22. Received a report from the Unauthorized Practice Committee and authorized the filing of an appropriate civil action against a person believed to be engaged in the unauthorized practice of law.

23. Received a report of a committee on Law and Justice Center space planning and discussed pending lease arrangements with Bar Foundation and Law Related Education groups.

24. Received a report of the CLE Advisory Committee and adopted a proposed policy to require active sections of the Bar to produce at least one CLE program per year as a condition of remaining an active session.

A full copy of the minutes of this and other meetings of the Board of Bar Commissioners is on file at the Utah State Bar and is available for inspection by members of the Utah State Bar and the public.

Training in Use of Child Support Guidelines Worksheet

Members of the Utah State Bar Association who are interested in training in the use of worksheets implementing the mandatory child support guidelines, which go into effect July 1, 1989, may telephone Gina Talbot, Office of Recovery Services, 538-4402 or 1-800-662-8525.

UTAH STATE BAR 59TH ANNUAL MEETING

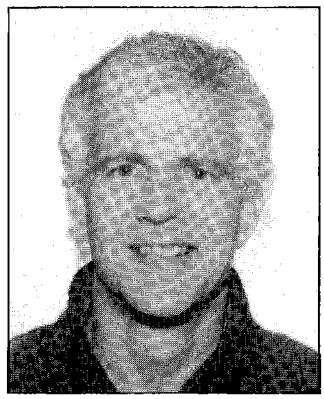
Sun Valley, Idaho
June 28 to July 1, 1989

FEATURED PARTICIPANTS:

THE HONORABLE HAROLD G. CHRISTENSEN
Deputy Attorney General for the United States
Mr. Christensen was confirmed by Congress as Deputy Attorney General of the United States October 4, 1988. Mr. Christensen was formerly chairman of the board of Snow, Christensen & Martineau in Salt Lake City, a firm he joined in 1953. He was president of the Utah State Bar in 1975, and of the Salt Lake County Bar Association in 1972. Mr. Christensen is a graduate of the University of Utah and received his J.D. from the University of Michigan.

JAMES W. McELHANEY
Joseph C. Hostetler Professor of Trial Practice and Advocacy
Franklin T. Backus School of Law
Case Western Reserve University

Professor McElhaney is one of the most widely read authors on the art of effective trial advocacy in America. He is author of *McElhaney Trial Notebook* and columnist for *Litigation*. He holds an endowed chair at Case Western. He received both his undergraduate and law degrees from Duke University. Mr. McElhaney's presentation will cover these subjects: The picture method of trial advocacy, direct and cross-examination and opening statements.



GARY KINDER

Mr. Kinder received his juris doctor from the University of Florida College of Law and now teaches legal writing there. He is the author of two books on investigative journalism, *Victim* and *Light Years*. In his presentation to the Utah State Bar, he will cover the art and mechanics of assembling words for greater clarity and impact. Helping lawyers write clearer letters, tighter contracts, and more compelling briefs will be the goal of his presentation.

ALSO FEATURING:

MICHAEL D. BLACKBURN, ESQ.
Shareholder in the firm of
Snow, Christensen & Martineau

CHRISTINE A. BURDICK, ESQ.
Bar Counsel
Utah State Bar

RICHARD C. CAHOON, ESQ.
Partner in the firm of
Marsden, Orton & Cahoon

DAVID J. CASTLETON, ESQ.
Member of the firm of
Snow, Christensen & Martineau

CARLIE CHRISTENSEN, ESQ.
General Counsel
Administrative Office of the Courts
for the State of Utah

BEVERLY J. DENNING
Office Administrator for the firm of
Watkiss & Campbell

LIONEL FRANKEL, ESQ.
Professor
University of Utah College of Law

THE HONORABLE GORDON R. HALL
Chief Justice
Utah Supreme Court

NANCY HALVERSON
Manager for the firm of
Davis, Graham & Stubbs

STEPHEN F. HUTCHINSON, ESQ.
Executive Director
Utah State Bar

THE HONORABLE NORMAN H. JACKSON
Utah Court of Appeals

THE HONORABLE BRUCE S. JENKINS
Chief Judge
United States District Court for
the District of Utah

KENT M. KASTING, ESQ.
Partner in the firm of
Dart, Adamson & Kasting
President
Utah State Bar

