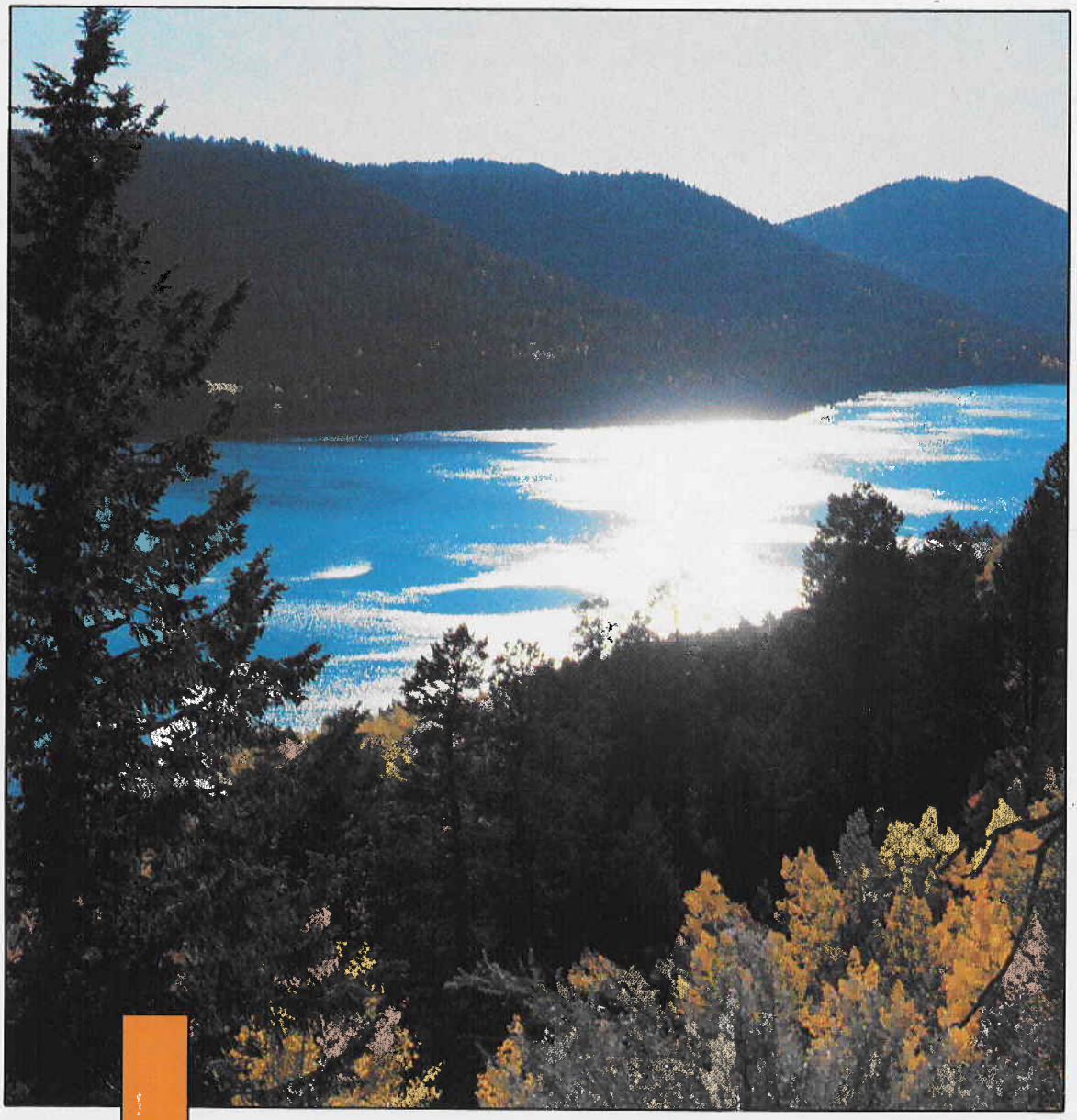
UTAH BAR JOURNAL

Vol. 2, No. 8

October 1989



Investigatory Stops: Exploring the Dimensions of the "Reasonable Suspicion" Standard

Negligent Hiring: The Dual Sting of Pre-Employment Investigation

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

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COVER: Our thanks to Robert T. Braithwaite, Fifth Circuit Judge, for his cover photograph of Navajo Lake in Southern Utah.

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

LETTERS

Editor's Note Reminder:

One objective of the *Utah Bar Journal* is to provide a forum for the free expression and exchange of ideas. To facilitate this, members of the Utah State Bar are invited and encouraged to submit articles, artwork, letters to the Editor and advertising for publication in the *Bar Journal.*

Article topics are not limited to specific areas of the law and all articles of general interest will be considered for publication. Bar members are also encouraged to submit photographs and drawings for the *Bar Journal's* cover art.

Readers are also welcome to submit letters to the Editor. However, letters which are published may not be obscene, defamatory, advocate or oppose a candidate for office, solicit business or subject the Bar to civil or criminal liability.

Finally, readers are invited to use the *Utah Bar Journal* as a medium for advertising. Law firm announcements, display and classified ads, etc., may be placed at reasonable rates.

The *Bar Journal* Editorial Board feels that article quality and general content of the *Bar Journal* has improved dramatically in the past year. Its present and future success is dependent upon reader participation.

Appearing for the first time in this issue of the *Bar Journal* is a cartoon by Denver C. Snuffer of the firm of Maddox, Nelson and Snuffer. His work will also appear from time to time in future issues.

Editor:

The legal profession as a self-regulating profession in Utah will end not because of lawyers in general, but because of the actions and attitudes of Bar Commissioners and Bar Counsel.

In a pending action, Bar Counsel serves as defense counsel for the Commissioners. Simultaneously, she appears before her clients, as prosecutrix in quasi-judicial Bar disciplinary matters. Thus, as an advocate she convinces her clients, the impartial Commissioners, of the strength of her case and the guilt of offending attorney. Bar Counsel also recently testified in a contested case wherein she served as defense counsel.

A judge, serving as Bar Commissioner, helps determine what proposed laws the Utah State Bar shall lobby for or against and how much to spend for lobbying. She often hears confidential information regarding Bar applicants and confidential information about attorneys subject to disciplinary action. Might such action and information influence when favored legislation or a malfeasing attorney later comes before the judge?

These actions create an appearance of impropriety and/or are prohibited by *Utah Rules of Professional Conduct;* however, the Commissioners and Counsel refuse to critically examine their conduct and are accountable to nothing except their myopic concept of "the good of the profession."

Brian M. Barnard
Attorney at Law

Dear Editor:

In response to the above letter from Brian Barnard, I offer the following comments:

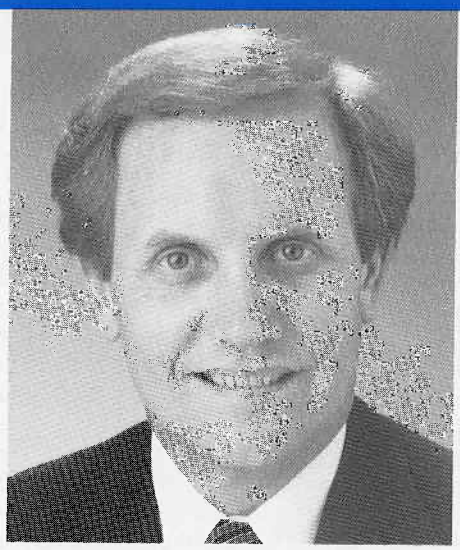
The propriety of an attorney serving in multiple roles occasionally raises questions of conflict of interest or undue influence. The mere fact of multiple roles or facets of a relationship between an attorney and a client or group, however, does not itself establish any impropriety.

At all levels of government, state and federal, and within virtually all State Bar associations, attorneys serve multiple roles. Some responsibilities are advisory, some representative and some include advocacy before a board, commission or council. The Attorney General, county and city attorneys, Bar Counsel and others have always had such multiple roles and have carefully balanced their duties and loyalties to avoid improprieties. Hence, it would seem to be no more conflict for Bar Counsel to also serve as general counsel to the Bar than for the County Attorney to simultaneously serve as counsel to the County Commission and also prosecutor of various matters before the same commission.

While an individual instance of impropriety could arise and must be avoided, it is my belief that attorneys serving in these capacities are well aware of the ethical constraints. I have not been aware of any improper conduct by attorneys serving in these roles. It is, therefore, incorrect and unfair to suggest the existence of improper actions by Bar Commissioners and Bar Counsel simply by reference to a very common structure. During my many years as a Bar Commissioner and President of the Bar, I can say that the various Bar Counsel and commissioners have always understood the responsibilities of the multiple roles and conducted themselves accordingly.

The comments regarding the judge relate to the subject of a petition Mr. Barnard has filed before the Supreme Court and are more appropriately resolved in the Court than in the press. Suffice it to say, I could not disagree more strongly with either the premise or innuendo.

Brian Florence



"Pick More Daisies . . ."

By Hans Q. Chamberlain

Most likely each one of us asks ourselves at least three or four times each year, "Do I want to continue to practice law the rest of my working years?" Each of us has our own reason for asking this question, but undoubtedly at the top of most lists is the "stress factor," or perhaps better termed, the "*dis*tress factor."

A few months ago I attended a meeting with other State Bar officers where the subject of stress among Bar members was one of the topics for a breakout session. The room was literally overflowing and it was readily apparent that everyone attended this session to the exclusion of other offered subjects. This affirmed to me that the issue of stress on Bar members is a matter that should be addressed on a regular basis. At this meeting, the panel discussed the results of a recent survey in Maryland where 207 attorneys were interviewed in depth by 21 graduate students to determine current attitudes about the practice of law. Sixty percent of the lawyers reported that they were mostly satisfied with their professional life, 30 percent were clearly dissatisfied and 94 percent felt that the practice of the law was less of a profession and more of a business. Only 36 percent stated without qualification that they would like to remain in the practice of law for the rest of their career. Comments made by the interviewed attorneys also indicated that they were concerned that the public view of lawyers was becoming more unfavorable, the pressure to specialize increasing, partners and associates are becoming less loyal to their firms and moving to other firms quite readily, and clients retain counsel more frequently on a project basis rather than on a continuing basis. The survey also indicated that complaints voiced were not isolated to large or small firms and that lawyers see too many other lawyers as having the "type A personality." Finally, a common complaint from lawyers interviewed was that they were working more hours than they wanted and many felt they were receiving pressure to bill more hours in a year than was reasonable. As you will recall, Past President Kent Kasting addressed the issue of excessive billable hours in his President's Message in the April 1989 *Bar Journal.*

The Maryland survey, as well as other recent data, provides some other useful information:

1. Most lawyers are proud of the profession and would continue in it without hesitation if not for the stress factor.

2. Most lawyers recognize that stress is inevitable and often self-perpetrated, but are unable to control it to the degree they would like.

3. Lawyers don't want to work seven days a week and bill 2,200 hours per year. Particularly, younger lawyers don't want production quotas, but rather, want competency and integrity, which will in turn allow the system to improve even though they may not personally generate as much income.

4. Many younger lawyers recognize that they are not taking enough time off which can lead to problems at home. One comment from a middle-aged lawyer was particularly enlightening. He stated that he was a physical wreck, had lost his family, wished that he could have changed his life earlier, spent more time with his children and wished he could have received some direction along these lines while he was younger.

The seminar also indicated that we may be teaching young lawyers the wrong heroes to worship, and that we should remind them that winning isn't everything, particularly when they are losing their families in spite of having the outside appearance of success. Another comment was the fact that too many young lawyers are practicing the

"Rambo-type" law where they advocate through paper and not by telephone, with resulting stress imposed. One of the speakers also indicated that an author had recently interviewed children of "great people," one of which was Walter Cronkite's daughter. Cronkite himself has recently reflected that one of his major regrets was that he did not spend more time with his children, and his children have likewise indicated that they did not have a close relationship with their father. Many of us look at Cronkite as one of our heroes, with the point being that in perhaps the most important aspect of his life, he did not succeed.

Stress is a fact of life every day for those in the legal profession. The young lawyer is especially prone to the pressures that come from court appearances, client conferences, meeting deadlines and dealing with opposing counsel.

Some of the general ways to deal with stress include regular exercise, vacations, relaxation exercises and hobbies. Furthermore, a stress-free home will certainly help create a stress-free office. We also need to create a pleasant working environment and, of course, balance work and recreation. It is also important to take control of your attitude by learning to accept things you cannot change.

When dealing with lawyers and our own clients, stress can be eliminated by following a few fundamental principles. One of the first things we should do to eliminate stress is to become organized and get things done on a timely basis. If we procrastinate, we too often get in a hurry to solve a problem, with resulting stress imposed needlessly. The person who allows himself to appear in a hurry gives himself a needless handicap to the judge, the jury and the opposition. Likewise, the onlooker or client is likely to conclude that the frazzled lawyer may have found the job too big, that he has no time for the client, with the result being an unsatisfied and perhaps "former" client.

In dealing with our employees and our families, we also need to realize that no one likes to be told to do something; we prefer to feel we are acting on our own ideas, or that we are thoughtfully agreeing with the ideas of someone else. People who are successful in working with people have mastered the method of giving instructions, proving a point or winning agreements in such a way that to those to whom they convey their ideas feel they are their own.

Stress can also be reduced if we recognize that the lawyer's approach should not be to dominate, but rather to inspire; not to strike fear into men or women, but to enlist their good will; not to gain a point by fighting, but to win support by making people want to get behind their course of action.

When we have to make a decision that will undoubtedly create stress for another lawyer and perhaps those he represents, and have decided that it is time to fight, we should all ask, "Is the cause worthy? Can I not persuade rather than compel? If I do win my point by force, will the response be favorable among the people who count most in my life?"

I do not mean to suggest that there should not be an appropriate degree of advocacy providing it carries with it professional courtesy. However, we should recognize that to those who insist upon fighting their way through life, having it in their nature to do so, there are points of strategy that should be attended to. It was a principal among the ancient Greek fighters not to cut off the enemies' retreat, because when bottled up he would fight more desperately. In our modern business relationship, it is often the best approach to give an opponent a chance to "save face." A true professional takes pains to spare others humiliation.

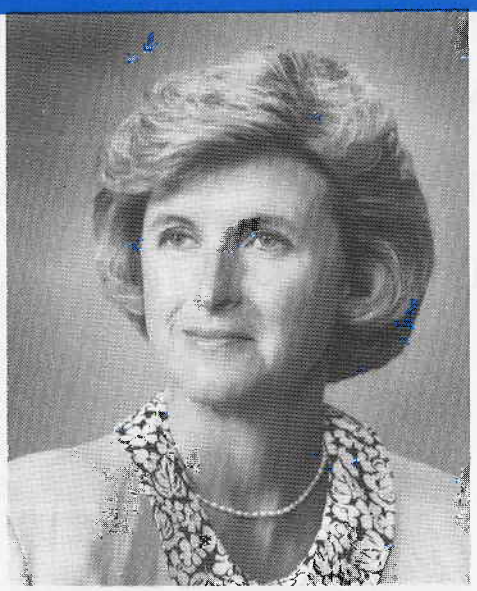
There is always a loser in any given lawsuit, and even if we are the loser and retain our poise in that situation, we retain our self-respect, our feeling of being in control and, most likely, the respect of our opponent. In that situation, stress will be controlled and confidence established.

In some future *Bar Journal*, either I or perhaps a contributing author will address the stress factor in more detail and provide more information on ways to cope with stress. At this juncture, however, the following statement from a stress management publication prepared by the Texas Young Lawyers Association, quoting from "Brother Jeremiah," is an interesting reflection from someone who would live differently the second time around and suggests a way to deal with the everyday situations that cause stress in our life:

> "If I had my life to live over again...I would relax. I would limber up. I would be sillier than I have been this trip. I know of very few things I would take seriously. I would take more trips. I would climb more mountains, swim more rivers and watch more sunsets. I would do more walking and looking. I would eat more ice cream and less beans. I would have more actual troubles and fewer imaginary ones. You see, I am one of those people who live prophylactically and sensibly and sanely hour after hour, day after day. Oh, I've had my moments; and if I had it to do over again, I'd have more of them. In fact, I'd try to have nothing else. Just moments, one after another instead of living so many years ahead each day. I have been one of those people who never go anywhere without a thermometer, a hot water bottle, a gargle, a rain coat, aspirin and a parachute. If I had it to do over again, I would go places, do things and travel lighter than I have. If I had my life to do over, I would start barefooted earlier in the spring and stay that way later in the fall. I would play hooky more...I would rather go on more merry-go-rounds. I'd pick more daisies."

Let me conclude by suggesting that if we don't reduce everyday stress and "stop to pick more daisies," we might be pushing them up earlier than we anticipated.

COMMISSIONER'S REPORT



By Hon. Pamela T. Greenwood

You will soon be receiving information about the forthcoming Mid-Year Meeting of the Bar, to be held January 17 through January 20. This year's meeting will include some innovative features which I find intriguing and hope that you will agree. The first day and one-half will be held at the Law and Justice Center, taking advantage of the pleasant and well-planned facilities there. On Wednesday, we will have a unique panel discussion featuring Stan Chauvin, president of the American Bar Association, and Alan R. Nelson, president of the American Medical Association. Dr. Nelson resides in Utah and certainly brings credit to the state by his recent election to the American Medical Association presidency. We are very fortunate to be able to have these two leaders of their professions willing to meet with us. We anticipate discussion of important subjects affecting health care and the law in the United States, and the difficult implications of issues such as organ donations, in vitro fertilization, the right to die, and problems particularly affecting children and the elderly. On Thursday, we will have further CLE sessions, some of the first to be held after implementation of mandatory continuing legal education. Thursday afternoon, charter planes will be available to transport us to Scottsdale, Arizona, for further activities at the Inn at McCormick Ranch. Facilities at McCormick Ranch include a beautiful golf course, tennis, swimming and other family activities. We will have further CLE offerings in Arizona, as well as social and recreational opportunities. You can register for just the Salt Lake City activities, just Arizona or both. Our committee is ably chaired by Janet C. Graham, who reports that negotiations are under way to secure the most favorable prices for travel and accommodations. We are hopeful that many of you will opt to join us for education, camaraderie and good times.

You may wonder why we are not returning to St. George this year for our Mid-Year Meeting. The reason is that there are not big enough facilities to accommodate our needs, at present, especially with the onset of mandatory continuing legal education. However, further building is going on in St. George and we hope to have our 1991 meeting once again in beautiful St. George. On a related note, some have questioned why we hold annual meetings in places such as Sun Valley and Coronado, California. The straightforward response is because it works. The last several times we held annual meetings in Salt Lake or even in Park City, attendance was dismal and we experienced significant financial losses. For example, our meeting in Park City had 226 registrants and the 1985 Salt Lake City meeting had only 92 registrants. On the other hand, our most recent annual meetings in Sun Valley and Coronado had record registrations of 380 and 356, respectively, and produced no financial losses. It's difficult to argue with success. I think that most of us are more apt to participate in conventions which are away from home, where we can enjoy our families and friends and aren't easily able to return to offices.

If you have never attended a Bar Mid-Year Meeting, perhaps this is the year to give it a try. I think you will be pleased with the experience.

Investigatory Stops: Exploring the Dimensions of the "Reasonable Suspicion" Standard

By Judge Lynn W. Davis
Fourth Circuit Court

I. Introduction

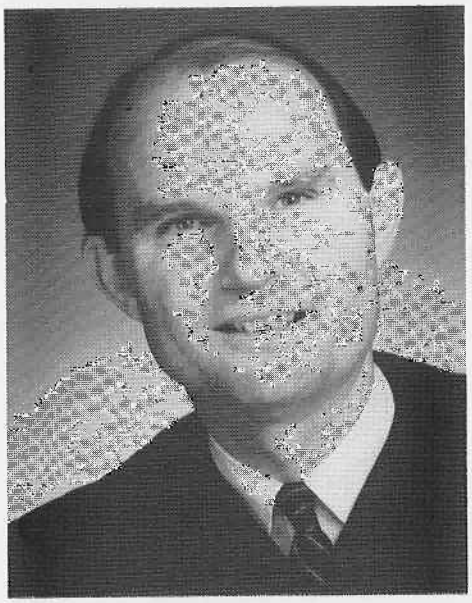
An individual's right to be free from unreasonable searches and seizures is protected and guaranteed both by the Fourth Amendment and by the provisions of Article I, Section 14 of the Constitution of Utah, which both provide:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Government "has a legitimate interest in crime prevention and detection." *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987). But personal privacy rights are paramount, and intrusions must be scrutinized under the protections afforded by the Fourth Amendment. The balance between public interest and an individual's constitutionally guaranteed right to personal security and privacy tilts in favor of freedom from police interference. *Brown v. Texas*, 443 U.S. 47 (1979).

These interests often compete; public interest in crime prevention may conflict with an individual's right to be free from arbitrary interference from law officers.[1] The state also has a strong interest in safeguarding citizens' rights of privacy, liberty and autonomy against unsanctioned or unfettered intrusions.

The United States Supreme Court first explicitly permitted a seizure upon suspicion short of probable cause in the landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, a veteran police officer observed two men whom he believed were casing a store for a robbery. An on-the-street confrontation resulted in a pat-down search of the suspect and the discovery of a weapon. The Court found the government's interest in crime prevention and detection outweighed the suspect's right of privacy and recognized the search as an exception to the probable cause requirement of the Fourth Amendment.



JUDGE LYNN W. DAVIS serves as a Fourth Circuit Court Judge in Provo, Utah. He is a member of the Utah Supreme Court Advisory Committee on the Code of Professional Responsibility, a member of the Bar Examiner Committee, a member of the Utah State Bar Constitutional Bicentennial Committee and is the recent recipient of its exceptional service award. He graduated from the J. Reuben Clark Law School in 1976. The author acknowledges the research and editing assistance of Susan Polizzotto, a second-year law student at J. Reuben Clark Law School, in preparing this article for publication.

Terry teaches that a police officer may not act on a hunch, mere speculation or unparticularized suspicion, but only on specific reasonable inferences based on facts, in light of the officer's experience. *Id.* at 27. While not capable of precise definition, "reasonable suspicion" has been characterized as a combination of specific and articulable facts together with reasonable inferences from those facts, which, in light of the officer's experience, reasonably justify a belief that the person to be stopped had committed, was committing or was about to commit a crime. *Id.*

The Court reaffirmed the reasonable suspicion test in *Florida v. Royer*, 460 U.S. 491, 500 (1983), where it stated that "the predicate permitting seizures upon suspicion short of probable cause in that law enforcement interests warrant a limited intrusion on the personal security of the suspect." The standard articulated in *Terry* and also in *Brown v. Texas* has come to be known as the "reasonable suspicion" test. *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-84 (1975).

What is the proper scope of the reasonable suspicion test? In a long line of cases, the Court has significantly expanded the application of the test.[2] *Terry* involved a violent crime in which there was a legitimate fear of immediate physical danger to the officer. However, it is clear that the reasonable suspicion test applies to factual settings beyond the enforcement need as presented in *Terry*. There is also no doubt that it applies to vehicle stops as well as on-the-street detentions. Most recently it has been applied to the growing number of drug courier profile cases.[3] *Terry* insists that the conduct of officers enforcing the law be subjected to the more "detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure." 392 U.S. at 21-22. However, the Court in *Terry* failed to explain what quan-

tum of suspicion is necessary to justify an investigatory stop or search. In addition, *Terry* and its progeny have failed to announce a definitive standard enunciating at what point of an investigatory stop Fourth Amendment protections are implicated. These issues continue to plague appellate and trial courts.

