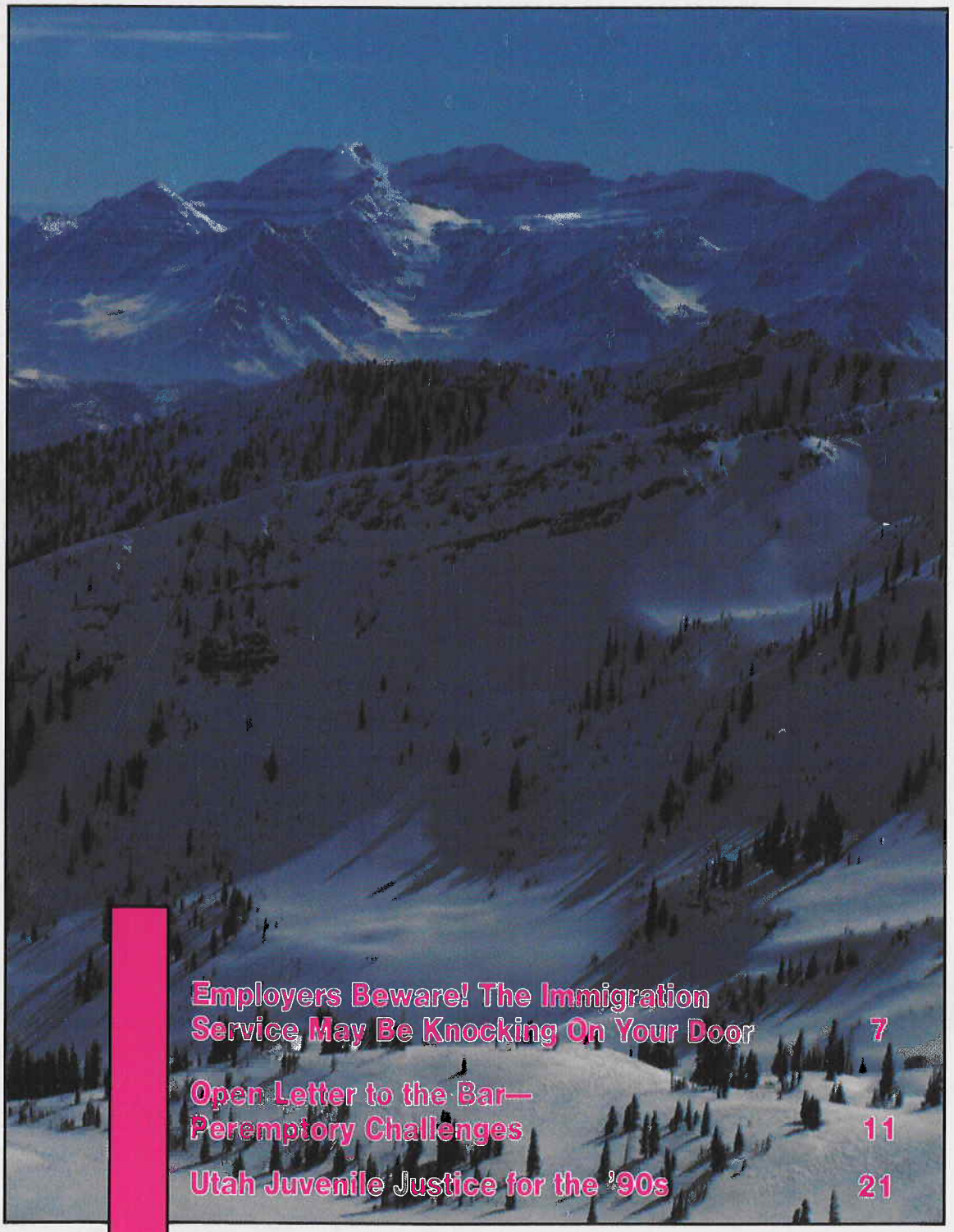
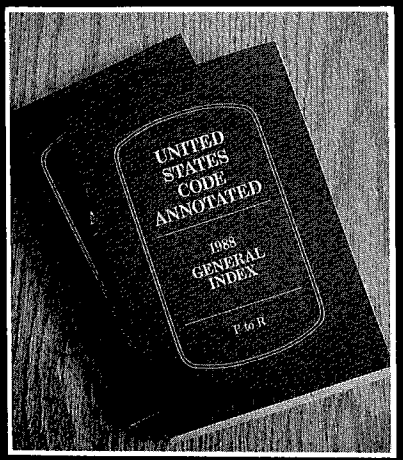
UTAH BAR JOURNAL

Vol. 3, No. 2 February 1990



"Only One Annotated Federal Law Source Has The Complete, Current Indexing You Need. Only One."



Superb indexing in United States Code Annotated® takes you to the federal law you need faster and easier.

The set's nine-volume General Index contains thousands of entry lines not found in any other annotated federal law source. Annual revisions ensure the index is always up-to-date.

Finding federal law fast with superior indexing: a dividend you receive only from USCA.

For a free "Buyer's Guide To USCA," contact your West Sales Representative or write to: West Publishing Company, 50 W. Kellogg Blvd., P.O. Box 64526, St. Paul, MN 55164-0526.

USCA®

The Choice for success

Call 1-800-328-9352

(In MN, call collect: 0-612-688-3600)

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

UTAH BAR JOURNAL

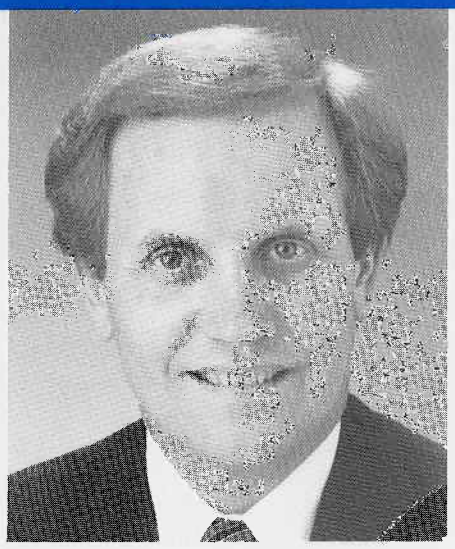
Vol. 3, No. 2 February 1990

■

COVER: Our thanks to Harry Caston of McKay, Burton & Thurman for the cover photograph, Mount Timpanogos, Utah County, in winter.

■

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.



Courtesy—It Begins With a Handshake

By Hans Q. Chamberlain

I know you have been bombarded with many views concerning professionalism because this topic has been on the lips of many lawyers for some time. Rather than trying to discuss professionalism in its broadest sense, I would like to simply share a few of my thoughts concerning courtesy. Because lawyers are the main lubricant that makes society run smoothly and are so often in the public eye, it is my belief that courteous conduct by lawyers should always be the rule.

Because we see so much rudeness in today's world, many of us have reached the point of being courteous primarily because we want to be, and if there is an ulterior motive behind common courtesy, it is that when we make other people feel good, it makes us feel good, too.

Courtesy is often intertwined with manners. Fred Astair once said, "The hardest job kids face today is learning good manners without seeing any."

Too often in today's society, and even among lawyers, we hear someone proclaim, "I don't give a damn about what other people think of me." What that person is really saying is that he or she doesn't give a damn about other people, because it amounts to the same thing.

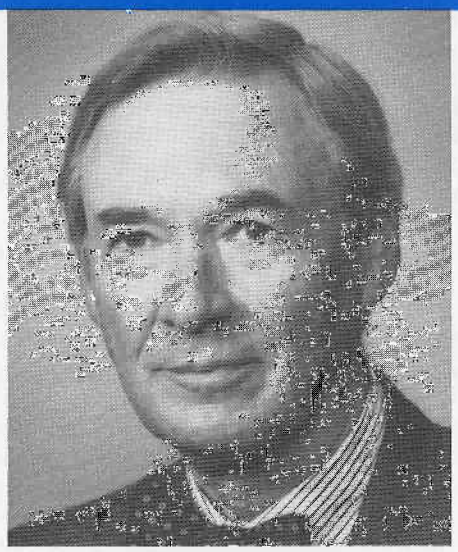
I have often tried to determine what the real difference is between practicing in a small community and the practice of law in the metropolitan areas. Contrary to what some of you may think, things really don't move much slower (or, for that matter, much faster) in the rural area than they do in the city. The days are the same length in southern Utah as they are elsewhere, and we face the same time demands that lawyers everywhere face on a day-to-day basis. I have come to the conclusion that because rural lawyers meet and deal with the same lawyers over and over again and know everyone on a first-name basis, they usually go about their business with courtesy. Likewise, I have always been impressed with the courteous conduct of lawyers throughout the state and simply want to encourage that philosophy.

These courtesies begin with a simple handshake. It seems to me that shaking hands is becoming a thing of the past unless the other attorney happens to be a close personal friend. Admittedly, I have some failing in this regard, but generally try to excuse my behavior by blaming the other person for not offering his or her hand first. I also have to frequently remind myself to ignore the outdated principle that one does not shake hands with a woman unless she offers her hand first. Shaking hands adds a degree of warmth and courtesy to any professional transaction. Even boxers shake hands before they challenge each other in the ring. Lawyers should do likewise so in every professional transaction, including the vigorous stages of litigation.

We all like to think we have a hometown advantage when the case at issue is tried in our locale. From the standpoint of the rural practitioner, we should avoid the tendency to be rather cliquish when out-of-town lawyers make an appearance on our turf. Because rural lawyers seem to know everybody on a first-name basis, it is much easier for us to be cliquish than if the tables are turned and we have to make an appearance in the Wasatch Front where everyone doesn't know each other.

Lawyers are image conscious. We have been taught to be conscious of how we act or portray ourselves at almost every CLE event we have ever attended. It is my suggestion that we become conscious of our image concerning courtesy, and recognize that courtesy should not be misconstrued as a sign of adversarial weakness or, for some reason, affect the image we have strived to create.

As you know, the Rules of Professional Conduct obligates us to represent a client zealously within the bounds of the law. This does not mean that we have to engage in rude behavior or use tough rhetoric. Courtesy simply boils down to an outwardly appearance of having a genuine regard for the feelings and general welfare of those we meet professionally and otherwise.



"Being a Lawyer is Not for Everyone"

By Jackson B. Howard

At one time, it was the concept that a lawyer did most everything that was expected of a lawyer, and specialties were more the exception than the rule. Now, it is the consensus that the practice of law requires specialization and specialty practice is more, in my opinion, the rule than the exception. When I began the practice, law firms in Utah were small, and if my recollection serves me, the largest law firm in Utah in 1949 was approximately six members. We now have many firms in Utah with more than 50 lawyers and a few in the neighborhood of 100 lawyers. This has changed greatly the character and personality of the lawyer.

The nature of the practice has increased the complications, and nearly every case now requires extensive discovery and preparation. Even non-litigation cases require extensive briefing and memorandums. Files that would earlier have been a few pages now are two or three folders and the cost of each individual transaction or each individual case has increased exponentially.

I am not sure that all of this change has been for the good. In fact, a healthy argument could be made that the quality of the practice is not better now than it was 40 years ago, and certainly a wholesome argument could be made that the quality of the lawyer is not as good now as it was then. In this age of notice pleading and full disclosure, we have a good many more litigators than lawyers, and the objective now is to exhaustively prepare a case for trial, even to the extent that trial becomes economically impossible. Cases that should be tried in a week now take a month to try. We deal in a host of side issues rather than getting to the heart of the problem. Insurance companies and large corporate litigants have embarked upon the technique of economic defenses, making the prosecution of a case financially impossible for most litigants. Injuries of minor value, regardless of how just and deserving, cannot be addressed because of the cost involved.

Supposed simplifications have themselves increased the complications of litigation. For example, we now write a five-page digest for a 10-page brief (Rule 4-501(1) of the Utah Rules of Jud. Admin.) and instead of knowing the basics of pleading as required in the days of code pleadings, we now are confronted with rules of procedure, rules of evidence, and appellate rules for each of the courts, and so, the practice of law has frequently been reduced to rule interpreting, vis-à-vis, issue resolving. This is not to say that it is all bad, but it does point out that it is questionable whether we have improved the manner in which law is practiced, whether we have elevated the quality of practice, and whether we have inculcated the fundamental lawyer-like qualities required of a true advocate.

We have further, as lawyers, been compromised by industry organizational concepts and the microchip mentality, to the detriment of the lawyer as the well-rounded scholar conversant with science and the humanities, and knowledgeable in history and philosophy. We are reducing ourselves to technicians and are overwhelmed with the need to accumulate technical operating data. Because of the vast quantity of information we need to understand from recent case decisions to computer novations, many of us are simply sinking in the swamp of data overload.

While tangential to my basic theme, I have concluded that far too many graduates of the law schools are not truly qualified to be lawyers. I am also of the opinion that the practice of law is a great disappointment to a sizeable portion of our membership. It seems many come to the practice with expectations that cannot be obtained. All too often they don't discover the lack of potential or their disenchantment until too many years have been invested, and the opportunities to change have been irretrievably lost.

It is my feeling that many of the younger lawyers who have come into the profession in the last five years should take a strong and critical look at the profession to see if it is suited for them and their objectives. Many

of our members would be better off doing a number of other things that would bring to them a personal satisfaction that they will never receive from the practice of law. Lawyers who are not excited about what they are doing at 5:00 p.m. on a Friday afternoon are perhaps not suited to the practice.

Life is too short to engage in a profession that doesn't bring the personal satisfaction, joys and rewards that the individual requires, and to practice law simply because it is a profession which gives one standing in the community or minimal other reasons is a mistake, for to do so undermines the character of the individual, precursors failure and has a host of deleterious effects to the person, the spouse and the family.

The truth of these observations is fully reflected in the disciplinary proceedings before the Bar. More concerning, however, are those situations that don't make it to the discipline level, and are reflected in mediocrity in the performance of professional responsibilities.

It is my belief that a lawyer should think of himself as the "best lawyer in the world," and the standard of practice should be gauged by the concept that if any other lawyer could do it better, then it's the duty of the lawyer not to take the case or not to undertake the transaction, but to refer it to someone else who is better suited, more capable, and more devoted to the undertaking. While this may sound like an unreachable hyperbole, what I really mean is that before the lawyer takes the assignment he may not have all the knowledge and skill required, but if he takes the case it is incumbent for him to overcome his deficiencies by diligent preparation.

If the practice of law is not a happy home, I would recommend to those who have the youth and the will, and are not happy in the practice, to think seriously of another occupation, and to take steps to secure that change. I know of a number of lawyers who have made that decision and who are gratified and pleased that they have done so. The testimonies of those people to the happiness such change has brought to them is pleasing to me and I believe that, ultimately, it constitutes a service to the public. I am confident that neither the individual lawyer nor the public is well served by the lawyer whose heart is not in the practice. I further believe that many of the illnesses that afflict the Bar, such as those that I have mentioned above, are in many ways the result of law school graduates who become practitioners, but not lawyers.

It is impossible to write a succinct conclusion to these rambling observations, though it would be adequate to say that for one to get more out of the profession he must become more of a lawyer and less of a technician. Courts and legislators must find a way to make litigation a reasonable procedure for the average citizen, and those who are not exhilarated by practicing law should quickly and courageously seek another calling.

Employers Beware! The Immigration Service May Be Knocking On Your Door or What Every Employer Should Know About the Immigration Reform and Control Act of 1986

By Brad L. Englund

I. INTRODUCTION

Three years have passed since the Immigration Reform and Control Act of 1986 (herein "IRCA") was signed into law.[1] Despite this extended time, many employers, and probably even a few law firms, are still not in compliance with the requirements of the Act.

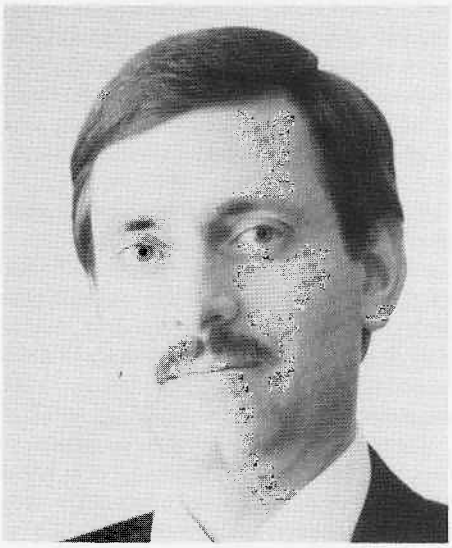
The IRCA is not a law to be ignored. The Act contains substantial civil and criminal penalties for non-compliance. The Immigration and Naturalization Service (herein "INS") is currently conducting random investigations throughout Utah to enforce compliance. These investigations are not limited to large employers nor to those who traditionally hire illegal aliens. All employers are subject to the requirements of the Act and all may be investigated.