JOHN T. KESLER, ESQ.
President of the firm of
Woodbury, Jensen, Kesler & Swinton

JAMES B. LEE, ESQ.
President of the firm of Parsons, Behle & Latimer

(continued on page 24)

PARTICIPANTS FEATURED

(continued from page 23)

CRAIG J. MADSON, ESQ.
Member of the firm of
Workman, Nydegger & Jensen

MICHAEL J. MAZURAN, ESQ.
Member of the firm of
Mazuran, Verhaaren & Hayes
Chairman of the 1989
Annual Meeting Committee

H. CHRISTINE O'CLOCK
Membership group account executive for
Mead Data Central—LEXIS program

PROFESSOR DAVID C. RASKIN
Professor of psychology at the
University of Utah

CATHERINE PARDOE REESE
Office Manager for the firm of
Strong & Hanni

BRADLEY V. SHAW, ESQ.
Firm Administrator for the firm of
Nielsen & Senior

ROBERT L. STOTT, ESQ.
Deputy County Attorney
for Salt Lake County

ALAN L. SULLIVAN, ESQ.
Partner in the firm of
Van Cott, Bagley, Cornwall
& McCarthy

C. JEFFREY THOMPSON, ESQ.
Associated with the firm of
Hatch, Morton & Skeen

RICHARD B. TURNBOW
Director of Administration
for the firm of Kirton,
McConkie & Poelman

RUSSELL S. WALKER, ESQ.
Associated with the firm of
Woodbury, Jensen, Kesler & Swinton

CHRIS WANGSGARD, ESQ.
Shareholder of the firm of
Van Cott, Bagley, Cornwall & McCarthy

DAVID R. WRIGHT, ESQ.
Associate with the firm of
Callister, Duncan & Nebeker

RONALD J. YENGICH, ESQ.
Partner in the firm of
Yengich, Rich, Xaiz & Metos

Apprenticeship Mentors Needed

The Board of Bar Commissioners has voted to repeat the highly successful Apprenticeship Program held last year. The 1989 program will commence in mid-August and extend for a three-month term. Lawyers and law firms throughout the state are invited to sign up promptly for apprentice placement. In the 1988 program, apprentices were placed in firms from Cedar City to Logan, and in firms of all sizes. Firms which did not participate in the 1988 program and would like to consider participation in the 1989 program should contact Paige Holtry at the Bar office for details. Based on the evaluations by mentors and apprentices in the 1988 program, this project offers a tremendously rewarding educational and professional experience for apprentices and mentors.

Please indicate your interest in participating in the 1989 program promptly as apprentices will need to be screened and placed before the end of July for the project to commence on or about August 15.

CALL NOW!

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.7(c) by failing to obtain and document consent to represent a woman in a divorce action while simultaneously representing the woman and her husband in a foreclosure matter.

2. For the inappropriate use of a trust account in violation of Rule 1.13(a), by writing a check for personal use on a trust account that did not in fact contain any client monies, and for failing to remit payment immediately upon notification that the check had not cleared the account in violation of Rule 8.4(b), an attorney was admonished.

PRIVATE REPRIMANDS

1. For violating DR 6-101(A)(3) for neglect of a legal matter, Rule 1.3 for lack of diligence, and Rule 1.4(a) for lack of timely communication with the client, an attorney was privately reprimanded for failing to file a writ of habeas corpus after accepting $1,000 to do so, for failing to respond to his client's requests for information, and later for failing to timely return the client's documents and the retainer.

2. For violating DR 6-101(A)(3) for neglect of a legal matter, an attorney was privately reprimanded for failing to prosecute a lawsuit on behalf of his client to recover approximately $3,000 on a construction contract and failing to discuss the status of the case with his client. The sanction was aggravated by the attorney's failure to appear before the Screening Panel on this matter.

3. An attorney was privately reprimanded for violating DR 6-101(A)(3) for neglect and Rule 1.3 for lack of diligence by failing to prosecute his client's probate matter for a period exceeding three years; for violating DR 1-102(A)(4) for misrepresentation by telling his client that the probate was nearly complete and that the papers were in the mail when in fact the attorney had done no work on the matter; and for violating Rule 8.4(d) for conduct prejudicial to the administration of justice by failing to respond to the inquiries forwarded to him by the Office of Bar Counsel, by failing to respond to the Notice of Complaint issued by the Office of Bar Counsel, and by failing to respond to a subpoena issued by the Screening Panel. The sanction was mitigated by the fact that the attorney completed the probate matter during the pendency of the disciplinary proceedings.