II. The Reasonable Suspicion Standard Applied in Utah

Utah courts have long recognized the "reasonable suspicion" standard and have applied it in a growing number of investigative stop cases.[4] This standard is codified in Utah Code Ann. Sect. 77-7-15 (1982):

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Both the Utah Supreme Court and the Utah Court of Appeals have been particularly active in deciding investigatory stop cases in the last several years.[5] It is significant to note that in the majority of those decisions, the courts have not found the requisite reasonable and articulable suspicion necessary to sustain an investigatory stop, search or seizure. Those decisions have largely resulted in acquittals or in suppression of the evidence.[6] The balance of this paper is devoted to an examination of those cases.

III. Utah Appellate Court Decisions Relating to Investigatory Stops Have Relied Upon Traditional Fourth Amendment Jurisprudential Arguments, Not Upon Independent State Constitutional Grounds

The language of Article I, Section 14 of the Utah Constitution is virtually identical with that of the Fourth Amendment of the United States Constitution. That may be one reason why the Utah Supreme Court "has never drawn distinctions between the protections afforded by the respective constitutional provisions. Rather, the [c]ourt has always considered the protections afforded to be one and the same." *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988). Yet in the same opinion, the Court announced its interest in the applicability of an Article I, Section 14 argument by stating, "Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating the state's citizens from the vagaries of inconsistent interpretations given the Fourth Amendment by the federal courts." *Id.* at 1221 n.8. Thus, it appears that the Court has not foreclosed the possibility of distinguishing the protections afforded by the respective constitutional provisions in a future case. At the very least, there are mixed signals from the Court.

While Utah has developed no separate body of state constitutional search and seizure law, both Justices Durham and Zimmerman of the Utah Supreme Court have expressed a willingness to seriously consider an analytical approach premised on Article I, Section 14 arguments.[7] Justice Zimmerman has stated that "[t]he federal law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Constitution."[8] Such an analysis may extend the scope of individual protection against unreasonable searches and seizures beyond that accorded by the Fourth Amendment.

Writing for the majority in *State v. Earl*,[9] Justice Durham noted that neither the state nor the defendant had discussed or relied independently on Article I, Section 14 of the Utah Constitution. She further noted that despite the Court's willingness to independently interpret the Utah Constitution in other areas of law, "the analysis of state constitutional issues in criminal appeals continues to be ignored."[10] Justice Durham concluded that "[i]t is imperative that Utah lawyers brief this Court on relevant state constitutional questions."[11] Justice Zimmerman was equally emphatic in *State v. Hygh*,[12] stating that "[s]ound argument may be made in favor of positions at variance with the current federal law respecting both the scope of the individual's right to be free from warrantless searches and seizures and the remedy for any violation of that right."[13]

Even in light of these frequent announcements of receptivity, state constitutional arguments have rarely been raised in an investigatory stop context. When presented, they have been found to be inadequately brief or argued or untimely raised. A mere five cases are reported.

In *State v. Mendoza*, 748 P.2d 181, 187 (Utah 1987), the Utah Supreme Court found no reasonable suspicion to justify the initial stop of the subject vehicle. The Court held that the investigatory stop violated defendant's Fourth Amendment rights. State constitutional arguments were not raised. But Justice Zimmerman independently observed in his concurring opinion that "the whole question of protections that are afforded by the remedies available under Article I, Section 14 of the Utah Constitution, "[Utah's] own search and seizure provision has never been carefully considered by this court." *Id.* at 187. Also, in his dissenting opinion in *State v. Dorsey*, 731 P.2d 1085, n.1 (1986), Justice Zimmerman comments on the lack of briefing of the state constitutional issues.

The Utah Court of Appeals has addressed Article I, Section 14 arguments in an investigatory stop context in *State v. Aquilar*, 758 P.2d 457 (Utah App. 1988), *State v. Arroyo*, 770 P.2d 153 (Utah App. 1989), and *State v. Johnson*, 771 P.2d 326 (Utah App. 1989).

In *Aquilar*, the Court confined its analysis to the protections granted under the United States Constitution. It did so because "although Aquilar recited the Utah Constitution's Fourth Amendment provision in his brief, he did not argue that the Utah Constitution yields a different result than the United States Constitution." *Aquilar*, at 458, n.1. *See also State v. Lafferty*, 749 P.2d 1239, 1247 n.5 (Utah 1988).

In *State v. Arroyo*, 770 P.2d 153, the Court also confined its analysis to the protections granted under the Fourth Amendment, but for different reasons. The Court found that "a three line conclusory statement as to the greater scope of state constitutional protections [was] an insufficient briefing for [the court] to embark on a state constitutional analysis." *Arroyo*, at 36, n.1.

The Court, in *State v. Johnson*, 771 P.2d 326, declined to consider a state constitutional argument under a preservationist doctrine. The Court found that "[n]ominally alluding to such different constitutional guarantees without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal." *Johnson*, at 328. *Accord James v. Preston*, 746 P.2d 799, 801 (Utah App. 1987).

We may conclude from this brief analysis:

1. A nominal invocation of the state constitution is insufficient to raise state constitutional protections; *see also State v. Lafferty*, 749 P.2d 1239 (Utah 1988).
2. State constitutional arguments must be adequately brief and argued at every level of the case.
3. Such arguments must set forth the reasons why the Utah Constitution yields a different result than the United States Constitution.

Lastly, the Utah Supreme Court has cited with approval the state constitutional analytical guidelines set forth in *State v. Jewett*, 146 Vt. 221, 500 A.2d 233 (1985).[14]

IV. Utah Appellate Court Decisions Are Highly Fact Sensitive

Terry encouraged the judiciary to decide each case on its own facts. *Terry*, 392 U.S. at 30. Utah appellate courts have appropri-

ately recited the facts of each case in great detail. A determination of the constitutionality of a police officer's stop of a person under the Fourth Amendment turns upon the facts of each case. *State v. Trujillo*, 739 P.2d 85, 86 (Utah App. 1987); *see also State v. Sierra*, 754 P.2d 972, 973 (Utah App. 1988).

Prosecutors and defense counsel alike err when citing controlling case law without first urging the finding of particular facts. Every analytical stage of an investigative stop case requires a totality of the circumstances consideration in that all decisions are highly factual in nature. For example, an investigative stop must be limited both as to scope and duration "to satisfy the conditions of an investigative seizure." *State v. Sery*, 758 P.2d 935, 952 (Utah App. 1988), quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983). The length of the stop, a critical fact to be determined, may transform it from an authorized *Terry* stop into a de facto arrest requiring probable cause. *United States v. Sharpe*, 470 U.S. 675 (1985).

In a suppression hearing, witnesses invariably offer conflicting versions of the facts. Deference is traditionally afforded the fact finder to determine the credibility of witnesses. *State v. Bagley*, 681 P.2d 1242, 1244 (Utah 1984); *State v. Holyoak*, 67 Utah Adv. Rep. 24 (1987); *State v. Walker*, 64 Utah Adv. Rep. 10 (1987). Appellate courts recognize that the trial judge is in a preferred position to assess the witnesses' credibility in a suppression hearing. *See State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987); *State v. Sierra*, 754 P.2d 972. The trial court's factual evaluation underlying its decision to grant or deny a motion to suppress ought not to be disturbed unless clearly erroneous. *State v. Mendoza*, 748 P.2d at 183; *Ashe*, 745 P.2d at 1258.

However, no such deference is afforded the trial court in its application of the law to the facts. The Utah Court of Appeals recently noted that "in assessing the trial court's legal conclusions based upon factual findings, we afford it no deference but apply a 'correction of error' standard." *State v. Johnson*, 771 P.2d at 327, citing *Oates v. Chavez*, 749 P.2d 658, 659 (Utah 1988). Appellate courts are charged with the duty to correct errors in application of the law to the facts. *State v. Swanigan*, 699 P.2d 708, 719 (Utah 1985); *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987).

V. Vehicle Stops Are "Seizures" Necessitating the Operation of Fourth Amendment Protections

The Utah Court of Appeals in *State v. Sierra*, 754 P.2d 972, 975 (Utah App. 1988) agreed with the U.S. Supreme Court by announcing that "the stopping of an automobile and the consequent detention of its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment, despite the fact that the purpose of the stop is limited and the resulting detention is quite brief." *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also State v. Cole*, 674 P.2d 119, 123 (Utah 1983). Similarly, the Utah Court of Appeals has held that anytime a police officer stops an automobile, the stop necessarily involves a seizure requiring reasonable, articulable suspicion. *State v. Baird*, 763 P.2d 1214, 1216 (Utah App. 1988).

The Court in *Sierra* further pointed out that a stop of a vehicle may be constitutionally justified on one of two alternative grounds. First, "reasonable suspicion" must be based upon specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude that the defendant had committed or was about to commit a crime. *Sierra*, 754 P.2d at 975; *Terry*, 392 U.S. at 21; *State v. Christensen*, 676 P.2d 408, 412 (Utah 1984); *Trujillo*, 739 P.2d at 88. Second, the stop could be incident to a lawful detention for a traffic violation. *Sierra, Id.*

> "Prosecutors and defense counsel alike err when citing controlling case law without first urging the finding of particular facts."

VI. Not All Police Encounters With Citizens Constitute Seizures Implicating Fourth Amendment Protections

In the thorny field of investigatory stops, it is for the fact finder, based upon the totality of the circumstances to determine whether the police/citizen encounter amounts to a seizure of the person, giving rise to Fourth Amendment protections and scrutiny, or whether the encounter intrudes upon no constitutionally protected interests. Utah appellate courts have adopted some helpful guidelines in this area.

In *State v. Deitman*, 739 P.2d 616 (Utah 1987), the Utah Supreme Court relied upon the standard enunciated in *United States v. Merritt*, 736 F.2d 223 (5th Cir. 1984). In *Merritt*, the Court delineated three levels of police encounters with the public which the Court held to be constitutionally permissible. The Court established these parameters:

1. An officer may approach a citizen any time and pose questions so long as the citizen is not detained against his will.
2. An officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention" must be temporary and last no longer than is necessary to effectuate the purpose of the stop.
3. An officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed. *Id.* at 230.

Those constitutionally sanctioned levels of police encounter have also been adopted by the Utah Court of Appeals in *State v. Baird*, 763 P.2d at 1216, and *State v. Johnson*, 771 P.2d at 328. Additionally, the Court of Appeals in *State v. Trujillo* held that "a seizure within the meaning of the Fourth Amendment occurs only when the officer by means of physical force or the show of authority has in some way restricted the liberty of the person." *See also United States v. Mendenhall*, 446 U.S. 544, 553 (1980). The *Trujillo* Court went on to say that "[w]hen a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation with the officer's investigation, but because he believes he is not free to leave a seizure occurs." 79 P.2d at 87. *Cf. Florida v. Royer*, at 501.

VII. The "Reasonable Suspicion" Principle is Best Understood and Comprehended by a Review of Current Applicable Case Law

"No area of law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the Magistrate," than the Fourth Amendment.[15] As one commentator has pointed out "[w]hat has bedeviled the justices of the Supreme Court is the quantum of evidence that is necessary to constitute articulable suspicion. The puzzlement has flowed from the highest court in the land down to the police officer on the beat."[16] Utah's appellate courts have struggled with the application of the reasonable suspicion standard, and justices have clashed over critical factors which trigger its application as opposed to a probable cause standard.[17]

Practitioners, judges and legal scholars recognize the difficulty in applying the reasonable suspicion standard. The Su-

preme Court in *United States v. Cortez*, 449 U.S. 411, 417 (1981), noted that "terms like articulable suspicion and founded suspicion are not self-defining; they fall short of providing clear guidance dispositive of the myriad of factual situations that arise." Despite this reality, Justice Rehnquist announced in the same opinion that the concept of reasonable suspicion is "one of the relatively simple concepts embodied in the Fourth Amendment." *Id.*

The announcement of bright line definitions and a "litmus-paper test" that many practitioners seem to demand from our appellate courts would be strikingly foreign to traditional Fourth Amendment jurisprudence. The Utah Court of Appeals recognized this principle in *State v. Sery*, 758 P.2d at 943 n.3, where it noted that "no litmus-paper test can determine whether the police possessed sufficient facts to justify a person's seizure." As Justice Rehnquist recently announced in *United States v. Sokolow*, 109 S. Ct. 1581 (1989), "the concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.' " *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In a recent investigatory stop case, *State v. Baumgaertel*, 762 P.2d 2 (Utah App. 1988), the Utah Court of Appeals affirmed the conviction, finding that the officer had reasonable suspicion to stop the subject vehicle. The Court stated that "when a police officer sees or hears conduct which gives rise to suspicion of crime, he has not only the right but the duty to make observations and investigations to determine whether the law is being violated; and if so, to take such measures as are necessary in the enforcement of the law." *Id.* at 52 (citations omitted). What conduct gives rise to suspicion of a crime?

What factors are probative or of little probative value in determining whether or not an officer has reasonable suspicion to stop or to search? Conclusions from extant case law are set forth below. However, it must be stressed that the unique combination of facts in each case must be evaluated and no single factor should be declared probative or non-probative when separated from its unique factual setting.

We may conclude from all recent decisions:

1. *Latin descent* has only minor probative value in determining if a suspect has entered the country illegally. *Mendoza*, at 183; *Arroyo*, at 155.

2. The *route of travel* and *out-of-state license plates* have little probative value in determining if the officers had a reasonable suspicion to stop the vehicle. *Carpena*, at 675.

The fact that a traveler in a drug case has come from a "major source" city is of some significance, but is not a weighty factor. *Reid v. Georgia*, 448 U.S. 438 (1980). *See also* 3 W. LaFave, **Search and Seizure** Sect. 9.3 (c) (2d ed. 1987).

An officer's statement that "something just struck me funny about [the out-of-state license plate]" was held insufficient to justify the stop. *State v. Baird*, at 1215.

3. The *time of year* and the *time of day* of the stop have little relevance. *Mendoza*, 748 P.2d at 183; *Carpena*, at 675; *Swanigan*, at 719; *Trujillo*, at 86. But the time of day was found significant in *State v. Baumgaertel*, at 4, in tandem with other factors.

4. *Nervous behavior and failure to make eye contact.* These are highly ambiguous factors at best. The Fifth Circuit Court of Appeals has held that the failure to make eye contact can have no weight in determining if the officers had a reasonable suspicion to conduct an investigatory stop. *Mendoza*, at 183-84; *Sierra*, at 976. The Court in *Sery* further noted that "if the officer cannot articulate the unusual mannerisms or actions by the defendant that led to a conclusion of nervousness, it is impossible for any reviewing court to determine, after the fact, whether the person's apparent nervousness was any different from that observed in countless travelers—or if the nervousness existed at all." *Sery*, at 944. "The officer's mere conclusions regarding defendant's nervousness, unsupported by relevant objective facts, can have no weight in determining if he had a reasonable suspicion of criminal activity." *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986). The Court in *Trujillo* concluded that nervous conduct on the part of the defendant when confronted by a law enforcement officer was "consistent with innocent as well as criminal behavior." Lastly, the Court in *Sierra* concluded that lack of eye contact affords no weight in determining if the officer had reasonable suspicion to conduct the investigatory stop. *Sierra*, at 975 (citations omitted).[18]

"The unique combination of facts in each case must be evaluated and no single factor should be declared probative or non-probative."

5. *High crime area. Carpena, Swanigan* and *Trujillo* suggest that "travelling in a lawful manner at a late hour in a high crime area and acting in a nervous manner in the presence of police is not sufficient to support a reasonable suspicion that the suspect is involved in criminal conduct." *State v. Baumgaertel*, at 4.

"[A]n area's reputation for criminal activity should not be imputed to an individual." *State v. Holmes*, at 509. A "high crime area" factor is insufficient, *alone*, to constitute reasonable suspicion. *Holmes*, at 509. Nevertheless, it is one factor which can be considered by the trier of fact in applying a "totality of the circumstances" analysis. For example, an officer was justified in asking defendants for ID and explanation of their presence in an area where police had responded to a burglar alarm. *State v. Deitman*, at 618.

6. *Furtive gestures.* In the recent case of *State v. Schlosser*, 108 Utah Adv. Rep. 38, 42 n.5, the Court observed that "if furtive gestures are coupled with prior reliable information indicating possible criminal conduct, further investigation may be justified." *United States v. Pajari*, 715 F.2d 1378 (8th Cir. 1983). The Court found the "furtive gestures" in *Schlosser* to be insufficient to support reasonable suspicion to search. The Court in *State v. Holmes*, at 511, announced that furtive movements or gestures "must be shown which, in the totality of the circumstances, would lead a reasonable and prudent person to believe that there is evidence of criminal activity." It is one factor which can be considered in the analysis, but, isolated, cannot be given any weight. Furtive comments were recognized in *Florida v. Rodriguez*, 469 U.S. 1 (1984). Furtive gestures by the defendant with his knapsack were held insufficient in *Trujillo*, at 86.

7. *Misc.* Faulty equipment, plus suspicion of stolen vehicle constituted adequate reasonable suspicion in *State v. Johnson, supra* at 326. The fact that an officer learned only days

before that defendant's license had been revoked, plus confirmation with dispatch, constituted reasonable suspicion to stop. *State v. Constantino*, 732 P.2d 125 (Utah 1987). Where an officer had previously arrested defendant for DUI and knew his license status, Court held officer had reasonable suspicion to stop. *State v. Gibson*, 665 P.2d 1302 (Utah 1983).

Utah courts acknowledge that a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained eye. *Trujillo*, at 88; *Mendenhall*, at 564; *State v. Sery*, 758 P.2d 935, at 941 (Utah 1988). However, the officer frequently does not articulate the perceived meaning from the subject actions to the trial court, resulting in a suppression of the evidence.

Lastly, Utah courts have further noted that officers are "entitled to assess the facts in light of [their] experience."[19] In this regard a prosecutor errs at a suppression hearing when failing to elicit the training, experience, background and schooling of the officer. A consideration of that collective experience may be critical in determining whether the stop was based upon a hunch or upon articulable suspicion.

VIII. The "Hypothetical Reasonable Officer" Standard

In *State v. Sierra*, 754 P.2d 972 (Utah App. 1988), the Utah Court of Appeals announced a legal framework to protect individuals from pretextual misdemeanor traffic arrests. The Court stated that "in traffic violation stops, in balancing the rights of individuals to be free from arbitrary interference by law enforcement officers and the government's interest in crime prevention and public protection, if a hypothetical reasonable officer would not have stopped the driver for the cited traffic offense, and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional." *Sierra*, at 979. Earlier in the *Sierra* opinion, the Court emphasized that the proper inquiry is not whether the officer could validly have made the stop. Rather, the focus is on whether a hypothetical reasonable officer, in view of the totality of the circumstances, would have stopped the vehicle. *Id.* at 978.

In announcing the "hypothetical reasonable officer" standard, the court relied upon a curious collection of state and federal cases: *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986); *Diggs v. State*, 345 So. 2d 815 (Fla. App. 1977); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985); *State v. Holmes*, 256 So. 2d 32, 34 (Fla. App. 1971); *Urquhart v. State*, 261 So. 2d 535, 536 (Fla. App. 1972); 5 LaFave, **Search and Seizure** Sect. 5.2(e) (2d ed. 1987). Unfortunately, those courts declined the opportunity to define "hypothetical reasonable officer."[20] Likewise, no reported Utah decision has interpreted "hypothetical reasonable officer."

The Utah Court of Appeals has most recently applied this standard in *State v. Arroyo*, 770 P.2d 153, 155. The Court was persuaded that "a reasonable officer would not have stopped Arroyo and cited him for 'following too closely' except for some unarticulated suspicion of more serious criminal activity." The Court concluded that the stop was an unconstitutional pretext to search for drugs.

The announcement of a "hypothetical reasonable officer" standard presents a host of questions. What constitutes the "hypothetical reasonable officer?" Is the standard statewide or regional? What factors may be relied upon in this difficult line-drawing exercise? What if the arresting officer always cites a violator of a particular offense, but no one else on the force does? How does the imposition of the standard impact individual officer discretion and exercise of initiative? Does the defense merely have to assert that a hypothetical reasonable officer would not have made the stop in order to place its constitutionality at issue? Does the plaintiff then have the burden to show that a hypothetical reasonable officer would have made the stop? What kind of evidence can be submitted? Expert testimony? Utah courts have recognized that officers are entitled to assess the facts in light of their experience.[21] Does that individualized deference to the collective experience of the officer conflict with the application of the hypothetical reasonable officer standard?

"The announcement of a 'hypothetical reasonable officer' presents a host of questions. What constitutes the 'hypothetical reasonable officer?' "

The employment of this standard thus far is limited to stops incident to traffic violations. Ultimately, this strike standard must be applied by the trier of fact without the benefit of elucidating criteria. Hopefully, future cases may address some of these concerns.

IX. A Consent to Search *May* Be Sufficient to Purge the Taint of the Illegal Prior Stop

On three occasions the Utah Court of Appeals has addressed the issue whether a consent to search purges the taint of the prior illegal stop: *State v. Sierra*, 754 P.2d 972, 979 (Utah App. 1988); *State v. Aquilar*, 758 P.2d 457, 458 (Utah App. 1988); and *State v. Arroyo*, 770 P.2d 153, 154 (Utah App. 1989). In each case the Court has relied upon *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), which held that "if voluntary consent is found to have been given by an individual capable of consenting, then such a search, limited to the scope of the consent, is reasonable under the Fourth Amendment." The Court has applied a "totality of the circumstances" standard to determine whether consent is voluntary. *Sierra*, at 980; *Arroyo*, at 155; *Aquilar*, at 459.

In *State v. Sierra*, the Court found the stop to be pretextual and therefore unconstitutional. The Court then remanded the case for a determination of whether the consent to search was voluntary. Since the stop was unconstitutional, the search could not survive as an inventory search or a search incident to a lawful arrest. If the search is to withstand constitutional scrutiny, it must do so as consensual.

In *State v. Aquilar*, the defendant gave written consent for the search of a van. The search yielded 383 pounds of marijuana. The Court declined to address whether the initial stop was a violation of Aquilar's Fourth Amendment rights because the issue was not raised on appeal. The Court found, however, that the voluntary consent cured the illegality of the stop. *Aquilar*, 758 P.2d at 459.

In *Arroyo*, counsel stipulated at the trial stage that the consent was voluntary. In reversing the trial court's suppression order, the Court held that "although the original illegal stop was unconstitutional, Arroyo's subsequent voluntary consent purged the taint from the initial illegality." *Arroyo*, at 156. The Court stated that the appropriate inquiry is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 155 (quoting *Sierra*, at 980 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963))).

From *Sierra, Aquilar* and *Arroyo*, we may conclude:

1. The State bears the burden of proving that consent was voluntarily given. *Sierra*, at 981; *Arroyo*, at 156.
2. The Utah Court of Appeals, like

the United States Supreme Court, has eschewed the "but for" exclusionary rule for evidence seized as a result of prior illegality. *Arroyo*, at 155.

3. A search conducted pursuant to voluntary consent purges the taint from prior illegality. *Arroyo*, at 155; *Sierra*, at 980; *Aquilar*, 459.

The Utah Court of Appeals agreed with the principles announced by the Tenth Circuit Court of Appeals in *United States v. Carson*, 762 F.2d 833, 837 (1985). Voluntary consent is sufficiently distinguishable from any prior illegality to purge the taint of that illegality. *Sierra*, at 981; *Aquilar*, at 459; *Arroyo*, at 155.