Most small employers have only a vague notion of what the Act requires. Many of these notions are incorrect or incomplete, and are likely to cause the employer to run afoul of the Act.

The requirements of the IRCA should not be discovered at the time the INS delivers its Notice of Inspection to the employer. Such lateness can have disastrous consequences. Neither the IRCA nor the supporting regulations provides a procedure to remedy past violations. An employer is subject to penalties even if the violations were not knowingly made. However, the sooner an employer complies with the Act the more likely it is to avoid the penalties.

II. PROHIBITION AGAINST HIRING "UNAUTHORIZED" ALIENS

One of the false notions that many have about the IRCA is that it only prohibits the employment of undocumented aliens, or more generally, illegal migrant workers from Mexico. However, the Act actually prohibits the employer[2] from *knowingly* hiring any alien (regardless of the country of origin) who does not have authorization to work. Such an alien is defined in the Act as an "unauthorized alien." This definition includes tourists, many students, some foreign exchange visitors, non-immigrant fiancees, and a host of others. It also includes certain aliens who have work authorization, but only for employment with one employer, or only for a certain number of hours per week. These aliens are "unauthorized" if they seek work beyond the scope of their authorization.



BRAD L. ENGLUND graduated magna cum laude from Brigham Young University in 1980 with a B.S. in accounting, and cum laude from the J. Reuben Clark Law School in 1984. He practices law in Salt Lake City in the areas of immigration, commercial law, and general litigation.

The Act also prohibits employers from *knowingly* obtaining the labor or services of an unauthorized alien through a contract, subcontract, or exchange.[3] Finally, the IRCA prohibits the employer from continuing to employ an alien if it knows the alien is (or has become) an unauthorized alien. However, this prohibition does not apply to unauthorized aliens who were hired prior to November 7, 1986. These aliens are "grandfathered" in the Act. Employers may continue to employ such workers without liability under the Act.[4]

III. PENALTIES FOR EMPLOYING "UNAUTHORIZED ALIENS"

If the employer knowingly hires or continues to employ an unauthorized alien, it is subject to both criminal and civil penalties. The criminal penalties include fines of up to $3,000 for each unauthorized alien or imprisonment for six months, or both. However, criminal penalties cannot be imposed unless the employer is engaged in a pattern and practice of violating the Act.[5] Where the Attorney General has reasonable cause to believe that an employer is engaged in a pattern or practice, he may seek an injunction or restraining order against the employer.

The amount of the civil penalty depends on the number of violations of the employer. The penalties can range from a minimum of $250 to a maximum of $10,000 *for each unauthorized alien.*[6] The amount of the penalty also depends on such factors as the size of the business, the good faith of the employer, seriousness of the violation, and the history of previous violations of the employer.[7] In addition to the monetary penalties, the employer may be required "to take such other remedial action as is appropriate."[8] The limits on the nature of this remedial action are unclear.

In addition to other civil and criminal penalties, the IRCA also provides a penalty of $1,000 for each unauthorized alien who has provided some indemnity or financial guarantee to the employer against potential liability arising under the Act. In addition, any amount received by the employer as part of the indemnity must be returned to the alien.

In order to assess any penalty, the government has the burden of proving that the employer *knowingly* hired or continued

to employ an unauthorized alien. For criminal penalties the government must show that each act of the pattern and practice was knowingly done. This is a substantial burden. However, for civil penalties, the government's burden is merely by a preponderance of the evidence.

IV. PROCEDURE FOR ASSESSING PENALTIES

Understanding the manner in which the civil penalties are assessed under the IRCA is essential to preserving the employer's rights. Failure to act properly and promptly can cut off the right to require the government to meet its burden of proof, or the right of appeal.

A proceeding to assess administrative penalties against an employer is commenced by the INS issuing a Notice of Intent to Fine, INS Form I-763.[9] This Notice indicates the charges against the employer and the penalty that will be imposed. A copy of this Notice is delivered by the INS to the employer. Under the regulations, service of the Notice may be considered complete when it is delivered to "a person in charge" of an office, or when it is received in the mail room.[10]

After receipt of the Notice, the employer has 30 days to request a hearing before an Administrative Law Judge.[11] This is done by filing a written request with the INS. The written request is not deemed filed until actually received in the correct INS office. If the employer fails to file its request for a hearing within the required time, the INS automatically issues a final order assessing the penalties set forth in the Notice of Intent to Fine. No appeal can be made from this order, and it may not be collaterally attacked.[12]

If the employer's request is timely made, a hearing is held before an Administrative Law Judge. The INS must prove the facts by a preponderance of the evidence. Following the hearing, the employer is entitled to an administrative appeal before the Office of the Chief Administrative Hearing Officer. If necessary, the employer may appeal to an appropriate U.S. Court of Appeals.

In practice, 85 percent of the cases settle before the hearing. However, the INS will not likely consider settlement before the employer files its request for hearing. In the settlement, the INS will generally require an admission of liability. This admission will permit the assessment of higher penalties in the future.

V. EMPLOYEE VERIFICATION PROCEDURES AND RECORDKEEPING REQUIREMENTS OF THE IRCA

As a corollary to the prohibition against hiring unauthorized aliens, the IRCA also prohibits employers from hiring anyone, including citizens, without first completing an INS Form I-9. This is known as the "employee verification procedure." This prohibition applies to all employers, even of one employee. It applies to all employees hired after November 6, 1986, even if the employee is hired for only one day. The only employees exempted from this prohibition are domestic workers in private homes that provide only "sporadic, irregular, or intermittent" work and independent contractors or the employees of independent contractors.

Under the IRCA, the employer is required to complete this form within three days of the employment.[13] Furthermore, the employer is required to retain[14] the Form I-9 for three years after the date the employee is hired or one year after the date the employment is terminated, whichever is longer.[15] The employer is also required to update the form where the employee has temporary work authorization and that authorization has expired.[16]

The civil penalty available for violations of the employee verification procedures or the retention requirements is an amount not less than $100 and not more than $1,000 for each Form I-9 not completed or not retained. The amount of the penalty is determined by the same standards used when an unauthorized alien is hired.

Employers are liable for these penalties if they do not have a completed Form I-9 on file for every employee hired after November 6, 1986.

Criminal penalties are also available, but, as with the prohibition hiring unauthorized aliens, they may be charged only if the employer engages in a pattern and practice of violations.[18] The criminal penalties for violating the employee verification procedures is the same as for hiring unauthorized aliens. The only difference is that the government does not need to prove knowledge on the part of the employer that an alien was unauthorized.

The Act or the regulations do not provide any relief for an employer who has not yet complied with the employment verification procedures. However, a tardy compliance is better than no compliance at all, and may cause the INS to refrain from seeking any penalties. It may also permit a lower settlement figure if the INS determines to settle the case.

VI. INVESTIGATION AND PENALTY ASSESSMENT PROCEDURES

Under the regulations, either the INS or the Department of Labor can request an inspection of the Forms I-9 retained by the employer. The right to gain access to the employer's files is obtained simply by giving the employer a Notice of Inspection. The only restriction is that the notice must give the employer at least three days to prepare for the inspection.

According to the regulations, no warrant or subpoena is necessary to inspect the Forms I-9.[19] The government need only deliver the Notice of Inspection. If the employer refuses to permit inspection, the government can obtain a warrant or subpoena. However, if the employer forces the government to do this, or for some other reason fails to timely permit an inspection of the forms, the employer is deemed to have failed to comply with the retention requirements of the Act. In this event, the employer is subject to an automatic assessment of a fine of up to $1,000 for each employee hired since November 6, 1986.[20] In its Notice of Inspection, the government routinely requests the employer to also provide payroll records, employment tax records, employee applications and personnel files. However, the Notice of Inspection only pertains to inspection of Forms I-9.[21] Access to additional records cannot be required in the absence of a valid warrant or subpoena.[22] Furthermore, access to the employer's premises, for purposes of inspecting the premises, cannot be required simply by issuing a Notice of Inspection.[23] As a practical matter, however, if the employer is in violation of the Act, the INS will be less likely to settle the case if the employer does not cooperate voluntarily.[24]

If, upon investigation, the INS determines that a violation has occurred, it will issue a Notice of Intent to Fine. This Notice is the same as that issued by the INS where an employer has hired an unauthorized alien, the effect is also the same. The employer must act timely to prevent the automatic assessment of penalties and to preserve its rights.

VII. UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

The final employer sanction provision of the IRCA is a prohibition against what is called "unfair immigration-related employment practices." In a nutshell, the IRCA prohibits employers from discriminating between individuals because of the national origin or citizenship status of the individuals.

This prohibition is designed to compliment and extend the protection afforded by Title VII of the Civil Rights Act of 1964. Under Title VII, employers with more than 15 employees[25] are prohibited from discriminating against individuals based on, among other things, their national origin.[26]

However, in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973) the Supreme Court held that this prohibition did not include discrimination based on citizenship.[27] Thus, prior to the IRCA, an employer could refuse to hire an alien solely because of his non-citizenship status, so long as it was not a disguise for national origin discrimination.

The IRCA extended the Title VII protection in two ways. First, it expanded the number of employers covered by prohibition against national origin discrimination to include all employers employing more than three employees.[28] In doing so, it adopted the standard used under Title VII for national origin discrimination. Second, it included citizenship status as an improper basis for discrimination.[29] However, the Act does permit discrimination in hiring in favor of a citizen over an alien where the two are equally qualified.[30]

While the IRCA was designed to expand the coverage of Title VII protections, there are some limitations to the coverage it extends. For example, unlike Title VII, the IRCA only prohibits discrimination with respect to the hiring or discharging of an individual from employment.[31] Title VII prohibits discrimination in areas such as compensation, terms, conditions, or privileges of employment. It also bars the employer from limiting, segregating or classifying employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.[32] Furthermore, the IRCA only prohibits intentional discrimination, whereas Title VII prohibits innocent activities which have a discriminatory impact.[33] Finally, only citizens and certain aliens are protected against discrimination based on citizenship status.[34]

VIII. PROSECUTION OF UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

Any person who believes that he has been discriminated against may commence an action for unfair immigration-related employment practices by filing a change with the Office of Special Counsel in Washington, D.C.[35] This charge must be filed within 180 days of the date of discrimination or it will be dismissed with prejudice.[36] After receipt of the charge, the Office of Special Counsel fails to file a complaint before an administrative law judge within the 120-day period, the individual may file the complaint. In this event, the individual has 90 days to do so.

At the hearing before the administrative law judge, the burden is on the individual to make a prima facie showing that he is part of a national origin or citizenship status group, that he applied for a job given to another individual of similar qualifications. If this showing is made, the employer has the burden of showing a non-discriminatory explanation for the rejection of the charging party. If an explanation is produced, the individual must then show that the employer's reason is a pretext and that the employer's refusal was because of national origin or citizenship status.[37]

If the employer is found to be in violation of this provision of the IRCA, it is subject to a civil penalty of up to $1,000 for each individual discriminated against. However, if the employer has been found guilty of prior acts of discrimination, the civil penalty increases up to $2,000 for each individual discriminated against. In addition, the employer may be required to hire the individual, and may be required to pay back pay. Finally, the judge may allow the prevailing party a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.[38]

These penalties can be substantial, particularly where the charging party has been unemployed since the act of discrimination.

It should be noted that even though employers are entitled to discriminate in favor of citizens or nationals of the United States where applicants are equally qualified, employers should not rely upon this exception. Like most things, whether applicants are equally qualified is in the eye of someone other than the employer.

CONCLUSION

The IRCA provides substantial civil and criminal penalties for the violation of its prohibitions. Ignorance is generally not an acceptable excuse, and can have expensive consequences. Employers should be aware of the requirements of the Act and be in compliance before the INS gives its Notice of Inspection. Employers should also take action to avoid discrimination complaints. Even an unfounded complaint can be expensive to defend.

[1] Act of November 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359.

[2] The prohibitions and requirements of the Act also apply to persons or entities who recruit or refer for a fee. Most of the provisions which apply to employers also apply to these entities. Where differences occur they will be noted in a footnote.

[3] This prohibition only applies to contracts, subcontracts or exchanges entered into, renegotiated, or extended after November 6, 1986.

[4] Even though no direct sanctions exist against the employer for continuing to employ the grandfathered aliens, the employer is still liable for some federal sanctions if it violates the alien's rights under the various federal employment or labor laws, such as minimum wage, or the right to organize. See e.g. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984); *Impact Industries, Inc.*, 285 N.L.R.B. 2 (July 30, 1987).

[5] This requires that the violations be regular, repeated and intentional. 8 C.F.R. §274a.10(a) and 8 C.F.R. §274a.1(k).

[6] For the first violation, the fine is not less than $250 and not more than $2,000 for each unauthorized alien. For the second violation, the fine is not less than $2,000 and not more than $5,000 for each unauthorized alien. For further violations, the fine is not less than $3,000 and not more than $10,000 for each unauthorized alien. For purposes of assessing penalties, a finding of more than one violation in the course of a single proceeding or determination is counted as a single violations. 8 C.F.R. §274a.10(b).

[7] For purposes of determining the size of the employer or the number of its violations, the regulations state that where the employer is composed of

a distinct, physically separate subdivision which does its own hiring, that subdivision is considered a separate employer. However this applies only to those subdivisions which hire without reference to the practices or control of another subdivision or entity. 8 C.F.R. §274a.10(b)(3).

[8] 8 C.F.R. §274a.10(b)(1)(iii).

[9] The exact requirements of each party to the proceedings to assess civil penalties against the employer is beyond the scope of this article. These requirements are generally set forth in 8 C.F.R. §274a.9 and 28 C.F.R. Part 68.

[10] 8 C.F.R. §103.5a(a)(2). Any employee likely to receive the notice should be instructed of the importance of the Notice, and the steps to be taken upon its receipt.

[11] Five additional days are added to the period if service of the Notice is by mail.

[12] 8 C.F.R. §274a.9(d).

[13] The Form I-9 appears easy to complete. However, the rules relating to completion and retention of the form are quite complex. Ignorance of the rules can create problems for the employer. Further information can be obtained from the INS publication titled "Handbook for Employers, Form M:274. This booklet can be obtained by writing to Immigration and Naturalization Service, 230 W. 400 S., Salt Lake City, UT 84101. Complete information can be obtained from reviewing 8 C.F.R. Part 274a.

[14] The form must be maintained in its original form or may be copied onto microfilm or microfiche. Forms copied on to microfilm or microfiche must meet special additional requirements set forth in the regulations. 8 C.F.R. §274a.(b)(2)(iii).

[15] For recruiters and referrers for a fee, the Form I-9 must be maintained for three years after the date of the hire. 8 C.F.R. §274a.(b)(2)(i)(B).

[16] If an employee's authorization has expired and the employee cannot obtain another authorization, the employer is required to terminate the alien's employment. Failure to do so will subject the employer to penalties. In this instance, the proof of knowledge will be easy, the employer is charged with knowledge of the information contained on the Form I-9, including the expiration date of work authorization.

[17] The Act exempts employees hired after November 6, 1989 from these requirements if they were no longer employed after May 31, 1987.

[18] See note 5 *supra*.

[19] 8 C.F.R. §274a.2(b)(2)(ii).

[20] The constitutionality of this regulation has yet to be tested in court.

[21] 8 C.F.R. §274a.2(b)(2)(ii).

[22] While the INS has subpoena authority, it is not self-executing. A court order is required to make a subpoena enforceable. 8 U.S.C. §1225(a). For a discussion of subpoena requirements see *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984).

[23] The regulations state that the Forms I-9 must be made available at the location where the request for production was made. 8 C.F.R. §274a.2(b)(2)(ii). Under this, access to the employer's premises may be obtained for purposes of inspecting the Forms I-9.

[24] The local enforcement officer for the INS has indicated that where the employer cooperates, the proposed fine can be reduced substantially.

[25] Under Title VII, in order to be subject to the Act, the employer must have had at least 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e(b).

[26] 42 U.S.C. §2000e-2.

[27] The Court did hold that Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. 414 U.S. at 92.