4. An attorney was privately reprimanded for violating DR 6-101(A)(3) for neglect and DR 7-101(A)(2) for intentional failure to carry out a contract of employment by failing to file a bankruptcy action, failing to return his client's telephone calls for a period of approximately one year and delaying for approximately one year the filing of a civil action on behalf of his client.

5. For violating Rule 1.4(a) and 1.4(b) for failure to timely communicate, an attorney was privately reprimanded for failing to timely inform his client that she had no cause of action, thereby allowing the client to believe that the attorney was pursuing her case for a period of approximately one and a half years.

PROBATION

1. On March 20, 1989, the Utah Supreme Court suspended Theodore L. Cannon from the practice of law for a period of one year, staying the suspension for a period of two years during which time Mr. Cannon will be on probation and required to file monthly reports with the Office of Bar Counsel, for violating DR 1-102(A)(3) for engaging in conduct involving moral turpitude by his conviction of official misconduct. The sanction was mitigated by the fact that Mr. Cannon served 30 days in jail and was fined more than $4,000; by the fact that Mr. Cannon has taken and will continue to take appropriate steps toward rehabilitation; and by the fact that Mr. Cannon had no disciplinary history prior to the time of his misconduct.

Jane Marquardt Selected Woman Lawyer of the Year

JANE MARQUARDT, a partner in the law firm of Marquardt, Hasenyager & Custen in Ogden, Utah, has been selected as Woman Lawyer of the Year for 1989 by Women Lawyers of Utah.

The recipient of the award each year is a woman member of the Utah State Bar who is professionally active in government, education, the judiciary, or private or corporate practice. Under the guidelines established by the Board of WLU, the Woman Lawyer of the Year should have (1) demonstrated professional excellence and integrity; (2) through her work and activities displayed an awareness of the needs and concerns of women; and (3) helped to advance the position of women generally or in the legal profession.

Ms. Marquardt is a member of the Utah State Bar Disciplinary Hearing Panel and the Second Judicial District Nominating Committee, as well as of the American, Utah and Weber County Bar Associations. Her past law-related activities include, among many others, service as pro-tem judge in the Small Claims Court, as supervising attorney in the Weber County Guardian ad Litem Project, as president of the Weber County Bar Association, and as secretary on the Board of Trustees of the University of Utah College of Law Alumni Association. She was named Child Advocate of the Year by the Weber/Morgan Child Abuse Coordinating Council in 1987 and Outstanding Young Lawyer of the Year by the Utah State Bar in 1984.

Ms. Marquardt's special interest is the prevention of spouse abuse and domestic violence. She has published several articles on those subjects and has acted as technical advisor to the Legislative Subcommittee of a Joint Legislative Task Force and was a member of the Domestic Violence Advisory Council of the Utah Department of Social Services.

The organization of Women Lawyers of Utah was founded to encourage women in their professional growth and development, to assist in establishing professional contacts, to provide a support and communication network, and to generally promote the professional endeavors of women lawyers in Utah.

Local Attorneys Admitted to American College of Trial Lawyers

Richard D. Burbidge and E. Scott Savage have become Fellows of the American College of Trial Lawyers. Membership, which is a position of honor, is by invitation of the Board of Regents. The College is a national association of 4,300 Fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the profession.

The induction ceremony took place during the recent Spring Meeting of the American College of Trial Lawyers. More than 1,000 persons were in attendance at this meeting of the Fellows in Boca Raton, Florida.

Mr. Burbidge is a partner in the firm of Burbidge and Mitchell and has been practicing for 17 years. He is an alumnus of the University of Utah School of Law.

Mr. Savage is a partner in the firm of VanCott, Bagley, Cornwall & McCarthy and has been practicing for 17 years. He is also an alumnus of the University of Utah School of Law.

Judicial Council to Conduct Bar Survey

During June 1989, over 4,000 judicial performance questionnaires will be circulated by the Utah Judicial Council among a large number of Utah Bar members. Attorneys will be selected for participation based on their recent practice before the judge they will be asked to evaluate. All 90 judges of courts of record in the state will be involved in the survey which will be repeated every two years for all judges. Many attorneys may be asked to complete questionnaires on several judges, if their recent appearances warrant it.