4. To determine whether consent is voluntary, we look to the totality of the circumstances to see if the consent was in fact voluntarily given and not the result of "duress or coercion, express or implied." *Arroyo* at 155; *Sierra* at 980 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

X. Where No Reasonable or Articulable Suspicion Exists to Justify the Stop, After-Acquired Evidence is Insufficient to Cure the Illegality of the Stop Absent an Exception to the Exclusionary Rule

In *State v. Baird*, 763 P.2d 1214 (Utah App. 1988), the Court held that the 165 pounds of marijuana should have been suppressed. An officer, who was unaware of Arizona's color scheme for determining license plate sticker validity, lacked reasonable suspicion to make an investigative stop where the officer later testified that he stopped the vehicle because "something just struck me funny about" the sticker. *Id.*

Lack of reasonable and articulable suspicion for the initial stop precluded consideration of the after-acquired evidence in justifying the stop. *Baird*, at 1215. "The State attempted to justify the stop by the after-discovered evidence of new tires and shocks, a twisted-off gas cap, the jack in the back seat, the defendant's confusion about ownership of the car and the smell of marijuana." *Id.* at 1217. The Court held that "while this may have justified a further inquiry of the driver after a valid stop, such articulable suspicion must be present at the time of the stop and must be the reason for the stop." *Id.* The Court further observed that the "evidence used to convict the defendant was derived by exploitation of the impermissible stop." *Id.*

Conclusion

This paper examines investigatory stop decisions both from the Utah Supreme Court and the Utah Court of Appeals. It is essential to note that critical issues addressed by the Utah Court of Appeals have not yet been addressed by the Utah Supreme Court. Two issues come to mind. The Utah Supreme Court has neither discussed nor adopted the hypothetical reasonable officer standard. Secondly, the Utah Supreme Court has not ruled that a consent purges the taint of an illegal stop. Practitioners must thoroughly read the frequent opinions in this developing area, must be cautious and must carefully follow a case, particularly if a writ of certiorari is granted. The conclusions reached in this paper need to be assessed in this light.

Because of the acknowledged rising tide of illegal drugs in this nation,[22] we may expect Utah's appellate courts to continue to be very active in this field. They will yet address issues such as the limitation on duration of detention in connection with a stop, the consequences of delayed arrests, limitations on the scope of the stop and the application of a drug courier profile in light of the Court's recent decision in *Sokolow*. While we may continue to expect general guidance from Utah's appellate courts, it cannot be overemphasized that decisions are fact intensive and are based upon a "totality of the circumstances."

"Utah's appellate courts, like the practicing Bar, struggle with definitions, distinctions, inconsistent federal analyses, cloudy theories and imponderable complex interpretations . . . ."

We may conclude that investigatory stops must be executed with a dedicated awareness of state and federal constitutional requirements. But it is illusory to expect concrete rules and formulae in Fourth Amendment cases. Utah's appellate courts, like the practicing Bar, struggle with definitions, distinctions, inconsistent federal analyses, cloudy theories and imponderably complex interpretations in the field of Fourth Amendment jurisprudence. It may always be an area of uncertainty.

[1] The Utah Supreme Court recognized this conflict in *State v. Lopes*, 552 P.2d 120, 122 (1976); *State v. Folkes*, 565 P.2d 1125, 1127 (1977); *State v. Wittenback*, 621 P.2d 103 (1980); and *State v. Dorsey*, 731 P.2d 1085 (Utah 1986). The Utah Court of Appeals recognized these competing interests in its first reasonable suspicion case, *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987).

[2] *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Scott v. United States*, 436 U.S. 128 (1978); *Brown v. Texas*, 443 U.S. 47 (1979); *United States v. Cortez*, 449 U.S. 411 (1981); *Michigan v. Summers, United States v. Hensley*, 469 U.S. 221 (1985).

[3] *United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Rover*, 460 U.S. 491 (1983); *Florida v. Rodriquez*, 469 U.S. 1 (1984); *United States v. Sokolow*, 109 S.Ct. 1581 (1989).

[4] From March 1985 through August 15, 1989, the Utah Supreme Court decided seven investigative stop cases. From June 1987 through June 1989, the Utah Court of Appeals decided nine such cases. Several cases involve overlapping issues.

[5] Here is a chronological review of the Utah Supreme Court and Utah Court of Appeals cases discussing "reasonable suspicion" standards in conjunction with an investigative stop or search:

State v. Gibson, 665 P.2d 1302 (Utah 1983). Police stopped defendant based upon the belief that his driver's license had been revoked. The officer had previously arrested defendant for DUI and knew his license status. The Court held that officer had reasonable suspicion that the license was still revoked. Conviction affirmed.

State v. Swanigan, 699 P.2d 718 (Utah 1985). Description of two men seen in area by another officer two hours previously was insufficient to give officer reasonable suspicion to stop two men walking at 1:40 a.m. three blocks from burglary. The investigatory stop was improper and the evidence seized was not admissible at burglary trial. Conviction reversed.

State v. Carpena, 714 P.2d 675 (Utah 1986). Officer lacked reasonable suspicion to stop vehicle with out-of-state plates moving slowly at 3:00 a.m. through neighborhood where rash of burglaries had recently occurred. The Court upheld the trial court's ruling suppressing the evidence.

State v. Dorsey, 731 P.2d 1085 (Utah 1986). The facts are complex and reader is referred to text. The majority held that there was probable cause for officer's stop and search of the vehicle. Drug charge affirmed.

Dorsey is included herein because Justice Zimmerman's concurring opinion challenges the applicability of the probable cause standard, substituting an investigative stop standard in its place. Justice Zimmerman concluded that the search was lawful as incident to a *Terry* stop, and the reasoning is important to any practitioner attempting to understand the application of an investigative *Terry* stop standard in Utah.

State v. Constantino, 732 P.2d 125 (Utah 1979). Officer had reasonable suspicion to stop auto because officer knew of revoked license and outstanding arrest warrant. Conviction affirmed.

State v. Deitman, 739 P.2d 616 (Utah 1987). Police responded to burglar alarm at video shop. Upon arriving, officers observed a vehicle leaving the area. One followed the vehicle to a residence and waited for occupants to exit it. He called to them and asked if he could speak to them. They crossed the street and presented identification upon request. Neither defendant was arrested. The officer returned to the shop, determined that a VCR was missing and returned to the residence. Defendants agreed to talk to him and allowed him to look in the vehicle. Officer observed a black rectangular object and arrested defendants.

An officer may approach citizen at any time and ask questions so long as the citizen is not detained against his will. In this case, citizens willingly talked to officers; therefore trial court did not err in refusing to suppress evidence. (The court also outlined two other constitutionally permissible police encounters: (1) an officer may seize a person if he has an articulable suspicion that the person has or is about to commit a crime; the detention must be temporary and last no longer than necessary to effectuate the purpose of the stop; (2) an officer may arrest a suspect if he has probable cause to believe an offense has been or is being committed.) The Utah Supreme Court relied on *United States v. Merritt*, 736 F.2d 223 (5th Cir. 1984).

State v. Trujillo, 739 P.2d 85 (Utah App. 1987). Officer detained trio of pedestrians who admittedly had not violated any traffic ordinances or engaged in any criminal behavior. Officer based his initial detention upon four factors: (1) it was a high-crime area; (2) lateness of the hour; (3) apparent nervous conduct of trio; and (4) "suspicious" nylon knapsack Trujillo carried. Officer testified that his search of Trujillo, on whom a knife was discovered (forming the basis of the felony charge), was based upon "intuition."

Officer's seizure and subsequent search of Trujillo violated Fourth Amendment. Knife should have been suppressed. No reasonable suspicion found; conviction reversed.

State v. Mendoza, 748 P.2d 181 (Utah 1987). Police stopped car on I-15 south of St. George, Utah based on: (1) apparent Latin descent of occupants; (2) route of travel; (3) time of day (4:50 a.m.); (4) time of year (March); (5) California license plates; (6) erratic driving pattern with police car tailing two to six feet behind; (7) nervous behavior of occupants.

Court held that officers did not have reasonable suspicion that defendants were engaged in illegal activity. Therefore, trial court's finding that the stop violated defendant's Fourth Amendment rights was not clearly erroneous. Suppression of the evidence affirmed.

Court further held the Utah Fourth Amendment Act, which purported to create a "good faith" exception to such searches, unconstitutional. A good faith exception to the exclusionary rule can never apply to an investigatory stop and search in that, if no reasonable suspicion exists to justify the investigatory stop, the officer's conduct was not reasonable within the meaning of the exception and, in any event, the exception cannot operate where there is no outside authority on which the officer reasonably relied.

State v. Sierra, 754 P.2d 972 (Utah App. 1988). Sierra, driving northbound on I-15 in vehicle with New York plates, was stopped for minor traffic violation because of his "suspicious nature" and his failure to make eye contact with officer. A search of auto revealed drugs. Court found officer did not have reasonable suspicion to stop Sierra. Reversed and remanded.

Court announced a "hypothetical reasonable officer" standard; if a hypothetical reasonable officer would not have stopped the driver for the cited traffic offense and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional.

State v. Aquilar, 758 P.2d 457 (Utah App. 1988). *Aquilar* involved an investigatory stop on I-15 where written consent to search van was obtained. A search revealed 383 pounds of marijuana. In light of *Sierra*, the initial stop was suspect, but Court declined to address whether the stop was a violation of Aquilar's Fourth Amendment rights, finding that voluntary consent to search purged the taint of any illegality. Conviction affirmed.

State v. Sery, 758 P.2d 935 (Utah App. 1988). Sery arrived at the Salt Lake International Airport carrying a blue suitcase with brown trim; there was nothing unusual about his appearance or attire. After what appears to be normal activity in an airport, he was detained by three officers, questioned and released. He was later detained again outside the terminal, taken back inside and, based upon a canine drug sniff of his luggage, arrested.

Seven facts were enumerated by respondent in support of the reasonableness of officer's suspicion. Sery (1) arrived from Florida; (2) waited a few minutes at the gate and looked nervously in direction of officers; (3) went to telephone booth and twice stood up and looked in direction of officers; (4) took strange route from phone booth area back to concourse; (5) possessed plane ticket on which he claimed his name had been inaccurately recorded; (6) told officer he had no identification on him; and (7) left a telephone number with airline reservationist that had been changed to an unpublished number.

Court found that the facts relied upon by officer did not support a reasonable suspicion that Sery was engaged in criminal activity. Because the seizure of Sery and his bag for the canine drug sniff violated his Fourth Amendment rights, the evidence found in the search of his bag should have been suppressed. Conviction reversed and case remanded.

State v. Baumgaertel, 762 P.2d 2 (Utah App. 1988). Deputy based his decision to follow defendant's pickup truck upon his observation that he had not seen this particular truck when he had inspected Ernie's Automotive parking lot just 15 minutes earlier, and that there was no legitimate reason for truck to be there, since Ernie's had been closed for over eight hours. This observation elevated the deputy's decision to follow the truck from a mere hunch to a fact sufficient for deputy to conclude that occupants may have been engaged in criminal activity. Conviction affirmed.

State v. Baird, 763 P.2d 1214 (Utah App. 1988). Defendant's conviction for possession of 165 pounds of marijuana found in trunk of car he was driving reversed because officer stopped car on a hunch; "something just struck [him] funny" about the license plate sticker. State attempted to justify the stop by evidence discovered afterward, including a twisted-off gas cap, defendant's confusion about the ownership of the car and the smell of marijuana. While this may have justified a further inquiry of the driver after a valid stop, more articulate suspicion must be present at the time of the stop and must be the reason for the stop. In this case, no reasonable or articulable suspicion existed to justify the stop. The evidence used to convict defendant was derived by exploitation of the impermissible stop, and it should have been suppressed. Conviction reversed.

State v. Arroyo, 770 P.2d 153 (Utah App. 1989). Judgment for defendant based on ruling that officer's stop was a pretext was reversed because a search conducted pursuant to voluntary consent purges the taint from the prior illegality. State bears burden of proving that consent was voluntarily given. Defendant freely admitted that his consent to search was voluntary before the trial judge, but denied it on appeal. However, defendant's consent had been established and purged the taint of the illegal stop, thereby making admissible the kilogram of cocaine found inside the passenger door panel. Conviction affirmed.

State v. Johnson, 771 P.2d 326 (Utah App. 1989). Officer stopped vehicle for faulty brake light. Defendant was passenger. Driver had ID but no registration, and ID did not match name of registered owner obtained through dispatch. Officer requested identification from passenger, reasoning that vehicle may be stolen. Officer ran a license check on driver and passenger and determined driver was driving on suspension and passenger had several warrants. Incident to the arrest, a backpack belonging to defendant was searched and was found to contain amphetamines, drug paraphernalia and defendant's Utah identification. Court held that nominal allusions to the Utah Constitution at trial were insufficient to preserve issue on appeal. Court further held that there was reasonable suspicion to support the seizure in that the car could have been stolen and defendant was not detained for an unreasonable period of time. Conviction affirmed.

State v. Holmes, 774 P.2d 506 (Utah App. 1989). Defendant was passenger in vehicle which was stopped by two plainclothes officers. Defendant was observed standing on a sidewalk talking to male driver of pickup truck. Defendant strolled on street, conversed with other male drivers and got into a vehicle after conversing briefly with driver. Officers suspected a "prostitution deal" and followed the vehicle. After observing a "somewhat evasive" driving pattern, officers stopped the vehicle. One officer approached driver, and other officer watched passenger. Officer testified as to "furtive gestures" of defendant, observed her take something from her purse and stuff it down between the car seat and console. Officer demanded the material and finally reached in and obtained it. Inside he discovered syringes containing cocaine. Court found reasonable and articulable suspicion to support the stopping of the vehicle, but found the search illegal. Defendant's conviction for attempted possession of a controlled substance reversed and case remanded.

State v. Schlosser, 108 Utah Adv. Rep. 38 (1989). Defendant was passenger in vehicle stopped for speeding. Officer witnessed passenger bending forward in vehicle, acting fidgety, turning to left and right, and turning back to look at officer. Upon stopping vehicle, driver exited with valid driver's license and vehicle registration. Defendant's behavior led officer to conclude that he was trying to hide something. Officer asked Schlosser for identification as a pretense for trying to determine what he may have been hiding. Officer opened truck door, scanning interior for contraband, and saw a bag of marijuana. He also smelled marijuana smoke. Court found no reasonable articulable suspicion to support the search. Court also found that the opening of the door by officer exceeded the legitimate objectives of the traffic stop. The "furtive movements" of passenger did not give rise to an articulable suspicion suggesting criminal activity. Court affirmed trial court's suppression of the evidence, finding neither reasonable suspicion nor probable cause to support the search.

[6] It is the observation of this author, though not yet empirically supported, that the acquittal rate in investigatory stop cases is significantly higher than in other appellate criminal decision areas.

[7] *See, e.g., State v. Earl*, 716 P.2d 803 (Utah 1986); *State v. Bishop*, 717 P.2d 261 (Utah 1986) (Durham, J., concurring on Utah Constitution, Articles I and V grounds); *State v. Mendoza*, 748 P.2d 181 (Utah 1987) (Zimmerman, J., concurring); *State Farm Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987) (Durham, J., dissenting); *State v. Hygh*, 711 P.2d 264, 281-73 (Utah 1985) (Zimmerman, J., concurring); *American Fork City v. Cosgrove*, 701 P.2d 1069 (Utah 1985) (Durham, J., for the majority, relies upon the Utah Constitution's self-incrimination provision, Articles I and XII; Zimmerman, J., concurring, suggests an Article I, Section 14 analysis).

[8] *State v. Hygh*, 711 P.2d 264, 273 (Utah 1985).

[9] 716 P.2d 803 (Utah 1986).

[10] *Id.* at 806.

[11] *Id.*

[12] 711 P.2d 264 (Utah 1985).

[13] *Id.* at 272.

[14] The Court outlined various, non-exclusive, analytical approaches including: 1) the use of fundamentally historical materials including legislative history; 2) the textual approach (construction of the language); 3) a sibling-state approach—comparing what other states with identical or similar constitutional clauses have done; 4) the use of economic and sociological materials in constitutional litigation. The Court offered other guidelines and reference materials and the reader is referred to the text.

For additional information *see* Note, *The Utah Supreme Court and the Utah State Constitution*, 1986 Utah L. Rev. 319 and Davis & Wallentine, *A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah*, 3 BYU J. of Pub. L. (1989).

[15] LaFave, *Search and Seizure: The Course of True Law has not . . . Run Smooth*, 1966 U. Ill. L. F. 255 (1966).

[16] Note, *The Limits of an Investigatory Stop on Grounds Less Than Probable Cause of Individuals Who Display the Characteristics of a Drug Courier Profile, Florida v. Royer*, 1984 Howard L. Rev. 345.

[17] Representative cases where Utah's justices and judges have been sharply divided include *State v. Schlosser*, at 42; *Dorsey*, at 1090; *Sery*, at 950; *State v. Johnson*, at 329.

[18] One legal commentator concludes after his review of recent drug courier profile cases, *Mendenhall, Reid* and *Royer*, that "nervousness," as a highly particularized yet plain and subjective factor, plays an important part in establishing reasonable suspicion. He suggests that the "use of the profile was upheld in *Mendenhall* and *Royer*, and the only characteristic found in those cases but not in Reid was 'nervousness.' " Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye*, 65 N.C. L. Rev. 458 (1987).

[19] *State v. Holmes*, 774 P.2d at 509; *see also State v. Folkes*, 565 P.2d 1125, 1127 (Utah 1977), cert. denied, 434 U.S. 971 (1977); *Brignoni-Ponce*, 442 U.S. at 885; *Brown*, 443 U.S. at 52 n.2; *State v. Baumgaertel*, 762 P.2d 2,4 (Utah App. 1988).

[20] The state cases all rely upon *State v. Holmes*, 256 So. 2d 32, which held that a traffic violator is not immune from the seizure of evidence of a more serious crime "provided that the gravity of the traffic offense is such that any citizen would routinely be stopped for it if seen comitting the offense by a traffic officer on routine patrol." *Holmes*, at 34; *Blair* at 263; *Urquhart*, at 536; *Diggs*, at 816. At least these courts identify the reasonable officer as a "traffic officer on routine patrol."

[21] *See* note 19.

[22] President Ronald Reagan declared "war on drugs" in October 1982. *See New York Times*, Oct. 3, 1982, section A, at 38, col. 1; *New York Times*, Oct. 15, 1982, section A, at 1, col. 2. It is interesting to note that 11 of the 15 investigatory stop cases examined in this paper are drug related.

Negligent Hiring: The Dual Sting of Pre-Employment Investigation

By Kenneth R. Wallentine

I. INTRODUCTION

Over the past decade, tort attorneys have found a new tool to pry away the barrier posed by master and servant liability actions.[1] The hurdle of the tortious act being within the scope of the employment may be overcome in some cases by pleading negligent hiring or negligent retention[2] of the tortfeasor. Intentional torts, such as assaults, sexual abuse and theft, are generally found to be outside of the scope of any employment relation. Thus, the doctrine of respondeat superior is not available. For this reason, the majority of negligent hiring suits have resulted from an employee's criminal action or automobile accidents, where the victims seek to reach the insurance policies of the fleet owner or the driver's employer. This, in turn, presents scenarios of victims deserving of the jury's sympathy and often leads to large damage awards.[3] Unfortunately for the practitioner, the paucity of negligent hiring cases dwindles to a true dearth when searching for case law with meaningful analysis of the extent of the investigatory duty. Thus, the employer is faced with uncertainty as she seeks to establish a basis for the hiring selection.

A further frustration for employers and attorneys who advise employers is the severely limited reference that prior employers are willing to offer in response to pre-employment inquiry. Former employers, in fear of state and federal privacy laws, common law defamation actions and Equal Opportunity Employment Commission guidelines, shrink at the thought of doing more than confirming dates of employment. An added concern is the growing body of statutory law limiting the scope of pre-employment inquiry and the bases for which an applicant may be denied work.[4] Therefore, the cautious employer, seeking to hire only competent workers, may be barred from the very inquiry that would guide a wise choise.

This article examines the elements of a negligent hiring claim. The article explores the scope of the employer's duty to conduct pre-employment inquiries, focusing on the nature of the employment duties as a guiding influence. The countervailing considerations against investigation are presented and, finally, limited counsel is presented for mitigation of the employer's risk in hiring.

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II. ELEMENTS OF NEGLIGENT HIRING

The foundation of the complaint is that the employer knew, or should have known, about the employee's dangerous qualities. Failing that, the duty of the employer to investigate competence and suitability is breached.[5] The root elements of a negligent hiring action include the establishment of a master and servant relationship, a showing of the employee's incompetence and proximate cause between the employee's incompetence and the injury.[6] The tortious act must occur as an incident of the employment, or during the employee's working hours.[7] The employer's duty extends to the public at large where the public is invited onto the business premises.[8] If the employee is required or allowed onto the plaintiff's premises, such as in the case of a maintenance worker, the duty extends to all those whose premises might be entered.[9]

A negligent hiring claim may reach employer liability when the employee is acting completely outside of the employment. There are significant tactical benefits to styling a complaint as an action for negligent hiring. The employee's prior history and temperament will be at issue and evidence which would otherwise be excluded may be introduced on these points. Furthermore, a negligent hiring complaint might obviate difficulties of a short statute of limitations for intentional torts. Finally, the deep pockets of the employer and insurer become available.

III. THE DUTY OF PRE-EMPLOYMENT INVESTIGATION

A. The Scope of the Investigation

i. A High Duty of Investigation for High Risk Positions

No court has established clear parameters of propriety for pre-employment investigation. Notwithstanding, general guidelines may be distilled from a review of the few cases discussing the duty. The level of the duty may be characterized as one of reasonable care.[10] Reasonableness will correspond with the nature of the duties of the employee, with those having security and landlord responsibilities being subject to the most thorough scrutiny.[11] Conversely, workers with little or no public contact may not be subject to any pre-employment inquiry.[12] As a general proposition, no criminal record inquiry is required, except for positions of high trust, where there are likely circumstances for the commission of an intentional tort.[13] Moreover, the knowledge of a criminal record will not constitute negligence per se; it must be shown that the conviction was for a crime that bore a relationship to the risk incurred through the claimed negligent hiring.[14]

Two million dollars in damages were sought in *Cramer v. Housing Opportunities Commission*,[15] where the plaintiff was raped by a housing inspector. Slater, the inspector, conducted an inspection of Cramer's townhouse, with Cramer present. During the inspection he asked about the number of occupants of the unit, a question not authorized by the Commission's guidelines. Slater returned later that evening and raped Cramer. Slater did not use a passkey although he had access to them. He likely entered through a window commonly left open for ventilation. Slater was hired

through a CETA employment program. At the time he was hired, he was on parole. His previous convictions included robbery, assault and burglary. Just prior to his hiring, he was indicted for rape and other related crimes. The trial judge ruled that there was no causal connection between the Commission's negligence and the rape.

On appeal, the Maryland Supreme Court held that the evidence of prior criminal convictions and the availability of this information to the Commission should have been allowed at trial. Contesting that it had been negligent, the Commission argued that it relied on the investigation conducted by the CETA program. It was shown, however, that this investigation was limited to eligibility factors. The Commission did concede that its duty of investigation was not delegable.[16] The Court also held that Cramer would be able to introduce evidence showing that the Commission failed to contact any of the three references given by Slater, and that least one of the references knew of Slater's criminal record. Also admissible would be evidence showing the relative ease with which the Commission could have obtained a full criminal history. The Court said that there may well be a duty to conduct a criminal record investigation in the hiring for a position of trust, such as a police officer.[17] Notwithstanding, the Court did not go so far as to hold that the Commission is obligated to conduct a criminal record inquiry for a housing inspector. Items such as cost, difficulty of obtaining records, other and indicia of competence, were among factors the Court said should be considered in determining if a criminal record check should be made.[18]

A criminal history inquiry was found appropriate in *Estate of Arrington v. Fields*.[19] Fields entered a convenience store at which Arrington was working as an armed security guard. Arrington accused Fields of shoplifting and searched him. Fields had no stolen items and was released. Arrington followed Fields into the parking lot where a scuffle ensued and Fields was shot in the lower groin. At trial, evidence was introduced showing Arrington's seven prior convictions and four penal commitments, the most recent of which was 13 years prior to Arrington's hiring. Executive Security Systems, Arrington's employer, claimed that the conviction information was not available, and in any event, the events were too remote in time to be relevant. The Court disagreed on both counts. Arrington had truthfully responded to an application question concerning prior criminal history. Executive Security Systems failed to ask Arrington about his convictions. Furthermore, the conviction information was readily available through the state security guard licensing agency.[20] The Court did not view the time gap as being relevant, showing that perhaps any prior conviction which is germane to the incident leading to a negligent hiring action may be considered by the Court.