[28] Under the IRCA the number of employees is counted as of the date the violation of the Act occurred. For purposes of counting employees, part-time employees are treated as a full-time employee. Preamble to Part 44, 28 C.F.R. Part 44. Compare this with the procedure under Title VII, note 25 *supra*.

[29] With regard to discrimination based on citizenship, employers are exempt from the prohibitions if they are required to discriminate because of a law, regulation, executive order, or governmental contract. 8 U.S.C. §1324b(a)(2).

[30] 8 U.S.C. §1324b(a)(4). In a policy statement regarding this exception, the EEOC stated: "Employers should be aware, however, that such citizenship preferences *may still violate Title VII* if they have the purpose or effect of discriminating on the basis of national origin." EEOC Policy Statement, Notice Number N-915, Feb. 27, 1987, n.1 (Emphasis in original).

[31] 8 U.S.C. §1324b(a)(1).

[32] 42 U.S.C. §2000e-2.

[33] Preamble to Part 44, 28 C.F.R. Part 44.

[34] This limitation does not apply to discrimination based on national origin. The rules regarding whether an alien is a qualifying alien to assert citizenship discrimination are quite complex. See 8 U.S.C. §1324b(3) and 28 C.F.R. §§44.101(c)(2)—(4).

[35] This applies only to IRCA complaints. Because the IRCA prohibits overlap between EEOC complaints and IRCA complaints, a complaint filed with the EEOC will be transferred to the Office of Special Counsel. However, the charging party should not rely on this.

[36] This is the date that the applicant was informed that he was not going to be hired. See *Mesa Airlines*, Case No. 88200001, Office of the Chief Administrative Hearing Officer.

[37] Preamble to Part 44, 28 C.F.R. Part 44.

[38] 8 U.S.C. §§1324b(g)—(h).

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

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

'The Federal Judiciary In Utah'

by Clifford Ashton

Please send me _____ copies.

Enclosed is my check payable to the
Utah Bar Foundation in the total amount of ..... $ _____

Please Print or Type

Name _____ Telephone _____

Organization _____

Address _____

City/State/Zip _____

Mail the completed form and your check payable to the Utah Bar Foundation to: Judicial History, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. Please allow at least three weeks for delivery.

Open Letter to the Bar Peremptory Challenges

By Jackson B. Howard

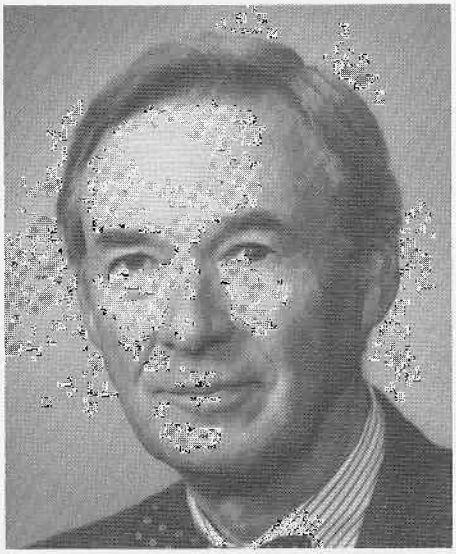
Dear Colleague:

In September, I requested that the Supreme Court adopt a rule change permitting a peremptory challenge of a trial judge in the District and Circuit Courts of the State. In November, I made a similar application to the newly appointed Rules Committee of the Utah Federal trial bench. While at this writing I haven't received a response to my application, I am advised that the Supreme Court has rejected the application primarily for economic reasons indicating the proposed rule would impose excessive costs upon the courts and was otherwise impracticable. The Federal committee is presumably still studying the question.

While I have regard for the Judicial Council and the Supreme Court which considered my application, I am convinced they are wrong and that there is a compelling need for such a rule. I am not convinced that there would truly be a significant increase in costs, but irrespective of cost, the ultimate objective of justice cannot be measured on a cost per case basis. It is further my opinion that there is an equally compelling need in the Federal trial bench.

The arguments are best set forth in my memorandum filed with the Supreme Court from which I take these extracts.

> Your petitioner...has conducted research to determine whether the right to peremptory challenges of judges exists in the 25 western-most states. Of those 25, more than half have peremptory challenges of judges as a matter of right. Those states which have such a system include the following: Alaska, Arizona, California, Idaho, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, South Dakota, Washington, Wisconsin and Wyoming.[1]
>
> The judicial peremptory challenge schemes differ among the several states that have them, but there are common threads which run through them. For example, once a peremptory challenge is issued, the judge may proceed no further in the matter, except that some states allow the judge to rule on the timeliness and/or sufficiency of the challenge, and some states allow the judge to handle any matters necessary to avoid harm to the parties, but in no case is a challenged judge allowed to do anything that goes to the merits of the case. Peremptory challenges typically apply to trial judges, magistrates and the like, and do not apply to appellate judges. In most cases, the use of a peremptory challenge does not affect the right to challenge a judge for cause. Also, most of the states allow a new peremptory challenge when a new trial is granted.
>
> Most states allow only one peremptory challenge per party. Some states, however, restrict this to one peremptory challenge per side, and when one co-party exercises a peremptory challenge, the other co-parties lose their right to do so. Of the 14 states identified as having judicial peremptory challenges, nine have the challenge by statute and five by court rule. Most of the states provide for the challenge in both civil and criminal cases by a single statute or rule, but two states have separate statutes or rules for civil and for criminal cases. Ten of the states allow a pure peremptory challenge as of right, wherein the party or counsel files a simple document requesting a change of judge. Four of the states, Alaska, California, South Dakota and Washington, require the challenging party to make an allegation that a fair and impartial trial cannot be obtained before the challenged judge. No facts to support the allegation are to be enumerated, and proof of prejudice is not required. It is interesting to note that where the peremptory challenge has been created by rule of the court, allegations, of the type mentioned above, are not required.
>
> Your petitioner, in his Petition for Rule Change, has outlined some of the benefits of the system of peremptory challenge of judges. In states where the peremptory challenge system exists, members of the bar appear to greatly appreciate, and even jealously guard, the system. An illustration of this occurred in Wyoming, when the Wyoming Supreme Court in 1983 issued an order repealing that state's peremptory challenge of judges system. This change "evoked a great deal of criticism from members of the Wyoming Bar and from within the court iself." Comment, *Disqualification of District Judges in Wyoming: An Assessment of the Revised Rules*, 19 Land & Water L.



JACKSON B. HOWARD has practiced law in Provo, Utah, for 40 years and is president of Howard, Lewis & Petersen. He received a B.B.A. from the University of Texas and a J.D. from the University of Utah, and is presently a Utah State Bar Commissioner. He is past president of the Utah Chapter of the American Board of Trial Attorneys and was Utah Trial Lawyer of the Year, 1984-85. He is the former president of the Central Utah Bar Association, a Fellow in the International Academy of Trial Lawyers, a member, Inner Circle of Trial Lawyers, and past president and trustee of the University of Utah Law School Alumni Association.

Rev. 655 (1984). Wyoming's peremptory challenge system was reinstated one year and four months after it was revoked.

The judicial peremptory challenge system is not without its criticisms. One primary concern is that a peremptory challenge allows for judge shopping and the use of the challenge as a delaying tactic. Another criticism is that the system creates difficulties in single-judge districts when that judge is challenged.

In order to combat the judge shopping or delaying tactic use of the peremptory challenge, the number of peremptory challenges is usually limited to one per side. Often, the statutes and rules creating judicial peremptory challenges state that the challenge may not be used for the purpose of hindrance or delay, and some states require the peremptory challenge itself to contain a certification that the challenge is made in good faith and not for purposes of delay. While such measures serve to declare the purpose of the peremptory challenge and prevent abuses by the ethically inclined practitioners, the very nature of the challenge means that there will be some abuse, and there is no way to eliminate all abuse without compromising the purpose of the judicial peremptory challenge.

The problem of having to call in judges from other areas to handle cases in single-judge districts is not something that such districts do not currently face. For-cause disqualifications and recusals in single-judge districts are common because of the intimate nature of rural communities. That there would be some increase in the need to bring in other judges to hear cases is likely, but that increase would probably not be significant. The State of Nevada has devised perhaps the most innovative method of dealing with this situation. In order to file a peremptory challenge in any court in the State of Nevada, a $100 filing fee is required. Those fees are collected by the clerk of the Supreme Court and deposited in the state treasury for the exclusive purpose of supporting district judges' travel expenses. Thus, the $100 fee serves both as a deterrent to the exercise of the peremptory challenge as a matter of routine, and provides a new source of revenue to defray the increased travel expenses incurred in single-judge districts.

The advantages of having a system of peremptory challenges of judges are obvious to any trial practitioner. While there are problems with the peremptory challenge rule, as with virtually every new rule, we have the benefit of the experience of numerous other states' systems, from which we may borrow the best aspects and carefully craft a rule which will minimize difficulties while bestowing the benefits of a peremptory challenge system.

It seems to me that lawyers may see the question differently than judges. I would be interested in receiving your thoughts, observations, or criticism regarding the question. I can't believe that I am alone in these views and it may be that the petition should be remade by others who have had personal experiences and stronger arguments than I have made.

Respectfully,

HOWARD, LEWIS & PETERSEN

Jackson Howard

[1] In addition, the State of Illinois has a limited peremptory challenge system which allows a peremptory challenge only in criminal matters involving a single defendant.

Bar Commission Highlights

At its regularly scheduled meeting of November 17, the Bar Commission received the following reports and took the actions noted:

1. Approved the minutes of the October 27 meeting.

2. Accepted the resignation of member Neil R. Porter.

3. Accepted with regret the resignation of Christine A. Burdick as Bar Counsel.

4. Re-affirmed Bar support for legislation to increase federal judicial salaries.

5. Approved nominees to the Board of Utah Legal Services.

6. Received a report from Lawyers Helping Lawyers Committee; authorized special fund-raising by the Committee.

7. Received Executive Director's report, noting various administrative items, a possible strategy for future fund-raising for the Law and Justice Center, and the petition filed with the Supreme Court to change the dues cycle. Re-affirmed indemnification policy of the Bar. Denied staff recommendation to upgrade one staff position from part-time to full-time.

8. Received a report by Dr. Amir Noshirivan regarding his activities in the international law community, and his request for licensing of foreign-trained lawyers.

9. Received a report of the Legislative Affairs Committee, including approval of John T. Nielsen as new Bar Legislative Representative. Approved Bar support for bill to amend Uniform Limited Partnership Act.

10. Received Budget and Finance report. Reviewed Client Security Fund and monthly financial reports. Noted excess expense on litigation budget and need for mid-year budget adjustments. Approved a procedure to maintain fund in separate bank account.

11. Received status report on 1990 Annual Meeting. Re-affirmed practice of annual report presentations and awards.

12. Received internal affairs report, noting incidental administrative items and reviewing program for Mid Year Meeting.

13. Received Admissions report. Approved a re-admission application, list of applicants who had passed the October attorney bar exam, and incidental MPRE waivers. Rejected an appeal from prior denial of a re-admission application.

14. Received the monthly report of the Office of Bar Counsel, approving or otherwise reviewing discipline matters as are reported in the *Bar Journal.*

15. Reviewed the status of pending litigation.

16. Received report of the ADR Committee.

17. Referred a Letter to the Editor to the *Bar Journal* Editor.

A full copy of the minutes of this and other meetings of the Board of Bar Commissioners is available for inspection by members of the Bar and the public at the Office of the Executive Director.

Discipline Corner

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violating Rules 8.4(c) and (d) for conduct involving dishonesty and conduct prejudicial to the administration of justice by filing a frivolous lawsuit against his minor son's dentist in an attempt to avoid payment of a judgment which the dentist had taken against the attorney for past-due dental bills. The sanction was aggravated by the attorney's failure to respond to the Screening Panel's requests for information.

2. For violation of Rules 1.1 and 1.3 for failure to provide competent representation and failure to act with reasonable diligence, an attorney was privately reprimanded for failing to counsel his client as to her alternatives with respect to delinquent bankruptcy payments, failing to give his client sufficient notice of an upcoming bankruptcy hearing, and failing to notify her that her bankruptcy had been dismissed when she did not attend the hearing.

3. For failing to pursue a modification of his client's bankruptcy payments as requested, for failing to attend the client's bankruptcy hearing, for failing to notify the client that the bankruptcy had been dismissed, and for failure to return the client's numerous telephone calls requesting information, an attorney was privately reprimanded for violating Rules 1.3 and 1.4(a) and (b). The sanction was aggravated by the attorney's prior discipline history of similar neglect.

PUBLIC REPRIMANDS

1. On September 19, 1989, Dean Becker was publicly reprimanded for violating Rules 1.3 and 1.4(a) by failing to initiate a lawsuit on behalf of his clients for approximately seven months although promising on several occasions to do so, and by failing to respond to his client's numerous inquiries as to the status of the matter.

1990-1991
Utah State Bar
Request for Committee Assignment

I. Instructions to Applicants: All applicants for committee assignment will be assigned to a committee, with every effort made to assign according to choices indicated. Service on Bar committee includes the expectation that members will regularly attend meetings of the committee. Meeting frequency varies by committee, but averages one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside the Salt Lake area are encouraged to participate in committee work. Many committees can accommodate to travel or telephone conference needs and much committee work is handled through correspondence, so it is rarely necessary for such members to have to expend large amounts of time traveling to and from meetings. Any questions may be directed to: Paige Stevens, Bar Programs Administrator, at 531-9095.

II. Applicant Information

Name _____

Address _____

_____

Telephone _____

Most Recent Committee Assignments _____

_____

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

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

Please return this form to Paige Stevens, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111 by March 15, 1990.

Judicial Council Adopts New Probate Rules

On December 14, 1989, the Judicial Council adopted four new rules concerning court administration under the Utah Uniform Probate Code. The Honorable John A. Rokich sponsored the new rules, having first sought and obtained the approval of the Board of District Court Judges.

Two of the rules deal with the 1988 legislative amendments to the guardianship and conservatorship sections of the Utah Uniform Probate Code which require guardians and conservators to file annual reports with the Probate Court. The rules are substantially identical with one rule applying to guardianships and one rule applying to conservatorships. Each rule provides instructions on how to prepare and file the annual reports and when the court will hold hearings on the reports filed.

Because the Judicial Council felt there is substantial confusion on how the 1988 legislative amendments should be administered by the courts and that this confusion could lead to litigation in the future, the Judicial Council suspended its normal rule-making procedures and adopted the new rules effective March 15, 1990. Interested attorneys can obtain copies of the new rules from the Office of the Court Administrator, 230 S. 500 E., #300, Salt Lake City, UT 84102.

The Judicial Council's decision to suspend its normal rule-making procedure modifies the normal comment period for new rules. However, the Judicial Council encourages practitioners to send any comments to its General Counsel, Carlie Christensen, in care of the Office of the Court Administrator.

The other two rules both deal with affidavits in support of attorney fees—one rule with regard to attorney fees in probate matters and one rule with regard to fees in conservatorship matters. These rules are similar to Rule 4-505 of the Code of Judicial Administration and were adopted pursuant to the normal procedures governing new rules, including the normal comment period. Absent any problems, these rules will be effective next fall.

Law Day Fair Art Show

Last April, the Utah State Bar Committee on Law Related Education and Law Day and Utah Lawyers for the Arts co-sponsored the first Law Day Fair Art Show. The one-day show was presented in conjunction with the Utah State Bar Young Lawyers Section Law Day Fair held in the center court of the ZCMI Center Mall in downtown Salt Lake City. The Law Day Fair Art Show subcommittee solicited amateur and professional artwork from lawyers, judges, paralegals and legal secretaries. Several attorneys and one legal secretary contributed their artwork to the show. The work displayed included a video, a collection of hand-woven baskets, black and white and color photographs, watercolor and oil paintings, pen and ink drawings and poetry.

The show consisted not only of an exhibit of artwork by legal professionals, but also of a T-shirt design contest. Both children and adults entered the contest. The Art Show subcommittee and the chairman of the Bob Miller Memorial Law Day Run subcommittee reviewed the entries, selected winners and awarded first, second and third prizes in five age categories. One of the winning designs may be used for next year's Bob Miller Memorial Law Day Run T-shirt.

Several lawyers volunteered to staff the show. They kept an eye on the artwork, disseminated printed information, encouraged people to include their names on the Utah Lawyers for the Arts mailing list, administered the T-shirt design contest, answered general legal questions and directed people to the adjoining Law Day Fair where members of the Young Lawyers Section answered legal questions and disseminated additional printed information, including a quiz developed by a member of that Bar section.