A pilot test of the survey was conducted in April 1989 to fine tune the questionnaire as well as the survey process. The survey is only one part of a larger judicial performance improvement process initiated in 1986 following the revision of the judicial article of Utah's constitution. Although self-improvement is the primary goal of the program, portions of the survey results will be used by the Judicial Council to help them determine whether a judge, standing for retention election, has met performance standards previously set by the Council.

Since the initiation of the judicial performance program by the Council in 1986, oversight has been the responsibility of a special Council Standing Committee currently chaired by Salt Lake attorney Joseph Novak. Committee membership includes judges from each court, private citizens and a bar commissioner. The current bar representative is Randy Dryer.

Chief Justice Gordon R. Hall encourages all who receive questionnaires to complete them promptly and return them to the University of Utah's Survey Research Center who are conducting the survey for the Council. A process similar to the one used in voting for bar commissioners will be used to ensure respondent anonymity.

U Law Professor Named Dean of San Diego Law School

KRISTINE STRACHAN, Professor of Law at the University of Utah College of Law, has been selected to be Dean of the University of San Diego School of Law. The University of San Diego is a private,

independent Roman Catholic University chartered in 1949 with a student body of approximately 6,000. Its law school was founded in 1954 and now has a faculty of 45, student enrollment of approximately 1,200 and a new $6.2 million law library. Although she finds it extremely difficult to leave the school, faculty, students, community and friends that have meant so much to her for the past 16 years, this is a rare opportunity for academic leadership in a location especially attractive to her because of her family ties.

Professor Strachan attended high school at The Bishop's School in La Jolla, received her undergraduate education at the University of Southern California, and received her law degree from the University of California at Berkeley in 1965, where she was an editor of the Law Review and Order of the Coif. Her experience in public and private law began when she joined the Wall Street law firm of Sullivan & Cromwell. Later she served with the Office of the Legal Advisor in the Department of State in Washington, D.C., where she worked on war powers legislation, arms control, prisoner of war and southeast Asian matters.

She joined the University of Utah law faculty in 1973 and has taught courses in procedure, remedies, evidence, litigation, and law in radically different cultures. Her published works focus on the subjects of jurisdiction, evidence, international law, and legal education. During her sabbatical in 1980, she served as deputy county attorney for Salt Lake County and she currently serves, pro bono, as prosecutor for the town of Alta, Utah. In 1987, she was awarded the College of Law's Burlington Northern Faculty Achievement Award.

Claim of the Month

ALLEGED ERROR AND OMISSION

Plaintiff alleges failure to commence action within time prescribed by statute.

RESUME OF CLAIM

The Insured was retained by plaintiff to commence an action against a municipality for personal injuries arising from the municipality's negligent failure to properly maintain a walkway that served as an entrance ramp to a building owned and operated by said municipality. The Insured performed all of the necessary background investigation, correctly identified the party to be sued and was familiar with the procedural requirements imposed by statute. However, after he drafted a Notice of Claim he attempted to serve same by mail just before the expiration of the 90-day statutory period. Service was not made in a timely manner and plaintiff thereby lost his valid cause of action against the municipal defendant.

HOW CLAIM MAY HAVE BEEN AVOIDED

Attorneys may not recognize the crucial role the Notice of Claim plays in commencement of the litigation process. However, untimely service of the Notice of Claim will lead to dismissal of the case.

The Insured should not have attempted service by mail but should have effected personal service on the municipality. Alternatively, a calendar system which makes automatic allowance for the longer lead time required for timely service by mail should be instituted by the Insured.

Claim of the Month furnished by Bayly, Martin & Fay—Continental, Inc. Administrator. Utah State Bar Professional Liability Program.

Justice I. Daniel Stewart Honored As U of U Law School's Alumnus of the Year

Utah Supreme Court Justice I. Daniel Stewart was honored by the University of Utah College of Law Alumni Association as its Alumnus of the Year at the annual banquet held Thursday, April 27, 1989 at the Salt Lake Marriott Hotel.

Justice Stewart was appointed to the Utah Supreme Court in 1979 by Gov. Scott Matheson. Prior he was a partner in the Salt Lake City law firm of Jones, Waldo, Holbrook & McDonough where he handled major business, antitrust and First Amendment litigation as well as general practice.