The Rhode Island Supreme Court has stated that the mere lack of negative criminal information may not be sufficient when a particularly sensitive employment position is concerned. In *Welsh Manufacturing v. Pinkerton's Inc.*,[21] a security guard stole $300,000 in gold. Pinkerton's had requested police records for the guard. However, it did not contact the character references supplied by the guard on his application. Moreover, while previous employers were contacted, and were apparently willing to discuss the guard's employment record, Pinkerton's did not *specifically inquire as to honesty*, a pertinent quality for a security guard. The Court termed Pinkerton's investigation "cursory," in light of these defects.[22]

"Particularly sensitive occupational categories may require a fairly inclusive investigation."

These cases strongly suggest that particularly sensitive occupational categories may require a fairly inclusive investigation. It does not appear, however, that outside of the limited category of security and police employment a criminal record check will be necessary. In one of the most often-cited negligent hiring decisions, *Ponticas v. K.M.S. Investments*,[23] the Court stressed that a criminal record check was not required in normal hiring situations, even where an apartment manager with passkey access was being hired.[24] The Court stated that if other factors, such as references and employment history, were indicative of suitability, then no resort to criminal records need be made.

Stephanie Ponticas was sexually assaulted by the resident manager of her apartment complex. He used a passkey to gain entry to the apartment. Dennis Graffice, the manager, had been hired after an interview and a credit check. He had served time in prison for receiving stolen property, armed robbery and burglary. His application listed significant gaps in his employment history, and showed that he received a discharge from the Army after only 14 months. A simple reference check would have revealed that the persons listed as character references were Graffice's mother and sister.[25]

The Court was faced with the issue of whether this evidence could have led a reasonable jury to conclude that a further check, including a criminal records check, would be appropriate. The Court considered that the manager's position gave Graffice full access to the apartments and distinguished the level of trust, and accompanying threat, from that of a yard worker.[26] An earlier Washington, D.C., case, *Kendall v. Gore Properties*,[27] involved similar facts and was cited as support for a higher level of investigation warranted for those with residential access. The Court determined that the jury could have easily decided that the higher duty, coupled with the gaps reflected on the employmet application, would lead to a duty of criminal record investigation.[28]

Another line of cases where a duty of criminal record investigation is suggested concerns tavern workers. In *Valdez v. Warner*,[29] a bar worker's car was struck in a parking lot accident. When the worker heard that his car had been hit, he rushed outside to the parking lot and argued with the driver of the other car, who had not been a bar patron. When the driver tried to leave the parking lot, the worker assaulted him. The employer had notice of the worker's violent proclivities and excessive drinking. The worker had previously beaten the tavern owner's son and had been involved in many altercations while working as a bouncer in the same bar.[30] These facts, without any reference to a pre-employment investigation, adequately supported the jury's verdict of negligence. Notwithstanding, the Court went ahead to say that where the worker is in contact with the public in an argumentative atmosphere, there is a duty of reasonable inquiry into fitness.

The Massachusetts Court of Appeals recently affirmed a jury verdict in which it was inferred that a bar was a volatile atmosphere and held a high potential for violent altercations.[31] In *Foster v. Loft, Inc.*,[32] the jury found that the bar's owner made no attempt to investigate the bartender's background or even require a written application form. Not only had no inquiry been made, but an off-duty police officer, working as a bouncer, had advised the owner to check on the record of the bartender. The bartender's record included violent crimes. Indeed, the court found that the owner knew of the bartender's criminal record, although it is not clear that the owner was aware of the

violent nature of the offenses.[33]

The *Foster* court was cautious to stress that mere existence of a criminal record will not bar an applicant from employment. Rather, it is the nature of the criminal record that is critical to the analysis.[34] The Court stressed the public policy interest of rehabilitating those convicted of crimes.[35] Furthermore, the employer was not held to a duty of criminal record investigation in all employment classifications, even where the employee regularly deals with the public.[36]

Consistent with *Valdez* and *Foster*, the Maryland Court of Appeals has ruled that a criminal record investigation is not required where the employer had no reason to suspect that the applicant is potentially dangerous. In *Evans v. Morsell,*[37] Jessie Hopkins, a bartender, shot Evans, a patron in the bar, with a shotgun. Hopkins had a past record of violent assaults. This fact was not known to the bar owner, and he made no inquiry into Hopkins' criminal record.[38] The Court said that it would not require a criminal record check, relying on the policy consideration of rehabilitation as well as the difficulty in obtaining criminal records. Moreover, the Court was concerned with the potential burden on employers and applicants if production of criminal records was made a condition for employment.[39]

It may also be that common carriers, too, are charged with a higher duty of investigation, perhaps even to the point of a criminal records check. In *Burch v. A & G Associates,*[40] a taxicab company was held to a higher standard of care. The Checker Cab driver followed his passenger from the cab and beat him with a tire iron. He removed the passenger's pants, containing his wallet. In discussing the higher duty of investigation, the Court stated that the "standard may involve a requirement that the carriers investigate prospective employees to determine whether they are dangerous."[41] The Court remanded to the trial court to determine if Checker should have known about the cabby's dangerous tendencies.[42]

It is reasonable, based on the cases cited above, to conclude that a court will find a duty of criminal records investigation where there is a high degree of entrustment of property and public safety. However, when other factors lead to a "squeaky-clean" view of the applicant, it may be that the employer is relieved of any duty to inquire about criminal records. This view is supported by repeated warnings of courts that they are not finding a general duty to investigate criminal records; their holdings are limited to facts similar to those litigated.[43] Conversely, it appears that a minimum verification of references and prior employment is required.[44]

Contrasted with the cases where the high degree of public contact or positions of trust and security are those in which the employee works alone or there is a low probability of injury inherent in the position. Even where there is a high frequency of customer contact, the higher duty of investigation may not apply if the contact is limited in scope and duration.[45] These classifications may include maintenance workers (without residential unit access), delivery persons, yard workers, gas station attendants and others. This group is limited by the proximate cause element of a negligent hiring tort. Since it is necessary to show that the employer's negligence is the proximate cause of the tortious act, the link between the negligence and the act becomes critical.[46] This link is likely to be attenuated where the employee is not hired to be in contact with the public or to be in a position of risk.

The question of requiring an employer to conduct a criminal record investigation for a salesperson was squarely confronted in *Stevens v. Lankard.*[47] A 13-year-old boy was taken by his mother to a sporting goods store to purchase football uniform items. In the fitting room, the salesclerk forcibly sodomized the boy. The clerk had a criminal conviction record of a prior sodomy offense. The Court found that the employer would not have discovered the prior conviction in the course of the background check normally performed for persons seeking such a position. The Court was unwilling to apply a higher standard of care to the employer, reasoning that a greater scrutiny of applicants for clerk positions would result in little benefit, while encumbering the employer with a greater financial burden.[48]

> "Contrasted with the cases where the high degree of public in trust and security are those in which the employee works alone or there is a law probability of injury . . . ."

Gas station attendants have frequent public contact, although such contact is brief, and generally non-confrontational. In *Tyus v. Booth,*[49] the Court described the duty of a service station owner as one to use reasonable care to not expose employees with known violent tendencies to the public.[50] While it is not apparent what steps were taken in reviewing the employee's application, the court said that the employer is not required to "conduct an in-depth background investigation" of the applicant.[51] It would seem, from the lack of evidence on the record, that no more than a cursory check was conducted. Had there been a further investigation, counsel for the defendant employer would have likely defended on that basis.

At least one Court has held that mere knowledge of a criminal record will not give rise to a heightened duty of investigation for a gas station attendant. A young man requested cigarettes from a gas station attendant, who threw them to the youth. The customer responded in kind, throwing the money at the attendant. When the attendant demanded that the customer pick up the money, he did so, and the attendant shot him as he bent to pick up the fallen coins.[52] The station manager hired the attendant, knowing that he was currently on parole from the state penitentiary, although not knowing or inquiring into the conviction leading to his commitment. The Court said that the manager had no reason to know of the violent nature of the worker. The Court did not specifically mention the duty to investigate, although it is evident that it was not concerned by the lack of investigation, despite the knowledge that the employee was on parole.[53]

Analogous to the case of a gas station attendant is that of the residential doorman, whose principal duty is to greet the public, albeit for brief moments. In *Kassman v. Busfield Enterprises, Inc.,*[54] a doorman was enlisted to aid in pursuit of a patron fleeing a tavern altercation. The doorman shot the patron, believing that he was an armed robber. The employer did not know that the doorman carried a gun, and had not authorized him to do so. The plaintiff alleged that the employer was negligent in not investigating the doorman's past criminal record. The court found that the background check had been reasonable for the position of doorman. Once again, the record is sparse in telling the reader what precise steps were taken in the pre-employment check, although it appears to have been a routine employment history and reference check.[55] The court cited and distinguished *Estate of Arrington v. Fields,*[56] stating that the category of an armed guard and an unarmed doorman were quite distinct and different. The court found that the degree of inquiry was appropriate to a position where the employee was not authorized to carry weapons or whose duties did not present a risk of harm to others.[57]

Even where some degree of harm is risked through the employment, the Court

may impose only a duty of reference and employment history checks. In *Wilson N. Jones Memorial Hospital v. Davis,*[58] a nurse improperly removed a catheter. The hospital had not checked references, although some prior employment was confirmed. However, in speaking with the prior employer, inquiries concerning reasons for termination, job skills, or eligibility for rehire were purposely not answered. The court found that this should have put the hospital on notice to further investigate references. It seems that the Court was concerned by the failure of the hospital personnel officer to follow established procedure of checking four employment and three personal references. Had the hospital checked with the U.S. Navy, where the employee claimed to have received medical training, it would have discovered that the employee had been discharged from the medical orderly training program and had a serious drug problem.[59] Although the claim was not fashioned as a negligent hiring action, the Court found that failure to follow the normal procedure constituted gross negligence.

ii. The Vehicle Cases

Outside of intentional torts, the most common claim styled as a negligent hiring action involves automobile accidents. Such suits are often brought under a variety of theories, including negligent entrustment and respondeat superior.[60] The single connection to a negligent hiring theory is the duty of investigation of the employee's previous driving record, and hence suitability for employment as a driver. It may, as a practical matter, be simpler for counsel to demonstrate that the offending employee had a poor driving record, than to prove that the accident occurred in the scope of the employment relationship.[61] It appears that failure to discover the poor driving record may rise to the level of negligence per se. Furthermore, one element of the negligent hiring claim, proximate cause, is easily fulfilled in the case of a poor driver injuring a party by way of an automobile accident, assuming that some portion of fault lies with the employee. Indeed, the case is rare where a sole party in an auto accident bears the full burden of blame.

A series of Texas cases shows that failure to uncover poor driving records will, with virtual certainty, impute gross negligence to the employer.[62] While these cases were not brought as complaints of negligent hiring, the facts pleaded would support a claim of negligent hiring. Texas has recognized the tort of negligent hiring; it was one of the first states to do so.[63] In the first case, *Montgomery Ward & Co. v. Marvin Riggs Co.,*[64] the defendant hired a driver with a record of four serious moving traffic violations.[65] Furthermore, the driver did not pass the commercial driving examination until after his hiring date. At the time he was hired, his regular license had just been suspended. The company employee assigned to train the driver in driving large trucks said that the driver lacked visual and aural perceptive abilities and could not handle stressful traffic.[66] In an ironic twist, the employer did check the driver's criminal record with the local police department, neglecting, however, to check the driving record. The Court held that failure to request the driving record, which was readily accessible, was grossly negligent.[67] While the Court did not mention it, Texas has a state statute requiring that commercial drivers' records be checked through the Department of Public Safety, prior to any employment as a truck driver.[68] This could, arguably, support a finding of negligence per se in Texas when a driving record is not checked prior to employment.

"An employee not subjected to a pre-employment investigation of the appropriate degree may be a Damoclean sword. . . ."

A subsequent case suggests that employers may have a continuing duty of inquiry into employees' driving records. Jimmy Westor was hired as a log transport driver for Go, International at the age of 18, a violation of federal law requiring logging truck drivers to be 21 years old.[69] He turned his logging rig in front of a motorcyclist, striking and instantly killing the biker and his wife. Prior to this accident, Westor had received six speeding tickets and had been at fault in two accidents. Westor had been retained due to his father holding a position of influence.[70] The court found that even though some of the violations occurred after Westor was hired, the employer was negligent in hiring and retaining him as a driver of heavy trucks.

IV. CONSTRAINTS ON PRE-EMPLOYMENT INVESTIGATIONS

The preceding cases have shown that an employee not subjected to a pre-employment investigation of the appropriate degree may be a Damoclean sword, awaiting an accident or loss of temper to fall from its uncertain perch. Notwishstanding, conscientious employers who endeavor to hire only the competent may find their efforts shackled by unwieldy state and federal employment laws, as well as practical considerations.

A. Statutory Limitations

In *Guillermo v. Brennan,*[71] parents of a young girl who was struck and killed by a drunk driver brought suit against the employer, the tavern at which the driver had been drinking[72] and the driver. The driver was driving a business truck at the time of the accident. Prior to hiring the driver, the employer conducted no investigation, other than to view the driver's state driver's license. Even a cursory investigation would have revealed that his driver's license had been suspended for over seven years due to reckless and drunk driving charges, his three most recent jobs had not been held for more than a few months each, and that he had multiple felony convictions.[73]

At this juncture, in light of the cases described above, one would reasonably conclude that the duty of investigation was violated, and that the failure to investigate was a proximate cause of the girl's death. However, the defendant-employer was able to summon a Wisconsin statute to his aid. Wisconsin has prohibited employers from basing an employment decision on an arrest or conviction record, except where the employer can show that the circumstances of the arrest or conviction substantially relate to the job under consideration.[74] The Court found that the employer was clearly justified in not inquiring about the driver's criminal record.[75] Furthermore, the Court found that the plaintiffs had failed to prove that the employer would have known the reason for which the driver's license had been suspended.[76]

New York has a comprehensive Human Rights Law[77] which restricts employers from denying employment based on an applicant's prior conviction record. Employers may not ask about arrests or other criminal actions that did not lead to conviction.[78] Nor may employers use a criminal conviction to support a finding of poor moral character.[79]

Employment applicants with criminal records are given even further protection under the correctional code. Sect. 753 provides, in part, that "[t]he public policy of [New York is]. . .to encourage the. . .employment of persons previously convicted of one or more criminal offenses."[80] The employer must consider the bearing of the previous criminal conduct

on the job duties, the proximity in time of the conviction(s), the age of the applicant at the time of the criminal act, the gravity of the offense, and any and all mitigating claims *made by the applicant* which may tend to show rehabilitation.[81] If the employer considers all these factors and does not hire the applicant, the applicant has the right to demand a written statement of reasons for denial of employment.[82]

Finally, there is a legal presumption that the convicted applicant has been rehabilitated if the applicant has a certificate of good behavior from the prison he attended, or a certificate of relief from disability (i.e., certification of sanity for a murderer who successfully advanced an insanity defense).[83] Nonetheless, the correctional code does allow consideration of criminal convictions where there is a *direct* connection between the job classification and the criminal convictions.[84] Thus, while an apartment manager applicant might be denied employment on the grounds that she had a burglary conviction, she could not be denied employment as a day care worker.

From a labor perspective, the first reading of this type of statute conjures the image of a people committed to fairness and of enlightened views of justice. It may also be that if employers were allowed to refuse employment on the basis of convictions, certain racial minorities would be de facto excluded from employment. However, sheer logic must inescapably lead one to conclude that the provisions of the correctional code and executive code are so protective to criminal convicts that employers will circumvent them, just as has often been the case in gender and racial discrimination. What employer is willing to commit to paper that an applicant was denied employment as a hot dog stand vendor on the grounds of his bad check convictions? Obviously, this broad statutory scheme endows the employer with tremendous defenses to a claim of negligent hiring. While no case law was found where the New York law was raised as a defense, an employer may plead, as in *Guillermo,*[85] that the state law made criminal record investigation impracticable and unnecessary.

The majority of the states, including Utah, do not have laws as restrictive as New York's.[86] Our western neighbor, California, does offer some protection against use of criminal records in pre-employment screening. Employers are prohibited from inquiring about arrests, any non-conviction criminal action or pre-trial and post-trial diversion participation.[87] On an unusual note, employers may not seek this information from any other source. If arrest information is inadvertently acquired, the employer must disregard it in the decision process.[88]

California employers may ask about recent arrests, for which court or prosecutorial resolution is pending. They may also ask if the applicant is on bail, free on her own recognizance or currently under indictment.[89] California has a particularly liberal expungement provision. Persons who successfully complete a diversion program may treat the arrest and conviction as expunged, without any court or agency approval.[90] However, the applicant may consent to having the diversion record used as a discriminatory factor in denying him employment.

After determining what provisions apply under the respective state law provisions, an employer or her attorney must then consider the federal Civil Rights Act, Title VII.[91] The Equal Employment Opportunity Commission has examined federal case law[92] and formulated guidelines to help employers comply with Title VII.[93] If the employer denies employment to a member of a protected class, and the denial is based on a conviction policy or practice, she must show that the decision was motivated by a business necessity. Three factors are to be considered in finding a business necessity. First, the employer must consider the nature and gravity of the offense. Second, the time between the application and the conviction or the release from prison must be considered. However, the policy does not state when it is appropriate to consider the date of conviction rather than the date of release, which certainly will differ greatly. Finally, the position sought must be considered along side of the conviction.

B. Additional Concerns

An employer who seeks information from the applicant may risk a novel tort action, that of compelled self-defamation. While this cause of action is still nascent, a few courts have allowed recovery. In *Lewis v. Equitable Life Ins. Co.,*[94] the Minnesota Supreme Court held that the plaintiffs' forced revelation that they had been fired for gross insubordination was compensable as self-published libel. Most employers now refuse to respond to reference requests as a matter of course, other than to confirm dates of employment. This practice harms both the potential employer and the competent prospective employee. Eventually, the former employer may also be harmed by the innovative attorney defending a claim of negligent hiring, who may seek to join the former employer in the suit. While this author found no such cases, creative counsel may seek contribution on the grounds that a negligent reference was given.

V. TOWARD A REMEDY

One possible solution is to require a release from the applicant. This may overcome some fears of former employers, and cause them to open up. Such a release should be carefully formulated to convince former employers that the employee understands the nature of the release and information sought. It may be best if the release was accompanied by a standardized questionnaire, to which the applicant specifically agrees, prior to distribution to references and former employers.

However, the use of a release is not without potential pitfalls. A cautious employer may find himself as the target of a Title VII[95] employment discrimination lawsuit. If the employer defends on the grounds that he was seeking to hire competent workers, and obtained a release of information to further that end, the release may be void. The

Supreme Court has emphatically stated that "there can be no prospective waiver of an employee's rights under Title VII."[96] Waivers have been used in the context of the Age Discrimination in Employment Act [ADEA][97] and have been voided by the Courts, in furtherance of the public policy to eliminate employment discrimination.[98] Some ADEA rights waivers have been upheld, although under strict standards of knowledge and voluntariness.[99]

Another protection is that of common sense. Even verification of employment can go a long way in shaping an opinion of the prospective stability and suitability of the applicant. Applicants with numerous employment transitions might have difficulty in a number of areas. Significant gaps in employment history may indicate a period of incarceration. A discharge from the armed forces in less than the normal time should always be a concern. The legitimately requested information on the application may tell much, and should always be verified.[100]

Several Utah firms are now using pencil and paper predictive tests.[101] These tests are behavioral surveys, designed to identify undesirable traits and ferret out unsuitable applicants. By resorting to testing, an employer may raise one more defense against negligence in hiring selection. While the cost of purchasing and administering the test may deter most employers, many find it to be a cost-effective venture when measured against the cost of hiring the wrong person for a professional position.[102] However, an employer should be cautious to ensure that the test is authoritatively validated to be free of gender and racial bias, and does not expose the company to a discrimination action.

VI. CONCLUSION

It is clear that a job with a high level of trust, or presenting a risk to the public safety will require pre-employment investigation, including criminal records and driving records in appropriate cases. The employer's interest is broader than protection against a negligent hiring suit. Hiring competent employees promotes retention, public image, and may lead to lower costs through stable insurance rates and unemployment assessments.

This article has not sought to demonstrate that there is a teeter-totter standard of a duty to investigate criminal and driving records, contrasted with no duty at all. As stated, the employer has the duty to exercise reasonable care in hiring her employees. However, the little case law that exists shows that this duty is clearly augmented in certain circumstances. Employers and counsel alike must take note of the trends illustrated herein, and formulate pre-employment screening accordingly.

[1] Over half of the states have established a cause of action for negligent hiring; most have done so in the past 10 years. *See, e.g.*, Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 472 A.2d 531 (1984); Jannsen v. American Hawaii Cruises, Inc., 731 P.2d 163 (Hawaii 1987); Lane v. Central Bank of Alabama, 425 So. 2d 1098 (Ala. 1983); Golden West Broadcasters, Inc. v. Superior Ct. of Riverside County, 114 Cal. App. 3d 947, 171 Cal. Rptr. 95 (1981). Utah is among the states recognizing a cause of action. *See* Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963).

[2] It is recognized that the elements of negligent hiring and negligent retention are very similar. Notwithstanding, it is the intention here to treat only negligent hiring, and the duty of pre-employment investigation. There may well be a duty of continued investigation and monitoring of the employee, but that subject is left for another day.

[3] *See, e.g.*, Henley v. Prince George's County, 305 Md. 320, 503 A.2d 1333 (1986), in which $10 million were sought in damages for wrongful death. The parties settled for $440,000 before trial.

[4] *See infra*, notes 78-91 and accompanying text.

[5] **Restatement (Second) of Agency** Sect. 213 (1958).

[6] *See* Skaggs, Inc. v. Joannides, 372 So. 2d 985 (Fla. App. 1979); Edwards v. Robinson-Humphrey Co., 164 Ga. App. 876, 298 S.E.2d 600 (1983). *See also*, Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 **Or. L. Rev.** 296, 300-01 (1973).

[7] Lear-Seigler, Inc. v. Stegall, 184 Ga. App. 27, 360 S.E.2d 619 (1987).

[8] *See, e.g.*, Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963).

[9] *See, e.g.*, Cramer v. Housing Opportunities Comm., 304 Md. 705, 501 A.2d 35 (1985).

[10] Fleming v. Bronfin, 80 A.2d 915 (D.C. Ct. App. 1951).

[11] *See, e.g.*, Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956); Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Ct. Civ. App. 1979).

[12] Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. App. 1980).

[13] *See generally*, Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. App. 1980); Strauss v. Hotel Conteinental, 610 S.W.2d 109 (Mo. App. 1980); Amendeolara v. Macy's of New York, 19 A.D.2d 702, 241 N.Y.S.2d 39 (1st Dept. 1963); Abraham v. S.E. Onorato Garages, 50 Haw. 628, 446 P.2d 821 (1968).