Plans are under way for another one-day show in April 1990. The Art Show subcommittee would like to exhibit more artwork created by Utah attorneys, judges, paralegals and legal secretaries. It is seeking artwork of all kinds and all levels of professionalism for display or performance, including drawings, paintings, sculpture, photography, graphic art, music, dance, poetry, readings and performance art. The show will probably be held on Saturday, April 28, 1990, in the Salt Lake Valley. Please contact Dawn Hales at 322-2516 for further information.

Law Day Fair Art Show Co-sponsored by the Utah State Bar Committee on Law Related Education and Law Day and Utah Lawyers for the Arts

Lawyer Referral Service Update

The Lawyer Referral Service, sponsored and promoted by the Utah State Bar Association, is a voluntary program whereby Bar members, for a $35 fee, are placed on a referral list maintained by the Bar. Clients seeking referral to a lawyer speak with the appropriate staff person, Diáne Clark, and are given the name of a lawyer who practices in the area of their need.

In the past, the program was funded by the Bar, through payment of general Bar dues. For the past two to three years, the program has been funded through the payment of a $15 fee to be collected by the lawyer and forwarded to the Bar office. Fewer and fewer of these fees are being forwarded to the Bar and the program is no longer paying for itself. Consequently, alternative funding must be established if the program is to continue.

SURVEY RESULTS

Over the past year, the Lawyer Referral Service Committee has been in the process of assessing the Lawyer Referral Service program. We have been primarily attempting to reevaluate its effectiveness for the lawyer participants, as well as the effectiveness for the clients utilizing the service. In this process, a written survey was submitted to current and past lawyer participants. Approximately 100 responses were received, all but two of which were completed by current participants. With only 450 lawyers currently participating in the program, the response rate demonstrated that those participating clearly care about the program and are interested in its continuation and improvement. The following is a summary of the survey responses and sets forth some of the information requested by the respondents.

Attorneys from 13 counties responded, with approximately 65 percent of those located in Salt Lake County and an additional 29 percent in Weber, Davis, and Utah counties. The range of length of practice varied from less than one year to more than 30 years, with the average length of 11.5 years. The firm size also varied from sole practitioners to firms of 75 lawyers or more. Approximately 80 percent of the attorneys responding practiced in firms of 10 lawyers or less, with more than 65 percent in firms of five lawyers or less. The areas of practice were extremely varied and very few lawyers had uniquely specialized practices.

The survey results revealed some very interesting information with regard to the distribution of case referrals. The narrative responses included several inquiries in this regard. Several people felt the cases were not being fairly distributed. The monthly referrals estimated by the participants were as follows:

Number of Referrals	Number of Attorneys
1-2	39
3-5	38
6-10	13
11+	5

Of these referrals, the participants estimated the following numbers of referrals to result in fee-generating cases on an annual basis:

Number of Cases	Number of Attorneys
0	13
1-2	22
3-5	18
6-10	24
11-15	7
16+	6

A number of respondents indicated that they frequently received notification that a referral had been made, but the client never contacted them.

The participants also estimated the amount of income generated from Lawyer Referral clients. Although many indicated in the narrative responses that they felt participation in the program was primarily a public service, many of the respondents had *some* income from their Lawyer Referral clients. The range of income was from $0 to $15,000, with the breakdown as follows:

Annual Receipts	Number of Attorneys
$0	13
$100-$499	6
$500-$999	9
$1,000-$1,999	26
$2,000-$4,999	17
$5,000-$9,999	8
$10,000+	1

In addition to the foregoing statistical information, the respondents were asked their opinions regarding the $15 fee to be collected by the lawyer and regarding the malpractice insurance requirement. Approximately 90 percent of those responding stated that they had no objection to the requirement of malpractice insurance and a number of those commenting felt this requirement was an absolute necessity. There was a different response with regard to the collection of the $15. This seemed to be the single most significant complaint of the respondents. Approximately 70 percent stated that they did not object to the imposition of the fee with approximately 30 percent objecting to the imposition of any fee. However, of the 70 percent having no objection to the fee's existence, an overwhelming majority of those commenting stated that the fee should be paid directly to the Bar through some mechanism without the lawyer being burdened with the time and expense of collection. A significant number of individuals suggested that the program return to the previous practice of funding through the annual Bar dues paid by all attorneys. Other suggestions included that the client participants and the lawyers simply make voluntary donations to the program, the fee be paid by the lawyer. The bottom line is that the collection of the $15 fee is either morally unpalatable or simply inconvenient for the lawyers and the program revenues show that it is simply not being collected by the lawyers.

The suggestions for improvement and general comments demonstrated that in addition to the problems with regard to collection of the service fee, several participants are concerned about how the program is being managed and where the money is going. The 1989 budget, set by the Bar Commission, is as follows:

Telephone	$16,000
Postage	3,000
Advertising	8,000
Printing/Forms	2,500
Misc. Supplies	1,500
Equip./Prog.	1,000
Contract Labor	2,000
Salaries	19,500
Fringe Benefits	2,900
Tuesday Night Bar	2,000
TOTAL	$58,400

Clearly, the staff is not being overpaid and the Committee is looking into ways in which the program can be economically streamlined. Some options are to eliminate the computer-generated form which indicates to the lawyers that a referral has been made and eliminate the WATS telephone lines and require the clients to pick up that expense. The telephone expense is the more significant cost, but elimination of the WATS lines may limit some client access to the program. Whether this is a good idea depends to some extent on what role the Bar decides the service should play.

Several persons were concerned that referrals were being unfairly made. Concerned about that, the Committee reviewed those responses indicating that they received six or more referrals each month. Interestingly, each of these was from a geographical area either outside the Salt Lake, Ogden, and Provo areas, or they had a specific area of practice. Diáne Clark, the Lawyer Referral Service staff, indicated that many clients will call with requests for specific geographical locations (West Valley, Roy, Orem, Murray, etc.) and they will often request either a male or female and request someone with a specified number of years of practice. She stated that often a client will ask for a young lawyer "because they will work harder" or for a more experienced lawyer "because they know what they are doing." Because these requests are objective, Diáne tries to accommodate the clients. However, because of the participants' concern, the Committee is presently attempting to evaluate this procedure.

The general comments from the survey clearly demonstrate that there are varied expectations from the program. A majority of respondents indicated that they viewed the program as a public service, with a possible "long shot" chance for that "Home Run." Although some felt that the Lawyer Referral Service is absolutely not a pro bono service for free advice, others felt that it is a pro bono service and there should be some recognition for the pro bono service provided. Many indicated that the program was working well, with the exception of the $15 fee.

The Lawyer Referral Service Committee appreciates the time and thought invested by those persons responding to the survey summarized above. The responses are available in the Bar office for anyone interested in seeing the results firsthand. Also available upon request is a more detailed recap of the responses with all written comments contained. The Lawyer Referral Service is interested in additional comments and suggestions for improvement of the program and we urge you to contact us. Please contact the Bar office for more information.

TUESDAY NIGHT BAR AND MODEST MEANS PANEL

Together with the Young Lawyers Section of the Bar, the Lawyer Referral Service is participating in the Tuesday Night Bar Program. This relatively new program is established to provide free legal "first aid" and screening for the Lawyer Referral Service, Utah Legal Services and Salt Lake County Legal Aid, and the Modest Means Panel. On Tuesday evenings, volunteer lawyers meet with clients who have contacted the Bar office either for a referral or specifically for the Tuesday Night Bar program. There, the lawyers attempt to resolve the problem at issue, if possible, or to make an appropriate referral based upon the nature of the problem and the income available to the clients. With this screening process available, the Lawyer Referral Service has been requested by the Bar to establish a panel of lawyers who will agree to represent certain low income clients at a reduced fee. These clients will not qualify for indigent legal services. The only cases referred to these "Modest Means Panel" lawyers will have been first screened by a lawyer at the Tuesday Night Bar before the referral is made. Hopefully, this will avoid many of the frustrations experienced by lawyers receiving Bar referrals without the benefit of the Tuesday Night Bar process.

Your participation in the Tuesday Night Bar, the Lawyer Referral Service, and the Modest Means Panel is necessary to the viability of these programs. The Lawyer Referral Service would be a far more effective service to the clients if a greater number of lawyers participated. We invite your participation and urge you to contact the Bar office for further information.

Notice—New Bankruptcy Fees

SUMMARY OF NEW FEES

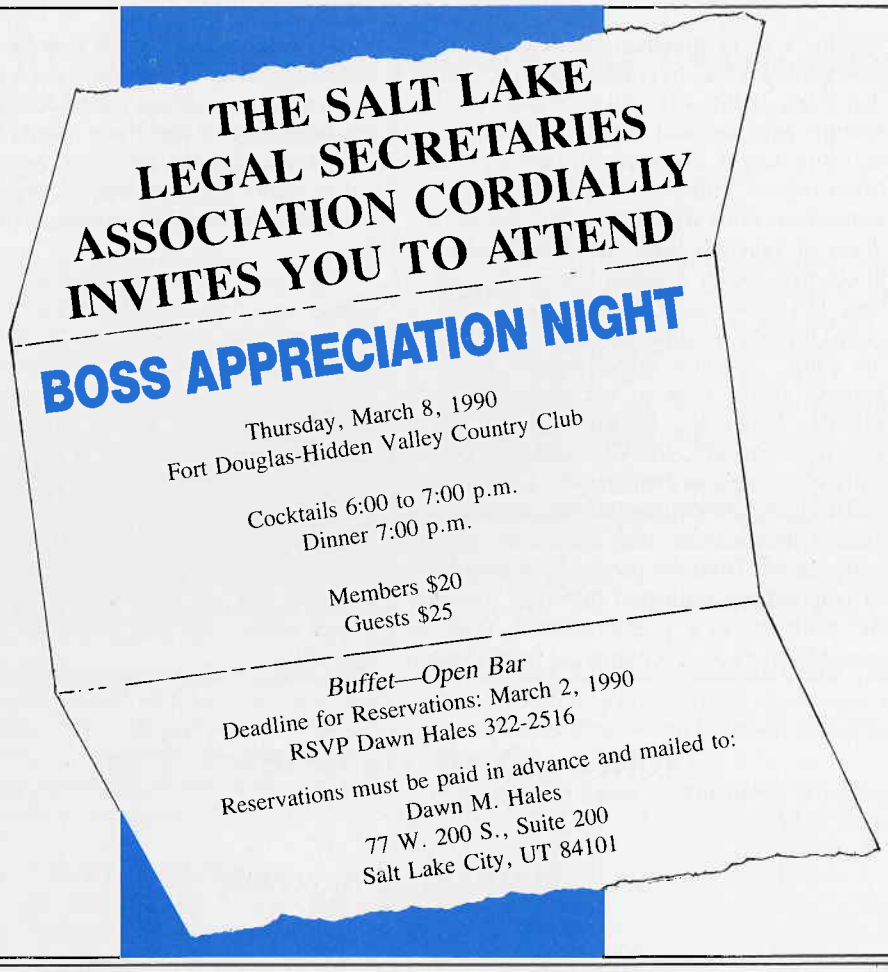
Effective 12/21/89

Chapter 7 filing fee	$120.00
Chapter 13 filing fee	$120.00
11 U.S.C. 362(d) motion filing fee	$ 60.00
28 U.S.C. 157(d) motion filing fee	$ 60.00
Bankruptcy Rule 6007(b) motion filing fee	$ 60.00

Effective 1/11/90

Deconsolidation fee Chapter 7 or 13	$ 60.00
Deconsolidation fee Chapter 11	$250.00
Deconsolidation fee Chapter 12	$100.00
Cross appeal docketing fee	$100.00

For further information, please contact:
William Stillgebauer, Clerk of Court
U.S. Bankruptcy Court
United States Courthouse, Room 361
350 S. Main Street
Salt Lake City, UT 84101
(801) 524-5157



U of U College of Law to Hold Annual Alumni Banquet

The University of Utah College of Law Alumni Association will hold its Eleventh Annual Alumni Banquet on Thursday, February 22, 1990, at Little America Hotel beginning at 6:30 p.m. The guest speaker will be Griffin B. Bell, former U.S. Attorney General in the Carter Administration and a judge on the Fifth Circuit Court of Appeals. He is currently a partner in the Atlanta, Georgia, law firm of King & Spalding. For more information, contact Holly Hale, 581-3153.

Ethics Advisory Opinion

No. 95

ISSUE

May a lawyer disclose a client's threats to commit suicide to another who might help prevent it even though the client's communication is privileged and confidential and otherwise falls within the scope of the attorney/client relationship?

OPINION

If it is in the best interests of a client, an attorney who reasonably believes the client is contemplating imminent suicide may disclose a suicide threat to another who may help prevent it.

The committee wishes to avoid any suggestion that a lawyer is obligated in any way to make such a disclosure. The lawyer should disclose the information only when to do so would help the client get help, such as medical assistance.

ANALYSIS

The factors which favor allowing a lawyer under exigent circumstances to disclose otherwise confidential information of a client's threat or expression of serious intent to commit suicide are compelling. In 1987, suicide was the eighth leading cause of death in the United States, third among adolescents and second among university and college students.[1]

Certain inherent characteristics of the suicidal individual also seem to indicate a need to encourage disclosure. Often the suicidal individual is experiencing a feeling of intense ambivalence, i.e., a very strong wish to die counterbalanced by an equally strong wish to live. The literature seems to indicate that most suicidal persons are undecided about living or dying and they "gamble with death" leaving it to others to save them.[2]

In addition to the ambivalence suggested by the literature, the desire for death seems to be often, although not uniformly, temporary and reversible. Lastly, attempted suicide, or the expression of the desire to commit suicide, e.g., "I want to die," may actually be a cry for help and the neurotic expression of the need for help or feelings of desperation.[3]

Although expressed in quite different ways, historically society has always manifested a strong interest in preventing suicide. The association between suicide and criminality began as early as the seventh century in England. In 1562, an English Court held suicide a punishable felony because it offended nature, God, and the King. *Hales v. Petit*, 1 Plowden 253, 261, 75 Eng. Rep. 387, 400 (q.b. 1562). Ironically those who failed in their attempt to take their own lives were subject to being hanged by the State, although the frequency of such occurrence is unknown.[4]

In America until recently suicide was a criminal offense in most jurisdictions, often characterized as a crime of moral turpitude. Recently, however, almost all states, Utah among them, have decriminalized suicide and attempted suicide. The apparent rationale behind the movement to decriminalize is based upon the apparent lack of deterrent effect along with prosecuting authorities

and coroner's juries' reluctance to pronounce a suicide or attempted suicide sane, and therefore punishable. The literature indicates that the third and probably most plausible explanation of decriminalization rests in the belief that most suicides are caused by mental illness.[5]

The expression of society's concerns over protecting against suicide as embodied by state and governmental exercise of its powers has been clearly enunciated by the Courts. The first and most sweeping aspect of State interest in preserving life is in the interest of preservation of the value of societal life. In the suicide context, courts have emphasized that "the preservation of life has a high social value in our culture and suicide is deemed a 'grave public wrong.' " *Vaughn Holder v. Chapmen,* 87 A.D.2d 66, 68, 415 N.Y. S.2d 623, 626 (1982).

In addition to the protection of societal life, the State's interest in life preservation also extends to the protection of each individual from harm, even self-inflicted harm, by virtue of the parens patriae doctrine. This power is employed by the State in the suicide context in order to protect the individual suffering from mental illness from self-induced harm on the theory that the individual is, at that time, incapable of protecting him or herself. Mentally ill suicidal individuals are perceived as having lost their capacity for rational decision, and the State assumes therefore the power of such decision which it exercises in favor of life.[6]

There is very little which can be said in favor of not encouraging a lawyer from suspending the strict requirements of confidentiality in order to serve the interests of preserving life. The high degree of value that society seems to have placed historically, and at present, on the value of preserving life demands that as lawyers, servants within the system of justice and government, and as human beings, the Rules of Conduct and Ethical Considerations allow that expressions of genuine suicidal intent be subject to disclosure. The committee does not believe that such an exception to the requirements of confidentiality would have a deleterious effect upon the attorney/client relationship or deter open and free communications between attorney and client.

Some of the reported ethical opinions are founded upon the ABA Model Rule 1.14 relating to a client under a disability, which allows a lawyer to "take protective action with respect to a client, (only) when the lawyer believes that the client cannot adequately act in the client's own interest." This rule has unfortunately not been adopted in Utah and thus may not be relied upon at the present time.