A native of Utah, Justice Stewart graduated *magna cum laude* from the University of Utah in 1959 with a B.A. in political science. He went on to attend the U. law school where he graduated first in his class in 1962, was Order of the Coif and editor in chief of the *Utah Law Review*.

Following law school, Justice Stewart worked with the U.S. Department of Justice Honors Program Antitrust Division handling appeals in all U.S. courts of appeals and the U.S. Supreme Court. He also served as an assistant and associate professor of law at the University of Utah College of Law from 1965-70.

Local Attorney/Nurse "First Ever" Appointed to Army Reserve Position

The newest associate at the law firm of Fabian & Clendenin, Kathleen Henderson Switzer, was recently appointed as a detailed inspector general (IG) for the 96th U.S. Army Reserve Command (ARCOM) Headquarters, Fort Douglas, Utah.

It is believed that Switzer, a major, is the first nurse reservist in the history of the Army to become a detailed IG and one of very few female reservists to do so. "It's a pretty safe bet I'm the only nurse, who's also a lawyer and a female, to make the IG system," said Switzer. "I wasn't a traditional IG candidate, but I have much I want to contribute to the system."

The Inspector General, for the Department of the Army, Lt. Gen. Henry Doctor Jr., in his appointment of Switzer said the appointment was approved "based on her experience and demonstrated potential."

Switzer was nominated for the post by Col. Paul D. Walker, inspector general, and Maj. Gen. Richard O. Christiansen, commander, 96th ARCOM. In his rationale, Christiansen cited the 2,500 medical personnel assigned to the 96th ARCOM, of which over half are female, as appropriate justification to appoint a female nurse to the post. He also drew attention to Switzer's various 96th ARCOM hospital assignments, her tours of duty with the Office of the Surgeon General, her extensive civilian education in civil law, and her "valuable" experience as a law clerk for the U.S. 10th Circuit Court of Appeals.

NOTICE OF ANNUAL MEETING

The annual meeting of the Utah Bar Foundation will be held in conjunction with the annual meeting of the Utah State Bar in Sun Valley, Idaho, on June 28, 1989. Richard C. Cahoon, President of the Foundation, will address members on the annual report and progress of the Foundation, at the morning session. The Foundation will be one of the sponsors of the break following Mr. Cahoon's address. Information about the IOLTA program will also be available as well as Trustees and the Executive Director to answer any questions.

Election of Trustees

Notice is hereby given 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 election will be conducted by secret ballot which was mailed to all members in May. Ballots must be received by the Foundation by June 22, 1989. Ballots may also be hand-delivered by depositing in the Ballot Box not later than 8:30 a.m. at the Annual Meeting of the Utah Bar Foundation on June 28, 1989, at Sun Valley, Idaho.

QUESTIONS AND ANSWERS ABOUT IOLTA

Are There Any Administrative Duties Caused by the Program?

The program imposes no administrative burden on participating attorneys. The duty to offer separate, interest-bearing accounts to clients whose deposits are neither nominal nor short-term is not expanded or changed by this program. A participating attorney could continue to place nominal or short-term deposits into a single unsegregated account. The only change caused by the IOLTA program is that the participating account would now bear interest, but this should not affect how an attorney or law firm currently handles clients' trust deposits.

What are Attorneys' Ethical Obligations Under the IOLTA Program?

Attorneys and law firms are precluded from earning interest or dividends paid on funds they hold in trust. Upon request of the client, earnings should be made available to the client, whenever administratively practicable or economically feasible, on deposited funds which are neither nominal in amount nor to be held for a short period of time. Again, such large, short-term client deposits or modest deposits to be held for significant periods, are usually invested by attorneys in an interest-bearing medium for the client's benefit with full disclosure.

The traditional attorney/client relationship does not compel attorneys either to invest the client's funds or to advise clients to make their funds productive. No charge of ethical impropriety or professional misconduct would attend a failure to invest or to advise of the possibility of investing clients funds of whatever amount or duration held. Failure to comply with a client's specific investment directive, however, may give rise to legal liability for damages.

The determination of whether trust funds are nominal in amount or to be held for a short period of time rest exclusively in the sound judgment of each attorney, and no charge of ethical impropriety or professional misconduct shall attend an exercise of judgment in that regard. ABA Formal Opinion 348.