[14] Gaines v. Monsanto Corp., 655 S.W.2d 568 (Mo. App. 1983).

[15] 304 Md. 705, 501 A.2d 35 (1985).

[16] 501 A.2d at 38. *See also*, Athas v. Hill, 300 Md. 133, 476 A.2d 710 (1984).

[17] 501 A.2d at 40.

[18] *Id.*

[19] 578 S.W.2d 173 (Tex. Civ. App. 1979).

[20] *Id.* at 177-78.

[21] 474 A.2d 436 (R.I. 1984).

[22] *Id.* at 442.

[23] 331 N.W.2d 907 (Minn. 1983).

[24] *Id.* at 913.

[25] *Id.* at 910.

[26] *Id.* at 913.

[27] 236 F.2d 673 (D.D.C. 1956).

[28] *Id.* at 914.

[29] 742 P.2d 517 (N.M. App. 1987).

[30] *Id.* at 520 (the worker's current employment duties are not clear from the record, nonetheless it is apparent that he had been rehired after a period of non-employment).

[31] *See also*, Gregor v. Kleiser, 111 Ill. App. 3d 333, 67 Ill. Dec. 38, 443 N.E.2d 1162 (1982) (host of private drinking party can be held liable for hiring a temporary "bouncer" who had a reputation and vicious propensity for physical violence upon others).

[32] 26 Mass. App. Ct. 289, 526 N.E.2d 1309 (1988).

[33] *Id.*

[34] *Id.* at 1312, n.7.

[35] *Id.* at 1312, n.6.

[36] *Id.* at 1313, n.8.

[37] 395 A.2d 480 (Md. App. 1978).

[38] *Id.* at 482.

[39] *Id.* at 484.

[40] 333 N.W.2d 140 (1983).

[41] *Id.* at 144.

[42] *Id. See generally*, McLeod v. New York, Chicago & St. Louis R.R., 72 A.D. 116, 76 N.Y.S. 347 (1902) (common carriers have absolute duty to protect passengers from torts of employees).

[43] *See, e.g.*, Evans v. Morsell, 395 A.2d 480 (Md. App. 1978); Abraham v. Onorato Garages, 50 Haw. 628, 446 P.2d 821 (1968); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1954).

[44] *See, e.g.*, Pontiacs v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983); Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956).

[45] *See infra*, notes 49-57 and accompanying text.

[46] *See generally*, Edwards v. Robinson-Humphrey Co., 164 Ga. App. 876, 298 S.E.2d 600 (1983); Henley v. Prince George's County, 479 A.2d 1375 (Md. App. 1984) (even where the hiring was negligent, recovery is barred if there is only a speculative but-for causation).

[47] 31 App. Div. 2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).

[48] *Id. See also* Detone v. Bullit Courier Service, Inc., 140 A.D.2d 278, 528 N.Y.S. 575 (1st Dept. 1988) (employer not negligent in re-hiring twice-fired employee where the employee was discharged for reasons other than violent behavior and employer had no reason to suspect violent tendencies).

[49] 235 N.W.2d 69 (Mich. App. 1975).

[50] *Id.* at 71.

[51] *Id.*

[52] Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971).

[53] *Id.* at 518.

[54] 131 Ariz. App. 163, 639 P.2d 353 (1982).

[55] *Id.* at 357.

[56] 578 S.W.2d 173 (Tex. Civ. App. 1979). *See supra*, note 19.

[57] 639 P.2d at 357.

[58] 553 S.W.2d 180 (Tex. Civ. App. 1977).

[59] *Id.* at 181-82.

[60] *See, e.g.*, Lear Siegler, Inc. v. Stegall, 184 Ga. App. 27, 360 S.E.2d 619 (1987); Guillermo v. Brennan, 691 F. Supp. 1151 (N.D. Ill. 1988) (applying Wisconsin law).

[61] It may be, however, that a motor vehicle accident and the resultant damage is not the only danger against which an employer must guard. In Malorney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265, 100 Ill. Dec. 21, 496 N.E.2d 1086 (1986), the trucking line was held liable when the driver raped a hitchhiker in the cab of his company-owned truck. An investigation, either of prior employers or of the driver's criminal record, would have revealed that the driver had been convicted of similar offenses while driving freight trucks for his previous employers.

[62] *See also*, Lear Siegler, Inc. v. Stegall, 184 Ga. App. 27, 360 S.E.2d 619 (1987), where a traveling salesman, who had a record of drunk driving conviction, struck another car while under the influence of alcohol. No liability for negligent hiring was found, however, as the court held that for the employer to be liable, the employee must be "on duty." The salesman was driving from his home to the office, and was found not to be traveling in the course of his employment. This case is important to the law of negligent hiring in Georgia as it directly overruled Hines v. Bell, 104 Ga. App. 76, 120 S.E.2d 892 (1961) (holding that actual knowledge of the employee's dangerous propensities is an essential element of a negligent hiring claim). The court was divided four to three, with the dissent arguing that the employer generally has a duty of inquiry into an applicant's past, but only when a danger is presented to the public by the employee's duties, and that this issue is a question for the jury. 360 S.E.2d at 621 (Benham, J., dissenting). The majority did not take issue with this general proposition. From the strength of the dissent, it would seem reasonable to infer that Georgia courts would also require a pre-employment driving record investigation.

[63] *See generally*, Hays v. H.G.N.R.R. Co., 46 Tex. 272 (1876); King v. McGruff, 234 S.W.2d 403 (Tex. 1950).

[64] 584 S.W.2d 863 (Tex. Civ. App. 1969). *See also*, North Houston Pole Line Corp. v. McCallister, 667 S.W.2d 829, 831-32 (Tex. App. 1983) (employer liable for negligent hiring where it failed to check prior to employment, driving record of an over-the-road driver who had received at least five speeding tickets in the prior 18 months and who had never had any truck driving training).

[65] *Id.* at 865 (two speeding violations, one stop sign violation, one failure-to-yield violation).

[66] *Id.* at 865-66.

[67] *Id.* at 866.

[68] **Tex. Rev. Civ. Stat. Ann.** art. 6687b, Sect. 37 (Vernon Supp. 1989).

[69] Go, International, Inc. v. Lewis, 601 S.W.2d 495 (Tex. Civ. App. 1980).

[70] *Id.* at 500.

[71] 691 F. Supp. 1151 (N.D. Ill. 1988) (applying Wisconsin law).

[72] Illinois, like many states including Utah, has enacted a Dram Shop Liability Act. **Ill. Rev. Stat.** ch. 43, Sect. 135 (Supp. 1988), *see also*, **Utah Code Ann.** Sections 32A-14-1, 2 (1986). While the accident occurred in Illinois, Wisconsin law was applied to the negligent hiring claim since the defendant corporation was headquartered in Wisconsin and the employee was hired there.

[73] *Id.* at 1153.

[74] **Wis. Stat. Ann.** Sections 111.31-111.335 (1988).

[75] 691 F. Supp. at 1156.

[76] 691 F. Supp. at 1158. This case was before the court on the defendant's motion for summary judgment, which was granted. Presumably, however, had the plaintiff alleged that the employer should have inquired as to the driver's driving record, there would have been a material issue of fact, thereby precluding summary judgment under Fed.R.Civ.P. Rule 56. The lack of subsequent case history suggests perhaps that a settlement was reached, or the plaintiff's resources exhausted.

[77] **N.Y. Exec. Law** Sect. 296 (McKinney Supp. 1989).

[78] *Id.*

[79] *Id.*

[80] **N.Y. Correction Law** Sect. 753 (McKinney 1987).

[81] *Id.*

[82] **N.Y. Correction Law** Sect. 754 (McKinney 1987).

[83] **N.Y. Correction Law** Sect. 753 (McKinney 1987).

[84] **N.Y. Correction Law** Sect. 752 (McKinney 1987).

[85] *See supra*, note 75 and accompanying text.

[86] Perhaps the most akin is that of its neighboring state, Connecticut. However, Connecticut employers may inquire about arrest records. Even so, the portion of the application that asks about the arrest record must be restricted by the employer to the staff of the personnel department or the interviewer. **Conn. Gen. Stat.** Sect. 31-51i (1987). The statute contains an encouragement for employers to employ convicted persons, and prohibits state agencies from discriminating on the basis of a criminal conviction. **Con. Gen. Stat.** Sect. 46a-79, 80 (1986). Like New York, the applicant with a criminal record, if not hired, may demand a written explanation. Public employers are required to consider rehabilitation evidence and the relation of the job duties to the conviction. **Con. Gen. Stat.** Sect. 46a-80(b) (1986). There is no similar provision for private employers, unlike New York. Many states, however, do prohibit the use of expunged records as factors in pre-employment consideration. *See, e.g.*, **Utah Code Ann.** Sect. 77-18-2(3)(1982).

[87] **Cal. Lab. Code** Sect. 432.7 (West Supp. 1989).

[88] *Id.*

[89] *Id.*

[90] **Cal. Penal Code** Sections 1001.9, 1203.4 (West 1985).
[91] **42 U.S.C.** Sect. 2000e *et seq.* (1982).
[92] *See generally*, Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (employer inquiry concerning convictions); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) (arrest considered by employer).
[93] Policy Statement on the Issue of Conviction Records under Title VII (Feb. 27, 1987).
[94] 389 N.W.2d 876 (Minn. 1986).
[95] **42 U.S.C.** 2000e (1982).
[96] Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).
[97] 29 **U.S.C.** Sections 621-634 (1982).
[98] *See generally*, E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); E.E.O.C. v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987). However, it should be noted that in E.E.O.C. v. Cosmair, Inc., the court was cautious to limit its holding to the proposition that the right to make a complaint could not be waived; while the right to relief under the ADEA could be waived. *Cosmair* at 1089.
[99] *See* Cirillo v. Arco Chemical Co., 862 F.2d 448 (3rd Cir. 1988) (requiring that a waiver under ADEA must be given knowingly and voluntarily). *Cirillo* established factors for review of the waiver, including the clarity and specificity of the language, the plaintiff's education and business experience, the amount of time allowed for deliberation before acceptance, whether the plaintiff was aware of his rights before signing the waiver, whether the plaintiff was encouraged to seek independent legal counsel, whether there was a negotiation opportunity, and whether there was valid consideration for the release. *See also*, Coventry v. U.S. Steel Corp., 856 F.2d 514 (3rd Cir. 1988) (requiring a close scrutiny of the indicia of a knowing and voluntary waiver, effecting a totality of the circumstances test). Other circuit courts are in agreement concerning the burden of showing a valid waiver. *See, e.g.*, Runyan v. Nat'l. Cash Register Corp., 787 F.2d 1039 (6th Cir. 1986); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).
[100] One local employer has resorted to the strategy of having its security department chief review all applications. Ostensibly, the review is intended as a check on the thoroughness of the personnel technician's review, a cursory process. In reality, the security chief holds the application for one to three days. During that time the security chief, who is not coincidentally an off-duty police officer, or one of his assistants, who not coincidentally are off-duty police officer, review driving records, arrest records, conviction records, confidential field contact records, intelligence files and generally ask around the law enforcement community. The procedure has been very effective in denying employment to not only convicted persons, but anyone whose name appears too frequently in police files.
[101] Zion's Bank, Gump & Ayers, Henry S. Day Ford are among those using the Predictive Index, one of the more popular pencil and paper tests. *Deseret News*, April 23, 1989 at M-1.
[102] *Id.* at M-2.

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

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

'The Federal Judiciary In Utah'

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At its regularly scheduled meeting on July 20, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Approved minutes of the June 16 and June 30 meetings.

2. Received the Executive Committee report, approving committee leadership appointments, reviewing and acting on various correspondence, and reviewing plans for the August meeting in Cedar City.

3. Received the Executive Director's report, noting recent speeches given by the Executive Director, reviewing activities of the Law and Justice Center Program and Policies Committee, and noting the continuing success of the weekly KSL Radio produced by the Bar.

4. Received the Annual Meeting site selection report and approved the designation of Beaver Creek, Colorado, for the Annual Meeting in 1990.

5. Received the Admissions report, approving reinstatements for individuals who had corrected dues deficiencies, approving individuals to sit for the July Bar Examination and reviewing the statistical profile of applicants for the July examination.

6. Received the Discipline report, acting on pending private and public discipline matters as reported elsewhere in this issue and noting the denial by the Supreme Court of a petition by a foreign trained attorney seeking waiver of the applicable admissions rule.

7. Received a report and appearance by Law Related Education Committee leaders who reviewed activities of the committee for 1988-89 and presented an agenda of proposed programs for 1989-90 and a budget request.

8. Received the budget proposal of the Budget and Finance Committee for fiscal year 1990. After considerable debate and discussion as to the ramifications of various budget cuts, the budget was approved subject to further monitoring and review.

9. Received an interim report of the Bar Organization Committee and approved an enlargement of the membership of the committee with appointments to be made by the Executive Committee.

10. Received a litigation report on pending litigation.

11. Received a report of the Young Lawyers Section, including the current organizational structure and program components of the sections and an announcement of activities planned for the Bill of Rights Bicentennial Project.

12. Received a report on a proposed new courts complex and on the status of the Judicial Poll Project.

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

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating DR 1-102(A)(5) and Rule 8.4(d) by failing to include the specific terms of visitation, as described by the domestic relations commissioner, in the divorce decree and for violating Rule 3.4(d) by failing to timely comply with a pro se opposing party's discovery requests.

2. For failing to provide information in a timely manner to an opposing party and counsel as promised, an attorney was admonished for violating DR 7-102(A)(3), DR 1-102(A)(4) and (5), Rule 3.4(a) and Rule 8.4(c) and (d). The sanction was aggravated by the attorney's tardy responses to the Office of Bar Counsel.

PRIVATE REPRIMANDS

1. For violating Rule 1.3, an attorney was privately reprimanded for failing to perform any substantive work on an ongoing divorce action after entering an appearance, for failing to communicate with the client and for failing to order an appraisal on the marital residence or to set a trial date after promising to do so. The sanction was mitigated because the attorney sought and is receiving assistance from the Lawyers Helping Lawyers Committee.

2. For failing to pursue his client's civil rights action and for failing to communicate with the client that he would no longer pursue the action, an attorney was privately reprimanded for violating DR 6-101(A)(3) and Rules 1.3 and 1.4(a). The sanction was mitigated because the attorney sought and is receiving assistance from the Lawyers Helping Lawyers Committee.

3. An attorney was privately reprimanded for violating DR 1-102(A)(4) and DR 9-102(A)(2) by applying trust monies to his fees without client authorization and prior to sending the client any statement for services rendered and failing to respond to the client's verbal and written protests of his actions.

4. An attorney was privately reprimanded for violating DR 1-102(A)(6) and DR 2-110(B)(2) by failing to withdraw from representing a client after he became emotionally infatuated with the client who was in an emotionally vulnerable state. The sanction was mitigated by the fact that the client's legal matter was not compromised, but aggravated by the fact that the attorney misrepresented his prior disciplinary history.

5. For violating DR 6-101(A)(3), Rule 1.3 and Rule 1.4(a) by failing to file an objection to a magistrate's recommendation that the clients' civil rights action be dismissed, and by failing to return the clients' numerous telephone requests for information and status reports, an attorney was privately reprimanded.

6. For failing to respond to the client's numerous telephone calls over a two and a-half-year period, for failing to communicate with the client regarding post-trial settlement negotiations and for failing to follow his client's directions regarding settlement, an attorney was privately reprimanded for violating DR 6-101(A)(3), DR 7-101(A)(2), Rule 1.3 and Rule 1.4(a).

7. For violating DR 1-102(A)(4) and (6), an attorney was privately reprimanded for failing to maintain adequate controls over his trust account, by failing to provide an accurate accounting of monies received and disbursed on behalf of his client and by failing to inform his client regarding the insolvency of his trust account.

PUBLIC REPRIMANDS

1. On June 21, 1989, Michael R. Loveridge was publicly reprimanded for violating DR 2-103(C) and DR 3-102(A) by improperly soliciting referrals from and splitting legal fees with an organization which Mr. Loveridge created and of which he was the president, which consisted of an association of financial planners and insurance agents who conducted financial seminars, referring the clients to Mr. Loveridge for any legal advice or representation.

2. On July 17, 1989, Elliott Levine was publicly reprimanded for violating DR 6-101(A)(3), Rule 1.3 and Rule 1.4(a) by failing to serve possible interest owners with a Notice of Default in a foreclosure action, by failing to order a foreclosure report on the property until after being terminated from representation, by failing to respond to his client's numerous requests for information and by telling the client a foreclosure sale was scheduled for a certain date when the Notice of Default had not yet been filed.

3. On July 25, 1989, William L. Schultz was publicly reprimanded for violating Rule 1.4(a) by failing to acknowledge his client's

parents' numerous attempts to notify him that the client was incapacitated and therefore unavailable for trial and by failing to notify the Court regarding his client's unavailability, and for violating Rule 1.14(d) by failing to return the unused portion of his retainer after withdrawing from representation. Mr. Schultz was also ordered to make restitution of the retainer to his client's mother.

SUSPENSIONS

1. On June 13, 1989, Phillip Lang Foremaster was suspended from the practice of law for 90 days, which suspension was stayed pending Mr. Foremaster's successful completion of a six-month probation for violating DR 1-102(A)(6) by engaging in conduct adversely reflecting on fitness to practice. Mr. Foremaster's conduct involved the making of several threatening phone calls to law enforcement officials and a third party; the calls were made while the attorney was under the influence of alcohol.

2. On July 25, 1989, Richard B. Johnson was suspended from the practice of law for six months, which suspension is stayed pending Mr. Johnson's successful completion of a one-year probationary period. The sanction was based on a violation of DR 6-101(A)(3) by failing to appear at a pretrial conference thereby allowing the lawsuit to be dismissed, by failing to respond to telephone calls and letters from his client and from opposing counsel, and by failing to inform his client that the lawsuit had been dismissed for several months.

DISBARMENTS

1. On July 17, 1989, B. Deon Criddle was disbarred from the practice of law in the State of Utah for violating DR 1-102(A)(4) and Rule 8.3(b) by misrepresenting to his client that various foreign patent applications had been filed when they had not, by producing false evidence of patent filings, and by sending the client statements for legal services which had not been rendered and for which the client paid approximately $10,000; for violating DR 6-101(A)(3) and Rule 1.3 by neglecting to secure foreign patents for the client's numerous inventions; for violating Rule 1.4 by failing to keep his client informed as to the actual status of the various patent filings; for violating DR 2-110 by charging an illegal fee of $44,000 plus the additional $10,000 paid by the client; and for violating DR 9-102(A) by failing to account for client funds held in trust.

REINSTATEMENTS

1. On July 6, 1989, Charles M. Brown Jr. was reinstated to the practice of law in the State of Utah from a disability suspension subject to the successful completion of a two-year probationary period.

CLARIFICATION

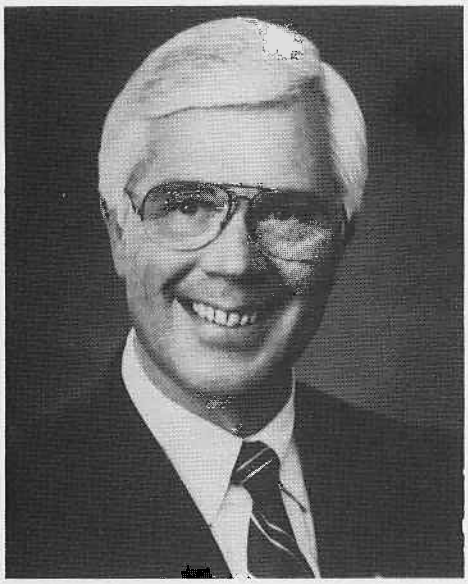
The Charles M. Brown Jr. listed in the above reinstatement is not Charles R. Brown of the firm Hunter & Brown, Charles C. Brown of the firm Brown, Smith & Hanna or Charles S. Brown of the firm Watkiss & Campbell.

Judicial Nominating Commission Vacancy

Due to the resignation of Kristine Strachan, the Judicial Nominating Commission for the Third District has a vacancy. This position is an appointment of the Board of Bar Commissioners, who hereby invites applications from all interested members who reside in the District. Per applicable rules regarding political balance, the appointee's political affiliation must be other than Republican, e.g. Democrat, Independent, etc.

Application letters with resumes attached will be considered if received by 5:00 p.m. on Tuesday, October 24, 1989 at the Office of the Executive Director, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111.

Legal and Medical Chiefs Will Headline Mid-Year Meeting



Alan R. Nelson

L. Stanley Chauvin

The Presidents of the American Bar Association and the American Medical Association will address the 1990 Mid-Year Meeting of the Utah State Bar. ABA President L. Stanley Chauvin and AMA President Alan R. Nelson will open the meetings at the Utah Law and Justice Center in Salt Lake City on Wednesday, January 17, at 1:00 p.m.

The afternoon program will feature the two association leaders in a rare meeting. According to Mid-Year Meeting Chair Jan C. Graham, this will be the first time Mr. Chauvin and Dr. Nelson have participated together in a program.

Both men have particular interest in how their professions are addressing the needs of children and the elderly. Although specific topics have not yet been determined, it is likely discussion will center on these critical issues.

The Mid-Year Meeting will run through Thursday afternoon at the Law and Justice Center with an awards ceremony and continuing legal education sessions. Following Thursday's meeting, the CLE program will continue at the Inn at McCormick Ranch in Scottsdale, Arizona.

The Bar's Mid-Year Meeting, held in St. George during the last three years, has outgrown the meeting facilities in Utah's Dixie. Although St. George hotels are rapidly building additional convention and guest rooms, they will not be completed in time for the 1990 meeting.

In order to provide a combination of current continuing legal education and winter get-away, the Mid-Year Meeting will be held in Salt Lake City at the Utah Law and Justice Center and will be followed by a post-convention symposium in Scottsdale.

For those wishing to take advantage of the Arizona sun, the post-meeting CLE symposium will begin in Scottsdale on Friday, January 19, beginning at 8:00 a.m. Arrangements are being confirmed for group air travel at reduced rates for departure on Thursday afternoon and return to Salt Lake City on Sunday afternoon, January 21.

The Inn at McCormick Ranch in Scottsdale offers a full range of outdoor activities, including golf, tennis, swimming and horseback riding. The meetings are scheduled in the mornings with free afternoons.

Meeting information will be covered in future issues of the *Bar Journal*, and all Bar members will receive registration material next month.

The committee members planning the agenda for the 1990 Mid-Year Meeting are:

John T. Anderson
Ross C. Anderson
Elizabeth K. Brennan
Carol Clawson
Glen A. Cook
Jan C. Graham (Chair)
Leslie A. Lewis
John A. Snow

Legal Secretaries Install Officers

Marsha L. Gibler

Marsha L. Gibler, PLS, of West Valley City, Utah, was recently installed President of the Salt Lake Legal Secretaries Association. Installation of the 1989-90 officers was held at the Fort Douglas Military Club in Salt Lake City. Jeri S. Schnitker, PLS, installed the officers and was assisted by Beverly Matheson.

Mrs. Gibler has been a legal secretary for 10 years and is employed by the law firm of Scalley & Reading of Salt Lake City where she is secretary to J. Bruce Reading, Esq. She has been a member of the Salt Lake Legal Secretaries Association since 1984 and has served as treasurer and chairman of several committees.

Other elected officers are Karen L. Anderton, First Vice President; DeAnn Heath, Second Vice President; Jeneal Monet, Recording Secretary; Mary Black, Corresponding Secretary; and Dawn M. Hales, PLS, Treasurer. Jeri S. Schnitker, PLS, was appointed Parliamentarian.