Others of the ethics opinions are based upon Rule 1.6 of the Rules of Professional Conduct, adopted by the Utah State Bar Association, the relevant portions of which are set forth as follows:

> (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.
>
> (b) A lawyer may reveal such information to the extent the lawyer believes necessary:
>
> (1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another.

As previously pointed out, Utah has decriminalized suicide, and neither suicide nor attempted suicide is punishable under the criminal law. However, opinions of other bar associations which have dealt with the situation have uniformly held that although suicide or attempted suicide is not criminal, they have in other respects always been deemed to be *malum in se* and treated as unlawful and criminal and therefore subject to disclosure. An opinion of the ABA states as follows:

> Ethics committees in two states have dealt with this problem. In Opinion 486 (1978), the Committee on Professional Ethics of the New York State Bar Association concluded that while suicide had been decriminalized in New York and DR 4-101(C)(3) (similar to the Utah Rule of Professional Conduct 1.6 (B)(1)) did not literally apply, the overriding social concern for the preservation of human life permitted the lawyer to disclose the information. The New York committee pointed out that the decriminalization of suicide in the state was not intended to effect any basic change in underlying common law and statutory provisions reflecting deep concern for the preservation of human life and the prevention of suicide. Accordingly, the committee analyzed an announced intention to commit suicide in the same manner as proposed criminal conduct under DR 4-101(c)(3). Addressing the same issue in Opinion 79-61 (1979), the Committee on Professional Ethics of the Massachusetts Bar Association determined that although neither suicide nor attempted suicide was in itself punishable under the criminal law of Massachusetts, both have in other respects been deemed to be *malum in se* and treated as unlawful and criminal. That committee cited the New York State Bar Association Opinion 486 and reached the same conclusion.
>
> We believe that in light of the following language of EC 7-12 relating to proper conduct in dealing with the client with a disability, these Committees reached the proper conclusion: "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities on his lawyer.... If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client..."
>
> This concept is also recognized in the ABA proposed Model Rules of Professional Conduct: "A Lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."
>
> The inquirer may justifiably conclude that his client is unable to make a considered judgment on this ultimate life or death question and should be permitted to disclose the information as a last resort when the lawyer's efforts to counsel the client have apparently failed. This interpretation is limited to the circumstance of this particular opinion request and should not be relied upon to permit the disclosure of any other information in any other situation. American Bar Association, Informal Opinion 83-1500, June 24, 1983.

In view of the compelling interest in disclosing a suicide threat to authorities, it is believed that the better course of action is to free the attorney from the strict requirement of the Rule 1.6 (B)(1), with the caveat[7] that cirumstances should be such as to cause a reasonably prudent attorney to deem the situation to be exigent in nature and of sufficient gravity to require the attorney in the exercise of his professional judgment to make such a disclosure, and that the preferable recipient of such disclosure should be a Court or other authorities who might help prevent it as opposed to family members or other third parties.

With respect to the question of an attorney's potential tort liability if he fails or refuses to disclose information of the nature set forth, such is a question of law and

beyond the scope of the committee.[8] The committee wishes to avoid any suggestion that a lawyer is obligated in any way to make such a disclosure. The lawyer should disclose the information only when to do so would help the client get help, such as medical assistance.

[1] The role of Law in Suicide Prevention: Beyond Civil Commitment A Bystander's Duty to Report Suicide Threats, 39 Stanford Law Review 929, April 1987.

[2] The issue is somewhat complicated by the fact that there are a certain number of false positives reported. False positives are created by people who would not, in fact, attempt suicide, but indicate that they would. This points up the fact that there are two different populations with quite different characteristics among those who attempt suicide. The goal of the suicidal patient is to die. On the other hand, suicide attempters do not necessarily plan to commit suicide, although they might well do so in error. Their goal is to survive and to impact others with whom they have personal relationships in order to modify those relationships. The fact that they often succeed beyond their actual desire, however, merely substantiates whatever preventative rationale exists. Legal Liability for a Patient's Suicide, Journal of Psychiatry and Law, 409 Fall-Winter, 1986.

[3] Id, 39 Stanford Law Review 938-939.

[4] Id. 39 Stanford Law Review, at 931.

[5] Id. 39 Stanford Law Review at 932.

[6] Id, 39 Stanford Law Review at 936.

[7] Inasmuch as a lawyer is not schooled to detect the warning signals of a client who may seriously intend to commit suicide, the issue presented requires considerable caution. A doctor, psychiatrist or other health worker is presumably trained to detect and be sensitive to outward symptoms which would be consistent with suicidal ideation. Doctors, psychiatrists and other such mental health professionals may very well have duties and obligations, the failure of which might be deemed the proximate cause of a patient's suicide, thus leading to potential liability. Consequently, such mental health professionals are more likely to maintain contemporaneous notes relating to impressions of the mental and emotional condition of a patient than a lawyer would of a client.

[8] It seems fairly clear from the reported cases that in most usual circumstances it would be very unusual to find any nexus between a lawyer's breach of duty and the client's suicide. Certainly there is no affirmative duty imposed by law on any bystander, let alone a lawyer receiving information in a confidential privileged setting, to report the expression of intent to commit suicide. Unless the lawyer commits an affirmative act which might subject any person, not just a lawyer, to liability for the commission of suicide by another, it is very unlikely that a meritorious cause of action could be maintained. An attorney's alleged negligence in representing a client in a criminal prosecution, and the suicide of that client following his alleged wrongful conviction and incarceration, has been held to be too attenuated (lack of proximate cause) to impose legal liability on an attorney. *McLaughlin v. Sullivan*, 461 A.2d 123, 41 A.L.R. 4th 343 (N.H., 1983).

Ethics Advisory Opinion

No. 98

ISSUE

Whether an attorney's refusal to pay for services rendered by a third party at the attorney's request is contrary to the attorney's obligation to act in an ethical manner and warrants disciplinary action?

OPINION

Absent dishonesty, fraud, deceit or misrepresentation, disputes resulting from the failure of an attorney to make payment for services rendered by third parties should be treated as questions of substantive law, which should be examined under traditional contract and agency doctrines, rather than questions of the ethical propriety of the attorney's actions.

ANALYSIS

The failure of an attorney to pay for services rendered by third parties at his request does not appear to have been addressed specifically by either the ABA in a formal or informal opinion or by a published state advisory opinion. However, several opinions discussing related issues suggest that while an attorney may be held financially liable for obligations incurred by the attorney on behalf of his client, a breach of an attorney's ethical obligation would arise only if the specific nature of the attorney's failure to pay for such services amounted to dishonesty, fraud, deceit or misrepresentation.

On at least two occasions, ABA and state committees discussing other issues have referred to this question and noted the possibility that by requesting services on behalf of a client, an attorney may have obligated himself to pay for those services unless the attorney clearly indicated to the third party that the client alone would be responsible for payment.[1] For example, one Informal Opinion issued by the ABA Committee on Ethics reviewed the obligation of an attorney to pay medical fees incurred by a client. Although the bulk of the opinion discusses the propriety of an attorney paying medical fees on behalf of his client, the Committee did note that where an attorney contacted a doctor and requested the performance of diagnostic work, an implied agreement existed that the attorney would pay for the work.[2]

A similar approach is suggested by a Delaware Bar Association Opinion in which the Delaware Committee determined that when an attorney requests the performance of medical services by a physician, the lawyer impliedly guarantees the payment of reasonable fees unless it is made clear to the doctor that only the client will be responsible for payment.[3]

The most significant aspect of both opinions with respect to the question presented here is the lack of reference to the ethical obligation of an attorney involved in such a dispute. Both committees noted the attorney's responsibility to pay for services rendered at his request, but their determination was based upon the prior determination that an implied contract resulted from the attorney's request for services. Under such an analysis, the failure of an attorney to pay for such services would most properly be dealt with as a contract or agency dispute, rather than through the Bar's disciplinary process. To impute an ethical obligation to such a failure suggests the possibility that the Bar could initiate disciplinary action against its members for the mere failure to pay creditors. Such a possibility seems beyond the scope of the Bar's role in maintaining ethical standards among its members.

The view that disputes of this nature are best resolved by courts of law rather than through the disciplinary process is supported by two other opinions related to this question. Both opinions discuss the failure of one attorney to make payment for services requested of a second attorney on behalf of a client. In both instances, the ABA Committee on Ethics determined that disputes of this nature involve questions of contract construction, and that such disputes should be resolved by the courts rather than the Ethics Committee.[4]

In the latter of the two opinions, the Committee stated:

> "Whether or not the local attorney would be liable to the Swedish attorney under the circumstances involves a question of law, upon which this Committee does not pass. However, it is the opinion of this Committee that there is nothing unethical in the local attorney taking the position that liability for a fee and expenses incurred by the Swedish attorney is a matter for Mrs. and that he (the local attorney) is not liable therefore."[5]

Although it is possible that the ABA Committee's determinations are based upon the belief that attorneys bear a greater duty to foresee the possibility of such a dispute and prevent its occurrence, the approach taken by the Committee appears to be the most common and most logical procedure for resolving disputes of this nature. Such an approach appears particularly appropriate in light of the express exclusion made in the Preliminary Statement to the Model Code: "the Code . . . [does not] undertake to define standards for civil liability of lawyers for professional conduct."[6]

An obvious exception to such an approach would be in those instances where the failure of an attorney to make payment for services rendered by third parties was

not the result of a good-faith dispute over the obligation of one party to make payment to another, but amounted to dishonesty, fraud, deceit, or misrepresentation by the attorney. None of the opinions outlined here discuss the possibility that the failure to make payment may have been fraudulent or deceitful. In such instances, there is little doubt that the attorney's conduct would constitute a violation of Rule 8.4(c) and should subject the attorney to discipline.[7]

However, where neither fraud, deceit nor misrepresentation are alleged, there is little precedent for applying principles of professional responsibility to the failure of an attorney to make payment for services requested on behalf of clients. It is the opinion of the Ethics Committee that controversies concerning such matters are matters of law to be determined by the courts and that ordinarily such controversies do not involve ethical questions.

[1] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 664 (1963), Del. Bar Ass'n Op. 1981-2 (April 21, 1981).
[2] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 664 (1963).
[3] Del. Bar Ass'n Op. 1981-2 (April 21, 1981).
[4] ABA Comm. on Professional Ethics and Grievances, Formal Op. 63 (1932), ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-482 (1961).
[5] ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-482 (1961).
[6] Model Code of Professional Responsibility, Preliminary Statement (1981).
[7] Rule 8.4(c) of the Model Rules reads: "It is professional misconduct for a lawyer to:
. . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." Model Rules of Professional Conduct (1983).

Ethics Advisory Opinion

No. 99

ISSUE

Is an attorney who serves as a part-time county attorney or part-time deputy county attorney ethically barred from appearing as counsel on behalf of a defendant in a civil action brought by the State of Utah to collect delinquent child support payments when the State is represented by the Attorney General's Office in the same action?

OPINION

An attorney who serves as a part-time county attorney or part-time deputy county attorney is ethically barred from appearing as counsel on behalf of a defendant in a civil action brought in the county by the State of Utah to collect delinquent child support payments. This opinion is limited to the disqualification required by the statutes specifically referenced herein and expresses no view on the general question of imputation of conflicts of interest under Rule 1.10.

ANALYSIS

1. *Conflict of Interest.* Conflicts of interest are governed by Rules of Professional Conduct Rule 1.7. Rule 1.7 prohibits a lawyer from representing a client if the representation will be adverse to another client or materially limited by responsibility to another client or by the lawyer's own interests unless (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation. A county attorney is also an elected public officer subject to statutory restrictions concerning the conduct of the attorney. Two such statutory restrictions are relevant to the present issue. Utah Code Ann. §67-16-9 states that:

> No public officer or public employee shall have personal investments in any business entity which will create a substantial conflict between his private interests and his public duties.

Utah Code Ann. §67-16-4 (Supp. 1989) restricts public officers' non-public employment and states:

> No public officer or public employee shall:
> . . . .
> (4) accept other employment which he might expect would impair his independence of judgment in the performance of his public duties; or
> (5) accept other employment which he might expect would interfere with the ethical performance of his public duties.

While the purpose of this opinion is not to address whether these statutory provisions have been violated, these provisions are relevant as to whether it would be an ethical violation for a county attorney to accept this type of private employment. The ethical standards a county attorney must meet are at least as stringent as the statutory standards.

2. *County Attorneys' Duties in Collecting Delinquent Support Payments.*

In three different situations a county attorney has a statutory duty respecting the collection of delinquent support payments.

A. The Office of Recovery Services is given the duty to "collect support from any obligor if the department [of Social Services] has provided public assistance, or if the department has contracted to collect support." Utah Code Ann. §62A-11-104(1) (Supp. 1988). The duty of representing the office in such actions is placed on "the attorney general or the county attorney of any county in which a cause of action can be filed." §62A-11-107(4). Under this section then the Office of Recovery Services seemingly can arrange for either the attorney general or the county attorney to represent it. It is our understanding that until a few years ago almost all such cases for Recovery Services were handled by the county attorneys but now all are handled by the Attorney General's office.

B. Under the Uniform Civil Liability for Support Act as enacted in Utah, the Office of Recovery Services may proceed to recover support on behalf of any state agency that provides public assistance, or on behalf of the support obligee, against the support obligor. Utah Code Ann. §78-45-9(1)(a) (Supp. 1989). In such actions the act places the duty of representing Recovery Services on the attorney general or the county attorney of the county of residence of the obligee. §78-45-9(1)(b). So here too the county attorney shares the statutory duty to collect support with the attorney general and it is seemingly the choice of Recovery Services as to which office handles the cases. It is our understanding that these cases are now also being handled by the attorney general's office by the choice of Recovery Services. This Act also places one duty exclusively on county attorneys. The county attorney's office is directed to provide assistance to an obligee desiring to proceed under this act by providing forms, informing the obligee of impecunious filing rights, advising the obligee of methods of service of process and assisting the obligee in expeditiously scheduling a hearing before the court. §75-45-9.2.

C. Utah has enacted the Uniform Reciprocal Enforcement of Support Act ("URESA"). Utah Code Ann. §77-31-1 to 39 (1982). This Act is designed to facilitate interstate collection of support payments. This Act places several duties exclusively on county attorneys. The county attorney, upon request of the court or the social ser-

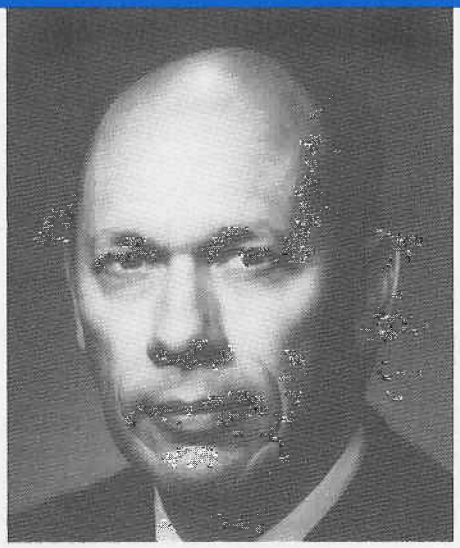
vices department, is to represent the petitioner in the initiation of any proceeding under the Act. §77-31-12. If the action is initiated by a non-resident against a resident, the county attorney is to diligently prosecute the case against the resident obligor. §77-31-10. The duties imposed by this statute on the county attorney are not shared with any other office and the county attorney is to handle all cases initiated under this Act.

These statutory provisions impose a duty of representation upon the attorney acting in the capacity of county attorney or deputy county attorney. If the attorney were to represent a defendant in a civil action to collect child support payments, then the attorney might be unable to fulfill the attorney's statutory obligations. Thus it would be ethically improper for the attorney to seek consent to the representation of the defendant because the attorney could not reasonably believe the representation of the statutorily defined client would not be adversely affected. There is also a significant question as to who would be authorized to consent to such representation.

CONCLUSION

County attorneys share with the Attorney General a statutory duty to represent the Office of Recovery Services under two different statutory acts and have sole responsibility under URESA for the collection of delinquent support payments in their county. The fact that Recovery Services has arranaged for the Attorney General's Office to handle the case does not, in our opinion, constitute sufficient consent under Rules of Professional Responsibility Rule 1.7 to avoid a conflict of interest in actions involving residents of the county in which the county attorney serves. The county attorney's statutory duties cannot be done away with by the consent of Recovery Services or any other state agency. The county attorney continues to have a statutory duty to represent the Office of Recovery Services and also in some instances a statutory duty to assist the obligee of the support in commencing and prosecuting an action. Any representation of a defendant in such an action involving a resident of the county in which the county attorney or deputy county attorney serves presents a conflict of interest and would not be ethically proper under Rules of Professional Responsibility Rule 1.7 and the statutory standards placed on public officers.