What are the Tax Consequences of Participating in the Program?

There is none to the client or the attorney. The Foundation, which will receive the interest from participating trust accounts, is exempt from federal income tax. It is important to make sure that the Utah Bar Foundation's Tax Identification number appears on accounts which participate in the IOLTA program. This is how the income is reported to the Internal Revenue Service.

The Internal Revenue Service has ruled that the interest earned on nominal or short-term client advances which is paid to the Foundation pursuant to the decision of the Utah Supreme Court is not includable in the gross income of any client.

How Does the Program Affect Financial Institutions?

Participating financial institutions—not attorneys—are responsible for transmitting interest income and furnishing at least quarterly reports to the Foundation. Any charges or fees assessed by a financial institution for its involvement in the program will be met from interest payments.

With each remittance to the Foundation, the participating lawyer or law firm depositor should be advised of the amount paid to the Foundation, the applicable interest rate, average account balance during the time period for which the report was made. The financial institutions should also provide the participating attorney with a duplicate of IRS Form 1099 sent to the Foundation at the year's end.

Do All Financial Institutions Know About the IOLTA Program?

The Foundation has undertaken an active educational campaign to familiarize Utah's financial community with the program and encourage cooperation in supporting program goals. At most of the major financial institutions, an IOLTA program is taking place. The person at the new accounts desk does not always know about IOLTA or the institutions participation in the program. Because of the frequent turnover in these jobs, you may find some uninformed people. If you have any problems of this kind, please contact the Foundation and the Foundation will direct the bank employee to the person at the bank who handles IOLTA. It is important to remember to set up a commercial account for enrollment in the IOLTA program. Some banks have a computerized IOLTA system which can only accept commercial account numbers.

There are a few financial institutions in Utah that have decided not participate in the IOLTA program. For a complete listing of participating banks, please contact Kay Krivanec at the Bar Foundation at 531-9077.

Lawyers Accost Judges!

By Judge Daniels

The Midwinter Meeting in St. George provided lawyers and judges with a rare opportunity to confront issues and problems in the administration of the courts. In the recent past, judges have had the opportunity to speak to the Bar, telling the lawyers what we expect. In St. George the tables were turned; lawyers had an opportunity to tell a panel of judges what lawyers expect from judges.

The format was a panel discussion. On one side of the room were four District Court judges and one Court of Appeals judge. On the other side of the room were six practicing lawyers. The audience was allowed to provide written questions. The panel was moderated by Doug Perry.

Some of the issues discussed were:

***CASES UNDER ADVISEMENT**

What does a lawyer do when a judge holds a case under advisement for a long period of time? Will the judge be offended if the lawyer calls? Not according to Judge Tibbs. Lawyers should feel free to call and ask when a decision will be made. Judge Page agrees, but thinks that such calls are inappropriate until the judge is truly tardy in making a decision. Judge Page feels that a call is appropriate after three weeks or so, but not before. Jim Clegg pointed out that a conference call with the other lawyer on the line is a much better way to handle the situation than an *ex parte* call to the judge.

***CHILD SUPPORT GUIDELINES**

Bert Dart asked the judges about the implementation of the statutory child support guidelines. These guidelines are officially effective July 1, 1989. The judges agreed that the new guidelines should be implemented as soon as possible. The Office of Recovery Services and the State Court Administrator's Office are preparing new forms to be used with the guidelines. As soon as these are ready, the District Courts will begin applying the new guidelines.

***JURY VOIR DIRE**

Nancy Bergeson raised the issue of allowing lawyers to ask voir dire questions of the prospective jury panel. Judge Russon has strong feelings about the procedure which is used in California where the lawyers question prospective jurors, often for several days, even in the simplest of cases. "God help us if we ever adopt the California practice," says Judge Russon.

There appears to be a strong difference of opinion between trial lawyers and trial judges on this point.

***RULE 4-501**

The Third District has recently adopted Rule 4-501 so that most motions will be decided upon written memoranda, rather than oral argument. This, of course, has been the practice in the rest of the state for some years. This rule is quite controversial, both among judges and lawyers. Many of the judges feel that the rule filters out frivolous motions. On the other hand, it does require more writing and lengthens the process by which motions are decided. Everyone agrees, however, that some changes in the rule are essential.