Nominations Now Being Accepted for 1990 Mid-Year Meeting Awards

Now is your opportunity to submit nominations for the 1990 Mid-Year Meeting awards of the Utah State Bar, and recognize those who have distinguished themselves or who have made exemplary contributions to the Bar. This is a time members of the Bar have to acknowledge those individuals, sections and committees who have made special contributions to the public and the Bar. There are many individuals who deserve special recognition, but without your nominations, some may be overlooked when the Board of Bar Commissioners vote on recipients for the awards at their January meeting. Careful attention should be given to the following definitions when submitting nominations.

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

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

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

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

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

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

A nomination letter should be sent to Paige S. Holtry, Bar Programs Administrator, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, no later than January 15, 1990.

Seventh Annual Oil and Gas Law Short Courses

The Rocky Mountain Mineral Law Foundation is sponsoring the Seventh Annual *Oil and Gas Law Short Courses* in Breckenridge, Colorado, at Beaver Run Resort.

The *Oil and Gas Law Short Course*, which will run from October 22 to 28, 1989, is designed to present the fundamentals of oil and gas law to lawyers, landmen and paralegals who have had either rudimentary experience or relevant coursework in oil and gas. Topics covered will include land status determination; the oil and gas lease and leasing procedures; pooling and unitization; exploration and operations; gas contracts; royalties and division orders; implied covenants; conveyancing; farmout agreements; development and operating agreements; basic oil and gas taxation; ethical considerations; and state conservation.

The *Federal Oil and Gas Leasing Short Course*, which will run from October 29 to November 3, 1989, will provide registrants with direct involvement in oil and gas problems and case studies. Participants will cover topics including land status determination and availability for leasing; administrative procedures and judicial review; noncompetitive and competitive leasing; right-of-way leasing; lease forms and basic provisions; lessee qualification; assignments and transfers of interest; options and rights to acquire; unitization and communitization; exploration, drilling, producing and operating regulations and procedures; royalties; conflicts with development of other minerals; bonds; extension, suspension, renewal and termination of leases; federal land records and title examination; surface management requirements; and state and local regulation. In addition, recent developments in royalty issues, notices to lessees, FOGRMA administration and lease issuance will be examined in detail.

Because of the intensive practical working format of these courses, enrollment in each will be limited to 75 people. For additional information, contact the Foundation at (303) 321-8100.

Energy and Natural Resources Section of ABA Announces Winner of Competition

The Natural Resources Section of the American Bar Association has announced the winners of the 1989 Annual Writing Competition. First place was awarded to Kenneth R. Wallentine of the J. Reuben Clark Law School at Brigham Young University, and second place was awarded to Amy A. Fraenkel of Harvard University Law School. The first place prize carries a $1,000 cash award.

The winning paper, *Wilderness Water Rights: The Status of Reserved Rights After the Tarr Opinion*, will be published this fall in the *Journal of Public Law*. It addresses the impact of a recent Solicitor General opinion concerning the administration's position on water rights for federal wilderness areas.

Wallentine is a third-year law student attending Brigham Young University. He serves as the 1989-90 Editor-in-Chief of the BYU *Journal of Public Law*. He is employed with the Salt Lake City law firm of Watkiss & Campbell. This is the second American Bar Association national award this year for Mr. Wallentine, having previously been recognized by the Section on State and Urban Government for outstanding accomplishment. He has previously published scholarly papers on employment law and constitutional law.

Grants Available for Research on Federal Judicial History

The United States Judicial Conference's Committee on the Bicentennial of the Constitution announces a summer stipend program to support research on the history and evolution of the federal courts. The Judicial Conference is the chief administrative policy-making body for the federal court system. The Conference created its Bicentennial Committee to promote recognition and understanding of the Constitution and its Bill of Rights, and the federal judicial system, on the occasion of their bicentennials.

The awards consist of an $8,000 honorarium and a $2,000 travel and expense grant. Up to five stipends will be awarded. The committee assumes that grantees will undertake no other major professional activity (e.g., summer school teaching) during the period covered by the award.

QUALIFICATIONS

Scholars in such fields as history, political science and law may apply; there is no disciplinary restriction. Academic affiliation is not required, but applicants should hold a terminal degree in their discipline. Preference will be given to applicants with a clear intention to publish. Recipients will be asked to file a brief report on the research undertaken during the term of the grant, to acknowledge the assistance of the Judicial Conference Bicentennial Committee in any published work and to supply a copy of any publication resulting from the grant.

Any topic in the field of federal judicial history is eligible for consideration, but the Committee encourages proposals that focus on federal courts other than the Supreme Court. Topics that explore the interaction between the state and the federal judiciaries are also welcome, but projects that deal exclusively with state courts or federal administrativie law processes are not eligible.

DEADLINES

Applications must be received by **December 15** for grants to be awarded **May 1**. Announcement of the winners will be made by **February 15**.

APPLICATIONS

Applicants should submit the following:

- A description of the overall research project, including a summary of the work completed so far (no longer than five pages).
- A statement of research goals to be achieved during the summer of the grant (no longer than two pages).
- An enumeration of the research sites to be visited, with a tentative budget.
- A curriculum vitae.
- Two letters of recommendation.

Applications should be sent to:

Judge Frank X. Altimari
U.S. Court of Appeals for the Second Circuit
Uniondale Avenue at Hempstead Turnpike
Uniondale, NY 11553

Winners will be chosen by a subcommittee of the full committee on the advice of a panel of scholars.

Resolution

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

Public interest areas are as follows:

1. Poverty and Low Income Law. Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel, including appointments by the courts in *habeas corpus*.

2. Civil Rights Including Civil Liberties Law. Legal representation involving a right of an individual which society has a special interest in protecting.

3. Charitable Organization Representation. Legal service to, or service on the boards of committees of, charitable, civic, governmental and educational institutions in matters which further their organizational purposes.

4. Administration of Justice and Law Reform. Activity, whether under Bar association auspices in the form of committee work or otherwise, which is designed to improve the law, the legal system or the legal profession, increase the availability of legal services or otherwise improve the administration of justice.

5. Public Education Awareness and Understanding of Law. Activity, whether under Bar association auspices in the form of section or committee work or otherwise, which is designed to promote public education awareness and understanding of the law, the rights and duties of individuals, the legal system and legal profession, and the availability of legal services.

The Utah State Bar also urges all law firms and corporate employers to promote and support the involvement of associates and partners in *pro bono* and other public service activities.

The Utah State Bar would also like to establish a goal of participation of 33 percent of its members in organized *pro bono* programs by 1990. Participation is currently 19 percent. In order to help secure this end, the Utah State Bar will assign a staff person to work on the issue and coordinate with the Utah Volunteer Lawyers Project.

The above resolution is now the official position of the Utah State Bar.

Women Lawyers of Utah, Inc.

The officers of Women Lawyers of Utah, Inc. (WLU) for 1989-90 are: Kathleen B. Barrett, President; Karen McCreary, Vice President; Martha Pierce, Secretary; Phyllis Vetter, Treasurer; and Cecelia Espenoza, Special Projects. WLU is a non-profit corporation with lawyer and law student members of both sexes, which sponsors programs of interest to the legal profession and participates in community activities on behalf of its membership.

On Friday and Saturday, October 27 and 28, 1989, WLU will hold a retreat at Bear Trap Lodge, Big Cottonwood Canyon. The focus of discussion will be on "Women and the Law: Do Our Values Make a Difference?" Friday evening's activities will include dinner, followed by a showing of the film "A Jury of Her Peers" and a discussion led by Sharon Swenson, a film instructor at BYU. On Saturday, Dr. Kate Kirkham, an Associate Professor in the Organizational Behavior Department at BYU, will lead discussions of values in the context of personal versus professional issues and in the context of roles in the economic and political life of the community. The program for the November 8, 1989, meeting will be The Lawyer as Performer by Deborah Threedy, local actor and faculty member at the University of Utah College of Law.

1990 Annual Meeting Slated for June 27 In Beaver Creek, Colorado

Beaver Creek near Vail, Colorado, has been selected as the site for the 1990 Annual Meeting of the Utah State Bar. The meeting has been moved from its original site at Snowbird to accommodate large registration and more activities. According to Committee Chair Carolyn Nichols, the meeting will begin Wednesday, June 27, and conclude Saturday, June 30.

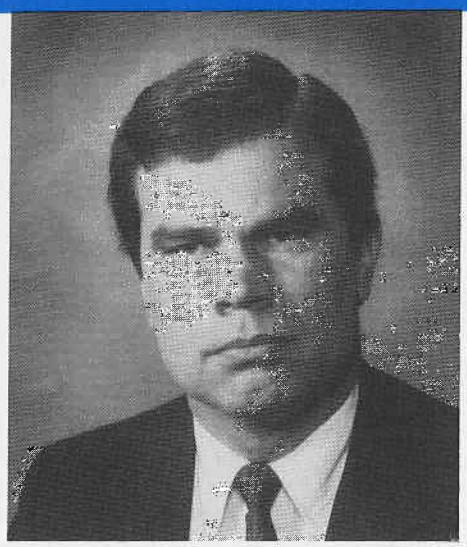
The central location for the meeting will be the new Hyatt Regency which opens this Thanksgiving. It is situated in the Alpine-style village of Beaver Creek, eight miles west of Vail and 110 miles west of Denver, an easy two-hour drive over four-lane Interstate 70. The drive from Salt Lake City is an easy eight hours.

In addition to the 300 hotel rooms at the Hyatt, the adjacent Inn at Beaver Creek offers 45 rooms. Surrounding the Robert Trent Jones designed golf course are condominiums which will be reserved for members of the Bar attending the meetings.

The Beaver Creek Village offers great shopping and dining to visitors, along with a delicatessen and bakery. Although it was designed as a ski resort to hold the 1976 Olympics, which the voters of Colorado rejected to protect the mountain against crowds, the area is now a year-round resort. Tennis courts, swimming pools, spas, mountain biking, canoeing, hiking, nature walks, fishing in private streams and lakes, and horseback riding are all available at the resort.

The Bar has been able to negotiate very favorable rates for accommodations during the convention because this will be one of the first meetings held at the new Hyatt. For those wishing to fly, $49 airfares to Denver are available, and there is an air shuttle from Stapleton Airport to Vail. The resort also runs convenient shuttle bus service several times daily between the airport and Beaver Creek.

CASE SUMMARIES



By Clark R. Nielsen

During the first six months of 1989, the Court of Appeals received approximately 400 new filings—260 original filings and 136 referred by the Supreme Court. New cases filed increased almost 12 percent from 1988. Final dispositions of appeals during this period were approximately 360: 111 opinions were issued after oral argument; 25 unpublished opinions issued without oral argument; 35 matters were summarily dismissed, affirmed or reversed under Rule 10; and, 50 matters were summarily heard and decided without opinion under Rule 31. Additional cases were dismissed for administrative reasons such as the failure to prosecute the appeal.

Annualized, the appeals court dispositions also increased by approximately 12 percent over 1988. The increase is a result of the more extensive use of Rule 31 by the court. As of June 30, 1989, approximately 550 appeals remained pending in the Court of Appeals.

During June, July and August the Utah Supreme Court significantly reduced the number of cases argued but awaiting decision. The Supreme Court issued 38 published opinions and the Court of Appeals issued 52 published opinions. Emphasis is given to a brief summary of several cases rather than an extensive discussion of a few cases.

BERUBE—EMPLOYMENT CONTINUED

A detailed analysis of *Berube v. Fashion Center Ltd.*, 104 Utah Adv. Rep. (1989), appeared in September's *Utah Bar Journal.* Since *Berube*, the Supreme Court has applied its decision in two additional decisions: *Lowe v. Sorenson Research Co.*, 114 Utah Adv. Rep. 26 (1989) (Justice Zimmerman), and *Calwell v. Ford, Bacon and Davis*, 114 Utah Adv. Rep. 14 (1989) (Justice Zimmerman).

In *Caldwell*, the court affirmed a summary judgment denying the employee's wrongful discharge claim. Employment-at-will is a presumption rebuttable by an employer's internal policies and procedures which can become part of the contractual terms of employment. What such policies are and whether they became part of the employment relationship is generally a factual matter for the fact trier. But, in this case, even assuming that defendant's policy manual was an integral part of the employment contract, the terms were not ambiguous. As a matter of law, Caldwell's termination did not contravene these additional terms of employment.

In the *Lowe* case, the court vacated the trial court's dismissal of the wrongful termination claim and remanded for reconsideration in light of *Berube*. The claim was improperly dismissed even though the defendant argued there was no material factual issue and summary judgment was proper. Because the evidentiary material, including depositions and the employer's policy manual, was not reviewed by the district court, summary judgment could not have been properly granted.

Note: The court also commented in these cases, as in other recent cases, upon the need for the trial court to state the grounds for its ruling, in compliance with U. R. Civ. P. 52(a), effective January 1987.

REFORMATION OF AN INSTRUMENT FOR MISTAKE

The Supreme Court (Justice Stewart) attempted to reconcile the confusion regarding mutual mistake and the reformation of agreements. A bank sought to reform its blank endorsement of a promissory note so as not to be liable for the failure of the payor to pay the note. Although the unrestricted endorsement was a "unilateral" mistake by the bank, it could be remedied when coupled with the knowledge, fraud or inequitable conduct of the other, non-erring party. Unilateral mistake may for a basis for reformation to conform to what *both* parties intended. The contemplation and intent of the parties as to the terms and nature of the relationship on a case by case basis becomes the focal point of analysis, and not a categorization of the alleged mistake as mutual, unilateral, legal or factual.

Guardian State Bank v. Stangl, 113 Utah Adv. Rep. 9 (1989).

"MARY CARTER" SETTLEMENT AGREEMENTS

A settlement agreement between a plaintiff and one of multiple defendants should be disclosed to a jury at trial. Injured in a multiple car collision, plaintiff brought suit against the other drivers, who also cross-claimed against each other. Plaintiff settled with the deceased driver's estate and went to trial against the second driver, Campbell. The settlement agreement required the estate to pay plaintiff but also allowed it to remain in the case to pursue its crossclaim against Campbell. Knowledge of the settlement and its terms was kept from the jury, suggesting undue prejudice against Campbell and the possibility of secret collusion between the settling parties.

The Supreme Court (J. Orme, Ct. Appeals Judge) balanced the relative interests regarding jury disclosure and nondisclosure and concluded that, upon request at trial, an agreement should be disclosed unless disclosure would create a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Although the trial judge should have disclosed the agreement to the jury in this case, the court concluded the failure to do so was harmless and had no effect on the jury's verdict.

Slusher v. Ospital, 111 Utah Adv. Rep. 18 (1989).

ATTORNEY'S FEES— PREVAILING PARTY

The court of appeals (Judge Orme) held that a "prevailing party," is that party in whose favor the "net" judgment is entered. But, attorney fees to the prevailing party are reasonable only on issues resolved in that party's favor.

Mt. States Broadcasting v. Neale, 111 Utah Adv. Rep. 50, modified on rehearing 113 Utah Adv. Rep. 41 (Ct. App. 1989)

LONG ARM PERSONAL JURISDICTION

Plaintiff was injured splitting logs with a Japanese manufactured maul. The maul was exported by a Japanese hardware company to a U.S. distributor. The Supreme Court (Justice Howe) held that although putting their product into the "stream of commerce," the Japanese defendants did not do business in Utah sufficient to satisfy the limitations of due process because they had not taken active steps to sell the product in Utah. Therefore the Utah courts lacked personal jurisdiction over the Japanese defendants.

Parry v. Ernst Home Center Corp., 114 Utah Adv. Rep. 19 (1989).

EVIDENCE OF PRIOR CONVICTIONS

Under the Utah Rule of Evidence 609(a)(2), evidence of a prior conviction is admissable if the conviction involves "dishonesty or false statement." Both Utah appellate courts have adopted the federal interpretation that dishonesty and false statement refers to crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth. Hence, crimes of theft and larceny are not included in Rule 609 (a)(2) unless committed by fraudulent or deceitful means.

State v. Bruce, 114 Utah Adv. Rep. 5, 10-13 (1989) (Justice Howe). *Accord State v. Brown*, 771 P.2d 1093 (Utah App. 1989); *State v. Wight*, 765 P.2d 12 (Utah App. 1988).

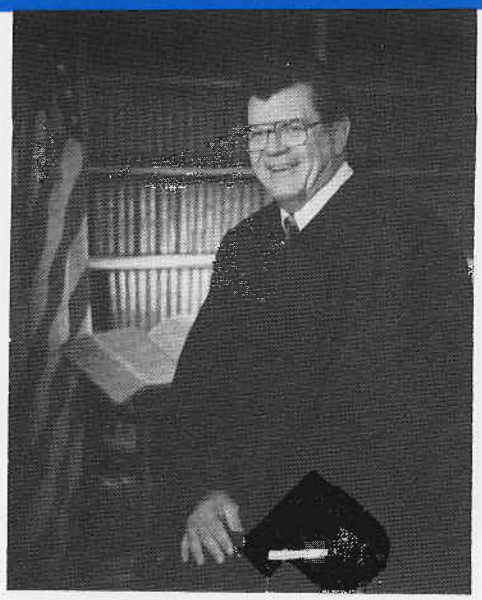
HEARSAY IN SEX ABUSE CASES

The trial court erroneously admitted hearsay statements of a sex abuse victim under Sect. 76-5-411(1). The Supreme Court has rejected a wholesale, unrestricted use of Sect. 76-5-411(1)(b) to defeat the due process right of confrontation. The court was in agreement that the hearsay statements of an 18-month-old child were erroneously admitted. However, the justices disagreed whether the evidence could be admitted after a proper determination of the child's availability to testify. A majority of the court agreed that regardless of availability, the hearsay statement of the child was insufficient to support a conviction. *State v. Webb*, 113 Utah Adv. Rep. 23 (1989); *See also, State v. Nelson*, 113 Utah Adv. Rep. 29, 31 (1989).

EXPERT TESTIMONY IN SEX ABUSE CASES

The testimony of a scientific expert that purports to pass upon the truthfulness of a sex abuse victim on a particular occasion is not admissible. The foundation required to support an expert's conclusion of another's verocity is lacking because there has been no demonstration that such a determination can reliably and accurately be made.

State v. Rimmasch, 108 Utah Adv. Rep. 20 (1989); *State v. Nelson*, 113 Utah Adv. Rep. 29 (1989).



State of the Federal Judiciary

Remarks of Bruce S. Jenkins
Chief Judge, United States District Court
District of Utah, at
the Utah State Bar Annual Meeting
Sun Valley, Idaho
June 1989

President Kasting, Chairman Mazuran, distinguished colleagues:

In 1641, in a Massachusetts statute then called the Body of Liberties, the following language is found:

> Every man that findeth himself unfit to plead his own case in any Court shall have Libertie to imploy any man against whom the Court does not except, to helpe him, Provided, he gives him noe fee or reward for the paines.

In the Session laws of the First Legislature of the Territory of Utah, there is found in an Act for the Regulation of Attorneys the following:

> Sec. 2. No person or persons, employing counsel in any of the courts of this Territory, shall be compelled by any process of law to pay the counsel so employed, for any services rendered by counsel, before or after, or during the process of the trial in the case.

I sometimes think those were the days when I practiced. Each statute is a wonderful example of legislative power in action—some say legislative power run wild. Both are powerful arguments for continuing court, not legislative, oversight of our integrated Bar, our profession. Above all else, both are an argument for fairness and self-discipline by Bar members, in dealing with clients. The Legislature spoke once on the subject of fees. They can do it again.

Now those provisions, long since repealed, have nothing to do and everything to do with what I am supposed to talk about.

I am supposed to talk about the status, the performance and the prospects of the Federal District Court of Utah. To talk about the court without talking about the court officers—the lawyers—would provide neither balance nor depth—it would be two dimensional—like looking at a picture with one eye closed.

It may be news to some and old hat to others that this year, 1989, is the bicentennial of the federal judicial system. Whether news or old hat, it is true that in 1789 the First Congress, then meeting in New York to implement the provisions of the newly ratified Constitution, passed "An Act to Establish the Judicial Courts of the United States."

It was in that First Congress the Federal Judicial System was born.

BRUCE S. JENKINS is Chief Judge, United States District Court, District of Utah.

Prior to assuming the bench, Judge Jenkins practiced law and was active in civic affairs.

He was a State Senator, Minority Leader of the Senate and at the age of 36 became President of the Utah State Senate.

He is the author of published opinions, speeches and essays on a variety of legal subjects. He is best known in legal circles for his opinion in Allen, et al. v. United States, *588 F. Supp. 247 (1984), wherein he found the United States was liable to certain plaintiffs for the negligent conduct by the United States of open air atomic testing. He has lectured before Bar Associations, Judges, Civic, Professional and Academic Groups. He has lectured to Law Schools, Law Faculties, Judges and Bar Associations in Third World Countries in Africa. He recently keynoted the Fourteenth Annual Airlie House Conference on the Environment sponsored by the Standing Committee on Environmental Law of the American Bar Association.*

Judge Jenkins holds B.A. (1949) and Juris Doctor (1952) degrees from the University of Utah. He is a member of Phi Beta Kappa, Phi Kappa Phi. In 1985, he was named Alumnus of the Year by the University of Utah College of Law.

Judge Jenkins was born in Salt Lake City, Utah. He is married to Peggy Watkins. They have four children and three grandchildren.

That First Congress was targeted to begin March 4, 1789. It started late, April 6. (Congress now starts on time and ends late.) The next day, April 7, a committee was charged with the responsibility of bringing in a judiciary bill before adjournment. The chairman of the committee was a man named Oliver Ellsworth. The bill was introduced June 12 by Richard Henry Lee of Virginia. It was primarily authored by Ellsworth, a distinguished lawyer from Connecticut, a United States Senator, a former member of the Continental Congress, and a member of the Constitutional Convention. He was also fated to serve briefly as Chief Justice of the Supreme Court, 1796 to 1800. He preceded Marshall. By September 24, 1789, the Judiciary Bill had been passed by both houses and signed by President George Washington, who, two days later, sent up his nominations for the high court.

There were 13 district courts, with trial functions of a limited nature. (By the way, district courts were empowered to impose whipping up to 30 lashes ("stripes") for certain criminal offenses.) It is interesting to note that there were no minimum-mandatory lashes, no guidelines as to the factors—be they augmenting or mitigating as to the number of lashes.

There were three circuit courts with both trial and appellate functions. The circuit court could impose more than 30 lashes. Some lawyers feel they still do so.

There was one Supreme Court, with one chief and five associate justices.

Implicit in the Judiciary Act of 1789 was the recognition of dual sovereignties—sovereign states, a sovereign nation—each with direct impact upon the citizens of both. The Act acknowledges a dual court system, with the state supreme as to state matters and the nation supreme as to national matters. The Act's famous Section Twenty-five provided for direct appeal to the United States Supreme Court from the highest court of a sovereign state as to any federal matter raised and decided in the state tribunal. This was a source of great debate and great apprehension. Its passage was an important victory for those who sought to build a nation. Patrick Henry thought that such national court power would engulf the state courts and soon eliminate them. His dire apprehensions have been belied by the noble experiment. Both court systems have flourished these 200 years.

Oliver Ellsworth's bill has not only worked, it has worked essentially unchanged.

We still have district courts—not 13, but 94.

We still have circuit courts, expanded in number—13, not three—and bereft of their hands-on trial responsibilities.

We still have a Supreme Court with nine justices rather than six, and almost but not quite discretionary jurisdiction only.

In 1789, legislation was by legislators—not parceled out to commissions, nor delegated to staff—legislators who knew what they were talking about and who could give reasons for what they did. When Oliver Ellsworth wrote the Judiciary Act of 1789—and he wrote it himself—his legislative pay was $6 a day. As far as I can determine, he was never paid for giving a speech, or paid for attending a reception, or having breakfast with any one who was impacted by such legislation.