MARK BEESLEY, a Salt Lake City native, is a former judicial clerk for Chief Justice Gordon R. Hall of the Utah Supreme Court. Beesley graduated from Brigham Young University in 1985 with a bachelor's degree in English Literature. He graduated from Cornell Law School in 1988 with a juris doctor degree. He is a new associate at Richards & O'Neil, a New York City law firm.



Utah Juvenile Justice for the '90s

By Judge Stephen A. Van Dyke

Utah's juvenile justice system is frequently commended as one of the nation's best, a model of deinstitutionalized treatment and care. We are collectively fond, in fact, of patting ourselves on the back in that regard, but all is not necessarily well in Zion.

As we end the decade, it is clear that Utah has experienced a remarkable growth in youth population. The "at risk" age population between ages 10 to 17 years will have realized a 33 percent increase in size over the 10-year period just past. We have approximately double the national birth rate, in spite of a gradually falling state birth rate, and 37 percent of the state's population is under 18 years of age, the highest rate in the country. Forty-five percent of Utah's households have children under the age of 18. Forty percent of our young people will have at least one contact with the juvenile court, most of them for some criminal offense.[1] Division of Youth Corrections figures show increased utilization of detention and secure facilities through the last quarter, with projections showing continued growth in use of all resources.[2]

Caseloads are building in the courts as well, with a recent study conducted by the Commission on Criminal and Juvenile Justice showing a continued growth trend well past 1992 when it was previously widely believed populations would taper off. It now appears that among high risk population groups the "growth rate will increase even more from 1990 to 1995, injecting [an increase of] 13,500 older male teens in[to] the population by 1995. Since these are the most crime prone years, the court and Youth Corrections can only expect more activity during these next five years."[3]

Our juvenile courts are operating at staff levels 60 percent below nationally recommended standards.[4] In 1990 between 45,000 and 46,000 filings are projected to be handled by the current 12 juvenile judges and staff statewide.[5] Each juvenile coming before the court is responsible for an average of just over two filings apiece, which equates to 20,000 offenders appearing and reappearing annually.[6] In more concentrated Wasatch Front areas, the pressure on court resources is most notable.

It is safe to assume that the Division of Family Services, driven by these same population engines, will see dramatically increased demand for foster care, medical care, shelter care, case management and counseling of juvenile clients and families, with county mental health services sharing the burdens. With this population growth, system loads are increasing not just in Utah's education sector but across the board.

Historically juvenile justice has differed from adult justice systems, and with good cause. Juveniles are considered less hardened and more responsive to rehabilitation efforts.[7] Approximately 59 percent of offenders have only one contact with the court, and do not reenter the justice system. Another 39 percent reenter at the juvenile level, perhaps as many as eight times, but by age 18 they phase out and do not meaningfully reenter at the adult level.[8] Simple arithmetic thus says that the present Utah system has been overwhelmingly successful

JUDGE STEPHEN A. VAN DYKE was appointed to the bench in 1985, and currently serves in the Second District Juvenile Court including Weber, Davis and Morgan counties. Judge Van Dyke is the Chairman-elect of the State Board of Juevnile Court Judges and holds a Ph.D. from Bowling Green State University in Communications, as well as a Juris Doctorate from the J. Reuben Clark Law School at BYU where he was a member of the school law review. He has served as member of state task forces to develop master plans for the judiciary, and Youth Corrections, and currently is a member of the Utah Board of Juvenile Justice and Delinquency Prevention and the Judicial Council's Advisory Board on Juvenile Court Rules of Procedure. Prior to being appointed to the bench he was an associate at Tanner, Kesler, Rust & Williams in Salt Lake, and later a partner at Bean & Smedley in Layton. He is a past President of the Davis County Bar Association.

in helping most kids avoid long-term criminal activity. The remaining 2 percent of the offender population has a high recidivism rate and accounts for the majority of youth who graduate to secure facilities and hit the system again as adults.[9] The lesson is fairly clear: with appropriate resources, the Utah model of juvenile justice does work.

The judge's role in this model approach has traditionally been one of more direct involvement in "individualized" justice and consequences management. Strictly speaking, our system is a combined treatment or "medical model" and "consequences" or justice model.[10] The legislature recognized this reality in 1988 by passing, with the approval of the Board of Juvenile Court Judges, a new purpose clause for the Juvenile Court Act which effectively preserves elements of both models. The new clause reads:

78-3a-1 Juvenile Court—Purposes—Jurisdiction.

> The juvenile court is established as a forum for the resolution of all matters properly brought before it consistent with all applicable constitutional and statutory requirements of due process. The court has the jurisdiction, powers, and duties under this chapter to:
>
> (1) Promote public safety and individual accountability by the imposition of appropriate sanctions on persons who have committed acts in violation of law.
>
> (2) Where appropriate, order rehabilitation, reeducation, and treatment for persons who have committed acts bringing them within the court's jurisdiction.
>
> (3) Adjudicate matters that relate to abused, neglected, and dependent children and to provide care and protection for these children by placement, protection and custody orders.
>
> (4) Adjudicate matters that relate to children who are beyond parental control and to establish appropriate authority over these children by means of placement and control orders.
>
> (5) Order appropriate measures to promote guidance and control, preferably in the child's own home, as an aid in the prevention of future unlawful conduct and development of responsible citizenship.
>
> (6) Remove the child from parental custody only where the minor's safety or welfare, or the public safety, may not otherwise be adequately safeguarded.
>
> (7) Consistent with the ends of justice, strive to act in the best interests of the children in all cases and attempt to preserve and strengthen family ties where possible.

Thus the parens patriae concept is preserved in such phrases as "where appropriate, order rehabilitation, reeducation, and treatment for persons . . .," and "strive to act in the best interests of the children in all cases and attempt to preserve and strengthen family ties where possible." At the same time the court's judicial responsibilities are defined by a call to "promote public safety and individual accountability by the imposition of appropriate sanctions . . .," and to "order appropriate measures to promote guidance and control . . . as an aid in the prevention of future unlawful conduct . . . ." The purpose clause thus blends the two approaches, but reprioritizes to the degree a justice model emphasis is clearly asserted along with the need to rehabilitate youngsters. The phrasing is merely a reflection of what our courts have actually been doing or attempting for the last decade.

> "...the present Utah system has been overwhelmingly successful in helping most kids avoid long-term criminal activity."

The rub comes in looking at dispositional resources and alternatives available to implement these blended objectives. The dispositional sections of the code are 78-3a-39 and 78-3a-39.5 UCA. These sections provide for probation (78-3a-39(1)); custody change, generally interpreted to mean temporary custody change (78-3a-39(2)); agency placement, also generally assumed to be a temporary placement alternative (78-3a-39(3)); secure confinement with Youth Corrections (78-3a-39(4)); commitment to observation and evaluation for up to 90 days (78-3a-39(5); short-term detention up to 30 days (78-3a-39(6)); a ranch or forestry camp placement (78-3a-39(7)); payment of restitution (78-3a-39(8)); restitution work programs (78-3a-39(9)); restriction of driving privileges in traffic matters (78-3a-39(10)); mandatory fees and work hours under drug and alcohol laws (78-3a-39(11)); medical treatment (78-3a-39(12)); guardianship of the child, generally assumed to be temporary (78-3a-39(13)); reasonable conditions which may be ordered to be complied with by the custodian or parent or parties (78-3a-39(14)); involuntary commitment to mental health (78-3a-39(15) and 62A-12-234); termination of parental rights (78-3a-39(17) and 783-3a-48); and "any other reasonable orders for the best interest of the child or as required for the protection of the public," except that a juvenile may not be jailed (78-3a-39(18)).

The caveat to these worthy and commendable sections is that there are few if any resources available in many instances to fully apply such dispositions. The Division of Youth Corrections recently reviewed drug abuse problems among juveniles and discovered that about 13,500 Utah youth are significantly abusing alcohol or other drugs.[11] The only state operated hospital beds available are children's and adolescent units at the State Hospital in Provo. Perhaps 60 beds exist there, most of them dedicated to treatment of mental and emotional disorders, not necessarily drug or alcohol problems. Other residential group-home type programs provide approximately 150 beds under contract to state agencies, where a few youth can be placed with counseling available from staff. The present need so far outstrips resources as to be laughable.

Occasionally the court can order a parent under §78-3a-39(14) to provide care, e.g. in a private hospital of the parent's choice. Very few parents of chronic drug users have the insurance or means necessary for such placements, with the result that many who need serious care are not getting it in a system endowed with few public resources but ironically endowed with an abundance of inaccessible private beds in high cost hospitals. This is not to argue with the reasonableness of the private price tags. The point is that people with what is often the greatest need among the 13,500 abusing youth cannot access what they cannot afford, regardless of the reasonableness of the fee charged.

Placements with agencies do not fare much better at times. Group or foster or "proctor" homes are contracted to or licensed by DFS and Youth Corrections to facilitate placement of problem youngsters who may not have drug problems. But it is generally conceded there is a shortage of such placements, and the only other placement reasonably possible when slots are full is often back into the community and home where the youth become dysfunctional to begin with.

Probation overload and filled observation and evaluation units blunt these options, with youngsters at times stuck in overloaded detention centers awaiting placement in observation units sometimes as long as 14 days

after a court order. Secure confinement faces the same overload problem, with only 70 secure beds statewide. These secure beds are high-cost beds. They were designed that way, doing little to inspire the legislature to build more of them.[12] The Youth Parole Board of Youth Corrections is under constant pressure to roll kids out of secure confinement to make room for incoming commitments. Court staffs are tempted to wait as long as possible before recommending committing youth to such limited or overloaded facilities. The average profile of a secure confinement youth has grown to eight felonies and 12 to 15 misdemeanors before the offender goes in. In recent months with caseload increases, youth awaiting placement in secure confinement are overflowing into detention centers which were only designed to temporarily hold youths pending adjudication or committed for short-term confinements.

One resource overflows into another, secure to less secure, to community, to home, to the streets. As system dysfunction is created by overload at one level, it imposes its effects onto adjoining or parallel levels of the justice and social order. More kids inadequately placed, many with inadequately treated drug problems, means more pressure on overloaded probation or parole officers, with subsequent fewer and less intensive contacts between officer and client. At the bottom of the ladder is the citizen suffering car or home burglaries or increased exposure to drugs, or schools suffering problems in public classrooms. It is all very subtle, almost invisible until street conditions rise to real crisis level. Few link system failure to increased crime levels. That link may in any event be difficult to define quantitatively in terms of numbers of burglaries or drug deals connected to early probation release or parole, or community placement shortages and overload; but make no mistake, the link is there.

Some of the dispositions allowed in the code are not actually available. There are no forestry camps that I know of, for instance. Work restitution programs and community service programs are often underfunded and during busy periods of the season there may be no work placements or supervision available. Drug fees and fines intended to pay for community projects have not produced the revenue needed. Large amounts of restitution ordered cannot be paid by 14- or 15-year-olds without skills and jobs. When non-paying offenders turn 18 the court, with a sigh of relief, turns the case over to an overworked Office of Recovery Services.

New drug and alcohol laws enacted in the 1988 legislature are designed to hit the juvenile user and dealer harder. The loss of driving privileges and mandatory fees of $150 in drug cases, plus mandatory community service hours on top of any fine or other penalty do indeed increase the system risk to the juvenile offender, but they cause an increase in numbers of trials demanded, placing even more severe strain on court time, and on police time in paperwork and trial testimony. While ends sought by the stiffer law are commendable, no added resources were voted to meet this as yet unrecognized added stress on the court and police components of the system.

One additional dispositional problem occurs under 78-3a-39(19). The court must make findings before removal of any child from its home that the welfare of the child or the public interest requires removal. An interesting question is posed by this section. Under 78-3a-16 (jurisdictional section) the court has broad jurisdiction to deal with the problems of children as well as problems created by children. §78-3a-40 further defines the "continuing jurisdiction of juvenile court," continuing jurisdiction until the child becomes 21 years of age, "unless terminated earlier." Paragraph (2) of 78-3a-40 says:

> (2) The continuing jurisdiction of the court terminates:
>
> (a) Upon order of the court.
>
> (b) Upon commitment to a secure youth corrections facility.
>
> (c) Upon commencement of proceedings in adult cases under §78-3a-19.

In times of overload, what authority then does an overloaded agency have, once given custody, to shift placement of the child without the permission and involvement of the court? Can an agency with limited slots, for instance, place a child back home when the court has expressly found that home placement is not in the child's or community's best interests? After all, custody is defined in 78-3a-2(14)(d) as "the right to determine where and with whom he shall live."

The jurisdictional language of 78-3a-40 has been assumed by most juvenile court judges to confer a right upon the court to make major placement determinations regardless of the desires of agencies involved. 78-3a-39(5) dealing with observation and evaluation placements makes it clear that such placements are subject to the court's continuing jurisdiction, and subsection (6) makes the same point with regard to short-term detention orders. Since the court has authority under 78-3a-39(14) to order a custodian to comply with conditions set by the court, and since agencies are custodians under the court's order, agencies arguably do not have authority to go beyond the court's wishes in any placement. The Utah Court of Appeals in a recent adoption case bolstered the authority of the juvenile court to remain the forum for determination of adoption where agency custody stemmed from a court order.[13] This exclusive jurisdictional power to decide the placement can be argued to extend to any case or placement in which the court has continuing authority to amend or determine dispositional treatment or care for a child.

> "In the face of growing populations and caseloads, . . . alternatives to present limited resources must be sought."

In the face of growing populations and caseloads, with increases projected into the mid-90s, alternatives to present limited resources must be sought. Drug rehabilitation and probation resources must be developed if we are to have reasonable hope of coping with increasing gang and drug street activity, not to mention the needs of 13,500 current admitted abusers. Less expensive alternatives to our present costly secure confinement facilities should be sought to provide secure confinement when and where appropriate without creating a self-defeating cost argument against building needed additional resources.

More community placement resources and group/foster/proctor homes need to be developed to allow proper housing for problem ridden children not requiring secure confinement. We should fight to retain and improve performance levels for the 98 percent of the offender population who turn around before age 18 and do not reenter the justice systems. That means training and retaining trained probation officers who have the time and ability to intensively monitor and work with youth. We need to emphasize faster turn around of offenders to better protect against recidivism and prevent deeper penetration of juveniles into the justice system.

Lawmakers need to study and address these issues, recognizing the needs of the juvenile justice sector when growing populations of children cause caseloads to climb. We must be willing to define needs and respond or the juvenile justice model in which many have taken pride will decline in effectiveness, to the detriment of com-

munity life.

[1] All figures taken from *Utah Juvenile Court Workload Request for Fiscal Year 1988-89*, Administrative Office of the Courts.

[2] Division of Youth Corrections utilization figures and projections are taken from or may be found in *The Utah Department of Social Services Division of Youth Corrections Annual Report 1988*, and quarterly reports submitted to the Utah Juvenile Court Board of Judges, including a DYC quarterly report on "Detention Utilization FY 1989 for the period July 1, 1988, through May 1, 1989." The most current reports show maximum utilization of secure confinement beds in the quarter just ended.

[3] *Preliminary Report to the Legislative Judiciary Interim Study Committee Regarding Utah's Juvenile Justice System, September 18*, 1989, draft, Administrative Office of the Courts, p.2.

[4] Conclusion based upon recommended staff levels found in *Unified Corrections Study—Final Report—A Study for the Social Services Study Committee of the Legislature of the State of Utah*, the John Howard Association, 67 E. Madison Street, Chicago, Ill. 60603, July 1976, p.62. Current staff levels are measured against the recommended levels when this older study was done, which says we have not paid much attention to the staff numerical shortfall for some time, as little movement is evident toward the standard.

[5] *Table 10, Forecast of Filings by County*, Administrative Office of the Courts working paper, 1988.

[6] The 1988-89 Workload Request previously cited projects that 40 percent of the "at risk" youngsters between 10 and 17 years will appear before the courts. The National Education Association places the total number in that at risk age group at 450,000 in Utah. Presumably the 40 percent (or 180,000) will not all appear in the same year, but court projections say that over 70,000 will appear more than once during their childhood.