A new form of the rule has been drafted and is open for public comment prior to final adoption. Copies of the rule can be obtained from the Office of the State Court Administrator, and comments should be addressed to Carlie Christensen in that office.

JUDGE DANIELS was appointed to the bench in 1982. He is Presiding Judge of the Third Judicial District, comprising Salt Lake, Summit and Tooele counties. He serves on the Commission on Criminal and Juvenile Justice and as Co-Chair of the Governor's Commission on Victims. Prior to becoming a Judge, he was a trial lawyer with the firm of Snow, Christensen, and Martineau. He graduated from the University of Utah College of Law where he was a member of the Order of the Coif and served on the Utah Law Review. He teaches Constitutional Law in the M.P.A. program at the University of Utah. He has twice won second place in the Judge category of the annual Bob Miller Law Day race. On both occasions there were only two entrants in the Judge category, however.

***COSTS OF LITIGATION**

In response to a question from Jim Holbrook regarding alternative dispute resolution and reform of rules of discovery, the judges expressed considerable concern regarding the costs of litigation. Judge Page expressed the view that the level of some requests for attorney's fees was "shocking."

This is obviously a cause for real concern for the profession; both Bench and Bar. Some suggestions include better management of cases by the courts to ensure speedy disposition, limitations on the amount of discovery, and the use of arbitration or other alternative dispute resolution. Mr. Holbrook suggested that a task force be charged with studying the entire system to devise methods to reduce the costs of litigation, and make legal services available, not only to the poor, but to the middle class as well.

***PROBLEMS OF YOUNGER LAWYERS**

Scott Matheson raised an interesting concern that some younger lawyers had expressed to him. Some lawyers feel that judges are more deferential to the older, seasoned members of the Bar, to the disadvantage of the younger lawyers and their clients. The judges responded by saying that if this is true, it is certainly unintended. The judges promised to be sensitive to the problem, and avoid it as much as possible.

Judges really don't get much opportunity for honest feedback from practicing lawyers, and lawyers don't get many chances to get their gripes off their chests. I hope there will be more use of this format in future Bar meetings.

APOLOGY

Mr. Robin Riggs' picture and biographical sketch were inadvertently omitted from the article he co-authored in the May 1989 issue, titled "1989 Legislative General Session Review." They are published here, with apologies. *Ed.*

ROBIN L. RIGGS, ESQ.
J.D., 1982—J. Reuben Clark Law School
Brigham Young University
M.P.A., 1982—Brigham Young
University
Honors B.A., 1977—University of Utah

Currently Associate General Counsel, Utah Legislature; Executive Director, Utah Constitutional Revision Commission; Senior Counsel, Tax Recodification Commission.

STATE BAR CLE CALENDAR

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

A live via satellite seminar. A program directed toward family businesses will 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.

CURRENT PENSION AND FRINGE BENEFITS REGULATIONS/GUIDANCE

A live via satellite seminar. This seminar will devote substantial time to Sect. 401(a)(26) and Sect. 89 and Sect. 125 fringe 11 problems. The faculty has expanded to include additional Internal Revenue Service personnel who shared primary responsibility for the drafting of these regulations. Other issues for discussion include the anticipated additional regulations/guidelines under Sect. 410(b) coverage rules and integration rules. If new regulations under Sect. 401(a)(4) discrimination rules and Sect. 401(a)(2) liability/reversion rules are issued prior to the program, these also will be discussed. Topics may be shifted if necessary to give attention to other important new developments that may unfold in the interim. The program is targeted to experienced practitioners, plan administrators, CPAs and actuaries practicing in this area.

Date: June 8, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

COMMERCIAL JOINT VENTURES

A live via satellite seminar. The purpose of this program is to provide counsel and other professional business advisers 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 principal issues that should be addressed in the joint venture agreement and the ancillary agreements?
- What are the principal federal income tax considerations relating to the formation and implementation of the joint venture?
- How should intellectual property be handled, both that which is made available to the joint venture by the venturers and that which is 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.