He found wisdom and authority in the injunction found in Matthew 6:24:

> No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one and despise the other...

As lawyers and judges, we know that lesson well, and we live by it in word and deed. We know that if we violate that moral precept, we become a walking civil war, subject to severe disapprobation, and Matthew's wisdom haunts us. How awesome that some who make law today find this point difficult to grasp.

Lawyers and courts produced *Marbury*. Lawyers and courts produced *Brown v.*

Board of Education. Lawyers and courts produced *Gideon.* But more importantly, lawyers and courts provide a peaceful alternative to what we see in the blood-flecked streets of Panama and the horrors of Tiananmen Square. Our well-used courts should be welcomed and honored in their use, and continue to be well used in helping people resolve problems they are otherwise unable to resolve peacefully for themselves. Litigation may be unpleasant for many reasons, but its methodology, its quest for truth, its effort at rationality and its implementation of social value is monumentally superior to tanks and warheads and blood. By the way, you should know that the whole of the federal judiciary costs about one-tenth of 1 percent of the yearly national budget, slightly more than two or three stealth bombers, about 1/294th of the amount the Pentagon seeks this year.

Let me focus on the Utah District Court. It joined the Ellsworth structure in 1896. It had but one judge until 1954, then two until 1979, and then three until 1985, when a fourth was added. We now have four active and two senior judges (six of the nine appointed since statehood are still with us), three bankruptcy judges, one full-time and one half-time magistrate in our urban areas, and three part-time magistrates in our rural areas. We have probation officers and support staff, and clerks' offices—district and bankruptcy.

We are alive, well and functioning very well. While we are busy and challenged each day by a number of highly complex civil and criminal cases, we are substantially current. In December 1986, we had more than 2,500 civil cases pending. Today, we have less than 1,800. Our filings, in contrast to our pendings this year so far, have increased a little less than 4 percent over last year. We have a diligent and able bench. I can't say enough good things about my colleagues. As judges and as colleagues, they are as good as can be found anywhere in the country. We have not asked, nor do we intend to ask, for any new district court judgeships in the near future.

I want to say a word about senior judges. I do this because of inaccurate nationwide press stories about senior judges not handling a great number of cases. What they do, they essentially do for nothing. They would be paid the same for doing nothing at all. The fact that they perform services reduces the number of additional judges needed. In effect, they donate their services. Our distinguished senior judges, while senior, have handled numerous large and complex matters. While seniors, they were the impelling force in the "Inns of Court" movement, a new way of improving advocacy, now 85 chapters strong nationwide.

Our bankruptcy judges do a first-class job. While an adjunct of the district court, our relationship is primarily appellate-trial. The excellent administrative relationship in Utah between the district and bankruptcy courts was noted nationally when Judge Clark and I were invited to Phoenix in April of this year as exemplars, to tell the chief district judges of the nation, based on the Utah experience, how to get along with their own bankruptcy courts. Adversary proceedings (lawsuits) are down 45 percent—this year as compared to last. Chapter 11 amounts to only 2 percent of the case filings.

We have some very exciting things going on administratively. The Utah District Court has been designated as one of three smaller federal courts to be pilot courts to automate clerk's office docketing and case management functions, including case assignments. With some apprehension about old dogs and new tricks, we go "on line" July 3. We have alerted you to that by letter. We begin electronic docketing on that date.

"Good lawyering helps make good judges."

We are wired. We hope we are not "haywired." We have provided specialized training to our office personnel. We ask for your cooperation—if not cooperation, at least your sympathy—during the shake-down period.

We continue to improve the court building in Salt Lake. The plans for the first floor are with the engineers and architects. We hope to "go to bid" around the first of the year on a new courtroom on the first floor to add to those we have, as well as new quarters for the probation department and new quarters for the clerk's office. If things go well, they should be in service by early 1991. Included also in building improvements will be a new grand jury room, as well as expanded facilities for the court library. If you don't know, the court's library is available to all members of the Bar.

We are in the process of appointing a new rules committee to update our local civil and criminal rules, and to integrate them with our electronic advances.

Each of our judges continues to work with the Inns of Court to improve advocacy. Each has been called upon to try cases in other districts and to sit on appellate panels.

One unusually satisfying activity this year was when all of our active judges went to prison, along with our acting chief probation officer. In fact, we went to many prisons. Our tour included Leavenworth, Leavenworth Barracks and Leavenworth Camp in Kansas; the Medical Center for Federal Prisoners in Springfield, Missouri, the principal prison medical facility; Marion, Illinois, the highest security prison in the system; Ft. Worth, Texas; Segoville, Texas; and Phoenix Correctional Institution and Phoenix Camp in Arizona. We got a view of all levels of custody—from the least to the most secure. We did it all from an early Thursday through late Tuesday. It was educational and obviously of great help in carrying out our responsibilities in sentencing. While I tried very hard to suggest to the wardens that some of my colleagues remain behind, the wardens would have none of it. Judge Greene become a expert on the architecture of sweat lodges. We also ran into some of our "alumni," "our graduates," a most unusual and thought provoking experience.

Two of our judges serve on judicial conference committees. Judge Sam serves on the Committee on Judicial Conduct. Judge Jenkins serves on the Committee on the Administration of the Bankruptcy system. Both are by appointment of the Chief Justice.

Judge Jenkins serves on a national state court committee dealing with a three-year study on the relationship of states to Indian tribes. Judge Jenkins also serves as a member of the Advisory Committee of Judges to the Institute for Health Policy Analysis, an adjunct of the Georgetown Medical Center and Georgetown Law School, engaged in creating a course of study for federal judges on the use of scientific evidence in the courtroom.

Judge Winder continues to function as Chairman of the Bar Examination Committee and will be a panel participant at the Tenth Circuit Judicial Conference in September, and Judge Greene works in the high echelons of the American Bar Association and serves as a member of the Circuit Council.

I am pleased to report, as I have reported, on the excellent status and function of the court, court personnel, our new look in automation and the ongoing improvement in our physical facilities.

Well, how about court officers—the lawyers—yourself and your colleagues? For the most part, you do very well. The practitioners in federal court are generally very

good. Most take their responsibilities to the court very seriously and discharge them very well. On occasion, a practitioner wants to try his case on the courthouse steps rather than in the courtroom. But in the long pull, the lesson is usually learned (by some more quickly than others), professionalism benefits the lawyer, the client and the process. The process these 200 years has provided social stability with opportunity for improvement and change. Change is one thing, progress another. Change is scientific. Progress is ethical. The contribution of practitioners to progress in the courtroom, and this progress in the nation has been monumental. Consider only *Brown*, 1954, and *Gideon* for example.

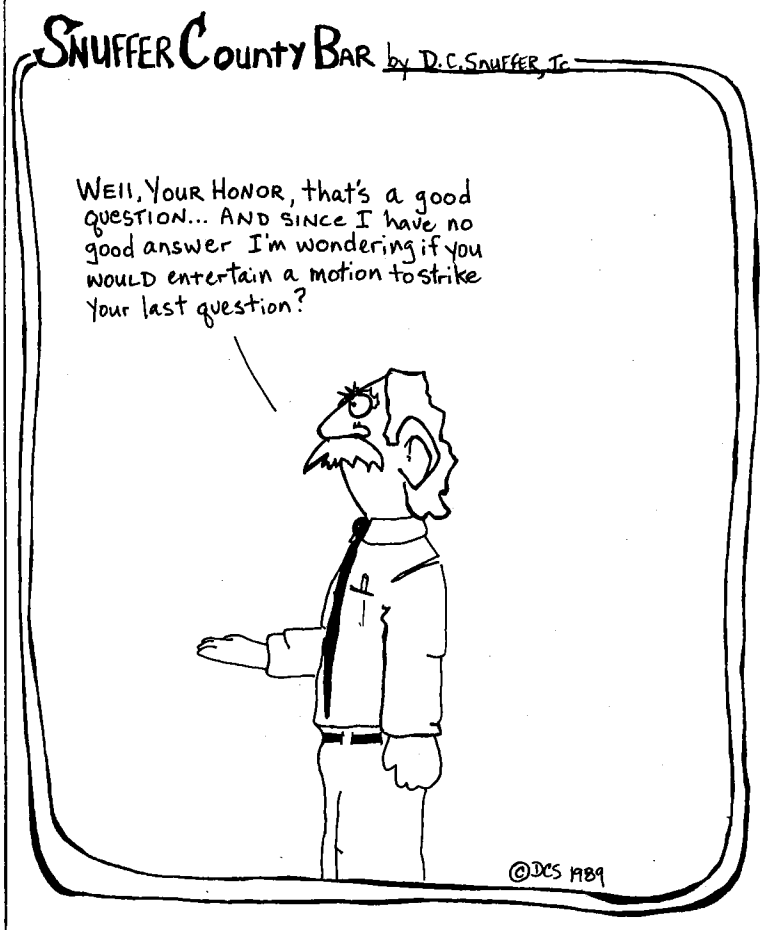
Oliver Ellsworth, George Washington's right-hand man in Congress and a man of vigorous rectitude, built the foundation of the judicial structure very well indeed in that first Congress 200 years ago. Others have added to the structure.

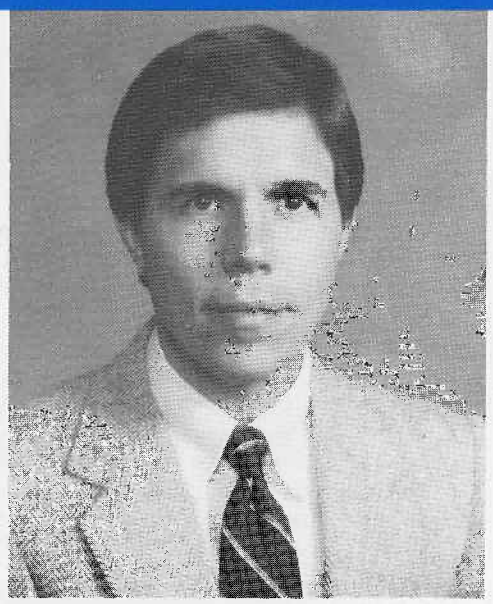
We try very hard to preserve and protect and improve that which he built in our efforts to prevent disputes, and to resolve disputes peacefully and rationally in accordance with the rule of law.

We all know that the house of law has many mansions. The court system is only one. You and I both know that a good lawyer practices preventative law, and tries awfully hard to keep his clients out of court—indeed considers that court is usually a last resort. Speaking for all of the judges, we want you to know that we want this court to provide excellent service, the Process which is Due, a respectful and adequate hearing, and thoughtful consideration of the issues presented.

It is an old observation, but a true one: Good lawyering helps make good judges. You do your part. We'll try to do ours.

That is my short and plain statement of the status of the United States District Court, District of Utah, June 29, 1989, 9:38 a.m. I have described status and change. Only we—lawyers and judges together—can produce progress.





President's Report

By Jonathan K. Butler

GET INVOLVED IN YOUNG LAWYER SECTION ACTIVITIES!

A partner at my firm recently asked me, "Who are Young Lawyers and what does the Utah Young Lawyers Section do?" He went on to say that although he had heard of the Young Lawyers, he did not know what the Young Lawyers Section does. I replied, "Where have you been? The Utah Young Lawyers Section has been actively involved in a large number of programs and projects of benefit to the public and to the Bar over the last several years." Perhaps you may have asked yourself the same question. Here is the answer.

WHO ARE YOUNG LAWYERS?

Young Lawyers Section are members of the Utah State Bar in good standing under 36 years of age or who have been admitted to the Bar for less than five years. Membership in the Section is automatic and, unlike other sections or committees of the Bar, does not require enrollment. If you meet the above criteria, you are one of the more than 2,000 members of the Utah Young Lawyers Section.

WHAT IS THE YOUNG LAWYERS SECTION?

The Young Lawyers Section is committed to public service and education, improved relations between the legal and non-legal communities and assistance to its members as they assimilate into the practice of law. It is one of 22 sections of the Utah State Bar and has created and implemented many programs and services to accomplish its purposes. The programs and activities of the Utah Young Lawyers Section are under the general supervision and control of the officers of the Section consisting of myself, Richard A. Van Wagoner, President-Elect, Larry R. Laycock, Secretary, and Keith A. Kelly, Treasurer, all of whom are elected by the Section membership. A 25-member Executive Council coordinates and executes the programs and affairs of the Section under the direction of the officers. Members of the Executive Council include the four officers, all 15 committee chairs, a representative of the American Bar Association Young Lawyers Division, a student representative from each of two law schools in the State of Utah and three district representatives of the Section, one each from Northern, Central and Southern Utah. All Executive Council members, with the exception of the President-Elect, serve for a term of one year. The President-Elect serves a two-year term, one year as President-Elect and one year as President.

WHAT DOES THE YOUNG LAWYERS SECTION DO?

The Young Lawyers Section has successfully implemented a broad range of projects through its 15 committees in the last few years. As noted in Jerry Fenn's accompanying article, the Section implemented over 25 projects last year and was awarded first place in its division by the American Bar Association, Young Lawyers Division. These 15 committees and some of the projects these committees plan to implement during the next year are set forth below:

*BILL OF RIGHTS COMMEMORATION COMMITTEE
- *Bicentennial of Bill of Rights
- *United States Constitution/Annual Commemoration

BRIDGE THE GAP COMMITTEE
- *Mandatory CLE Program
- *Reception for Judges
- Assist in Bar Admissions Ceremony
- Orientation Programs for New Attorneys
- Recruitment of Volunteers
- Refreshments at Bar Exams

COMMUNITY SERVICES COMMITTEE
- *Drug/Substance Abuse Program
- *Homeless Shelter Program
- Blood Drive
- Sub for Santa
- Tutoring Program in Schools

LAW DAY COMMITTEE
- Law Day Fair
- Public Television and Radio Programs During Law Week
- School Lectures/Presentations
- Regional Law Day Programs

LAW FOR THE CLERGY COMMITTEE
- Publication and Distribution of Pamphlet on Legal Issues for the Clergy
- Seminars/Conferences on Legal Issues for the Clergy

LAW-RELATED EDUCATION COMMITTEE
- Classroom Programs on the Law—Elementary, Jr. High and High School
- Law School for Non-Lawyers: Liberty Lecture Series on the Law
- People's Law Community Education Program
- Stepping Out: A Pamphlet for Graduating High School Seniors (Distribution and Lecture Presentations)

LAWYERS COMPENSATION COMMITTEE
- Lawyer Compensation Survey

LONG-RANGE PLANNING COMMITTEE
- YLS Long-Range Plan

MEMBERSHIP SUPPORT NETWORK COMMITTEE
- *Law Student/Law Firm Reception
- Brown Bag Luncheons
- CLEs at Mid-Year/Annual State Bar Meetings
- Partnership Survey

NEEDS OF CHILDREN COMMITTEE
- *Child Fair
- *Educating Teachers About Child Abuse: Their Rights and Responsibilities
- *National Child Advocacy Conference Reception
- In re Kids Pamphlet Distribution and Presentations
- Presentations on Children's Rights to Community Groups

NEEDS OF THE ELDERLY COMMITTEE
- *Columns in Senior Citizen Newsletters on Senior Citizen Rights
- Presentations in Senior Citizen Centers, etc., on Legal Rights
- Senior Citizens Handbook—Continued Distribution

*PRO BONO COMMITTEE
- *Law School Ethics Courses
- **Bar Journal* Articles
- *Pro Bono Referral Service
- Tuesday Night Bar Legal Intake Services at the Law and Justice Center

PUBLICATIONS COMMITTEE
- Barrister Segment of *Utah Bar Journal*

PUBLICITY COMMITTEE
- Press Releases
- Publicity for Events and Projects

*SPECIAL PROJECTS COMMITTEE
- *Public Service Announcements
- ABA/YLD Award of Achievement Competition Application
- Liberty Bell Award
- Young Lawyer of the Year Award

*New Committee or Project

The Utah Young Lawyers Section is in need of volunteers to serve on these various committees. Please review this list of projects and volunteer your services. Some projects require as little as one hour attention per month, while others may need as many as 10 or more hours per month. You will find great satisfaction in providing service to the public and to Section members through participation in Young Lawyers Section activities. I solicit your participation and encourage you to become involved. Please write to the Utah Young Lawyers Section % Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111-3834, if you are interested in getting involved. Contact any of the officers of the Section or Paige Holtry at the Bar offices if you would like further information. I look forward to hearing from you.

The *Barrister* Needs You

The *Barrister*, which was formally published separately from the *Utah Bar Journal*, is now included within the *Journal*. Although the *Barrister* is included within the *Journal*, the Young Lawyers Section has the goal of developing and maintaining the *Barrister* as a place where Section members can find our Section's President's Message, our announcements, publicity for Section events, and articles tailored to our needs and interests.

The Publications Committee has the responsibility of being the vehicle to achieve this goal. However, the committee needs and requests the support of all Section members to achieve the goal of developing the *Barrister* into a meaningful resource. We ask that all Section members feel free to contribute notices, announcements, news and articles which recognize or interest young lawyers.

Publicity for upcoming events relating to the Section should be sent to Lisa Watts, who is the Publicity Committee Chairperson. Lisa's telephone number is 538-1044.

We need articles, written by young lawyers or others, which relate to young lawyers' needs or interests. Articles, recognition pieces and news items should be coordinated through Patrick Hendrickson, who is the Publications Committee Chairperson. Pat's telephone number is 355-1053.

With the Section members' help and involvement, the *Barrister* will serve as a needed communication exchange and helpful resource for Utah's young lawyers.

New Address or Phone?

Please contact the Utah State Bar when your address or phone number changes. This will ensure accurate information for Bar records and for the Annual Bar Directory.

Call (801) 531-9077 or toll-free from outside Salt Lake City 1-800-662-9054, or use this coupon and mail.

Name _____

Bar Number _____

Old Telephone _____

New Telephone _____

Old Address _____

_____

New Address _____

_____

_____

Mail to: **The Utah State Bar**
645 South 200 East
Salt Lake City, Utah 84111

Utah's Young Lawyers Hold National Positions in the ABA-YLD

Several members of the Young Lawyers Section of the Utah State Bar hold national positions on committees with the ABA-Young Lawyer Division. Those in active duty include Cecelia Espenoza, Deputy City Prosecutor, who is the National Chairperson for the Immigration Assistance Committee. The I.A.C. has an overall objective to help immigrants in their new life by providing access to legal help when needed and to governmental and social services agencies.

Jerry D. Fenn, Snow, Christensen & Martineau, holds several positions in the ABA-YLD. He is Vice Chairperson of the Alternative Dispute Resolution Committee, Executive Council member of the ABA-YLD Litigation Committee, and member of the Affiliate Assistance Team of the Affiliate Outreach Project.

Kimberly K. Hornak, Deputy County Attorney, is the District Representative for the ABA/Young Lawyer Division for Nevada and Utah. She is also a member of the AOP (Affiliate Outreach Project) Team and holds specific responsibility for the National Conferences Committee of the AOP team. She acts as a liaison at national ABA meetings for our district which is one of 30 districts.

Ryan E. Tibbitts, Snow, Christensen & Martineau, is the Associate Editor of *Membernet*, a newsletter from the Membership Support Network Committee.

Summary of 1988-89 Young Lawyers Section Activities

By Jerry D. Fenn

Although my term as Section President ended June 30, 1989, I wanted to provide this summary of the Section's 1988-89 activities to the members of the Section. The Section experienced tremendous growth and change this year. In addition to continuing successful projects, this year the Section implemented and conducted 10 new public service projects and seven new bar service projects.

The culmination of a successful year was the recognition given to the Section at the ABA Annual Meeting in Honolulu on August 5, 1989. At this meeting, the American Bar Association Young Lawyers Division awarded the Utah State Bar Young Lawyers Section the first place award in the Award of Achievement competition, for state's with 3,000 or fewer young lawyers, for the Section's overall programs conducted during the 1988-89 bar year. The Award of Achievement competition is an annual national competition sponsored by the Young Lawyers Division to honor outstanding achievement by young lawyer affiliates. Competition included judging of service to the public and service to the bar projects submitted by state organizations. The Section was also recognized at home. At the mid-year meeting of the Utah State Bar, the Section was named Section of the Year by the Board of Bar Commissioners.

Let me briefly describe some of the accomplishments of the Section this year. The Law-Related Education Committee, chaired by Richard Van Wagoner completed a revision of the Supplement to *Street Law*, a high school textbook used by the Utah State Board of Education. This supplement entitled *Practical Law in Utah* is used by high school students in civics classes. The committee also prepared and distributed a pamphlet entitled *On Your Own* to 10,000 graduating high school students in seven school districts in Utah. This pamphlet discusses legal topics of interest to young adults. The committee also sponsored a library lecture series on law-related issues at the Ogden and Salt Lake City public libraries once a month and made presentations in many schools on legal topics.

The Needs of the Elderly Committee, chaired by Keith Kelly, updated its Senior Citizens Handbook to explain recent changes in Medicare law and distributed 7,000 copies throughout the state. In addition, this committee presented 50 lectures at senior citizen centers throughout the state. The committee was particularly successful in expanding this program to areas outside of the Salt Lake Valley.

The Law Day Committee, chaired by Rich Hamp, organized and held law day fairs, for the first time statewide in Logan, Ogden, Provo, St. George and two locations in Salt Lake City. The 52 volunteer attorneys participating in this program provided legal information, pamphlets on specific legal issues and referrals to approximately 450 people.

The Membership Support Committee, chaired by Nick Hales, sponsored two CLES at the annual meeting of the Utah State Bar titled Changes in Practice and Procedures in Utah Courts and Trends in Lender Liability. This committee also sponsored monthly brown bag luncheons where leaders of the profession and members of the judiciary made presentations to young lawyers and answered questions in an informal setting. The average attendance at these brown bag presentations was 45 young lawyers.

The Tuesday Night Bar Committee, chaired by Cecelia Espenoza, assisted the senior bar with the Tuesday Night Bar program at the Law and Justice Center. Forty young lawyers participated in various ways in this program.

The Community Services Committee, chaired by David Little, conducted its annual blood drives, continued its efforts to fund a scholarship for high school students participating in the blood drive, held its annual Sub-for-Santa program, conducted a voter registration project and attempted to recruit volunteers and provide materials for the Salt Lake Homeless Shelter.

The Law for the Clergy Committee, chaired by Blake Ostler, prepared a non-denominational pamphlet on legal issues for the clergy. In conjunction with the publication of this pamphlet, committee members participated in seminars where the

issues covered in the pamphlet were discussed.

The Bridge the Gap Committee, chaired by David Christensen, assisted the bar with admission ceremonies held in May and October and recruited new volunteers at these ceremonies. This committee also provided a continental breakfast for those taking the February 1989 bar examination.

The Awards Committee, chaired by Joann Shields, presented the Liberty Bell award to Lawrence L. Burton, a Salt Lake valley junior high school teacher and Young Lawyer of the Year award to J. Stephen Mikita.

The Publicity Committee, chaired by Larry Laycock, improved the dissemination of information about the Section's activities and accomplishments and the accomplishments of members of the Section.

The Lawyers Compensation Committee, chaired by Greg Skordas and Charlotte Miller, prepared and published the Lawyers Compensation Survey. This year the survey was mailed to 2,000 members of the state bar.

The Barrister Committee, chaired by Stan Fitts, collected, wrote and edited articles for the Section's contribution to *Utah Bar Journal.*

The Section initiated the "People's Law" program in conjunction with the Salt Lake School District's Division of Community Education, which consisted of a series of educational seminars addressing areas of general legal concern including small claims court, consumer rights, wills and estates, business organizations, landlord/tenant law, and divorce and child custody.