[7] *See, e.g.*, Johnson, Thomas, *Introduction to the Juvenile Justice System*, West Publishing Co. (1975), and Lou, H., *Juvenile Courts in the United States*, University of North Carolina Press (1927), for an overview of the philosophical and historical underpinnings of the juvenile court concept. *See also*, Guernsey, Carl E., *Handbook for Juvenile Court Judges*, National Council of Juvenile and Family Court Judges (1985) p.1.

[8] Basic figures supplied by the Utah Administrative Office of the Courts, based upon 1988 cohort studies. (Cohort studies are periodically done of the "graduate class" just leaving the at risk age groups. The 18-year-olds for that year and their prior case histories are looked at.)

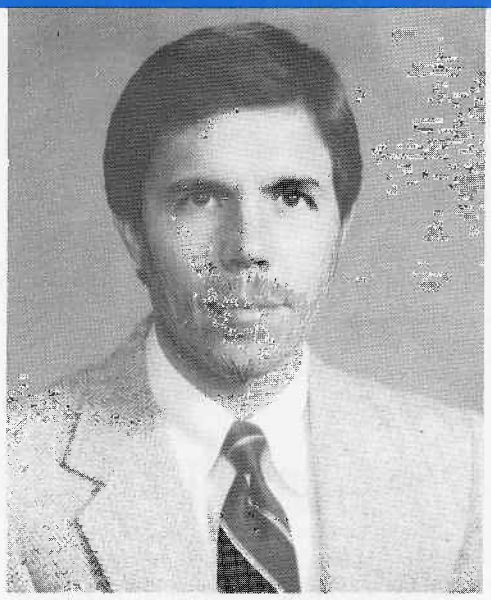
[9] *Ibid.*

[10] For a discussion of the distinctions between the "medical model" and "justice model" *See*, Christean, Hon. Arthur G., *Rethinking the Purpose of the Juvenile Court*, *Utah Bar Journal*, December 1988, pp. 22-29.

[11] Bahr, Stephen J., *Drug Abuse Among Utah Students*, Brigham Young University, 1989, as cited in report made before the Utah Board of Juvenile Court Judges by Leon PoVey of the Division of Youth Corrections, November-December 1989. (The 13,500 figure is probably conservative, since the study only involved those students present in school when the survey upon which it was based was administered, and also since it is a safe bet that some users did not answer the questions truthfully. Heaviest users are often not in the school system or are unwilling to answer questions concerning use.)

[12] DYC in 1988 represented the cost of secure confinement beds to be $115 per day per bed, down somewhat from the $119 per day quoted in the DYC Annual Report 1986, p.9.

[13] *Bullock v. Utah Department of Social Services*, 118 Utah Ad. Rep. 69 (1989).



Professionalism

By Jonathan K. Butler, President, Young Lawyers Section

Much has been said and written lately concerning the failure of many lawyers to adopt and adhere to an appropriate standard of professionalism. What is "professionalism" and why this concern about it? Professionalism is a concept that derives partly from the historic traditions of the law as one of the "learned professions" and partly from the obligations that flow from the exclusive license that we, as lawyers, have to participate in this nation's administration of justice. Those obligations include an obligation to serve the public interest, to adhere to a special standard of ethical conduct, and to maintain the necessary level of professional competence. Thus, all lawyers, as an indispensable part of their professional life, must use their education and skills for the public good. They must remain attendant to, and fulfill, obligations to their communities, persons in need, and the American judicial system. They must maintain high standards of ethical conduct. If we, as individuals or as a group, do not abide by these obligations, then we are not worthy of the exclusive license we have been given.

The tension between time-honored concepts of professionalism and the emerging emphasis on the monetary "bottom line" forms the central theme for many of the essays that follow. That tension manifests itself in myriad ways: from lawyers' over-combativeness in their efforts to "please" clients in a competitive market, to outright incivilities in depositions, trials, and contract negotiations; from the pressure of funding high salaries resulting in astronomic billable hour requirements, which eliminate time for pro bono and public service work, to a rash of disciplinary actions against attorneys.

In an effort to refocus lawyers' attention on the basic principles of professionalism, and their obligation to incorporate those principles into their daily work, the American Bar Association Young Lawyers Division developed the following Lawyers' Pledge of Professionalism:

LAWYERS' PLEDGE OF PROFESSIONALISM

"I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to professionalism concerns."

"I will encourage respect for the law and our legal system through my words and actions."

"I will remember my responsibilities to serve as an officer of the court and protector of individual rights."

"I will contribute time and resources to public service, public education, charitable and pro bono activities in my community."

"I will work with the other participants in the legal system, including judges, opposing counsel and those whose practices are different from mine, to make our legal system more accessible and responsive."

"I will resolve matters expeditiously and without unnecessary expense."

"I will resolve disputes through negotiation whenever possible."

"I will keep my clients well-informed and involved in making the decisions that affect them."

"I will continue to expand my knowledge of the law."

"I will achieve and maintain proficiency in my practice."

"I will be courteous to those with whom I come into contact during the course of my work."

"I will honor the spirit and intent, as well as the requirements, of the applicable rules or code of professional conduct for my jurisdiction, and will encourage others to do the same."

It is critical to the survival of the practice of law as a profession that professionalism regain its central role in our lives as lawyers. While the principles addressed in the foregoing pledge are aspirational—in that they are not meant to be enforced by disciplinary authority—they still should be embraced by every lawyer called to the bar. They should guide our every thought and action toward clients, courts, and counsel.

In 1953, Dean Roscoe Pound of Harvard Law School developed the following definition of a profession:

> The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

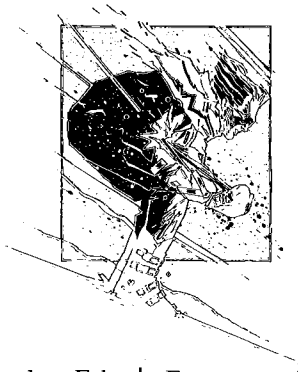
I hope that the Lawyers' Pledge of Professionalism will lead each of us to begin, or continue, a commitment to the pursuit envisioned by Dean Pound.

Utah Legal Employer Information Fair

On February 7, 1990, the Young Lawyers Section of the Utah State Bar will sponsor the Utah Legal Employer Information Fair for a second time. The Employer Fair will be held from 7:00 to 9:00 p.m. at the Law and Justice Center at 645 South 200 East in Salt Lake City. First- , second- , and third-year students are invited to attend. The Employer Fair is designed to help law students and law firm representatives get acquainted. It provides an informal setting for discussion and gives law students an opportunity to ask general and specific questions about law firms and law practice.

The Young Lawyers Section wishes to thank Kathy D. Pullins, Director of BYU Legal Career Services, and Francine Curran, Director of U of U Legal Career Services, for coordinating their efforts with YLS, scheduling the facility, and providing information to law students. The fair which was held in September was a success, and we encourage your attendance.

Ski Party Planned for Young Lawyers Section



A ski party will be held on Saturday, February 17, 1990 from 10:00 a.m. to 8:00 p.m. at Jeremy Ranch and Park City. Young Lawyers of the Utah State Bar are invited to attend. Skiiers are welcome to come and go throughout the day at a home on Jeremy Ranch Golf Course. This winter social event features Alpine skiing, cross-country skiing, a warm Jacuzzi and sauna, and plenty of refreshments.

Cross-country skiing is available to the public at Jeremy Ranch, and downhill skiing is available at the nearby resorts. Everyone will be responsible for his or her ski expenses. There will also be a minimal fee for refreshments.

Please RSVP by February 10, 1990 to Cecelia Espenoza at the Salt Lake City Prosecutors' office at 535-7767 or Charisse Haws at Holme, Roberts & Owen at 521-5800. They will provide information about the location of the home at Jeremy Ranch and the fee for refreshments. The more the merrier, so feel free to invite friends.

Young Lawyers Announce 1990 Brown Bag Series

The Membership Support Committee of the Utah Bar's Young Lawyers Section is pleased to announce the commencement of its 1990 monthly Brown Bag series. This program, which has been very successful in the past, offers members of the bar an opportunity to attend a series of guest lectures on a wide variety of subjects held during the fourth week of each month.

At the Young Lawyers' 1990 Brown Bag Kick-Off lecture which was held on January 22, 1990, the Honorable J. Thomas Greene of the United States District Court for the State of Utah spoke on the topic, "Judging the Federal Bar—Tips for Effective Federal Court Practice." According to Wm. Kelly Nash, chairperson of the Membership Support Committee, "Judge Greene's address typifies the educationally and professionally rewarding programs scheduled for this year's Brown Bag series."

Future Brown Bag lectures will feature, among others, the following recognized speakers: Mr. Dee Benson, United States Attorney; Justice Christine Durham, Supreme Court of Utah; and Mr. Kay Cornaby, former Utah State Senate Majority Leader. Future lecture topics include drug testing and enforcement, a lawyer's role in the legislative process, and raising and arguing constitutional issues in Utah courts.

This month's Brown Bag is scheduled for *February 22, 1990* at *12:00 noon* at the Utah Law and Justice Center, 645 South 200 East in Salt Lake. There will be no fee for attendance. Don't forget to bring your lunch.

Tuesday Night Bar Given National Exposure

The American Bar Association's Affiliated Outreach Project is sponsoring its spring conference in Miami, Florida, on May 10-12, 1990. The spring conference will highlight various Young Lawyer sponsored programs throughout the country.

Charlotte L. Miller, Chair of the Utah Young Lawyers Pro Bono Committee, has been asked to give a presentation on the Tuesday Night Bar Program. The presentation will describe how to initiate, organize, implement and maintain a referral/counseling program and will include a videotape of a five-to-ten minute Tuesday Night Bar session. The presentation will also discuss the success of the Tuesday Night Bar, the obstacles to its success, as well as budgetary concerns.

Lawyers' Compensation Survey

By Gregory G. Skordas

Last year, lawyers' compensation survey questionnaires were sent to 2,000 randomly selected members of the Utah State Bar from all areas of Utah. 582 members of the Utah State Bar responded to the questionnaire, which was the largest number of responses ever received.

PRO BONO

Attorneys were requested to indicate the number of hours spent on pro bono work and to describe the type of pro bono work. The responses indicated that the majority of the pro bono work is performed by attorneys in law firms. Of that work, a significant percentage includes habeas corpus work for inmates and non-legal volunteer work for non-profit entities. Other pro bono work listed on the responses included ACLU work, immigration work, consulting for the elderly, legal aid and legal services referrals and judging small claims court. Some self-employed attorneys included all uncollected debts as pro bono work. Also included was advice to friends, bar committees, assisting families and advice to ward members. Some government attorneys indicated that their work by its nature was pro bono since they received significantly lower salaries.

SALARIES

The following chart indicates the salaries and bonuses reported by the responding attorneys, according to years of practice and types of practice. The chart also indicates the number of hours billed by self-employed attorneys and attorneys employed in law firms.

FORMAT	
First Line:	**1989 Salary**
Second Line:	**1989 Bonus**
Second Line:	**[Overhead Expenses for Self-Employed] (Already Deducted from Income)**
Third Line:	**—Yearly Hours Billed—**

TYPE OF PRACTICE	YEARS IN PRACTICE						
	Under 3	**3 to 5**	**6 to 8**	**9 to 11**	**12 to 15**	**16 to 20**	**Over 20**
SELF-EMPLOYED	$15,500 [$7,500] —1,500—	$48,500 [$33,500] —1,790—	$51,800 [$39,200] —1,640—	$55,600 [$41,300] —1,670—	$60,800 [$46,900] —1,660—	$61,500 [$39,900] —1,670—	$73,100 [$49,000] —1,320—
SMALL FIRM Under 15	$25,900 [$1,100] —1,560—	$38,400 [$5,700] —1,770—	$54,800 [$10,700] —1,680—	$67,600 [$17,400] —1,650—	$91,000 [$5,900] —1,630—	$105,400 [$18,200] —1,640—	$65,700 [$23,600] —1,430—
MEDIUM FIRM 15 to 30	$31,500 [$1,300] —1,700—	$40,800 [$2,400] —1,600—	$66,200 [$16,400] —1,900—	$74,200 [$20,700] —1,830—	$90,800 [$18,800] —1,850—	$109,700 [$22,700] —1,660—	$104,300 [$6,700] —1,660—
LARGE FIRM Over 30	$42,700 [$2,300] —1,890—	$48,100 [$3,800] —1,940—	$65,200 [$7,000] —1,830—	$91,600 [$25,600] —1,850—	$104,400 [$13,100] —1,870—	$111,200 [$22,900] —1,830—	$106,900 [$11,300] —1,650—
CORPORATE COUNSEL	$26,500 [$100]	$43,200 [$5,800]	$52,700 [$6,500]	$62,500 [$15,400]	$77,900 [$5,900]	$94,000 [$7,900]	$86,800 [$15,900]
GOVERNMENT	$22,500	$30,400	$38,300	$43,200	$52,400	$57,000	$58,200

The following percentages of attorneys at firms reported that they are allowed to include the indicated activities toward billable hours for compensation:

Recruiting	30%
Pro bono	32%
Client relations	35%
Bar activities	30%
CLE	24%

BENEFITS

The following chart indicates the percentage of attorneys responding which receive the indicated benefits. Attorneys who classify themselves as self-employed are not included in determining the percentages.

Benefits (percentage of employers)

	Health	Dental	Disability	Bar Dues	Life	CLE
Small Firm (Under 15)	77	25	34	84	44	70
Medium Firm (15 to 30)	100	14	68	97	62	95
Large Firm (Over 30)	95	68	81	95	93	90
Corporate	100	85	73	92	76	68
Government	96	91	73	70	76	50

Attorneys were asked to describe the maternity and parental benefits provided by employers. Very few attorneys responded to the question. Of those responding, most responses included such comments as: "the usual," "full," "partial".

GENDER

Of the 582 attorneys who responded, 85% were men and 15% were women. Of the 94 attorneys who indicated that they worked for large firms, 82 were male and 12 were female. In the corporate counsel group, 87% of those responding were male. The survey results indicated that the largest percentage of females work in government: 69% responding were men and 31% responding were women. There are fewer self-employed female attorneys. Of those responding to the survey, only 6% of the self-employed attorneys were women. Small firms and medium firms also reported fewer women. Medium firms reported 97% males and the small firms reported 92% males.

COMMENTS

We were pleased with the number of responses. As a result, we will again send the questionnaires directly to attorneys throughout the State of Utah. The surveyor encourages attorneys to make suggestions or comments to improve the questionnaire.

Second Annual Founder's Day Luncheon Held

The Utah Bar Foundation hosted its second annual Founder's Day Luncheon at the Alta Club on December 13, 1989. The Luncheon was held to celebrate the 26th Anniversary of the Foundation and to update the former Trustees of the Foundation. Retired Justice Crockett and John R. Alley, Jr. were also invited to give an update on their corroborative efforts to complete Justice Crockett's biographical histories of the past justices of the Utah Supreme Court.

President Richard C. Cahoon reported that the Foundation expects to receive over $200,000 in IOLTA funds by 1989. He also reported on other activities of the Foundation.

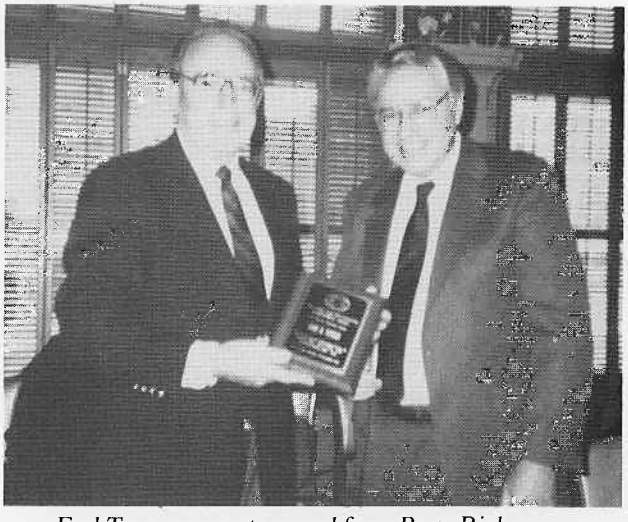
ACHIEVEMENT AWARDS

Three Foundation Achievement Awards were also presented at the luncheon. Earl Tanner was presented an award for his work as President of the Foundation from 1965-1966 and again from 1979-1980 and for his work as a Trustee from incorporation in 1963-1987. Honorable J. Thomas Greene was presented an award for his work as President from 1972-1974 and as a Trustee from 1972-1988. The third award was given to David E. Salisbury for his work as President from 1975-1978 and as a Trustee from 1972-1988. The Foundation expressed its deep appreciation to these three men for their great work and effort for the Foundation.