NEW IRS GUIDELINES ON ESTATE PLANNING FOR FAMILY ENTERPRISES UNDER IRC SECT. 2036(c)

A live via satellite seminar. Important substantive Internal Revenue Service guidelines expected shortly will clarify the tax consequences of many everyday estate planning transactions within the reach of controversial Internal Revenue Code Sect. 2036(c). This provision was intended to halt the use of the technique of "freezing" the value of transferred property interests that otherwise would be includable in the transferor's gross estate but has much broader application. It is extremely critical for estate planners, tax practitioners, and counsel for closely held businesses to understand these guidelines as soon as possible because action can be taken this year only to avoid triggering the adverse tax consequences contemplated by this tax provision. This program is designed to enable counsel to understand and apply Sect. 2036(c) to clients' earlier, current, and contemplated transactions, in light of the new substantive IRS guidelines. The faculty panel is comprised of the IRS official primarily responsible for drafting the new guidelines and practitioners nationally recognized for their experience in this area. As they did the two previous programs in this subject, they will work through examples to show the resulting tax consequences in common transactions.

Date: June 22, 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, about how to make positive changes in the law, and about 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
June 6	Representing Family Businesses: Tax, Operational, Estate Planning and Succession Problems	L & J Center	$160
June 8	Current Pension and Fringe Benefits Regulations/Guidance	L & J Center	$135
June 15	Commercial Joint Ventures	L & J Center	$135
June 22	New IRS Guidelines on Estate Planning for Family Enterprises Under IRC Sect. 2036(c)	L & J Center	$135
July 13	Legislation as a Remedy	State Capitol, Room 403	$30

Name Phone Firm or Company

Address City, State and ZIP

American Express, MasterCard/VISA Expiration Date

Total fee(s) enclosed $ _____

Make all checks payable to the Utah State Bar/CLE

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.

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

The Salt Lake City office of a major national firm seeks an attorney with one to three years' experience for an exceptional associate opportunity. We require excellent academic credentials and demonstrated ability to handle challenging legal work. We offer the benefits of a large national firm. Please reply in confidence to: Recruiting Coordinator, Box P, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111.

Eight attorney firm concentrating in civil and criminal litigation seeks litigation associate with five-plus years of experience in banking law. Trial experience a must. Prefer graduate in top one-third of his or her class. Please send replies care of Box R, Utah State Bar, Law and Justice Center, Salt Lake City, UT 84111.

Deputy Millard County, Utah Attorney. Duties include civil representation of county government and criminal prosecution. Position requires Utah State Bar membership, strong writing skills, municipal law experience and at least three years overall experience. Salary based on qualifications. Salary range: $25,000 to $37,200, with benefits. Contact Millard County Attorney, 362 W. Main Street, Delta, UT 84624. Telephone (801) 864-2748. Inquiries will be kept confidential. Equal Employment Opportunity Employer.

POSITIONS AVAILABLE

State Farm Insurance Company seeks a qualified attorney for associate house counsel position in the Murray area. Applicants must be admitted to the Utah Bar. One to three years' experience is preferred. Litigation experience is highly desirable. Send resume and salary requirements by July 14, 1989, to D. Richard Smith, 4551 Atherton Drive, Salt Lake City, UT 84123.

Morgan & Hansen, which specializes in insurance defense litigation, seeks associate with two to five years' experience. Please send resume to Stephen G. Morgan, Morgan & Hansen, Kearns Building, Eighth Floor, 136 S. Main, Salt Lake City, UT 84101.

ATTORNEY WANTED—at least three years' experience. Share office space and assist in Personal Injury Practice.

A legal association of independant attorneys, seeking association with superior attorneys who have established practices. We offer a constant source of referrals, opportunity to specialize, competition overhead, firm development, advertising and cost sharing. Prestigious office location. Send resumes to: ADAMSON & SUMMERHAYS, 136 E. South Temple, 2100 University Club Bldg., Salt Lake City, UT 84111. Telephone (801) 355-2800.

POSITIONS SOUGHT

Recent BYU Law School graduate available to do research, draft pleadings, write briefs, etc., on an hourly basis. Salary negotiable. Call 583-7305.

OFFICE SPACE AVAILABLE

Beehive Credit Union has a great location for a new practice, or for a relocation on the corner of 4700 S. 2700 W. If you are interested, contact Jim Wickens, 484-8811.

OFFICE PRACTICE FOR SALE

The office practice, office equipment and furniture and law library are for sale. Please call (801) 654-0742. Heber City, Utah.

BOOKS FOR SALE

For sale: AmJur2d, AmJur Proof of Facts 2d and AmJur Trials. Call 521-4135.

Utah State Bar
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