The Section also amended its bylaws this year, prepared a handbook for section leaders, prepared an election handbook and revised election procedures, cosponsored a summer Utah Symphony concert, conducted a leadership retreat and conducted several social events. The Section President also spoke at the bar admission ceremonies in May and October. Finally, two members of the Section were selected by the American Bar Association Young Lawyers Division to make presentations at national conferences on successful programs implemented in Utah.

I have appreciated the efforts and commitment of members of the Section, including those mentioned above, to make this year a success. I particularly want to thank the other officers of the Section, Jonathan K. Butler, David J. Smith and Ryan Tibbitts, for their dedicated service and great contributions. In addition, I would like to thank the committee vice chairpersons and committee members who gave many hours of their time in service to the public and bar. Members of the executive council, including Sandi Sjogren and Kim Hornak also made significant contributions. Kent Kasting and other members of the Board of Bar Commissioners and Steve Hutchinson, the Executive Director of the Utah State Bar, gave us great support and encouragement. I would like to thank Stuart Hinckley, 1987-88 president of the Section, for his excellent advice and counsel and recognize the contributions of Paul Durham, John Adams and Cecelia Espenoza, past presidents of the Section who laid the foundation for the accomplishments of the past year. Last but not least, I would like to thank my firm Snow, Christensen and Martineau and particularly Reed Martineau for the constant support and encouragement given me during this past year.

The Section offers an opportunity for young lawyers to have substantive and positive experiences in law-related public service and in the organized bar. I encourage more members of the Section to become active participants in thue programs and activities offered this year the direction of the 1989-90 officers, Jonathan K. Butler, President; Larry R. Laycock, Secretary; Keith W. Kelly, Treasurer and Richard A. Van Wagoner, President-Elect.

Legal Aid Services Extended Through IOLTA

By Arnold G. Gardner Jr., Executive Director, Legal Aid Society of Salt Lake

The Legal Aid Society of Salt Lake (LAS) is a non-profit 501(c)(3) organization governed by a volunteer Board of Trustees. It was created in 1922 to provide legal representation to low-income individuals who are unable to obtain representation through the private bar. LAS provides representation for qualified individuals whose legal problems are centered in Salt Lake County. Offices are located at 225 S. 200 E., Suite 230, Salt Lake City, Utah. The existence of LAS in the Salt Lake County community is due in no small part to the generous support of the Utah Bar Foundation through its funding of LAS from IOLTA monies. The IOLTA grant is one of only a few large grants which LAS utilizes to pay general operational costs of the organization. Without funding from IOLTA, due to the idiosyncracies of various funding sources' fiscal years, LAS could not stay in operation during the summer months.

Because most requests for LAS' representation occurred in the area of domestic law, the Board directed LAS to emphasize representation in this area. Through this emphasis, LAS has been able to provide representation to a larger number of low-income clients. Presently, LAS routinely provides representation in divorce/annulment cases, custody petitions, paternity matters, divorce modifications and stepparent/relative adoptions. LAS also provides representation in immigration matters involving family, students and laypersons. Without the interns and volunteers, LAS would not be able to serve the number of clients now represented.

There are presently over 380 persons on the waiting list to receive an appointment at LAS. Weekly appointments are scheduled four weeks in advance of the appointment by taking names from the top of the waiting list. The number of appointments made is in direct relation to the number of cases which have been closed by the office during the prior month. It is estimated that it will be six to eight months before all persons presently on the list will be able to receive appointments. Cases other than domestic and cases involving conflicts are referred to Utah Legal Services. Clients over the federal poverty guidelines are referred to the Lawyer Referral Service of the Utah State Bar or the Tuesday Night Bar.

Individuals with emergency cases or protective order cases are handled on an expedited basis. Individuals requesting immediate assistance are asked to come to the office to provide information regarding the case and explain why they feel they should be provided immediate representation. Those requests are staffed each evening to ascertain whether they fall within LAS' priorities. Individuals who present problems involving immediate and irreparable injury and cases where pleadings have been served requiring an immediate response may be immediately assigned to a staff attorney, if resources permit. Individuals who will not be immediately assigned an attorney at LAS are those who have created their own emergency situation, situations where the outcome of the hearing would not be affected if the individual was or was not an American citizen or permanent resident. For the last two and a half years, LAS has also provided legal representation to victims of domestic violence who are seeking protective orders.

Qualified clients are not charged any fees for legal services through Legal Aid. Clients who are not spouse abuse clients must be either low income (at or below the 100 percent of the Federal Poverty Guidelines) or receiving some form of public assistance. Spouse abuse clients are assisted irrespective of their financial means. Clients are required to pay in advance any costs of service or other court costs associated with their action which are not waived with an affidavit of impecuniosity.

With a staff of five attorneys, four paralegals, five other support staff and numerous volunteers, LAS handled 2,770 cases in 1988. Other than the Executive Director, who carries a lesser caseload, regular staff attorneys carry a caseload of from 100 to 150 open, active cases. The spouse abuse attorney opens from 30 to 60 cases each month and in 1988 handled over 700 domestic violence cases.

The staff is greatly assisted in its representation of LAS' clients by the Domestic Law Clinic and legal, paralegal and non-legal volunteers. Over 5,900 hours were volunteered in 1988. The Executive Director supervises the operation of the Domestic Law Clinic through which students of the University of Utah College of Law are trained and give hands-on experience in handling domestic law cases. LAS also provides internships for paralegal students and University undergraduate students. Literally thousands of hours of additional volunteer time has been donated to LAS by attorneys. Other funding sources have indicated a willingness to increase their funding commitments if support from the legal community were to increase. Additional funding would permit the hiring of additional attorneys and the representation of additional clients. Members of the Bar can assist in meeting the needs of low-income individuals directly by offering to handle cases on a pro bono basis through the Pro Bono Project of Utah Legal Services. The Legal Aid Society of Salt Lake endeavors to continue to provide high quality legal representation to Salt Lake County's low-income families through the continued support of the community and the Bar.

Ashton's Book Distributed to Schools

A copy of the *Federal Judiciary in Utah* was distributed to every junior high and high school in the state of Utah in May. The Foundation hopes that by giving the students in the state access to the book, a better understanding of Utah's history can be obtained.

QUESTIONNAIRE
UTAH ADMINISTRATIVE AGENCY DECISION REPORTING

A special task force of the Administrative Practice Section of the Utah State Bar has undertaken to determine the need and demand for better or more extensive reporting of Utah administrative agency decisions. Your response will assist the Section in making a recommendation. Even if your agency practice is minimal or nonexistent, it would be of assistance if you would answer the parts of the questionnaire for which you have information or an opinion.

Please feel free to add comments that do not fit the narrow scope of the questions. Thank you for your help on this project.

Does your practice involve Utah administrative agencies? Yes ☐ No ☐ Only occasionally ☐

	AGENCY 1	AGENCY 2	AGENCY 3
If so, which agencies.			
Relative frequency of your practice involving this agency (rare, occasional, frequent).			

In the following questions, rate from 1 (poor/none) to 5 (excellent/substantial).

Importance of past agency decisions and orders in your practice.			
Completeness of significant agency decisions and related records at the agency.			
Accessibility of agency decisions and related records to practitioner.			
Availability of indices, abstracts, key topics or other finding guides.			
More complete reporting of this agency's decisions would materially improve the quality or efficiency of your practice.			

Sources of agency decisions you currently use:

Agency publications			
Agency files			
Personal/firm files			
CCH or other reporter			
LEXIS/Westlaw			
Other lawyers			
Other (specify)			

Comments: _____

If a project to publish Utah administrative agency decisions were to be undertaken:

1. Which agencies' decisions should be published?
   - ____ Department of Commerce
   - ____ Department of Financial Institutions
   - ____ Department of Health
   - ____ Industrial Commission
   - ____ Insurance Department
   - ____ Board of Oil, Gas and Mining
   - ____ Department of Public Safety
   - ____ Public Service Commission
   - ____ Department of Social Services
   - ____ Tax Commission
   - ____ _____
   - ____ _____

2. What breadth of reporting do you believe would provide the most efficient balance of usefulness with the cost and volumes of material? (Indicate if you think this varies from agency to agency.)
   - ____ Full text of all agency and ALJ decisions and orders
   - ____ Full text of all final agency decisions only
   - ____ Full text of "key" or important decisions
   - ____ Only summaries or abstracts of decisions
   - ____ Other _____
     _____

3. What methods of publication would best suit your or your firm/agency/corporation's needs?
   - ____ Looseleaf service covering all agencies
   - ____ Periodic bound pamphlets—all agencies
   - ____ Periodic bound pamphlets—by agency
   - ____ On-line service similar to LEXIS/Westlaw
   - ____ Central repository/law library
   - ____ Other _____

4. What is the level of your or your firm/agency/corporation's interest in purchasing at "reasonable" cost a service that reports state administrative agency decisions? (1—none, 5—very likely to purchase) _____

5. In your opinion, how should any such service be published?
   - ____ Private publisher
   - ____ Utah State Bar
   - ____ Official Utah Code publisher
   - ____ Part of Utah State Bulletin
   - ____ A university

Please detach (or copy), fold so that the address label is facing out, tape or staple, and mail to the Utah State Bar

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From: (optional)

_____
_____
_____
_____

Postage

Task Force on Administrative Agency Reporting
Utah State Bar
645 S. 200 E.
Salt Lake City, UT 84111-3834

CLE CALENDAR

DEVELOPMENTS IN THE MECHANICS LIEN AND NOTARY LAWS

The Real Property Section and the Utah State Bar will co-sponsor a half-day seminar on the recent developments of Utah mechanics lien and notary laws. The seminar will discuss recent statutory changes as well as developments in case law.

Date: October 10, 1989
Place: Utah Law and Justice Center
Fee: $40
Time: 8:45 a.m. to 12:15 p.m.

ADVANCED TAX ISSUES IN ESTATE PLANNING

A live via satellite seminar. The federal estate, gift and generation-skipping tax system has been undergoing dramatic change in recent years, and the rate of change and increase in complexity is accelerating. More than ever before, non-estate planning transactions can greatly compound the client's estate planning problems. The program will focus on new developments in four areas: Section 2036(c) of the Internal Revenue Code; generation-skipping transfer tax; life insurance trusts; and the estate planning aspects of employee benefits.

Date: October 12, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

REPRESENTING THE SMALL BUSINESS CLIENT: A GUIDE FOR SOLE AND SMALL FIRM PRACTITIONERS

A live via satellite seminar. This program covers both the basic and special needs of small business clients and the particular skills required of sole or small firm practitioners who counsel them. The purpose is to review the fundamental services performed by practitioners in counseling small businesses and to sharpen the attorney's professional and organizational skills in a manner that will attract business clients. Attention also will be given to the concerns of minority—and women-owned businesses and to positive business counseling that the practitioner might wish to provide to clients.

Date: October 19, 1989
Place: Utah Law and Justice Center
Fee: $25 (special fee)
Time: 10:00 a.m. to 2:00 p.m.

TRIAL OF A COMMERCIAL CASE: LITIGATING AND DEFENDING UNDER ARTICLES 2 AND 9 OF THE UCC

A live via satellite seminar. How secure are you—in litigating under Articles 2 and 9—of your knowledge of the rights of the various parties, what's different and unusual about litigating under Article 9, and what is the full scope of Article 2? How about remedies and presuit considerations? Are you totally confident that you are doing all you can do to prepare the case for presentation, to present a prima facie case, to give effective cross-examinations and closing arguments? This program will be especially beneficial to commercial lawyers, but anyone who handles any aspect of litigating any case involving secured creditors or sales and desires to step years ahead in experience should consider attending this program.

Date: October 24, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

TAXATION OF S CORPORATIONS AND PARTNERSHIPS—A PRACTICAL COMPARATIVE ANALYSIS

A live via satellite seminar. This program will provide a thorough discussion of the factors that should be considered in choosing whether to form a business as a partnership or an S corporation and in operating the business after one of these forms is selected. Recent changes in the tax laws have enhanced the attractiveness of using a form of business entity that is not subject to federal income tax. In the past, new businesses were ordinarily conducted by regular corporations, and partnerships and S corporations were used only in special circumstances. The Tax Reform Act of 1986 has reversed the presumption. Under present law, it will normally be desirable to use a partnership or an S corporation. The tax rules governing these "flowthrough" entities are often complex, but practitioners will have to master them to advise their clients effectively. The program will be of interest to attorneys, accountants, and all of those who advise closely held businesses.

Date: October 31, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

UNDERSTANDING AND PREPARING THE HEAD INJURY CASE—WHAT THE ATTORNEY NEEDS TO KNOW

Any attorney dealing with personal injury cases can expect to have cases involving head injuries. Prominent national experts in the field of head injuries will present this informative two-day seminar co-sponsored by the Utah Head Injury Association and the Utah State Bar. The following topics will be addressed: (a) the attorney's perspectives, for both the plaintiff and the defense, in evaluating the head injury case; (b) the anatomy of a head injury; (c) modern diagnostic techniques for head injuries and their limitations; (d) behavioral and cognitive problems and the use of neuropsychological test data; (e) managing the head injury case; (f) preparing the head injury case for settlement or trial; and (g) rehabilitation and life case planning for the head injured. A catered lunch and catered breaks for each day will be provided in the cost of the seminar.

Date: November 2 and 3, 1989
Place: Utah Law and Justice Center
Fee: $250 ($195 for early registration before October 15, 1989)
Time: November 2, 1989, 8:00 a.m. to 5:30 p.m.
November 3, 1989, 8:30 a.m. to 12:30 p.m.

NEW DIRECTIONS IN EMPLOYMENT AND DISCRIMINATION LAW: THE SUPREME COURT TURNS RIGHT

A live via satellite seminar. This program examines the startling and substantial changes wrought by the new U.S. Supreme Court majority in the field of employment law during the 1988-89 term, both in the public and the private sectors. The Reagan appointees to the Supreme Court began the move to the conservative right eight years ago, but the Court is just now changing direction. This program will bring employment law practitioners, civil litigators, government attorneys and civil rights advocates up to date on the meaning and implications of these changes.

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

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Oct. 10	Developments in the Mechanics Lien and Notary Laws	L & J Center	$40
☐ Oct. 12	Advanced Tax Issues in Estate Planning	L & J Center	$135
☐ Oct. 19	Representing the Small Business Client: A Guide for Sole and Small Firm Practitioners	L & J Center	$25
☐ Oct. 24	Trial of a Commercial Case: Litigating and Defending Under Articles 2 and 9 of the UCC	L & J	$160
☐ Oct. 31	Taxation of S Corporations and Partnerships—A Practical Comparative Analysis	L & J Center	$160
☐ Nov. 2 and 3	Understanding and Preparing the Head Injury Case—What the Attorney Needs to Know	L & J Center	$250 ($195 before Oct. 15)
☐ Nov. 9	New Directions in Employment and Discrimination Law: The Supreme Court Turns Right	L & J Center	$135

Name _____ Phone _____ Firm or Company _____

Address _____ City, State and ZIP _____

Total fee(s) enclosed $ _____
Make all checks payable to the Utah State Bar/CLE

American Express, MasterCard/VISA
Expiration Date _____

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

POSITIONS AVAILABLE

The College of Law at the University of Wyoming in Laramie invites nominations and applications for the position of Dean. The appointment will be effective on or about July 1, 1990, although an earlier appointment may be arranged. Review of applications will begin in mid-October. Candidates should have solid academic records and strong administrative skills. Applications should include a resume and a letter expressing the applicant's interest. Nominations and applications should be addressed to: Professor Mark Squillace, Chair, Dean Search Committee, P.O. Box 3035, University Station, University of Wyoming College of Law, Laramie, WY 82071. Equal Opportunity Employer, Affirmative Action Institution. Women and minorities are encouraged to apply.

Downtown Salt Lake City firm with established business/litigation-oriented practice seeks to add one associate attorney with one to three years' experience to its securities department and one associate attorney with one to three years' experience to its litigation department. Interested parties may submit resume to: Utah State Bar, Box S, 645 S. 200 E., Salt Lake City, UT 84111. All inquiries will be kept confidential.

Permanent staff attorney positions in Farmington, Shiprock and Crownpoint, New Mexico, offices. Salary $18,000 for new law graduates; increased for experience and relevant bar admissions. Life, health, dental, vision and disability insurance; pension plan. QUALIFICATIONS: Graduate of accredited law school; demonstrable commitment to legal services to the poor. Must pass New Mexico bar exam. Commitment to three years' tenure at DNA desirable. Acceptable references and strong writing skills required. CLOSING DATE: Open until filled. Send resume, writing sample, law school transcript (new graduates only), and names, addresses and phone numbers of three references to: Steve Bunch, Litigation Director, DNA-PEOPLE'S LEGAL SERVICES, INC., P.O. Box 306, Window Rock, AZ 86515. Telephone: (602) 871-4151.

Looking for attorney to share office space and facilities in excellent downtown location with lawyers in general commercial and corporate practice. Reception area, conference room, limited library, word processing, other office equipment and some secretarial service available. Future association or partnership possibilities. Send inquiries to Utah State Bar, Box L, 645 S. 200 E., Salt Lake City, UT 84111.

WANTED: Lawyer with oil and mining exploration background to join private Utah oil and mining exploration company as officer and director. An opportunity to share in company profits plus shares and overriding royalties. Good financial contacts would be a big asset as we often get involved in deals needing finances. Contact George Allen, President, Black Gold Exploration Inc., 89 W. 1200 S., Bountiful, UT 84010. Call 295-3189 anytime after 10:00 a.m.

SALT LAKE LEGAL DEFENDER ASSOCIATION is currently seeking an appellate attorney to represent indigent defendants on appeal of criminal cases. Send resume and writing samples to Joan Watt, Chief Appellate Attorney, Salt Lake Legal Defender Association, 424 E. 500 S., Suite 300, Salt Lake City, UT 84111. Telephone: 532-5444.

ASSOCIATE POSITION AVAILABLE: Robert DeBry & Associates is looking for an attorney who has practiced for three years plus. Must have excellent research and writing skills. Litigation experience is helpful. Send resume, writing sample and salary requirements to: Steve Sullivan, ROBERT DEBRY & ASSOCIATES, 4001 S. 700 E., Suite 500, Salt Lake City, UT 84107.

Mid-sized downtown law firm is looking for tax counsel with three to five years' experience and own client base. Please respond to Utah State Bar, Box B, 645 S. 200 E., Salt Lake City, UT 84111.

POSITION SOUGHT

Second-year associate with large Salt Lake firm seeks associate position with small-to medium-sized firm, or other comparable position. Excellent academic credentials, experience in litigation, bankruptcy and real property law. Please direct inquiries to: Utah State Bar, Box W, 645 S. 200 E., Salt Lake City, UT 84111.

SERVICES AVAILABLE

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

WORD PROCESSING SERVICE: Word processing service run from home with an IBM Word Perfect computer. Four years' legal experience. Fast, accurate and confidential service. Guarantee a professional product. Will pick up and deliver written material or dictation tapes. Low rates. Please call Pam at 964-6116.

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OFFICE SPACE AVAILABLE

One or two beautiful window offices in professionally decorated suite available for sublease from small law firm. Complete facilities, including FAX, telephone, conference room, library, kitchen. Reception service provided. Gorgeous building featuring center six-story atrium with fountain. Please call 269-0200.

OFFICE EQUIPMENT FOR SALE

Used, like new, office furniture for sale. One large conference table; 10 swivel chairs for conference room; one wine-colored large leather sofa; two wine-colored leather wing-back chairs; one wine-colored executive posture swivel chair; one large Kimbal Traditional executive desk; one Kimbal matching credenza; one Myrtle Traditional desk with right return; also other credenzas, lamps, tables, wall hangings, etc. Contact Hal Jensen in Ogden at 1-800-451-7844 or 627-3073 in the day, or 782-7227 in the evening.

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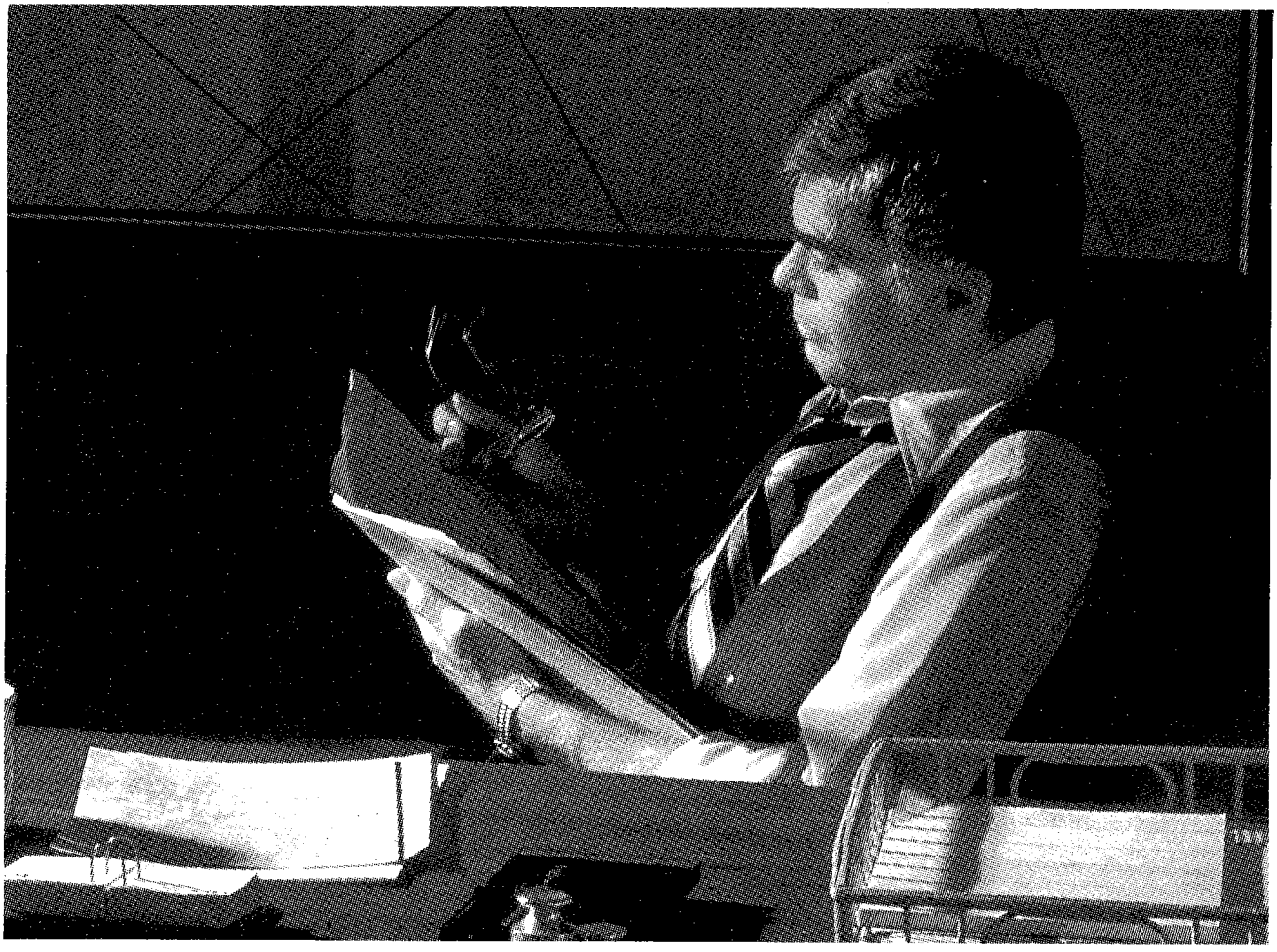

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