Front row, left to right Ellen Maycock, David S. Kunz, Joe Novak, Justice Crockett (retired), Judge Norman H. Jackson, LaVar Stark.

Back row: Bert L. Dart, Richard C. Cahoon, Judge J. Thomas Greene, Earl Tanner, John R. Alley, Jr., H. Michael Keller.

Judge Greene accepts award from Pres. Richard C. Cahoon.



Earl Tanner accepts award from Pres. Richard C. Cahoon.

CLE CALENDAR

CORPORATE MERGERS AND ACQUISITIONS

This two-day advanced course is designed to offer the experienced corporate lawyer an overview of some of the more sophisticated strategies and techniques, as well as the latest developments, in the field of corporate mergers and acquisitions. The program will cover (i) tax considerations in structuring the acquisition; (ii) methods of formulating the purchase price; (iii) issues that should be considered by both purchaser's and seller's counsel in negotiating the acquisition of a closely held company (or a subsidiary or division of a publicly held company); and (iv) special problems that should be considered in leveraged buyouts and when acquiring divisions and subsidiaries.

The faculty will identify and discuss some of the major as well as more subtle issues that may (or should) arise in the context of the acquisition. Important tax considerations will also be noted, with particular reference to the effect of the recent changes in the tax laws. Included in the program will be a discussion of the factors to be considered in the structuring of a negotiated transaction and the determination of the purchase price, as well as a mock negotiation of an acquisition agreement as a vehicle for identifying the various issues that should be considered, both from the purchaser's and seller's perspectives.

Continuing Legal Education Credit Pending.
Date: February 8 and 9, 1990
Place: Olympic Hotel, Park City, Utah
Fee: $375
Time: 8th, 9:00—4:30; 9th, 8:30—4:00

HOW TO HANDLE BASIC COPYRIGHT AND TRADEMARK PROBLEMS

A live via satellite seminar. Copyright law and trademark law have ever-increasing importance in the legal and business worlds, both in the domestic and international spheres. A faculty consisting of experts with a wide range of knowledge and experience in the copyright and trademark areas will focus on the handling of basic, everyday problems that practitioners in these areas and non-specialists most commonly encounter. The faculty will cover the fundamental principles, policies, and practices in each area, including the significant changes introduced in copyright law by the Berne Convention Implementation Act of 1988 and in trademark law by the Trademark Law Revision Act of 1988.

Other topics will include copyright and trademark infringement litigation, licensing and ethical considerations in the copyright and trademark field. In addition, the program will cover practice and procedures in the United States Copyright Office and the United States Patent and Trademark Office. This seminar is designed as an introduction for attorneys with little experience in copyright and trademark and as a review and update for those who need reacquaintance with intellectual property practice and procedure.

Continuing Legal Education Credit Pending.
Date: February 13, 1990
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

TAX PLANNING FOR INDIVIDUALS AND CLOSELY HELD BUSINESSES

The Utah State Bar in conjunction with Brigham Young University is pleased to announce the Third Rocky Mountain Tax Planning Institute. The Institute's focus will be on income tax planning opportunities available to individuals and closely held businesses. An experienced faculty will examine current planning techniques and describe the circumstances in which those techniques may be employed.

General topics will include tax planning considerations in the use of corporations, partnerships and trusts, fringe benefits, passive activity losses and the impact of 2036 (c). Speakers will emphasize the impact of recent developments in legislation, rulings, and case law on planning techniques and opportunities.

Continuing Legal Education Credit Pending.
Date: February 14 and 15, 1990
Place: Utah Law and Justice Center
Fee: $195
Time: 14th 8:00 a.m. to 5:00 p.m.; 15th 8:30 a.m. to 12:45 p.m.

CHOICE OF BUSINESS ENTITY FOR NEW AND OPERATING BUSINESSES

A tape delay presentation. The Tax Reform Act of 1986 and subsequent federal tax acts have made significant changes in the taxation of business entities. These changes affect in a fundamental way the tax factors that must be taken into account when deciding how to organize a new business venture or to reorganize an existing venture. Many states in recent years have enacted statutes authorizing new types of business entities, such as the statutory close corporation and the limited liability company, and have revised their other business entity statutes, including the statutes governing professional corporations and limited partnerships.

This program explores how these changes affect the choice of business entity form decision. The program is designed for all lawyers and accountants involved in the business form decision process. Every lawyer with a business practice will benefit from this four-hour telecast.

Continuing Legal Education Credit Pending.
Date: February 22, 1990
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

ESTATE PLANNING FOR FAMILY BUSINESSES AND NON-BUSINESS PROPERTY AFTER IRC §2036(c) OR ITS SUCCESSOR

A live via satellite seminar.

The 1987 enactment and 1988 modification of Internal Revenue Code §2036(c) have drastically changed estate planning techniques used to minimize tax consequences. Designed for estate planners, corporate and tax practitioners, and counsel for closely held corporations, this timely program covers recent Internal Revenue Service guidance, practical approaches to client problems, and legislative developments.

Code §2036(c) was intended to halt the use of estate "freezes" which "froze" the value of transferred property interests otherwise includable in the transferor's gross estate. However, in addition, the statutory language goes well beyond the traditional "freeze" to potentially affect the creation and transfer of corporate, partnership, and other business and non-business assets, and to create easy-to-avoid traps in the operation of family-owned businesses. Passing property interests in family businesses and investment and arrangements

poses particular problems.

This program provides an update on how to handle transactions and planning affected by §2036(c) in light of guidance in IRS Notice 89-99 and two years' experience with the statute. Key Counsel in the IRS office of Chief Counsel who participated in the preparation of the Notice will serve on the faculty panel with practitioners nationally recognized for their expertise in this area. They will illustrate applications of the Code provision to common transactions using discussion examples.

Continuing Legal Education Credit Pending.
Date: March 1, 1990
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

PROFESSIONAL LIABILITY LOSS CONTROL SEMINAR

The Utah State Bar announces a Loss Control Seminar to be presented in conjunction with The Home Insurance Company and your local administrator, Rollins Burdick Hunter of Utah, Inc. This 3-hour seminar will cover loss control ideas, including a discussion of Conflict of Interest Exposures and Hazardous Areas of Practice. The latest trends in Professional Liability claims and their prevention will also be discussed, as well as a look at local claims statistics. The seminar will include a panel discussion on the above subjects as well as insights into the Lawyers Professional Liability marketplace. Individuals on the panel will be Mr. Joseph Action, JD, publisher of *Lawyers Liability Review Journal*, Mr. Thomas Kay, JD, Utah State Bar Professional Liability Insurance Committee representative, and Mr. Mark Dougherty, JD, Assistant Vice President and Claims Coordinator for Professional Liability Underwriting Managers (PLUM). Please take time to reserve your space for this informative seminar. Call Barbara Rainey at Rollins Burdick Hunter of Utah, Inc., (488-2550) for more details.
Continuing Legal Education Credit Pending.
Date: March 5, 1990
Place: Utah Law and Justice Center
Fee: $55
Time: 12:00 to 5:00 p.m.

JURY COMPREHENSION IN COMPLEX CASES

A live via satellite seminar.

How much do jurors understand about a complex case? What aspects of the trial process most confuse them? What techniques can you use to help them understand the position of your client? How can you organize and explain the multitude of documents that are often part of a complex case? This program, chaired by Daniel Margolis of Patton, Boggs and Blow in Washington, D.C., will explore these issues and should enhance the trial advocate's ability to communicate with the jury.

The program will provide attendees with practical advice, based not only on the expertise of a faculty of experienced judges and trial lawyers but also on the basis of empirical research conducted under the auspices of the American Bar Association's Section of Litigation. This recently concluded three-year study was undertaken by the Litigation Section's Special Committee on Jury Comprehension and was conducted by professors from the Universities of Washington and Colorado. Members of the research team will be on the program faculty.

Continuing Legal Education Credit Pending.
Date: March 22, 1990
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

EVIDENCE FOR ADVOCATES— THE LAW YOU NEED TO PROVE YOUR CASE

This seminar features the popular James W. McElhaney, Professor of Law, Case Western Reserve University School of Law. Program topics and highlights include: The Open Door Theory of Relevance, Character Evidence and Impeachment, Foundations and Objections, Making and Meeting Objections, Privileges, Hearsay and Expert Witnesses. The program offers "invaluable information shared in an entertaining style," from one of the country's premier lecturers on evidence and trial practice.
Continuing Legal Education Credit Pending.
Date: March 30, 1990
Place: Marriott Hotel
Fee: TBA
Time: 8:00 a.m. to 5:00 p.m.

ENVIRONMENTAL AND NATURAL RESOURCE ISSUES IN COMMERCIAL TRANSACTIONS

The Utah State Bar and the Energy, Natural Resources and Environmental Section of the Utah State Bar are pleased to announce a one-day seminar examining the important environmental and natural resource law issues facing business and real estate practitioners in Utah. Environmental laws and regulations increasingly influence the negotiation of real estate sales, corporate mergers and acquisitions, asset sales, corporate reorganizations and dissolutions, financing development and leasing. Practitioners must be sensitive to the serious risks and potential liabilities posed by these laws and also recognize the important natural resource law issues, involving water rights, severed mineral interests, and public land rights, that uniquely affect commercial and real property transactions in Utah and other western states.

The Seminar will be geared toward non-natural resource and environmental law practitioners. It will provide an overview of the important state and federal environmental laws, and the important transactional aspects of natural resource laws. The Seminar will stress transactional problems and dilemmas posed by these laws, including identification and allocation of environmental risks and liabilities, transfer of water, mineral and public land rights and interests, creating and perfecting security interests in these property rights, and the procedures for transferring environmental and natural resource permits and approvals.
Continuing Legal Education Credit Pending.
Date: April 25, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 8:30 a.m. to 5:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Feb. 8-9	Corporate Mergers and Acquisitions	Park City	$375
☐ Feb. 13	How to Handle Basic Copyright and Trademark Problems	L & J Center	$160
☐ Feb. 15-16	Tax Planning for Individuals and Closely Held Businesses	L & J Center	$195
☐ Feb. 22	Choice of Business Entity for New and Operating Businesses	L & J Center	$135
☐ March 1	Estate Planning for Family Businesses and Non-Business Property after IRC §2036(c) or Its Successor	L & J Center	$135
☐ March 5	Professional Liability Loss Control Seminar	L & J Center	$55
☐ March 22	Jury Comprehension in Complex Cases	L & J Center	$135
☐ March 30	Litigation Section Seminar	L & J Center	TBA
☐ April 25	Environmental and Natural Resource Issues in Commercial Transactions	L & J Center	TBA

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990. Watch for future mailings.

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.

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

Name Phone Firm or Company

Address, City, State and ZIP

American Express, MasterCard/VISA Expiration Date

CLASSIFIED ADS

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 6-story atrium with fountain. Please call 269-0200.

Attractive office space is available at Prime Downtown location, in the McIntyre Building at 68 S. Main Street. Single office complete with reception service, conference room, telephone, FAX machine, copier, library and Word Processing available. For more information, please call (801) 531-8300.

Attractive office and location in Salt Lake City with well-established practitioners. $440 per month includes phones, reception services, photocopying, conference room and parking. Secretarial, FAX and telex services are available, if desired. Call us at 487-7834.

Share office space with three established attorneys. Restored Victorian Mansion. $300/month base rent. Plus ¼ common expenses. Some referral work available. Call Claudia at 363-9345.

POSITIONS AVAILABLE

Part-time position available. Attorney with experience in Estate Planning and Real Estate desired. Compensation depends on experience and time worked. Flexible hours with an innovative financial consulting firm. Please reply to Utah State Bar, Box F, 645 S. 200 E., Salt Lake City, UT 84111.

AV rated Northern Utah firm looking for associate patent attorney. Strong background in electronic and mechanical filings helpful. Compensation commensurate with experience. Reply to Utah State Bar, Box G, 645 S. 200 E., Salt Lake City, UT 84111.

Small Grand Junction law firm seeking 1 or 2 assertive, self-motivated associates with 0-3 years' experience to handle small business and commercial litigation and/or personal injury and insurance defense litigation. Send resumé, work sample, and salary requirements to Office Manager, 744 Horizon Court #360, Grand Junction, CO 81506.

Managing Attorney—Staff Attorney. DNA-People's Legal Services, Inc., ("DNA")—1 Managing Attorney position and 1 Staff Attorney position in Chinle, Arizona office. Salary $18,000 for new law graduates; increased for experience and relevant bar admissions. Excellent benefits plan.

QUALIFICATIONS: Graduate of accredited law school; demonstrable commitment to legal services to the poor. Must pass Arizona bar exam. Commitment to three years' tenure at DNA. Acceptable references and strong writing skills required.

CLOSING DATE: Open until filled. Send resumé, 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. Phone: (602) 871-4151.

DNA is an equal opportunity employer and will grant preference in employment to qualified Navajo and other Native American applicants.

POSITIONS SOUGHT

Starting May 1. Salt Lake City attorney/health care professional resuming full-time law practice, domestic relations emphasis. Large referral base. Overflow criminal, property, probate cases. Would like to hear from (1:) firm seeking domestic relations associate, (2:) firm/practice group with office space to rent, with possibility of future association, or (3:) individuals wanting to obtain and share office space without formal association. Contact Wes Baden, 363-1234 or 487-1602.

Attorney with experience in bankruptcy, personal injury defense, criminal defense, and administrative law seeks full-time position with reputable law firm, corporate legal department, or government agency. Member, Utah and Idaho Bars. Please reply to Utah State Bar, Box X, 645 S. 200 E., Salt Lake City, UT 84111.

BOOKS FOR SALE

For Sale: *Utah Reporter.* Up-to-date. New condition. Cost $1,400. Will sell for $600. *Damages in Tort Actions.* Up-to-date. New condition. Cost $1,025. Will sell for $500. Contact Gary at (801) 532-1601.

For Sale: *Collier Bankruptcy Practice Guide*, completely current and up-to-date. $650. Contact David at (801) 626-2208.

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.

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

Name _____

Bar Number _____

Old Telephone _____

New Telephone _____

Old Address _____

_____

_____

New Address _____

_____

_____

THE QUESTAR CORPORATION
Employee Stock Purchase Plan
(An Employee Stock Ownership Plan)

has purchased common shares of

QUESTAR CORPORATION

in a leveraged ESOP transaction

We served as independent financial advisors to First Security Bank of Utah as to the value of common shares purchased by The Questar Employee Stock Purchase Plan (an Employee Stock Ownership Plan).

HOULIHAN DORTON JONES
NICOLATUS & STUART INC.
VALUATION ADVISORS

HENDSUB DOD, INC.

A newly formed corporation organized by Henderson Investment Company and members of management has acquired the business of

DOD ELECTRONICS

We rendered an opinion of solvency in support of this transaction.

HOULIHAN DORTON JONES
NICOLATUS & STUART INC.
VALUATION ADVISORS

ALTA GOLD CORPORATION
(previously Silver King Mines, Inc.)

has merged with

PACIFIC SILVER CORP.

We rendered a fairness opinion as to the common stock exchange ratio used to merge the above companies.

HOULIHAN DORTON JONES
NICOLATUS & STUART INC.
VALUATION ADVISORS

BONNEVILLE PACIFIC CORPORATION

has acquired 80% of the common stock of

RECOMP, INC.

We rendered a fairness opinion to the Board of Directors of Bonneville Pacific Corporation as to the value of the acquired common stock of Recomp, Inc.

HOULIHAN DORTON JONES
NICOLATUS & STUART INC.
VALUATION ADVISORS

Providing valuation services for

Fairness & Solvency Opinions

HOULIHAN DORTON JONES NICOLATUS & STUART INC.

HVA Members

SALT LAKE CITY • LOS ANGELES • LAS VEGAS • SEATTLE • SAN FRANCISCO

VALUATION ADVISORS

• Consistent Quality • Responsive Service • Equitable Fees

For a description of valuations services and credentials call:

Richard Houlihan or David Dorton — (801) 322-3300

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Mr. William D. Holyoak
185 South State #600
P.O. Box 11898
Salt Lake City, UT 84147-0898

BULK RATE
U.S. POSTAGE
Paid
SALT LAKE CITY, UT
PERMIT NO. 844